

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re:)
)
HAGERSTOWN AIRCRAFT)
SERVICES, INC.,)
)
Respondent)
)
Docket No. RCRA-03-2011-0112)

**MOTION TO SET ASIDE DEFAULT ORDER AND
TEMPORARILY STAY PROCEEDINGS**

Respondent, Hagerstown Aircraft Services, Inc., by and through their undersigned counsel, respectfully requests the Environmental Appeals Board (the "Board") issue an order setting aside the Default Order dated June 27, 2013 (the "Default Order") issued in the above-captioned matter (the "Enforcement Action") and temporarily staying further action pending settlement discussions. For the reasons set forth below, Respondent submits that good cause exists for granting the relief sought by Respondent.

Respondent is a family-owned and operated aircraft servicing business located in Hagerstown, Maryland. Respondent was majority owned by and managed on a day-to-day basis by its President, Tracey L. Potter ("Tracey"). On March 5, 2013, Tracey died unexpectedly at the age of 48. Shortly after Tracey's passing, his widow, Kimberly A. Potter ("Kimberly"), stepped in and is now running Respondent. Prior to Tracey's passing Kimberly was a stay-at-

home mother caring for the couple's three children and had no involvement in the operation and management of Respondent.¹

Kimberly had no knowledge of the U.S. Environmental Protection Agency's ("EPA") Enforcement Action until May 3, 2013, when Anthony Enweze and Paul Sudano from the Maryland Department of Environment's Land Management Administration ("MDE") conducted a Compliance Evaluation Inspection ("CEI") of Respondent's facility in Hagerstown at the request of the EPA. During the inspection, MDE reportedly mentioned the April 28, 2010 EPA compliance inspection and subsequent EPA Enforcement Action.

During the May 3, 2013 CEI, MDE identified eight (8) separate violations of Code of Maryland Regulations for Controlled Hazardous Substances. A copy of the MDE's May 3rd Report of Observations is enclosed and incorporated hereto as **Exhibit A**. Following this CEI, Kimberly and staff subsequently conducted a search for any files or records associated with the EPA's April 2010 inspection and subsequent Enforcement Action; they found nothing.²

Following the May 3, 2013 MDE CEI, Respondent initiated a series of actions to address the shortcomings identified by MDE. On June 26, 2013, MDE visited the facility again and found the compliance efforts were underway but not yet complete. A copy of the MDE's June 26th Report of Observations is enclosed and incorporated hereto as **Exhibit B**. Since June 26th, each of the outstanding compliance deficiencies identified by EPA in their May 2010 inspection

¹ Counsel understands that Kimberly owned, and still owns, a minority number of shares of Respondent's stock but that her involvement was passive. The majority shares of Respondent's stock are currently held by Tracey's estate and are expected to ultimately pass to Kimberly. With regards to operations, Kimberly has engaged Mr. Alan Shanholtz, a family friend and former owner of an automobile dealership to assist her in overseeing general operations of the business apart from Federal Aviation Administration-regulated activities.

² Kimberly and Respondent's Counsel have yet to obtain and review copies of the EPA's Information Request Letter, dated May 28, 2010, a follow-up letter from EPA dated August 20, 2010, the EPA's Administrative Complaint, dated March 24, 2011, or the EPA's Motion for Default, dated June 23, 2011.

and MDE in their May and June 2013 inspections has been addressed by Respondent. A package of materials documenting these recent compliance efforts was sent by Respondent via email to Mr. Sudano of MDE on July 25, 2013. A copy of this information submitted to MDE, to undersigned Counsel's ("Respondent's Counsel") best current knowledge and belief, is enclosed and incorporated hereto as **Exhibit C**. Final supplemental compliance documentation, including information on staff hazard communications training completed July 31, 2013, was provided by Respondent's Counsel to MDE on August 5, 2013. A copy of these submittals are enclosed and incorporated hereto as **Exhibit D**.

Separate from Kimberly's and Respondent's efforts to address the newly-recognized environmental compliance issues, EPA Region III issued an Initial Decision and Default Order (the "Initial Decision") on June 27, 2013, granting the relief sought by the Director of the Land & Chemicals Division, U.S. EPA Region III in a June 23, 2011 Motion for Default Order. The Initial Order directed Respondent to comply with those compliance tasks specified in the EPA's Administrative Complaint, assessed a \$32,000 penalty for failure to comply with hazardous waste determination and compliance issues, and assessed a \$32,000 penalty for failure to respond to EPA's Information Request Letter and a subsequent follow-up letter. Respondent was served the Initial Decision on July 5, 2013.

Following discussions with their local general counsel, Respondent identified and subsequently retained Respondent's Counsel to represent it in this Enforcement Action late in the day on Friday, July 26, 2013. Respondent's Counsel contacted Counsel for EPA, Joyce Howell ("EPA's Counsel") that same day. A copy of this initial correspondence to EPA is enclosed and incorporated hereto as **Exhibit E**. Following cursory email correspondence over the weekend,

Respondent's Counsel and EPA's Counsel spoke early on July 30th and then late that same evening. During the later call, Respondent's Counsel and EPA's Counsel discussed the filing of a motion to set aside the Default Order and EPA's intent to respond following EPA's Counsels return from an overseas trip scheduled to begin August 1st.³ During this later conversation EPA's Counsel stated that EPA would not be joining this Motion.

Pursuant to and consistent with 40 C.F.R. § 22.17(c) and given Respondent's recent timely response to compliance shortcomings identified by both EPA and MDE as directed by the Default Order, the lack of any potential for harm from outstanding compliance issues, the inability of EPA and Respondent's current management to interview and examine Respondent's former management, the inability of Respondent to identify records pertaining to Respondent's alleged failure to respond to EPA's Information Request Letter or subsequent filings or obtain copies of such referenced documentation from EPA, and the desire of Respondent's current management to enter into settlement discussions with EPA to resolve the Enforcement Action, Respondent respectfully requests that the Board issue an order: 1) setting aside the Default Order that constitutes the initial decision; 2) staying the matter for a period of forty-five (45) days to allow Respondent's current management and EPA an opportunity to enter into settlement discussions; and 3) granting Respondent such other and further relief as the Board deems just, lawful and proper.

³ Respondent's Counsel did not explicitly discuss with EPA's Counsel including a request for the Board to temporarily stay the proceedings in this Motion. While such a stay would clearly not have been filed "sufficiently in advance of the due date so as to allow other parties a reasonable opportunity to respond and to allow the Presiding Officer or Environmental Appeals Board reasonable opportunity to issue an order" per 40 C.F.R. Section 22.7(b), Respondent believes that given the apparent existing record and good cause presented in this Motion, such a temporary stay would not unduly prejudice EPA.

Dated: August 5, 2013

Respectfully submitted,

/s/ M. Trent Zivkovich

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CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Motion to Set Aside Default Order and Temporarily Stay Proceedings to be served on the date, by the manner indicated, to the following people:

Via Electronic Filing, with Paper Copy of Exhibits also submitted via Federal Express, Standard Overnight Delivery:

Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
U.S. EPA East Building, Room 3334
Washington, DC 20004

Via U.S. Mail and Electronic Mail:

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Dated: August 5, 2013