

8/12/93

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

IN THE MATTER OF )  
 )  
RED BELL, INC., ) Docket No. IF&R-04-92F044-C  
 )  
Respondent )

INTERLOCUTORY ORDER GRANTING  
COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION

I. Background

On September 11, 1992, the United States Environmental Protection Agency (Complainant, EPA, or the Agency) filed the complaint and notice of opportunity for hearing in this matter. The complaint alleges in 18 separate counts that Red Bell, Inc. (Respondent or Red Bell) distributed a misbranded pesticide not registered under FIFRA.

More specifically, the complaint alleges that Respondent, on nine separate occasions shipped "Orange Power 100% Active Natural Citrus Shampoo for Dogs and Cats" to four different business concerns. With respect to each such act of distribution, the complaint alleges in nine counts that the shampoo was not registered under Section 3(a) of FIFRA, 7 U.S.C. § 136a(a). In the remaining nine counts the complaint alleges that the shampoo was misbranded in that information which is required by FIFRA to appear on the label "was not prominently placed thereon with such conspicuousness . . . and in such terms as to render it likely to be read and understood by the ordinary individual under customary

conditions of purchase and use." For these alleged violations Complainant proposes a penalty of \$81,000.

Mr. Neil Luxemberg, President of Red Bell, appearing pro se, submitted an answer to the complaint in a letter dated September 22, 1992. In that answer, Respondent did not deny the alleged violations. Instead, he stated that Respondent "had no idea that we had broken any laws." He went on to explain that:

As soon as we discovered this problem we had peel and stick labels printed with different wording so that we would not be in violation of FIFRA (copies enclosed) and sent instructions to any customer that called-to [sic] place new labels over the old verb[i]age.

We are such a small company that we had no way to tell who had bought our shampoo. The only way we knew was when there was a complaint or a stop sale was put on the product. We would then send peel and stick labels to whoever needed them. We also applied these labels to all of the shampoo in stock in our warehouse. We then proceeded to permanently change the bottles so that they would not violate FIFRA in any way . . . .

Mr. Pont, we are a very small company . . . . This \$81,000 penalty could bankrupt our company . . . .

I can assure you we had no intentions of breaking the law. We would have labeled the shampoo differently had we known. I am enclosing a sample of the new shampoo so that you can see we took the complaints seriously and took immediate action.

On January 12, 1993, I issued a prehearing exchange letter directing Respondent's attention to 40 C.F.R. § 22.15(d) of the Consolidated Rules of Practice (CROP) which provides: "Failure of respondent to admit, deny, or explain any material factual

allegation contained in the complaint constitutes an admission of the allegation." The prehearing exchange letter directed the parties to submit their prehearing exchanges no later than March 26, 1993.<sup>1</sup>

On May 13, 1993, Complainant filed a motion for a partial accelerated decision as to Respondent's liability in this matter, alleging that no genuine issue of material fact exists as to such liability. Respondent did not file a reply to Complainant's motion.

## II. Discussion and Findings

Section 22.20(a) of the CROP provides, in pertinent part, that the "Presiding Officer, upon motion of any party . . . may at any time render an accelerated decision in favor of the complainant or respondent as to all or any part of the proceeding, without further hearing . . . if no genuine issue of material fact exists and a party is entitled to a judgment as a matter of law, as to all or any part of the proceeding."

Respondent's answer to the complaint constitutes a tacit admission of liability as to the alleged violations. Respondent also failed to deny liability as to the violations in its answer. Even though my letter directing a prehearing exchange pointed out that the failure of Respondent to admit, deny or explain any

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<sup>1</sup>The date for the filing of the prehearing exchanges has been extended three times on motion of Complainant. At present the requirement for the filing of the prehearing exchange has been suspended pending my ruling on the motion for a partial accelerated decision now before me.

material factual allegation contained in the complaint constitutes an admission of the allegation, Respondent has not moved to amend its answer or to deny or otherwise contest any of the allegations contained in the complaint. Furthermore, Respondent has not filed a reply to Complainant's motion for a partial accelerated decision as to liability, thereby passing up an additional opportunity to contest the alleged violations.

