UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
BUG BAM PRODUCT, LLC,	)	DOCKET NO. FIFRA-09-2009-0013
FLASH SALES, INC.	)	
	)	
RESPONDENTS	)	

ORDER DENYING RESPONDENT BUG BAM'S MOTION TO DISMISS

The initial 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. § 136*l*(a). On October 15, 2009, Bug Bam Product, LLC ("Respondent Bug Bam" or "Bug Bam") filed its Answer. On November 18, 2009, Complainant filed a Motion for Leave to File First Amended Complaint, along with a Supplement that was submitted one day later.[1] The Complaint now alleges that Respondents Bug Bam and Flash Sales, Inc. ("Flash Sales") violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by offering for sale, selling, or distributing unregistered pesticidal products.

On December 8, 2009, Bug Bam filed a Motion to Dismiss U.S. EPA's Complaint, which was fully briefed by the end of December 2009. Following the service of the Amended Complaint on January

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[1] During the pendency of this Motion to Dismiss, the Motion to Amend the Complaint was granted. Complainant filed the Amended Complaint on January 28, 2010. The Amended Complaint is now the official Complaint in this matter. The caption has been changed to reflect the addition of Flash Sales, Inc. as a respondent.

28, 2010, Respondent Bug Bam filed a Renewed Motion to Dismiss, which states that it supersedes the briefing filed under the initial Motion to Dismiss. The Renewed Motion to Dismiss was accompanied by a Second Amended Memorandum of Law in Support of Respondent's Renewed Motion to Dismiss U.S. EPA's Complaint ("Amended Memo").

Complainant opposes the Renewed Motion to Dismiss and, on March 25, 2010, filed a Response to Respondent's Renewed Motion to Dismiss ("Response"). On April 9, 2010, Respondent Bug Bam filed its Reply to Complainant's Response to Bug Bam's Renewed Motion to Dismiss ("Reply").

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 ("Rules of Practice"), 40 C.F.R. part 22. The Rules of Practice address motions to dismiss at 40 C.F.R. § 22.20, which provides in pertinent part that:

> The Presiding Officer, upon motion of the respondent, may at any time 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 other grounds which show no right to relief on the part of the complainant.

40 C.F.R. § 22.20(a). The Environmental Appeals Board ("EAB") considers motions to dismiss under Section 22.20(a) to be analogous to motions for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP"). *In the Matter of Asbestos Specialists, Inc.*, TSCA Appeal No. 92-3, 4 E.A.D. 819, 827 (EAB, Oct. 6, 1993).

Rule 12(b)(6) of the FRCP provides for dismissal when the complaint fails "to state a claim upon which relief can be granted." It is well established that dismissal is warranted for failure to state a claim when the plaintiff fails to lay out "direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007); *see also McCulloch v. PNC Bank, Inc.*, 298 F.3d 1217, 1220 (11th Cir. 2002). This standard for dismissal further requires that the allegations in the complaint be taken as true and that all

inferences be drawn in favor of the plaintiff.[2] *See Twombly*, 550 U.S. at 555; *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Accordingly, to prevail in its Motion, Respondent Bug Bam must show that the EPA's allegations, assumed to be true, do not prove a violation of FIFRA as charged. In short, Respondent Bug Bam must demonstrate that Complainant has failed to properly plead a *prima facie* case.

DISCUSSION

I. Failure to Plead a *Prima Facie* Case

In its Renewed Motion to Dismiss, Respondent Bug Bam first argues that it is an improperly named party and bears no liability for the alleged violations because "Bug Bam did not distribute, sell, or offer to sell products to Mr. Frank Carpenter," Complainant's investigating agent. Amended Memo at 3. Instead, Bug Bam points to Flash Sales as the liable distributor, arguing that because "Flash Sales sent [the products] via mail to Mr. Carpenter," Bug Bam never engaged in the alleged sales or distributions. *Id.*, quoting Amd. Compl. at ¶¶ 28, 35, and 44. Respondent Bug Bam goes on to assert that "[n]o facts in dispute exist with respect to [that] conclusion, as Complainant admitted in its Amended Complaint that Flash Sales sent the products via mail to Mr. Carpenter." *Id.*[3] This fact, according to Respondent Bug Bam, is fatal to the Amended Complaint and warrants dismissal.

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[2] 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); *In re Wego Chemical & Mineral Corporation*, 4 E.A.D. 513, 524 n. 10 (EAB, Feb. 24, 1993).

[3] Respondent Bug Bam's assertion that there is no dispute as to the alleged facts is inconsistent with its earlier statement, which disputes the allegations that it sold or distributed unregistered pesticides. Indeed, denying the allegations seems to raise a clear factual dispute.

