

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY JUN 18 PM 3:01
REGION 4

HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)	
)	
American Consumer Products,)	Docket No. FIFRA-04-2009-3023
)	
Respondent.)	
_____)	

COMPLAINANT'S REBUTTAL PREHEARING EXCHANGE

Comes now Complainant, by and through its counsel, and in response to the Prehearing Order issued in this matter by Chief Administrative Law Judge Susan L. Biro, respectfully submits its Rebuttal Prehearing Exchange.

Respondent filed an Answer to the original Complaint on October 22, 2009 which included six Affirmative Defenses which shall hereinafter be referred to as "Answer 1." Complainant filed an Amended Complaint on March 26, 2010. Respondent filed an Answer to the Amended Complaint on May 7, 2010 which included sixteen Affirmative Defenses which shall hereinafter be referred to as "Answer 2." The Affirmative Defenses in Answer 2 include those in the Answer 1 along with ten others. The Prehearing Order issued on January 19, 2010, refers to Affirmative Defenses included in Answer 1. In this Rebuttal Prehearing Exchange, Complainant refers to the sixteen Affirmative Defenses included in Answer 2 since they encompass those referred to in the Prehearing Order.

Exhibits referenced in this Rebuttal Prehearing Exchange shall refer to Complainant's Exhibits provided in its Initial Prehearing Exchange and shall be cited as "CX _."

I. Respondent's Denial of Allegations in Complaint

In response to the Prehearing Order, Respondent was to provide a "narrative statement, and a copy of any documents in support, explaining in detail the assertions in Paragraphs 11 and 12 of the Answer." (Prehearing Order at ¶ 3(B).) Respondent denies that it "produced" and "distributed or sold" "Anti-Bacterial Formula 24-7 All Purpose Lemon Scent Cleaner." (Answer 1 at ¶¶ 11 and 12; Respondent's Prehearing Exchange at Section 3 ¶ B.) Respondent states that it will "use the documents and exhibits submitted by Complainant for its proofs." *Id.* However, Respondent does not indicate which documents and exhibits it intends to rely upon for its proofs.

Pursuant to Section 2(w) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136(w), a "producer" means the "person who manufactures, prepares, compounds, propagates, or processes any pesticide...." The definition is expanded by the implementing regulations of FIFRA at 40 C.F.R. § 167.3 to include "packaging, repackaging, labeling, and relabeling." Respondent admits in its Answer that the "Anti-Bacterial Formula 24-7 All Purpose Lemon Scent Cleaner" was labeled by Respondent. (Answer 1 at ¶¶ 11 and 12; Answer 2 at ¶ 17.) Therefore, Respondent meets the definition of "producer" under FIFRA.

Pursuant to Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), to "distribute or sell" means "to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver." Shipping records obtained during the October 3, 2007 and November 1, 2007 inspections of the Maxway #1482 (CX 8) and Variety Wholesalers (CX 11), respectively, as well as the statement from the manager of the Maxway store (CX 6) indicate that the "Anti-Bacterial Formula 24-7 All Purpose Lemon Scent Cleaner" was distributed, and shipped by Respondent.

Additionally, Respondent admits that the "24/7 all purpose cleaner produced by ACPC was not registered as anti-bacterial product with the EPA." (Answer 2 at ¶ 17.)

II. Respondent's Bases for Defenses

(A) Respondent's first Affirmative Defense is that American Consumer Products of Illinois is a separate company and should not be a party to this action. (Answer 1 at ¶¶ 1 and 2.) Complainant agreed and amended its Complaint to remove American Consumer Products of Illinois as a Respondent.

(B) Respondent's second Affirmative Defense is that the "only issue was the use of a label that was used erroneously and only used one time, of which no pesticide product was used." (Answer 1 at p. 4, ¶ 4; Answer 2 at p. 4, ¶ 2.) Respondent provides no documents nor cites any Exhibits to support this defense. The product at issue was clearly labeled as a pesticide as evidenced by the photos taken during the October 3, 2007, inspection. (CX 7.) The prima facie evidence collected by EPA indicates that the "Antibacterial Formula 24/7 All Purpose Lemon Scent Cleaner" was a pesticide that was not registered with EPA pursuant to the requirements of FIFRA.

Additionally, more than one bottle was labeled as a pesticide. Indeed, at least twelve units were shipped to Maxway # 1482 (CXs 6 and 7) and 2880 units were shipped to Variety Wholesalers (CX 11). Of the twelve units shipped to Maxway #1482, only six remained on the shelf at the time of the inspection (CXs 5, 6 and 9) meaning the other six units were sold and possibly used. Respondent has not provided any evidence rebutting the assumption that the six missing units were sold and possibly used by an unsuspecting customer. Complainant and the consumer have no way of knowing whether the product was a pesticide that was unregistered or mislabeled as Respondent asserts absent supporting evidence.

(C) Respondent's third Affirmative Defense is that Respondent took immediate remedial measures and destroyed the leftover labels from USA Labs which stated "Formula 24/7 Anti-Bacterial." (Answer 1 at p. 5 ¶ 5; Answer 2 at p. 5 ¶ 3.) Respondent's destruction of the labels upon notice of the violation does not absolve it of liability under FIFRA. FIFRA is a strict liability statute which infers penalties on any person responsible for a violation of FIFRA.

(D) Respondent's fourth Affirmative Defense is that no damage occurred, nor was there harm to humans or the environment nor was there any deception. (Answer 1 at p.5, ¶ 6; Answer 2 at p. 5 ¶¶ 4, 6, and 9.) Respondent has not provided any proof that there was no harm to humans or the environment. Complainant has considered the possibility of harm to humans or the environment in its penalty calculation. (CXs 1, 2 and 3.)

