

**ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE HEARING**

In the Matter of:

1310 Beulah Road
Buildings #401 and 501
Churchill, PA 15235

: Appeal of June 2, 2017 Enforcement Order
: re: Inability to Pay Hearings
:

BRIEF IN OPPOSITION TO APPELLANTS' INABILITY TO PAY CLAIM

NOW COMES, the Allegheny County Health Department (hereinafter "ACHD" or the "Department"), by and through its undersigned counsel, and hereby files this, its brief in opposition to Appellants' claim that they are unable to pay the civil penalty pursuant to Allegheny County Health Department's Rules and Regulations as set forth in Article XXI, Section 2109.06. In support thereof, the Department submits the following:

PROCEDURAL HISTORY

On August 7 and 29, 2017, the Hearing Officer conducted administrative hearings concerning the sole issue of whether Appellants have the ability to post the \$1,471,675.00 assessed civil penalty or bond prior to an adjudication on the merits of its appeal. During the hearings, Appellants proffered the testimony of Appellants Vikas Jain, Ramesh Jain and Appellants' accountant, Kevin McQuillan. The Department offered the testimony of Shannon Sandberg, ACHD Air Pollution Control Engineer, and Dean DeLuca, ACHD Air Quality Enforcement Chief. Although Appellants intended to offer the testimony of Thomas Lusk, "to testify that there is insufficient information to make any kind of [inability to pay] analysis, N.T. Hearing, 08/07/17, at 17-18, they ultimately introduced his testimony as a rebuttal witness to Mr. DeLuca's testimony.

STANDARD OF REVIEW

Article XI, Section 1105(D)(7) of the Allegheny County Rules and Regulations provides that “The person filing the appeal shall bear the burden of proof and the burden of going forward with respect to *all issues*.” Insofar as Appellants are the persons who filed the appeal in this matter and are the parties asserting an inability to post a bond or amount of the civil penalty, they bore the burden of proof at the time of the hearing to demonstrate their collective inability to pay the civil penalty.

Although the Allegheny County Health Department regulations were neither promulgated under nor bound by the authority of the PA Environmental Hearing Board (“EHB”) or the penalty provision under 35 P.S. Section 4009.1, the Commonwealth shares nearly identical requirements with respect to a party’s claimed inability to pay a civil penalty. Therefore, the analysis adopted under the Commonwealth’s framework, while not precedential, does constitute highly persuasive authority. Notably, and with respect to an appellant’s burden of proof, the PA Environmental Hearing Board has opined as follows:

It is well established that the Appellant bears the burden of proving that it is unable to prepay or post an appeal bond in the amount of the civil penalty. 35 P.S. § 4009.1(b); *See Kresge*, 2001 EHB at 515; *Hrivnak Motor Company v. DEP*, 1999 EHB 437, 441; *Heston S. Swartley Transportation Co., Inc. v. DEP*, 1999 EHB 88, 89; *Goetz v. DEP*, 1998 EHB 955, 964-65. *This burden is a considerable one. It is not enough to simply file a signed verification regarding inability to prepay and then testify to that effect.* Rather, to satisfy its burden, the Appellant must:

[p]roduce hard evidence that gives the Department a reasonable opportunity to challenge the claim and this Board a reasonable opportunity to independently assess the claim. That evidence must, among other things, include proof of the appellant’s assets and liabilities. In the absence of hard evidence, the Legislature’s objective in requiring prepayment could too easily be thwarted without sufficient proof or substantial justification.

Hrivnak, 1999 EHB at 441 (citing *Swartley*, 1999 EHB at 89)(emphasis supplied).

