

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

11201 RENNER BOULEVARD
LENEXA, KANSAS 66219

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY REGION 7

2015 DEC 15 AM 10:31

IN THE MATTER OF)
)
Matthew Andersen)
d/b/a Andersen Painting)
Omaha, NE)
)
)
Respondent.)
_____)

Docket No. TSCA-07-2014-0033

DECISION ON COMPLAINANT’S PENDING MOTIONS

Background

Complainant has filed eleven motions in this proceeding which involves a total proposed civil penalty of \$148,240.00 for alleged violations of Section 409 of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2689, by failing to comply with the regulatory requirements of 40 C.F.R. Part 745, Subpart E, *Residential Property Renovation*, promulgated pursuant to 15 U.S.C. §§ 2682, 2686 and 2687. The first motion, chronologically, is “Complainant’s Motion for Default Order,” “Memorandum In Support Of Motion For Default Order; Findings Of Fact And Conclusions Of Law” (collectively Motion 1), filed on April 27, 2015, which seeks a default order for Respondent’s failure to respond to a Complaint and Notice of Opportunity for Hearing, filed on July 21, 2014. The second motion is entitled “Motion To Withdraw Complainant’s Exhibit 5 And Leave To File Complainant’s Amended Exhibit 5” (Motion 2), filed June 19, 2015. The third motion is entitled “Motion To Withdraw Default Order” (Motion 3), filed November 2, 2015 under Docket No. TSCA-07-2014-0020. The fourth motion, also entitled “Motion To Withdraw Default Order” (Motion 4), was filed November 9, 2015 under Docket

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No. TSCA-07-2014-0033. The fifth motion, filed on November 9, 2015, is entitled “Motion To Withdraw Amended Exhibit 5 To Complainant’s Motion For Default Order” (Motion 5).

In response to my November 10, 2015 Order to Show Cause, Complainant filed three motions on November 24, 2015 entitled: 1) “Motion For Leave To File Out Of Time Withdrawal Of Default Order And Withdrawal of Exhibit 5 to Motion for Default Order” (Motion 6); 2) “First Amended Motion to Withdraw Amended Exhibit 5 to Complainant’s Motion for Default” (Motion 7); and 3) “First Amended Motion to Withdraw Default Order” (Motion 8). Subsequent to these three motions, on December 2, 2015, Complainant filed two additional motions, entitled “Amended Motion For Leave To File Out Of Time Complainant’s Second Amended Motion To Withdraw Complainant’s Motion For Default Order And All Exhibits Thereto” (Motion 9) and “Second Amended Motion To Withdraw Complainant’s Motion For Default Order And All Exhibits Thereto” (Motion 10). Finally, Complainant’s eleventh motion, is entitled “Motion To Withdraw Complainant’s Motion To Withdraw Default Order” (Motion 11), filed December 3, 2015.

Discussion

A. Motion 11 – “Motion To Withdraw Complainant’s Motion To Withdraw Default Order”

Complainant seeks to withdraw its “Motion for Default Order”, Motion 3, because Motion 3 was inadvertently filed under the wrong docket number and subsequently filed under

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the correct docket number, i.e., Motion 4. Noting that Respondent has not filed an opposition to this motion, I find good cause to grant the motion.

B. Motion 9 – “Amended Motion For Leave To File Out Of Time Complainant’s Second Amended Motion To Withdraw Complainant’s Motion For Default Order And All Exhibits Thereto”

Motion 9 is an amended version of Complainant’s Motions 6 and 7 and seeks leave to file out of time Complainant’s Second Amended Motion for Withdrawal of Default Order and All Exhibits Thereto. Complainant acknowledges that it missed the filing deadline as required by my November 10, 2015 Order to Show Cause. However, Complainant states that said late filing will not result in prejudice to either party. Complainant states that since the filing of Complainant’s Motion for Default Order, Complainant and Respondent have re-engaged in negotiations and have reached agreement upon the terms of a Consent Agreement and Final Order (CA/FO). Moreover, Complainant states that it contacted Respondent, who is in agreement with the request to withdraw the motion for default order, in favor of allowing the CA/FO to be filed in this matter and has no objection to this motion. For these reasons, I find good cause to grant the motion.

C. Motion 10 – Second Amended Motion To Withdraw Complainant’s Motion For Default Order And All Exhibits Thereto

Motion 10 is an amended version of Complainant’s Motions 4, 5, and 8 and moves to withdraw Complainant’s Motions 1 and 2. As stated in this motion as well as Motion 9 discussed

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above, since the filing of Complainant's Motion for Default Order, Complainant and Respondent have reached settlement of this matter and a default order and its exhibits are no longer necessary. Furthermore, Complainant states that it has contacted Respondent who is in agreement with Complainant withdrawing Motions 1 and 2 and allowing the CA/FO to be filed in this matter. For these reasons, I find good cause to grant the motion.

Conclusion

Based on the foregoing:

1. Complainant's "Motion To Withdraw Complainant's Motion To Withdraw Default Order", filed December 3, 2015, is GRANTED.
2. Complainant's "Amended Motion For Leave To File Out Of Time Complainant's Second Amended Motion To Withdraw Complainant's Motion For Default Order And All Exhibits Thereto", filed December 2, 2015 is GRANTED.
3. Complainant's "Second Amended Motion To Withdraw Complainant's Motion For Default Order And All Exhibits Thereto", filed December 2, 2015 is GRANTED.

As a final matter, I note that Complainant does not expressly address its failure to timely file a response as required by my order dated November 10, 2015, merely stating instead that such failure to comply was inadvertent. Moving forward, Complainant is expected to strictly adhere to any deadlines which may be established as well as following the Consolidated Rules of Practice, 40 C.F.R. Part 22. Pursuant to § 22.17 of the Consolidated Rules, failure to comply with an order of the Presiding Officer may result in default and default by complainant

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constitutes a waiver of complainant's right to proceed on the merits of the action, which may result in the dismissal of the complaint with prejudice.

SO ORDERED this 15th day of December, 2015.



Karina Borromeo
Regional Judicial Officer

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Docket No. TSCA-07-2014-0033

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Order was sent this day in the following manner to the addressees:

Copy emailed to Attorney for Complainant:

myers.lucetia@epa.gov

Copy by First Class Mail to Respondent:

Matthew Andersen
d/b/a Andersen Painting
8020 North 31st Street
Omaha, Nebraska 68112

Dated: 12/15/15



Kathy Robinson
Kathy Robinson
Hearing Clerk, Region 7