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BY FEDEX

March 11, 2010

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 4
61 Forsyth Street, SW
Atlanta, GA 30303

Re: Docket No. FIFRA-04-2010-3002,
Alleged Violations of the Federal Insecticide, Fungicide, and Rodenticide Act

Dear Sir or Madam:

I represent the Respondent, Agrimor Int'l Co., in this matter. Enclosed please find for filing in this matter the original and one copy of my client's Response in Opposition to the Complainant's Motion for Leave to File a Second Amended Complaint.

Respectfully submitted,

Stephen J. Darmody

SJD/gmr

Enclosure

Copy: Honorable Susan L. Biro, Chief Administrative Law Judge, USEPA (by FEDEX)
Robert Caplan, Esq., U.S. EPA, Region 4 (by FEDEX)
Mr. Mark Bloeth, U.S. EPA, Region 4 (by FEDEX)

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:	)	
	)	
Agrimor Int'l Co.,	)	DOCKET NO.: FIFRA-04-2010-3002
Respondent	)	
	)	
	)	

RESPONDENT AGRIMOR'S RESPONSE IN OPPOSITION TO COMPLAINANT'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Respondent, Agrimor Int'l Co. (hereinafter referred to as "Agrimor"), opposes the Complainant's effort to amend its complaint a second time.

Agrimor does not sell any pesticides for use in the United States. Involved instead in international trade, it purchased certain pesticides from a Chinese manufacturer for shipment to a purchaser in Honduras. Those pesticides were never intended for use in the United States. Unbeknownst to Agrimor, the pesticides were transported by vessel from China to California, and then by rail from California to Miami. A small spill occurred in transit and was cleaned up by the shipper, which conditioned delivery upon Agrimor reimbursing its clean up costs.

Apparently frustrated because the transportation of hazardous materials falls under the regulatory purview of another agency, the Complainant has been working hard to channel its frustration with the law into a FIFRA based complaint against Agrimor, which it had envisioned as a multi-national agribusiness. Now, after realizing that its case is flawed and Agrimor is just a small company, the Complainant is stretching the truth to add as a respondent an entity that had nothing to do with these events. But the law is not so broad that it allows the Complainant to take this case where it wishes it could go. Neither does the law support the Complainant's motion for leave to file a second amended complaint, which should be denied.

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MEMORANDUM OF LAW

A. Background.

The Complaint in this matter was filed on October 9, 2009. The first amended complaint was filed on October 26, 2009. Thereafter the Complainant, almost certainly knowing the weaknesses of its case, pressed Agrimor to accede to its demands. It begrudgingly agreed to short enlargements of time for Agrimor to file an answer to the complaint -- ostensibly to facilitate a settlement. But the Complainant repeatedly dragged its feet and only communicated its position to Agrimor a day or two before each enlargement was about to expire, typically in a "take it or leave it" fashion, which necessitated a series of short enlargements. This pattern caused the EPA's Regional Judicial Officer to caution the parties about requesting additional enlargements of time.

Agrimor is a small business and could not afford to pay the penalty initially proposed by the Complainant. After the Complainant rejected Agrimor's counterproposal, Agrimor submitted its financial information to the EPA with a request that the financial information be held in confidence. A few weeks later, the Complainant advised Agrimor that the Agency's analysis demonstrated to the Complainant that Agrimor did have the ability to pay the penalty it originally proposed. Frustrated with a perceived lack of good faith on the part of the Complainant, anticipating that another request for an enlargement of time would be denied by the Regional Judicial Officer, desiring to avoid the risk of a default, and knowing this Court would first refer the case to a neutral judge for ADR, Agrimor finally filed an answer in hope that it would be able to discuss its concerns with an objective third party.

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Now the Complainant has abused its access to Agrimor's confidential information by using that information as the basis for amending its Complaint. Specifically, in addition to the original eleven counts it made against Agrimor for failing to file a notice of arrival and another eleven counts for distributing unregulated pesticides, the Complainant seeks to:

- Add Stockton Chemical Corporation as a respondent based upon the Complainant's "information and belief," which appears to be nothing more than the Complainant's suspicions;
- Add ten additional counts against Agrimor for allegedly failing to file a notice of arrival in ten new instances;
- Add ten additional counts against Agrimor for allegedly distributing unregistered pesticides in ten new instances;
- Add one vague count against Agrimor for allegedly failing to maintain records; and
- Add two new counts against Agrimor for allegedly misbranding pesticides.

The net effect of the Complainant's proposed amendment would be to add as a new respondent a company that has no connection with this matter, to add two new theories of law, to more than double the number of counts against Agrimor, and to seek a penalty more than twice the size of the penalty originally sought.

