

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
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Philadelphia, Pennsylvania 19103-2029

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Hon. Susan Biro
Administrative Law Judge
Mail Code 1900L
U. S. Environmental Protection Agency
401 M Street, S.W.
Washington, DC 20460

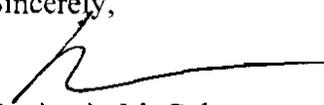
5/5/11

Re: Mr. Thomas Caracio et. al.
Docket No. CAA-03-2010-0408
Complainant's Motion In Limine and Motion to Disregard and Strike Pleadings in
Respondent Caracio's Answer; Complaint's Motion to Strike Respondent Zito's
Amended Answer, and a true and correct copy of a recent CAFO with
Respondent ScottA Equipment & Materials Sales LLC

Dear Judge Biro:

Please find enclosed a copy of Complainant's *Motion In Limine and Motion to Disregard and Strike Pleadings in Respondent Caracio's Answer* as well as a separate *Motion to Strike Respondent Zito's Amended Answer* in the above captioned matter, the originals of which were filed today with the EPA Regional Hearing Clerk. Copies have been served upon the Respondents as described in the attached Certificate of Service. I am also enclosing a copy of a recent CAFO with Respondent ScottA Equipment & Materials Sales LLC, which was filed before EPA Counsel received your "Order of Designation". Also, please note that Mr. Caracio's name is misspelled in your office's caption.

Sincerely,


Benjamin M. Cohan
Sr. Assistant Regional Counsel

Enclosures

cc: Ms. Lydia Guy (3RC00)
Regional Hearing Clerk
Paul Logan, Esquire (Current Counsel for Scotta Equipment & Materials Sales, LLC)
Leonard N. Zito, Trustee (*Pro Se*)
Mathew Goodrich, Esq. (Counsel for Mr. Thomas Caracio)

THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103

IN RE:

Mr. Thomas Caracio
P.O. Box 218
Wind Gap, PA 18091

and

Mr. Leonard N. Zito, Trustee
641 Market Street
Bangor, PA 18013

and

Scotta Equipment & Materials Sales LLC
HC #1 P.O. Box 70
Saylorsburg, PA 18353

Respondents

Former Sandt's Market
1021 South Broadway
Wind Gap, PA 18091

Facility

Docket No. CAA-03-2010-0408

**MOTION IN LIMINE
&
MOTION TO DISREGARD AND STRIKE PLEADINGS IN RESPONDENT
CARACIO'S ANSWER**

I. Introduction

Pursuant to 40 C.F.R. § 22.22 and for the reasons set forth and discussed herein, Complainant United States Environmental Protection Agency ("Complainant" or "EPA"), hereby moves this Court to grant Complainant's Motion in Limine and Motion to Disregard and Strike certain allegations set forth in Respondent Caracio's Answer, as identified below. The purpose of this Motion is to strike from the record certain allegations or claims stated in Respondent Caracio's Answer (as well as to exclude from introduction or presentation at hearing, and to exclude from admission into evidence at hearing) as follows:

- A. All claims/allegations set forth in Sections VI -VII of Respondent Caracio's Answer of April 5, 2011, relating to confidential settlement discussions held at EPA's offices on November 3, 2010 ("Confidential Settlement Meeting").

In support of its motion, Complainant states as follows:

II. The Appropriate Legal Standard for Granting a Motion In Limine is to Exclude Evidence that is Clearly Inadmissible on all Potential Grounds.

The Consolidated Rules of Practice authorize a party to make any written motion in an action. See 40 C.F.R. § 22.16. Also, pursuant to 40 C.F.R. § 22.22(a), the Presiding Officer has authority to rule on the admissibility of evidence and is directed to admit all evidence, "...except that evidence relating to settlement which would be excluded in the federal courts under Rule

408 of the Federal Rules of Evidence (28 U.S.C.) is *not admissable*.”(Emphasis Added). The Rules of Practice, the Federal Rules of Civil Procedure and the Federal Rules of Evidence do not explicitly authorize a motion in limine, however, the United States Supreme Court has stated that such in limine rulings “ha[ve] developed pursuant to the district court’s inherent authority to manage the course of trials.” Luce v. United States, 469 U.S. 38, 41 n.4 (1984).

