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In the Matter of 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 ("NYCRR")

DEC Case No.  
CO 1-20031229-415

**Ruling on Motion  
to Amend Complaint**

-by-

June 10, 2008

Satur Farms, LLC,

Respondent.

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**Proceedings**

Department Staff counsel commenced this proceeding by service of a Notice of Hearing (dated July 15, 2006) and a Complaint (undated). This initial Complaint alleged four causes of action related to pesticide regulation.

This matter was assigned to Administrative Law Judge (ALJ), Kevin J. Casutto, the undersigned, on September 12, 2006, following receipt of Respondent's Motion for More Definite Statement (dated August 9, 2006). On September 22, 2006, I issued a ruling granting Respondent's unopposed Motion for More Definite Statement. In response to the ruling, by e-mail on October 3, 2006 Department Staff counsel filed with this Office a first Amended Complaint (undated and unsigned) alleging three causes of action, a copy of which was sent to Respondent's counsel. (A fourth cause of action pled in the initial Complaint, relating to eyewash decontamination, was discontinued.) Respondent then filed a Verified Answer (dated October 21, 2006), denying the substantive allegations of the Amended Complaint and asserting five affirmative defenses.

On October 16, 2007, Department Staff counsel filed a Statement of Readiness. In a telephone conference on October 30, 2007, an adjudicatory enforcement hearing in this matter was scheduled to commence on November 28, 2007 in the Department's Region 1 Offices. Subsequently, Department Staff counsel advised that in fact, she was mistaken; a hearing room in the Regional Office was not available for that date. Counsel requested that the hearing be rescheduled. Consequently, with Respondent counsel's consent, the hearing was rescheduled to commence on November 27, 2007.

Next, by letter dated November 9, 2007, Department Staff counsel advised that Department Staff's primary witness for this hearing would be unavailable for hearing preparation prior to the scheduled hearing date, other than one day on which Department Staff counsel was unavailable. Therefore, Department Staff counsel requested again to reschedule the hearing "at a later date that is mutually acceptable" to opposing counsel and me. As noted by Respondent's counsel in his letter dated November 13, 2007, "[p]resumably hearing dates were chosen with a view toward the availability of counsel and witnesses. [The hearing dates] were chosen with that in mind and confirmed with our clients. We had hoped that [Department Staff counsel] had done similarly. Nonetheless, given the circumstances, we have no objection to the request and await proposed dates. We note that the weeks following the scheduled dates are now filled."

These sentiments were reiterated by me in a November 14, 2007 telephone conference in which the matter was re-scheduled for hearing to commence on January 3, 2008.

On Friday, December 14, 2007, when I was out of the office, my office received a telephone message from Department Staff counsel advising that this matter had been settled. The following Monday upon returning to my office, I found e-mail messages from the Department Staff counsel, apparently unilaterally canceling the hearing room reservations for the January 2008 hearing dates<sup>1</sup>. Consequently, on Monday December 17, 2007, I sent the parties an e-mail message stating my understanding that the parties had reached agreement on a conceptual settlement of this enforcement matter, and further confirming that I would retain jurisdiction over this matter until receipt of a fully executed Consent Order from Department Staff counsel.

Weeks elapsed with no communication from the parties and no receipt of a duly executed Consent Order. On February 12, 2008, Department Staff counsel sent a letter to Respondent's counsel noting that the settlement offer was good only until January 20<sup>th</sup>, and that if Respondent intended to accept the settlement offer, the executed Consent Order must be received by the Department immediately.

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<sup>1</sup> Pursuant to 6 NYCRR 622.9(d) and (e), the ALJ (or if the case has not been assigned to an ALJ, the OHMS Chief ALJ) sets the hearing schedule. Therefore, Department Staff counsel had no authority to cancel the hearing room reservation absent approval of the ALJ.

By e-mail on March 27, 2008, I requested that Department Staff counsel provide a status report on this matter. No response was forthcoming. On April 7, 2008, because Department Staff counsel had not responded to my previous e-mail, I re-transmitted the March 27, 2008 message.

Finally, on April 8, 2007, Department Staff counsel provided a letter advising that no settlement had been completed, and requesting that the matter be rescheduled for hearing. In addition, in this letter, Department Staff counsel summarily requested permission to amend the third cause of action of the first Amended Complaint.

