



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
LIPHATECH, INC.,) DOCKET NO. FIFRA-05-2010-0016
)
)
RESPONDENT.)

**ORDER ON MOTION OF CROPLIFE AMERICA AND RESPONSIBLE INDUSTRY
FOR A SOUND ENVIRONMENT FOR LEAVE TO FILE A NON-PARTY BRIEF
OPPOSING COMPLAINANT’S CONSTRUCTION OF FIFRA SECTION 12(a)(1)(B)**

On January 6, 2011, CropLife America (“CLA”) and Responsible Industry for a Sound Environment (“RISE”) (collectively “Non-Parties”) submitted a Motion of CropLife America and Responsible Industry for a Sound Environment for Leave to File a Non-Party Brief Opposing Complainant’s Construction of FIFRA Section 12(a)(1)(B) (“Motion”), along with a proposed Non-Party Brief of CropLife America and RISE in Opposition to Complainant’s Motion for Accelerated Decision on Liability for Counts 2,141 Through 2,183 of the Complaint (“Proposed Brief”). On January 10, 2011, Respondent Liphatech, Inc. (“Liphatech”), submitted a one-sentence letter supporting the Motion. On January 13, 2011, this Tribunal received Complainant’s Response in Opposition to the Motion of CropLife America and Responsible Industry for a Sound Environment for Leave to File a Non-Party Brief Opposing Complainant’s Construction of FIFRA Section 12(a)(1)(B) (“Response”). On January 19, 2011, Non-Parties served a Reply of CropLife America and RISE in Support of Motion for Leave to File a Non-Party Brief Opposing Complainant’s Construction of FIFRA Section 12(a)(1)(B) (“Reply”).

Non-Parties submit the Proposed Brief pursuant to 40 C.F.R. § 22.11(b). Section 22.11(b) provides in relevant part that:

Any person who is not a party to a proceeding may move for leave to file a non-party brief. The motion shall identify the interest of the applicant and shall explain the relevance of the brief to the proceeding.

40 C.F.R. § 22.11(b). Non-Parties state that they are both national, non-profit trade associations representing producers and suppliers of pesticide products. Motion at 1. Non-Parties assert that

the construction of FIFRA § 12(a)(1)(B) suggested in Complainant’s second Motion for Accelerated Decision is “contrary to the vital interests of pesticide registrants, distributors, and users.” *Id.* Non-Parties also argue that Complainant’s proposed construction is contrary to the text and legislative history¹ of FIFRA and inconsistent with promulgated interpretive rules concerning pesticide advertising claims. *Id.* at 2. Non-Parties also submit that Complainant’s construction of Section 12(a)(1)(B) would constrain the commercial free speech of their members. *Id.* Non-Parties claim that the Proposed Brief is “useful” because it raises “some legal issues and discuss[es] pertinent precedent not addressed” by the parties. *Id.* Lastly, Non-Parties assert that granting the Motion will not disrupt the proceedings because no hearing or other action has yet been taken in this matter. *Id.*

Complainant, in its Response, requests that the Motion be denied for the following reasons: (1) Non-Parties and their counsel are partial to Respondent and are acting, not as “friends of the court,” but as “surrogates” for Liphatech; (2) Non-Parties overstate their interests in the outcome of the case and point to nothing unique about their members or position that warrants participation; (3) Non-Parties offer little new information relevant to these proceedings; and (4) granting the Motion will result in significant delays and lead to a flurry of non-party briefs in this and future cases. Response at 1-2.

With respect to the allegations of partiality, Complainant argues that Non-Parties share “close association with Respondent” and provide documentary support, in the form of Attachments A through E, to demonstrate six different illustrations of interconnectedness² that Complainant believes precludes Non-Parties from presenting an “objective, dispassionate, neutral discussion of the specific issue they seek to brief.” Response at 5-6 (internal quotations omitted). Complainant also argues that Non-Parties lack any real interest in the outcome of this matter because they misunderstand the nature of the issues in play. *Id.* at 8. Complainant goes on to describe the “crucial distinction” between advertising claims that a registered product is efficacious from advertising claims regarding the level of efficacy or the relative efficacy as compared to other products. *Id.* Complainant argues that the former is relevant to Non-Parties and is fully allowed under the FIFRA regulations, but the latter is at issue in this matter and does not fall within the scope of interest asserted by Non-Parties. *Id.* Complainant concludes that the Proposed Brief lacks relevance because it is a “mere reiteration and extension of the arguments

¹ Non-Parties go so far as to attach to their Proposed Brief a 159-page Senate Committee Report from 1977 to support this assertion.

