

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	)	
	)	
Complainant,	)	Docket No. 08-1104
	)	
v.	)	
	)	
IMPERIAL SUGAR COMPANY;	)	
IMPERIAL-SAVANNAH, L.P.	)	
	)	
	)	
Respondents.	)	
_____	)	

**MEMORANDUM IN SUPPORT OF  
RESPONDENTS’ MOTION TO DISMISS CITATION 2, ITEMS 4 THROUGH 15**

Pursuant to 29 C.F.R. § 2200.2(b), Federal Rules of Civil Procedure 12(b)(6) and 12(c), 29 U.S.C. § 658(a), 29 C.F.R. § 1903.14(b) and other applicable law, Respondents Imperial Sugar Company and Imperial-Savannah, L.P. (collectively “Imperial”) respectfully submit this Memorandum of Law in support of their Motion to Dismiss Citation 2, Items 4-15. As explained below, the allegations contained in Citation 2, Items 4-15 fail to state a claim a claim upon which relief can be granted. Judgment on the pleadings is therefore appropriate on these Items and should be entered in Imperial’s favor.

**I. FACTS**

**A. The Housekeeping Citations at Issue.**

Citation 2, Items 4 through 15 allege violations of 29 C.F.R. § 1910.22(a)(1) and (2) and are characterized by Complainant as “egregious” “willful” violations. Each of the citations is worded similarly to the below example:

Citation 2 Item 4a Type of Violation: Willful

29 CFR 1910.22(a)(1): Places of employment, passageways, storerooms, and service rooms are not kept clean and orderly and in a sanitary condition:

a. Bosch Packing House, 1st Floor - The employer does not ensure that all elevated surfaces are kept free of hazardous accumulations of combustible dust, including sugar dust, thus, exposing employees to the hazards of fire, deflagration and dust explosion. On or about 02/07/2008, employees were exposed to death or serious physical injury from explosions, deflagrations, and other fire hazards where there were hazardous accumulations of combustible sugar dust on equipment, structural beams, and duct work.

...  
Citation 2 Item 4b Type of Violation: Willful

29 CFR 1910.22(a)(2): Floor(s) of workroom(s) are not maintained in a clean condition:

a. Bosch Packing House, 1st Floor - The employer does not ensure that workroom floors are kept free of hazardous accumulations of combustible dust, including sugar dust, thus, exposing employees to the hazards of fire, deflagration and dust explosion. On or about 02/07/2008, employees were exposed to death or serious physical injury from explosions, deflagrations, and other fire hazards in that hazardous accumulations of combustible sugar dust was allowed to accumulate on floors.

See Compl. Ex. A, Citation 2, Items 4 through 15.

**B. Lack of Guidance or Particularity Regarding Definition of “Hazardous Accumulation” of Combustible Dust.**

None of the citations defines, describes or attempts to quantify what is a “hazardous accumulation” of combustible sugar dust. Nothing in 29 C.F.R. § 1910.22(a) defines or describes a “hazardous accumulation” of sugar dust.<sup>1</sup> Nothing in any publication by OSHA

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<sup>1</sup> By contrast, the Complainant’s Grain Dust standard, which is inapplicable here, is quite specific: “The employer shall immediately remove any fugitive grain dust accumulations whenever they exceed 1/8 inch (.32 cm) at priority housekeeping areas, pursuant to the housekeeping program, or shall demonstrate and assure, through the development and implementation of the housekeeping program, that equivalent protection is provided.” 29 C.F.R. § 1910.272(j)(2)(ii).

defines or describes a “hazardous accumulation” of sugar dust.<sup>2</sup> Nothing in NFPA 61 (Standard for the Prevention of Fires and Dust Explosions in Agricultural and Food Processing Facilities) defines or describes a “hazardous accumulation” of sugar dust.<sup>3</sup> Indeed, in the House Report on the Combustible Dust Explosion and Fire Prevention Act of 2008, the House Committee on Education and Labor found as follows: “Although there are a variety of existing OSHA standards that inspectors can interpret to apply to combustible dust hazards ... most of the existing standards (e.g., housekeeping and General Duty) do nothing to educate or inform employers about how to prevent combustible dust explosions.” H.R. Rep. No. 110-601, at 11 (2008), *available at* [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_reports&docid=f:hr601.110.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:hr601.110.pdf). More specifically with respect to 29 C.F.R. § 1910.22(a), such standard “contains nothing about what levels of dust are safe, how to clean dust safely or how to prevent dust from accumulating to unsafe levels.” *Id.*

