

**STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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In the Matter of the Alleged Violations of Article 33 of the Environmental Conservation Law (ECL) and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Parts 320-329

**RULING ON MOTION  
TO COMPEL  
DISCOVERY**

- by -

DEC Case No.  
R7-20170503-24

**DAVID COHEN, APRIL TESTA  
(both d.b.a. TRI-CITIES APARTMENT RENTALS)  
CZAL, LLC**

Respondents

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**Appearances:**

- Thomas S. Berkman, Deputy Commissioner and General Counsel (Margaret Sheen, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation.
- David Cohen, respondent pro se, and for CZAL, LLC.
- April Testa, respondent pro se.

**I. Background**

Staff of the New York State Department of Environmental Conservation (Department) commenced this enforcement action against respondents David Cohen, April Testa, both d.b.a. Tri Cities Apartment Rentals, and CZAL, LLC (respondents) by service of a notice of hearing and complaint both dated September 8, 2017.

The complaint alleges that on March 6, 2017, in the presence of the occupants and residents of property located at 6/6 1/2 Morgan Street, Binghamton, New York (Site), including children, respondents or their agents or employees (collectively respondents) applied an unregistered pesticide known as “St. Gabriel Insect Dust (EPA # 63101-13)” (St. Gabriel Insect Dust) by a broadcast method to treat bed bugs. According to the complaint, respondents did not possess a commercial pesticide applicator certification, nor did they give prior notice of the pesticide application and its label warnings, as required by law, to the occupants of the Site.

Respondent David H. Cohen, individually, as the sole owner of Tri-Cities Apartments Rentals, and as the attorney for CZAL, LLC answered the complaint. Respondent April Testa, individually, separately answered the complaint. Both answers are signed and dated September 21, 2017 and were filed with the Department on September 25, 2017. By letter dated October 5, 2017, and received by the Department on October 10, 2017, respondents submitted a demand for verified bill of particulars and a request for interrogatories, both dated October 6, 2017, on Department staff (October 6 discovery demands).

Department staff filed the complaint together with respondents' answers with the Office of Hearings and Mediation Services (OHMS) on October 10, 2017. On November 2, 2017, staff filed a statement of readiness with OHMS and provided a copy to respondents (Statement of Readiness). Staff waived discovery and requested that a hearing date be set in this matter. (*See* Statement of Readiness at ¶¶ 3-4, 6). The matter was assigned to Administrative Law Judge (ALJ) Lisa A. Wilkinson on November 7, 2017

By letter dated November 9, 2017 addressed to ALJ Wilkinson, received in OHMS on November 28, 2017, Mr. Cohen submitted an unsigned affidavit responding to staff's Statement of Readiness, attaching respondents' September 21, 2017 Answers, respondents' October 6, discovery demands, and respondents' demand for verified expert witness dated October 6, 2017.<sup>1</sup> Mr. Cohen's unsigned affidavit requests that Department staff be directed to answer respondents' discovery requests and "any other reasonable discovery requests" respondents may make in the future. (*See* unsigned affidavit of David Cohen dated November 9, 2017 at ¶¶ 3, 7.)

I will treat Mr. Cohen's request as a motion to compel disclosure pursuant to 6 NYCRR 622.7(c). For the reasons stated below, I deny the motion in its entirety.

## **II. Discussion**

The scope of discovery under 6 NYCRR part 622 (Part 622) is as broad as that provided under article 31 of the CPLR (*see* 6 NYCRR 622.7 [a]). The parties are generally authorized to employ any disclosure devices available under CPLR article 31, with some notable exceptions and restrictions that are relevant in this proceeding (*see* 6 NYCRR 622.7[b][1]).

Bills of particulars are not permitted in Part 622 enforcement proceedings (*see* 6 NYCRR 622.7[b][3]). Department staff objects to respondents' demand for a verified bill of particulars as not allowed under the Department's regulations (*see* Statement of Readiness at ¶ 3). Respondents' motion to compel disclosure with respect to their demand for a verified bill of particulars is, therefore, denied.

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<sup>1</sup> The record is unclear whether the October 6, 2017 demand for verified expert witness was served with the remainder of the October 6 discovery demands.

Written interrogatories, as Department staff correctly notes, are allowed only with the permission of the ALJ upon a finding that they are likely to expedite the proceeding (*see* 6 NYCRR 622.7[b][2]; *see also Matter of Cobleskill Stone Products, Inc.*, Rulings of the Chief ALJ on Motions, Jan. 31, 2013, at 6; Statement of Readiness at ¶ 3). The party seeking such permission has the burden to demonstrate that the interrogatories would be in interest of justice and would expedite the proceeding (*see Matter of Toussie*, Rulings of the Administrative Law Judge, November 25, 2016 at 2).

Respondents' request for interrogatories seeks information related to the testing and safety of St. Gabriel Insect Dust by New York State, any findings the State has made related to the safety of the product, whether the Department has previously prosecuted Agway, Lowes or Home Depot for selling St. Gabriel Insect Dust or required them to obtain a license to sell the product, and whether the Department has ever required a "resident" to obtain a license before buying or using St. Gabriel Insect Dust (*see* request for interrogatories).

Staff objects to respondents' request for interrogatories because respondents did not seek permission of the ALJ as required by 6 NYCRR 622.7(b)(2) (*see* Statement of Readiness at ¶ 3). Mr. Cohen asserts that the interrogatories are necessary to prepare a defense and that he is entitled to answers as a matter of fairness (*see* unsigned affidavit of David Cohen dated November 9, 2017 at ¶¶ 3, 7).

