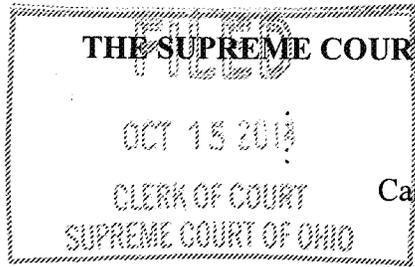


ORIGINAL



In re Application of

Joseph V. Libretti, Jr.

Case No. 2014-1555

RESPONSE OF CMBA TO APPLICANT'S MOTION TO STRIKE

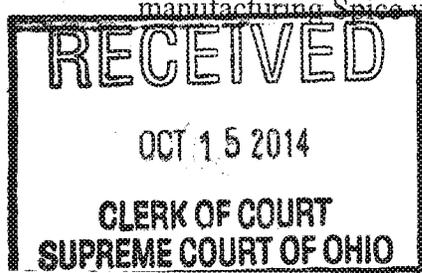
Now comes Cleveland Metropolitan Bar Association ("CMBA") and respectfully sets forth reasons why Applicant Joseph Libretti's Motion to Strike should be denied. Applicant's motion is without merit. And, the hearing panel exemplified diligence in preparing for the hearing, patience in enduring conflicting and evasive testimony from Libretti, and care in preparing its Report.

Libretti's criticisms of the Report run from nitpicking to frivolous to demonstrably untrue. The Sections below track corresponding sections in Libretti's brief, though captions are restated. Regrettably, the discussion which follows is necessarily more detailed than the vacuous arguments Libretti raises.

All of Libretti's arguments could have and should have been raised as objections in accordance with this Court's Order to Show Cause. This multiplication of motions, typical of Libretti's approach to litigation, provides a sufficient basis to deny Libretti's Motion to Strike. But, there is more.

1. Libretti aided and abetted his Casper roommate's evasion of child support garnishment orders (Report 3)

After his 2008 supervised release from federal prison, Libretti and Brian Frank Hohlios shared a home in Casper, Wyoming. Hohlios was a convicted methamphetamine dealer, also on federal probation. Shortly thereafter, Libretti and Hohlios became involved in selling and manufacturing Spice, using cannabinoid analogs sprayed onto a leafy substrate.



Nothing about Libretti's involvement in the Casper Spice business was disclosed in Libretti's application (CMBA Ex. 1; Tr. 359:7-10), nor in any pre-hearing supplement. Libretti did discuss limited aspects of the Casper Spice business with the CMBA interviewers on June 6, 2013, but he sought to distance himself from it claiming that (1) he only financed (2) his roommate's (3) "herbal incense" business.¹ Libretti did not disclose that he (Libretti) alone ran the Casper Spice business both during Hohlios's March-June 2010 imprisonment for a parole violation, and after Hohlios's death in July 2010, or that he alone ran the Casper Spice business after he (Libretti) moved to Cleveland to begin law school in August 2010 (Tr. 590:8-18 (Kline); 655:3-7 (Rosman); CMBA Ex. 71 @ p. 3). Nor did Libretti disclose to the CMBA interviewers his Cleveland Spice business (*see* Section 5 below), the March 30, 2011 searches of his Cleveland apartment and storage locker, or the seizure in Cleveland of JWH-018, then a controlled substance (Tr. 591:13-592:1 (Kline); Tr. 655:3-656:4 (Rosman)). At the hearing Libretti admitted his much greater and ultimately sole role in the Casper (and Cleveland) Spice businesses, and initially claimed that the US Probation office "has always known about my involvement in the spice business" (Tr. 95:24-96:6).

With respect to Hohlios's garnishment orders, Libretti stated (Tr. 94:23-95:23):

"When we started this business -- well, it was Brian's business and I was investing in it, and he wanted to put the money in my bank account because he had a -- some child support garnishments, and if the money was in his bank account, they could take my money for his obligations. So we ran everything through my bank account.

"But he wanted to make sure that he had access to my money, so he set up a trust and he put my bank account in the trust and he made himself a trustee and a beneficiary on that. And he made me a trustee and beneficiary."

