

FILED *DC*
MAR 20 2009
Received EPA/ORC
Reception

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9

In the Matter of:
99 Cents Only Stores,
Respondent

Docket No. FIFRA-09-2008-0027
RESPONDENT'S PREHEARING
EXCHANGE

COMES NOW THE RESPONDENT, in the above-referenced matter, 99¢ Only Stores, ("99¢ Only" or "the Company") by and through its counsel of record, Patrick J. Cafferty, Jr. of Munger, Tolles & Olson LLP, and submits the following Respondent's Prehearing Exchange pursuant to the Prehearing Order dated January 15, 2009, issued by the Honorable Susan L. Biro, Presiding Officer, and pursuant to 40 C.F.R. §22.19(a):

I. General Disclosures

A. Names of Witnesses

1. Michael Botterman - Mr. Botterman is a 99¢ Only manager responsible for, inter alia, product purchasing. Mr. Botterman will testify about the Company's product purchasing procedures in general and specifically about its procedures and practices for purchasing products that may be subject to regulation as pesticides. Mr. Botterman will also testify about how the products at issue in this case were purchased. In addition, Mr. Botterman will testify generally about the Company's product recall procedures and practices and will specifically discuss the procedures and practices followed by the Company in recalling the products at issue in this case, including the Bref product.

2. Mark Levine - Mr. Levine is a 99¢ Only manager responsible for product quality assurance. Mr. Levine will testify about the Company's procedures regarding the purchase of products that may be subject to pesticide regulation, the manner in which those procedures are implemented, and his role and the role of others in implementing those procedures. Mr. Levine will explain the complexity and inherent uncertainty involved in determining whether a particular product qualifies as a pesticide product and, if so, whether

1 pesticide regulator requirements are met. Mr. Levine will also testify about the Company's
2 understanding of the Bref product.

3
4 3. Michael Matteri - Mr. Matteri is a 99¢ Only purchasing agent. Mr. Matteri
5 will testify about the Company's purchasing procedures in general and specifically how those
6 procedures are implemented when purchasing products that may be subject to regulation as
7 pesticides. Mr. Matteri will also testify about the purchase of the products at issue in the
8 Complaint.

9 4. Alyssa Ahlman - Ms. Ahlman is a former 99¢ Only manager
10 knowledgeable about product recall issues. If available, Ms. Ahlman will testify generally about
11 the Company's product recall procedures and how those procedures were applied to the products
12 at issue in the Complaint.

13 5. "Person(s) Most Knowledgeable" From Henkel - The Bref product was
14 manufactured by Henkel, a large international manufacturer. 99¢ Only will identify a specific
15 Henkel employee (or employees) to testify about the nature of the Bref product and the Henkel
16 labeling program for their products.

17
18 B. Documents and Exhibits

19
20 1. All documents identified by Complainant in its initial Pre-Hearing
21 Exchange and in its Rebuttal Pre-Hearing Exchange.

22 2. Company files regarding the purchase of the Bref product (to be supplied).

23 3. Company files regarding the purchase of the "Farmer's Secret Berry &
24 Produce Cleaner" (to be supplied).

25 4. Company files regarding the purchase of "Boric Acid Roach Killer" (to be
26 supplied).

27 5. Company Bref product return notice (Attachment A).

28 6. Company files regarding the Bref product returns (to be supplied).

7. Bref product label (Attachment B).
8. Clorox Regular Bleach sample label (Attachment C).
9. 1/07 Company Pesticide Purchasing Procedures (Attachment D).

C. Location of Hearing

99¢ Only requests that the hearing be held in Los Angeles, California where the Company is headquartered and where the Company employees designated as witnesses are employed.

II. Pre-Hearing Exchange Requirements Specifically Directed To Respondent

A. Defense A / Failure To State A Claim

This defense is largely based on Defense B (Bleach Exception) as applied to the Bref product and on Defense C (No Liability For Manufacture Misapplication Of Labels) for the “Boric Acid Roach Killer” product. 99¢ Only withdraws this defense as it might apply to the “Farmer’s Secret Cleaner” product. The application of Defense B to the Bref product and of Defense C to the “Boric Acid Roach Killer” are discussed below.

