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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
United Global Trading, Inc.,	)	**Docket No. FIFRA-04-2011-3020**
	)	
	)	**Dated: February 28, 2014**
Respondent.	)	

INITIAL DECISION AND ORDER ON COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY AND PENALTY

I. Procedural Background

This proceeding was initiated on May 10, 2011 by the Director of Air, Pesticides and Toxics Management Division, United States Environmental Protection Agency, Region 4 ("Complainant" or "EPA") filing a Complaint against the Respondent pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (the "Act" or "FIFRA"), 7 U.S.C. § 1361(a). The Complaint charges Respondent, as owner and/or operator of United Global Trading, with unlawful distribution or sale of unregistered pesticide in violation of Section 12(a)(1)(A) of FIFRA. Complainant proposes a total penalty of $55,900 for the alleged violations.

After receiving the Complaint, Mr. Augustine Paldano, president of Respondent United Global Trading, Inc., telephoned Dawn Johnson, an Environmental Protection Specialist at EPA Region 4, to ask what he should do regarding the Complaint. Ms. Johnson informed Respondent that he needed to file an answer with the Hearing Clerk. On June 15, 2011, Mr. Paldano faxed her a letter ("Answer") in response to the Complaint. She was unable to reach him by telephone to remind him that he needed to file the Answer directly with the Hearing Clerk. On June 27, 2011, Mr. Paldano contacted EPA's attorney Keri Powell, and informed her that he had attempted to fax his Answer to EPA but the transmission had been unsuccessful. Ms. Powell invited him to join in on a conference call on June 30, 2011. The parties discussed the proposed penalty. Mr. Paldano indicated that within two to three weeks, he would provide tax returns for the past three years to support his inability to pay claim. He also stated he would file an answer with the hearing clerk by certified mail later that day. The telephone conference was the last contact between Respondent and EPA.

On October 30, 2012, Complainant filed a Motion for Default under 40 C.F.R. § 22.17

(a), which provides that "[a] party may be found to be in default . . . after motion, upon failure to file a timely Answer to the Complaint," on grounds that Respondent neither filed and Answer nor a motion for an extension of time to file an Answer. Respondent did not file a response to Complainant's Motion for Default. On April 2, 2013, an Order Denying Complainant's Motion for Default was issued by the Regional Judicial Officer, on the basis that the June 15, 2011 letter from Respondent served as an answer to the complaint, where Respondent made a timely and clear response to the complaint, contacted the Agency and took steps to file his response, but sent his document via facsimile to the incorrect fax machine.

On May 17, 2013, the undersigned was designated to preside in this matter. A Prehearing Order was issued on May 20, 2013 directing Complainant to file a prehearing exchange by July 5, 2013, and directing Respondent to file a prehearing exchange by August 2, 2013. Complainant timely filed its Prehearing Exchange, but to date Respondent has not filed any prehearing exchange.

On August 27, 2013, Complainant filed a Motion for Accelerated Decision on Liability and Penalty Amount ("Motion" or "Mot."), with supporting brief ("Brief"), seeking accelerated decision in its favor as to Respondent's liability for the alleged violations and as to a penalty of $55,900 for the violations. Complainant asserts that Respondent admitted all statements of fact contained in the Complaint, and therefore no issues of material fact exist with respect to Respondent's liability. To date, Respondent has not filed any response to the Motion. Complainant's brief describes extensive efforts Complainant has taken to locate and communicate with Respondent, but Respondent has not had any contact with EPA since a teleconference between the parties on June 30, 2011. Brief at 3-4. Respondent also has not had any contact with the Office of Administrative Law Judges.

II. Standards for Accelerated Decision

The applicable procedural rules in 40 C.F.R. Part 22 ("Rules of Practice" or "Rules"), provide at Section 22.20(a) as follows:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a).

The standard for accelerated decision under 40 C.F.R. § 22.20 is similar to that of summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). *Puerto Rico Aqueduct and Sewer Authority v. U.S. EPA,* 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied,* 513 U.S. 1148 (1995)("Rule 56 is the prototype for administrative summary judgment procedures, and the jurisprudence that has grown up around Rule 56 is therefore, the most fertile source of information about administrative summary judgment.").

The party moving for summary judgment bears the initial burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330-31 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A factual dispute is material where it "might affect the outcome of the suit under the governing law" and is genuine "if the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party." *Anderson* at 248. The movant must show that a material fact cannot be genuinely disputed by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the . . . presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." FRCP 56(c)(1). When the non-moving party has asserted an affirmative defense, the moving party must show that there is an absence of facts present in the record to support the defense in order to dispose of that defense. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002) (quoting *BWX Techs. Inc.*, 9 E.A.D. 61, 78 (EAB 2000)).

"In determining whether a genuine issue of material fact exists, a court must view the facts in the light most favorable to the non-moving party and make all reasonable inferences in that party's favor." *Gentile v. Nulty*, 769 F. Supp. 2d 573, 577 (S.D.N.Y. 2011).

Once the complainant has established a prima facie case as to liability and penalty, the burden of presentation shifts to the respondent both to present defenses to liability and to present "any response or evidence with respect to the appropriate relief." 40 C.F.R § 22.24. The respondent has the burdens of presentation and persuasion for any affirmative defenses. 40 C.F.R § 22.24(a). As to circumstances where the opposing party fails to respond to a motion for accelerated decision, the Rules of Practice state that "[a]ny party who fails to respond within the designated period waives any objection to the granting of the motion." 40 C.F.R § 22.16(b); see also, FRCP 56(e)(3)("If a party . . . fails to properly address another party's assertion of fact as required by Rule 56(c), the court may: . . . consider the fact undisputed for purposes of the motion" or "grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it").

Where the record supports a finding that no genuine issue of material fact exists with respect to either liability or the penalty, particularly where the respondent did not respond to the motion for accelerated decision, the motion may be granted as to the penalty. *Lyons Fuel, Inc.*, EPA Docket No. CAA-I-97-1001, 1998 EPA ALJ LEXIS 101 (ALJ, Jan. 21, 1998)(Order Granting Accelerated Decision on Penalty where respondent did not file any documents in its prehearing exchange nor respond to complaint's motion for accelerated decision); *Bonanza Valley Aviation, Inc.*, EPA Docket No. I F & R VII-1309C-97P, 1998 EPA ALJ LEXIS 70 (ALJ, Nov 20, 1998)(Order Granting Accelerated Decision on Liability and Penalty where respondent did not respond to motion). As stated by the Environmental Appeals Board, "a person is not entitled to an evidentiary hearing unless that person puts a material fact at issue." *Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 792, 1997 EPA App. LEXIS 4, *25 (EAB 1997).

