

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

In the Matter of

BuzzOff Mosquito, LLC,
BuzzOff Mosquito Control of Eastern New York,
Robert Courtney Enterprises, Inc., and
Robert Courtney,

Respondents.

ASSURANCE OF DISCONTINUANCE
PURSUANT TO EXECUTIVE LAW § 63(15)

Pursuant to the authority conferred by Executive Law § 63(12) and the referral of this matter by the New York State Department of Environmental Conservation (DEC) for enforcement of New York State pesticide laws and regulations, the Attorney General's Office of the State of New York has investigated certain sales and advertising practices of BuzzOff Mosquito, LLC ("BuzzOff"), BuzzOff Mosquito Control of Eastern New York ("BuzzOff New York"), Robert Courtney Enterprises ("Courtney Enterprises") and Robert Courtney, and based upon such inquiry, makes the following findings of fact and conclusions of law, which Respondents dispute:

1. BuzzOff is a limited liability company engaged in the business of manufacturing, selling and installing automatic mister mosquito control systems ("mister systems"). BuzzOff also sells the pesticide solution used in such systems ("pesticide products"). BuzzOff's principal place of business is located at 11236 Pennywood Avenue, Baton Rouge, Louisiana, 70809.
2. BuzzOff New York is BuzzOff's sole authorized dealer in New York State.

BuzzOff New York is located at 14 Clement Avenue, Saratoga Springs, New York 12866.

3. Courtney Enterprises is the owner of BuzzOff New York.
4. Robert Courtney is the president of Courtney Enterprises.
5. BuzzOff maintains an Internet website at www.buzzoffmosquito.com which it uses to market and advertise its mister systems and pesticide products for sale to the general public.
6. The mister system consists of a drum reservoir, electric pump, nylon tubing and stainless steel nozzles that automatically spray a pesticide solution for 20 to 40 second durations at pre-set, timed intervals. The mister system is designed to be installed outdoors, under eaves, along perimeter fences and around landscaped areas. Spray nozzles are installed every 10 to 15 feet, and deliver the pesticide in a fine mist. The mister system is also equipped with a remote control unit.
7. The pesticide used in the BuzzOff mister system consists of a diluted solution of a pyrethrin-based pesticide. Pyrethrins are botanical insecticides derived from pyrethrum, the extract of chrysanthemum flowers.
8. BuzzOff sells, but does not manufacture, the pyrethrin-based pesticide recommended for use in the mister system, Hydro-Py 300, a pesticide registered with the United States Environmental Protection Agency (EPA)(EPA Reg. No. 499-427) and New York State DEC. BuzzOff refers to Hydro-Py 300 as “BuzzOff Concentrate.”
9. Since at least 2004, BuzzOff and BuzzOff New York have sold and/or offered for sale in New York BuzzOff Concentrate.
10. BuzzOff New York sells and installs the mister systems at the purchasers’

residence or commercial establishment, and provides purchasers with instructions on how to prepare the pesticide solution and fill the mister system.

11. In its marketing and advertising of the mister system, BuzzOff has repeatedly stated in print and electronically via the Internet that the pesticide products they sell and their use in the mister systems are “safe.” BuzzOff New York’s marketing practices included distribution of BuzzOff’s written materials, reference to BuzzOff’s website, and orally representing to prospective purchasers that the pesticides and their use in the mister system are “safe.”

12. From 2004 to 2005, BuzzOff sold approximately ten mister systems and associated pesticides to BuzzOff New York, which in turn, sold these systems primarily to residents in the Saratoga County area.

13. In March 2006, the manufacturer of Hydro-Py 300 amended the pesticide’s label to prohibit its use in automatic mister systems in the State of New York.

14. Despite such label changes, BuzzOff continued to market and offer for sale to prospective purchasers in New York its mister system and pyrethrin-based pesticides. Unaware of the label change, BuzzOff New York continued to offer the products for sale in New York.

STATUTORY AND REGULATORY FRAMEWORK

Regulation of Business Fraud and Illegality Under Executive Law § 63(12) and Consumer Fraud Under GBL Article 22-A

15. Executive Law § 63(12) prohibits repeated or persistent fraudulent or illegal acts in the conduct of business in New York. Under the statute, the word “fraud” or “fraudulent” includes “any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual

provisions.” Executive Law § 63(12).

16. GBL Article 22-A prohibits any individual or business from engaging in deceptive business practices or false advertising, including making any false or misleading claim in the conduct of business. GBL § 349(a) provides that “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.” GBL § 350 provides that “[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful.”

Regulation of Pesticides Under ECL Article 33

17. Under New York law, the term “pesticide” includes “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.” Environmental Conservation Law (“ECL”) § 33-0101(35)(a).

