IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

UNITED STATES OF AMERICA	:	
	:	
V.	:	DOCKET NO. 04-20075
	:	
GREGORY JAMES CATON	:	

OBJECTION TO PRE-SENTENCE INVESTIGATIVE REPORT

The defendant Gregory James Caton objects to the Presentence Investigative Report in the following particulars hereinafter alleged.

Objection to Offense Level Computation Section 26

The defendant has had two points added on the basis that the probation department believes the offense involved the "conscious or reckless risk of serious bodily injury" according to U.S.S.G. §2F1.1(b)(7)(A). Defendant objects to the inclusion of those two points in his calculation. The probation officer must be presuming that the defendant knew that the use of Cansema or H_2O could result in serious bodily injury. The contrary is true. The defendant attaches as part of his objection the factual basis for his objection.

First the defendant directs the court to Exhibit #1. This is an affidavit by the injured victim Sue Gilliatt. This affidavit was created on May 29, 2004, while the current charges were pending. The affidavit is self-explanatory. It was created by Gilliatt and her attorney in connection with her civil case referenced in the presentencing court. The significance includes the following:

(1) The affidavit in which she alleges the loss of her nose makes no reference to Greg Caton or any of his companies. It solely blames Dan Raber and Appalachian Herbal Remedies. No reference to Cansema appears.

(2) The products sold by Appalachian Herbal Remedies and Raber are completely separate and apart from anything she received from Alpha Omega Labs.

(3) All of the advice she relates as to how to use the product came from Dan Raber. None of this came from Caton.

(4) She specifically in paragraph 10 blames Raber and Appalachian Herbal Remedies for the injury. And in paragraph 12 reflects exactly the loss in terms of physical injury and surgery and medical bills. The probation department attributes her entire loss to Caton.

On July 19, 2004, apparently as a result of the prosecutor's inquiry about this Affidavit, Gilliatt creates another Affidavit (See Exhibit 2). After reading both of these, apparently her chronology is the following:

(1) She has a medical problem in August 2001 and makes a doctors appointment for October 1, 2001. For whatever reasons, she decides to go on line and finds both Alpha Omega Labs (Greg Caton) and Appalachian Herbal Remedies (Dan Raber).

(2) At some point, she orders the Cansema and upon receiving it, begins using it on September 21, 2001.

(3) On September 24, 2001, blood root from Appalachian Herbal Remedies arrives.

(4) She uses the blood root for 12 hours on September 24. (At no time after September

21, did she ever relate using Cansema)

(5) On September 24, prior to the use of the blood root, she had developed a scab. She says the scab was the normal expected result according to the Cansema product information with the package.

(6) With her nose scabbed, when the blood root (AHP) arrives on September 24, she uses that product for 12 hours.

(7) On September 25 she calls AHP again discussing her large scab. She talks to Dan Raber and is told to use it for 24 hours which she does. (Again no mention is made of any use of Cansema, nor any discussion with Raber about the use of the Cansema 4 days previously)

(8) On October 1 she purchases two more products from Appalachian Herbal Remedies and two more from Alpha Omega.

(9) On January 17, 2003 (15 months later) she buys some more Cansema.

(10) On March 21, 2003 she requests a refund advising Alpha Omega that she never used their product ordered on October 2, 2001, and nor has she used the Cansema bought on January 17, 2003.

Logical deductions can be drawn from these two Affidavits. The victim never talks to Caton. The victim never tells anyone at Alpha Omega that she has used the Appalachian Herbal Remedy. She never tells anyone at Alpha Omega that she has used the Appalachian Herbal Remedy on two different occasions and that her condition is apparently worsening. She never reflects using Cansema after its first application of September 21. Her serious injury is not recognized until October 4. For

whatever reason, she does not go to her doctor appointment of October 1.

There is a civil case ongoing in Indiana, as reflected by these Affidavits. As pointed out in the pre-sentence, she has a pending lawsuit. Caton's company, Alpha Omega, is the only insured party. It has a million dollar insurance policy with Montgomery Insurance and demand has been made. (See Exhibit 3)

The defendant can present evidence and attaches a copy of the letter and shipping information regarding the orders by Gilliatt after October 2001. The FDA seized the Alpha Omega records. A request has been made for the return of the records regarding the January 2003 shipment which will back up the attached March 2003 refund record.

