BEFORE THE NORTH CAROLINA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
RALEIGH, NORTH CAROLINA

COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA,	)	**DOCKET NO. OSHANC NO: 2024-6635**
	)	**INSPECTION NO.: 318273042**
COMPLAINANT,	)	**CSHO ID: S0709**
	)	
v.	)	
	)	**ORDER ON RESPONDENT'S MOTION**
	)	**TO STRIKE REQUESTS FOR ADMISSION**
BARNES FARMING CORP.	)	**AND FOR SANCTIONS**
and its successors,	)	
RESPONDENT.	)	

This matter is before the undersigned on Respondent's Motion for Sanctions and To Strike Complainant's Requests for Admission. Respondent Barnes Farming contends that it is entitled to seek sanctions, including having Complainant's discovery requests struck, based on its allegations that Complainant violated court orders. Respondent contends that Complainant has violated a N.C. Superior Court's order pertaining to individuals associated with Barnes Farming who challenged a motion to compel their testimony during the investigation of this matter. Respondent also alleges that where the subject matter of certain requests for admission pertain to a prior settlement agreement, a prior ruling by this Court and the N.C. Rules of Evidence prohibit Complainant's inquiry. On or about November 22, 2024 Complainant served One hundred forty-two Requests for Admission pursuant to 24 NCAC .03.0403 and N.C. Gen. Stat. § 1A-1, Rule 36. Respondent is objecting to fifty-three of the one hundred forty-two requests.

N.C. R. Civ. P. Rule 36(a) provides that a matter is admitted unless, within the time allowed, the party to whom the request is directed serves upon the party requesting the admission "a written answer or objection addressed to the matter." In addition, the Rule provides that "[i]f objection is made, the reasons therefor shall be *stated*" and the answering party "shall specifically deny the matter or set forth in detail the reasons why" the party cannot truthfully admit or deny the matter. *Emphasis supplied.* Thus, as an initial consideration, the proper procedure for Respondent to have followed was to answer the requests and to state its objections within fifteen days of service, not to file this motion.

Respondent's Motion and Memorandum in Support do not reveal whether the Respondent has answered the eighty-nine requests to which it does not object. Complainant has not asked the Court to deem admitted any unanswered Requests for Admission based on Respondent's failure to follow the provisions of Rule 36. Therefore, the undersigned will address the substantive issues raised.

The N.C. Agricultural Health and Safety (NC ASH) Division of the N.C. Department of Labor requested to interview witnesses John Barnes, Owner and President of Barnes Farming Corp., and Respondent's employees Angel Moreno, Martin Negrete, and, Jesus Nava Vargas. The NC ASH Compliance Officer was informed by Respondent's attorney that his firm represented only the corporation and did not represent these individuals, who had retained their own counsel. Contact information for the witnesses' counsel was provided to the Compliance Officer who sought cooperation from that attorney. Interviews were arranged and as each individual appeared for his respective interview, each responded to the questions posed by the Compliance Officer that they declined to answer based upon their Fifth Amendment right against self-incrimination.

Following the interviews, Complainant sought to compel the witnesses' responses. A motion to compel was heard by N.C. Superior Court Judge Cynthia King Sturges presiding in Nash County. The Motion to Compel was denied. In her Order Judge Sturges identified the witnesses as "the individual Respondents" which she distinguished from their employer. See *In Re Inspection of Barnes Farming*, No. 23CVS1695, Sturges, J. presiding (Nash County Mar 27, 2024), p1. ¶4 (finding that the administrative subpoenas were issued to the "individual respondents," previously identified as Moreno, Negrete, Vargas, and John Barnes, in care of the attorney representing their individual interests); p5. ¶6 (concluding that "eliciting specific answers from individual Respondents concerning a workplace fatality" did not outweigh the individuals' Fifth Amendment rights "against self-incrimination.")[1] As an initial matter, it is very clear that the scope of Judge Sturges' order only referred to the rights of the individual witnesses and did not extend to any alleged rights of the corporation.

