

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

**IN THE MATTER OF:** )  
 )  
**Zaclon, Incorporated,** ) **Docket No. RCRA-05-2004-0019**  
**Zaclon, LLC and** )  
**Independence Land Development Company,** )  
 )  
**Respondents** )

**ORDER ON COMPLAINANT'S MOTION FOR ACCELERATED DECISION  
ON THE ISSUE OF ABILITY TO PAY**

**I. Procedural Background**

The Complaint in this matter, filed on September 29, 2004 by Complainant, United States Environmental Protection Agency Region 2, charged Respondent Zaclon Incorporated with violating the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. §§ 6901 *et seq.*, by storing hazardous wastes without a permit. Specifically, the Complaint alleged that Zaclon Incorporated owns and operates a facility at which sash and baghouse dust were stored without a permit or interim status for at least six years prior to an inspection on September 19, 2002, in violation of Section 3005(a) of RCRA, 42 U.S.C. § 6925(a) and the state regulations implementing this provision, Ohio Administrative Code (OAC) 3745-50-45. The penalty Complainant proposed for this violation is \$162,371. Respondent filed an Answer to the Complaint on November 2, 2004 (hereinafter referred to as "Original Answer"), denying the alleged violation. After unsuccessfully engaging in Alternative Dispute Resolution, the parties filed their prehearing exchanges as requested by a Prehearing Order.

On August 18, 2005, Complainant moved to amend the Complaint to add Zaclon LLC and Independence Land Development Company as Respondents to the Complaint.<sup>1</sup> A month later, Complainant moved to file a Second Amended Complaint, based on information Complainant received after the Prehearing Exchange from an inspection of Respondents' facility on August 10-12, 2005, adding a second count of violation of RCRA. The second count alleges that Respondents received, stored and treated hazardous waste, namely spent stripping acid,

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<sup>1</sup> Zaclon, Incorporated, Zaclon LLC, and Independence Land Development Company are hereinafter collectively referred to as "Respondents" or "Zaclon."

without a permit or interim status, in violation of Section 3005(a) of RCRA and OAC 3745-50-45. By Order dated October 7, 2005, the motions to amend were granted. Complainant filed the Second Amended Complaint on October 14, 2005 (hereinafter referred to as “Complaint”), proposing a penalty of \$231,772 for Count 2, so the total penalty proposed in the Complaint is \$394,143.

Respondents submitted an Answer to the Second Amended Complaint on November 2, 2005 (hereinafter referred to as “Answer”), denying also the second count of violation and contesting the proposed penalty.

Complainant filed a Motion for Accelerated Decision on Liability as to Count 1, which was granted on November 3, 2005. On January 9, 2006, Respondents filed a Supplement Prehearing Exchange For Count 2 of the Complaint (Supplement), and Complainant filed a Rebuttal Prehearing Exchange as to Count 2 on January 20, 2006 (Rebuttal).

On February 3, 2006, both Complainant and Respondents filed Motions for Accelerated Decision as to Count 2. An Order on those Motions was issued on May 15, 2006. On February 24, 2006, Complainant filed the instant Motion for Partial Accelerated Decision on the Issue of Ability-To-Pay and Memorandum in Support (Motion). Respondents submitted a Memorandum in Opposition to the Motion (Opposition) on March 10, 2006, and Complainant submitted a Reply thereto on March 23, 2006.

The evidentiary hearing in this matter was scheduled to commence on May 16, 2006, but was postponed to allow for ruling on this and other motions and is now scheduled to commence on June 6, 2006.

## **II. Arguments of the Parties on Motion for Accelerated Decision**

Complainant requests an order granting partial accelerated decision on the issue of Respondents’ ability to pay the proposed penalty, or, in the alternative, an order compelling discovery of financial information. Complainant points out that Respondents have not raised the issue of inability to pay the penalty in either their Answer or in the Original Answer. The Consolidated Rules of Practice, 40 C.F.R. Part 22, require that an answer to the complaint include “the basis for opposing the requested relief” (the penalty). By failing to state their inability to pay in the Answer, Complainant argues, Respondents have waived any claim of inability to pay.

