UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
99 CENTS ONLY STORES,	)	**Docket No. FIFRA-09-2008-0027**
	)	
Respondent.	)	

INITIAL DECISION

DATED: June 24, 2010

FIFRA: Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136*l*(a)(1), Respondent 99 Cents Only Stores is assessed an aggregate penalty in the amount of $409,490 for its 166 violations of FIFRA Section 12(a)(1), 7 U.S.C. § 136j(a)(1), resulting from its distributions and/or sales of three unregistered or misbranded pesticides.

PRESIDING OFFICER: Chief Administrative Law Judge Susan L. Biro

APPEARANCES:

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I. PROCEDURAL HISTORY

This proceeding was initiated on September 30, 2008, by the Associate Director for the Agriculture, Communities and Ecosystems Division, United States Environmental Protection Agency, Region 9 ("EPA," "Complainant" or the "Agency"), filing an Administrative Complaint pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136*l*(a)(1), charging 99 Cents Only Stores ("the Company" or "Respondent"), with 166 counts of violating FIFRA Section 12(a)(1), 7 U.S.C. § 136j(a)(1). Specifically, the Complaint alleges in Count 1 that Respondent violated FIFRA Section 12(a)(1)(A)(prohibiting the sale or distribution of an unregistered pesticide) on September 1, 2004, when it offered for sale or distribution from its store in Gardena, California, the product "Farmer's Secret Berry & Produce Cleaner," with a label indicating it "inhibits mold, fungus & bacteria including Ecoli." Counts 2 through 165 of the Complaint allege that, between September 2005 and May 2006, Respondent again violated FIFRA Section 12(a)(1)(A) when it offered for sale or distribution and/or sold from stores in California, Nevada and Arizona, at least 164 units of the product "Bref Limpieza Y Desinfección Total con Densicloro®," with labels claiming it "disinfects." Count 166 alleges that Respondent violated FIFRA Section 12(a)(1)(E)(prohibiting the sale or distribution of a misbranded pesticide) on May 8, 2008, when it offered for sale in its store in Las Vegas, Nevada, 11 units of the registered pesticide "PiC® BORIC ACID Roach Killer III" with labels that were "inside out, upside down, and/or misaligned." The Complaint proposes the imposition of an aggregate penalty in the amount of $969,930 for these violations.

On October 29, 2008, Respondent filed an Answer to the Complaint. In its Answer, Respondent admitted some allegations, asserted that it lacked sufficient information to either admit or deny the truth of many others, and raised certain legal defenses. Thereafter, consistent with the Prehearing Order issued on January 15, 2009, the parties filed their Prehearing Exchanges, which they subsequently supplemented as permitted by Order dated June 18, 2009.

On May 4, 2009, Complainant filed a Motion for Partial Accelerated Decision on Liability ("Motion") alleging that there was no genuine issue of material fact regarding Respondent's liability for the violations. Respondent filed an Opposition to the Motion on or about May 27, 2009. By Order dated June 2, 2008, Complainant's Motion was granted and Respondent was found liable for 166 violations of FIFRA Section 12(a)(1), 7 U.S.C. § 136j(a)(1), as alleged in the Complaint. *99 Cents Only Stores*, No. FIFRA-09-2008-0027, 2008 EPA ALJ LEXIS 45 (ALJ June 2, 2008)(Order on Motion for Partial Accelerated Decision and Request for Oral Argument) (hereinafter "AD Order").

A hearing on the appropriate penalty to be imposed for the violations was held before the undersigned in Los Angeles, California on June 23 and 24, 2009. At the hearing, Complainant introduced into evidence 31 exhibits (nos. 1-13, 15-19, 21, 22, 24, 25, 27-29, 32-35, 38 and 40) (hereinafter cited as "C's Ex. __"), and offered the oral testimony of four witnesses: Linnea J. Hansen, Mark Hartman, Julie Jordan and Jonathan Shefftz. Respondent introduced into evidence at hearing 22 exhibits (nos. 1-17 and 20-25) (hereinafter cited as "R's Ex. __"), and presented the

oral testimony of two witnesses: Michael Botterman and Michael Materri.[1]

A transcript of the hearing was received by this Tribunal on August 10, 2009.[2] On October 16, 2009, Complainant submitted its Proposed Findings of Fact, Conclusions of Law and Order along with a separate Brief in support thereof ("C's Initial Brief"), and Respondent submitted its Post-Hearing Brief ("R's Initial Brief"). Complainant submitted a Reply Brief ("C's Reply Brief") and Respondent submitted an Opposition to Complainant's Proposed Findings of Fact and Conclusions of Law ("R's Reply Brief") on November 2, 2009. An Amended Transcript was received on January 29, 2010, and with that filing, the record closed.[3]

II. FACTUAL BACKGROUND

Respondent, 99 Cents Only Stores,[4] is a quarter-century old publically held California corporation that has its principal executive offices and main warehouse facility at 4000 Union Pacific Avenue, City of Commerce, California. C's Exs. 16, 32. The Company describes itself as a "unique extreme value retailer of consumable general merchandise . . . encompass[ing] a wide selection of namebrand closeout and regularly available consumable products, including food, household supplies and health and beauty care," priced at 99¢ or less per item. C's Ex. 32; Tr. 401-02. Respondent purchases its merchandise from a multitude of wholesaler vendors who deliver their products in bulk to Respondent's warehouse facilities. From these facilities,

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[1] Two demonstrative exhibits were also marked for identification and used during the course of the hearing, but neither was offered or admitted into the record as evidence.

[2] By Order dated October 9, 2009, Complainant's Motion to Conform Transcript to Proceedings was granted.

[3] A transcript of the hearing was initially presented to this Tribunal and Complainant by the Court Reporter in two separately numbered volumes. Respondent, however, was provided with a transcript in which the pages in the two volumes were numbered consecutively. This discrepancy in pagination was only discovered upon the Tribunal's review of the parties' post-hearing briefs which cited different page numbers for the testimony memorialized in the second volume of the transcript. Upon request, on January 29, 2010, this Tribunal received from the Court Reporter an "Amended Transcript" with the pages in the two volumes numbered consecutively, but later discovered that the page numeration in the Amended Transcript was inconsistent with the numeration in the transcript provided to Respondent. In the interest of clarity and simplicity, citations to the transcript herein (as amended in accordance with the Order of October 9, 2009) will be to the Amended Transcript as received by this Tribunal and in the following form: "Tr. __."

[4] Respondent's Annual Report and Security & Exchange Commission filings indicate that its proper corporate name utilizes the cent symbol ("¢") in lieu of the word "cents." *See*, C's Exs. 16, 32-35.

Respondent allots and disseminates the products incrementally to its various retail stores. C's Ex. 35 at 11. In its 2008 Annual Report, Respondent touted that it operated 273 retail stores spread throughout California, Texas, Arizona and Nevada, and had annual net sales of $1.2 billion, an annual net income of $2.9 million, and $650 million in total assets.[5] C's Ex. 32 at 3; Tr. 177-78, 317-18. *See also*, C's Ex. 35 at 26 (Respondent's SEC Form 10-K 2008 Annual Report).

On September 1, 2004, a California Department of Pesticide Regulation (CDPR) inspector observed for sale at Respondent's retail store in Gardena, California, sixty-five (65) bottles of the product "Farmer's Secret Berry & Produce Cleaner" ("Farmer's Secret"), embossed with labels claiming it "Inhibits Mold, Fungus & Bacteria, including Ecoli." C's Exs. 5, 17; Tr. 142-43. Missing from the labels, however, were the requisite state and Federal (EPA) registration numbers.[6] *Id.*; Tr. 151. Consequently, the CDPR inspector issued Respondent a "Violation Notice" for offering for sale an unregistered product in violation of state law and referred the matter to EPA for "final review and determination." *Id*. Documentation that was subsequently gathered evidenced that the product was not, in fact, a registered pesticide and that Respondent had purchased 1837 cases (each containing 24 bottles) of the Farmer's Secret product from a wholesaler in Washington State five months earlier, on April 14, 2004. *Id*. On September 6, 2005, EPA issued a notice to Respondent of its intent to file an administrative civil penalty action charging it with a FIFRA violation for selling the unregistered pesticide. Tr. 139-40; C's Ex. 2.

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[5] The majority of Respondent's retail establishments trade as "99¢ Only Stores©," although the company also maintains three showroom locations that trade as "Bargain Wholesale." C's Exs. 16, 35.

[6] Pesticides are subject to Federal, state and local regulation, and EPA is authorized to enter into cooperative agreements with states to enforce FIFRA's provisions. *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 601-02 (1991). Documents in the record indicate that EPA has such a cooperative agreement with the State of California, Department of Pesticide Regulation. C's Exs. 5, 6. The Violation Notice indicates that Respondent's sale of the product, which was not a state "registered economic poison," violated section 12811 of California's Food and Agricultural Code. C's Ex. 5. Such sale concomitantly violated FIFRA, which provides that it is "unlawful for any person in any State to distribute or sell . . . any pesticide that is not registered under [FIFRA § 3]," and requires that pesticides registered under FIFRA display their EPA registration number on their packaging. 7 U.S.C. § 136j(a)(1)(A); 40 C.F.R. § 156.10(a)(1). The phrase "to distribute or sell" includes to "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). A "pesticide" is defined as including "any substance . . . intended for preventing, destroying, repelling, or mitigating any pest" and a "pest" includes any "virus, bacteria, or other micro-organism." 7 U.S.C. §§ 136(u), (t). The claims made on a product's label evidence its intended use. 40 C.F.R. § 152.15(a)(1). *See also*, AD Order, 2008 EPA ALJ LEXIS 45 *6-9.

On September 8, 2005, the same CDPR inspector observed for sale at Respondent's retail store in Lawndale, California, a product manufactured in Mexico labeled "Bref Limpieza Y Desinfección Total con Densicloro®" ("Bref"), which was also missing state and EPA pesticide registration numbers. C's Exs. 6, 9, 18; Tr. 143. Again the inspector issued a Violation Notice and referred the matter to EPA. C's Ex. 6. In response thereto, on September 13, 2005, Respondent issued a "Product Return Notice" instructing all of its retail stores to pull the Bref product from their shelves and inventory, and to return the remaining product to its warehouse facility in the City of Commerce, California. C's Exs. 6, 7; R's Ex. 5.

Five weeks later, on October 20, 2005, the CDPR inspector followed up on his prior store inspection by conducting a "For Cause/Referral" inspection of Respondent's headquarters and warehouse facility in the City of Commerce. C's Ex. 7; Tr. 144. During this inspection, the Respondent presented the inspector with the Bref bottles returned to its warehouse by its retail stores, but acknowledged on-going product sales, upon which another Violation Notice was issued. Subsequently produced company records document that Respondent had: (a) purchased 1440 cases (each with 15 bottles) of "Limpiador Bref Azul" from Grow-Link, Inc., a California distributor, in June 2005; (b) sold approximately 790 cases of the Bref in the five months prior to the September 2005 store inspection; and (c) sold an additional 119½ cases in the eight (8) full months after the store inspection. C's Ex. 8. Chemical analysis performed by the State in November 2005 revealed that a sample bottle of Bref contained 2.51% sodium hypochlorite (NaOCl).[7] C's Ex. 6, 18. On May 4, 2006, EPA issued a notice to Respondent of its intent to file an administrative action regarding additional FIFRA violations discovered in October and December 2005 involving the sale of the unregistered Bref pesticide. Tr. 140; C's Ex. 3.

More than two years later, on May 8, 2008, during a state inspection of Respondent's retail store in Las Vegas, Nevada, labels that were "inside out, upside down and/or misaligned" were found on 11 of 26 bottles of the registered pesticide product "PiC® BORIC ACID Roach

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[7] Sodium hypochlorite (in Spanish, "Hipoclorito de sodio") (NaOCl) is a chemical compound consisting of sodium (Na), oxygen (O), and chlorine (Cl), and as a solution is commonly known as "bleach." C's Ex. 18; The Condensed Chemical Dictionary 802 (8th ed. 1971); *Four Quarters Wholesale, Inc.*, EPA Docket No. FIFRA-9-2007-0008, 2008 EPA ALJ LEXIS 21 *16 n.4 (ALJ May 29, 2008)(Order on Motion for Accelerated Decision) (citing http://en.wikipedia.org/wiki/Sodium_hypochlorite). Although the chemical formula of bleach is known to have a pesticidal effect, bleach products are not considered pesticides under FIFRA unless a "pesticidal claim is made on their labeling in connection with their sale and distribution." 40 C.F.R. § 152.10(a). *See also,* R's Ex. 9 (Clorox advertisement indicating its products kill germs). *Also compare,* R's Exs. 7 and 8 (labels of 3 quart Clorox Bleach bottles – one with and one without EPA registration number). Such a finding was made by this Tribunal in regard to Bref based upon the "disinfeccion" claim on its label. *See*, AD Order, 2008 EPA ALJ LEXIS 45 *42.

Killer III" ("PiC") being offered for sale.[8] C's Ex. 10, 11; Tr. 144-45. Respondent was issued a Notice of Non-Compliance and a "Hold Order" on the sale of the improperly labeled pesticides, and the following day notified all its stores to remove PiC bottles with defective labels from sale. C's Ex. 10. It eventually returned 550 cases of the product (each with 24 bottles) to the manufacturer/distributor, the PIC Corporation, in New Jersey. C's Ex. 10; R's Ex. 2.

As indicated above, on September 30, 2008, EPA initiated this proceeding against Respondent in regard to the Farmer's Secret, Bref and PiC products, alleging 166 FIFRA violations and seeking a combined penalty in the amount of $969,930. C's Ex. 12.

III. PENALTY CRITERIA

The assessment of civil administrative penalties is governed by the Consolidated Rules of Practice, 40 C.F.R. Part 22, which provide in pertinent part that:

> If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based upon the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall [also] consider any civil penalty guidelines issued under the Act.

40 C.F.R. § 22.27(b). The Complainant bears the burdens of presentation and persuasion to show that the relief sought in this case is "appropriate." 40 C.F.R. § 22.24(a).

In regard to any relevant "civil penalty criteria in the Act," Section 14(a)(1) of FIFRA, 7 U.S.C. § 136*l*(a)(1), provides that "[a]ny . . . distributor who violates any provision of this subchapter may be assessed a civil penalty by the Administrator of not more than $5,000 for each offense." Pursuant to the Debt Collection Improvement Act, the maximum penalty for violations occurring after March 15, 2004, and until January 12, 2009, was adjusted upward to $6,500 per offense. 31 U.S.C. § 3701; 40 C.F.R. § 19.4. *See also*, C's Ex.13; R's Initial Brief at 8 n.6.

FIFRA Section 14(a)(4) further provides in pertinent part that:

In determining the amount of the penalty, the Administrator shall consider the

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[8] State inspection records suggest that this was a follow-up "for cause" inspection to "investigate a label problem on boric acid displayed & offered for sale" observed during a prior (March 24, 2008) market place inspection. C's Ex. 10. Under FIFRA, it is unlawful to distribute or sell any pesticide that is "misbranded." 7 U.S.C. § 136j(a)(1)(E). A pesticide is "misbranded" if the information required to appear on the packaging "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." 7 U.S.C. § 136(q)(1)(E). *See also*, AD Order, 2008 EPA ALJ LEXIS 45 *8-9, 55-58.

> appropriateness of such 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. Whenever the Administrator finds that the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment, the Administrator may issue a warning in lieu of assessing a penalty.

7 U.S.C. § 136*l*(a)(4).

In terms of civil penalty guidelines issued under the Act, on July 2, 1990, EPA's Office of Compliance Monitoring, Office of Pesticides and Toxic Substances issued an Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) (hereinafter cited as "the ERP"). C's Ex. 15. The ERP sets forth a "five stage process" for computing a penalty in consideration of the statutory penalty criteria. *Id.* at 18.

IV. COMPLAINANT'S PENALTY CALCULATIONS FOR ALL COUNTS

The Complaint proposes imposition upon Respondent of an aggregate civil penalty of $969,930 for its 166 FIFRA violations, apportioned as follows: Count 1 - distribution/sale of the unregistered pesticide Farmer's Secret - $5,850; Counts 2 through 165 - distribution/sale of the unregistered pesticide Bref - $5,850 *per count* for a total of $959,400; and Count 166 - distribution/sale of misbranded pesticide PiC - $4,680. C's Ex. 12. At hearing, EPA introduced a number of exhibits as well as the testimony of Julie Jordan, an Environmental Protection Specialist with Region 9's Communities and Ecosystems Division, who explained the calculations of the proposed penalty utilizing the ERP's five-step process. Tr. 134-37, 176-77; C's Exs. 12-13, 40. Based thereupon, the Agency asserts in its Initial Brief that "a civil penalty of *at least* $939,930 for these violations is appropriate and consistent with the statutory criteria and the ERP and is fully supported by the record." C's Initial Brief at 56 (italics added). A detailed explanation of EPA's penalty calculations under the ERP follows.

A. Gravity of the Violations

Complainant asserts that it properly determined the "gravity" of the violations using the ERP's Appendix A, entitled "FIFRA Charges and Gravity Levels," which assigns to the various types of FIFRA violations a numerical "level" ranging from 1 to 4, with '1' being the most egregious violations, and '4' being the least. C's Ex. 15 at Appendix A-1 to A-7; C's Initial Brief at 10. Level 1 type violations are those that are knowing and willful, such as violating a "Stop Sale" Order or "knowingly falsifying" any part of an application for registration. C's Ex. 15 at Appendix A-5 to A-6. Level 4 type violations include less significant acts of misfeasance such as distributing a registered pesticide with a label not bearing the registration number or submitting a late report to the Administrator. C's Ex. 15 at Appendix A-1, A-6.

In this instance, relying upon ERP's Appendix A, Ms. Jordan testified that she determined that the FIFRA § 12(a)(1)(A) violations in Counts 1-165 (involving the sale of the unregistered pesticides Farmer's Secret and Bref) fell within gravity "Level 2." Tr. 169; C's Ex. 12, 13, and 15 (at Appendix A-1). The FIFRA § 12(a)(1)(E) violation set forth in Count 166 (involving the sale of the misbranded registered pesticide PiC) she determined fell within gravity "Level 3." *Id.* In its Initial Brief, Complainant submits that these gravity determinations are appropriate, representing that "[c]ourts have consistently concluded that the sale or distribution of unregistered pesticides . . . is "harmful or potentially harmful to human health and the environment, as well as harmful to the FIFRA regulatory program." C's Initial Brief at 10-11, citing *Green Thumb Nursery*, 6 E.A.D. 782, 801 (EAB 1997), 1997 EPA App. LEXIS 4 *45-46 (EPA App. 1997), *Time Chemical, Inc*., EPA Docket No. IF&R-V-237-C, *slip op.* at 5 (ALJ Oct. 16, 1975), 1975 EPA ALJ LEXIS 1 *6-7 (ALJ 1975), and *Pacific Int'l Group, Inc*., EPA Docket. No. FIFRA-9-0890-C-98-15, *slip op.* at 7 (ALJ June 22, 1999), 1999 EPA ALJ LEXIS 27 *14 (ALJ 1999).

B. Size of Business

The second step in the ERP penalty calculation process undertaken by Ms. Jordan involved determining the "size of business category" for Respondent using ERP Table 2. Tr. 169; C's Ex. 15 at 20. Table 2 divides FIFRA Section 14(a)(1) violators (registrants, wholesalers, distributors) into three business size categories: Category I includes businesses with over $1,000,000 in gross revenues in the prior calendar year, Category II applies to businesses with prior year gross revenues from $300,001 to $1,000,000, and Category III includes businesses with gross revenues at or below $300,000. C's Ex. 15 at 20.

