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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9**

In the Matter of:

**99 Cents Only Stores
4000 Union Pacific Avenue
Los Angeles, California 90023-3202**

**Proceeding under Section 14 of
the Federal Insecticide,
Fungicide, and Rodenticide Act,
7 U.S.C. § 136l**

Docket No. FIFRA-09-2008-00 2 7

**COMPLAINT AND NOTICE OF
OPPORTUNITY FOR HEARING**

COMPLAINT

I. STATEMENT OF AUTHORITY

COMES NOW the Director of the Communities and Ecosystems Division (“Complainant”), U.S. Environmental Protection Agency (“EPA”), Region 9, by and through its attorney, hereby alleges:

1. This is a civil administrative action brought pursuant to Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq.* (“FIFRA”), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22. Complainant is duly delegated to commence this proceeding.
2. This Complaint and Notice of Opportunity of Hearing (“Complaint”) notifies 99 Cents Only Stores (“Respondent”) of Complainant’s determination that Respondent has violated Sections 12(a)(1)(A) and 12(a)(1)(E) of FIFRA, 7 U.S.C. §§ 136j(a)(1)(A) and 136j(a)(1)(E).

II. STATUTORY AND REGULATORY FRAMEWORK

3. Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), in conjunction with civil penalty inflation adjustment regulations set forth at 40 C.F.R. Part 19, authorize EPA to assess a civil penalty of up to \$5,500 for each violation of FIFRA occurring on or before March 15, 2004, and a civil penalty of up to \$6,500 for each violation of FIFRA occurring thereafter.
4. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), provides that it shall be unlawful for any person in any State to distribute or sell to any person any pesticide that is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.
5. "Pesticide," under Section 2(u) of FIFRA, 7 U.S.C. § 136(u), means, *inter alia*, any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest.
6. "Pest," under Section 2(u) of FIFRA, 7 U.S.C. § 136(t), means, *inter alia*, any insect, rodent, fungus, weed, or any other form of terrestrial or animal life or virus, bacteria, or other microorganism, except viruses, bacteria or other microorganisms on or in living man or other living animals.
7. "To distribute or sell," under Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), means, *inter alia*, to distribute, sell, or offer for sale, 7 U.S.C. § 136(gg).
8. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136(a)(1)(E), provides that it shall be unlawful for any person in any State to distribute or sell to any person any pesticide which is adulterated or misbranded.
9. A pesticide is "misbranded," under Section 2(q) of FIFRA, 7 U.S.C. § 136(q), if, *inter alia*, any word, statement or other information required by or under authority of FIFRA to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with

1 other words, statements, designs or graphic matter in the labeling) and in
2 such terms as to render it likely to be read and understood by the ordinary
3 individual under customary conditions of purchase and use.

4 **III. GENERAL ALLEGATIONS**

- 5 10. At all times relevant to this Complaint, Respondent was a corporation
6 incorporated under the laws of the State of California.
- 7 11. At all times relevant to this Complaint, Respondent was a "person," within
8 the meaning of FIFRA.
- 9 12. According to Respondent's website, Respondent has 279 stores in California,
10 Nevada, Arizona and Texas. Since April 1, 2007, Respondent has opened
11 30 new stores.
- 12 13. In fiscal year 2008, Respondent had over \$ 1.2 billion in total sales.
- 13 14. According to its 2008 Annual Report, Respondent's average sales per store
14 of \$4.5 million and sales per sellable square foot of \$263 were among the
15 highest in the deep discount industry.
- 16 15. According to Respondent's 2008 Annual Report, "[Respondent] is a unique
17 extreme value retailer of consumable general merchandise[,]" based on the
18 purchase and sale of "closeout merchandise at discounted prices," its
19 "ability to make immediate buying decisions," and "its ability to minimize
20 channel conflict for the manufacturer by quickly and discreetly selling"
21 closeout merchandise.
- 22 16. In its Form 10-K filed with the U.S. Securities and Exchange Commission
23 on April 2, 2007, Respondent states, "The Company purchases many
24 products on a closeout basis, some of which are of an unknown origin
25 and/or are manufactured or distributed by overseas entities, and some of
26 which are purchased through brokers as opposed to original manufacturing
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1 and supply sources. The closeout nature of many of the products may limit
2 the Company's opportunity conduct product, testing, label and ingredient
3 analysis and other diligence as to these products, including compliance with
4 particular State by State regulations."