Upon consideration of the pleadings and the motion and supporting memorandum filed by the Complainant, I conclude the Complainant's motion should be granted as to the issue of liability. I therefore make the following findings of fact and/or conclusions of law as alleged in the complaint:

1. The civil administrative complaint was issued under the authority of Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C. § 136 et seq. (FIFRA) and alleges that Red Bell, Inc. has violated Section 12 of FIFRA, 7 U.S.C. § 136j.

2. The Complainant, the Director, Air, Pesticides and Toxic Management Division, EPA, Region IV, is authorized by the Administrator of the EPA and the Regional Administrator, EPA, Region IV, to issue a complaint on behalf of the Agency to persons alleged to be in violation of FIFRA.

3. The Respondent, Red Bell, Inc., is a corporation, and is located at 116 West Horton Street, Zebulon, North Carolina 27597.

4. The Respondent is a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and as such is subject to FIFRA and the regulations promulgated thereunder.

5. On July 1, 1991, a sample of the product "Orange Power 100% Active Natural Citrus Shampoo For Dogs and Cats," Sample Number 070191 2502 0301 distributed by the Respondent was collected at Critter Corral in Vicksburg, Mississippi, by an inspector duly designated by the Administrator of the U.S. EPA. Shipping records were obtained documenting shipment of the product by the Respondent on or about October 5, 1990.

6. On August 21, 1991, a sample of the product "Orange Power 100% Active Natural Citrus Shampoo For Dogs and Cats," Sample Number 082191 1602 0101 distributed by the Respondent was collected at Efland Distributing Company in Efland, North Carolina, by an inspector duly designated by the Administrator of the U.S. EPA. Shipping records were obtained documenting shipment of the product by the Respondent on or about December 20, 1990.

7. On August 21, 1991, a sample of the product "Orange Power 100% Active Natural Citrus Shampoo For Dogs and Cats," Sample Number 082191 1602 0101 distributed by the Respondent was collected at Efland Distributing Company in Efland, North Carolina, by an inspector duly designated by the Administrator of the U.S. EPA. Shipping records were obtained documenting shipment of the product by the Respondent on or about December 31, 1990.

8. On August 21, 1991, a sample of the product "Orange Power 100% Active Natural Citrus Shampoo For Dogs and Cats," Sample

Number 082191 1602 0101 distributed by the Respondent was collected at Efland Distributing Company in Efland, North Carolina, by an inspector duly designated by the Administrator of the U.S. EPA. Shipping records were obtained documenting shipment of the product by the Respondent on or about March 28, 1991.

9. On August 21, 1991, a sample of the product "Orange Power 100% Active Natural Citrus Shampoo For Dogs and Cats," Sample Number 082191 1602 0101 distributed by the Respondent was collected at Efland Distributing Company in Efland, North Carolina, by an inspector duly designated by the Administrator of the U.S. EPA. Shipping records were obtained documenting shipment of the product by the Respondent on or about June 28, 1991.

10. On August 21, 1991, a sample of the product "Orange Power 100% Active Natural Citrus Shampoo For Dogs and Cats," Sample Number 082191 1602 0101 distributed by the Respondent was collected at Efland Distributing Company in Efland, North Carolina, by an inspector duly designated by the Administrator of the U.S. EPA. Shipping records were obtained documenting shipment of the product by the Respondent on or about July 1, 1991.

11. On August 21, 1991, a sample of the product "Orange Power 100% Active Natural Citrus Shampoo For Dogs and Cats," Sample Number 082191 2764 0101 distributed by the Respondent was collected at Sears Pet Center in Raleigh, North Carolina, by an inspector duly designated by the Administrator of the U.S. EPA. Shipping records were obtained documenting shipment of the product by the Respondent on or about August 12, 1991.