Based upon Respondent's Security and Exchange Commission filings showing that its annual revenues each year prior to the violations were between $862 million and $1.2 billion, for penalty calculation purposes, Ms. Jordan placed 99 Cents in size of business Category I (over $1 million in revenues). Tr. 169; C's Ex. 12-14. In its Initial Brief, Complainant notes that the Company admitted in its Answer that in its 2008 Fiscal Year (covering April 1, 2007, through March 29, 2008) it had over $1.2 billion in total sales. C's Initial Brief at 12; Ans. ¶ 13. EPA adds in support of this classification that "[t]he rationale for considering the size of business is to assist in ensuring that the deterrent effect of the penalty is commensurate with the size of the violator." C's Initial Brief at 12.

C. The ERP Matrix

The third step in the ERP calculation process followed by Ms. Jordan was to apply the violation level number of '2' or '3' and the size of business category of 'I' to the "Gravity Based Penalty Matrix for FIFRA Violations" for FIFRA Section 14(a)(1) violators, set out in the ERP as modified by the September 21, 2004, Memorandum from Thomas Skinner, Acting Assistant Administrator, Office of Enforcement and Compliance Assurance, to Regional Administrators

entitled "Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule (Pursuant to Debt Collection Improvement Act of 1966, Effective October 1, 2004). C's Ex. 15 p. 19-A and App. C-1; C's Ex. 13 at 6 n.2. Such application established for Counts 1 through 165 (distribution/sale of the unregistered pesticides Farmer's Secret and Bref) a base penalty amount of $6,500 per violation (the maximum allowed by law at the time the violations occurred) and for Count 166 (distribution/sale of the misbranded pesticide PiC) a base penalty of $5,200. Tr. 169-170; C's Exs. 12-13.

D. ERP Adjustments

As EPA notes in its Initial Brief, in recognition that "the actual circumstances of the violation [may] differ from the 'average' circumstances assumed in each gravity level of the Civil Penalty Matrices," the ERP provides leeway for adjustment of the preliminary dollar figure derived from the matrix. C's Initial Brief at 14; C's Ex. 15 at 21. To accomplish this fashioning of a penalty more closely aligned to the *actual* circumstances of the violation, the ERP lists a total of five adjustment factors to be considered in determining a proposed penalty. Three of the adjustment factors, "pesticide toxicity," "human harm," and "environmental harm," are geared towards more closely reflecting the actual *gravity of the harm*. The two other adjustment factors, "compliance history" and "culpability," are intended to have the penalty more accurately reflect the actual *gravity of the misconduct*. C's Ex. 15 at 21. Numerical values for these adjustments factors - ranging from zero to five - are set forth in the ERP's Appendix B entitled "Gravity Adjustment Criteria." Unlike the FIFRA Violation Levels and Size of Business Categories in Appendix A, the lower numerical values in Appendix B represent the least egregious violations, *i.e.*, those with the smallest risk of harm or potential for harm. The ERP provides that the gravity adjustment numbers from each of the five adjustment factors are to be added (up to a maximum total value of 21) and, based upon Table 3 in the ERP (C's Ex. 15 at 22), the gravity base penalty is either assessed as is, raised or lowered. *See*, Tr. 289. If the sum of the adjustment factors is 7 or below, the penalty is reduced or eliminated; if the sum is between 8 to 12, the base penalty is assessed; and if the sum of adjustments is 13 or above the penalty is theoretically increased.[9] C's Ex. 15 at 22.

E. Pesticide Toxicity

Ms. Jordan testified that in regard to toxicity, the first adjustment factor, she assigned each count a value of '1.' Tr. 170. Under the ERP, to account for the relative toxicity of the particular pesticide involved in the violation, the pesticide is rated either '1' or '2.' Pesticides rated '1' are those in EPA Toxicity Categories II through IV, pesticides assigned the signal word

[9] Of course, in cases such as this involving a Level 2 violation by a Category I violator or in any case involving a Level 1 violation, the penalty cannot be *increased* through the application of adjustment factors relevant to the particular case because the base penalty set forth in the Matrix is *already* the maximum penalty allowed by law.

"warning" or "caution," and those with no known chronic effects.[10] Pesticides rated '2' are Toxicity Category I pesticides, pesticides requiring the signal word of "danger," restricted use pesticides, pesticides that are flammable or explosive, or pesticides with chronic health effects. C's Ex. 15 at Appendix B-1. Comparing the two unregistered products at issue here (Farmer's Secret and Bref) to those registered products with similar ingredients, and looking at the label of the registered pesticide PiC, Ms. Jordan determined that the signal word missing from or used upon the labels was "caution" or "warning." Tr. 170; C's Ex 14. Therefore, she testified at hearing that in her calculations of the ERP adjustment factors she assigned each pesticide the lower pesticide toxicity value of '1.' *Id.*; C's Ex. 12.

Nevertheless, in its Initial Brief, Complainant argues that the Bref product actually falls within the ERP's higher toxicity value of '2.' C's Initial Brief at 15-17. As explanation therefor, EPA states that Bref's label states in Spanish "Producto corrosivo" (product is corrosive), "Corrosivo" (Corrosive) and/or displays a corrosive materials symbol. C's Initial Brief at 16, citing *inter alia*, C's Ex. 25, R's Ex. 25, and 49 C.F.R. §§ 172.400, 172.442. Citing its regulation (40 C.F.R. § 156.62), the Agency notes that pesticides that are "corrosive" are classified as within Toxicity Category I and are required to display the signal word "DANGER" on their packaging. It notes that the label on Tilex, a disinfectant cleaner with ostensible uses similar to those of Bref, uses the signal word "Danger." *Id.* at 17. Further, the ERP provides that such pesticides be assigned a value of '2' for the toxicity factor. C's Initial Brief at 16. In addition, the Agency points out that Bref lists among its ingredients "Sosa caustica" (caustic soda) also known as sodium hydroxide.[11] *Id.* at 17, citing Webster's Ninth New Collegiate Dictionary (1990). In their expert testimony, Dr. Hansen and Mr. Hartman opined that foreign manufacturers often use sodium hydroxide (NaOH) in sodium hypochlorite products as a stabilizer. *Id.* at 16-17, citing Tr. 26-27, 44, 78. The addition of sodium hydroxide also results, however, in a sodium hypochlorite product with a high pH (12.5), and thus increased corrosiveness. *Id.*

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[10] For regulatory purposes, EPA assigns registered pesticides to one of four toxicity categories based upon their "human hazard indicators." 40 C.F.R. § 156.62. For example, pesticides that are corrosive to the eye or skin upon contact are assigned to "Toxicity Category I." If contact would cause mild or no irritation to the eye or skin it would be assigned to "Toxicity Category IV." *Id.* (Table). EPA then sets the requirements for labeling and use of protective equipment based upon these categorizations. 40 C.F.R. § 156.64(a). For example, the labels on Category I pesticides are required to bear the signal word "Danger" and, depending on the reason for the assignment of the product to this category, may also be required to exhibit the word "poison" in red on a contrasting background with the "skull and crossbones" in immediate proximity. Labels on Category II pesticides must display the signal word "Warning." The word "Caution" is required on the labels of Category III pesticides and no signal word is required to be used on Category IV pesticides. *Id.*

[11] Sodium hydroxide or caustic soda (NaOH), commonly known as lye, "[t]he most important commercial caustic" used in myriad products including soaps and detergents, is also toxic if ingested or inhaled. The Condensed Chemical Dictionary 802 (8th ed. 1971).

F. Harm to Human Health

The second adjustment factor to be used to modify the penalty to better match the actual violation is "Harm to Human Health." As to this, the ERP provides for three numerical values: 1, 3, and 5. The value of '1' represents "minor potential or actual harm to human health, neither serious nor widespread;" the value of '3' represents the "potential for serious or widespread harm to health or where harm to health is unknown;" and the value of '5' applies to cases where "actual serious or widespread harm to human health occurred." C's Ex. 15 at Appendix B-1. For ERP purposes, "minor harm" is defined as harm "which is or would be of short duration, no lasting effects or permanent damage, effects are easily reversible . . . does not or would not result in significant monetary loss." C's Ex. 15 at Appendix B-3 n.3.

At the hearing, Ms. Jordan testified that she assigned to all of the counts a value of '3' for the harm to human health adjustment factor. Tr. 170-171; C's Ex. 12. She explained that she assigned such value to Counts 1 and 166 relating to the Farmer's Secret and PiC product sales because the risk of harm in regard to such products was unknown. *Id. See also,* C's Initial Brief at 30. As to the Bref product, she assigned the same value because the product has the potential to cause serious or widespread harm to human health. *Id.* Ms. Jordan indicated that her opinion in this regard was based upon the label being in only Spanish and not containing the requisite precautionary language about the product's ingredients, human environmental physical and chemical hazards, and use, storage and disposal. *Id.*; C's Ex. 13 at 8.

In its Initial Brief, EPA argues that its categorization of these violations as being in the middle of the range, *i.e.* a '3,' is justified based upon the following considerations:

(a) Bref contains sodium hypochlorite, exposure to which by any route (inhalation, ingestion, or contact), is known to be corrosive and toxic to the skin, eye, and respiratory and upper gastrointestinal tracts. C's Initial Brief at 18-19, citing Tr. 16-18 and C's Ex. 29. Sodium hypochlorite products mixed with sodium hydroxide, as Bref's label indicates it is (R's Ex. 25), results in a compound with a high pH, and is particularly basic, toxic and corrosive. C's Initial Brief at 19-20, citing C's Ex. 29 at 2, 5, and Tr. 26-27, 44, 98. EPA notes that Bref's product label warns that it is "corrosive" in two places. C's Initial Brief at 19-20, citing R's Ex. 25.

(b) Accidentally mixing sodium hypochlorite with ammonia or acid contained in other common household cleaners releases chlorine or chloramine gas which can cause serious illness or death. C's Initial Brief at 20, citing Tr. 17-18, 79-81, 91, and C's Ex. 29 at 2, 3, 5. Mr. Matteri testified that he thought Bref also contained ammonia and if so it would be a "deadly product." C's Initial Brief at 21, citing Tr. 237. Bref's Spanish label creates the potential for serious harm since it increases the chances of such mixture accidently occurring. *Id.*, citing Tr. 98-99.

(c) American Association of Poison Control Centers (AAPCC) Annual Reports for 2003-2007 recorded approximately 54,000 yearly poisoning incidents from exposure to "hypochlorite bleach" products and 3,000 (in 2003) trending upward to 14,000 (in 2007) yearly poisoning

incidents from "hypochlorite disinfectant" products. C's Initial Brief at 22-23, citing C's Ex. 29, and Tr. 18-20. Further, AAPCC reported for 2003-2007 a total of 10,836 "moderate" and 245 "major" health effects from such exposure, including the death of 12 persons. C's Initial Brief at 23-24 citing C's Ex. 29. Incidents resulting from exposure to household cleaning products is the second most common category of reported poisoning incidents for young children (under age 6) and the second or third most common category for the general population. C's Initial Brief at 22, citing C's Ex. 29.

(d) While Bref's label indicates its intended use on kitchen counters, due to its non-registration under FIFRA, EPA has no data as to its efficacy as a hard-surface antimicrobial pesticide against bacteria such as salmonella, a common potentially deadly bacterium found on raw chicken. C's Initial Brief at 24-26, citing 40 C.F.R. §§ 158.130, 158.400, 158.2160, Tr. 87, 91-93, 99-100, 126-128, and C's Ex. 25.

(e) Contrary to FIFRA's labeling requirements for registered pesticides, the Bref label is completely in Spanish, and as such its precaution information would not be comprehensible by non-Spanish readers. C's Initial Brief at 26-27, citing Tr. 34, 90.

(f) Even in Spanish, the Bref label does not fully meet FIFRA's labeling requirements as it does not provide all the requisite information as to ventilation and first-aid response in the event of eye contact or ingestion, and lacks a signal word and an ingredient statement on the front panel. C's Initial Brief at 27, citing Tr. 34-35, 90-92 and C's Ex. 29, R's Ex. 20.

(g) Bref was not sold in child-resistant packaging, although had it applied for pesticide registration there is a "high likelihood" such packaging would have been required due to its corrosivity to the eye. C's Initial Brief at 28-29, citing 40 C.F.R. Part 157, Tr. 93-94, 97, 131, and C's Ex. 7.

(h) Respondent sold 13,700 bottles of Bref at 188 stores in California, Texas, Arizona and Nevada, and thus its potential harm was "geographically widespread." C's Initial Brief at 29, citing C's Ex. 8 and Tr. 96.

(i) The illegal sale of 13,000 bottles of Bref harms the "integrity of the [FIFRA] regulatory program." C's Initial Brief at 29-30, citing *Green Thumb*, 6 E.A.D. at 801, *Time Chemical*, *Inc*., at 5, *Pacific Int'l* at 7, and Tr. 99-100.

G. Environmental Harm

The third adjustment factor in the ERP's Appendix B, "Environmental Harm," has the same three levels of 1, 3, and 5 as for Harm to Human Health and they are defined and divided the same as those for the second adjustment factor except that they are in regard to the environment. C's Ex. 15 at Appendix B-1. Prior to hearing, Ms. Jordan had assigned a value of '1' as to environmental harm for all three of the pesticide products at issue in this case,

suggesting that the violations' potential for actual harm to the environment was minor and neither serious nor widespread. Tr. 171; C's Exs. 12-13. However, at hearing she opined that assignment of the higher value of '3' was warranted in regard to Bref because it contained sodium hypochlorite. Tr. 171. However, EPA does not include in its Briefs this argument in support of assigning Bref to a higher level beyond a '1' as initially calculated by Ms. Jordan. C's Initial Brief at 30.

H. Compliance History

Turning to the adjustment factors relating to the gravity of the misconduct, under the fourth adjustment factor, "Compliance History," the ERP's Appendix B provides four numerical options, starting at zero for no prior violations, and increasing from 2, to 4, to 5 based upon the severity and number of prior FIFRA violations. C's Ex. 15 at Appendix B-2. In determining a violator's compliance history, EPA only considers violations which occurred within the past 5 years and which resulted in entry of a final order, a consent order, payment of a civil penalty, or a criminal conviction. Notices of warning are not considered in determining a violator's compliance history. C's Ex. 13 at 9-10. In calculating the penalty in this case, Ms. Jordan assigned a value of zero to compliance history because Respondent had no prior FIFRA violations. Tr. 171; C's Ex. 12, 13 at 9-10.

In its Initial Brief, Complainant argues that "a gravity value of '2' may be appropriate with respect to the Bref violations" because by September 2004, Respondent had already violated FIFRA with respect to the Farmer's Secret product and therefore EPA could have pursued a one count action against it at that time which would have counted as a prior violation against Respondent in a subsequent action in regard to the Bref sales. C's Initial Brief at 31. *See also*, C's Ex. 2 (September 6, 2005, correspondence from EPA to Respondent regarding FIFRA violation). That no such prior action was taken, the Agency explains, is due to Respondent's failure to timely respond to a show cause letter issued to it by the Agency on September 6, 2005 or telephone calls following up on such letter. *Id*.; Tr. 173-74. Complainant suggests that by assigning a zero value to compliance history "Respondent benefits from its lack of cooperation in failing to expeditiously resolve the Farmer's Secret matter." C's Initial Brief at 32.

I. Culpability

The final of the five gravity adjustment factors provided for by the ERP is "Culpability." This category has three numerical options: zero if the "[v]iolation was neither knowing nor willful and did not result from negligence [and the] [v]iolator instituted steps to correct the violation immediately after discovery of the violation;" '2' if the violation resulted from negligence or culpability was unknown; and '4' if it was a "[k]nowing or willful violation of the statute." C's Ex. 15 at Appendix B-2; Tr. 172.

Ms. Jordan assigned a '2' to this factor as to all counts for negligence, noting the company was warned several times, received compliance assistance materials, and the case involved multiple unregistered and misbranded products. Further, she noted that "[c]learly the recall efforts that 99 Cents attempted were not successful for Bref, because close to $1,700 [sic] Bref bottles were sold after its recall date." Tr. 172; C's Exs. 12, 13.

In its Brief, EPA argues that its assignment of a "culpability" rating of '2,' the middle rating in this category, is warranted in that Respondent was negligent. C's Initial Brief at 32. Noting that negligence is not defined in the ERP, EPA cites various authorities for the proposition that the term as used in the ERP means "ordinary negligence," that is the "failure to use such care as a reasonably prudent person would under similar circumstances." *Id*. at 32-33, citing *United States v. Hanousek*, 176 F.3d 1116, 1120-21 (9th Cir. 1999), *Rhee Bros. Inc*., EPA Docket No. FIFRA-03-2005-0028, 2006 EPA ALJ LEXIS 32 *79-80 (ALJ Sept. 19, 2006), *Hing Mau*, EPA Docket No. FIFRA-9-2001-0017, 2003 EPA ALJ LEXIS 63 *44-45 (ALJ Aug. 23, 2003), and various other EPA penalty policies. Complainant asserts that Respondent engaged in negligent misfeasance at some ten separate points, including employing a business strategy of buying products on "very short notice," thereby denying the opportunity for conducting proper compliance review, as a result of which, despite receiving general and specific notices about FIFRA, it purchased and sold 13,709 bottles of Bref over 12 months. C's Initial Brief at 35, citing C's Exs. 1, 2, 4-8, 35, and Tr. 159-60. Further, EPA asserts the company's recall system was "wholly ineffective," as it allowed for the sale of 1,793 bottles of Bref in the eight months following the recall. *Id*., citing C's Exs. 7, 8. *See also*, C's Initial Brief at 36-46.

J. Complainant's Calculation of the Total Penalty

Ms. Jordan testified at the hearing that to complete this fourth step in the penalty calculation process under the ERP, she added together the values she had assigned to the five adjustment factors – pesticide toxicity (1), human harm (3), environmental harm (1), compliance history (0), and culpability (2) – and obtained a numerical total of '7.' Tr. 172; C's Exs. 12; R's Ex. 10. Noting that under the ERP an adjustment figure of '7' calls for a ten percent (10%) reduction in the base penalty set forth in the matrix, for Counts 1-165 (the Farmer's Secret and Bref counts) she reduced by 10%, or $650, the $6,500 base penalty, obtaining an adjusted penalty of $5,850 per violation. Tr. 172-73; C's Exs. 12-13; C's Ex. 15 App. C, Table 3. For Count 166 (the PiC violation) she reduced the $5,200 base penalty by 10%, or $520, obtaining an adjusted penalty of $4,680. Tr. 173. Multiplying $5,850 by 165, and adding the penalty of $4,680 for Count 166, Complainant calculated a total proposed penalty of $969,930. *Id*.; Tr. 229. *See also*, C's Exs. 12, 13. Despite the various issues it raised as to certain factors warranting higher values (as noted above), Complainant does not appear to oppose imposition of a 10% reduction. C's Initial Brief at 46.

K. Effect on Violator's Ability to Continue in Business

The fifth and final step in the penalty calculation process under the ERP takes into consideration "the effect that payment of the total civil penalty will have on a violator's ability to continue in business." C's Ex. 15 at 18. At the hearing, Ms. Jordan stated that she made no reduction in the proposed penalty based upon this factor because the Company did not at any point claim any inability to pay and so the Agency never acquired any records relevant to its finances. Tr. 173-174. In its Initial Brief, observing that the proposed penalty is .08% of Respondent's net annual sales, Complainant declares that "[r]ealistically, the size of the penalty sought in this action will [have] no effect on Respondent's ability to carry on its business." C's Initial Brief at 47. Nevertheless, the Agency gripes, Respondent refused prior to hearing to stipulate to the fact that it had the ability to pay the penalty. *Id*.

L. Other Considerations

Ms. Jordan testified at hearing that she supplemented the fixed five-step penalty calculation provided for by the ERP by also considering whether any downward adjustment should be made based upon the factors of voluntary disclosure and/or good faith, even though the ERP does not explicitly provide for such considerations in regard to penalties calculated for the purposes of hearing. Upon such consideration, she determined that no reduction to the penalty was warranted due to "voluntary disclosure," under EPA's Audit Policy ("Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19618 (Apr. 11, 2000), because the violations came to light through a series of state inspections "expending scarce government resources" and not through the actions of Respondent. Tr. 173-74; C's Initial Brief at 47.

