

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
BUG BAM PRODUCT, LLC,	)	DOCKET NO. FIFRA-09-2009-0013
	)	
	)	
RESPONDENT	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR LEAVE  
TO FILE FIRST AMENDED COMPLAINT AS MODIFIED BY  
THE SUPPLEMENT TO THE AMENDED COMPLAINT

The Complaint in this matter was filed on September 18, 2009, pursuant to Complainant's authority under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 1361(a). Bug Bam Product, LLC's ("Respondent") Answer was filed on October 16, 2009. On November 5, 2009, the undersigned was designated as the presiding Administrative Law Judge by the Chief Administrative Law Judge.

On November 18, 2009, before a prehearing order had been issued, Complainant filed a Motion for Leave to File First Amended Complaint ("Motion") and a copy of the proposed Amended Complaint. Through its Motion, Complainant seeks to (1) add a new respondent, Flash Sales, Inc. ("Flash Sales"), (2) add allegations related to the minimum risk pesticide exemption set forth at 40 C.F.R. § 152.25(f), and (3) correct references to Respondent's physical address.<sup>1</sup> The Motion was followed, on November 19, 2009, with a Supplement to Motion for Leave to File First Amended Complaint ("Supplement") that sought to increase

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<sup>1</sup> Complainant alleges in the original Complaint that Respondent "distributed or sold" unregistered pesticide products in all three counts. Compl. at ¶¶ 14, 19, and 24. The Amended Complaint now uses the term "offered for sale" in those same allegations. Am. Compl. at ¶¶ 26, 34, and 42. This proposed change does not defeat Complainant's Motion, as the statute defines "distributed or sold" to include "offered for sale", but Complainant should have cited the changes in its Motion. See 7 U.S.C. § 136(gg).

the proposed penalty, from \$11,500 to \$15,300, based on the addition of a second respondent.

On December 2, 2009, Respondent filed a Consolidated Motion in Opposition to Complainant's Motion to File First Amended Complaint and Supplement to Amended Complaint ("Response") that opposed three of the changes Complainant sought in the Amended Complaint. Respondent did not oppose Complainant's correction of the Respondent's physical address. On December 10, 2009, Complainant filed a Reply to Consolidated Motion in Opposition to Complainant's Motion to File First Amended Complaint and Supplement to Amended Complaint ("Reply").<sup>2</sup>

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32. Section 22.14(c) of the Rules of Practice allows the complainant to amend the complaint once as a matter of right at any time before the answer is filed, and otherwise "only upon motion granted by the Presiding Officer." 40 C.F.R. § 22.14(c). The Rules of Practice do not, however, illuminate the circumstances when amendment of the complaint is or is not appropriate. In the absence of administrative rules on this subject, the Environmental Appeals Board ("EAB") has offered guidance by consulting the Federal Rules of Civil Procedure ("FRCP")<sup>3</sup> as they apply in analogous situations. *In re Carroll Oil Co.*, RCRA (9006) Appeal No. 01-02, 2002 EPA App. LEXIS 14 at \*35 (EAB, July 31, 2002); *In the Matter of Asbestos Specialists, Inc.*, TSCA Appeal No. 92-3, 4 E.A.D. 819, 827 n. 20 (October 6, 1993).

The FRCP adopt a liberal stance toward amending pleadings, stating that leave to amend "shall be freely given when justice

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<sup>2</sup> Separately, Respondent filed a Motion to Dismiss U.S. EPA's Complaint on December 8, 2009. This Order addresses only the Motion to Amend the Complaint and does not affect the pending Motion to Dismiss.

<sup>3</sup> The FRCP are not binding on administrative agencies, but many times these rules provide useful and instructive guidance in applying the Rules of Practice. See *Oak Tree Farm Dairy, Inc. v. Block*, 544 F.Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); *Wego Chemical & Mineral Corp.*, TSCA Appeal No. 92-4, 4 E.A.D. 513, 524 n.10 (EAB, February 24, 1993).

so requires." Fed. R. Civ. P. 15(a).<sup>4</sup> The Supreme Court has also expressed this liberality in interpreting Rule 15(a), finding that "the Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Foman v. Davis*, 371 U.S. 178, 181-82 (1962) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)).