On April 16, 2008, having received no objection from Respondent to Staff's request to amend, I advised the parties by letter that the preferred practice, pursuant to 6 NYCRR 622.5(b), prior to opening the hearing record, has been to make the request to amend a complaint by motion with the proposed amended complaint attached, and an affidavit (or affirmation) explaining the proposed amendment. However, because I had received no objection from Respondent, and because the Department's enforcement hearing regulations and New York Civil Practice Law and Rules (the "CPLR") generally favor granting motions to amend, I granted Department Staff counsel's request to amend the Complaint for a second time.

Then, by facsimile transmission dated April 17, 2008 (received by my office on Friday, April 18, 2008), Respondent's counsel advised Department Staff counsel and me that in fact, Respondent had objected (with documentation attached), but due to law office error that communication was sent to the wrong facsimile transmission telephone number, not the number for my office (Office of Hearings and Mediation Services). Moreover, Respondent's counsel requested, by letter dated April 17, 2008 (and included in the facsimile transmission), reconsideration of my April 16, 2008 determination to grant Staff's second request to amend the complaint in view of Respondent's timely (although mis-directed) objection.

Because I was out of the office on Friday, engaged in another case, I did not learn of Respondent counsel's facsimile transmission until the following Monday. Consequently, on Monday morning, April 21, 2008, when I first received Respondent's facsimile transmission, I had copies hand-delivered to Department Staff counsel. (As subsequently explained, Respondent's counsel had transmitted the documentation to Department Staff counsel but omitted to so indicate on the facsimile cover sheet).

On the morning of April 22, 2008, Department Staff counsel filed a second Amended Complaint under cover letter providing some explanation of the amendment, but failing to address or even acknowledge Respondent counsel's recent communications objecting to the amendment and requesting reconsideration of my determination granting the request to amend. By e-mail to the parties later that morning, I expressed my surprise at receiving the second Amended Complaint in view of the pending objection and request for reconsideration. I advised the parties I would schedule a telephone conference to address further scheduling.

By e-mail on April 23, 2008, Department Staff counsel sent a letter of apology for filing the second Amended Complaint while aware of Respondent counsel's objection and request for reconsideration. By way of apology and explanation, Department Staff counsel stated, in sum and substance, that this was not a strategic move by Department Staff to obtain an unfair advantage over Respondent, but instead that Department Staff counsel was unduly focused on filing the second Amended Complaint and was confused by Respondent counsel's recent filings.

During a telephone conference on April 25, 2008, I began by noting that Department Staff counsel's attention to this case is lacking and must improve. We addressed scheduling matters to move this case forward. I acknowledged that I would entertain Respondent counsel's motion for reconsideration. We agreed that by May 7, 2008, Respondent's counsel would file objections to the proposed second Amended Complaint. By May 14, 2008, Department Staff counsel was authorized to make a responsive filing. These filings were received in a timely manner and are discussed below.

### **Respondent's Objections to the Second Amended Complaint**

Respondent argues that, as compared to the first Amended Complaint, the first two causes of action are unchanged, but the third cause of action is almost entirely different both legally and factually. Further, Respondent contends that Department Staff has provided no affirmation or affidavit of merits or reasons for delay in making the proposed amendment. As compared to the initial Complaint and the first Amended Complaint, which were based upon an alleged violation of 6 NYCRR 325.6 (failure to train), Respondent asserts that this cause of action in the proposed second Amended Complaint is re-cast as an alleged violation of 6 NYCRR 325.2 (failure to follow label directions), a new theory of liability not previously identified in the prior two Complaints.

Pursuant to 6 NYCRR 622.5, consistent with the provisions of the CPLR, a party may amend its pleadings at any time prior to the final decision of the Commissioner, by permission of the ALJ or Commissioner, absent prejudice to the ability of any other party to respond. Respondent's counsel contends that Department Staff's motion to amend must be denied because it fails the tests under CPLR 3025(b), for four reasons:

First, Respondent's counsel states that amendments under CPLR 3025(b) are directed to the sound discretion of the Court. While leave to amend is generally liberally granted, Respondent argues, amendments are not liberally granted with respect to new theories of liability based upon new facts. McKinney's Cons Laws of NY, Book 7B, CPLR § 3025, Practice Commentaries; *Spence v. Bear Stearns & Co., Inc.*, 264 A.D.2d 601, 694 N.Y.S.2d 654 (1st Dept. 1999). Respondent asserts that, in the instant case, the new proposed third cause of action contains both new facts and new theories of liability.

