

1 SYLVIA QUAST
2 Regional Counsel
3
4 Margaret Alkon
5 Assistant Regional Counsel
6 U.S. Environmental Protection Agency
7 Region IX
8 75 Hawthorne Street
9 San Francisco, CA 94105
10 (415) 972-3890

** FILED **
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11
12 **UNITED STATES**
13 **ENVIRONMENTAL PROTECTION AGENCY**
14 **REGION IX**
15 **75 HAWTHORNE STREET**
16 **SAN FRANCISCO, CA 94105**

17
18 In the matter of:) Docket No. FIFRA-09-2016- 0016
19) **CONSENT AGREEMENT**
20 Snowden Enterprises, Inc.) and
21) **FINAL ORDER PURSUANT TO**
22 Respondent.) **SECTIONS 22.13 AND 22.18**
23)
24
25

26 **I. CONSENT AGREEMENT**

27 The United States Environmental Protection Agency (“EPA”) and Snowden Enterprises,
28 Inc. (“Snowden” or the “Respondent”) agree to settle this matter and consent to the entry of this
29 Consent Agreement and Final Order (“CAFO”). This CAFO simultaneously initiates and
30 concludes this proceeding in accordance with 40 C.F.R. §§22.13(b) and 22.18(b).

31 **A. AUTHORITY AND PARTIES**

32 1. This administrative proceeding for the assessment of a civil administrative penalty is
33 initiated pursuant to section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7
34 U.S.C. § 136, et seq. (hereinafter referred to as “FIFRA” or the “Act”), and the Consolidated
35 Rules of Practice Governing the Administrative Assessment of Civil Penalties and the
36 Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22.

1 2. Complainant is the Director of the Enforcement Division, EPA Region IX, who has
2 been duly delegated to commence and settle an enforcement action in this matter.

3 3. Snowden Enterprises, Inc. is a California corporation with a facility at 3257 East
4 Central, Fresno, California.

5 **B. STATUTORY AND REGULATORY AUTHORITIES**

6 4. The term “person” means “any individual, partnership, association, corporation, or
7 any organized group of persons whether incorporated or not.” Section 2(s) of FIFRA, 7 U.S.C.
8 §136(s).

9 5. It is unlawful for any person to distribute or sell to any person any pesticide that is
10 misbranded. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

11 6. A pesticide is “misbranded” if “any word, statement, or other information required by
12 or under the authority of [FIFRA] to appear on the label or labeling is not prominently placed
13 thereon with such conspicuousness (as compared with other words, statements, designs, or
14 graphic matter in the labeling) and in such terms as to render it likely to be read and understood
15 by the ordinary individual under customary conditions of purchase and use.” Section 2(q)(1)(E)
16 of FIFRA, 7 U.S.C. § 136(q)(1)(E).

17 7. A pesticide is also “misbranded” if “the pesticide contains any substance or
18 substances in quantities highly toxic to man, unless the label shall bear, in addition to any other
19 matter required by [FIFRA], (i) the skull and crossbones; (ii) the word “poison” prominently in
20 red on a background of distinctly contrasting color; and (iii) a statement of practical treatment
21 (first aid or otherwise) in case of poisoning by the pesticide.” Section 2(q)(2)(D) of FIFRA, 7
22 U.S.C. § 136(q)(2)(D).

23 8. The term “labeling” is defined, in part, as “all labels and all other written, printed, or

1 graphic matter . . . accompanying the pesticide or device at any time,” and defines “label” as “the
2 written, printed, or graphic matter on, or attached to, the pesticide or device or any of its
3 containers or wrappers.” Section 2(p) of FIFRA, 7 U.S.C. § 136(p).

4 9. The term “to distribute or sell” means to “distribute, sell, offer for sale, hold for
5 distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or
6 receive and (having so received) deliver or offer to deliver.” Section 2(gg) of FIFRA, 7 U.S.C. §
7 136(gg).

8 10. The term “pesticide” means any substance or mixture of substances intended for
9 preventing, destroying, repelling, or mitigating any pest. Section 2(u) of FIFRA, 7 U.S.C.
10 §136(u).

