



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

AUG 11 2011

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Harlan M. Doliner, Esq.
Verrill Dana LLP
One Boston Place, Suite 2330
Boston, MA 02108-4427

Re: *In the Matter of Carnation Home Fashions, Inc.*
Docket No. FIFRA-02-2011-5201

U.S. ENVIRONMENTAL
PROTECTION AGENCY
2011 AUG 11 A 10:11
REGIONAL HEARING
CLERK

Dear Mr. Doliner:

Enclosed is a copy of the Consent Agreement and Final Order in the above-referenced proceeding, signed by the Regional Administrator of the U.S. Environmental Protection Agency - Region 2.

Please note the payment provisions of the Agreement. Please arrange for payment of the penalty according to the instructions given in the Final Order.

Sincerely,

Naomi P. Shapiro
Assistant Regional Counsel

cc: Director, Pesticides Management Bureau
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233

Enclosures

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2**

In the Matter of

Carnation Home Fashions, Inc.,
Respondent

Proceeding under the Federal
Insecticide, Fungicide and
Rodenticide Act, as amended.

**CONSENT AGREEMENT
AND FINAL ORDER**

Docket No. FIFRA-02-2011-5201

U.S. ENVIRONMENTAL
PROTECTION AGENCY
2011 AUG 11 A 10:11
JUDICIAL HEARING
CLERK

PRELIMINARY STATEMENT

This administrative proceeding for the assessment of a civil penalty is initiated pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C. Section 136l(a) (hereinafter referred to as "FIFRA" or the "Act"), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22 (hereinafter "CROP"). Complainant in this proceeding is the Director of the Division of Enforcement and Compliance Assistance, United States Environmental Protection Agency, Region 2 ("EPA"). Pursuant to Section 22.13(b) of the CROP, where the parties agree to settlement of one or more causes of action before filing of an Administrative Complaint, a proceeding may be simultaneously commenced and concluded by issuance of a Consent Agreement and Final Order ("CA/FO") pursuant to 40 C.F.R. Sections 22.18(b)(2) and 22.18(b)(3).

Complainant and Respondent agree that settling this matter by entering into this CA/FO pursuant to 40 C.F.R. Sections 22.13(b), 22.18(b)(2) and 22.18(b)(3) of the CROP, is an appropriate means of resolving this matter without litigation.

EPA'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is Carnation Home Fashions, Inc.
2. Respondent is located at 53 Jeanne Drive, Newburgh, NY 12550.
3. Respondent is a "person" as that term is defined in FIFRA Section 2(s), 7 U.S.C. Section 136(s), and as such, is subject to FIFRA and the regulations promulgated thereunder.
4. Section 2(u) of FIFRA, 7 U.S.C. Section 136(u), defines the term "pesticide" as any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.
5. Section 2(t) of FIFRA, 7 U.S.C. Section 136(t), defines a "pest" as any insect, rodent, nematode, fungus, weed, or any form of terrestrial or aquatic plant or animal life or virus, bacteria or other micro-organism.
6. Mildew is a "pest" as that term is defined by Section 2(t) of FIFRA, 7 U.S.C. Section 136(t).
7. Respondent imports and distributes home products.
8. Among Respondent's products is the "Soft as Silk Mildew-Resistant Shower Curtain Liner" ("the Product"), a shower curtain manufactured with an incorporated antifouling agent.

9. Respondent has a contract manufacturing arrangement with Zhangjiagiang Manhing Plastic Products Co, Ltd., a Chinese company, for the manufacture of the Product with a pesticide that protects the Product itself.

10. The Product is not registered as a pesticide pursuant to Section 3 of FIFRA, 7 U.S.C. Section 136a.

11. Without registration of the product pursuant to Section 3 of FIFRA, 7 U.S.C. Section 136a, Respondent cannot make pesticidal claims on behalf of the product.

12. On or about March 7, 2008, an EPA inspector conducted an inspection of and at the Bed, Bath & Beyond store located in Holmdel, New Jersey.

13. At the time of the March 7, 2008 inspection, the EPA inspector identified packages of the Product offered for sale.

14. The label on the packages of the Product viewed by the EPA inspector included pesticidal claims for the Product.

15. On June 2, 2008, EPA – Region 2 issued an information request letter (“IRL”) pursuant to Sections 8 and 9 of FIFRA, requesting information and records regarding the sale or distribution of the Product bearing a label containing pesticidal claims to Bed, Bath & Beyond during the period January 1 – March 7, 2008.

16. “To distribute or sell” is defined by Section 2(gg) of FIFRA, 7 U.S.C. Section 136(gg), as “to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver.”

17. On June 8, 2008, Respondent provided a response to the IRL documenting 452 sales or distributions of the Product to Bed, Bath & Beyond during a single week of January.