¹ During the CMBA interview, Libretti used the sugar-coated term "herbal incense" (Tr. 294:4-6), but did not use other terms – such as Spice, synthetic marijuana, or similar more accurate terms (Tr. 653:18-23).

However, Libretti then contradicted himself by claiming that Hohlios was the sole trustee (Tr. 461:8-24); that his Probation Officer did not know of Libretti's Spice business until after the June 2010 search of his Casper residence (Tr. 462:15-21); and that he did not advise the Probation Office of his Spice-related income "Because originally Brian set this up as a trust so he said legally it wasn't my income." (Tr. 460:13-23). Nor did Libretti declare any of the income on his federal income tax returns (Tr. 363:9-364:17), except for a 2011 Schedule C based on a 1099 from JPL Marketing (discussed in Section 3 below).

Given Hohlios's concern over garnishment orders and given Hohlios's legal advice that trust income "legally ... wasn't [a beneficiary's] income," the Report's conclusion that Libretti aided Hohlios's evasion of garnishment orders was a fair and reasonable conclusion. What is neither reasonable nor fair is to now argue, as does Libretti here, that Spice-related income that was not Hohlios's income was Hohlios's income: "The other individual [i.e., Hohlios] was free to take his share of the sales profits and apply it to any child support arrearages that were his responsibility." (Motion to Strike at 1).

2. Did Libretti sell Spice to wholesalers in Colorado?

Before his 1992 conviction, Libretti sold marijuana, cocaine, marijuana and perhaps other drugs (and firearms) in Colorado. But, Libretti is correct that the record only reflects that Libretti sold Spice in Wyoming, Ohio and Arizona – not Colorado. This is an example, in the language of Libretti's motion, of "some errata are perhaps inevitable." Libretti could and should have raised this minor point in his objections.

3. **Libretti expended in excess of \$360,000 to buy synthetic cannabinoids and substrate to manufacture Spice.**

Libretti's objection to the Report (@ 8) and CMBA Ex. 89² is frivolous. First, in questioning by the Panel, Libretti admitted (Tr. 458:20-459:5)³:

Q. I'm handing you the first page of revised Exhibit 89. And we talked about the listings in 2011 totaling \$29,224. I want to talk about the listings in 2010, starting at the top of the page down to -- two-thirds of the bottom with the total of \$366,681. And if I'm not -- what you're doing here is listing -- what this reflects is a listing of the purchases you made, of the cost of goods?

A. Yes, I think so.

Second, the record is absolutely clear that Libretti withdrew his objection to CMBA Revised Ex. 89, while reserving the right to object in Libretti's closing brief to the Panel as a Motion to Strike "if [Libretti's counsel] find any inaccuracies." Tr. 668:23-669:11. No such Motion was ever filed.

Third, Libretti's critiques of a few entries are wrong. For example, Libretti criticizes the August 6, 2010 entry of \$27,500 because, he says, it refers to CMBA Ex. 88 @ pp. 1-2. In fact this entry refers to Ex. 87 @ p. 6. Further, many **but not all** of the documents underlying CMBA Revised Ex. 89 were admitted to evidence without objection. Some were not even offered, but that is the very purpose of summary exhibits. *See* Rule 1006 of the Ohio Rules of Evidence.

Fourth, Libretti's critique that certain amounts should have been netted out is both disingenuous and absurd. CMBA Revised Ex. 89 is entitled "Libretti purchases." It does not purport to show to whom he sold synthetic marijuana, nor does it purport to reflect his profit.

² Technically, the argument should be to CMBA Revised Ex. 89. Both Ex. 89 and Revised Ex. 89 were summary exhibits provided to Libretti's counsel in advance of the hearing.

³ *See* Tr. 507:1-7 (Libretti spent tens of thousands of dollars on JWH-018 and other synthetic cannabinoids).

That Libretti contributed some of the Spice or raw materials he purchased to JPL Marketing in exchange for a 42% of its profits (Tr. 419:2-4), does not change the fact that he purchased them.

Fifth, nowhere in his Application did Libretti disclose his 42% interest in JPL Marketing, an Arizona entity. Moreover, Libretti received a 1099 from JPL Marketing, which he converted into a Schedule C, deducting \$8,600 for Spice which was not sent to JPL Marketing but rather was seized in Cleveland by federal and state law enforcement officers (Tr. 507:18-508:1). The seized Spice had nothing to do with JPL Marketing, and may have included Spice treated with JWH-018.

