UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
New Waterbury, Ltd., A California Limited Partnership,	)	**Docket No. TSCA-I-88-1069**
	)	
	)	
	)	
Respondent	)	

DECISION AFTER REOPENED HEARING

The Initial Decision in this matter, issued July 8, 1992, found that Respondent, New Waterbury, Ltd., A California Limited Partnership (New Waterbury), had violated the Toxic Substances Control Act and the PCB Rule, 40 CFR Part 761, in specified particulars and assessed New Waterbury a penalty totaling $35,750. The decision specifically found that New Waterbury had not shown that the mentioned penalty should be reduced or eliminated, because of its inability to pay.

Under date of August 3, 1992, within the 20-day period specified by Rule 22.28 (40 CFR Part 22), New Waterbury filed a Motion to Reopen Hearing. Relief requested was for the purpose of introducing additional evidence regarding (1) the financial status of Vanta, Inc., the general partner of New Waterbury, and (2) a post-hearing civil enforcement action initiated by the U.S. EPA against New Waterbury in the U.S. District Court for the District of Connecticut on November 25, 1991, which alleges additional

violations of the PCB Rule and which will impact New Waterbury's ability to pay the penalty assessed in the Initial Decision. The civil action involves a number of PCB Items abandoned on New Waterbury's property by the former owner, Century Brass Products and/or Pan Metals Corporation, which is alleged to have purchased the items.

This motion was granted by an order, dated October 8, 1992. The order recited that the hearing was reopened for the limited purpose of permitting the introduction of evidence as to the cost of removing PCBs referred to in the mentioned civil action instituted by the government against New Waterbury in U.S. District Court and the financial condition of the general partner, Vanta, Inc.

Under date of February 22, 1993, the parties agreed that an additional oral hearing was unnecessary and jointly identified nine exhibits which were stipulated into evidence.[35/] The parties have

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[35/] These exhibits are:

1. Complaint in United States v. New Waterbury, Ltd., a California Limited Partnership and Vanta, Inc., C.A. No. 3-91CV00688 (WWE) (D. Conn.).

2. Answer of New Waterbury, Ltd. and Vanta, Inc. to the complaint identified in #1 above.

3. Response to Plaintiff's First Set of Interrogatories and Request for Production, in the litigation identified in #1 above and dated June 1, 1992, in particular Interrogatory 7 and Request for Production 27, 28 and 33-74 and documents responsive thereto.

4. Verification of Response identified in #3 above.

(continued...)

submitted supplemental proposed findings of fact and briefs in support thereof and the matter is now ready for decision.

Additional Findings of Fact

28. Vanta, Inc., a California Corporation, is the sole general partner of New Waterbury, Ltd., a California Limited Partnership (Deposition of Trevor C. Roberts, Joint Exh 7, at 13, 56, 57, hereinafter Roberts followed by page number). All of the stock of Vanta, Inc. is owned by Winston Management and Investment, Inc., hereinafter Winston (Roberts 13).

29. Mr. Trevor C. Roberts is the sole stockholder, director and corporate officer of Winston and also the sole corporate officer and director of Vanta, Inc. Mr. Roberts is the

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35/(...continued)

5. Rollins Environmental Site Services August 12, 1992 estimate for the removal and disposal of the PCB Items which are the subject of EPA's pending civil action, United States v. New Waterbury, Ltd., et al.

6. Unison Transformer Services, Inc. August 13, 1992 estimate for the removal and disposal of the PCB Items which are the subject of EPA's pending civil action, United States v. New Waterbury, Ltd., et al.

7. Transcript of Trevor C. Roberts' deposition by oral examination taken July 23, 1992 and October 19, 1992 by Attorney Paul Chassy, U.S. Department of Justice.

8. Vanta, Inc.'s balance sheet, December 31, 1992, if certified or verified no later than March 12, 1993.

9. Option and Purchase and Sale Agreement between Homart Development Co. and New Waterbury, Ltd., et al.

largest limited partner in New Waterbury (Roberts 14; Joint Exh 3, Exh A).

