UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

2009 DEC 14 AM 8:23
REGIONAL HEARING CLERK

In the Matter of:	)	
United States Environmental Protection Agency, Region IX ,	)	
Petitioner,	)	**Docket No. FIFRA 09-2009-0013**
and	)	
Bug Bam Products, LLC,	)	
Respondent.	)	

NOTICE OF TYPOGRAPHICAL ERRORS REGARDING RESPONDENT'S MOTION TO DISMISS AND MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

Bug Bam Products, LLC, by its attorney Martha E. Marrapese, Partner, Keller and Heckman LLP, 1001 G St., N.W., Suite 500 W, Washington, DC 20001, telephone: 202-434-4123, fax: 202-434-4646, email: marrapese@khlaw.com, hereby submits this Notice of Typographical Errors Regarding Respondent's Motion to Dismiss and Memorandum of Law in Support of its Motion to Dismiss ("Amended Motion").

Bug Bam submits the following Amended Motion in lieu of the Original Motion filed yesterday, December 8, 2009. The last full paragraph on page 5 of the Original Motion contains a typographical error with respect to Bug Bam's name. The Amended Motion corrects the name to read "Bug Bam." The Amended Motion also corrects all references to the term "Memorandum of Laws" to read "Memorandum of Law" and inserts "Amended" where relevant. All dates have been changed to reflect the new filing date.

Dated this 9th day of December, 2009

Martha E. Marrapese, Esquire
Keller and Heckman LLP
1001 G Street, N.W.
Suite 500 West
Washington, DC 20001

CERTIFICATE OF SERVICE

I, Martha E. Marrapese, hereby certify that on December 9, 2009, I sent the original of the foregoing Bug Bam Products, LLC's Notice of Typographical Errors Regarding Respondent's Motion to Dismiss and Memorandum of Law in Support of its Motion to Dismiss via Federal Express to:

1. Mr. Steven Armsey
   Acting Regional Hearing Clerk
   U.S. Environmental Protection Agency, Region IX
   75 Hawthorne Street (ORC-1)
   San Francisco, CA 94105

and one copy of the foregoing Notice via hand delivery to:

2. Honorable Barbara A. Gunning
   U.S. Environmental Protection Agency
   Office of Administrative Law Judges
   Franklin Court, Suite 350
   1099 14th St. NW
   Washington, DC 20005

and one copy via Federal Express to:

3. Mr. Ivan Lieben
   Assistant Regional Counsel (ORC-3)
   U.S. Environmental Protection Agency, Region IX
   75 Hawthorne Street
   San Francisco, CA 94105

Martha E. Marrapese

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

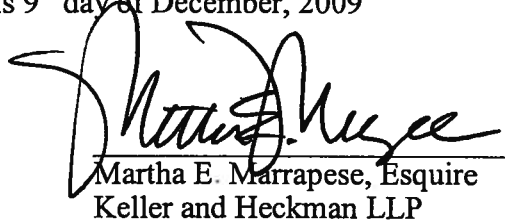
In the Matter of:	)	
United States Environmental Protection	)	
Agency, Region IX ,	)	
Petitioner,	)	**Docket No. FIFRA 09-2009-0013**
and	)	
Bug Bam Products, LLC,	)	
Respondent.	)	

AMENDED MOTION TO DISMISS U.S. EPA'S COMPLAINT

Bug Bam Products, LLC, by its attorney Martha E. Marrapese, Partner, Keller and Heckman LLP, 1001 G St., N.W., Suite 500 W, Washington, DC 20001, telephone: 202-434-4123, fax: 202-434-4646, email: marrapese@khlaw.com, hereby submits the following Amended Motion to Dismiss and Memorandum of Law in Support of its Motion to Dismiss pursuant to Rules 22.16(a) and 22.20(a) of the Consolidated Rules of Practice, 40 C.F.R. §§ 22.16(a), 22.20(a), to the Complaint filed in this matter by Region IX of the United States Environmental Protection Agency ("EPA" or "Complainant").

WHEREFORE, for the good cause shown in the accompanying memorandum of law in support, Bug Bam respectfully requests that the Court grant this Motion to Dismiss and dismiss the Complaint against Bug Bam with prejudice.

