BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

IN THE MATTER OF	)	
OMG Americas, Inc.	)	
Westlake, OH	)	**Docket No. TSCA-HQ-2015-5006**
Respondent	)	

AMENDED CONSENT AGREEMENT

Complainant United States Environmental Protection Agency (hereinafter "EPA" or the "Agency") and Respondent, OMG Americas, Inc. (hereinafter "OMGA" or the "Respondent") (collectively, the "Parties"), having consented to the entry of this Amended Consent Agreement and proposed Final Order before the taking of any testimony and without adjudication of any issues of law or fact herein, hereby consent to the terms of this Amended Consent Agreement and attached Final Order.

I. PRELIMINARY STATEMENT

1. This civil administrative proceeding for the assessment of penalties pursuant to § 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a), is being simultaneously commenced and concluded pursuant Rules 22.13(b), 22.18(b)(2), and 22.18(b)(3) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. §§ 22.13(b), 22.18(b)(2), and 22.18(3).

2. To avoid the disruption of orderly business activities and expense of litigation, Respondent, for purposes of this proceeding: (1) admits that EPA has jurisdiction over the subject matter in this Amended Consent Agreement, and (2) consents to the terms of this Amended Consent Agreement and Final Order ("CAFO").

3. The Respondent waives any defenses it might have as to jurisdiction.

II. EPA'S FINDINGS OF FACT AND LAW

4. Respondent, a corporation with its headquarters located at 811 Sharon Drive, Westlake, OH 44145, is a "person" as defined in 40 C.F.R. § 720.3(x) and, as such, is subject to TSCA, 15 U.S.C. § 2601 *et seq.*, and the regulations promulgated thereunder. Respondent owns and operates a plant located at 240 Two Mile Run Road, Franklin, PA 16323.

5. The chemical substance at issue in this matter is referred to herein and throughout this Amended Consent Agreement as "Chemical A." Chemical A is identified at 40 C.F.R. § 721.10414(a)(1) as "iron(1), chloro[rel-1,5-dimethyl (1R,2S,4R,5S)-9,9-dihydroxy-3-methyl-2,4-di(2-pyridinyl-.kappa.N)-7-[(2-pyridinyl-.kappa.N)methyl]-3,7-diazabicyclo[3.3.1]nonane-1,5-dicarboxylate-.kappa.N3,.kappa.N7]-,chloride (1:1), (OC-6-63)-(PMN P-10-358, CAS No. 478945-46-9)."

6. Respondent manufactures, imports, processes, distributes in commerce, uses, or disposes of Chemical A or mixtures containing Chemical A or in the past has manufactured, imported, processed, distributed in commerce, used, or disposed of Chemical A or mixtures containing Chemical A as those terms are defined in TSCA § 3(7) and 3(2), 15 U.S.C. § 2602(7) and (2), respectively, and 40 C.F.R. § 720.3(e) and (q). Respondent is subject to TSCA and regulations promulgated thereunder.

COUNT I – TSCA § 5(a)(1) VIOLATIONS

7. Any chemical substance which is not included in the chemical substance list (TSCA Inventory) compiled and published under TSCA § 8(b), 15 U.S.C. § 2607(b), is a "new chemical substance" pursuant to TSCA § 3(9), 15 U.S.C. § 2602(9) and 40 C.F.R. § 720.3(v).

8. TSCA § 5(a)(l), 15 U.S.C. § 2604(a)(l) and 40 C.F.R. § 720.22(a)(1) and § 720.40(b), provide that no person may manufacture (including import) a new chemical substance unless such person submits a Premanufacture Notification ("PMN") to EPA at least ninety (90) days before manufacturing that substance.

9. On February 28, 2014, Respondent voluntarily informed EPA that it had imported Chemical A on two (2) occasions (November 15, 2010 and December 8, 2010) prior to submitting a PMN for Chemical A.

10. EPA alleges that Respondent's failure to submit a PMN at least ninety (90) days before manufacturing (importing) Chemical A as described above constitutes failure to comply with TSCA § 5, 15 U.S.C. § 2604, which is a prohibited act under TSCA section 15(1)(B), 15(1)(C) and 15(3)(B), 15 U.S.C. § 2614(1)(B), (1)(C) and (3)(B) for which penalties may be assessed.

