UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
99 CENTS ONLY STORES,	)	**Docket No. FIFRA-9-2008-0027**
	)	
Respondent.	)	

ORDER ON MOTIONS TO SUPPLEMENT PREHEARING EXCHANGES

I. Background

The Complaint in this matter, filed by the U.S. Environmental Protection Agency, Region 9 ("Complainant"), charges Respondent, 99 Cents Only Stores, with a total of 166 violations of Section 12(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136j(a)(1), arising from its alleged distribution or sale of unregistered or misbranded pesticides. The Complaint proposes an aggregate penalty of $ 969,930 for these violations.

After Respondent filed an Answer, Complainant filed its Initial Prehearing Exchange (C's PHE) on February 27, 2009, identifying two proposed witnesses and submitting 23 proposed exhibits. On or about March 20, 2009, Respondent served its Prehearing Exchange (R's PHE), in which it identified as its proposed evidence for hearing five witnesses and nine documents and/or categories of documents, some of which were attached and some of which Respondent indicated would be submitted later. Complainant filed its Rebuttal Prehearing Exchange (C's Reb. PHE) on April 2, 2009, identifying another proposed witness and four additional documents.

By Order dated June 2, 2009, a Motion for Partial Accelerated Decision filed by Complainant was granted and Respondent was found liable on all counts of the Complaint. Hearing on the remaining issue of penalty is scheduled to begin on June 23, 2009.

Respondent filed a Motion in Limine, which was denied, and then submitted a supplement to its Prehearing Exchange on June 5, 2009, which included documents listed in its earlier Prehearing Exchange, along with some additional documents, which pertain to the recall by Grow-Link of the product "Bref" at issue in the Complaint, and the settlement between Grow-Link and the State of California Department of Pesticide Regulation regarding Grow-Link's sale of Bref. The supplement was filed without an accompanying motion to supplement the

prehearing exchange, but counsel for Complainant has indicated in the prehearing conference that it does not oppose the supplement.

Complainant filed two motions in quick succession. On June 5, 2009, Complainant filed a Motion to Supplement Prehearing Exchange ("First Motion") to add an expert witness and 10 exhibits (C's PHE Exs. 28-37) as proposed testimony and evidence at the hearing. Complainant filed a second Motion to Supplement Prehearing Exchange on June 8, 2009 ("Second Motion"), identifying 2 more exhibits (C's PHE Exs. 38 and 39) for presentation at the hearing.

On June 17, 2009, Respondent submitted a Motion to Supplement Prehearing Exchange, seeking to add nine proposed exhibits for the hearing, and a Partial Opposition to Complainant's Motion to Supplement Prehearing Exchange ("Opposition").

II. Complainant's Motions to Supplement and Respondent's Partial Opposition

Complainant's First Motion seeks to add to its Prehearing Exchange an expert witness, Jonathan Shefftz, to testify regarding financial issues relating to the appropriate civil penalty, and the following documents:

EPA's General Enforcement Policy GM-21 (C's PHE Ex. 28);

Expert report of Dr. Linnea Hanson, listed as expert in Complainant's Initial Prehearing Exchange (C's PHE Ex. 29);

Mr. Schefftz' resume and expert report on economic benefit and ability to pay, dated June 5, 2009 (C's PHE Ex. 30);

A page in Spanish from a website of Henkel, manufacturer of the product "Bref" at issue in this proceeding, and an affidavit of Norman Calero of Environmental Protection Specialist in EPA Region 9, Communities and Ecosystems Divisions, U.S. – Mexico Border Office, translating text from the web page into English (C's PHE Ex. 31);

Respondent's 2008 Annual Report (C's PHE Ex. 32);

U.S. Securities and Exchange Commission ("SEC") Form 10-Q, for the Quarterly Period Ended December 27, 2008 and financial statements (C's PHE Ex. 33),

Press Release issued by Respondent regarding Third Quarter Fiscal 2009 Financial Results (C's PHE Ex. 34);

SEC Form 10-K for Fiscal Year Ended March 29, 2008 (C's PHE Ex. 35);

Inspection Report of 99 Cents Only Store, by California Department of Pesticide Regulation, August 18, 2008 inspection date, regarding "Mold & Mildew Doctor" (C's Ex. 36); and

Enforcement Case Review of "Mold & Mildew Doctor," dated March 18, 2009 (C's Ex. 37).

