

**ALLEGHENY COUNTY HEALTH DEPARTMENT
HEARING OFFICER**

THE CRACK'D EGG, LLC	:	In re: The Crack'd Egg
	:	2424 Custer Ave. Pittsburgh, PA 15227
Appellant	:	
	:	Docket no. ACHD-22-023
v.	:	
	:	APPELLEE ALLEGHENY COUNTY
ALLEGHENY COUNTY HEALTH	:	HEALTH DEPARTMENT'S
DEPARTMENT,	:	MOTION TO COMPEL
	:	DISCOVERY RESPONSES
Appellee.	:	

APPELLEE'S FIRST MOTION TO COMPEL DISCOVERY RESPONSES

Appellee, Allegheny County Health Department ("ACHD" or the "Department"), files the following motion to compel and, in support thereof, states as follows:

1. On July 1, 2022, the ACHD served First Set of Discovery Requests upon Appellants.
2. On July 28, 2022, the ACHD received Appellant's responses to the ACHD's First Set of Discovery Requests. A copy of Appellant's discovery responses is attached hereto as Exhibit "A."
3. Several of Appellant's answers were completely nonresponsive and clearly intended to prevent the ACHD from obtaining any relevant evidence.
4. Pursuant to Rule 4019(a)(1)(i) of the Pennsylvania Rules of Civil Procedure, "[t]he court may, on motion, make an appropriate order if a party fails to serve answers, sufficient answers or objections to written interrogatories under Rule 4005."

5. Pursuant to Rule 4019(a)(1)(vii) of the Pennsylvania Rules of Civil Procedure, “[t]he court may, on motion, make an appropriate order if a party, in response to a request for production or inspection made under Rule 4009.”

6. Here, the Department believes such an “appropriate order” would entail the Hearing Officer overruling certain of Appellant’s more specious objections and directing it to answer certain of ACHD’s First Set of Discovery Requests fully.

7. In Interrogatory No. 2, the ACHD requested the following: “Please produce all documents submitted to the Pennsylvania Department of State as part of Appellant’s registration as a limited liability company.”

8. Appellant objected to the interrogatory by stating “anything beyond the Business Entity is irrelevant and is not likely to lead to discoverable information.” ACHD argues that this information is relevant as it speaks to the responsible party or parties of Crack’d Egg LLC.

9. In Interrogatory No. 8, ACHD requested that Appellant “produce the educational, job history, and any public health work completed by any and all employees of Crack’d Egg.”

10. Appellant once again objected, stating “anything beyond the Business Entity is irrelevant and is not likely to lead to discoverable information.” ACHD argues that Appellant is a permitted entity by ACHD and are under the purview of ACHD Rules and Regulations.

11. While the matter as heard on appeal will largely revolve around due process issues, Appellant has repeatedly attempted to argue that the Department is operating in an arbitrary, capricious, and unscientific matter. As such, the Department is interested as to the level of expertise of the individuals who helped determine Crack’d Egg’s covid mitigation measures, or lack thereof.

12. In Interrogatory No. 19, ACHD requested “any documents and communications related to Entrepreneurs Against Tyranny (“E.A.T.”).

13. Appellants again objected, stating “as being irrelevant and is not likely to lead to discoverable information.” E.A.T. had an active Facebook account during the Department’s COVID-19 mitigation efforts. Throughout that time, E.A.T. often endorsed restaurants that were not in compliance with the Department’s Rules and Regulations. However, this information is germane to the penalty calculation as it speaks to the willfulness of the violation. The Department is under the belief and assumption that E.A.T. posted restaurants that were defying the Department’s COVID-19 orders and encouraged customers to patronize those restaurants. Documents and communication between Appellants and E.A.T. would demonstrate Appellant’s willfully violating the closure order.

