

**NEW YORK STATE  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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In the Matter of the Alleged  
Violations of Articles 27 and 71 of the  
Environmental Conservation Law (ECL) of  
the State of New York and Section 360  
of Title 6 of the Official Compilation  
of Codes, Rules and Regulations of the  
State of New York (6 NYCRR),

**RULING ON MOTION TO  
DISMISS AND TO  
COMPEL PRODUCTION**

by

**OLDCASTLE, INC., OLDCASTLE MATERIALS,  
INC. and TILCON NEW YORK, INC.,**

DEC Case No.  
R2-20130827-532

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Respondents.

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Appearances of Counsel:

-- Thomas S. Berkman, Deputy Commissioner and General  
Counsel (John Nehila of counsel), for staff of the  
Department of Environmental Conservation

-- Sullivan PC (Peter Sullivan of counsel), for  
respondents Oldcastle, Inc., Oldcastle Materials, Inc. and  
Tilcon New York, Inc.

In this administrative enforcement proceeding, New York  
State Department of Environmental Conservation (DEC or  
Department) staff charges respondents Oldcastle, Inc., Oldcastle  
Materials, Inc. and Tilcon New York, Inc. with failing to: (i)  
provide daily records of incoming and outgoing solid waste  
material; (ii) submit a site plan and survey documenting the  
extent and volume of solid waste materials stored longer than  
eighteen months; and (iii) remove at least 20,000 cubic yards of  
solid waste materials stored longer than eighteen months, in  
violation of an order on consent with respondent Tilcon New  
York, Inc. (Tilcon) relating to Tilcon's construction and  
demolition (C&D) debris processing facility located at 980 East  
149th Street, Bronx, New York.

This matter first came before the Office of Hearings and  
Mediation Services upon Department staff's January 4, 2016  
motion for an order striking, or directing clarification of, the  
nine affirmative defenses pleaded in respondents' answer.

Respondents opposed the motion. By ruling dated February 29, 2016, I granted staff's motion, in part, dismissing respondents' fifth and seventh affirmative defenses, and otherwise denied staff's motion.

By motion dated June 13, 2016 and served on Department staff by email on June 13, 2016, respondents move to dismiss the complaint against Oldcastle, Inc. and Oldcastle Materials, Inc. (collectively Oldcastle respondents) and to compel production of documents. In support of their motion, respondents submitted the affirmation of Peter Sullivan, Esq. (Sullivan Affirmation), dated June 13, 2016 with the following exhibits: Exhibit A, Matter of Tilcon New York, Inc., Order on Consent, Case No. R2-20130827-532 dated September 16, 2014 with Schedule of Compliance attached; Exhibit B, Complaint, dated November 18, 2015; Exhibit C, Amended Complaint, dated December 3, 2015; Exhibit D, First Notice for Discovery, dated April 28, 2016; and Exhibit E, Continuation of Privilege Log (showing documents numbered 150 - 155).<sup>1</sup>

Department staff opposes the motion to dismiss and to compel production through the affirmation of John Nehila, Esq. (Nehila Affirmation) dated July 8, 2016 with the following exhibits: Exhibit A, First Notice for Discovery and Inspection DEC Response; Exhibit B, Notice of Violation dated February 25, 2015; Notice of Violation dated July 20, 2015; Exhibit D, Continuation of Privilege Log (showing documents numbered 150 - 155); Exhibit E, Privilege Log (showing documents numbered 1 - 149); Exhibit F, Privilege Log spreadsheet (describing documents 1 - 155 and the privileges claimed).<sup>2</sup> Respondents' motion papers and staff's response were emailed to the undersigned by Department staff on July 11, 2016.

The Department's uniform enforcement hearing procedures state that all motions prior to hearing must be filed in writing with the administrative law judge (ALJ) and served upon the parties (see 6 NYCRR 622.6[c][1]). As described above, respondents did not file their motion as required, but instead emailed the motion to Department staff who filed it by email to the undersigned. The parties have not sought or been given permission to file motions and papers with the ALJ by email. Nevertheless, I am accepting the email filing of the motion papers. In the future, however, the parties are directed to

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<sup>1</sup> Respondents also submitted a memorandum of law dated June 16, 2016 in support of the motion.