12. On September 25, 1991, a sample of the product "Orange Power 100% Active Natural Citrus Shampoo For Dogs and Cats," Sample Number 91-0385 distributed by the Respondent was collected at Vaughn's Home & Garden in Fort Wayne, Indiana, by an inspector duly designated by the Administrator of the U.S. EPA. Shipping records were obtained documenting shipment of the product by the Respondent on or about October 10, 1990.

13. On September 25, 1991, a sample of the product "Orange Power 100% Active Natural Citrus Shampoo For Dogs and Cats," Sample Number 91-0385 distributed by the Respondent was collected at Vaughn's Home & Garden in Fort Wayne, Indiana, by an inspector duly designated by the Administrator of the U.S. EPA. Shipping records were obtained documenting shipment of the product by the Respondent on or about September 18, 1991.

14. "Orange Power 100% Active Natural Citrus Shampoo For Dogs and Cats" is a pesticide within the meaning of Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

15. At the time of each of the inspections, said product was not registered as required by Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).

16. It is a violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), for any person to distribute or sell to any person any pesticide that is not registered under Section 3 or whose registration has been canceled or suspended.

17. Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

18. At the time of each of the inspections, said pesticide was misbranded per Section 2(q)(1)(E) of FIFRA, 7 U.S.C. § 136(q)(1)(E), in that any word, statement, or other information required by or under the authority of the Act to appear on the label or labeling was not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or graphic matter in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

19. It is a violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), for any person to distribute or sell to any person any pesticide that is misbranded.


20. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

#### IV. Conclusion

I conclude that no genuine issue of material fact exists as to the question of liability and Complainant is entitled to judgment as a matter of law. I find that Respondent, Red Bell, Inc., has violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), as alleged in Counts I, III, V, VII, IX, XI, XIII, XV and XVII of the complaint. I further find that Respondent, Red Bell, Inc., has violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), as alleged in Counts II, IV, VI, VIII, X, XII, XIV, XVI and XVIII of the complaint. Consequently, a partial accelerated decision on the issue of liability for the violations alleged in the complaint, should be, and is hereby, rendered for Complainant.

Pursuant to 40 C.F.R. § 22.20(b)(2), I further find that the issue of the amount, if any, of the civil penalty, which appropriately should be assessed for the violations found herein, remains controverted. The parties should make every possible good faith effort to settle this matter in accordance with the Agency policy encouraging settlement. (See 40 C.F.R. § 22.18.) Complainant is directed to submit a report on the status of settlement negotiations concerning the penalty issue on October 15, 1993. Upon receipt of such report, I will reevaluate the status of the case and determine whether a hearing should be scheduled for the purpose of deciding that issue.

So ORDERED.

  
Henry B. Frazier, III  
Chief Administrative Law Judge

Dated:

August 12, 1993  
Washington, D.C.

IN THE MATTER OF RED BELL, INC., Respondent,  
Docket No. IF&R-04-92F044-C

Certificate of Service

I hereby certify that this Interlocutory Order Granting Complainant's Motion for Partial Accelerated Decision, dated AUG 12 1993, was mailed this day in the following manner to the below addressees:

Original by Regular Mail to:

Julia P. Mooney  
Regional Hearing Clerk  
U.S. EPA, Region 4  
345 Courtland Street, N.E.  
Atlanta, GA 30365

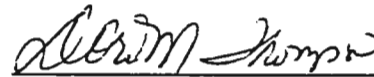
Copy by Certified Mail,  
Return Receipt Requested to:

Attorney for Complainant:

David A. Savage, Esquire  
Assistant Regional Counsel  
U.S. EPA, Region 4  
345 Courtland Street, N.E.  
Atlanta, GA 30365

For Respondent:

Neil Luxenberg  
President  
Red Bell, Inc.  
P.O. Box 887  
Zebulon, NC 27597



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Doris M. Thompson  
Secretary

Dated: \_\_\_\_\_

AUG 12 1993