



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD

CHICAGO, IL 60604-3590

February 4, 2019

REPLY TO THE ATTENTION OF E-19J

Honorable Susan L. Biro
Office of Administrative Law Judges
U. S. Environmental Protection Agency
Ariel Rios Building, Mailcode: 1900L
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

RE: In the Matter of: **David E. Easterday & Co., Inc., d/b/a Woodwright
Finishing - COMPLAINT- (Wilmot, Ohio)**

Docket Nos. FIFRA-05-2019-0005
Complaint Date: June 13, 2018
Total Proposed Penalty: Not Stated

Dear Judge Biro:

Pursuant to 40 C.F.R. § 22.21(a) I have enclosed the Respondent's Answer to an Administrative Complaint and Request for Hearing.

Please assign an Administrative Law Judge to this case.

If you have questions, please contact me at (312) 886-3713.

Sincerely,

LaDawn Whitehead
Regional Hearing Clerk

Enclosures

cc: Robert L. Brubaker
PORTER WRIGHT Morris & Arthur LLP
41 South High Street
Suites 2800-3200
Columbus, Ohio
rbrubaker@porterwright.com
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In the Matter of: **David E. Easterday & Co., Inc., d/b/a Woodwright Finishing - COMPLAINT- (Wilmot, Ohio)**

Docket No. FIFRA-05-2019-0005

Certificate of Service

I certify that I served the original and one copy of the Respondent's Answer and case file via certified mail to:

CERTIFIED MAIL RECEIPT NUMBER: 7011 1150 0000 2643 7473

Honorable Susan L. Biro
Office of Administrative Law Judges
U. S. Environmental Protection Agency
Ariel Rios Building, Mailcode: 1900L
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

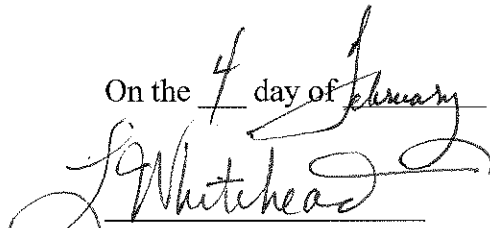
I certify that I served a copy of the Respondent's Answer by electronic mail to:

Ann Coyle, Regional Judicial Officer
coyle.ann@epa.gov

Robert L. Brubaker
PORTER WRIGHT Morris & Arthur LLP
41 South High Street, Suite 2800-3200
Columbus, OH 43215-6194
rbrubaker@porterwright.com

Robert Guenther, Associate Regional Counsel
guenther.robert@epa.gov

On the 4 day of January 2019.



LaDawn Whitehead
Regional Hearing Clerk
Region-5

Robert L. Brubaker
rbrubaker@porterwright.com

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January 25, 2019

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

**RE: Complaint Against David E. Easterday & Co.,
Inc., doing business as Woodwright Finishing
Docket Number: FIFRA-05-2019-0005**

Dear Regional Hearing Clerk:

Enclosed for filing is the original and one copy of the Answer of the Respondent, David E. Easterday & Co., Inc., doing business as Woodwright Finishing. Please file the original, and return the copy to me, time stamped, in the enclosed self-address envelope.

Thank you for your assistance.

Very truly yours,



Robert L. Brubaker

RLB:mkd
Enclosure



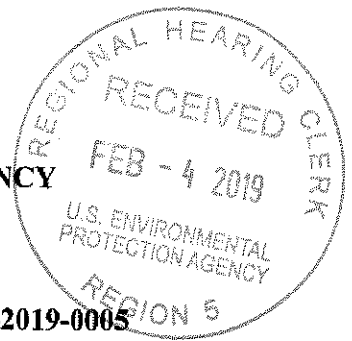
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5



IN THE MATTER OF:

DAVID E. EASTERDAY & CO., INC.
d/b/a WOODWRIGHT FINISHING,
WILMOT, OHIO,

RESPONDENT.

