

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)	COMPLAINANT’S MOTION TO
)	COMPEL DISCOVERY, OR IN THE
ADAMAS CONSTRUCTION AND)	ALTERNATIVE, MOTION IN LIMINE
DEVELOPMENT SERVICES, PLLC)	
)	
AND)	
)	
NATHAN PIERCE,)	
)	Docket No. CWA-07-2019-0262
Respondents.)	
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I. INTRODUCTION

COMES NOW, the U.S. Environmental Protection Agency, Region 7 (“Complainant”), through its undersigned counsel, to respectfully request that this Court issue an Order compelling Adamas Construction and Development Services, PLLC (“Respondent Adamas”) and Nathan Pierce (“Respondent Pierce”) (together, “Respondents”) to submit certain documents relevant to the issue of Respondents’ ability to pay the proposed penalty of \$59,583. If Respondents should fail to produce such documents within the required timeframe, Complainant additionally requests that this Court grant an Order in Limine preventing Respondents from raising their ability to pay the proposed penalty and finding that Respondents have waived any such arguments. Pursuant to this Court’s October 18, 2019 Prehearing Order, Complainant contacted Respondent Pierce to inform it of this motion and asked if Respondent intends to object; Respondent Pierce expressed neither opposition nor support of this motion.

Complainant has requested documentation and information supporting an Ability to Pay claim several times but has received no substantial response from Respondents. On October 15, 2019, Complainant advised Respondents via email “EPA always considers a company’s ability to

pay. If you would like to make such a claim, we can forward you the information necessary to do so.” *Complainant’s Initial Prehearing Exchange, CX28, Page 1.* On June 1, 2022, Complainant held a teleconference with Respondent Nathan Pierce wherein Complainant presented information on Ability to Pay and Respondent Pierce expressed interest in demonstrating an inability to pay. On June 10, 2022, Complainant sent Respondent Nathan Pierce via email resources providing information on Ability to Pay, as well as requesting specific documentation needed from Respondents in order to calculate a new penalty based on Ability to Pay. To date, no response was received. On June 22, Complainant held another teleconference with Respondent Nathan Pierce wherein Complainant inquired about receiving Ability to Pay information and documentation; Respondent Pierce told Complainant that he did not have the required documentation and information prepared yet.

Because Respondent Pierce has expressed interest in submitting Ability to Pay information but has failed to provide such information, Complainants anticipate that Respondents will bring up the issue of Ability to Pay the penalty during the hearing scheduled for the week of August 22, 2022. To avoid potentially lengthening and delaying the August 22-26, 2022 hearing, Complainants propose to resolve the issue of Ability to Pay as soon as possible.

Therefore, Complainant requests that the Court issue the following discovery order:

II. ADDITIONAL DISCOVERY REQUESTED

Within 30 days of issuance of the discovery order, Respondents shall provide the following documents to the Court and to Complainant:

(1) **Signed, Completed Ability to Pay Forms.** Two Ability to Pay forms to be filled out separately for Nathan Pierce and Adamas Construction and Development Services, PLLC, respectively. Both forms are attached hereto.

(2) **Federal Tax Returns.** True, accurate and complete copies of at least the last three to five years, if filed, of signed and dated U.S. income tax returns of Adamas Construction and Development Services, PLLC, including all associated schedules and attachments; true, accurate and complete copies of at least the last one to five years, if filed, of signed and dated U.S. individual income tax returns of Nathan Pierce.

If the information identified above is not provided to Complainant and the Court by the timeframe specified in the discovery order, Complainant requests that this Court issue an Order barring Respondents from proffering any testimony or other evidence relating to the issue of Respondents' ability to pay the proposed penalty or the proposed penalty's potential economic impact on Respondent.

III. STANDARD FOR GRANTING A MOTION FOR OTHER DISCOVERY

Motions for additional discovery are governed by Section 22.19(e) of the Consolidated Rules of Practice. 40 C.F.R. § 22.19(e). 40 C.F.R. § 22.19(e)(1) requires that a motion for additional discovery shall specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought. The Presiding Officer may order such other discovery only if it: (1) will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party; (2) seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and (3) seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought. As explained in Section IV, below, this Motion for Discovery satisfies each of these elements.

IV. THIS COURT SHOULD GRANT COMPLAINANT'S MOTION FOR DISCOVERY

A. Method Of Discovery Sought, Proposed Discovery Instruments, Nature Of The Information Sought

The method of discovery sought is the production of documents. The proposed discovery instrument is included in this motion as (1) a request for documents listed in Section II, above, and (2) the two attached Ability to Pay forms. The nature of the information sought relates to Respondents' ability to pay the penalty listed in the Complaint.

B. The Prehearing Exchange Has Taken Place

The prehearing information exchanges in this case concluded with the filing and service of Complainant's Rebuttal Prehearing Exchange on April 3, 2020. Further, this Court's May 23, 2022 Hearing Order allows for the parties to file non-dispositive motions, such as motions for additional

discovery, on or before June 24, 2022. Therefore, as the prehearing exchange has taken place and as this motion is filed prior to the June 24, 2022 deadline, it is appropriate for Complainant to file this motion for additional discovery.