² Those alleged connections are: (1) Non-Parties’ counsel represents Liphatech in a related district court action against U.S. EPA; (2) Liphatech’s CEO is a Board Member for RISE; (3) one of the declarants, whose declaration is appended to the Proposed Brief, is employed by counsel for Non-Parties; (4) Respondent’s proposed expert witness, Henry Jacoby, is employed by ACTA Group, LLC, and by counsel for Non-Parties; (5) ACTA Group, LLC, is a consulting affiliate for counsel for Non-Parties; and (6) counsel for Non-Parties is a member of CLA. Response at 6.

already made by Respondent.” *Id.* at 10. Thus, by denying the Motion, Complainant asserts, the undersigned would prevent the abuses identified in *Voices for Choices v. Illinois Bell*, 339 F.3d 542 (7th Cir. 2003), without “unduly” limiting the purposes served by legitimate amici. Response at 11 (citing *Animal Prot. Inst. v. Martin*, 2006 U.S. Dist. LEXIS 95724, *11 (D. Minn. Nov. 16, 2006)).

Complainant includes a request in the alternative, in the event the Motion is granted, that the undersigned require Non-Parties to file a disclosure statement in accordance with Rule 29(c) of the Federal Rules of Appellate Procedure (“FRAP”) that states the following:

1. A disclosure statement in accordance with FRAP 29(c)(1);
2. A statement that indicates whether Respondent’s counsel authored the Proposed Brief in whole or in part (FRAP 29(c)(5)(A));
3. A statement that indicates whether Respondent or Respondent’s counsel contributed money that was intended to fund preparing or submitting the Proposed Brief (FRAP 29(c)(5)(B));
4. A statement that indicates whether a person - other than Non-Parties or their counsel - contributed money that was intended to fund preparing or submitting the Proposed Brief and, if so, identify each such person (FRAP 29(c)(5)(C)); and
5. Because of the unique affiliations in this matter, a statement that includes whether any of the Board Members of CLA or RISE influenced or contributed to the inception and/or funding of the Proposed Brief - and, if so, identify each such Board Members of CLA or RISE.

Response at 11.

In their Reply, Non-Parties acknowledge all the connections between Respondent and the Non-Parties stated in Complainant’s Response but deny that they are acting as surrogates for Respondent. Stating that they have no objection to Complainant’s alternative request for a disclosure statement in accordance with FRAP 29(c), Non-Parties append to their Reply a document entitled Voluntary Rule 29(c) Disclosure of CropLife America and Responsible Industry for a Sound Environment (“Rule 29 Disclosure”). Nevertheless, Non-Parties cite *Neonatology Assocs. v. Comm. of Internal Revenue*, 293 F.3d 128, 131-32 (3d Cir. 2002), for the proposition that disinterested objectivity and a complete lack of pecuniary interest are no longer hallmarks of *amici* in federal court practice. *See also Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970) (*amicus* not normally impartial).

Whether impartiality is a relevant consideration, Non-Parties argue that the true test for granting the Motion should be an evaluation of the assistance such a brief would provide the undersigned by “presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties’ briefs.” Reply at 9 (citing *Voices for Choices v. Illinois Bell*, 339 F.3d 542, 545 (7th Cir. 2003)). Non-Parties then go on to lay out their position with respect to the underlying merits of Complainant’s second Motion for Accelerated Decision. Reply at 9-14.