30. In addition to copies of New Waterbury's U.S. Partnership Tax Returns for the calendar years 1987 through 1989,[36/] which were introduced at the hearing (finding 25), a copy of New Waterbury's tax return for the calendar year 1990 is in evidence (Response to Plaintiff's First Set of Interrogatories and Request for Production, Joint Exh 3, Exh 3C-1C1). These returns were signed by Trevor C. Roberts as general partner. According to Mr. Roberts "(w)e just forgot to type in the name Vanta, Inc.,. . . ." (Roberts 59).

31. New Waterbury's 1990 tax return reflects gross rents of [redacted] expenses totaling [redacted] and a net loss of [redacted]. Deducting interest, depreciation and amortization expenses would still leave a net loss of [redacted]. This return reflects a gain from the sale of "land improvement" or "land and improvement" of [redacted]

32. A New Waterbury balance sheet which includes the period ending December 31, 1991, reflects assets totaling [redacted] and liabilities totaling [redacted] (Joint Exh 3, Exh 3C-1D). Cash is shown as [redacted] as of December 31, 1989; [redacted] as of December 31, 1990 and only [redacted] as of December 31, 1991. Mr. Roberts testified that receivables shown on the balance

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[36/] The 1989 return reflects the sale of real estate for one million dollars alluded to by Mr. Harding (finding 27). This resulted in a reported gain o[redacted].

sheet ([redacted] as of December 31, 1991) were obligated to secure debts of Winston (Roberts 107). While the verification by Mr. Roberts, dated February 9, 1993 (Joint Exh 4), presumably covers this balance sheet, the balance sheet has not been audited or certified by an independent accountant or accounting firm and comparison with other documents included in Joint Exhibit 3 raises questions as to the accuracy or completeness of the balance sheet. For example, the balance sheet does not show any property taxes payable, while a letter from the Tax Collector for the City of Waterbury, dated January 17, 1992, shows total real estate taxes due of $[redacted] and total taxes on fixtures and equipment of $[redacted] (Joint Exh 3, Exh 3C-1B). These figures include interest computed to January 31, 1992. It will be recalled that the purchase price of the Century Brass facility included an assumption of liability for existing taxes of $[redacted].[37/] Moreover, the balance sheet as of December 31, 1991, reflects liability for mortgages totaling $[redacted] while a separate document (Joint Exh 3, Exh 3C-1F) lists mortgages totaling [redacted].[38/] This latter figure

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[37/] Finding 25. While a breakdown would have been helpful, it may be that real estate and personal property taxes are included in an item on the balance sheet entitled "A/P & Accrued Expenses" which as of December 31, 1991, totaled [redacted].

[38/] The $17,769,501 shown on the balance sheet includes $6,623,960 in participating mortgage notes, [redacted] described as "Winston & Shannons," $[redacted] itemized as lending partnerships, $5,680,000 designated as 1st mortgage notes, $[redacted] designated as (continued...)

accords with Mr. Roberts' estimate of mortgages on the property totaling [redacted] to [redacted] (Roberts 15) and is in line with Mr. Harding's testimony at the hearing in April 1991 that mortgage liability totaled approximately [redacted], excluding interest (finding 26). Although the balance sheet under notes payable includes liability to Century Brass of $[redacted]), this figure is not included in the mortgage total of [redacted] shown on Exhibit 3C-1F.[39/]

33. Liabilities shown on the balance sheet in addition to the mortgages and the "A&P & Accrued Expenses" totaling [redacted]" (supra note 37) include [redacted]) in construction accounts payable, [redacted] in tenant deposits, a bridge loan totaling [redacted], a loan from United Bank of [redacted], "DIF" loans of [redacted], "special participating notes" of [redacted], additional notes payable totaling [redacted]) and a separate item "18% promissory notes" totaling [redacted]). A

[38/](...continued)
a bridge first mortgage and [redacted] for a condo mortgage. The [redacted] figure on Exhibit F includes [redacted]) in mortgages to Winston Management & Investment, Inc., a mortgage deed and security agreement to Haley & Aldrich, Inc. in the amount of [redacted], a mortgage of [redacted]) to Louis Harding as trustee and two mortgages totaling [redacted]0 to Charles E. Crow, trustee. The mortgage in which Mr. Harding was named trustee was to secure sums advanced by investors at the time of New Waterbury's purchase of the Century Brass property (Roberts 101-02).