: Docket No.: FIFRA-05-2019-0005
:
: Proceeding to Assess a Civil Penalty
: Under Section 14(a) of the Federal
: Insecticide, Fungicide and
: Rodenticide Act, 7 U.S.C. §136(a)

ANSWER

Respondent David E. Easterday & Co., Inc., d/b/a Woodwright Finishing (Easterday), files this Answer in response to the Complaint filed with the Environmental Protection Agency (EPA) Region 5 Regional Hearing Clerk on December 19, 2018 by Complainant, the Director of the Land and Chemicals Division of EPA Region 5, seeking to assess a civil penalty under section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136(a). Respondent received the Complaint via certified mail on January 2, 2019. Respondent contests the material facts and legal claims in the Complaint. Respondent Easterday requests a hearing as to all contested questions of fact and law, as set forth further in this Answer.

As an initial matter, Respondent respectfully submits that the Complaint involves a first-time, purely past alleged violation of FIFRA by a small (19-employee) family-owned business, due solely to the Company's lack of awareness that truthful disclosure of the incidental antiseptic properties of alcohol in a furniture cleaning product would be presumed by EPA to transform that product into a "pesticide" regulated by EPA under FIFRA. Complainant's pursuit of a substantial punitive penalty assessment against Easterday is disproportionate, arbitrary, capricious, and an abuse of the EPA Administrator's discretion under sections 9(c)(3) and 14(a)(4) of FIFRA to waive any civil penalties for minor violations of FIFRA, under

circumstances where, as here, the public interest will be served by a written notice of warning, and/or where, as here, the violation did not cause significant harm to health or the environment.

Over the past 45 years, Respondent Easterday has been engaged in the business of producing quality stains and finishes at a production facility just outside the Village of Wilmot (population 301), in Holmes County, Ohio. Holmes County is one of the principal locations of the Amish community in Ohio. Easterday's stains and finishes are used mostly by nearby Amish woodworkers. Easterday's gross annual revenues are in the range of \$5 to \$6 million. In mid-2012, Easterday (doing business as Woodwright Finishing) began making a small sideline product called Heirloom Essentials Spotless Furniture and Glass Cleaner ("Spotless Cleaner"). Spotless Cleaner has a water-based ammonia-free formulation, that includes a small amount of three ubiquitous and beneficial alcohols (isopropyl alcohol, ethyl alcohol, and 2-butoxyethanol). The formulation is designed to clean furniture surfaces without causing the waxy buildup typical of mass-marketed furniture polishes. The purpose of the alcohols in Spotless Cleaner is to promote streak-free drying. Spotless Cleaner is distributed on a small scale to approximately 160 customers, including Amish furniture outlets, other retailers, and some individuals. Spotless Cleaner accounts for less than \$50,000 per year in sales (less than 1% of Easterday's total revenues from its stains and finishes business).

In mid-2012, after conducting third party laboratory testing, Easterday printed a new label for Spotless Cleaner that included the word "antibacterial" and the statement "Removes 99.9% of bacteria." Easterday added this language to accurately identify the product's inherent antibacterial features, after confirming the intuitive expectation that Spotless Cleaner was, in fact, antibacterial. After using the new labels, there was no discernable change in sales of Spotless Cleaner.

Upon being first contacted and told by EPA in late 2017 that the word “antibacterial” on the label of Spotless Cleaner was unacceptable, and allegedly constituted an unauthorized “pesticidal claim” under FIFRA, Easterday immediately changed the label to remove the word “antibacterial” and the statement “Removes 99.9% of bacteria.” Easterday has not used these words and phrases since, and there has been no discernable change in sales of Spotless Cleaner after the most recent revision of the label.

In addition to desirable furniture cleaning properties, the common alcohols in Spotless Cleaner have inherent and obvious incidental germ-killing properties, but that is not why they are part of the cleaner formulation. Spotless Cleaner is intended to be, and is, a furniture cleaner – not a pesticide. The alcohols in Spotless Cleaner are highly biodegradable and benign, and do not cause or threaten harm to health or the environment. Isopropyl alcohol is a very familiar and widely used antiseptic. Ethyl alcohol is the type of alcohol found in alcoholic beverages. 2-butoxyethanol is widely used in hand sanitizers, cosmetics, and a number of other common products. The organisms incidentally killed by these alcohols are typically bacteria existing in or on living man, and are therefore excluded from the meaning of “pest” in section 2(t) of FIFRA.