B. Defense B / Bleach Exception

The “bleach exception is set forth in 40 CFR §152.10 which provides that “[d]eodorizers, bleaches, and cleaning agents” are not considered to be pesticides “unless a pesticidal claim is made on their labeling or in connection with their sale or distribution”. This defense, therefore, raises two issues: (i) whether the Bref product is a “deodorizer, bleach, or cleaning agent” within the meaning of Section 152.10, and (ii) if it is, whether the presence of the single Spanish word “desinfeccion” on the label constitutes a pesticidal claim when read in the context of the label.

The answer to the first issue should be obvious -- Bref is eligible for the “bleach” exception either as a bleach or as a cleaner. Certainly, it is eligible as a cleaner as that is precisely what the label describes it to be and, as the photographs submitted as Exhibit 21 to Complainant’s

1 Initial Prehearing Exchange demonstrate, precisely how 99¢ Only marketed the Bref product.
2 Bref should also be eligible as a bleach because, as Complainant admits on page 1 of its Initial
3 Prehearing Exchange, Bref contains sodium hypochlorite which is the primary component of
4 bleach.

5
6 The second issue should also be relatively easy to resolve as it is inconceivable that the
7 appearance of the single Spanish word “desinfeccion” constitutes a pesticidal claim. Although
8 there is no definition of the term “pesticidal claim” in the EPA regulations, 40 CFR §152.1(a)(1)
9 provides that:

10 A substance is considered to be intended for a pesticidal purpose, and
11 thus to be a pesticide requiring registration, if :

- 12 (a) The person who distributes or sells the substance claims,
13 states, or implies (by labeling or otherwise):
14 (1) That the substance (either by itself or in combination with
15 any other substance) can or should be used as a potential...

16 An example of a pesticidal claim that requires registration as a pesticide is found on the
17 Clorox Regular Bleach sample label, included as Attachment C. That label expressly states “Kills
18 99.9% of Common Household Germs” and in the referenced “footnote” specifically identifies the
19 germs it kills as “staphylococcus aureus, Streptococcus pyogenes, salmonella enterier and
20 Escherichia coli O157:H7”. There is nothing of the sort on the Bref product label and,
21 consequently, there is no pesticidal claim.

22 C. Defense C / No Liability For Manufacturer Misapplication Of Labels

23 The claims with respect to the “Boric Acid Roach Killer” product are solely that
24 the manufacturer misapplied the labels to the product; there is no claim that the product was not
25 properly registered or that there was anything improper about the label itself when properly
26 applied by the manufacturer. Moreover, as the photographs produced by Complainant in Exhibit
27 10 to the Initial Prehearing Exchange demonstrate, many of the “Boric Acid Roach Killer”
28 products had labels that were properly applied and only 11 product units were identified with
misapplied labels.

1 Because the content and application of pesticide product labels is uniquely and solely
2 within the control of the manufacturer (see generally 40 CFR §156.10), it is the manufacturer, not
3 the retailer, who should be held liable for this type of alleged violation. Consequently, 99¢ Only
4 should not be held liable for the manufacturer's misapplication of pesticide labels to their "Boric
5 Acid Roach Killer" products.

6 D. Defense D / Unconstitutional Penalty Demand

7 This defense applies to the ruinous civil penalties that Complainant seeks to impose for
8 the alleged violations related to the Bref product, not to the relatively modest civil penalties that
9 Complainant seeks for the alleged violations related to the sale of the "Farmer's Secret Cleaner"
10 and "Boric Acid Roach Killer" products. Complainant seeks to establish liability for the sale of
11 the Bref products based on the presence of the single Spanish word "desinfeccion" on the product
12 label of a simple cleaning product which the Company sold without realizing Complainant would
13 later consider it to be a pesticide product required to be registered. If liability for the sale of the
14 Bref product can be established (and 99¢ Only firmly believes it cannot) , Complainant seeks the
15 imposition of a civil penalty of almost \$1 million for what was an innocent mistake (if it was a
16 mistake at all) in selling a product that even Complainant admits presents no risk to the
17 environment.

