



**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 RESPONDENT'S MOTION IN LIMINE

I. Procedural History

The U.S. Environmental Protection Agency, Region 9 ("EPA" or "Complainant") initiated this action on September 30, 2008 by filing an Administrative Complaint charging 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 imposition of an aggregate penalty of \$ 969,930 for these violations. On October 29, 2008, Respondent filed an Answer to the Complaint. In its Answer, Respondent admitted some allegations, asserted that it lacked sufficient information to either admit or deny the truth of many others, and raised a few defenses.

Thereafter, consistent with the Prehearing Order issued on January 15, 2009, the parties filed their Prehearing Exchanges. Complainant filed its Initial Prehearing Exchange (C's PHE) on February 27, 2009, identifying as the evidence it intended to submit at hearing the testimony of two proposed witnesses and 23 exhibits (C's PHE Exs. 1-23), copies of which were attached thereto. 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.¹ Complainant filed its Rebuttal Prehearing Exchange (C's Reb. PHE)

¹ In its Prehearing Exchange, Respondent identified as exhibits it intended to introduce at hearing "company files" regarding the purchase of the pesticide products at issue and/or returns thereof, but did not produce copies of the files, instead indicating the documents are "to be supplied." R's PHE at 2. In its Rebuttal Prehearing Exchange, Complainant "strenuously object[ed] to Respondent's intention of submitting product purchase files at a later date" indicating that if such document were not produced "immediately," Complainant would move for discovery. C's Reb. PHE at 2. To date, however, Respondent has submitted no further exhibits for hearing and Complainant has not filed a discovery motion.

on April 2, 2009, identifying another proposed witness and four additional documents (C's Ex. 24-27).

On May 4, 2009, Complainant filed a Motion for Partial Accelerated Decision on Liability, as to which Respondent filed an Opposition. By Order dated June 2, 2009, Complainant's Motion for Partial Accelerated Decision was granted, and Respondent was found liable on all counts of the Complaint. Specifically, Respondent was found to have violated FIFRA Section 12(a)(1)(A) in September 2004, when it offered for sale or distribution from its store in Gardena, California, the unregistered pesticide "Farmer's Secret Berry & Produce Cleaner," (Count 1); was found to have also violated Section 12(a)(1)(A), between September 2005 and May 2006, when it offered for sale or distribution and/or sold from its various stores in California, Nevada and/or Arizona, 164 units of the unregistered pesticide "Bref Limpieza Y Desinfección Total con Densicloro®," (Counts 2-165); and was found to have violated FIFRA Section 12(a)(1)(E) on May 8, 2008, when it offered for sale in its store in Las Vegas, Nevada, 11 misbranded units of the registered pesticide "PiC® BORIC ACID Roach Killer III" (Count 166).

Hearing on the remaining issue of penalty is scheduled to begin on June 23, 2009.

On May 29, 2009, Respondent filed a Motion in Limine and filed an amended version of the same motion on June 2, 2008 ("Motion"). To date, Complainant has not filed a response to the Motion and none is deemed necessary.

II. Standards for Adjudicating the Motion in Limine

This action is governed by the Consolidated Rules of Practice, 40 C.F.R. Part 22 (Rules). The Rules provide that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value" 40 C.F.R. § 22.22(a)(1). The Rules do not specifically address the issue of motions in limine and therefore federal court practice, the Federal Rules of Civil Procedure and the Federal Rules of Evidence may be of guidance. *See, Carroll Oil Co.*, 10 E.A.D. 635, 649, 2002 EPA App. LEXIS 14, *35 (EAB 2002); *Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 524 n.10, 1993 EPA App. LEXIS 6, *26-27 n.10 (EAB 1993); *Solutia Inc.*, 10 E.A.D. 193, 211 n. 22, 2001 EPA App. LEXIS 19, *47 n.22 (EAB 2001).

