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

In the Matter of:

ABC Corporation,

Respondent

Docket No. FIFRA-09-2007-0030

COMPLAINT AND NOTICE OF
OPPORTUNITY FOR HEARING

AUTHORITY AND PARTIES

This is a civil administrative action brought pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136l(a), for the assessment of a civil administrative penalty against ABC Corporation for the sale or distribution of a misbranded pesticide in violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

Complainant is the Associate Director for Agriculture of the Communities and Ecosystems Division, United States Environmental Protection Agency ("EPA"), Region IX. The Administrator of EPA delegated to the Regional Administrator of Region IX the authority to bring this action under FIFRA by EPA Delegation Order Number 5-14, dated May 11, 1994. The Regional Administrator

of Region IX further delegated the authority to bring this action under FIFRA to the Associate Director for Agriculture of the Communities and Ecosystems Division by EPA Regional Order Number 1255.08 CHG1, dated June 9, 2005.

Respondent is ABC Corporation ("Respondent").

GENERAL ALLEGATIONS

1. Respondent, a Hawaii corporation, is a "person" as that term is defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and is subject to FIFRA and the implementing regulations promulgated thereunder.
2. Respondent operates a facility (the "Facility") located at 94-085 Leonui Street, Waipahu, Hawaii.
3. Respondent engages in the distribution or sale of various cleaning products at the Facility.
4. "[T]o 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." 7 U.S.C. § 136(gg).
5. At all times relevant to this action, Respondent produced and sold a product named "Fresh and Clean" (also known as Lonza Formulation S-18, EPA Registration No. 6836-77) under a supplemental distribution agreement with Lonza, Inc. of Allendale, New Jersey.
6. "Fresh and Clean" is intended to kill or prevent growth of bacteria and viruses.
7. A "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. . . ." 7 U.S.C. § 136(t).
8. Bacteria and viruses are "pests" as that term is defined in Section 2(t) of FIFRA, 7 U.S.C.

§ 136(t).

9. A “pesticide” means “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.” 7 U.S.C. § 136(u) and 40 C.F.R. § 152.3(s).
10. “Fresh and Clean” is a “pesticide” as that term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).
11. At all times relevant to this action, the labeling on “Fresh and Clean” claimed that the product was a “concentrated economical germicidal detergent” and effective against various bacteria, including *Pseudomonas aeruginosa*.
12. A pesticide is “misbranded” if “its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular.” 7 U.S.C. § 136(q)(1)(A).
13. In or about August 2005, EPA tested a batch of “Fresh and Clean” collected from the Facility for biological efficacy as part of its antimicrobial testing program.
14. EPA testing of “Fresh and Clean” in August 2005 indicated that “Fresh and Clean” was ineffective against *Pseudomonas aeruginosa*.
15. At all times relevant to this action, “Fresh and Clean” was “misbranded” as that term is defined in Section 2(q)(1)(D) of FIFRA, 7 U.S.C. § 136(q)(1)(D).
16. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), makes it unlawful for any person to distribute or sell to any person any pesticide that is misbranded.

ALLEGED VIOLATIONS

COUNT 1: Sale or Distribution of a Misbranded Pesticide, 7 U.S.C. § 136j(a)(1)(E).

17. Paragraphs 1 through 16 above are hereby incorporated in this Count 1 by reference as if

the same were set forth herein in full.

18. On or about March 4, 2005, Respondent distributed or sold the pesticide product "Fresh and Clean" to Halekulani of Hawaii.

19. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling the pesticide product "Fresh and Clean" to Halekulani on or about March 4, 2005.

COUNT 2: Sale or Distribution of a Misbranded Pesticide, 7 U.S.C. § 136j(a)(1)(E).

20. Paragraphs 1 through 16 above are hereby incorporated in this Count 2 by reference as if the same were set forth herein in full.

21. On or about March 7, 2005, Respondent distributed or sold the pesticide product "Fresh and Clean" to Hawaii LDS Temple of Laie, Hawaii.

22. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by distributing or selling the pesticide product "Fresh and Clean" to Hawaii LDS Temple on or about March 7, 2005.

COUNT 3: Sale or Distribution of a Misbranded Pesticide, 7 U.S.C. § 136j(a)(1)(E).

23. Paragraphs 1 through 16 above are hereby incorporated in this Count 3 by reference as if the same were set forth herein in full.

