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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the matter of The Bullen Companies, Inc., III-470-C, C & III-473-C Respondent))))))	IF&R Docket Nos. III-471-C, III-472-
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ORDER DENYING RESPONDENT'S MOTION TO DISMISS AND GRANTING,
IN PART, COMPLAINANT'S MOTION FOR ACCELERATED DECISION

These consolidated cases arise under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). 7 U.S.C. § 136 *et seq.* The U.S. Environmental Protection Agency ("EPA") initiated this action against The Bullen Companies, Inc. ("Bullen"), alleging 13 violations of FIFRA. The alleged violations include claims of adulterated product, misbranded product, and the sale of unregistered pesticide.

This case will be heard on August 11, 1999, in Philadelphia, Pennsylvania. In the meantime, however, the parties have filed substantive cross-motions. Bullen, appearing *pro se*, has filed a motion to dismiss the counts alleged in docket number III-472-C, while EPA has filed a motion for accelerated decision with respect to all counts. 40 C.F.R. 22.20. These motions are addressed below.

A. The Motion To Dismiss

Bullen seeks dismissal of Counts II, IV, V, VII, VIII and IX of docket number III-472-C. ⁽¹⁾ Bullen's motion, however, was not filed on time. By order dated April 15, 1999, the parties were advised that the deadline for filing substantive motions was June 14, 1999. This filing deadline was also explained to the parties during a

conference call held on April 13, 1999. Despite these facts, Bullen's motion to dismiss was not filed until June 23, 1999, nine days out of time. Respondent offered no explanation for the lateness of its filing. While the temptation to allow this late-filing by a *pro se* litigant is considerable, it would not be fair to hold EPA to one standard of conduct, *i.e.*, timely filing, and Bullen to another. Accordingly, Bullen's motion to dismiss is *denied*.⁽²⁾

B. The Motion For Accelerated Decision

Claiming that no genuine issues of material fact exist, and that it is entitled to judgment as a matter of law, EPA seeks accelerated decision as to all 12 remaining counts. EPA seeks judgment as to liability only; its motion does not address the issue of civil penalty.

Docket No. III-470-C

This docket number involves one count. In the complaint, EPA alleges that Bullen violated FIFRA Sections 12(a)(1)(C) & (E), 7 U.S.C. § 136j(a)(1)(C) & (E), by selling or distributing an adulterated pesticide.⁽³⁾ Section 2(c)(1) of FIFRA, 7 U.S.C. § 136(c)(1), provides that a pesticide is adulterated if "its strength or purity falls below the professed standard of quality as expressed on its labeling under which it is sold."

Insofar as the facts are concerned, Bullen admits that it is the registrant for the pesticide "Residual Insect Spray II Contains Pyrenone and Diazinon." Ans. ¶ 6. The company further admits that Clausen Marketing Associates, Inc. ("Clausen"), was a supplemental distributor of this product under the brand name "CMA Insect Eliminator Carpet Water-Based Insect Spray and Deodorant," otherwise referred to here as "CMA Insect Eliminator." Ans. ¶ 7. It also is undisputed that the product label for the CMA Insect Eliminator states that the product contains 0.50% diazinon. Ans. ¶ 13.

On November 18, 1993, Indiana State Inspector Kevin Neal conducted an inspection of the American Sanitary Supply Company ("American"). During the inspection, Neal collected an invoice showing that Clausen had shipped CMA Insect Eliminator to American. Neal also collected from American a sample of the product CMA Insect Eliminator. (Neal Declaration.)

Thereafter, two separate laboratory analyses were conducted on this sample. The analyses were performed by Yingjuan Lu, a Formulations Chemist with the Office of Indiana State Chemist and Seed Commissioner. Lu's analyses showed "no detectable levels of diazinon." (Lu Declaration.) Accordingly, EPA submits that the pesticide was adulterated in violation of Section 12(a)(1)(E).

Bullen offered little in its response to EPA's motion for accelerated decision as to this count. Moreover, in a letter dated July 22, 1999, the respondent stipulates that testing of the CMA Insect Eliminator was done correctly, and it otherwise seems to concede the violation. Given the evidence submitted by EPA, and taking into account Bullen's response, it is held that complainant has established a violation of FIFRA Section 12(a)(1)(E) and that it is entitled to accelerated decision.

