

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII

901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:

T and N, Inc.)	Docket No. FIFRA-07-2007-0001
815 Hwy T.)	
Foristell, Missouri)	
)	
Respondent)	

**RESPONDENT'S ANSWER, DEFENSES AND
AFFIRMATIVE DEFENSES TO COMPLAINT AND
REQUEST FOR HEARING**

Section I

Jurisdiction

1. Respondent admits that this is an administrative action which purports to seek the assessment of civil penalties instituted pursuant to Section 14 of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136l.

2. Respondent admits that in the Complaint the United States Environmental Protection Agency (EPA) alleges that Respondent has violated Section 12 of FIFRA, 7 U.S.C. § 136j, but denies all other allegations not expressly admitted herein.

Section II

Parties

3. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3 of the Complaint and therefore denies same and demands strict proof thereof.

4. Respondent admits that it is a pesticide producing establishment located at 815

Highway T, Foristell, Missouri 63348. The remaining allegations contained in the second sentence of Paragraph 4 of the EPA's Complaint are legal conclusions to which no response is required and, therefore, Respondent denies same and demands strict proof thereof.

Section III

Violations

General Allegations

5. Paragraph 5 of the Complaint does not contain any factual allegations to which a response is required and therefore Respondent denies same and demands strict proof thereof.

6. Respondent admits that Paragraph 6 accurately paraphrases Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E) referred to therein, but denies all other allegations not expressly admitted herein.

7. Respondent admits that Paragraph 7 accurately paraphrases Section 2(q)(1)(A) of FIFRA, 7 U.S.C. § 136(q)(1)(A) referred to therein, but denies all other allegations not expressly admitted herein.

8. Respondent admits that Paragraph 8 accurately paraphrases Section 2(q)(1)(D) of FIFRA, 7 U.S.C. § 136(q)(1)(D) referred to therein, but denies all other allegations not expressly admitted herein.

9. Respondent admits that Paragraph 9 accurately paraphrases Title 40 of the Code of Federal Regulations Part 156.10(f) referred to therein, but denies all other allegations not expressly admitted herein.

10. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 10 of the Complaint and, therefore, denies same and demands strict proof thereof.

11. Respondent admits that Paragraph 11 accurately paraphrases Section 2(q)(1)(E) of FIFRA, 7 U.S.C. § 136(q)(1)(E) referred to therein, but denies all other allegations not expressly admitted herein.

12. Respondent admits that the Complaint accurately quotes the language of 40 C.F.R. § 152.132. Respondent denies all other allegations contained in Paragraph 12, including those legal conclusions contained in the second sentence, unless expressly admitted herein and demands strict proof thereof.

13. Respondent admits that Paragraph 13 accurately paraphrases Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg) referred to therein, but denies all other allegations not expressly admitted herein.

14. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 14 of the Complaint and therefore denies same and demands strict proof thereof.

15. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 15 of the Complaint and therefore denies same and demands strict proof thereof.

16. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 16 of the Complaint and therefore denies same and demands strict proof thereof.

17. Respondent admits the allegations contained in Paragraph 17 of the EPA's Complaint

18. Respondent admits that on August 16, 2005, a representative of the Missouri

Department of Agriculture (MDA) conducted an investigation of Respondent's facility at 815 Hwy. T, Foristell, Missouri. Respondent is without knowledge or information sufficient to admit or deny the allegations contained in the second sentence of Paragraph 18 of the EPA's Complaint and therefore denies same and demands strict proof thereof. Respondent admits the allegations contained in the third sentence of Paragraph 18 of the EPA's Complaint. Respondent denies the allegations contained in the last sentence of Paragraph 18 of the EPA's Complaint and demands strict proof thereof.

Count 1

19. Respondent's answer to Paragraphs 5 through 18 of the EPA's Complaint are incorporated by reference as if fully set forth herein.

20. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 20 of the Complaint and therefore denies same and demands strict proof thereof.

21. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 21 of the Complaint and therefore denies same and demands strict proof thereof.

22. The allegations contained in Paragraph 22 of the EPA's Complaint are legal conclusions to which no response is required and therefore Respondent denies these allegations and demands strict proof thereof.