B. <u>The Complainant No Longer Has a Right to Amend Its Complaint.</u>

The EPA's procedural rules provide that

> The complainant may amend the complaint once as a matter of right at any time before the answer is filed. Otherwise the complainant may amend the complaint only upon motion granted by the Presiding Officer.

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40 C.F.R. § 22.14(c). Unlike Rule 15 of the Federal Rules of Civil Procedure, which specifically provides that "the court should freely give leave" and then limits that principle to those circumstances "*when justice so requires,*" Rule 15(a)(2), Fed. R. Civ. P. (emphasis added), the rule that governs this Court's decision neither commands nor suggests that this Court should provide any such liberality in allowing amendments.

Moreover, none of the cases cited by the Complainant support its effort to amend the pleadings in this case. In fact, in one of those cases, the Environmental Appeals Board specifically affirmed a Presiding Officer's decision to deny the EPA's motion for leave to file a second amended complaint. *Port of Oakland and Great Lakes Dredge and Dock Co*, MSRPA Appeal No. 91-1, 4 Envtl. App. Dec. 170, 207 (Envtl. App. Bd., Aug. 5, 1992).

Based upon the rule quoted above, The Presiding Officer in the case of *Asbestos Specialists, Inc*, TSCA Appeal No. 92-3, 4 Envtl. App. Dec. 819 (Envtl. App. Bd., Oct. 3, 1993), dismissed the EPA's complaint with prejudice, refusing the Agency an opportunity to amend its complaint to state a claim. On appeal the Environmental Appeals Board held simply that dismissal with prejudice should rarely be invoked for the first instance of a pleading deficiency because as a matter of policy the objective of the rule should be "to get to the merits of the controversy." 4 Envtl. App. Dec. at 830 citing *Port of Oakland and Great Lakes Dredge and Dock Co*, 4 Envtl. App. Dec. at 207. Likewise, the Environmental Appeals Board in the case of *Wego Chemical & Mineral Corporation,* TSCA Appeal No. 92-4, 4 Envtl. App. Dec. 513 (Envtl. App. Bd., Feb. 24, 1993) addressed the question of whether the rules allowed an amendment to conform with the evidence in a case where a complaint included an incorrect citation to a statute. The Board found that because the respondent had not argued below that it would be

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disadvantaged by the Region's request to correct a typographical error, the Presiding Officer's decision to allow the amendment below was not reversible error. 4 Envtl. App. Dec. at 525 . Likewise, in the *Rogers Corp.* case, the Presiding Officer simply allowed the Agency to amend its complaint to accurately reflect the duration of the single violation alleged. *Rogers Corp.*, Docket No. TSCA-I-94-1079, 1997 EPA ALJ LEXIS 51 (November 13, 1997). And that issue was not appealed.

Thus, contrary to the Complainant's assertion that that this Court should apply the federal rule's requirement that amendments should be freely allowed, none of the cases cited by the Complainant actually requires the application of that rule. Instead, each of those cases deals with the correction of a minor detail or typographical error. The Complainant also fails to mention that the federal rules only encourage granting leave to amend freely *when justice so requires.* The Complainant no doubt omits that phrase from its argument because there is no basis for concluding here that justice requires the amendment the Complainant proposes. That is true because as the court in *Asbestos Specialists* explained, the objective of the rule should be "to get to the merits of the controversy," 4 Envtl. App. Dec. at 830, and here the Court here can get to the merits of this controversy without granting the Complainant's motion.

In fact, there are many reasons to believe that the interest of justice requires the exact opposite -- that the Complainant's motion be denied. There is simply no precedent to suggest that this Court must allow the Complainant to bring a new respondent into this case based only upon the Complainant's unfounded suspicions, and then double both the nature and number of allegations from 22 counts to 47 counts, when the consequence of doing so is to increase the penalty it seeks from $143,000 to $300,238.

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The Complainant's request to amend here is nothing like the requests approved in the cases it cites. Instead, knowing this case has been referred to ADR, the Complainant's motion is a blatant attempt to improve its negotiating position by dramatically expanding the breadth of the complaint, the relief sought, and the number of entities into whose pockets it hopes to reach. And without advising the Court of what it has done, the Complainant is basing its amendment in substantial part on information submitted to it in confidence by Agrimor.

This Court must not countenance such gamesmanship on the part of our government. The Complainant's motion to amend the complaint should be denied.

