

**UNITED STATES OF AMERICA  
ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

**In the Matter of Jerry L. Korn and  
Dairy Health**

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**Docket No. FIFRA 10-2000-0061**

**ORDER GRANTING LEAVE TO AMEND  
AND ESTABLISHING PROCEDURAL SCHEDULE**

The United States Environmental Protection Agency (“Complainant” or “EPA”), the Complainant in this matter, filed a Motion to Amend its Complaint on December 29, 2000. In this Motion Complainant seeks the inclusion of Susan Korn and George Holzer as respondents. Respondents oppose the granting of this Motion and filed a Memorandum in Opposition on January 29, 2000. Complainant responded to Respondents’ Memorandum with a memorandum of its own which was filed on February 15, 2001. Respondents then filed a Supplemental Memorandum in Opposition on April 11, 2001. Complainant’s Motion will be granted for the reasons set forth below.

**BACKGROUND**

This proceeding was initiated by the filing of a complaint by the EPA on April 3, 2000. The Complaint alleged that Dairy Health, Inc. and Jerry L. Korn, the President of the corporation, ( hereinafter collectively referred to as “Respondents”)<sup>1</sup> committed four violations of Section 12(a) of the Federal Insecticide and Rodenticide Act (“FIFRA”). These allegations are based on inspections conducted by the Idaho State Department of Agriculture (“ISDA”) at the Renfro Dairy and at the Dairy Health, Inc. facility. Respondents filed an answer to the Complaint on May 8, 2000, and then subsequently filed a Motion to Amend the Answer. This Motion was granted by the undersigned Administrative Law Judge. Respondents then filed their Amended Answer in which they deny that they committed any FIFRA violations and asserted that Dairy Health, Inc. does not have the ability to pay the penalty proposed in the Complaint. Respondents also assert in the Amended Answer that Jerry L. Korn should be dismissed from this matter

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<sup>1</sup> Respondents Jerry L. Korn and Dairy Health, Inc. and proposed respondents, George Holzer and Susan Korn are represented by the same counsel in this matter.

because he did not commit any FIFRA violations.

EPA's December 29, 2000, Motion to Amend seeks the addition of Susan Korn and George Holzer as respondents in the instant matter and is supported by three attachments. The basis of Complainant's Motion is its contention that Mrs. Korn and Mr. Holzer are "either personally involved in the operation of Dairy Health or have authority for its operation." Complainant's Reply to Respondents' Opposition ("C.'s Reply") at 1. Furthermore, Complainant argues that these individuals meet the definition of "person" in Section 2 of FIFRA and are therefore subject to the requirements set forth in Section 12(a) of FIFRA.

Susan Korn is Jerry L. Korn's wife. Jerry L. Korn is presently a respondent in this matter and serves as the President of Dairy Health, Inc. as well as a director and a 50% shareholder. Complainant has submitted a copy of a letter which Mrs. Korn sent to the Idaho Department of Agriculture in support of its Motion. In this letter Mrs. Korn requests a copy of an inspection report and identifies herself as an "owner" of Dairy Health, Inc. George Holzer owns 50% of the shares in Dairy Health, Inc. He is also one of the two directors of this corporation. EPA asserts that Mr. Holzer is subject to liability because he is a major shareholder and is a corporate officer and therefore, he has the authority to control the behavior of Dairy Health.

The EPA asserts in its Motion that the facts of this case support the "piercing of the corporate veil" as a theory of personal liability for the officers and shareholders of Dairy Health, Inc.. Complainant argues that Dairy Health, Inc. is the alter-ego of its major shareholders and that the corporation functions merely as a pass-through for funds to the shareholders. Complainant bases this argument on the fact that the corporation's tax returns show gross receipts or sales in excess of \$500,000 while the income for the corporation during the same period ranged from a \$106,469 loss in 1997 to a profit of only \$27,177 for 1999. C.'s Reply at 6.

