UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:	)	
	)	
Agrimor Int'l Co.,	)	DOCKET NO.: FIFRA-04-2010-3002
	)	
Respondent.	)	
	)	

COMPLAINANT'S REPLY TO RESPONDENT'S RESPONSE TO MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Respondent has argued that Complainant's Motion for Leave to Amend should be denied because, it alleges, the Motion was filed by EPA for purposes of delaying these proceedings, because the violations EPA seeks to add are based on confidential information provided by Respondent in settlement talks, and because Respondent will suffer severe prejudice if the Motion is granted. However, as Complainant shows in this Reply, none of these arguments is true. There is no evidence of any effort by EPA to delay this matter; in fact, EPA has attempted in good faith to settle this case without litigation for several years but finally had to file a complaint as a result of Respondent's continuing unwillingness to resolve the matter. The only evidence of delay in this matter is that of the Respondent who claimed that it was not subject to U.S. environmental laws.

I. The New Counts to be Added to the Proposed Second Amended Complaint Are Based On EPA's Continuing Investigation, Not on Information Provided by Respondent. Filing a Second Amended Complaint Will Avoid the Need to File a Separate Complaint Alleging Similar Violations.

On October 9, 2009, EPA filed its Complaint alleging that Respondent violated FIFRA by importing three unregistered pesticides into the U.S. without having filed Notices of Arrival (NOAs) prior to the arrival of the pesticides in the U.S. and by distributing unregistered pesticides. Shortly after filing the Complaint, EPA received additional information from the state of Florida showing that the shipment of pesticides involved in the spill in the Miami rail yard contained eight pesticides instead of three as first thought. This information prompted EPA to file its First Amended Complaint on October 22, 2009.

After filing the First Amended Complaint, EPA further determined based on new information from U.S. Customs that Respondent had imported additional pesticides into the U.S. during the four-year period (2005-2008) following the spill without filing NOAs. EPA Region 4 also recently obtained confirmation from its Headquarters office that tracks filings of foreign purchaser acknowledgement statements (FPAS) that Respondent did not file FPASs in connection with its exports of unregistered pesticides. Also, based on EPA's continuing evaluation of this matter, EPA determined that at least two of the imported containers of pesticides involved in the spill were misbranded.

It is these additional alleged NOA, misbranding, and export violations that EPA is seeking to add to this case. EPA believes that it makes better sense and serves the purpose of judicial economy to include all of these related FIFRA violations in this one case rather than filing a separate complaint that would result in splitting up the violations between two cases. EPA also assumes that if it were to file a second complaint while this case is pending, the court might consolidate

the cases, or the Respondent might seek to consolidate. Alternatively, if this case proceeds without the additional violations being included and EPA later files a second complaint alleging the additional violations EPA seeks to include here, Respondent is likely to move for dismissal on res judicata or collateral estoppel grounds arguing that the violations in the second case should have been raised and adjudicated as part of the first case.

II. Respondent Will Suffer No Prejudice if the Motion is Granted

Respondent has not explained the severe prejudice it claims it has suffered or will suffer by the filing of a Second Amended Complaint. In Bug Bam Product, LLC, Docket No. FIFRA-09-2009-0013, Order Granting Motion for Leave to File Amended Complaint, http://www.epa.gov/ALJhomep/orders/htm, (Jan. 7, 2010), EPA filed a motion for leave to file an amended complaint seeking to add violations and a new party and to increase the proposed penalties, similar to what Complainant has moved to do in the present case. The Court granted EPA's motion finding that respondent would suffer no undue prejudice from an amended complaint because the case was in the very early stages of the litigation process, a prehearing exchange order had not been issued, a hearing had not been scheduled, and no delay in the prehearing schedule would result from adding a party. The court also held that respondent had not identified any prejudice or additional burden resulting from the addition of a second respondent.

In Strong Steel Products LLC, 2003 WL 22534 (EPA), Docket No. RCRA-5-2001-0016, CAA—5-2001-0020& MM-5-2001-0006 (2003) (Order on Motion for Leave to File Amended Complaint), the court discussed factors leading

several courts to deny motions to amend, the most common of which were the motion's closeness in time to a hearing and the delay in filing the motion, and the prejudice resulting from the need for additional fact finding, amended prehearing exchanges, and delays in resolving the cases. None of those factors is present in the instant case.

