

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 GARY PURRINGTON, et al.,)
)
 Defendants.)
 _____)

Case No. CV-04-577-E-BLW

JUDGMENT

The United States of America, on behalf of the Consumer Product Safety Commission ("CPSC") and the Department of Transportation ("DOT"), having filed an Amended Complaint for injunctive relief on August 1, 2006; and the defendants, Gary Purrington, Diane Purrington and G. Skyler Purrington, individuals, and Firefox Enterprises, Inc. ("Firefox"), a corporation, having appeared; and the Court having considered the pleadings and the entire record herein, and having granted Plaintiff's Motion for Summary Judgment:

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. This Court has jurisdiction over the subject matter of this action and all parties hereto 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).

2. The complaint states a claim upon which relief may be granted against Defendants under 15 U.S.C. § 1267 and 49 U.S.C. § 5122(a).

3. For purposes of this Order, the following definitions shall apply:

- a) "Defendants" means Gary Purrington, Diane Purrington, G. Skyler Purrington, and Firefox, and each of their current and future directors, officers, agents, employees, servants, attorneys, successor corporations, and those persons in active concert or participation with any of them.
- b) "Banned hazardous substances" has the meaning set forth at 15 U.S.C. § 1261(q)(1), and includes "[f]ireworks devices intended to produce audible effects (including but not limited to cherry bombs, M-80 salutes, silver salutes, and other large firecrackers, aerial bombs, and other fireworks designed to produce audible effects, and including kits and components intended to produce such fireworks) if the audible effect is produced by a charge of more than 2 grains of pyrotechnic composition." 16 C.F.R. § 1500.17(a)(3). "Banned hazardous substances" also includes "[f]irecrackers designed to produce audible effects, if the audible effect is produced by a charge of more than 50 milligrams (.772 grains) of pyrotechnic composition (not including firecrackers included as components of a rocket), aerial bombs, and devices that may be confused with candy or other foods,

such as 'dragon eggs,' and 'cracker balls' (also known as 'ball-type caps'), and including kits and components intended to produce such fireworks" 16 C.F.R. § 1500.17(a)(8).

c) "Oxidizer" means ammonium nitrate, potassium chlorate, potassium perchlorate, potassium nitrate, sodium chlorate, sodium perchlorate, sodium nitrate, barium nitrate, strontium nitrate, or potassium permanganate.

d) "Fuel" means aluminum and aluminum alloys, magnesium, magnesium/aluminum alloys (magnalium), antimony sulfide, antimony trisulfide, potassium benzoate, sodium benzoate, sodium salicylate, sulfur, titanium, zinc, zirconium, or zirconium hydride.

Distribution of Chemicals and Components

4. Defendants are hereby permanently restrained and enjoined from violating 15 U.S.C. § 1263(a) by selling, giving away, or otherwise distributing any item where Defendants know or have reason to believe that the recipient intends to use such item as a component of banned hazardous substances. Nothing in this Order shall be read as an exception to this paragraph.

5. Defendants are hereby further permanently restrained and enjoined from participating in any transaction that involves selling, giving away, holding for sale, or otherwise distributing:

- a) To any delivery address or to any individual, more than one pound of any oxidizer per twelve-month period;
- b) To any delivery address or to any individual, any fuel for which the particle size is finer than 100 mesh (or particles less than 150 microns in size);
- c) To any delivery address or to any individual, more than 25 feet of fuse per twelve-month period; and
- d) To any delivery address or to any individual, any tube 10 inches or shorter in length.

6. Paragraph 5 above shall not apply to the distribution of any oxidizer, fuel, fuse, or tube to any individual or entity that submits a valid, current, certified license to manufacture explosives issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), provided, in the case of an entity, that the distribution is made to a "responsible person" for the entity as defined at 18 U.S.C. § 841(s) and 27 C.F.R. § 555.11.

