

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations of Article 33 of  
the New York State Environmental Conservation Law  
and Part 325 of Title 6 of the Official Compilation of  
Codes, Rules and Regulations of the State of New York,

- by -

DEC Case No.  
R2-20090810-506

**EXCELLENT PEST CONTROL LLC,**

Respondent.

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**RULING ON MOTION FOR ORDER WITHOUT HEARING**

This administrative enforcement proceeding concerns alleged violations of article 33 of the New York State Environmental Conservation Law (“ECL”) and part 325 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”) by respondent Excellent Pest Control LLC (“respondent”), a limited liability company located in Jamaica, New York.

Staff of the New York State Department of Environmental Conservation (“Department” or “staff”) commenced this proceeding by service of a notice of motion for order without hearing in lieu of complaint, dated April 10, 2013. Staff’s motion asserts one cause of action, alleging that respondent engaged in the commercial application of pesticides without the required business registration in violation of ECL § 33-0907(1), ECL § 33-1301(8-a) and 6 NYCRR § 325.23(a) for a period of time ending in August 2009. See Affirmation of Louis P. Oliva, Esq. dated April 10, 2013 (“Oliva Aff.”) ¶ 13. Staff seeks a penalty of \$5,000 for the alleged violations. See id. ¶ 14.

In response to staff’s motion, respondent served a document sworn to by Aruna Advani, who identifies herself as the President of respondent. See Response to Motion for Order Without Hearing, sworn to on May 8, 2013 (“Response to Motion”). In its response, respondent asserts, among other things, that:

- (i) Respondent did register as a pesticide business, and its registration became effective on August 6, 2009. See Response to Motion, Exhibit (“Ex.”) C, at 2;
- (ii) Respondent was not required to register until August 6, 2009 because it did not conduct any “pest control activities” until that time. See Response to Motion ¶¶ 4, 5, 8, 9;

- (iii) Ms. Advani is a licensed commercial pesticide applicator. See id. ¶¶ 4-5; see also id. Ex. C (copy of Advani’s commercial pesticide applicator certification #C1825861, expiration date October 21, 2014);
- (iv) Ms. Advani “conducted” and “performed” “pest control activities” under her own license, and for “other registered companies” prior to respondent’s registration in August 2009. Id. ¶¶ 4-5;
- (v) the Department “has not established that pest control activities were conducted by Excellent Pest Control LLC prior to August 6, 2009.” Id. ¶ 10; and
- (vi) the “interest rate sought by the DEC ... amounts to Usury and is therefore violative of the relevant statutes.” Id. ¶ 13.

The matter was originally assigned to Administrative Law Judge (“ALJ”) P. Nicholas Garlick. On July 7, 2015, the matter was reassigned to me. As discussed below, I deny staff’s motion for order without hearing, because: (i) staff did not satisfy its initial burden to demonstrate its entitlement to judgment as a matter of law; and (ii) respondent’s submissions in opposition to the motion raise questions of fact the resolution of which requires a hearing.

#### Legal Standard

On a contested motion for order without hearing, as on a motion for summary judgment, “issue finding and not issue resolution” is the proper analytical focus. Cruz v American Express Lines, 67 N.Y.2d 1, 13 (1986); see also Matter of Locaparra, Decision and Order of the Commissioner, June 16, 2003, at 3-4. The burden on the moving party “is a heavy one,” and facts must be viewed in the light most favorable to the non-moving party. Jacobsen v New York City Health and Hosp. Corp., 22 N.Y.3d 824, 833 (2014). It is not the ALJ’s role on such a motion to assess credibility. See Ferrante v American Lung Assn., 90 N.Y.2d 623, 631 (1997); see also Matter of Tractor Supply Co., Decision and Order of the Commissioner, Aug. 8, 2008, at 3, and all inferences are drawn in favor of the non-moving party. See Cruz, 67 N.Y.2d at 13; see also Vega v Restani Constr. Corp., 18 N.Y.3d 499, 505 (2012). The motion should not be granted where the ALJ has any doubt that a factual issue exists warranting a hearing, or where the issue is “arguable.” Glick & Dolleck, Inc. v Tri-Pac Export Corp., 22 N.Y.2d 439, 441 (1968); Asabor v Archdiocese of New York, 102 A.D.3d 524, 527 (1<sup>st</sup> Dep’t 2013).

