

**NEW YORK STATE  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Articles 15, 17, 19, 25 and 27 of the Environmental Conservation Law (ECL) of the State of New York, Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Parts 215, 360, 608 and 661, and Article 12 of the Navigation Law

**RULING ON MOTION TO  
COMPEL DISCLOSURE**

by

**EDKINS SCRAP METAL CORP., EDKINS AUTO SALES, INC., 2319 RICHMOND TERRACE CORP., BENEDETTO DICOSTANZO, MARIA DICOSTANZO, and HELENE IACONO,**

DEC Case No.  
R2-20131206-527

Respondents.

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Appearances of Counsel:

- Thomas Berkman, Deputy Commissioner and General Counsel (Jessica Steinberg Albin of counsel), for staff of the Department of Environmental Conservation
- Jonathan W. Tribiano, PLLC (Jonathan W. Tribiano of counsel), for respondents Edkins Scrap Metal Corp., Edkins Auto Sales Inc., 2319 Richmond Terrace Corp. and Benedetto DiCostanzo
- The Luthmann Law Firm, PLLC (Richard A. Luthmann of counsel), for respondents Maria DiCostanzo and Helene Iacono

Staff of the Department of Environmental Conservation (Department) moves for a ruling compelling respondents Edkins Scrap Metal Corp., Edkins Auto Sales, Inc., 2319 Richmond Terrace Corp., Benedetto DiCostanzo, Maria DiCostanzo and Helene Iacono (respondents) to respond to disclosure demands detailed in the Department's motion. For the reasons that follow, Department staff's motion is granted.

Proceedings

Department staff commenced this administrative enforcement proceeding against respondents by service of an August 20, 2014 motion for order without hearing in lieu of complaint alleging that respondents violated ECL articles 15, 17, 19, 25 and 27, 6 NYCRR parts

215, 360, 608 and 661 and Navigation Law article 12. Respondents, through their respective attorneys, opposed staff's motion and moved to dismiss staff's motion.<sup>1</sup> Department staff cross-moved to dismiss respondents' affirmative defenses.

By ruling dated May 10, 2015, I granted staff's motion for order without hearing and cross-motion, in part, denied respondents' motions to dismiss, and set down the remaining causes of action and relief requested for hearing. Following a conference call with the parties on January 24, 2017, I advised the parties that the next conference call was scheduled for March 8, 2017. Respondents' attorneys failed to attend the March 8, 2017 call or otherwise advise my office that the attorneys were unable to attend in advance of the call. Department staff requested that I issue a scheduling order for discovery and a hearing in the matter.

By letter dated March 9, 2017, I ordered the parties to exchanged discovery demands by March 31, 2017 with all responses to the demands due by May 2, 2017. The hearing is scheduled for July 19, 20, 21, 25, 26, 27, and 28, 2017.

Department staff served its discovery demands on respondents' respective attorneys on March 31, 2017. Respondents failed to serve any demands on Department staff. No extensions to serve discovery demands were requested or granted. Respondents failed to respond to Department staff's discovery demands on or before May 2, 2017. No extensions to respond to staff's demands were requested or granted.

Attempting to resolve respondents' failure to respond to staff's demands, Department staff sent an email to respondents' attorneys on May 3, 2017 inquiring when responses to staff's demands could be expected. Staff received no response from respondents' attorneys.

On May 8, 2017, Department staff served the present motion to compel disclosure on respondents. See Appendix A attached hereto. No responses to staff's motion have been filed by respondents, and respondents' time to do so has expired.

### Discussion

Pursuant to the Department's Uniform Enforcement Hearing Procedures, the scope of discovery is as broad as that provided for under article 31 of the CPLR (see 6 NYCRR 622.7[a]). Except as expressly provided for in the regulations, parties may employ any disclosure device authorized by CPLR article 31 (see 6 NYCRR 622.7[b]).

A party against whom discovery is demanded may make a motion to the ALJ for a protective order in general conformance with CPLR 3103 (see 6 NYCRR 622.7[c][1]). If a party fails to comply with a discovery demand without having made a timely objection, the proponent of the discovery demand may apply to the ALJ to compel disclosure (see 6 NYCRR 622.7[c][2]). The ALJ may direct that any party failing to comply with discovery after being

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<sup>1</sup> At the time, respondents Edkins Scrap Metal Corp., Edkins Auto Sales Inc., 2319 Richmond Terrace Corp. and Benedetto DiCostanzo, were represented by Felix T. Gilroy, Esq. After Mr. Gilroy's death in May 2015, respondents retained their current attorney Jonathan W. Tribiano.

directed to do so by the ALJ suffer preclusion from the hearing of the material demanded (see 6 NYCRR 622.7[c][3]). A failure to comply with the ALJ's direction will allow the ALJ or the Commissioner to draw the inference that the material demanded is unfavorable to the noncomplying party's position (see id.).

The Department's March 31, 2017 discovery demands were authorized by CPLR article 31 and Part 622, and duly served upon respondents' respective attorneys. None of the respondents raised a timely objection to the Department's demands or moved for a protective order. None of respondents responded to the Department's demands, nor have they provided any good cause for their failure to respond to the discovery demands or the motion to compel, notwithstanding Department staff's good faith efforts to resolve the dispute without resort to a motion.

### Ruling

Accordingly, Department staff's motion to compel discovery is granted. Respondents Edkins Scrap Metal Corp., Edkins Auto Sales, Inc., 2319 Richmond Terrace Corp., Benedetto DiCostanzo, Maria DiCostanzo and Helene Iacono are hereby directed to produce documents responsive to Department staff's March 31, 2017 discovery demands by close of business on Monday, June 12, 2017.

If respondents Edkins Scrap Metal Corp., Edkins Auto Sales, Inc., 2319 Richmond Terrace Corp., and Benedetto DiCostanzo, and Maria DiCostanzo and Helene Iacono fail to produce documents in accordance with this ruling, the material demanded in Department staff's March 31, 2017 discovery demands shall be precluded from the hearing, and the undersigned ALJ and the Commissioner may draw the inference that the material demanded is unfavorable to respondents' positions, pursuant to 6 NYCRR 622.7(c)(3).

SO ORDERED,

\_\_\_\_\_/s/\_\_\_\_\_  
Michael S. Caruso  
Administrative Law Judge

Dated: May 23, 2017  
Albany, New York

TO: Attached Service List (via email and regular mail)

## APPENDIX A

*Matter of Edkins Scrap Metal Corp., Edkins Auto Sales, Inc., 2319 Richmond Terrace Corp.,  
Benedetto DiCostanzo, Maria DiCostanzo and Helene Iacono*  
DEC Case No. R2-20131206-527  
Motion to Compel Disclosure

1. Cover letter from Jessica Steinberg Albin, Assistant Attorney, dated May 8, 2017.
2. Letter motion to compel disclosure, dated May 8, 2017.
3. Affirmation of Jessica Steinberg Albin in support of Department staff's motion to compel disclosure, dated May 8, 2017, attaching the following exhibits:
  - A. March 9, 2017 Scheduling Order;
  - B. Department staff's March 31, 2017 Notice for Discovery and Inspection;
  - C. March 31, 2017 emails from staff to attorneys Luthmann and Tribiano, transmitting staff's discovery demands;
  - D. April 3, 2017 email from Ms. Albin to attorneys Luthman and Tribiano;
  - E. April 3, 2017 email from Mr. Luthmann;
  - F. May 3, 2017 email from Ms. Albin to attorneys Luthman and Tribiano; and
  - G. Notice of Hearing, dated March 9, 2017.
4. Affidavit of Service of Jessica Steinberg Albin, sworn to May 8, 2017.