18. Pesticides are regulated under both State and federal laws. ECL § 33-0301 provides:

It is hereby declared to be a matter of legislative determination that the regulation of the registration, commercial use, purchase and custom application of pesticides is needed in the public interest and that in the exercise of the police power all persons be required to register or obtain permits before engaging in such activities.

New York regulates pesticides pursuant to its police powers because pesticides, “if improperly used, may injure health, property and wildlife.” Id.

19. Pursuant to ECL § 33-0303, jurisdiction in all matters pertaining to the distribution, sale, use and transportation of pesticides in New York, is vested exclusively in the Commissioner of the DEC.

20. In lieu of seeking administrative sanctions, the Commissioner may refer any violation of State pesticide laws or regulations to the Attorney General for enforcement. ECL § 71-2907(2).

21. New York requires that “[e]very pesticide which is used, distributed, sold, or offered for sale within this state” be registered with the DEC. ECL § 33-0701.

22. Pursuant to ECL §§ 33-0701, 33-0703, and 33-0705, every pesticide that is used, distributed, sold, or offered for sale within New York must be registered every two years with the DEC Commissioner through the filing of a registration application that sets forth: (i) the name and address of the applicant, (ii) the name of the pesticide, (iii) a complete copy of the labeling accompanying the pesticide and a statement of all claims to be made for it, including directions for use, and (iv) if requested by the Commissioner, a full description of the tests made and their results upon which the claims are based.

23. Through the registration process, DEC evaluates the risks associated with each pesticide, determines whether the benefits of the pesticide sufficiently outweigh such risks to justify the sale or use of the pesticide in New York, and limits the claims that may be made for the pesticide within the State.

24. Under ECL Article 33, it is unlawful:

1. For any person to distribute, sell, offer for sale or use within this state or deliver for transportation or transport in intrastate commerce or between points within this state through any point outside this state any of the following:

a. . . . any pesticide if any of the claims made for it or any of the directions for its use differ in substance from the representations made in connection with its registration

ECL § 33-1301(1)(a) (emphasis added).

25. The “representations made in connection with” the pesticide’s registration in New York refers to the statement of claims typically set forth on the label, which the registrant is required to submit to DEC. See ECL § 33-0703(3).

Federal Regulation of Pesticides

26. In addition to state regulation of pesticides, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 et seq., regulates pesticides nationwide. In enacting FIFRA, Congress set minimum nationwide requirements concerning the sale and use of pesticides. FIFRA expressly preserves the authority of states to regulate the sale and use of pesticides provided that such regulation is at least as stringent as federal regulation. 7 U.S.C. § 136v(a) (states can regulate sale and use “but only if and to the extent the regulation does not permit any sale or use prohibited by [FIFRA]”).

27. Similar to ECL Article 33, FIFRA provides that pesticides distributed or sold within the United States must be registered (with EPA) and that claims cannot be made for such pesticides which substantially differ from the claims allowed by EPA for the pesticides’ labels. 7 U.S.C. §§ 136j(a)(1)(A) and (B).

28. Pesticides are regulated on both the state and federal levels so as to manage the inherent risks pesticides pose to human health and the environment. Both state and federal laws and regulations designate as “false or misleading,” claims “as to the safety of the pesticide or its ingredients, including statements such as ‘safe,’ ‘nonpoisonous,’ ‘noninjurious,’ ‘harmless’ or ‘nontoxic to humans and pets’ with or without such a qualifying phrase as ‘when used as directed.’” 40 C.F.R. § 156.10(a)(5)(ix); see ECL § 33-0703(3).

Respondents' Marketing and Sales Practices

29. Since at least 2004, BuzzOff and BuzzOff New York have repeatedly stated in print, electronically via the Internet and/or orally to actual and prospective purchasers of their mister systems that the pyrethrin-based pesticide products they sell and their use in the mister systems are “safe.” Such claims of safety violate New York’s GBL, Executive Law, and ECL.

30. Specifically, BuzzOff’s Owner’s Manual (“Manual”) includes the following false claims of safety:

“The system is designed to automatically mist an environmentally safe Pyrethrum solution that kills and repels targeted insects on contact.” Manual, p. 2.

“It is completely safe and non-toxic to humans and animals, when used as directed.” Id. at 8.

“Our product is EPA registered and USDA accepted for use in human food processing facilities so you know it is not only safe for you but also for your animals.” Id.

“Because of its safety, Pyrethrum has long been preferred for household and agricultural applications.” Id.

31. Further, BuzzOff’s website includes the following false claims:

“The solution is EPA-registered, SAFE and EFFECTIVE and made with biodegradable, water-based pyrethrum”

“Pyrethrum is a biodegradable, water-based concentrate derived from Chrysanthemum flowers that is safe for use around your family or pets, when used as directed.”

32. BuzzOff New York has represented to prospective purchasers that the mister system and pesticides are “safe,” and that the pesticide mist can safely be sprayed around adults

and children, as well as food.

