

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

RESPONDENTS' INITIAL PREHEARING EXCHANGE

Respondents Aylin, Inc.; Rt. 58 Food Mart, Inc.; Franklin Eagle Mart Corp.; and, Adnan Kiriscioglu (collectively, the "Respondents") jointly submit this Initial Prehearing Exchange in the above-captioned matter in accordance with 40 C.F.R. §22.19(a) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, the Presiding Officer's November 5, 2013 Prehearing Order and Order on Motion to Stay Proceedings, and the Presiding Officer's April 2, 2014 Revised Order on Respondents' Consent Motion for Extension of Time.

In addition to Respondents' discovery responses to be submitted to the Complainant by May 5, 2014, Respondents respectfully reserve their rights to supplement this Initial Prehearing Exchange in accordance with 40 C.F.R. §22.19(f).

I. Experts and Other Witnesses

Respondents expect to call the expert and witnesses named below to testify at the hearing on behalf of the Respondents. Respondents anticipate that it may be appropriate to present some or all of the testimony of certain witnesses in written or affidavit form. Respondents reserve the right to see leave of the Court to present testimony in written or affidavit form.

Respondents anticipate that they and the Complainant will be able to stipulate to the authenticity of all exhibits used in conjunction with testimony and cross-examination of the experts and witnesses.

Based on the Complainant's Initial Prehearing Exchange (specifically CX39-43), Respondents anticipate that they will need to supplement their list of experts and witnesses upon proper notice to the Court and Complainant to call an expert to testify on Complainant's environmental sensitivity analysis. As of the filing of this pleading, Respondents have not yet retained such expert.

Respondents respectfully reserve the right to supplement the list of experts and witnesses upon adequate notice to the Court and Complainant should Complainant's supplemental or additional prehearing exchanges, or other investigation and discovery, reveal the need for additional witnesses. For example, Respondents reserve the right to call an expert on Complainant's "ability-to-pay" model should the parties be unable to agree on the anticipated, further analysis of Respondents' financial information.

Respondents further respectfully reserve the right to supplement the summaries of their expert and witnesses' testimony to add additional evidence. The length of the hearing may be reduced to the extent that the parties can agree to stipulations, narrowing the issues for hearing; seek accelerated decision by the Court on certain issues, or agree to limit the length of experts and witnesses' testimony.

Sullivan D. Curran, P.E.

Respondents expect to call Sullivan D. Curran, P.E. as an expert witness. Mr. Curran has extensive experience in the regulation of underground storage tanks ("USTs"). Mr. Curran is expected to testify about defects with the Complainant's inspections of Respondents' facilities and alleged non-compliance with the Commonwealth of Virginia's UST technical and financial responsibility regulations. Mr. Curran is expected to testify that the Respondents, in fact, did comply with the applicable release detection and financial responsibility requirements at all times relevant to this matter. Mr. Curran will be asked to provide his opinion on the Respondents' substantial compliance with Virginia's corrosion protection and line leak detection requirements. Mr. Curran further will be asked to rebut the testimony of Complainant's experts and witnesses on matters presented by Complainant in its case in chief.

Mr. Curran's resume is included as RX-1.

Adnan Kiriscioglu

Respondent Adnan Kiriscioglu is the president and owner of Aylin, Inc., Rt. 58 Food Mart, Inc., and Franklin Eagle Mart Corp. Mr. Kiriscioglu, in part, will testify that, as an individual, he is not the "owner" or "operator" of the USTs subject to this matter as defined by Virginia's UST regulations. Mr. Kiriscioglu is expected to testify about other factual matters related to this case that are within his knowledge and

arise during the course of the hearing, including the Respondents' financial condition.

Ezgi Kiriscioglu

Ezgi Kiriscioglu is Mr. Kiriscioglu's daughter, and she is involved in providing a number of services to the employees who operate the three facilities in this matter. Ms. Kiriscioglu, in part, will testify as to her involvement with Respondents' UST compliance activities, including those related to release detection and financial responsibility. She is expected to corroborate Mr. Kiriscioglu's testimony that he is not directly involved conducting or managing the Respondents' environmental compliance activities on a daily basis. Ms. Kiriscioglu is expected to testify about other matters related to this case that are within her knowledge and arise during the course of the hearing.