Further, she also determined that it was not appropriate to make a downward adjustment to the penalty based upon Respondent's "good faith." The ERP provides that "[d]uring the course of settlement negotiations," the Agency may reduce the penalty "as much as 20 percent" in consideration of a respondent's attitude or good faith efforts to comply with FIFRA, if such a reduction "would serve the public interest." C's Ex. 15 at 27. Ms. Jordan averred at hearing that Respondent did not exhibit good faith in this proceeding in that it did not timely respond to the show cause letter the Agency sent it on September 6, 2005, regarding its sales of Farmer's Secret, although she made several phone calls to the company in an effort to follow up on the letter. Tr. 173-74. In addition, she alleged that during one such call "Mr. Taylor, who was the director of quality assurance advised her that his manager was more interested in opening another location than dealing with 'our matter.'" Tr. 174.

Buttressing Ms. Jordan's decision that a reduction based upon good faith is inapplicable here, EPA takes the position in its Initial Brief that in defending this case Respondent fell "below the standard of appropriate conduct." C's Initial Brief at 48. In support thereof, it remarks that the company failed to disclose its defense regarding the Bref sales, *i.e.* that it ordered a legal product (Bref Brillante) and unbeknownst to it, received a different illegal product, until hearing.

Id. The Agency claims that "earlier disclosure of this contention to Complainant would have materially affected settlement discussions [and] [i]t might have even dispensed with the necessity to go to hearing." C's Initial Brief at 48. In addition, EPA reiterates the fact that the company refused to stipulate at any point prior to hearing to the fact that the proposed penalty would have no effect on its business. *Id*.

In support of the proposed penalty, EPA offers up in its Initial Brief a few additional points not specifically considered by Ms. Jordan in performing her calculations. The first such point is the claim that Respondent "financially profited from its violations." C's Initial Brief at 48. EPA quotes its General Enforcement Policy #GM-21, "Policy on Civil Penalties," dated February 16, 1984, for the proposition that the "first goal of penalty assessment is to deter people from violating the law" and to do so the penalty must place the violator in a "worse position than those who have complied in a timely fashion," thus removing the competitive economic benefit of non-compliance. *Id*. at 48-49, citing C's Ex. 28 at 3, 4. The Environmental Appeals Board ("EAB" or "Board") characterizes such recovery as ensuring a "level playing field" among business competitors, EPA states. *Id*. at 49-50, citing *inter alia*, *B.J. Carney Industries*, 7 E.A.D. 171, 207-08 (EAB 1997). Economic benefit accrues to a violator three ways - from delayed cost of compliance, avoided costs of compliance, and illegal competitive advantage from non-compliance, such as profits gained on the sale of illegal products. *Id*. at 50, citing *inter alia*, 68 Fed. Reg. 46604 (August 6, 2003). Respondent obtained this third type of economic benefit, Complainant asserts, noting that the company sold 13,709 bottles of Bref at $0.99 per bottle resulting in gross revenues from the sales of $13,707.63. *Id.* at 50, citing C's Exs. 6-8, 21. With a wholesale cost of $0.48 per bottle, or $6,580.32, Respondent's profit from the Bref sales was $7,127.31, Complainant figures.

Moreover, EPA asserts, Respondent benefitted from delaying until October 2005 the outlay of the costs associated with spot check procedures to prevent the sale of unregistered pesticides. C's Initial Brief at 51, citing Tr. 126-27. Assuming, based upon the testimony provided at hearing, that Respondent receives 100,000 product shipments a year, and it takes each of Respondent's 12 buyers 10 minutes each day to spot check, the total time devoted by the buyers to spot checking is two hours per day or one-fourth of a full-time equivalent employee, Complainant asserts. Using the figures from the Department of Labor as to the annual mean wage for buyers of $50,000, this resulted in Respondent avoiding $12,500 in costs from not instituting spot checking prior to October 2005, EPA reckons. C's Initial Brief at 52.

Finally, the Agency characterizes as "conservative" and "equitable" the methodology it chose to use in determining the number of violations charged in this proceeding, noting that it charged only one count for *each store* that sold Bref in each month *after* the *second notice of violation* was issued, which was 43 days *after Respondent issued its recall notice*. C's Initial Brief at 52-56. EPA proclaims that it could have charged far more violations, as many as 13,709, in regard to the Bref product, as caselaw and the ERP provides that each "sale" of an unregistered pesticide to a person constitutes a "unit of violation." *Id*. at 53-54, citing *Chempace Corp*. 9 E.A.D. 119, 129-130 (EAB 2000), *Microban Products, Co.*, 11 E.A.D. 425, 447, and *Sultan Chemists, Inc*., 9 E.A.D. 323 (EAB 2000), *aff'd Sultan Chemists, Inc. v. U.S. EPA*, 281 F.3d 73

(3d Cir. 2002) and C's Ex. 15 at 25, C's Ex. 8. However, it eschewed such approach because it could not determine with certainty the precise number of sales at each store each month. Further, in terms of time, it limited the number of stores, and thus counts alleged, to those occurring from November 2005, 43 days after Respondent issued its recall notice for Bref on September 18, 2005, and 11 days after it received its second notice of violation on October 20, 2005. *Id.* at 54, citing C's Ex. 7. Nevertheless, EPA notes that during this brief time period alone, Respondent sold over 656 bottles of Bref. *Id*. at 55. The proposed penalty is also fair, EPA asserts, because: (1) the violations encompass "hundreds of acts of malfeasance and nonfeasance committed by top officers within Respondent's management and product buyers, as well as the 188 store managers who failed to heed the recall notice or take elementary steps to comply with FIFRA over a seven to 12-month period;" (2) a small penalty is inappropriate when financial reasons explain a violation, citing Ms. Jordan's testimony about being advised that Respondent's managers were more interested in opening new locations than dealing with "our matter;" and (3) the penalty sought per unit of unregistered pesticide sold in this case of $70.70 ($969,930/13,730) is low compared to other cases such as *Rhee Bros*. ($891.25 per unit) and *Hing Mau* ($247.50 per unit). *Id*.

V. RESPONDENT'S CONCESSION TO COMPLAINANT'S PROPOSED PENALTY ON COUNT 1 – FARMER'S SECRET

In its post-hearing Initial Brief, Respondent affirms that in this proceeding it is not challenging the imposition of the Agency's proposed penalty of $5,850 for the violation set forth in Count 1 of the Complaint arising from its distribution and/or sale of Farmer's Secret. R's Initial Brief at 2 n.2.

VI. RESPONDENT'S CHALLENGES TO COMPLAINANT'S PENALTY CALCULATION ON COUNTS 2 – 165 REGARDING BREF

On the other hand, in its post-hearing briefs, Respondent aggressively challenges the "enormous penalty" ($959,400) sought by Complainant "on just one product, a common bleach-containing household cleaner called Bref." R's Initial Brief at 1. It characterizes the infractions for the other two products as being "insignificant" and "mere 'window dressing'" offered by the Agency "in an attempt to establish a pattern of FIFRA violations to justify its unsupportable penalty demand for the Bref product." R's Initial Brief at 1. Respondent condemns the proposed penalty for the Bref violations as inappropriate, either as a "strict application" of the ERP or as "an equitable matter based on the facts concerning the sales of the products . . . as proven at . . . hearing." R's Initial Brief at 1. The Company declares that under the circumstances of this case, a "reasonable application" of FIFRA's statutory and regulatory penalty provisions and "fundamental fairness dictates that no penalty should be imposed" or "if any penalty should be awarded for the sale of the Bref product, it should be only a small faction of the amount sought . . . and certainly less than $6,500." R's Initial Brief at 2, 13.

In support of this proposition, Respondent offers dual legal arguments founded upon the same two clusters of facts regarding due care/culpability and harm to human health. First, Respondent asserts that no monetary penalty should be imposed for its Bref sales because the violations fall within the parameters of the language of the second sentence of FIFRA § 14(a)(4) (7 U.S.C. § 136*l*(a)(4)), which provides as follows:

> Whenever the Administrator finds that the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment, the Administrator may issue a warning in lieu of assessing a penalty.

R's Initial Brief at 13. Alternatively, Respondent argues that the evidence adduced in this case demonstrates that the culpability criterion under ERP should be appropriately valued at '0' and not '2,' and the harm to human health criterion at '1' and not '3,' so the total of all the gravity adjustment criteria is only '3,' and as such, warrants the imposition of no penalty. R's Initial Brief at 16.

In addition to these two arguments, Respondent also challenges the Agency's methodology for charging it with, and seeking a penalty for, 164 separate counts of violation in regard to its sale of one unregistered product. R's Initial Brief at 16-17. Moreover, it asserts that fundamental fairness dictates that no penalty should be imposed upon it, much less a penalty of almost a million dollars, because of the "lack of meaningful enforcement action against Henkel or Grow-Link, who were responsible for importing the Bref product into the United States." R's Initial Brief at 12-13. Each of these four arguments is addressed below.

A. Due Care/Culpability

1. Respondent's Arguments as to Due Care/Culpability

In its post-hearing briefs, Respondent asserts that its Bref violations occurred despite its exercise of due care and/or it is not culpable for such violations. R's Initial Brief at 13, 15. As background, it explains that to satisfy the demands of the very large portion of its customer base which is Hispanic and particularly "brand loyal," the Company purchases and sells well-known brands of major manufacturers' products which are popular in Spanish-speaking countries such as Mexico. R's Initial Brief at 2-3, citing Tr. 203, 337-38, 407-419. *See also*, Tr. 340. Consistent therewith, in 2004, Mike Matteri, Respondent's buyer with 30 years of retail experience, arranged with Grow-Link, Inc., an importer/wholesaler, for the Company to purchase "1,2,3 Laundry Detergent," manufactured and sold in Mexico by Henkel, one of the world's largest consumer products companies. R's Initial Brief at 3, citing Tr. 420-21; R's Initial Brief at 13; R's Exs. 11, 13. *See also*, Tr. 341-44, 423-24. This laundry product proved so popular with its customers, Respondent claims, that it continued to purchase and sell hundreds of thousands of units of the detergent from 2005-2009. R's Initial Brief at 3, citing Tr. 421-22.

Thus, Respondent implies, Mr. Matteri was primed and eager to purchase when Grow-Link subsequently approached him in May 2005 about "Bref," a new Henkel cleaning product manufactured in Mexico. R's Initial Brief at 3, citing Tr. 422-23. *See also*, R's Exs. 14, 15; Tr. 425. Nevertheless, Respondent states, consistent with his "custom and practice," prior to purchasing the new product, Mr. Matteri reviewed the product label on the sample bottle of "Bref Brillante" provided to him by Grow-Link to determine if it made any pesticidal claims because, "as an experienced purchasing agent . . . he was well-aware that some cleaning products do contain pesticidal claims and, for those products . . . an EPA pesticide registration is required."[12] R's Initial Brief at 3-4; R's Ex. 6. *See also*, Tr. 425. Only upon finding that the sample label "did *not* contain any pesticidal claims," did Mr. Matteri place a Purchase Order (PO) for 1480 cases (each with 15 bottles) of "Bref Liquid Cleanser 1 LTR." R's Initial Brief at 4 (emphasis in original), citing Tr. 423 and R's Ex. 1; R's Reply Brief at 10-11. *See also*, Tr. 425-27, 436-37. Respondent further emphasizes that the PO provided that "[b]y accepting this PO and by shipping the goods identified in this PO, the Seller [Grow-Link] hereby represents and warrants that the goods to be furnished hereunder are and will be: (1) in conformity with all required laws; produced, labeled, and identified in compliance with all applicable federal, state, local laws, rules, and regulations . . . ." R's Initial Brief at 4, citing R's Ex. 1. In addition, the PO required Grow-Link to "indemnify and defend" Respondent against any claims that "the product (including product packaging and labeling) is . . . not compliant with law, mislabeled or not appropriately or fully labeled." *Id*. Respondent suggests that the presence of the labeling and indemnity provisions in the PO "arguably provides a defense to civil penalties under 7 U.S.C. § 136j(b)," in that they establish a valid seller guaranty, adding "[h]owever, it may not be necessary to reach this issue if this Tribunal otherwise concludes that a civil penalty for the sale of the Bref product is inappropriate under the statutory or FIFRA Penalty Policy Standards." R's Initial Brief at 16 n.11.

Pursuant to the PO, in June 2005, a total of 1440 cases of "Limpiador Bref Azul" and/or "Detergent" were shipped directly from the Henkel's facility in Mexico to Respondent's warehouse in California.[13] R's Initial Brief at 4, citing Tr. 424-29 and R's Ex. 1. *See also*, Tr.

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[12] Respondent was put on notice of FIFRA's requirements and its obligations in regards thereto on or before September 20, 2002, when EPA sent it a "Letter of Advisement," explaining that a cleaning product (Shower Klean) it was then selling in a store in Las Vegas, labeled "controls mold and mildew," was an unregistered pesticide under FIFRA and therefore could not lawfully be sold. C's Ex. 1; Tr. 205-06. A few years later, in February 2004, EPA included 71 of Respondent's stores as well as to its headquarters in the mass-mailing of an informational flyer entitled "Protect your Business: Avoid Selling Illegal Pesticides," providing general information on FIFRA pesticide registration requirements and warning that the sale of an unregistered pesticide "**may result in a civil penalty of up to $6500 for <u>each</u> sale**." C's Ex. 4 (emphasis in original); Tr. 141.

[13] The product was delivered to Respondent in two separate shipments. The first shipment of 1,056 cases was received by Respondent on June 20, 2005, and a second shipment of 384 cases was received on or about June 29, 2005. The Uniform Straight Bill of Lading

428. Unfortunately, at that point in time, the Company did not have procedures in place directing its purchasing agents to compare products received with sample products ordered and Mr. Matteri did not, in fact, compare the Bref product received with the sample he had been previously provided. Tr. 430, 450. As a result, Respondent asserts, prior to the September 2005 inspection, it was not aware that the label on the Bref product received differed from that on the sample provided, and that the label on the product received made a pesticidal claim. R's Initial Brief at 5, citing Tr. 446-47 and C's Ex. 6. *See also*, Tr. 449-50. Nevertheless, the failure to compare the products does not constitute negligence on its part, Respondent argues, because Henkel was a large well-respected multinational consumer products company with whom it had prior successful dealing and "[n]either Mr. Matteri nor 99¢ could possibly know that the label on the product shipped . . . would be different than the label on the sample product reviewed," contain a pesticidal claim, and be in violation of the Purchase Order. R's Initial Brief at 1; R's Reply Brief at 11, citing Tr. 341-325; R's Initial Brief at 6-7, citing Tr. 447.

Furthermore, Respondent stresses, less than a week after becoming so aware, it issued a "Product Return Notice" to each of its stores through its internal computer network, which "required that the Bref product be pulled from shelves and inventory," and returned to its warehouse. R's Initial Brief at 5, citing R's Ex. 5 and Tr. 341-44. This recall effort successfully recovered two-thirds of the Bref units (265 cases) then remaining unsold in its stores at the time, the Company touts.[14] R's Ex. 11. Nonetheless, Respondent concedes that its recall effort "ultimately proved not to be *totally* effective," in "that approximately 1800 units [bottles] of Bref were sold *after* September 2005." R's Initial Brief at 5 (italics added), citing C's Ex. 8; R's Initial Brief at 13-14; R's Reply Brief at 12, citing Tr. 341-344. However, the "overwhelming majority of those units (more than 1,100) were sold in October 2005 while the recall was still being implemented," the Company explains, noting that only about 650 units were sold throughout the "entire 99¢ system of more than 200 stores" after October 2005 until the last sale in May 2006. R's Initial Brief at 5, citing C's Ex. 8. Such post-recall sales were not negligently made, Respondent argues, because the recall program it had in place at the time "met industry standards." R's Initial Brief at 14; R's Reply Brief at 12, citing Tr. 341-344.

In addition, Respondent characterizes EPA's claim that "store managers must serve as guarantors that all products sold in their stores meet all regulatory requirements," as an "absurd 'principle'" that is "neither reasonable nor feasible" when there are myriad government

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accompanying the first shipment indicates that the product was shipped by "Henkel Capital, S.A. De C.V." from "Nuevo Laredo, Tamps. 88000." R's Ex. 1; Tr. 430-32, 457.

[14] In correspondence with State officials, Grow-Link suggests that it "imported and distributed solely for 99 cts Only Stores "four different Bref products (Blue Bref and Green Bref, each in 1 and 2 liter bottles), and that a total of 463 cases of the four products were "recovered" by Grow-Link for export back to Mexico. R's Ex. 11. However, Mr. Matteri testified that the Company did not purchase any other Bref products. Tr. 455-56. *See also*, C's Ex. 6, 21 (photographs of Bref bottles on display all of which appear to be the same blue one liter bottle); Tr. 222.

requirements. R's Reply Brief at 12-13, citing C's Initial Brief at 40-44. Further, the Company points out that Grow-Link, "the party that should bear liability for importing a product that did not match the sample," "escaped" with just a $1,500 state-imposed penalty based upon an "agreed finding" that its sale and delivery of the product were "made as a result of a good faith mistake" and not for "the purpose of gaining an unfair or unlawful economic advantage," and after presentation of its compliance correction efforts. R's Initial Brief at 6; R's Ex. 12. Respondent points out further that while EPA investigated Grow-Link's actions, it decided not to initiate any enforcement action against Grow-Link. R's Initial Brief at 6 n.4, 12 and 14, citing Tr. 211-16, 221-22.

Moreover, "[f]ollowing the incident," Respondent notes it modified its product receipt and recall procedures to address the "substitution problem" that had occurred with Bref, which modifications should "prevent (or at least minimize the potential for) similar future problems in the future." R's Initial Brief at 6-7. The modified procedures require the comparison of products received on a daily basis with the samples provided. R's Initial Brief at 7, citing Tr. 319-325. *See also*, Tr. 332. Further, in January 2007, Respondent reduced its pesticide purchasing procedures to writing. R's Initial Brief at 6 n.5; R's Ex. 3. *See also*, Tr. 419-20. Also, in October 2008, it "implemented a new recall program that goes beyond industry standards and adds a cash register lockout feature" that alerts the cashier to retrieve the item from the customer and prohibits recalled products from being scanned and sold. R's Initial Brief at 7, citing Tr. 344-346. *See also*, R's Ex. 4; Tr. 347-350.

Lastly, Respondent charges that "virtually all" of the reasons proffered by the Agency to justify the "extraordinary Bref penalty" sought were "proven . . . wrong" at hearing. R's Initial Brief at 1. In particular it points out that Bref was shown not to be a "'close-out' product . . . 'dumped' . . . by an 'unscrupulous foreign manufacturer,'" but a new product being marketed in the United States by Henkel, "a German company that is one of the largest and most respected consumer product manufacturers in the world selling instantly recognizable products like Dial and Coast soap." *Id.* at 1-2. In addition, at hearing it was shown that prior to purchasing the product, its label *was* reviewed for pesticidal claims, and none were found. *Id*. at 2. Finally, the full copy of the label on the product sold which Respondent presented at hearing evidenced that it was not, in fact, missing critical information regarding the product's ingredients, precautions for use, and emergency contact information, as Complainant had alleged. R's Initial Brief at 2, citing R's Ex. 24.

All of the forgoing, Respondent argues, proves that the Bref violations occurred despite its exercise of due care, and/or that its culpability therefor should be rated for the purposes of the ERP as '0.' R's Initial Brief at 12-13, 15-16.

2. Complainant's Response to Arguments as to Due Care/Culpability

In its Reply Brief, Complainant characterizes Respondent's "Case of Mistaken Identity Excuse," based upon its buyer ordering one product but receiving another, as "not compelling,"

because the label on the sample Bref product (Bref Brillante) *also implied* a pesticidal claim. C's Reply Brief at 1-2, citing C's Ex. 6. Specifically, EPA directs the Tribunal's attention to the words "no se use para desinfeccion de aqua o alimentos," under the heading "Precauciones," on the back panel of the sample product label (C's Ex. 6), which it translates as "Don't use to disinfect water or food." *Id*. This language, EPA suggests, implies that the substance can and should be used as a pesticide," and EPA refers to the statement in the Accelerated Decision that "[a] reasonable person, certainly someone fluent in Spanish, might imply from such a qualified phrase that the product could be used to disinfect things *other than consumable food or water*." C's Reply Brief at 2, citing AD Order at 18 n.7.