14. ACHD Rules and Regulations Art. XVI § 16059(C) states the Department shall consider “economic benefit gained by such person by failing to comply with the Article, the *willfulness of the violation*, the actual and potential harm to the public health, safety and welfare and to the environment, the nature, frequency and magnitude of the violation, and any other relevant factors.” (*emphasis added*).

15. The Department suspects that any such non-privileged communications may go to show that Appellant did not intend to comply with ACHD’s COVID-mitigation measures. Furthermore, since Appellant claims that the Department has been biased in its enforcement, such communications may lead to information tending to show the compliance status of other restaurants in Allegheny County.

Requests for Admission 3-6

16. In its responses to Requests for Admission 3-6, Appellant responded “Objection. The referenced video is beyond the scope of Pa.R.Civ.P. 4014.”

17. This is an obtuse and outdated reading of the term “document.”

18. The Pennsylvania Rules of Civil Procedure related to Requests for Production specifically define a “document” as:

writings, drawings, graphs, charts, photographs, and electronically stored information . . . which constitute or contain matters within the scope of Rules 4003.1 through 4003.6 inclusive and which are in the possession, custody or control of the party or person upon whom the request or subpoena is served

Pa.R.Civ.P. 4009.1.

19. The videos attached fall squarely within the category of “electronically stored information” and are certainly a subset of photographs. Even if they were not, the word “including” clearly indicates that the examples outlined in the Rules of Civil Procedure is not meant to be an exclusive enumeration, but rather a demonstrative list of documents.

20. Furthermore, the Definitions included in the Department’s requests state that documents shall include “microfilm, film, motion picture film, phonograph records or other forms.”

21. As such, the rules clearly contemplate inclusion of videos within the scope of “documents” and the Department requests that Appellants answer RFAs 3-6 accordingly.

22. As to all of responses where Appellant claims that its documents or answers would not “lead to discoverable information” misstates the purpose of discovery. Pursuant to Pa. Rule Civ. P. 4003.1 (b), the purpose of discovery is to pose the inquiries that may lead to admissible evidence. Appellant would have the Department believe, without a scintilla of information, that it is in possession of information responsive to the Department’s request but would refuse the Department’s request on the flimsiest of rationales without any proffer in support.

WHEREFORE, the Allegheny County Health Department respectfully requests the Hearing Officer to issue an order directing Appellants to provide full and complete responses to the ACHD's First Set of Discovery Requests within ten (10) days of this order or be barred from presenting any evidence or testimony at the hearing concerning the issues about which these interrogatories and requests for production relate.

Dated: August 5, 2022

Respectfully submitted,

/s/ Elizabeth Rubenstein
Elizabeth Rubenstein, Esq.
Allegheny County Health
301 39th Street, Bldg. No. 7
Pittsburgh, PA 15201-1891
Phone: (412) 578-2392
Fax: (412) 578-8144

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Allegheny County Health Department's First Motion to Compel has been served upon the following via electronic mail this 5th day of August, 2022:

James R. Cooney
Cooney Law Offices LLC
223 Fourth Ave, 4th Floor
Pittsburgh, PA 15222
Office: 412-392-0330
Cell: 412-583-8342
Email: jcooney@cooneylawyers.com

Attorney for Appellants

/s/ Elizabeth Rubenstein
Elizabeth Rubenstein, Esq.
Pa. I.D. No. 323254
ACHD Assistant Solicitor

**ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE HEARINGS**

Crack'd Egg LLC,

Appellants,

v.

ALLEGHENY COUNTY HEALTH
DEPARTMENT,

Appellee.

In re: The Crack'd Egg
2424 Custer Ave. Pittsburgh, PA 15227

Docket no. ACHD-22-023

APPELLEE ALLEGHENY COUNTY
HEALTH DEPARTMENT'S MOTION TO
COMPEL DISCOVERY RESPONSES

ORDER

AND NOW, this ____ day of _____, 2022, it is hereby ordered that Appellee's Motion to Compel is granted. Appellants shall file full and complete answers to Appellee's First Set of Discovery Requests upon Appellants within ten (10) days of this order or be barred from presenting any evidence or testimony at the hearing concerning the issues about which these interrogatories and requests for production relate.

