UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
HING MAU, INC.,	)	**Docket No. FIFRA-9-2001-0017**
	)	
Respondent	)	

ORDER GRANTING MOTION FOR ACCELERATED DECISION ON LIABILITY AND DENYING ACCELERATED DECISION AS TO PENALTY

I. Introduction and Procedural Background

This proceeding under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 et seq., was commenced on September 24, 2001, by the filing of a complaint by the Senior Associate, Cross Media Division U.S. EPA, Region 9 ("Complainant"), charging Respondent, Hing Mau, Inc., with the distribution and sale of unregistered pesticides in violation of Section 12(a)(1)(A) of the Act. Specifically, the complaint alleges that on November 30, 1999, Respondent distributed or sold the products "Naphthalene No. 108" and "Refined Naphthalene [Ball]", that these products are pesticides and that neither product was registered.[1] For these alleged violations, Complainant proposes to assess Respondent a penalty of $ 9,900.

Respondent, through counsel, filed an Answer on October 25, 2001, admitting that it was a person and thus a corporation and admitting that it owned, operated, controlled and was otherwise responsible for a facility located at 1040 Maunakea Street, Honolulu, Hawaii. Respondent denied liability and denied that the proposed penalty was appropriate. Specifically, Respondent denies the distribution or sales alleged in the complaint and denies for lack of information sufficient to form a belief the allegations that the products are pesticides and that neither product was registered. As affirmative defenses, Respondent alleges "discriminatory enforcement" in that the Act has not been applied equally against those similarly situated and "improper purpose" in that Complainant seeks to impose civil penalties based on the belief Respondent has not sufficiently cooperated with Complainant. With respect to the proposed penalty, Respondent asserts, *inter alia*, that Complainant has failed to allege any facts regarding the "gravity of the violation"; that Respondent is a "Mom and Pop" store with a single retail location in Honolulu; that Hawaii has been in a recession for ten years and is one of the states most affected economically by the terrorist attacks; and that imposition of the proposed penalty would place Respondent's ability to continue in business in serious jeopardy. Respondent requested a hearing on all issues raised by the complaint and answer.

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[1] It appears that the product in Count II should be correctly identified as "Refined Naphthalene Ball"(Inspection Report & Related Documents, C's Pxh 4).

Both parties have filed prehearing exchanges. Under date of May 15, 2002, Complainant filed a Motion for Accelerated Decision on Liability and Penalty. Although noting that Respondent has denied most of the allegations of the complaint without substantiation, Complainant asserts that there is no genuine issue that 1) Respondent "distributed or sold" two naphthalene products, 2) that these products are pesticides, 3) which were not registered under FIFRA (Memorandum in Support of Complainant's Motion..., hereinafter Memorandum). Complainant says that Respondent.'s affirmative defenses of selective enforcement and improper purpose are wholly unsupported by the record and that Respondent is mistaken as a matter of law in claiming that Complainant must prove through laboratory tests that the naphthalene products are correctly identified by the labels. As to the penalty, Complainant says the Respondent does not dispute that part of the record which supports a finding that the naphthalene products are a potential serious and widespread risk. Moreover, according to Complainant, there is no dispute that Respondent has gross revenues in excess of $1,000,000 a year and a good credit rating, placing it in an excellent position to pay a civil penalty of $9,900. Respondent has not filed a response to the motion. Nevertheless, the motion will be considered on its merits.[2]

II Facts

This proceeding had its genesis in an inspection of Respondent's retail establishment, located at 1040 Maunakea Street, sometimes referred to as "Chinatown", Honolulu, Hawaii, on November 30, 1999, conducted by Mr. Stephen Ogata of the Hawaii Department of Agriculture (Narrative, dated December 17,1999, C's Pxh 4).The stated reason for the inspection was that Respondent was suspected to be selling mothball pesticides which were not federally registered or licensed by the state. Mr. Ogata found two products, one identified as "Naphthalene 108" and the other identified as "Refined Naphthalene Ball."[3] Although the label language was primarily foreign, each product contained the statement: "This product is made of refined naph-thalene, which has resistance function against insect, mildew, and bad smell." These products were obtained by Respondent from the Family Supermarket, Santana, California (Invoice, dated December 16, 1998). The products, however, allegedly have Chinese lettering on the labels and were manufactured in

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[2] Although Rule 22.16(b) of the Consolidated Rules of Practice, entitled "Motions" (40 C.F.R. Part 22), provides that any party who fails to respond within the designated period waives any objection to granting the motion, a motion for an accelerated decision is a dispositive motion which should be considered on the available record. *See, e.g., Asbestos Specialists, Inc,* 4 E.A.D. 819 (EAB 1993), holding that under former version of rule, which used language that, *if no response is filed within the designated period, the parties may be deemed to have waived any objection to granting the motion*, it was error to dismiss complaint with prejudice where the ALJ was aware Complainant opposed the motion. This holding is appropriate here because, as will be seen, Respondent is entitled to a hearing on the penalty.