23. The allegations contained in Paragraph 23 of the EPA's Complaint are legal conclusions to which no response is required and therefore Respondent denies these allegations and demands strict proof thereof.

24. The allegations contained in Paragraph 24 of the EPA's Complaint are legal

conclusions to which no response is required and therefore Respondent denies these allegations and demands strict proof thereof.

Count 2

25. Respondent's answer to Paragraphs 5 through 18 of the EPA's Complaint are incorporated by reference as if fully set forth herein.

26. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 26 of the Complaint and therefore denies same and demands strict proof thereof.

27. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 27 of the Complaint and therefore denies same and demands strict proof thereof.

28. The allegations contained in Paragraph 28 of the EPA's Complaint are legal conclusions to which no response is required and therefore Respondent denies these allegations and demands strict proof thereof.

29. The allegations contained in Paragraph 29 of the EPA's Complaint are legal conclusions to which no response is required and therefore Respondent denies these allegations and demands strict proof thereof.

30. The allegations contained in Paragraph 30 of the EPA's Complaint are legal conclusions to which no response is required and therefore Respondent denies these allegations and demands strict proof thereof.

Count 3

31. Respondent's answer to Paragraphs 5 through 18 of the EPA's Complaint are incorporated by reference as if fully set forth herein.

32. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 32 of the Complaint and therefore denies same and demands strict proof thereof. Respondent denies the allegations contained in the second sentence of Paragraph 32 of the EPA's Complaint. Respondent admits the allegations contained in the third sentence of Paragraph 32 of the EPA's Complaint.

33. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 33 of the Complaint and therefore denies same and demands strict proof thereof.

34. The allegations contained in Paragraph 34 of the EPA's Complaint are legal conclusions to which no response is required and therefore Respondent denies these allegations and demands strict proof thereof.

35. Respondent denies the allegations contained in Paragraph 35 of the EPA's Complaint and demands strict proof thereof.

36. The allegations contained in Paragraph 36 of the EPA's Complaint are legal conclusions to which no response is required and therefore Respondent denies these allegations and demands strict proof thereof.

37. The allegations contained in Paragraph 37 of the EPA's Complaint are legal conclusions to which no response is required and therefore Respondent denies these allegations and demands strict proof thereof.

Section IV

Total Proposed Penalty

38. The allegations contained in Paragraph 38 of the EPA's Complaint are legal

conclusions to which no response is required and therefore Respondent denies these allegations and demands strict proof thereof. Respondent contends that the total proposed civil penalty of \$11,700.00 against Respondent for the alleged violations purportedly set forth in the EPA's Complaint, and without admitting that any civil penalty is allowed by law, is grossly excessive and unjustified in view of the facts and applicable law.

Appropriateness of Proposed Penalty

39. As set forth above the Respondent objects to the total proposed civil penalty proposed by the EPA, and contends that it is either not allowed by law and/or grossly excessive in view of the facts and applicable law. The remaining allegations contained in Paragraph 39 of the EPA's Complaint are legal conclusions and/or do not require a response by this Respondent and therefore Respondent denies the allegations and demands strict proof thereof.

40. As set forth above the Respondent objects to the total proposed civil penalty proposed by the EPA contends that it is either not allowed by law and/or grossly excessive in view of the facts and applicable law. The remaining allegations contained in Paragraph 40 of the EPA's Complaint are legal conclusions and/or do not require a response by this Respondent and therefore Respondent denies the allegations and demands strict proof thereof.

41. As set forth above the Respondent objects to the total proposed civil penalty proposed by the EPA contends that it is either not allowed by law and/or grossly excessive in view of the facts and applicable law. The remaining allegations contained in Paragraph 41 of the EPA's Complaint are legal conclusions and/or do not require a response by this Respondent and therefore Respondent denies the allegations and demands strict proof thereof.

42. As set forth above the Respondent objects to the total proposed civil penalty proposed

by the EPA contends that it is either not allowed by law and/or grossly excessive in view of the facts and applicable law. The remaining allegations contained in Paragraph 42 of the EPA's Complaint are legal conclusions and/or do not require a response by this Respondent and therefore Respondent denies the allegations and demands strict proof thereof.