<sup>2</sup> The Nehila Affirmation is titled "Affidavit In Opposition To Motion To Dismiss And Compel Production", but it is an affirmation of counsel.

file hard copies of all papers with the Office of Hearings and Mediation Services at the time they are served on the opposing parties.

Respondents also submitted a reply memorandum of law dated July 12, 2016 via email to the undersigned ALJ and Department staff. Pursuant to 6 NYCRR 622.6(c)(3), such a reply is not allowed without the permission of the ALJ. Respondents did not seek permission and staff did not object. Generally, I am not inclined to consider such replies, but I do in this instance only to the extent that respondents' reply addresses Department staff's privilege log spreadsheet, which respondents claim they did not receive until after the respondents' motion was served on staff.

### **Proceedings**

Department staff's amended complaint alleges four causes of action related to the alleged violations of a September 16, 2014 order on consent (2014 Order) with respondent Tilcon regarding its C&D debris processing facility (facility) at 980 East 149th Street, Bronx, New York. Due to violations at the facility, Department staff and respondent Tilcon entered into the 2014 Order wherein respondent Tilcon admitted the violations noted therein, paid a \$20,000 civil penalty and agreed to strictly comply with the conditions contained in the schedule of compliance.

In addition to the penalty payment, the schedule of compliance required respondent Tilcon to submit copies of the facility's daily records of incoming and outgoing solid waste materials for the years 2011, 2012 and 2013 within thirty days of the execution of the order; and submit a site plan and survey within thirty days of the effective date of the order documenting the extent and volume of solid waste materials stored on site longer than eighteen months. After an acceptable survey is provided, respondent Tilcon is required to submit a plan for removal of the solid waste materials stored more than eighteen months. Notwithstanding the requirement to submit a plan for removal of solid waste materials, the 2014 Order requires the removal of 20,000 cubic yards of solid waste materials stored at the facility longer than eighteen months at 365 day intervals from the effective date of the 2014 Order until such solid waste materials have been removed to the satisfaction of the Department.

Department staff alleges that respondent Tilcon did not submit copies of the daily records until April 13, 2015, some

178 days after they were due on October 16, 2014; that respondent Tilcon failed to submit an acceptable site plan and survey by the October 16, 2014 deadline; that respondent Tilcon did not remove 20,000 cubic yards of solid waste materials stored for more than eighteen months by September 17, 2015 - the first 365 day milestone; and that respondent Tilcon's violation of the 2014 Order constitutes a violation of ECL 71-2703(1)(a).

Respondents' current motion argues that the complaint against the Oldcastle respondents should be dismissed as the complaint and amended complaint do not allege the Oldcastle respondents violated any regulation or law. In short, respondents argue that staff has failed to state a claim against the Oldcastle respondents, as staff does not allege the Oldcastle respondents are owners or operators of a solid waste management facility. Respondents aver that the Department's only allegation is that respondent Tilcon is the wholly owned subsidiary of Oldcastle Materials, Inc., which in turn is the wholly owned subsidiary of Oldcastle, Inc. (See Complaint at ¶¶ 4 and 5; Amended Complaint at ¶¶ 4 and 5.) Otherwise, the Department alleges that respondent Tilcon operated the facility and failed to perform its obligations under the 2014 Order. (See Amended Complaint at ¶¶ 7 - 22, 26, 28, 30, and 32.) Respondents argue that in order to hold the Oldcastle respondents liable for the actions of respondent Tilcon, Department staff needed to allege facts sufficient to justify piercing the corporate veil, or allege facts demonstrating that the Oldcastle respondents are somehow responsible for Tilcon's execution of and alleged violation of the 2014 Order. As staff has failed to do so, respondents argue that no allegations support holding the Oldcastle respondents liable and the amended complaint against them must be dismissed.

Respondents also move to compel disclosure of documents that Department staff has withheld from disclosure based on asserted privileges. Staff asserts the attorney-client privilege, attorney work product, deliberative process privilege and public interest privilege as the basis for withholding 155 documents and attachments thereto. Respondents argue that staff's privilege log is deficient on its face as each entry may contain multiple documents, and the Department does not explain the basis of each privilege for each document.

Department staff opposes the motion to dismiss based on the uncertain financial viability of respondent Tilcon. In short, staff argues that the Oldcastle respondents must remain in this proceeding to bolster respondent Tilcon's ability to fund compliance with the 2014 Order. (See Nehila Affirmation at ¶¶

11 - 18.) In addition, staff argues that the Oldcastle respondents, "by their own statements and actions, including ownership of Tilcon, and involvement in its activities, justify that they be 'kept in the case' at this stage of the proceedings." (Id. at ¶ 27.)