Ismail Gokce Ozuturk, CPA

Ismail Gokce Ozuturk is the Respondents' accountant. As a fact witness, Mr. Ozuturk will be asked to testify about the Respondents' financial condition and matters related to their affirmative defense of inability to pay any assessed civil penalties. Mr. Ozuturk is expected to testify about other factual matters related to this case that are within his knowledge and arise during the course of the hearing.

II. Documents and Exhibits

Respondents respectfully submit the volume of exhibits (RX-1 through RX-11) with this pleading. In addition to Respondents' discovery responses to be submitted to the Complainant by May 5, 2014, Respondents respectfully reserve their rights to supplement this volume of exhibits in accordance with 40 C.F.R. §22.19(f).

In the interests of judicial economy, Respondents also adopt and incorporate for their use during any prehearing proceedings (including motions) and at the hearing Complainant's exhibits CX1 through CX47, as well as any exhibits later supplemented by Complainant.

III. Location and Duration of Hearing

In accordance with 40 C.F.R. §§22.19(d) and 22.21(d), Respondents are prepared to defend themselves and present their case at a hearing in Philadelphia, PA; Washington, DC; or, Suffolk, VA. However, Respondents believe "good cause" exists to conduct the hearing at a mutually-agreeable location between Philadelphia, PA and New York City, NY. Given the estimated time for the hearing, such an alternative location would enable the overwhelming majority of the participants to return to their homes each evening, helping to reduce the direct costs of the proceedings to the parties.

Respondents estimate that it will take two days to present their case.

Respondents do not need translation services for any of their witnesses.

IV. Respondents' Denials/Affirmative Defenses

Respondents do not transact business in Virginia under the names "New Jersey Petroleum Organization" or "NJPO." [Complaint Para. 4]

Mr. Kiriscioglu and Ms. Kiriscioglu are expected to testify that there is a small staff (three persons), based in North Bergen, NJ, that provide a variety of services to the modest network of retail gasoline outlets Mr. Kiriscioglu owns, including the three facilities in this matter. Such services include management support and training, back office accounting, and fuel supply and delivery. They will be further expected to testify that "NJPO" is a moniker used to refer to the North Bergen, NJ office and that Respondents' vendors, at their own discretion, often use this moniker to set up Respondents' accounts in their billing systems.¹ Mr. Kiriscioglu and Ms. Kiriscioglu also are expected to testify that, if a vendor invoices for products or services as "NJPO," the office staff in North Bergen, NJ will look for the applicable facility address or will call the vendor to determine the appropriate "owner" of the invoice.

Respondents will provide further information on this denial as part of their discovery responses due to Complainant by May 5, 2014. Respondents expect to ask Complainant to enter into a stipulation on this matter.

Failure to provide information [Complaint Para. 19]

Respondents intend to prove at the hearing that they fully complied with Complainant's Information Request Letter ("IRL"). Respondents and their retained environmental consultant, Atlantic Environmental Solutions, Inc., provided documents responsive to Complainant's IRL (*see e.g.*, CX13). Further, Mr. Kiriscioglu is expected to testify that he met with Complainant on April 13, 2013, and the parties agreed at that meeting that the Respondents would submit the remaining IRL information sought by Complainant. This information was provided, as agreed, by Respondents to Complainant (RX-11).

Ms. Kiriscioglu is expected to testify that Respondents made good faith searches for information sought by Complainant through the IRL; however, some records relevant to the IRL were lost or destroyed by a former manager of the three facilities. Further, much of the information Complainant alleges in the Complaint that it did not receive actually was available to it online through publicly-accessible,

¹ Respondents will show at the hearing that Mr. Kiriscioglu is not personally invoiced for environmental compliance activities at the three facilities in this matter.

online databases, such as the one maintained by the clerk of the Virginia State Corporation Commission.

Respondents will seek a stipulation with Complainant that all of the information sought by Complainant through the IRL has been provided by the Respondents.