[3] The inspection Narrative by Mr. Ogata identifies one of the products as "Naphthalene No. 108 225". In other inspection documents, e.g., Receipt for Samples and photos, the product is identified simply as "Naphthalene 225".

Taiwan (Memorandum at 14). The invoice reflects that one case of each product was shipped, which were received by Respondent in January 1999. The inspection Narrative and the Dealer's Statement (C's Pxh 4) indicate that each case contained 100 bags and the Investigation Summary states that 78 bags of Naphthalene 108 ***225 and 90 bags of Refined Naphthalene Ball were on hand at the time of the inspection on November 30, 1999. The Dealer's Statements applicable to each product indicate that these were the last and only shipments of the products at issue received by Respondent.

Mr. Ogata took photos of the products identified above at the time of his inspection of Respondent's establishment on November 30, 1999 (Receipt for Samples). The photos purport to show the products on a shelf presumably available to the public at Respondent's retail (grocery store) establishment and thus offered for sale (C's Pxh 16). As a result of Mr. Ogata's inspection, the State of Hawaii on December 23,1999, issued to Respondent an Order To Stop Sale and Remove From Sale the products Naphthalene 225 and Refined Naphthalene Ball (C's Pxh 4).

An affidavit, dated May 2, 2002, by Mr. Daniel B. Peacock, a biologist employed by EPA, Office of Pesticide Programs, Registration Division, states that he has examined photographs depicting labels of the products "Naphthalene 108" and "Refined Naphthalene Ball"(C's Pxh 13). Referring particularly to the language on each label "This product is made of refined Naph-thalene, which has resistance function against insect, mildew and bad smell", Mr. Peacock states that the term "resistance function" relates to the product's ability to repel insects or mitigate mildew. He further states that mildew is a form of "fungi", which along with 'insect" are each defined as a "pest"under the Federal Insecticide, Fungicide, and Rodenticide Act. He, therefore, concludes that Naphthalene 108 and Refined Naphthalene Ball are "pesticides" under FIFRA. Mr. Peacock has examined EPA FIFRA registration files and determined that as of November 30, 1999, neither Naphthalene 108 nor Refined Naphthalene Ball were registered as pesticide products. Additionally, he has determined that neither Naphthalene 108 nor Refined Naphthalene Ball are currently registered as pesticide products nor is there an application for registration of either product pending. Mr. Peacock has attached to his affidavit a Format Label: Naphthalene End-Use Product, dated September 15, 1998, which contains standard label texts to which registered naphthalene products for moth control must conform in order to be approved by EPA. He points out that the labels for Naphthalene 108 and Refined Naphthalene Ball lack virtually all required texts for their ingredient statements, use directions, and storage and disposal.

An affidavit, dated February 8, 2002 (C's Pxh 1), by William B. Lee, an enforcement officer in the Pesticide Section, EPA Region 9, sets forth in detail the calculation of the proposed penalty in accordance with the FIFRA Enforcement Response Policy (ERP) (1990), as amended. A Reference USA listing for Hing Mau Inc, apparently dated January 17, 2001 (C's Pxh 3) indicates that it has estimated sales of $1 million to $2.49 million and a Dun & Bradstreet Site Information summary of an undetermined date indicates that Respondent has five employees and annual sales volume of $1 million (C's Pxh 14).

Respondent has indicated that it intends to rely on the testimony of Maria Sam, identified as its manager, who was present when the inspection of November 30, 1999, and other followup inspections of its establishment referred to in the record were conducted (Prehearing Information Exchange, dated April 2, 2002). Respondent states that Ms. Sam will testify that the reason underlying the filing of the instant complaint was retaliation by EPA in that Respondent was expected to provide information regarding its distributors and suppliers which would prove to be the "Big Catch", i.e.,would implicate others in the supply and distribution of the pesticides at issue (Id.

at 2). According to Respondent, inspectors at EPA/Department of Agriculture made it clear to Ms. Sam that Respondent was to provide invoices with the names of all its suppliers and that it was only when they were informed that Respondent had already provided the names of all suppliers of the suspect merchandise, that the instant complaint was filed. It is argued that the decision of whether and whom to prosecute based on whether a person has provided incriminating evidence against others is not proper and certainly is not the purpose of FIFRA.

