

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

Docket No. FIFRA-08-2007-0014

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In the Matter of:)
)
OmniLytics, Inc.)
5450 W. Wiley Post Way,)
Salt Lake City, Utah 84116)
)
Respondent)
)

**PENALTY COMPLAINT AND NOTICE OF
OPPORTUNITY FOR HEARING**

INTRODUCTION (JURISDICTION)

1. This civil administrative enforcement action is authorized by Congress in section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. section 136l(a). The rules for this proceeding are the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits ("*Rules of Practice*")," 40 C.F.R. part 22, a copy of which is enclosed.

2. The undersigned EPA officials have been properly delegated the authority to issue this action.

3. EPA alleges that Respondent has violated FIFRA by selling a misbranded pesticide on four occasions and by producing a pesticide in an unregistered producer establishment and proposes the assessment of a civil penalty, as more fully explained below. FIFRA authorizes the assessment of a civil penalty for violations of FIFRA. 7 U.S.C. section 136l(a).

NOTICE OF OPPORTUNITY FOR A HEARING

4. Respondent has the right to a public hearing before an administrative law judge (ALJ) to disagree with (1) any fact stated (alleged) by EPA in the complaint, or (2) the appropriateness of the proposed penalty.

5. To disagree with the complaint and assert your right to a hearing, Respondent must file a written answer (and one copy) with the Regional Hearing Clerk (1595 Wynkoop Street; Denver, Colorado 80202-1129) within 30 days of receiving this complaint. The answer must clearly admit, deny or explain the factual allegations of the complaint, the grounds for any defense, the facts you may dispute, and your specific request for a public hearing. Please see section 22.15 of the *Rules of Practice* for a complete description of what must be in your answer.

FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN 30 DAYS MAY WAIVE RESPONDENT'S RIGHT TO DISAGREE WITH THE ALLEGATIONS OR PROPOSED PENALTY, AND RESULT IN A DEFAULT JUDGMENT AND ASSESSMENT OF THE PENALTY PROPOSED IN THE COMPLAINT.

QUICK RESOLUTION

6. Respondents may resolve this proceeding at any time by paying the specific penalty (\$27,300) proposed in the complaint. Such payment need not contain any response to, or admission of, the allegations in the complaint. Such payment constitutes a waiver of respondent's right to contest the allegations and to appeal the final order. See section 22.18 of the *Rules of Practice* for a full explanation of the quick resolution process. This payment shall be made by remitting a cashier's or certified check for that amount, payable to "Treasurer, United States of America," to:

U. S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P. O. Box 979077
St. Louis, MO 63197-9000

SETTLEMENT NEGOTIATIONS

7. EPA encourages discussing whether cases can be settled through informal settlement conferences. If you want to pursue the possibility of settling this matter, or have any other questions, contact Dana J. Stotsky, Esq., at 1-800-227-8917; extension 6905, 303-312-6905, or the address below. *Please note that calling the attorney or requesting a settlement conference does NOT delay the running of the 30 day period for filing an answer and requesting a hearing.*

DEFINITIONS

- I. ***Pesticide*** is defined by 40 C.F.R. § 152.3(s) as "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, or intended for use as a plant regulator, defoliant, or desiccant"
- II. ***Misbranded*** is defined by FIFRA as "Misbranded...(1) [a] pesticide is misbranded if—
 - (A) its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular;
 - (E) any word, statement, or other information required by or under authority of this subchapter to appear on the label or labeling is not prominently placed

thereon with such conspicuousness (as compared with other words, statements, designs, or graphic matter in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use....” 7 U.S.C. sections 136(q)(1)(A) and (E).

- III. ***Producer and produce*** are defined by FIFRA as...”The term “producer” means the person who manufactures, prepares, compounds, propagates, or processes any pesticide or device or active ingredient used in producing a pesticide. The term “produce” means to manufacture, prepare, compound, propagate, or process any pesticide or device or active ingredient used in producing a pesticide. The dilution by individuals of formulated pesticides for their own use and according to the directions on registered labels shall not of itself result in such individuals being included in the definition of “producer” for the purposes of this subchapter.” 7 U.S.C. section 136(w).
- IV. ***Establishment*** is defined by FIFRA as...”The term “establishment” means any place where a pesticide or device or active ingredient used in producing a pesticide is produced, or held, for distribution or sale.” 7 U.S.C. section section 136(dd).

GENERAL ALLEGATIONS

At all times pertinent to this complaint, the following general allegations apply:

8. EPA has jurisdiction of this matter under section 14(a)(1) of FIFRA, 7 U.S.C. section 136l(a)(1).
9. Respondent, OmniLytics, Inc., located at 5450 W. Wiley Post Way, Salt Lake City, Utah 84116, is a "person" within the meaning of Section 2(s) of FIFRA, 7 U.S.C. Section 136(s), and is therefore subject to regulation.

Counts 1-4 (Four Sales of Misbranded Pesticide)

10. Respondent obtained a pesticide registration for its product “Agriphage” on December 9, 2005 with the EPA Registration Number 67986-1.

11. The registration identified in the preceding paragraph specified at least two conditions that must appear on all labeling on all packaging of “Agriphage,” which is:

1. DO NOT ENTER OR ALLOW WORKER ENTRY INTO TREATED AREAS DURING THE RESTRICTED ENTRY INTERVAL (REI) OF 12

HOURS; and, 2. PPE [PERSONAL PROTECTIVE EQUIPMENT] REQUIRED FOR EARLY ENTRY TO TREATED AREAS THAT IS PERMITTED UNDER THE WORKER PROTECTION STANDARD AND THAT INVOLVES CONTACT WITH ANYTHING THAT HAS BEEN TREATED, SUCH AS PLANTS, SOIL, OR WATER IS: – COVERALLS OVER LONG-SLEEVED SHIRT AND LONG PANTS, – SOCKS, – SHOES.

