



4. This Complaint serves as notice that the U. S. Environmental Protection Agency (hereinafter “EPA”) has reason to believe that Respondent has violated Section 12 of FIFRA, 7 U.S.C. § 136j.

**B. Preliminary Statements**

5. A “pesticide” is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u), as, among other things, “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.”

6. A “pest” is defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t) to include any insect, rodent, nematode, fungus, weed, or any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism (except viruses, bacteria, or other micro-organisms on or in living man or other living animals) which the Administrator declares to be a pest under Section 25(c)(1).

7. Section 2(mm) of FIFRA, 7 U.S.C. § 136(mm), defines the term “antimicrobial pesticide” to include “a pesticide that . . . is intended to . . . disinfect, sanitize, reduce, or mitigate growth or development of microbiological organisms.”

8. Pursuant to Section 3(a) of FIFRA, 7 U.S.C. § 136a(a), no person in any state may distribute or sell to any person any pesticide that is not registered under FIFRA.

9. Pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), it shall be unlawful for any person in any state to distribute or sell to any person any pesticide that is not registered under Section 3 of the Act or whose registration has been canceled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator of EPA under FIFRA.

10. Section 2(w) of FIFRA, 7 U.S.C. § 136(w), states that the term “producer” means the person who manufactures, prepares, compounds, propagates or processes any pesticide or device or active ingredient used in producing a pesticide, and that the term “produce” means to manufacture, prepare, compound, propagate or process any pesticide or active ingredient used in producing a pesticide.
11. Pursuant to Section 7(a) of FIFRA, 7 U.S.C. § 136e(a), establishments which produce pesticides are required to be registered with the Administrator of EPA.
12. Pursuant to Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), it is unlawful for any person who is a producer to violate any of the provisions of Section 7 of FIFRA.
13. Pursuant to 40 C.F.R. § 152.25, certain pesticides and classes of pesticides are exempt from FIFRA regulation when intended for use, and used, only in the manner specified including “treated articles.” Pursuant to 40 C.F.R. § 152.25(a), a treated article or substance is an article or substance treated with, or containing, a pesticide to protect the article or substance itself (for example, paint treated with a pesticide to protect the paint coating, or wood products treated to protect the wood against insect or fungus infestation), if the pesticide is registered for such use.
14. On March 6, 2000, EPA published “Pesticide Registration (PR) Notice 2000-1” regarding the applicability of the Treated Articles Exemption (40 C.F.R. § 152.25(a)) to antimicrobial pesticides. EPA announced the availability of PR Notice 2000-1 in the Federal Register at 65 Fed. Reg. 7007 (Feb. 11, 2000) (the March 6, 2000 PR Notice 2000-1 corrected the February 3, 2000 PR Notice 2000-1 version). PR Notice 2000-1 provides guidance to the regulated community on the applicability of the treated article exemption.

15. According to PR Notice 2000-1, products that make public health claims extend beyond the protection of the article itself and do not qualify for the Treated Articles Exemption.
16. According to PR Notice 2000-1, a public health claim is made when there is a claim of “antibacterial,” “bactericidal,” or “germicidal” activity or when there are references in any context to activity against germs or human pathogenic organisms implying public health-related protection, rather than limiting the claims to protection of the article itself.
17. PR Notice 2000-1 lists examples of claims or types of claims for a treated article that would lead to a requirement to register the article as a pesticide product. This list is not an all-inclusive listing of unacceptable treated article labeling claims. This list includes the following language: “antibacterial,” “bactericidal,” “effective against E. coli and Staphylococcus,” and “provides a bacteria-resistant surface.”
18. According to PR Notice 2000-1, claims such as “antimicrobial” and “fungistatic” are not consistent with the intent of 40 C.F.R. § 152.25(a) if they are not properly qualified as to their intended non-public health use.

**C. Complainant’s Allegations of Violations**

**COUNT 1**

19. Complainant incorporates by reference herein paragraphs 1 through 18.
20. Respondent is a North Carolina limited liability company.
21. Respondent is a “person” as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s).
22. On or about July 22, 2010, an inspector, duly appointed by the EPA Administrator, inspected Respondent’s facility located at 4276 Helena Street, Granite Falls, North Carolina 28630.