C. The Motion for Other Discovery will Neither Unreasonably Delay the Proceeding nor Unreasonably Burden the Non-moving Party

This motion will not unreasonably delay the proceeding as the hearing has been scheduled with sufficient time for Respondent to be able to fully comply with the requested order. The hearing in this matter has been scheduled to begin on August 22, 2022. Complainant estimates that it would require approximately two weeks to analyze and respond to any financial information that Respondent submits. Accordingly, as long as Respondents submit responsive information prior to August 8, 2022, Complainant anticipates being able to analyze that information prior to the hearing. For Respondent to submit responsive documents by August 8, 2022, the requested discovery order, including the 30-day deadline, would need to be issued by July 8, 2022. As Complainant has filed this motion approximately two weeks in advance of the July 8, 2022 deadline, it does not anticipate this process delaying the hearing.

Further, production of the information sought will not unreasonably burden Respondents. As Respondent Adamas Development and Construction Services, PLLC is a business and Respondent Pierce is the sole proprietor of that business, Complainant anticipates that the information and records requested herein are kept in the ordinary course of Respondent Adamas's operation. Such information and records are presumably already organized and include information that a company must keep organized in order to prepare annual tax returns and meet its business obligations. Additionally, Respondents will have 30 days to complete the Ability to Pay forms, which is a reasonable amount of time to complete forms that are six and seventeen pages long, respectively, with information Respondents already possess.

Production of tax returns by Respondent Pierce as an individual will also not unreasonably

burden the Respondent because these are presumably records that an individual submits annually and keeps on hand. Additionally, Respondent Pierce is requested to submit, at minimum, one tax return from the previous five years.

It is also in Respondents' best interest to supply the requested information so that both the Court and Complainant may accurately assess Respondents' ability to pay the proposed penalty. In the context of this proceeding, the production of this information could only serve to reduce the amount of the proposed penalty. As such, any burden imposed by this request is outweighed by the significant impact the information could have on these proceedings, and the benefit which may inure to Respondents.

D. The Motion for Other Discovery Seeks Information that is Most Reasonably Obtained from the Non-Moving Party, and which the Non-Moving Party Has Refused to Provide Voluntarily

Complainant seeks financial information which is solely in the possession of Respondents. Complainant performed independent research into Respondents' financial condition via CLEAR reports. However, Complainant is unable to obtain sufficient information—the information necessary to evaluate Respondents' ability to pay—from any source other than Respondents. Therefore, the information sought by this motion is most reasonably obtained from Respondents.

Further, Respondent has failed to provide the requested information voluntarily. This Court in its Prehearing Order has ordered Respondents to turn over any material regarding inability to pay in Respondents' Prehearing Exchange. *See* October 18, 2019 Prehearing Order at 3 (“if Respondents take the position that the proposed penalty should be reduced or eliminated on any grounds, such as an inability to pay, then provide a detailed narrative statement explaining the precise factual and legal bases for their position and a copy of any and all documents upon which they intend to rely in support of such position.”). Despite this, Respondents have not provided any information Complainant needs in order to analyze Respondents' ability to pay. Additionally, Complainant has requested such material on several occasions from Respondents, and Respondents have failed to produce such materials in return (See Section I, paragraph 2).

E. The Motion for Other Discovery Seeks Information that Has Significant Probative Value on a Disputed Issue of Material Fact Relevant to the Relief Sought

This motion seeks information that has significant probative value on a disputed issue of material fact. “[I]n any case where ability to pay is put in issue, the Region must be given access to the respondent's financial records before the start of such hearing.” *In Re: New Waterbury, Ltd., A California Limited Partnership*, 5 E.A.D. 529, 542.

Complainant’s approach to evaluating Respondent’s purported ability to pay the proposed penalty in this case is precisely the approach that the EAB blessed in *New Waterbury*, 5 E.A.D. at 540. There, the EAB stated that “[s]ince the Agency must prove the appropriateness of the penalty, it necessarily follows that ‘ability to pay’ is a matter that the Agency takes into consideration as part of its prima facie case.” *Id.* Additionally, where a Respondent “fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the prehearing 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 and thus this factor does not warrant a reduction of the proposed penalty.” *Id.* at 542. *See also, Spitzer Great Lakes Ltd.*, 9 E.A.D. 302, 2000 WL 893127 (EAB June 30, 2000) (citing *New Waterbury*, 5 E.A.D. at 541) (noting that “since EPA’s ability to obtain financial information about a respondent is limited at the outset of a case, a respondent’s ability to pay may be presumed until it is put at issue by a respondent. Then, as the party with control over the relevant records, the respondent must, upon request, provide evidence to show that it is not able to pay the proposed penalty”); *Wisconsin Plating Works of Racine, Inc.*, 2009 WL 1266817 (E.P.A., Apr. 30, 2009) (citing *New Waterbury* as ground for granting Complainant’s Motion to Compel Discovery of the same sort of financial records sought here); *Vemco, Inc.*, CAA-05-2002-0012, 2003 WL 1919589 (E.P.A. Mar. 28, 2003) (granting Complainant’s motion for discovery of information such as “complete and preferably audited financial statements and all corporate minutes for the last three years for Respondent”); *Mark Fastow and Fiberglass Specialties, Inc.*, EPCRA-09-97-0013, 1998 WL

