



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

**VIA REGULAR MAIL**  
**CONFIRMATION OF RECEIPT REQUESTED**

November 19, 2015

Sybil Anderson, Headquarters Hearing Clerk  
Office of Administrative Law Judges  
U.S. Environmental Protection Agency  
Mail Code 1900R  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

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EPA REGION III, PHILA, PA

Re: In the Matter of the Aylin, Inc. et. al.  
EPA Docket No. RCRA-03-2013-0039

Dear Ms. Anderson:

Enclosed please find the original copy of the Complainant's Response to Respondents' Motion for Leave to Conduct Additional Discovery and to Supplement Their Prehearing Exchanges to Add a Witness, filed in accordance with the Office of Administrative Law Judge's electronic filing system, effective August 11, 2014.

Should you have any questions or require further information, please contact me at (215) 814-2681.

Sincerely,

  
Louis F. Ramalho  
Sr. Assistant Regional Counsel

cc: The Honorable Christine D. Coughlin  
U.S. Environmental Protection Agency

Jeffrey L. Leiter, Esq.  
Counsel for Respondents

Janet Sharke, Esq.  
Counsel for Complainant

*Customer Service Hotline: 1-800-438-2474*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
 REGION III  
 1650 Arch Street  
 Philadelphia, Pennsylvania 19103-2029

In the Matter of: )  
 )  
 Aylin, Inc., Rt. 58 Food Mart, Inc., )  
 Franklin Eagle Mart Corp., Adnan )  
 Kiriscioglu, 5703 Holland Road )  
 Realty Corp., 8917 South Quay Road )  
 Realty Corp., and 1397 Carrsville )  
 Highway Realty Corp. )  
 )  
 )  
 Respondents. )

Docket No. RCRA-03-2013-0039  
 Proceeding Under Section 9006 of the  
 Resource Conservation and Recovery  
 Act, as amended, 42 U.S.C. § 6991e

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 ENVIRONMENTAL  
 REGION III

**COMPLAINANT'S RESPONSE TO RESPONDENTS' MOTION FOR LEAVE TO  
 CONDUCT ADDITIONAL DISCOVERY AND TO SUPPLEMENT THEIR  
 PREHEARING EXCHANGES TO ADD WITNESS**

In accordance with 40 C.F.R. §§ 22.16(a) and (b) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/ Termination or Suspension of Permits*, the Complainant, the Director of the Land and Chemicals Division of the United States Environmental Protection Agency - Region III, hereby offers this Response to Respondents' Motion for Leave to Conduct Additional Discovery and to Supplement Their Prehearing Exchanges to Add a Witness (hereinafter "Respondents Motion"). For each of the reasons identified and discussed below, Complainant respectfully requests that the Presiding Officer enter an Order Denying Respondents' Motion For Leave to Conduct Additional Discovery and Granting Respondents' Motion to Supplement the Prehearing Exchange to Add a Witness.

**I. The Standards for “Other Discovery” under the CROP**

The Consolidated Rules, which govern this proceeding, provide several means by which a party may obtain discovery of relevant information from another party. Initially, 40 C.F.R. § 22.19(a) directs each party to exchange prehearing information in accordance with an order issued by the Presiding Officer. The prehearing exchange must include the names of witnesses, copies of documents and proposed exhibits and an explanation of how any proposed penalty has been calculated. The prehearing exchange of the parties has now occurred and Complainant therein provided Respondents with the names of each of its proposed hearing witnesses, brief narrative summaries of their anticipated testimony and numerous documents in support of such testimony, including copies of inspection reports, notes and photographs. After the information exchange required pursuant to 40 C.F.R. § 22.19(a), the Consolidated Rules provide that a party may be permitted to engage in “other discovery”, pursuant to 40 C.F.R. § 22.19(e), if the party is able to demonstrate that specified requirements and conditions have been met. Specifically, 40 C.F.R. § 22.19(e)(1) provides as follows:

After the information exchange provided for in [40 C.F.R. § 22.19] paragraph (a), a party may move for additional discovery. The motion shall specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought (and, where relevant, the proposed time and place where discovery would be conducted). The Presiding Officer may order such other discovery only if it:

- (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
- (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
- (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

40 C.F.R. § 22.19(e)(3) further specifies those conditions under which the Presiding Officer may order depositions upon oral questions, providing that:

The Presiding Officer may order depositions upon oral questions only in accordance with paragraph (e)(1) of this section [40 C.F.R. § 22.19] and upon an additional finding that:

- (i) The information sought cannot reasonably be obtained by alternative methods of discovery; or
- (ii) There is substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at hearing.

