



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY BEFORE THE ADMINISTRATOR

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In the Matter of:)
MTJ American, LLC) Docket No. FIFRA-04-2014-3009
Respondent.)

ORDER

I. Background

This action was initiated March 30, 2015, by the Director of the Air, Pesticides and Toxics Management Division of Region 4 of the United States Environmental Protection Agency ("EPA" or "the Agency"), who filed a Civil Complaint under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") (codified as amended at 7 U.S.C. § 136l(a)). The Complaint charges Respondent MTJ American, LLC in three counts with distributing or selling an unregistered pesticide and producing pesticides in an unregistered establishment in violation of 7 U.S.C. §§ 136j(a)(1)(A) and 136e(a).¹ The Agency proposes a penalty of up to \$6,500 for each violation.

On May 6, 2015, Respondent filed a consolidated Motion to Dismiss, Affirmative Defenses and Answer to the Civil Administrative Complaint and Request for Hearing ("Respondent's Motion"). This filing also included a series of counterclaims made against the Agency. The Agency filed a Response to Respondent's Motion to Dismiss ("Agency Response") on May 19, 2015. The next day, the Agency submitted an Amended Response to Respondent's Motion to Dismiss ("Amended Response"). It also separately filed a Motion to Dismiss and/or Strike Respondent's Counterclaims ("EPA Motion").

Thereafter, the parties voluntarily entered an Alternative Dispute Resolution (ADR) program offered by this office. The ADR process was not successful, and on October 23, 2015, the undersigned was designated to preside over this matter. Upon review of the parties' pending motions, and for the reasons outlined below, the EPA Motion is GRANTED and Respondent's Motion is DENIED.

¹ Paragraph 56 of the Complaint erroneously cites 7 U.S.C. § 136j(a)(1)(A) as the code section violated under Count 3. In fact, the violation is of 7 U.S.C. § 136e(a), which forbids any person from producing a pesticide unless the establishment in which it is produced is registered with the EPA.

II. EPA's Motion to Dismiss and/or Strike Respondent's Counterclaims

In Respondent's Motion, which also serves as its Answer, Respondent includes two counterclaims for "declaratory relief and recovery for intentional, bad faith and wanton decisions beyond discretionary interpretation and/or application of FIFRA, as well as bad faith attempts to penalize MTJ beyond the scope of the EPA's FIFRA enforcement policies causing direct, consequential damages and special damages including attorney fees." Respondent's Motion at 22 (capitalization eliminated).

The Agency has moved to dismiss or strike these counterclaims for lack of subject matter jurisdiction.² The Agency contends the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Rules of Practice"), 40 C.F.R. Part 22, which govern the litigation of this proceeding, do not provide this Tribunal authority to entertain a respondent's counterclaims for damages or injunctive relief. EPA Mot. at 1. This Tribunal's jurisdiction is expressly set forth in 40 C.F.R. § 22.1(a), the Agency argues, "and is limited to determining whether EPA has met its burden to establish Respondent's liability for alleged violations of FIFRA, and if so, to determining an appropriate penalty, if any." EPA Mot. at 1-2. Even if the counterclaims state valid causes of action, this is not the appropriate venue in which to bring them, the Agency adds. EPA Mot. at 2. Respondent has not submitted any response to the Agency's motion or contested this jurisdictional argument.

The Rules of Practice "govern all administrative adjudicatory proceedings for . . . [t]he assessment of any *administrative civil penalty* under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended." 40 C.F.R. § 22.1(a)(1) (emphasis added). These proceedings lead to a final order that "shall resolve *only* those causes of action alleged *in the complaint*." 40 C.F.R. § 22.31(a) (emphasis added). That is, the end result of this proceeding does not contemplate the existence of any claims brought by a party other than the Agency. Unlike the Federal Rules of Civil Procedure, specifically Rule 13's counterclaim provisions, nothing in the Rules of Practice governing this penalty proceeding provides or allows for a respondent's counterclaim. Indeed, the Rules of Practice discussing motions to dismiss presume that only the Agency, and not a respondent, will assert a right to relief in these proceedings. Compare 40 C.F.R. § 22.20(a) ("The Presiding Officer, upon motion *of the respondent*, may at any time dismiss a proceeding . . . on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part *of the complainant*), with Fed. R. Civ. P.

