

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
MALTER, INTERNATIONAL) **DOCKET NOS. EPCRA-3-2000-0010**
) **EPCRA-3-2000-0011**
RESPONDENT)

ORDER DENYING MOTION FOR ENTRY OF DEFAULT
and RULING ON ORDER TO SHOW CAUSE

I. Background

The Complaint in this proceeding, filed May 12, 2000, under Section 325(c) of the Emergency Planning and Community Right-To-Know Act (“EPCRA”), 42 U.S.C. §§ 11001 et seq., alleges violations of Section 311 and 312 of EPCRA by the Respondent, Malter International, Inc. Respondent received service of the Complaint on May 16, 2000, making its Answer due on June 15, 2000. On June 14, 2000, Respondent requested an extension of time in which to file its Answer, which request was granted. Thereafter, on June 29, 2000, Respondent filed its Answer.

In the prehearing order, dated December 11, 2000, Complainant and Respondent were directed to make simultaneous exchanges of the witnesses and documents intended to be introduced by February 9, 2001. Complainant timely filed its prehearing exchange. On February 23, 2001, not having received Respondent’s exchange, Complainant filed a motion for the entry of default judgment. After referring to the standard for default judgment and asserting that such judgment should include the full penalty sought by EPA, the Complainant asserted that it had been prejudiced by the Respondent’s failure to file by depriving it of equal time to prepare its case for the hearing, by preventing additional discovery, and by limiting the time available for motions and the opportunity for settlement. Complainant’s Motion at 5.

On February 23, 2001, Respondent’s prehearing exchange was filed, and was received by the Complainant on March 2, 2001. On March 5, 2001, following a conference call with the parties, the Court issued an Order to Show Cause, directing the Respondent to respond by Friday, March [9]¹, 2001, with its explanation for the untimely filing. The Respondent filed a response on March 8, 2001 indicating that its delays resulted from the fact that it was no longer

¹The Order to Show Cause contained a clerical error, incorrectly referring to the date as Friday, March 7th, but should have reflected that the Friday in question fell on March 9th.

in business. Respondent asserted that this resulted in a variety of problems including: 1) the inability to deal properly with the Complainant's large prehearing exchange; 2) a lack of employees to assist in compiling the necessary information for the prehearing exchange; 3) difficulty in locating and sorting Respondent's records, as they had been placed in storage; and 4) a problem acquiring information for the exchange, attributable to a witness who was not nearby. Respondent's Response at 1.

On March 20, 2001, Complainant requested additional time to Reply to Respondent's Response, which request was granted. The Complainant filed its Reply² to Respondent's Response on April 6, 2001, requesting that the Court disregard "inaccurate portions" of the Respondent's Response. EPA challenges the accuracy of the assertion that Malter International is no longer in business and submitted documents in support of its challenge.³ Complainant also notes that the Respondent's argument that it no longer has the personnel or resources to deal with the large amount of paperwork and exhibits provided in the complainant's prehearing exchange is clearly erroneous, as the Court's prehearing order required the exchanges to be simultaneous, meaning that the Respondent was not required to analyze the Complainant's prehearing exchange before providing its own prehearing exchange. Complainant's Reply at 4. The

² Complainant's reply is actually designated as "Complainant's Response to Respondent's Reply to This Court's Order to Show Cause," but this is inaccurate. Respondent's letter was not a reply, but a response to the Complainant's Motion for Default Judgment and the Order to Show Cause, and therefore the Complainant's document was a reply to that response. In this Order, the document in question shall be referred to as "Complainant's Reply."

³On March 5, 2001, the same day as the conference call and the Order to Show Cause, the president of Malter International, Frank Ripa, filed documentation of the chemicals stored at the 16 Gravity Street facility (the facility at issue in this matter) with the Luzerne County Emergency Management Agency. Complainant's Reply at 3, Complainant's Exhibit 1. Complainant further asserted that on March 15, 2001, ten days after the conference call and a week after the Respondent's Response, the Pittston police responded to a complaint of illegal unloading of chemicals at the Gravity Street Facility, and did in fact discover that chemicals were in the process of being unloaded and apparently mixed at the facility. Complainant's Reply at 3, Exhibit 2. The police report indicated that an employee who was interviewed stated that he had worked at the Malter Chemical for Frank Ripa, Malter International's president, for two months, and that several deliveries had been made during that time. Complainant's Reply, at 3, Exhibit 2. Complainant also maintained that the Luzerne County Court of Common Pleas had recently issued a preliminary injunction against Malter International, ordering it to cease and desist its illegal operations and perform necessary cleanup at the 16 Gravity Street facility. Complainant's Reply, Exhibit 4. Respondent is advised that the Court would take a dim view of assertions that it is no longer in business, if the hearing evidence shows this to be to the contrary. An administrative law judge not only has the authority to affirm the penalty proposed by EPA or to lower it, but also has the power to raise the penalty, where circumstances so warrant such an action.