Finally, Libretti implies that he ceased all involvement in the Spice business in March 2011 voluntarily, but in fact his involvement ended because he was indicted in Wyoming, arrested in Cleveland, and placed in pretrial confinement in March 2011. Libretti also repeats his mantra that Spice is “the legal product in question,”⁴ ignoring his possession on March 30, 2011 of JWH-018 treated Spice, then a controlled substance.

4. **Libretti was not forthcoming during the bar application process about his Spice business (Report 8) and he failed to list it in a separate Form 10 (Report 13).**

Libretti’s defiant contention that “there is simply no evidence in the record to support these assertions” is false. Virtually every page of the transcript screams otherwise. Libretti testified, for example:

Q. Now, not -- nowhere in your application, Exhibit 1, did you disclose your Casper or your Cleveland spice businesses, did you?

A. No.

⁴ Libretti invokes this “legal product” mantra some seven times in his brief. The mantra is misleading, since “the FDA has never approved any of the cannabinoid analogs “for human consumption.” CMBA Ex. 84; Tr. 505:12-17. Moreover, all controlled substance analogs are now banned by the DEA (*see* Ex. 74 @ ¶61), and Ohio law (O.R.C. § 3719.013). *Accord* Tr. 249:15-17 (Hricko).)

Additional evidence is recited in Section 3 above (and elsewhere herein). More examples include:

In his response to Question 7 in his Application (CMBA Ex. 1 @ p. 13), Libretti claimed that he was unemployed from August 2010 to March 2011, thereby concealing his self-employed Casper and Cleveland Spice businesses as well as his 42% interest in JPL Marketing. He also failed to disclose his Spice businesses in response to Question 23.C and in a Form 10.⁵ (Tr. 359:7-10).

In his June 6, 2013 CMBA interview, Libretti told the interviewers that he had financed his Casper roommate's "herbal incense" business, but did not even allude to his far greater involvement (Tr. 590:2-7) summarized above. Nor did he disclose to them his Cleveland Spice business (Tr. 655:8-11), or his possession in Cleveland of JWH-018, then a controlled substance (Tr. 591:17-592:5; Tr. 655:16-656:4). Moreover, the day after his June 6, 2013 CMBA interview, Libretti wrote both interviewers, asserting "Since my release from prison I have not broken any laws," except for two traffic tickets (CMBA Ex. 42 @ last 6 pages; *see* Tr. 352:22:-353:11). Given Libretti's possession in Cleveland of a controlled substance on March 30, 2011, his letter was simply untrue. He also told the interviewers that he had complied with the terms of his parole (Tr. 585:18-586:5), an assertion which the record reveals to be demonstrably untrue. And, Libretti did not tell the CMBA interviewers that in March 2011 he had sought and received immunity from the US Attorney's Office (Tr. 582:23-583:4; 592:6-9) for possessing JWH-018.

With respect to "candor" at the hearing, the Report found that Libretti was "evasive and not credible" (Report @ 11), and noted "multiple examples" where Libretti "walk[ed] a fine line

⁵ That Libretti understood his obligation to disclose even an unincorporated business is clear from his Form 10 disclosure of "Lakewood Firearms Supply" (CMBA Ex. 1 @ p. 75).

with regard to his disclosures” (Report @ 12). So troubled by Libretti’s hearing testimony, the Panel wrote (Report @ 13):

“Stated bluntly, after observing Libretti for a number of hours on the witness stand, the panel did not trust Applicant to be truthful or forthcoming.”

With respect to Libretti’s post-hearing supplement, *see* Section 7 below.

5. Libretti did not disclose that his Cleveland apartment had been searched (Report 10).

Based on an obscure reference in CMBA Ex. 46 @ p. 1 (Green Sheets of CMBA Interviewer James Kline),⁶ Libretti claims that the Report in only one of several related conclusions – that Libretti failed to disclose the search of his Cleveland apartment and storage locker in March 2011 – was “blatantly false.” The Green Sheet reference is to a civil case Libretti filed in the Cuyahoga County Court of Common Pleas, which had been removed to federal court. But, the Green Sheet entry does not refer to a search of Libretti’s Cleveland apartment, nor did Libretti provide copies of the complaint (or any of the proposed amended complaints) in that case. Even if Libretti were to have provided a copy of one or more of the complaints, none mentions Libretti’s possession of a controlled substance, because Libretti determined that JWH-018 simply was not “relevant” (Tr. 357:6-13). Nor do any of the complaints refer to Libretti’s request for immunity.

