

FILE

RECEIVED-DOCKET
2007 FEB 20 PM 12:4
PUCO

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaints of S.G. Foods, Inc., et al.; Miles Management Corp., et al.; Allianz US Global Risk Insurance Company, et al.; Lexington Insurance Company, et al.; and BMW Pizza, Inc. and DPNY, Inc., et al.,)

Complainants,)

Case Nos. 04-28-EL-CSS
05-803-EL-CSS
05-1011-EL-CSS
05-1012-EL-CSS
05-1014-EL-CSS

v.)

The Cleveland Electric Illuminating Company, Ohio Edison Company, Toledo Edison Company, and American Transmission Systems, Inc.,)

Respondents.)

MOTION TO DISMISS CERTAIN COMPLAINANTS FOR FAILURE TO RESPOND TO DISCOVERY

Respondents, pursuant to the Attorney Examiner's Entry of February 5, 2007, respectfully request an Entry dismissing the following complainants from this action for failure to respond to discovery:

Case No. 04-28 ("S.G. Foods")

Pak Yan Lui

John Summers

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
Technician [Signature] Date Processed 2-20-07

Case No. 05-803 (“Miles Management”)

Regional Therapy, Inc.

Case No. 05-1014 (“BMW Pizza”)

The Cincinnati Insurance Company

The Cincinnati Indemnity Company

The Cincinnati Casualty Companies

Selective Way Insurance Company

Selective Insurance Company of America

Selective Insurance Company of New York

United States Fire Insurance Company

Continental Casualty Insurance Company

Transportation Insurance Company

National Fire Insurance Companies of Hartford

Valley Forge Insurance Company

Transcontinental Insurance Company

American Casualty Insurance Company of Reading, PA

Columbia Casualty Insurance Company

Republic Engineered Products, LLC¹

Cooker Restaurant Corp. (both locations identified in Second Amended Complaint)

Lamrite West, Inc.

L J Manufacturing, Inc.

Oral Maxillofacial Surgeons

¹ Republic Engineered Products is also an insured of the complainants in Case Nos. 05-1011 and 05-1012. This motion seeks to dismiss only the subrogation claims for Republic that are brought in Case No. 05-1014.

Quiznos Subs

Mustard Seed Health Food Market

The Mad Crab Inc.

AVCA Corporation and Sigmatech

Hyde Park Restaurant Systems

This motion should be granted for the reasons set forth in the attached Memorandum in Support.

February 20, 2007

Respectfully submitted,



David A. Kutik (Counsel of Record)

Meggan A. Rawlin

JONES DAY

North Point

901 Lakeside Avenue

Cleveland, Ohio 44114

Telephone: 216-586-3939

Facsimile: 216-579-0212

E-mail: dakutik@jonesday.com

Mark A. Whitt

JONES DAY

Mailing Address:

P.O. Box 165017

Columbus, Ohio 43216-5017

Street Address:

325 John H. McConnell Blvd., Suite 600

Columbus, Ohio 43215-2673

Telephone: 614-469-3939

Facsimile: 614-461-4198

E-mail: mawhitt@jonesday.com

Attorneys for Respondents

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaints of S.G. Foods, Inc., et al.; Miles Management Corp., et al.; Allianz US Global Risk Insurance Company, et al.; Lexington Insurance Company, et al.; and BMW Pizza, Inc. and DPNY, Inc., et al.,)

Complainants,)

**Case Nos. 04-28-EL-CSS
05-803-EL-CSS
05-1011-EL-CSS
05-1012-EL-CSS
05-1014-EL-CSS**

v.)

The Cleveland Electric Illuminating Company, Ohio Edison Company, Toledo Edison Company, and American Transmission Systems, Inc.,)

Respondents.)

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS CERTAIN
COMPLAINANTS FOR FAILURE TO RESPOND TO DISCOVERY**

Because certain Complainants have failed to respond to discovery, after having over four months to respond and having been ordered to do so, the Commission must dismiss the claims relating to those Complainants.

On January 16, 2007, Respondents filed a Motion to Compel because none of the Complainants in Case Nos. 04-28, 05-803 or 05-1014 had answered Respondents' discovery as of the date that motion was filed. The Attorney Examiner issued an Entry, dated February 5, 2007, ordering any Complainant that had not yet responded to discovery to do so within 10 days.

(Entry, ¶12.) Any Complainant unable to respond within 10 days was instructed to “immediately contact the respondents to arrange a mutually agreeable schedule.” (*Id.*)

Numerous Complainants have ignored the Attorney Examiner’s Entry. The Complainants discussed below have neither provided discovery responses, nor have they contacted Respondents’ counsel to arrange a schedule for doing so. These Complainants’ flagrant disregard of the Attorney Examiner’s discovery order is ample reason to dismiss them from this action. Ohio Admin. Code § 4901-1023(F); *WeShare, Inc. v. Ameritech Ohio*, Case No. 96-770-TP-CSS (Entry of Oct. 9, 1997, at 3-4) (“Failure to respond timely to a discovery request could result in dismissal of the complaint by the Commission or other action deemed appropriate by the Commission.”).

Case No. 04-28

This Complaint was brought by S.G Foods, Inc., Pak Yan Lui and John Summers, all alleging to be customers of certain Respondents, receiving service at different addresses. Complainant S.G. Foods served discovery responses on February 9, 2007.² The two other Complainants, Pak Yan Lui and John Summers, still have not provided any discovery responses. Contrary to the suggestion made by S.G. Foods, because two of the three Complainants in this case did not respond to discovery, the mere fact that S.G. Foods responded (albeit meagerly) does not “moot” the motion to compel or the Attorney Examiner’s order with respect to the two nonresponding Complainants. (*See* Response to Motion to Compel.)

