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 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 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 23, 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. The Prehearing Order required that Respondents submit, *inter alia*:

> (B) all factual information Respondents consider relevant to the assessment of a penalty and any supporting documentation; and
> (C) if Respondents take the position that the proposed penalty should be reduced or eliminated on any grounds, such as inability to pay, then provided a detailed narrative statement explaining the precise factual and legal bases for its position and a copy of any and all documents upon which they intend to rely in support of such position.

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 relationships between Adnan Kiriscioglu, individually, and the corporate entities that Mr. Kiriscioglu claims are the owners and/or operators of the Facilities, are clouded by a myriad of corporate loan transactions and service contracts between the Respondents and other corporate entities controlled by Mr. Kiriscioglu. Complainant also sought financial information to

determine the validity of Respondents' inability to pay claim asserted in their Answer.

On March 12, 2014, this Court issued an Order on Complainant's Motion for Discovery ("Discovery Order"), which granted Complainant's motion and ordered Respondents to file responses to all requested discovery together with their Prehearing Exchange due 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 with no documentation supporting their inability to pay defense.

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 May 6, 2014, Respondents filed a partial response to the Discovery Order.

On May 6, 2014, Respondent Adnan Kiriscioglu filed a Motion for Partial Accelerated Decision and a Motion to Defer Discovery Response ("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 additional time in which to file dispositive motions on liability pending this Court's ruling on Adnan Kiriscioglu's Motion for Partial Accelerated Decision and Complainant's Motion to Strike.

As of the date of this Motion to Compel Discovery and Impose Sanctions, Respondents have neither fully responded to the interrogatories nor produced all the documents in derogation of this Court's Discovery Order of March 12, 2014, and the Prehearing Order of November 5, 2013.

II. Information Sought

As stated above, Respondents' May 6, 2014 partial response to the Discovery Order failed to produce any documents (except an insurance policy) ordered by the Discovery Order and the Prehearing Order.[1] In addition, any documents that Respondents claimed that a third party was assembling have not yet been received. Complainant seeks the following documents, which have not been provided to Complainant or this Court during the course of litigation: Documents 71 – 87 and 91 – 98. Respondents claimed in their May 6, 2014 response that "all documents have been provided to Complainant or do not exist for items 71-87, 91, 92 and 94." Any documents—except the sole document noted above—provided to Complainant to date were submitted during the course of confidential settlement discussions, and, thus Complainant is obligated to maintain their confidentiality. Complainant has not received complete tax returns, financial statements, balance sheets or profit and loss statements, nor have Respondents provided

[1] It appears from Respondent's cover letter to the May 6, 2014 partial response that the information provided—including answers to interrogatories and an insurance document—was not given to this Court.

Complainant with any documents with respect to items 71 – 87 and 91 – 98.

III. Legal Analysis

In Resource Conservation and Recovery Act Subtitle I cases, inability to pay is an affirmative defense that must be raised and proven by the Respondent. *See In re Carroll Oil Company*, RCRA (9006) Appeal No. 01-02, 10 EAD 635, 662–63 (July 31, 2002). Respondents have both the burden of presenting evidence and the burden of persuasion on an affirmative defense of inability to pay the penalty. *See In re Andrew B. Chase,* RCRA (9006) Appeal No. 13-04, slip op. at 30 (August 1, 2014) (citing *Carroll Oil*, 10 E.A.D. at 661–63). The statutory factors of Section 9006(c) of RCRA, 42 U.S.C. § 6991e(c), which EPA must consider when determining the gravity-based penalty, do not include ability to pay. *Id. at* 662. The Environmental Appeals Board explains:

> [B]ecause it is not part of the Agency's proof, 'ability to pay,' in order to be considered, must be raised to and proven as an affirmative defense by the respondent. The rules governing this proceeding provide that 'the respondent has the burdens of presentation and persuasion for any affirmative defenses.' 40 C.F.R. § 22.24. Consistent with the foregoing, in previous RCRA cases, recognizing that statutory penalty factors do not include 'ability to pay,' the Board and its predecessors have treated 'ability to pay' as a defense that must be raised and substantiated by respondents.

Carroll Oil, 10 E.A.D. at 662-63 (footnotes and internal citations omitted).

Here, Respondents did not provide inability to pay information in their Prehearing Exchange, or in response to EPA's specific request for production of supporting documents in its Motion for Discovery. Because Respondents have failed to sufficiently prove their affirmative defense of inability to pay, this Court should find that it may not consider ability to pay information when calculating the proper penalty.

Additionally, Respondents have clearly violated this Court's Discovery and Prehearing

Orders. 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;
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> (6) Admit or exclude evidence;
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> ***
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> (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 E.A.D. 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 Andrew B. Chase*, Docket No. RCRA-2-2011-7503, 4 (Judge Buschmann, June 28, 2012), *aff'd*, *In re Andrew B. Chase,* RCRA (9006) Appeal No. 13-04, slip op. at 30 (August 1, 2014) (precluding respondents from presenting evidence bearing on inability to pay/financial hardship for failure to comply with orders requiring adequate and timely documentation); *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, Respondents have failed to produce most of the documents required by this Court's Discover Order, specifically items 71 – 87 and 91– 98. These requested documents seek to establish the financial relationship between Aylin, Inc., Franklin Eagle Mart Corp., and Elizabeth NJPO and/or New Jersey Petroleum Organization, as well as Adnan Kiriscioglu's involvement in each entity. They also seek financial information such as tax returns, financial ledgers, and other documents necessary to assess Respondents' claim that they are unable to pay the proposed penalty. Complainant asks this Court to order Respondents to provide all the documents ordered in the Discovery Order and Prehearing Order, and to specify precisely which documents do not exist. *See* 40 C.F.R. § 22.4(c)(5).

Additionally, if Respondents continue to "fail[] to provide information within [their] control as required pursuant to [40 C.F.R. § 22.19]," Complainant 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). The Court may infer that information regarding the Respondents' financial relationships, especially Adnan Kiriscioglu's financial relationship with and control of the other Respondents, is adverse to Mr. Kiriscioglu's claims that he is neither the owner nor the operator of the underground storage tanks at the Facilities. The Court may also infer that Respondents can afford to pay the proposed penalty, or exclude any evidence that Respondents eventually provide regarding their claim that they are unable to pay the proposed fine. 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

As set forth above, Respondents have clearly failed to fully respond to the discovery ordered by this Court in the March 12, 2014 Discovery Order, and have failed to comply with the Prehearing Order of November 5, 2013. Complainant respectfully requests that this Court order Respondents to comply with the Discovery and Prehearing Orders, and if they fail to do so, impose such sanctions described in 40 C.F.R. § 22.19(g) as this Court deems appropriate.

Respectfully Submitted,

8/21/2014
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