² Although the EPA Motion is styled as a "motion to dismiss" or a "motion to strike," the Tribunal does not rely on the particular standards generally associated with each. It is not clear that the Rules of Practice offer the Agency the ability to move for dismissal for failure to establish a prima facie case as it does for a respondent. See 40 C.F.R. § 22.20(a). And in the context of motions to strike, which are not addressed by the Rules of Practice, federal judicial decisions note that such motions are "neither an authorized nor proper way to procure the dismissal of all or a part of . . . a counterclaim." *Penn Mut. Life Ins. Co. v. Berck*, 2010 U.S. Dist. LEXIS 86025, at *5 (D. Md. Aug. 20, 2010) (quoting 5C Wright & Miller, *Federal Practice & Procedure* § 1382 (3d ed. 2004)) (quotation marks omitted). Consequently, the Tribunal in this case simply recognizes that it does not have the ability or jurisdiction to hear Respondent's "counterclaims" and strikes them on those grounds.

12(b)(6) (“[A] party may assert the following defenses by motion: . . . failure to state a claim upon which relief can be granted”) (emphasis added).

Likewise, there is no provision in FIFRA that contemplates a counterclaim raised within an administrative penalty action brought under 7 U.S.C. § 136l(a). Further, the burden of establishing a federal Tribunal’s limited jurisdiction falls on the party asserting jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); 13D Wright & Miller § 3522, pp. 104-07; 15 *Moore’s Federal Practice* ¶ 102.14. To date, despite the passage of some five months, Respondent has filed no opposition to the EPA Motion. “Any party who fails to respond within the designated period waives any objection to the granting of the motion.” 40 C.F.R. § 22.16(b). Respondent has not demonstrated that this Tribunal is authorized to adjudicate its counterclaims or issue the relief sought, nor has this Tribunal independently found any authority supporting such a proposition. *Cf.* 56 Fed. Reg. 29996 (Jul. 1, 1991) (Proposed rule, Non-APA, Consolidated Rules of Practice for Administrative Assessment of Civil Penalties) (“[R]espondents (or other participants) may not make counterclaims or cross-claims within the administrative forum Should a party or other participant wish to engage in affirmative litigation with the Agency, it may do so to the extent authorized by statute or regulation in the appropriate judicial forum, or in another administrative forum.”). To the extent Respondent believes it has any viable claims against the Agency, it should raise them in the appropriate forum. This is not it.

Consequently, the EPA’s Motion is **GRANTED**. Because the Tribunal does not have the ability or jurisdiction to hear Respondent’s counterclaims, they must be stricken from the record.

III. Respondent’s Motion to Dismiss

Respondent’s motion to dismiss appears on the first page of its filing, above its Answer, and reads in full as follows:

The plain reading of materials referenced by the EPA Complaint shows that (a) the EPA does not have authority pursuant to FIFRA and no standing to bring action against Respondent; and (2) there is no violation of FIFRA, including without limitation that MTJ does not nor has made any pesticidal or “public health claim” in violation of FIFRA and (3) the statements cited in the Complaint support nothing more than MTJ’s products being inclusive in express exceptions of FIFRA. The Complaint should be dismissed pursuant to Rule 12(b)(6) and all similar rules set forth in the Administrative Procedure Act.

Respondent’s Mot. at 1.

The Agency argues in its response and amended response to this motion that Respondent’s Motion is facially defective because it does not “[s]tate the grounds [for relief], with particularity” as mandated by 40 C.F.R. § 22.16(a)(2). Agency Response at 2. Rather, the Agency contends, the motion is “vague and general.” Agency Response at 2. Further, it states,

the Complaint establishes a prima facie case for each of the three violations alleged. Amended Response at 4-5.³

The Rules of Practice state:

The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

40 C.F.R. § 22.20(a). Motions to dismiss under § 22.20(a) of the Rules of Practice are analogous to motions for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and case law interpreting that rule provides guidance in addressing a respondent's motion. *See Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 (EAB 1993). Under the federal rules, a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the factual allegations in a complaint must be enough to "state a claim for relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (dismissal for failure to state a claim upon which relief may be granted does not require appearance, beyond a doubt, that plaintiff can prove no set of facts that would entitle it to relief). A claim has "facial plausibility" when the factual allegations "allow[] the court to draw the reasonable inference that the defendant is liable for the conduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). The "plausibility standard" requires the Complaint to present "more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 557). The allegations must cross "the line between possibility and plausibility of 'entitlement to relief.'" *Id.* In determining whether a complaint fails to state a claim, only the facts alleged in the complaint are considered, along with attached documents or matters as to which judicial notice may be taken. *Tellabs, Inc. v. Makar Issues & Rights, Ltd.*, 551 U.S. 308, 322 (U.S. 2007). However, the allegations in the complaint are to be taken as true, and all inferences are drawn in favor of the plaintiff. *Liphatech Inc.*, Docket No. FIFRA-05-2010-0016, 2010 EPA ALJ LEXIS 27, at *18 (ALJ, Dec. 29, 2010). *See also Twombly*, 550 U.S. at 555; *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