A motion in limine is the appropriate vehicle for excluding testimony or evidence from being introduced at hearing on the basis that it lacks relevancy and probative value. "[A] motion in limine 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). Motions in limine are generally disfavored. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). "Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so questions of foundation, relevancy, and potential prejudice may be resolved in proper context." *Id.* at 1400-1401. Thus, denial of a motion in limine does not mean

that all evidence contemplated by the motion will be admitted at trial. Rather, denial of the motion in limine means only that, without the context of trial, the court is unable to determine whether the evidence in question should be excluded. *United States v. Connelly*, 874 F.2d 412, 416 (7th Cir. 1989).

III. Respondent's Motion

In its Motion in Limine, Respondent indicates it is seeking to exclude from admission at hearing “irrelevant and immaterial evidence as defined in Federal Rule of Evidence (“FRE”) Rule 401 and hearsay evidence that does not fall within any recognized hearsay exceptions under FRE Rules 803 and 804.” The evidence Respondent seeks to exclude as “irrelevant” it identifies as follows:

- (1) General EPA notices that have no relevance to the sales of the particular products at issue in this action (EPA Prehearing Exchange Exhibits (“EPA Ex.”) 1 and 4);
- (2) Witness testimony and exhibits regarding the purported health effects of products that contain sodium hypochlorite (testimony of Linnea J. Hanson and EPA Ex. 22, 24, and 26)[;]
- (3) Excerpts from 99 Cents documents that purport to identify a “distressed product” purchasing strategy employed by 99 Cents; [and]
- (4) Excerpts purportedly from a Mexican website operated by Henkel (EPA Ex.20)[.]

Motion at 1.

The evidence Respondent seeks to exclude as hearsay are the entirety of EPA inspection reports and letters identified as EPA Exs. 2, 3, 6, 7, 10, 17, and 18, with the exception of the attachments thereto consisting of photographs and documents which Respondent provided to EPA and as to which it has stipulated to admissibility. Motion at 1.

IV. Discussion - Irrelevant Evidence

In its Motion, Respondent notes that FRE 401 defines “relevant evidence” as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Further, it points out that under FRE 403, even relevant evidence may be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless

presentation of cumulative evidence.” Motion at 2.

The context in which evidence is offered determines its relevancy. The impending hearing will focus solely upon the issue of determining the appropriate penalty, if any, to be imposed upon Respondent, as its liability for the violations is no longer at issue. Admissible evidence as to the penalty issue is that which is relevant and of probative value as to the criteria the Tribunal must or may consider in determining an appropriate penalty.

The assessment of civil administrative penalties is generally governed by the Rule 22.27(b) which provides in pertinent part that:

[i]f the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based upon the evidence in the record and in accordance with *any civil penalty criteria in the Act*. The Presiding Officer shall [also] consider *any civil penalty guidelines* issued under the Act. . . . If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

40 C.F.R. § 22.27(b)(italics added). The Complainant bears the burdens of presentation and persuasion to show that the relief sought in this case is "appropriate." 40 C.F.R. § 22.24(a).

In regard to any relevant "civil penalty criteria in the Act," FIFRA Section 14(a)(4) provides in pertinent part that:

In determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to [1] the size of the business of the person charged, [2] the effect on the person's ability to continue in business, and [3] the gravity of the violation.

7 U.S.C. § 136l(a)(4)(numerical notation added). It has been held that the foregoing "gravity of the violation" factor hinges upon both the actual or potential gravity of the harm *and* the gravity of the misconduct. See, *Lerro Products*, EPA Docket No. FIFRA 03-2002-0241, 2003 EPA ALJ LEXIS 189, *14 (October 8, 2003)(violation for late filed pesticide report showing lack of pesticide production is of low gravity as violation could not have affected the environment or anyone's health); *Chem Lab Products, Inc.*, EPA Docket No. FIFRA-9-2000-0007, 2002 EPA ALJ LEXIS 2, *35 (January 2, 2002)(gravity of harm for selling unregistered pesticide mitigated by Respondent being permitted to sell similar products prior to registration).

