

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CA 94105

FILED

2007 OCT 18 PM 3:40

U.S. EPA, REGION IX
REGIONAL HEARING CLERK

In the matter of:)	Docket No. FIFRA-09-2007-0024
)	
Unified Western)	CIVIL COMPLAINT
Grocers, Inc.)	and
)	NOTICE OF
Respondent)	OPPORTUNITY FOR HEARING
)	

ANSWER TO COMPLAINT AND REQUEST FOR HEARING

Now comes Respondent, Unified Western Grocers, Inc, and for its Answer to the Civil Complaint filed by the United States Environmental Protection Agency, Region IX, states as follows:

GENERAL ALLEGATIONS

1. Respondent is a California corporation.

ANSWER: Respondent admits the allegations contained in Paragraph 1.

2. Respondent is a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. §136(s), and as such is subject to FIFRA and the regulations promulgated thereunder.

ANSWER: Respondent admits the allegations contained in Paragraph 2.

3. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. §136j(a)(1)(A), states that it shall be unlawful for any person to distribute or sell to any person any pesticide that is not registered under section 3 of FIFRA, 7 U.S.C. §136a, or whose registration has been canceled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator under this subchapter.

ANSWER: Respondent states that Paragraph 3 is a legal conclusion, and no answer is necessary. To the extent any answer is required, Respondent denies the allegations in Paragraph 3.

4. Section 2(gg), of FIFRA, 7 U.S.C. § 136(gg), states that "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.

ANSWER: Respondent states that Paragraph 4 is a legal conclusion, and no answer is necessary. To the extent any answer is required, Respondent denies the allegations in Paragraph 4.

5. Section 2(u) of FIFRA, 7 U.S.C. §136(u), states that the term "pesticide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.

ANSWER: Respondent states that Paragraph 5 is a legal conclusion, and no answer is necessary. To the extent any answer is required, Respondent denies the allegations in Paragraph 5.

6. Section 2(t) of FIFRA, 7 U.S.C. §136(t), states that the term "pest" means (1) any insect, rodent, nematode, fungus, weed, or (2) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism (except viruses, bacteria, or other micro-organisms on or in living man or other living animals) which the Administrator declares to be a pest under FIFRA section 25(c)(1).

ANSWER: Respondent states that Paragraph 6 is a legal conclusion, and no answer is necessary. To the extent any answer is required, Respondent denies the allegations in Paragraph 6.

7. Forty C.F.R. § 152.15(a)(1) provides that a substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if the person who distributes or sells the substance claims, states, or implies (by labeling or otherwise) that the substance (either by itself or in combination with any other substance) can or should be used as a pesticide.

ANSWER: Respondent states that Paragraph 7 is a legal conclusion, and no answer is necessary. To the extent any answer is required, Respondent denies the allegations in Paragraph 7.

8. Deodorizers, bleaches, and cleaning agents are products or articles that are not considered to be pesticides unless a pesticidal claim is made on their labeling or in connection with their sale and distribution. See 40 C.F.R. §152.10.

ANSWER: Respondent states that Paragraph 8 is a legal conclusion, and no answer is necessary. To the extent any answer is required, Respondent denies the allegations in Paragraph 8.

9. At all times relevant to this complaint, the label of the product Western Family Cleanser with Bleach stated that "Cleanser wipes out most household germs, including Staph, Salmonella, and Pseudomonas...."

ANSWER: Respondent is without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations referenced in Paragraph 9 and therefore denies same.

10. Staph, Salmonella, and Pseudomonas are types of bacteria.

ANSWER: Respondent is without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations referenced in Paragraph 10 and therefore denies same.

11. Therefore, Staph, Salmonella, and Pseudomonas are "pests" as that term is defined at section 2(t) of FIFRA, 7 U.S.C. § 136(t).

ANSWER: Respondent states that Paragraph 11 is a legal conclusion, and no answer is necessary. To the extent any answer is required, Respondent denies the allegations in Paragraph 11.

12. Pesticides are required to have the statement "It is a violation of Federal law to use this product in a manner inconsistent with its labeling" on their labeling. See 40 C.F.R. §156.10(i)(2)(ii).

ANSWER: Respondent states that Paragraph 12 is a legal conclusion, and no answer is necessary. To the extent any answer is required, Respondent denies the allegations in Paragraph 12.

13. At all times relevant to this complaint, the label of the product Western Family Cleanser with Bleach stated that "It is a violation of Federal law to use this product in a manner inconsistent with its labeling."

ANSWER: Respondent is without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations referenced in Paragraph 13 and therefore denies same.

14. Therefore at all times relevant to this complaint, the labeling of the product Western Family Cleanser with Bleach contained pesticidal claims.

ANSWER: Respondent states that Paragraph 14 is a legal conclusion, and no answer is necessary. To the extent any answer is required, Respondent denies the allegations in Paragraph 14.