Respondents argue in both their February 15, 2001, and April 11, 2001, memoranda that EPA's Motion to Amend should not be granted because the EPA cannot make a showing of liability for either Mr. Holzer or Mrs. Korn under FIFRA. In addition, Respondents also argue that the corporate veil should not be pierced in this matter. Respondents have attached three affidavits to their Memorandum in Opposition in support of their position. These affidavits are from Mr. Holzer, Mr. Korn and Mrs. Korn, respectively. In his affidavit, Mr. Holzer states that he is a director and a 50% shareholder in Dairy Health, Inc. However, he also asserts that he is a full-time veterinarian, that his involvement with Dairy Health is limited and that he does not participate in any of Dairy Health's day-to-day activities. Mr. and Mrs. Korn each state in his/her affidavit that Mrs. Korn has never been a shareholder or an officer or director of Dairy Health, Inc. Respondents argue that neither Mrs. Korn nor Mr. Holzer can be held liable under FIFRA because neither of them is a member of the class of persons subject to FIFRA liability, which is, according to Respondents' view, limited to the list of persons in Section 14(a)(1), namely, wholesalers registrants, dealers, commercial applicators, retailers, or distributors. Respondents' Memorandum Opposition ("R.'s Opposition") at 2; Respondents' Supplemental Memorandum ("R's Supplemental Memo") at 6-7.

## DISCUSSION

The instant proceeding is governed by the Consolidated Rules of Practice (“Rules of Practice”) and Section 22.14 addresses the amendment of complaints. Section 22.14(c) of the Rules of Practice permits the amendment of a complaint as a matter of right before the answer has been filed. 40 C.F.R. § 22.14(c). Once the answer has been filed, amendment can only be obtained upon motion granted by the Presiding Officer. *Id.* In general, “administrative pleadings are liberally construed and easily amended.” *Yaffe Iron and Metal Company*, 774 F.2d 1008, 1012 (10<sup>th</sup> Cir. 1985); *Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. 170, 205 (E.A.B.1992). However, the Rules of Practice do not discuss any limits on the amendment of pleadings.

Although the Federal Rules of Civil Procedure (“FRCP”) do not govern administrative proceedings, they are instructive regarding the parameters of the amendment of pleadings. Specifically, Rule 15(a) of the FRCP governs the subject of amendment and is very similar in content to Section 22.14(c) of the Rules of Practice.<sup>2</sup> The Supreme Court has enumerated in *Foman v. Davis*, 371 U.S. 178 (1962), with regard to Rule 15(a) of the FRCP, circumstances in which the amendment of pleadings is inappropriate. The Environmental Appeals Board (“EAB”) has specifically adopted these FRCP limits for application in environmental administrative proceedings. *Port of Oakland and Great Lakes Dredge Company*, 4 EAD at 205; *Asbestos Specialists, Inc.* 4 E.A.D. 819, 827-830 (EAB 1993). The circumstances in which granting leave to amend should not be permitted under *Foman* are: when such amendment (1) would result in undue delay, or (2) stems from bad faith or a dilatory motive on the part of the movant, or (3) there has been a repeated failure to cure deficiencies by previously allowed amendment of pleadings, or (4) granting leave would result in undue prejudice to the opposing party, or (5) the amendment is futile. *Foman*, 371 U.S. at 182.

Respondents assert that Complainant’s Motion to Amend should not be granted on the grounds that the amendment is futile. R’s Supplemental Memorandum at 2-10. Respondents

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<sup>2</sup> Rule 15(a) states:

A party may amend the party’s pleading once as a matter of course at any time before responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party’s pleading only by leave of court or by written consent of the adverse party; and shall be freely given where justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

Fed. R. Civ. P. 15(a) (emphasis added).

contend that: 1) neither Mr. Holzer nor Mrs. Korn is subject to FIFRA jurisdiction<sup>3</sup>; 2) Mrs. Korn is not an officer, shareholder or director of Dairy Health, Inc.; 3) the EPA has failed to make a sufficient showing that either Mrs. Korn or Mr. Holzer engaged in prohibited activities; 4) EPA has not produced any support for its assertion that Mr. Holzer is directly responsible for Dairy Health's operation; and 5) EPA's piercing the corporate veil argument is meritless.