24. On or about March 8, 2005, Respondent distributed or sold the pesticide product "Fresh and Clean" to Koolau Baptist Academy of Kaneohe, Hawaii.

25. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling the pesticide product "Fresh and Clean" to Koolau Baptist Academy on or about March 8, 2005.

COUNT 4: Sale or Distribution of a Misbranded Pesticide, 7 U.S.C. § 136j(a)(1)(E).

26. Paragraphs 1 through 16 above are hereby incorporated in this Count 4 by reference as if the same were set forth herein in full.
27. On or about March 8, 2005, Respondent distributed or sold the pesticide product "Fresh and Clean" to YMCA of Kailua, Hawaii.
28. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling the pesticide product "Fresh and Clean" to YMCA on or about March 8, 2005.

COUNT 5: Sale or Distribution of a Misbranded Pesticide, 7 U.S.C. § 136j(a)(1)(E).

29. Paragraphs 1 through 16 above are hereby incorporated in this Count 5 by reference as if the same were set forth herein in full.
30. On or about March 8, 2005, Respondent distributed or sold the pesticide product "Fresh and Clean" to Waipahu High School of Waipahu, Hawaii.
31. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling the pesticide product "Fresh and Clean" to Waipahu High School on or about March 8, 2005.

COUNT 6: Sale or Distribution of a Misbranded Pesticide, 7 U.S.C. § 136j(a)(1)(E).

32. Paragraphs 1 through 16 above are hereby incorporated in this Count 6 by reference as if the same were set forth herein in full.
33. On or about March 10, 2005, Respondent distributed or sold the pesticide product "Fresh and Clean" to Waipahu Hongwanji Mission of Waipahu, Hawaii.
34. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by

distributing or selling the pesticide product "Fresh and Clean" to Waipahu Hongwanji Mission on or about March 10, 2005.

COUNT 7: Sale or Distribution of a Misbranded Pesticide, 7 U.S.C. § 136j(a)(1)(E).

35. Paragraphs 1 through 16 above are hereby incorporated in this Count 7 by reference as if the same were set forth herein in full.
36. On or about March 10, 2005, Respondent distributed or sold the pesticide product "Fresh and Clean" to Moanaloa Inter School Cafeteria of Honolulu, Hawaii.
37. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling the pesticide product "Fresh and Clean" to Moanaloa Inter School Cafeteria on or about March 10, 2005.

COUNT 8: Sale or Distribution of a Misbranded Pesticide, 7 U.S.C. § 136j(a)(1)(E).

38. Paragraphs 1 through 16 above are hereby incorporated in this Count 8 by reference as if the same were set forth herein in full.
39. On or about March 10, 2005, Respondent distributed or sold the pesticide product "Fresh and Clean" to Daiei of Waipahu, Hawaii.
40. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling the pesticide product "Fresh and Clean" to Daiei on or about March 10, 2005.

COUNT 9: Sale or Distribution of a Misbranded Pesticide, 7 U.S.C. § 136j(a)(1)(E).

41. Paragraphs 1 through 16 above are hereby incorporated in this Count 9 by reference as if the same were set forth herein in full.
42. On or about March 11, 2005, Respondent distributed or sold the pesticide product "Fresh

and Clean” to Max’s Gym of Honolulu, Hawaii.

43. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling the pesticide product “Fresh and Clean” to Max’s Gym on or about March 11, 2005.

COUNT 10: Sale or Distribution of a Misbranded Pesticide, 7 U.S.C. § 136j(a)(1)(E).

44. Paragraphs 1 through 16 above are hereby incorporated in this Count 10 by reference as if the same were set forth herein in full.
45. On or about March 11, 2005, Respondent distributed or sold the pesticide product “Fresh and Clean” to Park Shore Hotel of Honolulu, Hawaii.
46. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling the pesticide product “Fresh and Clean” to Park Shore Hotel on or about March 11, 2005.

PROPOSED CIVIL PENALTY

Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), and the Civil Monetary Penalty Inflation Adjustment Rule at 40 C.F.R. Part 19, which implements the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, authorize the assessment of a civil administrative penalty of up to \$6,500 for each violation of FIFRA after March 15, 2004. For purposes of determining the amount of the civil penalty to be assessed, Section 14(a)(4) requires EPA to consider the size of Respondent's business, the effect on Respondent's ability to continue in business and the gravity of the violations alleged. Accordingly, Complainant requests that after consideration of these statutory assessment factors, the Administrator assess against Respondent a civil administrative penalty of up to \$6,500 for each violation of the Act, as set forth above.

