

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

Via electronic filing

March 9, 2016

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:

Yesterday, March 8, 2016, I filed a copy of Complainant's Response in Opposition to Respondents' Motion *In Limine*, Docket No. RCRA-03-2013-0039, in the above-referenced matter, electronically via the Office of Administrative Law Judge's electronic filing system. Because both the cover letter and certificate of service for yesterday's filing were incorrectly dated March 7, 2016, I am refiling today a duplicate copy of the response with a cover letter and certificate of service bearing today's date of March 9, 2016. I hope this causes no confusion.

Sincerely,



Janet E. Sharke
Senior Assistant Regional Counsel (3RC50)
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215-814-2689

cc: Jeffrey Leiter, Esq., Counsel for Respondents

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

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 Realty)	Proceeding Under Section 9006 of the
Corp., and 1397 Carrsville Highway)	Resource Conservation and Recovery
Realty Corp.)	Act, as amended, 42 U.S.C. § 6991e
)	
)	
Respondents.)	

**COMPLAINANT’S REPLY IN OPPOSITION
TO RESPONDENTS’ MOTION *IN LIMINE***

In accordance with 40 C.F.R. §§ 22.16(a) and (b) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (“CROP” or “Rules of Practice”), Complainant, the Director of the Land and Chemicals Division, U.S. EPA, Region III, submits this Reply in Opposition to Respondents’ Motion *In Limine* (“Motion”).

Respondents seek to sequester four of Complainant’s proposed witnesses, exclude certain testimony from such witnesses and exclude two of Complainant’s proposed exhibits. As to the exhibits, this Court’s Order on the Parties’ Motions Relating to Additional Discovery and to Supplement Their Prehearing Exchanges, issued March 2, 2016 (“Order”), renders Respondents’ request moot.

I. Legal Standards

Section 22.22(a)(1) of the Rules of Practice provide that “[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. § 22.1(a)(1). “A motion in limine is the appropriate means of seeking exclusion of proposed testimony and exhibits on the basis that the proposed evidence does not satisfy the foregoing standard.” Order at 24. Because the Rules of Practice provide no standard for adjudicating motions *in limine*, EPA’s administrative law judges look to the Federal Rules of Civil Procedure, the Federal Rules of Evidence and caselaw for guidance. *Id.* (citations omitted). Motions *in limine* “are generally disfavored and should be granted only if the proposed testimony or exhibit sought to be excluded is clearly inadmissible for any purpose.” *In re Aguachem Caribe, Inc.*, EPA Docket No. RCRA-02-2009-7110, 2010 ALJ LEXIS 9, at *7 (ALJ, Order on Complainant’s Motion *In Limine* and Motion to Strike and Respondent’s Request for Discovery, June 2, 2010 (citing *Zaclon, Inc.*, EPA Docket No. RCRA-05-2004-0119, 2006 EPA ALJ LEXIS 21, at *11 (ALJ, Order on Respondents’ Motion *In Limine*, Apr. 24, 2006)). If this high standard is not met, evidentiary rulings are deferred until the evidentiary hearing. *Id.* at *8.

The Rules of Practice are similarly silent regarding sequestration of witnesses. However, the Federal Rules of Evidence, which inform, are not. Rule 615 of the Federal Rules of Evidence provides:

At a party’s request, the court must order witnesses excluded so that they cannot hear other witnesses’ testimony. Or the court may do so on its own. But this rule does not authorize excluding:

- (a) a party who is a natural person;
- (b) an officer or employee of a party that is not a natural person,

after being designated as the party's representative by its attorney;

(c) a person whose presence a party shows to be essential to present the party's claim or defense; or

(d) a person authorized by statute to be present.

FED. R. EVID. 615.

The explanatory notes following the Rule state that “[t]he efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion.” FED. R. EVID. 615, Notes of the Advisory Committee on Proposed Rules (citation omitted). Four categories of persons are excepted from this Rule, including category three which “contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation.” *Id.*

II. Argument

A. The Witnesses at Issue Are Excepted from Rule 615

As Respondents state, Federal Rule of Evidence 615 allows for sequestration of fact and expert witnesses as a matter of right, except in the most exceptional circumstances. Motion at 8 (citation omitted). Respondents contend that “Complainant cannot show that any of three exceptions in Rule 615 apply to its designated expert witnesses, particularly Gail Coad and John V. Cignatta.” *Id.* Complainant disagrees.