In previous decisions, the Board listed the types of evidence it looks for in determining whether the appellant established its claim of inability to prepay. Such evidence includes:

1. Recent financial statements;
2. Income tax returns;
3. Information regarding accounts and notes receivable;
4. Information regarding marketable securities owned by appellant;
5. Information regarding interests appellant owns in closely held corporations or partnerships;
6. Information regarding intangible property owned by appellants;
7. Information regarding vehicles owned by appellant;
8. Information regarding real estate owned by appellant;
9. Information regarding oil, gas, or mineral rights owned by appellant;
10. Information regarding recent loan applications filed by appellant;
11. Information regarding insurance policies naming appellant as the insured or beneficiary; and
12. Information regarding property appellant recently sold for value or transferred as a gift.

Kresge, 2001 EHB at 516 (citing *Goetz*, 1998 EHB at 67-68.n. 9; *Swartley*, 1999 EHB at 89).

The Board will only excuse an appellant from the prepayment/bonding obligation if making the prepayment would result in undue financial hardship. *Hrivnak*, 1999 EHB at 442. An undue financial hardship occurs if making the prepayment or submitting a bond would interfere with the appellant's ordinary and necessary expenses, considering the appellant's current and reasonably anticipated future needs. *Id.*

Paul Lynch Investments, Inc., 2011 WL 4943804, at 2 (emphasis supplied). In emphasizing the point, the Board indicated that "We should be clear about the Appellant's burden. It is not enough

to show that it would be inconvenient or otherwise difficult satisfy prepayment/bonding requirements. Rather, the Appellant must show that it does not have *any* means available to it that would not cause undue hardship.” *Id.* at 4.

The substantial evidence required to support a finding of an administrative agency must be such relevant evidence as a reasonable mind might accept as adequate to support the conclusion. *See City of Pittsburgh v. Comm'n on Human Relations of City of Pittsburgh*, 444 A.2d 182, 185 (Pa. Cmwlth. 1982). Moreover, the Department is “under no affirmative duty to produce any witness or evidence not requested by the parties before it.” *Riojas v. Bd. of Licenses & Inspections Review of City of Philadelphia*, 364 A.2d 986, 987 (Pa. Cmwlth. 1976). Additionally, the case law is clear that with respect to Pennsylvania's administrative agency proceedings the fact finder is not required to issue findings specifically rejecting each and every allegation that is made by a party. *Gwinn v. Pennsylvania State Police*, 668 A.2d 611, 614 (Pa. Cmwlth. 1995) citing *Roth v. Workmen's Compensation Appeal Board (Armstrong World Industries)*, 562 A.2d 950 (Pa. Cmwlth.1989).

It is axiomatic that questions of resolving conflicts in the evidence, witness credibility, and evidentiary weight are properly within the exclusive discretion of the fact finding agency.... Even assuming *arguendo* that [specific] testimony was not contradicted, the [fact-finding agency] is not under an obligation to accept it. Additionally, the [fact-finder] need not provide specific reasons for finding one witness credible over another.

Birdsboro & Birdsboro Mun. Auth. v. Dep't of Env'tl. Prot., 795 A.2d 444, 447–48 (Pa. Cmwlth. 2002) (internal quotations and citations omitted).

DISCUSSION

I. CONSTITUTIONAL ARGUMENT

Appellants did not raise on appeal but suggested during their opening statement that they considered the bond requirement to be unconstitutional. N.T. Hearing, 08/07/17, at 22. While this

issue has not been adjudicated before this tribunal, the Department notes that there are ample examples of bond pre-requisites to a hearing on the merits which have been found to be constitutional. Briefly, it is noteworthy that the Commonwealth Court has reached that conclusion with respect to a similar bond issue. In 1984, the Court found “the bond requirement is [] a reasonable condition on Petitioner's right to appeal the assessment.” *Boyle Land & Fuel Co. v. Com., Env'tl. Hearing Bd.*, 475 A.2d 928, 930 (Pa. Cmwlth 1984), *aff'd sub nom. Boyle Land & Fuel Co. v. Env'tl. Hearing Bd.*, 488 A.2d 1109 (Pa. 1985). Four years later, the Court revisited its decision in *Boyle* and opined, “In *Boyle*, our Court noted that federal courts have consistently upheld the constitutionality of the bond requirement and therefore reasoned that the surety bond requirements set forth in the Commonwealth's statutes are also constitutional. Accordingly, we reaffirm our decision in *Boyle* and find the bond requirements to be constitutional.” *Tracey Min. Co. v. Com.*, 544 A.2d 1075, 1077 (Pa. Cmwlth. 1988). Based on the Commonwealth Court’s decision with respect to analogous bond requirements, Appellants’ notion that it may be unconstitutional is woefully misguided.

