IN RE SULTAN CHEMISTS, INC.

FIFRA Appeal No. 99-7

FINAL DECISION

Decided September 13, 2000

Syllabus

Sultan Chemists, Inc. ("Appellant" or "Sultan"), appeals an Initial Decision of the presiding Administrative Law Judge ("Presiding Officer"), arising out of an administrative enforcement action against Sultan for alleged violations of section 12 of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136j.

The Toxics and Pesticides Enforcement Division, Office of Regulatory Enforcement, Office of Enforcement and Compliance Assurance, United States Environmental Protection Agency ("Appellee" or "EPA Enforcement"), filed a complaint alleging that Sultan had committed 89 violations of FIFRA section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A), by selling and distributing four unregistered antimicrobial pesticide products ("unregistered Products"). The complaint proposed a civil penalty of $445,000.

At issue during an evidentiary hearing held in this matter was whether Sultan had received a valid guaranty under FIFRA section 12(b)(1), 7 U.S.C. § 136j(b)(1), that would shield it from liability for selling or distributing the unregistered Products. During the evidentiary hearing, EPA Enforcement objected to Sultan's attempt to introduce extrinsic evidence pursuant to sections 672.202(1) and 672.202(2) of the Florida Uniform Commercial Code (the "Florida U.C.C.") to supplement the guaranty language in a distributorship license agreement ("Agreement"), which Sultan had executed with Health Care Products, Inc. ("HCP") and Meditox, Inc. ("Meditox"). The Presiding Officer admitted the extrinsic evidence into the record, considered EPA Enforcement's objection as a motion to strike all of the direct testimony, and directed Sultan and EPA Enforcement to brief the matter.

The Presiding Officer subsequently ruled that: (1) the guaranty contained in the Agreement did not shield Sultan from liability for selling and distributing the unregistered Products, because the guaranty applied exclusively to a registered pesticide product, rather than to the unregistered Products that were the subject of EPA Enforcement's complaint; (2) Sultan could not introduce extrinsic evidence of "consistent additional terms" pursuant to section 672.202(2) of the Florida U.C.C. because the Agreement contained a merger clause; and (3) while extrinsic evidence could be admitted pursuant to section 672.202(1) of the Florida U.C.C. to demonstrate a "course of dealing," that evidence was neither sufficiently specific to demonstrate a clear course of dealing, nor sufficient to contradict or modify the specific contract terms limiting the guaranty to the registered pesticide product. In addition, although he did not expressly rule that Sultan's extrinsic evidence was inadmissible to establish the parties' "course of performance," the Presiding Officer did not consider Sultan's evidence for that purpose. The Presiding Officer found Sultan liable for all 89 Counts, and assessed a civil penalty in the total amount of $175,000.

Sultan argues on appeal that the Presiding Officer erred when he held that the Agreement between Sultan, HCP and Meditox did not create a valid guaranty covering the unregistered Products under FIFRA section 12(b)(1). Sultan also maintains that the evidence of the parties "course of dealings" is uncontroverted, and that the Presiding Officer improperly excluded extrinsic evidence pertaining to the parties' "course of performance." Additionally, Sultan argues that the Presiding Officer improperly assessed a civil penalty of $175,000 against Sultan.

Held:

(1) The Board affirms the Presiding Officer's ruling that the Agreement between Sultan, HCP and Meditox did not create a valid guaranty covering the unregistered Products under FIFRA section 12(b)(1), 7 U.S.C. § 136j(b)(1). The Agreement fails to contain an essential element of a valid guaranty: it fails to guarantee or otherwise assert that the unregistered Products were lawfully registered at the time of sale and delivery to Sultan.

(2)(a) The Board affirms the Presiding Officer's finding that all of the evidence pertaining to the parties' "course of dealing" offered by Sultan pursuant to section 672.202(1) of the Florida U.C.C. is not sufficient to contradict the specific contract terms, which do not contain a valid FIFRA guaranty for the unregistered Products.

(b) The Presiding Officer erred when he failed to consider Sultan's evidence of the parties' "course of performance," which Sultan offered pursuant to section 672.202(1) of the Florida U.C.C. Nevertheless, having duly considered Sultan's evidence, the Board finds that this evidence fails to establish that the Agreement contains a valid guaranty covering the unregistered Products under the statute.

(3) The Presiding Officer analyzed the statutory factors in FIFRA section 14(a)(4) and considered and weighed the testimony of witnesses and the evidence or lack thereof. The Board finds no clear error of law or abuse of discretion in the Presiding Officer's assessment of a $175,000 penalty.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge McCallum:

I. *INTRODUCTION*

Sultan Chemists, Inc. ("Appellant" or "Sultan") has appealed an Initial Decision issued August 4, 1999, in which the Presiding Officer assessed a civil penalty of $175,000 for 89 violations of section 12 of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136j. This case presents an issue of first impression for the Environmental Appeals Board (the "Board") concerning what constitutes a valid guaranty under FIFRA section 12(b)(1), 7 U.S.C. § 136j(b)(1). For the reasons stated below, we affirm the Presiding Officer's finding of liability and his assessment of a $175,000 civil penalty against Sultan.

II. *BACKGROUND*

A. *Statutory Background*

FIFRA is a federal statute regulating the manufacture, sale, distribution, and use of pesticides in the United States by means of a national registration system. Pursuant to FIFRA sections 3 and 12, no pesticide may be lawfully sold or distributed unless it is registered with EPA. FIFRA §§ 3(a), 12(a)(1)(A), 7 U.S.C. §§ 136a(a), 136j(a)(1)(A).[1]

B. *Factual Background*

Sultan is a corporation located at 85 West Forest Avenue, Englewood, New Jersey. Sultan manufactures and distributes dental products. Transcript of Hearing (September 23, 1998) ("Hearing Tr.") at 185. Sultan is a "person" as that term is defined by FIFRA section 2(s), 7 U.S.C. § 136(s), and is a "producer" of pesticides as that term is defined by FIFRA section 2(w), 7 U.S.C. § 136(w). Sultan is also a "registrant" as that term is defined by FIFRA section 2(y), 7 U.S.C. § 136(y). Sultan has continuously maintained pesticide registrations with EPA since 1973. Complainant's Exhibit ("CX") 49 at 27.

On October 14, 1992, Sultan executed a distributorship license agreement ("Agreement") with Health Care Products Inc. ("HCP"), a Canadian manufacturer of health care products, and Meditox Inc. ("Meditox"), HCP's principal distributor in the United States. The Agreement provided that Sultan would distribute a line of antimicrobial pesticide products manufactured by HCP. *See* CX 21. The products[2] listed in the Agreement include: (1) Liquid Solution comprised of either 0.3% Glutaraldehyde in sterilant form or 0.15% Glutaraldehyde in high level disinfectant form; (2) Towelettes in two different sizes; (3) QuicKit Infection Control Kits; (4) QuicKit Infection Control Kit refills; (5) High level disinfectant spray; and (6) Sterilant/High level disinfectant solution concentrate. *Id*. at 24.

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[1] While there are exceptions to this general rule, they are not relevant here. *See, e.g.*, FIFRA §§ 5, 18, 19 (requirements for experimental use pesticides, exceptions for federal and state agencies and certain storage and transport exceptions).

[2] We note that although the names of the pesticide products identified in the Agreement differ somewhat from the names of the pesticide products that were recovered during EPA Region II's inspection, neither the Toxics and Pesticides Enforcement Division, Office of Regulatory Enforcement, Office of Compliance Assurance, United States Environmental Protection Agency, nor Sultan has disputed that the "Liquid Solution" in the Agreement refers to the WipeOut Cold Sterilizing Disinfecting Solution; the "Towelettes" in the Agreement refer to the WipeOut Disinfectant Towelettes; the "QuicKit Infection Control Kit" in the Agreement refers to the QuicKit Biological Fluid Emergency Spill Kit; and the "High level disinfectant spray" in the Agreement refers to the WipeOut Household or Office Disinfectant Spray.