18 Due process principles continue to develop, primarily in the punitive damages context,
19 requiring that monetary sanctions must be commensurate with the nature of the offense.
20 Although the Company will fully brief this issue at the time of hearing after the evidence
21 regarding the sale of the Bref product has been presented, suffice it to say that the innocent sale of
22 a cleaning product that at most is only questionably subject to regulation as a pesticide does not
23 warrant the imposition of an almost \$1 million penalty. Stated another way a penalty of that
24 magnitude is wholly disproportionate to the alleged offense and frankly prevents settlement of
25 this case. Thus, whether the imposition of an almost \$1 million penalty comports with the EPA
26 civil penalty policy (and it does not as explained below), that size penalty for this offense "shocks
27 the conscience" and cannot pass constitutional muster.

1 E. Ability To Pay

2 99¢ Only does not take the position at this time that it would be unable to pay the
3 proposed penalty.

4 F. Reduction / Elimination Of Penalty

5 99¢ Only firmly believes that the civil penalty proposed for the Bref and “Boric Roach
6 Killer Acid” products should be eliminated for the reasons set forth above and that, consistent
7 with due process principles, the proposed civil penalty for the Bref product should be
8 substantially reduced if it is not eliminated. In addition, Counsel for Respondent 99¢ Only Stores
9 believes that the proposed civil penalty for the Bref product should be reduced or eliminated for
10 the following reasons:

11 1. Single Count

12 The Bref product is a single product that was immediately recalled by the
13 Company after the contention was raised that it was required to be registered as a pesticide. See
14 Attachment A. To avoid an inequitable result, the claimed violation should be reduced from 164
15 counts to just one count. Indeed, it is the pleading of an unfair number of counts that leads to the
16 constitutional infirmity of the proposed penalty so that reducing the Bref claim to a single count
17 would also cure that infirmity.

18 2. Application of Civil Penalty Policy Inconsistent With FIRE

19 As applied by Complainant in this instance, the EPA civil penalty policy is
20 inconsistent with the FIFRA civil penalty section (7 U.S.C. §136l(a)) in several ways. First, it
21 seeks in essence to impose a minimum civil penalty of \$5850 per store where Section 136l(a)(i)
22 does not prescribe any minimum civil penalty and merely provides for imposition of a civil
23 penalty “of not more than \$5,000 for each offense”. Second, in calculating an aggregate civil
24 penalty in this case, the Complainant applied the EPA civil penalty policy in a manner that is
25 wholly inconsistent with the gravity of the violation, one of the key factors required to be
26 considered by Section 136l(a)(4). Third, the alleged Bref product violations occurred despite the
27 exercise of due care by the Company and, by EPA’s own admission, “did not cause significant
28 harm to health to the environment” and, consequently Complainant abused its discretion under

1 Section 136l(a)(4) in pursuing this civil penalty proceeding, rather than issuing the Company
2 warning.

3 3. EPA Civil Penalty Policy Inappropriately Applied To Pesticide Retailer

4 The EPA civil penalty policy plainly was developed for pesticide
5 manufacturers and applicators and not for retailers. As applied to manufacturers and applicators
6 there is some sense of proportionality of the penalty to the offense because the potential number
7 of offenses is limited. However, as applied to retailers in general and in this case in particular, all
8 sense of proportionality is lost as EPA's interpretation of offenses as tied to sales has no
9 meaningful limits. And, as is the case here, EPA's interpretation can lead to absurd penalty
10 proposals completely out of proportion to the alleged offense(s).