In terms of civil penalty guidelines issued under the Act, on July 2, 1990, EPA's Office of Compliance Monitoring, Office of Pesticides and Toxic Substances issued an Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act (hereinafter cited as "the ERP"). C's PHE Ex. 15. The ERP sets forth a "five stage process" for computing a penalty

in consideration of the three statutory (FIFRA Section 14(a)(4)) penalty criteria. *Id.* at 18. These five steps are:

1. Determining the gravity or "level" of the FIFRA violation;
2. Determining the size of violator's business;
3. Determining the base penalty by placing the gravity level of the violation and the size of the business category of the violator into the FIFRA civil penalty matrix in the ERP;
4. Adjusting the base penalty in consideration of the specific characteristics of the pesticide involved, the actual or potential harm to human health and/or the environment, the compliance history of the violator, and the culpability of the violator; and
5. Adjusting the base penalty in consideration of the effect that payment of the total civil penalty will have on the violator's ability to continue in business.

Id.

The culpability adjustment factor in the ERP takes into account the violator's intent in regard to the violation, *i.e.* was the violation knowing or willful or did it result from negligence, and did the violator instituted steps to correct the violation immediately after discovery. C's PHE Ex. 15 at Appendix B-2.

The relevancy of the four types of evidence Respondent seeks to exclude will be considered in the context of the FIFRA statutory penalty criteria and the ERP guidelines.

A. General EPA Notices - EPA Exs.1 and 4

Respondent asserts that EPA Exs. 1 and 4 are general EPA guidance documents and should be excluded under Rule 401 or 403 "because they do not mention, much less relate to any of the three products at issue in this action." Motion at 2.

Complainant's PHE Ex. 1 appears to be a two-page "Letter of Advisement" dated September 30, 2002, which was sent by Pamela Cooper, Chief, Pesticides Section, EPA, Region 9, to Mr. Jose Casas, 99¢ Only Store, Las Vegas, Nevada. The EPA letter refers to a "routine marketplace inspection" conducted on August 13, 2001, advises of FIFRA's definition of a pesticide, and requests that sales of a product cease..

Complainant's PHE Ex. 4 appears to consist of two documents. The first is a two page EPA Region 9 publication entitled "Protect your business: Avoid Selling Illegal Pesticides," dated July 17, 2003 providing notice regarding the provisions of FIFRA. The second document is a 40 page document which appears to primarily be a typewritten list of store names and

addresses, the first page of which bears the handwritten notation “Mailed out Feb 2004 Sent to 72 Stores including HQs.” The name of a number of the stores on the list includes the term “Ninety Nine Cent” or “99 Cent[s].” *See*, C’s PHE Ex. 4 (Mailing List) at 3-10, 13-15, 21-31.

While Respondent is correct that neither of these two exhibits mention the pesticide products at issue in the instant matter, both of these exhibits appear on their face to provide general information regarding FIFRA and the sale of unregistered pesticides and refer to dates prior to the date of the violations found in this action. As such they may be relevant and probative as to the level of Respondent’s culpability in regard to the violations. Further, there is nothing about these documents which suggest that their probative value would be “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.” Therefore, Respondent’s Motion in Limine in regard to them is denied.

B. Testimony and Exhibits on Health Effects (EPA Exs. 22, 24, and 26)

The second category of evidence Respondent seeks to exclude on the basis of relevance is testimony of proposed EPA witnesses Linnea J. Hanson and Julie Jordan, and EPA Exs. 22, 24, and 26, regarding the purported health effects of products that contain sodium hypochlorite. Motion at 1. Respondent asserts this evidence is irrelevant “because there are no allegations that the use of the Bref cleaner product caused any adverse health effects.” Motion at 2. It characterizes EPA Ex. 26 as “particularly troublesome as it purports to be a compilation of ‘High Level Incidents Involving Sodium Hypochlorite’ in which the names of the companies and products have been redacted so that there is no way to tell whether the products involved in those incidents bore any resemblance whatsoever to the Bref product at issue here.” *Id.* Respondent further asserts that even if this evidence is relevant, the “probative value is small and is easily outweighed by consideration of unfair prejudice and confusion of issues, not to mention the two witnesses and review of eight so-called “high level incidents’ will result in undue delay and a needless waste of time at the hearing.” *Id.*