Respondents set forth substantive arguments. However, each of these arguments is premised on the assumption that the facts Respondents enumerate are accurate. At the present stage in the proceeding the record has not been closed. Both the EPA and the Respondents still have the opportunity to submit and to request additional evidence. Consequently, conclusions cannot be made regarding either Mr. Holzer or Mrs. Korn's precise role in Dairy Health's operation or in the alleged FIFRA violations.<sup>4</sup> In light of the guiding principles governing the amendment of pleadings, Complainant's Motion to Amend the Complaint must be granted. At this stage in the proceeding, the record is still being created and consequently, conclusions cannot be made with regard to liability. As stated previously, leave to amend is liberally given and is only denied if any of the circumstances set forth in *Foman* is present.

Respondents argue that Complainant's Motion should be denied on the grounds that amendment of the Complaint is futile. Leave to amend is futile if the complaint would not survive a motion to dismiss or if the claim is frivolous. E.g. *Dow Corning Corporation*, 3 F. Supp. at 364; *Monroe v. Williams*, 705 F. Supp. 621, 623 (D.D.C. 1988); *Cowles v. Yesford*, 2001 U.S. Dist. LEXIS 1662 \*8 (S.D.N.Y. 2001); *Becker v. University of Nebraska*, 191 F.3d 904, 908 (8<sup>th</sup> Cir. 1999). Complainant's Motion to Amend is not futile under this standard. Complainant sets forth allegations which are not frivolous and are sufficient to constitute a colorable claim against each of the Respondents. Therefore, none of the circumstances which would justify the denial of Complainant's Motion is present in this case. EPA's proposed amendments are not futile and do not stem from bad faith or dilatory motive, there is no danger of undue delay or prejudice to the Respondents, and there have been no prior attempts to amend the Complaint in which EPA could have sought these proposed additions to the Complaint. Consequently, Complainant's Motion to Amend the Complaint is **GRANTED**.

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<sup>3</sup> Section 12(a)(1) of FIFRA (which is at issue here) states: "[e]xcept as provided by subsection (b) of this section, it shall be unlawful for any person in any state to distribute or to sell to any person . . ." 7 USC § 136j (emphasis added). The term "person" is defined in Section 2 of FIFRA as "any individual, partnership, association, corporation, or any other organized group of persons whether incorporated or not." 7 USC §136. Thus, FIFRA establishes a broad jurisdiction which could include both Mr. Holzer and Mrs. Korn.

<sup>4</sup> A court is not required to determine the merits of a proposed claim or defense which comes before it upon motion to amend. *Sumitomo Electric Research Triangle, Inc. v. Corning Glass Works*, 109 F.R.D. 627, 628 (S.D.N.Y. 1986), cited in *Dow Corning Corporation v. Chemical Design, Inc.*, 3 F. Supp. 2d 361, 364 (W. D. N.Y. 1998). The court must "merely satisfy itself that it is colorable and not frivolous." *Id.*

The following procedural schedule is established:

Respondents' Answer to Amended Complaint	<b>August 15, 2001</b>
Complainant's Prehearing Exchange	<b>September 17, 2001</b>
Respondents' Answering Prehearing Exchange	<b>October 17, 2001</b>
Complainant's Rebuttal Prehearing Exchange	<b>November 7, 2001</b>

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Charles E. Bullock  
Administrative Law Judge

Dated: July 13, 2001

IN THE MATTER OF JERRY L. KORN, PRESIDENT & DAIRY HEALTH, INC.,  
Respondents  
Docket No. FIFRA-10-2000-0061

**CERTIFICATE OF SERVICE**

I certify that the foregoing Order, dated July 13, 2001, was sent in the following manner to the addressees listed below:

**Original and Copy by**

**Pouch Mail to:**

Ms. Mary Shillcutt  
Regional Hearing Clerk  
U.S. Environmental Protection  
Agency, Region 10  
1200 Sixth Avenue  
Seattle, WA 98101

**Copy by Pouch Mail to:**

Counsel for Complainant: M. Socorro Rodriguez, Esquire  
Assistant Regional Counsel  
U.S. Environmental Protection  
Agency, Region 10 (ORC-158)  
1200 Sixth Avenue  
Seattle, WA 98101

**Copy by Regular Mail to:**

Counsel for Respondent: John McCreedy, Esquire  
JIM JONES & ASSOCIATES  
1275 Shoreline Lane  
Boise, ID 83702-6870

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Marion Walzel  
Legal Assistant

Dated: July 13, 2001