Like in Bug Bam, and unlike in the "denial" cases discussed in Strong Steel Products, the instant case is in its very early stages - Respondent just recently filed an Answer and the parties have not yet begun the ADR process. Complainant's Motion was filed shortly after it confirmed the facts supporting the additional violations. The prehearing conference and prehearing exchange are at least 3-4 months away and a hearing may be as many as 6 months or more away. Respondent will have ample time to file an amended answer to address the additional violations alleged by EPA and to prepare for trial if necessary. Also, Respondent has not shown what prejudice or additional burden it would suffer by the addition of Stockton Chemical Corporation to this case.[1]

III. Respondent Cannot Claim Surprise by the Additional Violations

Respondent's claim that it has been surprised and will suffer prejudice by EPA's efforts to add violations to the case is without merit. After the First Amended Complaint was filed and Respondent hired counsel, EPA's counsel clearly explained to Respondent's counsel that EPA was continuing its investigation and had discovered additional NOA violations and might seek to add these violations to the complaint. EPA's counsel further stated that as an

[1] As argued elsewhere in this Reply Brief, Stockton Chemical Corporation and Agrimor Int'l appear to be very closely related companies; they should have no problem obtaining information from each other.

incentive to settlement, EPA was willing to wrap these additional violations into a settlement to resolve the First Amended Complaint without seeking to file another amendment that would add the other violations or ask for additional penalties.

While EPA extended this good faith settlement gesture, EPA also was clear that it could not agree to hold open such an offer endlessly, especially if settlement discussions were unsuccessful. EPA's Motion seeks to carry out exactly what it told Respondent it would do in the event the parties could not settle.

Additionally, when Respondent first raised inability to pay and size of business issues, EPA advised Respondent that in order for EPA to evaluate these claims under the FIFRA penalty policy, Respondent would have to submit tax returns and financial statements, not only for itself, but also for Stockton Agri and its divisions because the companies appeared to be interrelated.[2] Thus, there should be no surprise that EPA was evaluating the corporate relationship of the companies and that EPA might decide that there was a basis for adding another company as a party.

IV. Complainant's Proposed Amended Complaint is Not Based on Confidential Information Submitted by Respondent in Settlement Discussions

Respondent argues that EPA has "abused" confidential information submitted by Respondent during settlement discussions to gain an advantage in

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[2] The FIFRA penalty policy provides: "Size of business is determined from a company's gross revenues from all revenue sources during the prior calendar year. . . Further, the size of business and gross revenue figures are based on the entire corporation rather than a specific subsidiary or division of the company which is involved with the violation (including all sites owned or controlled by the foreign or domestic parent company), unless the subsidiary or division is independently owned." See: Enforcement Response Policy for FIFRA, July 2, 1990, amended Dec. 2009.

this case. However, Complainant has gained no advantage from the information submitted by Respondent.

A. The Proposed Additional Violations Were Not Disclosed in Financial Documents or by Respondent in Settlement Talks

The proposed additional violations in this case were discovered by EPA in the course of its continuing investigation into Respondent's practice of importing/exporting unregistered pesticides. None of these additional violations was discovered or based on the financial documents submitted by Respondent, nor did Respondent disclose any violations to EPA pursuant to the EPA Audit Policy prior to or after the case was filed, or during any settlement talks between counsel for the parties.

B. EPA's Motion Does Not Disclose or Seek to Introduce into Evidence Any Statements or Documents Pertaining to Settlement Discussions and Negotiations Regarding Liability or Penalties

40 C.F.R. § 22.22(a)(1) provides that the Presiding Officer shall admit all evidence "[E]xcept that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules is not admissible."

FRE Rule 408 prohibits admission into evidence statements and discussions pertaining to the parties' efforts to reach a compromise during settlement meetings. It was developed to enable parties to negotiate in settlement meetings without concern that statements they might make regarding liability, strengths or weaknesses of their positions, or how much they would agree to settle for, could be used against them at trial to prove liability or weaken their position. Not everything said or done or produced during settlement talks

must be excluded, as recognized by subsection (b) of Rule 408 and case law.