Complainant asserts the following reasons as good cause for submitting these documents after its Rebuttal Prehearing Exchange: (1) the time necessary to identify the expert witness, Mr. Schefftz, and for his review of relevant documents (C's Ex. 30); (2) Complainant only recently determined the relevancy of documents; (3) Dr. Hansen needed several weeks to conduct research (C's Ex. 29); (4) financial information regarding Respondent (C's Exs. 33, 34) is the most current publicly available information; and (5) the Enforcement Case Review report (C's Ex. 37) was not available to Complainant until March 2009. Complainant adds that most of the documents support arguments Respondent anticipated, as referenced in its Motion in Limine.

Complainant asserts that the proposed exhibits are relevant to factors for determining a penalty in this matter. Specifically, Complainant asserts that C's Ex. 28 is relevant generally to the penalty determination; C's Ex. 29 is relevant to potential harm of the product Bref; the Henkel web page (C's Ex. 31) is relevant to culpability; information regarding Respondent's Annual Report (C's Ex. 32) Form 10-Q (C's Ex. 33) Press Release (C's Ex. 34), and Form 10-K (C's Ex. 35) are relevant to factors of size of violator, ability to continue in business and gravity (culpability) of the violation; and the documents regarding "Mold & Mildew Doctor" are relevant to Respondent's culpability and lack of good faith to comply, as an additional failure to comply with FIFRA.

The Complainant's Second Motion seeks to update its Prehearing Exchange Exhibit 26, "Report on High Level Incidents Involving Sodium Hypochlorite March 31, 2009," which had product, company and location names redacted, with Exhibit 38, a version of the report which includes the redacted information (except for one incident), along with an Affidavit of Julie Jordan, dated June 8, 2009, concerning her preparation of the report. The Second Motion also seeks to add as Complainant's Exhibit 39 an agreement between the EPA Region 9 and agencies of the State of California to establish and maintain the records of episodes or incidents in the EPA Region 9 Pesticide Episode Reports Database, upon which, according to Ms. Jordan, Exhibit 38 is based.

In its Opposition, Respondent opposes the addition of Complainant's Exhibits 29, 30, 32, 33, 35, 36 and 37 to its Prehearing Exchange. Respondent opposes Exhibit 29, the expert report of Linnea Hansen, on grounds that Complainant has "dumped an expert report on Respondent just two weeks before hearing with a completely different analysis than was suggested in prior submittals," and that there is no suggestion that the Bref product caused any harm or that the reports of harm in the expert report have anything to do with a product like Bref when used according to its directions. Opposition at 4.

Respondent opposes Exhibit 30, 32, 33 and 35 on several grounds. Respondent points out that it is undisputed that Respondent has the ability to pay the proposed penalty, and thus Mr. Schefftz' opinion on that issue should be excluded under 40 C.F.R. § 22.22(a)(1) as "unduly repetitious" and "of little probative value." His opinion as to economic benefit of noncompliance is a new theory that Complainant did not raise in its penalty calculation or in the affidavit of the penalty calculation witness, and is based on the false premise that the products at issue were closeout products dumped on Respondent. Respondent objects to the fact that Mr. Schefftz was not previously identified as a witness, and objects to statements which are speculation in his expert report.

Respondent opposes Exhibits 36 and 37 on the basis that the documents regarding "Mold & Mildew Doctor" are unproven allegations and thus have no probative value, and that the hearing will be unnecessarily prolonged for proof regarding whether selling that product is a violation of FIFRA, an issue for which EPA should bring a separate action if enforcement is needed.

III. Respondent's Motion to Supplement

Respondent seeks to add the following exhibits to its Prehearing Exchange:

Clorox Regular Bleach sample label (RX 8);

Clorox magazine ad (RX 9);

Respondent's records of purchases from Grow-Link, which supplied Bref to Respondent (RX 13);

Excerpts from the 2005 Annual Report of Henkel, manufacturer of Bref ((RX 15);

E-mail correspondence regarding investigation of product that is the subject of Count 166 (RX 16)

Respondent's Form Purchase Order (RX 17)

Group of pesticide product labels and related materials (RX 18)

Webster's online dictionary definition of Chloro (RX 19)

Sample cleaning products "to be used at hearing" (RX 20).[1]

[1] Respondent's numbering of exhibits is not in numerical order due to renumbering of exhibits from its original Prehearing Exchange.

