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February 26, 2016

By Electronic Filing
Ms. Sybil Anderson
Headquarters Hearing Clerk (MC 1900R)
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: In the Matter of Aylin, Inc., et al.
Docket No. RCRA-0302-13-0039

Dear Ms. Anderson:

I have enclosed for filing in the above-referenced matter, Respondents' Motion In Limine.

Thank you for your assistance with this matter.

Sincerely,

BASSMAN, MITCHELL, ALFANO & LEITER

Jeffrey L. Leiter

Enclosure

cc: Service List

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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.,	)	**Docket No. RCRA-0302-13-0039**
	)	
	)	**Proceeding under Section 9006 of the Resource Conservation an and Recovery Act, as amended, 42 U.S.C. Section 6991e**
Respondents.	)	

RESPONDENTS' MOTION IN LIMINE

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 (the "Respondents"), by and through their undersigned counsel, and pursuant to Section 22.4(c)(6) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits* (the "Rules of Practice"), 40 C.F.R. Part 22, and the Presiding Officer's Order on Hearing, dated December 10, 2015, respectfully move *in limine* on the evidentiary and/or procedural issues set forth herein to exclude certain evidence or testimony expected to be offered by the Director of the Land and Chemicals Division of the United States Environmental Protection Agency ("EPA") – Region III (the "Complainant") at the hearing scheduled in this

matter in order to streamline the hearing, preserve the resources of the Tribunal and the parties, and to prevent potential prejudice to the Respondents.

Respondents' counsel discussed this motion *in limine* with Complainant's counsel. Complainant opposes the motion.

I. STANDARD OF REVIEW FOR MOTIONS *IN LIMINE*

Section 22.22(a) of the Rules of Practice provides that, at the hearing, "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value." 40 C.F.R. § 22.22(a). Because the Rules of Practice do not address motions *in limine,* the Presiding Officer may rely on federal court practice – specifically, the Federal Rules of Civil Procedure and the Federal Rules of Evidence – for guidance. *See In re Carroll Oil Company,* 10 E.A.D. 635, 649 (EAB 2002); *In re Wego Chem. & Mineral Corp.,* 4 E.A.D. 513, 524 n.10 (EAB 1993); *Solutia Inc.,* 10 E.A.D. 193, 211 n. 22 (EAB 2001).

Although motions *in limine* are not expressly sanctioned by the Federal Rules of Evidence ("Federal Rules"), courts and litigants rely heavily on them to clarify and address issues of admissibility prior to trial. The authority for filing motions *in limine* is found in Rules 104(a) and 103(c) of the Federal Rules, which authorize courts to control pretrial proceedings and resolve preliminary questions or evidence. *See* 21 Charles Alan Wright & Kenneth W. Graham Jr., Federal Practice and Procedure § 5037.10 (2005). Motions *in limine* are intended to secure advance rulings by trial judges on questions of evidence admissibility, and the U.S. Supreme Court has noted that "although the Federal Rules of Evidence do not explicitly

authorize *in limine* rulings, the practice has developed pursuant to the district court's inherent authority to manage the course of trials." *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984).

In practice before this Tribunal, motions *in limine* are generally disfavored and typically are granted only if the proposed testimony or exhibit sought to be excluded is clearly inadmissible for any purpose. *Zaclon, Inc.*, EPA Docket No. RCRA-05-2004-0019, 2006 EPA ALJ LEXIS 21, at *11 (ALJ, Order on Respondents' Motion in Limine, Apr. 24, 2006). If the proposed testimony or exhibits does not satisfy this standard, evidentiary rulings usually are deferred by the Presiding Officer in order to resolve questions of foundation, relevancy, and prejudice in the context of the evidentiary hearing. *Id.* Thus, in the instant case, denial of Respondents' motion *in limine* does not means that all of the proposed testimony or exhibits contemplated by the motion will be admitted at the hearing; instead, the Presiding Officer will determine in the context of a hearing whether the proposed testimony or exhibits in question should be excluded. *Id.* at 12.