In considering a motion to amend under Rule 15(a), the Court has held that leave to amend shall be freely given in the absence of any apparent or declared reason, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by previous amendment, undue prejudice, or futility of amendment. *Id.* at 182; accord *Carroll Oil*, 2002 EPA App. LEXIS 14 at \*37; see also *Yaffe Iron and Metal Co. v. U.S. EPA*, 774 F.2d 1008, 1012 (10th Cir. 1985) (administrative pleadings should be "liberally construed" and "easily amended"). Similarly, the EAB has found that a complainant should be given leave to freely amend a complaint in EPA proceedings in accordance with the liberal policy of FRCP 15(a), as it promotes accurate decisions on the merits of each case. *In the Matter of Asbestos Specialists, Inc.*, 4 E.A.D. at 830; *In the Matter of Port of Oakland and Great Lakes Dredge and Dock Company*, MPRSA Appeal No. 91-1, 4 E.A.D. 170, 205 (EAB, August 5, 1992).

In the instant matter, Complainant seeks to amend the Complaint to add a second respondent (Flash Sales), increase the proposed penalty, and add additional allegations related to the 40 C.F.R. § 152.25(f) exemption.<sup>5</sup> Respondent opposes each of

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<sup>4</sup> FRCP 15(a) provides that:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

<sup>5</sup> As Complainant's effort to amend references to the Respondent's physical address is a minor ministerial correction and is unopposed by Respondent, Complainant is hereby granted leave to include such changes in the Amended Complaint.

these amendments in its Response and Complainant develops its arguments in favor of amendment in its Reply. I shall address each of these proposed amendments in sequence.

#### 1. Adding an Additional Party

In support of its motion to add Flash Sales as a party, Complainant asserts that the role played by Flash Sales in the transaction alleged to violate FIFRA was only revealed to Complainant in Respondent's Answer. Motion at 5. Complainant goes on to state that its Motion was filed one month after Respondent filed its Answer. Motion at 4. In response, Respondent argues that Complainant possessed the relevant information about Flash Sales prior to filing the Complaint, based on Complainant's receipt of the products at issue, which bore Flash Sales' return address. Response at 3. According to Respondent, Complainant's knowledge as to the products' origin is not "new enough" to warrant amending the Complaint and the passage of time between the receipt of the products from Flash Sales and the Motion constitutes undue delay.<sup>6</sup> Response at 4, citing *In re Zaclon, Inc.*, RCRA 05-2004-0019 (Apr. 21, 2006); *In re Carroll Oil, Co.*, RCRA 8-99-05 (Apr. 30, 2001).

Respondent correctly identifies undue delay as a factor to be considered in deciding a motion to amend the complaint, but overstates the holdings in *Zaclon* and *Carroll Oil*. In *Carroll Oil*, the Administrative Law Judge denied the Motion to Amend the Complaint because it was offered "on the eve of trial" and would have substantially expanded the scope of discovery and the hearing. *Carroll Oil* at 7, citing *United States v. New Castle County*, 116 F.R.D. 19, 24 (U.S. Dist. Ct. Del. 1987); *City of Orlando, Florida*, CWA 04-501-99, 1999 WL 778575 (E.P.A., Aug. 24, 1999). The EAB's primary concern in reviewing the appeal in

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<sup>6</sup> In its Response, Respondent argues that by including new allegations as to Flash Sales' role, "EPA [] admits in its proposed Amended Complaint that 'Flash Sales sent the product[s]'. . .", implying that EPA possessed prior knowledge based on the statements made in the Amended Complaint. (Emphasis supplied). Response at 3. Although Complainant admittedly had some information that the products at issue were shipped by Flash Sales prior to the filing of the Complaint, Complainant claims that it did not understand Flash Sales' role in the sale and distribution of the products until Respondent filed its Answer. Reply at 5. Regardless, such claimed knowledge on Complainant's part may not be reasonably characterized as "undue delay" of the administrative proceeding.