12. On May 2, 2006, Respondent sold its pesticide product “Agriphage” to High **REDACTED** Farms, documented by Respondent’s Invoice Number 3531.

13. On May 3, 2006, Respondent sold its pesticide product “Agriphage” to **REDACTED** Plant Co., documented by Respondent’s Invoice Number 3535.

14. On May 2, 2006, Respondent sold its pesticide product “Agriphage” to UC Davis Dept. of Plant Pathology, documented by Respondent’s Invoice Number 3532.

15. On May 4, 2006, Respondent sold its pesticide product “Agriphage” to Tommy **REDACTED** Farms, documented by Respondent’s Invoice Number 3538.

16. For each of the four sales identified in Paragraphs 12-15 above, the label materials that accompanied the pesticide container(s) of Respondent’s pesticide “Agriphage” did not include the cautionary statements for Restricted Entry Intervals or the cautionary statements for Personal Protective Equipment which are required conditions of Respondent’s pesticide registration for its pesticide “Agriphage.”

17. At the time the four sales identified in Paragraphs 12-15 above occurred, the statement on Respondent’s website for its product “Agriphage,” did not include the required cautionary statements for Restricted Entry Intervals and also there were no Personal Protective Equipment required statements for use of “Agriphage.”

18. Respondent, by selling its pesticide “Agriphage” as described in Paragraphs 12-15 above, without required cautionary statements on its labeling or as statements made in association with its sale (webpage), has sold a misbranded pesticide four times, in violation of FIFRA section 12(a)(1)(E). 7 U.S.C. section 136j(a)(1)(E).

Count 5
(One Count of Producing a Pesticide in an
Unregistered Pesticide Producing Establishment)

19. EPA's regulations require that all pesticides be manufactured at registered pesticide producing establishments. FIFRA section 12(a)(2)(L) and section 7(a). 7 U.S.C. section 136j(a)(2)(L) and 7 U.S.C. section 136e(a).

20. On or before the dates associated with the sales of Respondent's pesticide "Agriphage" and identified in Paragraphs 12-15 above, Respondent had not registered any pesticide producing establishment.

21. Respondent sold its pesticide "Agriphage" at least four times, by the sales identified in Paragraphs 12-15 above, where such pesticide was made or produced not in any registered pesticide producing establishment.

22. Respondent, by selling a pesticide made or produced not in a registered pesticide producing establishment, has violated FIFRA. 7 U.S.C. section 136j(a)(2)(L) and 7 U.S.C. section 136e(a).

PROPOSED CIVIL PENALTY

23. For pesticide registrants and producers, FIFRA authorizes the assessment of a civil penalty of up to \$6,500 for each offense of the Act and the Debt Collection Improvement Act of 1996. FIFRA requires EPA to consider the appropriateness of the penalty to the size of the business, the effect on the person's ability to continue in business, and the gravity of the violation. EPA has established policies that provide a rational and consistent method for applying statutory factors to the circumstances of specific cases. A narrative description of the reasoning behind the penalty proposed in this case is attached to this complaint, along with copies of the EPA policies. **For the five FIFRA violations alleged in this complaint, EPA proposes a penalty of \$27,300.** The penalty narrative and calculation can be found in complainant's Exhibit Number 1.

24. The ALJ is not bound by EPA's penalty policy or the penalty proposed by Complainant, and may assess a penalty above the proposed amount, up to the maximum amount authorized in the statute. In this case, the maximum would be \$32,500.

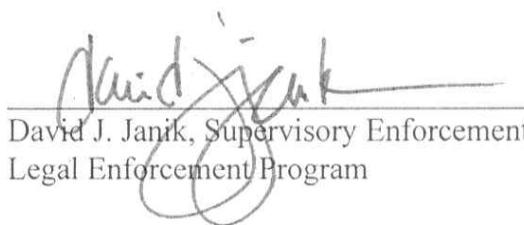
To discuss settlement or ask any questions you may have about this process, please contact Dana J. Stotsky, Senior Enforcement Attorney, at 1-800-227-8917; ext. 312-6905, or at the address below.

United States Environmental Protection Agency
Region 8, Office of Enforcement, Compliance and
Environmental Justice, Complainant
1595 Wynkoop Street (ENF-L)
Denver, CO 80202-1129

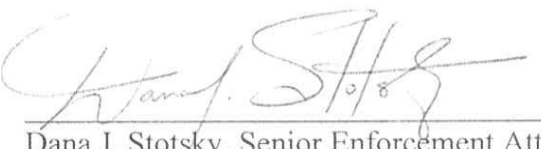
Date: 9/27/2007

By: 
Mark Chalfant, Director
Technical Enforcement Program

Date: 9/27/2007

By: 
David J. Janik, Supervisory Enforcement Attorney
Legal Enforcement Program

Date: Sept 27, 2007

By: 
Dana J. Stotsky, Senior Enforcement Attorney
Legal Enforcement Program
U.S. EPA Region 8
1595 Wynkoop Street
Mail Code: 8ENF-L
Denver, Colorado 80202-1146
Colorado Bar # 14717
Phone: (303)-312-6905
FAX: (303) 312-6953
stotsky.dana@epa.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and one copy of the COMPLAINT, AND NOTICE OF OPPORTUNITY FOR HEARING with Exhibits were hand-carried to the Regional Hearing Clerk, EPA Region 8, 1595 Wynkoop Street; Denver, Colorado 80202-1129, and that a true copy of the same was sent via Certified Mail to:

Mr. Justin C. Reber, President
OmniLytics, Inc.
5450 W. Wiley Post Way,
Salt Lake City, Utah 84116

9/28/07
Date

Judith McTernan
Judith McTernan