Dated this 9th day of December, 2009



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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of: **United States Environmental Protection Agency, Region IX ,** **Petitioner,** **and** **Bug Bam Products, LLC,** **Respondent.**	)	**Docket No. FIFRA 09-2009-0013**

AMENDED MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS U.S. EPA'S COMPLAINT

Bug Bam Products, LLC, by its attorney Martha E. Marrapese, Partner, Keller and Heckman LLP, 1001 G St., N.W., Suite 500 W, Washington, DC 20001, telephone: 202-434-4123, fax: 202-434-4646, email: marrapese@khlaw.com, hereby submits the following Amended Memorandum of Law in Support of its Motion to Dismiss pursuant to Rules 22.16(a) and 22.20(a) of the Consolidated Rules of Practice, 40 C.F.R. §§ 22.16(a), 22.20(a), to the Complaint filed in this matter by Region IX of the United States Environmental Protection Agency ("EPA" or "Complainant") for the reasons discussed below.

I. INTRODUCTION

Despite Bug Bam's voluntary and active participation in EPA Staff Settlement negotiations, U.S. EPA Region IX lodged, on September 18, 2009, its Complaint against Bug Bam, claiming that Bug Bam violated Section 12(a)(1)(A) of Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") by selling/distributing pesticides not registered pursuant to Section 3 of FIFRA. Orig. Compl. at ¶14, 19, 24. As Bug Bam has made no such sale/distribution,

Complainant has not, therefore, established an action by Bug Bam upon which it can base its claims.

Moreover, the penalty proposed by Complainant has never been satisfactorily explained, nor has any rational connection been made between the proposed penalty and the alleged violations. Thus, the Complainant's proposed penalty action cannot withstand review under the arbitrary and capricious standard of the Administrative Procedures Act ("APA"). 5 U.S.C. § 706(2).

II. STATEMENT OF FACTS

Bug Bam is a Sole Member LLC incorporated in California and headquartered at 414 2nd Street, Suite 241, Hermosa Beach, California, 90254-4673. Joseph Symond is the President and inventor of Bug Bam Insect Repelling Wristband, Bug Bam for Kids Insect Repelling Wristband, and Bug Bam Insect Repelling Grid, all of which are mosquito repellants.

Bug Bam participated in voluntary EPA Staff Settlement conferences from approximately July 9, 2009 through August 28, 2009. On September 18, 2009, Complainant lodged its Complaint against Bug Bam, claiming that Bug Bam violated Section 12(a)(1)(a) of FIFRA by selling/distributing pesticides not registered pursuant to Section 3 of FIFRA. Orig. Compl. at ¶ 14, 19, 24. Bug Bam responded to the Complaint by filing an Answer on October 15, 2009.

In response to Bug Bam's Answer, Complainant filed its First Motion on November 18, 2009, seeking to add Flash Sales, Inc. ("Flash Sales") as a party to this action. The next day, on November 19, 2009, EPA filed, and Bug Bam received, its Supplement Motion requesting to increase the penalties sought due to the proposed addition of Flash Sales as a party. On December 2, 2009, Bug Bam filed its Consolidated Motion in Opposition to Amending the Complaint and to the Supplement to Amend the Complaint.

III. LEGAL STANDARD

Upon motion of the respondent, the Presiding Officer "may dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case" or, in the alternative, on "other grounds which show no right to relief on the part of the complainant." 40 C.F.R. § 22.20(a). Thus, "[a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the [complainant] can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). A complaint against an improperly named defendant should be dismissed as to that defendant. *Winters v. U.S. Postal Service*, 721 F. Supp. 1388 (D.D.C. 1989) (dismissing the Postal Service as a named defendant from a tort action where the statute only permitted the United States to be the defendant); *Kilkenny v. Arco Marine, Inc.*, 800 F.2d 853, (9th Cir. 1986) (affirming summary judgment for and dismissal of a complaint against an improperly named defendant where the defendant had no relation to the property where the plaintiff had been killed).

IV. ARGUMENT

1. Bug Bam did not distribute or sell products to Mr. Frank Carpenter and is therefore an inappropriate respondent to this action.

In its Complaint, EPA alleged that, on February 25, 2009, Bug Bam sold, via its website www.bugbam.com, the following unregistered products to EPA employee, Mr. Frank Carpenter: Bug Bam Insect Repelling Wristband, Bug Bam for Kids Insect Repelling Wristband, and Bug Bam Insect Repelling Grid. Orig. Compl. at ¶12, 17, 22. Complainant, however, "can prove no set of facts . . . which would entitle [Complainant] to relief," *Conley*, 355 U.S. at 45-46, because Bug Bam never engaged in these sales or distributions. No facts in dispute exist with respect to this conclusion, as Complainant admitted in its Proposed Amended Complaint that "Flash Sales sent the product[s] via mail to Mr. Carpenter." Amended Compl. at ¶ 28, 36, 44.