III. Service of the Motion on Respondent

A. Facts

Some uncertainty exists as to whether Respondent actually received Complainant's Motion. Complainant's Certificate of Service indicates the Motion was sent via UPS, Next Day Air to Respondent at: Augustine Paldano, 16752 SW 5th Way, Weston, FL 33326-1545. This is reported to be the home address of Mr. Paldano, President and Registered Agent of United Global Trading, Inc., and according to the Certificate of Service, is one of the two addresses to which the Complaint was sent and received by Respondent in May 2011.[1] The Complaint was also sent to Respondent's business or facility address: 8841 NW 102nd Street, Medley, FL 33178. A copy of the green card confirming Respondent's receipt of the Complaint at the home address was provided to this office. Complaint, Attachment A.

Respondent's Answer was submitted on company letterhead with the company's business address at the top: 8841 NW 102nd Street, Medley, FL 33178. Importantly, the Rules of Practice mandate the following:

> The first document filed by any person shall contain the name, address, and telephone number of an individual authorized to receive service relating to the proceeding. Parties shall promptly file any changes in this information with the Regional Hearing Clerk, and serve copies on the Presiding Officer and all parties to the proceeding. If a party fails to furnish such information and any changes thereto, service to the party's last known address shall satisfy the requirements of paragraph (b)(2) of this section and § 22.6.

40 C.F.R. § 22.5(c)(4) (emphasis added).

However, in an email dated April 26, 2013 to my office staff, Complainant's counsel reported that when, in October 2012, Complainant's Motion for Default Order was sent by certified mail, with return receipt requested, to the same two addresses as in the Complaint, no confirmation of receipt by Respondent was returned to Complainant. Similarly, in April and May 2013, several documents that the undersigned's office sent to Respondent at both of those addresses were returned undelivered. In a May 16, 2013, email to this office, Complainant's counsel reported "Our additional search revealed that the company is not doing business at its previous address," i.e., 8841 NW 102nd Street, Medley, FL 33178. In an email dated May 16, 2013, Complainant's counsel provided this office with the two best addresses her research was able to find: one was the address to which the pending Motion was sent and the other was an address for Mr. Paldano as registered agent for RMX Global, a new company he had started. Nevertheless, also returned to this office as undeliverable was mail sent to Mr. Paldano at both of

[1] The Complaint was sent to Augustine Paldano, 16752 SW 5th Way, Fort Lauderdale, FL 33326. Despite the different city name, this appears to be the same location.

those addresses, as well as mail sent to a forwarding address provided by the U.S. Postal Service.

B. Discussion

Neither EPA's Rules of Practice nor the Constitution's guarantee of due process require proof of actual receipt of the Motion. All that is required to meet due process is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also Dusenbery v. United States.*, 534 U.S. 161, 171 (2002)("our cases have never required actual notice"); *Scotts-Sierra Crop Protection Company*, Docket No. FIFRA-09-0864-C-95-03, 1997 EPA ALJ LEXIS 144 (ALJ, Feb. 11, 1997) ("Even where efforts to give personal notice are unsuccessful, they may be sufficient to satisfy notice requirements.")

Respondent having requested a hearing in this matter, certain burdens fall squarely on Respondent in order to sustain its participation in the case. One fundamental obligation, applicable to all parties in the litigation, is to provide a current mailing address, and to "promptly file any changes to this information," so that documents in the proceeding can be served upon it. 40 C.F.R. § 22.5(c)(4). As noted above, the Rules of Practice further provide that "[i]f a party fails to furnish such information and any changes thereto, service to the party's last known address shall satisfy" the service requirements of the Rules. *Id.* It is clear that Respondent failed to satisfy this requirement and thus if Respondent has not received important documents served upon it in this case, such as the pending Motion (and the prior Prehearing Order), it is the fault of Respondent and Respondent bears the consequences thereof.[12] See *Dow Chemical Company*, Docket No. EPCRA-09-99-0030; FIFRA-09-99-025; 2000 EPA ALJ LEXIS 60, 2-3 (ALJ, August 7, 2000) (Default Order issued against Respondent for failure to file prehearing exchange, despite assertion that Respondent's counsel was unaware of the deadline due to his change of address). In the present case, Respondent's Answer provided its business address at the time, but when that address became obsolete, Respondent failed to provide an updated address as required by the Rules. Complainant, on the other hand, appears to have demonstrated due diligence in attempting to locate and communicate with Respondent. Although the address to which Complainant sent Respondent's copy of the Motion was not the last address provided by Respondent in this litigation, that last address was known with certainty to be defunct, whereas Complainant's research seems to have indicated that the address known to have been

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[2] Prior to the 1999 amendments to the Rules of Practice, the comparable provision stated: "A party who fails to furnish such information and any changes thereto shall be deemed to have waived his right to notice and service under these rules." 40 C.F.R. § 22.05(c)(4) (1998). See *Environmental Resource Services, Inc.*, TSCA Docket No. VII-93-T-068A, 1990 EPA ALJ LEXIS 28, *4 (ALJ, July 31, 1990). EPA noted in the preamble to the final rule amending this provision that "the consequences of any failure to update this information will be commensurate with the severity of the error." Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Final Rule, 64 Fed. Reg. 40138, 40147, July 23, 1999.

Respondent's home might still be current. For circumstances such as this, the "last known address" in Section 22.5(c)(4) does not mean the last address provided by that party. It is concluded that Complainant's Motion was satisfactorily served upon Respondent pursuant to 40 C.F.R. §§ 22.5(b)(2) and (c)(4).

IV. Findings of Fact

Respondent admits all the facts supporting all the counts alleged against it, in that Respondent's Answer states, "We agree with the statement of facts outlined on section B reference count [sic] 5 to 19." Answer ¶ 1. The Answer further states "We agree with all the facts stated from count 1 to 9." Answer ¶ 2. Respondent did not file a prehearing exchange nor any opposition to the pending Motion. Thus, the undersigned makes the following Findings of Fact. These findings are based on the factual allegations in the Complaint, supported by documents in Complainant's prehearing exchange, admitted by Respondent's one page Answer, and uncontroverted by Respondent who did not file a prehearing exchange nor reply to the pending Motion.

1. Respondent is United Global Trading, Inc., which was located at 8841 102nd Street, Medley, Florida 33178 during the periods of time relevant to the allegations in the Complaint. Complaint ¶ 3; Answer ¶¶ 1 and 2.

2. During the time periods relevant to the allegations in the Complaint, Respondent is or was a Florida corporation doing business in Florida. Complaint ¶ 5; Answer ¶¶ 1 and 2; Complainant's Prehearing Exchange Exhibit ("C's PHE Ex") 27.

3. On or about March 14, 2007, an officer or employee of the State of Florida, duly designated by the Administrator of the U.S. Environmental Protection Agency, conducted an inspection of the Caribbean Supercenter, located at 511 West Colonial Drive, Orlando Florida, 32087, pursuant to FIFRA Sections 8(b) and 9(a), 7 U.S.C. § 136f(b) and 136g(a). Complaint ¶ 7; Answer ¶¶ 1 and 2; C's PHE Exs 5-12.

4. During the inspection on or about March 14, 2007, the inspector observed that the Caribbean Supercenter was offering for sale containers of Royalty Black Disinfectant. Complaint ¶ 8; Answer ¶¶ 1 and 2; C's PHE Exs 5-12.