During two lawfully conducted inspections of Sultan in May and June of 1993, EPA Region II (the "Region"), at the direction of the Toxics and Pesticides Enforcement Division, Office of Regulatory Enforcement, Office of Enforcement and Compliance Assurance, United States Environmental Protection Agency ("Appellee" or "EPA Enforcement"), collected product samples, sales receipts and inventory reports that established that Sultan had distributed or sold four unregistered pesticides. *See* CX 3-5; CX 8-15; CX 50. These four unregistered pesticide products (collectively the "unregistered Products") were (1) WipeOut Disinfectant Towelettes (flat pack) ("Towelettes"); (2) WipeOut Household or Office Disinfectant Spray — 12oz. ("Spray"); (3) WipeOut Medi Disinfectant Wand ("Wand")[3]; and (4) QuicKit Biological Fluid Emergency Spill Kit ("QuicKit"). This product line was manufactured by HCP[4] based upon and containing the glutaraldehyde-based Liquid Solution[5]("Solution"). *See* CX 21. The parties stipulated that the Wand, the QuicKit, and the Spray were unregistered pesticide products. Hearing Tr. at 9. Sultan did not challenge EPA Enforcement's contention that the Towelettes were also unregistered. *See* CX 18; CX 32 at 1; CX 39; CX 49 at 21.

C. *Procedural Background*

On February 15, 1996, EPA Enforcement issued a complaint against Sultan alleging 89 counts of distribution or sale of unregistered pesticide products in violation of FIFRA section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A), and seeking $445,000 in penalties. The 89 counts contained in the complaint asserted that Sultan had distributed or sold: [1] the Towelettes (Counts 1 through 35 and 89); [2] the Spray (Counts 37 through 86); [3] the Wand (Count 87); and [4] the QuicKit (Count 88).

On March 10, 1995, Sultan filed its Answer and Request for Formal Hearing, in which it denied all of the allegations in EPA Enforcement's complaint, raised the existence of a guaranty in the Agreement as an affirmative defense, and challenged the appropriateness of the penalty proposed by EPA Enforcement.

D. *The Initial Decision*

On August 4, 1999, Administrative Law Judge Charles E. Bullock ("Presiding Officer") issued an Initial Decision finding Sultan liable for all 89 counts alleged in the Complaint, and assessed a penalty of $175,000.

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[3] The Wand is not identified anywhere in the Agreement. Hearing Tr. at 144, and 154.

[4] The parties stipulated that Sultan did not manufacture any of the four pesticide products in question. Hearing Tr. at 9.

[5] The Solution was, in fact, registered with EPA, and was assigned EPA registration number 58994-1 (*see* CX 48 at 2), until it was voluntarily canceled in 1997. *See* CX 49 at 9.

At issue during the hearing held in this matter was whether Sultan had received a valid guaranty under FIFRA section 12(b)(1),[6] from HCP and Meditox that all of the unregistered Products had been properly registered with EPA. Initial Decision at 7. Sultan argued that it should not be held liable for the 89 violations of FIFRA section 12(a)(1)(A) because it received a written guaranty from HCP and Meditox that all of the unregistered Products had been properly registered with EPA. Hearing Tr. at 32-46, 128-132; Initial Decision at 7.

EPA Enforcement acknowledged the existence of a guaranty in the Agreement, but argued that the guaranty language was not a defense to Sultan's liability for selling and distributing the unregistered Products because the guaranty applied exclusively to the registered Solution, rather than to the unregistered Products. Hearing Tr. at 30, 135-183; Initial Decision at 8.

Also at issue during the evidentiary hearing held in this matter was whether Sultan could introduce extrinsic evidence pursuant to sections 672.202(1) and 672.202(2) of the Florida Uniform Commercial Code[7] (the "Florida U.C.C.") to supplement the guaranty language in the Agreement. Hearing Tr. at 118-125. The Presiding Officer admitted the extrinsic evidence into the record over EPA Enforcement's objections, which he considered as a motion to strike all of the direct testimony, and directed Sultan and EPA Enforcement to brief the matter. Hearing Tr. at 123-124.

In his Initial Decision, the Presiding Officer agreed with EPA Enforcement and determined that the guaranty did not shield Sultan from liability for selling and distributing the unregistered Products in violation of FIFRA section 12(a)(1)(A). Initial Decision at 14.

The Presiding Officer also rejected Sultan's argument that extrinsic evidence to supplement the Agreement should be introduced pursuant to section 672.202(2) of the Florida U.C.C. Initial Decision at 4. That section provides that such evidence can be considered to explain or supplement a contract "by evidence of consistent additional terms unless the court finds the writing to have been in-

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[6] As we will discuss in greater detail in Section III.A.1., the FIFRA Guaranty Provision permits a person who violates FIFRA section 12(a)(1)(A) to shift his or her liability to the registrant or the person from whom he or she purchased the pesticide, if the person can establish a guaranty in writing from the pesticide registrant or seller to the effect that the pesticide was lawfully registered at the time of the sale and delivery, and that it complies with the other requirements of subchapter II of FIFRA.

[7] In evaluating the meaning of the Agreement, EPA Enforcement and Sultan agreed that section 17(a) of the Agreement provides that the Agreement is to be governed by the law of the State of Florida. Furthermore, they agreed that the Agreement is subject to the provisions of the Uniform Commercial Code contained in the Florida Code. Hearing Tr. at 124.

tended also as a complete and exclusive statement of the terms of the agreement." Fla. Stat. Ann. § 672.202(2) (West 1993).

The Presiding Officer determined that extrinsic evidence could not be admitted pursuant to that section of the Florida U.C.C. because section 17.00(d) of the Agreement provided that it "sets forth the entire understanding between the parties with respect to the subject matter of the Agreement" and it "supersedes all previous communications, representations and agreements between the parties with respect to the said subject matter." CX 21 at 23.

The Presiding Officer did, however, consider extrinsic evidence pursuant to another section of the Florida U.C.C., section 672.202(1), which provides in pertinent part:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing as a final expression of their agreement with respect to such terms are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:
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> (1) By course of dealing or usage of trade (s. 671.205) or by course of performance (s. 672.208)[.]

Fla. Stat. Ann. § 672.202 (West 1993). However, upon examination, the Presiding Officer determined that the extrinsic evidence offered by Sultan was not sufficiently specific to demonstrate a clear course of dealing, and, in any event, was not sufficient to contradict or modify the specific contract terms limiting the guaranty to the Solution. Initial Decision at 16.

At the recommendation of EPA Enforcement, the Presiding Officer calculated a base penalty of $445,000 (the product of 89 counts x $5,000/count). Initial Decision at 24. That penalty amount was reduced to $197,421 (4% of the four-year average of Sultan's gross sales for years 1990-1993) to reflect Sultan's ability to pay and remain in business. Initial Decision at 24. After a further reduction to account for several mitigating factors, the Presiding Officer assessed a penalty of $175,000. Initial Decision at 24-25.

E. *The Appeal*

Sultan's appeal raises three issues: (1) whether the Presiding Officer erred when he held that the Agreement between Sultan, HCP and Meditox did not create a valid guaranty under FIFRA section 12(b)(1); (2) whether the Presiding Officer improperly excluded extrinsic evidence pertaining to the "course of perform-

ance" of the parties to the Agreement; and (3) whether the amount of the civil penalty, $175,000, assessed against Sultan was improper. Appellant's Brief at 3.

Sultan urges the Board to reverse the Presiding Officer's Initial Decision, or alternatively to remand this matter to "a different law judge" to consider Sultan's evidence of the course of performance of the Agreement, or alternatively to reduce the penalty against Sultan to reflect Sultan's good faith reliance upon the guaranties contained in the Agreement. *Id*. at 22-23, 29.

In response, EPA Enforcement makes three arguments: (1) the Presiding Officer properly held that the Agreement did not create a valid guaranty under FIFRA section 12(b)(1) for the violations at issue; (2) the Presiding Officer did not exclude Sultan's extrinsic evidence, but rather, had properly considered and ultimately rejected the evidence on its merits; and (3) the Presiding Officer had properly considered the facts of this matter and the statutory factors in FIFRA to set the penalty. Appellee's Brief in Support of Affirmance ("Appellee's Brief") at 4-25, 36.

III. *DISCUSSION*

We now turn to the issues presented on appeal. First we address the issue of whether the language of the Agreement, standing alone, creates a valid guaranty under FIFRA section 12(b)(1) to cover the unregistered Products. Next, we turn to whether the Agreement can be varied or supplemented through extrinsic evidence to establish a valid guaranty. Finally we turn to the issue of the penalty calculation raised by Sultan. The Board reviews the Presiding Officer's factual and legal conclusions on a *de novo* basis. 40 C.F.R. § 22.31(a).