Max Slater, Esq.
Administrative Hearing Officer
Allegheny County Health Department

BEFORE THE ALLEGHENY COUNTY HEALTH DEPARTMENT

THE CRACK'D EGG, LLC,

Appellant,

v.

No. ACHD-22-023

THE ALLEGHENY COUNTY
HEALTH DEPARTMENT

Appellee.

RESPONSES TO DISCOVERY REQUESTS

AND NOW, The Crack'd Egg, LLC, by its Counsel, James R. Cooney, submits the within Responses:

1. Please provide the full and correct name of the business entity captioned above as "The Crack'd Egg, LLC" as it appears in its registration as a limited liability company with the Pennsylvania Department of State.

ANSWER:

The Cracked Egg, LLC. The Business Entity Details from the PA Department of State, Corporations Bureau will be produced herewith.

2. Please produce all documents submitted to the Pennsylvania Department of State as part of Appellant's registration as a limited liability company.

ANSWER:

Objected to. Anything beyond the Business Entity Details is irrelevant and is not likely to lead to discoverable information.

EX. A

3. Please identify the members (i.e., owners) of The Crack'd Egg, LLC.

ANSWER:

Kimberly Waigand
Donald Waigand

4. Please identify the individual residing at the address identified in the Pennsylvania Department of State's business and corporation database entry for "Cracked Egg Catering Company LLC" at the time of the company's registration as a limited liability company (i.e. 26 Chestnut Street, Natrona PA 15065 Allegheny).

ANSWER:

Unknown.

5. Please identify any and all real property, movable property, as well as any other assets, both tangible and intangible, owned by The Crack'd Egg, LLC.

ANSWER:

Objected to as being irrelevant and not likely to lead to the discovery of relevant information. Moreover, the law is clear that prejudgment asset discovery is prohibited. See, *Merithew v. Valentukonis*, 2005 Pa. Super. 81, 869 A.2d 1040 (2005); *Iorio v. Carnegie Borough*, 13 Pa. D. & C. 3d 236 (Allegh. Co. 1980); *Linde v. Linde*, 2019 Pa. Super. 331, 222 A.3d 776 (2019); *Adams v. Rio Paper Co.*, 75 Pa. D. & C. 2d 119 (Phila. 1975).

6. Please identify bank accounts owned and controlled by The Crack'd Egg, LLC.

ANSWER:

Objected to as being irrelevant and not likely to lead to the discovery of relevant information. Moreover, the law is clear that prejudgment asset discovery is prohibited. See, *Merithew v. Valentukonis*, 2005 Pa. Super. 81, 869 A.2d 1040 (2005); *Iorio v. Carnegie Borough*, 13 Pa. D. & C. 3d 236 (Allegh. Co. 1980); *Linde v. Linde*, 2019 Pa. Super. 331, 222 A.3d 776 (2019); *Adams v. Rio Paper Co.*, 75 Pa. D. & C. 2d 119 (Phila. 1975).

7. Please provide an accounting of Appellant's monthly, quarterly, and yearly profits along with any relevant supporting documents.

ANSWER:

Objected to as being irrelevant and not likely to lead to the discovery of relevant information. Moreover, the law is clear that prejudgment asset discovery is prohibited. See, *Merithew v. Valentukonis*, 2005 Pa. Super. 81, 869 A.2d 1040 (2005); *Iorio v. Carnegie Borough*, 13 Pa. D. & C. 3d 236 (Allegh. Co. 1980); *Linde v. Linde*, 2019 Pa. Super. 331, 222 A.3d 776 (2019); *Adams v. Rio Paper Co.*, 75 Pa. D. & C. 2d 119 (Phila. 1975).

