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December 11, 2015

By E-filing
Ms. Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA/Office of Administrative Law Judges
Room M-1200
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

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

Dear Ms. Anderson:

I have enclosed for filing Respondents' Partial Opposition to Complainant's Motion for Leave to File Supplemental Exchange.

Sincerely,

Jeffrey L. Leiter

cc: Certificate of 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' PARTIAL OPPOSITION TO COMPLAINANT'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL PREHEARING EXCHANGE

In accordance with the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, 40 C.F.R. Part 22 ("Rules of Practice"), 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 Corp. (collectively, the "Respondents") respectfully submit this response to the Director of the Land and Chemicals Division of the U.S. Environmental Protection Agency – Region III's ("Complainant") Motion for Leave to File Supplemental Prehearing Exchange ("Motion"). Specifically, the 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

clearly inadmissible because they 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.

I. PROCEDURUAL HISTORY

On November 21, 2015, Complainant filed its Motion, seeking to supplement the already voluminous and previously amended prehearing exchange with six additional, proposed exhibits – CX 149 to CX 150.[1] These six exhibits were attached to the Motion.

Complainant's proposed exhibit 149 (CX-149), dated November 18, 2015, purports to be the results (on one page) of an online search for any bankruptcies, judgments or liens involving Respondent Adnan Kiriscioglu and the corporate Respondents in this proceeding.

Complainant's proposed exhibit 150 (CX-150) is a LexisNexis® copy of the U.S. Environmental Protection Agency's ("EPA") final rule on underground storage tank ("UST") lender liability (60 Fed. Reg. 46692 (1995)).

In support of its Motion, Complainant argues that its amended prehearing exchange needs to be supplemented because, "[S]uch information is either incomplete and/or inaccurate and has not otherwise been disclosed to Respondents…." Motion at 1. Further, Complainant asserts that:

> [E]ach proposed exhibit contains information that is relevant and material to matters at issue in this proceeding and that such information is not unduly repetitious, unreliable, or of little probative value…."

Id.

[1] Complainant re-filed its Motion on December 10, 2015, after Respondents notified Complainant that its two-page Motion had not been filed and served on the Tribunal and Respondents.

Respondents object only to proposed CX-149 and CX-150 as being clearly inadmissible for any reason. Respondents do not object to Complainant's four remaining, proposed exhibits.

II. STANDARD FOR ADJUDICATING THE MOTION

The Rules of Practice require the parties to file and exchange certain information before the hearing, including the names of witnesses, a brief narrative summary of their testimony, or a statement that no witnesses will be called, and copies of all documents that party intends to introduce into evidence at the hearing. 40 C.F.R. § 22.19(a).

The Rules of Practice also provide that parties "shall promptly supplement or correct the [prehearing] exchange when the party learns that the information exchanged or response provided is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section." 40 C.F.R. § 22.19(f).

Section 22.22(a)(1) of the Rules of Practice requires the Presiding Officer to admit "all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value...." 40 C.F.R. § 22.22(a)(1).

The Prehearing Order issued in this matter on November 5, 2013, notified the parties that any addition of a proposed witness or exhibit had to be filed with an accompanying motion to supplement the prehearing exchange.[2]

III. ARGUMENT

Complainant's proposed CX-149 and CX-150 are irrelevant, immaterial, and of no probative value to the questions of liability or the determination of any penalty in this matter. In its Motion, Complainant merely recites the language from Sections 22.19(f) and 22.22(a)(1) of the Rules of Practice without any further foundation or explanation to the Tribunal that the two

[2] Although required by the Prehearing Order, Complainant's counsel did not confer with Respondents' counsel prior to the submission of the Motion to the Tribunal.

challenged exhibits are intended to prove or disprove some fact at issue in the proceeding.

Because these two proposed exhibits are clearly inadmissible for any purpose under Section 22.22(a) of the Rules of Practice, the Presiding Officer should exclude them as this stage of the proceedings. It is not necessary to determine in the context of the hearing whether the proposed exhibits in question should be excluded. *See Zaclon, Inc.,* 2006 EPA ALJ LEXIS 21, at*11(ALJ, Order on Respondents' Motion in Limine, Apr. 24, 2006).