With respect to the numbered paragraphs of the Complaint, Respondent Easterday answers and responds as follows:

1. In response to Paragraph 1 of the Complaint, Easterday states that this paragraph contains no allegations of fact or law with respect to which a response is required. To the extent that Paragraph 1 can be construed to contain allegations of fact or law with respect to Easterday, Easterday denies each and every allegation of Paragraph 1.
2. In response to Paragraph 2 of the Complaint, Easterday states that this paragraph contains no allegations of fact or law with respect to which a response is required. Moreover, Easterday has no direct knowledge as to a delegation of authority to the Director of the Lands and Chemicals Division of EPA Region 5, or as to the lawfulness of any such delegation. To the extent that Paragraph 2 can be

construed to contain allegations of fact or law with respect to Easterday, Easterday denies each and every allegation of Paragraph 2.

3. Easterday admits it is a corporation doing business in the State of Ohio as Woodwright Finishing.
4. In response to Paragraph 4 of the Complaint, Easterday states that this paragraph contains no allegations of fact or law with respect to which a response is required. To the extent that Paragraph 4 can be construed to contain allegations of fact or law with respect to Easterday, Easterday denies each and every allegation of Paragraph 4.
5. In response to Paragraph 5 of the Complaint, Easterday states that this paragraph contains no allegations of fact or law with respect to which a response is required. To the extent that Paragraph 5 can be construed to contain allegations of fact or law with respect to Easterday, Easterday denies each and every allegation of Paragraph 5.
6. In response to Paragraph 6 of the Complaint, Easterday states that this paragraph contains no allegations of fact or law with respect to which a response is required. To the extent that Paragraph 6 can be construed to contain allegations of fact or law with respect to Easterday, Easterday denies each and every allegation of Paragraph 6.
7. In response to Paragraph 7 of the Complaint, Easterday states that this paragraph contains no allegations of fact or law with respect to which a response is required. To the extent that Paragraph 7 can be construed to contain allegations of fact or law with respect to Easterday, Easterday denies each and every allegation of Paragraph 7.
8. In response to Paragraph 8 of the Complaint, Easterday states that this paragraph contains no allegations of fact or law with respect to which a response is required. To the extent that Paragraph 8 can be construed to contain allegations of fact or law with respect to Easterday, Easterday denies each and every allegation of Paragraph 8.
9. In response to Paragraph 9 of the Complaint, Easterday states that this paragraph contains no allegations of fact or law with respect to which a response is required. To the extent that Paragraph 9 can be construed to contain allegations of fact or law with respect to Easterday, Easterday denies each and every allegation of Paragraph 9. Easterday further responds that the meaning of "pest" in section 2(t) of FIFRA does not include bacteria or micro-organisms on or in living man.
10. In response to Paragraph 10 of the Complaint, Easterday states that this paragraph contains no allegations of fact or law with respect to which a response is required. To the extent that Paragraph 10 can be construed to contain allegations of fact or law with respect to Easterday, Easterday denies each and every allegation of Paragraph 10. Easterday further responds that 40 C.F.R. § 152.15(a)(1) is

unlawful as applied to Easterday's Spotless Cleaner product, and that Easterday's Spotless Cleaner product is not intended for preventing, destroying, repelling, or mitigating any pest, within the meaning of "pesticide" as defined in section 2(u) of FIFRA simply because the alcohol contained in the product has an inherent incidental effect.

11. In response to Paragraph 11 of the Complaint, Easterday states that this paragraph contains no allegations of fact or law with respect to which a response is required. To the extent that Paragraph 11 can be construed to contain allegations of fact or law with respect to Easterday, Easterday denies each and every allegation of Paragraph 11.
12. In response to Paragraph 12 of the Complaint, Easterday states that this paragraph contains no allegations of fact or law with respect to which a response is required. To the extent that Paragraph 12 can be construed to contain allegations of fact or law with respect to Easterday, Easterday denies each and every allegation of Paragraph 12.
13. In response to Paragraph 13 of the Complaint, Easterday states that this paragraph contains no allegations of fact or law with respect to which a response is required. To the extent that Paragraph 13 can be construed to contain allegations of fact or law with respect to Easterday, Easterday denies each and every allegation of Paragraph 13.
14. In response to Paragraph 14 of the Complaint, Easterday states that this paragraph contains no allegations of fact or law with respect to which a response is required. To the extent that Paragraph 14 can be construed to contain allegations of fact or law with respect to Easterday, Easterday denies each and every allegation of Paragraph 14.
15. In response to Paragraph 15 of the Complaint, Easterday states that this paragraph contains no allegations of fact or law with respect to which a response is required. To the extent that Paragraph 15 can be construed to contain allegations of fact or law with respect to Easterday, Easterday denies each and every allegation of Paragraph 15.
16. Easterday admits the allegation in Paragraph 16 of the Complaint.
17. Easterday admits the allegation in Paragraph 17 of the Complaint.
18. Easterday denies the allegation in Paragraph 18 of the Complaint.
19. Easterday admits that on or about October 1, 2014 it was visited at its Wilmot, Ohio facility by two individuals who claimed to be employed by the Ohio Department of Agriculture (ODA) and claimed to be conducting an inspection under FIFRA at the behest of EPA. Easterday has no direct knowledge of the nature and extent of authorization of those individuals to conduct inspections under FIFRA, and therefore denies any allegation related to such an authorization.

