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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
MARK FASTOW AND 0013 FIBERGLASS SPECIALTIES, INC.,	)	Docket No. EPCRA-09-97-
	)	
Respondents	)	

ORDER ON MOTIONS FOR DISCOVERY

Both Complainant and Respondents have filed Motions for additional discovery. For the reasons discussed below, Complainant's motion will be **Granted** and Respondents' motion will be **Denied**. <sup>(1)</sup>

Standard for "Other Discovery"

Rule 22.19(f) of the Consolidated Rules of Practice (40 C.F.R. 22.19(f)) provides for "other discovery," that is discovery other than that provided for in the prehearing exchange, only upon determination by the Presiding Officer:

- (i) That such discovery will not in any way unreasonably delay the proceeding;
- (ii) That the information to be obtained is not otherwise obtainable; and
- (iii) That such information has significant probative value.

Complainant's Motion

Complainant's discovery motion demands production of Respondent Mark Fastow's personal Federal income tax returns for a period of five years immediately preceding the last year that Respondent Mr. Fastow filed a Federal income tax return. <sup>(2)</sup> This information is necessary, Complainant maintains, because it has the burden of proof as to the appropriateness of the penalty, one element of which is

the Respondents' ability to pay, and Respondents' have asserted inability to pay as a defense. According to Complainant, analysis of Respondent Fiberglass Specialties' tax returns shows that there are financial relationships between it and the individual Respondent, Mark Fastow, which require an analysis of the personal income tax returns of Mr. Fastow.

Respondent Mark Fastow argues that Complainant's request is unreasonable because, while his personal Federal tax returns will show income, they will not provide a complete picture of his financial status. In particular, the Federal tax returns do not show expenses associated with providing food, clothing and shelter for himself and his family. If he is required to produce his tax returns, Mr. Fastow asserts, he will then have to spend an inordinate amount of time and money to prove his other expenses, burdening him unnecessarily.

Upon consideration, I find that Complainant's request satisfies all three elements of a discovery request under Consolidated Rule 22.19(f). Production of his personal Federal tax returns by Mr. Fastow should not unreasonably delay this proceeding in any way; the information is within the control of Mr. Fastow and is not otherwise obtainable by Complainant; and the information is significantly probative on the issue of Respondents' asserted inability to pay the proposed civil penalty.

Accordingly, Complainant's motion will be **GRANTED**.<sup>(3)</sup>

#### Respondents' Motion

Respondents' discovery Motion challenges the accuracy of the Dun and Bradstreet report submitted by Complainant as Prehearing Exchange Exhibit 2 and requests information regarding the source of the data underlying the report.<sup>(4)</sup> To date, Complainant has not opposed the Motion. However, upon review, it is clear that Respondents' discovery request does not meet the second criterion of Rule 22.19(f) that "[t]hat the information to be obtained is not otherwise obtainable." There is simply no evidence that the Respondents could not otherwise obtain this information from Dun and Bradstreet directly. Moreover, even if the discovery request was granted, it is unlikely that the Complainant would be a reliable informant as to exactly what data and/or documentation was utilized by Dun and Bradstreet, a third party entity, to create its report regarding the Respondent. Rather, it is far more likely that the Respondents would be aware of the information which was used to form the report, some of which they may have voluntarily submitted.

Furthermore, the Respondents' discovery request really raises a question concerning the admissibility of the Dun and Bradstreet report, an evidentiary issue more appropriately raised at hearing. In the event that Respondents do not stipulate to the admissibility of the Dun and Bradstreet report, prior to the document being introduced into evidence, Complainant will be required to lay a foundation for the report and to authenticate the writing itself. At that point and/or subsequently in the proceeding, Respondents will be given the opportunity to introduce evidence of their own concerning the number of employees, gross sales and other issues relating to the financial condition of Respondent Fiberglass Specialties. The evidence as a whole will then be considered in determining what weight the report should be given in regard to deciding a material fact in dispute.

Accordingly, Respondents' motion will be **DENIED**.

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Susan L. Biro  
Chief Administrative Law Judge

Dated: \_\_\_\_\_  
Washington D.C.

1. Complainant describes its motion as one "Requesting Additional Financial Information from Respondent." Because this is the equivalent of a motion for discovery it will be treated as such.
2. The Motion actually requests the returns for the five year period "commencing" with the last year a return was filed. It is clear that such a request is illogical and reflects a scrivener's error.
3. At the hearing, Respondents will have the opportunity to present evidence relating to their financial status if they so desire, however, the evidence both sides will be permitted to introduce at the hearing will be limited to that identified in their prehearing exchanges. Therefore, if, as a result of additional discovery, any party wishes to introduce additional evidence not previously identified on its prehearing exchange, it should promptly move to amend the prehearing exchange. Respondents' are hereby advised that, to date, the only witness for the defense identified in the Prehearing exchange is Kathy Keener and **if, Respondent Mark Fastow wishes to testify on behalf of himself or the corporate Respondent, he must move to amend his prehearing exchange to indicate his intention and provide a narrative summary of his intended testimony.**
4. In addition to the pending discovery motion, Respondents had previously filed a Motion to Compel Discovery, which was granted by Order dated April 8, 1998.

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