



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

RECEIVED AUG - 2 2012

In the Matter of:

Ms. Dessie L. Brumfield, d/b/a Brumfield Properties, LLC

Respondent

)
)
)
)
)
)

Docket No. TSCA-05-2010-0014

Dated: July 27, 2012

REGIONAL HEARING CLERK U.S. ENVIRONMENTAL PROTECTION AGENCY

ORDER ON MOTIONS TO SUPPLEMENT PREHEARING EXCHANGE AND ON COMPLAINANT'S MOTION TO STRIKE

The Complaint in this matter, filed on July 8, 2010, charges Respondent with violating Title IV of the Toxic Substances Control Act ("TSCA"), added by the Residential Lead-Based Paint Hazard Reduction Act of 1992, codified at 42 U.S.C. §§ 4851 through 4856. Respondent filed an Answer to the Complaint on September 29, 2011, and thereafter, the parties filed prehearing exchanges. The hearing in this matter is scheduled to commence on August 7, 2012.

I. Complainant's Motion to Supplement Prehearing Exchange

On July 11, 2012,¹ Complainant filed a motion to supplement its Prehearing Exchange of information ("Motion") by adding one potential witness and one document to its list of potential exhibits. Complainant identifies the potential fact witness as Maureen E. O'Neill, a civil investigator with EPA Region 5, who investigated public records concerning Respondent's assets for the purpose of updating Complainant's financial documentation concerning Respondent's ability to pay the proposed penalty. Id. at 1-2. The proposed exhibit is a ninety-four page "EPA Report of Investigation of Dessie L. Brumfield and Brumfield Properties, LLC," dated July 2012. Id. at 2. Complainant argues that the proposed evidence concerning Respondent's ability to pay the proposed penalty that Complainant originally submitted with its Prehearing Exchange is now over two years old and is outdated. It argues that the new witness and document it proposes to add to its Prehearing Exchange are necessary to update that outdated information. Id. Respondent has indicated that she objects to the Motion, but has not filed any written response to

¹ On July 13, 2012, Complainant filed a Notice to the Court and Respondent in which it stated that it filed its Motion on July 11, 2012, but the Regional Hearing Clerk's official date stamp erroneously marked the document as having been filed on July 22, 2012. The undersigned recognizes that Complainant's Motion was in fact filed on July 11, 2012.

the Motion.

The Rules of Practice governing this proceeding, 40 C.F.R. Part 22 (“Rules”) provide that parties are required to “promptly supplement or correct” their prehearing information exchanges whenever they learn “that the information exchanged or response provided is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party” through other discovery. 40 C.F.R. § 22.19(f).

Under TSCA, Complainant must show that it considered Respondent’s ability to pay when calculating the proposed penalty for the alleged violations. 15 U.S.C. § 2615(a)(2)(B). Complainant did address Respondent’s ability to pay the proposed penalty in both the Complaint and in its Prehearing Exchange. Complaint at 36–37; Complainant’s Prehearing Exchange at 3, 5, CXs 3–6. Because Complainant did provide evidentiary material regarding Respondent’s ability to pay the proposed penalty with its Prehearing Exchange, and because Complainant is required to supplement that information when it becomes outdated, it is appropriate to allow Complainant to supplement its Prehearing Exchange with updated evidentiary material regarding Respondent’s ability to pay the proposed penalty.²

II. Respondent’s Motion to Supplement Prehearing Exchange and Complainant’s Response and Request to Strike

A. Arguments of the Parties

On July 20, 2012, Respondent filed a Motion to Supplement Prehearing Exchange (“Motion”), seeking to add as proposed exhibits bank statements of Brumfield Properties for the months of April and May 2012 and a page showing five bank deposit slips. Respondent states that she “did not believe it was necessary to file any financial documentation” with her Prehearing Exchange because Complainant’s information concerning her finances “appeared outdated and insufficient.” Motion at 1. Respondent argues that after receiving Complainant’s Motion to amend its Prehearing Exchange with updated information concerning Respondent’s financial condition, Respondent now “believes it is necessary to counter” Complainant’s filing by adding “her own, current . . . financial documents to show she is unable to pay the civil penalties sought by Complainant.” *Id.*