A. *Whether the Terms of the Agreement Between Sultan, HCP and Meditox Created A Valid Guaranty Under FIFRA section 12(b)(1) for the Unregistered Products*

1. *The FIFRA Guaranty Provision*

We affirm the Presiding Officer's finding that the language in the Agreement between Sultan, HCP and Meditox does not create a valid guaranty under FIFRA section 12(b)(1) for the unregistered Products. That section states in pertinent part:

> The penalties provided for a violation of paragraph (1) of subsection (a) of this section 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 the sale and delivery to the person, and that it complies with the other requirements of this subchapter, and in such case the guarantor shall be subject to the penalties which would otherwise attach to the person holding the guaranty * * *.

Id.

The issue of what constitutes a valid guaranty under FIFRA section 12(b)(1) is a matter of first impression before the Board. This provision of FIFRA has not been at issue in any administrative or judicial proceeding, and there are no cases interpreting the language of this provision.[8] Consequently we will consult general rules of statutory construction and the plain language of section 12(b)(1) to assist us in determining whether the evidence in the record supports a finding of a valid guaranty as Sultan asserts.

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[8] We note that there have been two instances in the past in which examples of appropriate guaranty language have been formally adopted under FIFRA section 12(b)(1). The more recent one was a regulation promulgated by EPA (40 C.F.R. § 162.12), which was repealed on May 4, 1988, when 40 C.F.R. § 162 was revised and consolidated in 40 C.F.R. § 152. *See* 53 Fed. Reg. 15952 (1988). The earlier one was published by the U.S. Department of Agriculture, Agricultural Research Service, Pesticides Regulation Division ("USDA"), which was responsible for administering and interpreting FIFRA before the Environmental Protection Agency ("EPA") was established. *Interpretation Number 11 of the Regulations for the Enforcement of the Federal Insecticide, Fungicide, and Rodenticide Act, (clarifying* FIFRA section 7(a)(1), now FIFRA section 12(b)(1)). *See* CX 19. The repealed EPA regulation and the USDA interpretation are very similar in that they both contain language that is identical to the language of the statute, and they both contain suggested forms of guaranty. The form of guaranty in the repealed EPA regulation read as follows:

> The pesticides comprising each shipment or other delivery hereafter made by _____,
> (Name of guarantor)
>
> to or on the order of _____
> (Name and address of person receiving guarantee)
>
> are hereby guaranteed to be lawfully registered with the United States Environmental Protection Agency and to comply with all requirements of the Federal Insecticide, Fungicide, and Rodenticide Act, as of the date of such shipment or delivery.
>
> _____
> (Signature and post office address of guarantor)
>
> _____
> (Date)

40 C.F.R. § 162.12(f)(2). Although we are not constrained by either example, our reading of this provision is consistent with them.

The starting point for interpreting a statute is the language of the statute itself. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980). In construing statutes, words should be interpreted where possible in their ordinary, everyday senses. *Crane v. Commissioner of Internal Revenue*, 331 U.S. 1 (1947).

The terms of the statute indicate that it was Congress' intent to allow any person who violates FIFRA section 12(a)(1)(A) to shift his or her penalty liability to the registrant or U.S. resident from whom the person purchased or received in good faith the pesticide in the same unbroken package, if that person holds a guaranty in writing that is signed by and contains the name and address of the registrant or U.S. resident, to the effect that the pesticide was lawfully registered at the time of the sale and delivery to the person, and that it complies with the other requirements of subchapter II (FIFRA sections 2-34, 7 U.S.C. §§ 136-136w). The existence of a guaranty under FIFRA section 12(b)(1) is an affirmative defense for which Sultan bears the burden of proof. *See* 40 C.F.R. § 22.24.

In accordance with the terms of the guaranty provision of FIFRA, Sultan can escape liability for violating FIFRA section 12(a)(1)(A) if it can establish that: (1) it holds a written guaranty; (2) the guaranty is signed by and contains the name and address of HCP and Meditox; (3) the guaranty provides that the unregistered Products were lawfully registered pesticide products at the time of sale and delivery to Sultan; (4) the guaranty provides that the unregistered Products comply with the other requirements of subchapter II of FIFRA; (5) it received the unregistered Products from Meditox and HCP in good faith; and (6) it purchased or received the unregistered Products in an unbroken package. *See* FIFRA § 12(b)(1).

2. *The Guaranty Provisions in the Agreement Do Not Meet the Requirements of FIFRA section 12(b)(1) for the Unregistered Products.*

Sultan argues that the Agreement contains a valid guaranty that shields it from liability for selling or distributing the unregistered Products. Appellant's Brief at 13-19. We disagree. Moreover, we do not believe that it is necessary as Sultan contends, to engage in a "hypertechnical construction of both the Guarantee [sic] Statute and the Agreement"[9] to reach the conclusion that the Agreement did not contain a guaranty — valid or otherwise — with respect to the unregistered Products. The guaranty language offered by Sultan fails to contain at least one very important element required by the plain language of FIFRA section 12(b)(1).

[9] *See* Appellant's Brief at 6.

Specifically, it fails to guarantee or otherwise assert that the unregistered Products were lawfully registered at the time of the sale and delivery to Sultan. The explicit language of the Agreement provides that HCP and Meditox guaranteed that they had registered the *Solution*. The Agreement simply does not contain language to the effect that HCP and Meditox had registered the Towelettes, the Spray, the QuicKit or the Wand. Specifically, section 1.04 of the Agreement, "EPA and FDA Approval," provides that:

> HCP and MEDITOX hereby warrant to [Sultan] that the *Solution* containing not more than 0.3 percent of Glutaraldehyde in all respects meets the EPA's specifications for a sterilant, and that such solution containing no more than 0.3 percent Glutaraldehyde has been approved by EPA as a sterilant.

CX 21 at 7 (emphasis added). At the hearing, Sultan's own witnesses testified that the unregistered Products were not included in section 1.04 of the Agreement. Hearing Tr. at 157-161. In addition, paragraph 10.00(b) of the Agreement provides that:

> MEDITOX and HCP warrant that the U.S. EPA has assigned No. 58994-1 to the *Solution*, the formulation of which forms the basis for all of the PRODUCTS.

CX 21 at 19 (emphasis added). Schedule "C" of the Agreement provides that:

> HCP confirms that it has registered its *Solution* with the local offices of Environmental Protection Agency and/or its state equivalent in each of the states of the United States, excepting Alaska. Said registrations are in addition to HCP's Federal registration with the U.S. Environmental Protection Agency.

Id. at 27 (emphasis added).

> In stark contrast, Schedule "D" of the Agreement provides that:
>
> The HCP *Products* have been approved and registered with the following parties and under the following registration number *in Canada* * * *.

Id. at 28 (emphasis added). Similarly, Section 10.00(b) of the Agreement provides that:

> HCP further confirms that is has received all necessary regulatory authority approvals *in Canada* for the sale of the *Products*.

Id. at 20 (emphasis added).

The express terms of the Agreement compel the conclusion that Sultan did not receive a guaranty that the Wand, the QuicKit, the Towelettes, or the Spray were registered with EPA. As the previously quoted language demonstrates, the guaranty language consistently — and significantly — refers to the registered Solution alone. All references to the registration status of the unregistered Products specify registration in Canada, rather than registration with EPA. *See* CX 21 at 20, 28. Clear and unambiguous language of a contract should be given no meaning other than that expressed therein and should be enforced in accordance with its terms. *Board of Public Instruction of Dade County v. Fred Howland, Inc.*, 243 So. 2d 221 (1970).

Moreover, there is no language in the Agreement to the effect that the term "Solution" was intended to encompass the term "PRODUCTS" in the context of the guaranty. To the contrary, the term "Solution" is used as a subset of the term "PRODUCTS" throughout the Agreement. For example, paragraph 1.01(j) defines "PRODUCTS" as "a product or products listed in Schedule A." CX 21 at 2. Schedule "A" of the Agreement makes a clear distinction between the term "PRODUCTS," which incorporates several items including the Solution, and the term "Solution" in various forms:

> For purposes of this Agreement the *PRODUCTS* are described as follows:
> (a)Liquid *Solution* comprised of either:
> - 0.3% Glutaraldehyde * * *.
> - 0.15% Glutaraldehyde * * *.
>
> (b)Towelettes in approximate size 5½″ by 8½″
> (c)Towelettes in approximate size 8″ by 10″
> (d)Plus any other Towelettes in other sizes * * *.
> (e)"QuicKit" Infection Control Kits.
> (f)"QuicKit" Infection Control Kit refills.
> (g)High level disinfectant spray.
> (h)Sterilant/High level disinfectant *solution* * * *.