11 11. The term “pest” means “(1) any insect, rodent, nematode, fungus, weed, or (2) any
12 other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism
13 (except viruses, bacteria, or other micro-organisms on or in living man or other living animals)
14 which the Administrator declares to be a pest under [FIFRA section 25(c)(1)].” Section 2(t) of
15 FIFRA, 7 U.S.C. §136(t). Pursuant to the authority in section 25(c)(1) of FIFRA, 7 U.S.C. §
16 136w(c)(1), the Administrator declared that a pest includes “[a]ny fungus..., except for those on
17 or in living man or other living animals and those on or in processed food or processed animal
18 feed, beverages, drugs . . . and cosmetics. . . .” 40 C.F.R. § 152.5.

19 12. EPA has promulgated regulations under the authority of FIFRA setting forth labeling
20 requirements for pesticides, found at 40 CFR Part 156 (“Labeling Regulations”).

21 13. The Labeling Regulations require every pesticide to bear a label containing hazard
22 and precautionary statements as prescribed by subpart D and E of 40 CFR Part 156. 40 C.F.R.
23 §156.10(a)(1)(vii).

1 Pesticide Regulation conducted an inspection of the facility at 3257 East Central, Fresno,
2 California.

3 19. At all times relevant to this CAFO, Respondent distributes and sells the pesticide
4 The Fruit Doctor, EPA Reg. No. 11195-1 (“The Fruit Doctor”).

5 20. The Fruit Doctor is a fumigant used on grapes held in cold storage to suppress spread
6 of grey mold disease caused by *Botrytis cinerea*. The Fruit Doctor contains 100% active
7 ingredient Sulfur Dioxide. The Fruit Doctor is a restricted use pesticide, as that term is defined at
8 40 C.F.R. Part 152 Subpart I, due to corrosive effects during inhalation and to eyes and skin and
9 its signal word is “Danger”. The Fruit Doctor is fatal if inhaled in high concentration.

10 21. At all times relevant to this CAFO, Respondent distributes and sells The Fruit Doctor
11 in cylinders of various sizes, and further packages some of these cylinders within an outer case.
12 At all times relevant to this CAFO, Respondent affixes a small cylinder label (the “small
13 cylinder label”) on Fruit Doctor packaged in small cylinders and affixes a larger label (the “main
14 label”) on the outer case and on Fruit Doctor packaged in larger cylinders. At all times relevant
15 to this CAFO, the Fruit Doctor label includes the word “poison” in red on a white background in
16 the immediate proximity to the skull and crossbones symbol.

17 22. At all times relevant to this CAFO, the main label had a colored background except
18 for the word “poison” in red on a white background and where a white “Fruit Doctor” logo is
19 placed on top of the first aid and precautionary statements. The location of this logo is different
20 from the location of the logo on the label accepted by EPA. The Labeling Regulations state that
21 all words, statements, graphic representations, designs or other information required on the
22 labeling by FIFRA or the Labeling Regulations must be clearly legible to a person with normal
23 vision, and must be placed with such conspicuousness (as compared with other words,

1 statements, designs, or graphic matter on the labeling) and expressed in such terms as to render it
2 likely to be read and understood by the ordinary individual under customary conditions of
3 purchase and use, and that all required text must appear on a clear contrasting background and
4 not be obscured or crowded. 40 C.F.R §156.10(a)(2). The placement of the Fruit Doctor logo on
5 the main label obscures the First Aid and Precautionary Statements. Because the main label does
6 not have all required label text clearly legible and on a clear contrasting background that is not
7 obscured, as required by 40 C.F.R §156.10(a)(2), The Fruit Doctor pesticide labeled with the
8 main label is “misbranded” as that term is defined by Section 2(q)(1)(E) of FIFRA, 7 U.S.C. §
9 136(q)(1)(E).

10 23. At all times relevant to this CAFO, the small cylinder label does not contain a first
11 aid statement on the front panel of the label or a variant approved by EPA as required by 40
12 C.F.R §156.68(d). Because The Fruit Doctor contains a substance in quantities highly toxic to
13 man, and the small cylinder label does not contain a statement of practical treatment (first aid or
14 otherwise) in case of poisoning by the pesticide, The Fruit Doctor packaged in cylinders labeled
15 with the small cylinder label are “misbranded” as that term is defined by Section 2(q)(2)(D) of
16 FIFRA, 7 U.S.C. § 136(q)(2)(D).

