UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Panasony Electronics Corp.,	)	Docket No. IF&R-V-114-P
	)	
Respondent	)	

DEFAULT ORDER

This is a proceeding under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), section 14(a), 7 U.S.C. 136 l(a), instituted by a complaint issued January 20, 1984, by the Director, Waste Management Division, Region V, United States Environmental Protection Agency. The complaint alleges that Respondent has violated FIFRA, section 12(a)(1)(F), 7 U.S.C. 136J(a)(1)(F), by distributing, selling, offering for sale, shipping or delivering for shipment its PEST FREE device which was misbranded in that the labeling falsely represented that the device was effective in controlling rats, mice and roaches. Respondent answered denying the allegations in the complaint and further alleging that the EPA is without jurisdiction to control either the device or its labeling. Respondent also included in its answer a demand for Agency records relating to the expertise and competence of the Director, Waste Management Division to issue the complaint, to the identity of Respondent as the manufacturer of the products referred to in the complaint, and to the tests referred to in the complaint.

On March 8, 1984, pursuant to the rules of practice governing these proceedings, 40 CFR 22.14(e), I sent a letter to the parties directing them to undertake a prehearing exchange of information by April 30, 1984. Complainant complied with that direction, Respondent did not. Respondent persisted in its refusal to comply after receiving a second request from me by letter dated May 14, 1984, and to this date has not complied. Complainant by motion served on Respondent on July 13, 1984, moved for a default order. Respondent has not replied to that motion.

By reasons of the foregoing, Respondent is found to be in default pursuant to 40 CFR 22.17, and, the penalty of $45,000 proposed in the complaint is assessed. Incorporated into and made a part of the record in this matter are the relevant pleadings and correspondence (Vol. 1 of the Record), and Complainant's prehearing exchange (Vol. 2 of the Record).

Findings of Fact

1. On January 27, 1984, a civil administrative complaint, Docket No. IF&R-V-114-P, was filed charging Respondent, Panasony Electronics Corporation, with distributing, selling, offering for sale, holding for sale, shipping or delivering for shipments its misbranded PEST FREE device in violation of FIFRA, section 12(a)(1)(F). Service of the complaint upon Respondent, in accordance with 40 CFR 22.05(b), was made by mailing a copy by certified mail to Respondent care of Respondent's Registered Agent, Barbara B. Bressler. Record, Vol. 1.
2. On February 7, 1984, Respondent filed its answer to the complaint denying the allegations of the complaint and the jurisdiction and authority of the EPA over the matters alleged therein. Record, Vol. 1.

3. On March 8, 1984, the Administrative Law Judge, acting pursuant to 40 CFR 22.19(e), directed the parties to undertake a prehearing exchange of information by April 30, 1984, if the case had not been settled prior to that date. Said letter was served by mailing a copy certified mail to Respondent care of Respondent's registered agent Barbara B. Bressler, and was returned unclaimed. On April 17, 1984, at the direction of the Administrative Law Judge, a copy of the letter was personally delivered to said Barbara Bressler, who acknowledged receipt thereof. Record, Vol. 1.

4. By letter dated April 5, 1984, Complainant wrote to the Administrative Law Judge, advising that the case would not be settled and that Complainant intends to proceed with a hearing. A copy of this letter was served upon Respondent. Record, Vol. 1. Complainant, thereafter, fully complied with the prehearing information exchange and witness and exhibit identification requirements of the Administrative Law Judge's letter of March 8, 1984. Record, Vol. 2. No response to said letter of March 8, 1984, was received from Respondent.

5. On May 14, 1984, the Administrative Law Judge, by certified mail, directed Respondent to submit its prehearing response by May 29, 1984, Respondent was advised that a failure to comply was grounds for a default order. Record, Vol. 1.