In its Prehearing Exchange, EPA identifies Dr. Linnea J. Hanson as its sole proposed expert witness, indicating that she will “testify regarding the health effects of exposure to sodium hypochlorite generally and the hazards posed by ‘Bref Disinfectant with Densicloro®’ specifically.” C’s PHE at 1. Further, it identifies Julie Jordan as a proposed fact witness who will “testify regarding the development of the complaint on file in the action . . . [and] calculation of the proposed civil penalty.”

Complainant’s PHE Ex. 22 appears merely to be the Curriculum Vita of Dr. Linnea J. Hansen. C’s PHE Ex. 24 is an Affidavit of Julie Jordan, dated April 2, 2009, referring inter alia, to her preparation of Complainant’s PHE Ex. 26, which is a two-page document entitled “Report on High Level Incidents Involving Sodium Hypochlorite March 31, 2009.” The Report appears to list 9 “incidents” in which persons were exposed to sodium hypochlorite and became ill.

A review of the record reflects that Respondent is correct that EPA has not alleged any of the three unregistered pesticides at issue here actually caused any adverse health effects. However, as indicated above, it has been held that FIFRA's "gravity of the violation" penalty factor takes into account both actual and *potential* harm from the violation. *See, Lerro Products and Chem Lab, supra.* The testimony and exhibits Respondent seeks to exclude appear to be generally probative as to the potential harm of the product Bref, at issue here, which Respondent has previously acknowledged contains sodium hypochlorite, the basic component of bleach. *See, Respondent's Opposition to Motion for Accelerated Decision at 8.* Nevertheless, it does appear that information has been redacted from C's PHE Ex. 26, the Report on High Level Incidents Involving Sodium Hypochlorite, to avoid disclosure of the entities involved in the alleged incidents, and no identification of the particular bleach products are identified. However, such redactions do not make the evidence "irrelevant," but may go to the weight to be accorded it. Further, while introduction of this evidence, and cross-examination related thereto, may be time consuming, I fail to see how such evidence will cause unfair prejudice, confusion of issues, result in undue delay, and/or needlessly waste of time. Similar evidence is routinely introduced at FIFRA hearings involving unregistered pesticides. *See e.g., Rhee Bros., Inc., FIFRA-03-2005-0028, 2006 EPA ALJ LEXIS 32, *47 (ALJ, September 19, 2006)*(testimony taken on potential harm from unregistered naphthalene (mothballs)).

C. Respondent's Purchasing Strategy

The Motion in Limine also seeks to exclude as irrelevant evidence that EPA may seek to offer consisting of excerpts from 99 Cents documents "in support of its misguided theory that Bref cleaner product and the PiC Boric Acid Roach Killer were 'distressed merchandise' that 99 Cents was able to purchase because it was non-compliant." Motion at 2-3. Respondent further states "nothing could be further from the truth as the Bref cleaner was, in fact, a brand new product being sold for the first time in the United States, while 99 Cents routinely purchased the Boric Acid Roach Killer from a major multi-national company as a 'reorderable' product." Motion at 2-3.

Respondent, however, does not identify any particular exhibit included in Complainant's Prehearing Exchange as containing the allegedly irrelevant documents or excerpts therefrom. Rather, the Motion indicates that Respondent's basis for believing that EPA has this "misguided theory," as to which it may seek to introduce these documents, comes only from paragraphs 15-17 of the Complaint. However, as indicated in the Prehearing Order, documentary evidence not submitted as part of a party's prehearing exchange will not be admitted at hearing. Therefore, there is no need to rule on the relevancy of documents or excerpts therefrom which have not been included in Complainant's Prehearing Exchange. In the event that Complainant moves to supplement its Prehearing Exchange with any such documents, then Respondent may renew its motion at that time.

