

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 4

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BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
American Consumer Products,) Docket No. FIFRA-04-2009-3023
)
Respondent.)
_____)

COMPLAINANT'S INITIAL PREHEARING EXCHANGE

Comes now Complainant, by and through its counsel, and in response to the Prehearing Order issued in this matter by Chief Administrative Law Judge Susan L. Biro, respectfully submits its Prehearing Exchange pursuant to Section 22.19(a) of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and the Revocation, Termination or Suspension of Permits," 40 C.F.R. Part 22 (Rules of Practice). For ease of review, this response is divided in a manner that reflects the style of the Prehearing Order.

1. Complainant submits the following:

(A) The names of all expert and other witnesses intended to be called at hearing, identifying each as a fact or expert witness, with a brief narrative summary of their expected testimony, or a statement that no witnesses will be called:

1. Melba Table
Environmental Scientist
Pesticides Enforcement Section
U.S. Environmental Protection Agency, Region 4
Sam Nunn Atlanta Federal Center
61 Forsyth Street
Atlanta, Georgia 30303

Ms. Table is expected to testify as a fact witness, to her duties as an Environmental Scientist in EPA's Pesticides Enforcement Section. Ms. Table is the case development officer and is expected to testify about her investigation of this matter, the violations alleged in the Complaint, and the development and preparation of the Complaint. In addition, Ms. Table is expected to testify to the calculation of EPA's proposed penalty in this matter and provide the basis for concluding that the penalty proposed in the Complaint is the appropriate penalty for these violations.

2. Phillip C. Sykes
Inspector
North Carolina Department of Agriculture and Consumer Services
1090 Mail Service Center
Raleigh, North Carolina 27699

Mr. Sykes is expected to testify as a fact witness, to his duties as an Inspector in the Structural Pest Control and Pesticides Division of the North Carolina Department of Agriculture and Consumer Services. Mr. Sykes conducted an inspection on October 10, 2007 of Maxway # 1482, 2400 Memorial Drive, Greenville, North Carolina 27834. Mr. Sykes is expected to testify about observations he made and information he gathered during the inspection, including collection of documentary samples. Mr. Sykes' inspection report is included in this Prehearing Exchange as Exhibit CX 9.

3. William B. Dunn
Inspector
North Carolina Department of Agriculture and Consumer Services
1090 Mail Service Center
Raleigh, North Carolina 27699

Mr. Dunn is expected to testify as a fact witness, to his duties as an Inspector in the Structural Pest Control and Pesticides Division of the North Carolina Department of Agriculture and Consumer Services. Mr. Dunn conducted an inspection on November 1, 2007 of Variety Wholesalers, Inc., 1000 Facet Road, Henderson, North Carolina 27536. Mr. Dunn is expected to testify about observations he made and information he gathered during the inspection including collection of documentary samples. Mr. Dunn's inspection report is included in this Prehearing Exchange as Exhibit CX 12.

4. Dennis Edwards, Chief
Regulatory Management Branch I
Office of Pesticide Programs
Antimicrobials Division
Potomac Yards South
2777 S. Crystal Drive
Room #S8641
Arlington, VA 22202

Mr. Edwards is expected to testify as a fact witness concerning the registration requirements pursuant to FIFRA and the regulations promulgated thereunder. Mr. Edwards is expected to testify regarding his assessment that "Anti-Bacterial Formula 24-7 All Purpose Lemon Scent Cleaner" makes pesticidal claims, see Exhibit CX 13. Mr. Edwards is also an expert on the criteria which determine what constitutes a pesticide under FIFRA and its regulations. At the hearing, Mr. Edwards will also testify concerning the violations alleged in the Complaint, EPA registration procedures and their importance to the purposes of FIFRA.

Complainant respectfully reserves the right to call or not call the aforementioned potential witness, and to expand or otherwise modify the scope, extent, or areas of the testimony of the above mentioned witness, where appropriate. Complainant also respectfully reserves the right to supplement its witness list as authorized pursuant to 40 C.F.R. Section 22.19(f) with the Court's approval and upon adequate notice to Respondent. Complainant also reserves the right to call any or all of Respondent's witnesses at the hearing.

