

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX

FILED

2009 OCT 16 PM 4:30

In the Matter of:) Docket No. FIFRA-09-2009-0013 ER1
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)
Bug Bam Products, LLC,)
)
)
Respondent.)
_____)

**ANSWER TO COMPLAINT AND
NOTICE OF OPPORTUNITY FOR HEARING AND
REQUEST FOR RELIEF**

Bug Bam Products, LLC, by its attorney Martha E. Marrapese, Partner, Keller and Heckman LLP, 1001 G St., N.W., Suite 500 W, Washington, DC 20001, telephone: 202-434-4123, fax: 202-434-4646, email: marrapese@khlaw.com, hereby answers the Complaint and Notice of Opportunity for Hearing (“Complaint”) filed in this matter by Region IX of the United States Environmental Protection Agency (“EPA” or “Complainant”) by interdelineating its responses to the paragraphs of the Complaint.

AUTHORITY AND PARTIES

1. This is a civil administrative action brought pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136l(a), for the assessment of a civil administrative penalty against Bug Bam Products, LLC (“Respondent”) for the sale and/or distribution of unregistered pesticides in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

ANSWER: Paragraph 1 states a legal conclusion to which no response is required. To the extent that this paragraph alleges any facts, those facts are denied.

2. *Complainant is the Associate Director for Agriculture of the Communities and Ecosystems Division, United States Environmental Protection Agency (“EPA”), Region IX. The Administrator of EPA delegated to the Regional Administrator of Region IX the authority to bring this action under FIFRA by EPA Delegation Order Number 5-14, dated May 11, 1994. The Regional Administrator of Region IX further delegated the authority to bring this action under FIFRA to the Associate Director for Agriculture of the Communities and Ecosystems Division by EPA Regional Order Number 1255.08 CHGI dated June 9, 2005.*

ANSWER: Bug Bam Products, LLC admits the allegations of Paragraph 2.

3. *Respondent is Bug Bam Products, LLC.*

ANSWER: Bug Bam Products, LLC admits the allegation of Paragraph 3.

GENERAL ALLEGATIONS

1. *Respondent, a California corporation, is a “person” as that term is defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and is subject to FIFRA and the implementing regulations promulgated thereunder.*

ANSWER: Bug Bam Products, LLC is a California Sole Member LLC. Bug Bam Products, LLC admits that it is a “person” as that term is defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s), subject to the statute and implementing regulations thereunder.

2. *Respondent has a place of business located at 2104 Monterey Boulevard, Hermosa Beach, California 90254-2630.*

ANSWER: Bug Bam Products, LLC denies the allegation of Paragraph 2. Bug Bam Products, LLC is located at 414 2nd Street, Suite 241, Hermosa Beach, California 90254-4673.

3. *“Bug Bam Insect Repelling Wristband,” “Bug Bam for Kids Insect Repelling Wristband” and “Bug Bam Insect Repelling Grid” all claim to repel mosquitoes.*

ANSWER: Bug Bam Products, LLC admits the allegation of Paragraph 3.

4. *Mosquitoes are “pests” as that term is defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t).*

ANSWER: Paragraph 4 states a legal conclusion to which no response is required.

5. *A “pesticide” means “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.” 7 U.S.C. § 136(u) and 40 C.F.R. § 152.3(s).*

ANSWER: Paragraph 5 states a legal conclusion to which no response is required.

6. *“Bug Bam Insect Repelling Wristband,” “Bug Bam for Kids Insect Repelling Wristband” and “Bug Bam Insect Repelling Grid” are “pesticides” as defined by 7 U.S.C. § 136(u) and 40 C.F.R. § 152.3(s) in that they are substances or mixtures of substances intended for preventing, destroying, repelling or mitigating “pests.”*

ANSWER: Bug Bam Products, LLC admits the allegation of Paragraph 6.

7. *At all times relevant to this action “Bug Bam Insect Repelling Wristband,” “Bug Bam for Kids Insect Repelling Wristband” and “Bug Bam Insect Repelling Grid” were not registered with EPA.*

ANSWER: Bug Bam Products, LLC admits that at all times relevant to the Complaint “Bug Bam Insect Repelling Wristband,” “Bug Bam for Kids Insect Repelling Wristband” and “Bug Bam Insect Repelling Grid” were not registered under Section 3 of FIFRA, 7 U.S.C. § 136(a). However, for the reasons stated in its Answer to Paragraph 8, Bug Bam Products, LLC denies that registration was required.