8. Please provide the educational, job history, and any public health work completed by any and all employees of Crack'd Egg.

ANSWER:

Objected to as being irrelevant and not likely to lead to the discovery of relevant information.

9. Please identify the names of any and all employees that are Certified Food Protection Managers along with any documentation indicating the completion of such certification.

ANSWER:

Kimberly Waigand
Cody Waigand
Ernest Smith

The certifications will be provided.

10. Please provide any evidence that any ACHD employee entered Crack'd Egg while closed as outlined in its August 31, 2020 Facebook post. See, Exhibit 1.

ANSWER:

Objected to as being irrelevant and not likely to lead to the discovery of relevant information.

11. Please identify any and all restaurants within Allegheny County which Appellant knows to have operated at full capacity and in contravention of Department's dining restrictions related to COVID-19.

ANSWER:

The answer to this request requires access to information that is in the possession of an adverse party. In fact, the Appellant has requested this information from the ACHD.

12. Please identify any and all restaurants within Allegheny County which Appellant knows to have not complied with Department's regulations related to COVID-19 mitigation and which were not subject to ACHD Enforcement Action.

ANSWER:

The answer to this request requires access to information that is in the possession of an adverse party. In fact, the Appellant has requested this information from the ACHD.

13. Please identify any and all restaurants within Allegheny County which Appellant knows to have operated despite being subject to any closure order issued by the ACHD Food Program.

ANSWER:

The answer to this request requires access to information that is in the possession of an adverse party. In fact, the Appellant has requested this information from the ACHD.

14. Please identify the basis of Appellant's contention that ACHD has waived its right to seek penalties as well as any communications, documents, or other evidence supporting such waiver.

ANSWER:

The Cracked Egg, LLC filed an appeal from the Injunction issued by the Honorable John T. McVay to the Commonwealth Court of Pennsylvania. While the appeal was pending, on May 18, 2021, the voters of Pennsylvania passed a Constitutional Amendment which limited the Governor's Emergency Powers to a period of 21 days.

Oral argument was held before a Panel of the Commonwealth Court (by Zoom) on June 7, 2021. James R. Cooney argued for The Cracked Egg. Vijyalakshmi argued for the ACHD.

During the argument, Ms. Patel asserted that the Constitutional Amendment rendered the case moot. Mr. Cooney responded that the case was not moot since the ACHD could still impose penalties. Ms. Patel countered that the ACHD would waive the penalties since the ACHD's real interest was enforcement of its orders and penalties were only a secondary consideration.

15. Please identify the number of days Appellant was in operation between August 24, 2020 and June 28, 2021.

ANSWER:

114 days

16. Please identify the number of individuals employed by Appellant at The Crack'd Egg between August 24, 2020 and June 28, 2021.

ANSWER:

15 individuals

17. Please identify any and all procedures related to cleaning and disinfecting dining and food preparation areas.

ANSWER:

Objected to. None of the citations in question involved cleaning and disinfecting, but rather, they were based solely upon the Covid-19 mitigation measures.

18. Please produce any and all social media posts made by Appellant relating to ACHD, its inspectors, or any other regulatory agencies tasked with preventing the spread of Covid-19.

ANSWER:

Screen shots of the posts will be provided.

19. Please Produce any documents and communications related to Entrepreneurs Against Tyranny (EAT).

ANSWER:

Objected to as being irrelevant and not likely to lead to the discovery of relevant information.

20. Please describe in full any COVID-19 testing requirements directed to employees, or customers.

ANSWER:

None.

21. Please describe in full any COVID-19 vaccination or proof of vaccination requirements directed towards employees or customers.

ANSWER:

None.

22. Please provide any security footage in your possession depicting the front door where ACHD's placard was displayed for the dates August 26, 2020, August 31, 2020, and December 14, 2020.

ANSWER:

There is no security footage.