*Carroll Oil*, a concern shared by the ALJ in *Zaclon*, was whether the delay in amending the complaint would have unduly prejudiced the opposing party. *Carroll Oil Co.*, RCRA (9006) App. 01-02, 2002 EPA App. LEXIS 14 at \*38 (E.A.B., July 31, 2002); *Zaclon* at 3. As noted in the ALJ's decision in *Carroll Oil*, the EAB has observed that "[p]rejudice is usually manifested by a lack of opportunity to respond or need for additional pre-hearing fact-finding and preparation that cannot be readily accommodated." *In re Lazarus, Inc.*, 7 E.A.D. 318, 1997 EPA App. LEXIS 27 \*28-29 (Sept. 30, 1997); *Carroll Oil* at 8. I am not persuaded that Respondent will be unduly prejudiced by the addition of Flash Sales as a party.

Unlike the cases relied upon by Respondent, the present case is at the very beginning of the litigation process. The Motion was received only 13 days after the matter was assigned to this Court and cannot be considered an "eleventh hour Motion." See *Carroll Oil* at 6, 12, 19. A prehearing exchange order, one of the initial procedural steps in an administrative enforcement action, has not yet been issued, let alone an order scheduling the hearing. No delay in the prehearing schedule will result from adding a party nor will the scope of Respondent's information exchange be expanded. Moreover, Respondent has not identified any prejudice or additional burden resulting from the addition of a second respondent.

Respondent's alternative argument in opposition to adding Flash Sales as a party is that such an amendment would be futile. Complainant asserts in its Motion that the Answer "lays a basis for filing" the Amended Complaint because it identifies Flash Sales as the "importer of record" in the transaction at issue. Motion at 2. Complainant asserts that pursuing a single action against both parties will conserve resources because the underlying facts it must prove will be almost identical. *Id.* Respondent, noting that an amendment is *not* futile if it is based on a theory of liability established by law, argues that the theory of liability in this case cannot be joint and several liability because there is no commercial or corporate relationship between the parties on which to base such liability. Response at 4-5, citing *In re Jerry Korn and Dairy Health*, FIFRA 10-2000-0061 (EPA July 31, 2001); *In re Roger Antkiewicz & Pest Elimination Products of America, Inc.*, 8 E.A.D. 218 (Mar. 26, 1999); *In re William E. Comley, Inc. and Bleach Tek, Inc.*, 11 E.A.D. 247 (Jan. 14, 2004). In its Reply, Complainant argues that the plain language of the FIFRA regulations makes the legal relationship between the parties irrelevant and Complainant's failure to claim such a relationship does not render the Motion futile. Reply at 5. In this regard, Complainant contents that

Flash Sales and Respondent are each independently liable for the violations. Moreover, Complainant argues, under *Korn* and *Zaclon* an amendment is not futile if a colorable basis for the amendment exists. Reply at 6, citing *Korn* at 4; *Zaclon* at 6. I am not persuaded that Complainant's Amendment would be futile.

Respondent's reliance on *Korn*, *Antkiewicz*, and *Comley*, is misplaced. Unlike the complainants in those cases, Complainant here does not seek to attach liability to a new party based on successor-in-interest liability or any other construction of corporate law. Instead, Complainant asserts that Flash Sales is independently liable for a violation of FIFRA as a person "involved in the sale or distribution of an illegal pesticide product" and liable under Section 12(a)(1)(A) of FIFRA.<sup>7</sup> Reply at 5; 7 U.S.C. § 136j(a)(1)(A). See also Am. Compl. at ¶¶ 6, 25-26, 33-34, 41-42. Complainant's allegations therefore present at a minimum a colorable basis for naming Flash Sales as a respondent that does not rely on tort theories of joint and several liability. Accordingly, the amendment would not be futile.