Transport of Hazardous Materials

7. Defendants are hereby further permanently restrained and enjoined from:
- a) designating or offering for transportation 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") or Consumer Commodities;

b) designating or offering for transportation other specialty chemicals, including, but not limited to, potassium chlorate and potassium perchlorate, as ORM or Consumer Commodities;

c) offering metallic powders for transportation within the same outer packaging as any oxidizer ("oxidizer" being defined for purposes of this paragraph according to the Hazardous Materials Regulations, 49 C.F.R. Pts. 171-180, and not limited to the specific oxidizers set out in paragraph 3(c) above);

d) failing to declare all metallic powders as hazardous materials to the carrier prior to transportation;

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

f) failing to declare all hazardous materials on all shipping papers and/or declarations corresponding to materials offered for transportation, particularly when more than one hazardous material is offered in a shipment;

g) offering for transportation any material, article or device requiring an explosives approval ("EX") number, unless the material is specifically

authorized under the EX number, the EX number is described and documented on a shipping paper as required by the Hazardous Materials Regulations, and the package containing the material is marked as required by the Hazardous Materials Regulations;

h) offering for shipment within the same outer packaging more than one material, article or device requiring an EX number, unless each material, article or device is described and documented on a shipping paper as required by the Hazardous Materials Regulations, and the packagings containing the materials are marked as required by the Hazardous Materials Regulations;

I) offering any fuse for transportation without having confirmed and documented the validity of the "EX" number used on the shipping paper for the fuse;

j) offering for shipment, within the same outer packaging, all the chemicals or materials used to manufacture "flash powder," "black powder," or any explosive or pyrotechnic article or device, irrespective of whether the chemicals or materials are listed in the hazmat table found under section 101, Part 172 of Title 49 of the Code of Federal Regulations;

k) offering for transportation or selling any "thermatic" mixture unless the material is subjected to the testing required by the Hazardous Materials

Regulations, including, but not limited to, self-reactivity testing under the UN Manual of Tests and Criteria, as incorporated into the Hazardous Materials Regulations by 49 C.F.R. § 107.7, to determine the material's type; and, if required by the Hazardous Materials Regulations, submission of the mixture to the Associate Administrator, Pipeline and Hazardous Materials Safety Administration, for approval;

l) offering any metallic powder for shipment, unless the metallic powder is classified, described and documented on a shipping paper and on the packaging containing it, based on the smallest particle size found in the material (e.g., magnesium powder containing 50% or more ribbons or turnings must be classified as "Magnesium Powder," and not as "Magnesium with more than 50 percent magnesium in pellets, turnings or ribbons");

m) offering for transportation any package containing a hazardous material when the outside of the package is not marked as required by the Hazardous Materials Regulations (e.g., with the proper shipping name and UN identification number of each hazardous material contained therein); and

n) offering for transportation any package containing a hazardous material when the packaging does not contain each of the labels required by the Hazardous Materials Regulations.

Record Keeping and Compliance Monitoring

8. For each transaction involving the sale or other distribution by Defendants of any chemical, fuse, or other component of explosive materials (as that term is defined at 27 C.F.R. § 555.11), Defendants must:

a) obtain and maintain for not less than five years a photocopy of the recipient's current, valid driver's license, which must contain the recipient's name, date of birth, and complete address;

b) create and maintain for not less than five years an 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 and the date of such sale or transfer; and

c) in the case of a recipient with a valid, current ATF license to manufacture explosives, obtain and maintain for not less than five years a certified copy of such license, including, in the case of an entity, documentation that the person who received the materials was a "responsible person" authorized to take possession of the oxidizer or fuel or other component of regulated explosives on the entity's behalf.

9. Within 10 days of receipt of written notice, Defendants must send copies of any and all requested records maintained pursuant to paragraph 8 above

to the Director of the CPSC Office of Compliance and Field Operations. The Government shall bear the copying and shipping costs of any such requests.

10. In each instance where any Defendant offers hazardous materials for transportation, Defendants must retain all hazardous materials shipping papers for at least 2 years after the material is accepted by the initial carrier.

11. For any material requiring an explosive approval ("EX") number, Defendants must request from the supplier all information relative to the approval and the material authorized thereunder, and retain such information for as long as any Defendant offers the material for transportation.