At the outset Complainant notes that Respondents' apparent concern that, absent sequestration, Complainant's witnesses may engage in collusion or conform their testimony is simply misplaced, because, with the exception of Mr. Ma, each witness will testify on a separate and distinct issue, consistent with the written testimony in the record. Nonetheless, Complainant does not object to the sequestration of such witnesses during Mr. Ma's testimony, if

only to allay Respondents' concerns. As set forth below, however, Complainant *does* object to sequestration of *any* of its witnesses during the testimony of *any* of Respondents' witnesses. In addition, as to the concern regarding confidential business information ("CBI"), Ms. Coad, Mr. Cignatta and Mr. Ma each have current RCRA CBI authorization.

1. Leslie Beckwith

As set forth in EPA's prehearing exchange, and as elaborated in Ms. Beckwith's affidavit supporting Complainant's Motion for Partial Accelerated Decision on Liability ("A.D. Motion"), absent stipulations¹ by the parties, Ms. Beckwith will be called to testify how an owner or operator of underground storage tanks and systems ("USTs") in Virginia must demonstrate financial responsibility in accordance with 9 VAC § 25-590-10 *et seq.* As the director of the Virginia Department of Environmental Quality ("VADEQ") Office of Financial Responsibility and Data Management, who supervises, among others, Josiah Q. Bennett, she will also attest to Respondents' compliance with Virginia's requirements. Any other issues bearing on liability² or penalty are beyond the scope of her intended testimony. Nevertheless, Ms. Beckwith should not be sequestered during any testimony by Respondents' witnesses regarding financial responsibility and any interactions or communications with VADEQ personnel supervised by Ms. Beckwith.

2. Andrew Ma

Complainant objects to Respondents' request to sequester Mr. Ma. As set forth in Complainant's prehearing exchange, and as detailed in Mr. Ma's affidavit accompanying

1 To date, the parties have agreed to no stipulations, but will endeavor to do so as instructed by the Court.

2 Although portions of her testimony may support Complainant's contention that Respondent Kiriscioglu is an "operator" of the USTs at the Facilities (*e.g.*, certifications of annual gallonage and financial responsibility (CX 132, EPA 2179-2182)).

Complainant's A.D. Motion, Mr. Ma will testify to his inspections of the facilities and his follow-up investigation that led to the commencement of this proceeding. Mr. Ma will also testify how he determined the proposed penalty Complainant seeks for the violations alleged. As an investigative agent of EPA who is essential to presenting Complainant's claims, Mr. Ma clearly fits under the third category, and arguably the second category, of persons excepted from Rule 615. Arguably Mr. Ma could be designated to attend the hearing as an employee of a party that is not a natural person, but for the fact that in this case Complainant is a natural person, that is, the Director of the Land and Chemicals Division.³

We need not shoehorn Mr. Ma into this exception because it is clear that Mr. Ma's presence is essential to present Complainant's claims, and thus his presence is allowed under the third exception to Rule 615. As the record reflects, Mr. Ma is integral to Complainant's prosecution of this matter. Mr. Ma inspected the facilities, conducted follow-up investigation, and best knows the facts of the alleged violations and the details of the relief sought. In this matter there is no witness more essential to EPA's presentation of its *prima facie* case. The extensive testimony provided by Mr. Ma in his affidavit in support of Complainant's A.D. Motion bears this out. Moreover, it is vital that Mr. Ma be present throughout the hearing in order to rebut any testimony by Respondents' witnesses that bears on liability or penalty, particularly testimony offered by either Adnan Kiriscioglu or Ezgi Kiriscioglu regarding Mr. Ma's interactions with them or any other representatives of Respondents. This is particularly

³ One of the explanatory notes that accompany the Rule states that many "district courts permit government counsel to have an investigative agent at counsel table throughout the trial although the agent is or may be a witness" as an exception to the rule of exclusion. Because the government may not be able to show that such agent's presence is essential (as required by the third exception), the Senate Committee on the Judiciary explicitly stated that it construed the second exception to the Rule to include such agents. FED. R. EVID. 615, Notes of Committee on the Judiciary, Senate Report No. 93-1277.

important where, as here, Respondents have implied that the Agency was overzealous or exerted its prosecutorial discretion inappropriately. Respondents' Reply to A.D. Motion at 16, 21.