Further, acknowledging that Respondents did state in their Prehearing Exchange that the penalty proposed for Count 1 would “present a severe hardship to the company,” Complainant argues that in RCRA cases, inability to pay is an affirmative defense on which Respondents have the burden of production and of persuasion, citing *Carroll Oil Co.*, RCRA (9006) Appeal No. 01-02, 2002 WL 1773052 (EAB, July 10, 2002). Complainant asserts that Respondents did not provide in their prehearing exchange any financial documents for any of the three Respondents,

but only provided “consolidated financial statements” of Alpha Zeta Holdings, Inc., a company Respondents refer to as their parent company.

Therefore, Complainant states that it requested Respondents provide to it certain financial documents by February 3, 2006 if they intended to raise the issue of inability to pay. Complainant asserts in its Rebuttal that such information has not been provided. Thus, having failed to raise the issue of ability to pay, failed to sustain their burden of proof, and failed to provide financial information requested, Complainant argues that Respondents have waived any objection to the proposed penalty based on the issue of ability to pay and are barred from proffering testimony or evidence on this issue.

Respondents assert that they implicitly raised the issue of ability to pay in their Answer and the Original Answer, stating that the proposed penalty is “excessive, unreasonable inequitable and not in compliance with the U.S. EPA’s own penalty policy and matrix.” Respondents argue that “inequitable” and “excessive” relates to the correlation between the penalty and the size of the entity and the ability of the entity to pay that penalty.

Respondents assert that there is clearly a disputed factual issue of Respondents’ ability to pay. Their Prehearing Exchange states that “Zaclon is a small company with its 2004 annual revenues at approximately \$9 million. Zaclon is a near break even company with the retained deficit as of December 31, 2004 of (\$78,795) therefore a penalty of approximately \$162,000 would present a severe economic hardship to the company.” Zaclon “submits that this testimony will be given under oath sworn to by both Mr. Krimmel and/or Mr. Turgeon at the hearing on this matter. . . [who will] then discuss in more details the financial condition of the company and the impact of the extreme penalty which is proposed on the operations of that company.” Opposition at 2. Respondents argue that it is “simply unfair to bar the ability of Zaclon’s witnesses to address these issues simply because Complainant has prematurely concluded that Zaclon has failed to meet its burden of proof prior to the hearing even being held.” *Id.*

Respondents explain that Alpha Zeta Holdings, Inc. is the holding company for the three Respondents in this case, and that the financial documents for Alpha Zeta Holdings include the financial condition of the three Respondents.<sup>2</sup> Zaclon submits that “these financial statements will be discussed in more depth during the sworn testimony by witnesses at the hearing,” and that the purpose of the hearing is for the presiding judge to hear testimony of witnesses and their

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<sup>2</sup>A holding or parent company is usually a company that does not itself produce goods or services but holds partial or complete controlling interest in one or more other companies by owning enough voting stock to control management and operations by influencing or electing its board of directors. Holding companies allow the dispersion and reduction of risk for owners through the ownership and control of a number of different companies. The overall financial condition of a holding company is not necessarily consistent with the financial condition of each individual company in which it holds a controlling interest.

analysis of the documents submitted, and render a decision on ability to pay.

As to the financial information requested by Complainant, Zaclon asserts that Complainant never formally submitted a request for production to Respondents, and that they object to the requests on grounds that much of them relate to the financial condition of the President and CEO of Respondents, who are not respondents to this case, and it is burdensome, onerous, and time consuming to compile and does not add appreciably to the financial statements of Alpha Zeta Holdings, Inc.

In its Reply, Complainant asserts that Respondents have not shown that they raised the issue of ability to pay. Furthermore, they only offered conclusory statements and promises of testimony, without pointing to evidence or providing affidavits, and have therefore not met the burden to prove the affirmative defense of inability to pay the penalty. Complainant points out that in the Order on Complainant's Motion for Accelerated Decision on Liability, issued earlier in this proceeding, this Tribunal discussed standards for opposing a motion for summary judgment, and based thereon, ruled that Respondents failed to provide evidence or affidavits to demonstrate a genuine issue of material fact as to their liability for Count 1. Complainant argues that Respondents, by failing to provide evidence and affidavits this time, did not take heed of that discussion and ruling.