A. Proposed CX-149 is Circumstantial Evidence on a Non-Issue in the Proceeding

In its Motion, Complainant does not set forth any foundation or relevancy for admitting proposed CX-149. Further, the Complainant does not explain how this document addresses any question of liability or determination of penalty. Proposed CX-149 is another attempt by the Complainant to attack Mr. Kirisciogluʼs character, when his character is not an issue in this proceeding.

The document purports to show the results of a LexisNexis search on November 18, 2015, of publicly-available databases on bankruptcies, judgments and liens. The document indicates that an $18,525 civil judgment was filed by Crossroads Fuel Service, Inc. ("Crossroads") against Respondents Aylin, Inc. and Adnan Kirisciogluon August 23, 2013. The Motion does not identify who conducted the search, who authenticated the document or, at a minimum, that the document was obtained in the course of the Complainant preparing its recently-filed motion for partial accelerated decision.[3]

[3] The only rule of evidence applicable in this proceeding is Section 22.22(a) of the Rules of Practice. However, this fact does not completely obviate the necessity of [Complainant] proving by competent evidence that real evidence is what it purports to be, and absent such proof, the evidence to be admitted would be irrelevant or immaterial and hence should be excluded from the proceeding. *Minnesota Metal,* 2007 EPA ALJ LEXIS 14, at 15 (quoting *Woolsey v. NTSB,* 993 F.2d 516 (5th Cir. 1991)(internal quotation marks omitted).

Mr. Kiriscioglu, in his oral examination by Complainant's counsel on December 18, 2014, was asked about the financial agreement with Crossroads for the supply and delivery of motor fuels to the three retail gasoline outlets involved with this proceeding. A copy of deposition transcript of this exchange is attached at Attachment A. Mr. Kiriscioglu volunteered in his deposition that he was settling the judgment reflected in proposed CX-140 with Crossroads.

The declaration of Respondents' counsel (attached as Attachment B) indicates that it is a common practice for wholesale motor fuel suppliers (or jobbers) to ask for and receive personal guarantees from retailers to secure payment for the deliveries. Typically, these personal guarantees substitute for large cash deposits.

Importantly, Complainant counsel's questions to Mr. Kiriscioglu (and his answers) about the financial arrangements with Crossroads during his deposition and as reflected in proposed CX-149 have no relevancy to and are probative of nothing in this proceeding. The proposed exhibit goes to none of the allegations in the First Amended Complaint, questions of liability or determination of penalty.

Without setting forth the relevancy of CX-149 in its Motion, Respondents presume that the Complainant is attempting to introduce the proposed exhibit as circumstantial evidence to prove that a Mr. Kiriscioglu acted in conformity with his or her character or behaved in a particular way on a particular occasion. While there is a genuine issue of material fact as to whether Mr. Kiriscioglu is an "operator" of the *USTs* at the three retail gasoline outlets under the Commonwealth of Virginia's UST regulations, his character is not an issue – substantive or otherwise -- in this proceeding.

Because this proposed exhibit is clearly inadmissible for any purpose, it should be excluded from the prehearing exchange. *Zaclon, Inc.* at *11.

B. EPA's "Lender Liability" Rule is Not Applicable to This Proceeding

Complainant, in its Motion, does not explain the relevancy, materiality and probative value of admitting proposed CX-150 to the prehearing exchange. There is none. CX-150 is a final rule promulgated by EPA in 1995 to provide a regulatory exemption from the federal UST regulations for those persons or entities who provide secured financing to UST owners. The Agency was attempting to address "lender liability" fears and encourage the extension of credit to creditworthy UST owners. 60 Fed. Reg. at 46692. The exemption promulgated by EPA exempts from the definition of "owner":

> [t]hose owners, who without *participating in the management of* the UST or UST system, and who are not otherwise engaged in petroleum production, Refining, and marketing, maintain indicia of ownership in an UST or UST system primarily to protect a security interest.

Id. (emphasis added).

Again, without any guidance from Complainant's Motion, Respondents presume that Complainant intends to use the rule set forth in CX-150 for the proposition that Mr. Kiriscioglu is an "operator" because of his "participation in the management" of the three retail gasoline outlets in this proceeding. The flaw in the Complainant's use of proposed CX-150 is that EPA makes clear in the preamble to this rule that "participation in management" is used *solely* for purposes of distinguishing the acceptable activities a secured lender can take related to the USTs without losing its liability exemption. *Id.* at 46698.

Because this proposed exhibit is clearly inadmissible for any purpose, it should be excluded from the prehearing exchange. *Zaclon, Inc.* at *11.

