

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2007 NOV 13 PM 12:35

DOCKET NO. FIFRA-08-2007-0014

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EPA REGION VIII
ST. LOUIS, MO

In the Matter of:

OMNILYTICS, INC.

Respondent

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ANSWER OF RESPONDENT

Respondent, OmniLytics, Inc. ("Respondent"), by and through its counsel pursuant to § 22.15(a) of the Consolidated Rules of Practice ("C.R.P."), 40 C.F.R. part 22, hereby answers and asserts defenses to the claims and allegations made by the U.S. Environmental Protection Agency, Region 8 ("Complainant") in the PENALTY COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING ("COMPLAINT") filed in this matter on September 28, 2007.

INTRODUCTION (JURISDICTION)

1. The allegations in paragraph 1 constitute legal conclusions to which no response is required or which are otherwise denied.
2. The allegations in paragraph 2 constitute legal conclusions to which no response is required or which are otherwise denied.
3. The allegations in the first sentence of paragraph 3 constitute Complainant's characterizations of the COMPLAINT to which no response is required or which are otherwise denied. The allegations in the second sentence of paragraph 3 constitute legal conclusions to which no response is required or which are otherwise denied.

NOTICE OF OPPORTUNITY FOR A HEARING

4. The allegations in paragraph 4 constitute legal conclusions to which no response is required or which are otherwise denied. Respondent states that it is not requesting a public hearing before an administrative law judge.
5. The allegations in paragraph 5 constitute legal conclusions to which no response is required or which are otherwise denied.

QUICK RESOLUTION

6. The allegations in paragraph 6 constitute legal conclusions to which no response is required or which are otherwise denied. Respondent states that it does not wish

to avail itself of the Quick Resolution option for resolving this matter.

SETTLEMENT NEGOTIATIONS

7. The allegations in paragraph 7 constitute legal conclusions and statements of policy to which no response is required or which are otherwise denied. Respondent states that, through counsel, it has contacted Senior Enforcement Attorney Dana J. Stotsky, Esq. and requested an informal settlement conference in order to pursue settlement of this matter.

DEFINITIONS

The allegations in paragraphs I through IV purport to quote provisions of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136 *et seq.* ("FIFRA"), and its implementing regulations which speak for themselves and are the best evidence of their contents. To the extent that the allegations in paragraphs I through IV are inconsistent with the plain language and meaning of FIFRA and its implementing regulations, Respondent denies those allegations.

GENERAL ALLEGATIONS

8. The allegations in paragraph 8 constitute legal conclusions to which no response is required or which are otherwise denied.

9. The allegations in paragraph 9 constitute legal conclusions to which no response is required or which are otherwise denied. Respondent admits that it is located at 5450 W. Wiley Post Way, Salt Lake City, Utah 84116.

Counts 1-4 (Four Sales of Misbranded Pesticide)

Respondent incorporates its answers to paragraphs 1 through 9 as though fully set forth herein.

10. Respondent admits that it obtained a registration for the Agriphage product on December 9, 2005, with the EPA Registration Number 67986-1.

11. Respondent admits that the registration identified in paragraph 10 and the accompanying label approved at the time of registration included, *inter alia*, a cautionary statement for a Restricted Entry Interval ("REI") and a cautionary statement for Personal Protective Equipment ("PPE"). To the extent the allegations in paragraph 10 purport to quote provisions of the Agriphage registration and label as of December 9, 2005, those documents speak for themselves and are the best evidence of their contents.

12. Respondent admits the factual allegations in paragraph 12.

13. Respondent admits the factual allegations in paragraph 13.

14. Respondent admits the factual allegations in paragraph 14.

15. Respondent admits the factual allegations in paragraph 15.

16. Respondent denies the allegations in paragraph 16. The label that accompanied the Agriphage containers sold under these invoices in May 2006 included the REI and PPE cautionary statements as required under the terms of the December 9, 2005 EPA-stamped label and EPA-approved registration. The Agriphage label used by Respondent was not changed until August 2006, following acceptance by EPA on June 22, 2006, of a revised label for Agriphage that did not include the REI and PPE cautionary statements.

17. Respondent denies the allegations in paragraph 17. On information and belief, at the time the four sales of Agriphage occurred in May 2006, the Agriphage website included the required precautionary statements. Those precautionary statements were removed, however, following the EPA's acceptance of the revised Agriphage label on June 22, 2006.

18. The allegations in paragraph 18 constitute legal conclusions to which no response is required or which are otherwise denied.

Count 5
(One Count of Producing a Pesticide in an
Unregistered Pesticide Producing Establishment)

Respondent incorporates its answers to paragraphs 1 through 18 as though fully set forth herein.

19. The allegations in paragraph 18 constitute legal conclusions to which no response is required or which are otherwise denied.

20. Respondent denies the allegations in paragraph 20. Agriphage is the predecessor company to Respondent and was acquired by Respondent on October 22, 2002. On information and belief, in 1995, Agriphage was assigned EPA company number 067986, registered its pesticide producing establishment, and was assigned EPA establishment number 067986-UT-001.

21. Respondent denies the allegations in paragraph 21. Respondent's Agriphage product was produced in a registered pesticide producing establishment. Respondent mistakenly believed the EPA establishment number assigned to Agriphage in 1995 was 67986-1 and placed this number on the labels used for its Agriphage product shipped in 2006.

As a result of the inspection conducted on November 6, 2006, OmniLytics contacted EPA Region 8 and, with the help of Ms. Kathleen Craig in Compliance Assistance, determined that the complete establishment number for its facility was

067986-UT-001. OmniLytics then submitted a label notification to EPA headquarters changing the establishment number from 67986-1 to 067986-UT-001. All Agriphage labels subsequently ordered and used by OmniLytics bear the correct establishment number.

22. The allegations in paragraph 18 constitute legal conclusions to which no response is required or which are otherwise denied.

PROPOSED CIVIL PENALTY

23. The allegations in the first three sentences of paragraph 23 constitute legal conclusions or statements of policy to which no response is required or which are otherwise denied. The allegations in the remainder of paragraph 23 constitute Complainant's characterizations of the COMPLAINT to which no response is required or which are otherwise denied.

24. The allegations in paragraph 24 constitute legal conclusions to which no response is required or which are otherwise denied.

25. For the reasons set forth herein, Respondent contests the material facts upon which the COMPLAINT is based, contends that the proposed civil penalty is inappropriate, and contends that it is entitled to judgment as a matter of law. In the alternative, Respondent respectfully requests withdrawal of the subject COMPLAINT.

Respectfully submitted,

ARENT FOX LLP

Date: November 9, 2007

By: _____



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Attorneys for Respondent OmniLytics, Inc.

CERTIFICATE OF SERVICE

I certify that on this 9th day of November, 2007, a copy of the foregoing was served by Federal Express, properly addressed to:

Dana J. Stotsky
Senior Enforcement Attorney
United States Environmental Protection Agency
Region 8, Office of Enforcement, Compliance and Environmental Justice
1595 Wynkoop Street (8ENF-L)
Denver, CO 80202-1146
Complainant

An original and one copy were sent by Federal Express to:

Tina Artemis, Paralegal
Regional Hearing Clerk
U.S. Environmental Protection Agency (8RC)
1595 Wynkoop Street
Denver, CO 80202-1129



Stanley H. Abramson