Complainant counters by arguing that it sufficiently alleged all elements of its *prima facie* case.[4] Response at 5. Specifically, Complainant points to two factual allegations, which, Complainant argues, "if accepted as true, would readily meet Complainant's *prima facie* pleading requirements." *Id.* First, in paragraphs 26, 34, and 42 of the Amended Complaint, Complainant alleges that "the website bugbam.com offered for sale the three unregistered pesticides on or about February 25, 2009." *Id.* (internal quotations omitted). Second, in paragraphs 28, 36, and 44 of the Amended Complaint, Complainant alleges that "Flash Sales sent the three unregistered pesticides via mail to Mr. Carpenter *after the purchase* of the item(s) on the bugbam.com website on or about February 25, 2009." *Id.* (internal quotations omitted) (emphasis supplied).

Complainant further alleges in its Amended Complaint that "[t]he website bugbam.com was registered to, administered by, and under the control of Respondent on or about February 25, 2009." Amd. Compl. at ¶¶ 25, 33, 41. Accepting all of Complainant's allegations as true, as is required when considering a motion to dismiss,[5] I find that the Amended Complaint achieves the minimum requirements for stating a *prima facie* case under Section 12(a)(1)(A) of FIFRA. 7 U.S.C. § 136j(a)(1)(A).

Respondent Bug Bam does cite some authority for the assertion that "a published price list is not an offer to sell the goods listed at the published prices . . . ." Amended Memo at 3, citing *In re TIFA Ltd.* ("*TIFA*"), 9 E.A.D. 145 (EAB, June 5, 2000). Respondent Bug Bam offers no further argument on this point but appears to suggest the conclusion that a website is a published price list. There are several reasons why this argument is not persuasive.

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[4] Neither party addresses the other elements of a *prima facie* case under Section 12(a)(1)(A) of FIFRA in the briefs for the Renewed Motion to Dismiss. As the movant on the motion, Respondent Bug Bam has the burden of proving that Complainant can prove no facts that would entitle it to relief. *See Wilson Auto Enters., Inc. v. Mobil Oil Corp.*, 778 F. Supp. 101, 103-04 (D.R.I. 1991). Respondent Bug Bam raises only the issue of whether there was a sale or distribution by Bug Bam and does not dispute Complainant's other allegations in support of its *prima facie* case. Therefore, I consider only Bug Bam's challenge to the sufficiency of the Amended Complaint as it relates to the "sale or distribution" element.

[5] *See Twombly*, 550 U.S. at 555; *Pardus*, 551 U.S. at 94.

First, *TIFA* dealt with the meaning of "offer to sell" under FIFRA as a matter of first impression. 9 E.A.D. at 158. In order to resolve the matter, the EAB had to determine whether a specific activity fell within the meaning of "offer to sell" as a legally operative term. This dispute required the EAB to decide a mixed question of fact and law. Similarly, by this Motion, I am urged by Respondent Bug Bam to determine *as a matter of law* whether the bugbam.com website constitutes an "offer for sale" under FIFRA. This dispute over statutory interpretation and application to a factual scenario cannot be determined as a matter of law and is therefore not ripe for adjudication on a motion to dismiss.[6] Consequently, this line of Bug Bam's argument must fail.

Second, even if the holding in *TIFA* were on point and binding on this proceeding, this issue cannot be resolved on a motion to dismiss because it involves a significant question of fact. As the Sixth Circuit has cogently observed:

> There are generally three levels of interactivity of websites, including: (1) passive sites that only offer information for the user to access; (2) active sites that clearly *transact business* and/or *form contracts;* and (3) hybrid or interactive sites that allow users to exchange information with the host computer.

See, Inc. v. Imago Eyewear Pty, Ltd., 167 Fed. Appx. 518, 522 (6th Cir. 2006) (internal quotations omitted) (emphasis supplied). Whether a website is sufficiently sophisticated to permit users to create a contract by accepting an offer for sale or is merely an electronic price list is a question of fact and cannot be decided based solely on the pleadings. Therefore,

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[6] Even if a substantive discussion of statutory interpretation were appropriate at this stage, the persuasiveness of *TIFA* is questionable. In *TIFA*, the only evidence submitted to support the "offered for sale" claim was a single facsimile from Respondent's employee to a potential buyer. The facsimile referred to a prior telephone inquiry and confirmed a price list for certain pesticides. It also contained the following statements: "Prices are all delivered Missouri. Material in stock available prompt shipment." 9 E.A.D. at 158. There was nothing in that communication to suggest that it was intended to serve as an offer or that assent to the quote was the only remaining step in establishing a binding contract between seller and buyer. 9 E.A.D. at 160.