There is not clear, nor convincing evidence, that Caton's product did, nor would, cause the injury. The issue for the guidelines is whether he acted in such a conscious or reckless manner as to create a risk of serious bodily injury. The evidence that Alpha Omega caused the loss is mirky at best, and that Caton had any knowledge that it could be expected is non-existent. No where does anyone else appear to use Cansema and suffer an adverse result.

According to the Presentence Report, Caton's product Cansema was not mailed until September 20, 2001. It is clear from the affidavit that Gilliatt began to be concerned about her nose in August 2001 and had a dermatologist appointment for October 2001. For whatever reasons she finds Appalachian Herbal Remedies on a web-site and on September 15th begins calling, attempting to buy their product. She apparently receives this on September 24, 2001. According to her, the next day serious problems began to arise. On October 1, 2001 she then begins to use additional products also from Dan Raber. Evidently according to the affidavit by October 2, 2001 she is using three

different Appalachian Herbal Remedies and on October 4, 2001 loses her nose. Nowhere does she relate that the use of Cansema was the cause of the injury. As pointed out in the presentence, the victim has a pending lawsuit. Caton's company, Alpha Omega, is the only insured party. Alpha Omega has a million dollar policy with Montgomery Insurance, a subsidiary of Liberty Mutual.

Defendant can present evidence and attaches a copy of the letter from Tabatha LaDoux, a customer service representative for Alpha Omega Labs. That letter along with the shipping information is reflected in Exhibit #4.

The FDA seized the Alpha Omega records. A request has been made for the return of the records regarding the January 17, 2003 shipment, which backs up the March 2003 refund record.

The Commission never defines a "conscious or reckless risk" term. The guidelines state that reckless refers to a situation where the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard the risk constituted a gross deviation from the standard of care a reasonable person would exercise in such a situation. 1 U.S.S.G. §2A1.4 comment. (N.1).

The Eighth Circuit uses a subjective test. The government must prove the conduct created a risk of serious bodily injury and the defendant was aware of the risk and consciously or recklessly disregarded the risk. *United States v. McCord*, 143 F.3d 1095 (8th Cir. 1998).

The Second and Ninth Circuits have rejected this standard. They require only that the risk was created by the defendant's conduct. *United States v. Johansson*, 249 F.3d 848 (9th Cir. 2001). The Second Circuit says that the rule does not require the defendant subjectively know his conduct creates the risk, but the risk must be obvious to a reasonable person. *United States v. Lucien*, 347

F.3d 45 (2nd Cir. 2003).

The acts themselves must be self evident. Creating low impact car wrecks is an insurance scam, obviously involves the potential for a serious injury. *United States v. Hoffman*, 9 F.3d 49. A doctor prescribing unnecessary and dangerous medications in a medicare billing scam, after being put on notice of the potential danger, meets the criteria under the formula. *United States v. Jimenez*, 41 F. Appx. 1 (7th Cir. 2002). Requiring unnecessary surgeries be performed to increase fraudulent billings also qualified. *United States v. Laughlin*, 26 F.3d 1523. These cases do not apply to Caton.

None of these cases should apply here. There is no proof of conscious knowledge by Caton. Enclosed in Exhibit #5 are numerous testimonials from individuals about the Cansema product. Caton had no reason to believe nor is there any evidence to cause one to believe that his product would cause injury, and the testimonials reflect consistent success in the use of the product.

This injury suffered by Gilliatt is serious, but there is no proof Caton's product was the cause, or the sole cause, or that Caton should expect such a result. The product was sold for years to hundreds of people (See Exhibit #5). No one had this reaction. Whether Gilliatt over applied the product, mixed it with the Raber product, or the use of the Raber product aggravated the reaction of the Cansema is unknown at this time. All of these issues are subject to the Indiana litigation.

For all of these reasons to burden Caton with an additional two points for conscious or reckless risk of serious bodily injury under the §2 F1-1(b)(7)(A) criteria is inappropriate and that two points should be deducted from the total offense level.

