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December 21, 2015

By E-filing

Ms. Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA/Office of Administrative Law Judges
Room M-1200
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

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

Dear Ms. Anderson:

I have enclosed for filing Respondents' Response to Complainant's Second Motion to Compel Discovery and Impose Sanctions and Memorandum of Law.

Sincerely,

A handwritten signature in black ink that reads 'Jeffrey L. Leiter'.

Jeffrey L. Leiter

cc: Certificate of Service List

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)	
)	
Aylin, Inc.; Rt. 58 Food Mart, Inc.;)	Docket No. RCRA-0302-13-0039
Franklin Eagle Mart Corp.;)	
Adnan Kiriscioglu; 5703 Holland)	
Road Realty Corp.; 8917 South)	Proceeding under Section 9006
Quay Road Realty Corp.; and,)	of the Resource Conservation and
1397 Carrsville Highway Realty)	and Recovery Act, as amended,
Corp.,)	42 U.S.C. Section 6991e
)	
Respondents.)	

**RESPONDENTS' RESPONSE TO COMPLAINANT'S SECOND MOTION TO
COMPEL DISCOVERY AND IMPOSE SANCTIONS**

In accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 (“Rules of Practice”), Respondents 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. (collectively, the “Respondents”), through their attorney, respectfully submit this response to the Director of the Land and Chemicals Division of the U.S. Environmental Protection Agency – Region III’s (“Complainant”) Second Motion to Compel Discovery and Impose Sanctions and accompanying Memorandum of Law (“Motion”). Specifically, the Respondents seek an Order from the Presiding Officer, denying Complainant’s Motion. The rules governing this proceeding provide that the Respondents, not the Complainant, have the burdens of presentation and persuasion at the hearing for the Ability-to-Pay affirmative defense. Complainant does not need the

information being sought through its instant Motion to meet its burden of proving liability for the alleged violations or the penalty assessment.

I. LEGAL STANDARD FOR ADJUDICATING THE MOTION

The procedural rules governing this proceeding are the Rules of Practice. Section 22.19(a)(2) of the Rules of Practice set forth in pertinent part the required contents of a prehearing exchange:

Each party's prehearing exchange shall contain: (i) The names of any expert or other witness it intends to call at the hearing, together with a brief narrative summary of their expected testimony; and (iv) Copies of all documents and exhibits it intends to introduce into evidence at the hearing.

40 C.F.R. § 22.19(a)(2).

When it comes to supplementing prior exchanges, the Rules of Practice specify that:

A party who has made an information exchange shall promptly supplement or correct the exchange when the party learns that the information exchanged is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party

40 C.F.R. § 22.19(f).

Further, the Prehearing Order issued in this proceeding directs the parties, if they intend to supplement a prehearing exchange to file a motion with the supplement, explaining why the exhibits or witnesses were not provided in the original prehearing exchange.

With respect to failure to exchange information, the Rules of Practice provide:

Except as provided in § 22.22(a), a document or exhibit that has not been included in a prehearing exchange shall not be admitted into evidence, and any witness and testimony summary has not been included in prehearing information exchange shall not be allowed to testify.

40 C.F.R. § 22.19(a).

Notwithstanding the foregoing, Section 22.22(a) of the Rules of Practice provides that a document, exhibit or witness name or summary of testimony must be filed at least 15 days prior to the hearing date or it will be not be admitted into evidence, unless the party offering it “had good cause for failing to exchange the required information” and provided it to the other party “as soon as it had control of the information, or had good cause for not doing so.” 40 C.F.R. § 22.22(a).

The Rules of Practice further provide:

Where a party fails to provide information within its control as required the presiding officer may, in [her] discretion: (1) Infer that the information would be adverse to the party failing to provide it; (2) Exclude the information from evidence; or (3) Issues a default order under § 22.17(c).

40 C.F.R. § 22.19(g).

Typically, the preferred initial remedy for an insufficient prehearing exchange is to compel the party to produce the information rather than to exclude it or find the party in default. *See Alan Richey, Inc.*, EPA Docket No. CWA-06-2004-1903, 2005 EPA LEXIS 46, *8 (August 18, 2005).

II. ARGUMENT

Contrary to Complainant's assertion in its Motion, Respondent Adnan Kiriscioglu and the six corporate Respondents in this proceeding are not ignoring the Presiding Officer's prior orders regarding discovery. The Motion must be considered in the proper context -- that is, the statutory penalty factors in this proceeding are restricted to "seriousness of the violation" and "good faith" efforts to comply. *Carroll Oil Co.*, 10 E.A.D. 635, 662-63 (EAB 2002). The issue of "ability-to-pay" is not part of the Complainant's prima facie burden in proving liability for the alleged violations in this proceeding. Because Ability-to-Pay it is not part of Complainant's required proof, it must be raised and proven by the Respondents as an affirmative defense. *Id.* The Rules of Practice provide that "the respondent[s] ha[ve] the burdens of presentation and persuasion for any affirmative defenses." 40 C.F.R. § 22.24. Accordingly, if Respondent Adnan Kiriscioglu does not offer any evidence to prove his individual inability to pay, it will affect neither Complainant's case-in-chief nor the assessment of any penalty.