As a reason for eliminating or reducing the penalty, Respondent argues that Complainant has failed to make a *prima facie* case that the products allegedly distributed or sold were Naphthalene 108 or Refined Naphthalene Ball (Pxh at 4). Respondent apparently intends that Complainant meet its burden in this respect by laboratory testing of the products. Complainant correctly points out, however, that this argument relates to liability rather than the penalty.

Respondent has listed numerous documents as proposed or potential exhibits (Pxh 3, 4) However, none of these documents are in addition to those proposed or listed by Complainant.

III Standard for Considering The Motion

Under the Rules of Practice governing this proceeding, an Administrative Law Judge ("ALJ") may render an accelerated decision in favor of a party as to any or all part of a proceeding if no genuine issue of material fact exists and if that party is entitled to judgment as a matter of law. 40 C.F.R. § 22.20(a). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986). As correctly noted by Complainant, the standard for granting a motion for accelerated decision is analogous to that of a motion for summary judgment under the Federal Rules of Civil Procedure. *In re Green Thumb Nursery, Inc.,* 6 E.A.D. 782, 793 (EAB 1997); *In re CWM Chem. Serv.,* 6 E.A.D. 1, 12 (EAB, 1995). In deciding such motions, the evidence must be viewed in a light most favorable to the non-moving party, which is Respondent in this instance. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

IV Statutory and Regulatory Provisions

FIFRA § 12(a)(1) provides: *Except as provided in subsection (b) of this section, it shall be unlawful for any person in any state to distribute or sell to any person*

(A) any pesticide which is not registered under section 136(a) of this title.....

FIFRA § 2(u) provides in pertinent part that:*the term "pesticide" means (1) any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest...*

Additionally, the regulation (40 C.F.R. § 152.15), provides in pertinent part:

> A pesticide is any substance (or mixture of substances) intended for a pesticidal purpose ,i.e., use for the purpose of preventing, destroying, repelling or mitigating any pest or for use as a plant regulator, defoliant, or desiccant. A substance is considered to be for a pesticidal purpose requiring registration, if:
> (a) The person who distributes or sells the substance claims states, or implies (by labeling or otherwise):

> (1) That the substance (either by itself or in combination with any other substance) can or should be used as a pesticide; or
> (2) That the substance consists of or contains an active ingredient and that it can be used to manufacture a pesticide; or ....
> (c) The person who distributes or sells the substance has actual or constructive knowledge that the substance will be used or is intended to be used for a pesticidal purpose.

It should be noted that FIFRA defines "pest" as including insects and mildew.[4]

Consistent with the foregoing, it has been held that a product is a "pesticide" within the meaning of FIFRA, if the person selling or distributing the product makes pesticidal claims. *N. Jonas & Co. Inc.,* Docket No. I.F. & R. III-121C, 1978 EPA ALJ LEXIS 3, at * 28-29 (ALJ, July 27, 1978), *aff'd*, 666 F.2d 829 (3rd Cir. 1981).

FIFRA § 2 (gg) defines the term "to distribute or sell" as meaning "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."

The regulation at 40 C.F.R. § 152.3(j), implementing Section 2(gg), also provides that the term "distribute or sell" means the "acts of distributing, selling, offering for sale, holding for sale, shipping, holding for shipment, delivering for shipment, or receiving and (having so received) delivering or offering to deliver, or releasing for shipment to any person in any State."

Discussion

Respondent has denied for lack of information sufficient to form a belief the allegation that the products identified in the complaint, "Naphthalene 108 [225]" and "Refined Naphthalene Ball", were pesticides, essentially putting Complaint to its proof The labels on the mentioned products contain a statement "This product is made of refined naph-thalene, which has a resistance function against insect, mildew, and bad smell." Because a "pesticide" is defined as any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest (FIFRA § 2(u)); insects and mildew are pests (FIFRA 2(t)); "the term "resistance function" is consistent with "repelling" or "mitigating"[5] and a product's function or purpose may be gleaned from its label or accompanying literature (40 C.F.R. § 152.15), it is concluded that "Naphthalene 108 [225]" and

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[4] FIFRA § 2(t) provides 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 section 136w(c)(1) of this title.

