

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
ATLANTA, GEORGIA**

In the Matter of:)	Docket No. FIFRA-04-2007-3017
)	
Jack's Magic Products, Inc.)	CIVIL COMPLAINT
)	NOTICE OF
Respondent.)	OPPORTUNITY FOR HEARING
<hr/>)	

**ANSWER AND DEFENSES TO CIVIL COMPLAINT
AND MOTION TO DISMISS**

Respondent, Jacks Magic Products ("Jacks"), hereby submits its Answer and Defenses to the Civil Complaint filed by EPA on or about June 25, 2007. In answer to EPA's Civil Complaint, Jacks states as follows:

A. JURISDICTION

1. Respondent admits that EPA has issued this Complaint pursuant to the authority of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C. § 136 *et seq.* "FIFRA"), but denies that the exercise of such jurisdiction is warranted.

2. Respondent admits that EPA believes Jacks has violated FIFRA but denies that such belief is warranted, or supported by the facts of this case. In the alternative, if Jacks has violated FIFRA, which it specifically denies, it has not done so in the manner set forth in the Complaint.

3. Admitted.

4. Paragraph 4 is an administrative instruction and accordingly, no response is warranted. To the extent a response is warranted, Jacks agrees to serve its responsive documents on the party so delineated.

5. Admitted.

6. Respondent denies the allegations contained in Paragraph 6 of the Complaint. Respondent does not, and has not, manufactured bleaching solutions for any purpose. Further, no manufacturing takes place at the facility whose address is listed in this paragraph. Further, no FIFRA registered products are packaged at this facility.

7. Admitted.

8. Respondent denies that he is a “producer” as defined by FIFRA. The only pesticide with which Jacks is involved is an algaecide which is not manufactured, prepared or packaged by Jacks. The algaecide is manufactured and packaged by a separate company. It is only sold by Jacks pursuant to a FIFRA sub-registration which is current, compliant and not the subject of this Complaint.

B. STATEMENT OF FACTS AND VIOLATIONS

COUNTS 1-5

9. Respondent hereby incorporates and repeats its responses to Paragraphs 1-8 above.

10. Respondent admits that during February 2006, approximately sixteen months prior to the filing of this Complaint, an EPA inspector visited its facility in Largo, Florida.

11. Admitted.

12. Respondent admits that at the time of the inspection, a product named “The all fixedup stuff” was being offered for sale by Jacks. The other product referred to in Paragraph 12 (“Formula Three”) was not sold individually, but only sold as part of a package called “Jack in a Box” which also contained the appropriately labeled and appropriately registered algaecide. Respondent also points out that “Formula Three” and the “The all fixedup stuff” is actually the same product but the former was only sold as part of the “Jack in a Box” product.

13. Respondent admits that the Formula Three product was sold as part of the “Jack in a Box” kit and that it was sold in the five shipments indicated in the Complaint.

14. Respondent denies that the Formula Three product is a pesticide as defined as FIFRA. Respondent further denies that there are any pesticidal claims on the Formula Three product which relate to the Formula Three product or which the reasonable consumer would conclude make a pesticidal claim for this product.

15. No response is due to Paragraph 15 of the Complaint as the quoted statute speaks for itself.

16. Respondent denies that the Formula Three product is an antimicrobial pesticide as defined in FIFRA.

17. Respondent admits that it sells an algaecide which is registered with EPA pursuant to FIFRA by the manufacturer, and for which Jacks holds the appropriate and proper sub-registration with EPA. Other than that algaecide, Respondent does not distribute and/or sell pesticides. Jacks specifically denies that the two products at issue in this Complaint are pesticides.

18. Admitted. Formula Three was not registered with EPA pursuant to FIFRA because it is not a pesticide and the labeling on this product does not make pesticidal claims. Accordingly, had Jacks attempted to register Formula Three with EPA pursuant to the relevant rules governing registration, such registration would have been denied because its efficacy as a pesticide could not be established.