Respondents have not met their burden to demonstrate that their proposed interrogatories will likely expedite this proceeding. Notably, the information respondents seek could be obtained through a request for the production of documents, subject to the limitations set forth in article 31 of the CPLR and Part 622. Inasmuch as respondents have not previously made such a document request, and staff has not responded, sought relief from, or refused to answer such a request, it is premature for me to conclude that interrogatories are necessary for respondents' defense and would expedite this proceeding. A motion to compel staff to answer interrogatories would only be appropriate where I had previously granted respondents' request to serve interrogatories and denied a motion by staff for a protective order, if proffered. Accordingly, I will not require staff to answer respondents' request for interrogatories at this time. Respondents can proceed with a document request pursuant to Part 622.

With respect to respondents' demand for verified expert witness, I note that Mr. Cohen's November 9, 2017 letter to me included this discovery demand. The record is unclear, however, whether Mr. Cohen's October 5, 2017 letter to staff attaching respondents' October 6, 2017 discovery demands, included respondents' demand for expert witness disclosure. The letter references respondents' demand for a bill of particulars and request for interrogatories, but fails to mention respondents' demand for expert witness disclosure. Staff's statement of readiness

indicates that aside from respondents' demand for a verified bill of particulars and request for interrogatories, "[n]o further discovery has been requested by Respondent to date" (*see* statement of readiness at ¶ 3). Because insufficient proof exists in the record that respondents served their demand for expert witness disclosure on Department staff, I deny respondents' motion to compel disclosure of this information. Respondents should serve staff with their request for expert witness disclosure pursuant to Part 622.

Finally, Department staff has requested that I set a date for a hearing in this matter, which I intend to do. OHMS will contact the parties to set up a conference call regarding the scheduling of a hearing in this matter after discovery is completed. In the meantime, by this ruling, I am establishing a schedule for discovery and requiring respondents to serve all discovery demands upon staff by **January 15, 2017**.

### **III. Ruling**

- A. Respondents' motion to compel discovery is DENIED in its entirety.
- B. Respondents shall serve all discovery demands on Department staff no later than **January 15, 2017**.

\_\_\_\_\_/s/\_\_\_\_\_  
Lisa A. Wilkinson  
Administrative Law Judge

Dated: December 6, 2017  
Albany, NY

## APPENDIX A

### *Matter of David H. Cohen, April Testa (both d.b.a. Tri-Cities Apartment Rentals) and CZAL, LLC, Case No. R-7-20170503-24*

#### **Papers Submitted by Respondents**

1. Letter to ALJ Lisa Wilkinson from David H. Cohen dated November 9, 2017 with the following attachments:
  - a. Unsigned affidavit of David H. Cohen, Esq. dated November 9, 2017
  - b. Answer by David H. Cohen for David H. Cohen, individually, David H. Cohen as the owner of d.b.a. Tri City Apartment Rentals, and David H. Cohen as the attorney for CZAL, LLC dated September 21, 2017
  - c. Unsigned Answer by April Testa, individually
  - d. Demand for Verified Bill of Particulars dated October 6, 2017 and signed by David Cohen April Testa, individually, and David H. Cohen for CZAL, LLC
  - e. Respondents' Request for Interrogatories dated October 6, 2017 and signed by David Cohen, April Testa, individually, and David H. Cohen for CZAL, LLC
  - f. Demand for Verified Expert Witnesses dated October 6, 2017 and signed by David Cohen, April Testa, individually, and David H. Cohen for CZAL, LLC
2. Letter to Margaret Sheen from David H. Cohen dated October 5, 2017 with the following attachments:
  - a. Demand for Verified Bill of Particulars dated October 6, 2017 and signed by David Cohen, April Testa, individually, and David H. Cohen for CZAL, LLC
  - b. Respondents' Request for Interrogatories dated October 6, 2017 and signed by David Cohen, April Testa, individually, and David H. Cohen for CZAL, LLC
  - c. Letter from Margaret Sheen to David H. Cohen Esq. dated September 18, 2017

#### **Papers Submitted by Department Staff**

1. Letter from Chief ALJ James McClymonds to David H. Cohen, April Testa, and CZAL, LLC dated November 7, 2017
2. Letter from Margaret Sheen to Chief ALJ James McClymonds dated November 2, 2017 with attached Statement of Readiness dated November 2, 2017
3. Letter from Margaret Sheen to Chief ALJ James McClymonds dated October 10, 2017 with the following attachments:
  - a. Letter from David H. Cohen, Esq. to Margaret Sheen dated September 27, 2017

- d. Answer by David H. Cohen, Esq. for David H. Cohen, individually, David H. Cohen as the owner of d.b.a. Tri City Apartment Rentals, and David H. Cohen as the attorney for CZAL, LLC dated September 21, 2017
- b. Answer by April Testa, individually, dated September 21, 2017
- c. Letter from Margaret Sheen to David H. Cohen dated September 18, 2017
- d. Letter from David H. Cohen, Esq. to Margaret Sheen dated September 13, 2017
- e. Letter from Margaret Sheen to David H. Cohen, Esq., April Testa, and David H. Cohen Esq. for CZAL, LLC dated September 8, 2017
- f. Letter from Margaret Sheen to David H. Cohen, Esq., April Testa, and David H. Cohen Esq. for CZAL, LLC dated September 8, 2017 attaching Notice of Hearing and Complaint dated September 8, 2017