[39/] Obligations assumed by New Waterbury at the closing of the purchase from Century Brass included a first purchase money mortgage of [redacted]) (supra note 14). Mr. Roberts testified that among the issues in the Century Brass foreclosure action is whether the [redacted] withheld for transformer removal (finding 4) was a first mortgage obligation (Roberts 30, 31).

summary of records from the City of Waterbury Clerk's Office (Joint Exh 3, Exh 3C-1E) shows numerous mechanics liens, tax liens, judgment liens, attachments, lis pendens and lawsuits in progress against New Waterbury.

34. Notwithstanding the foregoing apparent discrepancies between the balance sheet and other evidence in the record referred to in finding 33, it is clear that New Waterbury's liabilities exceed its assets and that it is unable to pay its obligations as they become due. New Waterbury's dwindling cash position is reflected in finding 32. Mr. Roberts' testimony, which is supported by New Waterbury's income tax returns, is that New Waterbury's gross income was approximately $[redacted] Roberts 28). He testified, however, that New Waterbury had lost a major tenant, D. J. Wholesale, reducing gross income to $[redacted] to [redacted] a year.[40/] He stated that the impact of this loss on New Waterbury's ability to meet payroll obligations had been "brutal" and that New Waterbury had laid everybody off except Mr. Harding and a part-time secretary (Roberts 51). Additionally, he testified that insurance coverage had been canceled and that they were just "eking" by on utilities. He described New Waterbury as living "hand-to-

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[40/] Roberts 51. The Income Statement (Joint Exh 3, Exh 3C-1D) reflects gross rental income of $[redacted] in 1989, $[redacted] in 1990 and $[redacted] in 1991. The balance of gross income shown on the statement, which totaled $[redacted]) in 1989, $[redacted]) in 1990 and [redacted]n 1991, consists of such items as tenant reimbursements for maintenance, property taxes, utilities and insurance and unidentified "other income."

mouth" and basically going through a bankruptcy or liquidation outside bankruptcy court (Roberts 32). In other testimony, he stated that New Waterbury had opportunities to settle some of its bills for ten cents on the dollar, but did not have the money to do so (Roberts 34).

35. Mr. Roberts testified that Winston had not received any returns on money loaned to New Waterbury at the time of the purchase and that Winston had to subsidize New Waterbury (Roberts 52). Referring to advances to New Waterbury from Winston, he explained that as "we" (Winston) got more and more pinched, New Waterury was constantly forced to shrink down, "we were constantly cutting and (o)nce we went over the hump, we all started going downhill together" (Roberts 53). While he stated that New Waterbury had been unable to reimburse "us" (Winston) for payroll insurance, workmen's comp, etc., he denied that Winston had assumed responsibility for New Waterbury's obligations (Roberts 17, 18, 51). He estimated total loans from Winston to New Waterbury since the acquisition at over two million dollars and that New Waterbury's current liability to Winston was a million and a half or so.[41/] He denied that these figures represented any "payback" on the loans by New Waterbury, explaining that some of the advancement was mischaracterized and represented

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[41/] Roberts 16. These figures differ markedly from the $[redacted] in outstanding unsecured loans from Winston of which Mr. Harding testified (finding 26). It may be that some of these sums were subsequently included in mortgages to Winston.

payroll or insurance for which "we" (Winston) expected to be repaid.

36. Joint Exhibit 9 is an Option and Purchase and Sale Agreement entered into as of October 1, 1992, between Homart Development Co. as the purchaser and New Waterbury, Ltd., Federal Way, Ltd. and Shannon's Fine Food & Spirits as the seller. Property involved in the sale is described as approximately 87 acres of land commonly known as the west plant and the east plant of the former Century Brass factory located in the Town of Waterbury, County of Hartford, State of Connecticut.[42/] Although the purchase price of the property is stated to be [redacted] dollars, the agreement is actually a series of 25 renewable options, expiring, unless sooner exercised, in 1995. Option consideration, which is deductible from the purchase price, totals $[redacted], if all options are exercised. If at any time the purchaser fails to exercise any option, damages for the failure to do so are the sums paid for prior options.