CX 21 at 24 (emphasis added). Clearly, the Solution, the Towelettes, the QuicKit, and the Spray were intended as individual *subsets* of the more generic term "PRODUCTS." In construing a contract, a court cannot ignore language appearing therein. *Pure Oil v. Petrolite Corp.*, 158 F.2d 503 (5th Cir. 1946).

Thus, Sultan has failed to establish that the express terms of the Agreement contain a valid guaranty under FIFRA section 12(b)(1), for the Agreement fails to guarantee or otherwise assert that the unregistered Products were lawfully regis-

tered at the time of sale and delivery to Sultan.[10]

3. *A Guaranty That the Solution is Registered Cannot Serve as a Guaranty for the Unregistered Products as They are Discrete Pesticide Products That Require Independent Registration*

Sultan makes the legally untenable argument that since the Solution "forms the basis for all of the PRODUCTS," CX 21 at 19, the Products are the equivalent of the Solution, and the guaranty for the Solution automatically applies to the entire product line covered by the Agreement. Appellant's Brief at 14. Specifically, Sultan argues that:

> [S]ince the active ingredient in all the products requiring EPA approval was the same, and the basis for all of the products (the Solution) had been properly approved, the representations in the Agreement * * * created proper guarantees [sic] for the entire Product Line.

Appellant's Brief at 14. We disagree. Sultan's argument directly conflicts with FIFRA and its implementing regulations defining a pesticide and a pesticide product.

FIFRA section 2(u) defines a pesticide as, in part, "any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest." 7 U.S.C. § 136(u). FIFRA's implementing regulations at 40 C.F.R. § 152.3(t) define a pesticide product as:

> [A] pesticide in the particular form *(including composition, packaging, and labeling)* in which the pesticide is, or is intended to be, distributed or sold. The term includes *any physical apparatus* used to deliver or apply the pesticide if distributed or sold with the pesticide.

Id. (emphasis added). FIFRA and its implementing regulations require that each individual pesticide product be separately registered. *See* FIFRA §§ 3(a), 12(a)(1)(A); 40 C.F.R. § 152.15. Thus, pesticide products that contain the same

[10] A second important element required by the plain language of FIFRA section 12(b)(1) is the requirement that the pesticide comply with the other requirements of subchapter II of FIFRA. 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. Nor is there evidence in the record to support such compliance. For example, subchapter II of FIFRA requires that the registration of a pesticide be amended to reflect a labeling or formulation change for that pesticide. *See* FIFRA § 3(f)(1).

active ingredient, but which are composed, packaged or labeled[11] differently, or which contain a different apparatus for delivering or applying the pesticide, are unique pesticide products that require independent registration. *Id.*

The registered Solution[12] was a pesticide in liquid form, which was composed of 0.3% Glutaraldehyde (which could be diluted 1:1 yielding 0.15% Glutaraldehyde), 1.0% Phenol and 98.7% Inert Ingredients. *See* CX 16. The EPA-approved label for the Solution made the pesticidal claim that it was "Fast-acting, Non-staining, Sporicidal, Fungicidal, Virucidal, Bactericidal, Tuberculocidal and Pseudomonacidal." *Id.* The approved label also recommended that the Solution be "use[d] on surgical instruments, food preparation equipment, and any hard non-porous surface suspected of contamination." *Id.* The EPA-approved directions for the Solution provided that the object should be immersed for a minimum of ten minutes at room temperature to destroy viruses and other pathogens, and that after disinfection, the object should be rinsed with sterile water and handled with a sterile technique. *Id.*

The unregistered Towelette was a pesticide in disposable towelette form composed of 0.15% Glutaraldehyde and 99.85% inert ingredients. CX 10. The unapproved label for the Towelettes recommended that they "be used to disinfect all non-porous hard surfaces such as: toilet seats, telephones, exam tables, instruments, etc." and made the following unapproved pesticidal claims:

> WIPE OUT Towelettes destroy Viruses, Bacteria, and Fungus, including the FLU and the COMMON COLD, KILLS HERPES SIMPLEX 1, POLIOVIRUS LSC-1, ROTAVIRUS SA-11, S. MARCENSCENS, PSEUDOMONAS, SALMONELLA, STAPH.AUREUS, B. SUBTILLIS, TRICHOPHYTON, ATHLETES FOOT, HIV-1 (AIDS VIRUS) AND TUBERCULOSIS * * *.

CX 10.

The unregistered Spray was an "aerosol type product," CX 28 packaged in a canister with its contents under pressure. CX 11. The Spray was composed of 0.15% Glutaraldehyde and 99.85% inert ingredients. *Id.* The unapproved label for the Spray also made the following unapproved pesticidal claims:

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[11] Although the regulations at 40 C.F.R. § 152.43(a) provide that EPA may approve a basic formulation and one or more alternate formulation for a single product, the regulations at part 152.43(3) specify that the label text of the alternate formulation product must be identical to that of the basic formulation. *Id.*

[12] The Solution was voluntarily canceled in 1997. CX 49 at 9.

> [The Spray] destroys all known types of virus, bacteria and fungus, including the FLU and the COMMON COLD. Kills Herpes Simplex I, Poliovirus LSC.-1, Rotavirus SA-11, S. Marcescens, Pseudomonas, Salmonella, Staph.aureus, B. Subtillis, Trichophyton, Athletes Foot, HIV and Tuberculosis * * *.

Id. Furthermore, the label for the Spray contained unapproved claims and directions that did not appear on the label of any of the other unregistered Products:

> WipeOut begins to *reduce the risk of contamination from infectious micro-organisms on contact*. When sprayed on the surface to be disinfected the WipeOut Disinfectant Spray *appears as a foam* and may be wiped over the entire area of the object to be disinfected. For *disinfecting and deodorizing garbage cans, diaper pails, clothes hampers, storage areas, toilet seats, sinks, basins, shower stalls, animal areas and all other hard surface areas*.

CX 11 (emphasis added).

The unregistered QuicKit contained "3 Pairs of Latex Gloves, 1 Wipe Out Disinfectant Spray (12 oz.), 12 Wipe Out Towelettes, Spill Absorbent (6 oz.), 3 Pairs of Plastic Scoops, 3 Disposal Bags, and Instructions." CX 12. The unapproved label for the QuicKit also contained an unapproved claim that was not made about the other unregistered Products: "FOR SAFE DISPOSAL OF BIOLOGICAL FLUIDS AND OTHER CONTAMINANTS. DISINFECTS, CLEANS, PROTECTS." *Id*.

Lastly, the unregistered Wand contained 0.15% Glutaraldehyde and 99.85% inert ingredients. CX 13. The unapproved label of the Wand contained the following unapproved pesticidal claims:

> THE MEDI-PHONE WAND destroys all known types of virus, bacteria and fungus, including the FLU and the COMMON COLD. Kills Herpes Simplex 1, Poliovirus LSC-1, Rotavirus SA-11, S. Marcescens, Pseudomonas, Salmonella, Staph.aureus, B. subtillis, Trichophyton, HIV and Tuberculosis * * *.

Id. In addition, the label of the Wand contained unapproved directions that did not appear on the label of the other unregistered Products:

> Simply open the sealed package and remove the Wand. Remove the cap from the Wand. Brush over the area to be disinfected such as the mouthpiece or the earpiece of the telephone or on any object suspected of being contaminated.

Id.

As stated previously, a pesticide product is defined as a pesticide in a particular form, including the packaging and labeling. *See* 40 C.F.R. § 152.3(t). Each of the unregistered Products contained unique packaging and labeling. Each of the unregistered Products made different pesticidal claims, each appeared in a different form, and each had a different mode of application. As such, each of these pesticide products required independent registration. *See* FIFRA § 3.

That the registered Solution forms the basis for the unregistered Products is irrelevant. Assuming *arguendo* that Sultan obtained a valid guaranty under FIFRA § 12(b)(1) for the Solution, that guaranty cannot serve as a guaranty for the Spray, the Wand, the Towelettes or the QuicKit.