Even if the sample product did not contain a pesticidal claim, "a reasonably prudent company of Respondent's size would have built redundancies into its review system so that a single mistake - a major mistake by the Senior Buyer - would not result in the sale of thousands of bottles of an illegal pesticide," EPA proclaims. C's Reply Brief at 3. Moreover, the Respondent's misfeasance was not limited to a single mistake by the buyer, but hundreds of mistakes "as it sold 13,709 bottles of Bref over the next 12 months." *Id.* EPA emphasizes that the store managers "simply failed to pull [Bref] from shelves and inventory" in response to the recall notice, and so sold an additional 1,793 bottles between October 2005 and May 2006, that is, after the inspection. C's Reply Brief at 6-8. Whether such recall procedures met the "industry standards" is "beside the point," EPA maintains, if the practices did not meet the standard of care "a reasonably prudent and careful [company] would use under similar circumstances." C's Reply Brief at 7, citing Black's Law Dictionary 930 (5th ed. 1979). In addition, while Respondent alleges that the Bref incident provided the impetus to modify its product receipt and recall procedures, "in truth," the Agency states, its 2008 Form 10-K suggests that such modifications were made to address "accounting weaknesses and inventory shrinkage (employee theft or shoplifting)" and thus improve profits. C's Reply Brief at 7, citing C's Ex. 35 at 17. In contrast to the "great resources" Respondent was devoting to improving profits, it devoted scant resources to developing compliance procedures "which, to be effective, must be written," EPA intones. C's Reply Brief at 8. Complainant also stresses that the Company has admitted that it had no written procedures prior to January 2007, and contrary to its position, such absence had "*everything* to do with the Bref violations." C's Reply Brief at 8, citing R's Initial Brief at 6 n.5.

Lastly, the Agency declares, the labeling and indemnity provisions in the PO between Respondent and Grow-Link do not meet the specific requirements of 7 U.S.C. § 136j(b) necessary to establish a valid guaranty. C's Reply Brief at 4-5. Specifically, EPA asserts that Respondent failed to demonstrate that the PO included the signature of the importer or a representation that the pesticide was lawfully registered at the time of sale and delivery. *Id*.

3. Discussion of Due Care/Culpability

It is appropriate to first address the guaranty provisions in the Purchase Order (PO) and whether they meet the requirements of 7 U.S.C. § 136j(b) (FIFRA § 12), because the Company suggests that that statute provides it with a *complete defense* to imposition of *any* civil penalties

arising from its sale of Bref. R's Initial Brief at 16 n.11.

FIFRA § 12 provides in pertinent part as follows:

> (a) In general.
> (1) Except as provided by subsection (b), 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 [FIFRA] section 3 [7 U.S.C. § 136a] . . .
>
> * * *
>
> (b) Exemptions. The penalties provided for a violation of paragraph (1) of subsection (a) shall not apply to--
> (1) any person who establishes *a guaranty* signed by, and containing the name and address of, the registrant or person residing in the United States from whom the person purchased or received in good faith the pesticide in the same unbroken package, *to the effect that the pesticide was lawfully registered at the time of sale* and delivery to the person, *and that it complies with the other requirements of this Act*, and in such case the guarantor shall be subject to the penalties which would otherwise attach to the person holding the guaranty under the provisions of this Act;

7 U.S.C. § 136j (italics added).

In *Sultan Chemists, Inc*., the Environmental Appeals Board (EAB) addressed as a matter of "first impression" what constitutes a valid guaranty under FIFRA § 12(b)(1). *Sultan Chemists, Inc*., 9 E.A.D. 323, 2000 EPA App. LEXIS 24 (EAB 2000), *aff'd,* 281 F.3d 73 (3d Cir. 2000). It concluded that establishing such a guaranty requires the party seeking the benefit thereof to prove the following six specific requirements:

> (1) that it holds a written guaranty;
>
> (2) that the guaranty was signed by and contains the name and address of the guarantor;
>
> (3) that the guaranty provides that the unregistered products were lawfully registered at the time of sale and delivery to the guarantee;
>
> (4) the guaranty provides that the unregistered product complies with the other requirements of FIFRA subchapter II;
>
> (5) that the guarantee received the unregistered products from the guarantor in good faith; and
>
> (6) that the guarantee purchased or received the unregistered products in an

unbroken package.

See, Sultan Chemists, 9 E.A.D. at 331.

As noted above, it is undisputed that on May 31, 2005, Respondent issued to Grow-Link a two-page Purchase Order (# CA 290609) for 1480 cases of "Bref Liquid Cleanser 1 Ltr" "UPC # 7501199400068." R's Ex. 1.[15] The first page of that Purchase Order (PO) provides in pertinent part as follows:

> 1. This PURCHASE ORDER shall constitute an offer only; it is not a confirmation or acceptance of any prior or contemporaneous offer or proposal, and such offer or proposal, if any, is hereby expressly rejected. Acceptance of this PO is expressly limited to the terms of this offer. Purchaser is not willing to enter into or be bound by any agreement other than on the terms, and only the terms, of this PO. Acceptance of this PO is expressly limited to the terms herein, which may not be contradicted, added to, or varied in any way or by any manner or method. Acceptance of this PO, and any agreement formed by this PO, may not be contradicted upon or contain any different or additional terms, whether contained in a verbal communication, an invoice, confirmation, or other writing, conduct, course of dealing, custom and habit, trade usage, or otherwise. Notice is hereby given that any terms in addition to or different from the terms of this PO are by this notification expressly objected to and expressly rejected. Shipment . . . of the goods identified in this PO by the Seller shall constitute an acceptance of this PO on its terms, as shall execution (signing) of this PO by the seller.

R's Ex. 1.

Below this provision, in the spaces provided for the seller's representative's printed name and signature, appears an illegible scribble, which Mr. Matteri testified at hearing was that of Grow-Link's salesman Octavio Scherb. R's Ex. 1; Tr. 426-27. *See also*, R's Exs. 10-12 (Grow-Link documents purportedly signed by Mr. Scherb reflecting a similar signature and Mr. Scherb's Grow-Link business card on which the "Bref" name appears). Adjacent thereto appears Mr. Matteri's signature, adjacent to which is his first name and last initial, as "Buyer." *Id.*

The second or back page of the Grow-Link PO contains 30 additional numbered terms, including the following:

> 12. By accepting this PO and by shipping the goods identified in this PO,

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[15] The bulk of the PO appears to be a standard printed form completed by the handwritten addition thereto of identifying information as to the particular product being ordered and the parties' signatures. R's Exs. 1, 17.

> Seller hereby represents and warrants that the goods to be furnished hereunder are and will be: (1) in conformity with all required laws; (2) produced, labeled, and identified in compliance with all applicable interstate and local laws, rules and regulations . . .

R's Ex. 1. *See also*, R's Initial Brief at 4.

It is noted that this warranty provision is very broadly written, and does not explicitly provide that the pesticide products furnished by Grow-Link are or will be "lawfully registered at the time of sale or delivery" and/or that the "product complies with the other requirements of FIFRA subchapter II," two of the requirements the EAB held were necessary to establish a valid guaranty under FIFRA § 12. Even assuming *arguendo*, such representations regarding FIFRA compliance could be said to be implicitly included in the broad wording of this warranty provision, Respondent failed to prove at hearing all of the other statutory requirements necessary to establish a valid guaranty under FIFRA § 12. Specifically, it did not, and cannot, prove that the guaranty contains the "address" of the guarantor, because Grow-Link's address does not appear on the PO.[16] R's Ex. 1. Further, it did not prove that the goods were received in unbroken packages.

While the foregoing may seem a very narrow or strict interpretation of the requirements of FIFRA § 12, it is observed that similar "hypertechnical" deficiencies were held to prevent the creation of a valid guaranty by the EAB in *Sultan*. Specifically, in that case the EAB ruled that the explicit guaranty of FIFRA registration given by the seller as to one product (the "Solution"), did not encompass the other products sold, even though the chemical formulation of the Solution was the basis for all the other products. *Sultan*, 9 E.A.D. at 332. In addition, the EAB found that the "agreement is devoid of language to the effect that the unregistered Products (or, for that matter, the registered Solution) complied with the other requirements of subchapter II of FIFRA." 9 E.A.D. at 334 n.10. Further, upon appeal, the Third Circuit upheld the EAB's purportedly "hypertechnical" interpretation as "reasonable," despite the Respondent's good faith reliance upon the guaranty, noting that --

> the purpose of FIFRA's registration program is to protect human health and the environment from risks associated with pesticides. Accordingly, the EPA may rigorously enforce FIFRA against the distributor if the requirements of the guaranty provision have not been met. Such a system of enforcement is designed to encourage all parties to make additional efforts to ensure registration as required by the statute. The guaranty provision releases an innocent distributor who reasonably relies on the written assurances of the products' manufacturer but it does not shield the distributor of pesticides from the responsibility of ensuring to the extent possible that the manufacturer has complied with FIFRA's

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[16] It is noted however that adjacent to Grow-Link's name on the form is the number "#24903." It is possible that such number may reference the address of Grow-Link in Respondent's system, but this was not alleged or proven at hearing. *See*, R's Ex. 1.

> requirements. *We see no reason to reject the EAB's interpretation of § 12(b)(1) which places responsibility on the distributor, thereby providing additional protection for the consumer*.

Sultan Chemists, Inc. v. U.S. EPA, 281 F.3d 73, 81 (3d Cir. 2002) (italics added).

As such, it is hereby found that the Purchase Order between Respondent and Grow-Link does not meet the requirements of FIFRA § 12 to establish a valid guaranty, and therefore does not shield Respondent from incurring penalties thereunder for its distribution of the unregistered pesticide Bref.

Next, turning to Respondent's remaining due care/culpability arguments, it is noted that for such arguments to carry the day this Tribunal would have to find that Respondent was not negligent and, in fact, undertook such measures as may be held reasonably required of it to avoid distributing the unregistered pesticide. The record simply does not support such a finding.

First, it is observed that the 164 Bref counts (counts 2-165) as set forth in the Complaint, and upon which Respondent was found liable, conclude with the allegation that:

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

Complaint ¶ 41 (italics added).

Thus, of the 164 Bref counts, one alleges a violation occurring on September 8, 2005, the day of the State inspection of Respondent's Lawndale store, and the balance (163 counts) allege violations occurring in or after November 2005, that is beginning the month *after* the October 2005 State inspection of its warehouse facility occurred, and *after* Respondent's issuance of its "Product Return Notice" on September 13, 2005. R's Ex. 5.

With regard to the violation which occurred on September 8, 2005, Mr. Matteri's testimony regarding the good faith measures he initially undertook on Respondent's behalf to avoid ordering an unregistered pesticide seemed sincere, credible and legally sufficient, if less than ideal, in that he acknowledged that due to his limited Spanish fluency he had to informally engage other employees in his review of the "Hispanic label" (R's Ex. 6) on the sample bottle to determine whether pesticidal claims were made thereon. Tr. 425-26, 436. On the other hand, EPA's claim that the label on the sample bottle also implied a pesticidal claim by stating "no se use para desinfeccion de aqua o alimentos" (do not use to disinfect water or food), is not persuasive. First, the copy of the label in the record and as provided to this Tribunal (R's Ex. 6)

is so poor that such statement cannot be observed thereon by the undersigned. Second, even if such statement was proven to have appeared on the label of the sample bottle, such disclaimer alone cannot be said to make out a pesticidal claim. Complainant's citation to such language in the Order on Accelerated Decision and the finding that "[a] reasonable person, certainly someone fluent in Spanish, might imply from such a qualified phrase that the product could be used to disinfect things *other than consumable food or water,*" in support of its argument here, is misplaced. The context in which such finding was made was in regard to the Bref label (R's Ex. 25) upon which such words appeared on the back, which *also* displays on the front under the product's name "LIMPIEZA Y DESINFECCIÓN TOTAL" (Complete Cleaning and Disinfection). *Taken together*, this Tribunal found, the claim on the label that the product disinfects, along with the disclaimer that the product should not be used to disinfect food or water, might imply to someone fluent in Spanish in particular that the product could be used to disinfect other things. However, the Tribunal did not find then, and does not find now, that such disclaimer *alone* would imply that the product could be used for disinfection.

That being said, the record demonstrates that Respondent's good faith efforts to avoid selling an unregistered pesticide diminished significantly once the Purchase Order was placed. In particular, as Respondent acknowledges, at the time it did not have a policy providing for examining, and did not in fact ever examine, the Bref product it received from Grow-Link and/or compare it with the sample previously provided. As a result thereof, from June 2005, when it first received the product, until the state inspection in September 2005, it was unaware that the product it was distributing implied a pesticidal claim. R's Initial Brief at 6-7, citing Tr. Vol. II at 447. Respondent attempts to excuse this omission on various grounds, including a suggestion that due to its prior dealings with Henkel and that manufacturer's "reputation as a high quality consumer product company," the need for such "level of scrutiny cannot be said to be reasonably foreseen." R's Reply Brief at 7. It also mentions that substitution of products breached the terms of its contract with Grow-Link, and the fact that both the Bref Brilliant sample and the Bref Limpieza Y Desinfección Total product received displayed the same UPC code. R's Initial Brief at 4 and Tr. 429. Respondent affirms that it has since changed its procedures to require product comparisons on a daily basis to avoid the "product substitution problem that occurred with Bref." R's Initial Brief at 7. All these excuses are insufficient.

Quite conspicuously, Respondent does not claim that failing to compare products ordered with those received complied with "industry standards" and no doubt this is due to the fact that such failure is not a standard of the industry. The law of the State of California, where Respondent's principal office and warehouse is located, and the law of every other state by virtue of their adoption of the provisions of the Uniform Commercial Code as well, authorizes a seller to tender non-conforming goods (anticipating acceptance with or without a monetary offset) and explicitly provides with regard thereto that "the buyer has a right before payment or acceptance to inspect" the goods. Cal. Com. Code §§ 2508, 2513. *See also*, Cal. Com. Code § 2606 ("acceptance does not occur until the buyer has had a reasonable opportunity to inspect"). If such timely inspection reveals an unacceptable non-conformity, the buyer may notify the seller of the defect, reject the goods, and avoid liability for payment or loss. Cal. Com. Code §§ 2602, 2605. Further, upon such notice, if time for performance has not yet expired, the seller may cure with a

conforming delivery. On the other hand, the failure of a buyer to inspect tendered goods in a timely manner will bar the buyer from obtaining compensation for the non-conforming goods. Cal. Com. Code §§ 2606, 2607. Thus, it appears that industry standards expect, if not oblige, a buyer to inspect goods upon receipt, and that Respondent's failure to do so would not comply with industry standards.

Moreover, failing to compare a pesticide product received with the sample previously provided does not meet the standard of due care reasonably required of Respondent in this instance. R's Ex. 1 (PO ¶ 14). Mr. Matteri was aware of FIFRA provisions prohibiting the sale of unregistered pesticides, and because of such awareness, he said that he specifically examined the label on the sample product before placing the order. Such initial due care, however, became ineffectual when Respondent failed to follow through and undertake the rather nominal effort to inspect the label on the product it actually received for conformance with the sample label, before it distributed the product to its stores for sale. By such failure, it allowed the one FIFRA violation found on the day of the store inspection to occur, putting itself and its customers at risk, and fell below the standard of care required of it under the circumstances.[17]

Compounding such nonfeasance was Respondent's subsequent misfeasance, specifically its failure to timely and adequately respond to the two Notices of Violation the state inspector issued, resulting in the other 163 Bref violations. Specifically, the undisputed evidence establishes that *after* receiving the first Notice of Violation at its Lawndale store on September 8th, and *even after* receiving the second Notice of Violation at its headquarters/warehouse facility on October 20th, between November 2005 through May 2006, Respondent sold over 650 more bottles of the product.[18] Furthermore, such sales cannot even be attributed to one or two rogue

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[17] The fact that Henkel used the same Universal Product Code (UPC) bar code on both the sample product ordered and the product delivered does not excuse Respondent's failure to examine the product and its label upon delivery. UPCs are number sets requested by manufacturers from GS1-US (f/k/a the Uniform Code Council or Uniform Product Council), a voluntary non-governmental organization organized for the purposes of standardizing the use of UPC symbols on goods. *In re Kaslow*, 707 F.2d 1366, 1369 (Fed. Cir. 1983); www.gs1-us.info. The UPC contains the manufacturer's Uniform Commercial Code membership identification number, the manufacturer's product identification number, and a calculated check digit, but not the product name or description. *United States v. Bruce*, 531 F. Supp. 2d 983, 984 (N.D. Ill. 2008). There is no evidence that a manufacturer could not alter the product or its label and still maintain the same UPC. The Company's PO indicates that it permitted the delivery by the seller/manufacturer of a product different from the sample provided so long as the product delivered was "of equal or better quality than the quality as shown by sample." *See*, R's Ex. 1 at 2 ¶ 6; Tr. 325. As such, identical UPC codes did not assure that the exact same product, labeled exactly in the same way, was being provided.

[18] Specifically, in November 2005, a total of 38 stores sold 95 bottles; in December 2005, 49 stores sold 249 bottles; in January 2006, 33 stores sold 154 bottles; in February 2006, 14 stores sold 71 bottles; in March 2006, 20 stores sold 69 bottles; in April 2006, 8 stores sold 15

stores or store managers, because the sales literally occurred in dozens of different 99¢ stores. *Even the Lawndale store*, where inspection occurred and notice of violation was issued directly to the store manager on September 8, 2005, sold two more bottles of Bref in October 2005. C's Ex. 8; C's Initial Brief at 44. All this occurred despite the fact that Respondent had issued a Product Recall Notice to its stores, had contemporaneous access to data on the product's sales through its computerized inventory system, and, as Mr. Botterman testified, it was the Company's procedure to look at records of "scanned sales" of recalled products. C's Ex. 8; Tr. 350-51.

There can be no question that Respondent had a duty to properly comply with the Notices of Violation and cease selling the illegal pesticide promptly thereafter, a duty which it clearly breached by selling an additional 650 bottles over the next seven months, from November 2005 through May 2006. Respondent offered no explanation for why a significant number of its store managers ignored its Product Return Notice and continued to sell the Bref product for many months thereafter and/or why its upper or supervisory management did not adequately conduct effectiveness checks to verify that the stores were complying with the Return Notice and/or take other available measures to stop product sales after the Return Notice was issued. To be effective, such stop-sale measures need not necessarily have been as expensive or extensive as the product lock out on the cash register which Respondent alleges it subsequently put into place. R's Ex. 4. Instead, Respondent could have simply initially issued a more strongly worded recall notice, instructing its stores in imperative language, set forth in conspicuous print, that further sale of the product is illegal, and perhaps threatening punitive action against store managers which allow such illegal sales to occur. R's Ex. 5. Additionally, Respondent's headquarters staff could have periodically reviewed its computerized sales records in regard to the product after the Product Return Notice was issued, and placed a stiff telephone call to those stores where its records show the product was sold after the recall went out. Alternatively, the Company could have tasked personnel to go to each store to search for the recalled product being offered for sale and confiscate any product found. The absence of testimony regarding any effort by Respondent to stop product sales after receiving the two Notices of Violations, beyond issuance of the one recall notice, strongly suggests that its top managers did not place much importance upon recalling the product. In that corporate culture is generally viewed as filtering down from the top, it is likely that such culture of indifference at the top explains the weak response by the store managers below.