### **III. Standards for Accelerated Decision**

The Consolidated Rules of Practice, 40 C.F.R. Part 22, provide that –

The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a).

Accelerated decision is similar to summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure (FRCP), and therefore case law thereunder is appropriate guidance as to accelerated decision. *CWM Chemical Services, Inc.*, 6 E.A.D. 1, 12 (EAB 1995); *Mayaguez Regional Sewage Treatment Plant* 4 E.A.D. 772, 780-82, (EAB 1993), *aff'd sub nom.*, *Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d 600, 606 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148.

It is well established that the purpose of summary judgment is to “pierce the pleadings and to assess the proof to see whether there is a genuine need for trial.” *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment saves “the time and expense of a full trial when it is unnecessary because the essential facts necessary to decision of the issue can be adequately developed by less costly procedures, as contemplated

by the FRCP . . . with a net benefit to society.” *Pure Gold, Inc. v. Syntex (USA), Inc.*, 739 F.2d 624, 626 (Fed. Cir. 1984)(quoting *US. Steel Corp. v. Vasco*, 394 F.2d 1009 (CCPA 1968)).

A motion for summary judgment puts a party to its proof, on which it bears the burdens of production and persuasion, merely by referencing a lack of evidence. For the EPA to prevail on a motion for accelerated decision on an affirmative defense, it initially must show that there is an absence of evidence in the record for the affirmative defense. *Rogers Corporation v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002)(quoting *BWX*, 9 E.A.D. at 76).

If the EPA makes this showing, then the respondent “as the non-movant bearing the ultimate burden of persuasion on its affirmative defense, must meet its countervailing burden of production by identifying ‘specific facts’ from which a reasonable factfinder could find in its favor by a preponderance of the evidence.” *Id.* The respondent cannot “meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence.” *BWX Technologies, Inc.*, 9 E.A.D. 61, 75 (EAB 2000). While submissions must be viewed in light most favorable to the nonmovant, including one who bears the burden of persuasion on the issue, and such evidence is to be taken as true, the respondent must provide “more than a *scintilla* of evidence on a disputed factual issue to show their entitlement to a trial or evidentiary hearing.: the evidence must be substantial and probative in light of the appropriate evidentiary standard of the case.” *Id.* at 76.

Well settled case law on FRCP 56 states that the non-movant must designate specific facts showing that there is a genuine issue for trial by presenting affidavits, depositions, answers to interrogatories, admissions on file, or other evidence. *Celotex*, 477 U.S. at 324. The motion for summary judgment places the non-movant on notice that all arguments and evidence opposing the motion, including affirmative defenses, must be properly presented and supported. *Pantry, Inc. v. Stop-N-Go Foods, Inc.*, 796 F. Supp. 1164 (S.D. Ind. 1992). To avoid the summary judgment motion being granted, the non-movant must provide “sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). It is not sufficient if the nonmoving party’s evidence is “merely colorable” or “not significantly probative.” *Id.* at 249-250.

“Summary disposition may not be avoided by merely alleging that a factual dispute may exist, or that future proceedings may turn something up.” *Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 793 n. 24 (EAB 1997); *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 543 (9<sup>th</sup> Cir. 1978). “In countering a motion for summary judgment, more is required than mere assertions of counsel. The non-movant . . . must set out, usually in an affidavit by one with knowledge of specific facts, what specific evidence could be offered at trial.” *Pure Gold, Inc.*, 739 F.2d at 627 (Fed. Cir. 1984). It has been held that an issue of fact may not be raised by merely referring to proposed testimony of witnesses. *King v. National Industries, Inc.*, 512 F.2d 29, 33-34 (6<sup>th</sup> Cir. 1975)(affidavit saying what the attorney believes or intends to prove at trial is insufficient to comply with the burden placed on a party opposing a motion for summary judgment under FRCP 56); *Ricker v. American Zinser Corp.*, 506 F. Supp. 1, 2 (E.D. Tenn. 1978)(affidavit of counsel containing ultimate facts and conclusions, referring to proposed

testimony and stating what the attorney intends to prove at trial, is insufficient to show there is a genuine issue for trial), *aff'd, sub nom. Ricker v. Zinser Testilmaschinen GmbH*, 633 F.2d 218 (6<sup>th</sup> Cir. 1980).