8. *At all times relevant to this action, Respondent made claims that Bug Bam products protect users from specific diseases carried by mosquitoes.*

ANSWER: Bug Bam Products, LLC denies the allegations in Paragraph 8. Bug Bam Products, LLC never knowingly or intentionally made specific claims that products protect users from specific diseases carried by mosquitoes.

9. *As a result, "Bug Bam Insect Repelling Wristband," "Bug Bam for Kids Insect Repelling Wristband" and "Bug Bam Insect Repelling Grid" did not meet the requirements to be classified as minimum risk pesticides as defined by 40 C.F.R. § 152.25(f).*

ANSWER: Bug Bam Products, LLC denies the allegations of Paragraph 9.

10. *Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), makes it unlawful for any person to distribute or sell to any person any unregistered pesticide.*

ANSWER: Paragraph 10 states a legal conclusion to which no response is required. Bug Bam Products, LLC further notes that this paragraph is an incomplete statement of the law in that Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), allows the sale of a pesticide not registered under Section 3 of FIFRA, 7 U.S.C. § 136(a), to the extent that such distribution or sale has otherwise been authorized by the Administrator under that Chapter.

ALLEGED VIOLATIONS

COUNTS 1-3: Sale or Distribution of Unregistered Pesticides, 7 U.S.C. § 136j(a)(1)(A).

11. *Paragraphs 1 through 10 are realleged and incorporated herein by reference.*

ANSWER: Paragraphs 1 through 10 of this Answer are hereby incorporated by reference as if the same were set forth herein in full.

12. *On or about February 25, 2009, an employee of EPA identified as Frank Carpenter, accessed the website www.bugbam.com where he purchased the product "Bug Bam Insect Repelling Wristband."*

ANSWER: Bug Bam Products, LLC lacks sufficient knowledge of the allegations in Paragraph 12 and therefore denies those allegations.

13. *The website bugbam.com was registered to, administered by, and under the control of Respondent on or about February 25, 2009.*

ANSWER: Bug Bam Products, LLC denies that website sales on bugbam.com were under the control of or administered by Bug Bam Products, LLC during the period alleged.

14. *As a result, on or around February 25, 2009, Respondent distributed or sold "Bug Bam Insect Repelling Wristband."*

ANSWER: Bug Bam Products, LLC denies the allegations of Paragraph 14. If such a distribution or sale occurred, Flash Sales Inc., a Florida-based distribution company, would have been the importer of record and would have made the alleged sale of the product to the recipient from Miami, Florida.

15. *Respondent's sale or distribution of "Bug Bam Insect Repelling Wristband," an unregistered pesticide, constitutes a violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).*

ANSWER: Bug Bam Products, LLC denies that it made the sale or distribution alleged in Paragraph 15 and therefore denies that this violation has occurred.

16. *Paragraphs 1 through 10 are realleged and incorporated herein by reference.*

ANSWER: Paragraphs 1 through 10 of this Answer are hereby incorporated by reference as if the same were set forth herein in full.

17. *On or about February 25, 2009, an employee of EPA identified as Frank Carpenter, accessed the website www.bugbam.com where he purchased the product "Bug Bam for Kids Insect Repelling Wristband."*

ANSWER: Bug Bam Products, LLC lacks sufficient knowledge of the allegations in Paragraph 17 and therefore denies those allegations.

18. *The website bugbam.com was registered to, administered by, and under the control of Respondent on or about February 25, 2009.*

ANSWER: Bug Bam Products, LLC denies that website sales on bugbam.com were under the control of or administered by Bug Bam Products, LLC during the period alleged.

19. *As a result, on or around February 25, 2009, Respondent distributed or sold "Bug Bam for Kids Insect Repelling Wristband."*

ANSWER: Bug Bam Products, LLC denies the allegations of Paragraph 19. If such a distribution or sale occurred, Flash Sales Inc., a Florida-based distribution company, would have been the importer of record and would have made the alleged sale of the product to the recipient from Miami, Florida.