#### Discussion

As set forth above, staff’s motion alleges that respondent engaged in the commercial application of pesticides without the required business registration from at least December 2008 until August 3, 2009. See Oliva Aff. ¶ 13. Staff also alleges that respondent performed 122 commercial pesticides applications from January 1, 2009 to August 3, 2009. See id. ¶ 7. These allegations are actually comprised of four distinct facts: (1) respondent engaged in the commercial application of pesticides; (2) respondent lacked the required pesticide business registration; (3) respondent applied pesticides during “at least” the period from December 2008 through August 3, 2009; and (4) respondent applied pesticides 122 times. As discussed below, the record on this motion establishes only one of these facts as a matter of law.

## Respondent's Business Registration

The parties' submissions do establish as a matter of law that respondent was not registered prior to August 6, 2009. In support of its motion, staff has submitted the affidavit of Julio Perez, a business registration and certification clerk employed by the Department. Mr. Perez states that his search of the Department's Pesticide Business Registration database on March 6, 2009 revealed that respondent was not registered as a pesticide business. See Affidavit of Julio Perez dated March 21, 2013 ("Perez Aff."), ¶ 4. In addition, staff has submitted a signed statement from respondent's President Ms. Advani which contains an admission that, as of July 30, 2009, the business was not yet registered. See Affidavit of Robert Freese dated March 7, 2013 ("Freese Aff."), ¶ 3 and Ex. A (Voluntary Statement dated July 30, 2009). Staff has therefore submitted evidence sufficient to carry its initial burden on the motion to demonstrate that, as a matter of law, respondent was not registered during the relevant time period.

In response to the motion, respondent confirms staff's allegation that respondent was not registered during the relevant time. Ms. Advani states that respondent was not registered until August 6, 2009, and has submitted a copy of the registration document reflecting that it was issued on August 6, 2009. See Response to Motion, Ex. C at 2; see also Response to Motion ¶ 9.

The record therefore establishes as a matter of law that respondent was not registered until August 6, 2009.<sup>1</sup>

## Time Period of Alleged Violations

Staff has not established as a matter of law the time period during which respondent allegedly applied pesticides without the required registration. First, staff's submissions refer to two different time periods: (i) from January 1, 2009 to August 3, 2009. See Oliva Aff. ¶ 7; see also Affidavit of Robert Jablonski dated March 22, 2013 ("Jablonski Aff.") ¶ 3; and (ii) "from at least December 2008 to August 3, 2009." Oliva Aff. ¶ 13.

Second, staff apparently relies on what it refers to as "an electronic version of Respondent's 2009 annual report" as a basis for its claim that respondent applied pesticides during the cited period. See Jablonski Aff. ¶ 3, and Ex. B. Mr. Jablonski states that he reviewed this document on March 19, 2013. See id. ¶ 3, but does not otherwise describe or explain the contents of the document. The six page document to which he refers is not dated, has no title, the word "pesticide" does not appear anywhere in the document, and no reference to any year, including "2009," appears in the many lines of text and numbers in that document. See id. Ex. B. The unexplained document, the incomplete discussion in the affidavit submitted with the document, and the different time periods set forth in staff's papers, do not establish as a matter of law a specific time period during which respondent allegedly applied pesticides without a business registration.

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<sup>1</sup> Staff's papers allege that respondent first registered as a pesticide business on August 4, 2009. See Oliva Aff. ¶ 8. As discussed above, however, the documentary evidence submitted, and Ms. Advani's sworn statement, establish as a matter of law that the actual date of registration was August 6, 2009.

### Number of Alleged Pesticide Applications

Nor does the record establish as a matter of law that respondent made 122 pesticide applications, as alleged by staff. See Oliva Aff. ¶ 7; Jablonski Aff. ¶ 3. Again, staff relies for this assertion on the six page document attached as Exhibit B to Mr. Jablonski's affidavit. A review of the document reveals that it contains 226 lines of text and numbers. Staff has provided no explanation of the contents of each line, nor identified which of these 226 entries allegedly relate to or establish the 122 times that respondent is alleged to have applied pesticides without proper registration.