COUNT II – TSCA § 5(a)(2) VIOLATIONS

11. TSCA § 5(e), 15 U.S.C. § 2604(e), provides that "(e) Regulation pending development of information (1)(A) If the Administrator determines that- (i) the information available to the

Administrator is insufficient to permit a reasoned evaluation of the health and environmental effects of a chemical substance with respect to which notice is required by subsection (a) of this section; and (ii)(I) in the absence of sufficient information to permit the Administrator to make such an evaluation, the manufacture, processing, distribution in commerce, use, or disposal of such substance, or any combination of such activities, may present an unreasonable risk of injury to health or the environment, or (II) such substance is or will be produced in substantial quantities and such substance either enters or may reasonably be anticipated to enter the environment in substantial quantities or there is or may be significant or substantial human exposure to the substance, the Administrator may issue a proposed order, to take effect on the expiration of the notification period . . . to prohibit or limit the manufacture, processing, distribution in commerce, use, or disposal of such substance . . ."

12. On February 7, 2011, the Agency issued a TSCA section 5(e) consent order on Chemical A based on "...concerns for systemic toxicity, neurotoxicity, dermal sensitization, acute toxicity and immunotoxicity from dermal exposure." See "*Significant New Use Rules on Certain Chemical Substances,*" FEDERAL REGISTER, Vol. 77, pp. 24613-24628, at p. 24617.

13. The TSCA section 5(e) consent order on Chemical A cited in Paragraph 12 requires the following protective measures: "1. Use of personal protective equipment including dermal protection (when there is potential dermal exposure). 2. Establishment and use of a hazard communication program. 3. Use of the PMN substance only as described in the PMN. 4. That annual manufacture and importation volume not exceed the confidential limit specified in the consent order. 5. No manufacture, processing, or use of the PMN substance in the form of a powder or a solid." See "*Significant New Use Rules on Certain Chemical Substances,*" FEDERAL REGISTER, Vol. 77, pp. 24613-24628, at p. 24617.

14. TSCA § 5(a)(2), 15 U.S.C. § 2604(a)(2) and 40 C.F.R. § 721.25(a) provide that if EPA promulgates a Significant New Use Rule ("SNUR"), any manufacturer (including importer) or processor engaging in a designated significant new use must submit a Significant New Use Notice (or "SNUN") to EPA at least ninety (90) days before such new use.

15. On April 25, 2012, the Agency promulgated a SNUR on Chemical A under section 5(a)(2) of TSCA. The SNUR designated any use of Chemical A as a ''significant new use'' in the absence of the protective measures listed under Paragraph 13. See "*Significant New Use Rules on Certain Chemical Substances,*" FEDERAL REGISTER, Vol. 77, pp. 24613-24628, at p. 24617 and 40 C.F.R. § 721.10414.

16. On February 28, 2014, Respondent voluntarily informed EPA that it processed Chemical A on three (3) occasions (May 3, 2012, May 4, 2012, and May 10, 2012) prior to submitting a SNUN.

17. EPA alleges that Respondent's failure to submit a SNUN at least ninety (90) days before processing Chemical A as described in Paragraph 16 above constitutes failure to comply with TSCA § 5, 15 U.S.C. § 2604, which is a prohibited act under TSCA section 15(1)(B), 15(1)(C) and 15(3)(B), 15 U.S.C. § 2614(1)(B), (1)(C) and (3)(B) for which penalties may be assessed.

COUNT III – TSCA § 5(h)(4) VIOLATIONS

18. 40 C.F.R. § 723.50(e)(1) provides that a Low Volume Exemption ("LVE") applicant must submit to EPA an exemption application ("LVEA") on the standard PMN form at least thirty (30) days (a mandatory EPA review period) before the manufacture (import) of the new chemical substance begins.