II. INABILITY TO PAY OR POST BOND

At issue in this matter is whether Appellants are jointly or severally capable of paying the \$1.4 million penalty assessment or post a bond in that amount. Specifically, Article XXI of the Allegheny County Health Department Rules and Regulations provide, in pertinent part, as follows:

Failure to forward the money or the appeal bond at the time of the appeal shall result in a waiver of all legal rights to contest the violation or the amount of the civil penalty unless the appellant alleged financial inability to prepay the penalty or to post the appeal bond. If alleged, the Department shall conduct a hearing to consider the appellant's alleged inability to pay within 30 days of the date of the appeal.

Article XXI, Section 2109.06(3) (emphasis supplied). Because Appellants alleged in their Notice of Appeal an inability to pay the civil penalty, they bear the burden to demonstrate by substantial

evidence that they are both unable to pay the penalty and unable to post a bond in the amount of the penalty.

III. THE BOND REQUIREMENT

First, Appellants bear the burden on appeal to demonstrate by substantial evidence that they were unable to obtain a bond. Appellants failed to meet their burden. At the outset, what is most notable is that the only person to speak to efforts to obtain a bond was Vikas Jain. For his part, Ramesh Jain offered no testimony as to any efforts he made towards obtaining a bond. Despite that omission, Vikas Jain testified that he went to an “insurance broker” that he had used in the past to inquire about what is technically a *supersedeas* or appeal bond. N.T. Hearing, 8/7/17, at 57. Oddly, he fails to explain why he would merely go to his insurance agent rather than go to a specialized bonding agent.

When asked specifically on cross-examination, Vikas Jain could not recall the name of any other company he contacted, though he insisted that he “called quite a few companies”, “pretty big companies.” N.T. Hearing, 08/07/17, at 83, 84. When asked about specific bonding companies in the Commonwealth, he simply could not recall whether he spoke with any of them. Despite a claim that his insurance company would not offer him a bond, Appellants offered no corroborating testimony or demonstrable evidence of any action taken to get a bond. As the Environmental Hearing Board suggests, in *Paul Lynch Investments, Inc.*, it is not enough to sign a verification and testify to the claimed inability. Given Appellants complete failure to demonstrate an inability to obtain an appeal bond, beyond the self-serving testimony of one appellant, this tribunal must find that Appellants have failed to meet their “considerable” burden of proving an inability to obtain a bond, jointly and severally. Accordingly, this tribunal must direct Appellants to obtain

and post with the County an appeal bond in the amount of \$1,471,675.00 within 30 days of the date of the tribunal's order.

IV. INABILITY TO PRE-PAY CIVIL PENALTY

In addition to having to demonstrate an inability to obtain an appeal bond, Appellants bear the burden to prove that they, jointly and severally, have the "inability" to pre-pay the civil penalty. Again, harkening the EHB's decision in *Paul Lynch Investments, Inc.*, the Board makes clear that merely asserting an inability is insufficient and requires "hard evidence that gives the Department a reasonable opportunity to challenge the claim." *Paul Lynch Investments, Inc.*, 2011 WL 4943804, at 2. The Board enumerated a dozen forms of financial information it would deem requisite for an appellant to proffer in order to meet its burden. *Id.* Appellants proffered little more than their tax returns. As additional proof that Appellants did little to meet their burden on appeal, Appellants proffered the testimony of Kevin McQuillan, a certified public accountant who prepared Appellants tax returns based on information provided by Ramesh Jain. N.T. Hearing, 08/29/17, at 238. Mr. McQuillan testified that he would need access to "all the business tax returns, financial statements and underlying accounting records and bank statements and.... On the personal side you would need access, generally you'd start with all their bank statements, investment accounts, and for anybody, all their financial documents, insurance contracts, and try to put all that together to determine all the ins and outs of their cash flow." *Id.* at 249. Mr. McQuillan's list is similar to that expected by the EHB and yet, *sans* the tax returns, the Department saw little else of what even their accountant would require to determine their inability to pay.