12. CPSC and DOT representatives shall be authorized to make inspections during normal business hours, at their discretion and without prior notice, of Defendants' facilities and records therein, including electronic records, and to take samples, copies of documents, and photographs. Such inspection authority granted by this Order is apart from and in addition to the authority to make inspections under 15 U.S.C. §§ 1270 and 1271 (CPSC) and 49 U.S.C. § 5121 (DOT). Such inspections shall be authorized upon presentation of a copy of this Order and government credentials. During any such inspections, Defendants shall cooperate fully with government representatives by, among other things, promptly providing any investigator with all requested documents and immediate access to

any manufacturing, storage, or other facilities.

13. Defendants shall serve a copy of this Order, by personal service or registered mail, within 10 calendar days of its entry, upon all current officers, directors, agents, servants, employees, and consignees, and shall provide Plaintiff with an affidavit of compliance with this paragraph, signed under penalty of perjury by Defendant Gary Purrington, within 30 calendar days of such entry, stating the fact and manner of compliance identifying the names and positions of all persons so notified. Defendants shall likewise serve a copy of this Order, by personal service or registered mail, upon any new officer, director, agent, servant, employee, or consignee within 30 calendar days of the date on which that individual enters into a business relationship with Defendants, and shall provide Plaintiff with an affidavit of compliance with this paragraph, signed under penalty of perjury by Defendant Gary Purrington, within 30 calendar days of such service, stating the fact and manner of compliance and identifying the names and positions of all persons so notified.

14. Defendants shall notify CPSC at least 10 calendar days before any reorganization, relocation, or dissolution of the corporate defendant; any sale, lease, or transfer of assets resulting in the emergence of a successor business; the creation or dissolution of subsidiaries or affiliates; or any change the corporate

defendant's manner of operation or in the employment of any individual Defendant that could affect compliance obligations arising out of this Order. Defendants shall provide notice as directed in Paragraph 16 of this Order.

15. Each party shall bear its own costs in this action. If any defendant violates this Order and is found in civil or criminal contempt thereof, such defendant shall, in addition to other remedies, reimburse plaintiff for its attorney fees (including overhead), investigational expenses, and court costs relating to any contempt proceedings.

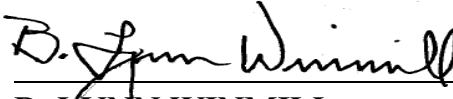
16. All notifications, correspondence, and communications required by this Order shall be addressed to: (a) Director, Office of Compliance and Field Operations, United States Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, Maryland 20814 (Facsimile Number 301-504-0359), or (b) to such other addresses or facsimile numbers as the CPSC or DOT may later provide in writing to Defendants.

17. This Court retains jurisdiction of this action for the purposes of enforcing or modifying is Order and for the purpose of granting such additional

relief as hereafter may be necessary or appropriate.



DATED: **April 30, 2007**


B. LYNN WINMILL
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,)	
)	Case No. CV-04-577-E-BLW
Plaintiff,)	
)	MEMORANDUM DECISION
v.)	AND ORDER
)	
GARY PURRINGTON, et al.,)	
)	
Defendants.)	
_____)	

INTRODUCTION

On December 6, 2006, the Court issued a Memorandum Decision and Order granting the Government’s Motion for Summary Judgment. The Court gave the parties time to negotiate an agreed upon remedy in line with the Memorandum Decision and Order. The parties were unable to agree upon a remedy, and the Court requested that each party submit a proposed remedy and short supporting brief. The Court has now reviewed the parties’ briefs and proposals and issues the following decision. The Court also has before it the Government’s Motion to Strike (Docket No. 98), which the Court will deny for the reasons stated below.

ANALYSIS

I. INJUNCTIVE RELIEF

The Court agrees in all material respects with the Government's proposed order for injunctive relief. The Court will therefore enter the Government's proposed order as a separate document constituting the final judgment in this matter. In this memorandum decision and order, the Court will explain its reasoning for agreeing with the Government and disagreeing with Defendants on the relief sought in this matter.

A. Fuel Sales

The Government argues that Defendants should be enjoined from selling, giving away, holding for sale, or otherwise distributing any fuel for which the particle size is finer than 100 mesh (or particles less than 150 microns in size). Defendants contend that the injunction should apply only to atomized aluminum powder with an average particle size of 10 micron or smaller, and flake aluminum powder with an average particle size of 70 micron or smaller.