Failure to provide financial responsibility [Counts VII, XII and XVII]

Respondents will seek a stipulation with Complainant that the Commonwealth of Virginia's UST financial responsibility regulations allow an "owner" or "operator" to use one or a combination of mechanisms to demonstrate the required financial assurance and these regulations do not require an "election" to be made by the UST "owner" or "operator" at any time, including when filing the Notice of Underground Storage Tank Registration (CX 10, 20, 27 and 28) or any other document with the Virginia Department of Environmental Quality ("VADEQ").

Respondents satisfied Virginia's financial responsibility requirement at 9 VAC §25-590-40 because their UST systems were eligible at all times relevant in this matter for the Virginia Storage Tank Fund (the "Fund"). Respondents will ask the Court to take judicial notice that the applicable Virginia UST financial responsibility regulations require the "owner" or "operator" to demonstrate to the VADEQ that it can satisfy the Fund's "deductible" within a specified period of time after an UST release is reported to the Fund. Mr. Curran is expected to provide expert testimony that most, if not all, UST leak insurance policies specify that the coverage provided by such policies are secondary if an UST trust fund, such as the Fund, exists in the state where the USTs are located.

To limit the issues for hearing, Respondents believe this issue (Counts VII, XII and XVII) can be addressed by the Court by accelerated decision.

Failure to provide release detection at each facility [Counts II, VIII and XIII]

Respondents will seek a stipulation with Complainant that Virginia's UST regulations (9 VAC §25-580-140 and 9 VAC §25-580-160) allow an "owner" or "operator" to use one or a combination of allowable methods to monitor USTs for releases and these regulations do not require the "owner" or "operator" to make an "election" of release detection method, binding the "owner" or "operator" at all times to that method.

Respondents will introduce at the hearing that they performed release detection by automatic tank gauge ("ATG") pursuant to 9 VAC §25-580-160(4) or by statistical inventory reconciliation ("SIR") pursuant to 9 VAC §25-580-160(4). Respondents will ask the Court to take judicial notice of VADEQ's UST enforcement manual (RX-10), which acknowledges that SIR can be conducted "in-house" in

Virginia.² Respondents previously have provided relevant SIR records (RX-2 through RX-9) to Complainant.

Mr. Curran is expected to provide expert testimony that Respondents' use of ATG and SIR fully satisfied the release detection requirements under Virginia's UST regulations.

Mr. Kiriscioglu is not an "owner" or "operator" of the USTs at the facilities [Complaint Para. 10]

Respondents intend to file a motion to dismiss Mr. Kiriscioglu as a Respondent in this matter. Respondents Aylin, Inc., Rt. 58 Food Mart, Inc., and Franklin Eagle Mart Corp. are the "owners" and "operators" of the USTs at the three facilities within the meaning and legal interpretation of those terms under both Virginia and the federal UST regulations (CX10, 20, 27).

Complainant asserts two arguments that Mr. Kiriscioglu should remain a named Respondent. First, he is listed as the UST "owner" for the USTs at the Franklin Eagle Mart facility on an amended UST notification form that was submitted to the VADEQ (CX28). Second, Mr. Kiriscioglu is the "operator" because he personally is responsible for the day-to-day operational control of and environmental compliance for the UST systems at each of the three facilities.

Mr. Kiriscioglu is expected to testify that he signed the original UST registration forms for the USTs at the three facilities in his capacity as president of Aylin, Inc., Rt. 58 Food Mart, Inc. and Franklin Eagle Mart Corp. Examination of the document (CX28) used by Complainant to assert Mr. Kiriscioglu's ownership of the USTs at the Franklin Eagle Mart facility will reveal that the notification form is an amendment, correcting certain information about the USTs. Mr. Kiriscioglu will be expected to testify that the facility manager submitted the amendment to VADEQ without his approval or review and inadvertently showed Mr. Kiriscioglu personally as the owner of the USTs. Mr. Curran is expected to provide expert testimony that petroleum marketers, such as Mr. Kiriscioglu, do not take personal ownership of USTs for liability reasons. Mr. Kiriscioglu was not aware of the UST notification amendment until recently when informed by Complainant through counsel. Mr. Kiriscioglu intends to correct this mistake with VADEQ prior to the hearing.