At the outset, the Department notes that it had, prior to the hearings, received from Appellants some information concerning some of their assets. However, when the Department

pointed out to this tribunal that Appellants had not responded to several requests for additional information, Appellants' counsel merely offered the flippant response, "As one of the better judges might say, if they were ignored you had a process to go through, you can't just keep asking the same question over again." N.T. Hearing, 08/07/17, at 15. Based on their refusal to provide information which would "give[] the Department a reasonable opportunity to challenge the claim," the process would be for this tribunal to take recognition that Appellants pointedly attempted to deprive the Department of its ability to challenge their claim. Indeed, even on a cursory review of the lists of documents the EHB and the PADEP would require for review on appeal, the only thing the Appellants offered was their tax returns. The "process" would require a finding that Appellants failed to meet their burden on appeal and require them to post a bond or the civil penalty amount before this tribunal reaches the substantive merits of their appeal. Indeed, on review of scant evidence presented on their behalf, it is clear Appellants failed to meet their burden.

On direct examination, Vikas Jain testified to the breadth and scope of the Jains' various business entities. N.T. Hearing, 08/07/17, at 28-58. However, his testimony in support of their claim of his inability to pay was limited to authenticating tax returns, noting the existence of real property situated in Mississippi¹, Pennsylvania and West Virginia, along with properties held by sundry other companies held by the Jains. At no time does Vikas Jain indicate the specific amount of income received from the income producing properties. The only liability raised on direct examination was a \$5,000,000 loan that Appellants received. *Id.* at 42-3. With respect to Ramesh Jain, his direct examination was limited to authenticating his tax returns and a bald claim that he did not have the liquidity to post the appeal bond. *Id.* at 137-140. He offered no evidence

¹ Specifically, he indicated that they owned three apartment complexes and a laundry building in Mississippi. N.T. Hearing, 08/07/17, at 41.

regarding any intangible property that he may own, nothing concerning oil, gas or mineral right, nothing concerning loan applications, insurance policies, any properties sold, vehicles, bank accounts or securities or appraised values of the properties owned. Nothing. This was obviously done so to avoid “the Legislature’s objective in requiring prepayment [that] could too easily be thwarted without sufficient proof or substantial justification.”² *John Lynch Investments, Inc.*, 2011 WL 4943804, at 2.

It was only on cross-examination of Vikas and Ramesh Jain that this tribunal began to get a glimpse into the true nature of the Appellants’ assets. Specifically, Vikas Jain testified that Appellants’ company owns a building in a shopping plaza in Mississippi containing a laundromat and a retail store. N.T. Hearing, 08/07/17, at 66-67. He testified that his company also owned three apartment complexes in Mississippi. *Id.* at 59. Vikas Jain indicated that they received a loan for \$5,000,000.00. *Id.* at 74. Although they completely failed or refused to admit such into evidence, Vikas Jain acknowledged that some undefined amount of that \$5 million loan was used to maintain the apartment complexes. *Id.* at 76. Interestingly, Vikas Jain claimed that his father Ramesh Jain would be able to explain how the money was spent because “he handles most of the finances,” notwithstanding his earlier assertion that Ramesh Jain was not a member of that company. *Id.* at 78, 81. Despite that inconsistency, as noted above, Ramesh Jain obliquely noted that some of the \$5 million made its way to Appellant Churchill Community Development.³ *Id.* at 148, 172. Vikas Jain, for his part, claimed that \$600,000.00 of the money was spent on roof

² In fact, Appellants’ counsel, in a seemingly defiant rejection of the regulatory burden of proof placed on Appellants, declared, “it’s our intention to present only a prima facie case, at which point the health department can then meet their obligation of coming forward with the evidence.” Interestingly, they failed to even proffer prima facie evidence sufficient to meet their burden.