Easterday further responds that the two individuals in question did not inform Easterday of any violation of FIFRA, that they specifically disclaimed any authority to do so, and that they advised Easterday that no action would be expected or required by Easterday unless and until Easterday was contacted by EPA.

20. Easterday denies any characterization of records provided to the ODA inspectors as "distribution records" with a specialized meaning for purposes of FIFRA. Easterday avers that it cooperated fully with the ODA inspectors and gave them certain sales records they requested.
21. Easterday does not have sufficient information to admit or deny the identification of records in "the inspection report." To the extent that any allegations in Paragraph 21 require an answer, Easterday denies those allegations.
22. Easterday denies any characterization of records referred to in Paragraph 22 as "distribution records" with a specialized meaning for purposes of FIFRA, and does not have sufficient information to admit or deny the time period referred to in Paragraph 22, and therefore denies that allegation.
23. In response to Paragraph 23 of the Complaint, Easterday states that this paragraph contains no allegations of fact or law with respect to which a response is required. To the extent that Paragraph 23 can be construed to contain allegations of fact or law with respect to Easterday, Easterday denies each and every allegation of Paragraph 23. Easterday specifically denies that EPA "requested" financial information from Easterday. Rather, EPA's November 14, 2017 letter stated:

If you believe that you will be unable to pay a \$248,770 penalty because of financial reasons, please send us certified, complete financial statements including balance sheets, income statements and all notes to the financial statements, and your company's signed income tax returns with all schedules and amendments, for the past three years.

Easterday further responds that Easterday informed EPA subsequent to EPA's November 14, 2017 letter that Easterday's total annual sales of Spotless Cleaner are less than \$50,000 and less than 1% of the revenues from Easterday's sales of stains and finishes.

24. Easterday admits that it produced Spotless Cleaner at its facility, but denies that the different container sizes or the timing of water addition change the formulation of its single furniture cleaning product. Easterday specifically contests the unnumbered characterizations of "Pesticide Product #1" through "Pesticide Product #6" above Paragraphs 24, 29, 34, 39, 44, and 49 of the Complaint. All of those products are the same Spotless Cleaner, and none of those products are "pesticides."

25. Easterday does not have sufficient information to admit or deny what was collected by the ODA inspectors, and therefore denies the allegations of Paragraph 25.
26. Easterday does not have sufficient information to admit or deny what was collected by the ODA inspectors, or know the basis or context of Complainant's use of the term "distribution records," and therefore denies the allegations of Paragraph 26.
27. Easterday admits that the label of its Spotless Cleaner formerly displayed the word "antibacterial" and the statement "Removes 99.9% of bacteria." Easterday does not know the basis or context of the adverb "prominently" in Paragraph 27, and therefore denies that characterization. Easterday further responds that no reasonable person could confuse Spotless Cleaner for a pesticide, or reasonably believe that Spotless Cleaner was (or is) intended for pesticidal purposes, rather than furniture and glass cleaning purposes.
28. Easterday denies the allegations of Paragraph 28. Easterday further responds that 40 C.F.R. § 152.15(a)(1) is unlawful as applied to the facts and circumstances of Easterday's Spotless Cleaner.
29. Easterday admits that it produced Spotless Cleaner at its facility, but denies that the different container sizes or the timing of water addition change the formulation of its single furniture cleaning product. Easterday specifically contests the unnumbered characterizations of "Pesticide Product #1" through "Pesticide Product #6" above Paragraphs 24, 29, 34, 39, 44, and 49 of the Complaint. All of those products are the same Spotless Cleaner, and none of those products are "pesticides."
30. Easterday does not have sufficient information to admit or deny what was collected by the ODA inspectors, and therefore denies the allegations of Paragraph 30.
31. Easterday does not have sufficient information to admit or deny what was collected by the ODA inspectors, or know the basis or context of Complainant's use of the term "distribution records," and therefore denies the allegations of Paragraph 31.
32. Easterday admits that the label of its Spotless Cleaner formerly displayed the word "antibacterial" and the statement "Removes 99.9% of bacteria." Easterday does not know the basis or context of the adverb "prominently" in Paragraph 32, and therefore denies that characterization. Easterday further responds that no reasonable person could confuse Spotless Cleaner for a pesticide, or reasonably believe that Spotless Cleaner was (or is) intended for pesticidal purposes, rather than furniture and glass cleaning purposes.