17 24. At all times relevant to this CAFO, the small cylinder label does not contain hazard
18 and precautionary statements. The Labeling Regulations state that every pesticide product must
19 bear a label containing hazard and precautionary statements as prescribed by subpart D and E of
20 40 CFR Part 156. 40 C.F.R §156.10(a)(1)(vii), and at all times relevant to this CAFO the
21 cylinder label accepted by EPA had such hazard and precautionary statements. Because the small
22 cylinder label used by Respondent in October 2013 did not contain hazard and precautionary
23 statements, as required by 40 C.F.R §156.10(a)(1)(vii), The Fruit Doctor packaged in cylinders

1 labeled with the small cylinder label are “misbranded” as that term is defined by Section
2 2(q)(1)(E) of FIFRA, 7 U.S.C. § 136(q)(1)(E).

3 25. At all times relevant to this CAFO, The Fruit Doctor is “misbranded” as that term is
4 defined by Section 2(q) of FIFRA, 7 U.S.C. § 136(q), because the main label does not have all
5 required label text clearly legible and on a clear contrasting background that is not obscured, as
6 required by 40 C.F.R §156.10(a)(2); the small cylinder label does not contain a first aid
7 statement on the front panel of the label or a variant approved by EPA as required by 40 C.F.R
8 §156.68(d); and the small cylinder label does not contain hazard and precautionary statements as
9 required by 40 C.F.R §156.10(a)(1)(vii).

10 26. In six instances from on or about October 16, 2013 to on or about October 29, 2013,
11 Respondent distributed or sold The Fruit Doctor. In each of these six instances, Respondent
12 violated section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling a
13 misbranded pesticide.

14 **D. RESPONDENT’S ADMISSIONS**

15 27. In accordance with 40 C.F.R. § 22.18(b)(2), and for the purpose of this proceeding,
16 Respondent (i) admits that EPA has jurisdiction over the subject matter of this CAFO and over
17 Respondent; (ii) **neither admits nor denies** the specific factual allegations contained in Section
18 I.C of this CAFO; (iii) consents to any and all conditions specified in this CAFO, (iv) agrees to
19 pay, and consents to the assessment of, the civil administrative penalty under Section I.E of this
20 CAFO; (v) waives any right to contest the allegations contained in Section I.C of this CAFO;
21 and (vi) waives the right to appeal the proposed final order contained in this CAFO.

22 **E. CIVIL ADMINISTRATIVE PENALTY**

23 28. Respondent consent to the assessment of a civil administrative penalty in the amount

1 of **THIRTY FOUR THOUSAND THREE HUNDRED TWENTY DOLLARS (\$34,320)** as
2 final settlement and complete satisfaction of the civil claims against Respondent arising from the
3 facts alleged in Section I.C of the CAFO and under the Act.

4 a. Respondent shall pay the civil penalty within thirty (30) days of the effective
5 date of this CAFO by one of the methods listed below:

6 i. Respondent may pay online through the Department of the Treasury
7 website at www.pay.gov. In the Search Public Form field, enter SFO 1.1,
8 click EPA Miscellaneous Payments - Cincinnati Finance Center, and
9 complete the SFO Form Number 1.1.

10
11 ii. Respondent may pay by remitting a certified or cashier's check, including
12 the name and docket number of this case, for the amount, payable to
13 "Treasurer, United States of America," and sent as follows:

14
15 Regular Mail:

16 U.S. Environmental Protection Agency
17 PO Box 979077
18 St. Louis, MO 63197-9000

19
20 Overnight/Signed Receipt Confirmation Mail:

21 U.S. Environmental Protection Agency
22 ATTN Box 979077
23 1005 Convention Plaza
24 Mail Station SL-MO-C2GL
25 St. Louis, MO 63101

26
27 iii. Respondent may also pay the civil penalty using any method, or
28 combination of methods, provided on the following website:

29
30 [http://www2.epa.gov/financial/additional-instructions-making-payments-](http://www2.epa.gov/financial/additional-instructions-making-payments-epa)
31 [epa](http://www2.epa.gov/financial/additional-instructions-making-payments-epa)

32
33 If clarification regarding a particular method of payment remittance is needed,
34 contact the EPA's Cincinnati Finance Center at (513) 487-2091.