C. The Complainant Has No Factual Basis for Adding Stockton Chemical Corporation As A Respondent.

Plaintiffs' initial complaint asserted several regulatory violations against Agrimor. Its first amended complaint added a few details that had been missed in the original. Since the filing of that complaint, in the course of settlement negotiations and subject to Agrimor's request that its financial information be treated confidentially, the Complainant learned that the stockholders of Agrimor also own stock in another company. The Complainant may find that relationship interesting, but absent some evidence to show that the second company violated a statute subject to the complainant's jurisdiction, the Complainant's interest is not sufficient to justify adding that second company to this matter as a respondent. The fact is that Stockton Chemical Corporation has not imported any goods into the United States and has not transshipped any goods through the United States to other destinations. Indeed, besides being the result of the Complainant's misuse of information provided to it pursuant to a confidentiality request, the Complainant's proposal to add Stockton Chemical Corporation as a respondent here makes no sense. It is the legal equivalent of saying that if one person holds stock in both Ford and General

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Motors, whenever the EPA brings an enforcement action against Ford, it can add General Motors as a party. And then, if Ford cannot afford to pay the penalty assessed, the EPA can recover the shortfall from General Motors.

Viewed in this light, the Complainant's request that it be allowed to add Stockton Chemical Corporation as a respondent in this case is, stated in the most gentle terms possible, bordering on frivolous. Under these circumstances, the Court cannot countenance and must reject the Complainant's effort to add as a respondent Stockton Chemical Corporation

D. Agrimor is Surprised by the Complainant's Proposal And Both Agrimor and Stockton Would Be Substantially Prejudiced By This Amendment.

As stated above, Complainant's proposed Second Amended Complaint is based in part on information submitted to the Agency in confidence, and raises numerous new theories of law. Contrary to the Complainant's suggestion, it never advised the Respondent of its intent to completely rewrite its complaint in this way. Rather, it is apparent that the Complainant's substantive edits and new allegations are first based upon an abuse of Agrimor's confidential information and subsequent lack of adequate pre-filing investigation. They are also clearly an attempt to work around the numerous factual errors and legal flaws that Agrimor identified in its answer to the First Amended Complaint. The Second Amended Complaint also seeks to double the number of counts against Agrimor and, through that multiplicity, seeks the imposition of a penalty more than twice the size of the penalty previously sought. Perhaps most significantly, the Complainant asks this Court to approve its new complaint just days after the case was referred to a neutral judge for alternative dispute resolution, when reaching a fair resolution of this matter has been the goal of the parties all along.

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Viewed in this light, the Complainant's motion is not only bordering on frivolous, it is teetering on the edge of bad faith. It would be a mistake for this Court to conclude anything other than that the Complainant's actions would cause the Respondent -- and potentially another entity that played no part in this matter -- to suffer severe prejudice in litigation that, but for the Complainant's intransigence, could have and should have been settled long ago.

Under circumstances such as this, when a government official abuses a Respondent's request for confidentiality and then uses information submitted in the course of settlement discussions for its own tactical advantage against that same Respondent, the government's best move would be to withdraw its motion. Absent that, however, it would not be an abuse of discretion for this Court to deny the Complainant's motion for leave to file a second amended complaint. *See Port of Oakland and Great Lakes Dredge and Dock Company*, MSRPA Appeal No. 91-1, 4 Envtl. App. Dec. at 207 (Envtl. App. Bd., Aug. 5, 1992) (affirming the Presiding Officer's decision to deny the Complainant's motion for leave to file a second amended complaint). The merits of this case are already before this Court and the Court should not countenance the Complainant's wrongful acts and intransigence. Instead, it should deny the Complainant's motion for leave to file a second amended complaint and resolve this matter on its merits.

CONCLUSION

Complainant's proposed Second Amended Complaint alleges numerous new theories that were not set forth in either its Complaint or its First Amended Complaint. It bases these allegations at least in part upon confidential information submitted to it by Agrimor in the course of settlement discussions and it has no basis in fact or law for adding Stockton Chemical

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Corporation as a respondent. Taking into consideration as well that the allegations included in the Second Amended Complaint are a surprise to Agrimor, that they would unquestionably prejudice Agrimor, that the Complainant seeks to amend its complaint to obtain negotiating advantage during alternative dispute resolution, and that the case law does not require this Court to grant the Complainant's motion, Complainant's Motion for Leave to File a Second Amended Complaint should be denied. At a minimum, in light of its recent referral of this matter to a neutral judge for alternative dispute resolution, this Court should defer ruling on this motion until that process is completed.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and one true and correct copy of the foregoing was served by FEDEX this 11th day of March 2010, to: Regional Hearing Clerk, U.S. EPA Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303; and that one true and correct copy of the foregoing was served by FEDEX this 11th day of March 2010, to: The Honorable Susan L. Biro, Chief Administrative Law Judge, U.S. Environmental Protection Agency – Mail Code 1900L, 1200 Pennsylvania Avenue, N.W., Washington, DC 20460; Robert Caplan, Esq., Senior Attorney, U.S. EPA, Region 4, 61 Forsyth Street, S.W., Atlanta, Georgia 30303; Mr. Mark Bloeth, Enforcement Officer, U.S. EPA, Region 4, 61 Forsyth Street, S.W., Atlanta, Georgia 30303.

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