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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,

Plaintiff,

v.

GARY PURRINGTON, an individual;
DIANE PURRINGTON, an individual;
G. SKYLER PURRINGTON, an individual;
and FIREFOX ENTERPRISES, INC.,
a corporation;

Defendants.

Civ. No.: 04-577-E-BLW

AMENDED COMPLAINT FOR INJUNCTION

NATURE OF THE CLAIM

1. Plaintiff brings this action to obtain permanent injunctive relief halting defendants' violations of the Federal Hazardous Substances Act ("FHSA"), 15 U.S.C. § 1261 *et*

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seq., the Federal Hazardous Materials Transportation Law, 49 U.S.C. § 5101 *et seq.*, and the regulations promulgated under these statutes.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 15 U.S.C. § 1267(a) and 28 U.S.C. §§ 1331, 1337, and 1345 (violations of the Federal Hazardous Substances Act), and 49 U.S.C. §§ 5122(a) & (b) (violations of the Federal Hazardous Materials Transportation Law).

3. Venue in this district is proper pursuant to 28 U.S.C. §§ 1391(b) and (c).

DEFENDANTS

4. Defendant Firefox Enterprises, Inc. (hereinafter referred to as "Firefox"), is a corporation existing under the laws of Idaho, with its principal place of business at 11612 North Nelson Lane, in Pocatello, Idaho. Firefox is a distributor and retailer of chemicals and other pyrotechnic supplies.

5. Defendant Gary Purrington is the President and a director of Firefox. He is a resident of Pocatello, Idaho. At all times relevant to this Complaint, Gary Purrington had knowledge of, and authority to control, the practices of Firefox.

6. Defendant Diane Purrington is the corporate Secretary and Treasurer and a director of Firefox. She is a resident of Pocatello, Idaho. She is responsible for sales and bookkeeping for Firefox.

7. Defendant G. Skyler Purrington is a director of Firefox. He is a resident of Pocatello, Idaho. He is responsible for taking orders from customers and processing orders.

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THE FEDERAL HAZARDOUS SUBSTANCES ACT

8. The U.S. Consumer Product Safety Commission ("CPSC") is an independent federal agency, authorized to administer the FHSA. 15 U.S.C. § 1261 *et seq.*

9. The CPSC is authorized by the FHSA, 15 U.S.C. § 1261(q)(1)(B), to promulgate regulations declaring a product a banned hazardous substance.

10. The CPSC has determined by regulations at 16 C.F.R. §§ 1500.17(a)(3) and (a)(8) that certain fireworks are "banned hazardous substances" as defined in 15 U.S.C. § 1261(q)(1)(B).

11. The CPSC regulations specify that "components" that are "intended to produce" banned fireworks are also banned hazardous substances. 16 C.F.R. §§ 1500.17(a)(3) and (a)(8).

12. The FHSA prohibits the introduction or delivery for introduction in interstate commerce of fireworks or firework components that are banned hazardous substances. 15 U.S.C. § 1263(a).

THE PRIOR INJUNCTION AGAINST DEFENDANT GARY PURRINGTON

13. On November 7, 1986, the United States District Court for the District of Idaho entered a Consent Decree of Permanent Injunction (the "Injunction") against defendant Gary Purrington and Norstarr Products, Inc., a corporation doing business at 11612 North Nelson Lane in Pocatello, Idaho, in United States v. Gary W. Purrington, Civ. No. 86-4214 (D. Idaho).

14. Among other terms, the Injunction enjoined Gary Purrington and Norstarr from violating 15 U.S.C. § 1263(a) "by introducing or delivering for introduction into interstate commerce any banned hazardous substances under the Federal Hazardous Substances Act

(FHSA), 15 U.S.C. §§ 1261-1267, and regulations at 16 C.F.R. §§ 1500.17(a)(3) and (a)(8) issued under the FHSA ('banned fireworks')." Injunction ¶ 3.

15. The Injunction also specifically prohibited Purrington and Norstarr from introducing or delivering for introduction in interstate commerce (except in certain limited circumstances involving customers with valid explosives permits or licenses issued by the Bureau of Alcohol, Tobacco & Firearms) "combinations of chemicals that could reasonably be expected to be used to make flash powder," a component of banned fireworks. Injunction ¶¶ 5, 11.

16. The Injunction expired by its own terms on November 7, 1991. Injunction ¶ 19.

THE DEFENDANTS' VIOLATIONS OF THE FHSA

17. Among the chemicals in Firefox's product line are several that are commonly used to make illegal fireworks and other explosive devices, such as aluminum, magnesium, magnesium/aluminum alloys, titanium, potassium chlorate, potassium perchlorate, potassium nitrate, potassium benzoate, and potassium permanganate.

18. Although Firefox sells only chemicals and related pyrotechnic supplies and not completed explosive devices, the company is a supply source for people in the business of manufacturing illegal explosives.

19. Since at least January 2002, the defendants repeatedly have violated 15 U.S.C. § 1263(a) by introducing and delivering for introduction into interstate commerce components intended to produce fireworks that are banned hazardous substances.