37. The Purchase and Sale Agreement contains an acknowledgment that the seller lacks financial ability to demolish and remove

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[42/] The manner in which Federal Way, Ltd. and Shannon's Fine Food & Spirits come to have an interest in the property and the extent of that interest are not disclosed by the record. It is noted, however, that New Waterbury and Federal Way and Shannon's have identical Post Office addresses, "1777 Rollins Road, P.O. Box 4496, Burlingame, California, 9401-4496." It is also noted that the agreement was signed on behalf of New Waterbury by Vanta, Inc. as general partner, Trevor C. Roberts, President and on behalf of Shannon's by Louis G. Harding, President. There is no indication the agreement was executed by Federal Way.

buildings and structures and remove hazardous waste and that, if the purchaser were required to cleanup the property, the property could not be developed as an economically viable site.[43/] The purchaser agreed to seek funding from federal, state or municipal sources for the "Cleanup," but the agreement provides that purchaser has no obligation to obtain such funding or liability for failure to do so. Other than as disclosed by a site assessment, dated May 8, 1988, seller represents that no hazardous waste has been generated, stored, treated or disposed of in or on the property. The seller, however, acknowledges responsibility, including responsibility for any resulting fines or penalties, for a PCB spill, allegedly caused by vandals on September 8, 1992.

38. Joint Exhibit 5 is a Rollins Environmental Site Services proposal, dated August 12, 1992, for the removal and disposal of the PCBs and PCB equipment which are involved in the previously referred to civil action against New Waterbury in U.S. District Court. The estimated price totals $[redacted]nd the proposal specifies that actual billing will be based on quantities received at disposal facilities, number of vehicles used and site services based on time and materials rate sheets which are attached. The proposal specifies that disposal

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[43/] The agreement contains a similar acknowledgment with respect to New Waterbury's ability to obtain a termination of the lease to New England Contract Packers and that the property could not be economically developed, if the purchaser were required to bear the burden of such termination.

prices are based on material arriving at the disposal facility (Deer Park, Texas) within the EPA specified nine months maximum from the date of removal from service. The pricing formula contains a multiplier depending on the age of the material, as measured from the date of removal from service, when received at Deer Park, which is 6.50 times the listed price for material beyond 12 months. Although as worded this multiplier would apply only to disposal costs totaling [redacted] in the initial proposal, under the revised proposal it appears that the multiplier would apply to the total estimated price of [redacted].

39. Joint Exhibit 6 is a proposal by Unison Transformer Services, dated August 13, 1992, for the removal and disposal of the PCBs and PCB equipment referred to in finding 38 for a total price of [redacted]. Among other things, this proposal required New Waterbury to disconnect and move drained transformers to the nearest site loading dock and to provide a current fluid analysis showing the PCB content in ppm of each transformer. Unison's proposal also contained a multiplier for dated material, a multiplier of 6.5 applying if less than one month remained. "Dated material" is not defined, but presumably refers to the date of removal from service for disposal.

40. Referring to the transformers involved in the government's action against New Waterbury and Vanta, Mr. Roberts testified that if Homart exercised its option, there would be enough funds to take care of the transformer problem (Roberts 110).

He stated [in that event] the first mortgage would be paid a hundred cents on the dollar and that contractors with mechanics liens would receive approximately 90 cents on the dollar. He indicated that "(e)verybody else" [all other creditors] would receive maybe 20 cents to 25 cents on the dollar and no interest.[44/] He estimated that the seven million dollar mortgage to Mr. Harding, securing investments of initial investors, and th[redacted] dollars due Winston would be [worth] "20 cents on the dollar on paper." (Id. 111). Mr. Roberts testified that Homart's exercise of the option would not enable him to recoup any of his personal investment and that he would have lost it all.