Docket No. III-471-C

Again, only one count is at issue here. As in the previous docket number, EPA alleges a violation of FIFRA Sections 12(a)(1)(C) & (E) on the ground that Bullen allegedly sold and distributed an adulterated pesticide. The brand name of this pesticide is "AIRX 55 Residual Insect Spray," also known as "AIRX 55."

In support of its motion for accelerated decision, EPA submitted the declarations of an inspector who collected a sample of AIRX 55 (Miller Declaration), and the lab personnel who analyzed the sample (Lim and Chuek Declarations). The laboratory analyses conducted by EPA show that the concentration of active ingredients diazinon, pyrethrin, and piperonyl butoxide were approximately 96% to 98% lower than the levels claimed on the product's label.

As with the previous docket number, respondent concedes the accuracy of the EPA test results and it also appears to concede the fact of violation. Accordingly, based upon the declarations submitted by EPA, and the lack of any meaningful rebuttal by respondent, a violation of Section 12(a)(1)(E) is established and complainant's motion for accelerated decision is granted as to this count.

Docket No. III-472-C

This docket number includes eight counts. In Count I, EPA alleges the sale of a misbranded pesticide in violation of Section 12(a)(1)(E). The involved pesticide is "Solar System Day-Lite." EPA submits that a violation occurred because the label of this product did not include the name and address of the producer, registrant, or the person for whom the product was produced. FIFRA Section 2(q)(2)(C)(i), 7 U.S.C. § 136(q)(2)(C)(i), provides that a pesticide is misbranded if its label fails to contain this information.

Bullen does not deny that this violation "apparently" occurred. In addition, through the declaration of Inspector Larry Catton, EPA has established that the pesticide Solar System Day-Lite was misbranded in violation of FIFRA. Accordingly, EPA's motion for accelerated decision is granted as to this count.

Count III involves the sale or distribution of "AIRX 80 Sanitizing/Extraction Type Carpet Cleaner With Airicide Odor Counteractant." Here, EPA again alleges a violation of Section 12(a)(1)(E) on the ground that the involved pesticide was misbranded.

EPA builds its case as to Count III on the declaration of Inspector James Hudson. During an inspection of respondent's facility, Hudson obtained a sample of a product bearing EPA Registration Number 1459-74-44089. This product bore a label containing the product name "AIRX 80 Sanitizing/Deodorizing Carpet Cleaner for Extraction and Bonnet Cleaning." This label, however, did not contain the registered name for EPA Registration Number 1459-74-44089. The registered name is "AIRX 80 Sanitizing/Extraction Type Carpet Shampoo with Airicide Odor Counteractant." EPA argues, therefore, that the pesticide was misbranded pursuant to the provisions of FIFRA Section 2(q)(2)(C)(ii).

While Bullen is generally troubled with EPA's decision to proceed against it on this count, it offers little in the way of rebuttal evidence. Accordingly, in view of Inspector Hudson's declaration, as well as the legal arguments advanced by EPA, it is held that complainant is entitled to accelerated decision as to Count III.

Counts IV, V, and VI involve the alleged sale of an unregistered pesticide, "AIRX 22," also known as "RX 22." Section 12(a)(1)(A) of FIFRA makes it unlawful to sell an unregistered pesticide. It is undisputed that the product has not been registered with EPA. The question, however, is whether the product is in fact a

pesticide.

EPA rests its claim that AIRX 22 is a pesticide on the basis of an AIRX 22 product label and related literature. See Hudson Declaration. Bullen counters with the argument that the involved product is not a pesticide because it treats odors in the air, and not bacteria growth. Also, both complainant and respondent rely upon the meaning of the term "Airicide" to support their positions.