³ This is also in contradiction to Vikas Jain’s testimony that the money was used for repairs to the Mississippi properties. N.T. Hearing, 08/07/17, at 76.

repair, though there is not “hard evidence” in the way of an invoice to demonstrate that. *Id.* at 79. Vikas Jain next indicated that Appellants were members of a company called Global Host which owned a Motel 6 on Banksville Road. *Id.* at 84-85. Despite a proffer of a letter purportedly from the Motel 6 franchisor and indicating a “default,” Vikas Jain acknowledged that he could remedy the default and that he had not even reached out to Motel 6 concerning the letter. *Id.* at 84-85. Importantly, he did not offer any testimony suggesting that an alleged default would have any necessary impact on their ability to pre-pay the civil penalty. Moreover, he acknowledged that the issues with the Motel 6 property occurred months *after* the imposition of the civil penalty and thus, as a temporal matter, would have no bearing on their ability to pay within the regulatory period. *Id.* at 88.

Vikas Jain’s testimony is at its least credible when it came to the grants sought from the Commonwealth of Pennsylvania’s RACP program. N.T. Hearing, 08/07/17, at 99-104. First, Vikas Jain admits that Churchill Community Development applied for the both a \$2.5 million and \$5 million dollar grant. *Id.* at 104. He claimed that Churchill was “qualified” for the \$2.5 million grant but that there are “a lot of different steps before you actually get the money...”⁴ *Id.* at 100-101. Critically, when asked if they were required to have 50% of the requested funds secured, he testified that “when I do decide to tap the grant, or get involved with the grant, *at that time* you need to have financials from auditors and accountants to give private opinions, there’s a whole process, and *that’s when they make sure that you have enough funds to actually get the grant.*” *Id.* at 101 (emphasis supplied).

⁴ Notably, Vikas Jain could not identify any of the remaining steps.

This testimony is critical, not to the question of whether Appellants did or did not receive the proceeds of the \$2.5 million grant, but because the process for granting their application contains a specific requirement that “[*at application submission time*, the *Applicant must* be able to *demonstrate that at least 50%* of the required *non-state funds necessary to complete the project are secured.*” See *Commonwealth of Pennsylvania Application & Business Plan Handbook*, December 2016, at p.2 (emphasis supplied in part); See also 72 P.S. § 3919.302 (defining a Redevelopment Assistance Capital Project as a project requiring in part that the applicant “Ha[ve] at least a 50% non-State financial participation documented *at the time of application*, including a portion of any funds reserved for future physical maintenance and operation of the project.” (emphasis supplied)).

Based on the letter of the law, and in direct contravention to Vikas Jain’s testimony, the Commonwealth required Churchill Community Development to demonstrate that it “secured” 50% of non-state funds when they applied for the \$2.5 million grant. Simple arithmetic shows that Appellant Churchill Community Development had to demonstrate that it had \$1.25 million “secured” at the time the application was made last year. Similarly, when the \$5 million request was made in 2017, Churchill Community Development had to demonstrate that it had \$2.5 million at the time of that application. Accordingly, one of two things (out of logical necessity) must be true. Either Vikas Jain misrepresented to the Commonwealth the amount of assets available to Churchill Community Development in order to obtain the \$2.5 and \$5 million grants or he misrepresented to this tribunal the breath of assets available to Churchill Community Development. While the Department opines that Vikas Jain falsely testified about the assets

available,⁵ the fact that he would make a false statement to either the Commonwealth or the Department deprecates his credibility beyond repair. In either event, Appellants fail to demonstrate their collective inability to prepay the penalty.