19. No response is due to paragraph 19 because the statute speaks for itself. Respondent reiterates, however, that Formula Three is not a pesticide and, therefore, does not need to be registered with EPA pursuant to FIFRA.

20. Denied.

COUNTS 5-9

[should read Counts 6-9]

21. Respondent hereby incorporates and repeats its responses to Paragraphs 1 through 8 and 9 through 13 above.

22. Respondent admits that the four shipments of “The all fixedup stuff” were documented by the inspector and that such shipments were made as documented in the Complaint.

23. Respondent denies that “The all fixedup stuff” is a pesticide as defined in FIFRA. Respondent further denies that there are any pesticidal claims on the “The all fixedup stuff” product which relate to this product or which the reasonable consumer would conclude make a pesticidal claim for this product.

24. No response is due to Paragraph 15 of the Complaint as the quoted statute speaks for itself.

25. Respondent denies that “The all fixedup stuff” is an anti-microbial pesticide as defined by FIFRA.

26. Respondent admits that it sells an algaecide which is registered with EPA pursuant to FIFRA by the manufacturer, and for which Jacks holds the appropriate and proper sub-registration with EPA. Other than that algaecide, Respondent does not distribute and/or sell pesticides. Jacks specifically denies that the two products at issue in this Complaint are pesticides.

27. Admitted. “The all fixedup stuff” was not registered with EPA pursuant to FIFRA because it is not a pesticide. Accordingly, had Jacks attempted to register “The all fixedup stuff” with EPA pursuant to the relevant rules governing registration, such registration would have been denied because its efficacy as a pesticide could not be established.

28. No response is due to paragraph 19 because the statute speaks for itself. Respondent reiterates, however, that “The all fixedup stuff” is not a pesticide and, therefore, does not need to be registered with EPA pursuant to FIFRA.

29. Denied.

C. **PROPOSED PENALTY**

Respondent denies that the proposed penalty is warranted or reasonable but admits that EPA is authorized to assess a monetary penalty in appropriate circumstances, after following statutory guidelines, and using its own discretion.

D. **APPROPRIATENESS OF PROPOSED PENALTY**

Respondent admits that it is appropriate to place its business into category 1. Conversations with EPA however, have revealed that the starting point for EPA’s proposed penalty was the statutory maximum fine for each alleged violation. After application of the guidelines, however, the maximum penalty was reduced by approximately 30% because EPA determined that Jacks had no history of FIFRA violations, there was no risk of human or environmental harm and that any such violation had been as a result of negligence not a willful violation of the statute. While Respondent appreciates the reduction in the proposed penalty, it questions why the starting point was the statutory maximum penalty, especially when the statute is designed to prevent the introduction into the environment of dangerous, unregulated chemicals and EPA has acknowledged both formally and informally, through waiting sixteen months to file its Complaint, that these products present no harm. Accordingly, even if EPA is correct in its allegations, which Respondent strongly denies, its fine of more than \$40,000 is grossly disproportionate to the violations alleged.

GENERAL DEFENSES ASSERTED
AND MOTION TO DISMISS

1. Respondent specifically denies any allegation in EPA's Complaint which is not specifically admitted above.

2. EPA's Complaint, and informal discussions with counsel for EPA, has revealed that this Complaint is not based on the efficacy of the products at issue but rather on EPA's view that the labeling on these products make pesticidal claims.

EPA's Complaint, however, does not state the specific language from the labels which EPA contends makes such a claim. Accordingly, this violates Respondent's due process rights. EPA's Show Cause Letter, dated April 2007, did contain certain language which was allegedly from the two products at issue which allegedly made pesticidal claims. Respondent is assuming that it is the violations alleged in the Show Cause letter which provide the basis for this Complaint. EPA has since admitted, however, that at least four of these enumerated quotations were from an entirely separate product unrelated to any product manufactured, marketed, distributed and/or sold by Jacks. Jacks is prejudiced in responding to this Complaint because it is unclear upon which language from the labels of Jacks products EPA is relying in asserting the allegations contained within its Complaint.