On considering the parties arguments, it is held that summary judgment is not an appropriate disposition for Counts IV, V, and VI. First, EPA acknowledges that the arguments raised in its motion for accelerated decision partially differ from the complaint filed against Bullen. See EPA Mot. at 17 n.5. While this ultimately may turn out to have little or no effect upon the case, as EPA argues, it nonetheless makes the Agency's request for accelerated decision more tenuous than it otherwise might have been. Second, there appears to be genuine issues of fact regarding the precise nature of AIRX 22, which in turn has a significant affect upon its pesticide status. In sum, whether respondent violated FIFRA as alleged in Counts IV, V, and VI is a matter that can be resolved only in the context of a hearing on the merits.

Next, EPA seeks judgment as to Counts VII, VIII, and IX. EPA states that these counts are very similar to Counts IV, V, and VI, "except that these Counts involve a different unregistered product, 'AIRX 60,' also known as 'RX 60.'" EPA Mot. at 24. Each count alleges a violation of Section 12(a)(1)(A). Both EPA and Bullen essentially raise the same arguments with respect to these counts that were raised with respect to Counts IV, V, and VI. Accordingly, for the same reasons, EPA's motion for accelerated decision is denied as to Counts VII, VIII, and IX.

Docket No. III-473-C

This docket number involves two counts. In Count I, EPA alleges a violation of Sections 12(a)(1)(C) & (E) on the ground that respondent's pesticide, "Sani-Brite Sanitizer," was adulterated, and that it has a composition which differs from its registered composition. In Count II, EPA alleges a violation of Section 12(a)(1)(E). Here, complainant asserts that the involved product was misbranded because it did not bear the registered product name.

In support of its motion for accelerated decision as to Count I, EPA submitted the declarations of Ozar Alcantar Leal, Lucita Altemero, and Bean May Lim. Leal is the inspector who collected a sample of the pesticide, while Altemero and Lim conducted chemical analyses on the sample. The separate analyses performed by Altemero and Lim establish that the pesticide Sani-Brite Sanitizer was significantly under formulated with respect to its active ingredients. Altemero's analysis showed that the level of total quaternary ammonium compounds was approximately 94.5% less than the level stated on the product label, while Lim's analysis showed this deficit to be 93.5%.

Bullen does not challenge the manner in which the pesticide sample was collected and analyzed. Nor does it challenge the results obtained by Altemero and Lim. Instead, the respondent generally raises issues that may have a bearing on the penalty amount to be assessed for the violation. Accordingly, given the undisputed evidence presented by EPA, the complainant is awarded accelerated decision as to Count I.

In Count II, EPA asserts that Bullen violated Section 12(a)(1)(E) because the product bore the name "Sani-Brite," followed in smaller type by the words "Cleaner . Sanitizer . Deodorizer" rather than the product's EPA-registered name. In that

regard, the approved name for the registered pesticide product with EPA Reg. No. 1459-74-11200 is "Sani-Brite Carpet Extraction Concentrate." See Ans. ¶ 25; see also, EPA Mot. at 25. In its brief response, Bullen concedes these facts. Accordingly, EPA is awarded judgment as to Count II.

ORDER

For the foregoing reasons, EPA's motion for accelerated decision is *granted* as to liability with respect to Count I (docket number III-470-C), Count I (docket number III-471-C), Counts I and III (docket number III-472-C), and Counts I and II (docket number III-473-C). EPA's motion for accelerated decision is *denied* with respect to Counts IV, V, VI, VII, VIII, and IX (docket number III-472-C).

The hearing scheduled in this matter will address the amount of the civil penalty to be assessed for the violations found with respect to Count I (docket number III-470-C), Count I (docket number III-471-C), Counts I and III (docket number III-472-C), and Counts I and II (docket number III-473-C). The hearing also will address the issues of liability and penalty with respect to Counts IV, V, VI, VII, VIII, and IX (docket number III-472-C).

Carl C. Charneski
Administrative Law Judge

Issued: July 27, 1999
Washington, D.C.

1. In an order predating Bullen's motion, Count II of docket number III-472-C was dismissed.
2. In any event, to the extent relevant, the arguments raised in respondent's motion to dismiss are considered in opposition to EPA's motion for accelerated decision.
3. In its motion for accelerated decision, however, EPA cites only to Section 12(a)(1)(E).

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