422191 (E.P.A. June 24, 1998) (granting Complainant's motion for discovery of respondent Fastow's personal federal income tax returns for most recent five years).

Therefore, as Respondents have communicated an interest in having their inability to pay evaluated but have failed to produce the requisite information to assess inability to pay, and as this motion seeks information that is central to assessing any such claim, this motion seeks information that has significant probative value on a disputed issue of material fact.

V. SHOULD RESPONDENT FAIL TO COMPLY WITH THIS COURT'S ORDER FOR OTHER DISCOVERY, THIS COURT SHOULD GRANT COMPLAINANT'S MOTION IN LIMINE

Should Respondents fail to comply with the requested order for other discovery, this Court should grant Complainant's alternative Motion in Limine preventing Respondent from raising its ability to pay the proposed penalty as an argument at the forthcoming hearing and find that Respondents have waived any such arguments. When a party fails to provide information within its control as required by the Consolidated Rules, this Court may, in its discretion, infer that the information would be adverse to that party, exclude the information from evidence, or issue a default order. 40 C.F.R. § 22.19(g).

As this case sits today, there are already sufficient grounds for this Court to determine that Respondent has waived its ability to argue that it cannot pay the proposed penalty. In *New Waterbury*, the EAB instructed that where a respondent "fails to produce any evidence to support an inability 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 an ability to pay has been waived." 5 E.A.B. at 524. Similarly, in *JHNY Inc.*, the EAB held that "by not complying with the prehearing exchange requirement to provide documentary evidence demonstrating its inability to pay the proposed penalty, [the Respondent] failed to raise its ability to pay as a cognizable issue. Thus, the company waived its ability to contest the Region's penalty proposal on this basis." 12 E.A.D. 372, 2005 WL 2902519, at *19 (EAB Sept. 30, 2005). *See also Spitzer Great Lakes*, 9 E.A.D. at *13 (holding that "the Presiding Officer properly excluded consideration of ability to pay as a mitigating

factor in assessing the penalty . . . [because] when asked by the Region, and directed by the Presiding Officer, to substantiate that claim, [Respondent] failed to respond”).

Here, both Complainant and this Court have apprised Respondents of their obligation to produce evidence to support its claimed inability to pay. CX28, Page 1; October 18, 2019; Prehearing Order at 3-4. Yet, Respondents still have not submitted any evidence related to this argument. *See generally* Respondents’ Prehearing Exchange. As such, adequate grounds exist for this Court to conclude that Respondents have failed to raise their ability to pay as a cognizable issue and thus waived their ability to do so at the hearing.

Nevertheless, recognizing that Respondents are currently appearing pro se and that Complainant would still be able to analyze Respondents’ claimed inability to pay the proposed penalty were Respondents to provide the necessary information, Complainant believes that allowing Respondents to submit such information is still warranted. However, if Respondents were to fail to produce the information requested herein by the deadline set by this Court, then it would be reasonable for this Court to conclude that Respondents have waived their ability to contest Complainant’s proposed penalty based on an alleged inability to pay.

V. CONCLUSION

This Court should grant Complainant’s motion to compel additional discovery, due within 30 days of the date of the Order, because (1) doing so will not unreasonably delay the proceeding or unreasonably burden Respondent; (2) the information sought in this motion is most reasonably obtained from Respondent, who has refused to provide it voluntarily; and (3) the information sought in this motion has significant probative value on a disputed issue of material fact. Further, if Respondents fail to comply with the requested order for discovery, this Court should grant Complainant’s alternative Motion in Limine preventing Respondents from raising its ability to pay the proposed penalty as an argument at the forthcoming hearing and find that Respondents have waived any such arguments.

Respectfully submitted,

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In the Matter of *Adamas Construction and Development Services, PLLC and Nathan Pierce*,
Respondents.
Docket No. CWA-07-2019-0262

CERTIFICATE OF SERVICE

I certify that the foregoing Complainant's Motion to Compel Discovery, or in the alternative, Motion in Limine, Docket No. CWA-07-2019-0262, has been submitted electronically using the OALJ E-Filing System.

A copy was sent by email to:

Nathan Pierce, Owner, Adamas Construction and Development Services PLLC:

Nathan Pierce

Email: adamas.mt.406@gmail.com

Dated: June 24, 2022

Respectfully submitted,

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