IV. CONCLUSION

CX-149 and CX-150 are irrelevant, immaterial and of no probative value to the allegations set forth in the First Amended Complaint. Because these two proposed exhibits are clearly inadmissible under Section 22.22(a)(1) of the Rules of Practice, Respondents respectfully request the Presiding Officer to exclude them from the prehearing exchange.

Dated: December 11, 2015

Respectfully submitted,

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Attorney for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 11th day of December, 2015, the foregoing Respondents' Partial Opposition to Complainant's Motion for Leave to File Supplement Exchange was sent electronically and by U.S. regular mail, postage prepaid:

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

Attorneys for Complainant

Jeffrey L. Leiter

ATTACHMENT A

because Crossroads -- let's say we buy it weekly, how come all the checks -- I want to say the date is what you're translating and what I'm reading is totally different. I'm going to say that's the entry date.

Q. Let me ask you this question. What was your agreement with Crossroads with respect to deliveries? How much time did you have to pay on an invoice, a week or ten days?

A. Ten days.

Q. Usually they keep you guys on a short leash, you have a ten-day window?

A. In good case it's probably lot to lot.

Q. So ten days?

A. Yes.

Q. Would it ever be more than ten days?

A. It could be.

Q. How much more?

A. Years.

Q. Years?

A. Yes.

Q. So you could have an outstanding

balance with your supplier for years and they'll still provide you with gasoline?

A. I will be settling with them as we speak.

Q. For what, sir?

A. For the money I owe to them, which my counsel didn't even know. We are at the end of 2014.

Q. Who's settling with Crossroads, is it Franklin Eagle Mart, Aylin, Inc., Route 58 Food Mart Corp. or is it Adnan Kiriscioglu?

A. It's under my name the judgments. And last time they pulled out gas, they never gave me credits.

Q. I want you to turn to now page 466.

A. Yes.

Q. Can you explain to me what CDS stands for?

A. No idea.

Q. You have no idea?

A. Cash deposits maybe.

Q. We're trying to figure out what it means. CDS income, what is that?

A. Deposits, it says -- in the first

ATTACHMENT B

DECLARATION OF JEFFREY L. LEITER

I, Jeffrey L. Leiter, swear and affirm that:

1. I am counsel to the Respondents in *In the Matter of Aylin, Inc., et al.,* Docket No. RCRA-0302-13-0039. I have represented petroleum marketers, such as the Respondents in this proceeding, since I was admitted to the District of Columbia Bar in December 1981. As part of my practice, I routinely assist my petroleum marketer clients with supply agreements for motor fuels (gasoline and diesel fuel). The majority of these supply agreements today are between wholesale distributors (or jobbers) and retailers (or dealers).

2. A key term in every supply agreement involves payment by the buyer. Wholesale distributors typically specify (at their sole option) three forms of payment for delivered motor fuels: (a) pre-payment for a delivery; (b) cash on delivery; or, (c) credit terms. Where credit is extended to a customer, "usual and customary" payment terms in the industry are either three or ten days by electronic funds transfer, depending on the buyer's creditworthiness. Wholesalers normally receive a one percent discount from their suppliers for prompt payment of their purchases within ten days.

3. Because of the widespread use of credit and debit cards by consumers, payments at the pump are processed by a third party, usually a refiner. The payments for the consumers' purchases are then transferred to the wholesale distributor, who in turn credits the payments against the retailer's account receivable. If there is a credit balance owed to the retailer, the wholesaler issues a payment to the retailer. If monies are needed to pay for the previously-delivered load, then the wholesaler initiates an electronic funds transfer from the retailer's bank account for the difference. This process repeats itself over and over.

4. Where credit is extended by the wholesaler to the retailer, the wholesaler normally requires a personal guarantee from the retailer's owner or principals as security. In addition, many wholesalers will file a UCC-1 with the state to perfect a security interest in the motor fuel inventory. Cash deposits are normally restricted to situations where the retailer is buying on a load-to-load basis.

5. Based on industry practice, it was not unusual for Crossroads to request a personal guarantee from Mr. Kiriscioglu for motor fuels sold and delivered to the corporate Respondents. These financial and security arrangements have nothing to do with environmental compliance for the underground storage tanks at the three sites.

I declare under penalty of perjury that the foregoing is true and correct.

Date: December 8, 2015

Jeffrey L. Leiter