18. Respondent is a “distributor or seller” within the meaning of Section 2(gg) of FIFRA, 7 U.S.C. Section 136(gg).

19. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. Section 136j(a)(1)(A), states that it shall be unlawful for any person in any state to distribute or sell to any person any pesticide that is unregistered.

20. Respondent’s sales or distributions of an unregistered pesticide, described in Paragraph 17, above, constitute unlawful acts under Section 12(a)(1)(A) of FIFRA, 7 U.S.C. Section 136j(a)(1)(A).

21. Upon notification that the pesticidal claims made on the Product’s label were in violation of FIFRA, Respondent worked quickly to generate new labeling for the Product and hired a contractor to relabel all of the Product packages in Bed, Bath & Beyond stores.

22. Respondent also changed the Product’s name from “Soft as Silk Will Not Mildew Shower Curtain Liner” to “Soft as Silk Mildew-Resistant Shower Curtain Liner.”

23. As a result of EPA’s compliance assistance, Respondent switched the pesticide used in the manufacture of the Product from Sea Hawk Mission Bay CSF Copper-free Antifouling Coating (EPA Reg. No. 44891-17) to Irgaguard 3000 (EPA Reg. No. 40810-20).

24. On October 19, 2010, the parties met to discuss settlement.

CONSENT AGREEMENT

Based upon the foregoing, and pursuant to Sections 22.13(b) and 22.18 of the CROP, 40 C.F.R. §§ 22.13(b) and 22.18, it is hereby agreed that:

1. Respondent shall hereafter maintain compliance with the statutory provisions of FIFRA, as amended, 7 U.S.C. Section 136 et seq., and its implementing regulations.

2. Within ninety (90) days of the effective date of this Consent Agreement, Respondent's signatory will certify on behalf of the Respondent that it has completed relabeling all packages of the Product held for distribution in its warehouse.

3. If Respondent fails to complete the relabeling process or to submit the required certification within the timeframe specified in paragraph 2, above, each day past the due date for performance shall be considered a separate violation of this Consent Agreement. The following Stipulated Penalties shall accrue per violation per day:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500	1st through 14th day
\$1,000	15th through 30th day
\$1,500	31st day and beyond

Stipulated Penalties under this paragraph shall begin to accrue on the day after performance is due and shall continue to accrue until performance is satisfactorily completed. Payment shall be made consistent with and subject to the provisions of paragraphs 7-10, below.

4. Respondent further certifies that, to the best of its knowledge, the labels on all packages of the Product in its warehouse or offered for sale to its wholesale customers, including Bed, Bath & Beyond, are fully compliant with FIFRA.

5. If in the future EPA believes that any information certified to, pursuant to paragraphs 2 and 4, above, of the Consent Agreement, is untrue or inaccurate, EPA will so advise the Respondent of its belief and basis, and will afford the Respondent thirty (30) days to submit comments to EPA or correct any alleged untrue or inaccurate certification. If, after consideration of Respondent's reply, EPA determines that the certification(s) is untrue or inaccurate, Respondent shall be liable to EPA for a stipulated penalty of \$25,000 for each certification that EPA determines was untrue or inaccurate. EPA may also initiate a separate criminal investigation pursuant to 18 U.S.C. Section 1001 et seq. or any other applicable law.

6. Respondent shall pay, by cashier's or certified checks, or by electronic fund transfers, a civil penalty in the amount of One Hundred and Fifty Thousand Dollars (\$150,000) in settlement of this case, according to the following schedule:

- a. \$22,500 due on or before forty-five (45) days after the date of signature of the Final Order at the end of this document;
- b. \$21,250 due on or before one hundred and fifty (150) days after the date of signature of the Final Order at the end of this document;
- c. \$21,250 due on or before two hundred and seventy (270) days after the date of signature of the Final Order at the end of this document;
- d. \$21,250 due on or before three hundred and ninety (390) days after the date of signature of the Final Order at the end of this document;

- e. \$21,250 due on or before five hundred and ten (510) days after the date of signature of the Final Order at the end of this document;
 - f. \$21,250 due on or before six hundred and thirty (630) days after the date of signature of the Final Order at the end of this document;
 - g. \$21,250 due on or before seven hundred and fifty (750) days after the date of signature of the Final Order at the end of this document;
7. Each payment must be received at the address listed in Paragraph 8, below, or the EFT must be received by the Federal Reserve Bank of New York, on or before its due date specified above (the date by which a payment must be received shall hereafter be referred to as its “due date”).
- a. Failure to pay the penalty in full according to the above provisions will result in referral of this matter to the United States Department of Justice or the United States Department of the Treasury for collection or other appropriate action.
 - b. Furthermore, if a payment is not received on or before its due date, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to the Debt Collection Act, 31 U.S.C. § 3717, on the overdue amount from the due date through the date of payment. In addition, a late payment handling charge of fifteen dollars (\$15.00) will be assessed for each thirty (30) day period (or any portion thereof) following a due date in which the balance remains unpaid.
 - c. A 6% per annum penalty also will be applied on any principal amount not paid within 90 days of its due date. Any such non-payment penalty charge on the debt will accrue from the date the penalty payment becomes due and is not paid.