Outside of certain exceptions, "no person in any State may distribute or sell to any person any pesticide that is not registered under [FIFRA]." 7 U.S.C. § 136a(a). Indeed, it is "unlawful for any person in any State to distribute or sell to any person any pesticide that is not registered under [7 U.S.C. § 136a] or whose registration has been canceled or suspended, except to the

³ The Agency Response further contends the motion should be denied because there are material facts in dispute. Agency Response at 2. However, this standard applies to motions for accelerated decision, not a motion to dismiss. On a motion to dismiss such as the one filed by Respondent, the typical question is whether the complaint states a claim upon which relief may be granted. Additionally, the Amended Response makes the argument that Respondent has not satisfied the requirement that motions "[b]e accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon." 40 C.F.R. 22.16(a)(4); Amended Response at 4. But this incorrectly presumes Respondent's Motion has relied on these materials. It has not.

extent that distribution or sale otherwise has been authorized by the Administrator under [FIFRA].” 7 U.S.C. § 136j(a)(1)(A). Similarly, “[n]o person shall produce any pesticide subject to [FIFRA] or active ingredient used in producing a pesticide subject to [FIFRA] in any State unless the establishment in which it is produced is registered with the Administrator.” 7 U.S.C. § 136e(a). It also is “unlawful for any person who is a producer to violate any of the provisions of [7 U.S.C. § 136e].” 7 U.S.C. § 136j(a)(2)(L). However, Agency regulations provide that any “article or substance treated with, or containing, a pesticide to protect the article or substance itself” is exempt from all FIFRA provisions “if the pesticide is registered for such use” and “intended for use, and used, only in” that capacity. 40 C.F.R. § 152.25(a) (“Treated Articles Exemption”). The Agency has further clarified through guidance documents that this exemption “covers qualifying treated articles and substances bearing claims to protect *the article or substance itself*. EPA does not regard this exemption as including articles or substances bearing implied or explicit public health claims against human pathogens.” See Pesticide Registration (PR) Notice 2000-1, Applicability of the Treated Articles Exemption to Antimicrobial Pesticides, at 1 (March 6, 2000) (available online at <http://www2.epa.gov/sites/production/files/2014-04/documents/pr2000-1.pdf>) (emphasis added). Examples of claims or types of claims for a treated article that the Agency has said “would lead to a requirement to register the article as a pesticide product” include but are not limited to “antibacterial,” “bactericidal,” or “germicidal.” *Id.* at 5.

A “person” is “any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.” 7 U.S.C. § 136(s). “[T]o distribute or sell” means to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver.” 7 U.S.C. § 136(gg). A “pesticide” includes “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.” 7 U.S.C. § 136(u). EPA regulations expand on this statutory definition:

A substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if: (a) The person who distributes or sells the substance claims, states, or implies (by labeling or otherwise): (1) That the substance (either by itself or in combination with any other substance) can or should be used as a pesticide.

40 C.F.R. 152.15(a)(1). “Pests” are “(1) any insect, rodent, nematode, fungus, weed, or (2) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism (except viruses, bacteria, or other micro-organisms on or in living man or other living animals) which the Administrator declares to be a pest . . .” 7 U.S.C. § 136(t). An “antimicrobial pesticide” includes a pesticide intended to “disinfect, sanitize, reduce, or mitigate growth or development of microbiological organisms.” 7 U.S.C. § 136(mm). A “‘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.” 7 U.S.C. § 136(w). “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. § 136(dd).

With respect to Counts 1 and 2, the Agency may establish a FIFRA violation under 7 U.S.C. § 136j(a)(1)(A) by showing that the Respondent: (1) is a person in any State, (2) who distributed or sold to any person, (3) any pesticide, (4) that is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a. *United Global Trading, Inc.*, EPA Docket No. FIFRA-04-2011-3020, 2014 EPA ALJ LEXIS 9, at *20 (ALJ, Feb. 28, 2014).