33. BuzzOff and BuzzOff New York's characterization of the pyrethrin-based pesticides, particularly as used in the mister systems, as "safe," "non-toxic," and/or "environmentally safe" violates GBL §§ 349 and 350.

34. BuzzOff and BuzzOff New York's claims relating to the safety of the pyrethrin pesticide used in its mister system differ substantially from claims made on the pesticide's label and therefore violate ECL § 33-1301(1)(a).

35. In or around March 2006, BuzzOff became aware that the label of Hydro-Py 300 had been amended to specifically prohibit its use in automatic mister systems in New York.

36. Notwithstanding the label change, BuzzOff, through its dealer, BuzzOff New York, continued to market the mister system and pesticides in New York.

37. BuzzOff and BuzzOff New York's offering for sale of the mister systems together with the pyrethrin pesticides after the pesticide labels were specifically amended to prohibit use in mister systems violates GBL §§ 349 and 350.

Respondents' Alleged Label Violations

38. A DEC inspection of BuzzOff New York's offices in October 2005 revealed that BuzzOff New York had sold to its customers for use in their mister systems misbranded containers of Hydro-Py 300, in violation of ECL § 33-1301(1)(e), since the pesticide containers lacked complete product warnings and directions for use, as required by New York State pesticide registration requirements.

39. Following the October 2005 inspection, the DEC's Office of General Counsel referred to the Office of the Attorney General, Respondents' violations of ECL § 33-1301(1)(e)

for appropriate civil enforcement.

WHEREAS, the Attorney General of the State of New York, the Department of Environmental Conservation and Respondents hereby desire to resolve this matter without litigation, and Respondents are willing to enter into this Assurance of Discontinuance,

IT IS HEREBY AGREED:

40. Respondents shall immediately and permanently cease and desist selling and offering for sale in the State of New York mister systems and pesticide products to be used in such mister systems.

41. Within 15 days of the effective date of this Assurance, Buzzoff New York shall contact, in writing, each entity in New York to which it sold a mister system and pesticide products, and offer to remove the system and fully refund the purchase price. This written offer of restitution shall be sent by certified mail, return- receipt requested, and shall contain the following language:

“Dear [Customer Name]:

Our records indicate that you purchased a BuzzOff automatic mosquito mister system from us within the last three years. I am writing to notify you that BuzzOff Mosquito, LLC and BuzzOff Mosquito Control of Eastern New York were recently contacted by the New York State Attorney General’s Office regarding the companies’ marketing and sales of pesticide mister systems in this State. We were advised that due to the potential for spraying of pesticides on unintended targets (such as children, animals, beneficial insects, water bodies, and outdoor furniture) both on- and off-premises, the use of automatic misters poses a

risk of harm to human health and the environment. We were further informed that in March 2006, the manufacturer of Hydro-Py 300 (“BuzzOff Concentrate”) changed the pesticide’s label to specifically prohibit its use in automatic mister systems in New York. Federal and New York State pesticide laws prohibit the use of any pesticide inconsistent with its label. The State has therefore requested that we discontinue marketing and sales of the BuzzOff mister system and pesticides, and to offer refunds to our customers.

In order to comply with the Attorney General’s request, we are offering you an opportunity to return the mister systems for a full refund of your purchase price. If you wish to return the mister system, please contact us no later than December 15, 2006 to set up a date for removal of the system and any unused pesticide product, at no cost to you. In the event you choose to keep the system, please be aware that there is currently no pesticide registered in New York State that can be used in the system, and that we will not be offering for sale any solution to be used in the system.

We apologize for any inconvenience, and thank you for your understanding. If you have any questions, please contact _____ at _____.”

In the event that BuzzOff New York receives a request to remove a mister system, which request is made prior to December 31, 2006, BuzzOff New York shall un-install and remove from the requestor’s premises all system-related equipment and materials, including any tanks, piping, nozzles and pesticides, at no cost to the requestor. BuzzOff New York shall comply with all

applicable laws and regulations regarding the proper handling and disposal of any equipment or materials removed.

42. Within 30 days of the effective date of this Assurance, BuzzOff and BuzzOff New York shall permanently modify any and all advertising and marketing of its mister system and associated pesticides to clearly specify that such products are not available for sale to New York customers.

43. Within 30 days of the effective date of this Assurance, BuzzOff and BuzzOff New York will file an affidavit with the Attorney General of New York certifying their compliance with the terms of this Assurance. Sample affidavits are attached hereto.

44. BuzzOff and BuzzOff New York are jointly assessed a civil penalty in the amount of \$25,000, which shall be payable as follows:

a) \$10,000 shall be paid by BuzzOff within ten business days of the effective date of this Assurance;

b) \$15,000 shall be suspended; provided, however, that in the event a Respondent violates any provision of this Assurance, the \$15,000 suspended penalty shall become due and owing by such violating Respondent.