Department staff opposes respondents' motion to compel production and asserts that the privilege log spreadsheet attached as Exhibit F to its papers satisfied the statutory requirements for asserting the privileges. In addition, staff released several of the documents previously withheld in whole or redacted form. (See Nehila Affirmation at ¶ 34.)

I requested and Department staff supplied me with the withheld documents for my in camera review.

### Discussion

#### 1. Respondents' Motion to Dismiss

Respondents move to dismiss the complaint against the Oldcastle respondents arguing that the complaint fails to state a cause of action against them. To determine whether a complaint states a claim, the pleading is liberally construed, the facts alleged in the complaint are accepted as true, the proponent of the complaint is given the benefit of every possible favorable inference, and the complaint is examined to determine whether the facts as alleged fall within any cognizable legal theory (see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co., 5 NY3d 582, 591 [2005]; Leon v Martinez, 84 NY2d 83, 87-88 [1994]). Giving staff's pleadings the broadest construction, I agree with respondents that the amended complaint states the parent-subsidiary relationship among the respondents but does not allege any wrongdoing by the Oldcastle respondents or state a cause of action against the Oldcastle respondents based on alleged facts.

Supplemental pleadings and other evidence, however, may amplify deficiencies in a complaint. Affidavits in response to a motion to dismiss "may be used freely to preserve inartfully pleaded, but potentially meritorious, claims" (see Rovello v Orofino Realty Co., 40 NY2d 633, 635-636 [1976][internal citations omitted]).

In response to respondents' motion to dismiss, Department staff allege that respondent Tilcon was purchased by CRH plc (public limited company), an Irish company. Respondent

Oldcastle, Inc. is CRH's American holding company and respondent Oldcastle Materials, Inc. is part of the Oldcastle, Inc. group. Respondent Tilcon represents that it is part of the Oldcastle Materials group. Department staff also concludes that respondent Tilcon's failure to provide the site plan and survey and failure to remove waste from the site as required by the 2014 Order calls into question whether respondent Tilcon can fund compliance with the 2014 Order. (See Nehila Affirmation at ¶¶ 11 - 18.)

Staff also argues that in addition to ownership of Tilcon, that the Oldcastle respondents by their statements and actions, and involvement in Tilcon's activities, justify denying respondents' motion. For those cited reasons, staff argues it is necessary and proper that the parent company respondents remain in this proceeding. I disagree.

Courts are generally reluctant to dismiss a complaint alleging the corporate veil must be pierced simply because such a claim is inherently fact specific. An attempt to pierce the corporate veil does not constitute a cause of action independent of that against respondent Tilcon. "[I]t is an assertion of facts and circumstances which will persuade the court to impose the corporate obligations on its owners." (See Morris v NYS Department of Taxation and Finance, 82 NY2d 135, 141 [1993].) Department staff must allege facts and circumstances that demonstrate that the Oldcastle respondents exercised complete domination of respondent Tilcon in respect to the 2014 Order and that such domination was used to commit a fraud or wrong against the Department. (See id.)

In this proceeding, however, staff failed to allege facts that would support piercing the corporate veil or state a cause of action based on such facts. Where the complaint states no legal theory or alleged facts to be liberally construed in support of a cause of action against the Oldcastle respondents, I conclude that an affidavit or affirmation cannot be used to preserve what has not been stated in the complaint.

Moreover, staff has not alleged in the amended complaint, or in the affirmation, that the Oldcastle respondents exercised any domination and control over Tilcon with respect to the 2014 Order that would support piercing the corporate veil or that such domination was used to commit a fraud or a wrong. Staff has made no allegation that the Oldcastle respondents have induced Tilcon to violate the 2014 Order for the parents' benefit. Nor does staff's concern that respondent Tilcon cannot fund compliance with the 2014 Order state a factual allegation

that Tilcon is being undercapitalized by the Oldcastle respondents. Except for references to public websites that provide an overview of respondents' corporate structures, staff does not allege how the Oldcastle respondents are involved in the activities of Tilcon, except by ownership.