D. Excerpts From Henkel Mexican Website - EPA. Ex. 20

The last exhibit Respondent seeks to exclude based upon relevance it identifies as “[e]xcerpts purportedly from a Mexican Website operated by Henkel (EPA. Ex. 20).” Motion at 1. In its Motion, Respondent states that this Exhibit is “an English translation from a Mexican website apparently operated by Henkel, the manufacturer of the Bref clearer, apparently to show that Henkel had some ‘pesticidal’ intent in selling Bref.” Motion at 3. It further notes that this evidence is “not authenticated in any way (including as to its translation from Spanish to English)” and has no probative value with respect to what a “reasonable consumer’ shopping in a 99 Cent store would have.” *Id.* Respondent also suggests that this evidence is “hearsay.” *Id.*

Complainant’s Prehearing Exchange Ex. 20 consists of eight pages, all of which appear to be printouts of material from a website operated by or relating to Bref, manufactured by Henkel in Mexico. Some of the pages are in English, while others appear to be in Spanish, and some pages may be translations of others. Respondent is correct that no certification as to the accuracy of the translation is included in the exhibit. However, the basis upon which Respondent questions this exhibit is that Complainant may rely upon it to show that Henkel, the manufacturer of the pesticide, had a “pesticidal” intent in selling the product. Pesticidal intent is an issue primarily relevant to liability, and since liability has already been determined in this case, Respondent’s concern raised about this exhibit appears to be moot. To the extent that such intent could be relevant to the penalty determination, perhaps in regard to the factor of culpability, a foundation must be laid for the exhibit before its admissibility can be determined. At this point in the proceeding, it cannot be concluded that the exhibit it is clearly inadmissible for any purpose.

V. Discussion - Hearsay Evidence

In its Motion, Respondent further requests that this Tribunal exclude from admission at hearing on the basis of hearsay EPA PHE Exs. 2, 3, 6, 7, 10, 17, and 18, which are inspection reports. It notes that hearsay is defined in FRE 801 as “a statement, other than one made by a declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Motion at 3. Respondent asserts that EPA cannot fit these inspection reports into any hearsay exception under FRE 802.

Complainant’s Prehearing Exchange identifies these five exhibits as:

6. Inspection Report of 99 Cents Only Store, State of California, Department of Pesticide Regulation, September 8, 2005 inspection date, for “Bref Limpieza Y Desinfección Total con Densicloro®,” made in Mexico, UPC 501199 400068 (“Bref”)
7. Inspection Report of 99 Cents Only Store, State of California, Department of Pesticide Regulation, October 20, 2005 inspection date, for “Bref”

10. Inspection Report of 99 Cents Only Store, State of Nevada, Department of Agriculture, May 8, 2008 inspection date, for "PiC® Boric Acid Roach Killer III," EPA Reg. No. 3095-20201 ("BORIC ACID Roach Killer")
17. Enforcement Case Review of "Farmer's Secret Cleaner," dated January 14, 2008, and Application therefor
18. Enforcement Case Review of "Bref," dated January 3, 2007, and Application therefor.

The basis for excluding these reports offered by Respondent is meritless. Hearsay is admissible at hearing in these administrative proceedings. *Pyramid Chemical Co.*, 11 E.A.D. 657, 675, 2004 EPA App. LEXIS 32, *49 (EAB 2004) ("Hearsay evidence is clearly admissible under the liberal standards for admissibility in the [Consolidated Rules], which are not subject to the stricter Federal Rules of Evidence."); *William E. Comley, Inc.*, 11 E.A.D. 247, 266, 2004 EPA App. LEXIS 2, *45 (EAB 2004) (same); *Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355, 368-70, 2003 EPA App. LEXIS 5, *36 (EAB 2003) (holding that hearsay evidence is admissible in administrative proceedings even if it would not be admissible under the Federal Rules of Evidence). Therefore, Respondent's Motion in Limine as to these exhibits is denied.

CONCLUSION

Based upon the forgoing, Respondent's Motion in Limine is hereby **DENIED**.

Susan L. Biro
Chief Administrative Law Judge

Dated: June 4, 2008
Washington, D.C.