Further, while Respondent claims that its recall process at the time was consistent with "industry standards," common sense and experience suggests otherwise. Respondent sells a wide variety of products in its stores other than pesticides, including "produce, dairy, deli, frozen foods, baked goods, and gourmet foods," as well as baby products, toys and "health & beauty care and household products." *See,* C's Exs. 32, 35; Tr. 313, 316. As Mr. Botterman acknowledged at hearing, federal and state regulatory agencies frequently issue public warnings of contamination and/or danger in regard to some mass distributed household product such as

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bottles; and in May 2006, one store sold 3 bottles of Bref. C's Ex. 8; C's Initial Brief at 40.

those sold by Respondent, *i.e.* dog food tainted with melamine, toys containing lead, and/or hamburger meat, lettuce or peanuts contaminated with salmonella or e-coli bacteria. R's Ex. 4; Tr. 380. *See also*, R's Ex. 4 (computer screen print dated May 20, 2009 of "99 ¢entral" with six current product Recall Notices for peppers, seeds, clips, preserves, candy, and cookies). With a risk of potential liability for death or injuries resulting from the sale of such products after such governmental recall, it defies common sense that the "standard" of the retail industry is to take *months*, in fact up to *ten* (10) months (September 2005 - May 2006) to cease selling such recalled products. *United States v. Santarsiero*, 566 F. Supp. 536 (S.D.N.Y. 1983)(judge is entitled to consider all the facts presented to him and to draw reasonable inferences from those facts based upon his common sense and experience); *Abad v. Bayer Corp*., 531 F. Supp. 2d 957, 966-967 (N.D. Ill. 2008)(In weighing the credibility of witnesses, a court is entitled to consider the inherent plausibility of the testimony. If the testimony runs counter to the judge's common sense, or the judge's own experience, to the extent he or she has any experience that is relevant, this is a factor that can weigh against acceptance of the opinion.). Therefore, Respondent's claim that the recall process it employed in regard to Bref was consistent with "industry standards" is rejected.

In sum, Respondent's actions in terms of handling the Bref product's purchase, distribution, sale, and recall do not evidence that the violations occurred despite its "exercise of due care" within the meaning of 7 U.S.C. § 136*l*(a)(4), such that it would be more appropriate to issue a warning instead of imposing a penalty. Furthermore, such actions do not demonstrate that Respondent's culpability for the violations should be appropriately valued at '0' rather than a '2' under the ERP.

B. Harm to Human Health or the Environment

1. Respondent's Arguments as to Harm to Human Health or the Environment

As noted above, alternatively Respondent argues that no penalty should be imposed upon it as to Counts 2-165 based upon 7 U.S.C. § 136*l*(a)(4) or the ERP as "it is undisputed that there was no [actual] harm to public health or to the environment associated with the Bref product." R's Initial Brief at 14, citing Tr. at 236, 59-60; R's Reply Brief at 9. The Company suggests that all EPA offered at hearing in this regard was "speculative" testimony about the product's corrosive or toxic nature, as it failed to obtain any data on the product's specific composition from Henkel. R's Reply Brief at 7. Further, Respondent suggests, the Agency's evidence as to the product's "*potential*" to cause "serious or widespread" harm consisted only of incidents of injury involving products "different than" or "not shown to be the same as" Bref and, even then, "the number of reported incidents involving significant injuries were a negligible percentage of the total sales of bleach containing household cleaners." R's Initial Brief at 14-15, citing Tr. 61-67, 181, 189. Specifically, Respondent cites EPA's exhibits to the effect that only 245 serious incidents were reported over 5 years from 2003-2007, and mostly resulting from product misuse. R's Reply Brief at 8, citing Tr. 61-67, 181-189, Tr. 8 n.9. Respondent suggests that the risk of Bref's misuse by, for example, mixing it with ammonia, is no different from that of any other bleach product, and asserts that it "defies common sense to conclude that every bleach-containing

household cleaner presents a potential for widespread or serious harm to human health." R's Reply Brief at 7. It adds that the risk that the Bref product will not kill salmonella bacteria is the same as that of all other unregistered bleach containing cleaners. *Id*. at 8.

Moreover, as to EPA's attempt to create the appearance of serious or widespread potential harm based upon the product's label being in Spanish and/or missing key information, Respondent explains that "as a product intended for Hispanic customers, many of whom read *only* Spanish, having a Spanish label is not only appropriate, but essential." R's Initial Brief at 15 n.10 (italics in original); R's Reply Brief at 8. In addition, "*all* of the information" Complainant thought was missing from the label was in fact present on the label. *Id*., citing Tr. 439-446 and R's Ex. 25. The remaining label deficiencies are "minor at best" and relate to treatment "after harm has occurred and, therefore, cannot possible create a potential for widespread or serious harm," Respondent claims. R's Reply Brief at 8 (internal punctuation omitted). It also declares that there is simply no evidence in the record that would support a finding that Bref was not sold in a child resistant bottle. R's Reply Brief at 9, citing Tr. 133. Finally, the claim that the violations harm the regulatory program is undermined, Respondent asserts, by the fact that EPA did not immediately contact Henkel to stop importation of the product and failed to take any action in regard thereto against Henkel or Grow-link. R's Reply Brief at 9 n.11.

2. Complainant's Response to Arguments as to Harm to Human Health or the Environment

In response, Complainant acknowledges its lack of evidence as to actual poisoning incidents involving Bref, noting that if it had such evidence, it would have set the value of the ERP criterion of "harm to human health" at '5' rather than '3.' C's Reply Brief at 5. EPA suggests its '3' rating is supported by the "scientific literature," specifically that of the AAPCC, which reported a total of 129,791 incidents of accidental poisoning involving sodium hypochlorite products over a 5 year period, 11,093 of which had moderate to major outcomes, and which reported that in 2006, children under the age of 6 accounted for 62% of the reported poisoning incidents involving hypochlorite bleach. C's Reply Brief at 5-6, citing C's Ex. 29. EPA hypothesizes that "[s]ome or many of the 51,699 accidental poisonings in 2005 and 2006 may have involved Bref." *Id*. Such data, EPA opines, supports Dr. Hansen's conclusion that "household products containing hypochlorite (bleach and disinfectants) [ ] represent a significant source of accidental exposures to young children as well as the population in general." C's Reply Brief at 6.

3. Discussion of Harm to Human Health or the Environment

a. Environmental Harm

As noted above, in its penalty calculations, Complainant assigned the 164 Bref violations a value of '1' in terms of harm to the environment, the lowest of the three numeric choices offered, but still a value representing the presence of some amount of risk, rather than the absence thereof.

However, the Agency offered no evidence as to any actual or potential harm to the environment created by the product. Thus, Complainant's valuation in this regard is unsubstantiated and Respondent's challenge thereto well-founded. This criterion should have an adjustment value of '0' under the ERP.

b. Harm to Human Health

The bulk of the evidence submitted in this case by Complainant was directed towards justifying its proposed penalty of $959,400 for counts 2-164 on the basis that, by holding for sale and/or selling Bref containing sodium hypochlorite (NaOCl), Respondent created a significant risk of serious and widespread harm to human health. After long and serious consideration thereof, this assertion and the resultant penalty proposed, is found not to be fully sustained by evidence in the record.

The record demonstrates that sodium hypochlorite (NaOCl), commonly known as bleach, is a ubiquitous chemical ingredient of myriad products including household cleaners and disinfectants, laundry whiteners, and water sanitizers and clorinators. C's Exs. 6, 29 (Hansen Affidavit); R's Exs. 7, 8, 20-24; Tr. 27 (Dr. Hansen)("Clorox or standard household bleach . . . are very commonly used"); Tr. 61. *See also*, The Condensed Chemical Dictionary 802-03 (8th ed. 1971)(uses include bleaching paper pulp, textiles, water purification, medicine, fungicides, swimming pools, household bleach, laundering); *Chem Mark of Reno*, EPA Docket No. FIFRA-09-0823-C-92-40, 1993 EPA ALJ LEXIS 474 *15-16 (ALJ Dec. 7, 1993)("ordinary household chlorine bleach . . . is available for purchase without restriction in supermarkets throughout the United States. It is used everyday by ordinary citizens throughout the country in doing their household laundry."); *Four Quarters Wholesale, Inc.*, EPA Docket No. FIFRA-9-2007-0008, 2008 EPA ALJ LEXIS 21 *16 n.4 (ALJ May 29, 2008) (Order on Motion for Accelerated Decision) citing http://en.wikipedia.org/wiki/Sodium_hypochlorite ("'Bleach,' the common name for the chemical compound sodium hypochlorite (NaOCl), is an established disinfectant.").

The percentage of NaOCl contained in such products appears to range from approximately 1.1% to 12.5%, with household cleaners and disinfectants, generally sold in smaller quantity containers, containing less NaOCl, and laundry whiteners and pool sanitizers containing more. *See*, R's Ex. 22 (24 ounces Soft Scrub Cleaner with Bleach with 1.1% NaOCl); R's Ex. 20 (1 quart Clorox Clean-up Cleaner with 1.84% NaOCl); C's Ex. 13 (Jordan Affidavit)(Tilex with 2.40% NaOCl); C's Exs. 6, 18 (1 liter Bref with 2.51% NaOCl); R's Ex. 7 (3 quart Clorox Regular Bleach with 6% NaOCl); Tr. 27 ("Clorox or standard household bleach . . . would be 5 to 6 percent sodium hypochlorite"); Tr. 88-89 (Mr. Hartman)("I picked out 7 products" in the EPA pesticide registration database ranging from 2.0-2.5% NaOCl); Tr. 97-98 (Mr. Hartman)(mentioning products with 2.0-2.5% and 5.25-12.5% NaOCl); *Chem Mark*, 1993 EPA ALJ LEXIS 474 (sale of sanitization products mislabeled containing 2.5%-6% NaOCl); *Sunset Pools of St. Louis, Inc.*, EPA Docket No. I.F.&R.-VII-355C, 1980 EPA ALJ LEXIS 6 *3 (ALJ Dec. 5, 1980)(9% NaOCl solution for algae control); *Green Thumb Nursery, Inc.*, EPA Docket No. I.F.&R.-V-014-94, 1995 EPA ALJ LEXIS 98 *2 (ALJ Mar. 2, 1995)(Orders)(pool sanitizer

with 12% NaOCl); *Ind. Mich. Power Co.*, EPA Docket No. CERCLA-05-2004-0010, 2005 EPA ALJ LEXIS 23 *35 (ALJ May 3, 2005)(Order on Motion for Accelerated Decision on Liability and Penalty)(release of 12% NaOCl solution used in water circulation system to prevent zebra mussel infestation and control condenser fouling); *William E. Comley, Inc*., EPA Docket No. FIFRA-04-2000-0060, 2003 EPA ALJ LEXIS 7 (ALJ Jan. 31, 2003), *aff'd*, 2004 EPA App. LEXIS 2 (EAB 2004)(swimming pool disinfectant with 12.5% NaOCl). *See also*, R's Ex. 21 (Safeway Cleaner with Bleach with unstated percent of NaOCl); R's Ex. 23 (Henkel Mountain Breeze Soft Scrub with Bleach Cleaner with unstated percent of NaOCl); R's Ex. 24 (Henkel Soft Scrub Bleach Clean Gel Cleanser with unstated percent of NaOCl); *Four Quarters*, 2008 EPA ALJ LEXIS 21 (ALJ May 29, 2008)(Clorox Concentrado [bleach] with unstated percent of NaOCl); *Chem Lab*, 2001 EPA ALJ LEXIS 100 (pool shock); *Spang and Co.*, EPA Docket No. RCRA-III-169, 1996 EPA ALJ LEXIS 52 *7-8 (ALJ May 1, 1996)(water treatment); *Metrex Research Corp.*, EPA Docket No. FIFRA-92-H-04, 1993 EPA ALJ LEXIS 478 *4 (ALJ Jun. 8, 1993)(misbranded pesticide). *See also*, The Condensed Chemical Dictionary 802-03 (8th ed. 1971)(indicating that NaOCl solutions over 7% available chlorine are subject to shipping regulations).

State testing determined that Bref contained 2.51% NaOCl, slightly more than the percentage found in some other household cleaners and disinfectants, but less than half the amount contained in laundry bleach and a fourth of the amount found in water sanitizers.[19] *See*, C's Exs. 6, 13, 18; R's Exs. 7, 20, 22; Tr. 27, 79 (Dr. Hansen)("Clorox or standard household bleach . . . would be 5 to 6 percent sodium hypochlorite"); Tr. 29 (Dr. Hansen)("Clorox is about twice as concentrated [as Bref]."); Tr. 55. Complainant's expert in the field of pesticide toxicology, Dr. Hansen, a scientist with EPA's Office of Pesticide Programs, Health Effects Division, acknowledged in her Affidavit that the concentration of sodium hypochlorite in a product impacts the risk thereof:

> *At high concentrations*, sodium hypochlorite is corrosive to the skin, eye, respiratory tract and mucous membranes of the upper gastrointestinal tract. *High concentrations* may cause significant toxicity if ingested, inhaled or in contact with the skin or eyes. *At concentrations of sodium hypochlorite found in household products comparable to Bref (as analyzed), it is usually irritating rather than*

[19] At hearing, Dr. Hansen suggested that, due to the absence of information as to the age of the sample bottle of Bref tested, it was impossible to know for certain if the amount of NaOCl found therein (2.51%) represented the typical concentration in the product or if the amount had degraded over time. Tr. 27. While that may be true, it is irrelevant, in that the health risk presented by the unregistered product must be determined as of the time of sale, not as of the time of manufacture or any other time. In addition, the suggestion by Complainant that the risk presented by Bref might be as great or greater than laundry bleach – because the instructions on the latter call for its dilution (Tr. 28-29, 31) – rings false, in that this argument evaluates risk for the laundry bleach upon the product's proper use, which is unsupported by the incident reports proffered by Complainant (C's Ex. 38), and contrary to its claim as to the product's increased risk from improper mixing with other chemicals such as ammonia. Tr. 98-99, 188.

> *corrosive*, but more serious symptoms may be observed depending upon the nature of the exposure.
>
> * * *
>
> Mixing of sodium hypochlorite with certain other chemicals such as ammonia or acids results in release of toxic chlorine or chloramine gas. Respiratory irritation may result from short-term or lower ambient concentration exposures, but more serious or longer-term effects have also been reported from exposure to these gases.

C's Ex. 29 (italics added). *See also,* Tr. 10; C's Exs. 22, 29 (Hansen Affidavit); *William E. Comley*, 2003 EPA ALJ LEXIS 7 (noting in regard to a 12.5% NaOCl mislabeled pool disinfectant that at the highest level of human exposure, NaOCl causes skin burns and irreversible eye damage).

Thus, the health risk posed by Bref falls at the lower end of the spectrum for products containing sodium hypochlorite, with it being at most a potential irritant. Tr. 55 (Dr. Hansen agreeing that "toxicity is in the dose;" "the higher the dose, the more toxic the product."); Tr. 56 (Dr. Hansen agreeing that, assuming it is not diluted, laundry bleach is more toxic than Bref). This would be true even to extent that mixing the product with other products containing chemicals such as ammonia could result in release of toxic gas.[20] Tr. 24 (Dr. Hanson) ("the higher [the] concentration . . . [of sodium hypochlorite] [t]he more likely you would have such an incident [from mixing with ammonia]").

Such conclusion is buttressed by the incident data offered in this case by Complainant.[21] As noted by Dr. Hansen, the AAPCC divides household cleaning products with sodium hypochlorite into two categories: "bleach" or "disinfectant," but does not explicitly define the categories. C's Ex. 29; Tr. 21. "Bleach" is the household cleaning product category with the highest frequency of incidents, and the number of such yearly incidents (40-41,000) has been fairly consistent over the years. C's Ex. 29; Tr. 21. Incidents involving disinfectants on the other

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[20] This Tribunal finds no credible support for Complainant's suggestion that Bref was a "deadly product" on the basis that it contained ammonia as well as sodium hypochlorite. C's Initial Brief at 21. EPA bases such claim on a misstatement made by Mr. Matteri during the stress of hearing. Tr. 437. However, the State lab reports evidences that it conducted an "analysis for quaternary ammonium" and none was found. C's Ex. 6; Tr. 26, 59 ("ammonium signif[ies] ammonia"). Further, Complainant's expert witnesses testified that mixing ammonia and bleach immediately causes the release of toxic chlorine gas, not a chemical reaction Henkel was likely to bottle and sell, and even if it had, such reaction would not likely to have been missed by the inspectors, state chemists, or anyone else who ever opened a bottle of the product. Tr. 59, 117-18.

[21] EPA proffered selections of AAPCC data though the testimony and Affidavit (C's Ex. 29) of Dr. Hansen, but did not offer the AAPCC Reports themselves into the record for this Tribunal's independent review.

hand, are only a small fraction of that amount, with approximately 3,000 to 3,600 in 2003-2005, 7,600 in 2006, and 13,800 in 2007, with the trend upward attributed by Dr. Hansen to possible "increase in product use." C's Ex. 29; Tr. 21. *See also*, *William E. Comley*, 2003 EPA ALJ LEXIS 7 (citing expert testimony to the effect that from 1995 to 2001, that there were approximately 1,100 reported incidents involving sodium hypochlorite). From this data, as well as Dr. Hansen's testimony that sodium hypochlorite poses a greater risk at higher concentrations, it can be deduced that the AAPCC's "bleach" category likely covers incidents involving "regular" laundry bleach which has been steadily and copiously used for generations, which is sold in larger volume units, and contains a higher percentage of sodium hypochlorite. *See*, R's Ex. 7 (3 quarts Clorox Regular Bleach – 6% NaOCl); Tr. 27 (Dr. Hansen)("Clorox or standard household bleach . . . [is] very commonly used and [is] probably often observed in the incident reports or in case studies"); Tr. 24 (Dr. Hanson). "Disinfectants," on the other hand, would likely be products like "Clorox Clean-up" or Bref, sold in smaller bottles containing significantly less sodium hypochlorite by percentage, which are not as commonly or constantly used and whose popularity has more recently been on the increase. *See,* R's Ex. 20 (1 quart spray bottle Clorox Clean-Up – 1.84% NaOCl).

Thus, not only are the absolute number of poisoning incidents from disinfectants such as Bref relatively small, but the risk of incurring serious injury from such incidents is as well. The AAPCC reported that in the vast majority of cases the outcome of such exposure was "minimal or no effects were observed." C's Ex. 29; Tr. 22. In fact, in the five year period from 2003 to 2007, when the number of total reported incidents involving disinfectants was about 31,500, and the total number of outcomes from incidents reported was 13,235, only 2 deaths, 46 major effects, and 1,251 moderate effects were reported as resulting from the exposure. *Id*. Complainant's Report on High Level Incidents Involving Sodium Hypochlorite in California confirms the unlikely nature of incurring death or serious injury or illness from hypochlorite exposure from a household cleaning product. C's Ex. 38. That Report identified a total of only *9* "high level" incidents involving sodium hypochlorite occurring in California (a state with a population over 36 million) in a *nine year* period between 1999 and June 2009, and discloses that only *three* of those incidents occurred in a residential, rather than industrial, setting. *Id*.; Tr. 158, 181-88. At hearing, even Dr. Hansen acknowledged that the incidence of injury is a "small percentage" of the "possibly" "hundreds of millions" of total units of cleaners with bleach sold in the United States. Tr. 61-62, 65. While obviously even a single poisoning incident is regrettable, in a country like ours with a population of over 300 million people, from such data one can only conclude that the risk of someone actually incurring serious injury from Bref is almost insignificant. Further buttressing this conclusion is the evidence of record showing that although Respondent sold 13,700 bottles of Bref over the course of almost a year, from 188 stores in four states, neither party was aware of even a single claim of injury arising therefrom.[22] Tr. 66, 239. The sheer

[22] There is no factual support whatsoever in the record for EPA's suggestion that some of the incidents reported to the AAPCC may have involved Bref or that Bref may have contained sodium hydroxide or another inactive chemical as a stabilizing agent which could have increased its pH to 12.5 or above. Tr. 31, 98. It is noted that neither Complainant nor Respondent performed any tests to determine the presence of other chemicals in the product or acquired such

number of such sales belies the likelihood that such a positive outcome results from mere serendipity or consistent careful consumer product use.