- d. If Respondent fails to pay the total civil penalty within thirty (30) days of the final due date, Respondent shall also be liable to the United States for an additional stipulated penalty of Fifty Thousand Dollars (\$50,000) for such failure unless, on or before the due date, Respondent has submitted to EPA a writing that demonstrates to EPA's satisfaction good cause for such failure, as provided in paragraph 9 of this Consent Agreement.
 - e. Pursuant to 40 C.F.R. Section 22.31(b), the effective date of this Consent Agreement and Final Order shall be the date of filing with the Regional Hearing Clerk, U.S. E.P.A. Region 2, New York, New York.
8. If any payment is made by cashier's or certified check, each such payment shall be payable to the "Treasurer, United States of America." The check shall be identified with the notation of the name and docket number of this case as follows: In the Matter of Carnation Home Fashions, Inc., Docket No. FIFRA-02-2011-5201.

Each such check shall be mailed to:

United States Environmental Protection Agency
Fines & Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

If Respondent chooses to pay by electronic fund transfer ("EFT"), Respondent shall provide the following information to the remitter bank (Federal Reserve Bank of New York):

- a. Amount of Payment
- b. SWIFT address:

FRNYUS33
33 Liberty Street
New York, N.Y. 10045

- c. Account Code for Federal Reserve Bank of New York receiving payment: 68010727
- d. Federal Reserve Bank of New York ABA routing number: 021030004
- e. Field Tag 4200 of the Fedwire message should read: "D 68010727 Environmental Protection Agency"
- f. Name of Respondent: Carnation Home Fashions, Inc.
- g. Case Docket Number: FIFRA-02-2011-5201

Respondent shall also send proof of each payment, whether by check or EFT, to:

Naomi Shapiro
Assistant Regional Counsel
Office of Regional Counsel

Office of the Regional Hearing Clerk
and

U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, N.Y. 10007-1866;

9. All stipulated penalties are due and payable within forty-five (45) calendar days of Respondent's receipt from EPA of a written demand for payment. All stipulated penalty payments shall be made in accordance with the payment instructions in paragraph 8, above. Penalties shall accrue as provided below regardless of whether EPA has notified the Respondent of the violation or made a demand for payment, but need only be paid upon demand. Any payment of stipulated penalties shall be in addition to any other payments required under any other paragraph of this CA/FO. Nothing in this CA/FO, including payment of penalties identified in this CA/FO, shall preclude EPA from initiating a separate criminal investigation pursuant to 18 U.S.C. Section 1001 et seq. or any other applicable law. Failure to pay any stipulated penalty in full may result in referral of this matter to the United

States Department of Justice or the United States Department of the Treasury for collection and/or appropriate action.

10. The Complainant may, in her sole discretion, reduce or eliminate any stipulated penalty due under this CA/FO if Respondent has, in writing, demonstrated to EPA's satisfaction good cause for such action by EPA. If, after review of Respondent's submission, Complainant determines that Respondent has failed to comply with the provisions of this Consent Agreement, and Complainant does not, in her sole discretion, eliminate the stipulated penalties demanded by EPA, Complainant will notify Respondent, in writing, that either the full stipulated penalty or a reduced stipulated penalty must be paid by Respondent. Respondent shall pay the stipulated penalty amount indicated in EPA's notice within thirty (30) calendar days of its receipt of such written notice from EPA. Failure of Respondent to pay any stipulated penalty demanded by EPA pursuant to this Consent Agreement may result in further action by EPA.

11. Respondent has read the Consent Agreement, understands its terms, finds it to be reasonable and consents to the issuance and its terms. Respondent consents to the issuance of the accompanying Final Order. Respondent agrees that all terms of settlement are set forth herein.

12. For the purpose of this proceeding and in the interest of an expeditious resolution of this matter, Respondent (a) admits that EPA has jurisdiction pursuant to Section 14 of FIFRA, 7 U.S.C. Section 1361(a), to commence a civil administrative proceeding for the allegations in the EPA Findings of Fact and Conclusions of Law section above; and (b)

neither admits nor denies any allegations in the EPA Findings of Fact and Conclusions of Law contained herein.

13. The civil penalty and any applicable stipulated penalties provided for herein are penalties within the meaning of Title 26, Section 162(f) of the United States Code, 26 U.S.C. § 162(f), and are not deductible expenditures for purposes of federal, state or local law.