II. DISCUSSION

A. Leslie Beckwith

The Respondents seek an Order barring certain testimony and/or lay opinions by Complainant's proffered fact witness Leslie Beckwith ("Beckwith"), the director of the Virginia Department of Environmental Quality's ("VADEQ") Office of Financial Responsibility and Data Management. Specifically, the following testimony and/or lay opinions of Beckwith should be barred: (1) any testimony or lay opinions regarding Counts I, II, III, IV, V, VI, VIII, IX, X, XI, XIII, XIV, XV, and XVI of the First Amended Complaint; (2) any testimony that Beckwith "agrees" with the testimony of any other fact or expert witness proffered by the Complainant for

Counts VII, XII and XVII of the First Amended Complaint; (3) any testimony or lay opinion as to whether Respondent Adnan Kiriscioglu is an "operator" of the underground storage tanks ("USTs") at the three retail gasoline outlets that are the subject of this proceeding; and, (4) any testimony or lay opinions regarding the "consistency" or "appropriateness" of the penalty demanded by the Complainant in the First Amended Complaint with the EPA UST Penalty Policy. Further, as a non-party fact witness for Complainant, Beckwith should be sequestered during the hearing, except when she is testifying before the Tribunal.

In its First Supplemental Hearing Exchange, at page 3, Complainant listed Beckwith as a fact witness to "testify to VADEQ's financial responsibility requirements for USTs and Respondents' compliance with same." Complaint also indicates that it may call Beckwith as a rebuttal witness.

In response to Respondents' motion still pending before this Tribunal to take Beckwith's deposition at her office in Richmond, Virginia, Complainant has made multiple representations to the Tribunal that it will call Beckwith to testify at the hearing.[1] On the basis that Respondents expect Beckwith to testify at the hearing, as promised by the Complainant, her testimony should be limited *solely* to the three counts (Counts VII, XII and XVII) in the First Amended Complaint dealing with Respondents' compliance with VADEQ's UST financial responsibility requirements. Based on the Complainant's representation to the Tribunal as to Beckwith's credentials, she has no stated expertise or other training in VADEQ's technical regulations for

[1] Contemporaneous with this motion *in limine,* Respondents are filing another pleading, renewing their request to conduct an oral examination of Beckwith prior to the hearing. If Beckwith is not called to testify at the hearing, and in the absence of Respondents' ability to take her deposition prior to the hearing, Respondents will move at the hearing to exclude as evidence her affidavit submitted with Complainant's Motion for Partial Accelerated Decision as to Liability and Memorandum of Law.

USTs which are the bases of the other counts in the First Amended Complaint (with the exception of Count I dealing with Complainant's information requests to the Respondents). To allow Beckwith to go beyond testifying on UST financial responsibility matters would be tantamount to elevating her to the status of an expert witness for which she is neither qualified nor has she been disclosed by the Complainant as an expert witness. Section 22.19(a)(2) of the Rules of Practice provides that "[e]ach party's prehearing information exchange shall contain: (i) the names of any expert of other witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony ...." 40 C.F.R. § 22.19(a)(2). Under the plain language of this applicable Rule of Practice, any witness that has been disclosed by the Complainant who has not been specifically identified as offering opinion testimony, including lay opinions, should be barred from doing so at the hearing.

Beckwith should be barred from testifying that she "agrees" with the opinions of any other witnesses or experts offered by the Complainant, including, but not limited to, Andrew Ma, with respect to the three UST financial responsibility counts in the First Amended Complaint. Such testimony is improper bolstering, creating the false impression of redundant, favorable opinions which is prejudicial to the Respondents. Further, such testimony by Beckwith is not proper without a proper foundation laid by the Complainant that she conducted an independent investigation and analysis of the opinions offered by the Complainant's other witnesses, notwithstanding the fact that Beckwith has not been disclosed by Complainant in its pre-hearing exchanges as an expert witness.[2]

[2] As noted above, Beckwith should be excluded from the hearing room at all times, except for when she is testifying before the Tribunal.