However, Complainant and its expert witnesses Dr. Hansen and Mr. Hartman are correct in their claim that whatever health risks the ingredients of the Bref product itself created, such risks were magnified, not mitigated, by the fact that the bottle's label was only in Spanish. R's Ex. 25, C's Exs. 25, 29; Tr. 34, 90. While Respondent attempts to minimize the impact of the product's Spanish label on the basis that it sells such product to a mostly Hispanic clientele, that justification is simply unacceptable. America is a diverse cosmopolitan society that has been enriched by "the immigration of persons from many lands with their distinctive linguistic heritage and cultural heritages." *Carmona v. Sheffield*, 325 F. Supp. 1341, 1342 (N.D. Cal. 1971). English is "lingua franca" of this country, the dominant language used to communicate by *all* those who do not share a mother tongue. *Id*. ("For historical reasons too well-known to require review herein, the United States is an English-speaking country."). Even in that portion of our country that is predominantly Hispanic, *i.e.* Puerto Rico, English is an official language, and it is the language in which federal court proceedings are held. *See*, 1 L.P.R.A. § 59; 48 U.S.C. § 864 ("All pleadings and proceedings in the United States District Court for the District of Puerto Rico shall be conducted in the English language."). FIFRA requires the labels on pesticides to be at least in English. 40 C.F.R. § 156.10; Tr. 88. Thus, while no doubt a Spanish language label would be helpful to those literate in Spanish (Tr. 68), Respondent did not, and could not, limit its sales of the Bref to such persons, or its use by such persons. Rather, it sold the product to whoever walked through the doors of its 188 stores and desired to purchase it, regardless of fluency, and to any purchaser or user not literate in Spanish, the fact that the label was in Spanish rather than English deprived them of access to the requisite use and precaution information. Tr. 70-71. *See also*, Tr. 119-20 (Mr. Hartman)(noting bottle language "no mezclar con acidos" wouldn't mean anything to him because it is in Spanish). Thus, the failure of the Bref product to be labeled in English increased the risk of injury from the product because it deprived all non-fluent Spanish readers of all the information on use, precautions, warnings, storage and disposal available thereon. *Cf.* R's Ex. 20 (English language label on registered Clorox Clean-up product).

It is further noted that the additional risk of injury asserted by EPA based upon its allegation that certain critical precautionary information was missing from the Bref Spanish label is undermined in part by the evidence of record. At hearing, Dr. Hansen testified that the Bref label did not list the product's ingredients, which is very important information for poison control or follow-up to accidental exposure, and did not provide contact information for the company. Tr. 34-35. EPA also claimed that the label failed to provide information regarding avoiding prolonged inhalation and using it in a well ventilated area, as well as measures to be taken if the product gets in the eyes or if it is ingested, and a phone number for the poison control center. Tr. 34-35, 91-92. Such testimony was based solely upon photographs of the product's label taken at the time it was wrapped around a cylindrical bottle (*i.e.* a three dimensional object). *See*, C's Exs. 9, 21, 25. At hearing, however, Respondent presented as its Exhibit 25 a xerox color copy of the

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information on the product's composition from Henkel, its manufacturer. Tr. 100, 114, 122, 174-75, 194.

complete product label, which Mr. Matteri testified was sent to him from Grow-Link just prior to the hearing. The full product label displays some of the information which Dr. Hanson believed was missing, specifically the product's ingredients and the company contact information. R's Ex. 25; Tr. 41, 51-52, 90, 438-39, 442-48. EPA did not cross examine Mr. Matteri at the hearing regarding authenticity of the full label. *See*, Tr. 451-53. A preponderance of the evidence proves that the label as shown in Respondent's Exhibit 25 is the full label for the Bref product at issue, and that it included the product's ingredients and contact information for the company. Thus, EPA's claim as to this critical information being missing from the Bref Spanish label is not fully supported by the record.

Also, EPA's claim that the risk of harm to human health was increased by the absence and/or non-submission of toxicity and efficacy data as an antibacterial is not persuasive. Tr. 92-93. Bleach is commonly known to act as a disinfectant. EPA first registered it as a pesticide in 1957, and more than 20 years ago, EPA publically acknowledged that bleach's "chemical and toxicological properties are extensively documented in published literature." *See*, *EPA R.E.D. Facts, Sodium and Calcium Hypochlorite Salts, EPA Pesticide and Toxics Substances*, Pub. # 738-F-91-108 (Sept. 1991) available at: http://www.epa.gov/oppsrrd1/REDs/factsheets/0029 fact.pdf. *See also*, *Four Quarters*, 2008 EPA ALJ LEXIS 21 *16 n.4, citing http://en.wikipedia.org/wiki/Sodium_hypochlorite ("'Bleach,' the common name for the chemical compound sodium hypochlorite (NaOCl), is an established disinfectant."). Mr. Hartman acknowledged at hearing that in February 1986, EPA issued a Registration Standard for products with sodium hypochlorite placing them on "a special registration track" that allows for waiver of data submission and/or the reliance on similar product data. Tr. 93, 127. Bref contained a greater percentage of sodium hypochlorite than other EPA approved "disinfectants." *See*, R's Ex. 20 (EPA registered Clorox Clean-Up with 1.84% sodium hypochlorite, with label indicating it "Kills germs on hard, nonporous surfaces: Salmonella enterica, Cold Virus (Rhinovirus Type 37), Flu Virus (Influenza A2, Hong Kong));" R's Ex. 22 (EPA registered Soft Scrub with 1.1% sodium hypochlorite, with label indicating it "Kills 99.9% of Germs"). Thus, the absence and/or non-submission of such data to EPA does not significantly impact the product's risk to human health.

This Tribunal is also unpersuaded by Complainant's argument of an increased risk of injury resulting from the failure of the product to be sold in non child-resistant packaging (CRP). Tr. 93, 97. Complainant bases this argument on the conclusory opinion of Mr. Hartman expressed in regard thereto at hearing. Tr. 93-94. However, this Tribunal attributes little weight to such opinion in that Mr. Hartman acknowledged on cross-examination that CRP takes many forms, that he had never personally examined a Bref bottle, and that he could not state "for sure" that Bref was not sold in CRP without having seen the actual product package. Tr. 131-32. Further, while Mr. Hartman alleged that Bref would not have been registered by EPA as a pesticide unless it was in CRP, no definitive legal authority for imposing such a condition was offered in this case. *See,* R's Ex. 20 (registered Clorox Clean-Up with 1.84% NaOCl, which appears to be in a common spray bottle). Tr. 116.

Also unpersuasive is the characterization of the risk of injury from Respondent's sales of Bref as "widespread," based upon the testimony of Mr. Hartman whose opinion derived from the

fact that 13,000 bottles of the product were sold in hundreds of stores in three states over a year. Tr. 96. In making this argument, Complainant fails to note that each count of violation, and thus each assessment of risk of injury, represents bottles sold in a particular store in a particular month; Complainant did not allege one count of violation representing 13,000 bottles. The ERP does not define "serious and widespread" geographically, chronologically, or numerically. Rather, it states that "[f]or the purposes of this ERP, serious or widespread harm refers to actual or potential harm which does not meet the parameters of minor harm, as described below," and states "minor harm refers to actual or potential harm which is, or would be of short duration, no lasting effects or permanent damage, effects are easily reversible, and harm does not, or would not result in significant monetary loss." *See*, C's Ex. 15, B-3 (Appendix B Footnotes). Thus, the ERP suggests that a pesticide such as Bref, which the evidence indicates has the potential to be only an irritant, causing minor harm, *i.e*. harm of short duration, with no lasting effects or permanent damage, cannot be considered under the ERP to pose a "serious or widespread" risk of harm to human health.

In sum, the evidence of record does not demonstrate that Respondent's violations caused either actual harm or even a risk of harm to the environment, and as such this factor under the ERP should have been properly rated as '0,' rather than '1.' As to harm to human health, there is no evidence of any actual harm caused by the product, but the evidence does support a finding that inherent in the product was a risk of minor harm to human health. As such, the violations do not warrant issuance of a warning in lieu of assessing a penalty under 7 U.S.C. § 136*l*(a)(4). However, considering the minor potential risk posed by the product's ingredients, and the improper labeling thereon, and the various other considerations mentioned above, it is found that the risk of harm to human health presented by this product should have been designated less than a '3' out of '5' in terms of the adjustment criteria under the ERP. C's Ex. 15, B-1.

C. Methodology for Assessing Units of Violation

1. Respondent's Arguments

Respondent additionally challenges the proposed penalty in this action relating to its Bref sales on the basis that the Agency has charged it with an "arbitrarily large number of violations." R's Reply Brief at 14. Specifically, Respondent complains that it was charged with 164 separate violations, each carrying a potential maximum penalty of $6,500, as a consequence of which it is subject to an aggregate penalty of close to one million dollars, for selling a single "low risk," unregistered, bleach containing cleaner. R's Initial Brief at 1; R's Reply Brief at 14. Charging 164 violations under such circumstances "does not pass the 'straight face' test," Respondent protests, noting that the ERP contains no discussion as to how to treat multiple sales of the same allegedly violative pesticide product, and thus it does not mandate the number of violations charged here. R's Initial Brief at 16; R's Reply Brief at 14. Rather, Respondent notes, as Ms. Jordan acknowledged at hearing, determining the number of violations EPA would charge fell entirely within EPA's discretion. R's Initial Brief at 16, citing Tr. 225-228; R's Reply Brief at 14. As such, this Tribunal is not bound in any way by the proposed penalty demand of $959,500 and

may decide for itself the issue of how to treat multiple sales of the same violative pesticide, Respondent claims. *Id*.

Moreover, Respondent characterizes the determination of this issue as "critical to any calculation of the appropriate civil penalty for a retailer, who in most instances will be far less culpable than the vendor or manufacturer who sold the product to the retailer, and, yet, under a multiple product sale scenario, would always be subject to much higher, potentially ruinous, penalties than the vendor or manufacturer." R's Initial Brief at 10, 16, citing Tr. 225-228. It is particularly "unfair and inequitable" for EPA to charge it with 164 violations and seek $959,400 in civil penalties under the circumstances here, Respondent asserts, where the sample label contained no pesticidal claims, where it "immediately began recalling the Bref product after learning of the CDPR concern, [ ] and where no meaningful enforcement action was taken against the [importer, Grow Link, or Henkel, the manufacturer]." R's Initial Brief at 16-17. Therefore, Respondent suggests, "if any penalty is imposed here, it should be based on just a single count for the single product involved," and should be no greater than $5,850. R's Initial Brief at 17. Respondent implies that this conclusion is supported by Ms. Jordan's testimony to the effect that the next highest penalty she ever calculated using the FIFRA ERP was "in the range of $250,000." R's Reply Brief at 15, citing Tr. 199-200. "Surely, the sale of the Bref product does not qualify as the worst case . . . ever seen," Respondent suggests. R's Reply Brief at 15.

In a footnote to its Initial Brief, Respondent supplements its argument here as to the arbitrariness of the violations charged by suggesting that "the $959,400 penalty is so shockingly large that it may violate due process principles," citing *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). R's Initial Brief at 17 n.13.

2. Complainant's Response

In reply, the Agency asserts that it is vested with the discretion to determine the appropriate number of violations to pursue in an enforcement action, citing *B&R Oil Co.,* 8 E.A.D. 39, 1998 EPA App. LEXIS 106 (EAB 1998), *Microban Products, Co.*, FIFRA Appeal No. 02-07, 2004 EPA App. LEXIS 13 n.20 (EAB 2004), *Chempace Corp.*, 9 E.A.D. 119, 127-31, 2000 EPA. App. LEXIS 15 (EAB 2000). C's Reply Brief at 3. In this case, it explains, it decided to charge one violation for the inspection on September 8, 2005, and "charge one count for *each store* that sold Bref [on or after November 1, 2005 which was 10 days] after a) the second notice of violation . . . was issued [on October 20, 2005], and b) 43 days after [the recall notice was issued on September 18, 2005])." C's Initial Brief at 53 (italics added), citing Tr. Vol. II at 43-47. It adopted this approach because it could not determine the precise number of sales at each store in each month so it conservatively presumed that one customer purchased all of the bottles sold by the store in a particular month. C's Initial Brief at 54, citing Tr. Vol. II at 43-47. Such approach is equitable, Complainant suggests, because it correlates to the risk of harm taking into account number of customers exposed and geographic scope. Further, EPA explains, this approach provided Respondent with a 43 day compliance window, throughout which the recall notice was viewable to store managers on the Company website, and for which no violations were charged.

C's Initial Brief at 54, citing Tr. Vol. II 146, 194. As a result of taking this approach, although Respondent sold 13,709 bottles of Bref, including 656 bottles of Bref sold between November 1, 2005 through May 2006, it was only charged with 164 violations, EPA proclaims.

3. Discussion

There is a "presumption of regularity afforded an agency in fulfilling its statutory mandate." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 44 n.9 (1983). Thus, an agency action will be deemed "arbitrary and capricious" only if it is *not* based on "consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute." *Id*. at 43. "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id*., quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

With FIFRA, Congress granted EPA broad authority to bring myriad pesticide-related enforcement actions against a wide range of persons and/or entities, including registrants, applicators, wholesalers, retailers, and distributors. 7 U.S.C. § 136*l*(a)(1). Further, it (initially) authorized the Administrator to assess a penalty "of not more than $5,000 *for each offense*," against all those covered by its provisions, except private applicators, to which it limited the penalty per offense to $500 or $1,000 depending on circumstances. 7 U.S.C. §§ 136*l*(a)(1), (a)(2) (italics added). In determining the amount of the penalty, FIFRA mandated that "the Administrator shall consider the appropriateness of such 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." And, as Respondent has cited on its own behalf, it also gave the Administrator the discretion to "issue a warning in lieu of assessing a penalty," if she "finds that the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment." 7 U.S.C. § 136*l*(a)(4).

What FIFRA did not do, however, was to define what constitutes a single offense. *Cf*. EPCRA, 42 U.S.C. § 11045(c)(3)("Each day a violation .. . continues shall . . . constitute a separate violation."). As a result, the EAB was eventually presented with this issue and it held that "[e]ach . . . sale or distribution of a pesticide . . . constitutes a distinct unit of violation, and thus is grounds for the assessment of a separate penalty." *Chempace Corp.*, 9 E.A.D. 119, 120, 127-31 (EAB 2000), *Microban Products, Co.*, 9 E.A.D. 674, 683-84 (EAB 2001). In so holding, the Board set for the Agency the *upper limit* of the number of lawful violations the Agency could charge under FIFRA. It did not, however, direct a lower limit, *i.e*. the minimum number of violations it could or should charge. In fact, the Board has since repeatedly stated that "the agency . . . retains the discretion to seek to impose liability for less than the maximum number of possible violations." *Microban Products, Co.*, FIFRA Appeal No. 02-07, 2004 EPA App. LEXIS 13 n.30 (EAB 2004)(EPA only charged 32 violations although it had evidence of at least 54 shipments to the same company). *See also*, *Chempace Corp.*, 9 E.A.D. 119, 129-30 (EAB 2000).

In terms of exercising such discretion, it is noted that the ERP, the Agency's long-standing guidance document on assessing FIFRA penalties, provides no instructions or criteria to be used by the enforcement staff in determining the number of violations to be charged in a particular case. Tr. 230. As such, it appears that the Agency has utilized a variety of different methods to calculate the number of violations. For example, on some occasions, the Agency has exercised its maximum authority under FIFRA and charged a violation for each individual sale. *See*, *Sultan Chemists, Inc.,* 1999 EPA ALJ LEXIS 46 at *4 (ALJ Aug. 4, 1999), 2000 EPA App. LEXIS 24 (EAB 2000), *aff'd Sultan Chemists, Inc. v. U.S. EPA*, 281 F.3d 73 (3d Cir. 2002)(manufacturer/distributor charged with 89 violations for 89 individual sales of four types of unregistered pesticides); *Super Chem Corp*., EPA Docket No. FIFRA-9-2000-0021, 2002 EPA ALJ LEXIS 25 (ALJ April 24, 2002)(manufacturer charged with 15 violations one for each sale over a one year period). In most instances, however, EPA has exercised its discretion and, utilizing several different approaches, charged fewer violations than the maximum permitted. For example, EPA has limited the number of violations charged to: (a) months of sale (*Avril, Inc*., EPA Docket No. IF&R III-441-C, 1997 EPA ALJ LEXIS 176 (ALJ March 24, 1997)("chemical blender" charged with five counts of violation by combining sales (22 sales over 13 days) within calendar months into single counts - total proposed penalty of $17,500)); (b) years of sale (*Hanlin Chemicals-West Virginia, Inc*., EPA Docket No. I.F.&R. III-425-C, 1995 EPA ALJ LEXIS 91 (ALJ Nov. 9, 1995)(chemical manufacturer charged with one count for each year it sold approximately 171,000 gallons of unregistered pesticide after cancellation - total proposed penalty $10,000)); (c) number of different unregistered products (*Hing Mau, Inc.*, 2003 EPA ALJ LEXIS 63 (ALJ Aug. 25, 2003)(retailer charged with one count of violation for each of the two types of unregistered mothball products sold (total packages sold 32) – total proposed penalty of $9,900)*; Sporicidin International,* 3 E.A.D. 589 n.26 (EAB 1991)(pesticide manufacturer/distributor charged with two violations for each unregistered product despite evidence of at least three sales and three corresponding shipments of one pesticide product and one shipment of another pesticide product); *Green Thumb*, 6 E.A.D. at 785-86 (pesticide producer charged with one violation for one unregistered pesticide despite sale of thousands of gallons in multiple sales over a multi-year period, and knew that the respondent continued to sell the product for a year even after it was specifically advised by its supplier of the need for registration.); *Johnson Pacific, Inc.*, 5 E.A.D. 696 (EAB 1995)(retailer charged with one violation for one unregistered product sold to inspector despite many units of the product available for sale); *Sav Mart, Inc.*, 5 E.A.D. 732, 1995 EPA App. LEXIS 13, at *1-5 (EAB 1995)(retailer charged with one violation for selling an unregistered pesticide although evidence indicated that it produced and offered for sale ten bottles of unregistered pesticide and made one sale of two bottles to the inspector); (d) number of customers (*FRM Chem, Inc.*, *slip op.* at 2 (pesticide producer charged with three violations of FIFRA, one for each customer (municipality) to which it made two sales over four months)); and (e) portion of invoices (*Microban Products, Co.*, FIFRA Appeal No. 02-07, 2004 EPA App. LEXIS 13 n.30 (EAB 2004)(EPA charged 32 violations in the complaint although it had evidence (invoices) of at least 54 shipments to the same company).

Sometimes, as was seen in the recent *Rhee* case, the Agency took a middle ground in that it charged the wholesaler/distributor with *467 violations* based upon number of cases or cartons sold *but* only sought a penalty for *264* "*distributions*," by consolidating into "one shipment or

distribution" all the sales or shipments of products to a customer on a certain day, regardless of how many cartons were sold or if the shipment contained various sizes or types of products. *Rhee Bros., Inc.*, EPA Docket No. FIFRA-03-2005-0028, 2006 EPA ALJ LEXIS 32 *88-90 (ALJ Sept. 19, 2006). As a result, the maximum potential penalty sought was reduced from $2,311,650 to $1,306,800. *Id*.