35
36 b. Respondent shall identify each and every payment with the name and docket
37 number of this case; and

1 c. Within 24 hours of payment, Respondent shall provide EPA with proof of
2 payment (“proof of payment” means, as applicable, a copy of the check, confirmation of credit
3 card or debit card payment, confirmation of wire or automated clearinghouse transfer, and any
4 other information required to demonstrate that payment has been made according to EPA
5 requirements, in the amount due, and identified with the name and docket number of this case),
6 including proof of the date payment was made, along with a transmittal letter, indicating
7 Respondent’s names, the case title, and docket number, to the following addresses:

8 Regional Hearing Clerk
9 Office of Regional Counsel (ORC-1)
10 U.S. Environmental Protection Agency, Region IX
11 75 Hawthorne Street
12 San Francisco, CA 94105

13
14 Allison Watanabe
15 Enforcement Division (ENF 3-3)
16 U.S. Environmental Protection Agency, Region IX
17 75 Hawthorne Street
18 San Francisco, CA 94105
19

20 29. In the event that Respondent fails to pay the civil administrative penalty assessed
21 above by its due date, Respondent shall pay to EPA a stipulated penalty in the amount of **FIVE**
22 **HUNDRED DOLLARS (\$500)** for each day that payment is late in addition to the unpaid
23 balance of the penalty assessed above. Upon EPA’s written demand, this stipulated penalty shall
24 immediately become due and payable.

25 30. If Respondent fails to pay the penalty assessed by this CAFO in full by its due date,
26 the entire unpaid balance and accrued interest shall become immediately due and owing.

27 Respondent’s tax identification numbers may be used for collecting or reporting any delinquent
28 monetary obligation arising from this CAFO (see 31 U.S.C. § 7701). If payment is not received
29 within thirty (30) calendar days, interest, penalty and administrative costs will accrue from the

1 effective date of this CAFO as described at 40 CFR §13.11. In addition, if this matter is referred
2 to another department or agency (e.g., the Department of Justice, the Internal Revenue Service),
3 that department or agency may assess its own administrative costs, in addition to EPA's
4 administrative costs, for handling and collecting Respondent's overdue debt. Respondent's
5 failure to pay in full the civil administrative penalty by its due date also may also lead to any or
6 all of the following actions:

7 a. The debt being referred to a credit reporting agency, a collection agency, or to
8 the Department of Justice for filing of a collection action in the appropriate United States District
9 Court. 40 C.F.R. §§ 13.13, 13.14, and 13.33. In any such collection action, the validity, amount,
10 and appropriateness of the assessed penalty and of this CAFO shall not be subject to review.

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

16 c. EPA may (i) suspend or revoke Respondent's licenses or other privileges; (ii)
17 suspend or disqualify Respondent from doing business with EPA or engaging in programs EPA
18 sponsors or funds; (iii) convert the method of payment under a grant or contract from an
19 advanced payment to a reimbursement method; or (iv) revoke a grantee's or contractor's letter-
20 of-credit. 40 C.F.R. §§ 13.17.

21 **F. CERTIFICATION OF COMPLIANCE**

22 31. In executing this CAFO, Respondent certifies that the information it has supplied
23 concerning this matter was at the time of submission, and is at the time of signature to this

1 CAFO, truthful, accurate, and complete; and that Respondent has corrected the violations alleged
2 in Section I.C of this CAFO. Under 18 U.S.C. § 1001, submitting false or misleading
3 information can result in significant penalties, including the possibility of fines and
4 imprisonment for knowing submission of such information.

5 **G. RETENTION OF RIGHTS, BINDING EFFECT, ETC.**

6 32. This Consent Agreement constitutes the entire agreement between the Respondent
7 and EPA. Full payment of the civil penalty and any applicable interest charges or late fees or
8 penalties as set forth in this CAFO shall constitute full settlement and satisfaction of civil penalty
9 liability against Respondent for the violations alleged in Section I.C of this CAFO.