20. *Respondent's sale or distribution of "Bug Bam for Kids Insect Repelling Wristband," an unregistered pesticide, constitutes a violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).*

ANSWER: Bug Bam Products, LLC denies that it made the sale or distribution alleged in Paragraph 20 and therefore denies that this violation has occurred.

21. *Paragraphs 1 through 10 are realleged and incorporated herein by reference.*

ANSWER: Paragraphs 1 through 10 of this Answer are hereby incorporated by reference as if the same were set forth herein in full.

22. *On or about February 25, 2009, and employee of EPA identified as Frank Carpenter, accessed the website www.bugbam.com where he purchased the product "Bug Bam Insect Repelling Grid."*

ANSWER: Bug Bam Products, LLC lacks sufficient knowledge of the allegations in Paragraph 22 and therefore denies those allegations.

23. *The website bugbam.com was registered to, administered by, and under the control of Respondent on or about February 25, 2009.*

ANSWER: Bug Bam Products, LLC denies that website sales on bugbam.com were under the control of or administered by Bug Bam Products, LLC during the period alleged.

24. *As a result, on or around February 25, 2009, Respondent distributed or sold "Bug Bam Insect Repelling Grid".*

ANSWER: Bug Bam Products, LLC denies the allegations of Paragraph 24. If such a distribution or sale occurred, Flash Sales Inc., a Florida-based distribution company, would have been the importer of record and would have made the alleged sale of the product to the recipient from Miami, Florida.

25. *Respondent's sale or distribution of "Bug Bam Insect Repelling Grid," an unregistered pesticide, constitutes a violation of Section 12(a)(1)(A) of FIFRA.*

ANSWER: Bug Bam Products, LLC denies that it made the sale or distribution alleged in Paragraph 25 and therefore denies that this violation has occurred.

PROPOSED CIVIL PENALTY

Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), and the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, authorize the assessment of a civil administrative penalty of up to \$7,500 for each violation of FIFRA occurring on or after January 12, 2009. For purposes of determining the amount of the civil penalty to be assessed, FIFRA Section 14(a)(4) requires EPA to consider the size of Respondent's business, the effect on Respondent's ability to continue in business and the gravity of the violations alleged. Based on the violations alleged in this Complaint, and after consideration of the statutory factors enumerated above, EPA proposes to assess the following civil penalty pursuant to FIFRA Section 14(a) and the FIFRA Enforcement Response Policy dated July 2, 1990 (a copy of which is enclosed with this Complaint), which provides a rational, consistent and equitable calculation methodology for applying the statutory penalty factors enumerated above:

<i>Count 1 (Sale and/or distribution of an unregistered pesticide, violating Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A))</i>	\$3,825
<i>Count 2 (Sale and/or distribution of an unregistered pesticide, violating Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A))</i>	\$3,825
<i>Count 3 (Sale and/or distribution of an unregistered pesticide, violating Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A))</i>	\$3,825
<i>TOTAL (after rounding to nearest \$100)</i>	<i>\$11,500</i>

ANSWER: This unnumbered Paragraph is comprised solely of unsupported conclusions and is denied in full. Respondent denies that it made the alleged sale to a Mr. Frank Carpenter or distributed the product to Mr. Carpenter. In addition, respondent asserts that EPA incorrectly applied the Enforcement Response Policy (“ERP”) for the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), as issued by the Office of Compliance Monitoring on or about July 2, 1990. First, the penalties pled by EPA do not accurately reflect the calculations required by the FIFRA ERP. According to the ERP, the base penalty for a category III business at violation level two is \$3,300, \$525 less than the fine levied by EPA. Second, the FIFRA ERP dictates that, for gravity adjustment values below three, the enforcement remedy should be a 50% reduction in the total penalty, a Notice of Warning (“NOW”), or no action. Gravity adjustment is appropriate for these products and should be two, as calculated from adjustments for lack of “human harm” and for lack of “environmental harm.” EPA, at most, should have assessed a

penalty of \$1,650 per count, rather than \$3,825 per count. Moreover, EPA's own policy tends toward issuance of a NOW in lieu of a civil complaint when the total gravity adjustment value is less than three.