41. A Department of Justice form "Financial Statement of Corporate Debtor" for Vanta, Inc. executed by Trevor C. Roberts, President, on April 21, 1992, is in evidence (Joint Exh 3C-2). This document reflects that Mr. Roberts is the sole corporate officer and director of Vanta and that Vanta files tax returns and pays taxes as a wholly owned subsidiary of Winston Management & Investment, Inc. An attached income statement reflects that Vanta had no income for the year ending October 31, 1990, and a net loss of[redacted]. For the year ending October 31, 1991, the statement shows that Vanta's expenses equalled its income and that it had no net income. The

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[44/] It is not clear why secured creditors, i.e., those having claims secured by judgment or mechanics liens, would receive less than full payment in order that unsecured creditors could receive 20 percent to 25 percent of their claims.

balance sheet for the year ending October 31, 1991, shows a negative net worth. Vanta's balance sheet for the period ending December 31, 1992, shows assets of [redacted] dollar as against liabilities (accounts payable) of [redacted] (Joint Exh 8). The income statement for the period ending December 31, 1992, reflects a net loss of [redacted]. These statements were certified by Mr. Roberts as true and correct to his best knowledge, information and belief on March 8, 1993.

42. United States income tax returns for Winston Management & Investment, Inc. & Subsidiaries for its fiscal years ending October 31, 1988, through October 31, 1991, are in evidence (Joint Exh 3C-2A through 2D). The returns show a generally declining gross income of over [redacted] for the fiscal year 1987, nearly [redacted] for the fiscal year 1988, approximately [redacted] for fiscal 1990 and slightly over [redacted] for fiscal 1990. Principal sources of income are commissions, management fees, lease and formation fees and guaranty fees. These returns also show declining total assets ranging from just over $3.2 million in fiscal 1987 to approximately $2.25 million at the close of fiscal year 1990. Mr. Roberts testified that Winston did not have the financial wherewithal to finance the removal of the PCB equipment on the New Waterbury property (Roberts 54).

C O N C L U S I O N S

1. In accordance with the Rules of Practice, the burden of persuasion as to the appropriateness of the penalty is on Complainant.

2. Complainant has not rebutted New Waterbury's showing that it does not have the ability to pay any penalty and, accordingly, the penalty of $35,750 assessed in the Initial Decision will be rescinded.

D I S C U S S I O N

Complainant injected the issue of the ability of the general partner, Vanta, Inc., to pay into this proceeding by arguing that the general partner was jointly and severally liable for the debts of the partnership including the penalty at issue and that, inasmuch as there was no evidence of Vanta's financial condition in the record, New Waterbury had not established an inability to pay.[45/] Complainant now asserts, however, that it has never argued that Vanta, or any other entity not named in the complaint, should be found liable for the PCB violations herein (Reply To Respondent's Supplemental Proposed Findings of Fact and Supporting Brief, dated April 16, 1993, at 5,6).

[45/] Memorandum In Support of Proposed Findings of Fact and Conclusions of Law, dated June 17, 1991, at 1-3; Discussion and Conclusions of Law at 30-33. Complainant seems oblivious of the fact that by focusing its attention on the assets of the general partner, Complainant could be deemed to have conceded that New Waterbury lacks the financial wherewithal to pay a penalty.

Complainant attacks the conclusion in the Order Denying Motion for Certification of Interlocutory Appeal that, consistent with due process and the Administrative Procedure Act (APA), Complainant could not rely on the assets of Vanta, Inc. to satisfy its statutory obligation to consider New Waterbury's ability to pay and the effect of the penalty on New Waterbury's ability to continue in business without giving notice of such intention.[46/] Complainant baldly asserts that TSCA section 16 does not assign to EPA the burden of proving a violator's ability to pay (Reply at 7). Regardless of the sense in which Complainant used "burden of proving," this assertion is contrary to the APA, contrary to a substantial number of court decisions construing civil penalty statutes indistinguishable from TSCA section 16 as to the matter at issue here and contrary to the Consolidated Rules of Practice.

TSCA section 16(a)(2)(A) provides in pertinent part "A civil penalty for a violation of section 2614 of this title shall be assessed by the Administrator by an order made on the record after opportunity (provided in accordance with this subparagraph) for a hearing in accordance with section 554 of Title 5. . . ." and there can be no argument but that a TSCA civil penalty proceeding is subject to the APA. The APA (5 U.S.C. § 556(d)) provides in part

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[46/] This is because, as pointed out in the mentioned order, a judgment against the partnership is not a judgment against individual partners. See, e.g., Detrio v. United States, 264 F.2d 658 (5th Cir. 1959) (judgment against partnership could not be satisfied out of assets of former partner who was not named in action and had no notice thereof). Vanta not having been named in the complaint, its financial status may not be regarded as controlling on New Waterbury's ability to pay absent notice.