5. During the inspection on or about March 14, 2007, the inspector documented in inspection reports that the label on the containers of Royalty Black Disinfectant did not include the following information:

a. a product registration number,
b. a producing establishment number,
c. an ingredient statement, and
d. directions for use.

Complaint ¶ 9; Answer ¶¶ 1 and 2; C's PHE Exs. 8, 10, 11. see, C's PHE Ex. 14. During the inspection, photographs of Royalty Black Disinfectant containers were taken by the inspector. C's PHE Exs. 9, 10, 11. The photographs show that the label for Royalty Black Disinfectant does not include a product registration number, producing establishment number, ingredient statement, or directions for use. C's PHE Ex. 21. The photographs display the brand name "Royalty Black Disinfectant" and include the following statement on the label: "For Cleaning and Disinfecting Toilets, Urinals, Gutters, Animal Pens and other areas prone to Bacterial Growth." *Id.* The label includes a small skull and crossbones symbol. C's Ex. 21.

6. During the inspection on or about March 14, 2007, the owner of the Caribbean Supercenter provided the inspector with a signed affidavit stating that the Caribbean Supercenter had purchased the Royalty Black Disinfectant from Respondent. Complaint ¶ 10; Answer ¶¶ 1 and 2; C's PHE Ex. 6.

7. On or about April 15, 2008, and officer or employee of the State of Florida, duly designated by the Administrator, conducted an inspection of Respondent's facility, located at 8841 102nd Street, Medley, Florida 33178, pursuant to FIFRA Sections 8(b) and 9(a), 7 U.S.C. § 136f(b) and 136g(a). Complaint ¶ 11; Answer ¶¶ 1 and 2; C's PHE Exs. 17-20. Mr. Augustine Paldano, the owner of Respondent, was present during the inspection. C's PHE Exhs. 17-20.

8. During the inspection on or about April 15, 2008, Mr. Paldano provided invoices documenting that Respondent had distributed and sold four shipments of Royalty Black Disinfectant, including a shipment to Caribbean Supercenter, as follows:

a. Invoice number 4113, dated May 10, 2007, to Jamaica Groceries & Spices Imports;
b. Invoice number 1290, June 14, 2007, to Caribbean Supercenter;
c. Invoice number 6379, September 6, 2007, to B & M Bakery & West Indian Grocery;
d. Invoice number 6604, September 28, 2007, to S & A Caribbean Market.

Complaint ¶ 12; Answer ¶¶ 1, 2, 3 ("One of our shipments had this product sent to us by our supplier . . . We sold to our customers"); C's PHE Exs. 19, 23.

10. As of the dates of inspections on or about March 14, 2007 and April 15, 2008, Royalty Black Disinfectant was not registered as a pesticide with EPA pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a. Complaint ¶ 17; Answer ¶¶ 1 and 2; C's PHE Exs. 8, 9, 11, 14, 26.

11. During the inspection on or about April 15, 2008, Mr. Paldano by affidavit confirmed that Respondent had imported the Royalty Black Disinfectant from Shahadat Ramiakhan Company, located in Navet Village, Rio Claro, Trinidad and Tobago. Complaint ¶ 18; Answer ¶¶ 1 and 2; C's PHE Exs. 19, 20, 33. The total number of bottles of the product imported and sold was five packs of 24 bottles of 250 milliliters in each package, plus five large packs with 12 bottles of 750 milliliters. C's Exs. 19, 20, 23.

12. Respondent admitted that it did not file a Notice of Arrival of Pesticides and Devices (EPA

Form 3540-1) ("Notice of Arrival") with the EPA Administrator prior to the arrival in the United States of the Royalty Black Disinfectant shipment described in the preceding paragraph. Complaint ¶¶ 19, 39; Answer ¶¶ 1 and 2.

13. During the inspection of the Caribbean Supercenter on March 14, 2007, a physical sample of the product was purchased by the inspector. C's Ex. 10, 11, 12. A lab report was prepared for the sample taken, but no lab report appears in Complainant's Prehearing Exchange. C's Ex. 12.

14. During the inspection on or about April 15, 2008, no violations of FIFRA were found. C's PHE Exs. 18, 20.

V. Liability

A. Counts 1-4: Distribution or Sale of Unregistered Pesticide

1. Relevant statutory provisions

FIFRA sets forth the requirement for registering pesticides as follows, at Section 3(a): "Except as provided by this subchapter, no person in any State may distribute or sell to any person any pesticide that is not registered under this subchapter." 7 U.S.C. § 136a(a). In turn, Section 12(a) of FIFRA provides, in pertinent part, as follows:

> (1) Except as provided by subsection (b) of this section, it shall be unlawful for any person in any State to distribute or sell to any person----
>
> > (A) any pesticide that is not registered under section 136a of this title or whose registration has been canceled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator under this subchapter;
> > * * * *

7 U.S.C. § 136j(a). According to the definitions in FIFRA, "pesticide" means "any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest" and "pest" includes, among other things, "virus, bacteria, or other micro-organism" other than those living on or in a living human or animal. 7 U.S.C. §§ 136(t), 136(u). FIFRA Section 2(mm) defines "antimicrobial pesticide" as

> a pesticide that ---
> (A) is intended to –
>
> > (i) disinfect, sanitize, reduce, or mitigate the growth or development of microbiological organisms;
> > * * * *

7 U.S.C. § 136(mm)(1).

2. Discussion and Conclusion

The Complaint alleges in Counts 1 though 4 that Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by distributing or selling Royalty Black Disinfectant, a pesticide that is not registered under Section 3 of FIFRA, on at least four occasions. Complaint ¶¶ 12, 17, 23, 24. To establish a violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), Complainant must show that the Respondent: (1) is a person in any State, (2) who distributed or sold to any person, (3) any pesticide, (4) that is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

As a corporation in Florida, Respondent is a "person" in a "state" within the meanings of FIFRA Sections 2(s) and 2 (aa), 7 U.S.C. § 136(s) and (aa). Findings of Fact 1 and 2, *supra*. Invoices obtained from Respondent show that Respondent distributed or sold Royalty Black Disinfectant to four persons. Finding of Fact 8, *supra*. Thus the first two elements are established for each of the four counts of violation.

As to the third element, the word "disinfectant" in the name of the product "Royalty Black Disinfectant," which appears on the product's label, establishes that the product was intended for use to "disinfect . . . or mitigate the growth or development of microbiological organisms." Finding of Fact 5, *supra*. Further showing the intended use of the product, the label states: "For Cleaning and Disinfecting Toilets, Urinals, Gutters, Animal Pens and other areas prone to Bacterial Growth." Finding of Fact 5, *supra*. Therefore, Royalty Black Disinfectant is an "antimicrobial pesticide" within the meaning of Section 2(mm) of FIFRA, 7 U.S.C. § 136(mm), and a "pesticide" under FIFRA Section 2(u), 7 U.S.C. § 136(u). *99 Cents Only Stores*, EPA Docket No. FIFRA-9-2008-0027, 2008 EPA ALJ LEXIS 45, * 41-45 (ALJ, June 2, 2008).