A. Respondents Have Provided Extensive Financial Information to Complainant

The Complainant, in its Motion, fails to inform the Tribunal that the Respondents already have provided Complainant with over 1,000 pages of the following financial records as part of the prehearing exchanges and that are contained in Respondents' Exhibit Volumes II and III (all subject to "confidential business information" claims):

Respondent	Document	2009	2010	2011	2012	2013	2014
Aylin, Inc.	Balance Sheet	X	X	X	X	X	
Aylin, Inc.	General Ledger	X	X	X	X	X	
Aylin, Inc.	Income Statement	X	X	X	X	X	
Aylin, Inc.	Income Tax Return	X	X	X	X	X	
Franklin Eagle Mart, Inc.	Balance Sheet	X	X	X	X	X	
Franklin Eagle Mart, Inc.	General Ledger	X	X	X	X	X	
Franklin Eagle Mart, Inc.	Income Statement	X	X	X	X	X	
Franklin Eagle Mart, Inc.	Income Tax Return	X	X	X	X	X	
Rt. 58 Food Mart, Inc.	Balance Sheet	X	X	X	X	X	
Rt. 58 Food Mart, Inc.	General Ledger	X	X	X	X	X	
Rt. 58 Food Mart, Inc.	Income Statement	X	X	X	X	X	
Rt. 58 Food Mart, Inc.	Income Tax Return	X	X	X	X	X	
1397 Carrsville Hwy. Realty Corp.	Income Tax Return		X	X	X	X	X
5703 Holland Road Realty Corp.	Income Tax Return		X	X	X	X	X
8917 South Quay Rd. Realty Corp.	Income Tax Return		X	X	X	X	X
Real Estate Entities	Combined Financial Information		X	X	X	X	X
Adnan Kiriscioglu	Income Tax Return and Schedules				X	X	X

In addition to the above, Respondents have provided the Complainant with bank account statements for the period February 1, 2013 through July 31, 2013, for Respondents Franklin Eagle Mart, Inc. and Rt. 58 Food Mart, Inc. The corporate Respondents Aylin, Inc., Franklin Eagle Mart, Inc., and Rt. 58 Food Mart, Inc. also submitted completed Ability-to-Pay questionnaires to Complainant.

Complainant's contractor, Industrial Economics, Inc. ("IEC"), has prepared an Ability-to-Pay Analysis for Respondents Aylin, Inc., Franklin Eagle Mart, Inc. and Rt. 58 Food Mart, Inc. based on the above-provided financial records and its review of publicly-

available records and databases. Complainant has provided Respondents with a copy of IEC's June 9, 2015 analysis.¹

B. Respondent Adnan Kiriscioglu Has Not Decided Whether to Assert the Affirmative Defense of "Ability-to-Pay."

As part of Complainant's discovery in this proceeding, it served interrogatories, request for production of documents and requests for admissions in 98 parts (including multiple subparts) on the Respondents. The Respondents have timely responded to all but one of these 98 parts.

The part in dispute is No. 92:

Completed signed and dated copy of the attached Individual Ability to Pay Claim (Attachment "B") prepared by Respondent Adnan Kiriscioglu or his accountant or other representative on his behalf.

Respondents, through their counsel, previously have informed Complainant, through its counsel, that Respondent Adnan Kiriscioglu has not made a decision whether to assert Ability-to-Pay as an affirmative defense at the hearing, now scheduled to begin on April 25, 2016.

As an initial matter, a material issue for the hearing is whether Mr. Kiriscioglu is an "operator" of the underground storage tank ("UST") systems under the Commonwealth of Virginia's UST regulations.²

Respondent Kiriscioglu and his attorney read Part 92 quoted above as conditional – that is, if Mr. Kiriscioglu intends to assert Ability-to-Pay as an affirmative defense for

¹ Based on the RCRA Confidential Business Information regulations, Respondents expect that the parties will stipulate as to the submission of IEC's analysis to the Tribunal.

² In addition, the Respondents have not conceded the issue that the three real estate corporations are "owners" of the UST systems at the three locations under the Commonwealth of Virginia's UST regulations.

himself, then he must submit the Individual Inability to Pay Claim form attached to the Motion; and, if he does not intend to assert this affirmative defense at the hearing for himself, then he need not complete and submit the form.