20. On or about November 9, 2001, defendants sent one or more packages to a customer in Wisconsin, which contained five (5) pounds of sulfur, ten (10) feet of fuse,

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1000 paper tubes, and 2000 end plugs. Based on the type and quantity of materials the customer ordered, defendants knew or had reason to know that they were components intended to produce banned fireworks. The customer held no licence or permit issued by the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") authorizing him to manufacture explosives.

21. On or about January 15, 2002, defendants sent one or more packages to a customer in Illinois, which contained five (5) pounds of potassium chlorate and 500 paper tubes. The customer ordered the materials through defendant Diane Purrington. Based on the type and quantity of materials the customer ordered, defendants knew or had reason to know that they were components intended to produce banned fireworks. The customer held no licence or permit issued by the ATF authorizing him to manufacture explosives.

22. On or about July 22, 2002, defendants sent one or more packages to a customer in Illinois, which contained one (1) pound of aluminum powder and 300 paper tubes. Based on the type and quantity of materials the customer ordered, defendants knew or had reason to know that they were components intended to produce banned fireworks. The customer held no licence or permit issued by the ATF authorizing him to manufacture explosives.

23. On or about March 17, 2004, and March 26, 2004, defendants sent one or more packages to a customer in Illinois, which contained five (5) pounds of potassium chlorate, one (1) pound of aluminum powder, 250 cardboard tubes, and 500 end caps. The customer ordered the materials through defendant G. Skyler Purrington. Based on the type and quantity of materials the customer ordered, defendants knew or had reason to know that they were components intended to produce banned fireworks. The customer held no licence or permit issued by the ATF authorizing him to manufacture explosives.

24. On or about April 13, 2004, defendants sent one or more packages to a customer in Illinois, which contained 250 feet of fuse. The customer ordered the material through defendant G. Skyler Purrington. Based on the type and quantity of material the customer ordered, defendants knew or had reason to know that it was a component intended to produce banned fireworks. The customer held no licence or permit issued by the ATF authorizing him to manufacture explosives.

25. Based on defendants' past and present course of conduct, there is a substantial likelihood that, unless restrained by order of this Court, defendants will continue to introduce and deliver for introduction into interstate commerce, fireworks components that are banned hazardous substances in violation of 15 U.S.C. § 1263(a).

THE FEDERAL HAZARDOUS MATERIALS TRANSPORTATION LAW

26. The Federal Hazardous Materials Transportation Law ("Federal hazmat law") is the Federal statute relating to the transportation of hazardous materials and is codified in 49 U.S.C. §§ 5101*et seq.*

27. Under the Federal hazmat law, the Secretary of Transportation ("Secretary") is responsible for designating materials as hazardous when the materials, in a particular amount or from, pose "an unreasonable risk to health and safety, or property" while in transportation in commerce. 49 U.S.C. §5103(a).

28. The Secretary is also responsible for establishing "regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate and foreign commerce." 49 U.S.C. § 5103(b).

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29. The Pipeline and Hazardous Materials Safety Administration ("PHMSA") is a Federal agency within the United States Department of Transportation.

30. The Secretary delegated, to the Administrator of PHMSA, the vested authority under 49 U.S.C. §§ 5121(a), (b) & (c), 5122, 5123 and 5124 "relating to investigation, records, inspections, penalties and specific relief." 49 CFR § 1.53(b)(1).

31. The Secretary has also delegated, to PHMSA's Administrator, the vested authority to set and enforce regulations. 49 CFR § 1.53(b)(2).

32. PHMSA's regulations concerning the safe transportation of hazardous materials are known as the Federal Hazardous Materials Regulations ("HMR"). 49 C.F.R. pts. 171-180.

33. The PHMSA has determined certain materials to pose an unreasonable risk to health and safety or property and has listed these materials in the "Hazardous Materials Table," which is set out in 49 C.F.R. § 172.101.

34. By use of the Hazardous Materials Table and other provisions concerning the proper classification of materials, the HMR sets limits on the types and/or forms and quantities of materials authorized for transportation in commerce; among other things, the HMR sets requirements concerning the types of packagings that may be used to transport a listed material, how the packaging must be marked and labeled, how and when the transport vehicle must be placarded, and requirements concerning shipping paper contents.

DEFENDANTS' VIOLATIONS OF THE FEDERAL HAZMAT LAW AND HMR

35. In the ordinary course of business, Firefox offers for transportation in commerce many products listed as hazardous materials, which include aluminum powder, ammonium nitrate, magnesium powder, magnesium/aluminum alloy, titanium powder, potassium chlorate,

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potassium perchlorate, potassium nitrate, potassium benzoate, potassium permanganate, fuses, and flammable solid mixtures.

36. One of Defendant's products is identified as item number C159C, which is a 5 micron (1,000 mesh) magnesium powder described by Defendant as "atomized" magnesium.