Department Staff counters that the proposed amendment does not change the basic fact pattern of the case or even the basis of the third cause of action. Department Staff contends that the current cause of action, alleging a failure to provide proper training to agricultural workers, is similar to the proposed amended cause of action alleging failure to follow label directions. In addition, Department Staff notes that in the Department's administrative enforcement hearings, Department staff has been granted leave to amend a complaint to add additional claims and to reference violations of prior consent orders even after the adjudicatory hearing began (*citing, Pattons's Busy Bee Disposal Service, Inc.*, 1993 WL 393440); but that leave to amend has been denied when there is prejudice to any party (*citing, Tartan Textiles Services, Inc.*, 2001 WL 288941).

Second, Respondent's counsel asserts that because this case was scheduled for a specific hearing date, it is analogous to a case that is certified for trial under the CPLR. Therefore, Respondent's counsel contends, the burden to justify the proposed amendment is heavy upon movant. Leave to amend is granted only in limited circumstances. *Yavorski v. Dewell*, 288 A.D.2d 545, 732 N.Y.S.2d 263 (3rd Dept., 2001); *Kassis v. Teacher's Ins. & Annuity Ass'n.*, 258 A.D.2d 271, 685 N.Y.S.2d 44 (1st Dept., 1999). In such circumstances, both an affidavit of merits as well as reasonable excuse must be provided. *Hemmerick v. City of Rochester*, 63 A.D.2d 816, 405 N.Y.S.2d 841 (4th Dept. 1978); *Maiolo v. DeMare*, 66 A.D.2d 1011, 411 N.Y.S.2d 749 (4<sup>th</sup> Dept.

1978). Respondent's counsel states that no such affidavit or affirmation was provided by movant.

Countering Respondent's contention that Department Staff bears a heavy burden to justify the motion to amend when a hearing is scheduled, Department Staff counsel asserts that Respondent counsel's arguments are misplaced, and that the circumstances of *Yavorski* and *Kassis*, cited by Respondent's counsel, are not applicable here.

Department Staff counsel canceled the January 2008 hearing dates (without permission of the ALJ) based upon a conceptual settlement agreement that, subsequently, was not brought to conclusion. The adjudicatory hearing has not yet been rescheduled. In the event the motion to amend is granted, Respondent would have an opportunity to file an amended answer and engage in additional discovery (if any). Consequently, Department Staff contends that this motion to amend has not been brought on "the eve of trial," and therefore, no substantial prejudice to Respondent will result from granting the motion to amend.

In addition, with its May 14, 2008 filing, Department Staff counsel provided an Affirmation of Merit, explaining that, "[t]here is an error in the third cause of action in the current complaint that I discovered sometime prior to April, 2008. The error, while based on the same set of facts, should be modified to specify the correct regulatory citation and to reflect the source of the training requirements as the worker protection standards stated on the pesticide label, rather than general training requirements specified in DEC regulation." Department Staff Counsel's Affirmation of Merit, contained in Exhibit E of Staff's Affirmation in Support of Motion to Amend the Complaint (dated May 14, 2008). Lastly, Department Staff counsel asserts in the Affirmation in Support of Motion to Amend, that less than a two-year delay has occurred from service of the initial Complaint until the current request to amend was filed.

In sum, Department Staff counsel argues that the proposed amendment is a change in theory of liability that does not add new facts, relying upon McKinney's Cons Laws of NY, Book 7B, CPLR § 3025, Practice Commentary C3025:8 [an amendment that does not add new facts but seeks only to add a new theory in support of a claim or defense is more likely to be granted leave by the trier of facts]. Department Staff counsel concludes that both the current and the proposed amendment of the Complaint's third cause of action relate to the failure to provide pesticide safety training; the only change, if the amendment is granted, is the

source of authority cited by Department staff as a basis for the violation.

Third, Respondent asserts that where all of the facts are known to movant long prior to the proposed amendment, leave to amend is not to be liberally granted, citing *L.B. Foster v. Terry Contracting, Inc.*, 25 A.D.2d 721, 268 N.Y.S.2d 618 (1st Dept. 1966). In the instant case, Respondent contends, all facts were known to the Department from the inception and there is no showing to the contrary.

Department Staff counsel argues that the allegations asserted in the proposed the third cause of action are not based upon new information, because the Notice of Violation attached to the initial Complaint (dated July 31, 2006) and the first Amended Complaint (dated October 3, 2006) identified an alleged violation pertaining to 6 NYCRR 325.2(b). See, Notice of Violation, p.2., ("6 NYCRR 325.2(b) that requires that pesticides be used only in accordance with label directions. . . "). Therefore, Department Staff counsel concludes that Respondent has been on notice of a possible allegation of violation of 6 NYCRR 325.2(b) since at least July 31, 2006. Department Staff counsel contends that staff's proposed amendment merely seeks to conform the Complaint to information identified in the Notice of Violation. In sum, Department Staff counsel concludes that from service of the initial Complaint, Respondent has been aware of the possible alleged 6 NYCRR 325.2(b) "label" violation; following the failed settlement negotiations, a hearing date has not yet been rescheduled; and consequently, Respondent would not suffer any prejudice if the motion to amend is granted.