Respondents do not understand the Rules of Practice as requiring “all or none” when it comes to asserting Ability-to-Pay as an affirmative defense in a case with multiple respondents. There currently are seven respondents in this proceeding, and it is the Respondents’ choice whether to assert the Ability-to-Pay affirmative defense to one, three, six or all seven Respondents. As previously noted, Mr. Kiriscioglu has not decided whether he will assert the affirmative defense as to himself. Because the Individual Inability to Pay Claim form applies only to Mr. Kiriscioglu, and because the Complainant does not need the information from this form to make its prima facie case of liability, Respondent Kiriscioglu should not be ordered to provide this document to Complainant at this time.³

At this point in the proceeding, the information sought by Complainant from Respondent Kiriscioglu is relevant only if Respondents assert the Ability-to-Pay affirmative defense as to Mr. Kiriscioglu. Section 22.22(a)(1) of the Rules of Practice states, in part, that if a party fails to provide, at least 15 days prior to the hearing date, any document, exhibit, witness name or testimony required in the prehearing exchange, it shall not be admitted into evidence absent good cause. Respondents recognize that, if Mr. Kiriscioglu decides to assert the affirmative defense as to himself, and he then were

³ Complainant has not set forth any bases in its Motion as to why the information from the Individual Inability to Pay Claim form is needed other than to assess Mr. Kiriscioglu’s ability-to-pay the proposed penalty. Notwithstanding the conditional reading of Part 92, Respondent Kiriscioglu did provide his last three federal income tax returns (Form 1040) to the Complainant. The schedules to these personal returns give a rather detailed “snapshot” of Mr. Kiriscioglu’s personal finances.

to submit the completed Individual Inability to Pay Claim form 15 days before the start of the hearing, then Complainant may not have sufficient time for its analysts to review the form and prepare a rebuttal. The affidavit of Gail Coad, which is attached to Complainant's Motion, reveals that she and IEC have conducted significant analyses of the Respondents in this proceeding since 2012. If Mr. Kiriscioglu decides to assert the Ability-to-Pay affirmative defense as to himself, it would be reasonable and appropriate for the Respondents to submit Mr. Kiriscioglu's completed Individual Inability to Pay Claim form as soon as he makes such a decision, but no later than 30 days before the hearing. Such one-month "window" should not prejudice the Complainant.

C. The Imposition of Sanctions at This Time is Premature.

The next question is whether to grant Complainant's request to impose the sanctions described in Section 22.19(g) of the Rules of Practice on Mr. Kiriscioglu. Sanctions (automatic or otherwise) should not be imposed at this time for Mr. Kiriscioglu's good-faith belief that he needed to respond to Part 92 only if he was asserting the Ability-to-Pay affirmative defense as to himself.

In reviewing cases before the Tribunal, the preferred initial remedy has been to compel the party to produce the information, rather than to exclude it as a sanction. *See In the Matter of Paco Swain Realty, LLC*, EPA Docket No. CWA-06-2012-2710 (2014), at 3 (Judge Buschmann citing *Alan Richey, Inc.*).

The Complainant seeks to jump over such a remedy, contending that Respondent Kiriscioglu has ignored two prior orders from the Presiding Officer to provide the completed Individual Inability to Pay Claim form. This is not an accurate representation by the Complainant.

After the Presiding Officer issued her Order on March 12, 2014, granting Complainant's Motion for Discovery, Respondent Kiriscioglu submitted on May 7, 2014, his Motion to Defer Discovery Response until the Presiding Officer decided his Motion for Partial Accelerated Decision. The Presiding Officer denied Respondent Kiriscioglu's Motion to Defer Discovery Response at the same time she denied his Motion for Partial Accelerated Decision on August 10, 2015. In accordance with the Presiding Officer's August 10, 2015, Orders on Motions, Mr. Kiriscioglu timely submitted his last three personal federal income tax returns and made the good-faith determination with counsel that it was not necessary to submit the completed Individual Inability to Pay Claim form because he had not yet decided to assert the Ability-to-Pay affirmative defense as to himself.

As previously noted, because the Complainant does not need the completed Individual Inability to Pay Claim form for its prima facie case, any decision to impose sanctions under Section 22. 22(g) of the Rules of Practice – namely, the inference drawn by the presiding officer that any information contained in the Individual Inability to Pay Claim form would be adverse to the Respondents – is premature.

III. CONCLUSION

Respondents have provided significant financial information to the Complainant, even when it is not the Complainant's burden at the hearing to prove ability-to-pay as part of the Complainant's prima facie case. Mr. Kiriscioglu did provide the Complainant with his last three personal income tax returns, which contain a trove of information, and made a good-faith determination that he did not need to submit an Individual Inability to Pay Claim form when he has not yet decided on whether to assert the affirmative defense

at a hearing a little more than four months away. The Complainant's Motion should be denied. Alternatively, if Mr. Kiriscioglu decides to assert the Ability-to-Pay affirmative defense as to himself at the hearing, then he should be ordered to submit the completed Individual Inability to Pay Claim form to the Complainant no more than 30 days before the start of the hearing.

Dated: December 21, 2015

Respectfully submitted,



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Attorney for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 21st day of December, 2015, the foregoing Respondents' Response to Complainant's Second Motion to Compel Discovery and Impose Sanctions and Memorandum of Law was sent electronically and by U.S. regular mail, postage prepaid to:

Louis Ramalho, Esq.
Janet E. Sharke, Esq.
U.S. EPA, Region III (Mail Code 3RC50)
1650 Arch Street
Philadelphia, PA 19103-2029

Attorneys for Complainant



Jeffrey L. Leiter