

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029**

Via electronic filing

December 4, 2015

Sybil Anderson, Headquarters Hearing Clerk
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900R
William Jefferson Clinton Building
1200 Pennsylvania Ave. NW
Washington, DC 20460

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

Dear Ms. Anderson:

Please find enclosed a copy of Complainant's Second Motion to Compel Discovery and Impose Sanctions and accompanying Memorandum of Law in the above-referenced matter, filed electronically via the Office of Administrative Law Judges' electronic filing system. Please let me know if there is any difficulty with this submission. Thank you in advance.

Sincerely,



Janet E. Sharke
Senior Assistant Regional Counsel (3RC50)
sharke.janet@epa.gov
215-814-2689

cc: Jeffrey Leiter, Esq., Counsel for Respondents

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 3**

In the Matter of:)	Docket No. RCRA-03-2013-0039
)	
Aylin, Inc., Rt. 58 Food Mart, Inc.,)	
Franklin Eagle Mart Corp., Adnan)	
Kiriscioglu, 5703 Holland Road)	
Realty Corp., 8917 South Quay Road)	Proceeding Under Section 9006 of the
Realty Corp., and 1397 Carrsville)	Resource Conservation and Recovery
Highway Realty Corp.)	Act, as amended, 42 U.S.C. § 6991e
)	
Respondents.)	
)	

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

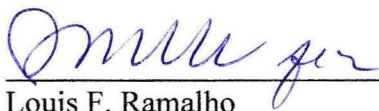
In accordance with 40 C.F.R. §§ 22.16(a), 22.19(e) and 22.19(g) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, Complainant, the Director of the Land and Chemicals Division of the United States Environmental Protection Agency, Region III, submits this Second Motion to Compel Discovery and Impose Sanctions, and Complainant hereby requests this Court to compel Respondents to comply with this Court's Order dated August 10, 2015 ordering Respondents to respond in accordance with the Order on Complainant's Motion for Discovery issued on March 12, 2014 to the extent that Respondents had not already done so, and, if necessary, to impose sanctions against Respondents for their failure to respond to these orders by this Court.

Accompanying this Motion is Complainant's Memorandum of Law in support of its Second Motion to Compel Discovery and Impose Sanctions.

WHEREFORE, Complainant requests that this Court issue an Order granting Complainant's Second Motion to Compel Discovery and Impose Sanctions, including an Order granting Complainant's relief requested herein.

Respectfully Submitted,

12/4/2015
Date



Louis F. Ramalho
Sr. Assistant Regional Counsel
United States Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103-2029

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 3**

In the Matter of:)	Docket No. RCRA-03-2013-0039
)	
Aylin, Inc., Rt. 58 Food Mart, Inc.,)	
Franklin Eagle Mart Corp., and)	
Adnan Kiriscioglu, d/b/a New Jersey)	
Petroleum Organization)	
)	
)	
Respondents.)	
)	
)	

**MEMORANDUM OF LAW IN SUPPORT OF COMPLAINANT’S SECOND MOTION
TO COMPEL DISCOVERY AND IMPOSE SANCTIONS**

In accordance with 40 C.F.R. §§ 22.16(a), 22.19(e) and 22.19(g) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, Complainant, the Director of the Land and Chemicals Division of the United States Environmental Protection Agency, Region III, hereby submits this Memorandum of Law in support of the Complainant’s Second Motion to Compel Discovery and Impose Sanctions.

I. Procedural Background

On March 27, 2013, Complainant filed an Administrative Complaint, Compliance Order, and Notice of Right to Request Hearing (Complaint) commencing this proceeding. On or about April 29, 2013, Respondents filed their Answer wherein Respondents asserted, *inter alia*, inability to pay Complainant’s proposed civil penalty.

The parties participated in Alternative Dispute Resolution (ADR), but could not achieve settlement. On September 26, 2013, ADR was terminated.

On October 31, 2013, the Parties filed a Joint Status Report and Motion to Stay Proceedings.

On November 5, 2013, the court issued a Prehearing Order and Order on Motion to Stay Proceeding (Prehearing Order), which granted in part and denied in part the Motion to Stay Proceedings. The Prehearing Order required Complainant to submit its Initial Prehearing Exchange by March 14, 2014, Respondents to submit their Initial Prehearing Exchange by April 4, 2014, and Complainant to submit its Rebuttal Prehearing Exchange by April 18, 2014.

