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U.S. EPA REGION IX
REGIONAL HEARING CLERK

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
SAN FRANCISCO, CALIFORNIA

In the Matter of:)	
)	
Winston Company, Inc.,)	Docket No. FIFRA-9-2007- <u>0001</u>
)	
)	CONSENT AGREEMENT AND FINAL
)	ORDER PURSUANT TO
)	40 C.F.R. §§ 22.13 AND 22.18
)	
Respondent.)	
_____)	

I. COMPLAINT/CONSENT AGREEMENT

The United States Environmental Protection Agency, Region IX ("EPA"), and Winston Company, Inc. ("Respondent") agree to settle this matter and consent to the entry of this Consent Agreement and Final Order ("CAFO"), which simultaneously commences and concludes this matter in accordance with 40 C.F.R. §§ 22.13 and 22.18.

A. AUTHORITY AND PARTIES

1. This is a civil administrative action instituted pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA" or "the Act"), as amended, 7 U.S.C.

§136 et seq., for the assessment of a civil administrative penalty against Respondent for a violation of Section 12 of the Act.

2. Complainant is the Director of the Communities and Ecosystems Division, EPA, Region IX, who has been duly delegated the authority to bring this action and to sign a consent agreement settling this action.

B. APPLICABLE STATUTORY AND REGULATORY SECTIONS

3. Section 17(c) of FIFRA and regulations promulgated at 19 C.F.R. Part 12 pursuant to Section 17(e) of FIFRA by the Secretary of the Treasury in consultation with the EPA Administrator govern the importation of pesticides into the United States.

4. 19 C.F.R. § 12.111 provides that "all imported pesticides are required to be registered under the provisions of section 3 of the Act."

5. 19 C.F.R. § 12.112 provides that "an importer desiring to import pesticides into the United States shall submit to the Administrator a Notice of Arrival of Pesticides or Devices prior to the arrival of the shipment to the United States."

6. Section 12(a)(1)(E) of FIFRA provides that it shall be unlawful for any person to distribute or sell to any person a pesticide which is adulterated or misbranded.

7. Section 2(q)(1)(D) of FIFRA states a pesticide is

misbranded if its label does not bear the registration number assigned under section 7 to each establishment in which it was produced.

8. Section 2(q)(1)(F) of FIFRA states a pesticide is misbranded if the labeling accompanying it does not contain directions for use which are necessary for effecting the purpose for which the product is intended and if complied with, together with any requirements imposed under section 3(d) of this Act, are adequate to protect health and the environment.

9. Section 2(q)(2)(C) of FIFRA states a pesticide is misbranded if there is not affixed to its container, and to the outside container or wrapper of the retail package, if there be one, through which the required information on the immediate container cannot be clearly read, a label bearing-(i) the name and address of the producer, registrant, or person for whom produced; (ii) the name, brand, or trademark under which the pesticide is sold; (iii) the net weight or measure of content, except that the Administrator may permit reasonable variations; and (iv) when required by regulation of the Administrator to effectuate the purpose of this Act, the registration number assigned to the pesticide under this Act and the use classification.

C. ALLEGATIONS

10. Respondent is a corporation and therefore, a "person"

as defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

11. Respondent imports "Algae-Off Tech85" from its supplier in China.

12. "Algae-Off Tech85" is used to control or kill algae.

13. Algae are "pests" as defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t).

14. "Algae-Off Tech85" is a "pesticide" as defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

15. On or about July 10, 2006, Respondent registered "Algae-Off Tech85" with EPA pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a, under EPA Registration Number 80876-1.

16. On or about December 2, 2006, approximately 728 bags of "Algae-Off Tech85" that Respondent imported to the United States from China arrived at the Port of Los Angeles.

17. The 728 bags of "Algae-Off Tech85" that arrived at the Port of Los Angeles on or about December 2, 2006, did not have a EPA-approved label attached to the bags.

18. Therefore, the pesticide, "Algae-Off Tech85" that Respondent imported from China to the Port of Los Angeles is a "misbranded" pesticide and its shipment constitutes a violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

D. RESPONDENT'S ADMISSIONS

19. In accordance with 40 C.F.R. § 22.18(b)(2) and for the purpose of this proceeding, Respondent (i) admits that EPA has

jurisdiction over the subject matter of this CAFO and over Respondent; (ii) neither admits nor denies the specific factual allegations contained in the Complaint; (iii) consents to any and all conditions specified in this CAFO and to the assessment of the civil administrative penalty under Section I.F. of this CAFO; (iv) waives any right to contest the allegations contained in Section I.C. portion of the CAFO; and (v) waives the right to appeal the proposed final order contained in this CAFO.

E. RE-LABELING

20. No later than one (1) day after the effective date of this CAFO, Respondent shall provide to Jason Gerdes in the Region IX Pesticide Section at the address provided in Paragraph 26 in Section I.F. of this CAFO, a properly completed Notice of Arrival of Pesticides and Devices (NOA) (EPA Form (3540-1) and the EPA-accepted label for "Algae-Off Tech85."