Respondent asserts that good cause exists for granting the motion because many of the documents are "in direct response to the late-served exhibits that Respondent received from Complainant last week," and Respondent's counsel was busy with a seven week jury trial until June 5, and he filed the motion promptly upon concluding that the exhibits were relevant to this case. Respondent adds that the exhibits are consistent with documents previously identified and support arguments Respondent has consistently offered in this matter.

IV. Discussion

This action is governed by the Consolidated Rules of Practice, 40 C.F.R. Part 22 (Rules). The Rules provide that –

> The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . . . If, however, a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under 2 1 22.19(a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the evidence, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.

40 C.F.R. § 22.22(a)(1).

Section 22.19 of the Rules require parties to submit prehearing exchanges, and require that a party who has submitted its prehearing exchange "shall promptly supplement . . . the exchange when the party learns that the information exchanged . . . is incomplete . . . , and the additional . . . information has not otherwise been disclosed to the other party pursuant to this section [22.19]." 40 C.F.R. § 22.19(f). The Rules state in addition that if a party fails to provide information within its control as required in the prehearing exchange or to promptly supplement its prehearing exchange when it learns that information therein is incomplete, outdated or inaccurate, the Presiding Officer may, in his discretion infer that the information would be adverse to the party failing to provide it, exclude the information from evidence, or issue a default order. 40 C.F.R. § 22.19(g). Thus, where the supplement is not prompt or where the existing information is not incomplete, inaccurate or outdated, and particularly where there is evidence of bad faith, delay tactics, or undue prejudice, supplements to prehearing exchanges may be denied. Where a party opposes a motion to supplement the prehearing exchange on the basis of lack of relevancy or probative value, such opposition may be considered under the standard for a motion in limine, which "should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Noble v. Sheahan,* 116 F.Supp. 2d 966, 969

(N.D. Ill. 2000).

Complainant's First and Second Motions are just within the 15 day time frame referenced in Rule 22.22(a)(1), and thus are not required to meet the standards of that Rule. However, to prevent parties from strategically waiting until 15 days prior to the hearing to submit proposed exhibits and witnesses, and in order to enforce Rule 22.19(f), the undersigned requires parties to submit a motion to supplement their prehearing exchanges, to explain the reasons for not submitting it sooner.[2] Accordingly, Complainant has provided such reasons.

Complainant's claim that it became aware only recently of the relevancy of some of the documents seems doubtful at first blush, since the Respondent set out its position as to the penalty in its March 20, 2009 Prehearing Exchange and in other filings, and since the inspection report on "Mold & Mildew Doctor" states that it was sent to EPA on October 16, 2008. However, Complainant's awareness of the relevancy of the documents may be more a matter of *degree* of relevancy rather than of the time that an issue was raised; Complainant appears to have added some of the documents as extra support rather than core support for its arguments.

In addition, both parties appear to be equal participants in submitting documents after the prehearing exchange deadlines. Respondent listed several documents in its Prehearing Exchange without attaching them, simply stating "to be supplied," and then only supplied them near the time of 15 days prior to hearing. Therefore any prejudice from the delays would be suffered by both parties, so neither will be faulted for any delay in supplementing prehearing exchanges.

This rationale also applies with respect to Respondent's objection to the identification of Mr. Schefftz as an expert witness only two weeks before the hearing commences. Moreover, as indicated by Complainant, time was needed for Complainant to fund and contract his services to prepare the expert report and provide testimony. The necessity of allocating these resources to engage Mr. Schefftz may not have been clearly apparent earlier, when the parties were discussing settlement, and where the economic benefit of noncompliance is not a penalty factor included in FIFRA § 14(a)(4) or in the Enforcement Response Policy for FIFRA ("ERP").