Based on the expert reports and testimony presented in this case, the Court believes that the Government's proposed restrictions best fulfill the Court's need to balance the equities between the parties and give due regard to the public interest.

See [High Sierra Hikers Assoc. v. Blackwell](#), 390 F.3d 630, 641 (9th Cir. 2004).

Although Defendants' expert suggests that the Court should only restrict particle sizes finer than 10 or 70 micron, depending on shape, he also admits that there are

significantly limited applications for such fine particles. (See Plaintiff's Statement of Undisputed Facts, Report of Dr. Roger Schneider, Ex. H at ¶ 5.2). Moreover, the Government's expert noted that there is no simple chemistry rule of thumb dividing powders into sizes that can be used to make flash powder and sizes that cannot. (See Joholske Decl, ¶ 5).

As suggested by the Government, the only way to foreclose Defendants' customers from building illegal fireworks would be an outright ban on fuel sales of all mesh sizes. Although the Court believes that it would be legally justified in ordering such an outright ban, the Court agrees with the Government that enjoining Defendants from selling, giving away, holding for sale, or otherwise distributing to any fuel for which the particle size is finer than 100 mesh will stop most of Defendants' sales related to banned firework manufacture. Thus, the Court will adopt the Government's proposal with respect to fuel sales.

B. Oxidizer Sales

The Court also agrees with the Government's proposal that Defendants be enjoined from distributing more than one pound of oxidizer per year to any one address or individual. Again, the only way to completely foreclose Defendants' customers from building illegal fireworks would be an outright ban on oxidizers. However, the Government's proposal should stop at least the large-scale

production of banned fireworks, without completely closing down Defendants' business.

C. Additional Banned Fireworks Components

Defendants suggest that an artful shopper can assemble most of the additional components to manufacture illegal fireworks, and therefore an injunction would only injure Defendants without promoting public safety. The Court agrees that an artful shopper probably can assemble such components. However, that does not mean the Court should condone such assembly by allowing Defendants to make it easier for them to do so. Thus, the Court agrees with the Government's recommendation that Defendants should be restricted to distributing 25 feet of fuse per year per customer and tubes no shorter than 10 inches.

D. Length of Injunction

The Government seeks a permanent injunction, while Defendants believe the injunction should be limited to three years. Given Defendants' inability or unwillingness to comply with the law after the previous injunction against them expired, the Court finds that a permanent injunction is necessary at this point.

E. Exemptions

Defendants seek several exemptions to the restrictions ordered in the injunction, in addition to the agreed upon ATF exemption. However, Defendants'

suggested exemptions appear to be nothing more than an attempt to create loopholes in the injunction. Unlike the ATF exemption, Defendants' proposed additional exemptions are found nowhere in the regulations. Accordingly, the Court will not allow for exemptions other than the exemption for those who have obtained a relevant ATF explosives license.

F. Copy Charges

Defendants ask that the Government pay for the cost of copying and shipping of documents which the Government may request in monitoring Defendants' compliance with the injunction. In paragraph 9 of the injunction, the Court is ordering Defendants to send copies of any and all requested records maintained pursuant to the injunction. The Court agrees that if the Government request such documents, the Government must bear the cost. Accordingly, the Court will add a line to paragraph 9 of the injunction requiring the Government to pay the cost of copying and shipping requested documents.

II. MOTION TO STRIKE

The Government seeks to strike the supplemental expert reports submitted by Defendants. However, even considering the supplemental reports, the Court agreed to enter the Government's proposed order. Accordingly, the Court will deny the motion.


ORDER

NOW THEREFORE IT IS HEREBY ORDERED that the Court will enter the Government's proposed order as a final injunction in this matter. The injunction shall be entered as a separate document.

IT IS FURTHER ORDERED that Plaintiff's Motion to Strike (Docket No. 98) shall be, and the same is hereby DENIED.

DATED: **April 30, 2007**




B. LYNN WINMILL
Chief Judge
United States District Court