In Count 1, the Agency alleges Respondent violated 7 U.S.C. § 136j(a)(1)(A) when it distributed or sold the Fusion Advantage University Mattress. Specifically, the Agency asserts Respondent is a company in North Carolina, and therefore a person in a state, who distributed or sold a pesticide when it sold or shipped the Fusion Advantage University Mattress in April or July 2010. Compl., ¶¶ 28-32. At the time of shipment, the Fusion mattress qualified as both a pesticide and a microbial pesticide, the Agency contends, because claims about its pesticidal properties were advertised in print and online using the following language: “Bacteria Resistant,” “Anti-Microbial/Anti-Fungal/Bacteriostatic/Virus Barrier,” and “Anti-microbial, anti-fungal, bacteriostatic, virus barrier.” Compl., ¶¶ 24-25. This advertising constituted “public health claims which extend beyond the protection of the article itself,” the Complaint states, rendering the Treated Articles Exemption inapplicable. Compl., ¶¶ 29, 35. Finally, the Agency alleges this pesticide, the Fusion mattress, was not registered under Section 3 of FIFRA, 7 U.S.C. § 136a. Compl., ¶ 34.

Similarly, in Count 2, the Agency alleges Respondent violated 7 U.S.C. § 136j(a)(1)(A) when it distributed or sold the Clear Safe Detention Mattress. The Agency contends Respondent, a person, distributed or sold a pesticide when it sold or shipped the Detention mattress in June 2010. Compl., ¶¶ 46-47. At the time of shipment, the Detention mattress qualified as both a pesticide and a microbial pesticide, the Agency alleges, because claims about its pesticidal properties were advertised in print and online using the following language: “Bacteria Resistant,” “Anti-Microbial/Anti-Fungal/Bacteriostatic/Virus Barrier,” and “Anti-microbial, anti-fungal, bacteriostatic, virus barrier.” Compl., ¶¶ 38-39, 44-45. This advertising constituted “public health claims which extend beyond the protection of the article itself,” the Complaint states, rendering the Treated Articles Exemption inapplicable. Compl., ¶¶ 43, 49. Finally, the Agency alleges this pesticide, the Detention mattress, was not registered under Section 3 of FIFRA, 7 U.S.C. § 136a. Compl., ¶ 48.

Under Count 3, the Agency charges Respondent with violating 7 U.S.C. § 136e(a) by producing a pesticide in an unregistered establishment. As set forth in Counts 1 and 2, the Agency has alleged the Fusion and Detention mattresses are pesticides. Further, the Agency asserts it inspected Respondent’s North Carolina facility and determined that in making the mattresses Respondent was a “producer” who was “producing” pesticides at the time of the inspection. Compl., ¶¶ 52-53. Respondent’s facility, an establishment, is not registered with the EPA Administrator under 7 U.S.C. § 136e, the Agency states. Compl., ¶¶ 54-55.

Based on the allegations in the Complaint as outlined above, the facts are sufficient to “state a claim for relief that is plausible on its face.” To the extent Respondent challenges the

Agency's authority and standing under FIFRA to bring this action, it is clear based on the statutes and regulations cited above that the act does provide the Agency that authority. *See also* 7 U.S.C. § 136l(a)(1) (stating that the Agency may assess a civil penalty against "[a]ny registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of" FIFRA). Whether the Agency will be able to prove its case factually or legally is another matter. In its motion, Respondent argues that it has not made a "public health claim" in violation of FIFRA and that it qualifies for the Treated Articles Exemption. Perhaps so, but this requires further development of the record to ascertain. Otherwise, accepting the allegations as true and drawing all inferences in its favor, the Agency has plausibly alleged Respondent does not qualify for the exemption based on labeling used to advertise the mattresses at issue. To that extent, the Agency has met this proceeding's minimal requirements to survive a motion to dismiss.

Respondent's Motion is **DENIED**.

A handwritten signature in black ink, appearing to read 'S. Biro', written over a horizontal line.

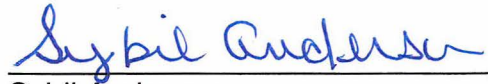
Susan L. Biro
Chief Administrative Law Judge

Dated: NOVEMBER 17, 2015
Washington, D.C.

In the Matter of MTJ American, LLC Respondent
Docket No. FIFRA-04-2014-3009

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order** dated November 17, 2015, was sent this day in following manner to the addresses listed below:



Sybil Anderson
Office of Administrative Law Judges
U.S. Environmental Protection Agency
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Dated: **November 17, 2015**

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