As to the presentation of expert reports only two weeks prior to hearing, Complainant is not required under the Rules to provide expert reports for its expert witnesses. Respondent is only entitled to a "brief narrative summary" of the witness' expected testimony under the Rules. 40 C.F.R. § 22.19(a)(2). Any expert report supplied by Complainant can only assist Respondent in preparing for the hearing.

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[2] Parties may attempt to unfairly disadvantage their opponent by holding back significant information until a couple of weeks prior to the hearing, when opposing counsel may not have sufficient opportunity to review it, respond, and prepare rebuttal testimony and exhibits. Accepting supplements to prehearing exchanges without reasons for filing information after the prehearing exchange would in effect make the prehearing exchange deadlines meaningless.

Respondent now asserts that its ability to pay is undisputed, but did not stipulate to it in the parties' Joint Set of Stipulations, and had merely stated in its Prehearing Exchange that it "does not take the position *at this time* that it would be unable to pay the proposed penalty." R's PHE at 6. Complainant has the burden of proof to show that the penalty is appropriate in accordance with the statutory penalty assessment factors, which include effect of the penalty on ability to continue in business. Therefore, absent a stipulation as to ability to pay, Complainant was not unreasonable in preparing to present testimony and evidence on the issue of ability to pay.

As to Respondent's reference to economic benefit of noncompliance as a "new theory," it has long been the policy of EPA and the courts to consider the economic benefit of noncompliance in assessing penalties under the various environmental statutes, in order to achieve deterrence. *See*, C's PHE Ex. 28 (EPA's General Enforcement Policy GM-21); *B.J Carney Industries, Inc.,* 7 E.A.D. 171, 207 (EAB 1997). As stated by the Environmental Appeals Board:

> Assessing a penalty amount that reflects a violator's economic benefit of noncompliance serves two purposes vital to an effective enforcement program. First, it deters violations by taking away the economic incentive to violate the law. *See, Atlantic States Legal Found. v. Tyson Foods, Inc.,* 897 F.2d 1128, 1141 (11th Cir. 1990)("Insuring that violators do not reap economic benefit by failing to comply with the statutory mandate is of key importance if the penalties are to successfully deter violations.") * * * * Second, the economic benefit of noncompliance component of a penalty helps "ensure a level playing field by ensuring that violators do not obtain an economic advantage over their competitors who made the necessary investment in environmental compliance." 60 Fed. Reg. 16,875, 16,876 (Apr. 3, 1995).

B.J Carney Industries, Inc., 7 E.A.D. at 207-08. Deterrence is a primary purpose of FIFRA penalties. *Johnson Pacific, Inc.*, 5 E.A.D. 696, 707 (EAB 1995); *Sav-Mart, Inc.*, 5 E.A.D. 732, 738-39 (EAB 1995). Evidence and testimony regarding economic benefit of noncompliance appears to be additional support Complainant wishes to provide in support of its independent calculation under the ERP.

The relevancy of the documents and proposed testimony cannot be determined at this point in the proceeding but must be determined at hearing after a foundation has been laid. Respondent may present any arguments as to the relevancy, weight and premises of the testimony and evidence later in this proceeding, but at this point it is not "clearly inadmissible for any purpose."

As to Respondent's Motion to Supplement, Respondent supplied reasons therein for the delay in providing the documents. Although the Motion is being filed just few days prior to the hearing, Respondent has shown "good cause for failing to exchange the required information and

provided the required information" to Complainant, and has shown good cause for not providing it as soon as it had control of the information. The relevancy of documents cannot be determined at this point in the proceeding, and will be made after Respondent has an opportunity to lay a foundation for the exhibits. Given that the hearing commences in only a few days, and the parties' time to prepare for the hearing is very limited, a ruling is made herein without waiting for a response from Complainant.

Accordingly, the motions are granted.

ORDER

1. Complainant's Motion to Submit Supplemental Prehearing Exchange, dated June 5, 2009 is **GRANTED.**

2. Complainant's Motion to Submit Supplemental Prehearing Exchange, dated June 8, 2009 is **GRANTED.**

3. Respondent's Motion to Submit Supplemental Prehearing Exchange, dated June 17, 2009 is **GRANTED.**

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Susan L. Biro
Chief Administrative Law Judge

Dated: June 18, 2009
Washington, D.C.