A guaranty that one pesticide product is registered cannot serve as a guaranty for another separate and distinct pesticide product. *See generally*, FIFRA §§ 3, 12(a)(1)(A), and 12(b)(1); 40 C.F.R. § 152.15.

4. *The Presence of EPA Registration Numbers on the Labeling of Some of the Unregistered Products Does Not Establish a Guaranty Derived from the Agreement's Warranty of Suitability*

The Agreement provides in section 10.00(f) that the Products are suitable for any claims made on the labeling. The evidence in the record shows that the labeling for three of the unregistered Products bears registration numbers, clearly purporting to be EPA pesticide product registration numbers.[13] Since these Products are indisputably unregistered, the registration numbers on the Products recovered during the inspections of Sultan's place of business are clearly fraudulent. Based on the foregoing warranty provision in the Agreement, and on the false registration numbers on some of the labeling, Sultan attempts to argue that these factors amount to a guaranty from HCP and Meditox that the unregistered Products are in fact registered. In Sultan's words,

> [T]he Agreement * * * states that, "Meditox and HCP warrant that the Licensed Products are suitable for any claims in their labeling," and the labeling on each[14] of the Product Line contains an EPA registration number, thus a claim that the product being labeled and to be sold by Sultan has been properly registered with EPA.

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[13] While the labels for the Towelettes, the Spray, and the Wand, which were recovered during the Region's inspection bore registration numbers, *see* CX 10-11; CX 13, the label for the QuicKit that was recovered during the Region's inspection did not bear a registration number. *See* CX 12.

[14] This is not an accurate statement. *See supra* note 13.

Appellant's Brief at 10-11.[15] Implicit in the argument is the assumption that HCP and Meditox placed false registration numbers on the labeling which caused Sultan to be misled into believing that the unregistered Products were registered. The argument is also founded on the notion that a registration number on the labeling of a pesticide product is a claim of sorts, which is covered by the Agreement's warranty of suitability for the claims made on the Products' labeling. We are unpersuaded by Sultan's argument for a number of reasons, a few of which we will address below.

Before turning to the specifics, however, we note as an initial observation that the argument is constructed by using extrinsic evidence — i.e., the labeling — to construe the warranty provisions of the Agreement. As discussed in the next section of this decision, there are special rules under the Florida U.C.C. that govern the use of extrinsic evidence to construe the written terms of a sales agreement. But since those rules do not have to be invoked to dispose of Sultan's argument, we have chosen to address the argument here.

First, the evidence does not persuade us that Sultan was misled into believing that the registration numbers were genuine. As discussed earlier, the Agreement consistently draws distinctions between the registered Solution, which is clearly represented as being a pesticide product that is registered with EPA (*see* CX 21 at 7, 19, 20, 27), and the unregistered Products, which are just as clearly represented as being pesticide products that are registered in Canada. *See id*. at 20, 28.

Furthermore, the Agreement contains language that strongly suggests that the parties intended for *Sultan* to bear responsibility for obtaining any necessary registrations or sub-registrations.[16] Specifically, section 10.00(b) of the Agreement provides that:

> HCP and/or MEDITOX shall execute such reasonable documentation as is necessary to expedite [Sultan's] *own registration*.

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[15] The Board notes that the term "Licensed," as it appears in Sultan's quotation from the Agreement, is not defined in the Agreement and there is no evidence in the record that the parties to the Agreement intended for the term "Licensed" to mean EPA registration. Rather, this reference to "Licensed Products" is consistent with Gabriel Kaszovitz' testimony that the Agreement itself was for "an exclusive distributorship license." Hearing Tr. at 117. In addition, the use of the term "registration" in Section 10.00(b) and Schedule C, and "Licensed" in Section 10.00(f) compels the conclusion that the two terms are not interchangeable.

[16] The regulations covering the supplemental registration of pesticide products and the transfer of product registrations are found at 40 C.F.R. § 152.132, 135, respectively. The term "sub-registration" is not used in the regulations.

CX 21 at 20 (emphasis added). In addition, section 3.00 of the Agreement, "Duties of Distributor," provides that Sultan, as distributor:

> (6) agrees to obtain and provide for all sub-registrations as may be required at its expense.

Id. at 8. It would have been unnecessary for the parties to include these provisions in the Agreement if they did not anticipate Sultan bearing some significant measure of responsibility for registering or sub-registering any pesticide products that were the subject of the Agreement and that were also in need of registration under FIFRA. There would have been no need for Sultan to register any of the unregistered Products if HCP and/or Meditox had, in fact, warranted in the Agreement that the unregistered Products were registered with EPA.

Moreover, Sultan presented photocopies of draft labels and advertising sheets for the unregistered Products which, rather than lending support to its claim that it had reason to believe that the unregistered Products recovered in the Region's inspection were registered with EPA, convinces us that Sultan should have known that there was a serious problem with the registration status of the unregistered Products. When we compare the draft product labels containing Sultan's name, address and telephone number, *see* Respondent's Exhibit ("RX") 1-2; RX 4, with the actual labels containing HCP's name, address and telephone number, which appeared on the Products recovered during the Region's inspection, *see* CX 10-13, the inconsistencies are obvious.

Unregistered Products	**Registration Number on Label of Product Collected During the Region's Inspection**	**Registration Number(s) on Draft Labels offered by Sultan**
Towelettes	58994-1 (CX 10)	58994-1 (RX 2) 58994-1-18184 (RX 4) 58994-1 (RX 4)
Spray	10352-21 (CX 11)	10352-21 (RX 1) 58994-1 (RX 1) 58994-1-18184 (RX 4)
Wand	10352-21 (CX 13)	no draft label offered
QuicKit	none (CX 12)	no draft label offered

As our table demonstrates, the label for the QuicKit that was collected during the Region's inspection did not have an EPA registration number. *See* CX 12; Hearing Tr. at 216. As a pesticide registrant that has held pesticide registrations

with EPA since 1973, Sultan should have known that it is a violation of FIFRA to sell a pesticide product that does not bear an EPA registration number.

In addition, RX 1 and RX 4, which are photocopies of draft labels for the Spray, show *three* different EPA registration numbers: RX 1 contains EPA registration numbers 10352-21 and 58994-1, and RX 4 contains EPA registration number 58994-1-18184. It is unlikely that an experienced pesticide registrant such as Sultan did not know that a pesticide product could not have three different EPA registration numbers. Moreover, RX 1 and RX 4 contradict Paul Seid, Sultan's president and sole shareholder, who testified that Sultan believed that all of the unregistered Products were registered under the number 58994-1. Hearing Tr. at 214.

Finally, the draft label for the Spray (RX 1) contains the same EPA registration number — 10352-21 — as the label for the Wand which was collected during the Region's inspection (CX 13). As an experienced pesticide registrant, Sultan also should have known that two pesticide products could not have the same EPA registration number. As such, the weight of the evidence shows that Sultan did not have a reasonable basis for believing that the false registration numbers were genuine.

As a second reason for rejecting Sultan's argument, we find no merit in the connection Sultan seeks to make between the registration numbers on the labeling and the Agreement's warranty of suitability. An EPA registration number is not a "labeling claim" within the meaning of FIFRA. While the term "claim" is not defined in section 2 of FIFRA, it is used throughout the statute to denote claims made by registrants regarding the properties, actions, use and efficacy of a pesticide.[17] *See, e.g., In re Roger Antkiewicz & Pest Elimination Products of America, Inc.*, 8 E.A.D. 218, 243 (EAB 1999) (McCallum, J., concurring) ("For example, the phrases 'repels insects,' 'safe for use on tomatoes,' 'does not irritate skin,' * * * all constitute 'claims' because they provide the reader with definitive, EPA-validated information about a product's efficacy, safety, or other qualities.").

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[17] *See* FIFRA § 3(c)(1)(C) (requiring applicants for registration of a pesticide to file with EPA a statement which includes a complete copy of the labeling of the pesticide, a statement of all claims to be made for it, and any directions for its use); FIFRA § 3(c)(5)(A)(authorizing the Administrator to register a pesticide if, among other requirements, its composition is such as to warrant the proposed claims for it); FIFRA § 3(e) (allowing products with the same formulation that are manufactured by the same person, and which bear labels containing the same claims, to be registered as a single pesticide); FIFRA § 12(a)(1)(B) (prohibiting the distribution or sale of any registered pesticide if any claims made for it as part of its distribution and sale substantially differ from any claims made for it as a part of the statement required in connection with its registration under Section 3); and FIFRA § 13(b)(1)(E)(authorizing seizure of a pesticide if any of the claims made for it or any of the directions for its use differ in substance from the representations made in connection with its registration).