But, more significantly, Libretti wholly ignores the uncontradicted testimony of Mr. Kline:

Q. During the June 6, 2013, interview, did you talk to Mr. Libretti about the search of his Cleveland apartment in March of 2011?

A. I don't believe so.

⁶ The obscure reference Libretti cites is part of an entry in response to Question 2, noting that Libretti had filed yet another lawsuit: “Civil litigation he brought in USDC NDOH, Case No. 1:13-cv-00932-DAP seeking compensation for property taken in search associated with criminal prosecution (for which he was acquitted).” Evidently, Libretti assumes that the CMBA interviewers should have construed “property” to refer to Spice.

Q. Did he tell you that on March 30th and 31st of 2011 that spice or a chemical used to make spice named JWH-018 was found in his possession in a locker or storage -- closet or storage locker to his apartment?

A. No.

6. **Why did Libretti fail to disclose his March 30, 2011 request for and grant of immunity?**

Libretti (purposely?) misstates the Panel's comment (by deleting the phrase in bold):

“Possibly the reason why Libretti did not make the ‘immunity’ disclosure was because it would have led to questions about his having the controlled substances in his possession.” (Report @ 10).

By way of background, in his application, Libretti acknowledged that he was granted immunity in 1985 by a Wyoming grand jury investigating narcotics trafficking (CMBA Ex. 1 @ pp. 25 & 63). But, Libretti did not disclose that he also sought and received immunity in March 2011 because he possessed a controlled substance in his Cleveland apartment's storage locker (Tr. 125:14-19). Indeed, nowhere in his application (Tr. 123:12-17), nor in any pre-hearing supplement (Tr. 125:20-24), nor in his June 6, 2013 interview (Tr. 126:1-4; 582:23-583:4 (Kline)), nor in his direct examination (Tr. 126:9-12), did Libretti disclose that he sought and received immunity in 2011.

Libretti eventually admitted at the hearing that he sought immunity in 2011 (Tr. 126:14-19; Tr. 340:10-341:22; Tr. 471:21-23), but claimed that he was never told by anyone, including his Cleveland federal public defender, that immunity had been granted (Tr. 518:20-519:2). Libretti's claim of ignorance is contradicted by CMBA Ex. 65 (@ p. 30 (and *see id.* @ p. 6 (caption to table))), which was filed with the Ohio federal court on April 30, 2013. Because Libretti now admits that he saw CMBA Ex. 65 @ p. #30 several months before the hearing (Tr. 516:13-517:2), he concocted a new explanation for nondisclosure: he claimed that he did not

have immunity (1) because he was not hauled before a federal court as he had been in 1985, and (2) based on his own legal research conducted **before** he submitted his Application in November 2012 (Tr. 521:7-22). However untenable, Libretti knew that he had sought immunity, knew by April 2013 that government records (CMBA Ex. 65) reflect a grant of immunity, and knew that he was under a duty of inquiry (*see* Tr. 520:7-19).

Libretti now challenges the Panel's "possible" (and reasonable and logical) explanation for Libretti's nondisclosure. Conversely, Libretti had no reasonable alternative explanation at the hearing, and offers no such explanation in his Motion to Strike.

7. **Libretti's FOIA Request (relating to the March 2011 request for and grant of immunity) attached to Libretti's post-hearing supplement was knowingly false.**

Libretti's post-hearing supplement contains a January 9, 2014 FOIA request to the US Department of Justice. Libretti's FOIA Request sought records relating to his March 2011 request for and grant of immunity. It states that "The records are requested for the purpose of scholarly research and for educational purposes" and "these records are being requested for an educational purpose and nor for a commercial purpose". The Panel appropriately found both statements to be knowingly false (Report @ 11).

Libretti now claims that the Panel failed to ask him about the FOIA Request at the hearing, an absurdity since the hearing concluded two days earlier.