Discussion and Conclusions

The Rules of Practice do not set forth a clear standard for evaluating the appropriateness of proposed non-party briefs, instead leaving such determinations to the sound discretion of the Presiding Officer. 40 C.F.R. § 22.11(b). While this Tribunal may look to analogues under the Federal Rules of Civil Procedure for guidance where the Rules of Practice are silent, *see, e.g., Carroll Oil Co.*, 10 E.A.D. 635, 649 (EAB 2002), there is no such analogue addressing non-party, or *amicus*, briefs. *See* Response at 4. Complainant asserts that resorting to the Federal Rules of Appellate Procedure would be proper in this instance, Response at 4, but acknowledges that with respect to the role of *amici*, the interests of federal appellate courts do not equate with those of trial courts, *id.* at 11 (citing *Animal Prot. Inst.*, at *10 n.4). In an administrative proceeding, the Presiding Officer is tasked, under the Administrative Procedure Act, with developing a complete and accurate factual record on which a final decision may be based. 5 U.S.C. § 556(e). This emphasis on a full record militates against unnecessary exclusion of relevant testimony and evidence.

In this case, Non-Parties have identified their interest in this matter as national, non-profit trade organizations serving pesticide producers and suppliers. Motion at 1; Reply at 3-4. Complainant's concern over the apparent impartiality or lack of objectivity of the Non-Parties, by itself, is an insufficient reason to deny the Motion. Upon review of the Proposed Brief along with the Motion and Reply, I find that the Non-Parties have explained the relevance of the Proposed Brief to the proceeding, as required by Rules of Practice. 40 C.F.R. § 22.11(b). Such a finding addresses only whether the Proposed Brief will be accepted into the record and has no bearing on the weight accorded to the Proposed Brief. The Proposed Brief will speak for itself. As to Complainant's concern that the Non-Parties' interests are insufficiently unique to justify their participation, I find that the Proposed Brief offers additional information aside from the arguments offered by the parties that warrant its inclusion. Moreover, the level of participation requested is minimal as it applies only to a single motion for accelerated decision as to a small set of the counts at issues in this proceeding. Lastly, I find Complainant's concern, that admission of the Proposed Brief will lead to "a flurry of such non-party briefs in this and future administrative cases," to be overstated. As Complainant notes in its Response, its own research reveals no administrative cases from the Environmental Appeals Board or the Office of Administrative Law Judges interpreting 40 C.F.R. § 22.11(b), which indicates how frequently this issue is raised. For good cause shown, the Motion is **GRANTED**.

Nevertheless, Complainant argues, and in its Reply the Non-Parties acknowledge, that a full disclosure of the relationship among and between the Non-Parties and Respondent Liphatech is an important consideration when determining what weight to accord a non-party brief. Complainant requests five specific disclosures in the event that the Motion is granted, *supra* at 3, and Respondent voluntarily provides most of the requested information in the attachment to its Reply. *See* Voluntary Rule 29(c) Disclosure, attachment to Reply. The voluntary disclosure does not address all five of Complainant's requests. Specifically, Complainant requests "a

statement that includes whether any of the Board Members of CLA or RISE influenced or contributed to the inception and/or funding of the Proposed Brief - and, if so, identify each such Board Members of CLA or RISE.” Response at 11. To the extent that such request seeks information about Board Members who are *not* parties to this proceeding, I find the connection too attenuated to be appropriate and **DENY** the request. To the extent that Non-Parties’ voluntary disclosure does not fully comply with FRAP 26.1 as required by FRAP 29(c)(1), Complainant’s request is **GRANTED** and Non-Parties are directed to file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

ORDER

1. The Motion for Leave to File a Non-Party Brief Opposing Complainant’s Construction of FIFRA Section 12(a)(1)(B) is **GRANTED**.
2. Complainant’s request to direct an information disclosure in accordance with FRAP 29(c)(1) is **GRANTED**.
3. Complainant’s request to direct an information disclosure in accordance with FRAP 29(c)(2)-(7) is **DENIED AS MOOT**.
4. Complainant’s request to direct an information disclosure as to Board Members of Non-Parties who are not parties in this proceeding is **DENIED**.
5. The Proposed Brief is deemed **FILED** upon the issuance of this Order.
6. Complainant may file a Response to the Proposed Brief on or before **May 20, 2011**. No leave for a Reply by Non-Parties is given.

Susan L. Biro
Chief Administrative Law Judge

Dated: May 4, 2011
Washington, DC