43. As set forth above the Respondent objects to the total proposed civil penalty proposed by the EPA contends that it is either not allowed by law and/or grossly excessive in view of the facts and applicable law. The remaining allegations contained in Paragraph 43 of the EPA's Complaint are legal conclusions and/or do not require a response by this Respondent and therefore Respondent denies the allegations and demands strict proof thereof.

44. As set forth above the Respondent objects to the total proposed civil penalty proposed by the EPA contends that it is either not allowed by law and/or grossly excessive in view of the facts and applicable law. The remaining allegations contained in Paragraph 44 of the EPA's Complaint are legal conclusions and/or do not require a response by this Respondent and therefore Respondent denies the allegations and demands strict proof thereof.

45. As set forth above the Respondent objects to the total proposed civil penalty proposed by the EPA contends that it is either not allowed by law and/or grossly excessive in view of the facts and applicable law. The remaining allegations contained in Paragraph 45 of the EPA's Complaint are legal conclusions and/or do not require a response by this Respondent and therefore Respondent denies the allegations and demands strict proof thereof.

NOTICE OF OPPORTUNITY FOR HEARING

Section V

Answer and Request for Hearing

46. As set forth above the Respondent objects to the total proposed civil penalty proposed

by the EPA contends that it is either not allowed by law and/or grossly excessive in view of the facts and applicable law. The remaining allegations contained in Paragraph 46 of the EPA's Complaint are legal conclusions and/or do not require a response by this Respondent and therefore Respondent denies the allegations and demands strict proof thereof.

47. As set forth above the Respondent objects to the total proposed civil penalty proposed by the EPA contends that it is either not allowed by law and/or grossly excessive in view of the facts and applicable law. The remaining allegations contained in Paragraph 47 of the EPA's Complaint are legal conclusions and/or do not require a response by this Respondent and therefore Respondent denies the allegations and demands strict proof thereof.

48. As set forth above the Respondent objects to the total proposed civil penalty proposed by the EPA contends that it is either not allowed by law and/or grossly excessive in view of the facts and applicable law. The remaining allegations contained in Paragraph 48 of the EPA's Complaint are legal conclusions and/or do not require a response by this Respondent and therefore Respondent denies the allegations and demands strict proof thereof.

49. As set forth above the Respondent objects to the total proposed civil penalty proposed by the EPA contends that it is either not allowed by law and/or grossly excessive in view of the facts and applicable law. The remaining allegations contained in Paragraph 49 of the EPA's Complaint are legal conclusions and/or do not require a response by this Respondent and therefore Respondent denies the allegations and demands strict proof thereof.

Section VI

Settlement Conference

50. As set forth above the Respondent objects to the total proposed civil penalty proposed

by the EPA contends that it is either not allowed by law and/or grossly excessive in view of the facts and applicable law. The remaining allegations contained in Paragraph 50 of the EPA's Complaint are legal conclusions and/or do not require a response by this Respondent and therefore Respondent denies the allegations and demands strict proof thereof.

51. As set forth above the Respondent objects to the total proposed civil penalty proposed by the EPA contends that it is either not allowed by law and/or grossly excessive in view of the facts and applicable law. The remaining allegations contained in Paragraph 51 of the EPA's Complaint are legal conclusions and/or do not require a response by this Respondent and therefore Respondent denies the allegations and demands strict proof thereof.

52. As set forth above the Respondent objects to the total proposed civil penalty proposed by the EPA contends that it is either not allowed by law and/or grossly excessive in view of the facts and applicable law. The remaining allegations contained in Paragraph 52 of the EPA's Complaint are legal conclusions and/or do not require a response by this Respondent and therefore Respondent denies the allegations and demands strict proof thereof.

**RESPONDENT'S REQUEST FOR FORMAL HEARING
AND INFORMAL SETTLEMENT CONFERENCE**

53. Respondent formally requests a hearing to contest the material fact set forth in the Complaint and/or to contest the appropriateness of the penalty proposed therein, and for any other purpose permitted by law under Section 14(a) of FIFRA, 7 U.S.C. § 1361(a).