The appropriate remedy for a wrongly named party is to dismiss the complaint against it. *Winters*, 721 F. Supp. at 1388; *Kilkenny,* 800 F.2d at 853. The naming of an incorrect party should not be rewarded and cannot be cured by an amendment to the complaint to add the appropriate party. Where no cause of action exists against a party, justice requires the dismissal of that party from the action. No cause of action exists against Bug Bam because Bug Bam did not engage in the conduct ascribed to it by Complainant. Under FIFRA, it is unlawful to distribute or sell to any person any unregistered pesticide. 7 U.S.C. § 136j(a)(1)(A). Bug Bam did not sell or distribute the products to Mr. Carpenter.

2. EPA cannot prevail in its Complaint because the penalty derived in the Complaint is arbitrary and capricious and an abuse of discretion

The APA permits courts to hold unlawful and set aside agency action that is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2). To survive scrutiny under the "arbitrary and capricious" standard of review, the agency must be found to have "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In this case, EPA's proposed penalty cannot withstand such review.

During pre-Complaint, Staff settlement negotiations, Complainant requested a payment of $11,000 without a "satisfactory explanation for its actions," *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, as Complainant's request did not comport with the EPA FIFRA Penalty Policy or appear to address the prompt and cooperative resolution by Bug Bam of the following issues. First, Bug Bam quickly complied with removing references on the website concerning "EPA approved ingredients," replacing this statement with "food grade ingredients." Second, Bug Bam clarified that the elastomer used in its products is a synthetic latex (a listed 25(b) inert) and initiated steps to revise its labeling and sticker existing stock to identify this ingredient as 'synthetic latex.' Third, Bug Bam agreed to voluntarily discontinue the use of the red colorant

which was used at extremely low levels. Bug Bam notes, however, that the red colorant is completely safe: the red pigment at issue made up only 0.02 % of the entire product formulation and was used at levels that fully comply with Food and Drug Administration clearance for use in contact with food at 21 C.F.R. § 178.3297. Moreover, to the best of Bug Bam's knowledge, colorants, though used, are not typically found listed on labels for 25(b) repellant products, signaling widespread industry misunderstanding.

Bug Bam submitted, during Staff settlement negotiations, financial information demonstrating Bug Bam's inability to pay this or any other amount. Most recently, Complainant indicated in a November 2, 2009 communication to Bug Bam's counsel that "[Complainant] will not offer any additional settlement terms beyond what has already been offered."

Complainant's action is arbitrary in its refusal to account for, as is required by FIFRA, "the appropriateness of [the proposed] penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation," FIFRA § 14(a). Complainant has not explained its departure from the FIFRA Enforcement Response Policy ("ERP") guidelines. Such an explanation is called for by *Motor Vehicle Manufacturers Association* and because Bug Bam has made substantial efforts to cooperate with EPA, has never before been subject to an enforcement action, and manufactures a minimum-risk pesticide that poses very little, if any, risk to human health or the environment

The penalties pled by EPA do not accurately reflect the calculations required by the FIFRA ERP because the base penalty for a category III business at violation level two is $3,300, $525 less than the fine levied by EPA. Orig. Compl. at 5. Bug Bam squarely fits into the category level three because Bug Bam's gross revenues averaged over the past three years fall between $0 and $300,000. *FIFRA ERP* at C-1, Table 2.

The FIFRA ERP accounts for a business' ability to pay any proposed fine. Before the Complaint was filed and based solely on a fine quoted by the Complainant, Bug Bam provided Complainant with financial information, illustrating Bug Bam's inability to pay.

The FIFRA ERP dictates that, for gravity adjustment values below three, the enforcement remedy should be a 50% reduction in the total penalty, a Notice of Warning ("NOW"), or no action. *Id.* at C-1, Table 3. Gravity adjustment is appropriate for Bug Bam products and should be two, as calculated from adjustments for lack of "human harm" and for lack of "environmental harm." *Id.* at B-1. Bug Bam's good faith efforts to comply and remain in compliance, in addition to Bug Bam's previously clean enforcement record should have been reflected in a decrease in penalty. EPA, at most, should have assessed a penalty of $1,650 per count, rather than $3,825 per count. Orig. Compl. at 5. Thus, even assuming the alleged violations to be true, no rational connection exists between the alleged violations and the proposed penalty of $3,825 per count. As such, the penalty should be dismissed as arbitrary agency action in violation of the APA.