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<sup>2</sup> The October 18, 2007 version of Complainant’s Combustible Dust National Emphasis Program directed that Complainant should issue citations under 29 C.F.R. § 1910.22 when dust accumulations “are over 1/32-inch deep, and such depth covers an area of at least 5% of the total area of the room,” and references NFPA 654 as the source of this standard. (Occ. Health & Safety Admin., *CPL 03-00-006 - Combustible Dust National Emphasis Program*, § IX.E.9(c) (Oct. 18, 2007), *available at* [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=DIRECTIVES&p\\_id=3729](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=3729)). NFPA 654 is, by its terms, inapplicable to Imperial’s facilities. A few weeks after the February 7, 2008 explosion at Imperial’s Port Wentworth facility, Complainant issued a revised National Emphasis Program. In the revised March 11, 2008 version of the National Emphasis Program, Complainant changed its guidance to its compliance officers on when to cite for housekeeping violations by removing the reference to a 1/32 inch level and replacing it with the vague guidance to issue housekeeping citations when a level of dust “can create an explosion, deflagration or other fire hazard.” (Occ. Health & Safety Admin., *CPL 03-00-008 - Combustible Dust National Emphasis Program (Reissued)*, Section IX.E.9(c) (Mar. 11, 2008), *available at* [http://www.osha.gov/OshDoc/Directive\\_pdf/CPL\\_03-00-008.pdf](http://www.osha.gov/OshDoc/Directive_pdf/CPL_03-00-008.pdf)).

<sup>3</sup> *See, e.g.*, NFPA 61, Appendix D, D.2.5 (“The work area should be maintained in as clean, orderly, and sanitary a manner as working conditions allow.”)

## II. ARGUMENT AND CITATION OF AUTHORITY

### A. The Standard for a Motion to Dismiss.

The purpose of a Rule 12(b)(6) motion to dismiss is to test the legal sufficiency of the statement of claim for relief. *Brooks v. Blue Cross & Blue Shield, Inc. of Fla.*, 116 F.3d 1364, 1368-69 (11th Cir. 1997). Under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), a complaint must be sufficient “to give the defendant fair notice of what the . . . claim is.” 127 S.Ct. at 1964. Although a complaint does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* at 1964-65. Significantly, in evaluating whether the pleading is sufficient, only the well-pleaded facts are construed liberally in the Complainant’s favor: “conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.” *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1262 (11th Cir. 2004) (citation omitted).

*Twombly* expressly overrules the more lenient standard for motions to dismiss previously articulated in *Conley v. Gibson*, 355 U.S. 41, 44-45 (1957). *See Twombly*, 550 U.S. at 1959-60 (“The ‘no set of facts’ language has been questioned, criticized, and explained away long enough by courts and commentators, and is best forgotten as an incomplete, negative gloss on an accepted pleading standard . . .”). It is the now abrogated *Conley* standard that the Review Commission based its previous decisions regarding the sufficiency of the Secretary’s allegations under the “fair notice” standard. *See, e.g., Sec’y of Labor v. Conagra Flour Milling Co.*, 15 O.S.H. Cas. (BNA) 1817, 1992 O.S.H.D. (CCH) ¶ 29808 (1992) (citing *Conley* and concluding that “[g]iven the procedures available under the Federal Rules of Civil Procedure to define and narrow the issues, we conclude that, although the pleadings were not precise, they gave fair notice of the charges”). Accordingly, Imperial submits that the more stringent *Twombly* standard

now applies regarding the sufficiency of Complainant's allegations in this action, and as shown below, Complainant's allegations fail to meet this standard.