As to Mr. Kiriscioglu being an "operator" of the USTs under the Virginia UST regulations, Mr. Kiriscioglu is expected to testify that his involvement with the "day-to-day operational control" of the USTs at the three facilities was and is minimal, if any. Mr. Kiriscioglu and Ms. Kiriscioglu will be expected further to testify that each facility's manager is responsible for day-to-day UST compliance. For example, the

² To the extent that the staff in North Bergen, NJ are not employees of Aylin, Inc., Rt. 58 Food Mart, Inc. or Franklin Eagle Mart Corp., the Respondents alternatively will argue that the SIR was performed by a third party.

facility manager must make sure that the required tank readings are performed daily. The facility manager also is responsible for ordering required compliance testing to be performed by a third-party vendor, including corrosion protection and line leak detection tests. The facility manager is responsible for inspecting the dispenser hoses and nozzles daily for proper operation and to observe any surface spills of motor fuels. Ms. Kiriscioglu is expected to testify that staff in the North Bergen, NJ office from time to time becomes involved with scheduling of third-party testing because of standing relationships with certain vendors. Employees in the North Bergen, NJ office perform the SIR analysis. Mr. Kiriscioglu is expected to testify that his own daily involvement with the three facilities in this matter principally, if not exclusively, is to set the street prices for the motor fuels sold to the public. Complainant has not properly pled in its Complaint that Mr. Kiriscioglu's conduct gives rise to "piercing the corporate veil" and naming him individually as a Respondent.

Respondents have an inability to pay any assessed penalty [Affirmative defense]

Respondents already have provided financial information to Complainant to enable Complainant to make an initial ability-to-pay analysis. Complainant has asked for additional financial information from the Respondents that is expected to be provided with the Respondents' discovery responses to be submitted by May 5, 2014. To the extent that Respondents file a motion to dismiss Mr. Kiriscioglu, they may ask the Court to delay his providing personal financial information to the Complainants until after the motion is addressed by the Court.

Mr. Kiriscioglu, Ms. Kiriscioglu and Mr. Ozoturk will be expected to testify that the three facilities have been closed and have been listed for sale because of financial losses incurred by the three facilities.

Complainant has not treated Respondents equally to other respondents in similar cases in EPA Region III [Affirmative defense]

Mr. Curran is expected to provide expert testimony that Complainant's proposed penalty exceeds those imposed in similar UST enforcement actions in EPA Region III.

V. Penalty Calculation

Respondents' position is the proposed penalty should be reduced or eliminated. Because the USTs at the three facilities were eligible at all times relevant to this matter, the Court should find for Respondents on Counts VII, XII and XVII, thereby eliminating any penalty. At worst, the Court should impose a minimal penalty for possible paperwork issues associated with the Fund's "deductible" showing.

Similarly, Respondents believe that the proposed penalty should be reduced or eliminated for any alleged UST release detection violation because Complainant failed to take into account Respondents' use of both ATG and SIR for compliance (Counts II, VIII and XIII).

Under Complainant's "U.S. EPA Penalty Guidance for Violations of UST Regulations" (November 14, 1990)(www.epa.gov/oust/directiv/od961012.htm), Respondents will question Complainant's proposed penalty in a number of areas, including degree of environmental harm, economic benefit calculations, deterrent factors and environmental sensitivity multiplier. Respondents likely will need the opportunity to retain an expert to rebut Complainant, if Mr. Curran is unable to opine on the environmental sensitivity issue.

Respondents will provide testimony on their inability to pay any assessed civil penalty. Mr. Ozoturk is expected to testify about the Respondents' financial condition. Mr. Kiriscioglu is expected to testify that the three facilities have been closed and are not generating any income that would allow for the payment of any assessed civil penalty.

VI. Other Matters

In addition to Respondents' discovery responses to be submitted to the Complainant by May 5, 2014, Respondents respectfully reserve their rights to supplement this Initial Prehearing Exchange in accordance with 40 C.F.R. §22.19(f).

Date: April 4, 2014

Respectfully submitted,



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Certificate of Service

I hereby certify that the foregoing Respondents' Initial Prehearing Exchange and Exhibits, dated April, 2014, was sent this day in the following manner to the addresses listed below.

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