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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9

FILED

2009 FEB 27 PM 3:57

In the Matter of:
99 Cents Only Stores,
Respondent

Docket No. FIFRA-09-2008-0027
INITIAL PREHEARING
EXCHANGE

COMES NOW THE COMPLAINANT in the above-referenced matter by and through its counsel of record, Brian P. Riedel, and submits the following Initial Prehearing Exchange pursuant to the Prehearing Order dated January 15, 2009, issued by Susan L. Biro, Presiding Officer, and pursuant to 40 C.F.R. § 22.19(a):

Expert Witness.

1. Linnea J. Hansen, Scientist. Linnea J. Hansen received her Doctorate of Philosophy (Ph.D.) in Experimental Pathology from Northwestern University Medical School in Chicago, Illinois in 1984. Dr. Hansen has been employed as a Scientist in the Health Effects Division (Toxicology Branch) of the Office of Pesticide Programs at the U.S. Environmental Protection Agency for the past 17 years. Dr. Hansen will testify regarding the health effects of exposure to sodium hypochlorite generally and the hazards posed by “Bref Disinfectant with Densicloro®” specifically.

Fact Witness.

2. Julie Jordan, Environmental Protection Specialist. Julie Jordan will testify regarding the development of the complaint on file in the action. Ms. Jordan will be available to respond to questions regarding the calculation of the proposed civil penalty.

Documentary Evidence.

3. The list of documentary evidence and exhibits intended to be introduced into evidence, and copies thereof, are attached.

1 Place of Hearing.

2 4. Complainant's First Choice is San Francisco, California. Complainant
3 estimates that one day will suffice to present its direct case.

4 Statements Required by Judge.

5 5. No translation services will be necessary for testimony.

6 6. A copy of Complainant's Penalty Calculation Worksheet is attached as CX
7 12. The Penalty Calculation Worksheet tracks the FIFRA Enforcement
8 Response Policy. The Affidavit of Julie Jordan contains the detail of how
9 the proposed penalty amount was calculated in accordance with the criteria
10 set forth in FIFRA. Ms. Jordan's Affidavit will be offered into the record in
11 lieu of direct testimony. Ms. Jordan will be available for questions from the
12 Presiding Administrative Law Judge and cross examination by counsel for
13 Respondent regarding the penalty calculation.

14 7. The Paperwork Reduction Act (the "PRA") has no effect on this case for the
15 following reasons. First, the PRA does not apply to prohibitions on activity
16 such as a prohibition on the distribution of an unregistered pesticide. The
17 PRA applies to certain record keeping and information collection
18 requirements imposed by a federal agency. Second, to the extent that
19 information collection activities took place during the investigation
20 underlying this enforcement action, these information collection activities
21 fall outside the scope of the PRA because the PRA does not apply to the
22 collection of information during the conduct of an administrative action or
23 investigation against specific individuals or entities. *See* 44 U.S.C.
24 §§ 3502(3) (B) and 3518(c)(1)(B)(ii). Consequently, there is no current
25 Office of Management and Budget control number involved in this case,
26 and Section 3512 of the Paperwork Reduction Act is not applicable in this
27

1 case.

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3 Respectfully submitted this 27th day of February 2009,

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6 Brian P. Riedel
7 Counsel for Complainant

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CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of the foregoing Initial Prehearing Exchange was filed with the Regional Hearing Clerk, United States Environmental Protection Agency, Region IX, and that a copy was sent by Pouch Mail to:

The Honorable Susan L. Biro
Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

and by U.S. Mail, First Class, to:

Patrick J. Cafferty, Jr., Esq.
Munger, Tolles & Olson LLP
560 Mission Street
Twenty-Seventh Floor
San Francisco, CA 94105-2907

3/2/09
Date

Dawn Del Monte
United States Environmental Protection Agency
Region IX

CX#

1. Letter from Pamela Cooper, Chief, Pesticides Office, U.S. Environmental Protection Agency, Region 9, to Mr. Jose Casas, 99 Cents Only Store, regarding Letter of Advisement, Reference No. FIFRA-ADL-02-49, dated September 30, 2002
2. Letter from Pamela Cooper, Manager, Pesticides Office, U.S. Environmental Protection Agency, Region 9, to Mr. Eric Schiffer, President, Bargain Wholesale/99 Cents Only Stores, regarding Alleged Violation of the Federal Insecticide, Fungicide and Rodenticide Act, dated September 6, 2005
3. Letter from Pamela Cooper, Manager, Pesticides Office, U.S. Environmental Protection Agency, Region 9, to Mr. Eric Schiffer, President, Bargain Wholesale/99 Cents Only Stores, regarding Alleged Violation of the Federal Insecticide, Fungicide and Rodenticide Act, dated May 4, 2006
4. "Protect you business: Avoid Selling Illegal Pesticides," FIFRA Compliance Notification Sheet, and mailing list, sent February 2004
5. Inspection Report of 99 Cents Only Store, State of California, Department of Pesticide Regulation, September 1, 2004 inspection date, for "Farmer's Secret Berry & Produce Cleaner, Inhibits Mold, Fungus & Bacteria including Ecoli," UPC 786483 002013 ("Farmer's Secret Cleaner")
6. Inspection Report of 99 Cents Only Store, State of California, Department of Pesticide Regulation, September 8, 2005 inspection date, for "Bref Limpieza Y Desinfección Total con Densicloloro®," made in Mexico, UPC 501199 400068 ("Bref")
7. Inspection Report of 99 Cents Only Store, State of California, Department of Pesticide Regulation, October 20, 2005 inspection date for "Bref"
8. Fascimile from Russell F. Wolpert, Esq., 99 Cents Only Stores, to Brian Reidel, Esq., EPA, 21 pages, sales printout for "Bref" from September 2005 to June 2006, dated June 16, 2006
9. Close-Up of Front label of "Bref," generated from photograph collected during inspection of 99 Cents Only Store on September 8, 2005 (CX 6, exhibit 3 therein)
10. Inspection Report of 99 Cents Only Store, State of Nevada, Department of Agriculture, May 8, 2008 inspection date, for "PiC® BORIC ACID Roach Killer III," EPA Reg. No. 3095-20201 ("BORIC ACID Roach Killer")

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11. Close-Up of Label of "BORIC ACID Roach Killer," generated from photograph collected during inspection of 99 Cents Only Store on May 8, 2008 (CX 10, from photograph #220 therein)
 12. FIFRA Civil Penalty Calculation Worksheet, 99 Cents Only Stores, dated March 26, 2008
 13. Affidavit of Julie Jordan
 14. Translation of "Bref" Label and Affidavit of Norman Calero
 15. Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act, dated July 2, 1990
 16. U.S. Securities and Exchange Commission Forms 10-K for FY 2003 - 2008, Consolidated Statements of Income, for 99 Cents Only Stores
 17. Enforcement Case Review of "Farmer's Secret Cleaner," dated January 14, 2008, and Application therefor
 18. Enforcement Case Review of "Bref," dated January 3, 2007, and Application therefor
 19. Spanish-English Dictionary Definitions of "Desinfeccion":
Webster's Online Dictionary
Word Reference.com
 20. Advertisements for "Bref" on Henkel's website, dated January 24, 2006 and February 19, 2009
 21. Additional photographs of "Bref" taken by California Department of Pesticide Regulation Inspector, not included in Inspection Reports at CX 6 and 7
 22. Curriculum Vita of Dr. Linnea J. Hansen
 23. Cross Reference Between Prehearing Order and Initial Prehearing Exchange