**B. Complainant's Burden.**

**1. Complainant's Burden of Fair Notice Requires that Citations Describe with Particularity the Nature of the Violation.**

In accordance with the mandates of due process, an employer in an OSHA enforcement action must receive adequate notice of the alleged violation. *See, e.g., Alden Leeds, Inc. v. Occupational Safety and Health Review Comm'n*, 298 F.3d 256, 261 (3d Cir. 2002). The Occupational Safety and Health Act protects this due process right by requiring that a citation “describe *with particularity* the nature of the violation. . . .” 29 U.S.C. § 658(a).” *Id.* (emphasis added); *see also* 29 C.F.R. § 1903.14(b) (“Any citation shall describe with particularity the nature of the alleged violation. . . .”). The citation’s description of the violation need not be elaborate or technical, but instead must “fairly characterize the violative condition so that the citation is adequate both to inform the employer of what must be changed and to allow the Commission, in a subsequent failure-to-correct action, to determine whether the condition was changed.” *Marshall v. B.W. Harrison Lumber Co.*, 569 F.2d 1303, 1308 (5th Cir. 1978). “An employer cannot . . . be held in violation of the Act if it fails to receive prior notice of what is required.” *Sec’y of Labor v. Thomas Indus. Coatings, Inc.*, 21 O.S.H. Cas. (BNA) 2283, 2008 O.S.H.D. (CCH) ¶ 32,937 (2007); *see also Sec’y of Labor v. Keating Building Corp.*, 21 O.S.H. Cas. (BNA) 1513, n.7 (2006) (discussing whether Secretary's allegations of how employer allegedly violated 29 C.F.R. § 1926.703(a)(1) were described with particularity

and whether they properly gave the employer fair notice of the charge being made).<sup>4</sup>

## **2. The Complainant's Burden to Allege a Reasonable, Objective Definition or Interpretation of the Standards.**

In addition to the requirements of 29 U.S.C. § 658(a) to describe an alleged violation with particularity, where, as here, the Complainant alleges violations of general, performance-based standards, the Complainant also has the burden to establish an objective, reasonable definition of what violates the standard. 29 C.F.R. §§ 1910.22(a)(1) and (2) are broad, general standards that contain no specific, quantifiable definition of how an employer must comply. *See, e.g., Sec'y of Labor v. Lone Star Steel Co.*, 8 O.S.H. Cas. (BNA) 1542, 1980 O.S.H.D. (CCH) ¶ 24313 (1980) (“The housekeeping standards at § 1910.22(a)(1) and (2) paint with a broad brush according to the interpretations placed upon them by the Secretary of Labor”); *Sec'y of Labor v. The Cincinnati Gas & Elec. Co.*, 2002 O.S.H.D. (CCH) ¶ 32622 (2002) (“The Secretary agreed at the outset of the hearing that § 1910.22(a)(1) is a general standard, for which the Secretary bears the burden of proving the cited conditions created a hazard”).

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<sup>4</sup> Compare *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (“No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids”); *Ga. Pac. Corp. v. Occupational Safety & Health Review Comm'n*, 25 F.3d 999 (11th Cir. 1994) (holding that 29 C.F.R. § 1910.178 (n)(4) was unconstitutionally vague as applied because, among other reasons, the U.S. Secretary of Labor presented several different definitions of what would violate the standard); *Lloyd C. Lockrem, Inc. v. United States*, 609 F.2d 940 (9th Cir. 1979) (observing that an employer is not required to assume the burden of guessing what the Secretary of Labor intended safety regulations to mean); *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1335-36 (6th Cir. 1978) (holding in an OSHA that “even a regulation which governs purely economic or commercial activities, if its violation can engender penalties, must be so framed as to provide a constitutionally adequate warning to those whose activities are governed”); *Bethlehem Steel v. Occupational Safety & Health Review Comm'n*, 573 F.2d 157, 161 (3d Cir. 1978) (observing that the Secretary has the responsibility to promulgate clear and unambiguous standards under OSHA); *Diamond Roofing Co. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976) (holding that an OSHA standard must give the employer fair warning of the conduct it prohibits).

