

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

IN THE MATTER OF:

New Prime, Inc.
3720 West 800 South
Salt Lake City, Utah

Respondent.

Docket No. RCRA-08-2020-0007

**COMPLAINANT’S RESPONSE TO RESPONDENT’S MOTION
FOR SUPPLEMENTAL BRIEFING**

On July 21, 2021, Respondent submitted a Motion for Supplemental Briefing (Respondent’s Motion). Counsel for Complainant respectfully submits this response to Respondent’s Motion pursuant to sections 22.16(b) and 22.20 of the Consolidated Rules of Practice (40 C.F.R. §§ 22.16(b) and 22.20), and the Prehearing Order of the Presiding Officer in this matter dated November 2, 2020. Because Complainant’s rebuttal expert report is completely irrelevant to this Court’s consideration of Complainant’s Motion for Accelerated Decision (Complainant’s Motion), Complainant respectfully requests that Respondent’s Motion be denied.

On July 16, 2021, Complainant filed a Second Supplement to Complainant’s Prehearing Exchange (Complainant’s Second Supplement), in order to add an expert rebuttal report, developed by Dr. Kristen Keteles. This report was developed solely for consideration if the Presiding Officer denies Complainant’s Motion, particularly on a penalty for Count 3 of the Complaint.

Despite Complainant’s clear and oft-repeated statements that Dr. Keteles’ rebuttal report will not be submitted as support for Complainant’s Motion for Accelerated Decision,

Respondent now requests permission to file a brief to address issues Respondent argues are raised by “Complainants’ [sic] late supplementation of the record on an issue that is at the heart of the Motion for Accelerated decision [sic] that is currently before the Presiding Officer.”

Respondent’s Motion at 2. Respondent continues to misunderstand the basis of Complainant’s Motion despite Complainant’s unambiguous statements that Respondent’s expert’s opinions are uncontested by Complainant for purposes of Complainant’s Motion.

In the memorandum submitted in support of Complainant’s Motion (EPA Memo), Complainant stated that for purposes of Complainant’s Motion, it accepts Respondent’s expert’s opinions. *See, e.g.*, EPA Memo at 47-48. Notwithstanding this clear statement, in its response to Complainant’s Motion, Respondent pointed to its retention of Dr. Elizabeth Walker as Respondent’s expert, and to her expert report, and argued that “unlike Respondents [sic], who had Dr. Walker prepare an expert report, . . . Complainant has provided no expert report” and that, therefore, “Dr. Walker’s expert opinion is uncontested and at odds with EPA’s non-expert assessment of harm to human health and the environment set out in Exhibit CX04.” Response at 9. In its Reply, Complainant reiterated that “Dr. Walker’s opinions are uncontested for purposes of the Motion,” Reply at 11, and Complainant continued that “these opinions are not at odds with Complainant’s position on the potential for harm component of the proposed penalty for Count 3, as fully described in CX04 and the EPA Memo.” *Id.*

In Complainant’s Reply, Complainant further explained that the Prehearing Order requires the parties to simultaneously prepare for hearing while developing and arguing dispositive motions, and that Complainant, therefore, named Dr. Kristen Keteles in its Rebuttal Prehearing Exchange in case it becomes necessary to rebut the expected testimony of Dr. Walker at hearing. Reply at 11, fn 4. (emphasis added). Again, because of the parallel timing

requirements, Dr. Keteles prepared her expert rebuttal report as her schedule allowed and Complainant informed the Presiding Officer and Respondent that Complainant would file the report when it was complete. *Id.*, fn.4. Thus, Complainant recently filed Dr. Keteles expert report in Complainant's Second Supplemental, and as part of that filing reiterated that "[t]his supplemental filing does not affect Complainant's position that potential for harm can be determined on consideration of the Motion." Complainant's Second Supplement at 1.

Finally, in Complainant's Reply, in response to Respondent's citation to *In re Dave Erlanson, Sr.*, 2018 WL 4859961 (EPA ALJ Sept. 27, 2018) in support of its argument that Complainant's Motion should be denied and a hearing held, Complainant reiterated that "Complainant has clearly accepted Respondent's view of the impact Respondent's illegal storage had on the environment for Count 3 for purposes of the Motion. Further, Complainant has explained in great detail how Complainant has factored this undisputed information into its calculation of a proposed penalty for the illegal storage violation." Reply at 21.

Because Complainant's Second Supplement was filed pursuant to 40 C.F.R. § 22.19(f), and the Prehearing Orders of the Presiding Officer in this matter dated November 2, 2020, and March 31, 2021, and Complainant does not ask this Court to consider Dr. Keteles' expert report during the Court's consideration of Complainant's Motion, Complainant respectfully requests that Respondent's Motion be denied.

Dated: July 30, 2021

Respectfully Submitted,

Laurianne Jackson
Senior Assistant Regional Counsel
Environmental Protection Agency Region 8

Of counsel:

Charles Figur
Senior Assistant Regional Counsel
Environmental Protection Agency Region 8

CERTIFICATE OF SERVICE

The undersigned certifies that on July 30, 2021, I filed electronically the foregoing **COMPLAINANT’S RESPONSE TO RESPONDENT’S MOTION FOR SUPPLEMENTAL BRIEFING** with the Clerk of the Office of Administrative Law Judges using the OALJ E-Filing System and sent by electronic mail to Mark Ryan, attorney for Respondent, at mryanboise@msn.com and Scott McKay, attorney for Respondent, at smckay@nbmlaw.com.

Date: July 30, 2021

By: /s/ Kate Tribbett
Kate Tribbett
Paralegal
Regulatory Enforcement Section
U.S. EPA, Region 8
1595 Wynkoop Street (R8-ORC-R)
Denver, Colorado 80202-1129