[5] In common usage, "resist" means to "withstand the force or effect of:be able to repel or ward off "or to exert oneself to counteract or defeat: strive against: oppose". Webster's Third International Dictionary (1981).

"Refined Naphthalene Ball" are pesticides. This conclusion is supported by the affidavit of Daniel B. Peacock of EPA's Registration Division.

Respondent has also denied for lack of information sufficient to form a belief the allegation that the products identified in the complaint were not registered with EPA. Proof in this respect is supplied by Mr. Peacock's affidavit which establishes that neither "Naphthalene 108 [225]" or "Refined Naphthalene Ball"was registered with EPA at the time of the inspection on November 30, 1999. Mr. Peacock's affidavit further establishes that these products were not registered on the date of his affidavit (May 2, 2002), nor were applications for registration of these products pending on that date.

FIFRA is essentially a labeling statute, the premise being that users, handlers, and others coming into contact with a pesticide product will read and comply with the label. EPA's process of registering a pesticide carries with it approval of the label which would not be meaningful unless the label accurately identified the product. Moreover, as we have seen, the determination of whether an unregistered product is a pesticide turns primarily on whether pesticidal claims for the product are made on the label or accompanying literature. It is therefore clear that an essential element of FIFRA is that users, handlers and others coming into contact with the product, and EPA in registering a product, may rely on the premise that a product is accurately identified by its label. Accordingly, it is concluded that Respondent's contention that Complainant has not established a *prima facie* case that the products identified in the complaint were distributed or sold in the absence of laboratory tests demonstrating that the labels accurately characterize the products is erroneous. This contention must be, and hereby is, rejected.

Respondent has denied that the products identified in the complaint were distributed or sold. The statute (FIFRA § 2(gg)) and the regulation (40 C.F.R. § 152.3(j), however, make it clear that "distribute or sell" includes the act of "offering to sell". Respondent has not disputed by affidavits or otherwise that the products "Naphthalene 108 [225]" and " Refined Naphthalene Ball" were on a shelf available to the public in its retail store on November 30, 1999, and thus offered for sale. Moreover, the record indicates that 100 bags of Naphthalene 108 [225] and 100 bags of Refined Naphthalene Ball were received in January 1999 and that 78 bags of the former product and 90 bags of the latter product were on hand at the time of the inspection on November 30, 1999. This permits an inference that sales of the products, albeit not extensive, occurred during the period January to November 30, 1999.

There is no dispute of material fact that Respondent sold or distributed the unregistered pesticides Naphthalene 108 [225] and Refined Naphthalene Ball as alleged in the complaint. Complainant is therefore entitled to and will be granted an accelerated decision finding Respondent liable for two violations of FIFRA § 12(a)(1)(A).

However, Complainant's motion for an accelerated decision as to the penalty overlooks the provisions of the Administrative Procedure Act, 5 U.S.C. § 556(d), providing in pertinent part that: "A party is entitled to present his case by oral or documentary evidence, to submit rebuttal evidence and to conduct such cross-examination as may be required for a full disclosure of the facts." Judge Bullock's Order Establishing Procedures, dated December 20, 2001, refers to the quoted provision of the APA. Although the penalty provision (FIFRA § 14), does not expressly require that the hearing or the opportunity thereof contemplated by that section be "on the record", EPA's General Counsel has determined that FIFRA § 14(a)(3) "[R]equires a hearing in accordance with the Administrative Procedure Act (5 U.S.C. § 556), unless the respondent waives the right and agrees

to some sort of an abbreviated hearing." 1973 WL 21963, at *1 (Feb. 12, 1973, E.P.A.G.C.). Respondent has not waived its right to a hearing, but has clearly expressed its intention to proceed, stating , *inter alia,* that it intends to cross-examine Complainant's witnesses. (Prehearing Exchange at. 6, 7). Accordingly, Complainant's request for an accelerated decision as to the penalty is denied.

So ordered.

Dated this __13th___ day of August, 2002.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of this Order, dated August 13, 2002, *In the Matter of Hing Mau, Inc.* Docket No. FIFRA-9-2001-0017, were mailed to the Regional Hearing Clerk, Reg.IX, and a copy was mailed certifieto addressees listed below as follows:

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