On July 25, 2012, Complainant filed a Response to Respondent’s Motion (“Response”). In its Response, Complainant “requests the Court strike Respondent’s untimely ‘inability to pay’ claim, and deny Respondent’s Motion because Respondent has forgone several opportunities to provide financial information or claim an inability to pay the proposed penalty. Specifically, Complainant states that Respondent had the opportunity to present financial information regarding her ability to pay a penalty when she received Complainant’s Prefiling Letter dated December 14, 2009, but that Respondent failed to do so. Response at ¶¶ 1–2. Respondent again

² This is not a ruling on the admissibility of either Ms. O’Neill’s testimony or the EPA Report of Investigation of Dessie L. Brumfield and Brumfield Properties, LLC, dated July 2012.

failed to identify her financial condition as a possible defense in her Answer dated September 25, 2011, or in her Prehearing Exchange. *Id.* at ¶¶ 3–4. Complainant also claims that on April 20, 2012, and again on May 18, 2012, it provided Respondent with “financial analysis forms to complete and return to Complainant to encourage and simplify her submission of any relevant financial information should she wish to allege she was unable to pay the proposed civil penalty,” but that Respondent failed to complete and submit the forms on both occasions. *Id.* at ¶¶ 6–9.

B. Discussion and Conclusions

1. Request to strike

Complainant’s request to strike the claim of inability to pay is ruled on herein without waiting for a response from Respondent, given the nature of the request and the circumstances of this case, including the fact that the hearing is scheduled to commence in a few days.

In administrative actions brought under TSCA, consideration of respondent’s ability to pay is one of the statutory penalty factors that comprise the Agency’s prima facie penalty case.” *Carroll Oil Co.*, 10 E.A.D. 635, 662 n.24 (EAB 2002); *see*, 15 U.S.C. § 2615(a)(2)(B). A claim of inability to pay is therefore not an affirmative defense. *New Waterbury, Ltd.*, 5 E.A.D. 529, 540–41 (EAB 1994); *see Carroll Oil Co.*, 10 E.A.D. at 662–63 & n.24 (contrasting actions brought under TSCA to actions brought under the Resource Conservation and Recovery Act (“RCRA”). However, the Rules “require a respondent to indicate whether it intends to make an issue of its ability to pay, and if so, to submit evidence to support its claim as part of the pre-hearing exchange.” *New Waterbury, Ltd.*, 5 E.A.D. at 542 (citing 40 C.F.R. § 22.19(f)(4) (1994) (current version at 40 C.F.R. § 22.19(g))). Specifically, the Rules require an answer to a complaint to include “the basis for opposing any proposed relief [the proposed penalty].” 40 C.F.R. § 22.15(b). The Rules also require a respondent to “explain in its prehearing information exchange why the proposed penalty should be reduced or eliminated” and provide “copies of all documents and exhibits which it intends to introduce into evidence at the hearing.” 40 C.F.R. § 22.19(a)(2)(i) and (a)(3).

In the context of an administrative action under TSCA, the Environmental Appeals Board has stated:

where a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, the Region may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived under the Agency’s procedural rules and thus this factor does not warrant a reduction of the proposed penalty.

New Waterbury, Ltd., 5 E.A.D. at 542 (footnote omitted).

The Complaint (at pp. 36, 37, ¶¶ 163, 165) stated that factors relevant to assessing a penalty include Respondent's ability to pay a penalty, and that publically available information regarding real property values of Respondent's properties demonstrates that Respondent has the ability to pay the proposed penalty. The Complaint (at pp. 36-37, ¶¶ 164, 166) also indicated that Respondent did not respond to a request to provide financial documents prior to issuance of the Complaint. The Prehearing Order issued in this proceeding specifically stated that if Respondent "intends to argue that the proposed penalty should be reduced or eliminated for any reason, such as inability to pay the penalty, she should include a statement explaining why the penalty should be reduced or eliminated . . . [and] should be accompanied by a copy of any and all documents supporting [Respondent's] argument." In addition, Complainant asserts that it has sought financial documentation from Respondent.

Despite having more than ample notice over the past two years about asserting a claim of inability to pay a penalty, Respondent has not made any such claim. Given this ample notice, the argument that she did not believe it was necessary because Complainant's documentation appeared insufficient is not persuasive. Now Respondent believes that it is necessary, but does not assert any change in financial circumstances or any other reasonable explanation as to why she seeks to show inability to pay only two and a half weeks before the hearing. Furthermore, Respondent does not provide documentation sufficient to support a claim of inability to pay, such as copies of tax returns and financial statements. Therefore, it is appropriate to grant Complainant's request to strike Respondent's assertion of inability to pay.