The information disclosed in Complainant's Motion can be easily distinguished from the evidence excluded in In the Matter of United States Air Force, Tinker Air Force Base, Respondent, Docket No. RCRA-6-98-001(Order on Complainant's Motion to Disregard, http://www.eap.gov/ALJhomep/order/htm, (Aug. 8, 2000), Crown Central Petroleum Corp., Docket No. CWA-08-2000-06, 2002 EPA ALJ Lexis 1, http://www.epa.gov/OALJ/orders/Crownid.pdf (Jan. 8, 2002), and Bug Bam, id., wherein the courts deemed inadmissible certain testimony, statements or documents derived from settlement conferences that pertained to confidential penalty offers, liability, continuing noncompliance and penalty calculations. In the present case, the information Respondent complains about in Complainant's Motion contains no statements or positions communicated by Respondent during a 408 settlement conference or a settlement meeting regarding liability, penalties, or how much EPA would accept or Respondent would pay, but only pertains to the relatedness of the companies. As such, EPA believes that the information would not be precluded from admission into evidence by Rule 408 and 40 C.F.R. § 22.22(a)(1). Further, Rule 408 does not require the exclusion of any evidence merely because it is presented in the course of compromise negotiations, and does not require exclusion when the evidence is offered for another purpose. See U.S. Air Force, Tinker Air Force Base, id. Also, evidence concerning ability to pay and size of business is admissible into evidence. See New Waterbury, Ltd., TSCA Appeal N. 93-2, 5 EAD 529 (EAB, Oct. 20, 1994).

C. EPA Believes That the Information in Complainant's Motion Should Not be Treated as Confidential Business Information, but to the Extent the Court Finds It Should Be So Treated, Several Options Are Available to Protect the Information From Disclosure.

Prior to, and after the time that Respondent submitted financial information, EPA continued to evaluate evidence from a variety of public sources that suggested a very close relationship between Agrimor Int'l and Stockton Chemical Corporation. In the financial documents submitted by Respondent (claimed confidential), EPA noticed an item of information that provided additional support about the close relationship between the two companies. This information was cumulative to what EPA had seen elsewhere.

In its Motion for Leave, EPA's counsel mentioned this item of information and its source, not with a knowing intent of disclosing confidential information or attempting to circumvent 40 C.F.R. § 22.22(a)(2),[3] but only to show additional support for the information EPA had obtained elsewhere about the companies' close relationship. The Motion did not disclose any information pertaining to Respondent's finances, taxes, revenues, salaries, payments, debts, products, sales, contractual matters, projections, customer lists, or pesticide formulations.

In light of the type of information mentioned in the Motion, EPA believes that its disclosure would have no harmful effect on Respondent's business, its competitive position, or its finances, and that if Respondent were asked to

[3] Pursuant to 40 C.F.R. 22.22(a)(2), a business confidentiality claim does not prevent information from being introduced into evidence, but shall instead require that the information be treated in accordance with 40 C.F.R. Part 2, subpart B.

substantiate its confidentiality pursuant to 40 C.F.R. § 2.204,[4] it is likely that the information would not qualify as confidential business information. Also, the information has no bearing on whether the additional alleged violations should be added to the Complaint through Amendment.

If the Court were to determine that the information in the Motion is confidential, such that it shouldn't have been mentioned without a prior determination by EPA or the Court pursuant to 40 C.F.R. §§ 2.204 and 2.208 that it does not qualify as confidential, EPA asserts that it is harmless error since disclosure cannot harm Respondent's competitive position. Also, pursuant to 40 C.F.R. § 22.22(a)(2), the information may still be admitted into evidence and steps can be taken, as has been done in other cases, to preserve its confidentiality through issuance of a protective order. See, In the Matter of Ronald Hunt, et al., Docket No. TSCA-03-2003-0285, Order on Joint Motion for Protective Order, Aug. 4, 2004, http://www.epa.gov/OAlJ/orders/ ronhunt2 – pro.pdf. Alternatively, Complainant could withdraw its Motion, excise that language and re-file the Motion, and/or Respondent could be directed to make a showing that the information is entitled to CBI protection under 40 C.F.R. §§ 2.204 and 2.208.

V. Adding Stockton Chemical Corporation as a Respondent is Warranted

Respondent argues that EPA is "stretching the truth" to add Stockton

[4] Under 40 C.F.R. § 2.204(e), when information is submitted that is claimed as confidential business information, a claimant may be required to substantiate the confidentiality of the information by showing that disclosure of the information would be likely to result in substantial harmful effects on the business' competitive position, showing what those harmful effects would be, why they should be viewed as substantial, and an explanation of the causal relationship between disclosure and such harmful effects.

