



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

DEC 16 2019

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BY CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Theodore Fiore, President
T. Fiore Demolition, Inc.
457 Wilson Ave.
Newark, NJ 07105

Re: In the Matter of: T. Fiore Demolition, Inc.
Docket No. CAA-02-2016-1203

Dear Mr. Fiore,

I am writing to inform you that on January 2, 2020, in response to a request from the Regional Judicial Officer (RJO) in this matter, I plan to provide to the RJO electronic copies in Microsoft Word format of the Supplemental Motion and Incorporated Memorandum in Support of Supplemental Motion Providing Confirmation of Service of the Complaint on the Respondent. This electronic copy will be identical to the physical copy previously submitted by EPA, except that it will be unsigned (will not have the signatures that appear on the physical copy). A hard copy of this electronic file is enclosed with this letter. Since I am not aware of your email address, I will be unable to copy you on this electronic communication, but will mail you a print copy of the email.

If you have any concern or objection to this action, you may provide a written response to the RJO, copying me, by December 31, 2019. If you would like, you may also contact me via phone at (212) 637-3263 or email at froikin.sara@epa.gov.

Sincerely,

Sara Froikin
Assistant Regional Counsel
Office of Regional Counsel, Air Branch

Enclosures

Cc: Helen S. Ferrara, Regional Judicial Officer

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

In re:

T. Fiore Demolition, Inc.

Respondent

In a proceeding under
Section 113(d) of the Clean Air Act

**SUPPLEMENTAL MOTION AND
INCORPORATED MEMORANDUM IN
SUPPORT OF SUPPLEMENTAL
MOTION PROVIDING
CONFIRMATION OF SERVICE OF
THE COMPLAINT ON THE
RESPONDENT**

CAA-02-2016-1203

**SUPPLEMENTAL MOTION AND INCORPORATED MEMORANDUM IN SUPPORT
OF SUPPLEMENTAL MOTION PROVIDING CONFIRMATION OF SERVICE OF
THE COMPLAINT ON THE RESPONDENT**

Complainant by and through EPA, Region 2, Office of Regional Counsel, has previously moved for a default judgment assessing a penalty against Respondent T. Fiore Demolition, Inc. On October 29, 2019, Complainant was ordered “to provide, by motion, any confirmation it may have that Respondent was successfully served on the date claimed.” Complainant now moves the Presiding Officer to find service of process for the complaint was adequate.

Under the Consolidated Rules of Practice, service of a complaint shall be “on respondent, or a representative authorized to receive service on respondent's behalf,” and can be accomplished, *inter alia*, by certified mail with a return receipt requested. 40 C.F.R. § 22.5(b)(1)(i). Under 40 C.F.R. § 22.5(b)(1)(ii)(A), “[w]here respondent is a domestic or foreign corporation, a partnership, or an unincorporated association which is subject to suit under a common name, complainant shall serve an officer, partner, a managing or general agent, or any other person authorized by appointment or by Federal or State law to receive service of process.” Service of a complaint is complete when the return receipt is signed. *Id.* § 22.7(c). Due process

is satisfied, even if actual notice is not achieved, if an agency employs a procedure reasonably calculated to achieve actual notice. See *In re C.W. Smith, Grady Smith, & Smith's Lake Corp.*, Docket No. CWA-04-2001-1501, 2002 WL 257696, at *8 (E.P.A. A.L.J. Feb. 6, 2002) (citing *Katzson Bros., Inc. v. U.S. E.P.A.*, 839 F.2d 1396, 1400 (10th Cir. 1988)). In addition, “[t]he achievement of actual service of process obviates the failure of Complainant to strictly comply with the service of process procedures of the Rules of Practice.” *In re C.W. Smith, Grady Smith, & Smith's Lake Corp.*, at *6.

For service of process via certified mail under the Consolidated Rules of Practice, the Tenth Circuit in *Katzson* notes that requiring any more than the addressing of the letter to a proper recipient under the EPA’s Consolidated Rules of Practice “would severely hinder service of process on corporations by certified mail, since the postal service employee would have to wait on the corporation’s premises until the officer, partner, or agent could sign the return receipt.” *Katzson Bros., Inc.* at 1399; see also *In re Medzam, Ltd.*, 4 E.A.D. 87, 93 (E.A.B. 1992) (“[w]hen serving a Complaint by mail, Complainant has control over how the mail is addressed but none whatsoever over who receives and signs for it on behalf of the Respondent.”).¹ The EAB in 2014 further noted that the part 22 rules authorizing service of a complaint on a corporation by certified mail do not require the EPA to take the further step of using USPS “restricted delivery,” which would require the signature of the specific person listed as the addressee. See *In re Jonway Motorcycle (USA) Co., Ltd, et al.*, 2014 WL 8060919, at *4 n.14 (E.A.B. Nov. 14, 2014) (noting this distinction); see U.S. Postal Service website at <https://www.usps.com/ship/insurance-extra-services.htm> for additional description of restricted delivery.