#### **IV. Discussion and Conclusion**

The criteria in RCRA, set out in Section 3008(a)(3), 42 U.S.C. § 6928(a), for determining a penalty are the “seriousness of the violation and any good faith efforts to comply with applicable requirements.” As stated by the Environmental Appeals Board:

because it is not part of the Agency's required proof, "ability to pay," in order to be considered, must be raised and proven as an affirmative defense by the respondent. *See 2A Moore's Federal Practice Manual* 8-17a (2d ed. 1994) ("A true affirmative defense, which is avoiding in nature, raises matters *outside* the scope of the plaintiff's prima facie case."). 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*, 2002 EPA App. LEXIS 14 \* 70. The defense as to ability to pay, or more precisely, the defense of inability to pay the proposed penalty, is a factor that may be considered in mitigation of the penalty, not as a bar to assessment of a penalty. *Id.*

Respondents' statement in their Answers that the proposed penalty is “excessive, unreasonable, inequitable and not in compliance with the U.S. EPA’s own penalty policy and matrix” cannot reasonably be construed as raising the issue of inability to pay the proposed penalty. An entity may be fully able to pay a penalty and still argue the penalty is excessive, unreasonable or inequitable in relation to the violation alleged. Or, a particular penalty may not be excessive, unreasonable or inequitable but an entity may nevertheless be unable to pay it.

The Respondents were given notice of an opportunity to raise the issue of inability to pay the proposed penalty in the Prehearing Order, dated May 26, 2005, page 5, ¶ 3(F), which stated that - “if Respondent takes the position that it is unable to pay the proposed penalty, a narrative statement explaining the precise legal and factual basis for its position and a copy of any and all documents it intends to rely upon in support of such position.” This also put Respondents on notice that their prehearing exchange must include all documentary evidence they would produce at a hearing in support of a defense of inability to pay.

In response, in their Prehearing Exchange, Respondents stated that Zaclon is a “small” and “near break even” company with 2004 annual revenues at approximately \$9 million and a retained deficit as of December 31, 2004 of (\$78,795), and that “a penalty of approximately

\$162,000 would present a severe economic hardship to the company.” This statement can be construed to raise an issue of inability to pay. See, EPA’s “Guidance on Determining a Violator’s Ability to Pay a Civil Penalty” (“GM-56”), dated December 16, 1986 (referring to a defense of ability to pay as a claim that paying a penalty would cause “extreme financial hardship”); RCRA Civil Penalty Policy at p. 38 (June 23, 2003)(the “Agency will not assess penalties that are clearly beyond the means of the violator”). Respondents specifically stated in their January 6, 2006 Supplement to their Prehearing Exchange that “Zaclon is unable to pay the proposed penalty of \$394,193.”

Ability to pay is not a criterion listed in RCRA for determining penalties, and ability to pay was not mentioned in the Original Complaint as a penalty criterion. Therefore, Respondents may not have had notice at the time of filing their Original Answer that ability to pay would be an appropriate “basis for opposing any proposed relief.” 40 C.F.R. § 22.15(b). As noted, Respondents were offered the opportunity by the Prehearing Exchange Order to raise the issue, and inability to pay is a mitigating factor rather than an affirmative defense to liability or a bar to assessment of any penalty. Given these circumstances, it is concluded that Respondents have raised the claim of inability to pay the proposed penalty in their Prehearing Exchange.<sup>3</sup>

The next question is whether Respondents have provided in their Prehearing Exchange any evidence in support of the claim. The EAB has stated, “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 [Complainant] 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. *New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (EAB 1994). In their January 6, 2006 Supplement to their Prehearing Exchange, Respondents have produced some documentation of financial information which they contend is relevant to the Respondents, in the “Alpha Zeta Holdings, Inc. Consolidated Financial Statements with Accountant’s Review Report” for calendar year 2004 (Financial Statements). Therefore, Respondents have not waived a claim of inability to pay the penalty.