"(e)xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." EPA is seeking a civil penalty and is clearly the proponent of an order and there is nothing in TSCA section 16 which could be said to "otherwise provide." (see note 31, supra). "Burden of proof" in the quoted sentence from the APA means burden of production.[47/]

The foregoing brief analysis indicates that there are substantial difficulties with Complainant's position that, in the face of TSCA section 16(a)(2) requiring the Administrator, in determining the amount of a civil penalty, to consider, inter alia, "ability to pay, [and] effect on ability to continue to do business," it has neither a burden of production nor of persuasion on the issue of ability to pay (Reply at 1-5). Court decisions are equally inhospitable to Complainant's contentions. See, e.g., Dazzio v. F.D.I.C., 970 F.2d 71, 82 (5th Cir. 1992) (where section of Federal Deposition Insurance Act (12 U.S.C. § 1828(j)(4)(B)) provided that "(i)n determining the amount of penalty, the corporation shall take into account [among other things] the appropriateness of the penalty with respect to the size of financial resources and good faith of the member bank or person charged. . .," FDIC had burden of production of evidence [of ability to pay]). To the same effect, see Merrit v. United States, 960 F.2d 15, 19 (2nd Cir. 1992) (where section 13(c) of the Shipping Act (46 U.S.C. app. § 1712(c)) required that "(i)n

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[47/] NLRB v. Transportation Management Corp., 462 U.S. 393, 403, 76 L.Ed. 2d 667 (1983).

determining the amount of any penalty, the Commission shall take into account the nature, . . . and, with respect to the violator, . . ability to pay . . ," Commission was required to consider violator's ability to pay before assessing penalty and burden of going forward with evidence on ability to pay was on Commission). See also Premex, Inc. v. Commodity Futures Trading Commission, 785 F.2d 1403, 1409 (9th Cir. 1986) (where Commodity Exchange Act, 7 U.S.C. § 9a, provided that "(i)n determining the amount of a monetary penalty, the Commission shall consider . . . the appropriateness of such penalty to the net worth of the person charged . . .," commission had burden of producing evidence to support the penalty it seeks). Additionally, see Hutto Stockyard v. U.S. Department of Agriculture, 903 F.2d 299, 305 (4th Cir. 1990) (under Parkers and Stockyards Act, 7 U.S.C. § 213(a), which requires Secretary, before assessing monetary penalties, to consider, among other things, ". . (3) the effect of the penalty on the person's ability to continue in business," USDA, as proponent of order, bears burden of producing evidence that penalty is reasonable); and Bosma v. U.S. Department of Agriculture, 754 F.2d 804, 810 (9th Cir. 1984).

The opening sentence of Rule 22.24 (40 CFR Part 22) provides: "(t)he complainant has the burden of going forward with and of proving that the violation occurred as set forth in the complaint and that the proposed civil penalty, revocation, or suspension, as the case may be, is appropriate." (emphasis added). This language clearly places on Complainant both the burden of production and the

burden of persuasion that penalty proposed is reasonable in the light of all the statutory factors including ability to pay. See Kay Dee Veterinary Division of Kay Dee Feed Company, FIFRA Appeal No. 86-1 (CJO, October 27, 1988) ("EPA regulations impose the burden of persuasion on the complainant in a civil penalty proceeding both with regard to the occurrence of the violation and the magnitude of the penalty") (slip opinion at 9). As pointed out in the Order Denying Motion For Certification of Interlocutory Appeal, it is one thing to apply, in accordance with Guidelines for the Assessment of Civil Penalties Under Section 16 of TSCA (1980) or the PCB Penalty Policy (1990), a presumption that respondent has the ability to pay a proposed penalty at the time a complaint is issued and quite another to apply such a presumption in evaluating evidence after an adjudicatory hearing in accordance with the Consolidated Rules of Practice. Applying the presumption in the latter situation is to elevate the Guideline or the Penalty Policy, as the case may be, over the Rules of Practice, which is impermissible, because only the Rules of Practice were promulgated in accordance with the APA and neither the Guideline nor the Penalty Policy have the force and effect of law.[48/]

New Waterbury having introduced evidence regarding its ability to pay, the question of who has the burden of production is moot.

