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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:)
)
Hanson's Window and Construction, Inc.) **Docket No. TSCA-05-2010-0013**
_____)

Motion to File the Amended Complaint

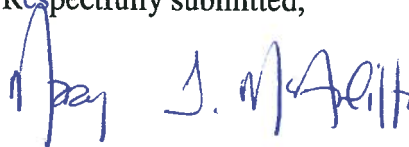
In accordance with 40 C.F.R. § 22.14(c), Complainant, the United States Environmental Protection Agency, Region 5, seeks the Court's permission to amend the complaint in the Matter of Hanson's Window and Construction, Inc. in four areas: (1) to clarify Respondent's assumed and trade names as set forth in Respondent's Answer; (2) to cite to the original regulations promulgated at 40 C.F.R. Part 745, Subpart E, prior to the regulatory amendment and recodification in 2008; (3) to add references to Section 407 of TSCA, 15 U.S.C. § 2687; and (4) to make clear that the allegations in the original Complaint are only for contracts entered into during the period of approximately May 2005 through December 2005.

To allow Complainant to amend the Complaint in this matter will not result in any prejudice to Respondent, and is not the result of undue delay, bad faith or dilatory motive on the part of Complainant. Further, Complainant's request does not follow repeated failure to cure deficiencies by previous amendment, nor is amendment futile.

Complainant's Memorandum in Support of this Motion to File the Amended Complaint and the proposed Amended Complaint (in both clean and mark-up forms) are filed with this Motion.

In accordance with 40 C.F.R. § 22.5(b)(1), should the Court grant this Motion, Complainant shall serve on Respondent the Amended Complaint personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery. In accordance with 40 C.F.R. § 22.14(c), Respondent shall have 20 days from the date of service of the Amended Complaint to file its answer.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Mary T. McAuliffe". The signature is written in a cursive style with a large initial "M".

Mary T. McAuliffe
Mark Palermo
Associate Regional Counsel
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:)
)
Hanson's Window and Construction, Inc.) **Docket No. TSCA-05-2010-0013**
_____)

Memorandum in Support of Motion to File the Amended Complaint

The Consolidated Rules of Practice (Rules) at 40 C.F.R. § 22.14(c) provide that after the filing of an Answer, Complainant, the United States Environmental Protection Agency, Region 5, must seek the Court's permission to amend the complaint. The original Complaint in this matter was docketed with the Regional Hearing Clerk on June 9, 2010. On July 30, 2010, Respondent Hanson's Window and Construction, Inc., d/b/a under numerous assumed names, including but not limited to, 800-Hansons, 1-800-Hansons, Hanson's Window & Siding World, Window & Siding World, Hanson's Windows & Siding, Inc., Hanson's Window & Siding, and Hanson's Window Company, filed its Answer. Complainant respectfully requests that the Court grant its Motion to File the Amended Complaint in the Matter of Hanson's Window and Construction, Inc.

The Rules provide at 40 C.F.R. § 22.14(d) that after the answer is filed, the Complainant may amend the complaint only upon motion granted by the Presiding Judge. No standard is provided in the Rules for determining whether to grant an amendment. The general rule, however, is that administrative pleadings are "liberally construed and easily amended." In re Port of Oakland and Great Lakes Dredge and Dock Company, 4 E.A.D. 170, 205, 1992 EPA App. LEXIS 73, *72 (EAB1992); see also, Lazarus, Inc., 7 E.A.D. 318, 334, 1997 EPA App. LEXIS 27,

*38 (EAB 1997). The standard in Federal court for amendment of pleadings is set forth in Foman v. Davis, 371 U.S. 178, 181-82 (1962) as follows: “[i]n the absence of . . . undue delay, bad faith or dilatory motive on the part of the movant . . . undue prejudice to the opposing party . . . [or] futility of amendment,” leave to amend pleadings should be allowed.

The Environmental Appeals Board has held that a complainant should be given leave to freely amend a complaint in an EPA proceeding in accord with the liberal policy of Federal Rule of Civil Procedure (FRCP) 15(a). See In the Matter of Asbestos Specialists, Inc., TSCA Appeal 92-3, 4 EAD 819, 830 (EAB Oct. 6, 1993). From the Office of the Administrator, see In the Matter of City of West Chicago, 2000 WL 356387 (February 25, 2000), Docket No. CWA-5-99-013. and more recently In the Matter of Bug Bam Product, LLC, 2010 WL 149296, (January 7, 2010), Docket No. FIFRA-09-2009-0013 .

To allow Complainant to amend the Complaint in this matter will not result in any prejudice to Respondent, and is not the result of undue delay, bad faith or dilatory motive on the part of Complainant. Further, Complainant’s request does not follow repeated failure to cure deficiencies by previous amendment, nor is amendment futile.

Complainant seeks permission to amend the Complaint in the following four areas: (1) to clarify Respondent’s assumed and trade names as set forth in Respondent’s Answer; (2) to cite to the original regulations promulgated at 40 C.F.R. Part 745, Subpart E, prior to the regulatory amendment and recodification in 2008; (3) to add references to Section 407 of TSCA, 15 U.S.C. § 2687; and (4) to make clear that the allegations in the original Complaint are only for contracts entered into during the period of approximately May 2005 through December 2005.

With respect to the first proposed change, in its Answer, Respondent clarifies that Respondent is Hanson's Window and Construction, Inc., d/b/a under numerous trade names, including but not limited to 800-Hansons and 1-800-Hansons, and numerous assumed names, including but not limited to Hanson's Window & Siding World, Hanson's Window & Siding, and Hanson's Window Company. Complainant requests this Court's permission to revise paragraph 3 of the Complaint to reflect the trade and assumed names of Respondent as set forth in Respondent's Answer.