6. By letter dated May 26, 1984, Respondent replied stating that it does not intend to participate further in this matter. The following reasons were given:

> 1. Your letter of March 8, 1984 was not received by our Registered Agent until April 16, 1984 thereby invalidating the original timetable.
>
> 2. Your assignment in this matter was the result of a fraudulent representation made to the Chief Judge by the Assistant Regional

> Counsel stating that we had requested a hearing which he knew was not true. Therefore, you should immediately step down!
>
> 3. As stated in our answer to the complaint, the E.P.A. is without jurisdiction. A reading of the Legislative History of F.I.F.R.A. shows clearly that any violation thereof must constitute a hazard to the environment to confer jurisdiction. The complaint makes no such allegation.

Respondent also said that it had changed registered agents, but did not identify the new agent. Record, Vol. 1.

7. On July 17, 1984, Complainant filed its motion for a default order, serving Respondent by certified mail care of its new registered agent The Company Corporation, 725 Market Street, Wilmington, Delaware. Record, Vol. 1. Under the rules of practice, 40 CFR 22.16(b), Respondent had 10 days after service to respond to the motion.

8. To date, Respondent has not complied with the prehearing information exchange directed by the Administrative Law Judge, and has filed no response to the motion for default order.

Discussion and Conclusions

The above facts clearly constitute grounds for a default order under 40 CFR 22.17. By its default, Respondent has for purposes of this proceeding admitted all factual allegations in the complaint. Respondent has also waived its right to a hearing. Indeed, as shown in its letter of May 26, 1984, Findings of Fact No. 6, supra, Respondent has never sought a hearing, but, instead, would apparently rest on its allegations as to the EPA's lack of authority or jurisdiction over Respondent's device and its labeling and on what it regards as other defects in the proceeding. Respondent, however, has shown no ground which would justify its default.

First, EPA's jurisdiction over Respondent's PEST FREE device is conferred by the claims made on the device's labeling that the device gets rid of and drives away all flying or crawling pests including rats, mice and roaches. 1/ FIFRA, section 2(h), 7 U.S.C. 136b(h), defines a device to include any "instrument or contrivance (other than a firearm) which is intended for . . . repelling, or mitigating any pest . . . ." Rats, mice and roaches come within the definition of "pests" in the EPA's regulations for the enforcement of FIFRA, 40 CFR 162.14. Under authority granted to the EPA Administrator by FIFRA, section 25(C)(4), 7 U.S.C. 136w(c)(4), devices such as PEST OFF have been subject to the misbranding prohibitions of FIFRA since 1975. See 41 Fed. Reg. 51065 (November 19, 1976). While the statute and the applicable regulations are sufficient in themselves to show the EPA's authority and jurisdiction over the labeling of PEST OFF, it is also to be noted that the EPA has for years enforced the misbranding prohibitions against electronic or ultrasonic pesticidal devices. See, e.g., VRP Corporation, IF&R Docket No. IX-267C (Initial Decision, December 28, 1981); Buzz-Off Products, Inc., IF&R Docket No. II-157C (Initial Decision, December 2, 1977). The EPA's interpretation of its authority and jurisdiction is entitled to weight. Udall v. Tallman, 380 U.S. 1, 10-17 (1965). Thus, the EPA's jurisdiction over the labeling of the PEST FREE device is clear. Respondent's allegations to the contrary are without any legal basis whatever, and it has, in effect, admitted as much by refusing to respond to the prehearing exchange, since as part of

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1/ See complaint, Par. 3. (Record, Volume 1), and Plaintiff's Exh. 5, Attach. D, in the documents submitted by Complainant (Record, Vol. 2).

that exchange Respondent was requested to furnish the legal basis for its position. 2/

Second, Respondent asserts that the complaint is defective because it does not allege that Respondent or its PEST FREE device adversely affects the environment. 3/ Respondent has misread the statute, which makes misbranding in and of itself an unlawful act. 4/ Included in the definition of misbranding is labeling which is false and misleading. 5/ Label claims that a product will repel pests when, in fact, it is ineffective in doing so are plainly false and misleading. Respondent contends that there is legislative history to support its position. It is significant that it has proffered none, for the obvious explanation is that there is none to cite.