As to whether Complainant has supported its Motion on the basis that there is an absence of support in the record for the claim of inability to pay, Complainant’s argument, that financial information on a company not named as a respondent in the case does not support a claim of inability to pay, is persuasive at first blush.

To avoid accelerated decision being granted, Respondents must identify “specific facts,”

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<sup>3</sup> It is noted that the EAB has held that if the respondent does not to raise ability to pay as an issue in the *answer*, it may be concluded that any objection to the penalty based on ability to pay has been waived. *New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (EAB 1994). However, that case involved violations of the Toxic Substances Control Act (TSCA), which includes ability to pay as a statutory penalty assessment criterion.

pointing to substantial and probative evidence from which a reasonable factfinder could find in their favor by a preponderance of the evidence. *BWX*, 9 E.A.D. at 76; *Anderson*, 477 U.S at 249-250. Arguments and evidence cannot be assumed, but must be properly presented and supported. *Pantry, Inc.*, 796 F. Supp. 1164.

Respondents' promises to produce testimony of Mr. Krimmel and Mr. Turgeon at the hearing do not raise an issue of fact. *King v. National Industries, Inc.*, 512 F.2d at 33-34. The Financial Statements state that they "include the accounts of Alpha Zeta Holdings, Inc. . . . and its wholly owned subsidiaries, Zaclon, LLC, and Independence Land Development Company. All intercompany transfers have been eliminated." Respondents' Prehearing Exchange Exhibit (Rs' Ex.) 13 p. 5. The Accountant's Review Report therein states that the review "is substantially less in scope than an audit" and that the accountants do not express an opinion regarding the financial statements taken as a whole. Rs' Ex. 13. The Financial Statements include a balance sheet of Alpha Zeta Holdings, Inc. (AZ). There are no financial figures for any of the Respondents.

Respondents do not provide any argument, explanation, comment or supporting documentation regarding the Financial Statements, except they recite figures from the Statements of the net income and loss of AZ for the years 2003 and 2004, and AZ's retained deficit and total stockholders' equity, and simply state in that "The cash flow impact of the proposed penalty would likely trigger a bankruptcy filing by Zaclon LLC." Respondents' Prehearing Exchange Supplement, dated January 6, 2006, p. 3.

Even if the information in the Financial Statements is taken as true, Respondents have not provided any specific facts as to the ability to pay of Zaclon, Inc., Zaclon LLC or Independence Land Development Company. Respondents have not provided any tax returns, recent financial information, or other documents that indicate the financial condition of each Respondent. Respondents have not suggested any inferences to be drawn in their favor, but merely assert that AZ is their holding company and that the Financial Statements will be discussed in more depth in testimony at the hearing. Unverified balance sheets standing alone are inadequate to establish inability to pay. *F & K Plating Company*, 2 E.A.D. 443, 339 (CJO 1987). Even if Mr. Krimmel and Mr. Turgeon were to testify at the hearing, self-serving testimony by corporate officers, uncorroborated by documentation, is generally given little weight regarding inability to pay. *Central Paint & Body Shop, Inc.*, 2 E.A.D. 309, 315 (CJO 1987); *F & K Plating* 2 E.A.D. at 449, n. 14; *SuperChem Corp.*, EPA Docket No. FIFRA-9-2000-0021, 2002 EPA ALJ LEXIS 25 \* 24 (ALJ, April 24, 2002).

The unaudited Financial Statements of AZ may be "merely colorable" as to inability to pay, but do not constitute substantial and probative evidence from which a reasonable factfinder could find by a preponderance of the evidence that the Respondents are unable to pay the proposed penalty. Therefore, Respondents have failed to sustain their burden in opposing the Motion for Accelerated Decision on the Issue of Ability-to-Pay.

Accordingly, Complainant's Motion for Accelerated Decision in the Issue of Ability-to-

Pay is **GRANTED.**

In view of this ruling, the Complainant's alternative request for discovery is **moot.**

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Susan L. Biro  
Chief Administrative Law Judge

Dated: May 23, 2006  
Washington, D.C.