Respondent Bug Bam's request for a ruling requiring this issue's resolution is premature.[7]

Complainant offers its own authority to rebut Respondent Bug Bam's arguments that "the *de facto* presence of a website" is an insufficient allegation to withstand a motion to dismiss. Amended Memo at 5. In its Response, Complainant points to a 1989 interpretive rule, found at 40 C.F.R. 168.22(a), which defines "offer for sale," under Sections 12(a)(1)(A) and (B) of FIFRA, to comprehend "advertisements in any advertising medium to which pesticide users or the general public have access."[8] Response at 6. Complainant then cites *In the Matter of Sporicidin Int'l* ("*Sporicidin*"), 3 E.A.D. 589 (EAB, June 4, 1991), to support its argument. However, *Sporicidin* is distinguishable and does not provide any guidance on the instant issue.

In *Sporicidin*, the EAB had to review the sufficiency of a complaint on appeal and decide the legality of claims made in connection to ongoing sales of registered pesticides. While the EAB did observe, in *dicta*, that a "distribution" includes both "marketing and merchandising a commodity," *Id.* at 605, this discussion is limited to the context of Section 12(a)(1)(B) of FIFRA, which deals with illegal claims. 7 U.S.C. § 136j(a)(1)(B). The case does not address Section 12(a)(1)(A), the relevant provision in this proceeding, which deals with

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[7] I note that in finding that the Amended Complaint sufficiently alleges a *prima facie* case, there is no implicit adjudication of liability or finding that an offer for sale actually occurred. These factual and legal issues are best resolved at hearing and on further briefing.

[8] In its Reply, Respondent Bug Bam argues that Complainant's reference to the 1989 interpretive rule adds "a general advertising claim" not raised in the Amended Complaint and that Complainant's arguments "unacceptably stray" from the FIFRA claims set forth in the Amended Complaint. Reply at 2. Respondent Bug Bam mischaracterizes Complainant's Response. Complainant's discussion of the rule does not attempt to add any allegations; it attempts to counter a factual argument. As explained above, disputes involving questions of fact are not ripe for adjudication in the Motion to Dismiss. Further, Complainant's omission of the 1989 interpretive rule in its pleadings does not render the Amended Complaint insufficient, nor does the subsequent reference to it in the Response impermissibly expand the charges in the Amended Complaint.

whether a particular communication constitutes an offer for sale. 7 U.S.C. § 136j(a)(1)(A).

While the *Sporicidin* case does not illuminate the matter at hand, the 1989 interpretive rule does state the EPA's official position on a generally relevant matter (whether advertisements are interpreted to be "offers for sale" under Section 12(a)(1)(A)). However, the EPA's position itself does not address the pleading of Complainant's *prima facie* case and therefore is not directly relevant in deciding a motion to dismiss.

Respondent Bug Bam's second argument is largely an extension of its first. Respondent Bug Bam argues that the allegation that it sold or distributed unregistered pesticides "is a naked assertion" that is too conclusory to state a claim and requires further factual enhancement. Amended Memo at 4 (internal quotations omitted). According to Respondent Bug Bam, I need not accept as true "conclusionary allegations in the complaint." Amended Memo at 3, citing *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982).

The court in *Kaiser* relied specifically on an earlier Fifth Circuit case, *Associated Builders, Inc. v. Alabama Power Co.*, which held that conclusory allegations are not admitted as true and failure to plead a sufficiently specific factual allegation is grounds for dismissal. *Associated Builders, Inc. v. Alabama Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974). However, the *Associated Builders* court likened conclusory allegations to unwarranted *deductions* of fact, not allegations of fact. In that case, the conclusory allegation was that the defendant's corporate prospectus was "materially misleading." *Id.* The term "materially misleading," in turn, is a legal conclusion requiring an evaluation of the other facts in the case to determine materiality as well as an evaluation of the prospectus' statements themselves to determine whether they were "misleading."

Contrary to *Associated Builders*, here the Complainant asserts the factual allegations that Respondent Bug Bam offered for sale specific unregistered pesticides through its website on or about February 25, 2009, and that an identified person purchased and received those pesticides. *See* Amd. Compl. at 2-7. Bug Bam's desire for more detailed allegations that include admissible evidence (such as an invoice or sales receipt, as argued in the Amended Memo at 4) is not a basis for granting a motion to dismiss. Respondent Bug Bam's other citations are

equally unavailing as they raise the same issues of pleading sufficiency discussed above.

ORDER

Having reviewed the Amended Complaint, I conclude that Complainant sufficiently states its *prima facie* case. For the foregoing reasons, Respondent Bug Bam's Renewed Motion to Dismiss is **DENIED**.

Barbara A. Gunning
Administrative Law Judge

Dated: April 23, 2010
Washington, DC

In the Matter of *Bug Bam Product, LLC, Flash Sales, Inc.*, Respondents.
Docket No. FIFRA-09-2009-0013

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order Denying Respondent Bug Bam's Motion to Dismiss**, dated April 23, 2010, was sent this day in the following manner to the addressees listed below.

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Dated: April 23, 2010
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