2. Respondent's Request to Supplement and Complainant's Response

The Respondent's Motion to supplement the prehearing exchange was filed on July 20, 2012, the due date for the parties to request permission to supplement their prehearing exchanges. Order Scheduling Hearing at 1-2. Respondent's Motion was timely, and was ostensibly filed in response to Complainant's request for permission to add evidentiary material. Respondent appears to have informally provided Complainant with the documents that are the subject of Respondent's Motion by facsimile transmission on or about July 12, 2012. Complainant has not claimed that granting Respondent's Motion to add the five pages of proposed exhibits to Respondent's Prehearing Exchange will cause Complainant undue prejudice or occasion delay in this proceeding.

The Complainant's request to deny the Motion may be viewed as a motion in limine because it seeks to preclude consideration of a category of evidence in advance of hearing. *See Colleen Tillion*, EPA Docket No. CWS-10-2004-0067, 2005 EPA ALJ LEXIS 2, at *1-2 (ALJ, Jan. 13, 2005) (Order Denying Respondents' Motion to Strike) (motion to strike may be viewed as motion in limine); *Zaclon, Inc.*, EPA Docket No. RCRA-05-2004-0019, 2005 EPA ALJ LEXIS 74, at *3-4 (ALJ, Dec. 20, 2005) (Order Granting Complainant's Motion for Leave to Supplement Prehearing Exchange) (opposition to inclusion of proposed exhibit in prehearing exchange is essentially a motion in limine to exclude evidence from hearing). The Rules do not refer to motions in limine, and therefore federal case law is instructive. "Motions in limine are generally disfavored" and "should be granted only if the evidence sought to be excluded is

clearly inadmissible for any purpose.” *Noble v. Sheahan*, 116 F.Supp. 2d 966, 969 (N.D. Ill. 2000)). When “evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial so questions of foundation, relevancy, and prejudice may be resolved in context. *Id.* (citing *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1401 (N.D. Ill 1993)). The evidentiary standard under the Rules is that all evidence which is not “irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value” shall be admitted. 40 C.F.R. § 22.22(a).

Although Respondent indicates that the bank statements and deposit slips are presented to show Respondent is unable to pay the proposed penalties, it cannot be determined at this time that these documents are “clearly inadmissible for any purpose.” *Noble v. Sheahan*, 116 F.Supp. 2d at 969. Accordingly, Respondent will be permitted to supplement the Prehearing Exchange with these documents. This Order does not express any opinion as to the admissibility of the aforementioned documents; Respondent will have an opportunity at the hearing to lay a foundation for offering them into evidence.

ORDER.

1. Complainant’s Motion to Supplement Prehearing Exchange is **GRANTED.**
2. Complainant’s request to strike Respondent’s assertion of inability to pay the proposed penalties is **GRANTED.**
3. Respondent’s Motion to Supplement Prehearing Exchange, dated July 20, 2012, is **GRANTED.**



M. Lisa Buschmann
Administrative Law Judge

RECEIVED
AUG - 2 2012

**REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY**

In the matter of *Ms. Dessie L. Brumfield, d/b/a Brumfield Properties, LLC*. Respondent.
Docket No. TSCA-05-2010-0014

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Motions to Supplement Prehearing Exchange and on Complainant's Motion to Strike**, dated July 30, 2012 was sent this day in the following manner to the addressees listed below.



Knolyn R. Jones
Legal Staff Assistant

Original and One Copy by Pouch Mail to:

LaDawn Whitehead
Regional Hearing Clerk
U.S. EPA, Region V, MC-E-19J
77 West Jackson Blvd.,
Chicago, IL 60604-3590

One Copy by Pouch Mail to:

Jeffrey Trevino, Esq.
Associate Regional Counsel
U.S. EPA, Region V
77 West Jackson Blvd., C-14J
Chicago, IL 60604-3590

One Copy by Regular Mail to:

Dessie Brumfield
5067 N. 37th Street
Milwaukee, IL 53209

Thomas J. McClure, Esq.
McClure Law Offices
15 Crossroads Court
Delafield, WI 53018-2035

RECEIVED
AUG - 2 2012

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY