

SIMON GLUCK & KANE LLP
CUSTOMS & INTERNATIONAL TRADE LAW
250 WEST 34TH STREET-SUITE 4615
ONE PENN PLAZA
NEW YORK, N. Y. 10119

TEL: 212-775-0055
FAX: 212-839-9103

E-MAIL: ckane@customs-law.com
INTERNET: www.customs-law.com

New York- January 21, 2014

Via Fed Ex 8013 5075 7731
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, NY 10007-1866

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2014 JAN 23 A 11:50
REGIONAL HEARING
CLERK

Attention: Ms. Karen Maples
Regional Hearing Clerk

Regarding: In the Matter of Mara Shipping Inc.
Docket No. FIFRA-02-2013-5111

Dear Ms. Maples:

Enclosed is the Answer and Request for Hearing regarding Docket No. FIFRA-0202013-5111.

Thank you for your consideration.

Sincerely,
SIMON GLUCK & KANE LLP



Christopher M. Kane

Attachments
CMK/ps

{00236638;1}

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

-----X
In the Matter of: :
: :
Mara Shipping, Inc., :
: :
: :
Respondent. :
-----X

ANSWER and REQUEST FOR HEARING

Docket No. FIFRA-02-2013-5111

REGIONAL HEARINGS
CLERK

2014 JAN 23 A 11:50

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II

ANSWER and REQUEST FOR HEARING

Pursuant to 40 C.F.R. 22.15 of the Environmental Protection Agency (“EPA”) Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, Respondent requests a hearing and responds to the allegations in the Complaint as follows:

1. Denies. This proceeding is not authorized by law or regulation. Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”), 7 U.S.C. 136, may be assessed a civil penalty by the Administrator of not more than \$5,000 for each offense. At all relevant times, Respondent was and is a licensed Customs broker and is not and was not a registrant, not a commercial applicator, not a wholesaler, not a dealer, not a retailer and not a distributor of any kind. Respondent is not subject to any civil penalty under FIFRA as it is not a person named thereunder.

The EPA has never to Respondent’s knowledge issued an administrative decision nor have any courts upheld or imposed liability on a licensed Customs broker where there has been a failure to file a notice of importation separately or in addition to the obligation imposed by the statute on registrants, commercial applicators, wholesalers, dealers, retailers and distributors.

2. Denies for lack of knowledge or information sufficient to form a belief as to the truth of the allegations made in this paragraph.

3. Admits to having an office at the stated address. Denies that it is a “facility” being any more than an office. There are no receiving, no storing, no unloading or loading, no distribution of goods included in the importations identified in this proceeding, nor are there any goods imported or domestic at the stated address.

4. Admits.

5. Admits in part. The statute includes the averred language is 7 U.S.C. 136(u)(1), but includes other language in additional language and further definition of the term.

6. Denies. Respondent denies for lack of knowledge or information sufficient to form a belief as to the truth of the allegations made in this paragraph. Statute cited pertains to the responsibilities of the Secretary of the Treasury in connection with imports of pesticides. Respondent understands that the Secretary of the Treasury may no longer have such responsibilities.

7. Denies. The language of 7 U.S.C. 136o states that the Secretary of the Treasury, in consultation with the Administrator, shall prescribe regulations for the enforcement of FIFRA subsection 17(c). Respondent understands that the Secretary of the Treasury may no longer have such responsibilities.

8. Admits in part. 19 C.F.R. 110-12.117 are regulations enforced by U.S. Customs. Respondent understands that the Secretary of the Treasury may no longer have such responsibilities.

9. Admits in part. An IMPORTER desiring to import pesticides into the United States shall submit a Notice of Arrival of Pesticides and Devices prior to the arrival of the shipment in the United States. This is a single obligation of the IMPORTER. No separate obligation is imposed on any other person or agent to file this notice. The fact that the EPA Administrator shall complete and return the notice indicating the disposition to be made of the shipment of pesticides or devices upon its arrival in the United States to the importer or its agent creates no obligation for anyone other than the IMPORTER to file the notice to cover the IMPORTER’S shipment.

The Division of Enforcement and Compliance Assistance is seeking to impose an obligation and enforce a failure to meet that obligation to file a notice of importation without statutory or regulatory authority. As the obligation to file a tax return under 26 U.S.C. 6012(a)(1) is personal to the taxpayer, notwithstanding the use of a tax preparer. The Internal Revenue Service has no separate or additional claim against a preparer who has not filed a return. Neither does the EPA against a licensed Customs broker if a notice of importation of pesticides is not filed. Conversely, if the IMPORTER had filed the notice, EPA has no authority to seek recourse

against a licensed Customs broker (or anyone else) simply because the broker had NOT filed the notice.

10. Admits in part. This paragraph is quoted verbatim from 19 C.F.R. 101.1. However, while persons of several descriptions MAY be the importer, there is only ONE IMPORTER for any particular importation. Complainant's attempted application of the FIFRA penalty provisions relies on the establishment of Respondent as the IMPORTER and fails by virtue of the fact that Respondent was NOT the IMPORTER. Because a person "may" be the IMPORTER does not mean that it is always the IMPORTER or that it is *de facto* or *de jure* the IMPORTER in any particular instance without having undertaken that role as evidenced by the facts. Complainant ignores the facts and the law and concludes that because a licensed Customs broker *may* be the IMPORTER under certain defined circumstances, it is *always* the IMPORTER. That is wrong in the extreme.

Respondent was not the person primarily responsible for the payment of duties nor was Respondent authorized to act nor did it agree to act as importer, nor does it appear as importer of record and/consignee on any of the import documents filed with U.S. Customs for the importations in issue in this proceeding. As stated in U.S. Customs ruling HQ H080181 dated December 30, 2009:

"Under 19 U.S.C. § 1484(a)(1), a party that qualifies as an "importer of record" may make entry for imported merchandise; and under 19 U.S.C. 1484(a)(2)(B), in pertinent part, the "importer of record" may be either the owner or purchaser of the merchandise. CBP Directive 3530-002A, dated June 27, 2001, is instructive in interpreting the meaning of the terms "owner or purchaser" for purposes of section 1484(a)(2)(B):

The terms "owner" and "purchaser" include any party with a financial interest in the transaction, including, but not limited to, the actual owner of the goods, the actual purchaser of the goods, a buying or selling agent, a person or firm who imports on consignment, a person or firm who imports under loan or lease, a person or firm who imports for exhibition at a trade fair, a person or firm who imports goods for repair or alteration or further fabrication, etc."

In fact, the goods were entered under the Customs bond of Royce Associates LLP, which is registered under EPA Registration No. 75630-1 dated June 9, 2004 for Zinc Borate, the imported product on the importations in issue in this. Further, Royce Associates LLP was the actual owner and actual purchaser of the goods, and appeared and acted as the importer of record and consignee on all of the importations in issue in this proceeding.

Royce Associates LLP was **(1)** The consignee, AND **(2)** the importer of record, AND **(3)** the actual owner of the merchandise. Respondent was NONE of these persons. And therefore cannot be the importer of the goods on the importations in issue. (Note: The fourth part of the definition of who may be the importer is not relevant as the goods were not placed in a bonded warehouse).

11. Denies for lack of knowledge or information sufficient to form a belief as to the truth of the allegations made in this paragraph.

12. Denies in part. A SINGLE Notice of Arrival is required to be filed by the IMPORTER desiring to import pesticides into the United States shall submit a Notice of Arrival of Pesticides and Devices prior to the arrival of the shipment in the United States.

13. Denies in part. It is unlawful for any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor to fail to file reports required by FIFRA. Respondent denies any inference that it is or was any of these named persons.

14. Denies in part. The term “to 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. That is the statutory definition of the term. Respondent denies any inference that it did ANY of these things. Respondent sees a literal interpretation of the statutory definition as requiring the overseas sellers, the foreign freight forwarders, the foreign trucking companies, the steamship lines, the stevedores in the United States, the marine terminal operators, the individual U.S. Customs employees, the domestic U.S. trucking company, Royce Associates as IMPORTER, its warehouse employees and sales personnel and the purchasers of the imported goods from Royce as parties who DID engage in some or all of the functions named in the definition of “to distribute or sell.” As such, these may properly be named as respondents in this proceeding, whereas Mara Shipping Inc. is NOT.

15. Denies for lack of knowledge or information sufficient to form a belief as to the truth of the allegations made in this paragraph. Certainly the purported EPA inspectors overstepped legitimate authority in any way that cast Respondent as a violator of FIFRA. This is not unusual. See *Vidrine v. United States*, Case No. 07-1204 (W.D. La. 9/30/11).

16. Denies. Documents may have suggested that there were importations that the IMPORTER may have made that would have required the IMPORTER to file the notices. Notices in the files of Respondent showed that there were advance notices that pertained to the importation of zinc borate that may have been made by the IMPORTER Royce Associates LLP who had sole responsibility for the filing of the notices with the EPA. It is axiomatic that rights may be assigned, but obligations cannot.

17. Denies. Every licensed Customs broker must have a written Power of Attorney to conduct Customs business on behalf of its IMPORTER customers. This does not preclude the IMPORTER from acting in its own behalf and in no way transfers any obligation to the licensed Customs Broker of any of the IMPORTER’S responsibilities to make proper entry of the goods. The broker can only be held liable for a Customs violation if the broker has played a demonstrable part in misconduct that benefits BOTH the broker and the IMPORTER. 19 C.F.R. 141.1(a) states that the duty obligation is the PERSONAL DEBT OF THE IMPORTER. If duties

paid to the broker are not transferred to Customs, the IMPORTER is still liable for the payment of the duty. See 19 C.F.R. 111.29(b). If an entry is not filed or if it is filed late, it is the bond of the IMPORTER that is charged, NOT the broker. Like the FIFRA notice requirement, filing of the entry with Customs and the payment of duty are both SINGLE obligations. If the IMPORTER fails to file in either respect, the broker to whom authority was given under the Power of Attorney has NO obligation to make good on the IMPORTER'S default.

18. Denies for lack of knowledge or information sufficient to form a belief as to the truth of the allegations made in this paragraph. On the dates shown in this paragraph, individuals purporting to be employed by the EPA asked for and were given documents that they requested. No "INSPECTIONS" are known to have occurred, as no EPA-regulated goods were on the Respondent's premises.

19. Denies. NO inspections took place. Respondent appeared as the licensed Customs broker on the import documentation for the listed shipments. Respondent assumed no exclusive obligation for the filing of notices with the EPA under FIFRA, nor would the EPA have discharged the IMPORTER from its exclusive obligation even if Respondent and the IMPORTER agreed between themselves in that manner. In fact, EPA has already exacted a penalty from the IMPORTER Royce Associates LLP for the failure of the IMPORTER to file the notices directly with the EPA. These were and are the only instances of alleged violations of FIFRA ever, and at worst could have been the bases of a warning letter. Further, Complainant ignored its own enforcement policy by seeking multiple penalties for the same operable set of facts based on the same elements of proof, namely that notices of arrival were not filed.

20. Denies. Notices of Arrival were constructively received by EPA on the identified shipments as such documentation was filed as part of the live entry packages submitted to U.S. Customs for review prior to release of the goods. Such entries were accepted by U.S. Customs which found no violation of that would prevent release of the goods into U.S. commerce. All of the importations were released by U.S. Customs without incident.

21. N/A

22. Denies in part. As noted above, the representation of an IMPORTER by a licensed Customs broker in no way relieves the IMPORTER of its obligations under law and regulation. The EPA has found that the reliance on a licensed Customs broker is no defense for an IMPORTER in its noncompliance. *In the Matter of Rhee Bros., Inc. Docket No. FIFRA-03-2005-0028*. Respondent knows of no instance, including *Rhee Bros.*, where EPA enforced FIFRA penalties for failure to report against a broker who had no other interest or participation in an importation of pesticides other than as a licensed Customs broker.

23. Denies. This is an egregiously, if not maliciously erroneous conclusion of law that flies in the face of the facts of this case and the history of U.S. Customs administration of the import process. A licensed Customs broker *may* be an importer, but that requires the use of its own

import bond, declaration of the broker as IMPORTER and/or CONSIGNEE and none of these facts exist in this case.

24. Denies. Immediate delivery of these goods was made to the trucker designated by the IMPORTER, not to Respondent.

25. Denies. The IMPORTER made its own arrangements for truckers to pick up the goods at the pier and in all other ways to ensure delivery to itself for distribution by the IMPORTER to others.

26. Denies in part. Respondent appears as the licensed Customs broker on the Customs forms 3461 and 7501. As for distribution, to say that Respondent distributed the goods is an erroneous conclusion of law that flies in the face of the facts of this case and the definitions found in FIFRA.

27. Denies. Respondent constructively filed the notices with EPA in its filings with U.S. Customs. Further, the single, exclusive obligation to file notices of arrival under FIFRA is that of the IMPORTER.

28. Denies. Respondent cannot violate the law unless it had an obligation under the law to act or refrain from acting. The cited statutes and regulation do not impose any obligation on multiple parties to file the single notice of arrival for imported goods subject to FIFRA.

29. Denies. Respondent constructively filed the notices with EPA in its filings with U.S. Customs. Further, the single, exclusive obligation to file notices of arrival under FIFRA is that of the IMPORTER. Respondent cannot violate the law unless it had an obligation under the law or regulation to act or refrain from acting. The cited statutes and regulation do not impose any obligation on multiple parties to file the single notice of arrival for imported goods subject to FIFRA.

DEFENSES

Whereas, Respondent has answered all of the paragraphs of the complaint in this matter, denying or admitting or explaining each of the factual allegations contained therein to the extent of Respondent's knowledge, enumerating therein the grounds for defenses and the bases for opposing Complainant's proposed relief, Respondent here makes a summary statement of its defenses, incorporating by reference all defenses raised in its answers, waiving none of them, and reserving the right to amend this submission in whole or in part:

1. The statute cited by the Complainant pertains to the IMPORTER and does not pertain to Respondent in its status as a licensed Customs broker; nor does it apply to any act or failure to act by Respondent;
2. Complainant has abused governmental power and overreached any semblance of legitimate statutory or regulatory authority in bringing this proceeding;

3. Complainant has already pursued its sole recourse in this case against the IMPORTER and has settled any and all claims for the failure to have notices of importation of pesticides in Complainant's possession prior to importation;
4. Complainant has knowingly sought to extract a penalty from a party who's licensed Customs broker status has never before been subjected to enforcement under FIFRA that has reached an administrative or judicial decision;
5. Complainant has ignored its own authority to issue a warning letter for first offenses; and has sought to assess multiple penalties from the same set of facts, on the same importations already the subject of settlement between the EPA and the IMPORTER.

WHEREFORE, Respondent respectfully requests that judgment be entered dismissing this action in its entirety, overruling Complainant's claims, and granting Respondent attorney's fees and such other and further relief as may be just and appropriate.

Respectfully submitted,

SIMON GLUCK & KANE LLP
Attorneys for Respondent Mara Shipping, Inc.
One Penn Plaza
250 West 34th Street, Suite 4615
New York, New York 10119



Christopher M. Kane



Mariana del Rio Kostenwein

Dated: January 17, 2014
New York, New York

CERTIFICATE OF SERVICE

I, Christopher M. Kane, hereby certify that on this day in the Matter of Mara Shipping, Inc., Docket No. FIFRA-02-2013-5111, I caused the foregoing **Answer and Request for Hearing** to be served on the Regional Hearing Clerk via United States Postal Service, certified mail, return receipt requested:

Ms. Karen Maples
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, New York 10007-1866

and copies were sent to:

Karen L. Taylor, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, New York 10007-1866

Helen Ferrara, Esq.
Regional Judicial Officer
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, New York 10007-1866

SIMON GLUCK & KANE LLP
Attorneys for Respondent Mara Shipping, Inc.
One Penn Plaza
250 West 34th Street, Suite 4615
New York, New York 10119



Christopher M. Kane

Dated: January 17, 2014
New York, New York