14. This Consent Agreement is being voluntarily and knowingly entered into by the Complainant and Respondent to resolve, conditional upon full payment of the civil penalty herein and the accuracy of the Respondent's certifications and representations in this proceeding, the civil and administrative claims alleged in this Consent Agreement. Nothing herein shall be read to preclude EPA or the United States, on behalf of EPA, however, from pursuing appropriate injunctive or other equitable relief or criminal sanctions for any violation of law.

15. Respondent explicitly and knowingly consents to the assessment of the civil penalty and any applicable stipulated penalties as set forth in this Consent Agreement and agrees to pay the civil penalty and any applicable stipulated penalties in accordance with the terms of this Consent Agreement.

16. Respondent explicitly and knowingly waives its right to request or to seek any Hearing on this Consent Agreement or on the Findings of Fact and Conclusions of Law herein, or on the accompanying Final Order.

17. The Respondent agrees not to contest the validity or any term of this CA/FO in any action brought: a) by the United States, including EPA, to enforce this CA/FO; or b) to enforce a judgment relating to this CA/FO.

18. Respondent waives its right to appeal this Consent Agreement and the accompanying Final Order.

19. This Consent Agreement and any provision herein shall not be construed as an admission of liability in any criminal or civil action or other administrative proceeding, except in an action or proceeding to enforce or seek compliance with this Consent Agreement and its accompanying Final Order.

20. Respondent explicitly waives any right it may have pursuant to 40 C.F.R. § 22.8 to be present during discussions with or to be served with and to reply to any memorandum or communication addressed to the Regional Administrator, Deputy Regional Administrator, or Regional Judicial Officer for Region 2, where the purpose of such discussion, memorandum, or communication is to discuss a proposed settlement of this matter or to recommend that such official accept this Consent Agreement and issue the attached Final Order.

21. This Consent Agreement and Final Order does not relieve Respondent of its obligations to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or a determination of, any issue related to any federal, state or local permit. This Consent Agreement and Final Order does not waive, extinguish, or otherwise affect Respondent's obligation to comply with all applicable provisions of FIFRA and the regulations promulgated thereunder.

22. Nothing in this Consent Agreement and Final Order shall be construed as a release from any other action under any law and/or regulation administered by EPA.

23. Each undersigned signatory to this Consent Agreement certifies that he or she is duly and fully authorized to enter into and ratify this Consent Agreement and Final Order and all the terms and conditions set forth in this Consent Agreement and Final Order.

24. The provisions of this Consent Agreement and Final Order shall be binding upon both EPA and Respondent, its officers/officials, agents, authorized representatives and successors or assigns.

25. Any failure by Respondent to perform fully any requirement herein will be considered a violation of this CA/FO, and may subject Respondent to a civil judicial action by the United States to enforce the provisions of this CA/FO.

26. Each party hereto agrees to bear its own costs and fees in this matter.

27. Respondent consents to service upon itself of a copy of this Consent Agreement and Final Order by an EPA employee other than the Regional Hearing Clerk.

RESPONDENT: **Carnation Home Fashions, Inc.**

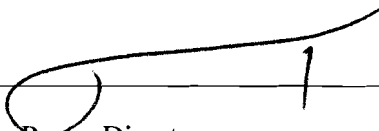
BY: Lawrence B. Mayer
(Signature)

NAME: LAWRENCE B. MAYER
(Please Print)

TITLE: PRESIDENT

DATE: 7/27/11

COMPLAINANT:

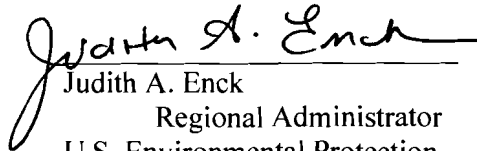


Dore F. LaPosta, Director
Division of Enforcement
and Compliance Assistance
U.S. Environmental Protection Agency - Region 2

DATE: AUGUST 4, 2011

FINAL ORDER

of this Order shall be the date of filing with the Regional Hearing Clerk, United States Environmental Protection Agency, Region 2, New York, New York.



Judith A. Enck
Regional Administrator
U.S. Environmental Protection
Agency - Region 2
290 Broadway, 26th Floor
New York, New York 10007

DATE: 8-8-11

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing fully executed Consent Agreement and Final Order ("CA/FO"), bearing the below-referenced docket number, in the following manner to the respective addressees listed below:

Original and Copy
By Hand Delivery:

Office of the Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 2
290 Broadway, 16th Floor
New York, N.Y. 10007-1866

Copy by Certified Mail/
Return Receipt Requested:

Harlan M. Doliner, Esq.
Verrill Dana LLP
One Boston Place, Suite 2330
Boston, MA 02108-4427

Dated: AUG 11 , 2011
New York, New York