NOTICE OF OPPORTUNITY FOR HEARING

Answer and Administrative Hearing

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. Part 22, govern these proceedings. A copy of the Consolidated Rules of Practice accompanies this Complaint.

Under these rules, you have the right to request a hearing. Any request for a hearing must be in writing and must be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, California within thirty (30) days of receipt of this Complaint. In the event that you intend to request a hearing to contest any material facts set forth in the Complaint, to dispute the amount of the penalty proposed in the Complaint, or to assert a claim for judgment as a matter of law, you must file a written Answer to this Complaint with the Regional Hearing Clerk at the above address within thirty (30) days of receipt of this Complaint. A copy of your Answer should also be sent to:

David H. Kim
Assistant Regional Counsel (ORC-3)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105

Your Answer should clearly and directly admit, deny, or explain each factual allegation contained in this Complaint with regard to which you have any knowledge. The Answer should state: (1) the circumstances or arguments which are alleged to constitute the grounds of defense; (2) a concise statement of the facts which you intend to place at issue in the hearing; and (3) whether a hearing is requested. Hearings held in the assessment of the civil penalties will be

conducted in accordance with the provisions of the Administrative Procedures Act, 5 U.S.C. §§ 551 et seq., and the Consolidated Rules of Practice. 40 C.F.R. Part 22.

If you fail to file an Answer to this Complaint with the Regional Hearing Clerk within thirty (30) days of receipt, such failure shall constitute an admission of all facts alleged in the Complaint and a waiver of your right to a hearing under Section 113(d)(2). The proposed penalty shall become fixed as the amount owing without further proceedings sixty (60) days after a final order issued upon default. Payment of the penalty shall be in accordance with Title 11 of the United States Code (the Bankruptcy Code) unless your bankruptcy case has been dismissed at the time payment becomes due.

Settlement Conference

EPA encourages all parties against whom civil penalties are proposed to pursue the possibilities of settlement through informal conferences. Therefore, whether or not you request a hearing, you may confer informally with the Agency concerning the alleged violations or the amount of the proposed penalty. You may wish to appear at the conference yourself or be represented by counsel. If a settlement is reached, it shall be finalized by the issuance of a written Consent Agreement and Final Order by the Regional Judicial Officer, EPA, Region IX. The issuance of such Consent Agreement and Final Order shall constitute a waiver of your right to request a hearing of any matter stipulated to therein.

To explore the possibility of settlement in this matter, address your correspondence to:

David H. Kim
Assistant Regional Counsel (ORC-3)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105

His telephone number is (415) 972-3882.

Instead of requesting an informal settlement conference or filing an Answer requesting a hearing, you may choose to agree to the amount of the proposed penalty. In order to do this, please contact Mr. Kim to arrange for the preparation of a Consent Agreement and Final Order.

After this Complaint is issued, the Consolidated Rules of Practice prohibit ex parte (unilateral) discussion of the merits of any action with the EPA Regional Administrator, Chief Judicial Officer, Administrative Law Judge, or any person likely to advise these officials in the decision of this case.

Dated at San Francisco, California on this 25 day of September, 2007.

A handwritten signature in black ink, appearing to read "Katherine A. Taylor", written over a horizontal line.

Katherine A. Taylor
Associate Director for Agriculture
Communities and Ecosystems Division
USEPA, Region IX

CERTIFICATE OF SERVICE

I certify that the original and one copy of the foregoing Complaint and Notice of Opportunity for Hearing was hand delivered to:

The Regional Hearing Clerk
United States Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105

and that a true and correct copy of the Complaint; the Consolidated Rules of Practice, 40 C.F.R. Part 22; and the FIFRA Enforcement Response Policy were placed in the United States Mail, certified mail (7006 0810 0003 9306 2793 and 7006 0810 0003 9306 2809), return receipt requested, addressed to the following:

Gavin Morisada
President
ABC Corporation
94-085 Leonui Street
Waipahu, HI 96797

Stanley W. Landfair, Esq.
McKenna Long & Aldridge LLP
101 California Street, 41st Floor
San Francisco, CA 94111

Dated: SEP 26 2007

By: 

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