Fourth, Respondent argues that allowing the amendment will result in an additional burden for Respondent as it will be required to respond to yet a third pleading, engage in further discovery, and otherwise expend time, resources and money. This is exactly the type of prejudice, Respondent states, that the rules regarding amendment by leave set forth above are designed to protect against.

Respondent concludes that there is no reason why Department Staff should have a third opportunity to plead its case; that this matter was and is ready to go to hearing; and finally, that Department Staff has provided no reason for the proposed amendment in theory of liability or reason for delay in seeking the proposed amendment. In conclusion, Respondent's counsel asserts that Respondent will be prejudiced by the proposed amendment, and consequently, the motion to amend should be denied.

Department Staff counsel counters that the hearing date has not yet been rescheduled, and consequently, there is no impending deadline that would affect or impair Respondent's ability to answer the amended cause of action or engage in additional discovery, if necessary. In any event, if the motion to amend were granted, then another Statement of Readiness would be filed before the matter would be scheduled for hearing. In sum, Department Staff counsel asserts that Respondent will suffer no prejudice if the motion to amend was granted.

Department Staff counsel, in concluding its Affirmation in Support of Motion to Amend, states that by this amendment, Staff seeks merely to conform its pleadings to the alleged violations identified in the NOV. Although the motion to amend will result in some delay, Department Staff counsel argues, the delay is not unreasonable and will not deprive Respondent of the ability to answer the second Amended Complaint and engage in further discovery, if any.

**Ruling:** In New York practice, leave to amend is to be "freely given, upon such terms as may be just." See, CPLR 3025(b). Similarly, this is the case in the Department's administrative practice. See, 6 NYCRR 622.5(b). In commenting upon CPLR 3025(b), Professor David Siegel states that "[the] policy is to permit amendment, for almost any purpose, as long as the adverse party cannot claim prejudice. This policy is spelled out in the instruction that 'leave shall be freely given'." McKinney's Cons Laws of NY, Book 7B, CPLR § 3025, Practice Commentary C3025:4. Additionally, the administrative forum is intended to be a less formal forum with more relaxed procedures than the courts, suggesting that leave to amend should be more liberally construed in the administrative forum than pursuant to CPLR practice.

In view of these statutory and regulatory provisions, I find Respondent's objections to the motion to be unconvincing. In this instance, although Department Staff counsel has committed several procedural and administrative errors, nonetheless, Respondent will suffer no substantial prejudice if the motion is granted. The adjudicatory hearing has not yet been rescheduled and Respondent will be given the opportunity to file an amended Answer and engage in additional discovery (if any), should Respondent wish to do so.

I am unpersuaded that any delay occasioned by the proposed amendment will cause any substantial prejudice to



Respondent. Normally, in a Departmental enforcement proceeding, it is Department staff, not the Respondent, who is aggrieved by delay; it is Department Staff who brings the action, bears the burden of proof, and seeks a remedy and monetary penalty for the alleged violations. Respondent has not identified any reason why different circumstances exist in this case. Instead, Respondent cites the additional expense of responding to the proposed second Amended Complaint. While I recognize the burden of this additional expense, when balanced with the public interest in having a full review of all allegations, I find the expense factor to be *de minimis*.<sup>2</sup> Under these circumstances, in view of the provisions of 6 NYCRR Part 622 and the CPLR that strongly favor granting leave to amend, I find any prejudice to Respondent arising from answering the proposed second Amended Complaint to be *de minimis*.

Department Staff's motion to amend is hereby granted. Department Staff may serve the second Amended Complaint upon Respondent.

I direct Department Staff counsel to advise me when this matter is ready to be re-scheduled for an adjudicatory hearing by filing a superceding Statement of Readiness consistent with the provisions of 6 NYCRR 622.9.



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Kevin J. Casutto  
Administrative Law Judge

Dated: June 10, 2008  
Albany, New York

To: Satur Farms, LLC Service List  
(Dated November 1, 2007)

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<sup>2</sup> The statutes and regulations governing Departmental administrative enforcement proceedings make no provision for award of costs or attorney fees.