The purpose of a motion in limine is “to aid the trial process by enabling the Court to rule *in advance of trial on the relevance of certain forecasted evidence*, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial.” Palmieri v. Defaria, 88 F.3d 136, 141 (2d Cir. 1996) (quoting Banque Hypothecaire Du Canton De Geneve v. Union Mines, 652 F. Supp. 1400, 1401 (D. Md. 1987)). *See also* Jaroslawicz v. Engelhard Corp., No. 84-3641 (CSF), 1989 U.S. Dist. Lexis 3332, at *2 (D. N.J. Apr. 5, 1989) (“In certain circumstances, motions in limine are considered acceptable and efficient tools of trial management.”). In limine motions also have value for the parties to the proceeding for such motions “may enable the parties to avoid the costs of bringing witnesses to the courtroom and will enable them to concentrate their energies (and organizational skills) on the subjects that will actually be resolved at trial.” Pivot Point Int’l, Inc. v. Charlene Products, Inc., 932 F. Supp. 220, 222 (N.D. Ill. 1996) (“Knowledge of what lies in store also may promote settlement by closing the gap between the parties’ estimates of the likely outcome.”). Likewise, a motion in limine may perform the salutary purpose of insulating the trier of fact “from potentially harmful or unfairly prejudicial evidence.” Ross v. City of Evanston, No. 96-C-6042, 1998 U.S. Dist. Lexis 5032, at *6 (N.D. Ill. Apr. 10, 1998) (citing McCormick on EVIDENCE, § 52 at 202-203 (4th ed. 1992)). *See also* Johnson v. Pistilli, No. 95-C-6424, 1996 U.S. Dist. Lexis 14931, at *4 (N.D. Ill. Oct. 7, 1996) (“Motions in limine are primarily intended to prevent unfair prejudice, to the

objecting party, usually arising from an irrelevant but compelling inference.”).

A motion in limine to exclude evidence should be granted when “evidence is clearly inadmissible on all potential grounds.” Hawthorne Partners v. AT&T Technologies, Inc., 831 F. Supp. 1398, 1400-1401 (N.D. Ill. 1993). The movant must demonstrate that the evidence is “inadmissible on any relevant ground,” Koch v. Koch Industries, Inc., 2 F. Supp. 2d 1385, 1388 (D. Kan. 1998), and must provide the “necessary specificity with respect to the evidence to be excluded. . .”, National Union Fire Ins. Co. of Pittsburgh v. L.E. Myers Co., 937 F. Supp. 276, 287 (S.D.N.Y. 1996).

Consistent with the above legal analysis, this motion, if granted, has the “salutary purpose of insulating the trier of fact” from the unfairly prejudicial narrative of confidential settlement discussions stated in Respondent Caracio’s Answer, and will further serve to “avoid the costs of bringing witnesses to the courtroom”, such as Counsel for Respondents Thomas Caracio and Scott A Equipment & Materials Sales, LLC, Mr. Paul Logan, Esq., who held himself forth as clearly representing both Respondents at the settlement table.

III. Sections VI and VII, pages 14-15, of Respondent Caracio’s Answer Relating to the “Confidential Settlement Meeting” Should Be Stricken From the Pleadings, and Any Prospective Evidence Relating to Confidential Settlement Discussions Should Be Excluded from Introduction and Admission into Evidence At Hearing Because it is Clearly Inadmissible on all Potential Grounds, Under the Consolidated Rules of Practice, the Federal Rules of Evidence, and Common Law

As stated above, Part 22 of the “Consolidated Rules of Practice” for Administrative agencies provides that “evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence is not admissible.” 40 C.F.R. § 22.22 (a)

(1). Rule 408 of the Federal Rules of Evidence states:

(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish--or accepting or offering or promising to accept--a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.¹

An examination of Sections VI and VII of Respondent's Answer evidence that the accounting of confidential settlement discussions was offered for the prohibited uses set forth in subsection (a)(1-2), above, and for no other discernable purpose. Indeed, there could not be any other permissible and discernable purpose because the very nature and purpose of the settlement discussions related to Respondents' "liability for, invalidity of, or amount of a claim" – and the settlement of any civil penalties relating thereto.² In other words, Respondent's albeit confusing

¹ Because this is not a criminal case, and the confidential details of settlement were, on their face, clearly offered to proffer evidence within the exclusion set forth in subdivision (a)(1-2) of 408, EPA has not included a discussion of permitted uses under 408 of the Federal Rule of Evidence. Had Respondent's discussion of confidential settlement discussions been offered for a different purpose (e.g. proving witness bias, negating a contention of undue delay, proving an effort to obstruct a criminal investigation etc.), EPA would have addressed these potential exemptions to the applicability of 408 accordingly.

