

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CA 94105

FILED

2008 FEB 27 PM 4:53

U.S. EPA, REGION IX
REGIONAL HEARING CLERK

In the matter of:

ATEN Technology, Inc.
d/b/a IOGEAR, Inc.

Respondent

) Docket No. FIFRA-09-2008-0003
)
) CONSENT AGREEMENT
) and
) FINAL ORDER PURSUANT TO
) SECTIONS 22.13 AND 22.18
)
)
)
)

I. CONSENT AGREEMENT

Complainant, the Director of the Communities and Ecosystems Division, United States Environmental Protection Agency, Region 9, ("EPA") and Respondent ATEN Technology, Inc., on behalf of its wholly-owned subsidiary IOGEAR, Inc., (hereafter "IOGEAR" or "Respondent") seek to settle this case and consent to the entry of this Consent Agreement and Final Order ("CAFO").

A. APPLICABLE STATUTES AND REGULATIONS

1. This administrative proceeding is initiated pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136, et. seq. (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.

B. AUTHORITY AND PARTIES

2. IOGEAR is a California corporation. Respondent is a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and as such is subject to FIFRA and the regulations promulgated thereunder.

3. The authority to take action under Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), is vested in the Administrator of the EPA ("Administrator"). By EPA Delegation Order Number 5-14, dated May 11, 1994, the Administrator delegated to the Regional Administrator of EPA Region IX the authority to commence administrative proceedings under Section 14 of FIFRA and to sign consent agreements memorializing settlements in such proceedings. By EPA Regional Order Number R9 1255.08 dated June 9, 2005, the Regional Administrator of EPA Region IX redelegated this authority to the Director, the Deputy Director, the Associate Director for Agriculture, and the Manager of the Pesticides Office of the Communities and Ecosystems Division. The Associate Director for Agriculture of the Communities and Ecosystems Division has the authority to commence and settle an enforcement action in this matter.

4. Pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), it shall be unlawful for any person to distribute or sell to any person any pesticide that is not registered under section 3 of FIFRA, 7 U.S.C. § 136a, or whose registration has been canceled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator under FIFRA. Section 2(gg), of FIFRA, 7 U.S.C. § 136(gg), states that "to distribute or sell" means 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.

5. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), states that the term "pesticide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), states that the term "pest" means (1) any insect, rodent, nematode, fungus, weed, or (2) 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 FIFRA section 25 (c)(1).

6. Section 152.25(a), 40 C.F.R. § 152.25(a), determines that certain treated articles or substances are of a character not requiring regulation under FIFRA, and are therefore exempt from all provisions of FIFRA when intended for use, and used, only in certain manners. One such listed use includes 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.

7. The EPA further clarified the interpretation of Section 125.25(a) in a Pesticide Registration (PR) Notice and a Federal Register Notice. Clarification of Treated Article Exemption; Availability of Draft PR notice, 63 Fed. Reg. 19256 (April 17, 1998), and Pesticide Registration Notice 2000-1. This Federal Register notice states that unregistered products may be marketed provided that: (1) no implied or explicit public health claims of any kind are made; (2) the claims concerning the presence of a pesticide in the treated article are limited to protection of the treated article only; (3) when such claims involve antibacterial properties, (a) the words "antibacterial," "antimicrobial," or "germicidal," or related terms, are not part of the name of the product, and (b) the permissible claims are qualified by statements indicating that the presence of the antibacterial properties does not protect users and others against disease and that users should follow prudent hygienic measures, i.e., cleaning and washing the article; and (4) the pesticide in a treated article is present only as a result of using a pesticide product which is registered under FIFRA and labeled for use in treating the article in question. 63 Fed. Reg. at 19257.

C. COMPLAINANT'S ALLEGATIONS

8. At the times relevant to this CAFO, the Wireless Laser Mouse with nano shield coating (model number GME227RW6), Laser Travel Mouse with Nano Coating Technology (model number GME226AW6), Wireless RF Keyboard and Mouse Combo (model number GKM541RA), and Wireless RF Keyboard and Mouse Combo (model number GKM531RA) (hereafter, these four products are the “nano products”) labeling contained pesticidal claims.

9. In the marketing of the nano products, IOGEAR has made both implicit and explicit public health claims and pesticidal claims. Statements by IOGEAR include claims that the nano coating has “mechanisms to deactivate enzymes and proteins to prevent bacteria from surviving on the surface of the product” and “the compound has been tested and proven effective against various bacteria.”

10. Each of the nano products is a “pesticide” as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u). Each of the nano products is not a registered pesticide. In 2007, Respondent distributed or sold the nano products, as the term “to distribute or sell” is defined in Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), to various persons on 40 separate occasions, in violation of section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

D. RESPONDENT'S ADMISSIONS

11. 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 Section I.C. of this CAFO; (iii) consents to any and all conditions specified in this CAFO; (iv) agrees to pay, and consents to the assessment of, the civil administrative penalty under Section I.E. of this

CAFO; (v) waives any right to contest the allegations contained in Section I.C. of this CAFO; and (vi) waives the right to appeal the proposed final order contained in this CAFO.