(B) Copies of all documents and exhibits intended to be introduced into evidence.

In addition to the Complaint and Respondent's Answer (copies of which have previously been filed with the Court and which all parties presently possess), incorporated herein by reference, EPA intends to offer into evidence the following documents, copies of which are marked for identification and attached. For the purposes of the list of documents below, "Complainant's Exhibit No." is abbreviated as "CX _."

- CX 1. EPA's "Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)" (July 2, 1990)
- CX 2. FIFRA Civil Penalty Calculation Worksheet prepared by Ms. Table
- CX 3. Complainant's EPCRA Penalty Calculation Narrative
- CX 4. North Carolina Department of Agriculture and Consumer Services letter regarding inspections of Maxway #1482 and Variety Wholesalers, Inc. (November 14, 2007)
- CX 5. Investigation Summary and Notice of Inspection of Maxway #1482 prepared by Phillip Sykes (October 3, 2007)
- CX 6. Statement of Martin Critcher, Store Manager, Maxway #1482 (October 3, 2007)
- CX 7. Receipt for Samples of documentary photographs and photographs of container and labeling of "Antibacterial Formula 24/7 All Purpose Lemon Scent Cleaner" obtained during inspection of Maxway #1482 (October 3, 2007)
- CX 8. Shipping Records obtained during Inspection of Maxway #1482 (October 3, 2007)
- CX 9. Maxway #1482 Inspection Summary prepared by Phillip Sykes (October 3, 2007)
- CX 10. Investigation Summary and Notice of Inspection of Variety Wholesalers, Inc. prepared by William Dunn (November 1, 2007)

- CX 11. Shipping Records obtained during inspection of Variety Wholesalers, Inc. (November 1, 2007)
- CX 12. Variety Wholesalers, Inc. Inspection Summary prepared by William Dun (November 1, 2007)
- CX 13. EPA Enforcement Case Review, ECR Log No. FY08-IV-012 (June 23, 2008)
- CX 14. Georgia Secretary of State information on American Consumer Products
- CX 15. Illinois Secretary of State information on American Consumer Products
- CX 16. Dun and Bradstreet Report for American Consumer Products

Complainant anticipates the possibility that Complainant may need to introduce further evidence in response to issues which may be raised in Respondent's prehearing exchange. Complainant therefore respectfully reserves the right to supplement its exhibit list upon adequate notice to Respondent and to this Court. In addition, Complainant may request this Court to take official notice of appropriate matters in accordance with 40 C.F.R. § 22.22(f).

In the event EPA's continuing review of Respondent's documents, in preparation for this case, reveals additional violations, Complainant respectfully reserves the right, upon adequate notice to Respondent and this Court, to move for Amendment of the Complaint and for: (1) presentation of additional testimony substantiating such additional violations; and (2) introduction of additional documentary evidence substantiating such additional violations.

(C) A statement of Complainant's views on the appropriate place of hearing and an estimate of the amount of time needed to present its direct case.

Pursuant to 40 C.F.R. §§ 22.21(d) and 22.19(d), the hearing should be held in the county where the Respondent resides or conducts the business which the hearing concerns, in the city in which the relevant Environmental Protection Agency Regional Office is located, or in Washington, D.C.

Complainant prefers to have the hearing either in Columbus, Georgia, (where the business which the hearing concerns is conducted) or in Atlanta, Georgia (the relevant EPA Regional Office) however, Complainant will agree to have the hearing in Chicago, Illinois where Respondent resides. Complainant estimates that it will require approximately one day to present its case.

2. In addition, Complainant submits the following:

(A) A copy of records from the Georgia Secretary of State and the Illinois Secretary of State indicating the correct names and address of Respondent are attached as Exhibits CX 14 and CX 15 respectively. As requested in the Prehearing Order, a separate motion to amend the Complaint has been submitted to name only American Consumer Products of Georgia as the

Respondent in this matter.

(B) A copy of the documents in support of the allegations in Paragraph 5 of the Complaint are attached as Exhibits CX 14 and 15.

