UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

SUMMARY OF AGREEMENTS AND STIPULATIONS BY THE PARTIES DURING PREHEARING CONFERENCE AND ORDER ON MOTIONS

This proceeding, initiated by a Complaint filed on September 30 , 1997, pursuant to section 14 of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136*l*(a), is scheduled for a hearing beginning on October 27, 1998. The Complaint alleges against Respondent three counts of importing a suspended pesticide product, nine counts of offering for sale suspended pesticide products, fifteen counts of distribution and sale of a suspended pesticide product, five counts of offering for sale a registered pesticide product for a non-registered use, and two counts of producing pesticides in a non-registered pesticide producing establishment, in violation of Section 12 (a), 7 U.S.C. 136j.

On October 9, 1998, a prehearing conference was held by telephone with the parties for purposes set forth in 40 C.F.R. § 22.19(a), including stipulation of facts not in dispute; discussing the necessity of amendments to pleadings and motions, prepared testimony, and proposed witnesses; and scheduling submissions of documents.

The following motions, and responses thereto, will be addressed *seriatim* in this Order:

1. Respondent's Notice of Addition of Witnesses, dated September 1, 1998;

2. Respondent's Motion for Subpoenas, dated September 23, 1998, and Complainant's Reply thereto, dated October 8, 1998;

3. Complainant's Reply to Respondent's Notice of Addition of Witnesses and Motion for Clarification, dated September 25, 1998;

4. Complainant's Motion for Leave to File out of Time Request, dated September 29, 1998;

5. Complainant's Motions to Preclude Respondent from Litigating Issue of its Inability to Pay; and Strike Witness Testimony, dated September 29, 1998;

6. Complainant's Renewal of Motion for Production of Financial Documents, dated September 29, 1998;

7. Motion to Supplement Complainant's Prehearing Exchange, dated September 30, 1989; and Respondent's Response thereto, dated October 13, 1998.[(1)]

I. Respondent's Notice of Addition of Witnesses, Complainant's Motion for Clarification and Respondent's Motion for Subpoenas

Respondent submitted a notice of addition of two EPA employees as witnesses: Steven Johnson and Susan Jennings. During the prehearing conference, counsel for Respondent indicated that he did not need Mr. Johnson's testimony, and therefore withdrew Mr. Johnson as a witness. Complainant's motion for clarification of his testimony is therefore **denied as moot**.

Respondent requested a subpoena of Ms. Jennings, to testify about EPA having lost documents, including letters written by EPA, as allegedly disclosed in a telephone conversation with one of Respondent's witnesses. Pursuant to the prehearing conference, Complainant agreed to add Ms. Jennings as a witness for Complainant. Therefore, the motion for subpoena of Ms. Jennings and Complainant's motion for clarification as to Ms. Jennings' testimony are **denied as moot**.

Respondent also requested subpoenas for EPA employees Carole Buckingham, Larry Schnaubelt, and Daniel Peacock. At the prehearing conference, EPA agreed to add Ms. Buckingham as Complainant's witness, and to submit her direct testimony in writing on or before October 19, 1998, and have her appear at the hearing for cross-examination by Respondent. Therefore, the request for subpoena of Ms. Buckingham is **denied as moot.**

Complainant objected to the request for subpoena of Mr. Schnaubelt on the basis that he is not fully knowledgeable about the subject upon which Respondent requested him to testify, namely the preregistration and reformulation of Respondent's products. Complainant stated that Mr. Peacock was more knowledgeable on that subject than Mr. Schnaubelt, who would not have anything to add to Mr. Peacock's testimony. On that basis, Respondent agreed to withdraw its request for subpoena of Mr. Schnaubelt. Accordingly, that request for subpoena is **denied as moot.**

Respondent requested the subpoena for Mr. Peacock to testify regarding the reformulation of Respondent's products, since one of Respondent's defenses is that the product was only suspended because it included an ingredient that was suspended on the basis that EPA did not have enough information on it. Respondent's counsel explained that Respondent had reformulated its products, eliminating the ingredient (rotenone) from its products at the time the products were sold, and that Mr. Peacock knew about the reformulation. Complainant's counsel objected to such testimony as irrelevant and immaterial, stating that Respondent did not explain how the testimony related to the allegations in the Complaint or the Amended Answer. Complainant explained that the products were suspended because Respondent failed to timely submit data pursuant to a EPA's Data Call-In request, which applied to all rotenone registrants, and product reformulation prior to the sale of the products does not affect the validity of the Suspension Order. Complainant asserted that the issue is relevant to the undisputed fact that Respondent took steps to lift the Suspension Order, but that fact does not negate the allegation that violations occurred during the effective period of the Suspension Order.