10 33. In accordance with 40 C.F.R. § 22.18(c), this CAFO only resolves Respondent's
11 liabilities for federal civil penalties for the violations and facts specifically alleged in Section I.C
12 of this CAFO. Nothing in this CAFO is intended to or shall be construed to resolve: (i) any civil
13 liability for violations of any provision of any federal, state, or local law, statute, regulation, rule,
14 ordinance, or permit not specifically alleged in Section I.C of this CAFO; or (ii) any criminal
15 liability. EPA specifically reserves any and all authorities, rights, and remedies available to it
16 (including, but not limited to, injunctive or other equitable relief or criminal sanctions) to
17 address any violation of this CAFO or any violation not specifically alleged in Section I.C of this
18 CAFO. This CAFO does not exempt, relieve, modify, or affect in any way Respondent's duties
19 to comply with all applicable federal, state, and local laws, regulations, rules, ordinances, and
20 permits.

21 34. Except as set forth in Paragraph 30 above, EPA and Respondent shall each bear its
22 own fees, costs, and disbursements in this action.

23 35. For the purposes of state and federal income taxation, Respondent shall not claim a

1 deduction for any civil penalty payment made pursuant to this CAFO.

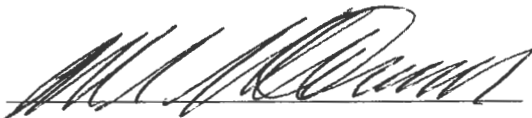
2 36. This CAFO constitutes an enforcement action for purposes of considering
3 Respondent's compliance history in any subsequent enforcement action. This CAFO will be
4 available to the public and does not contain any confidential business information.

5 37. In accordance with 40 C.F.R. §§ 22.18(b)(3) and 22.31(b), the effective date of this
6 CAFO shall be the date on which the accompanying Final Order, having been signed by the
7 Regional Judicial Officer, is filed.

8 38. The provisions of this CAFO shall be binding on Respondent and on Respondent's
9 officers, directors, employees, agents, servants, authorized representatives, successors, and
10 assigns.

11 39. The undersigned representatives of each party to this Consent Agreement certify that
12 each is duly authorized by the party whom he or she represents to enter into the terms and
13 conditions of this Consent Agreement and Final Order and bind that party to it.

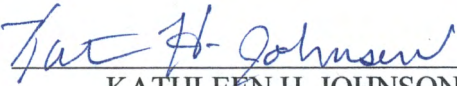
14
15 **SNOWDEN ENTERPRISES, INC.:**

16
17 Date: 5/25/16 By: 

18
19
20 Name: KIRK SHERMER

21
22
23 Title: PRESIDENT

1 **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:**
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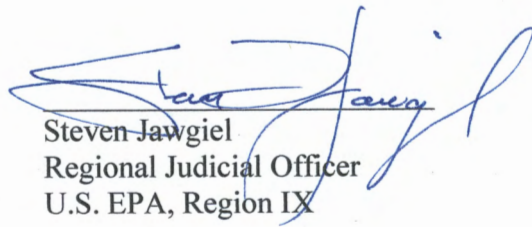
4
5 Date: 6/15/16 By: 

6 KATHLEEN H. JOHNSON
7 Director
8 Enforcement Division
9 U.S. Environmental Protection Agency,
10 Region IX
11
12

1 **II. FINAL ORDER**

2
3 IT IS HEREBY ORDERED that this Consent Agreement and Final Order be entered and
4 that Respondent shall pay a civil administrative penalty in the amount of **THIRTY FOUR**
5 **THOUSAND THREE HUNDRED TWENTY DOLLARS (\$34,320)** in accordance with the
6 terms set forth in the Consent Agreement.
7
8

9
10 Date: 06/17/16

11 
12 Steven Jawgiel
13 Regional Judicial Officer
14 U.S. EPA, Region IX
15

CERTIFICATE OF SERVICE

I certify that the original of the fully executed Consent Agreement and Final Order (Docket No. FIFRA-09-2016-0016) was filed with the Regional Hearing Clerk, U.S. EPA, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, and that a true and correct copy of the same was sent to the following parties:

A copy was mailed via CERTIFIED MAIL to:

Kirk Shermer
President
Snowden Enterprises, Inc.
3257 East Central Avenue
Fresno, CA 93725

Certified Mail Number: 7015 1520 0000 9141 9726

An additional copy was hand-delivered to the following U.S. EPA case attorney:

Margaret Alkon
Assistant Regional Counsel (ORC-2)
U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105



FOR: _____
Regional Hearing Clerk
U.S. EPA, Region IX



Date