Similarly, in the Agreement, the term "claim" is used to denote claims made regarding the properties, actions, use and efficacy of a pesticide. For example, section 1.01(a) of the Agreement defines "EPA" as "the agency in the United States responsible for overseeing and approving the claims of products having anti-microbial properties for the sterilization and disinfection of non-porous surfaces." CX 21 at 2. In addition, section 1.01(q) of the Agreement defines "formula" as "a composition of chemical in specifically defined quantities and concentrations * * *; the antimicrobial claims of which have received the approval of the United States Environmental Protection Agency." *Id*. at 3. Moreover, section 10.00(e) of the Agreement states, in part:

> Meditox and HCP warrant that when the Protocol for mixing is properly followed * * * [it] produces 1,463 U.S. Gallons of WipeOut Sterilizing Solution which Solution's anti-microbial claims and particulars are defined in and approved under EPA registration Approval Number 58994-1.

Id. at 20. This provision clearly demonstrates that the parties differentiated between a "claim" made for the Solution and the EPA registration number assigned to the Solution. As such, Sultan has failed to prove that HCP and Meditox warranted that the unregistered Products were registered with EPA.[18]

Accordingly, we affirm the Presiding Officer's finding that the Agreement between Sultan, HCP and Meditox does not create a valid guaranty under FIFRA section 12(b)(1), with respect to the Wand, the Towelettes, the QuicKit or the Spray.

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[18] We note that Section 10.00(f) also provides that:

> *MEDITOX and HCP make no Guarantee* [sic], or Warranty expressed or implied, of any kind whatsoever respecting the use of the Licensed PRODUCTS *except* (iv)warranties of merchantability and fitness for a particular use.

CX 21 at 20 (emphasis added). Sultan never raised the issue of whether an express warranty of merchantability and fitness for a particular use for the unregistered Products satisfies FIFRA section 12(b)(1)'s requirement that a violator establish a guaranty to the effect that a pesticide was lawfully registered at the time of sale and delivery, and that it complies with the other requirements of subchapter II of FIFRA. As such, Sultan has waived this argument. However, were this issue to be reviewed, Sultan would not prevail as the evidence in the record demonstrates that the parties designated the unregistered Products as being registered in Canada, rather than with EPA; there is no evidence that the parties intended for the warranty of merchantability to refer to the registration status of the Products; and to find that a holder of a warranty of merchantability automatically holds a valid guaranty under FIFRA for a sale of pesticides would defeat Congress' purpose in enacting FIFRA section 12(b)(1).

B. *Whether Sultan Can Establish A Valid Guaranty Under FIFRA section 12(b)(1) By the Use of Extrinsic Evidence*

Sultan argues on appeal that its extrinsic evidence demonstrates that "the Agreement contains guarantees [sic] that the entire Product Line had been properly registered with EPA." Appellant's Brief at 20. The Presiding Officer, however, determined that this evidence was not sufficient to modify or contradict the specific contract terms limiting the guaranty to the Solution. Initial Decision at 16. We affirm the Presiding Officer's finding on this issue.

Moreover, we find that a valid guaranty under FIFRA section 12(b)(1) must be in writing, must be created by clear language, and must contain all of the elements enumerated in the statute. A valid guaranty may not be established by implication without fully satisfying the statutory criteria. The terms of the statute indicate that it was Congress' intent to shield from liability, any person who violates FIFRA section 12(a)(1)(A), if that person could establish a guaranty that meets very specific criteria. Congress' intent is clear, and we will give effect to that intent. *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

1. *Evidence of Course of Dealing*

The Presiding Officer considered extrinsic evidence pursuant to section 672.202(1) of the Florida U.C.C. As previously referenced, that section provides in pertinent part:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing as a final expression of their agreement with respect to such terms are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be *explained or supplemented*:
>
> (1) By *course of dealing* or usage of trade (s. 671.205) or by course of performance (s. 672.208)

Fla. Stat. Ann. § 672.202 (West 1993) (emphasis added). Although Sultan does not argue expressly that the Presiding Officer erred when he ruled that the extrinsic evidence as it related to the parties' course of dealing was not sufficient, Sultan continues to argue on appeal that "the evidence of the parties' intent and course of dealing is uncontroverted." Appellant's Brief at 17. Consequently we will include a discussion of the extrinsic evidence as it relates to "course of dealing."

A "course of dealing" is defined as "a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." Fla. Stat. Ann. § 671.205(1) (West 1993). Previous conduct is defined as conduct between the parties that preceded the formation of the contract. *See Allapattah Services, Inc., v. Exxon Corp.*, 61 F. Supp.2d 1300, 1304 (1999) ("Course of dealing can only refer to conduct between the parties that preceded the formation of the contract.").

For example, in *Amerine Nat'l Corp. v. Denver Feed Co.*, 493 F.2d 1275 (10th Cir. 1974), a case involving a contract for the sale of young turkeys, the court considered evidence of a course of dealing to explain the meaning of the term "Amerine" in the contract. The turkey seller, Amerine, brought suit against the turkey buyer, Denver, for the balance due on the sales contract. The buyer alleged that the contract called for pure-bred "Amerine" turkeys, but the seller had supplied cross-bred turkeys, and as such, the turkeys did not conform to the breed required to be delivered by the contract. The seller alleged, and the court agreed, that "Amerine" meant a turkey sold by it rather than a particular kind of brand. The court was persuaded by the evidence of the seller's previous course of dealing, which established that it had marketed large numbers of cross-bred turkeys as "Amerine" turkeys for several years with its customers, including the buyer in this case. *Id*. at 1278.

The evidence offered by Sultan to demonstrate a course of dealing was RX 1-4 and 6-8, the testimony of Mr. Paul Seid, and the testimony of Mr. Gabriel Kaszovitz, the attorney for Sultan. Sultan offered this evidence to establish the existence of a guaranty covering the unregistered Products. However, for such an effort to be successful, it would be necessary for Sultan to prove that the terms of the guaranty in the Agreement can be construed as encompassing the unregistered Products. The evidence cannot be used by Sultan for the purpose of seeking to imply the existence of a separate guaranty apart from the one that currently exists in the Agreement, for a guaranty is a creature of the statute, as explained earlier, and the statute contemplates a written guaranty. Consequently, a guaranty cannot be established by implication alone. Based on our examination of the evidence, Sultan's evidence does not demonstrate that the guaranty in the Agreement encompasses the unregistered Products. Moreover, as we discussed earlier, this evidence convinces us that Sultan did not have a reasonable basis for believing the unregistered Products to be registered.

RX 1 and RX 2 are facsimile transmittal sheets dated October 13, 1992, from Pat Downs, a Sultan employee, to Frank Midghall, an HCP employee. Attached to the facsimile transmittal sheets are photocopies of draft labels for the Spray and the Towelettes, which contain handwritten edits to their ingredients and

to lines designating EPA product registration and establishment numbers.[19] Both RX 1 and RX 2 are dated October 13, 1992, which is one day prior to the execution to the Agreement, and both are communications from Sultan to HCP. It seems obvious from these facts that neither RX 1 nor RX 2 demonstrates a course of dealing, that is, a sequence of previous conduct from which it can be concluded that the Agreement contains a valid guaranty under FIFRA section 12(b)(1) with respect to the Spray or Towelettes. These exhibits represent single fragmentary events, showing only that Sultan sent draft labels for the Spray and the Towelettes to HCP that contained false EPA registration numbers. They shed no light on whether the Solution also encompassed the Spray and Towelette products.

RX 3 is a facsimile dated November 10, 1992, from Frank Midghall of HCP to Pat Downs of Sultan regarding the Towelettes. The facsimile contains the statement, "In reference to Sodium Phenate — EPA has Approved the Label." However, the label copy referenced in the facsimile is not attached to RX 3. Of perhaps greater relevance is the fact that the Agreement is dated October 14, 1992, CX 21 at 25-26, and RX 3 is dated November 10, 1992, which was *after* the execution of the Agreement, and thus is more properly considered under the topic "course of performance" discussed *infra*, Section III.B.2. A "course of dealing" is restricted to a sequence of conduct between the parties *prior to* the Agreement. *See* Fla. Stat. Ann. § 671.205(1) (West 1993). Consequently, RX 3 does not establish the "previous conduct" between the parties to the Agreement. Moreover, RX 3 does not demonstrate a course of dealing from which it can be concluded that the Agreement contains a valid guaranty under FIFRA section 12(b)(1) with respect to the Towelettes. Rather, RX 3 shows that HCP informed Sultan, albeit erroneously, that EPA had approved the label for the Towelettes with regard to the ingredient, Sodium Phenate.