Similarly, for the same reasons set forth above, Beckwith should be barred from offering any testimony or lay opinion on whether Respondent Adnan Kiriscioglu exercised such pervasive control over the USTs subject to the First Amended Complaint that he should lose the protection as an officer of the corporate Respondents and be deemed personally liable as an "operator." Any testimony or lay opinion by Beckwith on this issue is improper bolstering and is prejudicial to the Respondents, particularly Mr. Kiriscioglu.

Beckwith should be barred from offering any testimony or lay opinion regarding the "consistency" or "appropriateness" of the penalty demanded by the Complainant in its First Amended Complaint with EPA's UST Penalty Policy. The issue of "consistency" or "appropriateness" is to be determined by the Presiding Officer as the trier of fact. Any testimony or lay opinion on this issue by Beckwith is self-serving and prejudicial to the Respondents.

B. Andrew Ma

The Respondents seek an Order barring certain testimony and/or lay opinions by Complainant's proffered fact witness, Andrew Ma ("Ma"), regarding the "consistency" or "appropriateness" of the penalty demanded by the Complainant in the First Amended Complaint with EPA's UST Penalty Policy. As noted above, the issue of "consistency" or "appropriateness" is to be determined by the Presiding Officer as the trier of fact. Any testimony or lay opinion on this issue by Ma is self-serving and prejudicial to the Respondents because Ma is the Complainant's employee who apparently was responsible for undertaking the penalty calculation set forth in the First Amended Complaint.

Ma also should be barred from testifying that he "agrees" with any other fact witnesses or experts proffered by the Complainant, including, but not limited to, Beckwith. Such testimony by

Ma is improper bolstering, creating the false impression of redundant, favorable opinions which is prejudicial to the Respondents. Further, such testimony by Ma is not proper without a proper foundation laid by the Complainant that he conducted an independent investigation and analysis of the opinions offered by the Complainant's other witnesses, notwithstanding the fact that Ma has not been disclosed by Complainant in its pre-hearing exchanges as an expert witness.

Finally, while it is appropriate for the Complainant to have a designated representative, other than its counsel of record sit through the entirety of the hearing, such designated representative should be someone other than Ma.[3] He is the Complainant's principal fact witness on every count in the First Amended Complaint. It is prejudicial to the Respondents if Ma is allowed to serve as the Complainant's designated representative and is allowed to listen to the entirety of the testimony by all of the witnesses and experts called by the parties. Ma should be sequestered from the hearing room at all times other than when he is testifying before the Tribunal.

C. Expert Witnesses

Respondents seek an Order sequestering each of the Complainant's expert witnesses at all times other then when they are testifying before the Tribunal. Because the Rules of Practice do not address sequestering of witnesses during a hearing, the Presiding Officer may rely on the Federal Rules of Evidence for guidance. *See Carroll Oil,* 10 E.A.D. at 649. Rule 615 of the Federal Rules provides that a party may request the court to exclude any witnesses, with certain exceptions, including for a person whose presence is essential to the party's case. Fed. R. Evid. 615. None of the three exceptions in Rule 615 apply here.

[3] In addition, the anticipated introduction into evidence of Confidential Business Information at the hearing suggests that the presence of individuals aside from the Tribunal's personnel, the parties, and their counsel, should be kept to a minimum.

The purpose of this sequestration rule, which is a component of the modern judicial process, is to prevent witnesses from conforming their testimony to the testimony of other witnesses. *Jury v. Virginia,* 395 S.E.2d 213, 216 (Va. Ct. App. 1990) ("Orders excluding witnesses during the taking of testimony play an important part in our system of justice and should be enforced."). In the trial context, Rule 615 allows for sequestration of fact and expert witnesses as a matter of right, except in the most exceptional circumstances. *See United States v. Ell,* 718 F.2d 291, 292 (9th Cir. 1983) ("The rule makes the exclusion of witnesses as a matter of right and the decision is no longer committed to the court's discretion as it once was."); *NLRB v. Stark,* 525 F.2d 422, 428-29 (2d Cir. 1975) ("Now Rule 615 has adopted Wigmore's principle of mandatory exclusion....").