19. 40 C.F.R. § 723.50(e)(2) requires that the LVEA include: (1) the identity of the manufacturer or importer; (2) the identity of the chemical substances; (3) the identity of any known impurities; (4) any known synonyms; (5) any by-products; (6) the intended production volume; (7) a description of intended categories of use; (8) for manufacturer-controlled sites only, the identity of manufacturing sites, process descriptions, and worker exposure and environmental release information; for sites not controlled by the manufacturer, processing and use operation descriptions, the estimated number of processing and use sites, and worker exposure/environmental release information; (9) an indication on the first page of the application that the submission is a "TSCA section 5(h)(4) exemption notice" and whether the application is submitted under 40 C.F.R. § 723.50(c)(1) (<10,000 kilograms) or (c)(2) (low environmental releases and human exposures); (10) any test data in the possession or control of the applicant regarding the new chemical's effects on human health and the environment; (11) required certifications; and (12) a sanitized copy of the notice.

20. On February 28, 2014, Respondent voluntarily informed EPA that it imported Chemical A on two (2) occasions (April 15, 2010 and May 10, 2010) prior to submitting a LVEA.

21. EPA alleges that Respondent's failure to submit an LVEA at least thirty (30) days before manufacturing (importing) Chemical A as described above constitutes failure to comply with TSCA § 5, 15 U.S.C. § 2604, which is a prohibited act under TSCA section 15(1)(B), 15(1)(C) and 15(3)(B), 15 U.S.C. § 2614(1)(B), (1)(C) and (3)(B) for which penalties may be assessed.

III. CIVIL PENALTY

22. The proposed penalty in this matter is THIRTY-TWO THOUSAND, FIVE HUNDRED THIRTY-FIVE U.S. DOLLARS ($32,535.00). The penalty is consistent with the "*TSCA Section 5 Enforcement Response Policy*" (issued August 5, 1988, as amended June 8, 1989 and July 1, 1993) ("TSCA § 5 ERP"). The TSCA ERPs were developed in accordance with the "*Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy,*" which sets forth a general penalty assessment policy for TSCA violations. 45 Fed. Reg. 59,770 (Sept. 10, 1980). The TSCA ERPs establish a framework for applying the statutory factors to be considered in assessing a civil penalty, *i.e.*: "the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require." Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B).

23. The proposed civil penalty in this case reflects: (1) a determination of the Gravity-based Penalty ("GBP"); and, (2) adjustments to the GBP, taking into account the statutory factors.

24. Not more than thirty (30) calendar days after the effective date of the Final Order, respondent shall either:

    A. Dispatch a cashier's or certified check with a notation of "OMG Americas, Inc., Civil Penalty Docket No. TSCA-HQ-2015-5006" payable to the order of the "Treasurer of the United States of America" to the following address:

        U.S. Environmental Protection Agency
        Fines and Penalties
        Docket No. TSCA-HQ-2015-5006
        Cincinnati Finance Center
        P.O. Box 979077
        St. Louis, MO 63197-9000

    OR

    B. Pay by Fedwire transfer with a notation of "OMG Americas, Inc., Civil Penalty Docket No. TSCA-HQ-2015-5006" by using the following instructions:

        Federal Reserve Bank of New York
        ABA = 021030004
        Account = 68010727
        SWIFT address = FRNYUS33
        33 Liberty Street
        New York, NY 10045

    [Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency."]

25. Concurrently with Paragraph 24A or 24B, Respondent shall forward a copy of the check or documentation of a wire transfer to the following address with a certification that regarding the violations alleged herein, Respondent is in compliance with sections 5 and 15 of TSCA, 15 U.S.C. § 2604 and 2614.

        U.S. Environmental Protection Agency
        Office of Civil Enforcement
        Waste and Chemical Enforcement Division (2249A)
        Attn: Tony R. Ellis (Case Development Officer)
        1200 Pennsylvania Ave., NW
        Washington, DC 20460
        Phone: (202) 564-4167
        E-mail: Ellis.Tony@epa.gov

By written notice to Respondent, EPA may change the address and/or person listed above.

26. If Respondent fails to make the payment in a timely manner as required by Paragraph 24A or 24B, then Respondent shall pay a stipulated penalty of ONE THOUSAND U.S. DOLLARS ($1,000.00) per calendar day for every day the penalty payment is late, unless EPA in writing excuses or mitigates the stipulated penalty. EPA may excuse or mitigate the stipulated penalty if EPA determines that the failure to comply occurred despite Respondent's exercise of good faith and due diligence.