² Complainant further asserts that in Respondent's settlement related narrative, which is the subject of this Motion, Respondent and Respondent's counsel incorrectly characterize Complainant's settlement offer, and incorrectly or falsely characterize statements of Complainant's Counsel and others. In other words, whether intended or not, Respondent's

and factually inaccurate accounting of settlement discussions pertain to liability for, offers of compromise of, and the parties “conduct or statements made in compromise negotiations...” – within the ambit of prohibited uses stated in subdivision (a). Clearly, on its face, this (mis)characterization of confidential settlement discussions is forbidden. Indeed, In the Matter of U.S. Air Force, Tinker Air Force Base, ALJ Gunning endorsed this straightforward application of Federal Rule of Evidence 408 in the administrative law setting. In holding that penalty offers were excluded from evidence under 408 and should be “stricken and disregarded as inadmissible settlement material”, the Court agreed with Complainant that the “Federal Rules of Evidence, the Federal Rules of Procedure, and case law *support the confidentiality of statements shared at settlement meetings by excluding settlement discussions and materials from formal testimony.*” 2000 EPA ALJ LEXIS 63, 9-12 (Emphasis Added) . Because such evidence concerning statements relating to settlement would be excluded under Rule 408, “such evidence is not admissible under § 22.22 (a) (1) of the Rules of Practice.” Id. at 10. *See also, BP Oil Supply v. United States*, 44 Cust. B. & Dec. No. 36, 7 (2010)(disregarding confidential settlement communications as inadmissible under 408 and reasoning that: 1) the rule promotes the settlement of disputes prior to litigation by recognizing that compromises are more likely to result when parties are free to speak openly during settlement negotiations and are not inhibited by the fear that statements made therein may later be used against them and 2) the rule seeks to exclude irrelevant or unreliable evidence, recognizing that parties will often settle disputes for reasons completely unrelated to the merits of the claim)(citing *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.* 332 F. 3d 976, 980-981 (6th Cir. 2003)). A court may also consider

Answer substantially confuses and misconstrues statements made during confidential settlement discussions.

“whether admitting the evidence would be contrary to the public policy of encouraging settlements and avoiding wasteful litigation.” *Id.* at 7-8.

IV. ADMITTING THE CONFIDENTIAL SETTLEMENT DISCUSSIONS IN QUESTION WOULD BE CONTRARY TO PUBLIC POLICY OF ENCOURAGING SETTLEMENTS AND AVOIDING WASTEFUL LITIGATION

Notwithstanding the above stated legal imperative for this Motion, there remain compelling policy reasons which dictate in favor of disregarding and striking the subject narrative of confidential settlement discussions set forth in Respondent Carracio’s Answer. First among them is the chilling effect caused by Respondent’s disingenuous actions in this regard. This chilling effect is not hypothetical at all – it is indeed one of the driving reasons why Complainant declined ADR, and why this matter may not be resolved through confidential settlement discussions.³

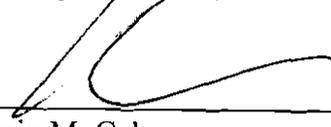
WHEREFORE, Complainant asserts and moves, for the reasons set forth above, that:

- A. All claims/allegations set forth in Sections VI -VII of Respondent Caracio’s Answer of April 5, 2011, relating to purported statements made during confidential settlement discussions held at EPA’s offices on November 3, 2010 (“Confidential Settlement Meeting”) be stricken (i.e. precluded) from the pleadings in this matter.
- B. Respondent Caracio and his new Counsel be precluded from introducing or presenting at hearing, or attempting to admit into evidence at hearing, all communications relating to settlement discussions, past or present, including the narrative of confidential settlement discussions set forth in Sections VI-VII of his Answer.