Respondent agreed during the prehearing conference to submit by October 13, 1998 either an explanation of the relevance of Mr. Peacock's testimony and the reformulation issue, or a withdrawal of its request for subpoena of Mr. Peacock. Pursuant thereto, Respondent submitted on that date a Response to Complainant's Motion to Supplement the Prehearing Exchange and Cross-Motion for an Adjournment and Further Discovery. Therein, Respondent stated that it will withdraw its request for Mr. Peacock on condition that EPA withdraw its request to supplement its prehearing exchange with Complainant's proposed exhibits 21 though 25. Complainant maintains its request to supplement its prehearing exchange, as stated in its Reply to Respondent's Response to Complainant's Motion to Supplement Prehearing exchange .

Respondent did not, in its Response to Complainant's Motion to Supplement and Cross-Motion for Adjournment and Further Discovery, or in any other document, submit by October 13, or by the date of this Order, an explanation of the relevance of Mr. Peacock's testimony or the reformulation issue. Therefore, and further because there is no authority under FIFRA for an administrative law judge to issue a subpoena, Respondent's Motion for Subpoena of Mr. Peacock is **denied.**

II. Complainant's Motion for Leave to File Out of Time Request

Acknowledging that the deadline for filing motions had passed, Complainant requested leave to file its motions "out of time," based on an apparent inconsistency in Respondent's position as to the issue of its ability to pay, and the need to clarify the issues for hearing. Complainant asserts that it would be prejudiced if Respondent claims inability to pay without providing financial documents and information requested by Complainant. Respondent has not opposed the Motion. Accordingly, the Motion for Leave to File Out of Time is **granted.**

III. Complainant's Motions to Preclude Respondent from Litigating Issue of its Inability to Pay; and Strike Witness Testimony

Respondent stated in a letter dated September 3, 1998 addressed to the undersigned: ". . . Tifa would no longer continue to assert its defenses based upon ability to pay or size of business" and that "the issue of Tifa's financial status is now moot." The letter also stated, "Tifa does not concede that it does have the ability to pay the proposed fine, but simply deems it too costly to fight the government on this issue (due to the fact that it, in fact, does not have the ability to defend this case and pay the hefty fine EPA is seeking)." Complainant is concerned that Respondent may change its mind at hearing based on these apparently contradictory statements, and pursue the issue of inability to pay.

During the prehearing conference, Respondent agreed that it would not challenge the issues of Respondent's ability to pay the penalty, its ability to continue in business, or the Complainant's assessment of Respondent's size of business. Accordingly, the parties submitted Joint Stipulations Regarding Financial Issues on October 13, 1998. The Motion to Preclude Respondent from Litigating Issue of Inability to Pay is now **moot.**

During the prehearing conference, Respondent agreed also to withdraw from its witness list Jack Nahama, Respondent's accountant who was to testify, according to Respondent's prehearing exchange, about Respondent's business volume and inability to pay the penalty. In its submission dated October 13, Respondent confirmed that it had no objection to the entry of an order barring him from testifying. Complainant's Motion to Strike Witness Testimony is **granted.**

The parties discussed during the prehearing conference the Complainant's evidentiary burden as to the appropriateness of the penalty, in light of the Respondent's agreement not to contest issues of the ability to pay, continue in business and size of business. The Complainant has the burden of proof as to the appropriateness of the penalty, which includes consideration of Respondent's financial status, as outlined in *New Waterbury, Ltd.*, 5 EAD 529, TSCA Appeal No. 93-2 (EAB, October 20, 1994). Consequently, Complainant clarified the expected testimony of its financial expert witness, Dr. Joan Meyer, and withdrew a witness

who was expected to testify on ability to pay, Jonathan Libber, by Notice dated October 13, 1998.