27. Whenever this CAFO requires EPA to give notice or submit information to Respondent, such information shall be submitted to the address and to the attention of the individual listed below:

Squire Patton Boggs LLP
Attn: Allen A. Kacenjar (Counsel for OMG Americas, Inc.)
4900 Key Tower
127 Public Square
Cleveland, OH 44114
Phone: (216) 479-8500
E-mail: Allen.kacenjar@squirepb.com

Respondent agrees that the notification may be issued *via* facsimile, e-mail, first class mail (including by certified mail or return receipt requested, Overnight Express and Priority Mail), or any reliable commercial delivery service.

By written notice to EPA as specified in the address provided under Paragraph 25, Respondent may change the address and/or the person listed above.

IV. RESERVATION OF RIGHTS AND COVENANT NOT TO SUE

28. Payment of the penalty resolves the civil administrative claims alleged in this Amended Consent Agreement.

29. Respondent is authorized to process, distribute and otherwise use Chemical A stocks in its control on the date this CAFO is fully executed, as specified by Paragraph 36, but shall not use more than 2,200 kilograms of such stocks, subject to the requirements of 40 CFR §§721.10414(a)(2)(i)-(ii) & (b)(1).

30. Pursuant to 40 C.F.R. § 22.18(b)(2), Respondent waives its right to contest the allegations herein, its right to appeal the Final Order, and its right to request a judicial or administrative hearing on any issue of law or fact set forth in, and resolved by, this Amended Consent Agreement.

31. For the sole purpose of establishing Respondent's compliance history in any future enforcement proceeding that EPA may bring against Respondent within five (5) years of the date of the execution of the Final Order, Respondent agrees not to challenge the violations

alleged in this Amended Consent Agreement. Otherwise, Respondent neither admits nor denies the allegations, but consents to the terms and conditions of this CAFO.

32. This settlement is conditioned upon the thoroughness and accuracy of Respondent's representations to EPA in this matter.

33. Compliance with this CAFO shall not be a defense to any subsequent action EPA may commence pursuant to federal law or regulation for violations occurring after the date of this Consent Agreement, or any violations of TSCA not alleged in this Amended Consent Agreement that may have occurred prior to the date that this Amended Consent Agreement is fully executed by both Parties that were not disclosed to EPA by Respondent on February 28, 2014.

34. Nothing in this Amended Consent Agreement or the Final Order is intended to, nor shall be construed to operate in any way to resolve any criminal liability of respondent.

V. OTHER MATTERS

35. This Amended Consent Agreement shall be binding upon the Parties, and their respective officers, directors, employees, successors and assigns. The undersigned representative of each Party certifies that he or she is duly authorized by his or her respective Party to enter into this binding Amended Consent Agreement.

36. This Amended Consent Agreement shall take full effect upon the signing and filing of the Final Order by EPA's Environmental Appeals Board.

37. Respondent's obligations under this Amended Consent Agreement shall end when it has paid in full the scheduled civil penalty, paid any stipulated penalties, and submitted the documentation required by the CAFO.

38. All of the terms and conditions of this Amended Consent Agreement together comprise one settlement agreement, and each of the terms and conditions is in consideration for all of the other terms and conditions. This Amended Consent Agreement shall be null and void if any term or condition of this Amended Consent Agreement is held invalid or is not executed by all of the signatory parties in identical form, or is not approved in such identical form by EPA's Environmental Appeals Board.

39. The penalty, including any stipulated penalties, specified above represents civil penalties assessed by EPA, and shall not be deductible for purposes of federal, state, or local income taxes.

40. Failure of Respondent to remit the civil penalties provided herein will result in this matter being forwarded to the United States Department of Justice for collection of the amount due, plus stipulated penalties and interest at the statutory judgment rate provided in 28 U.S.C. § 1961.

41. The Parties agree to bear their own costs and attorney's fees.

WE HEREBY AGREE TO THIS:

For Complainant:

Kenneth C. Schefski
Acting Director
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

Date: 8/19/15

Mark Garvey, Attorney
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

Date: 8/4/15

For Respondent:

Devlin Riley
General Manager
OMG Americas, Inc.
811 Sharon Drive,
Westlake, OH 44145

Date: 7/7/15

Allen A. Kacenjar
Squire Patton Boggs LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114

Date: 7/9/15