Accordingly, the complaint is dismissed against respondents Oldcastle, Inc. and Oldcastle Materials, Inc. without prejudice to Department staff to amend staff's amended complaint within fourteen days of the date of this ruling.

## 2. Respondents' Motion to Compel Production

Respondents move to compel disclosure of documents identified by Department staff as attorney-client privileged, attorney work product or deliberative process privileged. Respondent takes issue with the withheld documents listed on a one page log identifying documents 150 - 155 (see Sullivan Affirmation at ¶ 4). Respondent argues the stated privileges do not apply and the log is facially deficient, as it does not provide adequate explanation of the claimed privileges.

Department staff opposes the motion to compel and submitted a five page privilege log in spreadsheet format listing all 155 withheld documents, the author, document type, recipient, who was courtesy copied, date, privileges asserted, and attachments/subject matter/notes (see Nehila Affirmation, Exhibit F). Upon my request, Department staff provided me with the withheld documents for my in camera review together with a revised privilege log spreadsheet correcting whether some documents had been released or redacted and released. Department staff provided a copy of the revised privilege log spreadsheet to respondents. The privilege log spreadsheet lists the attorney-client privilege, attorney work product, deliberative process privilege or public interest privilege as privileges claimed for the respective documents. Most of the listed documents contain a chain of several emails (some with attachments). Accordingly, my review included each document in a chain and any attachments and whether any of the claimed privileges applied.

The scope of discovery under the Department's Uniform Enforcement Hearing Procedures is as broad as that provided under the CPLR. (See 6 NYCRR 622.7[a]; CPLR article 31; Matter of U.S. Energy Develop. Corp., Ruling of the Chief ALJ, on Motion for Leave to Conduct Depositions, May 9, 2014, at 4; Matter of U.S. Energy Develop. Corp., Ruling of the Chief ALJ, on Renewed Motion to Compel Disclosure, December 23, 2015, at 2-

3.) Any matter that is material and necessary in the prosecution or defense of an administrative enforcement proceeding must be disclosed unless it is otherwise protected from disclosure as privileged or attorney work product. (See CPLR 3101[a], [b], and [c]; State Administrative Procedure Act [SAPA] § 306[1].) Privileges such as the attorney-client privilege (CPLR 4503) and attorney work product (CPLR 3101[c]) are applicable to proceedings conducted under part 622. The ALJ "must give effect to the rules of privilege recognized by New York State law." (See 6 NYCRR 622.11[a][3].)

It is Department staff's burden to establish that each of the claimed privileges applies (see e.g. Spectrum Sys. Intl. Corp. v Chem. Bank, 78 NY2d 371, 377 [1991]). For the sake of judicial economy, my in camera review was limited to whether at least one of the several claimed privileges applied to each of the emails in a chain and any attachments. I do not identify which asserted privilege applies to which email or attachment contained in a numbered document, I only confirm that at least one of the asserted privileges applies.

Respondents do not provide a specific factual basis for requiring those documents claimed by staff to be protected by the respective privileges. Respondents' argument is primarily a legal one that is rendered moot by my in camera review. Respondents argue, however, that the deliberative process privilege is not recognized outside the Freedom of Information Law (FOIL) context. It has been previously held that "[i]n referencing a 'deliberative process' privilege, Department staff is invoking a New York common law privilege more correctly known as the governmental 'official information' or 'public interest' privilege applicable in the discovery context" (see Matter of U.S. Energy Develop. Corp., Ruling of the Chief ALJ on Renewed Motion to Compel Disclosure, December 23, 2015, at 6, citing Cirale v 80 Pine St. Corp., 35 NY2d 113, 117 [1974]; Jerome Prince, Richardson on Evidence § 5-802 [Farrell 11th ed 1995]; 5 Robert A. Barker & Vincent C. Alexander, Evidence in New York State and Federal Courts § 5:53 [2d ed 2011]).

The public interest privilege applies to "confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged" (see Cirale, 35 NY2d at 117). The privilege requires a balancing of the harm to the overall public interest from disclosure against the interests of the party seeking the information (see id. at 118). If disclosure would be more harmful to the interests of the government than



nondisclosure would be to the interests of the party seeking the information, then the overall public interest would be better served by nondisclosure (see id.).