11 4. Gravity Adjustments

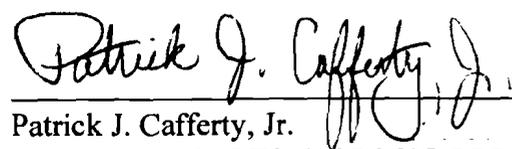
12 The EPA gravity adjustments set forth in Appendix B to the EPA civil
13 penalty policy were misapplied in this instance. Specifically, the adjustment factor for culpability
14 should have been "0" not "2", the adjustment factor for human harm should have been "1" (at
15 most) not "3", and the adjustment factor for environmental harm should have been "0". See
16 Exhibit 12 to Initial Prehearing Exchange. Consequently, the total gravity adjustment factor
17 should have been "2" at most, which requires at least a 50% adjustment under the EPA civil
18 penalty policy and can be used to support either no action or issuance of a warning in lieu of a
19 civil penalty action, as discussed above.

20 G. Request For Dismissal

21 99¢ Only will not pursue a request for dismissal at this time. However, the Company
22 reserves its right to pursue a motion for accelerated decision within 30 days after the due date for
23 Complainant's Rebuttal Prehearing Exchange as set forth in the Prehearing Order.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Respectfully submitted this 20th day of March 2009.



Patrick J. Cafferty, Jr.
MUNGER, TOLLES & OLSON, LLP
560 Mission Street
San Francisco, California 94105
Telephone: (415) 512-4012
Email: Patrick.Cafferty@mto.com
Counsel for Respondent 99¢ Only Stores

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO:

3 I, the undersigned, declare that I am over the age of 18 and not a party to the
4 within cause. I am employed by Munger, Tolles & Olson LLP in the County of San Francisco,
5 State of California. My business address is 560 Mission Street, Twenty-Seventh Floor, San
6 Francisco, California 94105-2907.

7 On March 20, 2009, I served upon the interested party in this action the foregoing
8 document described as:

9 **RESPONDENT'S PREHEARING EXCHANGE**

10 By placing the original(s) a true and correct copy thereof, as set out below, in an
11 addressed, sealed envelope clearly labeled to identify the person being served at the
12 address set forth below.

13 **BY MAIL** I caused such envelope to be placed in interoffice mail for collection and
14 deposit in the United States Postal Service at 560 Mission Street, San Francisco,
15 California, on that same date, following ordinary business practices. I am familiar with
16 Munger, Tolles & Olson LLP's practice for collection and processing correspondence for
17 mailing with the United States Postal Service; in the ordinary course of business,
18 correspondence placed in interoffice mail is deposited with the United States Postal
19 Service with first class postage thereon fully prepaid on the same day it is placed for
20 collection and mailing.

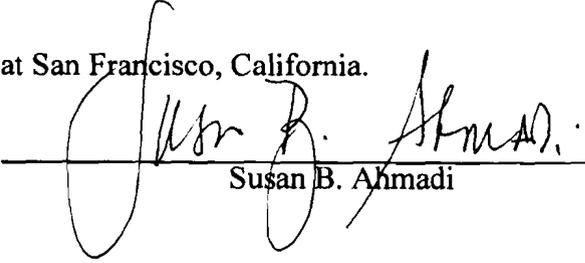
21 Brian P. Riedel
22 Assistant Regional Counsel
23 U. S. Environmental Protection Agency Region 9
24 75 Hawthorne Street
25 San Francisco, CA 94105

26 **BY FEDERAL EXPRESS PRIORITY OVERNIGHT DELIVERY.** I delivered the
27 sealed Federal Express envelope to an employee authorized by Federal Express to receive
28 documents, with delivery fees paid or provided for.

The Honorable Susan L. Biro
Chief Administrative Law Judge
Office of Administrative Law Judges
U. S. Environmental Protection Agency
1099 14th Street, N. W. Suite 350
Washington, D.C. 20005

29 **(STATE)** I declare under penalty of perjury that the foregoing is true and correct.

30 Executed on March 20, 2009 at San Francisco, California.

31 
32 _____
33 Susan B. Ahmadi