Second, Complainant seeks to amend its Complaint with respect to the amendment and recodification of the regulations applicable to the violations alleged to have occurred during 2005. As Complainant states in the original Complaint at paragraph 5:

On June 1, 1998, EPA promulgated regulations codified at 40 C.F.R. Part 745, Subpart E, Requirements for Hazard Education Before Renovation of Target Housing (Pre-Renovation Education Rule or PRE Rule) pursuant to 15 U.S.C. § 2686, which was subsequently amended and recodified on April 22, 2008 at 40 C.F.R. Part 745, Subpart E, Lead; Renovation, Repair, and Painting Program; Lead Hazard Information Pamphlet (RRP Rule).

When the PRE Rule was amended and recodified, the regulation at 40 C.F.R. § 745.85 entitled "Information distribution requirements," was recodified at 40 C.F.R. § 745.84. The substantive requirements of the regulation, "Information distribution requirements," were not significantly changed. The original Complaint cited to the PRE Rule as recodified at 40 C.F.R. § 745.84. Complainant has determined that the citations to 40 C.F.R. § 745.85, in effect at the time of the 2005 transactions, rather than citations to 40 C.F.R. § 745.84 as recodified, are the correct citations.

Complainant notes that the original Complaint included a narrative description of the alleged violations pertaining to each transaction (at paragraphs 47 and 321 of the original Complaint). Although the original Complaint cited to the new codification of the PRE Rule rather than the original codification, the Complaint did provide notice to Respondent that its claims were alleged violations under the PRE Rule which was in effect in 2005.

In addition, Complainant has revised the definitions to be consistent with the originally promulgated regulations. The revised definitions were primarily meant to address new work practice provisions for renovation work conducted in target housing and child-occupied facilities that were added to the PRE rule when it was amended and recodified. In many instances, the definitional changes have no impact the allegations in the Complaint (see, for example, definition of child-occupied facility). In no instance does a change in the definition change Complainant's allegation of a violation.

Complainant is seeking to conform the pleadings, so that the original regulations, rather than the recodified regulations, are referenced in the Amended Complaint.

For the reasons stated above, Respondent has had the relevant information in Complainant's possession pertaining to these violations since the Complaint was filed, and will not be prejudiced by this amendment. Complainant has only recently realized this error, and has moved immediately to correct the citations. Therefore, Complainant has not been dilatory in seeking this amendment.

Third, Complainant omitted references to Section 407 of TSCA, 15 U.S.C. § 2687, which required that the regulations promulgated by the Administrator include such recordkeeping and reporting requirements as may be necessary to insure the effective implementation of TSCA

Subchapter IV (TSCA §§ 2681-2692). While the Court might take judicial notice of the statutory underpinnings of 40 C.F.R. § 745.86, Complainant proposes to include references to Section 407 of TSCA in the Amended Complaint. (Note that 40 C.F.R. § 745.86 was modified to be consistent with the definitions added to Subpart E, but was not recodified in 2008).

Finally, in paragraph 37 of the Amended Complaint, Complainant makes clear that the allegations in the original Complaint are only for contracts entered into during the period of approximately May 2005 through December 2005.

Complainant does not seek to revise the language in Counts 1 through 542. Complainant does not seek to add new transactions or violations, or to assess additional penalties.

To allow Complainant to amend the Complaint in this matter will not result in any prejudice to Respondent, and is not the result of undue delay, bad faith or dilatory motive on the part of Complainant. Further, Complainant's request does not follow repeated failure to cure deficiencies by previous amendment, nor is amendment futile.

The proposed Amended Complaint is filed with this Motion, in both clean and mark-up forms. In accordance with 40 C.F.R. § 22.5(b)(1), should the Court grant this Motion, Complainant shall serve on Respondent the Amended Complaint personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery. In accordance with 40 C.F.R. § 22.14(c), Respondent shall have 20 days from the date of service of the Amended Complaint to file its answer.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Mary T. McAuliffe". The signature is written in a cursive style with a large initial "M" and a distinct "T" and "A".

Mary T. McAuliffe
Mark Palermo
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In the Matter of Hanson's Window and Construction, Inc.
Docket No. TSCA-05-2010-0013

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2010, I filed the original and one copy of Complainant's Motion to File the Amended Complaint and Memorandum in Support of Motion to File the Amended Complaint, including two copies of the proposed Amended Complaint, with LaDawn Whitehead, Regional Hearing Clerk, EPA Region 5, 77 West Jackson Blvd., Chicago, Illinois 60604, and placed for pickup to be mailed a copy of Complainant's Motion to File the Amended Complaint and Memorandum in Support of Motion to File the Amended Complaint by Pouch Mail, including two copies of the proposed Amended Complaint, to:

Chief Judge Susan L. Biro
Office of the Administrative Law Judges
U.S. Environmental Protection Agency
Ariel Rios Building, Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-2001

and placed for pickup to be mailed a copy of Complainant's Motion to File the Amended Complaint and Memorandum in Support of Motion to File the Amended Complaint, including two copies of the proposed Amended Complaint, by Express Mail, to:

D.S. Berenson, Esquire
Kevin M. Tierney, Esquire
Johanson Berenson LLP
1146 Walker Road, Suite C
Great Falls, Virginia 22066



Leanne Fountas
Office Automation Assistant