On February 20, 2014, EPA filed a Motion for Discovery seeking, *inter alia*, information to clarify the business, financial, and operational relationships between Adnan Kiriscioglu, individually, and the corporate entities that Mr. Kiriscioglu claims are the owners and/or operators of: 5703 Holland Road, Suffolk, Virginia also known as the Pure Gas Station (“Pure Facility”); 8917 S. Quay Road, Suffolk, Virginia also known as the Rt. 58 Food Mart (“Rt. 58 Facility”); and 1397 Carrsville Highway, Franklin, Virginia also known as the Franklin Eagle Mart (“Franklin Facility”) (hereinafter collectively referred to as the “Facilities”). The business, financial, and operational relationships between Adnan Kiriscioglu, individually, and the corporate entities, that Mr. Kiriscioglu claims are the owners and/or operators of the Facilities, including the day-to-day operations of these Facilities, are clouded by a myriad of corporate loan transactions and service contracts between the Respondents and other corporate entities controlled by Mr. Kiriscioglu. In addition, Complainant sought financial information to determine the validity of Respondents’ inability to pay claim asserted in their Answer filed on April 29, 2013 to the initial Administrative Complaint filed in this case on March 27, 2013.

On March 12, 2014, this Court issued an Order granting Complainant's Motion for Discovery (Discovery Order), and ordering Respondents to file responses to all requested discovery together with their Prehearing Exchange by April 4, 2014.

On March 14, 2014, Complainant filed its Prehearing Exchange.

On March 31, 2014, Respondents filed a Consent Motion for Extension of Time to respond to the Discovery Order.

On April 2, 2014, this Court issued an Order granting Respondents' Motion for Extension of Time, setting May 5, 2014 as the new due date for Respondents' discovery responses.

On April 7, 2014, Respondents filed their Initial Prehearing Exchange.

On April 7, 2014, Complainant filed its Response to Respondents' Consent Motion for Extension of Time and Motion for Extension of Time.

On April 10, 2014, the Court granted Complainant's Motion for Extension of Time setting May 20, 2014 as the new due date for Complainant's Rebuttal Prehearing Exchange.

On or about May 7, 2014, Respondents filed a partial response to the Discovery Order.

On or about May 7, 2014, Respondent Adnan Kiriscioglu filed a Motion for Partial Accelerated Decision and a Memorandum of Points and Authorities in Support, in which Respondent Kiriscioglu sought the dismissal, with prejudice, of all claims asserted against him in the initial Complaint. Simultaneously, Respondent Kiriscioglu filed a Motion to Defer Discovery Response wherein he sought to delay his obligation to submit his personal financial information until after a ruling had been issued by this Court on his Motion for Partial Accelerated Decision.

On May 20, 2014, Complainant filed its Rebuttal Prehearing Exchange.

On May 21, 2014, Complainant filed its Motion to Strike Respondent Adnan Kiriscioglu's Motion for Partial Accelerated Decision (Motion to Strike).

On June 10, 2014 Complainant and Respondents filed a Joint Motion for Extension of Time, seeking more time to file dispositive motions on liability while awaiting this Court's ruling on Adnan Kiriscioglu's Motion for Partial Accelerated Decision and Complainant's Motion to Strike.

On August 21, 2014, Complainant filed a Motion to Compel Discovery and Impose Sanctions ("Motion to Compel") and Memorandum of Law in Support, in which Complainant sought an order compelling Respondents to comply with the March 12, 2014 Discovery Order and, if Respondents failed to comply, an order imposing sanctions pursuant to 40 C.F.R. § 22.19(g).

On or about September 10, 2014, Respondents filed an Opposition to Complainant's Motion to Compel.

On or about September 19, 2014, Respondents filed a Supplemental Discovery Exchange ("Supplemental Discovery Exchange") and Exhibit Volume II, which Respondents asserted, *inter alia*, included documents responsive, in part, to Complainant's February 20, 2014 Discovery Request.

On September 30, 2014 and December 4, 2014, Complainant filed Status Reports.