5 17. According to its 2008 Annual Report, Respondent states, "We have never
6 cancelled a purchase order in the Company's history."

7 18. EPA has informed Respondent in writing that distribution or sale of an
8 unregistered pesticide is a violation of federal law, via letters dated as
9 follows: September 30, 2002 (Letter of Advisement, Reference No. FIFRA-
10 AKL-02-49), September 6, 2005 (notification of intention to commence
11 enforcement action), and May 4, 2006 (notification of intention to
12 commence enforcement action).

13 19. In February 2005, EPA Region 9 sent to 71 of Respondent's stores in
14 California and Arizona and to its Headquarters a FIFRA compliance
15 notification sheet entitled, "Protect your business: Avoid Selling Illegal
16 Pesticides," which notified Respondent that the distribution or sale of an
17 unregistered pesticide is a violation of federal law.

18 **IV. SPECIFIC ALLEGATIONS**

19 **COUNT 1 – DISTRIBUTION OR SALE OF THE UNREGISTERED** 20 **PESTICIDE, "FARMER'S SECRET CLEANER," IN SEPTEMBER 2004**

21 20. Paragraphs 1 through 18 are restated and incorporated herein by reference.

22 21. On September 1, 2004, a duly designated inspector of the California
23 Department of Pesticide Regulation ("CDPR") inspected Respondent's
24 store located at 15505 Normandie Avenue, Gardena, California ("the
25 Gardena Store").

26 22. On September 1, 2004, the CDPR inspector observed that Respondent was
27 offering for sale the product, "Farmer's Secret Berry & Produce Cleaner,
28

1 Inhibits Mold, Fungus & Bacteria including Ecoli,” UPC 786483 002013
2 (“Farmer’s Secret Cleaner”), at the Gardena Store.

3 23. The labeling of the product, “Farmer’s Secret Cleaner,” states that it
4 “inhibits mold, fungus & bacteria including Ecoli.”

5 24. At all times relevant to this Complaint, the product, “Farmer’s Secret
6 Cleaner,” was a “pesticide” within the meaning of Section 2(u) of FIFRA, 7
7 U.S.C. § 136(u).

8 25. At all times relevant to this Complaint, the product, “Farmer’s Secret
9 Produce Cleaner,” was not registered with EPA under Section 3 of FIFRA.

10 26. Respondent’s offering for sale the product, “Farmer’s Secret Cleaner,” at the
11 Gardena Store on September 1, 2004, constitutes one violation of Section
12 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

13 **COUNTS 2 THROUGH 165 - DISTRIBUTION OR SALE OF**
14 **THE UNREGISTERED PESTICIDE,**
15 **“BREF DISINFECTANT WITH DENSICLORO,”**
16 **IN SEPTEMBER 2005 THROUGH MAY 2006**

17 27. Paragraphs 1 through 18 are restated and incorporated herein by reference.

18 28. On September 8, 2005, a duly designated CDPR inspector inspected
19 Respondent’s store located at 14049 S. Hawthorne Boulevard, Lawndale,
20 California (“the Lawndale Store”).

21 29. On September 8, 2005, the CDPR inspector observed that Respondent was
22 offering for sale the product, “Bref Limpieza Y Desinfección Total con
23 Densicloro®,” made in Mexico, UPC 501199 400068 (“Bref Disinfectant
24 with Densicloro” or “Bref”), at the Lawndale Store.

25 30. The labeling of the product, “Bref Disinfectant with Densicloro,” claims
26 that it “disinfects.”

27 31. At all times relevant to this Complaint, the product, “Bref Disinfectant with
28 Densicloro,” was a “pesticide” within the meaning of Section 2(u) of

1 FIFRA, 7 U.S.C. § 136(u).

2 32. At all times relevant to this Complaint, the product, "Bref Disinfectant with
3 Densicloro," was not registered with EPA under Section 3 of FIFRA.

4 33. The label on "Bref Disinfectant with Densicloro" has no ingredient
5 statement.

6 34. According to Respondent's sales records, Respondent sold at least one unit
7 of the product, "Bref," at each of 38 stores owned and operated by
8 Respondent in California, Nevada and/or Arizona in November 2005.