As noted in Finding of Fact 10 above, Royalty Black Disinfectant is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a. Thus, it is concluded that all elements to support the four counts of distribution or sale of an unregistered pesticide have been met.

B. Counts 5-8: Distribution or Sale of Misbranded Pesticide

1. Relevant Statutory and Regulatory Provisions

Section 12(a)(1)(E) of FIFRA provides, in pertinent part:

(1) Except as provided by subsection (b) of this section, it shall be unlawful for any person in any State to distribute or sell to any person----

* * *

(E) any pesticide which is adulterated or misbranded
* * * *

7 U.S.C. § 136j(a)(1)(E).

Under the definition in Section 2(q)(1)(E) of FIFRA, a pesticide is "misbranded" if "any word, statement, or other information required by or under authority of this subchapter to appear on the label or labeling is not prominently placed thereon . . ." 7 U.S.C. § 136(q)(1)(E).

A "label" is "the written, printed or graphic matter on, or attached to, the pesticide . . . or any of its containers or wrappers." The broader term "labeling" means "all labels and all other written, printed, or graphic matter – (A) accompanying the pesticide . . . at any time; or (B) to which reference is made on the label or in literature accompanying the pesticide . . . ."

Section 2(q) of FIFRA defines "misbranded " as follows, in pertinent part:

(1) A pesticide is misbranded if--

* * *

(B) it is contained in a package or other container or wrapping which does not conform to the standards established by the Administrator pursuant to section 136w(c)(3) of this title;

* * *

(D) its label does not bear the registration number assigned under section 136e of this title to each establishment in which it is produced;

(E) any word, statement or other information required by or under authority of this subchapter to appear on the label or labeling is not prominently placed thereon with such conspicuousness . . . and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use;

(F) the labeling accompanying it does not contain directions for use which are necessary for effecting the purpose for which the product is intended and if complied with, together with any requirements under section 136a(d) of this title, are adequate to protect health and the environment;

* * * *

(2) A pesticide is misbranded if –

(A) the label does not bear an ingredient statement on that part of the immediate container . . . which is presented or displayed under customary conditions of purchase * * * *

7 U.S.C. § 136(q).

Promulgated pursuant to the standard-setting authority of Section 136w(c)(3) of FIFRA, the regulations at 40 C.F.R. § 156.10(e) expressly require that "The registration number assigned to the pesticide product at the time of registration shall appear on the label, preceded by the

phrase 'EPA Registration No.' or 'EPA Reg. No.'" The regulations further specify that "The producing establishment registration number preceded by the phrase 'EPA Est. No.' . . . may appear in any suitable location on the label or immediate container." 40 C.F.R. § 156.10(f) The regulations further specify requirements for the ingredient statement and directions for use. 40 C.F.R. §§ 156.10(g), 156.10(i).

2. Discussion and Conclusion

As alleged in Counts 5 through 8, Respondent is charged with distribution or sale of a misbranded pesticide on at least four occasions, in violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E). Complaint ¶ 32. The Complaint alleges that the label on the Royalty Black Disinfectant omitted the product registration number, the producing establishment number, an ingredient statement, and instructions for use. Complaint ¶¶ 9, 12 and 30.

To establish Counts 5 through 8, Complainant must show, in addition to the first three elements of Counts 1 through 4 discussed above, that the pesticide is adulterated or misbranded. 7 U.S.C. § 136j(a)(1)(E).

The Inspection Report for the inspection on March 14, 2007 and photographs taken of the Royalty Black Disinfectant containers establish that the label on the containers of Royalty Black Disinfectant did not include the following information required under FIFRA: a product registration number, a producing establishment number, an ingredient statement, and directions for use. Finding of Fact 5, *supra*. In particular, the photographs showing all sides of the label on the bottle containing the product make it quite clear that such information is entirely absent. *Id.;* C's PHE Ex. 21. There is no evidence in any of the exhibits in Complainant's Prehearing Exchange of any labeling accompanying the Royalty Black Disinfectant, or of any labeling referenced on the label.

It is concluded that Respondent sold or distributed a misbranded pesticide on four occasions, and therefore Complainant has established that Respondent violated Section 12(a)(1)(E) of FIFRA as alleged in Counts 5 through 8 of the Complaint.

C. Count 9: Failure to File Notice of Arrival Prior To Import of Pesticide

1. Relevant Statutory and Regulatory Provisions

Section 12(a) of FIFRA provides, in pertinent part, as follows:

(2) It shall be unlawful for any person----

* * * * *

(N) who is a registrant, wholesaler, dealer, retailer, or other distributor to fail to file reports required by this subchapter;

7 U.S.C. § 136j(a).

Section 17(e) of FIFRA authorizes the Secretary of the Treasury, in consultation with the EPA Administrator, to promulgate regulations for the enforcement of Section 17(c) of FIFRA, which requires the Secretary to notify the EPA Administrator of the arrival of pesticides in the United States. Pursuant thereto, the Secretary, through the United States Customs Service, promulgated regulations at 19 C.F.R. §12.110-12.117. Included among those regulations is the following requirement:

> An importer desiring to import pesticides or devices into the United States shall submit to the Administrator a Notice of Arrival of Pesticides and Devices (Environmental Protection Agency Form 3540-1), hereinafter referred to as a Notice of Arrival, prior to the arrival of the shipment in the United States.

19 C.F.R. § 12.112(a).

2. Discussion and Conclusion

The Complaint alleges in Count 9 that Respondent violated Section 12(a)(2)(N) of FIFRA, 7 U.S.C. § 136j(a)(2)(N), by importing the pesticide Royalty Black Disinfectant without submitting to EPA a Notice of Arrival as required by 19 C.F.R. § 12.112(a). Complaint ¶¶ 18, 19, 33-42. To establish a violation of Section 12(a)(2)(N) of FIFRA, 7 U.S.C. § 136j(a)(2)(N), Complainant must show that the Respondent: (1) is a person, (2) who is a registrant, wholesaler, dealer, retailer, or other distributor [of a pesticide], (3) and failed to file reports required under FIFRA. In turn, to establish a violation of 19 C.F.R. § 12.112(a) specifically, Complainant must show that Respondent: (1) is a registrant, wholesaler, dealer, retailer or other distributor, (2) which imported a pesticide into the United States, (2) without submitting to EPA a Notice of Arrival of Pesticides and Devices (Environmental Protection Agency Form 3540-1), (3) prior to the arrival of the shipment in the United States.

The fact that Respondent distributed and sold a pesticide, Royalty Black Disinfectant, has been established, and thus Respondent is a "distributor." Finding of Fact 8, *supra*. During an inspection of Respondent's facility on April 15, 2008, Respondent's owner, Mr. Paldano, confirmed that Respondent had imported Royalty Black Disinfectant into the United States from Trinidad and Tobago, and signed two affidavits to that effect. Finding of Fact 11, *supra*. Respondent admitted that it did not file the required Notice of Arrival for the shipment of Royalty Black Disinfectant pesticide. Finding of Fact 12, *supra*.