Thus, even if Respondent had answered the discovery requests as required by the Rules and asserted a Fifth Amendment privilege against self-incrimination, the objection would be overruled. Our U.S. Supreme Court's jurisprudence has repeatedly established that the Fifth Amendment rights against self-incrimination are personal rights that do not extend to any corporation, including the Respondent in this case. *Braswell v. United States*, 487 U.S. 99, 100 (1988) (holding that corporate records' custodian, who was business owner, could not use Fifth Amendment right against self-incrimination to resist a subpoena and citing to *Fisher v. United States*, 425 U.S. 391 (1976), *Bellis v. United States*, 417 U.S. 85 (1974) and *United States v. Doe*, 465 U.S. 605 (1984) for the proposition that Supreme Court jurisprudence in this regard "is well established").

If Respondent is suggesting that it may assert a Fifth Amendment privilege because the discovery requests require testimonial responses from any of the individuals within the scope of Judge Sturges' Order, this assumption is incorrect. Unlike Rule 33, Rule 36 does not require that an individual be identified to answer on behalf of a corporate entity. The answers to Requests for Admission must be "signed by the party *or his attorney*" N.C. R. Civ. P. Rule 36(a). *Emphasis supplied.* Nevertheless, the answering corporation is required to make reasonable inquiries into the subject matter of a Request for Admission. Would this, then, be an "end run"

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[1]Based upon the briefs submitted by the parties to the superior court matter and the text of the Order, neither hearing nor Judge Sturges' Order concerned any right under the Fifth Amendment other than the right against self-incrimination.

around the Superior Court's Order, as Respondent contends? It is not, for the following two reasons. First, Respondent need not identify any witness from which it procured its answer to a Request for Admission. A review of the Requests for Admission reveals that there is no request which necessarily requires the testimony of John Barnes or any of the other individual witnesses within the scope of the Superior Court's Order.

Respondent identifies thirty-six Requests for Admission which it contends infringe upon a Fifth Amendment privilege. The Court disagrees that any of the requests infringe upon the Fifth Amendment rights of any of the witnesses identified in the Superior Court Order. A review of all of the Requests for Admission reveals that the following topics correspond with individual requests.

SUBJECT MATTER	NUMBERED RFA(s)
Prior Consent Decree	1-17
Notification of Penalty	18
Corporate Heat Stress & Acclimatization Policies	19-35
Identification of Juan Mendoza and prior experiences	36-38
Geography & Meteorology	39-45
Corporate duties, working conditions, including applicability to Mr. Mendoza	46-50; 76-79
John Barnes' Relationship to Respondent	51
Statements on Respondent's website	52
John Barnes' communication with media outlets	53-56; 58-60
Facts related to Mr. Mendoza's death	61-70; 75; 97-98; 109-112; 122-125; 133-137
Job Requirements for sweet potato harvesters	71-73
Business relationships between Respondent, contractors & employees	80-89; 99-100; 113-114
Events related to service of subpoenas & subsequent interviews	90-94; 102-106; 115-119; 126-130
Identification of potential witnesses	95-96; 107-108; 120-121
Facts related to NC ASH inspection	101
Statutory provision	131
Autopsy report - chronology	132

Authentication of email messages sent by John Barnes to NC DOL in October 2024.	138-142

All of the Requests for Admission can be answered without obtaining information from the witnesses identified in the Superior Court's Order. For instance, Respondent objects to Requests #s 53-60 as potentially requiring self-incrimination, presumably of witness Barnes. The request asks that the Respondent corporation admit or deny facts pertaining to Barnes' publicized communication with media outlets. Complainant supplied documents for the corporation to review. "Exhibit C" to Respondent's motion is the complete set of Requests for Admission including Complainant's attachments to its discovery requests. "Exhibit H" to the Requests for Admission is a copy of an October 8, 2024 email which bears the signature block of John Barnes and which is part of an email chain to a variety of individuals. The subject line is: "Fwd News Release and Information Support Packet." The text of the emails in the chain state "Please share with everyone."