RX 4 is a set of undated photocopies of draft labels for the Towelettes, the Solution, and the Spray. Each of these photocopies contain handwritten edits to the ingredients, the EPA registration and establishment numbers, and the claims about the product. RX 7 is a photocopy of an undated "advertising sheet"[20] for the Solution, the Spray and the Towelettes. There is a handwritten asterisk next to the statement "WipeOut meets and/or exceeds all U.S. EPA and Canadian Health Protection Branch efficacy requirements."

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[19] As the parties stipulated that the Spray was an unregistered pesticide product (Hearing Tr. at 9), and as EPA Enforcement offered evidence that the Spray has never been registered in the United States (CX 49 at 16), this EPA registration number is presumed false. In addition, Sultan did not challenge EPA Enforcement's contention that the Towelettes were unregistered (CX 18; CX 32 at 1; CX 39); and the record contains evidence that the Towelettes were never registered in the United States (CX 49 at 21). Therefore, this EPA registration number is also presumed false.

[20] Hearing Tr. at 203.

As RX 4 and RX 7 are undated documents, they do not establish the "previous conduct" of the parties to the Agreement. More significantly, neither of these documents demonstrates that the Agreement contains a valid guaranty under FIFRA section 12(b)(1) with respect to the Spray and Towelettes. These exhibits only demonstrate that Sultan possessed undated draft labels and advertising sheets for the Towelettes and the Spray. Moreover, since RX 4 bears Sultan's name, address and telephone number, it is likely that Sultan drafted this label. In addition, the representation in RX 7 that the products meet or exceed U.S. efficacy standards falls short of representing that they are currently registered.

RX 6 is an undated fact sheet or "advertising sheet" about "Wipe Out" in a question and answer format; only the registered Solution and the unregistered Towelettes are specifically referenced in this exhibit.[21] There is a handwritten asterisk next to the statement:

> Results of tests performed by independent laboratories in Canada and the U.S.A. show that Wipe Out meets and/or exceeds all Canadian Health Branch and U.S. Environmental Protection Agency efficacy requirements. These test results have been accepted and registered with H.P.B. and EPA and are available upon request.

RX 6. As an undated document, RX 6 does not demonstrate a course of dealing prior to the execution of the Agreement. Moreover, RX 6 lends little support to Sultan's claim that it understood that the unregistered Product had been registered by EPA: the advertisement falls short of containing a statement to that effect; rather, it claims only that efficacy test results[22] have been "registered" with EPA.

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[21] RX 6 contains the following questions and answers related to the Solution and the Towelettes:

> Q What is the glutaraldehyde content in Wipe Out cold sterilizing/disinfecting solution?
> A 0.3% —- used full strength for sterilization or diluted 1.1 with tap water, to provide a high level hard surface disinfectant.
>
> Q What is [the] glutaraldehyde content in Wipe Out towelettes?
> A 0.15% —- to provide high level hard surface disinfection.
>
> Q What is the post activation shelf life of Wipe Out?
> A 45 days for Wipe Out solution. Deterioration of effectiveness is not a factor with the Wipe Out towelette.

[22] Neither the sending of efficacy tests to EPA, nor the acceptance of such tests by EPA, completes the pesticide registration process. The FIFRA registration procedures are found at 40 C.F.R. §§ 152, 156 and 158. These regulations provide that when EPA receives a registration application, the application is screened initially for formatting and completeness. *See* 40 C.F.R. § 152.104. Among other things, the application usually must satisfy data requirements for product chemistry, residue chemistry, environmental fate, hazards to humans and domestic animals, and reentry protection, so that the Agency may evaluate the efficacy of the product. *See*

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Id. Whatever that might signify is not known. As advertising material of uncertain date and origin, RX 6 may merely have reflected descriptive words that would be used once the product became registered.

RX 8 is a photocopy of undated advertising sheets for the Towelettes. There is a handwritten asterisk next to an illegible EPA registration number. While RX 8 does not contain a date, it may have been prepared prior to August 1, 1992,[23] which was prior to the execution of the Agreement. However, this document does not demonstrate that the Agreement contains a valid guaranty under FIFRA section 12(b)(1) with respect to the Towelettes. RX 8 only demonstrates that Sultan possessed advertising sheets for the Towelettes that contained a false EPA registration number.

As for the testimony of Paul Seid and Gabriel Kaszovitz, it fails to demonstrate a clear course of dealing. First, Mr. Seid's testimony generally describes RX 1-4 and 6-8 and his belief that the unregistered Products were registered because he knew that they were being distributed in the United States by other distributors. Hearing Tr. at 187-205, 212-225. Mr. Kaszovitz's testimony generally describes his belief that the unregistered Products were covered by the "warranty" for the Solution, because the Solution was the basis for the formulation of the other unregistered Products[24](Hearing Tr. at 128), and his belief that the Agreement contains a valid guaranty under FIFRA. Hearing Tr. at 132. Their interpretations and understanding of the guaranty provision conflict with the express terms of the Agreement, are self-serving, and are not sufficient to buttress the weaknesses inherent in the exhibits themselves, or vice versa.

In sum, we affirm the Presiding Officer's finding that all of the evidence pertaining to the course of dealing offered by Sultan is not sufficient to contradict the specific contract terms, which do not contain a valid FIFRA guaranty for the unregistered Products.

(continued)
40 C.F.R. § 158.202. After EPA completes its review, the Agency will either reject as incomplete the application for pesticide registration and require more information from the applicant or grant the application for pesticide registration and notify the registrant in writing. *See* 40 C.F.R. §§ 152.112, 117-118.

[23] RX 8 contains the statement "Our new price list will be in force beginning August 1, 1992 * * *." *Id*.

[24] As we noted earlier, that the Solution forms the basis for the unregistered Products is irrelevant. Each of the unregistered Products was a different pesticide product, and as such, the guaranty for the Solution could not serve as a guaranty for the unregistered Products unless the term "Solution" was intended to encompass the term, "Products." Since the Agreement is devoid of language to that effect, and because Sultan's evidence of course of dealing does not establish that the parties interpreted the Agreement to contain a guaranty for the unregistered Products, Sultan has failed to prove a valid guaranty under FIFRA section 12(b)(1) for the unregistered Products.

2. *Course of Performance*

Sultan argues that the Presiding Officer improperly excluded evidence of the parties' course of performance of the Agreement. Appellant's Brief at 20. Course of performance is defined as conduct *subsequent* to a contract's execution and is considered the best indication of what the parties intended the contract to mean. *Frank Griffin Volkswagen, Inc. v. Smith*, 610 So.2d 597, 608 (1992). In addition, a course of performance is always relevant to determine the meaning of an agreement. Fla. Stat. Ann. § 672.208 cmt. 1 (West 1993). According to Sultan, this evidence supports its position that the Agreement contains guaranties from HCP and Meditox that the unregistered Products had been properly registered with EPA. Appellant's Brief at 20. EPA Enforcement argues that the Presiding Officer considered the evidence, found it lacking in specificity, and rejected it. Appellee's Brief at 16-18.

In fact, while the Presiding Officer did consider Sultan's extrinsic evidence of the parties' course of dealing, he did not consider that same evidence as it related to the parties' course of performance,[25] because Sultan did not clearly raise the issue of the extrinsic evidence as it related to the parties' course of performance in its Post-hearing briefs.[26] Thus, the Presiding Officer's erroneous decision to not consider the evidence in the context of the parties' course of performance appears to be the consequence of Sultan's consistent use of the term "course of dealing," rather than the term "course of performance" in the Post-hearing briefs submitted to the Presiding Officer.

The evidence offered by Sultan to demonstrate a course of performance was the same evidence it offered to demonstrate a course of dealing: RX 1-4 and 6-8, the testimony of Mr. Paul Seid, the president and sole shareholder of Sultan, and the testimony of Mr. Gabriel Kaszovitz, the attorney for Sultan.