[48/] In Merrit v. United States, supra, the Second Circuit, in the face of a provision of the Shipping Act specifying that "ability to pay," was one of the factors for consideration in determining the amount of any penalty, squarely rejected the notion that ability to pay was an affirmative defense. No reason is apparent why the result should be different under TSCA.

Nevertheless, the Rules of Practice, as we have seen, place the burden of persuasion as to the statutory factors, including ability to pay, on Complainant. House Analysis & Associates & Fred Powell, CAA Appeal No. 93-1 (EAB, February 2, 1993), cited by Complainant, was an appeal from a default order where respondent never raised inability to pay as a defense and indeed, had failed to respond to an order from the ALJ directing that evidence supporting inability to pay be furnished, if it wished to raise such a defense. The facts in that case bear no relationship to the situation here, where New Waterbury has not only raised inability to pay as a defense, but has presented a persuasive case that it doesn't have the ability to pay any penalty.

In a Memorandum of Law accompanying Supplemental Proposed Findings of Fact, dated March 25, 1993, New Waterbury asserts that, because the Initial Decision failed to apply the proper standard of proof, the penalty amount should be determined without reference to the additional stipulated evidence.[49/] Moreover, New Waterbury says that, because liability [for any penalty] is that of the partnership, the partner merely having a potential future liability, it is improper to consider the assets of the general partner to determine a reasonable penalty for the partnership.

[49/] Memorandum at 13. Complainant alleges that this position is evidence of dilatory tactics on New Waterbury's part and urges that the penalty should be increased by 15 percent as consequence thereof (Reply to Respondent's Supplemental Proposed Findings of Fact, etc. at 11). Because of the conclusions herein and because it was Complainant, who injected the issue of Vanta's financial status into this proceeding, this argument is palpably erroneous and is rejected.

While these arguments would be more appropriate on an appeal from the Initial Decision, their validity was recognized in the Order Denying Motion For Certification of Interlocutory Appeal. The Order specified, however, that the ruling that evidence of Vanta's financial status was relevant and crucial to New Waterbury's ability to pay was considered the "law of the case." It follows that the stipulated evidence must, and will, be considered.

As we have seen (finding 27), Mr. Harding testified that New Waterbury could not afford to pay any penalty. There is nothing in the record which contradicts that testimony at the time it was given and, indeed, the record clearly supports the conclusion that New Waterbury's financial condition has deteriorated drastically since that time. As of December 31, 1991, New Waterbury's liabilities exceeded its assets by $16,837,742, and cash on hand was only $1,829 (finding 32). Additionally, Mr. Roberts, who appeared for deposition in July and October 1992, testified that New Waterbury had lost a major tenant, dramatically reducing its gross income; that all employees with the exception of Mr. Harding, the manager, and a part-time secretary had been laid off; that insurance had been canceled and that receivables in the amount of $232,217, shown as an asset on New Waterbury's balance sheet, were encumbered to secure debts of [to?] Winston; that New Waterbury was living "hand-to-mouth" and in effect going through a bankruptcy liquidation without being in bankruptcy (findings 34 & 35).

Complainant makes no effort to dispute the foregoing facts. Instead, it argues that New Waterbury hasn't established an

inability to pay the penalty assessed, because it hasn't shown that New Waterbury could not borrow the money from Winston.[50/] To the contrary, New Waterbury has shown that its liabilities exceed its assets, that its income is insufficient to pay its obligations as they become due and that Winston has advanced funds to pay certain of these expenses (findings 34 & 35). The record also shows a precipitous decline in Winston's gross income and a decline in its total assets (finding 42) and the mere fact that it has loaned New Waterbury several million dollars in the past does not mean Winston has either the ability or the incentive to loan New Waterbury further sums, least of all for the purpose of paying penalties.

The record shows that Vanta, Inc., the general partner in New Waterbury, has an insignificant income and a negative net worth (finding 41). Accordingly, its assets, which Complainant, on post-hearing brief, alleged were controlling, add nothing to New Waterbury's ability to pay a penalty.