On December 31, 2014, Complainant filed a First Supplemental Prehearing Exchange.

On March 19, 2015, Complainant filed a Motion for Leave to File First Amended Complaint and Memorandum of Law in Support.

On August 10, 2015, this Court issued its Order on Motions granting Complainant Complainant's Motion for Leave to File First Amended Complaint and granting Complainant's Motion to Compel Discovery, and denying Respondent Kiriscioglu's Motion for Partial Accelerated Decision and denying Respondent Kiriscioglu's Motion to Defer Discovery Response.

On August 20, 2015, Complainant filed a Motion for Leave to File Supplemental Prehearing Exchange.

On August 31, 2015, Respondents filed Respondents' Answer to First Amended Administrative Complaint, Compliance Order and Notice of Right to Request a Hearing, in which Respondents reasserted their inability to pay the proposed civil penalty.

On September 14, 2015, this Court issued an Order granting Complainant's Motion for Leave to File Supplemental Prehearing Exchange.

On or about September 14, 2015, Respondent Kiriscioglu filed an Unopposed Motion for Extension of Time to Respond to Complainant's Motion for Discovery in which Respondent Kiriscioglu requested an extension of the deadline to respond to Complainant's Motion for Discovery until October 1, 2015.

On September 25, 2015, Complainant filed a Status Report.

On October 9, 2015, Respondents filed Respondents' Supplemental Prehearing Exchange Exhibits.

On October 23, 2015, Complainant filed Complainant's Second Supplemental Prehearing Exchange.

On November 4, 2015, Respondents filed a Motion for Leave to Conduct Additional

Discovery and to Supplement Their Prehearing Exchanges to Add a Witness.

On November 19, 2015, Complainant filed Complainant's Response to Respondents' Motion for Leave to Conduct Additional Discovery and to Supplement Their Prehearing Exchanges to Add a Witness.

On November 20, 2015, Complainant filed a Motion for Partial Accelerated Decision on Liability and Memorandum of Law in Support.

II. Information Sought

As of the date of this Second Motion to Compel Discovery and Impose Sanctions, Respondent Kiriscioglu has not provided his personal financial statement as ordered by this Court on two separate occasions: March 12, 2014 Discovery Order, and August 10, 2015 Order on Motions. Respondent Kiriscioglu's personal financial information statement was requested by Complainant in the February 20, 2014 Motion for Discovery as Item #92 (Attachment B), and requested by Complainant in the August 21, 2014 Motion to Compel Discovery and Impose Sanctions. Respondent Kiriscioglu stated in support of his Motion to Defer Discovery Response that "he should not be required to provide the [personal financial] information to EPA until after the Court rules on his motion for accelerated decision." Respondent Kiriscioglu Motion to Defer Discovery Response, page 2. (May 7, 2014). On August 10, 2015, this Court issued its Order on Motions granting Complainant's Motion for Leave to File First Amended Complaint and granting Complainant's Motion to Compel Discovery, and denying Respondent Kiriscioglu's Motion for Partial Accelerated Decision and denying Respondent Kiriscioglu's Motion to Defer Discovery Response.

Despite Respondent Kiriscioglu's affirmative pleadings to this Court and this Court's Orders, Respondent Kiriscioglu continues to withhold personal financial information from the scope of discovery granted by this Court to Complainant. Complainant seeks the following documents, which have not been provided to Complainant or this Court during the course of this litigation: Item #92 (Attachment B) of Complainant's February 20, 2014 Motion for Discovery, attached hereto and made part hereof as Attachment A.

III. Legal Analysis

Where a party does not comply with a prehearing exchange requirement of 40 C.F.R. § 22.19—including responding to additional discovery ordered by the court—the Part 22 Rules empower the Presiding Officer to effect sanctions. 40 C.F.R. § 22.19(g) provides that, “[w]here a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion” do any of the following:

- (1) Infer that the information would be adverse to the party failing to provide it;
- (2) Exclude the information from evidence; or
- (3) Issue a default order under § 22.17(c).