33. Easterday denies the allegations of Paragraph 33. Easterday further responds that 40 C.F.R. § 152.15(a)(1) is unlawful as applied to the facts and circumstances of Easterday's Spotless Cleaner.
34. Easterday admits that it produced Spotless Cleaner at its facility, but denies that the different container sizes or the timing of water addition change the formulation of its single furniture cleaning product. Easterday specifically contests the unnumbered characterizations of "Pesticide Product #1" through "Pesticide Product #6" above Paragraphs 24, 29, 34, 39, 44, and 49 of the Complaint. All of those products are the same Spotless Cleaner, and none of those products are "pesticides."
35. Easterday does not have sufficient information to admit or deny what was collected by the ODA inspectors, and therefore denies the allegations of Paragraph 35.
36. Easterday does not have sufficient information to admit or deny what was collected by the ODA inspectors, or know the basis or context of Complainant's use of the term "distribution records," and therefore denies the allegations of Paragraph 36.
37. Easterday admits that the label of its Spotless Cleaner formerly displayed the word "antibacterial" and the statement "Removes 99.9% of bacteria." Easterday does not know the basis or context of the adverb "prominently" in Paragraph 37, and therefore denies that characterization. Easterday further responds that no reasonable person could confuse Spotless Cleaner for a pesticide, or reasonably believe that Spotless Cleaner was (or is) be intended for pesticidal purposes, rather than furniture and glass cleaning purposes.
38. Easterday denies the allegations of Paragraph 38. Easterday further responds that 40 C.F.R. § 152.15(a)(1) is unlawful as applied to the facts and circumstances of Easterday's Spotless Cleaner.
39. Easterday admits that it produced Spotless Cleaner at its facility, but denies that the different container sizes or the timing of water addition change the formulation of its single furniture cleaning product. Easterday specifically contests the unnumbered characterizations of "Pesticide Product #1" through "Pesticide Product #6" above Paragraphs 24, 29, 34, 39, 44, and 49 of the Complaint. All of those products are the same Spotless Cleaner, and none of those products are "pesticides." Easterday avers that one ounce containers of Spotless Cleaner are sample bottles.
40. Easterday does not have sufficient information to admit or deny what was collected by the ODA inspectors, and therefore denies the allegations of Paragraph 40.
41. Easterday does not have sufficient information to admit or deny what was collected by the ODA inspectors, or know the basis or context of Complainant's

use of the term "distribution records," and therefore denies the allegations of Paragraph 41.