Respondent makes no argument as to why this email would incriminate John Barnes. The corporation is asked to admit or deny the authenticity of a public statement made a few months ago. It is difficult to understand how the statements themselves might be incriminating to Mr. Barnes whether he is the source of the discovery response or not. Assuming for the sake of argument that authenticating the emails might be incriminating, it is possible for the corporation to respond to the request without making an inquiry of Mr. Barnes directly. It is also worth noting that the emails in question were sent more than six months after the entry of Judge Sturgis' Order. Judge Sturges did not have an opportunity to consider whether Mr. Barnes' communication with media outlets would have altered the balance of factors which informed her analysis.

Respondent objects to Requests #s 88 and 89, which concern whether individuals were employed or were contractors of the corporation. Presumably the corporation's own records would be the source of Respondent's answers. Respondent has also admitted to most of these relationships in its Amended Answer to the Complaint and in its Superior Court briefing (See, Am. Compl. ¶10; Resp. Motion to Strike, Ex. 2, p 21). Similarly, Respondent objects to Requests #s 92-93 and 95-99 which relate to events surrounding the service of the subpoena to the witnesses who asserted their Fifth Amendment privilege. Respondent would not be required to consult with the individual witnesses concerning these Requests for Admission because these facts are memorialized in Judge Sturgis' Order.

Second, based on the U.S. Supreme Court's review of a similar issue regarding interrogatories, the undersigned finds that Respondent has an obligation to identify a source "who could, without fear of self-incrimination, furnish such requested information as was available to the corporation." *United States v. Kordel*, 397 U.S. 1, 8 (1970). The Supreme Court's reasoning in *Kordel* is applicable here:

> It would indeed be incongruous to permit a corporation to select an individual to verify the corporation's answers, who because he fears self-incrimination may thus secure for the corporation the

> benefits of a privilege it does not have. Such a result would effectively permit the corporation to assert on its own behalf the personal privilege of its agents.

Id. Internal Quotation Marks Omitted. See also, *United States v. 3963 Bottles*, 265 F.2d 332, 336 (7th Cir. 1959) (finding that interrogatories directed to a corporation did not require that the individual verifying the responses be an officer or managing agent of the corporation and that the corporation had a responsibility to furnish the information without reliance on an individual who might fear self-incrimination).

Respondent next contends that Requests for Admission Numbers 1-17 should be struck because they reference a prior settlement agreement, in violation of Rule 408 of the North Carolina Rules of Evidence and this Court's prior ruling regarding assertions about the settlement agreement in Complainant's original Complaint. Respondent's contention is without merit. First, this Court's prior ruling was narrowly applicable to paragraph 18(g) (and subparts) of the Complaint, made no statement as to the scope of Rule 408, and, allowed Complainant to make substantively the same factual allegations without referencing "prior settlement agreements, settlement negotiations, or settlement offers." In the hearing the undersigned referenced the public policy supporting Rule 408 and the fact that, as used in the Complaint, the reference to the prior agreement was intended to support an element of Complainant's claim. None of these concerns apply where facts about a settlement agreement or prior settlement negotiations are the subject of discovery.

Rule 408 prohibits the introduction into evidence of prior settlement conduct or statements to prove "liability for or invalidity of the claim or its amount." N.C. Gen. Stat. §8C-1, Rule 408. However, the information may be used for other purposes. For instance, while evidence of prior negotiations could not be introduced to prove liability, it could be introduced to support a separate claim for damages. *Wilson Realty & Constr. v. Asheboro-Randolph Bd. of Realtors*, 134 N.C. App. 468, 518 S.E.2d 28 (1999). Evidence of a prior agreement could also be used to prove the existence of a contract of compromise and whether or not there had been specific performance. *Carter v. Foster*, 103 N.C. App. 110, 116, 404 S.E.2d 484, 488 (1991).