Chemical Corporation. EPA believes that the evidence supports a finding that Stockton and Agrimor Int'l are one and the same company such that Stockton can be held responsible for some or all of the violations alleged in this case. Most of the information leading EPA to draw this conclusion comes from publicly available sources showing that the companies are located at the same address, have the same owner who serves as president of both companies, and appear to be conducting essentially the same, if not identical type of business, with no clear distinctions between them.

The internet sites further showed that Stockton Agrimor AG, based in Switzerland, markets itself as a global company with distributor divisions located in many countries, including Agrimor Int'l and Stockton Chemical Corporation in the U.S. Stockton Agrimor AG was founded by, and appears to be owned by the same person who owns Agrimor Int'l and Stockton Chemical Corporation. The websites for Stockton Agrimor AG, Stockton Chemical Corporation, and Agrimor Int'l are linked to each other and show that the two divisions based in the U.S., along with companies in other nations are distributor/divisions for Stockton Agrimor AG. All the divisions have Stockton and/or Agrimor in their names. The websites leaves an impression that Agrimor Int'l and Stockton Chemical Corporation are not clearly distinguishable from one another as separate companies engaged in different businesses and that they may not be independent from each other or from Stockton Agrimor AG.

Additionally, import records from U.S. Customs show that Stockton Agrimor AG and Agrimor Int'l were variously listed as either a shipper and/or

importer for a number of the pesticide shipments that arrived in the U.S. without NOAs being filed first. Also, on at least one occasion, Stockton Chemical Corporation is listed as the shipper of chemicals to Agrimor Int'l, suggesting that, in light of all the other information, that Stockton and Agrimor, arranged to ship and receive pesticides to and from one another as part of the global pesticide sales and distribution operation of Stockton Agrimor AG.

Based on this information, when Respondent raised inability to pay and size of business, EPA advised Respondent (consistent with FIFRA penalty policy guidelines) that in order to evaluate these assertions, EPA needed to review financial information for Agrimor and also the other companies including Stockton Agrimor AG and various divisions and subsidiaries[5] in the U.S. and elsewhere. Stockton Chemical Corporation was one of the companies that appeared to be closely related to Agrimor Int'l, and like Agrimor was a division or subsidiary of Stockton Agrimor AG. [6] EPA's goal was to review these financial relationships to help EPA determine the impact of the proposed penalty on the Respondent's ability to stay in business, its ability to pay, and to determine the size of business component of the penalty calculation.[7]

At this time, EPA is not asserting an "alter-ego" theory or attempting to

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[5] At this time, it is unclear whether the distributors are divisions or subsidiaries, but the web sites strongly suggest that they are divisions.

[6] Respondent submitted some of the requested documentation for Agrimor only but not for any of the other companies.

[7] See In the Matter of 1836 Realty Corporation, Docket No. CWA -2-I-98-1 (Nov. 6, 1998), 1998 EPA ALJ Lexis 119, in which EPA moved for discovery of financial records of companies related to respondent. Citing New Waterbury, Ltd., 5 EAD 529 (EAB, Oct. 20, 1994), the court granted the motion finding that EPA's motion "was warranted in order for EPA to examine the degree of financial interrelatedness between the Respondent and any of its related business enterprises and the degree of control exercised by one corporation or individual over the other to determine the economic impact of the proposed penalty on the Respondent."

arranged to ship and receive pesticides. As a result, EPA believes that there is a basis for adding Stockton Chemical Corporation as a party.

Alternatively, if the Court does not agree that the evidence is sufficient at this time to draw such a conclusion, the matter could be addressed later in discovery, if permitted by the Court.

In closing, EPA believes that it has acted in good faith at all times to encourage settlement of this case. EPA is prepared to engage in ADR, but has filed this Motion to ensure that all the allegations of known FIFRA violations growing out of Respondent's importation and exportation of unregistered pesticides are addressed by this action rather than in two separate cases.

Respectfully submitted,

3-22-10
Date

Robert W. Caplan
Counsel for Complainant

CERTIFICATE OF SERVICE

I hereby certify that I have this day served to the Region 4, Regional Hearing Clerk, the original and one copy of the foregoing Complainant's Reply to Respondent's Response to Motion for Leave to File Second Amended Complaint, in In the Matter of: Agrimor Int'l Co., FIFRA-04-2010-3002. I also certify that I have served a true and correct copy of the same on the parties listed below in the manner indicated.

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