D. Conclusion as to Liability

The Rules of Practice state that "Any party who fails to respond . . . waives any objection to the granting of the motion." 40 C.F.R. § 22.16(b). However, the judge must make a decision as to whether the motion has merit, and whether it meets procedural requirements. A motion,

albeit unopposed, which has no merit under applicable law, or which does not meet procedural requirements such as timeliness, may be denied.

Complainant's motion appears both timely and meritorious. Respondent's Answer admitted all facts alleged in the Complaint in support of all the counts, 1 through 9. Subsequently, Respondent has failed to further participate in the litigation, despite extensive efforts by Complainant to locate and communicate with Respondent. Brief at 3-4. Beyond Respondent's unambiguous admissions and failure to respond to the pending Motion, Complainant's Prehearing Exchange provides substantial documentary support for every element of the alleged violations, including reports of two investigations conducted by representatives of the State of Florida as authorized by the U.S. Environmental Protection Agency. Accordingly, it is concluded that Complainant has shown that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law as to Respondent's liability for Counts 1 through 9 of the Complaint.

VII. Penalty

A. Statutory Penalty Factors and the Penalty Policy

The Rules of Practice require that determination of the amount of the civil penalty must be based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Rules also require that any civil penalty guidelines issued under the Act be considered in such determination. 40 C.F.R. § 22.27(b). If the penalty assessment differs from the amount proposed in the complaint, the administrative law judge "must set forth in the initial decision the specific reasons for the increase or decrease." *Id.*

Section 14(a)(1) of FIFRA provides that "[a]ny registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violated any provision of this subchapter may be assessed a civil penalty by the Administrator of not more than $5,000 for each offense." 7 U.S.C. § 1361(a). The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 et seq. and the regulations promulgated at 40 C.F.R. Part 19 raised the maximum amount of the penalties which may be assessed for violations occurring between March 15, 2004 and January 12, 2009 to $6,500 per violation. 28 U.S.C. § 2461, 31 U.S.C. § 3701 et seq., 40 C.F.R. §§ 19.2, 19.4. Section 14(a)(4) of FIFRA sets out the factors for assessing a penalty, stating that "[i]n determining the amount of the penalty, the Administrator shall consider the appropriateness of the penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation." 7 U.S.C. § 136l(a)(4).

To implement the FIFRA penalty authority in a consistent manner, EPA developed a guidance document, the FIFRA Enforcement Response Policy ("ERP" or "Penalty Policy"), last updated December 2009. The Penalty Policy describes seven steps to compute a penalty, involving determination of: (1) the number of assessable violations, (2) the size category of the violator's business, (3) the gravity of each violation, (4) the base penalty amount for the determined business size and gravity, (5) an appropriate adjustment factor based on case-specific

factors, (6) the economic benefit of non-compliance, and (7) the effect of the total penalty on the violator's ability to continue in business.

In the first step, a separate penalty of up to the statutory maximum is assessed for each independent violation of the Act, that is, a violation that results from an act or failure to act which is not the result of any other violation for which a penalty is assessed, a violation with at least one element of proof different from any other violation, a violation that occurs from each sale or shipment of a product (by product registration number), or each sale of a product. Penalty Policy at 16. The Penalty Policy states that a penalty will be assessed "for one violation arising from a single event or action (or lack of action) that is unlawful under FIFRA for multiple reasons unless that event or action results in two unlawful acts for which at least one element of proof differs." Penalty Policy at 17. As to misbranding, the Penalty Policy states that a count of violation may be assessed for each time that a misbranded product is sold or distributed, even where there are multiple misbrandings on the label. *Id.* As an example, "a registrant who sells or distributes four distinct shipments of a misbranded pesticide product generally may be assessed four counts of misbranding." *Id.*

In the second step, the size of the violator's business is based on "gross revenues from all revenue sources during the prior calendar year" or the average of the past three years if the prior year appears unrepresentative of the general performance of the business. Penalty Policy at 17. The size is assessed at Category I for gross revenues over $10,000,000 per year, Category II for $1,000,000 to $10,000,000 per year, or Category III for under $1,000,000 per year.

The third step, assessment of the gravity of the violation, is based on a chart in Appendix A of the Penalty Policy which lists various violations of FIFRA with an assigned Gravity Level ranging from 1 for the most severe gravity, to 4 for the least severe gravity. The severity of gravity is associated with the actual or potential harm to human health and the environment which could result from the violation and the importance of the requirement to achieving the goals of FIFRA.

The fourth step is the application of a penalty matrix, composed of one axis representing the size of business category and the other axis representing the gravity level, to determine a base penalty, which appears in the cells of the matrix.

The fifth step is the adjustment of the base penalty for the following five factors: pesticide toxicity, harm to human health, environmental harm, compliance history, and culpability. In Appendix B of the Penalty Policy, numeric values are assigned based on the severity of each of the factors. The numeric values are added up and the total is applied to Table 3 of the Penalty Policy which designates decrease or increase of the base penalty by up to 60 percent. Penalty Policy at 20.

The sixth step is a calculation of any significant economic benefit the violator received from the violation in terms of delayed costs, avoided costs, or illegal profits from sales. That amount is added as a separate component to the penalty to eliminate any economic incentives for noncompliance with FIFRA. Penalty Policy at 20.

The last step is consideration of the effect of the penalty on the respondent's ability to continue in business or its ability to pay the penalty. The Penalty Policy states that if the respondent raises the issue of inability to pay, EPA should ask the respondent to produce documentation such as tax returns and financial statements, and if it does not provide sufficient information to substantiate the claim, EPA may draw an inference from available information that the respondent has the ability to pay the penalty. Penalty Policy at 24.

B. Calculation of the Penalty

1. Number of Independently Assessable Violations

In counts 1 through 8, Complainant alleged four counts of distribution or sale of an unregistered pesticide and four counts of distribution or sale of a misbranded pesticide. Respondent sold or distributed the pesticide in four separate shipments. Complainant explains that a sale of an unregistered pesticide is independent of sale of a misbranded pesticide because each involve a distinct element of proof. Brief at 11. Complainant charged only a single violation, Count 9, because it involves importation of one shipment into the United States. Brief at 12.

The text of the Act, that "no person in any State may distribute or sell to any person any pesticide that is not registered . . . " and that "it shall be unlawful for any person in any State to distribute or sell to any person . . . any pesticide which is . . . misbranded (7 U.S.C. §§ 136a(a), 136j(a)(1)(E)) is fairly read to mean that each sale to a person of an unregistered pesticide, and each sale to a person of a misbranded pesticide, is a separate unlawful act or offense. This interpretation is consistent with the Penalty Policy's guidance. Penalty Policy at 16-17. Therefore a separate penalty may be assessed for each of Counts 1 through 9.

