UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
TIFA, LIMITED	)	I.F.& R. Docket No. II-547-C
	)	
Respondent	)	

ORDER ON COMPLAINANT'S MOTION TO AMEND COMPLAINT AND RESPONDENT'S MOTIONS TO AMEND ANSWER; FOR ADJOURNMENT OF HEARING; AND FOR DISCOVERY

In a motion dated October 13, 1998, Respondent moved (1) to amend its Amended Answer to add affirmative defenses of EPA bias, selective enforcement and violation of due process; (2) for adjournment of the hearing; and (3) for further discovery. Complainant opposed the motion on October 16, 1998, and on October 19th requested leave to amend the Complaint to change a date referenced in an allegation therein. For the reasons that follow, the Motion to Amend the Complaint is granted. Respondent is granted leave to amend its Amended Answer as provided below, but the request for adjournment of the hearing is denied. The Respondent's Motion for Discovery is granted to the extent provided below.

I. Motion for Adjournment

40 C.F.R. § 22.21(c) provides, "No request for postponement of a hearing shall be granted except upon motion and for good cause shown." Respondent requests that the hearing be adjourned so that it can conduct discovery to explore the defenses of bias, selective enforcement and violation of due process. Respondent's grounds for postponement, however, are without merit.

Generally, to postpone a hearing so close to the start of the hearing, there must be consent of the parties such as due to settlement or an emergency concerning key witnesses or counsel. Such is not the case here. Respondent has not made a showing that additional discovery necessitates postponing the hearing. Nor has Respondent alleged any other ground which constitutes a good cause basis for postponement. Therefore, the motion for adjournment is denied.

II. Amendment of Pleadings and Motion for Discovery

The Rules of Practice provide, at 40 C.F.R. §§ 22.14(d) and 22.15(e), that a Complaint or an Answer may be amended upon motion granted by the Presiding Officer, but no standard is provided for determining such motions. The general rule is that administrative pleadings are "liberally construed and easily amended." *In re Port of Oakland and Great Lakes Dredge and Dock Company,* MPRSA Appeal No. 91-1 at 41 (EAB, August 5, 1992); *see also, Lazarus, Inc.,* TSCA Appeal No. 95-2, slip op. at 22 (EAB, Sept. 30, 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.

Complainant requests amendment of the Complaint to properly reflect the date of transaction alleged in Paragraph 107, Count 24 of its Complaint. Complainant asserts that the correct date appears on a copy of an invoice collected during the inspection of Respondent's facility. The amendment is a minor technical correction and no prejudice to Respondent results from such correction. Therefore, the Motion to Amend the Complaint is granted.

Respondent requests amendment of its Answer to assert affirmative defenses of EPA bias, selective enforcement, and violation of due process. Respondent makes this request on the basis of a statement in a letter ("AgrEvo letter") from EPA Region II, to Respondent's main competitor, AgrEvo, that:

> it has come to [AgrEvo's] attention that EPA Region II has specific information regarding questionable business practices on the part of Tifa, Ltd., and their compliance with pesticide regulations. In light of this [AgrEvo] can not, in the spirit of good product stewardship, do business with Tifa, Ltd.

(Complainant's Motion to Supplement Prehearing Exchange, attachment). A copy of the letter was sent to Dr. Enache, the EPA inspector who inspected Respondent's facility, and one of Complainant's key witnesses in this proceeding. Respondent asserts that the letter reveals that Dr. Enache made disparaging statements about Respondent to its competitor. Respondent therefore requests that EPA be compelled immediately to produce all correspondence ever exchanged between EPA and AgrEvo, so these defenses can be explored. In the alternative, Respondent requests that all such documents which mention or refer to Respondent in any way be compelled.[(1)]

In response, Complainant asserts that the letter is irrelevant, speculative and does not substantiate the defenses Respondent seeks intends to add. Complainant points out the presumption that Federal officials are presumed to act in good faith in carrying out official duties, and that "unsubstantiated allegations of bias or misconduct are insufficient to state a claim," citing, *Ostrer v. Luther,* 668 F. Supp. 724, 734 (D. Conn. 1987). As to the defense of selective enforcement, Complainant asserts that it has inspected and had past enforcement actions against AgrEvo. Complainant cites to Federal case law, including *United States v. Smithfield Foods, Inc.,* 969 F.Supp. 975 (E.D. Va. 1997), setting forth the burden for establishing a defense of selective enforcement. Complainant asserts that Respondent is seeking to conduct a "fishing expedition" normally rejected by the courts.

Undue prejudice to the non-moving party is the touchstone for denying leave to amend an Answer. *Bechtel v. Robinson,* 886 F.2d 644, 652 (3d Cir. 1989). Complainant broadly states that any delay due to the amendment would be unnecessary and prejudicial to Complainant, but does not assert adequate grounds for prejudice. In that both parties have requested eleventh hour amendments to pleadings, witness lists and proposed exhibits, any prejudice resulting from Respondent's request to amend its Amended Answer cannot be considered undue. The hearing, therefore, will not be postponed, and Respondent's discovery on the defenses requested will be

extremely limited, as discussed below.