9 35. According to Respondent's sales records, Respondent sold at least one unit
10 of the product, "Bref," at each of 49 stores owned and operated by
11 Respondent in California, Nevada and/or Arizona in December 2005.

12 36. According to Respondent's sales records, Respondent sold at least one unit
13 of the product, "Bref," at each of 33 stores owned and operated by
14 Respondent in California, Nevada and/or Arizona in January 2006.

15 37. According to Respondent's sales records, Respondent sold at least one unit
16 of the product, "Bref," at each of 14 stores owned and operated by
17 Respondent in California, Nevada and/or Arizona in February 2006.

18 38. According to Respondent's sales records, Respondent sold at least one unit
19 of the product, "Bref," at each of 20 stores owned and operated by
20 Respondent in California, Nevada and/or Arizona in March 2006.

21 39. According to Respondent's sales records, Respondent sold at least one unit
22 of the product, "Bref," at each of eight stores owned and operated by
23 Respondent in California, Nevada and/or Arizona in April 2006.

24 40. According to Respondent's sales records, Respondent sold at least one unit
25 of the product, "Bref," at one store owned and operated by Respondent in
26 California, Nevada and/or Arizona in May 2006.

1 41. Respondent's offering for sale the product, "Bref Disinfectant with
2 Densiclolor" at the Lawndale Store on September 8, 2005, and Respondent's
3 sale of the following units of "Bref" at Respondent's stores in California,
4 Nevada and/or Arizona: 38 units in November 2005, 49 units in December
5 2005, 33 units in January 2006, 14 in February 2006, 20 units in March
6 2006, eight units in April 2006, and one unit in May 2006, constitute 164
7 violations of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

8 **COUNT 166 - DISTRIBUTION OR SALE OF THE**
9 **MISBRANDED PESTICIDE,**
10 **"BORIC ACID ROACH KILLER," IN MAY 2008**

11 42. Paragraphs 1 through 18 are restated and incorporated herein by reference.

12 43. On May 8, 2008, a duly designated inspector of the Nevada Department of
13 Agriculture ("NDOA") inspected Respondent's store located at 4910 E.
14 Tropicana Avenue, Las Vegas, Nevada ("Las Vegas Store").

15 44. On May 8, 2008, the NDOA inspector observed that Respondent was
16 offering for sale the product, "PiC® BORIC ACID Roach Killer III," EPA
17 Reg. No. 3095-20201 ("BORIC ACID Roach Killer") at the Las Vegas
18 Store.

19 45. At all times relevant to this Complaint, the product, "BORIC ACID Roach
20 Killer," was a "pesticide" within the meaning of Section 2(u) of FIFRA, 7
21 U.S.C. § 136(u).

22 46. At all times relevant to this Complaint, the product, "BORIC ACID Roach
23 Killer," was registered with EPA under Section 3 of FIFRA and subject to
24 labeling requirements under FIFRA and 40 C.F.R. Part 156.

25 47. On May 8, 2008, the labels of 11 units of the product, "BORIC ACID
26 Roach Killer," at the Las Vegas Store, were inside out, upside down, and/or
27 misaligned such that they were not likely to be read and understood by the
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1 ordinary individual under customary conditions of purchase and use.

2 48. On May 8, 2008, 11 units of the product, "BORIC ACID Roach Killer," at
3 the Las Vegas Store were "misbranded," within the meaning of Section 2(q)
4 of FIFRA, 7 U.S.C. § 136(q).

5 49. On May 8, 2008, Respondent offered for sale 11 misbranded units of the
6 product, "BORIC ACID Roach Killer," at the Las Vegas Store.

7 50. Respondent's offering for sale misbranded units of the product, "BORIC
8 ACID Roach Killer," at the Respondent's Las Vegas Store on May 8, 2008,
9 constitutes one violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C.
10 § 136j(a)(1)(E).