42. Easterday admits that the label of its Spotless Cleaner formerly displayed the word "antibacterial" and the statement "Removes 99.9% of bacteria." Easterday does not know the basis or context of the adverb "prominently" in Paragraph 42, and therefore denies that characterization. Easterday further responds that no reasonable person could confuse Spotless Cleaner for a pesticide, or reasonably believe that Spotless Cleaner was (or is) intended for pesticidal purposes rather than furniture and glass cleaning purposes.
43. Easterday denies the allegations of Paragraph 43. Easterday further responds that 40 C.F.R. § 152.15(a)(1) is unlawful as applied to the facts and circumstances of Easterday's Spotless Cleaner.
44. Easterday admits that it produced Spotless Cleaner at its facility, but denies that the different container sizes or the timing of water addition change the formulation of its single furniture cleaning product. Easterday specifically contests the unnumbered characterizations of "Pesticide Product #1" through "Pesticide Product #6" above Paragraphs 24, 29, 34, 39, 44, and 49 of the Complaint. All of those products are the same Spotless Cleaner, and none of those products are "pesticides."
45. Easterday does not have sufficient information to admit or deny what was collected by the ODA inspectors, and therefore denies the allegations of Paragraph 45.
46. Easterday does not have sufficient information to admit or deny what was collected by the ODA inspectors, or know the basis or context of Complainant's use of the term "distribution records," and therefore denies the allegations of Paragraph 46.
47. Easterday admits that the label of its Spotless Cleaner formerly displayed the word "antibacterial" and the statement "Removes 99.9% of bacteria." Easterday does not know the basis or context of the adverb "prominently" in Paragraph 47, and therefore denies that characterization. Easterday further responds that no reasonable person could confuse Spotless Cleaner for a pesticide, or reasonably believe that Spotless Cleaner was (or is) intended for pesticidal purposes rather than furniture and glass cleaning purposes.
48. Easterday denies the allegations of Paragraph 48. Easterday further responds that 40 C.F.R. § 152.15(a)(1) is unlawful as applied to the facts and circumstances of Easterday's Spotless Cleaner.
49. Easterday admits that it produced Spotless Cleaner at its facility, but denies that the different container sizes or the timing of water addition change the formulation of its single furniture cleaning product. Easterday specifically contests the unnumbered characterizations of "Pesticide Product #1" through

“Pesticide Product #6” above Paragraphs 24, 29, 34, 39, 44, and 49 of the Complaint. All of those products are the same Spotless Cleaner, and none of those products are “pesticides.”

50. Easterday does not have sufficient information to admit or deny what was collected by the ODA inspectors, and therefore denies the allegations of Paragraph 50.
51. Easterday does not have sufficient information to admit or deny what was collected by the ODA inspectors, or know the basis or context of Complainant’s use of the term “distribution records,” and therefore denies the allegations of Paragraph 51.
52. Easterday admits that the label of its Spotless Cleaner formerly displayed the word “antibacterial” and the statement “Removes 99.9% of bacteria.” Easterday does not know the basis or context of the adverb “prominently” in Paragraph 52, and therefore denies that characterization. Easterday further responds that no reasonable person could confuse Spotless Cleaner for a pesticide, or reasonably believe that Spotless Cleaner was (or is) intended for pesticidal purposes rather than furniture and glass cleaning purposes.
53. Easterday denies the allegations of Paragraph 53. Easterday further responds that 40 C.F.R. § 152.15(a)(1) is unlawful as applied to the facts and circumstances of Easterday’s Spotless Cleaner.
54. Easterday incorporates by reference its answers and responses to the allegations contained in Paragraphs 1 through 53 of the Complaint.
55. Easterday admits the allegations of Paragraph 55.
56. Easterday denies the allegations of Paragraph 56.
57. Easterday admits the allegations of Paragraph 57.
58. Easterday denies the allegations of Paragraph 58.
59. Easterday denies the allegations of Paragraph 59.
60. Easterday incorporates by reference its answers and responses to the allegations contained in Paragraphs 1 through 53 of the Complaint.
61. Easterday admits the allegations of Paragraph 61.
62. Easterday denies the allegations of Paragraph 62.
63. Easterday admits the allegations of Paragraph 63.
64. Easterday denies the allegations of Paragraph 64.