Where a standard is general, like 29 C.F.R. §§ 1910.22(a)(1) and (2), it is incumbent upon the Secretary to establish an objective, reasonable definition. As the Review Commission recently held regarding § 1910.217(e)(1)(i),

As a broad, performance-oriented standard, section 1910.217(e)(1)(i) provides employers with a certain degree of discretion in determining what type of inspection is appropriate to ensure that its program meets the standard's stated objective. It does not identify each specific part of every type of mechanical press that must be inspected. Such broad standards may be given meaning in particular situations by reference to objective criteria, including the knowledge of reasonable persons familiar with the industry.

*Sec'y of Labor v. Siemens Energy and Automation, Inc.*, 2007 O.S.H.D. (CCH) ¶ 32880 (2005); *see also Sec'y of Labor v. Brooks Well Servicing, Inc.*, 20 O.S.H. Cas. (BNA) 1286, 1291, 2002 OSHD (CCH) ¶¶ 32,675, 51,475 (OSHRC 2003) (“Because the phrase “exits sufficient to permit the prompt escape” does not state with specificity what an employer must do to comply with the standard, we apply the well-established principle that a broadly-worded regulation may be given meaning in a particular situation by reference to objective criteria, including the knowledge and perception of reasonable persons knowledgeable about the industry”); *Thomas Indus. Coatings, Inc.*, 21 O.S.H. Cas. (BNA) 2283, 2008 O.S.H.D. (CCH) ¶ 32,937 (“Because performance standards, such as § 1926.51(f)(1), do not identify specific obligations, they are interpreted in light of what is reasonable.”); *Sec'y of Labor v. Marinas of the Future, Inc.*, 6 O.S.H. Cas. (BNA) 1120, 1977 O.S.H.D. (CCH) ¶ 22406 (1977) (29 C.F.R. § 1910.22(a)(1) “is to be read objectively in light of what is reasonable under the circumstances”); *Secretary of Labor v. Trinity Indus., Inc.*, 15 O.S.H. Cas. (BNA) 1481, 1992 O.S.H.D. (CCH) ¶ 29582 (1992) (“Section 1910.132(a) is a general standard, broadly worded to encompass many hazardous conditions or circumstances. If the duty to comply with the standard is not defined, it could run the risk of being almost indefinitely applicable.”).

**C. Complainant Has Failed to Meet Her Burden.**

Citations 2, Items 4 through 15 should be dismissed because the Complainant has failed to carry her burden to describe with sufficient particularity the nature of the violation – specifically, any sort of reasonably quantifiable definition of a “hazardous accumulation” of sugar dust.<sup>5</sup> In addition to the due process requirements of particularity embodied in the Act’s requirements, as noted by the U.S. Court of Appeals for the Fifth Circuit, the particularity requirement is also intended to provide the employer an ability to abate properly the citation by putting the employer on specific notice of what is expected by the Complainant. *B.W. Harrison Lumber Co.*, 569 F.2d at 1308. Imperial respectfully submits that Complainant was required to state with particularity the level or levels of sugar dust it contends violates 29 C.F.R. § 1910.22. *See, e.g., id.* at 1308-09 (citation underlying failure-to-abate violation did not describe with particularity the nature of the violations because it should have noted the particular work stations involved and specified only the vague phrase “hearing conservation program”).

**III. CONCLUSION**

For the foregoing reasons, Imperial respectfully requests that the Commission enter an order dismissing Citation 2, items 4 - 15.

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<sup>5</sup> Indeed, Imperial presumes that Complainant is referring only to sugar dust in the citations, but the citations are vague as to exactly what type of dusts are intended to be addressed by the citations.



Respectfully submitted this 27<sup>th</sup> day of January 2009.

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**CERTIFICATE OF SERVICE**

I certify that all parties have consented that all papers required to be served in this action may be served and filed electronically. I further certify that a copy of RESPONDENTS' MOTION TO DISMISS CITATION 2, ITEMS 4 THROUGH 15 and MEMORANDUM IN SUPPORT was electronically served on January 27, 2009 on the following counsel:

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