Other portions of the Part 22 Rules codify the general authority of the Presiding Officer to control events leading up to, and through, a hearing. These provisions specifically provide the Presiding Officer with resources that enable her to “conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay.” 40 C.F.R. § 22.4(c). To effect these ends, a Presiding Officer is specifically empowered to, *inter alia*:

- (5) Order a party, or an officer or agent thereof, to produce testimony, documents,

or other non-privileged evidence, and failing the production thereof without good cause being shown, draw adverse inferences against that party;

(6) Admit or exclude evidence;

(10) Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by [40 C.F.R. Part 22].

Under the jurisprudence of Part 22, EPA tribunals have issued preclusion orders or found adverse inferences (or noted their authority to do so) where a party did not comply with a pre-trial order of production. *See, e.g., In re William E. Comley, Inc. & Bleach Tek, Inc.*, FIFRA Appeal No. 03-01, 11 EAD 247, 256 (EAB 2004). Specifically, where Respondents have made an inability to pay claim, but have not provided financial information either in their prehearing exchange or in a specifically ordered discovery response, the Court may make an adverse inference about what that information would have shown, or exclude the information from evidence. *See In re New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (EAB 1994) (“where a respondent . . . fails to produce any evidence to support an ability 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”); *see also In re Mike Vierstra d/b/a Vierstra Dairy*, Docket No. CWA-10-2010-0018, 4 (Judge Gunning, June 2, 2010) (explaining that if Respondent’s financial documents required by the order were not produced, Respondent will be deemed to have waived his inability to pay claim); *Doug Blossom*, CWA-10-2002-0131, 2–3 (Chief Judge Biro November 28, 2003) (explaining that if Respondent’s financial documents required by the

order were not produced, an adverse inference would be drawn or the information would be excluded from evidence); *In re Vemco, Inc.*, CAA-05-2002-0012, (Chief Judge Biro March 28, 2003) (same); *In re 1836 Realty Corporation*, Docket No. CWA-2-I-98-0017, 10 (Judge Gunning April 8, 1999) (finding an adverse inference concerning the issue of Respondent's ability to pay and precluding Respondent from raising the defense of inability to pay, where Respondent failed to provide financial information).

Here, as explained in Section II, above, Respondent Kiriscioglu failed to provide his personal financial information statement as ordered by this Court on two separate occasions. The requested document, Individual Debtor Statement (INDIPAY Financial Data Request Form) seeks to analyze the validity of Respondents claim of inability to pay the proposed civil penalty in this case such as the assets and debts of Respondent Kiriscioglu including such assets or debts as they relate to his relationship with the corporate Respondents that he owns and controls. *See*; Attachment B: Gail Coad Declaration (December 3, 2015). Complainant respectfully asks this Court to order Respondent Kiriscioglu to provide the financial information sought in the Individual Debtor Statement (INDIPAY Financial Data Request Form), attached hereto and made a part hereof as Attachment A. *See* 40 C.F.R. § 22.4(c)(5).

Since Respondent Kiriscioglu has continued to “fail[] to provide information within [his] control as required pursuant to [40 C.F.R. § 22.19],” Complaint asks this Court to use its discretion to “(1) Infer that the information would be adverse to the party failing to provide it; (2) Exclude the information from evidence; or (3) Issue a default order under § 22.17(c).” *See* 40 C.F.R. § 22.19(g). In this case, the Court may exclude any evidence that Respondents eventually provide regarding their claim that they are unable to pay the proposed fine or the

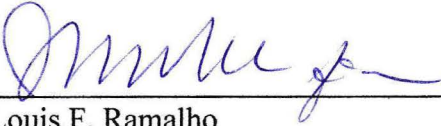
Court may infer that the financial information sought is adverse to the Respondents' claim that they are unable to pay the proposed civil penalty in this case. These remedies are within those contemplated in 40 C.F.R. § 22.19(g) and comport with the decisions described in section II.

IV. Conclusion

Respondent Kiriscioglu has clearly failed to respond to the discovery ordered to be produced by this Court's Orders. Complainant therefore requests that this Court order Respondent Kiriscioglu to comply with the Discovery Order, and if he does not, then impose the sanctions described in 40 C.F.R. § 22.19(g) for failure to respond to the ordered discovery.

Respectfully Submitted,

12/4/2015
Date



Louis F. Ramalho
Sr. Assistant Regional Counsel
United States Environmental Protection Agency
Region III
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Philadelphia, PA 19103-2029