Here, Complainant cannot show that any of three exceptions in Rule 615 apply to its designated expert witnesses, particularly Gail Coad and John V. Cignatta. Their presence in the hearing room throughout the presentation of direct examination and cross-examination of other witnesses is not necessary for the management of Complainant's case by its counsel. Further, Complainant cannot make a particularized showing of the need for its expert witnesses to hear each other's testimony and evidence or the testimony of any of Respondents' witnesses. *See Stark,* 525 F2d. at 430 ("[T]he presumption in favor of sequestration ... could be rebutted, if at all, only by a particularized showing of need for [witnesses] to hear each other's evidence – a showing we find extremely hard to visualize'); *cf. Babcock v. Alaska,* 685 P.2d 721, 724 (Alaska Ct. App. 1984) ("Only in exceptional circumstances are there sufficient reasons for denying exclusion."); *Grace v. Delaware,* 314 A.2d 169, 170 n.2 (Del. 1973) ("Many states have adopted a policy favoring sequestration whenever possible. In other words, a presumption is created in

favor of allowing it, which may be rebutted by showing 'good cause' or sound reason for refusal.")

Any showing of need for Complainant's witnesses to be present in the hearing room throughout the hearing is outweighed by the prejudice to Respondents. For example, Respondents have reason to believe that, prior to the hearing, Complainant may seek leave to amend its prehearing exchange to add Respondent Adnan Kiriscioglu to its list of witnesses. It would be prejudicial to the Respondents, particularly Mr. Kiriscioglu, to have Complainants' experts sit through his direct examination as a witness for the Complainant and then potentially tailor their testimony instead of opining whether a particular set of fact is true. Accordingly, any of Complainant's witnesses should be sequestered for the duration of the hearing, except for the times they are testifying before the Tribunal.

D. Exhibits

Respondents seek an Order from the Presiding Officer, excluding Complainant's proposed Exhibits ("CX") 149 (EPA page 2396) and 150 (EPA pages 2397 to 2436) from the prehearing exchange. These two exhibits are irrelevant, immaterial, and of no probative value to either the allegations set forth in Complainant's First Amended Complaint or the issues of liability and determination of penalty.

These two exhibits are part of the Complainant's Motion for Leave to Supplement its Prehearing Exchange. This motion remains pending before the Tribunal. Respondents, in response, filed their Partial Opposition to Complainant's Motion for Leave to Supplement its Prehearing Exchange. Complainant subsequently filed its reply.

Respondents will not reargue the admissibility of these two exhibits in this pleading. Respondents and Complainant have argued their positions to the Tribunal in the above-referenced filings. Respondent will defer to the Presiding Officer's decision on the Complainant's pending motion.

E. Other Matters

Complainant should be precluded from introducing any speculation or argument about the substance of the testimony of any witness who is absent or unavailable, or whom Respondents did not call to testify at the hearing.

Any reference to Respondents' refusal to agree or stipulate to any matter should be excluded. The parties have conferred in good faith and reached agreement on numerous documents and facts that are intended to streamline the hearing and conserve the resources of the Tribunal and the parties. However, Respondents' refusal to agree to stipulate to any specific fact or exhibit that was not the subject of an agreement between the parties is irrelevant to the material issues in this matter and should not be made reference to at the hearing.

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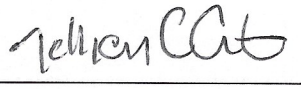
WHEREFORE, the Respondents respectfully request that the Presiding Officer enter an Order *in limine* barring certain testimony as set forth above of Leslie Beckwith and Andrew, sequestering Complainant's expert witnesses for the duration of the hearing, excluding two proposed exhibits by the Complainants, and for such other and further relief as this Tribunal deems just and proper.

Dated: February 26, 2016

Respectfully submitted,



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Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 26th day of February, 2016, the foregoing Respondents' Motion *In Limine* was filed electronically with:

Sybil Anderson, Headquarters Hearing Clerk
Office of Administrative Law Judges
U.S. EPA, Mailcode 1900 R
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

I FURTHER CERTIFY that, on this 26th day of February, 2016, I served via electronic mail and first class mail a true and correct copy of the foregoing to:

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

Date: February 26, 2016

Jeffrey L. Leiter