3. The labels relied upon by EPA, and reviewed by its inspector were those contained on a display shelf in the office of Jacks. The labels affixed to the products which were shipped (and which form the basis of EPA's Complaint), were not those reviewed by the inspector because the labels had been changed the previous year. Again, EPA's failure to include the relevant label language in its Complaint prejudices Respondent in its defense against such speculative allegations.

4. The allegedly pesticidal claims made on the label, presuming these are the ones quoted in the Show Cause Letter, and which form the basis of EPA's Complaint, do not make a pesticidal claim and the reasonable consumer would not interpret the language on the product in such a manner as to believe that he or she should use the product as a pesticide.

5. EPA's Show Cause Letter uses selective quotes and in some cases omits parts of sentences. If the full sentence were quoted it would become apparent that no pesticidal claim is made and no reasonable consumer would conclude that the product could be used as a pesticide. For example, EPA's Show Cause Letter states that the following language allegedly on the "Formula Three" label, makes a pesticidal claim:

"the only product to offer a guarantee against stains and discolorations from metals, scum and algae."

As previously stated, however, the Formula Three product is only sold as part of the Jack in a Box package, which consists of Formula One, Formula Two, Formula Three and a registered algaecide. The Formula Three label, however, when read as a whole, clearly makes reference to the entire Jack in a Box package. Missing from the above quotation is the phrase which precedes this language. The full sentence should read:

"Formula Three is part of Jack in a Box, the only product to offer a guarantee against stains and discolorations from metals, scum and algae."

To omit the first part of this sentence is disingenuous at best. The reasonable consumer would understand that this language, written on the Formula Three bottle, relates to the entire Jack in a Box product, which contains the registered algaecide. No reasonable consumer could believe that this language makes a pesticidal claim for Formula Three alone.

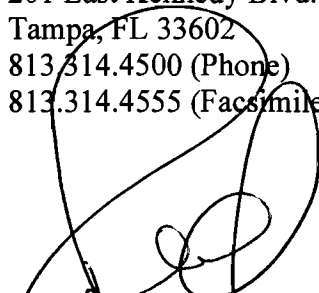
6. Because these products are not pesticides and because no documents exist, or could exist to substantiate their efficacy as a pesticide, these products could not be registered

pursuant to FIFRA. Accordingly, EPA is seeking to assess a penalty on Jacks for failing to do something which EPA's own rules would not allow it to do. As a result, EPA's use of the FIFRA non-registration penalty for an alleged violation such as this is overreaching and constitutes an abuse of its discretion under the powers given to it by Congress.

7. Jacks hereby demands a hearing on this issue and respectfully requests, pursuant to 40 C.F.R. §§ 22.21(d) and 22.19(d), that the hearing be held in Hillsborough County, Florida, where Respondent's place of business is located.

WHEREFORE, Respondent respectfully requests that EPA's Complaint be dismissed and that Jacks be awarded such other relief as the Hearing Officer considers just and reasonable.

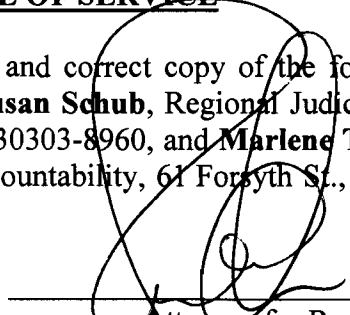
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of true and correct copy of the foregoing has been furnished by facsimile and Federal Express to: **Susan Schub**, Regional Judicial Officer, EPA-Region 4, 61 Forsyth St., 13th Floor, Atlanta, GA 30303-8960, and **Marlene Tucker**, Attorney, U.S. EPA, Region 4, Office of Environmental Accountability, 61 Forsyth St., SW, Atlanta, GA 30303, this 13th day of August, 2007.



Attorney for Respondent