21. No later than thirty (30) days after the effective date of this CAFO, Respondent shall re-label the "Algae-Off Tech85" currently being detained by EPA and U.S. Customs Service with the EPA-accepted label for "Algae-Off Tech85."

22. Respondent shall not sell or distribute the detained boxes of "Algae-Off Tech85" (and their contents if appropriate) until they have been re-labeled with the EPA accepted label.

23. No later than one (1) day after the detained boxes of "Algae-Off Tech85" (and their contents if appropriate) have been

re-labeled with the EPA accepted label, Respondent shall submit a written status report to Jason Gerdes in the Region IX Pesticide Section certifying that the required re-labeling has been completed in accordance with the terms of this CAFO.

24. Respondent shall maintain production records of each container that is re-labeled, in accordance with all applicable FIFRA requirements, including, but not limited to, the requirements set forth at 40 C.F.R. Part 169, and comply with all reporting requirements set forth in Section 7(c) of FIFRA, including, but not limited to, all record keeping and reporting requirements promulgated at 40 C.F.R. Part 167.

F. CIVIL ADMINISTRATIVE PENALTY

25. Respondent agrees to the assessment of a penalty in the amount of SIX THOUSAND FIVE HUNDRED DOLLARS (\$6,500) as final settlement of the civil claims against Respondent arising under the Act as alleged in Section I.C. of the CAFO.

26. Respondent shall pay the assessed penalty no later than thirty (30) days from the effective date of this CAFO. Payment shall be made by cashier's or certified check payable to the "Treasurer, United States of America," and shall be sent by certified mail, return receipt requested, to the following address:

U.S. Environmental Protection Agency
Region 9
P.O. Box 371099M

Pittsburgh, PA 15251

The payment shall be accompanied by a transmittal letter identifying the case name, the case docket number, and this CAFO. Concurrent with delivery of the payment of the penalty, Respondent shall send a copy of the check and transmittal letter to the following addresses:

Regional Hearing Clerk
Office of Regional Counsel (ORC-1)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

Jason Gerdes
Pesticide Section (CED-5)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

27. Payment of the above civil administrative penalty shall not be used by Respondent or any other person as a tax deduction from Respondent's federal, state, or local taxes.

28. If Respondent fails to pay the assessed civil administrative penalty as specified in Paragraph 25, then Respondent shall pay to EPA the stipulated penalty of SEVEN THOUSAND DOLLARS (\$7,000), which shall be immediately due and payable. In addition, failure to pay the civil administrative penalty by the deadline specified in Paragraph 22 may lead to any or all of the following actions:

a. The debt being referred to a credit reporting agency, a collection agency, or to the Department of Justice for filing

of a collection action in the appropriate United States District Court. 40 C.F.R. §§ 13.13, 13.14, and 13.33. In any such collection action, the validity, amount, and appropriateness of the assessed penalty and of this CAFO shall not be subject to review.

b. The debt being collected by administrative offset (i.e., the withholding of money payable by the United States to, or held by the United States for, a person to satisfy the debt the person owes the Government), which includes, but is not limited to, referral to the Internal Revenue Service for offset against income tax refunds. 40 C.F.R. Part 13, Subparts C and H.

c. EPA may (i) suspend or revoke Respondent's licenses or other privileges; or (ii) suspend or disqualify Respondent from doing business with EPA or engaging in programs EPA sponsors or funds. 40 C.F.R. § 13.17.

d. In accordance with the Debt Collection Act of 1982 and 40 C.F.R. Part 13 interest, penalties charges, and administrative costs will be assessed against the outstanding amount that Respondent owes to EPA for Respondent's failure to pay the civil administrative penalty by the deadline specified in Paragraph 21. Interest will be assessed at an annual rate that is equal to the rate of current value of funds to the United States Treasury (i.e., the Treasury tax and loan

account rate) as prescribed and published by the Secretary of the Treasury in the Federal Register and the Treasury Fiscal Requirements Manual Bulletins. 40 C.F.R. § 13.11(a)(1). Penalty charges will be assessed monthly at a rate of 6% per annum. 40 C.F.R. § 13.11(c). Administrative costs for handling and collecting Respondent's overdue debt will be based on either actual or average cost incurred, and will include both direct and indirect costs. 40 C.F.R. § 13.11(b). In addition, if this matter is referred to another department or agency (e.g., the Department of Justice, the Internal Revenue Service), that department or agency may assess its own administrative costs, in addition to EPA's administrative costs, for handling and collecting Respondent's overdue debt.