Responses to Requests for Admission:

1. Admit that Crack'd Egg did not have a *mandatory* masking equivalent for customers or staff at any point between the effective date and expiration of the Commonwealth of Pennsylvania's Emergency Declaration regarding COVID-19.

Admit x Deny

2. Admit that Crack'd Egg's Facebook page is under the exclusive control of Appellant and its agents.

Admit x Deny

3. Admit that the video dated August 24, 2020, attached hereto as Exhibit 2, depicts Ms. Kimberly Waigand asking a crowd of people seated in Crack'd Egg "you all eating?" with the crowd answering in the affirmative.

Admit Deny

Objection. The referenced video is not a document. Accordingly, this request is beyond the scope of Pa.R.Civ.P. 4014.

4. Admit that Exhibit 2 depicts individuals at Crack'd Egg being served food.

Admit Deny

Objection. The referenced video is not a document. Accordingly, this request is beyond the scope of Pa.R.Civ.P. 4014.

5. Admit that in the January 14, 2021 social media post attached hereto as Exhibit 3, Crack'd Egg claimed it would "refuse to follow the edicts of a tyrannical government."

Admit x Deny

6. Admit that in Exhibit 1, Crack'd Egg told members of the public to ignore the placard posted by the Department indicating that the restaurant had been closed for violations of ACHD's rules and regulations.

Admit Deny

Objection. The referenced video is not a document. Accordingly, this request is beyond the scope of Pa.R.Civ.P. 4014.

7. Admit that Crack'd Egg was operating on each of the following dates in 2020:

- August 25-September 4;
- September 10-11;
- September 14-17;
- October 1;
- December 14; and
- December 30
-

Admit Deny x

8. Admit that Crack'd Egg was operating on each of the following dates in 2021:

- January 25;
- February 21;
- March 1;
- May 10; and
- June 28
-

Admit Deny x

9. Admit that the proprietors of Crack'd Egg had knowledge of the closure order issued against it on August 11, 2020.

Admit x Deny

10. Admit that the proprietors of Crack'd Egg were informed that it was operating with a suspended permit on December 14, 2020.

Admit x Deny

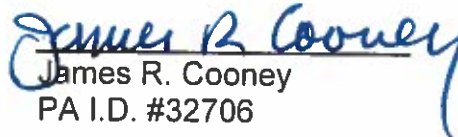
11. Admit that Kim Waigand of Crack'd Egg expressed that she had no intention of paying any penalty levied against her by ACHD in a Facebook post dated June 17, 2022.

Admit x Deny

12. Admit that on September 6, 2021, Kim Waigand called for the arrest of "Allegheny County Health Secretary, [sic] Dr. Debra Bogen." See Exhibit 4.

Admit x Deny

Respectfully Submitted,


James R. Cooney
PA I.D. #32706

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VERIFICATION

I, Kimberly Waigand, hereby verify that the facts set forth in the foregoing Responses are true and correct to the best of my personal knowledge, information and belief. This statement and verification is made subject to the penalties of 18 Pa.C.S.A. §4904 relating to unsworn falsification to authorities, which provides that if I make knowingly false averments, I may be subject to criminal penalties.

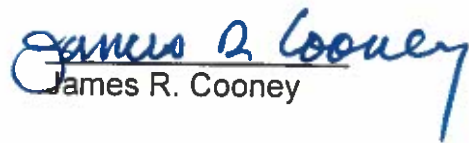
Date: 7/27/2022


Kimberly Waigand

CERTIFICATE OF SERVICE

I, James R. Cooney, hereby certify, that on the 28th day of July, 2022, I served a true and correct copy of the foregoing **Responses** upon Counsel for the Appellee, by E-mail, addressed as follows:

Elizabeth Rubenstein
Brendan Turley
Allegheny County Health Department
301 39th Street
Building No. 7
Pittsburgh, PA 15201
Elizabeth.rubenstein@alleghenycounty.us
Brendan.turley@alleghenycounty.us


James R. Cooney