2. Size of Business

Based on information provided in a 2009 American Business Report, which estimated Respondent's annual revenue as $3,410,000, the Complaint originally classified Respondent as a "Category 2" sized business, which applies to business with total annual revenue between $1,000,000 and $10,000,000. Brief at 12; C's PHE Ex. 41. However, in its pending Motion, EPA relied on a more recent report from Demographics Now, providing an annual sales figure for Respondent of $333,000. Id. Based on this newer information, Complainant has reclassified Respondent as "Category 3" (annual revenues under $1,000,000). *Id.* There is no reason to depart from this classification.

3. Gravity of Violation

Complainant assessed Counts 1 through 4 as Gravity Level 1, which is considered the most serious. Complainant states that "All violations involving the distribution or sale of an

unregistered pesticide are assigned Level 1." Brief at 13. Counts 5 though 8 were also assessed as Gravity Level 1. Complainant notes that, generally speaking, "[t] the gravity level for a misbranding violation varies depending on what information was omitted or misstated on the product label," but that in this particular case, "Respondent omitted all required labeling information, including directions for use necessary to make the product effective and to adequately protect health and the environment." *Id.* For Count 9, Complainant assigned Gravity Level 2, which is the level recommended by the ERP for all reporting violations. *Id.*

For Counts 1 through 4, the applicable Gravity Level description shown in Appendix A of the Penalty Policy is "sold or distributed a pesticide NOT REGISTERED under section 3 . . . " which is designated therein as Gravity Level 1. Penalty Policy p. 29, Appendix A.

Assessment of the severity of the misbranding violation as Gravity Level 1 is consistent with the Penalty Policy classification of Gravity Level 1 for a pesticide that is misbranded "in that the label . .. did not contain directions for use necessary to make the product effective and to adequately protect health and the environment." Penalty Policy, Appendix A. The label merely states the purpose, "For: Cleaning and Disinfecting Toilets, Urinals, Gutters, Animal Pens and other areas prone to Bacterial Growth." C's PHE Ex. 21. Therefore, it refers to the sites of application, but it does not include dosage rate or method of application such application equipment, need for dilution, frequency and timing of application for effective results, and instructions for storage and disposal of the pesticide and its container. It also does not specify target pest organisms or any warnings required against use on certain areas 40 C.F.R. § 156.10(i)(2). Additional omissions on the label rendering the product misbranded, which as the sole omission would warrant a lower gravity level, only serve to increase the gravity of the violation where necessary directions for use were omitted.

The assessment as Gravity Level 1 for Counts 1 through 8 is further supported by the appearance of the product in its container. As noted in several documents in Complainant's Prehearing Exchange, and as evident from photographs in the Prehearing Exchange, Royalty Black Disinfectant was packaged, and distributed and sold on supermarket shelves, in bottles that strongly resemble soda bottles. C's PHE Exs. 4, 7, 9, 11, 14 and 21. "The product looks very similar to a glass soda bottle and opens in the same manner with a metal cap (appears to be an improper CRP.)"[6] C's PHE Ex. 11, p. 2. This may increase the likelihood that a person could ingest the product on the assumption that it is a beverage.

Regarding Count 9, Appendix A of the Penalty Policy lists a violation of Section 12(a)(2)(N) of FIFRA, described as a "registrant, wholesaler, dealer, retailer or other distributor FAILED TO FILE REPORTS . . . required by the Act" and designates Gravity Level 2 to such violation. Penalty Policy at 32. This classification of the Gravity Level is appropriate for the

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[6] The reference to "CRP" most likely refers to Child Resistant Packaging requirements under FIFRA Section 25(c)(3), 7 U.S.C. § 136w(c)(3), and 40 C.F.R. Part 157, Subpart B. However, in the Complaint, Complainant did not allege violation of the Child Resistant Packaging regulations.

violation in Count 9.

4. Base Penalty

For Count 1 through 8, Complainant assessed base penalties of $6,500, the maximum authorized under the Act as amended by the Debt Collection Improvement Act and 40 C.F.R. part 19. Complainant explains that the violations alleged in this case occurred before the effective date of the 2009 ERP, so Complainant utilized the "base penalty" amounts set forth in an earlier matrix set forth in a Memorandum from Stephanie P. Brown, Acting Director of EPA's Toxics and Pesticides Enforcement Division in the Office of Civil Enforcement, *Penalty Policy Supplements Pursuant to the 2004 Civil Monetary Penalty Inflation Adjustment Rule*, dated June 5, 2006 ("Brown Memorandum"). Mot. at 14. The matrix in the Brown Memorandum assesses a $6,500 base penalty to all Level 1 violations, regardless of the size of the respondent's business. *Id.* Therefore, Complainant assessed a base penalty of $6,500 for each of counts 1 through 8, i.e., the four counts for selling or distributing an unregistered pesticide and the four counts for selling or distributing a misbranded pesticide. *Id.*

Utilizing the matrix in the Brown Memorandum, Complainant assessed the Notice of Arrival violation in Count 9 with Gravity Level 2 and Category III Size of Business, resulting in a penalty of $3,869. *Id.*

The regulations 40 C.F.R. part 19 set the adjustments to the penalty amounts under the Debt Collection Improvement Act, and provide that "[t]he penalty amounts in the fifth column of Table 1 of § 19.4 apply to all violations . . . which occurred after March 15, 2004 , through January 12, 2009." 40 C.F.R. § 19.2. The violations at issue in this case occurred between those dates, and the maximum penalty amount for violations of 7 U.S.C. § 136l(a)(1) as shown in Table 1 of Section 19.4 is $6,500. Therefore the maximum penalty authorized for each count of violation is $6,500.

The applicable penalty policy is the FIFRA ERP dated December 2009, but it does not include a matrix for calculating penalties for violations occurring between March 15, 2004 through January 12, 2009. The Brown Memorandum includes a matrix for calculating penalties under the $6,500 statutory maximum, but it states that the penalty policies subject to the memorandum are listed in Attachment A, which lists the ERP issued on July 2, 1990. C's Ex. 2 pp. 1, 3. However, the December 2009 ERP in effect at the time the Complaint was filed, and upon which Complainant relies for the penalty calculation, states that it supersedes the ERP issued on July 2, 1990. C's Ex. 1, Penalty Policy at 4; Complaint ¶ 44. Therefore, it is not clear that the matrix in the Brown Memorandum is appropriate for calculating the penalty in this case. The matrix in the December 2009 ERP designates a penalty of the maximum statutory amount ($7,500) for Gravity Level 1 and Size of Business Category I, but a reduced penalty amount for both Gravity Level 1, Size of Business Categories II and III; specifically, the maximum penalty is multiplied by 0.953 for both Size of Business Categories II and III to arrive at the matrix figure of $7,150 (rounded to the nearest 10). It is reasonable to use the same methodology, resulting in the same penalty proportions, to determine a penalty with the statutory maximum applicable to

the violations in this case. Thus, applying the same reduction (multiplying by 0.953) to the maximum penalty of $6,500 results in a penalty of $6,195, or rounded to the nearest ten, $6,200. It is concluded that the appropriate base penalty for Counts 1 through 8 is $6,200.