IV. Complainant's Renewal of Motion for Production of Financial Documents

On July 15, 1998, Complainant filed a motion for production of Respondent's financial documents, in order to assess the size of Respondent's business and the effect of the penalty on Respondent's ability to continue in business, which are factors listed in Section 14(a) of FIFRA for determination of the penalty, and to assess Respondent's ability to pay a penalty. The motion was denied as moot based upon Respondent's agreement to produce documents requested. However, considering its decision not to pursue the issues of ability to pay or size of business, Respondent did not provide the documents. Consequently, and because Complainant was unsure of whether Respondent would pursue the issues, Complainant renewed its motion for production.

In view of Respondent's agreement that it would not challenge those issues, the parties agreed during the prehearing conference to discuss and stipulate, by October 13: (1) as to which of the documents requested in the motion Complainant would need to use in showing the appropriateness of the penalty, and (2) that Respondent would produce such documents. Counsel for each of the parties stated by telephone on October 14 with the undersigned's staff attorney that they agreed that Complainant needed and Respondent would produce its 1998 tax return and a signed 1997 tax return, requests numbered 1 and 2 in the renewed motion for production.[(2)]

Accordingly, the Motion for Production of Documents is **denied in part,** as to the requests numbered 3 through 9, and **granted in part**, as to the requests numbered 1 and 2.

V. Motion to Supplement Complainant's Prehearing Exchange

Complainant moved for addition of six documents to its prehearing exchange. Complainant's proposed exhibits 20 and 21 are letters of correspondence, dated April 8, 1996 and April 9, 1996, which Complainant alleges refute Respondent's contention that it first became aware of the Suspension Order on April 15, 1996. Complainant alleges that proposed exhibits 21, 22, and 23, letters addressed to Respondent, warn Respondent that it cannot market suspended products until it receives formal notification from the EPA that the Suspension Order has been lifted. Complainant pointed out that proposed exhibits 20 through 23 are correspondence between EPA and Respondent and therefore are not new to Respondent.

During the prehearing conference, Respondent strongly opposed the Motion to Supplement on the basis of prejudice and surprise to Respondent and Complainant's unexplained delay in producing them, and Complainant agreed to provide a written response to Respondent's opposition. Complainant submitted it on October 9, 1998. Complainant explained therein that its attorneys submitted its Motion to Supplement as soon as the information became available to it from EPA Headquarters office in Washington, D.C., which occurred the week of September 21, 1997, after Complainant interviewed witnesses in Washington D.C. Complainant asserted that the correspondence relates to Robert Stewart, one of Respondent's witnesses. Pointing out that Respondent did not request subpoenas until about the same time as the Motion to Supplement was filed, and that Complainant agreed to make available some of the witnesses requested, Complainant asserted on grounds of fairness that additional documents should be also allowed in. Respondent replied that the failure of EPA officials to produce the documents earlier was "purposeful, contrived and designed to gain a strategic advantage over Respondent."

The Rules of Practice at 40 C.F.R. § 22.19(b) provide with regard to prehearing exchanges that documents that have not been exchanged shall not be introduced into evidence without permission of the Presiding Officer, who "shall allow the parties reasonable opportunity to review new evidence." Pursuant to section 22.19(b), the parties were directed by Prehearing Order dated October 31, 1997 to submit, *inter alia,* copies of all documents and exhibits intended to be introduced into evidence. The Rules provide that the Presiding Officer shall admit all evidence which is "not

irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value." 40 C.F.R. § 22.22(a).

Parties are generally allowed to amend prehearing exchanges up to 30 days prior to hearing. Complainant moved to supplement its prehearing exchange 26 days prior to the hearing. The questions to address are whether the proposed exhibits are "new," whether Respondent would have "reasonable opportunity" to review them, and whether prejudice would result by allowing Complainant to supplement its prehearing exchange less than 30 days prior to the date of hearing.

Complainant has not set forth a persuasive reason for failing to produce the proposed exhibits 20 through 23 in the prehearing exchange. They appear to be relevant to an issue raised in the Amended Answer, namely the time at which Respondent was on notice of the Suspension Order. However, they appear to be written correspondence between EPA and Respondent. Respondent did not challenge the authenticity of the documents, and did not claim that it did not have copies of the documents in its possession. Therefore, there is no basis upon which to conclude that the documents are "new" to Respondent or would prejudice the Respondent by surprise. Furthermore, the time period of 26 days prior to hearing allows Respondent reasonable time to review the documents and is not so short as to be prejudicial to Respondent. The Motion to Supplement Complainant's Prehearing Exchange is **granted** as to proposed exhibits 20 through 23.