(C) A copy of the reports of the inspections referenced in Paragraphs 6 and 9 of the Complaint are attached as Exhibits CX 9 and CX 12. Photographs, documents, and field notes taken during the inspections in support of the allegations of the Complaint are attached as Exhibits CX 5 - 8 and CX 10 and 11.

(D) The photographs and shipping records referenced in Paragraphs 8 and 10 of the Complaint are attached as Exhibits CX 7 and 8 and Exhibits CX 11 respectively.

(E) A copy of the document in support of the allegations in Paragraphs 11 and 14 of the Complaint is attached as Exhibit CX 16. The Answer filed by Respondent also supports the allegations in Paragraphs 11 and 14 of the Complaint.

(F) Copies of the documents in support of the allegations in Paragraphs 12, 15 and 18 of the Complaint are attached as Exhibits CX 7, CX 8, CX 11 and CX 16.

(G) Complainant's narrative explanation of which inspection Paragraphs 12 and 14 refer to and whether the product referenced in Paragraph 12 is the same product as that referenced in Paragraph 11 is as follows:

Paragraphs 12 and 14 of the Complaint refer to both the inspection of Maxway #1482 on October 3, 2007, and the inspection of Variety Wholesalers on November 1, 2007. The product referenced in Paragraph 12 of the Complaint, "Anti-Bacterial Formula 24-7 All Purpose Cleaner" is the same product referenced in Paragraph 11 of the Complaint as "Anti-Bacterial Formula 24-7 All Purpose Lemon Scent Cleaner." As requested in the Prehearing Order, a separate motion to amend the Complaint has been submitted to correct these factual errors.

(H) A copy of the Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), July 2, 1990 is attached as Exhibit CX 1.

(I) Complainant's statement explaining in detail the calculation of the proposed penalty, addressing each factor listed in Section 14(a)(4) of FIFRA is attached as Exhibit CX 3.

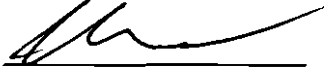
(J) Complainant's statement on the applicability of the Paperwork Reduction Act, 44 U.S.C. § 3501 *et. seq.*, to this proceeding, including whether there is a current Office of Management and Budget Control number involved and whether the provisions of Section 3512 of the PRA may apply to this case is as follows:

The Paperwork Reduction Act (PRA), 44 U.S.C. § 3501 *et. seq.*, and specifically § 3512 is not an issue in this proceeding. To the extent the PRA is applicable to the information collection requirements required by 40 C.F.R. part 167, the Office of Management and Budget (OMB) has approved such information collection requirements under the provisions of the PRA

and has assigned the Information Collection Request OMB control number 2070-0078. Thus, the PRA does not bar enforcement of the regulatory violations of FIFRA alleged in the Complaint nor the imposition of penalties therefore.

Dated: March 26, 2010

Respectfully Submitted,



Jennifer Lewis, Associate Regional Counsel
Office of Environmental Accountability
U.S. EPA, Region 4
61 Forsyth Street, S.W.
Atlanta, Georgia 30303
Tel (404) 562-9518/Fax (404) 562-9486

CERTIFICATE OF SERVICE

I certify that the foregoing Complainants Initial Prehearing Exchange, dated March 26, 2010, was sent this day in the following manner to the addressees listed below:

Original by Interoffice Mail to:

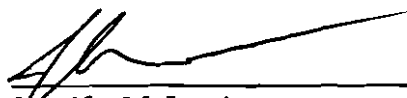
Regional Hearing Clerk
U.S. EPA - Region 4
61 Forsyth St., SW
Atlanta, Georgia 30303

Copy by Certified Mail to:

Robin Zahran
American Consumer Products
1301 W. 22nd Street, Suite 815
Oakbrook, IL 60523
Fax No. (706) 562-2222

Copy by Pouch Mail to:

The Honorable Susan L. Biro
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1200 Pennsylvania Ave., N.W.
Mail Code 1900L
Washington, DC 20005
Fax No. (202) 565-0044



Jennifer M. Lewis
U.S. Environmental Protection Agency
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61 Forsyth Street, SW
Atlanta, Georgia 30303

Dated: 5-26-10