15. At all times relevant to this complaint, the product Western Family Cleanser with Bleach was a "pesticide" as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

ANSWER: Respondent states that Paragraph 15 is a legal conclusion, and no answer is necessary. To the extent any answer is required, Respondent denies the allegations in Paragraph 15.

16. At all times relevant to this complaint, Respondent "sold or distributed" the pesticide Western Family Cleanser with Bleach, as those terms are defined by Section 2(gg) of FIFRA, 7 U.S.C. §136(gg).

ANSWER: Respondent states that Paragraph 16 is a legal conclusion, and no answer is necessary. To the extent any answer is required, Respondent denies the allegations in Paragraph 16.

17. Western Family Cleanser with Bleach was not registered with EPA as required under Section 3 of FIFRA, 7 U.S.C. § 136a.

ANSWER: Respondent admits that Western Family Cleanser with Bleach was not registered under FIFRA. Respondent denies the remaining allegations of Paragraph 17.

VIOLATIONS

Counts 1 through 92: Distribution or sale of an unregistered pesticide, in violation of Section 12(a)(1)(A) of FIFRA

18. Paragraphs 1 through 17 of this Complaint are hereby incorporated by reference and alleged as if set forth in full herein.

ANSWER: Respondent restates and realleges its responses to Paragraphs 1 through 17 as full set forth herein as its response to Paragraph 18.

19. On or about April 4, 2006, Donna Marciano, an inspector from the State of California Department of Pesticide Regulation ("DPR"), conducted a for-cause inspection of Unified Western Grocers at 1990 Piccoli Road, Stockton, California.

ANSWER: Respondent lacks sufficient information to form a belief as to the whether the inspection referenced in Paragraph 19 was "a for-cause inspection" and therefore denies the same. Respondent admits the remaining allegations contained in Paragraph 19.

20. On or about June 19, 2006, Unified Western Grocer representative Patrick Guillermy sent to DPR Inspector Marciano an invoice summary identifying 92 sales of the pesticide Western Family Cleanser with Bleach that occurred from December 1, 2005 to April 4, 2006 (hereafter the "Invoice Summary"). (Respondent has requested that EPA treat individual invoices and any information containing the names of the retail grocery stores who purchase products from Unified Western Grocers as confidential business information pursuant to 40 C.F.R. § 2.201, et. seq.).

ANSWER: Respondent admits that on June 19, 2006, Patrick Guillermy sent an email to Donna Marciano indicating that attached to the email was a summary of the sales invoices for Western Family Cleanser with Bleach. Respondent denies the remaining allegations of Paragraph 20. Respondent admits that it has requested that USEPA treat individual invoices and any information containing the names of the retail grocery stores who purchase products from Unified Western Grocers as confidential business information pursuant to 40 C.F.R. § 2.201, et. seq.

21. Each of the 92 sales of the pesticide, Western Family Cleanser with Bleach, listed in the Invoice Summary, constitute one violation of section 12(a)(1)(A) of FIFRA, 7 U.S.C. §136j(a)(1)(A), which prohibits the distribution or sale of an unregistered pesticide.

ANSWER: Respondent states that Paragraph 21 is a legal conclusion, and no answer is necessary. To the extent any answer is required, Respondent denies the allegations in Paragraph 21.

PROPOSED CIVIL PENALTY

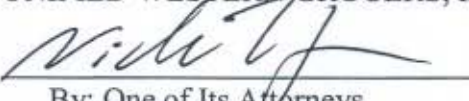
22. Section 14(a)(1) of FIFRA, 7 U.S.C. 1361(a)(2), as adjusted by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, codified at 40 C.F.R. Part 19, authorizes the assessment of a civil penalty of up to \$6,500 for each offense occurring after March 15, 2004. EPA has determined that the appropriate penalty for the violations alleged above is **FIVE HUNDRED THIRTY EIGHT THOUSAND TWO HUNDRED DOLLARS (\$538,200)**. The proposed penalty was derived pursuant to EPA's Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act issued by the Office of Compliance Monitoring on July 2, 1990. In determining the amount of the penalty that is appropriate in this case, as required by law, the Agency considered the size of the business, the effect on Respondent's ability to continue in business, and the gravity of the violation.

ANSWER: Respondent states that Paragraph 22 is a legal conclusion, and no answer is necessary. To the extent that Paragraph 22 contains other allegations, Respondent lacks sufficient information to form a belief as to the remaining allegations and therefore denies the same.

RESPONDENT REQUESTS A HEARING.

Respectfully Submitted

UNIFIED WESTERN GROCERS, INC.


By: One of Its Attorneys

Nicholas W. Targ
HOLLAND & KNIGHT LLP
50 California Street Suite 2800
San Francisco, CA 94111
(415) 743-6926

Mark Steger
Eric Dorkin
HOLLAND & KNIGHT LLP
131 S. Dearborn Street, 30th Floor
Chicago, Illinois 60603
(312) 263-3600

Christopher G. Foster
Attorney At Law
Hatch & Parent, A Law Corporation
11911 San Vicente Boulevard, Suite 350
Los Angeles, CA 90049
(310) 500-4619

#4850559_v1