Complainant showed further arbitrary action by basing a penalty on the assertion that Bug Bam claimed that "the products were scientifically proven to be an effective mosquito repellant," Proposed Amended Compl. at ¶ 19. EPA expressly permits true safety claims on labels of Section 25(b) exempt products. *See* Pesticide Registration Notice 2000-6 (May 7, 2000). It is readily ascertainable from the public information on the Bug Bam website on product safety testing that there is no question that this claim can be adequately supported. Because Section 25(b) exempt products are subject to the FIFRA proscription against false and misleading labeling, EPA necessarily views true safety claims as not inherently misleading. As the U.S. Supreme Court has admonished, "if there are circumstances in which the speech is not misleading, it is entitled to the protection of the First Amendment." *See Association of Nat'l Advertisers v. Lungren*, 44 F.3d 726 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995). Indeed,

such First Amendment protection applies in the case of insect repellent products claimed to be "Safe for Kids." *See Bioganic Safety Brands, Inc. v. Don Ament, Colorado Commissioner of Agriculture*, 174 F. Supp. 2d 1168 (D. Colo. 2001) (holding that the "Safe for Kids" claim for a Section 25(b)-exempt insect repellent product is not inherently misleading and worthy of First Amendment protection). As protected commercial speech, EPA must demonstrate that it has a substantial government interest that would justify its attempts to stifle speech, that the action directly advances that substantial interest, and the action is not more extensive than is necessary to serve the substantial State interest. *See Central Hudson Gas & Electric v. Public Service Commission of New York*, 447 U.S. 557 (1980). Yet, EPA has made no such overtures – has given no satisfactory explanation for its stance – instead opting to press for the payment of a fine for a product that benefits the public interest by encouraging people to use safe insect repellents.

V. CONCLUSION

EPA's Complaint against Bug Bam should be dismissed because EPA can establish no set of facts on which it is entitled to relief. The alleged violation of FIFRA attaches to a seller/distributor of the violative product, which Bug Bam was not. Complainant's allegations are therefore false, as they are asserted against the wrong party: Bug Bam never sold or distributed products. Moreover, the proposed penalty is arbitrary, capricious, and an abuse of discretion by Complainant, as Complainant has never explained or made any logical connection amongst the alleged violations, the cooperative participation by Bug Bam in Settlement discussions, and the amount sought by EPA.

Thus, for the reasons set out above, and for any additional reasons that may become known at a hearing on this motion, Bug Bam respectfully submits that EPA's Complaint should be dismissed.

Dated this 9th day of December, 2009

Martha E. Marrapese,
Esquire
Keller and Heckman LLP
1001 G Street, N.W.
Suite 500 West
Washington, DC 20001

CERTIFICATE OF SERVICE

I, Martha E. Marrapese, hereby certify that on December 9, 2009, I sent the original of the foregoing Bug Bam Products, LLC's Amended Motion to Dismiss and Memorandum of Law in Support of its Motion via Federal Express to:

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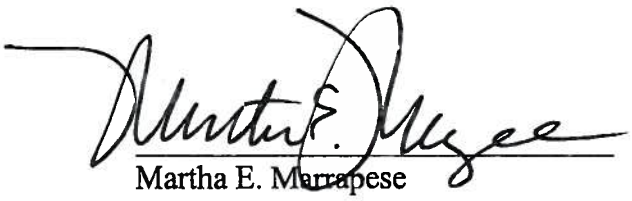

Martha E. Marrapese

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
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Petitioner,	)	**Docket No. FIFRA 09-2009-0013**
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ORDER GRANTING RESPONDENT'S AMENDED MOTION TO DISMISS

On December 9, 2009, Respondent Bug Bam Products, LLC's Amended Motion to Dismiss U.S. EPA's Complaint, Docket No. FIFRA-09-2009-0013 ("the Motion") came before the Court.

On consideration of the pleadings and papers submitted in connection with the Motion, and good cause appearing therefore:

The Motion is hereby GRANTED. All claims against Bug Bam Products, LLC are accordingly dismissed with prejudice.

IT IS SO ORDERED.

Dated:_____, 2009

_____
Honorable Barbara A. Gunning