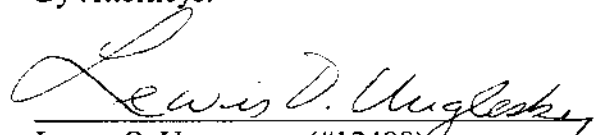
Objection to Victim Impact page 7, paragraphs 14,15,16

Plaintiff attorney John Muller claims that it is Cansema which ate away the nose of Sue Gilliatt. This is incorrect evidence. The deposition of Ms. Gilliatt has been taken. Counsel believes that the deposition actually took place on Friday, July 23rd after the completion of the Presentence Report. The deposition reflects the following facts:

It is unfair to burden Caton with the full cost nor fault in this matter. The photographs presented to the FDA showing the damage were not taken after the application of Cansema alone. These were taken later after she had used both products as discussed above. Additionally, the skin cancer which she believes she suffered, has been cured. The lawsuit is about the fact that while killing the cancerous tissue, also certain healthy tissue was seriously harmed and she has been disfigured. The photograph occurs after Ms. Gilliatt has debrided her own nose without having sought medical attention. There is no evidence that Caton, nor his company, ever was made aware she was using another product, that she applied any product more than the single dose which they were aware on September 21, nor that she ever consulted with Caton as to the propriety of what she was doing. Caton's product may have not been the cause.

Caton's product may or may not have been the cause. The Indiana litigation is ongoing. There are issues of other defendants, and Gilliatt's comparative fault. It is not fair to burden Caton with full restitution.

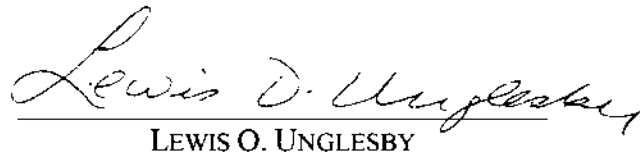
By Attorneys:



LEWIS O. UNGLESBY (#12498)
UNGLESBY & MARIONNEAUX
246 Napoleon Street
Baton Rouge, Louisiana 70802
Telephone: (225) 387-0120
Facsimile: (225) 336-4355

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been forwarded to all counsel of record via United States Mail, First Class postage prepaid and properly addressed or via Facsimile Transmission on this 2nd day of August, 2004.



LEWIS O. UNGLESBY

UNGLESBY & MARIONNEAUX, LLC

Trials and Appeals

246 NAPOLEON STREET
BATON ROUGE, LOUISIANA 70802
TELEPHONE: (225) 387-0120
FAX: (225) 336-4355
email: trialsandappeals@bellsouth.net

LIVONIA OFFICE:
2993 LA. HWY. 78
LIVONIA, LOUISIANA 70755
TELEPHONE: (225) 637-3622
FAX: (225) 637-3613

†LEWIS O. UNGLESBY
ROBERT M. MARIONNEAUX, JR.

PLEASE REPLY TO:
BATON ROUGE

August 2, 2004

The Honorable Catherine B. Carter
Deputy Clerk-in-Charge
2100 John M. Shaw
United States Courthouse
800 Lafayette Street
Lafayette, Louisiana 70801

Re: USA v. Gregory J. Caton

Dear Ms. Carter:

Please find enclosed an original and one (1) copy of an Objection to Pre-Sentence Investigative Report in the above captioned matter. I ask that you file the original and return one copy date stamped in the self-addressed stamped envelope.

Thanking you for your cooperation in this matter.

Sincerely,

Lewis O. Unglesby

LOU:jc

Enclosures

cc: Mr. Larry Regan
Mr. Ronald J. Helo
Hon. Tucker L. Melancon

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

NOTICE OF MANUAL ATTACHMENT

CASE# 2:04CR20075

UNITED STATES OF AMERICA

VS.

GREGORY JAMES CATON

ATTACHMENTS TO:

DESCRIPTION: OBJECTION TO PRE-SENTENCE INVESTIGATIVE REPORT

FILED BY: DEFENDANT

FILE DATE: 08-04-04

ARE LOCATED IN THE CLERK'S OFFICE OF THE PRESIDING JUDGE

CARLEEN LEBLANC

DEPUTY CLERK