In this case, it appears the Agency employed two different methodologies to determine the number of violations to be charged. Tr. 229. As to Count 1 and Count 166, it charged only one violation for the offending product, regardless of the number of unregistered or misbranded products available for sale or sold. Tr. 231. Specifically, in Count 1 it charged Respondent with only one violation (and sought only a reduced penalty of $5,850) relating to its sale of the unregistered pesticide Farmer's Secret on the day of inspection, although evidence of record shows that the Company had purchased 1,837 cases (each with 24 bottles) at $2 per case in April 2004; 65 bottles were found for sale (at 99¢ each) on the day of the store inspection in September 2004; and only 640 cases remained for sale by September 2004, suggesting that Respondent sold about 1197 cases or a total of 28,728 bottles of the unregistered pesticide from which it made a gross profit of $26,056. C's Ex. 5. Similarly, Count 166 charged Respondent with only one violation for the mislabeled pesticide PiC although it had evidence that Respondent had purchased 640 cases (each with 24 bottles) of the product in April 2008, 11 mislabeled bottles were found for sale in the store in May 2008; and appropriately 20% of the bottles remaining in the warehouse may have been mislabeled. C's Ex. 10. As to Counts 2-165, however, relating to Respondent's sales of Bref, EPA took another tactic, and charged Respondent with one violation for the sale of the unregistered product on the day of inspection, and then with an additional violation for every store that sold Bref in one of the seven months after November 1, 2005.

At hearing, this Tribunal asked Ms. Jordan to explain the rationale for EPA's determinations on the number of violations to be charged in this case. Citing unwritten national or regional enforcement policy as authority therefor, Ms. Jordan stated in response "we can take one count offer for sale when the product is offered for sale, compared to a transaction-based count. So each time the product is actually sold or distributed to an individual, that's an additional count." Tr. 240-41. In other words, she suggested that regardless of the number of bottles of the illegal pesticide found available for sale on store shelves on the day of inspection, the Agency would charge only one count related thereto; however it could charge additional counts based upon actual sales. Tr. 252. In this case, Ms. Jordan recalled, the inspector had requested records of sales regarding the Farmer's Secret product, but since none were provided, or she did not understand the "codes" on the information provided, she charged only one count. Tr. 242, 256-57. Similarly, with the mislabeled 166 PiC product, Ms. Jordan explained that while the Agency had evidence of the mislabeled bottles being offered for sale, it had no proof of *actual sales*, so again it charged only one count. Tr. 243. However, with regard to the Bref counts, Ms. Jordan acknowledged that she did not follow this same methodology, and charged a violation for each of 13,000 units as to which it had evidence of sale. Tr. 244, 255. Rather, she explained, "I was looking for an equitable way to take the most egregious counts. So after that recall date, that's the number of counts we took." Tr. 245, 250. In doing so, she said she exercised "[s]imply enforcement discretion" and "look[ing] at all the facts of the case . . . that seemed the most

logical" to her. Tr. 245. Ms. Jordan alleged she had applied this methodology of charging violations based upon sales per store per month in other cases, but not after a recall had been issued. Tr. 251. Further, she claimed that in deciding upon the number of counts to be charged she did not consider the type of pesticide, profit made upon sale, or size of Respondent's business. Tr. 243, 248.

While such variation in the number of counts charged from case to case, and even within a single case, belies the Agency's claim that it exercises its enforcement discretion in as consistent a manner as possible (Tr. 253), the variation does not by itself prove that the Agency's exercise of its discretion in this case was arbitrary or capricious, or even against Respondent's interests. As indicated above, the EAB has held that the maximum number of violations with which Respondent could have been charged was one for "each sale or distribution," *i.e*. approximately 13,700 violations. Instead, the Agency exercised its discretion, and charged Respondent with only a small portion thereof (164 violations). The methodology the Agency chose to determine such number of counts, while perhaps novel, was not irrational, as it reflected actual sales as documented by Respondent's own records, which occurred over a month after Respondent was first notified that such sales were illegal, and reflected even a fairly minimal number thereof, in that it charged only one violation for each store that sold the product in each month. Therefore, it is found that the Agency acted neither arbitrarily nor capriciously in charging Respondent with 164 violations in regard to its sales of Bref. Tr. 231.

Furthermore, the mere fact that the aggregate penalty sought here is of a magnitude substantially greater than any penalty Ms. Jordan had previously *personally* calculated for other FIFRA violations, does not make the Agency's action arbitrary or capricious. First, it must be noted that this action does not, in fact, represent the highest penalty ever sought against a FIFRA violator. While this Tribunal has not made a comprehensive study of such matters, it is aware that in *Rhee*, as mentioned above, the Agency sought a penalty for *264 distributions* with a total potential penalty of $1,452,000. *Rhee Bros., Inc.*, 2006 EPA ALJ LEXIS 32 *88-90. Second, FIFRA gave the Agency the authority to seek up to $6,500 per violation, or a total of $1,066,000 for the 164 Bref violations. The Agency has not sought more than that amount and, in fact, seeks less, after employing the ERP methodology for considering the three statutory factors for penalty determinations set forth in 7 U.S.C. § 136*l*(a)(4). The fact that the amount is still more than EPA has sought against some other violators does not render it unlawful. As observed by the EAB –

> [T]he Supreme Court has explained that, with respect to government actions "which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments," the principles underlying equal protection are "not violated when one person is treated differently from others." This is because "treating like individuals differently is an accepted consequence of the discretion granted."

Desert Rock Energy Co., PSD App. No. 08-03, 2009 EPA App. LEXIS 28, 55-56 (EAB Sept. 24, 2009) (citation omitted). *See also*, *Newell Recycling Co. v. U.S. EPA*, 231 F.3d 204 (5th Cir. 2000)(the employment of a sanction within the authority of an administrative agency is not

rendered invalid in a particular case because it is more severe than sanctions imposed in other cases).

Finally, to the extent that Respondent's due process argument could be construed as a challenge to the constitutionality of FIFRA, this Tribunal has no jurisdiction to review it. *See e.g.*, *Johnson v. Robison*, 415 U.S. 361, 368 (1974)(it is generally considered that the constitutionality of congressional enactments is beyond the jurisdiction of administrative agencies). *See also*, *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975); *Finnerty v. Cowen*, 508 F.2d 979 (2d Cir. 1974); *Frost v. Weinberger*, 375 F. Supp. 1312, 1320 (E.D.N.Y. 1974).

In short, while the Agency's determination as to the number of violations charged and penalty proposed in regard to Bref appears harsh to Respondent, such determination is found not to be unlawful and does not, by itself, provide a basis for mitigating the penalty in this case.

D. Selectivity

1. Respondent's Argument

Respondent also decries EPA's "enormous" penalty demand for its Bref violations as neither fair nor equitable based upon EPA's "lack of diligence" and "failure to take *any* action against Henkle [sic], the company that manufactured the Bref product, labeled that product, *and* imported it to the United States." R's Reply Brief at 15 (emphasis in original). It suggests that the Agency's claim that the product's sale presented a serious and widespread risk of harm and/or harmed its regulatory program is undermined by EPA's minimal contact with Henkel regarding its importation of the illegal product into the United States, noting that Ms. Jordan admitted that her first contact with Henkel occurred in May 2009, four years after importation, and only then in order to obtain information in support of EPA's prosecution of this case against Respondent. R's Reply Brief at 9 n.11, 10 n.12, 15, citing Tr. 175-176, 193-95.

Additionally, Respondent bemoans that Grow-Link, "the party that should bear liability for importing a product that did not match the sample product it had provided to 99¢, escaped with a penalty of just $1,500 imposed by CDPR." R's Initial Brief at 6; R's Ex. 12. It notes that while EPA briefly investigated Grow-Link, it decided not to pursue any action against it. R's Initial Brief at 6, citing R's Ex. 12; R's Reply Brief at 16. The Company suggests that its successful recall process accounts for this positive outcome for Grow-Link. R's Initial Brief at 6 n.4, 12. Therefore, Respondent concludes "[u]nder these circumstances, fundamental fairness dictates that no penalty should be imposed on 99¢, much less a penalty of almost $1 million." R's Initial Brief at 13.

2. Complainant's Response

In response, Complainant asserts that neither the culpability of Henkel, the foreign

manufacturer, nor Grow-Link, the importer, is relevant here, suggesting that this argument "harkens back" to Respondent's selective enforcement defense previously considered and rejected in the Tribunal's Accelerated Decision Order. C's Reply Brief at 3. Further, EPA proclaims it has the discretion to decide against whom it wishes to take enforcement action. *Id*., citing *B&R Oil Co.,* 1998 EPA App. LEXIS 106 at *26-27. In any case, it explains, it lacked the authority to take action against Henkel for products sold in Mexico, as its authority is limited to FIFRA violations occurring "in any State." C's Reply Brief at 4, citing FIFRA § 12(a)(1)(A), Tr. Vol. II 256 and R's Ex. 1. Further, with regard to Grow-Link, the sole importer and distributor of Bref, "pursuing an action against it would have no more - and arguably less - deterrent effect than pursuing an action against Respondent," EPA declares. C's Reply Brief at 4.

3. Discussion

In that Respondent has never alleged, much less proven, that this action was instituted based upon unlawful criteria, such as race, religion, or the desire to prevent the exercise of Constitutional rights, it has no viable selective prosecution defense. *See,* AD Order. Further, there is no merit to its argument that the amount of the penalty imposed here should equate to that imposed by State authorities on Henkel or Grow-Link. It is well established that "the EPA may impose stiffer penalties than the penalties assessed by an authorized state." *Titan Wheel Corp. v. U.S. EPA*, 291 F. Supp. 2d 899, 913 (S.D. Iowa 2003). *See also, U.S. Army Training Center and Fort Jackson*, EPA Docket No. CAA 04-2001-1502, 2003 EPA ALJ LEXIS 187, *44 (ALJ Sept. 12, 2003).

Furthermore, to the extent that Respondent believes that it has been unfairly allocated responsibility for the violations, it has always been within Respondent's control to attempt to act on its belief. By its terms, the Purchase Order requires Grow-Link to "indemnify and defend" Respondent against any claims that "the product (including product packaging and labeling) is . . . not compliant with law, mislabeled or not appropriately or fully labeled." R's Ex. 1. Thus, Respondent could have, and may already have, invoked such indemnity provision seeking to recoup its costs of defense and/or the penalty imposed here from that entity. *See, Ram, Inc.,* EPA Docket No. SWDA-06-2005-530J, 2008 EPA ALJ LEXIS 27 *79 (ALJ July 12, 2008)(the owner and/or operator liable for penalties assessed by the EPA may pursue reimbursement in a court with jurisdiction on the basis of any contract with an indemnification clause between the owner and/or operator and the contractor); *Roger Barber*, EPA Docket No. CWA-05-2005-0004, 2005 EPA ALJ LEXIS 43 *7 (ALJ Aug. 15, 2005)(Respondent that is found liable and assessed a penalty is not precluded from pursuing indemnification from third parties in a separate forum). Such agreement, however, does not provide a basis for mitigation of the penalty here. *Alliant Techsystems, Inc.*, EPA Docket No. CAA-III-075, 1997 EPA ALJ LEXIS 142, 5-7 (ALJ Dec. 4, 1997)(indemnification agreement is irrelevant as it is not listed among statutory penalty factors to be considered). *See also*, C's Ex. 35 at 19 (Respondent's SEC Form 10-K 2008 Annual Report indicating that it attempts to "procure product insurance from its vendors" to limit its liability and losses for labeling and "packaging violation claims"). Thus, the lack of significant penalties imposed upon others does not provide a basis for reducing the penalty imposed upon Respondent

in this case. As was noted by the Third Circuit in *Sultan Chemists*, "EPA may *rigorously enforce* FIFRA against the distributor if the requirements of the guaranty provision have not been met. Such a system of enforcement is designed to encourage *all parties* to make additional efforts to ensure registration as required by the statute. The guaranty provision . . . does not shield the distributor of pesticides from the responsibility of ensuring to the extent possible that the manufacturer has complied with FIFRA's requirements . . . [thereby] providing *additional protection for the consumer*." *Sultan Chemists, Inc. v. U.S. EPA*, 281 F.3d 73, 81 (3d Cir. 2002) (italics added).

E. Discussion and Conclusions as to Penalty Assessment

The Agency calculated the proposed penalty in this case utilizing the ERP. In regard thereto, it must be kept in mind that the ERP has never been put out for notice and comment, lacks the force of law and is merely "a non-binding agency policy whose application is open to attack in any particular case." *McLaughlin Gormley King Co.,* 6 E.A.D. 339, 350 (EAB 1996), citing *James C. Lin and Lin Cubing, Inc.,* 5 E.A.D. 595, FIFRA Appeal No. 94-2, *slip op.* at 5 (EAB 1994)("While Agency penalty policies 'facilitate application of statutory penalty criteria, they serve as guidelines only and there is no mandate that they be rigidly followed.'"). The "matter of concern is . . . whether the penalty is appropriate in relation to the facts and circumstances at hand" and "in light of the highly discretionary nature of penalty assessment, there is no precise formula by which statutory criteria must be considered in every case." *FRM Chem, Inc., slip op.* at 15, 16. Thus, even a penalty calculated according to the ERP can be excessive. *See, James C. Lin & Lin Cubing, Inc.,* 5 E.A.D. at 602 (holding that assessed penalties were "excessive" even though they were assessed in accordance with the FIFRA penalty policy).

Therefore while this Tribunal must "consider" the applicable penalty policy, it has the "discretion either to adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where the circumstances warrant." *M.A. Bruder & Sons*, RCRA (3008) App. No. 01-04, 2002 EPA App. LEXIS 12, at *28 (EAB July 10, 2002), citing *DIC Americas, Inc.*, 6 E.A.D. 184, 189 (EAB 1995). *See also, Employers Ins. of Wausau, Inc.*, 6 E.A.D. 735, 759 (EAB 1997)(ALJ is free to deviate from the penalty policy in a particular case); *Rybond, Inc.*, 6 E.A.D. 614, 639 (EAB 1996)("Under the circumstances of a given violation, reduction of a penalty assessment may be appropriate even if the penalty has been properly calculated in accordance with [the appropriate] Penalty Policy."). However, EAB decisions indicate that the Tribunal should only deviate from applying the penalty policy if the reasons for doing so are "compelling" or "persuasive and convincing." *Chem Lab Products, Inc.*, FIFRA App. No. 02-01, 2002 EPA App. LEXIS 17 *40 (EAB Oct. 31, 2002); *FRM Chem, Inc.*, FIFRA App. No. 05-01, 2006 EPA App. LEXIS 28 (EAB June 13, 2006), *slip op.* at 19-20. The Consolidated Rules provide that if this Tribunal "decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease." 40 C.F.R. § 22.27(b).

As concluded above, while the bulk of the Agency's penalty calculations under the ERP is supported by the facts of this case, a few of its determinations as to adjustments thereunder are not. Specifically, in that there is no evidence in the record of any actual or potential harm to the environment from Bref, the EPA should have rated such factor as '0,' rather than a '1.' In addition, its rating of '3' for the factor of "harm to human health," is too high in that the evidence shows that the pesticide presented only a minor potential risk of harm. This factor should have been rated between a '1' and '2,' *i.e.* perhaps 1½, based upon the risk of the pesticide's ingredient sodium hypochlorite and the Spanish labeling. With such revised ratings, the total gravity adjustment criteria would be 4½, which the ERP suggests would warrant a 35% reduction in the matrix value of $1,066,000 (164 x $6,500), a reduction of $373,100.

In addition, it is noted that Respondent was given no credit in the penalty calculations for its good faith. While it is regrettable that Respondent did not more effectively implement its stop sale/recall efforts as to Bref, advise Complainant as to its mistaken product identity defense earlier, and/or stipulate as to its ability to pay prior to hearing, it did voluntarily issue a recall for the product which was somewhat effective in that it recovered 3,975 bottles before sale, and it did provide various records as to its product purchases and sales, and otherwise engage with the inspectors in this proceeding in a proper and productive manner.[23] Tr. 221-222. As such, under the circumstances of this case, it is concluded that an additional 10% reduction (or $106,600) from the total matrix value of $1,066,000 would be appropriate.

With such two adjustments, the total penalty for Respondent's Bref violations suggested by the ERP would be $586,300. Still, such a penalty amount, directly resulting from the large number of violations charged, strikes this Tribunal as inappropriately high considering the totality of circumstances in this case.

In particular, this penalty amount seems inappropriate in relation to the rather nominal economic benefit Respondent obtained as a result of its violations. EPA calculated economic benefit in this case as including Respondent's purported gross profit of $7,127.31 (or approximately 52¢ per bottle) on all 13,709 bottles of Bref it sold between June 2005 and May 2006, plus $12,500 per year in avoided compliance costs representing the value of the time Respondent's buyers did not spend inspecting products received prior to October 2005, when it

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[23] It is not exactly clear what negative impact Respondent's failure to explicitly "stipulate" to its ability to pay the penalty prior to hearing had upon Complainant, in that Respondent had acknowledged its ability to pay in previously filed pleadings and most of the records related to this issue which Complainant submitted at hearing also supported its size of violator classification under the ERP. *See*, *99 Cents Only Stores*, Docket No. FIFRA-9-2008-0027, 2009 EPA ALJ LEXIS 9 *7 (ALJ June 18, 2009)(Order on Motions to Supplement Prehearing Exchanges); Tr. 9; *see also*, C's Ex. 35 at 21-22, 26, 58 (Respondent's 2008 SEC Annual Report Form10-K reporting its annual net income as $2.9 million and omitting this legal matter among others from disclosure stating that "[i]n the management's opinion, none of these matters are expected to have a material adverse effect on the Company's financial position, results of operations, or overall liquidity.").

implemented such procedure. C's Initial Brief at 50-52. However, such calculation is wrong in many respects.

First, testimony and invoice records reflect that Respondent's gross profit per bottle was, in fact, only *41¢*, not 52¢ as Complainant calculated, in that each bottle sold at 99¢, cost 58¢ (1 case/15 bottles at $8.70). *See*, R's Ex. 1; Tr. 410, 427. Thus, even on all 13,709 bottles it sold, Respondent's gross profit actually totaled only $5,621. Second, the violations for which an appropriate penalty is being determined in this case do not cover all the bottles sold, but only those sold on the day of the inspection in September 2005, and from November 2005 through May 2006. During that seven month period, from November 2005 through May 2006, Respondent sold only 658 bottles of Bref (two on the day of inspection and 656 from November to May), which means its total gross profit from the violations found here was only about $270. Third, the Agency did not introduce at hearing the Department of Labor data regarding yearly labor costs of buyers it used in its Brief to calculate compliance costs avoided, but instead it merely requests in its post-hearing brief that this Tribunal take official notice thereof.[24] C's Initial Brief at 52 n.15. Moreover, it does not suggest in its Brief any particular period of time for which such annual avoided costs should be recovered in the penalty. C's Initial Brief at 52. The evidence of record shows that the Bref product was delivered to Respondent's warehouse and not inspected in June 2005, and that Respondent implemented a more formal spot checking procedure about five months later in October 2005. Tr. 327-328. As such, prevention of the Bref violations would have been likely obtained if Respondent had merely implemented its product inspections just six months earlier, and so arguably the total avoided compliance costs related to the Bref violations could be as little as $6,250. Even using the date of September 2002, the earliest date the record indicates that the Agency specifically notified Respondent of an instance of selling an illegal pesticide (see, C's Ex. 1), the total avoided compliance costs relating to buyers' time would only be three years at $12,500 each, that is a total of $37,500.

Thus, even when the avoided compliance costs ($6,250-$37,500) are added to Respondent's extremely minimal gross profits of the violative sales at issue here ($266), they represent at most only a small fraction (1%-6.5%) of the penalty of $586,300 suggested by the ERP. Thus, a penalty of such amount goes far above and beyond what is necessary to take away the economic incentive to violate the law and level the playing field among competitors, which, as EPA notes, is the point of assessing a penalty that reflects a violator's economic benefit of noncompliance. C's Initial Brief at 49-50, citing, *inter alia, B.J. Carney Industries*, 7 E.A.D. 171, 207-08 (EAB 1997).