65. Easterday denies the allegations of Paragraph 65.
66. Easterday incorporates by reference its answers and responses to the allegations contained in Paragraphs 1 through 53 of the Complaint.
67. Easterday admits the allegations of Paragraph 67.
68. Easterday denies the allegations of Paragraph 68.
69. Easterday admits the allegations of Paragraph 69.
70. Easterday denies the allegations of Paragraph 70.
71. Easterday denies the allegations of Paragraph 71.
72. Easterday incorporates by reference its answers and responses to the allegations contained in Paragraphs 1 through 53 of the Complaint.
73. Easterday admits the allegations of Paragraph 73.
74. Easterday denies the allegations of Paragraph 74.
75. Easterday admits the allegations of Paragraph 75.
76. Easterday denies the allegations of Paragraph 76.
77. Easterday denies the allegations of Paragraph 77.
78. Easterday incorporates by reference its answers and responses to the allegations contained in Paragraphs 1 through 53 of the Complaint.
79. Easterday admits the allegations of Paragraph 79.
80. Easterday denies the allegations of Paragraph 80.
81. Easterday admits the allegations of Paragraph 81.
82. Easterday denies the allegations of Paragraph 82.
83. Easterday denies the allegations of Paragraph 83.
84. Easterday incorporates by reference its answers and responses to the allegations contained in Paragraphs 1 through 53 of the Complaint.
85. Easterday admits the allegations of Paragraph 85.
86. Easterday denies the allegations of Paragraph 86.
87. Easterday admits the allegations of Paragraph 87.

88. Easterday denies the allegations of Paragraph 88.
89. Easterday denies the allegations of Paragraph 89.
90. Easterday incorporates by reference its answers and responses to the allegations contained in Paragraphs 1 through 53 of the Complaint.
91. Easterday denies that it produced pesticide products.
92. Easterday denies the allegations in Paragraph 92.
93. Easterday admits the allegations in Paragraph 93.
94. Easterday denies the allegations in Paragraph 94.

Proposed Civil Penalty

Beginning on page 13 of the Complaint, the Complainant sets forth a long narrative, without numbered paragraphs, wherein it is stated that “Complainant is not proposing a specific penalty now,” but then proceeds to describe a framework for assessing up to \$7,500 for “each” of “34 discrete sales of unregistered pesticides” and for one count of “producing pesticides in an unregistered establishment.” EPA’s Proposed Civil Penalty narrative is factually flawed, disproportionate, unreasonable, and contrary to law. While Complainant states that she “is not proposing a specific penalty now,” Complainant has previously demanded the sum of \$248,770.00 from Respondent for the alleged violations contained in the Complaint. See Paragraph 23 of this Answer. EPA informed the Deputy National Ombudsman for the U.S. Small Business Administration in a letter dated August 8, 2018 that EPA had “reduced the proposed penalty figure from \$248,770 stated in our notice letter to \$149,262.”

The 35 supposedly independent FIFRA violations alleged in the Complaint all depend entirely on a single fact, and all fail in the absence of that fact. The single indispensable element of proof on which all of the alleged violations in the Complaint rest is the factually true statement on the label of Spotless Cleaner that the product is “antibacterial” and “removes bacteria.” Since there are no claimed violations of FIFRA in the absence of the statement on the

label of Spotless Cleaner, that statement constitutes a single violation of FIFRA, not 35 independent violations.

The one indispensable element of proof of the FIFRA violations which the Complainant claims to be “very serious” was immediately rectified after Respondent’s receipt of a letter from EPA. In 2014, EPA requested ODA to inspect Respondent’s facility after receiving what the Complaint characterizes as an “anonymous tip.” The ODA representatives did not recommend any behavior modification, or give Easterday any guidance or instructions at the time of the investigation, other than to tell Easterday to do nothing unless or until Easterday was contacted by EPA. The investigation was conducted in October 2014. More than three years passed before EPA first contacted Easterday (in November, 2017) and explained its position that the wording on the label of Spotless Cleaner was a “very serious” problem. If, in fact, the label was a “serious problem,” one would not expect EPA to wait more than three years before telling that to Easterday.

While the words “antibacterial” and “removes bacteria” were easily and instantly removed from the label of Spotless Cleaner, the underlying ingredients and properties of Spotless Cleaner did not change at all. Spotless Cleaner was just as antibacterial with or without so stating on the label. An innocent lack of familiarity by Respondent regarding EPA’s desire to prevent manufacturers of products from accurately identifying certain intuitively obvious antiseptic properties of its product should not form the basis for a disproportionate punishment.

Even if a technical violation of FIFRA occurred, Respondent corrected its labels, as instructed by EPA, and would have done so at any time during the more than three years which passed between the 2014 inspection and EPA’s November, 2017 correspondence, which first identified EPA’s concerns to Respondent. Respondent’s prior label, which identified the

antiseptic effect of its product, did not result in economic benefit or health or environmental harm. It does not warrant “gotcha” monetary penalties, nor does it faithfully implement Congressional intent or EPA’s institutional interests.