AFFIRMATIVE DEFENSES

Bug Bam Products, LLC states the following affirmative defenses, and expressly reserves the right to amend this Answer to raise additional defenses as may arise during the course of discovery and information exchange in this matter:

FIRST AFFIRMATIVE DEFENSE

Bug Bam Products, LLC was improperly served process and thus has been subject to a violation of due process. While Bug Bam Products, LLC received process via electronic mail, and so has prepared an Answer in good faith, this service was improper. Despite numerous prior conversations between EPA Region IX and Bug Bam Products, LLC, in which Bug Bam Products, LLC made good faith efforts to respond to EPA requests in a timely manner, EPA failed to send the Complaint to the correct corporate address. Bug Bam Products, LLC did not receive a copy of the Consolidated Rules of Practice with the Complaint, as required by 40 C.F.R. § 22.5(b)(1). To the best of its knowledge, written proof of receipt has not been lodged by EPA Region IX, as required by 40 C.F.R. § 22.5(b)(1).

SECOND AFFIRMATIVE DEFENSE

Bug Bam Products, LLC at all times acted reasonably and in good faith, based on all relevant facts and circumstances it knew at the time.

THIRD AFFIRMATIVE DEFENSE

Complainant has failed to demonstrate a claim upon which relief can be granted.

FOURTH AFFIRMATIVE DEFENSE

The proposed civil penalty for Counts 1, 2, and 3 is arbitrary and capricious, and an abuse of discretion under the Administrative Procedure Act, 5 U.S.C. §§ 553 and 706(2).

FIFTH AFFIRMATIVE DEFENSE

Complainant's allegations constitute agency action that is arbitrary and capricious, and an abuse of discretion under the Administrative Procedure Act, 5 U.S.C. §§ 553 and 706(2).

SIXTH AFFIRMATIVE DEFENSE

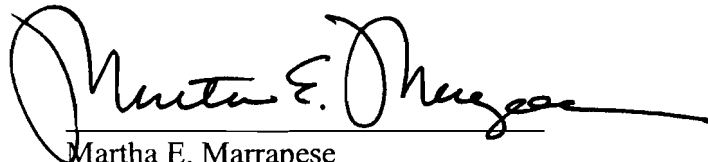
Complainant has no right to relief. 40 C.F.R. §§ 22.4(c)(7), 22.20(a).

REQUEST FOR RELIEF

Because EPA has failed to establish a claim for which relief can be granted and because EPA did not follow the proper procedures for service of process, Bug Bam Products, LLC respectfully motions, in accordance with 40 C.F.R. § 22.15(c), that all charges against it be dismissed.

In the alternative, because Bug Bam Products, LLC has acted in good faith; has never before been subject to an enforcement action; and has not distributed or sold a product that is likely to endanger human health or the environment, Bug Bam Products, LLC respectfully motions, in accordance with 40 C.F.R. § 22.15(c), that EPA issue a NOW based upon the dictates of the FIFRA ERP.

Respectfully submitted,



Date: October 15, 2009

Martha E. Marrapese
marrapese@khlaw.com
Keller and Heckman LLP
1001 G Street, N.W., Suite 500 West
Washington, D.C. 20001
Telephone: (202) 434-4123
Facsimile: (202) 434-4646

ATTORNEY FOR RESPONDENT,
Martha E. Marrapese

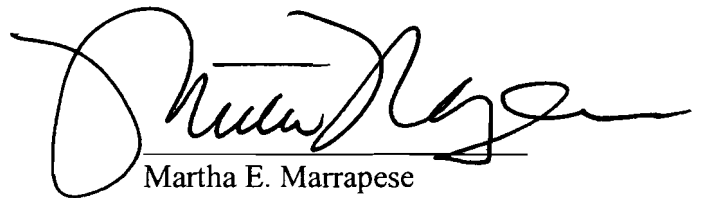
CERTIFICATE OF SERVICE

I, Martha E. Marrapese, hereby certify that on October 15, 2009, I sent one original and one copy of the foregoing Bug Bam Products, LLC's Answer to USEPA's Complaint and Notice of Opportunity for Hearing via Federal Express for filing with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region IX, at the following address:

Mr. Steven Armsey
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street (ORC-1)
San Francisco, CA 94105

I further certify that I have sent one copy of the foregoing Bug Bam Products, LLC's Answer to USEPA's Complaint and Notice of Opportunity for Hearing via Federal Express to opposing counsel at the following address:

Mr. Ivan Lieben
Assistant Regional Counsel (ORC-3)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105


Martha E. Marrapese