Finally, Respondent seeks to justify its default on the grounds that the timetable established by my letter of March 8, 1984, was invalidated because my letter was not received by Respondent's registered agent until April 16, 1984, and that the Assistant Regional Counsel had made a "fraudulent representation" that Respondent had requested a hearing. 6/

As to the first objection, Respondent had two weeks after the receipt of the letter within which to comply with the prehearing request or seek an extension if it had good cause for not complying within that time. It did neither. Further, Respondent in my letter of May 14, 1984, was given an

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2/ See Administrative Law Judge's letter of March 8, 1984, Record, Vol. 1.

3/ See answer and Respondent's letter of May 26, 1984, Record, Vol. 1.

4/ FIFRA, section 12(a)(1)(F), 7 U.S.C. 136j(a)(1)(F).

5/ FIFRA, section 2(g)(1)(A), 7 U.S.C. 136(1)(A).

6/ Respondent's letter of May 26, 1984.

additional two weeks to May 29th to comply, and it still refused to comply. Plainly, the delay in Respondent's receiving the initial request for a prehearing exchange did not in any way prejudice Respondent's ability to respond so as to avoid being found in default, whatever the reason for the delay. 7/

As to the second objection, it was the Regional Hearing Clerk who advised the Chief Administrative Law Judge that Respondent had requested a hearing. 8/ In this she may have misread Respondent's answer, but in no way can it be considered a "fraudulent representation". 9/ Respondent by statute, FIFRA, section 14(a)(3), 7 U.S.C. 136 l(a)(3), has a right to a hearing. It can waive this right but it cannot simply withdraw from the proceeding and escape a final order. The jurisdiction of the Administrative Law Judge over the proceeding vested upon his assignment to the proceeding by the Chief Administrative Law Judge after the filing of Respondent's answer. 10/ Whether or not Respondent actually requested a hearing, it was still subject to the orders of the Administrative Law Judge, and to the sanctions imposed by the rules of practice for failure to comply with them.

7/ It is to be noted that the delay in serving Respondent's registered agent was caused by the post-office returning the certified letter unclaimed. Finding of Fact No. 3, supra.

8/ See letter of Regional Hearing Clerk dated March 2, 1984, Record, Vol. 1.

9/ In fact, the complaint, at page 12, specifically states that Respondent's denial of any material fact or raising of any affirmative defense shall be construed as a request for a hearing. Respondent in its answer denied all allegations of the complaint so that the Regional Hearing Clerk was warranted in advising the Chief Administrative Law Judge that Respondent had requested a hearing.

10/ Rules of practice, 40 CFR 22.21. Respondent was served with a copy of the rules of practice along with the complaint. See complaint, p. 10.

As to the factual allegations of the complaint, these are admitted by Respondent's default. 11/ Evidence supporting the allegations are also contained in Complainant's prehearing exchange. 12/ Respondent has provided no evidence indicating that the proposed penalty will adversely affect Respondent's ability to continue in business.

FINAL ORDER 13/

Pursuant to the Federal Insecticide, Fungicide and Rodenticide Act, section 14(a)(1), 7 U.S.C. 136 l(a)(1), a civil penalty of $45,000 is assessed against Panasony Electronics Corporation, for violation of the Act found herein.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order upon Respondent forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States of America.

Gerald Harwood
Gerald Harwood
Administrative Law Judge

DATED: Aug 17, 1984

11/ 40 CFR 22.17(c).

12/ See Record, Vol. 2.

13/ Pursuant to 40 CFR 22.17(b), this Default Order will constitute the initial decision in this matter. Unless an appeal is taken pursuant to 40 CFR 22.30, or the Administrator elects to review this decision on his own motion, this decision shall become the final order of the Administrator. See 40 CFR 22.27(c).