³ It is noted that all parties, including Mr. Caracio’s Counsel at the time (i.e. Mr. Paul Logan) expressly agreed and understood that settlement discussions were confidential. **Thus, Mr. Logan stated to Complainant’s Counsel by teleconference that he does not object to the subject motions.**

C. Any other relief that this Court may deem appropriate, *Sua Sponte*.

Respectfully Submitted,



Benjamin M. Cohan
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U.S. EPA Region III
1650 Arch Street
Philadelphia, PA 19103
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THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
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Philadelphia, Pennsylvania 19103

IN RE:

Mr. Thomas Caracio
P.O. Box 218
Wind Gap, PA 18091

and

Mr. Leonard N. Zito, Trustee
641 Market Street
Bangor, PA 18013

and

Scotta Equipment & Materials Sales LLC
HC #1 P.O. Box 70
Saylorsburg, PA 18353

Respondents

Former Sandt's Market
1021 South Broadway
Wind Gap, PA 18091

Facility

Docket No. CAA-03-2010-0408

MOTION TO STRIKE RESPONDENT ZITO'S AMENDED ANSWER

I. Introduction and Relevant Procedural and Factual Background

Pursuant to 40 C.F.R. § 22.15(e), and for the reasons set forth and discussed herein, Complainant United States Environmental Protection Agency ("Complainant" or "EPA"), hereby moves this Court to grant Complainant's Motion to Strike Respondent Leonard N. Zito, Trustee's (Respondent Zito's) Amended Answer, dated March 31, 2011. The relevant procedural and factual background is summarized as follows: 1) On or about September 29, 2010, Complainant's Counsel filed the subject Complaint in this matter and mailed same via certified mail to the parties; 2) Although Respondent Zito's certified return receipt does not bear a specific date, Counsel for Complainant believes that, based upon the dates that the other Respondents received the Complaint, Respondent Zito received the Complaint on or about October 4, 2010; 3) By letter dated October 12, 2010, Respondent Zito acknowledged receipt of the subject Complaint by filing an "Answer to Administrative Complaint and Request for Hearing" dated October 12, 2010 ("original Answer"); 4) Respondent Zito subsequently attempted to Amend his Answer by letter dated March 31, 2011(enclosing an Amended Answer without the requisite Motion and Certificate of Service).¹ Respondent Zito filed the Amended Answer without Motion to this Court, and without providing Complainant the opportunity to respond as set forth in 40 C.F.R. 22.16(b)(Response to Motions). To this date, Complainant does not know why Respondent Zito attempted to file an Amended Answer, and why he did so in contravention of Part 22.²

¹ The cover letter to the Amended Answer copies the wrong parties as well – i.e. Mr. Caracio is in fact represented by Mr. Goodrich, and ScottA Equipment & Material Sales, LLC is represented by Mr. Paul Logan, Esq.

² Complainant's Counsel is not suggesting that he will necessarily file a motion in opposition to any motion to amend Respondent Zito's Answer; but Complainant does have a right to know what alleged facts have changed, and why these amended allegations were not

In support of its motion, Complainant states as follows:

II. Pursuant to 40 C.F.R. § 22.1(a)(2), the “Consolidated Rules of Practice”³ Govern All Administrative Adjudicatory Proceedings for, *Inter Alia*, the Case at Bar. As Such, All Parties are Required to Comply with the Consolidated Rules of Practice, Accordingly.

This matter is governed by Part 22. See 40 C.F.R. § 22.1(a). Also, the Complaint in this matter identifies Part 22 as the governing rules for this matter, and Complainant provided each Respondent a copy of Part 22 when it served the Complaint upon the parties.

III. Despite Having Been Notified of Not Complying With Part 22, Respondent Zito Failed and Continues to Fail to Comply with the Consolidated Rules of Practice in Filing An Amended Answer Which Does Not Comply With 40 C.F.R. § 22.15(e) and 40 C.F.R. § 22.16.

On 4/05/2011, Counsel for Complainant sent Respondent Zito a letter notifying him again that these proceedings were governed by Part 22 (as stated clearly in the Complaint), and that he must comply with 40 C.F.R. § 22.15(e) and 40 C.F.R. § 22.16 when attempting to amend a pleading (Exhibit A). Respondent Zito did not reply to the subject letter.

IV. The Filing of Respondent Zito’s Amended Answer Without Motion Clearly Runs Afoul of the Express Directive and Purpose of Part 22 , and Must Be Stricken Pending Compliance with the Governing Rules of Administrative Practice, Which

accounted for in the original Answer.

³ As used herein, the “Consolidated Rules of Practice” or “Part 22” is a short hand reference to “Part 22– Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits”, 40 C.F.R. Part 22. Respondent Zito received a copy of Part 22 when Complainant filed its Complaint in this matter.

Are Intended to Afford Substantive and Procedural Due Process, and a Level Playing Field to All Parties.