37. On or about February 22, 2001, Defendant offered its atomized magnesium powder for transportation in commerce in packaging that had neither been subjected to design qualification testing nor been certified as meeting a United Nations (UN) performance standard, in violation of 49 C.F.R. §§ 171.2(a), (b), & (e), 173.22(a)(2), and 173.212.

38. On or about February 22, 2001, Defendant offered its atomized magnesium powder for transportation in commerce as an Other Regulated Material ("ORM"), resulting in the transportation of an undeclared shipment of hazardous materials, which included the following violations:

(A) Failure to complete a shipping paper identifying the materials as hazardous (49 U.S.C. §5110; and 49 C.F.R. §§ 171.2(a), (b), & (e), 172.201, 172.202 and 172.203);

(B) Failure to mark the package (49 C.F.R. §§ 171.2(a), (b), & (e), 172.301 and 172.304); and

(C) Failure to label the package (49 C.F.R. §§ 171.2(a), (b), & (e), 172.400 and 172.423).

39. Since at least January 2002, Defendants have systematically and repeatedly classified materials as ORM when the materials do not qualify for this classification, resulting in

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additional violations of the HMR that are identical or similar to those identified in the preceding paragraph.

RELIEF REQUESTED

WHEREFORE, pursuant to 15 U.S.C. § 1267(a) and Rule 65 of the Federal Rules of Civil Procedure, plaintiff respectfully requests that this Court enter the following orders:

(1) a Permanent Injunction, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, that directs defendants, and each and all of their officers, agents, employees, attorneys, successors and assigns, and those persons in active concert or participation with them, to:

(a) not sell, give away, or otherwise distribute any chlorate compound, magnesium metal, permanganate compound, peroxide compound, zirconium metal, or any chemical listed at 16 C.F.R. § 1507.2 to any recipient who does not possess a valid manufacturing license for explosives issued by the ATF;

(b) not sell, give away, or otherwise distribute any of the following chemicals for which the particle size is finer than 100 mesh (or particles less than 150 microns in size) to any recipient who does not possess a valid manufacturing license for explosives issued by the ATF: aluminum and aluminum alloys, magnalium metal, magnesium/aluminum alloys, titanium and titanium alloys, or zinc metal;

(c) not sell, give away, or otherwise distribute any of the following chemicals in an amount greater than one pound per year per recipient to any recipient who does not possess a valid manufacturing license for explosives issued by the ATF: antimony and antimony

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compounds, benzoate compounds, nitrate compounds, perchlorate compounds, salicylate compounds, or sulfur;

(d) not sell, give away, or otherwise distribute any fuse in an amount greater than twenty-five feet per year per recipient to any recipient who does not possess a valid manufacturing license for explosives issued by the ATF;

(e) not sell, give away, or otherwise distribute any chemical, fuse, or other component of explosive materials (as that term is defined at 27 C.F.R. § 555.11) listed in Paragraphs 1(a) through 1(d) above to any recipient unless and until defendants obtain and maintain for not less than five years the following documentation for each such transaction:

(1) a photocopy of the recipient's current, valid driver's license, which must contain the recipient's name, date of birth, and complete address; and

(2) if the recipient possesses an ATF manufacturing license for explosives, a photocopy of the recipient's valid, current license to manufacture explosives issued by ATF;

(f) not sell, give away, or otherwise distribute any chemical, fuse, or other component of explosive materials (as that term is defined at 27 C.F.R. § 555.11) listed in Paragraphs 1(a) through 1(d) above to any recipient unless and until defendants create and maintain for not less than seven years for each such transaction a detailed invoice documenting the relevant sale or transfer, which invoice must contain the name, description, and quantity of each chemical, fuse, or other component of explosive materials that was sold or transferred;

(g) within ten (10) days of receipt of written notice from the Regional Director of the CPSC's Western Region, send copies of the records maintained pursuant to

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paragraphs 1(e) and 1(f) above to that Regional Director, and/or provide entry during normal business hours to any business location in defendants' possession or direct or indirect control to inspect the business operation, including all records maintained pursuant to paragraphs 1(e) and 1(f) above;

(h) follow other reporting and recordkeeping requirements designed to prevent them from further violating the FHSA;

(i) not classify metallic powders and dusts, including but not limited to aluminum, titanium, zinc and magnesium and any mixtures or compounds containing metallic powders, as Other Regulated Materials ("ORM");

(j) not offer fuses for transportation or cause fuses to be transported via the United States Postal Service;

(k) not place fuses and "sticky matches" within the same outer packaging;

(l) not place packages of metallic powders in the same outer packaging as oxidizers;

(m) declare all metallic powders as hazardous materials to the carrier prior to transportation;

(n) inform carriers of the presence of hazardous materials in the form of ORM prior to transportation when offering an ORM classified material for transportation; and

(2) Grant plaintiff judgment for its costs and for such other and further equitable relief, including disgorgement, that the Court deems just and proper.

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Dated this 21st day of June, 2006.

Respectfully submitted,

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