Complainant further states that the Respondent's assertions that necessary documents and assisting personnel were not available are questionable, given that the Respondent's prehearing exchange ultimately only consisted of a total of four pages. Complainant's Reply, p. 4 at n. 4.⁴

II. Discussion

The procedural rules provide that a "party may be found to be in default, after motion ... upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer ... [d]efault by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." Consolidated Rules of Practice, 40 C.F.R. § 22.17(a). Such a motion for default may ask to resolve all or part of the proceeding, but if the motion seeks the assessment of a penalty, the movant must set forth the penalty and state the legal and factual grounds for that penalty. 40 C.F.R. § 22.17(b). "When the Presiding Officer finds that default has occurred he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued." 40 C.F.R. § 22.17(c).

As a default order is a harsh sanction, such actions are not favored by courts and are utilized only in extreme situations. Issuance of such an order is not a matter of right, even when an "unresponsive party is technically in default." Donald L. Lee and Pied Piper Pest Control, Inc., FIFRA 09-0796-92-13, November 9, 1992, 1992 WL 340775 (E.P.A.). Administrative law judges have broad discretion in ruling upon such motions. Gard Products, Inc. IFFRA-98-005, June 2, 1999, 1999 WL 504712 (E.P.A.). Such discretion is informed by "the type and the extent of any violations and by the degree of actual prejudice to the [party seeking default]." Lyon County Landfill, 5 CAA 96-011, September 11, 1997, 1997 WL 821131 (E.P.A.).

In the context of this proceeding and given the averment that the Respondent is no longer an active business, the Respondent's two week delay in filing its prehearing exchange is insufficient to justify the harsh sanction of default judgment, especially as the Complainant has suffered no significant prejudice from Respondent's failure. Furthermore, the Respondent did respond to the Order to Show Cause with a putative good cause explanation for its delay. Therefore, the Complainant's Motion for Default Judgment is DENIED. However, Respondent was obligated under the Prehearing Order to supply supporting documentation if it maintained an inability to pay the proposed penalty or that such penalty would have an adverse effect on its ability to continue in business.⁵ Respondent's prehearing exchange did not supply such

⁴Complainant asserts that even now the exchange is deficient as the Respondent has still failed to include any information about any potential ability to pay claims, as required by the Prehearing Order. Complainant's Reply p.4 at n.5.

⁵ The Court notes that the Respondent's prehearing exchange did not declare an inability to pay nor provide any documentation to support such a contention. In contrast, the

information independently. Instead it responded that it would “rely on those exhibits set forth in the Complainant’s exhibit list.” Respondent’s Exchange at 2. Therefore, unless new documentation is presented, Respondent has limited its defense to the documentation EPA has provided in its exchange.

Both parties are advised that any further delays in filings, or failures to comply with the Court’s orders, will not be overlooked. A conference call will be held shortly to set the hearing date and location. No further motions will be permitted to be filed after September 7, 2001.

William B. Moran
United States Administrative Law Judge

Dated: _____

Washington, DC

Respondent’s response to the Order to Show Cause does declare that it is “no longer in business.” While the prehearing order permits *supplements* to the exchange up to 30 days before the hearing, this contemplates documents that were not available at the time of the initial exchange. Therefore subsequent documentation will be scrutinized under such a standard.

In the Matter of Malter International, Respondent
Docket Nos. EPCRA-3-2000-0010 &
EPCRA-3-2000-0011

CERTIFICATE OF SERVICE

I hereby certify that this **ORDER DENYING MOTION FOR ENTRY OF DEFAULT AND RULING ON ORDER TO SHOW CAUSE**, dated August 14, 2001 was sent this day in the following manner to the addressees listed below:

Original + 1 copy to:

Lydia A. Guy
Regional Hearing Clerk
U.S. EPA - Region 3
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Copy by Certified Mail Return Receipt and Facsimile to:

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Rachele D. Jackson
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Dated: August 14, 2001