40 C.F.R. § 22.19(e)(4) thereafter provides, in relevant and applicable part, that:

The Presiding Officer may issue a subpoena for discovery purposes only in accordance with paragraph (e)(1) of this section [40 C.F.R. § 22.19] and upon an additional showing of the grounds and necessity therefore.

**II. Prehearing Oral Depositions are Disfavored Under the CROP and May Be Ordered Only Under Limited Conditions and Upon Specific Findings**

Upon review and application of the 40 C.F.R. § 22.19(e)(3) requirements, provisions and necessary conditions precedent and pursuant to which a Presiding Officer properly may order the taking of depositions upon oral questions, EPA Administrative Law Judges have recognized that these particular Rules:

... are not hospitable to discovery by means of oral depositions, 40 C.F.R. § 22.19(e)(3) providing that the ALJ may order oral depositions *only* upon findings that, in addition to the requirements for other discovery in Rule 22.19(e)(1), (i.e., the information will not unreasonably delay the proceeding nor unreasonably burden the non-moving party; seeks information which is most reasonably obtained from the non-moving party and which the non-moving party has refused to provide voluntarily; and seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought), the information cannot reasonably be obtained by alternative methods of discovery or there is substantial reason to believe that relevant and probative evidence may not otherwise be preserved for presentation by a witness at the hearing. This stringent provision for discovery by oral depositions means that, in proceedings subject to the Consolidated Rules, oral depositions are seldom granted over the opposition of the

opposing party. *In the Matter of: Clarke Environmental Mosquito Management, Inc.*, Docket No. FIFRA 02-2005-5203, Order Denying Respondent's Motion for Discovery by Deposition, Directing Complainant's Compliance with Prehearing Exchange Requirement for a Summary of Expected Testimony of its Witnesses, and Directing Complainant's Cooperation in Discovering Testimony of NYDEC Employees (ALJ, September 29, 2005), *citing, e.g., Safety-Kleen Corporation*, Docket Nos. RCRA-1090-11-10-3008(a) and 11-11-3008(a), Order on Discovery, 1991 EPA ALJ LEXIS 21 (ALJ, December 6, 1991).

The Environmental Appeals Board has placed particular emphasis on the fact that “. . . [t]he CROP is specific in . . . stating that the presiding officer may order depositions *only* under certain conditions. See 40 C.F.R. § 22.19(e). One of these conditions is that *there must be a finding that there is a “substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by at [sic] witness at the hearing.”* 40 C.F.R. § 22.19(e) (3)(ii). *Chippewa at 368.* (Emphasis supplied).

### **III. ARGUMENT**

As previously noted, a party moving for additional discovery must “describe in detail the nature of the information and/or documents sought (and, where relevant, the proposed time and place where discovery would be conducted)” and that the Presiding Officer may order such other discovery *only* if: (1) it will not unreasonably burden the non-moving party; (2) seeks information that is most reasonably obtained from the non-moving party; and (3) seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought. 40 C.F.R. § 22.19(e)(1). In addition, a Presiding Officer may order depositions upon oral questions only in accordance with the above and upon an additional finding that: (1) The information sought cannot reasonably be obtained by alternative methods of discovery; or (2) There is substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at hearing. 40 C.F.R. § 22.19(e) (3).

The Presiding Officer may issue a subpoena for discovery purposes, such as the taking of third party oral depositions, only in accordance with the above and upon a further showing of the grounds and necessity therefore. 40 C.F.R. § 22.19(e) (4). (Emphasis supplied).

Respondents' Motion is deficient and does not comport with the requirements for "other discovery" set forth in the CROP because it: (1) *unreasonably burdens Complainant*, the non-moving party; (2) *seeks information that has been provided voluntarily to Respondents* by Complainant; (3) *fails to present any reason* to support any (unstated) belief that relevant and probative evidence may otherwise not be preserved for presentation by a witness at hearing. For each of these reasons, Respondents Motion for Leave to Conduct Additional Discovery, and the relief requested therein, should be **Denied**.

**(1) The request will unreasonably and unduly burden Complainant and Complainant's witnesses**

Complainant does not believe a response to Respondents' interrogatories and request for oral examination of two witnesses, Leslie Beckwith, VADEQ, and Andrew Ma, EPA Region III, listed by Complainant in its Prehearing Exchange, is warranted because: the information and testimony sought by Respondents has been provided to Respondents by Complainant in (a) its Prehearing Exchange, as supplemented, and (b) the affidavits provided in this case, including the affidavits of these two witnesses, Leslie Beckwith, VADEQ, and Andrew Ma, EPA Region III, in support of Complainant's Motion for Accelerated Decision to be filed on November 20, 2015 (filed in accordance with the deadline imposed by this Court's Order dated August 20, 2015). Given the considerable amount evidentiary information supplied by Complaint to Respondents in support of its case and its theory of liability against each Respondent, responses to interrogatories and oral examination of two witnesses in December 2015 would serve no other

purpose than to frustrate Complainant and its two witnesses as they prepare for a hearing.

Respondents Motion states that Complainant's narrative summary in its Second Supplemental Prehearing Exchange of Ms. Beckwith's expected testimony is "insufficiently detailed..." "merely of the general nature," and "does not provide details regarding the substance of her testimony" in order to prevent surprises to the Respondents at trial and permit adequate preparation for trial. Respondents Motion p.5-6. To the extent the Respondents found the Complainant's narrative summary of Ms. Beckwith's expected testimony insufficient, the detailed information proffered by Ms. Beckwith's affidavit provides Respondents ample information as to her testimony at trial with respect to the financial responsibility violations alleged in the Administrative Complaint, as amended. Furthermore, Ms. Beckwith is non-party witness located in Richmond, Virginia and employed by VADEQ. Any request for her oral examination or notice of the same would have to be presented to her legal representatives for the Commonwealth of Virginia. Obviously, the oral examination of Ms. Beckwith would be a burden to Ms. Beckwith, the Commonwealth of Virginia, and Complainant; all of which would have to spend time and resources in preparation for the oral examination, including travel and lodging, to accommodate Respondents unreasonable request to obtain information that has been or will be provided voluntarily by Complainant and Ms. Beckwith to Respondents on or before November 20, 2015.

With respect to Andrew Ma, Complainant voluntarily offered Respondents the opportunity to depose Andrew Ma since December 2015 during the same time Respondent Adnan Kiriscioglu was deposed by Complainant as agreed by the parties mutually. However, Respondents have declined to depose Andrew Ma since December 2015. Since all the information sought by Respondents Motion has been provided to Respondents by Complainant,

including a detailed affidavit by Andrew Ma in support of Complainant's Motion for Accelerated Decision to be filed November 20, 2015, Respondents request for oral examination of Andrew Ma at this point in time serves no purpose other than to frustrate and burden Complainant on the eve of trial. Respondents had ample opportunity to depose Mr. Ma without having to seek this Court's permission to do so. At this time, all the information purportedly sought by Respondents Motion from Mr. Ma is in the administrative record from which Respondents can put on a vigorous defense of his anticipated testimony in the event of a trial on the merits of Complainant's allegations in the Administrative Complaint; so that there are no surprises to the Respondents at trial in order for Respondents to put on a vigorous defense of his anticipated testimony.

**(2) Respondents seek information that has been provided voluntarily to Respondents by Complainant**

Respondents Motion seeks information that has been provided voluntarily to Respondents by Complainant in the Complainant's Prehearing Exchange, as amended, including information voluntarily provided by Complainant and Complainant's primary witnesses in support of Complainant's Motion for Accelerated Decision to be filed on November 20, 2015. These documents offer Respondents no surprises at trial as to Complainant's theory of liability as it applies to each Respondent and these documents and sworn affidavits provide Respondents with the anticipated testimony of the two witnesses for which Respondents seek leave to conduct oral examination.

**(3) Fails to present any reason to support any (unstated) belief that relevant and probative evidence may otherwise not be preserved for presentation by a witness at hearing**

Noticeably absent from Respondents Motion is any representation that Respondents have reason to believe that the information sought from Leslie Beckwith, VADEQ, and Andrew Ma, EPA Region III, may not, in the absence of depositions upon oral questions, otherwise be preserved for presentation by these witnesses at hearing. The absence of any such representation, however, is not surprising, because Complainant has listed each of these individuals as hearing witnesses and has clearly expressed (as it once again does so herein) its intent to produce each of these witnesses at the hearing and to have them testify as witnesses, on Complainant's behalf, at such hearing. These witnesses each have been advised of the potential hearing dates in this matter, have kept their schedules open for such proposed dates and have consented to appearing as witnesses at the hearing.

Leslie Beckwith, VADEQ, and Andrew Ma, EPA Region III, have provided Respondents with a sworn affidavit of their findings and their anticipated testimony at the hearing. Respondents will have the opportunity to examine these two witnesses during the hearing regarding their findings and sworn testimony provided to Respondents in advance of the hearing.

With respect to Respondents' request to add an additional witness, Ezgi Kiriscioglu, Complainant through its counsel has agreed to the addition of Ms. Kiriscioglu on the pre-condition, as agreed to by counsel for the parties, that Respondent Adnan Kiriscioglu would make himself available to testify at the hearing and subject himself to direct and cross examination. Based on the foregoing, Complainant does not object to the addition of Ezgi Kiriscioglu as witness provided Respondent Adnan Kiriscioglu makes himself available for

direct and/or cross examination by Complainant.

Consistent with due process and applicable CROP requirements governing the administrative prehearing discovery process, Complainant has provided Respondents with full disclosure and a thorough explanation of the facts in its possession on all relevant matters at issue. There are no grounds and necessity for taking oral examination of Leslie Beckwith, VADEQ, and Andrew Ma, EPA Region III, by Respondents, nor the necessity to respond to Respondents interrogatories. For these reasons, as further set forth above, Respondents Motion for Leave to Conduct Additional Discovery should be **DENIED**, and the relief requested to add an additional witness, **GRANTED** in accordance with the terms and condition agreed to by the parties as set forth herein.

WHEREFORE, Complainant requests this Court issue an Order Denying Respondents Motion for Leave to Conduct Additional Discovery.

Respectfully Submitted,

11/19/15  
Date

  
\_\_\_\_\_  
Louis F. Ramalho  
Senior Assistant Regional Counsel  
United States Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

ATTORNEY FOR COMPLAINANT

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that on the date listed below, in accordance with the Office of Administrative Law Judge's electronic filing system, effective August 11, 2014, I filed electronically of copy of Complainant's Response to Respondents' Motion for Leave to Conduct Additional Discovery and to Supplement Their Prehearing Exchanges to Add a Witness, Docket No. RCRA-03-2013-0039, for service:

**Electronically Transmitted via e-mail and  
Original copy via EPA Pouch Mail:**

Sybil Anderson, Headquarters Hearing Clerk  
Office of Administrative Law Judges  
U.S. Environmental Protection Agency  
Mail Code 1900R  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

**Copy by via UPS:**

Jeffrey L. Leiter, Esq.  
Leiter & Cramer, PLLC  
1707 L Street, Suite 560  
Washington, DC 20460

**Copy by EPA pouch mail and Electronically Transmitted via e-mail:**

The Honorable Christine D. Coughlin  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
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Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

11/19/15  
Date

  
\_\_\_\_\_  
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