[50/] Proposed Supplemental Findings of Fact and Conclusions of Law on Ability to Pay, dated March 26, 1993. Complainant asserts without elaboration that the facts herein could justify piercing the corporate veil of Vanta for the purpose of fastening liability on Winston Management and/or Trevor Roberts for the debts of New Waterbury (Id. at 7). Assuming, without deciding, that the corporate veil of Vanta could be pierced for the benefit of creditors of New Waterbury, this would normally mean only that creditors of New Waterbury could reach Vanta's assets and not necessarily those of Vanta's owner or owners as that would require piercing of a different corporate veil, that of Winston in this instance. Apart from the fact that this line of inquiry injects into this proceeding the financial status of Winston, another entity not named in the complaint, the record is clearly insufficient to enable disregard of Winston's corporate status. See, e.g., In Re Acushnet-River & New Bedford Harbor Proceeding, 675 Fed. Supp. 22, 41 (D. Mass. 1987).

The option agreement for the sale of New Waterbury's property reflects that Homart has complete discretion as to whether to exercise any option to extend the duration of the option to purchase and, indeed, of whether to exercise the option to purchase (finding 36). Moreover, the option is, in any event, contingent on obtaining government funding for cleanup and the termination of an existing lease to a major tenant (finding 37). Estimated costs of PCB removal and disposal, which may not include costs of all cleanup of the site, range from approximately $450,000 to over $3,400,000 (findings 38 & 39). Additionally, the evidence establishes that, even if Homart were to exercise its option, New Waterbury's existing indebtedness to Winston would be worth "20-cents on the dollar on paper" (finding 40). This indicates the 20-cent figure is simply a rough estimate, which probably overstates the actual value (see note 44). Accordingly, even if it be assumed, which is by no means established, that Winston is financially able to loan New Waterbury additional money to pay the penalty, there is no earthly reason for it to do so, because the loan simply will not be repaid. Under these circumstances, if inability to borrow money to pay a penalty is a requirement for showing an inability to pay, New Waterbury has satisfied that burden.[51/]

[51/] It is simply unrealistic to expect that a firm in straitened financial circumstances will be able to borrow money for the purpose of paying penalties. If such a firm is able to borrow, at all, it would be for some purpose having a reasonable prospect of keeping the firm in business, e.g., increasing revenue or reducing expenses or both. It is worthy of note that penalties are (continued...)

New Waterbury having shown an inability to pay any penalty and Complainant not having rebutted that showing, the penalty of $35,750 assessed in the Initial Decision will be rescinded.

O R D E R

The penalty of $35,750 assessed against New Waterbury, Ltd., a California Limited Partnership, is rescinded.[52/]

Dated this 7th day of May 1993.

Spencer T. Nissen
Administrative Law Judge

[51/](...continued)
subordinated to the claims of other creditors in a liquidation under Chapter 7 of the Bankruptcy Code and, that in a reorganization under Chapter 11, penalty claims are generally discharged (Environmental Enforcement and the Bankruptcy Laws, Department of Justice Outline, March 15, 1989).

[52/] In accordance with Rule 22.18(b) (40 CFR Part 22), filing of the Motion To Reopen Hearing, automatically stayed the running of the appeal period until the conclusion of the reopened hearing. Service of this Order is considered to conclude the reopened hearing and the appeal period from the Initial Decision as well as from this Order runs from that date.

New Waterbury, Ltd.
Docket No. TSCA I-88-1069

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Letter Transmitting Judge Nissen's Initial Decision was sent to the following persons in the following manner:

Hand Delivery:

Thomas Olivier, Esq.
Assistant Regional Counsel
U.S. EPA, Region I
J.F. Kennedy Federal Building
Boston, MA 02203-2211

Certified Mail
Return Receipt Requested:

Kevin C. Murphy, Esq.
Pullman & Comley
850 Main Street
PO Box 7006
Bridgeport, CT 06601

I further certify that the original copy of the Decision, together with the Record in this matter, were filed with the Hearing Clerk, Headquarters, by Judge Nissen's office and that a copy of the Decision, Cover Letter and Certificate of Service were filed with the Regional Hearing Clerk, U.S. EPA, Region I.

5-11-93
Date

Linda D'Amore
Regional Hearing Clerk