The EPA filed the complaint in this matter on Sept. 13, 2016. Service of the complaint on the Respondent was made by certified mail with return receipt requested. The complaint was

¹ Note that *Katzson Bros.* and *Medzam, Ltd.* were decided under an earlier version of the current part 22 rules, under which service was considered effective upon mailing as long as it was “directed to” the proper person. This language was revised in 1999, and both the proposed and final rule preambles effectuating the revision describe the change as “clarify[ing]”; neither preamble describes any intent to narrow the means of service by certified mail. See Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 64 Fed. Reg. 40138, 40146 (finalized July 23, 1999); Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 63 Fed. Reg. 9464, 9468 (proposed Feb. 25, 1998).

mailed to “Theodore Fiore, President, T. Fiore Demolition, Inc., 457 Wilson Ave, Newark, NJ 07105.” Mr. Fiore, as the company’s president, was a proper addressee for the mailed complaint. 457 Wilson Ave is T. Fiore Demolition, Inc.’s business address, and it is the address the company used in signing the contracts with the Township of Brick for the demolition work at issue in this matter. *See* Attachment A (contract with Brick Township).

Complainant here provides, as Attachment B, a copy of the signed and dated green card, as it was returned to EPA. According to the green card, the package was received and signed for at T. Fiore Demolition, Inc.’s mailing address three days later on “9-16” (September 16). *See* Attachment B (green card); *see also* Attachment C (Declaration of Sara Froikin).

Respondent T. Fiore Demolition, Inc. is a “domestic profit corporation.” *See* Attachment D (State of New Jersey’s Division of Revenue and Enterprise Services Business Name Search, from Nov. 1, 2019). Thus, as discussed above, the complaint may be served on “an officer, partner, a managing or general agent, or any other person authorized by appointment or by Federal or State law to receive service of process.” The green card appears to be signed by “A. McGriff.” According to the website LinkedIn, an individual named AlNisha McGriff lists in her “experience” a position in “accounts receivables” for T. Fiore Demolition, Inc. *See* Attachment E (AlNisha McGriff LinkedIn profile). At a company such as T. Fiore Demolition, Inc., it would be reasonable for an office worker such as an employee in accounts receivables to be considered a general agent for purposes of receiving and signing for the mail and for knowing how to direct it properly within the company. EPA has further reason to believe that AlNisha McGriff regularly received and signed for the mail for the company, as Ms. McGriff also signed the green card for EPA’s Dec. 23, 2016 reminder letter (previously provided as Attachment C to the Memorandum in Support of Complainant’s Motion for Default Judgment on Civil Penalty).

Further, Mr. Fiore himself signed the green card for EPA’s second reminder letter on Feb. 8, 2018 (Attachment D to the previously provided Memorandum in Support of Complainant’s Motion for Default Judgment on Civil Penalty). This letter included as attachments copies of both the complaint and the first reminder letter. Mr. Fiore also left a voicemail for Complainant’s counsel, Sara Froikin, on April 29, 2019, and cited the case docket

number (Docket #CAA-02-2016-1203) in his voicemail.² *See* Attachment C (Declaration of Sara Froikin). The combination of the Feb. 8, 2018 green card and the voicemail indicates that Mr. Fiore and T. Fiore Demolition, Inc. are on actual notice of this matter.

Complainant is serving on the Respondent by certified mail the following documents:

- i. the Complainant's Supplemental Motion and Incorporated Memorandum in Support of Supplemental Motion Providing Confirmation of Service of the Complaint on the Respondent; and
- ii. Attachments to the Complainant's Supplemental Motion and Incorporated Memorandum in Support of Supplemental Motion Providing Confirmation of Service of the Complaint on the Respondent.

As per the Presiding Officer's October 29, 2019 Order, any response by the Respondent to Complainant's present motion and accompanying documents must be filed within twenty (20) days after this motion is filed with the Regional Hearing Clerk, and in accordance with 40 C.F.R. § 22.16(b) (Response to Motions).

In accordance with 40 C.F.R. § 22.5(a), the original and one copy of any response to this motion and any supporting documents must be filed at the following address:

Karen Maples
Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 2
290 Broadway - 16th Floor
New York, New York 10007-1866

A copy of any response to this motion and any supporting documents, as well as copies of all other papers filed in this matter, are to be served on EPA to the attention of EPA counsel at the following address:

² At the time of the Motion for Default Judgment, Complainant was aware that Respondent's Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the District of New Jersey was dismissed. However, Respondent has in fact been undergoing a state chancery proceeding in the Superior Court of New Jersey, Chancery Division, Docket No. C-257-09, which is the state equivalent of a federal bankruptcy proceeding. Mr. Fiore informed the Respondent of the state chancery proceeding via his April 29, 2019 voicemail. Complainant intends to enforce any penalty from a default judgment in the chancery proceeding.

Sara Froikin
Assistant Regional Counsel
Office of Regional Counsel, Air Branch
U.S. Environmental Protection Agency - Region 2
290 Broadway - 16th Floor
New York, New York 10007-1866

Complainant has previously sent (along with the Complaint) the Respondent a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, found at 40 C.F.R. Part 22.

Dated: _____, 2019

New York, New York

Respectfully submitted,

Sara Froikin
Assistant Regional Counsel
Office of Regional Counsel
Air Branch
U.S. Environmental Protection Agency
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New York, New York 10007-1866
212-637-3263
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