## 2. Increasing the Proposed Penalty

In the Supplement to its Motion to Amend the Complaint, Complainant seeks an upward adjustment in the proposed penalty to account for the addition of Flash Sales as a party. Complainant argues that adding Flash Sales increases the overall "size of business" component identified in the FIFRA Enforcement Response Policy ("ERP") and thus warrants an increase in the proposed fine. Additionally, Complainant asserts that such a change is "necessary to conform the proposed penalty to the facts and circumstances surrounding the violations and the proper application of the ERP." Supplement at 3. Respondent devotes little direct argument to this point except to assert that a "'proper' application of the ERP would not combine the revenues of two separate and unrelated corporate entities." Response at 9. Instead, Respondent's primary argument against the penalty is that Complainant incorrectly applied the ERP by failing to explain the penalty calculation and failing to account for Respondent's "[a]ctive cooperation". Response at 8. Complainant, in its Reply, argues that Part 22 of the Rules of Practice require only a "brief explanation of the proposed

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<sup>7</sup> Respondent's implicit argument that Complainant has failed to state a claim is more appropriately made in the context of a Motion to Dismiss, which Respondent has already and separately served on Complainant.

penalty" in the administrative complaint and Complainant need not disclose calculations in the Complaint. Reply at 8. According to Complainant, any factual dispute as to the amount of the proposed penalty must wait until the prehearing exchange and, ultimately, the hearing itself. *Id.*

I find Respondent's minimal response to Complainant's argument unpersuasive and I find Respondent's primary counter-argument misplaced. I am unaware of any cases that rule on whether co-respondents in a FIFRA case can be evaluated together for ERP penalty calculation purposes and no authority concerning this question has been cited. Rather, this question is more appropriately reserved for a later stage of the administrative proceeding. Whether Complainant has properly applied the ERP is a mixed question of fact and law that cannot be resolved during the pleadings stage. The proper analysis of the Motion requires a resort to the *Foman* factors of undue delay, bad faith, undue prejudice, futility, etc. See *Foman v. Davis*, 371 U.S. at 182. Here, there is no undue delay for the same reasons outlined above with respect to adding another respondent. In addition, no undue prejudice results from the Amended Complaint because the information Respondent seeks may be discovered during the prehearing exchange regardless of whether the Complaint is amended. Respondent will thus have sufficient opportunity to organize its arguments and challenge Complainant's penalty calculation before hearing.

### 3. Additional Minimum Risk Pesticide Exemption Allegations

The third substantive change Complainant seeks to include in the Amended Complaint concerns the minimum risk pesticide exemption under 40 C.F.R. § 152.25(f), as authorized by Section 25(b) of FIFRA, 7 U.S.C. § 136w(b). Under Section 25(b) of FIFRA, the EPA Administrator is authorized to exempt certain pesticides from the Act's registration requirement by listing these pesticides in the regulations, currently at 40 C.F.R. § 152.25(f) ("25(f)").<sup>8</sup> As Complainant points out, the burden of proving such an exemption rests on the proponent of the exemption, in this case the Respondent. Reply at 6, citing *In the Matter of Ashland Chem. Co., Division of Ashland Oil Inc.*, RCRA-V-W-86-R-13, 1987 RCRA LEXIS 50 (EPA, June 22, 1987); *In the Matter of Steven Tuttle, Tuttle Tool Engineering and Tuttle Apiary Laboratories.*, FIFRA 10-86-0012, 1997 WL 738081 (EPA,

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<sup>8</sup> While Complainant refers to "the 25(f) exemption" (40 C.F.R. § 152.25(f)), Respondent refers to "Section 25(b) exempt products".