54. Respondent also requests an informal settlement conference with the EPA to explore the possibility of settlement in this matter. Respondent's request for an informal settlement conference is made without admitting any allegations not otherwise expressly admitted herein or admitting any liability whatsoever for any of the purported violations set forth in the EPA's Complaint.

AFFIRMATIVE DEFENSES

55. Further answering and by way of Affirmative Defense, the EPA's Complaint fails to state a claim for relief against this Respondent.

56. Further answering and by way of Affirmative Defense, Respondent states that its conduct was not in violation of any of the purportedly applicable FIFRA statutes or regulations set forth in the EPA's Complaint and that any of the alleged violations therein were caused by the acts and/or omissions of individuals or entities who are not a party hereto.

57. Further answering and by way of Affirmative Defense, Respondent contends that its label as set forth in Paragraph 33 of the EPA's Complaint is not misbranded and sufficiently identifies the actual producing establishment.

58. Further answering and by way of Affirmative Defense, Respondent contends that the EPA Label Review Manual Third Edition, August 2003 does not have force and effect of law and therefore cannot be the proper basis for stating a violation of any purportedly applicable FIFRA statute or regulation.

59. Further answering and by way of Affirmative Defense, Respondent is not liable for any of the alleged acts or omissions set forth in the EPA's Complaint given that those alleged violations were caused by the intervening acts and/or omissions of third parties not subject to control by Respondent.

60. Further answering and by way of Affirmative Defense, Respondent states that the proposed civil penalties set forth in the EPA's Complaint grossly exceed that which might be justified under the law in light of the applicable facts and law.

61. Respondent reserves its right to raise additional defenses at any hearing in this

matter, which may arise or become known to Respondent in discovery or otherwise during its preparation and review of this matter.

FACTS PLACED IN ISSUE BY RESPONDENT

Respondent T and N, Inc. expects that at a formal hearing in this matter the following categories of facts will be placed in issue:

62. Whether T and N, Inc. is governed by the provisions of FIFRA set forth in the EPA's Complaint.
63. Whether the alleged conduct of Respondent as set forth in the EPA's Complaint is violative of any of the provisions of FIFRA set forth therein.
64. Whether any other person or entity not a party to these proceedings is, or should be liable for any of the purported violations of FIFRA and the proposed civil penalties set forth in the EPA's Complaint.
65. Whether Respondent had entered into a supplemental distribution agreement with PBI Gordon Corporation at all times relevant.
66. Whether the purported labels set forth in the EPA's Complaint are "misbranded" or otherwise not in compliance with the allegedly applicable FIFRA statutes and regulations set forth therein.
67. Whether the actual producing establishment was not identified on the labels of product allegedly inspected on August 16, 2005 by a representative of the MDA as set forth in the EPA's Complaint.
68. Whether any of Respondent's alleged acts and/or omissions as set forth in the EPA's Complaint are violative of any of the allegedly applicable provisions of FIFRA.
69. Whether Respondents' alleged acts and/or omissions violated any applicable Federal

law set forth in the EPA's Complaint.

70. Respondent reserves its right to raise any additional issues of fact at the hearing on this matter that are related to any of the issues set forth herein or in the Complaint, or that may arise during the course of discovery or otherwise in its preparation for the hearing in this matter.

WHEREFORE, having fully answered the EPA's Complaint herein, Respondent T & N, Inc. requests that it be dismissed henceforth from these proceedings, and that it be awarded its reasonable attorneys fees and costs incurred in defending this matter and for all further orders and relief the Administrator deems just and proper.

Respectfully submitted,

HELFREY, NEIERS & JONES, P.C.

By:  _____

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Attorney for Respondent T and N, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served Federal Express Overnight delivery, on this 9th day of November, 2006 upon the following:

**Regional Hearing Clerk
EPA – Region 7
901 North 5th Street
Kansas City, KS 66101**

**Rupert G. Thomas, Esq.
Assistant Regional Counsel
EPA – Region 7
901 North 5th Street
Kansas City, KS 66101**