The mere fact that Respondent states that Spotless Cleaner is antibacterial (because of the incidental effects of its alcohol content) is not sufficient proof that the furniture and glass cleaner is “intended for” mitigating “pests” instead of for cleaning furniture and glass. No reasonable person would believe that Spotless Cleaner is intended for use as a pesticide, or for any purpose other than its principal purpose: the cleaning of furniture and window surfaces. This factually accurate disclosure apparently is viewed, under an EPA regulation (40 C.F.R. § 152.15(a)(1)), as irrebuttable proof that a substance is “*intended for*” preventing, destroying, repelling or mitigating any pest within the meaning of the definition of “pesticide” in section 2(u) of FIFRA. Easterday was given no notice of this presumption. An irrebuttable presumption created by rule cannot lawfully expand the statutory definition of a “pesticide.” EPA must prove intention by facts, not by an overbroad and self-serving irrebuttable presumption with no statutory basis.

While complainant is “not proposing a specific penalty now, but will do so after an exchange of information has occurred” (Complaint, p. 13), Complainant has already prejudged the amount of the civil penalty which it demands, and which it included in its November 2017 correspondence to Easterday and August 2018 correspondence to the Small Business Administration. Complainant should be aware now of facts and circumstances pertinent to its proposed penalty. Complainant knows now that the alcohol content of Spotless Cleaner is the only reason for the factually-correct “antibacterial” information on the label. Complainant knows now the nature of Easterday’s small family-owned business, and the miniscule scale of

Easterday's Spotless Cleaner sales (accounting for less than \$50,000 of gross annual revenues and less than 1% of Easterday's revenues). Complainant knows now that Easterday has cooperated fully with EPA and the ODA inspectors, and immediately removed the antibacterial disclosure on the label of Spotless Cleaner when admonished by EPA to do so. Complainant knows now that Spotless Cleaner is the exact same product with or without the words "antibacterial" and "removes bacteria" on the label. Complainant knows now that Spotless Cleaner never caused or threatened harm to health or the environment. Complainant should know now that the penalty it has previously proposed is disproportionate, and that no penalty is appropriate under the facts and circumstances of this case.

The facts and circumstances of this case cry out for the exercise of the EPA Administrator's discretion under section 9(c)(3) of FIFRA to waive civil penalties for minor violations where the public interest will be served by a written notice of warning, and of the Administrator's discretion under section 14(a)(4) of FIFRA to waive civil penalties where the violation did not cause significant harm to health or the environment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Answer" was served by electronic mail this
25th day of January, 2019, upon the following:

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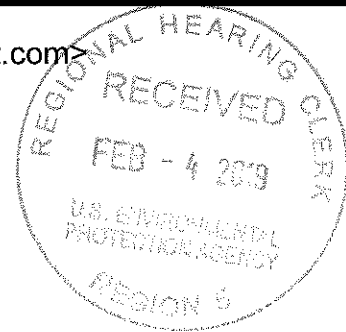
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ROBERT L. BRUBAKER

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From: Deverse, Molly K. <mdeverse@porterwright.com>
Sent: Friday, February 01, 2019 4:41 PM
To: Whitehead, LaDawn
Cc: Brubaker, Robert L.
Subject: Certified Mail Package
Attachments: SKM_454e19020117510.pdf



La Dawn – this is Molly from Porter Wright in Columbus, Ohio. We spoke this afternoon (Friday, 2/1/19) regarding receipt of a certified letter which included an Answer to be filed in a case. I asked if you had received this certified package and you told me you had not received any mail since the government shutdown. You told me that we would not be impacted because of the late mail delivery.

I have attached a copy of the cover letter (along with the Certified Mail information) and the Answer to be filed in Docket Number FIFRA-05-2019-0005 for your information. Could you please look into this and let me know when you receive this certified package.

Thank you for any help you can give me.

Molly Deverse
Secretary to Robert L. Brubaker
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MOLLY K. DEVERSE
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We are proud to announce that on February 1, 2019, Butler Rubin Saltarelli & Boyd LLP merged into Porter Wright, marking our firm's expansion into the Chicago market. [Learn more.](#)

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