E. CIVIL ADMINISTRATIVE PENALTY

12. Respondent consents to the assessment of a penalty in the amount of **TWO HUNDRED EIGHT THOUSAND DOLLARS (\$208,000)** as final settlement and complete satisfaction of the civil claims against Respondent arising from the facts alleged in Section I.C. of the CAFO and under the Act, as alleged in Section I.C. of the CAFO.

13. Respondent shall pay the assessed penalty no later than thirty (30) days from the effective date of this CAFO.

14. The civil penalty shall be paid by certified or cashier's check, payable to "Treasurer, United States of America," and sent by certified mail, return receipt requested, to

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

The check should note the case title and docket number, and a transmittal letter, indicating Respondent's name, and this case docket number, must accompany the payment. When payment is mailed to the above address, Respondent shall send a copy of the check and transmittal letter to:

- a) Regional Hearing Clerk
Office of Regional Counsel (ORC-1)
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, California 94105
- b) Bill Lee
Pesticides Program
Communities and Ecosystems Division (CED-5)

U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, California 94105

15. In the event that Respondent fails to pay the civil administrative penalty assessed above by its due date, Respondent shall pay to Complainant an additional stipulated penalty in the amount of ONE **HUNDRED DOLLARS (\$100)** for each day the payment is late. Upon Complainant's written demand, payment shall immediately become due and payable.

16. Respondent's failure to pay in full the civil administrative penalty by its due date also 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. Section 13, Subparts C and H.

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

F. CERTIFICATION OF COMPLIANCE

17. In executing this CAFO, Respondent certifies (1) that it is no longer distributing or selling Wireless Laser Mouse with nano shield coating (model number GME227RW6) with pesticidal claims; (2) that it is no longer distributing Laser Travel Mouse with Nano Coating Technology (model number GME226AW6) with pesticidal claims; (3) that it is no longer distributing Wireless RF Keyboard and Mouse Combo (model number GKM541RA) with pesticidal claims; (4) that it is no longer distributing Wireless RF Keyboard and Mouse Combo (model number GKM531RA) with pesticidal claims; and (5) that it has complied with all other FIFRA requirements at all facilities under its control.

G. RETENTION OF RIGHTS, BINDING EFFECT, ETC.

18. Issuance of this CAFO does not constitute a waiver by EPA of its right to enforce the terms of this CAFO or to seek other civil or criminal relief for violations, if any, of any provision of federal law not specifically settled by this Consent Agreement. Nothing in this CAFO shall relieve Respondent of its duty to comply with all applicable provisions of the Act and other Federal, state or local laws or statutes.

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

20. Except as set forth in Paragraph 16 above, each party shall bear its own costs, fees, and disbursements in this action.

21. For the purposes of state and federal income taxation, Respondent shall not claim a deduction for any civil penalty payment made pursuant to this CAFO.

22. This Consent Agreement constitutes the entire agreement between the Respondent and EPA. This Consent Agreement and Final Order is for the purpose of fully and finally settling the civil claims against Respondent arising from the facts alleged in section I.C. of this CAFO. Full payment of the civil penalty and any applicable interest charges or late fees or penalties as set forth in this Consent Agreement and the Final Order shall constitute full settlement and satisfaction of civil penalty liability against Respondent for the violations alleged in Section I.C. of this CAFO.

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

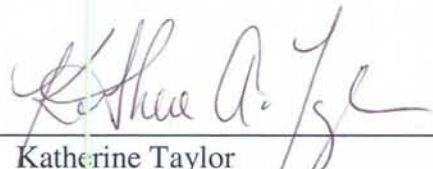
24. The undersigned representatives of each party to this Consent Agreement certify that each is duly authorized by the party whom he or she represents to enter into the terms and bind that party to it.

ATEN TECHNOLOGY, Inc.:

Date: 1/17/08 By: 
Sampson Yang
CEO
ATEN Technology, Inc.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

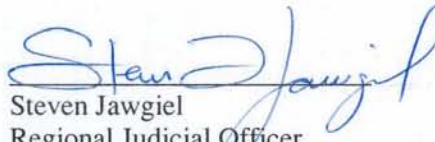
Date: Feb. 25, 2008

By: 
Katherine Taylor
Associate Director for Agriculture
Communities and Ecosystems Division
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105

II. FINAL ORDER

IT IS HEREBY ORDERED that this Consent Agreement and Final Order be entered and that Respondent shall pay a civil administrative penalty in the amount of **TWO HUNDRED EIGHT THOUSAND DOLLARS (\$208,000)**, in accordance with the terms set forth in the Consent Agreement. This Final Order, once signed, shall be effective immediately upon it being filed with the Regional Hearing Clerk.

Date: 02/27/08


Steven Jawgiel
Regional Judicial Officer
U.S. EPA, Region IX

CERTIFICATION / CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing Consent Agreement and Final Order, Docket No FIFRA-9-2008- has been filed with the Region 9 Hearing Clerk and that a copy was sent certified mail (7005 3110 0002 8247 4873), return receipt requested, to:

Sampson Yang, CEO
IOGEAR, Inc.
23 Hubble Drive
Irvine, CA 92618

2-29-08

DATE

for

Steven Arnsay
Danielle Carr
Regional Hearing Clerk
U.S. Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105