In addition, Department staff witness Mr. Freese has provided the following statement regarding documents he saw during a July 30, 2009 inspection:

“I reviewed an electronic spreadsheet that Ms. Advani had been keeping to use as Respondent's 2009 annual report. The entries indicated that Respondent had commercially applied pesticides about twelve (12) times earlier in the year 2009. I also reviewed three (3) electronic invoices for commercial pesticides applications that had been performed by Respondent earlier in the year 2009.”

Freese Aff. ¶ 4.

Mr. Freese's statements are problematic for several reasons. First, he has submitted neither the “electronic spreadsheet” to which he refers nor any of the three “electronic invoices” that allegedly reflect respondent's application of pesticides in 2009. Moreover, he does not explain how he knows that Ms. Advani was “keeping” the “electronic spreadsheet” “to use as Respondent's 2009 annual report.” Nor does Mr. Freese explain how the entries on the spreadsheet “indicated” that respondent, rather than someone else (such as, for example, Ms. Advani, a certified commercial pesticides applicator) applied pesticides.

Finally, staff provides no explanation of the relationship, or disparity, between (i) Mr. Freese's statement that, as of July 30, 2009, the spreadsheet he reviewed reflected that respondent applied pesticides twelve (12) times in 2009; and (ii) staff's other allegations that respondent applied pesticides 122 times between January 1 and August 3, 2009.<sup>2</sup> Indeed, if the document referred to by Mr. Freese was up-to-date as of his July 30<sup>th</sup> inspection, respondent would have had to apply pesticides 110 times during the five day period of July 30 to August 3, 2009 to reach 122 applications by August 3.

Respondent has submitted a document entitled “Applicator/Technician Pesticide Annual Report” that reflects a “Report Year” of 2009, and includes Ms. Advani's certification identification number and “Bus/Agency Reg. No.” 14930, which is the registration number for respondent. See Response to Motion Ex. B. The document contains 114 entries, for what appears to be the period from January 5 through August 5, and that may reflect the application of

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<sup>2</sup> The record is also silent with respect to whether the “electronic spreadsheet” to which Mr. Freese refers, see Freese Aff. ¶ 4, is a version of, or is otherwise related to, the “electronic version of Respondent's 2009 annual report” to which Mr. Jablonski refers. See Jablonski Aff. ¶ 3.

pesticides. Neither party discusses this document, however, and therefore its content and significance are not established for purposes of this motion.

Given the lack of clarity in the record, staff has not established as a matter of law the number of times pesticides were allegedly applied by respondent during the cited period.

#### Whether Respondent Applied Pesticides

Finally, staff has not established as a matter of law that respondent engaged in the commercial application of pesticides before it was a registered pesticide business.

This enforcement matter was apparently prompted by staff's receipt of a liability insurance certificate for respondent which, according to Mr. Perez, "indicated that Respondent was operating as a pesticide business in Jamaica, NY." Perez Aff. ¶ 4. Staff has not submitted with its motion papers a copy of the insurance certificate, and has not explained how it "indicated" that respondent was "operating" as a pesticide business.<sup>3</sup> In addition, although Mr. Freese has stated that he saw three "electronic invoices for commercial pesticides applications that had been performed by Respondent earlier in the year 2009," Freese Aff. ¶ 4, he did not submit copies of the invoices, state that they were on respondent's letterhead, or otherwise explain how they support his conclusion that it was respondent that applied the pesticides.

Staff has submitted only one document containing respondent's letterhead, a letter from respondent to Region 1 staff received on June 21, 2011. See Jablonski Aff., Ex. A, pp. 2-3. The letter states, among other things, that "beginning January 2009 till date," Mr. Miguel Ventura, a certified applicator, mixed, handled and applied pesticides "while working under the direct supervision of the undersigned, Ms. Aruna Advani." The letter does not state that Mr. Ventura was employed by respondent during the relevant period, or that the work identified was performed for or on behalf of respondent. The letter states only that Mr. Ventura mixed, handled and applied pesticides under the supervision of Ms. Advani, who is a certified applicator.