23. At the time of the inspection, Respondent's website on the Internet was [www.mtjamerican.com](http://www.mtjamerican.com).
24. At the time of the inspection, advertising for the Fusion Advantage University Mattress on Respondent's website on the Internet contained the following language: "Bacteria Resistant" and "Anti-Microbial/Anti-Fungal/Bacteriostatic/Virus Barrier."
25. At the time of the inspection, advertising for the Fusion Advantage University Mattress in Respondent's sales brochure contained the following language: "Anti-microbial, anti-fungal, bacteriostatic, virus barrier."
26. Microbes, fungus, bacteria and viruses are pests.
27. Microbes, fungus, bacteria and viruses are microbiological organisms.
28. "Bacteria Resistant" and "Anti-Microbial, Anti-Fungal, Bacteriostatic and Virus Barrier" are pesticidal claims.
29. The claims in the immediately preceding paragraph are public health claims which extend beyond the protection of the article itself.
30. At the time of the inspection, the Fusion Advantage University Mattress was a pesticide.
31. At the time of the inspection, the Fusion Advantage University Mattress was an antimicrobial pesticide because it was intended to disinfect, sanitize, reduce, or mitigate growth or development of microbiological organisms.
32. At the time of the inspection, the inspector collected an invoice which shows that Respondent sold or shipped Fusion University Advantage Mattresses in April or July, 2010.
33. In or about April or July, 2010, Respondent "distributed or sold" the Fusion Advantage University Mattress, as defined by Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg).

34. The Fusion Advantage University Mattress is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.
35. In or about April or July, 2010, the Fusion Advantage University Mattress did not qualify for the Treated Articles Exemption.
36. Therefore, Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by distributing or selling an unregistered pesticide.

**COUNT 2**

37. Complainant incorporates by reference herein paragraphs 1 through 36.
38. At the time of the inspection, advertising for the Clear Safe Detention Mattress on Respondent's website on the Internet contained the following language: "Bacteria Resistant" and "Anti-Microbial/Anti-Fungal/Bacteriostatic/Virus Barrier."
39. At the time of the inspection, advertising for the Clear Safe Detention Mattress in Respondent's sales brochure contained the following language: "Anti-microbial, anti-fungal, bacteriostatic, virus barrier."
40. Microbes, fungus, bacteria and viruses are pests.
41. Microbes, fungus, bacteria and viruses are microbiological organisms.
42. "Bacteria Resistant" and "Anti-Microbial, Anti-Fungal, Bacteriostatic and Virus Barrier" are pesticidal claims.
43. The claims in the immediately preceding paragraph are public health claims which extend beyond the protection of the article itself.
44. At the time of the inspection, the Clear Safe Detention Mattress was a pesticide.

45. At the time of the inspection, the Clear Safe Detention Mattress was an antimicrobial pesticide because it was intended to disinfect, sanitize, reduce, or mitigate growth or development of microbiological organisms.
46. At the time of the inspection, the inspector collected an invoice which shows that Respondent sold or shipped Clear Safe Detention Mattresses in or about June, 2010.
47. In or about June, 2010, Respondent "distributed or sold" the Clear Safe Detention Mattress, as defined by Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg).
48. The Clear Safe Detention Mattress is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.
49. In or about June, 2010, the Clear Safe Detention Mattress did not qualify for the Treated Articles Exemption.
50. Therefore, Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by distributing or selling an unregistered pesticide.

### COUNT 3

51. Complainant incorporates by reference herein paragraphs 1 through 50.
52. At the time of the inspection, Respondent was a "producer" as defined by Section 2(w) of FIFRA, 7 U.S.C. § 136(w), and 40 C.F.R. § 167.3 and 40 C.F.R. § 169.1.
53. At the time of the inspection, Respondent was "producing" pesticides, as that term is defined by Section 2(w) of FIFRA, 7 U.S.C. § 136(w).
54. Section 7(a) of FIFRA, 7 U.S.C. § 136e(a) states that no person shall produce a pesticide in any State unless the establishment in which it is produced is registered with the Administrator.
55. Respondent's establishment is not registered with the Administrator.

56. Therefore, Respondent violated Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

**D. Proposed Penalty**

57. Section 14 of FIFRA, 7 U.S.C. § 136l, in conjunction with the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note, and its implementing regulation, the Civil Monetary Penalty Inflation Adjustment Rule, codified at 40 C.F.R. Part 19, authorizes the issuance of this Complaint for the assessment of a civil penalty up to \$6,500 for each violation of FIFRA. In determining the amount of the penalty, Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), EPA must take into consideration the size of Respondent's business, the effect on the Respondent's ability to continue in business, and the gravity of the violations. Based upon the facts alleged in this Complaint and upon the statutory factors enumerated above, Complainant requests that the Administrator assess against the Respondent a civil administrative penalty of up to \$6,500 for each of the three violations of FIFRA.