Although the discovery responses of S.G. Foods are verified by Complainant Pak Yan Lui, the responses do contain any information about an outage allegedly sustained by

² These responses are deficient in several respects, and, in an effort to avoid the need for the involvement of the Attorney Examiner, Respondents will attempt to address these deficiencies with S.G.Foods’ counsel in the near future.

complainant Lui. The only outage identified in the responses relates to service at 5555 Brecksville Road. (Response to Interrogatory No. 1(c).) According to the caption of the Complaint and Respondents' records, this is the address for Complainant S.G. Foods. The caption lists different addresses for Complainants Lui and Summers. Pak Yan Lui's status as an officer, shareholder or other representative of S.G. Foods, Inc. cannot give rise to standing to maintain a complaint in an individual capacity. A corporation is a distinct legal entity from its officers or representatives. Thus, Pak Yan Lui cannot remain a Complainant in this action based solely on its status as a representative of S.G. Foods. Pak Yan Lui, as well as John Summers, should be dismissed from this case.

Case No. 05-803

Three Complainants remain in this case: Alok Bhaji, M.D., Union House Bar and Regional Therapy, Inc. Complainants Alok Bhaji, M.D. and Union House Bar finally served discovery responses, albeit after Respondents filed their motion to compel.³ Complainant Regional Therapy, Inc., still has not provided responses. Nor has its counsel contacted Respondents' counsel to discuss when responses might be served. The Attorney Examiner's February 5, 2007 Entry clearly states that "any complainant" that has not yet responded to discovery must do so within 10 days, or seek leave from the Commission for an alternative schedule. Regional Therapy Inc. has violated the Attorney Examiner's Entry and must therefore be dismissed.

³ These responses, like those of S.G. Foods in Case No. 04-28, are deficient in many different ways, and, in an effort to avoid the involvement of the Attorney Examiner, Respondents will address these deficiencies with counsel.

Case No. 05-1014

This action involves 30 Complainants. Sixteen of the Complainants are insurance companies; the remainder are insureds on whose behalf the insurance companies allegedly paid claims. Despite the February 5 Entry directing *all* Complainants to provide discovery responses, as of this date, only two Complainants have done so. Complainants' responses reveal that Selective Insurance Company of South Carolina allegedly paid claims on behalf of Complainant Moordough, Inc. d/b/a Angelina's Pizza, and that Selective Insurance Company of the Southeast allegedly paid a claim to Stephen Clemente. All other claims in this complaint should be dismissed.

The Complainants that are the subject of this motion have had ample opportunity to respond to discovery. The discovery was served in September 2006. Respondents wrote letters in October 2006, and again in January 2007, asking Complainants for their responses. (*See* Respondents' Jan. 16, 2007 Memo. in Support of Motion to Compel.) Complainants ignored these letters, forcing Respondents to file a motion to compel. Only then did some responses begin to trickle in. The Attorney Examiner specifically instructed *all* Complainants that had not already responded to discovery to do so by February 15. The Complainants discussed above have proven that they are no more inclined to obey the Attorney Examiner's order than they are to honor the requests of opposing counsel for reasonable discovery deadlines. If the Attorney Examiner's entries in this case are to mean anything, they should be enforced. Under the circumstances here, fair enforcement means dismissal of all Complainants that have failed to answer Respondents' discovery as of the date of this motion.

February 20, 2007

Respectfully submitted,



David A. Kutik (Counsel of Record)
Meggan A. Rawlin
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Telephone: 216-586-3939
Facsimile: 216-579-0212
E-mail: dakutik@jonesday.com

Mark A. Whitt
JONES DAY
Mailing Address:
P.O. Box 165017
Columbus, Ohio 43216-5017
Street Address:
325 John H. McConnell Blvd., Suite 600
Columbus, Ohio 43215-2673
Telephone: 614-469-3939
Facsimile: 614-461-4198
E-mail: mawhitt@jonesday.com

Attorneys for Respondents

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion to Dismiss Certain Complainants for Failure to Respond to Discovery, and Memorandum in Support, was served by facsimile or e-mail and U.S. Mail to the following persons this 20th day of February, 2007.

Edward F. Siegel, Esq.
27600 Chagrin Boulevard, Suite 340
Cleveland, OH 44122

W. Craig Bashein, Esq.
Bashein & Bashein Co., L.P.A.
35th Floor, Terminal Tower
50 Public Square, Suite 3500
Cleveland, OH 44113

Francis E. Sweeney, Jr. Esq.
323 Lakeside Avenue, Suite 450
Cleveland, OH 44113

Joel Levin, Esq.
Aparesh Paul, Esq.
Levin & Associates Co., L.P.A.
The Tower at Erieview, Suite 1100
1301 East Ninth Street
Cleveland, OH 44114

Paul W. Flowers, Esq.
Paul W. Flowers Co., L.P.A.
50 Public Square, Suite 3500
Cleveland, OH 44113

Leslie E. Wargo, Esq.
McCarthy, Lebit, Crystal & Liffman Co.,
L.P.A.
101 West Prospect Avenue
1800 Midland Building
Cleveland, OH 44115

Mark S. Grotefeld, Esq.
Daniel G. Galivan, Esq.
Grotefeld & Denenberg, LLC
105 West Adams Street, Suite 2300
Chicago, IL 60603

Christina L. Weeks, Esq.
Matthew L. Friedman, Esq.
Grotefeld & Denenberg, LLC
21 E. Long Lake Road, Suite 200
Bloomfield Hills, MI 48304

Patrick J. O'Malley, Esq.
Keis George LLP
55 Public Square, Suite 800
Cleveland, OH 44113



Mark A. Whitt
An Attorney for Respondents