29. If Respondent fails to comply with Section I.E of this CAFO, then Respondent shall pay the following stipulated penalties:

- a. If Respondent fails to provide any notice or report required by this CAFO by the date due or keep records required by this CAFO, Respondent shall pay a stipulated penalty of \$500 per day for each day that the notice or report is late or the record is not kept. If Respondent files any notice or report with incomplete, inaccurate, or missing information, Respondent shall provide EPA with a revised report within one (1) day of its receipt of written notification from EPA of the nature of the

problem. Respondent shall pay a stipulated penalty of \$500 for each day that the revised report is late.

G. CERTIFICATION STATEMENT

30. All notices, records, and submissions required in this CAFO which purport to document compliance with the terms of this CAFO shall contain a Certification Statement signed by a responsible official. The Certification Statement shall be as follows:

I certify under penalty of law that the information contained in or accompanying this document is true, accurate, and complete. As to the portion[s] of this document for which I cannot personally verify [its/their] truth and accuracy, I certify that, based on my inquiry of the person or persons directly responsible for gathering the information, the information is true, accurate, and complete.

For purposes of this provision, the term "responsible official" means a president, secretary, treasurer or vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy or decisionmaking functions for the corporation; or the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding \$35 million, if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

H. RETENTION OF RIGHTS

31. In accordance with 40 C.F.R. § 22.18(c), this CAFO only resolves Respondent's liability for federal civil penalties for the

violations and facts specifically alleged in Section I.C. of the CAFO. Nothing in this CAFO is intended to or shall be construed to resolve (i) any civil liability for violations of any provision of any federal, state, or local law, statute, regulation, rule, ordinance, or permit not specifically alleged in Section I.C. of the CAFO; or (ii) any criminal liability. EPA specifically reserves any and all authorities, rights, and remedies available to it (including, but not limited to, injunctive or other equitable relief or criminal sanctions) to address any violation of this CAFO or any violation not specifically alleged in Section I.C. of the CAFO.

32. This CAFO does not exempt, relieve, modify, or affect in any way Respondent's duty to comply with all applicable federal, state, and local laws, regulations, rules, ordinances, and permits.

I. ATTORNEYS' FEES AND COSTS

33. Each party shall bear its own attorneys' fees, costs, and disbursements incurred in this proceeding.

J. EFFECTIVE DATE

34. In accordance with 40 C.F.R. §§ 22.18(b)(3) and 22.31(b), this CAFO shall be effective on the date that the final order contained in this CAFO, having been approved and issued by either the Regional Judicial Officer or Regional Administrator, is filed.

K. BINDING EFFECT

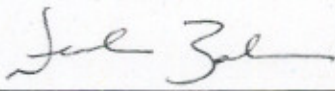
35. The undersigned representative of Complainant and the

undersigned representative of Respondent each certifies that he or she is fully authorized to enter into the terms and conditions of this CAFO and to bind the party he or she represents to this CAFO.

36. The provisions of this CAFO shall apply to and be binding upon Respondent and its officers, directors, employees, agents, trustees, servants, authorized representatives, successors, and assigns.

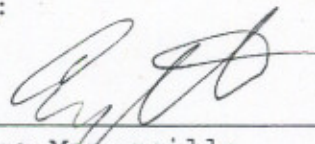
FOR RESPONDENT, WINSTON COMPANY, INC.

12/12/2006
DATE


NAME: NEAL ZAHN
TITLE: PRESIDENT

FOR COMPLAINANT, EPA REGION IX:

12/19/2006
DATE


Enrique Manzanilla
Director
Communities and Ecosystems Division
U.S. Environmental Protection Agency,
Region IX

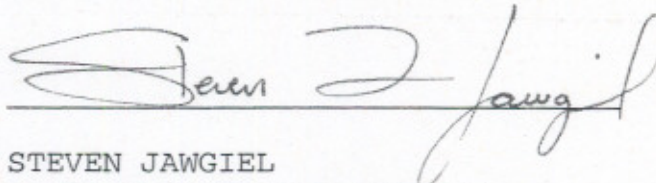
II. FINAL ORDER

Complainant and Respondent, Winston Company, Inc., having entered into the foregoing Consent Agreement,

IT IS HEREBY ORDERED that this CAFO (Docket No. FIFRA-9-2007-____) be entered, and that Respondent shall pay a civil administrative penalty in the amount of SIX THOUSAND FIVE HUNDRED DOLLARS (\$6,500) and comply with the terms and conditions set forth in the Consent Agreement.

12/20/06

DATE



STEVEN JAWGIEL
Regional Judicial Officer
U.S. Environmental Protection
Agency, Region IX

CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of the foregoing Consent Agreement and Final Order, Docket Number FIFRA-9-2007-0001 have been filed with the Regional Hearing Clerk and a copy was sent, certified mail to:

John McIntosh
Winston Company, Inc.
7704 East 38th Street
Tulsa, OK 74145

12-20-2006

DATE

for Steven Armsey (Acting)
Danielle Carr
Regional Hearing Clerk
U.S. Environmental Protection Agency,
Region IX