40 C.F.R. 40 C.F.R. § 22.15(e)(Amendment of the answer) states “[t]he respondent may amend the answer to the complaint upon motion granted by the [ALJ].” 40 C.F.R. § 22.16 sets forth the manner and content of all Motions, the other Party’s right to respond to Motion(s), and the Court’s decisional authority pertaining thereto.

Respondent Zito’s Amended Answer runs afoul of Part 22 because it was not preceded by the requisite Motion; and nor does it provide Complainant’s Counsel the opportunity to respond accordingly. Moreover, it undercuts and nullifies the decision making authority of this Court as expressly granted and set forth in 40 C.F.R. § 22.15(c)(stating that the Court “...shall rule on all motions filed...”).

WHEREFORE, Complainant asserts and moves, for the reasons set forth above, that:

- A. This Court strike Respondent Zito’s Amended Answer from the record and that he be directed or reminded to comply with the governing Part 22 process.
- B. Any other relief that this Court may deem appropriate, *Sua Sponte*.

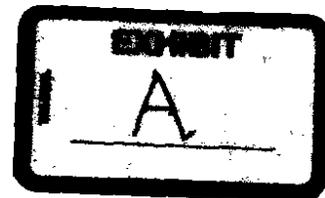
Respectfully Submitted,



Benjamin M. Cohan
Sr. Assistant Regional Counsel
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1650 Arch Street
Philadelphia, PA 19103
Tel. (215)814-2618
Fax (215) 814-2603



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103



BY UPS OVERNIGHT DELIVERY

4/05/2011

Judge Leonard N. Zito, Trustee
Northampton County Courthouse
699 Washington Street
Easton, PA 18042

Re: EPA Docket No. CAA-03-2010-0408

Dear Trustee Zito:

I received your Amended Answer today; it runs afoul of Part 22 and is not acceptable. I am writing to inform you that if you are seeking to amend your answer (originally filed October 12, 2010), you may do so only upon motion and order of the Presiding Officer. See 40 C.F.R. § 22.15(e) (Amendment of the Answer upon motion). Any motion on these grounds must comport with 40 C.F.R. § 22.16 (Motions). I provided you with a copy of the Consolidated Rules of Practice (part 22) with the Complaint, which you should have in hand. I will provide you some additional time to file your motion requesting leave to file an amended Answer before I must move to strike your amended Answer on the grounds stated herein.

Sincerely,

Benjamin M. Cohan
Senior Assistant Regional Counsel

cc: Richard Ponak (3LC62)

ben e

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JUANITA WOODYARD 215-814-3206 US EPA 1650 ARCH ST PHILADELPHIA PA 19103	0.0 LBS LTR 1 OF 1	SHIP-TO: JUDGE LEONARD N. ZITO, ESQUIRE NORTHAMPTON COUNTY COURTHOUSE 699 WASHINGTON STREET EASTON PA 18042	PA 181 9-16 	UPS NEXT DAY AIR 1 TRACKING #: 1Z A43 F71 24 9711 6897 	 <small>CS 19113 WXPB70.12.0A 01/2011</small> BILLING: P/P SIGNATURE REQUIRED
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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

IN RE:

Mr. Thomas Caracio
P.O. Box 218
Wind Gap, PA 18091

and

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Facility

Docket No. CAA-03-2010-0408

CERTIFICATE OF SERVICE

I hereby certify that the original of Complainant's **Motion In Limine and Motion to Disregard and Strike Respondent Caracio's Answer and Motion to Strike Respondent Zito's Amended Answer** was hand delivered to Lydia Guy, Regional Hearing Clerk, EPA Region III, and that true and correct copies were mailed to each of the following persons in the following manner:

VIA EPA POUCH MAIL, TO:

Hon. Susan Biro
Administrative Law Judge
Mail Code 1900L
U. S. Environmental Protection Agency
401 M Street, S.W.
Washington, DC 20460

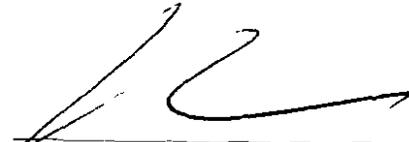
VIA UPS DELIVERY, TO:

Matthew Goodridge
Martino, Karasek, Martino and Lopiano-Reilly, LLP
641 Market Street
Bangor, Northampton County, PA 18013

Trustee Leonard N. Zito (Judge)
Northampton County Courthouse
669 Washington Street
Easton, PA 18042

Paul Logan, Esq.
475 Allendale Road
King of Prussia, PA 19406

5/9/11
Date


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