He also claims that the Panel had no evidence before it to conclude that the FOIA Request's statements were knowingly false. This second proposition is preposterous. The Report correctly concluded: if it walks like a duck, talks like a duck, and looks like a duck, it is a duck. The FOIA request was made two days after the hearing concluded, it directly relates to a matter covered at some length in the hearing, and it bears no resemblance to any scholarly or educational purpose, and indeed no such purpose has been identified by Libretti.

Furthermore, the post-hearing FOIA Request was undoubtedly a gambit to see if the left-hand of the government knew or could find out what the right-hand of the government had done. Notably, Libretti's FOIA request failed to cite documents already in Libretti's possession showing the grant of immunity by the US Attorney's Office (CMBA Ex. 65 @ p. #30). The FOIA Request did not even identify the DOJ employee most likely to have knowledge: the prosecutor (Renee Bacchus) who handled the case in the district court and is now handling Libretti's appeal.

8. **Contrary to Libretti's contention, the record reveals that Spice is toxic.**

Libretti complains that the portion of footnote 3 (Report @ 3) relating to the toxicity of Spice lacks record support. He is wrong. CMBA Ex. 84 details adverse health effects of Spice, stating, for example, that the scheduling of JWH-018 (and certain other cannabinoid analogs) "was necessary to prevent an imminent threat to public health and safety." It then elaborates:

"Since 2008, DEA has received an increasing number of reports from poison control centers, hospitals and law enforcement regarding these products. ... Emergency room physicians report that individuals that used these types of products experience serious side effects which include: convulsions, anxiety attacks, dangerously elevated heart rates, increased blood pressure, vomiting and disorientation."

Moreover, even Libretti admitted the toxicity of Spice. Specifically, Libretti claimed that although he was desperately seeking to rid himself of his Spice inventory,⁷ he accepted the advice of his suppliers who told him not to flush it or throw Spice in the garbage, because it was an "environmental hazard" (Tr. 99; 343:14-344:6; 438:11-16). Instead and ironically, Libretti continued to knowingly sell for human consumption that which was too toxic to be put into a garbage dump (Tr. 344:10-14). Libretti also testified that his sale of Spice was "immoral," which is not a description of something "positive." See State v. Shalash, 2014 Ohio 2584 at ¶10

⁷ Libretti, however, continued to order Spice chemicals, including JWH-018 on February 28, 2011.

(10th Dist. Ct. App. June 16, 2014), quoting with approval testimony of the State's expert who opined that at least some cannabinoid analogs, including AM-2011 and JWH-018 (both of which Libretti made and sold), "are more potent than regular marijuana and ... these substances affect a person's brain causing hallucinations, paranoia and aggression, and can cause seizure and death."

9. The record demonstrates that Spice is toxic and "not positive" to humans.

The toxicity of Spice is addressed in Section 8 above. The DEA's description of the toxicity of Spice in CMBA Ex. 84, and its scheduling of JWH-018 on March 1, 2011 do not exempt the Spice made and sold by Libretti.

Moreover, the passage of the Report @ 16 Libretti challenged is not limited to Spice. Rather, it includes "his conduct both as a drug dealer and with respect to his activities in selling spice." Not even Libretti has the hubris to argue that the effects of cocaine are "positive."

Finally, one of the Panel's chief concerns was Libretti's "amoral viewpoint as it pertained to his criminal activities and spice operation." (Report @ 13.) The record is essentially devoid of evidence of Libretti's concern about the adverse health effects of any of the drugs he trafficked in, including Spice,⁸ on users and third parties, evidence of remorse, and evidence of acceptance of responsibility. The arguments Libretti advanced in sections 8 and 9 of his brief provide even more evidence of the Report's "amoral" conclusion.

⁸ There is another sad but telling irony in Libretti's position. While manufacturing and selling Spice for human consumption, Libretti callously did not bother to study "the effects of spice or what it does." (Tr. 274:4-7).

CONCLUSION

Libretti's Motion to Strike should be denied. His arguments range from nitpicking, to frivolous, to demonstrably untrue.



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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that the original and 10 copies of the foregoing RESPONSE OF CMBA TO APPLICANT'S MOTION TO STRIKE were mailed this 14th day of October, 2014

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