Prior to the entrance of Appellants' current counsel, Appellants' prior counsel did informally provide the Department some idea of the Appellants' assets. Dean DeLuca, the Air Quality Program's Enforcement Chief, testified that he made use of the information provided along with Appellants' tax returns to determine Appellants' ability to pay. N.T. Hearing, 07/29/17, at 245, 366-67, 369, 375. Mr. DeLuca went on to testify that the total market value of all of the Appellants' assets, deducting for assessment values, would not be less than \$10 million. Ramesh Jain was given ample opportunity to deny the amount but claimed he had no idea what was the total value of his assets. *Id.* at 149-152. The same Ramesh Jain, who by his son's account, was the "financial person" for the myriad of family businesses, *id.* at 79, 80, 81, 149, who had been in the real estate business for decades, who had purchased no fewer than 20 parcels of real estate across three states, *id.* at 179, and had assisted in applying for state grants worth a total of \$7.5 million, yet has never calculated and had no idea of the value of his assets. *Id.* at 180. Not only does such testimony defy credibility but, by omission, goes nowhere towards a demonstration of their inability to pay the penalty.

Next, Mr. DeLuca, who this tribunal accepted as an expert in environmental economic modeling, (N.T. Hearing, 08/29/17, at 366), went on to testify as to his use of the United States Environmental Protection Agency's ("EPA") INDIPAY system in this matter. Specifically, he

⁵ This conclusion is supported by Ramesh Jain's testimony admitting that Appellants infused Appellant Churchill Community Development with a capital contribution of \$1.3 million (strikingly just enough money to demonstrate the secured portion of the Commonwealth grant). N.T. Hearing, 08/07/17, at 169.

noted that he made use of the computer program because it is one that the EPA uses to calculate a party's ability to pay a penalty⁶, the Department does not have its own program, and because it was the best model of which he was aware. *Id.* at 349. He explained how the INDIPAY program can output with nearly 100% certainty whether a party has the ability to pay. *Id.* at 361. That certainty was established because the model did not account for Appellants' assets. Thus, if the model demonstrates an ability to pay, the inclusion of assets would merely increase that ability. *Id.* at 362. He noted further that the ability to pay contemplates a party's ability to obtain a loan to satisfy the payment. *Id.* at 363, 364. Ultimately, Mr. DeLuca concluded that under the INDIPAY system of calculations, Vikas Jain had the ability to pay either the full amount or \$718,000.00...excluding the assets. *Id.* at 384-85, 387. A second "run" through the INDIPAY program for Vikas indicated that he had an ability to pay either the full amount or \$417,280.00. Similarly, with respect to Ramesh Jain, the INDIPAY results indicated that he could pay either \$1,427,786.00 or \$512,718.00. *Id.* at 389. Mr. DeLuca indicated that a difference between the two "runs" for Vikas Jain was attributable to "bank account statements which were not part of the exhibits which showed balances, so that would be the significant difference between exhibits only and this run of the program." *Id.* at 392. Ultimately, Mr. DeLuca concluded that the most conservative estimate as to Appellants' ability to pay "would be the combination of Ramesh's and Vikas' [...] with Ramesh at \$512,000 and Vikas at \$718,000, that's somewhere around 1.23 million excluding the assets of both the individuals." *Id.* at 393. Based on the fact that Appellants

⁶ Notably, the EPA has a webpage for public access to the INDIPAY model it employs to evaluate a party's ability to pay a penalty. See <https://www.epa.gov/enforcement/penalty-and-financial-models>.

had approximately “13 to 14 million” in assets, *id.* at 393-94, to supplement the conservative \$1.23 million estimate, the Department has ample evidence of the Appellants’ ability to pay.