Sept. 30, 1997). Nevertheless, Complainant states, it seeks to include specific allegations related to the 25(f) exemption in the Amended Complaint in order to "help to clarify and focus the areas of dispute for hearing", which Complainant opines will "result in better judicial economy". Reply at 7. Respondent disputes this claim, asserting that the issues raised by these additional allegations were resolved in settlement conferences and thus no savings will be realized by adding these additional allegations. Response at 6. Respondent goes on to deny each new allegation with explanation. *Id.* at 6-8. Respondent then puts forth a First Amendment commercial speech argument and attempts to put the burden of proving a substantial government interest on Complainant. *Id.* at 7, citing *Bioganic Safety Brands, Inc. v. Don Ament*, 174 F. Supp. 2d 1168 (D. Colo. 2001).<sup>9</sup>

Respondent's attempts to import an argument on the merits into the pleadings are misdirected. As explained above, the *Foman* test for appropriateness is not concerned with the adjudication of factual issues, but instead seeks to prevent undue prejudice, delay, or other procedural injustice to the non-moving party. See *Foman v. Davis*, 371 U.S. at 182. Again, I see no hardship to Respondent by allowing Complainant to include in the Amended Complaint specific allegations aimed at eliciting responses to factual allegations that may or may not affect the availability of a regulatory exemption. Indeed, this is the fundamental purpose of pleadings. Respondent appears to be objecting to the fact that Complainant filed a complaint in the first place and accuses the Complainant of being "financially-motivated" in its decision to bring an enforcement action. Response at 8. However, Complainant's state of mind is irrelevant in this instance. Although there is no particular reason to permit the Complainant to allege the inapplicability of the regulatory exemption, there is also no reason to deny the amendment. Such an amendment would allow the parties to narrow the scope of disputed, material facts by requiring a direct admission or denial by the Respondent. Under the liberal pleading standard enjoyed by parties in our administrative proceedings, Respondent must demonstrate some cognizable harm as a result of the amendment, which Respondent has failed to do.

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<sup>9</sup> In addition to being inappropriate in a Motion to Amend the Complaint, Respondent's reliance on *Bioganic* is misplaced. In *Bioganic*, the parties were dealing with a recognized, 25(f)-exempt insect repellent. *Bioganic*, 174 F. Supp. 2d at 1172 (citing an earlier version of the CFR, "section 25(g)", which was renumbered in 2001 to be the 25(f) exemption discussed here). In this instance, the applicability of the 25(f) exemption is the disputed issue. See Am. Compl. at ¶ 20.

Accordingly, Complainant's Motion for Leave to File First Amended Complaint as modified by the Supplement to the Amended Complaint is **GRANTED**. Upon the filing of the proposed First Amended Complaint and Supplement, it shall become the Complaint in this matter. Pursuant to Section 22.14(c) of the Rules of Practice, 40 C.F.R. § 22.14(c), Respondent Bug Bam Product shall have twenty (20) additional days from the date of service of the First Amended Complaint to file its amended Answer.<sup>10</sup> Further, Respondent Bug Bam Product shall now serve Flash Sales with copies of all documents filed in this proceeding, including its Answer and Motion to Dismiss. See 40 C.F.R. §§ 22.5(b), 22.15(a).

Finally, I note Complainant's request that "[a]ll discussion in Respondent's Opposition referring to statements made during settlement conferences should be stricken from the record, and the Respondent should be admonished for having attempted to disclose these statements in violation of the Part 22 requirements." Reply at 7. Complainant is correct in its assertion that under Section 22.22(a) of the Rules of Practice, 40 C.F.R. § 22.22(a), evidence relating to settlement, which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence, FED. R. EVID. 408, is not admissible. Therefore, all references to the substance of the parties' settlement discussions are not properly before me and Respondent should refrain from discussing any confidential settlement matters in future pleadings.

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Barbara A. Gunning  
Administrative Law Judge

Dated: January 7, 2010  
Washington, DC

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<sup>10</sup> Flash Sales, Inc. shall have thirty (30) days to file its answer to the Complaint. 40 C.F.R. § 22.15(a).