The Court of Appeals for the Second Circuit has stated, "As a matter of law, justice requires leave to amend when the moving party has demonstrated 'at least colorable grounds' for the proposed amendment." *S.S. Silberblatt, Inc., v. East Harlem Pilot Block Building 1 Hous. Dev. Fund Co.,* 608 F.2d 28, 42 (2d Cir. 1979). In determining whether there are colorable grounds, an inquiry must be made comparable to that of a motion to dismiss under FRCP 12(b)(6), where "it must appear beyond doubt that the [movant] can prove no set of facts supporting his claim that entitles him to relief." *Ragin v. Harry Macklowe Real Estate Co.,* 126 F.R.D. 475, 478 (S.D.N.Y. 1989). A mere claim of bias is not of sufficient substance to overcome the presumption of honesty and integrity on the part of administrative decision-makers and thus show a denial of due process. *Sacco v. U.S. Parole Comm'n,* 639 F.2d 441, 443 (8th Cir. 1981). The factors required in order to show a claim for selective enforcement or selective prosecution are (1) membership in a protected group; (2) prosecution; (3) that others in a similar situation not members of the protected group would not be prosecuted; and (4) that the prosecution was initiated with discriminatory intent. *Futernick v. Sumpter Township,* 78 F.3d 1051, 1056 (6th Cir. 1996).

To obtain discovery in Federal court, "a mere allegation of selective prosecution ... does not require the government to disclose the contents of its files....[i]n addition , the defendant must produce some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements." *United States v. Catlett,* 584 F.2d 864, 865 (8th Cir. 1978). "The defendant must first make a preliminary or threshold showing of the essential elements of the selective prosecution defense." *United States v. Jacob*, 781 F.2d 643, 646 (8th Cir. 1986). "Mere allegations of selective prosecution do not authorize a defendant to engage in a fishing expedition." *United States v. Aanerud,* 893 F.2d 956, 960 (8th Cir. 1980), quoting, *United States v. Cammisano,* 546 F.2d 238, 241 (8th Cir. 1976).

The standards applicable to this administrative proceeding for compelling "other discovery," set forth at 40 C.F. R. § 22.19(f), are more stringent than standards for discovery in Federal court. Discovery under section 22.19(f) requires a showing that the discovery will not in any way unreasonably delay the proceeding, that the information is not otherwise obtainable, and that it has significant probative value.

As to the selective enforcement defense, Respondent has neither referred to any "protected group," nor alleged that others not in such group, in a similar situation would not be prosecuted.[(2)] Therefore Respondent has not provided a basis for a selective prosecution claim, has not adequately supported its motion to amend and has not provided "colorable grounds" for amending the Amended Answer with regard to selective enforcement. Therefore, the motion to amend the Amended Answer to add the defense of selective enforcement will be denied.

As to the bias and due process issues, it is not clear whether Dr. Enache or any other EPA official who may have been involved in this case is a decision-maker subject to the standards of bias and violation of due process. *See, e.g., Chemical Waste Management, Inc. v. U.S. EPA,* 873 F.2d 1477 (D.C. Cir. 1989). The statement in the AgrEvo letter may be nothing more than a reflection of the fact that AgrEvo discovered that EPA Region II was conducting an investigation of Respondent's compliance with pesticide regulations. However, it cannot be concluded at this time that the claims of bias and violation of due process would fail under any set of facts which could be introduced. The AgrEvo letter could be construed as relevant to such a claim, although a conclusion cannot be drawn at this time that the statements therein overcome a presumption of honesty and integrity of Federal decision-makers. Without ruling on the merits of the issues, Respondent's motion to amend the Amended Answer is granted as to the issues of bias and violation of due process.

However, Respondent has not shown that discovery of all documents exchanged between AgrEvo and EPA are relevant to defenses of bias or violation of due process. Only

such documents that refer specifically to Respondent may be relevant, material and of significant probative value to the defenses. They are not otherwise obtainable by Respondent. In view of the short time period until the start of the hearing, Complainant will not be instructed to produce such documents prior thereto. The hearing will not be delayed, however, on the basis of Respondent's discovery request. Therefore, it is strongly suggested that Complainant produce, at the hearing, all documents in its possession which were exchanged between EPA and AgrEvo which specifically refer to Respondent. If Complainant cannot do so by the last date of the hearing, the Respondent may move to continue the hearing for the purpose of presenting such documents and examination of any witnesses necessary for the presentation of the documents. If necessary, Complainant may move to continue the hearing for the purpose of presenting any rebuttal evidence or testimony as to the defenses of bias or violation of due process.

Accordingly, **IT IS ORDERED THAT:**

1. Complainant's Motion to Amend its Complaint is **GRANTED.**

2. Respondent's motion requesting amendment of the answer is **GRANTED in part**, as to the defenses of bias and violation of due process, and **DENIED in part**, as to the defense of selective enforcement.

3. Respondent's motion for discovery is **GRANTED in part,** as to documents in Complainant's possession which were exchanged between EPA and AgrEvo and which specifically refer to Respondent.

4. Respondent's motion for adjournment of the hearing is **DENIED.**

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Stephen J. McGuire
Administrative Law Judge

Dated: October 22, 1998
Washington D.C.

1. Respondent states in its Motion that cross examination of Dr. Enache would be meaningless without first having obtained the deposition of AgrEvo. Respondent neither specifically requested a deposition nor attempted in its motion to meet the requirements of 40 C.F.R. § 22.19(f), to set forth the nature of the information expected to be discovered and the proposed time and place where it will be taken, and to show that the information sought cannot be obtained be alternative methods. Thus, there is no basis upon which to order a deposition.

2. A similar defense, "vindictive prosecution," is a prosecution undertaken in retaliation for the exercise of a statutory or constitutional right. *United States v. Aviv,* 923 F.Supp. 35, 36 (S.D.N.Y. 1996). Respondent has not asserted any such right.