In response to staff's motion, respondent asserts that it did not "conduct pest control activities" prior to August 6, 2009, the date it became a registered pesticide business. See Response to Motion ¶¶ 4, 5, 9. Respondent's papers also contain, however, Ms. Advani's sworn admission that she "conducted pest control activities as a registered Commercial Pest Control Applicator under my own 'Commercial Pesticide Applicator' License." Id. ¶ 4. Although this admission establishes that Ms. Advani conducted pest control activities, such admission is not inconsistent with respondent's position that respondent did not apply pesticides before it was registered.

The parties do not disagree regarding whether pesticides were in fact applied during the period at issue. The submissions raise a question of fact, however, as to whether the pesticides were applied by respondent or by Ms. Advani in her individual or "independent contractor" capacity. See Letter from A. Advani to Hon. Richard Wissler, dated October 3, 2012, attached to

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<sup>3</sup> The existence of an insurance certificate, without more, does not establish as a matter of law that respondent had applied or was going to apply pesticides.

Response to Motion as Ex. A, at 2 (admitting that she “conducted a small number of jobs as an independent contractor”).

For example, the record does not establish whether Ms. Advani represented to her customers that she was acting on behalf of respondent. Nor does the record contain any invoices from, checks made payable to, or correspondence from or to, respondent during the relevant time that would establish that respondent had applied pesticides. Given the lack of proof regarding respondent, and Ms. Advani’s personal admissions, it is plausible to infer from this record that Ms. Advani, rather than respondent, performed the pesticide applications at issue here. As set forth above, all facts must on this motion be viewed in the light most favorable to, and all inferences must be resolved in favor of, non-movant respondent. See e.g. Jacobsen, 22 N.Y.3d at 833; Cruz, 67 N.Y.2d at 13. Given the lack of clarity in the submissions, and the law governing motions for order without hearing, I am constrained on this record to deny staff’s motion.

In light of the foregoing, I deny staff’s motion for order without hearing.<sup>4</sup> Pursuant to 6 NYCRR § 622.12(e), based upon my examination of the evidence filed by the parties, I find the following facts are not in dispute:

1. Respondent Excellent Pest Control LLC was a pesticide business registered with the Department beginning on August 6, 2009. See Response to Motion, Ex. C, at 2 (Pesticide Business/Agency Registration # 14930, issued August 6, 2009, with expiration date of February 29, 2012).
2. Respondent Excellent Pest Control LLC was not a registered pesticide business prior to August 6, 2009. See Response to Motion ¶¶ 9, 13; see also Perez Aff. ¶ 4; Freese Aff., ¶ 3 and Ex. A (Advani Voluntary Statement).
3. Aruna Advani was President of respondent Excellent Pest Control LLC. See Response to Motion, at 1.
4. Aruna Advani was a certified commercial pesticide applicator. See Response to Motion, Ex. C, at 1 (commercial pesticide applicator card, ID # C1825861, with expiration date of October 21, 2014).
5. Prior to August 6, 2009, Aruna Advani applied pesticides under her commercial pesticide applicator certification. See Response to Motion ¶¶ 4, 5.

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<sup>4</sup> Because I am denying staff’s motion for order without hearing with respect to liability, I do not address herein the other issues raised in the parties’ submissions, including issues relating to civil penalties.

**RULING**

Department staff's motion for order without hearing, dated April 10, 2013, is denied. I will schedule a conference call with the parties to discuss the next steps in this matter.

\_\_\_\_\_/s/\_\_\_\_\_  
D. Scott Bassinson  
Administrative Law Judge

Dated: July 9, 2015  
Albany, New York

Excellent Pest Control LLC  
170-40 Highland Avenue  
Apt. 401  
Jamaica, NY 11432

(via First Class Mail)

Ms. Aruna Advani  
170-40 Highland Avenue  
Apt. 401  
Jamaica, NY 11432

(via First Class Mail)

Karen Mintzer, Esq.<sup>5</sup>  
Regional Attorney  
New York State Department of Environmental Conservation  
Region 2 Offices  
One Hunter Point Plaza  
47-40 21<sup>st</sup> Street  
Long Island City, NY 11101

(via Intra-Agency Mail)

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<sup>5</sup> This matter was originally handled by Region 2 Regional Attorney Louis Oliva. Subsequent to the submission of the papers on this motion, Attorney Oliva transferred to the Department's Albany office. Accordingly, Karen Mintzer, Esq., who is now Regional Attorney for Region 2, is hereby substituted as the Department contact in this matter at this time.