11 **V. PROPOSED CIVIL PENALTY**

12 Complainant determined the civil penalties proposed in this Complaint in
13 accordance with the statutory penalty factors set forth at Section 14(a)(4) of
14 FIFRA, 7 U.S.C. § 136l(a)(4), which requires Complainant to consider the
15 appropriateness of such penalty to the size of the business of the person charged,
16 the effect on the person's ability to continue in business, and the gravity of the
17 violation. Based on the particular facts and circumstances of this case with
18 specific reference to EPA's Enforcement Response Policy for the Federal
19 Insecticide, Fungicide, and Rodenticide Act, dated July 2, 1990, Complainant
20 proposes that the following civil penalty be assessed against Respondent:

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22 Count 1- Distribution or Sale of the Unregistered Pesticide, "Farmer's Secret Cleaner," in September 2004	\$ 5,850
23 Counts 2 through 165 - Distribution or Sale of the Unregistered Pesticide, "Bref Disinfectant with Densicloloro," in September 2005 through May 2006	\$959,400 (\$5,850 x 164)
26 Count 166 - Distribution or Sale of the Misbranded Pesticide, "Boric Acid Roach Killer," in May 2008	\$ 4,680

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Total Penalty	\$969,930
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VI. NOTICE OF OPPORTUNITY TO REQUEST A HEARING

As provided by Section 14(a)(3) of FIFRA, Respondent has a right to request a hearing on the issues raised in this Complaint. Any such hearing will be conducted in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22. Note that a request for a hearing must be incorporated in a written answer ("Answer") filed with the Regional Hearing Clerk within thirty (30) days of service of this Complaint. *See* 40 C.F.R. § 22.15.

In its Answer, Respondent may contest, among other things, any material fact contained in the Complaint. The Answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the Complaint as to which Respondent has any knowledge. Where Respondent has no knowledge as to a particular factual allegation and so states, the allegation is deemed denied. The Answer shall also state: (1) the circumstances or arguments alleged to constitute the grounds of any defense; (2) the facts which Respondent disputes; (3) the basis for opposing any proposed relief; and, (4) whether a hearing is requested. Any failure of Respondent to admit, deny or explain any material fact contained in the Complaint constitutes an admission of that allegation.

VII. POSSIBILITY OF DEFAULT

If Respondent fails to file a timely Answer to the Complaint, Respondent may be found to be in default pursuant to 40 C.F.R. § 22.17. For purposes of this action only, default by Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations.

VIII. QUICK RESOLUTION

1
2 Instead of requesting an informal settlement conference or filing an Answer
3 requesting a hearing, you may choose to resolve the proceeding by paying the
4 specific penalty proposed in the Complaint and filing a copy of the check or other
5 instrument of payment with the Regional Hearing Clerk within thirty (30) days
6 after receiving the Complaint. If you wish to resolve the proceeding in this
7 manner instead of filing an answer but need additional time to pay the penalty, you
8 may file a written statement stating that you agree to pay the proposed penalty in
9 accordance with 40 C.F.R § 22.18(a)(1) with the Regional Hearing Clerk within
10 30 days after receiving the Complaint. The written statement need not contain any
11 response to, or admission of, the allegations in the Complaint. Within sixty (60)
12 days after receiving the Complaint, the full amount of the proposed penalty must
13 be paid. Failure to make such payment within this sixty-day period may subject
14 you to default. Upon receipt of payment in full, the Regional Judicial Officer will
15 issue a Final Order. Payment by a respondent shall constitute a waiver of the
16 respondent's rights to contest the allegations and to appeal the Final Order. In
17 addition, full payment of the proposed penalty shall only resolve Respondent's
18 liability for Federal civil penalties for violations and facts alleged in the Complaint
19 and does not affect the right of EPA or the United States to pursue appropriate
20 injunctive or other equitable relief or criminal sanctions for any violations of law.

21 SO ISSUED this 29 day of September 2008:

22 
23 KATHERINE A. TAYLOR
24 Associate Director for Agriculture
25 Communities and Ecosystems Division
26 United States Environmental Protection Agency,
27 Region 9
28 75 Hawthorne Street
San Francisco, California 94105

CERTIFICATE OF SERVICE

I certify that the original of the foregoing Complaint and Notice of Opportunity for Hearing ("Complaint") was hand delivered to the Regional Hearing Clerk, United States Environmental Protection Agency, Region 9, 75 Hawthorne Street, San Francisco, California 94105, and that true and correct copy of the Complaint, along with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22, were placed in the United States Mail, certified mail, return receipt requested, addressed as follows:

Mr. Jeff Gold
President, 99 Cents Only Stores
4000 Union Pacific Avenue
Los Angeles, California 90023-3202

Certified Return Receipt No. 7000 0520 0025 37113442

Dated: SEP 30 2008

By: 
United States Environmental
Protection Agency
Region IX
San Francisco, CA 94105

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