

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)
) FIFRA 04-2014-3009
 MTJ American, LLC)
)
 Respondent)
 _____)

COMPLAINANT'S AMENDED RESPONSE TO RESPONDENT'S
MOTION TO DISMISS

On May 5, 2015, MTJ American, LLC (Respondent) served on the U.S. Environmental Protection Agency, Region 4 (EPA or Complainant) a Motion to Dismiss, Affirmative Defenses and Answer to the Civil Administrative Complaint and Request for Hearing in the above captioned matter. Respondent's pleading also included counterclaims for relief. On May 15, 2015, Complainant mailed to the U.S. EPA Office of Administrative Law Judges via overnight mail a Response to Respondent's Motion to Dismiss in the above captioned action. The Response to Respondent's Motion to Dismiss was mailed prematurely. Complainant therefore submits this Amended Response to Respondent's Motion to Dismiss as a supplement to its previously filed response. Simultaneously with this Amended Response to Respondent's Motion to Dismiss, EPA is filing separately a Motion to Dismiss and/or Strike Respondent's Counterclaims.

I. Standard of Review

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and the Revocation/Termination of Suspension of Permits (Rules of Practice), govern this proceeding. 40 C.F.R. Part 22. The Rules of Practice provide that the Presiding Officer may, upon motion of the respondent, 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.” 40 C.F.R. § 22.20(a).

The Environmental Appeals Board considers motions to dismiss under Section 22.20(a) to be analogous to motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure (FRCP). In the Matter of Asbestos Specialists, Inc., TSCA Appeal no. 92-3, 4 E.A.D. 819, 827 (EAB, Oct. 6, 1993). “To survive a [FRCP] 12(b)(6) motion to dismiss, a complaint ‘does not need detailed factual allegations’, but must provide the plaintiff’s grounds for entitlement to relief – including factual allegations that when assumed to be true ‘raise a right to relief above the speculative level.’”, Cuvillier v. Taylor, 503 F.3d 397, 401 (5th Cir. 2007) quoting Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1964-65 (2007). The statement need only “give the defendants fair notice of what the...claim is and the grounds upon which it rests.” Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007), citing Twombly, Id. “In addition, when ruling on a defendant’s motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.” Id.

II. Argument

Complainant hereby incorporates those arguments previously made in its Response to Respondent’s Motion to Dismiss. Complainant further argues that it has alleged sufficient facts to establish a prima facie claim regarding Respondent’s violations of FIFRA. In Count 1, EPA alleged that:

- 1) Respondent’s on-line advertising for the Fusion Advantage University Mattress contained the terms Bacteria Resistant and Anti-Microbial/Anti-Fungal/Bacteriostatic/Virus Barrier.

- 2) Respondent's sales brochure for the Fusion Advantage University Mattress contained the terms, Anti-microbial, anti-fungal, bacteriostatic, virus barrier.
- 3) The terms Bacteria Resistant and Anti-Microbial, Anti-Fungal, Bacteriostatic and Virus Barrier are pesticidal claims, that these claims are public health claims which extend beyond the protection of the article itself, and that the Fusion Advantage University Mattress is therefore a pesticide and is not exempt from FIFRA regulation.
- 4) Respondent distributed or sold Fusion University Advantage Mattresses in April or July 2010, and that at that time, the Fusion Advantage University Mattress was not registered as a pesticide under Section 3 of FIFRA 7 U.S.C. § 136a.

Therefore, EPA contends that it has satisfied its burden of establishing a prima facie case in the Complaint for Count 1.

In Count 2, EPA alleged that:

- 1) Respondent's on-line advertising for the Clear Safe Detention Mattress contained the terms Bacteria Resistant and Anti-Microbial/Anti-Fungal/Bacteriostatic/Virus Barrier.
- 2) Respondent's sales brochure for the Clean Safe Detention Mattress contained the terms Anti-microbial, anti-fungal, bacteriostatic, virus barrier.
- 3) The terms Bacteria Resistant and Anti-Microbial, Anti-Fungal, Bacteriostatic and Virus Barrier are pesticidal claims, that these claims are public health claims which extend beyond the protection of the article itself, and that the Clear Safe Detention Mattress is therefore a pesticide and is not exempt from FIFRA regulation.
- 4) Respondent distributed or sold Clear Safe Detention Mattresses in or about June 2010, and that at that time, the Clear Safe Detention Mattress was not registered under Section 3 of FIFRA 7 U.S.C. § 136a.

Therefore, EPA contends that it has satisfied its burden of establishing a prima facie case in the Complaint for Count 2.

In Count 3, EPA incorporates by reference all previous allegations and further alleges that:

- 1) Respondent is a producer of pesticides.
- 2) Respondent's establishment is not registered with the Administrator as required by Section 7(a) of FIFRA, 7 U.S.C. § 136e(a).

Therefore, EPA contends that it has satisfied its burden of establishing a prima facie case in the Complaint for Count 3.

In its Motion to Dismiss, Respondent does not specifically allege that EPA has failed to establish a prima facie case of liability under FIFRA for the alleged violations. Instead, Respondent's Motion to Dismiss is premised on unsubstantiated claims 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 [make] 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." [sic]

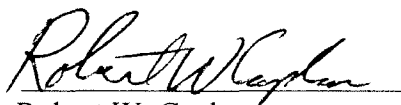
Respondent's Motion to Dismiss should be denied on several grounds. In addition to those grounds cited in Complainant's Response to Respondent's Motion to Dismiss, Complainant makes the following arguments. First, in addition to the fact that Respondent's Motion to Dismiss was not accompanied by any evidence as stated in Complainant's Response to Respondent's Motion to Dismiss, Respondent's Motion to dismiss was unaccompanied by an affidavit, certificate, or legal memorandum relied upon, as required by 40 C.F.R. § 22.16(a)(4). Second, FIFRA provides Complainant with the express authority to file complaints for violations

of the statute. As stated in EPA's Complaint, Section 14 of FIFRA, 7 U.S.C. § 136l, in conjunction with the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and its implementing regulation, the Civil Monetary Penalty Inflation Adjustment Rule, codified at 40 C.F.R. Part 19, authorize EPA to issue a complaint for the assessment of a civil penalty of up to \$6,500 for each violation of FIFRA. Third, as noted above, Complainant has established a prima facie case concerning Respondent's alleged violations of FIFRA including the fact that Respondent's products are not exempt from FIFRA regulation.

For all of the foregoing reasons, Complainant asserts that its Complaint sets forth a prima facie case under FIFRA and that Respondent has proven up no other grounds which show that Complainant has no right to the requested relief. Accordingly, Complainant respectfully requests that Respondent's Motion to Dismiss be denied.

Respectfully submitted,

Date: 5/20/15


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CERTIFICATE OF SERVICE

I certify that the foregoing Complainant's Amended Response to Respondent's Motion to Dismiss was transmitted according to the manner specified, to the listed parties on the date provided below:

METHOD:

PDF filed electronically via
OALJ Electronic Filing System

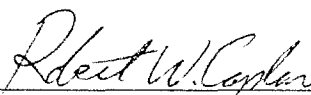
TO:

Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Mail Code 1900R
1200 Pennsylvania Avenue, N.W.
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Copy by first class mail

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