Respondents also seek to exclude Mr. Ma from testifying as to the "appropriateness" or "consistency" of the penalty. Motion at 6. Such request should be denied. The Rules of Practice provide that Complainant bears the burden of presentation and persuasion that the relief Complainant seeks is "appropriate." 40 C.F.R. § 22.24(a). *In re 99 Cents Only Stores*, EPA Docket No. FIFRA-09-2008-0027, 2008 ALJ LEXIS 46, at *8 (ALJ, Order on Respondent's Motion *In Limine*, June 4, 2008); *accord*, *In re Carbon Injection Sys.*, EPA Docket No. RCRA-05-2011-0009, 2012 ALJ LEXIS 28, at *9 (ALJ, Order on Respondents' Motion *In Limine* to Bar Certain Testimony and/or Opinions of U.S. EPA's Fact Witness Michael Beedle, May 31, 2012)(citing *New Waterbury, Ltd.*, 5 E.A.D. 529, 538 (EAB 1994)). Indeed, where "a witness has been tasked with calculating the proposed penalty in an administrative enforcement action as part of that witness's official duties, that witness will be treated in many ways like an expert witness and will be allowed to present 'opinion' testimony that explains how and why the EPA reached the proposed penalty." *Carbon Injection* at *6-7 (citations omitted). Hence, Complainant fully intends to call Mr. Ma⁴ to testify that the proposed penalty is both appropriate (taking into account the statutory factors of seriousness of the violation and any good faith efforts to comply) and consistent with the applicable civil penalty guidelines, "U.S. EPA Penalty Guidance for Violations of UST Regulations," dated November 14, 1990. Thus Mr. Ma should not be sequestered nor should any of his testimony be excluded.

⁴ Not later than March 25, 2016, Complainant will seek leave to supplement its prehearing exchange with, *inter alia*, Mr. Ma's resume.

3. Gail Coad and John V. Cignatta

Respondents also seek to sequester two of Complainant's expert witnesses, Gail Coad and John Cignatta. Complainant objects to this request. As noted above, the subject of each proposed witness's testimony differs thereby rendering collusion impossible. Each such witness is also essential to Complainant proving its claims: Mr. Cignatta as to liability and Ms. Coad as to liability (of Respondent Kiriscioglu) and penalty. The record of this proceeding bears this out. They are also each experts "necessary for counsel to manage the litigation," in order for counsel to assess and develop its cross-examination of those portions of the testimony of Respondents' witnesses regarding Respondents' liability (compliance with the VA-authorized UST regulations and/or Respondent Kiriscioglu's liability as an "operator") and penalty (ability to pay). Therefore, contrary to Respondents' assertion, each expert is exempt from exclusion by operation of the third exception to Rule 615 and should not be sequestered.

III. Conclusion

For the reasons set forth above, Complainant opposes Respondents' Motion in Limine and respectfully requests that such motion be denied.

WHEREFORE, Complainant requests this Court issue an Order Denying Respondents' Motion *In Limine*.

Respectfully Submitted,



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ATTORNEYS FOR COMPLAINANT

3/7/2014
Date

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, in accordance with the procedures set forth in the Standing Order Authorizing Electronic Filing in Proceedings before the Office of Administrative Law Judges, dated August 11, 2014, I filed Complainant's Reply in Opposition to Respondents' Motion *in Limine*, Docket No. RCRA-03-2013-0039, for service to:


Sybil Anderson, Headquarters Hearing Clerk
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1200 Pennsylvania Ave., NW
Washington, DC 20460

The Hon. Christine D. Coughlin
Administrative Law Judge
U.S. EPA Mail Code 1900R
William Jefferson Clinton Building
1200 Pennsylvania Ave., NW
Washington, DC 20460

I further certify that on the date set forth below, I served via e-mail and first class mail a true and correct copy of the foregoing to:

Jeffrey L. Leiter, Esq.
Counsel for Respondents
Bassman, Mitchell, Alfano & Leiter Chtd.
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3/5/2016
Date



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