Neither North Carolina nor the federal courts that include North Carolina have ever recognized a discovery privilege. That is, there is no blanket privilege to withhold discovery simply because it concerns prior settlement conduct. *Media Network Inc. v. Mullen Adver. Inc.*, 2006 NCBC LEXIS *4-7, 05cvs7255, (Mecklenburg Cty Apr 21, 2006) (collecting cases). *Roanoke River Basin Ass'n v. Duke Energy Progress, LLC*, 1:16cv607, 2018 US Dist. LEXIS 247444, *18 (M.D.N.C. May 25, 2018) (collecting federal cases). Where information about a settlement agreement or prior settlement negotiations is sought during discovery, Rule 26 of the North Carolina Rules of Civil Procedure controls the Court's inquiry regarding the appropriateness of the discovery requested. The Court's inquiry concerns *relevance*, not admissibility. In the instant case, evidence of the prior agreement is relevant, at a minimum, to the penalty calculation where Complainant has the burden to prove that the penalty was properly calculated. N.C. Gen. Stat. §95-138(a)(1), Fields Operation Manual, Ch VIA(2), Feb. 2000.

Finally, the objections to Requests #1-17 strain credibility considering that Respondent has admitted to the existence and substance of the May 21, 2020 settlement agreement in its Amended Answer. Paragraph 18g of the Amended Complaint states: "A feasible and acceptable method of abatement exists in that Respondent is able to correct this hazard by development and implementation of a heat stress program, which, at a minimum, includes the following . . . ." Am. Compl. p 8. Subparagraphs 18g(i)-(ix) then list the specific elements alleged to be part of a feasible abatement program. To each of the subparagraphs 18g(i)-(ix), Respondent has answered as follows:

> The allegations contained in Paragraph 18(g)... of the Amended Complaint are admitted insofar as the information in this Paragraph was contained within the informal settlement agreement executed on or about May 21, 2020, under NC OSH Inspection No. 318181815. Any and all remaining allegations in Paragraph 18(g)... of the Amended Complaint are denied.

Am. Answ., pp 6-8.

The Requests for Admission to which Respondent is now objecting are stated in the following form:

> Admit in the May 21, 2020 Informal Settlement Agreement (Inspection Number 318181815) Barnes Farming agreed to develop and implement a Heat Stress Prevention Program.

Resp. Mot. to Strike, Ex. 10, p4 (Request for Admission #3). Respondent's Answer to the Amended Complaint introduces the fact that an agreement exists and then admits that the "information" contained in the respective factual allegations of the Amended Complaint are in said agreement. This is not materially different than responding to the same factual statements in the Requests for Admission where Complainant has introduced the fact that an agreement exists.

Respondent's Motion for Sanctions and to Strike Complainant's Requests for Admission is DENIED in its entirety. Respondent has asked for leave to file a reply to Complainant's brief in opposition to this motion. Respondent's request for leave to file a reply is DENIED.

Having determined that none of the Respondent's objections are justified, the Court orders that Respondent answer the Requests for Admission within fifteen days of the service of this Order. N.C. R. Civ. P. Rule 36(a) ("Unless the court determines that an objection is justified, it shall order that an answer be served").

So Ordered, this the 30th day of December 2024.

Mary-Ann Leon

Mary-Ann Leon
Hearing Examiner
maleon@leonlaw.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER upon:

TRAVIS W VANCE
FISHER & PHILLIPS
227 WEST TRADE ST STE 2020
CHARLOTTE, NC 28202

By depositing a copy of the same in the United States Mail, by certified mail, return receipt requested, postage prepaid at Raleigh, North Carolina, and upon:

JONATHAN D JONES
NC DEPARTMENT OF JUSTICE
LABOR SECTION
PO BOX 629
RALEIGH NC 27602

By depositing a copy of the same in the United States Mail, first class, postage prepaid at Raleigh, North Carolina, and upon:

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH, NC 27699-1101

via email.

THIS THE 30 DAY OF December 2024.

PAUL E. SMITH
CHAIRMAN

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