Complainant's proposed exhibits 24 and 25 are letters to an EPA official from AgrEvo Environmental Health and Foreign Domestic Chemicals Corporation, respectively. Complainant asserted that they discuss issues relating to alternative sources and Respondent's product formulation. Maintaining that it does not deem those issues relevant to the alleged violations, Complainant could not have addressed them in its initial and rebuttal prehearing exchange because it did not know about the issues earlier. Complainant pointed out that Respondent only recently raised questions, in its Motion for Subpoenas and in its Interrogatories served on Complainant, about alternative sources and product formulation. Complainant also asserted that Respondent has not provided a clear statement as to the nature of the product formulation issue or how it relates to the allegations in the Complaint or Amended Answer.

As to Complainant's proposed exhibit 24, Respondent asserted during the prehearing conference and in its Response to Complainant's Motion to Supplement that it plans to use proposed exhibit 24 at the hearing. Respondent asserted that it reveals that one of Complainant's witnesses, Dr. Enache, made disparaging statements about Respondent to its competitor, which Respondent may use to prove bias and violation of due process. Because Respondent intends make use of proposed exhibit 24 at the hearing, it may be inferred that adding it to the prehearing exchange would not prejudice Respondent, particularly where Respondent has not asserted any grounds for prejudice other than Complainant's delay.

There is no basis upon which to find that Respondent will be prejudiced by Complainant's proposed exhibits 24 and 25. At this point in the proceeding, however, Respondent has not clearly raised the issue of product formulation. The answer to a complaint must state "the circumstances or arguments which are alleged to constitute the grounds of defense" and "the facts which respondent intends to place at issue." 40 C.F.R. § 22.15(b). A hearing is held "upon the issues raised by the complaint and answer." 40 C.F.R. § 22.15(c). Respondent is aware that its answer must be amended to raise additional defenses, as it has moved to amend its answer in this proceeding to add other defenses. Complainant has questioned, in the prehearing conference and subsequent filings, the relevance of the product formulation issue to the complaint and answer. Respondent to date has not responded to the question. Thus, because exhibits 24 and 25 are presented on the issue of product formulation, admission into evidence may be denied as "irrelevant, immaterial . . . or of little probative value" under the standard at 40 C.F.R. § 22.22(a). Accordingly, the Motion to Supplement Complainant's Prehearing Exchange is **denied** as to Complainant's proposed exhibits 24 and 25.

ORDER

1. Respondent's Motion for Subpoenas, dated September 23, 1998, is **DENIED.**

2. Complainant's Motion for Clarification, dated September 25, 1998, is **DENIED AS MOOT.**

3. Complainant's Motion for Leave to File out of Time Request, dated September 29, 1998, is **GRANTED.**

4. Complainant's Motion to Preclude Respondent from Litigating Issue of its Inability to Pay is **DENIED AS MOOT**.

5. Complainant's Motion to Strike Witness Testimony, dated September 29, 1998, is GRANTED.

6. Complainant's Renewal of Motion for Production of Financial Documents, dated September 29, 1998, is **GRANTED in part,** as to requests numbered 1 and 2, and **DENIED in part,** as to requests numbered 3 through 9.

7. Motion to Supplement Complainant's Prehearing Exchange, dated September 30, 1989 is **GRANTED in part,** as to Complainant's proposed exhibits 20 through 23, and DENIED in part, as to Complainant's proposed exhibits 24 and 25.

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Susan L. Biro
Chief Administrative Law Judge

Dated: October 19, 1998

1. Respondent's Cross-Motion for an Adjournment and Further Discovery, dated October 13, 1998, which includes a cross-motion to amend the Answer, and Complainant's reply thereto, dated October 16, 1998, will be ruled upon separately.

2. Respondent stated further by telephone that it has sent the 1998 tax return and a "client copy" of the 1997 tax return, and that it will send a signed copy of the latter as soon as possible.