Respondents' narrow reading and application of the case law on the public interest privilege would strip the balancing of interests from the court's review. In addition, respondents' reliance on Marisol A. v Giuliani, 1998 WL 132810 at \*6 [US Dist Ct, SDNY Mar. 23, 1998] is misplaced. In Marisol A. the court cited Burka v. New York City Transit Authority (110 FRD 660 [US Dist Ct, SDNY 1986]), for the statement of an exception to the deliberative process privilege. "Where the decision-making process itself is the subject of the litigation, the deliberative privilege may not be raised as a bar against disclosure of critical information." (See Burka at 667.) In Burka, the court held that the process for requiring an employee to submit to a drug test was at issue, and information relating to that process must be disclosed.

Respondents claim the "present dispute concerns the DEC's decision that Respondents violated the terms of the September 16, 2014 consent order." (See Respondents Reply Memorandum of Law at 6.) I disagree. This proceeding concerns the alleged facts that constitute the violations of the terms of the 2014 Order, not the decision to commence the proceeding. Respondents' arguments to the contrary are unconvincing.

Based on my in camera review, I find those portions of the documents that Department staff claims are protected by the public interest privilege are clearly communications between Department staff containing recommendations, draft documents, suggestions, opinions, ideas, or advice exchanged as part of the deliberative process of government decision making and reflecting the personal opinions of Department staff. As such, they are protected from disclosure (see Matter of Berger, ALJ's Ruling on Disclosure, February 10, 2010 at 7).

In balancing the competing interests in this proceeding, I conclude that Department staff's interest in nondisclosure is greater than respondents' purported interest in disclosure. Respondents claim that the privilege is inapplicable because the very documents withheld "inform[] the DEC's decisionmaking [sic] process that the Respondents violated the consent order" that resulted in the November 2015 complaint. (See Respondents Reply Memorandum of Law at 6.) In essence, respondents argue they are entitled to disclosure of the pre-decisional communications among staff leading to staff's conclusion that respondents were in violation of the consent order. Department staff's amended

complaint, however, contains the factual allegations that constitute violations of the 2014 Order.

Department staff's competing interest in nondisclosure includes the candid internal discussion of the status of a facility's compliance and whether or not to commence enforcement when it is determined there is noncompliance. There is an overall public interest in encouraging candor in communications between public employees (see e.g. Martin A. v Gross, 194 AD2d 195, 203 [1st Dept 1993]). This is nowhere more evident than in an agency whose mission includes improving and protecting the environment, preventing pollution, and enhancing the health and safety of the people of the State.

Accordingly, based on those considerations and my in camera review of the withheld documents, I conclude that the privileges apply to the documents numbered by Department staff as follows:

Attorney-Client Privilege	Attorney Work Product	Public Interest Privilege
1 - 16;	1 - 16;	1 - 16;
18 - 23;	29;	18 - 21;
29 - 30;	42;	30 - 31;
34 - 60;	46 - 48;	34 - 41;
63 - 155	54;	43 - 45;
	56 - 60;	49 - 53;
	68 - 78;	61 - 74;
	82 - 89;	82 - 129;
	93 - 94;	133 - 153;
	105 - 113;	155
	130 - 135;	
	154 - 155	

As to those documents, the privileges do not apply to any emails to or from Tilcon or the offices of Peter Sullivan found in documents 41, 42, 43, 44, 45, 90, 100, 101, 102, 104, 105, 133, 143, 144, 145, 146, 148, and 149 or to any annual reports submitted by Tilcon (attachment to document 136).<sup>3</sup> As noted by Department staff's privilege log spreadsheet, documents 17, 24 - 28, 32 and 33 and 71 photographs attached to document 143 were released to respondents. In addition, portions of several documents, including documents 5 - 17, and 114, contain materials discussing matters other than the instant proceeding.

<sup>3</sup> Department staff responded to respondents' third demand for production of documents that "[c]ounsel for Respondents has all documents & emails sent by him, addressed to him, or on which he was copied" and indicated staff would provide some of those documents but not all of them in staff's response. Respondents did not object.

Those materials are non-responsive and not subject to respondents' discovery demands.

RULING

Respondents' motion to dismiss the complaint against respondents Oldcastle, Inc. and Oldcastle Materials, Inc. is granted without prejudice to Department staff to amend staff's amended complaint within fourteen days of the date of this ruling.

Respondents' motion to compel disclosure is denied.

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/s/  
Michael S. Caruso  
Administrative Law Judge

Dated: October 12, 2016  
Albany, New York