As to Count 9, the Penalty Policy matrix shows a penalty of $4,250 for a Gravity Level 2, Size of Business Category III. The maximum penalty of $7,500 is multiplied by approximately 0.566 to arrive at a penalty of $4250. Applying the same multiplier to a maximum penalty of $6,500 results in a penalty of $3,680 for Count 9.

5. Adjustments to the Base Penalty

Complainant assigned a value of 3 for toxicity, which represents Category I pesticides, Restricted Use Pesticides, pesticides with flammable or explosive characteristics or which are associated with chronic health effects, or a pesticide which is "unregistered and the ingredients or labeling indicate Category I toxicity." Penalty Policy p. 34, Appendix B. Complainant does not explain further its assessment of the value of 3 in its Motion or in the Prehearing Exchange. See, C's PHE Ex. 3 Toxicity Category I is the most toxic, and is classified in the applicable regulations under FIFRA as one which is required to bear the word "danger" on the front panel of the product and the word "poison" with a skull and crossbones symbol, and which is corrosive to skin or eyes with corneal opacity not reversible within 7 days, and the lethal dose to kill 50 percent of a population (LD_{50}) for oral exposure up to 50 milligrams per kilogram, for dermal exposure up to 200 milligrams per kilogram, or for inhalation exposure up to 0.2 milligrams per liter. 40 C.F.R. §§ 156.62, 156.64(a)(1). According to the Penalty Policy, the value of 2 is assigned for pesticides in Toxicity Category II, a signal word "warning," or a pesticide unregistered and unknown, but not expected to meet Category I toxicity criteria. A value of 3 is assigned for pesticides in Category III or IV, with signal word "caution" or the pesticide is unregistered and the ingredients are in a lower or minimum risk category. Penalty Policy at 34, Appendix B.

Complainant's assignment of a value of 3 would appear reasonable based on the skull and crossbones appearing on the label. Finding of Fact 13, *supra.* However, the product was manufactured and packaged overseas, and the label does not suggest adherence to EPA's federal regulations for pesticides. Thus the skull and crossbones are not indicative of a classification under 40 C.F.R. § 156.64(a)(1). It is not reasonable to simply presume, for purposes of a penalty assessment, that a household cleaner is likely a Restricted Use Pesticide or one with a lethal dose for oral, dermal, inhalation exposure equivalent to a Category I pesticide. The failure of Complainant to include in the Prehearing Exchange the lab report of the sample taken during the March 14, 2007 inspection (Finding of Fact 13, *supra*) does not support a finding that the sample would be classified as Category I. There is nothing in the record to support a value of 3 to represent the toxicity of the product at issue in this case. A value of 2 best represents the toxicity in the circumstances of this case.

Complainant assessed a value of 3 for the factor of harm to human health, which represents an unknown or potential serious or widespread harm to human health. Complainant

assessed a value of zero presenting no compliance history. These assessments are accepted as reasonable.

As to harm to the environment, Complainant also assessed a value of 3, representing an unknown, or potential serious or widespread harm to the environment. The number of bottles of the product at issue in this case, five packs of 24 bottles of 250 milliliters and five packs of 12 bottles of 750 milliliters, does not support a finding of potential serious of widespread harm to the environment, and is more indicative of negligible potential harm to the environment. Finding of Fact 11, supra. Accordingly, the appropriate value for this factor is zero.

For culpability, Complainant assessed a value of 2, which represents culpability which is unknown or a violation resulting from negligence. A value of 1, representing negligence but a violator instituting steps to correct the violation immediately after discovery of the violation, is more appropriate in the circumstances of this case. During the inspection on or about April 15, 2008, no violations of FIFRA were found, and there is no evidence that Respondent violated FIFRA after the four sales of Royalty Black Disinfectant at issue. Respondent's Answer states: "We stopped importing from the supplier who sent this product." Answer ¶ 3. "We didn't violate these regulations knowingly[.]" Answer ¶ 4.a. "Our business is a small business and if the penalties and fines are greater than our income, we may have difficulty to pay them." Answer ¶ 4.b. "We pledge to you we will not bring these pesticides ever again." Answer ¶ 4.c. Finding of Fact 14, *supra.*

The sum of the gravity adjustment values is 6. For such a sum, the Penalty Policy instructs that the matrix value be reduced by 30 percent. Penalty Policy at 37, Table 3. The total gravity based penalty is $53,280. A 30 percent reduction results in a penalty of $37,296.

6. Economic Benefit

According to the Penalty Policy, economic benefit of more than $10,000 is defined as significant and should be added to the gravity-based penalty component. Brief at 16. Complainant appropriately does not include any economic benefit component to the penalties, as any economic benefit to Respondent is less than $10,000.

7. Effect of Penalty on Ability of Respondent to Remain in Business

Complainant's Brief states that Respondent "United Global Trading, Inc, was administratively dissolved in 2012, the year after the complaint was filed." Brief at 2, n.1. However, Complainant explains that this proceeding against Respondent may continue because, "[p]ursuant to FLA STAT. § 607.1405(2)(e) (2013) 'dissolution of a corporation does not prevent commencement of a proceeding by or against the corporation in its corporate name.'" *Id.*

In numerous prior EPA administrative enforcement cases, it has been noted that 11

U.S.C. § 362(b)(4) expressly exempts governmental enforcement lawsuits from a general stay due to bankruptcy. See, e.g., *Patrick J. Newman*, 5 E.A.D. 450, 454 n.1 (EAB 1994)("The mere fact that [Respondent] filed a petition for bankruptcy during the pendency of this enforcement action had no effect on the status of the action."); *Britton Construction Co.*, 8 E.A.D. 261, 292 n. 21 (EAB 1999)("The specter of bankruptcy is not necessarily a reason to avoid assessing a penalty."); *Frank J. Davis*, EPA Docket No. TSCA-05-2007-0002, 2008 EPA ALJ LEXIS 12, *36 (ALJ, March 31, 2008) (quoting the federal Bankruptcy Court that "state and federal enforcement of environmental protection laws and regulations against debtors has been allowed to proceed under § 362(b)(4) because the primary purpose of such laws is to promote public safety and welfare.") Thus, "bankruptcy is not a bar to the imposition of a penalty." *Bituma-Stor, Inc.*, EPA Docket No. EPCRA-7-99-0045, 2001 EPA ALJ LEXIS 16 at *54 (ALJ, 2001). "It is well established that an administrative penalty proceeding seeking entry of a judgment for past violations of environmental regulations is within EPA's regulatory power to enforce environmental laws and is therefore not stayed by Respondent's filing of a bankruptcy petition." *Keenhold Assoc.*, EPA Docket No. TSCA-03-2007-0084, 2007 EPA ALJ LEXIS 28 (ALJ, Oct.16, 2007)(Order to Show Cause and Order Granting Motion for Extension) citing *Patrick J. Newman*, 5 E.A.D. at 454 n.1 (EAB 1994).[4] The Environmental Appeals Board has noted that, as long as ability to pay is considered, an otherwise appropriate penalty may be imposed, even if it forces a respondent into bankruptcy, because the respondent may still be able to continue in operation. *New Waterbury, Ltd.*, 5 E.A.D. 529, 539-40 (EAB 1994). "The issue ... is not whether the respondent can, in fact, pay a penalty, but whether a penalty is appropriate." *New Waterbury, supra*, at 539.[5] Furthermore, bankruptcy by itself is not specific evidence that a respondent cannot pay any penalty. *Keenhold Associates* at *3 n.1, citing *Bituma-Stor, Inc.*, at *53-4.