Moreover, while the Respondent's conduct here is far from perfect, in that it did not inspect Bref prior to placing it on its shelves for sale, and continued to sell Bref after it was on

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[24] Complainant offered the testimony of Mr. Shefftz at hearing on the issue of Respondent's economic benefit. Tr. 257-296. However, Mr. Shefftz indicated during his testimony that he could not actually provide an expert opinion with regard to Respondent's economic benefit or savings on compliance costs, because he had not been given access to the data experts in his field normally used to derive such an opinion. Tr. 278, 281, 288-89.

notice that to do so was illegal, the fact is that there is no evidence that its violative actions caused an actual negative impact upon persons or the environment. In addition, it did subsequently voluntarily put in place measures to prevent a recurrence of the violation. In light thereof, the total penalty of $586,300 suggested by the ERP as a result of the many counts alleged, also seems unduly high.

Unfortunately, the FIFRA ERP provides no specific guidance on how to deal with a penalty calculated under it which the Tribunal finds is disproportionately high in light of all the circumstances of the case. *Rhee*, 2007 EPA App. LEXIS 17. It only states that the penalty calculated under the ERP may be departed from when there are compelling reasons to do so. The totality of the circumstances in this case, including the rather nominal economic benefit, provides a compelling reason to depart from the high penalty calculated under the ERP. Taking into account all the circumstances of this case, and exercising the discretion granted, the total penalty imposed in this case for Respondent's 164 Bref-related violations is hereby reduced to $400,000. It is the opinion of this Tribunal that such penalty appropriately reflects the gravity of the violations, including the harm to the FIFRA regulatory program caused thereby, and will serve as a deterrent to Respondent and other companies committing similar violations in the future. *See,* C's Ex. 28 at 3 (EPA General Enforcement Policy #GM - 21 identifying "deterrence" as the "first goal of penalty assessment"); Tr. 99-100 (Mr. Hartman)(describing FIFRA's registration program's review of toxicity and efficacy data and labeling as the "gateway to the market place for pesticide(s)").

VII. RESPONDENT'S CHALLENGES TO COMPLAINANT'S PENALTY CALCULATION ON COUNT 166 – PiC BORIC ACID

As with the Bref violations, in its Initial Brief, Respondent argues that no monetary penalty should be imposed for Count 166, offering for sale 11 misbranded units of PiC Boric Acid Roach Killer, because the circumstances of the violation evidence that it falls within the parameters of the language of the second sentence of FIFRA § 14(a)(4) (7 U.S.C. § 136*l*(a)(4)), which as indicated above allows the Administrator to issue a warning instead of a penalty if "the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment." R's Initial Brief at 10.

As to the evidence of the violation occurring despite its exercise of due care, 99 Cents explains that from 2006 to the present, it has "repeatedly and routinely" purchased "literally hundreds of thousands of units" of the boric acid product on a reorderable basis from PIC, a large American company based in New Jersey. R's Initial Brief at 7, citing Tr. at 330. *See also*, Tr. 333-34; R's Ex. 2. As with Bref, its purchase order requires the product PIC supplies to be "in conformity with all required laws" and to be "labeled in compliance with all applicable federal, state, local laws, rules, and regulations." R's Initial Brief at 7, citing R's Ex. 1. Respondent represents that prior to the May 2008 inspection, it had never received any report of misapplied labels on the PIC product sold to it or to others. R's Initial Brief at 10, citing Tr. at 355. Furthermore, after the 11 units were found in the store in May, it undertook "further checking of

the 99¢ warehouse stock [and] did not find any other mislabeling by PIC." R's Initial Brief at 8, citing Tr. 333-34. Thus, the Company asserts that the mislabeling was clearly "unusual" and it could not have been reasonably expected to have discovered the small number of mislabeled units beforehand as they were the "proverbial 'needle in a haystack.'" R's Initial Brief at 10. It further notes that after the problem was discovered, it promptly corrected the violation by returning all of its then current stock of the product to PIC in exchange for replacement products. R's Initial Brief at 8, citing Tr. 336-37 and R's Ex. 16. Respondent alleges that PIC has acknowledged that *it* was responsible for the mislabeling, advising that such printing errors occur "sometimes, not very often," as a result of its "highly automated" production line. *Id*.; R's Ex. 2. EPA has taken no action against PIC, Respondent observes, and so it is "patently unfair" for EPA to make Respondent the "scapegoat" for the manufacturer's mistake. R's Initial Brief at 12. Further in support of issuance of a warning in lieu of a penalty under FIFRA § 14(a)(4), Respondent asserts that EPA presented "no evidence of *any* harm to health or the environment, much less *significant* harm" at hearing. R's Initial Brief at 10-11.

Alternatively, Respondent avers that "even a strict application of the gravity adjustment criteria under the FIFRA Penalty Policy leads to the conclusion that no penalty should be assessed" for Count 166. R's Initial Brief at 11. The evidence demonstrates that the violation was "neither knowing nor wilful and did not result from negligence," and that Respondent instituted steps to correct the violation immediately after discovery, so under the ERP its culpability level should be '0,' not '2,' the Company asserts. R's Initial Brief at 12, quoting C's Ex. 15, ERP App. B. Furthermore, based upon the lack of evidence offered by the Agency, the gravity of the harm to human health under the ERP should be a '1,' rather than a level '3.' Together, these reductions would result in the numerical adjustments to the base penalty under the ERP totaling only '3.' R's Initial Brief at 11-12. In such case, Respondent offers, the ERP provides that the appropriate response to the violation is "no action, notice of warning, or a 50% reduction of matrix value." R's Initial Brief at 12, citing C's Ex. 15 at 22.

In response to the foregoing pleas, Complainant declares in its Reply Brief that "[t]he decision to issue a warning for violations of FIFRA rests with the responsible enforcement officials." C's Reply Brief at 9, citing *Green Thumb Nursery, Inc*., FIFRA Appeal No. 95-4a, 1997 EPA App. LEXIS 4 *44 (EAB 1997) and *Chempace*, 2000 EPA App. LEXIS 24 *140 (EAB 2000). Further, EPA explains that it assigned a '3' to the adjustment factor of harm to human health because the "harm resulting from the misbranded Roach Killer was *unknown*." *Id*. (italics added). It defends its culpability rating of '2,' asserting that "Respondent's employees at the Nevada store should have spotted the inside out, upside down and/or misaligned nature of the Roach Killer labels," and "Respondent was negligent in not better policing its FIFRA compliance after receiving numerous notices and warnings." *Id.,* citing C's Exs. 10 and 13, Tr. 172.

Respondent counters these assertions in its Reply Brief by first reiterating its claim that the 11 mislabeled bottles "were buried apparently in only one case of products" out of the "*hundreds of thousands of bottles*" it purchased, and that the mislabeling occurred despite its exercise of due care and there was nothing it could have done to prevent that mislabeling caused by PIC. R's Reply Brief at 2-3 (italics in original). "What then is the basis for Region 9 to impose a civil

penalty action against 99¢ for PIC's mistake?" it queries. R's Reply Brief at 2. "Nowhere in [its] *56 page* . . . Post-Hearing Brief" does the Agency answer this question and such a "*threshold question* . . . *must be* answered before any penalty should even be considered against 99¢," Respondent proclaims. *Id*. (italics added and in original). Going on, Respondent suggests a possible answer, which is that the Agency wanted to be able to use the PiC violation to portray the Company as an "unrepentant recidivist violator," and gird its "unsupportable demand for almost $1 million in penalties for the Bref product." R's Reply Brief at 1, 4 n.5. In support thereof, Respondent implies that after the Bref violations were found, the Region targeted Respondent for special treatment by conducting one or two inspections of its stores looking for unregistered pesticides. R's Reply Brief at 4 n.5. Further, 99 Cents asserts that the Nevada Department of Agriculture (NDA) inspection that "uncovered" the PiC violation was the second time that NDA had inspected that one store. R's Reply Brief at 4 n.5, citing Tr. 211-12 and C's Ex. 10. Respondent further notes that after the inspection, the NDA quickly forwarded its report on the PiC violation directly to Ms. Jordan at EPA, and the EPA promptly included the violation in the Complaint filed just a few months later, whereas it had not acted for years on inspections uncovering the violations relating to the Farmer's Secret or Bref products. R's Reply Brief at 4 n.5, citing Tr. 211-12 and C's Ex. 10.

In its Reply Brief, Respondent also characterizes as "incredible" the Agency's claim that the harm to human health of the Roach Killer is "unknown" in defense of assigning a value of '3.' R's Reply Brief at 3. It derisively queries "[h]ow can the harm to human health for the *registered* boric acid Roach Killer product be unknown" *to EPA* when it is charged with knowing the risks of harm to human health of the pesticides it registers? *Id*. at 3-4 (italics in original and added). "[E]ven a simple Internet search on Wikipedia could have shown [EPA] that boric acid is 'generally considered not more toxic than table salt." *Id*. at 4, citing http://en.wikipedia.org/wiki /Boric_acid. It adds to this point the fact that the Agency did not offer any testimony on the product's risk to human health through its witness toxicologist Dr. Hansen.

After consideration of the foregoing arguments of the parties, and the evidence in the record, I am unpersuaded by Respondent's arguments that a warning or a zero penalty is appropriate for Count 166 because it was neither negligent nor culpable for the violation and/or there is no evidence of "significant harm." As reason therefor, the following observations are made.

First, while Respondent correctly observes that PIC caused the bottles to become mislabeled and that there was *nothing* it could have done to "prevent the mislabeling" (R's Reply Brief at 2), that point is irrelevant, as the Company is not being charged with *causing* the mislabeling. Rather, Respondent was charged with, and found liable for the violation of "*offering for sale*" a misbranded pesticide. Thus, while PIC may have made it *possible* for Respondent to commit the violation at the retail level, its activities do not establish that the Company was neither negligent nor culpable for the violation charged.[25]

[25] This is not to say that Respondent may not have had or does not have a claim against PIC for breach of contract or indemnity based upon its Purchase Order requiring that the products

Second, Respondent's "needle in a haystack" analogy in support of its claimed lack of negligence and/or culpability is based upon the factual assumption that there were only "11" mislabeled bottles "buried apparently in only one case of products." R's Reply Brief at 3. In support of such assumption Respondent cites the June 2009 hearing testimony of Mr. Botterman, Respondent's Vice President of Buying and General Merchandise Manager. R's Reply Brief at 2-3. Mr. Botterman testified that upon becoming aware of the labeling problem on the 11 bottles found in the Las Vegas store via an email he received from Mr. Mark Levine, he "immediately had Mark, our quality control department, check some labels in the warehouse [and we] also had some of the other stores check the labels to see, you know, how widespread the problem was." Tr. 336. In regard to what such checking revealed, Mr. Botterman stated:

> As far as – I don't think there were any *other issues* with that product whatsoever. We checked the warehouse, *some locations*. Subsequently, I will say we did return all of the product because I didn't want to take the labor in the warehouse to go through every case. So the vendor agreed to take – he took just over *500 cases* back.

Tr. 336-37 (italics added).

Thus, Mr. Botterman did *not* testify that the Company found no other mislabeled bottles in the warehouse – only that he did not recall any "*other issues*" with the product being uncovered at that point, and he certainly did not testify one way or another as to whether any mislabeled bottles were found in *any other stores*.

The record does contain e-mails dated May 8 and 9, 2008, from Mark Levine to Mr. Botterman and others within the Company, in regard to the mislabeled PiC bottles in which Mr. Levine states, "I checked 10 cases at random in the DC and they appear okay," and "I did check several cases here and found no problems as pictured." R's Exs. 2, 16. However, such statements appear inconsistent with a memorandum from the state inspector created contemporaneously with the events surrounding the May 8, 2008, inspection, which includes the following entry:

> On 05/09/08, Mr. Levine called me again to update me on 99 Cents Only Stores action. Mr. Levine stated *he personally* inspected several cases of the subject pesticide in their warehouse *and found label problems on approximately 20% of the products*. He further stated [that] he had contacted the PIC Corporation and notified them of the problems. Mr. Levine stated he had contacted all of 99 Cents Only Stores, by bulletin, notifying the store managers to pull products with defective labels from sale. . . .

C's Ex. 10 (italics added).

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sold to it be properly labeled. However, as indicated above, such civil claims are beyond the authority of this proceeding and this Tribunal to determine.

Thus, at best it is unclear from the record exactly how many bottles of the product sold to Respondent were discovered to be mislabeled. Mr. Levine's 20% statement as memorialized by the inspector and Respondent's invoice records reflecting that it received a total of 640 cases (15,360 bottles) of the PiC product on April 18, 2008, suggest that there may have been as many as 3,072 mislabeled bottles. It is noted, however, that the fact that the Company went ahead and returned all the PiC product then remaining unsold to the manufacturer, over 500 cases, belies the claim that only one isolated case was found to contain mislabeled bottles. Further buttressing this conclusion of multiple cases containing mislabeled product are the photographs taken during the inspection which appear to show the mislabeled PiC bottles being offered for sale in two separate cardboard case boxes. *See*, C's Ex. 10 (photographs 215 & 216).

All of this brings us to the next fallacy with Respondent's "needle in a haystack" analogy in support of the claim that the violation occurred despite its exercise of due caution. While it is true that it would be unreasonable to expect Respondent to go through each case of product in its warehouse prior to distribution looking for any mislabeled bottles, it is not unreasonable to have expected the Company to have trained its store personnel to spot mislabeled products as they were being shelved and/or displayed for sale, or worse in the process of sale, and if found, notify the store manager and/or headquarters for further instructions prior to sale. Such training seems particularly imperative with regard to pesticide products labeled with health warnings similar to those which appeared on the PiC product, which conspicuously advised on its label, when readable, in English and Spanish, "CAUTION: KEEP OUT OF REACH OF CHILDREN," "Caution: Harmful if swallowed, inhaled or absorbed through skin," and provides first aid advice. *See*, C's Ex. 10 (photographs of readable label on products).

If Respondent had undertaken such training and had such practices in place then in all likelihood, it would not have committed the violation in that the mislabeled PiC pesticide bottles would have been discovered by store personnel in the Las Vegas store and perhaps in other stores as it was being put on the shelves and if not then, over the next few days as it was being blatantly displayed for sale. *See*, C's Ex. 10 (photographs 215 & 216 documenting that the mislabeled PiC bottles were being displayed for sale in the Las Vegas store on a shelf at eye-level).

Third, although Respondent attributes some nefarious purpose to the two state inspections of the one Las Vegas store in which the mislabeled bottles were found, the evidence in the record suggests a perfectly reasonable explanation and provides even further evidence of Respondent's negligence. Specifically, the Notice of Inspection for the May 8, 2008, inspection states under the heading "Violation Suspected:" as follows:

> Follow up inspection to Market Place Inspection conducted *on 3/24/08*. A second inspector observed Boric Acid on display with inverted & inside out label. Purpose of this inspection is to obtain sample of subject Boric Acid, if possible, and to attempt to obtain purchase/invoice/shipping documents.

C's Ex. 10 (italics added). *See also*, R's Exs. 2, 16 (May 8, 2008, e-mail from Mark Levine to Michael Botterman and others indicating that a state inspector visited the store on March 24,

2008, regarding "a problem with a flea collar," which "turned out to be okay").

Similarly, a narrative Memorandum created by the state inspector dated May 8, 2008, states in pertinent part:

> Per your request, Scott Cichowlaz and I went to the 99 Cent Only Store #132 at 4910 E. Tropicana Avenue, Las Vegas, Nevada, on 05/08/08, to investigate a potential label problem on boric acid displayed [and] offered for sale. . . . I issued an EPA Notice of Inspection . . . We then located the *subject pesticide*, PIC® BORIC ACID Roach Killer III, EPA Reg. No. 3095-20201. . . .

C's Ex. 10.

Together, these documents evidence that mislabeled bottles of the PiC Boric Acid product were being displayed for sale in at least one of Respondent's stores on *March 24, 2008, six weeks prior to the May 8, 2008, inspection,* and *prior to its receipt of its last product lot* (#202010803) from PIC on April 18, 2008. Tr. 210-11. Additionally, these documents suggest that mislabeled bottles of the product were not "unusual," but probably occurred in various product lots received by 99 Cents as part of the "hundreds of thousands" of cases it purchased. As such, the Company's claim that such mislabeling never came to its attention prior to the May 8, 2008, inspection is neither credible nor significant.

In sum, the record adequately evidences that the violation did not occur despite Respondent's "exercise of due care," but as a result of its negligence, and as such does not fall within the language of the first clause of FIFRA § 14(a)(4) suggesting issuance of a warning rather than a monetary penalty. Moreover, such negligence fully supports the '2' culpability rating under the ERP given by Complainant.

Also fallacious is Respondent's assertion that there is no evidence in the record that the violation caused "any" risk of "harm to health or the environment," much less "significant harm," to warrant the imposition of a monetary penalty. While it is true that Dr. Hansen did not specifically testify with regard to the risk of harm to human health posed by the PiC product, the product is a *registered pesticide* defined as a "substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest." 7 U.S.C. § 136(u)(1). The approved label uses the signal word "Caution," indicating it is a pesticide meeting the criteria of Acute Toxicity Category III. *See*, 40 C.F.R. §§ 156.62, 156.64. The product label, *when readable*, conspicuously states: "CAUTION: KEEP OUT OF REACH OF CHILDREN," "Caution: Harmful if swallowed, inhaled or absorbed through skin. Causes eye irritation. Avoid breathing dust. Avoid contact with skin, eyes and clothing, Wash throughly with soap and water after handling. Remove pets, birds and cover fish aquarium before dusting." It also provides first aid advice such as: "If swallowed call a poison control center or doctor immediately for treatment advice." The label also provides directions for use, noting: "It is a violation of Federal law to use this product in a manner inconsistent with its labeling," as well as storage and disposal. *See*, C's Ex. 10. The inside out, upside down, offset labels on the 11 bottles of the product Respondent

was offering for sale limited consumers' access to such critical information. Therefore, there is sufficient evidence in the record that the mislabeled bottles presented a risk of harm to human health.

Complainant states that it rated this factor a '3' because the risk of harm was "unknown," a rationale Respondent justly derides. Under the ERP, such rating constitutes the middle value out of the three numerical choices offered (1, 3 and 5) and applies to violations with the potential of serious or widespread harm. Especially in light of the fact that the pesticide was a toxicity Category III pesticide, the third lowest category, such a rating seems high. Therefore, a rating of '2' seems more appropriate in this case, leading to a total gravity value of the violation to be a '6,' which under the ERP calls for a 20% reduction in the matrix value.

In addition, in determining the penalty in this case, the Agency did not take into account Respondent's post-violation good faith cooperation and compliance, as the ERP provides for such downward adjustment of up to 20% only "[d]uring the course of settlement negotiations." The Memorandum of the State Inspector documents that the assistant store manager and Mr. Levine "were extremely cooperative during [the] inspection & investigation by answering all questions asked and providing the documents requested." C's Ex. 10. Such cooperation is worthy of an additional 10% reduction in the penalty.

As such, the penalty for this violation as determined under the matrix by EPA was $5,200. Reducing this penalty by 30% leads to a final penalty for Count 166 of $3,640.

VIII. CONCLUSION

After considering all the evidence adduced at hearing in this case, it is determined that Complainant met its burden to show the proposed penalty for Count 1 of $5,850 is appropriate for the violation set forth therein as to Respondent's sale of the unregistered pesticide Farmer's Secret. However, Complainant has not met its burden of proof to show that the proposed penalty of $959,400 is appropriate for the 164 violations regarding Respondent's sale of the unregistered pesticide Bref (Counts 2-165) nor the one violation relating to Respondent's sale of mislabeled PiC pesticide bottles (Count 166). Upon consideration of the evidence of record, the three statutory penalty factors set forth in FIFRA Section 14(a)(4) and the FIFRA ERP, a total aggregate penalty of $400,000 is imposed upon Respondent for its 164 Bref violations and a penalty of $3,640 is imposed for the one PiC violation.

ORDER

1. For the 166 violations of FIFRA Section 12(a)(1), 7 U.S.C. § 136j(a)(1), found to have been committed, Respondent, 99 Cents Only Stores, is hereby assessed an aggregate civil penalty of $409,490.

2. 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 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

3. 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.

4. 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.

5. 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).

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Susan L. Biro
Chief Administrative Law Judge

Date: June 24, 2010
Washington, D.C.