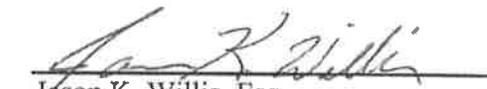
For their part, Appellants proffered the testimony of Thomas Lusk as a rebuttal witness to Mr. DeLuca’s INDIPAY analysis. N.T. Hearing, 08/29/17, at 420. The fundamental flaw with Mr. Lusk’s testimony is he acknowledged that he never prepared a report determining Appellants’ ability to pay, *id.* at 431, and had never used the EPA’s INDIPAY program. *Id.* at 433. In fact, in discussing his review of the INDIPAY results, Mr. Lusk noted that “I can’t really opine on anything there because I don’t understand how the 9.7 percent interest rate was done, the report’s not transparent enough to give me enough information to even draw a conclusion.” *Id.* at 437. Although he concluded that the INDIPAY calculation was “not the method I would use,” *id.* at 424, he admitted that he did not know how it worked or the underpinnings of the program. *Id.* at 437. For him to evaluate the market value of each of the properties owned by Appellants, Mr. Lusk claimed he would have to appraise each property but ultimately he could not opine whether Appellants could or could not obtain the financing to pay the penalty. *Id.* at 425, 427. Indeed, with respect to the INDIPAY results proffered by Mr. DeLuca, Mr. Lusk opined, “I don’t have -- I’m not questioning, *I want to be clear with this, I am not questioning the conclusions*, I’m saying I cannot make conclusions based on what I’m looking at.” *Id.* at 428 (emphasis added). While there is no disagreement that Appellants could have proffered more information with respect to their ability to pay, they failed to provide it to the Department or this tribunal for consideration. Strikingly, they failed to produce such information to their own accountant, such that he could proffer his own opinion as to their ability to pay. As a consequence, Appellants failed to meet their considerable burden to proffer hard evidence that they, jointly and severally, did not have the ability to pre-pay the penalty.

In sum, not only did Appellants fail to meet their burden on appeal to demonstrate with hard evidence that they were unable to post a bond or pre-pay the assessed penalty, they seemingly went out of their way to not meet their burden. They failed to produce evidence or identify what precisely happened with the proceeds of the \$5,000,000. They proffered no bank statements while acknowledging that one of their accounts contained over \$784,000. N.T. Hearing, 08/07/17, at 79-80. Ramesh Jain admitted to personally infusing Churchill Community Development with a capital contribution of \$1.3 million, *id.* at 169-70, but failed to explain how or why they were able to make a **cash** capital of such a large amount but not be able to procure a similar amount for the assessed penalty. They acknowledge gross receipts of \$2.4 million for one of Ramesh Jain's companies but had no evidence of costs or expenditures. N.T. Hearing, 08/07/17, at 164. They indicated income from the Beulah Road property alone amounting to over \$500,000 a year but no receipts or invoices to show expenditures or losses. They offered no valuation for any of the properties in Allegheny County, West Virginia or Mississippi. They refused to permit the Department review of documents which could demonstrate an inability to pay and protested even allowing review prior to the hearing. *Id.* at 15-17. Their testimony on direct was merely to authenticate their tax returns and claim an inability to pay. Their accountant's testimony was limited to discrediting Mr. DeLuca's use and calculations using the U.S. EPA's own inability to pay calculator, despite not knowing how it worked nor having ever used it personally. Appellants' testimony and exhibit on direct examination do little more than beg further questions as to the scope of their actual assets. Conversely, the Department's testimony and exhibits coupled with a nationally employed "ability to pay" calculator utilized by someone with training in its use and taking advantage of what little information Appellants provided--amply demonstrate Appellants' ability to pay the penalty.

CONCLUSION

For all of the aforementioned reasons, the Department respectfully requests that this tribunal enter an order compelling Appellants, jointly and severally, to post a bond or pay the civil penalty of \$1,471,675.00 within 30 days of the date of the order.

BY:



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing BRIEF IN IN OPPOSITION TO APPELLANTS' INABILITY TO PAY CLAIM was served upon the following counsel of record by electronic mail, on this 13th day of November, 2017:

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