Under the EAB's *New Waterbury* analysis, Complainant has satisfied its burden(s) of proof regarding ability to pay, whereas Respondent has not. First, the Board indicated that Complainant bears the initial burden of production or presentation requiring the Complainant to at least consider and touch upon each of the statutory penalty factors in order to establish a prima facie case. *New Waterbury, supra*, at 538; 40 C.F.R. § 22.24(a). "Once this is accomplished the burden of going forward shifts to the respondent." *Id.* The Board also noted that, because EPA's "ability to obtain much information about respondent's ability to pay is likely to be limited when a complaint is filed . . . we recognize that a respondent's ability to pay may be *presumed* until it is put at issue by a respondent." *New Waterbury*, supra, at 541 (emphasis in original). The

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[4] In contrast to the *assessment* of a penalty, "[i]t is only the collection of any monetary judgment resulting from the administrative enforcement proceeding that is subject to the stay provisions of the bankruptcy code." *Keenhold Assoc.*, at *3 (emphasis added), citing *Patrick J. Newman*, 5 E.A.D. at 454 n.1.

[5] Further, the Board noted that inability to pay is not an affirmative defense because "inability to pay does not by itself preclude imposition of a penalty. A successful demonstration of inability to pay a proposed penalty would not automatically justify the non-assessment of a penalty." *New Waterbury* at 540-41.

Board further noted that EPA "at a penalty *hearing*, must as part of its prima facie case produce some evidence regarding respondent's *general* financial status from which it can be *inferred* that the respondent's ability to pay should not affect the penalty amount." *Id.* (emphasis in original). The EAB stated:

> The rules governing penalty assessment proceedings require a respondent to indicate whether it intends to make an issue of its ability to pay, and if so, to submit evidence to support its claim as part of the pre-hearing exchange. In this connection, where a respondent does not raise its ability to pay as an issue in its answer or fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, the [Complainant] may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived under the Agency's procedural rules and thus this factor does not warrant a reduction of the proposed penalty.

New Waterbury, supra, at 542.

In the instant case, Respondent's Answer states that "Our business is a small business, and if the penalties and fines are greater than our income, we may have difficulty to pay them." Answer ¶ 4.b. However, other than this bald assertion, Respondent never provided any additional support and did not file a prehearing exchange. Nevertheless, Complainant has clearly made efforts to consider Respondent's ability to pay, has included three relevant exhibits in its prehearing exchange, and has noted in its Motion that Respondent corporation was administratively dissolved in 2012 (a year after the complaint was filed). A March 2009 publication from American Business Directory indicates "Location Sales ($): $ 3,410,000." C's PHE Ex. 41. A report from Demographics Now appears to have been obtained in June 2012 and appears to report annual sales of $333,000. C's PHE Ex. 43. However, the same report, also lists Respondent's Credit Risk Score as "Very High Risk." *Id.* Further, the June 2012 report from Dun & Bradstreet says "no information available at this time" and "attempts to reach UGT proved unsuccessful," thus indicating no present financial activity for this company. C's PHE Ex. 42

Taken as a whole, Complainant has satisfied the relatively low burdens of proof required for this element as articulated by the Board in *New Waterbury*.

8. Conclusion as to Penalty

Ultimately, it is concluded that by failing to participate in this litigation and provide any substantiation of the assertion in its Answer regarding inability to pay or as to any of the other penalty assessment factors, Respondent has thereby waived its arguments, and has not raised any genuine issue of material fact as to the penalty. Complainant is entitled to accelerated decision on a penalty as calculated herein of $37,296.

ORDER

1. Complainant's Motion for Accelerated Decision is **GRANTED** with respect to Respondent's liability for Counts 1 through 9 of the Complaint.

2. Complainant's Motion for Accelerated Decision as to assessment of penalties in this matter is **GRANTED**. For violating Sections 12(a)(1)(A), 12(a)(1)(E), and 12(a)(2)(N) of FIFRA as alleged in Counts 1 through 9 of the Complaint, Respondent United Global Trading, Inc., is hereby assessed an aggregate civil penalty in the amount of **$37,296**.

3. Payment of the full amount of this civil penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below. Payment shall be made by one of the following methods:

a) Submitting a certified or cashiers' check(s) in the requisite amount, payable to the Treasurer, United States of America, and mailed to:

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

b) Submitting a certified or cashiers' check(s) in the requisite amount, payable to the Treasurer, United States of America, and mailed by overnight mail to:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines & Penalties
1005 Convention Plaza
Mail Station SL-MO-C2-GL
St. Louis, MO 63101

c) Wire transfer to the Federal Reserve Bank of New York as follows:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT Address = FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read:
"D 68010727 Environmental Protection Agency"

d) Through Automated Clearinghouse (ACH):

U.S. Treasury REX / Cashlink Receiver
ABA: 051036706
Account Number: 310006, Environmental Protection Agency
CTX Format Transaction Code 22 - checking

e) Debit card or credit card online payment:

https://www.pay.gov/paygov
Enter SFO 1.1 in the search field
Open form and complete required fields.

4. A transmittal letter identifying the subject case and the EPA docket number, as well as the Respondent's name and address, must accompany the check;

5. If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Initial Decision, interest on the penalty may be assessed. *See,* 31 U.S.C. § 3717; 40 C.F.R. § 13.11;

6. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless: (1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 22.30(b).

Lisa Busch

M. Lisa Buschmann
Administrative Law Judge

In the Matter of United Global Trading, Inc., Respondent
Docket No. FIFRA-04-2011-3020

CERTIFICATE OF SERVICE

I certify that the foregoing Initial Decision and Order on Complainant's Motion for Accelerated Decision on Liability and Penalty, dated February 28, 2014 was sent this day in the following manner to the addressees listed below.

Knolyn Jones
Staff Assistant

Dated: February 28, 2014

Original And One Copy To:

Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA
Mail Code 1900R
1200 Pennsylvania Avenue, NW
Washington, DC 20460-2001

Copy By Regular Mail To:

Deborah Benjamin, Esquire
Associate Regional Counsel
U.S. EPA
61 Forsyth Street, S.W.
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