45. Payment of civil penalties shall be made by certified or bank check made payable to the "State of New York."

46. All payments, submissions and written notices pursuant to this Assurance shall be mailed to the appropriate counsel at their respective addresses listed below:

Counsel for the State of New York

Lisa Kwong
Assistant Attorney General
Environmental Protection Bureau
New York State Department of Law
The Capitol
Albany, New York 12224

Counsel for BuzzOff Mosquito, LLC

Reginald Ringuet
Ringuet Daniels & Collier
302 Rue France, Suite 201
P.O. Box 52647
Lafayette, LA 70505-2647

Counsel for BuzzOff Mosquito Control of Eastern New York,
Robert Courtney Enterprises, and Robert Courtney

Thomas S. DiPaolo, Esq.
375 Park Avenue, Suite 1209
New York, NY 10152

47. Acceptance of this Assurance by the State of New York shall constitute a release and satisfaction of any and all claims asserted by the State regarding Respondents' pesticide marketing, advertising, and sales of mister systems and pesticides in New York, or which could have been asserted, as of the date of such acceptance. However, this Assurance shall not be deemed approval by the State of any of Respondents' advertising or business practices, and Respondents shall not make any representations to the contrary.

48. This Assurance shall become effective on the date that it is fully executed by all parties.

49. The State of New York reserves its right to enforce this Assurance. Pursuant to Executive Law § 63(15), a violation of this Assurance shall constitute prima facie proof of a violation of the applicable statutes in any civil action proceeding hereafter commenced by the

Attorney General.

50. The State of New York reserves its right to seek penalties for violations of law arising out of facts and circumstances not addressed by this Assurance.

51. This Assurance shall be binding upon Respondents and their officers, agents, successors and assigns.

52. Nothing contained herein shall be construed so as to deprive any person of any private right under the law.

53. By entering into this Assurance, Respondents are agreeing to settle, compromise and resolve what they consider to be disputed claims. Nothing contained herein, including the payment of the civil penalty, should be construed or interpreted as an admission of liability or violation of any law or regulation, or the agreement of Respondents concerning any statement or conclusion of law or regulation contained herein. Further, nothing contained herein shall be construed, or shall operate, to preclude Respondents from asserting in any other proceeding any position or claim contrary to any statement contained herein.

54. The terms of this Assurance shall constitute the complete and entire agreement between the State of New York and Respondents. No term, condition, understanding or agreement purporting to modify or vary the terms hereof shall be binding unless made in writing and subscribed by the parties to be bound. This Assurance may be executed in counterparts.

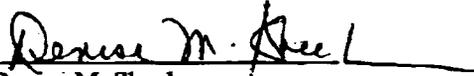
ELIOT SPITZER
Attorney General of the State of New York
By:

Lisa S. Kwong
Assistant Attorney General
Environmental Protection Bureau
New York State Department of Law
The Capitol
Albany, New York 12224

Date: 11/8/06

New York State Department of
Environmental Conservation

By:



Denise M. Sheehan
Commissioner

625 Broadway
Albany, New York 12233

Date: 11/6/06

BuzzOff Mosquito, LLC

By:

Charles Ayres, CEO

Date: 11-06-2006

BuzzOff Mosquito Control of Eastern New York

By: Robert Courtney
~~Robert Courtney~~
Date: 11-8-06

Robert Courtney Enterprises, Inc.

By: Robert Courtney
~~Robert Courtney~~
Date: 11-8-06

Robert Courtney

By: Robert Court
Date: 11-8-06

ATTACHMENTS

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

In the Matter of

BuzzOff Mosquito, LLC,
BuzzOff Mosquito Control of Eastern New York,
Robert Courtney Enterprises, Inc., and
Robert Courtney,

Respondents.

AFFIDAVIT

_____, being duly sworn, hereby declares that I am the
_____ of BuzzOff Mosquito, LLC, Respondent in the above-captioned
matter, and that BuzzOff Mosquito has complied with the requirements of paragraphs 40, 42, 43
and 44 of the Assurance of Discontinuance dated _____, 2006.

Subscribed and sworn to before me
on this ____ day of _____, 2006

Notary Public

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

In the Matter of

BuzzOff Mosquito, LLC,
BuzzOff Mosquito Control of Eastern New York,
Robert Courtney Enterprises, Inc., and
Robert Courtney,

Respondents.

AFFIDAVIT

Robert Courtney, being duly sworn, hereby declares that BuzzOff Mosquito Control of Eastern New York, Robert Courtney Enterprises, Inc., and Robert Courtney, Respondents in the above-captioned matter, have complied with the requirements of paragraphs 40-44 of the Assurance of Discontinuance dated _____, 2006.

Robert Courtney

Subscribed and sworn to before me
on this ____ day of _____, 2006

Notary Public