(E) Respondent's fifth Affirmative Defense is that Complainant "failed to issue a written warning to cease for a violation of FIFRA prior to filing suit and the proposed assessment of civil penalty." (Answer 2 at p. 5, ¶ 5.) There is no requirement in FIFRA that a written warning to cease be issued prior to filing suit and Respondent has not cited such requirement. Respondent was issued an "Opportunity to Show Cause" letter on December 19, 2008, attached as Complainant's Exhibit 17, which notified Respondent of the violations EPA believed had occurred and afforded Respondent the opportunity to meet with EPA and show cause why an enforcement action should not be taken.

(F) Respondent's sixth, seventh, eighth, and ninth Affirmative Defenses appear to be reiterations of the second and fourth Affirmative Defenses which have been addressed above.

(G) Respondent's tenth Affirmative Defense is that Complainant failed to follow the guidelines set by EPA FIFRA 14(a)(4) in arriving at its proposed penalty amount in that no prior

notice was given to Respondent and notice of warning following a citation for prior violation and no assessment of the harm was produced. (Answer 2 at p. 5 ¶ 10.)

(H) Respondent appears to be confused about the applicability of Section 14 of FIFRA in general and 14(a)(4) in particular. Section 14(a)(1) of FIFRA states, "In General. Any registrant, commercial applicator, wholesaler, dealer, retailer or other distributor who violates any provision of this Act may be assessed a civil penalty...." As stated in the Complaint and reiterated above, Respondent is a distributor within the meaning of FIFRA. Respondent seems to refer to language included in Section 14(a)(2) related to "private applicators" when stating that no prior notice of warning following a citation for prior violation was given to Respondent. Respondent is not considered a "private applicator" within the meaning of FIFRA. A "private applicator" is a "certified applicator who uses or supervises the use of any pesticide which is classified as restricted use for purposes of producing any agricultural commodity...." FIFRA § 2(e)(2). Therefore, the requirements of Section 14(a)(2) do not apply to Respondent in this instance.

Respondent also states that no assessment of the harm was produced. Section 14(a)(4) requires that the harm to health or the environment be assessed in determining whether to issue a warning in lieu of the penalty. The harm to human health and the environment was assessed in the penalty calculation. (CXs 1, 2, and 3.) Since there was a potential for serious harm to human health and the environment, a penalty was appropriate in this matter.

(I) Respondent's eleventh Affirmative Defense is that the maximum applicable penalty for first time violators is \$500. (Answer 2 at p. 5 ¶ 11.) Respondent has again confused the requirements for "private applicators" as described by FIFRA § 14(a)(2) with those for

"distributors" as described by FIFRA § 14(a)(1). The penalty for a "distributor" who violates FIFRA is no more than \$5000 for each offense.

(J) Respondent's twelfth Affirmative Defense appears to be a reiteration of the fourth Affirmative Defense which is addressed above.

(K) Respondent's thirteenth Affirmative Defense is that "ACP/GA" is currently without assets." (Answer 2 at p. 5 ¶ 13.) Despite repeated requests for information related to the financial status of Respondent, no information has been provided to support this claim. Indeed, in Respondent's Prehearing Exchange at p. 3 ¶ H. (b), an "asset sheet" is cited as proof that Respondent has "negative assets and practically ceased to do business and manufacturing as of the year 2009." However, said "asset sheet" was not included with the Prehearing Exchange, nor was it provided upon filing to the Hearing Clerk in the Region 4 office.

(L) Respondent's fourteenth Affirmative Defense is that "the alleged violation was neither known nor willful and did not result from negligence, nor is their [sic] any prior violations by ACP." (Answer 2 at p. 5 ¶ 14.) FIFRA is a strict liability statute. Willfulness and knowledge are not required elements for violations under FIFRA. Indeed EPA's Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (July 2, 1990) (FIFRA Penalty Policy) states that "a civil penalty is appropriate where the violation...(2) was apparently committed as a result of ordinary negligence...inadvertence, or mistake...." (See CX 1 at p. 10.)

(M) Respondent's fifteenth Affirmative Defense appears to be a reiteration of the third Affirmative Defense addressed above.

(N) Respondent's sixteenth Affirmative Defense states that a penalty would be inequitable as no harm resulted, nor was a pesticide product sold. (Answer 2 at p. 6 ¶ 16.) As

stated previously, FIFRA is a strict liability statute. There was a violation of FIFRA in that a product not registered with EPA, with a label making a pesticidal claim was distributed and sold by respondent. (See CXs 4 - 13.) Respondent has not provided any proof that no harm resulted, however, the FIFRA Penalty Policy contemplates penalties where the possibility of harm exists. (See CX 1 at p. 21.) Therefore, a penalty is appropriate in this instance.

Dated: June 18, 2010

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that the foregoing Complainants Rebuttal Prehearing Exchange, dated June 18, 2010, was sent this day in the following manner to the addressees listed below:

Original by Interoffice Mail to:

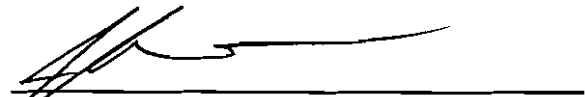
Regional Hearing Clerk
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61 Forsyth St., SW
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Copy by Certified Mail and Facsimile to:

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Copy by Pouch Mail and Facsimile to:

The Honorable Susan L. Biro
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1200 Pennsylvania Ave., N.W.
Mail Code 1900L
Washington, DC 20005
Fax No. (202) 565-0044



Jennifer M. Lewis
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61 Forsyth Street, SW
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Dated: 6-18-2010

COMPLAINANT'S EXHIBIT