**II. NOTICE OF OPPORTUNITY FOR HEARING**

**A. Answer and Request for Hearing**

58. The "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, as amended," 40 C.F.R. Part 22 (Consolidated Rules), govern the procedures of the hearing. A copy of the Consolidated Rules accompanies this Complaint. Under these rules, you have the right to request a formal hearing to contest any material fact set forth in this Complaint and/or to contest the appropriateness of any proposed penalty.



59. You must file a written Answer within 30 days of your receipt of this Complaint (unless a Consent Agreement and Final Order resolving this matter is filed within the 30 days) to avoid being found in default. Default constitutes an admission by you of all facts alleged in the Complaint, waives your right to a hearing, and may result in having a penalty assessed without further proceedings.
60. Your Answer must clearly and directly admit, deny, or explain each of the factual allegations contained in this Complaint with regard to which you have knowledge. If you have no knowledge of a particular fact and so state, the allegation is considered denied. Failures to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of allegation. Your Answer must also briefly state all facts and circumstances, if any, which constitute grounds for a defense and specifically request an administrative hearing (if desired). If you deny any material fact or raise any affirmative defense, you will be considered to have requested a hearing.

Your written Answer to the Complaint should be sent to:

Regional Hearing Clerk  
U.S. EPA, Region 4  
61 Forsyth Street  
Atlanta, Georgia 30303  
Telephone: (404) 562-9511.

A copy of the Answer should also be sent to:

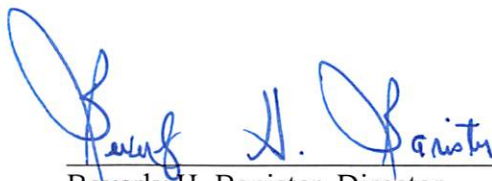
Michiko Kono, Attorney  
U.S. EPA, Region 4  
61 Forsyth Street  
Atlanta, Georgia 30303  
Telephone: (404) 562-9558.

**B. Informal Settlement Conference**

61. Whether or not you request a hearing, you may confer informally with Ms. Michiko Kono at (404) 562-9558 to discuss the facts of this case or the possibility of a settlement. An informal settlement conference does not, however, affect your obligation to file a written Answer to the Complaint.
62. The terms of such an agreement would be embodied in a Consent Agreement and Final Order (CAFO). A CAFO signed by EPA and the Respondent would be binding as to all terms and conditions specified therein upon signature by the EPA Regional Judicial Officer.
63. Please be advised that after the Complaint is issued, pursuant to Section 22.8 of the Consolidated Rules, any *ex parte* discussion of the merits of any action with the Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer, Presiding Officer, or any person likely to advise these officials in the decision of the case is prohibited. *Ex Parte* discussion as used herein means communicating to any of the above officials by one party to a proceeding without notice to and in the absence of the other party.

3-27-2015

Date



Beverly H. Banister, Director  
Air, Pesticides and Toxics  
Management Division  
U.S. Environmental Protection Agency, Region 4

**CERTIFICATE OF SERVICE**

I certify that the foregoing Civil Complaint and Notice of Opportunity for Hearing, in the Matter of MTJ American, LLC, Docket No. FIFRA-04-2014-3009, and a copy were filed with the Regional Hearing Clerk, and a copy was mailed to the addressees below, in the manner indicated below.

**Addressees:**

Law Offices of Matthew K. Rogers, PLLC  
P.O. Box 9096  
Hickory, North Carolina 28603

Certified Mail, Return Receipt  
Requested

MTJ American, LLC  
P.O. Box 826  
Granite Falls, NC 28630

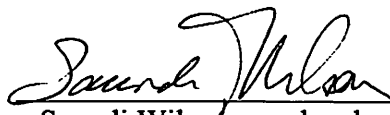
Certified Mail, Return Receipt  
Requested

Mark R. Kiser  
5225 Jones Park Dr.  
Granite Falls, NC 28630

Certified Mail, Return Receipt  
Requested

A copy of 40 C.F.R. Part 22 – Consolidated Rules of Practice were mailed with the copy of the Complaint and Notice of Opportunity for Hearing to the addressees above.

March 30, 2015  
Date

  
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Saundi Wilson, paralegal specialist  
U.S. EPA Region 4