Having duly considered Sultan's evidence, we remain unpersuaded that the Agreement contains guaranties from HCP and Meditox that the unregistered Products had been properly registered with EPA.[27] The only argument that Sultan

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[25] Initial Decision at 14-15.

[26] Sultan argued in its post-hearing brief that "the evidence of the parties intent and course of dealing is uncontroverted." Respondent's Post-hearing Brief at 10. Similarly, in another post-hearing brief Sultan argued that "much of [Sultan's evidence] concerns the parties' course of dealing." Respondent's Post-hearing Reply Brief at 10. The only instance in which it appears that Sultan raised the issue of course of performance before the Presiding Officer is in its Post-hearing Reply Brief in which it stated, "[i]n the course of the parties dealings while performing the Agreement * * *." *Id.* at 11.

[27] Since "course of performance" is defined as conduct subsequent to a contract's execution, RX 1 and RX 2 are not relevant as they are dated prior to the Agreement's execution. In addition, as RX 4 and RX 6-8 are undated documents, they do not demonstrate conduct subsequent to the Agree-

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makes in its brief on appeal with respect to the evidence relating to its course of performance is conclusory in nature. In Sultan's own words:

> Sultan submitted evidence of the parties' course of performance of the Agreement in support of its position that the Agreement contains guarantees [sic] that the entire Product Line had been properly registered * * *. In the course of the parties' dealings while performing the Agreement, they discussed (in writing) and drafted various labels for various products in the Product Line, each of which contained an EPA registration number * * *. As further demonstrated by the parties' course of performance, the parties' intent in drafting the contractual guarantees [sic], which the ALJ was apparently not concerned with, was that the guarantees [sic] in the Agreement would apply to the entire Product Line.

Appellant's Brief at 20-22. As can be seen, Sultan does not explain how this evidence establishes that the explicit guaranty for the registered Solution can be interpreted to cover the unregistered Products that were recovered in the Region's inspection. Moreover, based on our examination of that evidence discussed earlier, we fail to see how it would lead someone with twenty-seven years of pesticide registration experience to believe that the unregistered Products recovered in the Region's inspection were registered pesticide products. As such, the evidence not only fails to support Sultan's contentions, it also casts doubt on Sultan's claim that it received the unregistered Products from HCP and Meditox in good faith.

C. *Whether Sultan's Alleged Good Faith is Sufficient to Shield It From Liability for Violating FIFRA section 12(a)(1)*

Sultan argues on appeal that its good faith reliance on the guaranty in the Agreement should shield it from liability for selling or distributing the unregistered Products, and serve as a basis for a further reduction of the penalty. Specifically, Sultan argues that "[t]he ALJ found that Sultan acted with just such good faith, and thus for the Guarantee [sic] Statute to retain any meaning at all it must protect Sultan and shift liability to HCP and Meditox." Appellant's Brief at 28.

By the terms of the statute, the good faith of the purchaser of pesticide products in believing that the products are registered is simply one element of a valid FIFRA guaranty. Inasmuch as Sultan failed to establish that the guaranty language applied to the Wand, the Spray, the Towelettes and the QuicKit, or that the unre-

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(continued)
ment's execution. Lastly, as discussed earlier, while RX 3 is dated after the execution of the Agreement, and may be properly considered under the topic of "course of performance," it does not demonstrate that the Agreement contains a valid guaranty under FIFRA section 12(b)(1).

gistered Products complied with the other requirements of subchapter II of FIFRA, Sultan failed to establish a valid guaranty under the statute, notwithstanding any alleged good faith. Moreover, as noted earlier, we find that the evidence fails to persuade us that Sultan had any reasonable grounds for believing that the registration numbers on the unregistered Products were genuine. This finding is consistent with the "presumption of negligence" finding in the Presiding Officer's assessment, discussed *infra*, of Sultan's culpability. Thus, Sultan does not hold a valid guaranty under the statute, and cannot escape liability for violating FIFRA section 12(a)(1)(A). Moreover, Sultan's alleged good faith cannot serve to defeat liability under a strict liability statute like FIFRA.[28] The issue of Sultan's alleged good faith is relevant for purposes of penalty mitigation only, and we will consider it in that context, in Section III.D., below.

D. *The Appropriateness of the Penalty Imposed*

The Presiding Officer assessed a penalty of $175,000 for Counts 1 through 89 of the complaint. Initial Decision at 24. Sultan argues that this penalty is improper because certain mitigating factors were not adequately considered when the Presiding Officer reduced the penalty. Appellant's Brief at 24-28. EPA Enforcement argues that the Presiding Officer properly considered the facts and the statutory factors in FIFRA to set the penalty, and as such, Sultan is not entitled to a further penalty reduction. Appellee's Brief at 21-22.

EPA's regulation regarding administrative penalty assessments requires penalties to be assessed in accordance with "any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.27(b).

FIFRA authorizes a civil penalty of up to $5,000 for each violation of the statute. However, the current maximum allowable penalty for a FIFRA violation is actually $5,500.[29] FIFRA mandates that three factors be taken into account in determining a penalty: "[1] the appropriateness of [the] penalty to the size of the business of the person charged, [2] the effect on the person's ability to continue in business, and [3] the gravity of the violation." 7 U.S.C. § 136*l*(a)(4). The Board

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[28] *See In re Arapahoe County Weed Dist.*, 8 E.A.D. 381, 388 (EAB 1999) ("FIFRA is a strict liability statute"); *In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 796 (EAB 1997)("The environmental statutes are intended to be action forcing, and brook no excuse for failure to achieve the required result. * * * The environmental statutes * * * , including FIFRA, consistently have been construed as imposing strict liability to meet their requirements.").

[29] The Debt Collection Improvement Act of 1996 ("DCIA"), 31 U.S.C. § 3701 requires EPA to adjust the maximum civil penalties on a periodic basis to incorporate inflation. On June 27, 1997, EPA promulgated the Civil Monetary Penalty Inflation Adjustment Rule ("CMPIAR"), 40 C.F.R. § 19 et seq., as mandated by the DCIA. The CMPIAR set the maximum allowable penalty for a FIFRA violation at $5,500. *See* 40 C.F.R. § 19.1.

must consider EPA's FIFRA Enforcement Response Policy ("ERP") in its analysis of these factors, but it is not required to follow the ERP. *In re Roger Antkiewicz & Pest Elimination Prods. of America.*, 8 E.A.D. 218, 239 (EAB 1999); *see* U.S. EPA, Office of Compliance Monitoring & Office of Pesticides & Toxic Substances, *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)* (July 2, 1990).

We have held that when a Presiding Officer assesses a penalty within the range of penalties provided in the penalty guidelines for a particular statute, we will not substitute our judgment for that of the Presiding Officer absent a showing that the Presiding Officer has committed an abuse of discretion or clear error in assessing the penalty. *In re Predex Corp.*, 7 E.A.D. 591, 597 (EAB 1998); *In re Johnson Pacific Inc.*, 5 E.A.D. 696, 702-703 (EAB 1995); *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994). In the present case, we find that the Presiding Officer has not committed an abuse of discretion or a clear error in assessing the penalty and, therefore, we decline to modify the Presiding Officer's penalty assessment.

At the outset, Sultan argues that "EPA's claim of carefully considering many factors in order to arrive at a penalty which is precisely suited to the violation is a sham." Appellant's Brief at 25. Since the Presiding Officer accepted EPA Enforcement's analysis of the ERP, and we affirm the Presiding Officer's finding, we will include a detailed discussion of the Presiding Officer's methodology in arriving at the penalty of $175,000.

1. *Determining Level of Gravity*

The gravity level of a FIFRA violation is measured on a scale of 1-4; 1 being the lowest level of gravity and 4 being the highest. Appendix A of the ERP assigns a level of 2 to the sale or distribution of an unregistered pesticide. Since Sultan was found liable for 89 counts of sale or distribution of unregistered pesticides, the Presiding Officer correctly determined that the level of gravity for Sultan's violation of FIFRA section 12(a)(1)(A) was 2. *See* Initial Decision at 21.

2. *Size of Business and Base Penalty*

The Presiding Officer then turned to the issue of the size of the business. The Presiding Officer examined the record and determined that Sultan was a company with "an excess of $1,000,000 in gross annual revenues" and as such, "was of the size to be treated as a large business in Category I." Initial Decision at 22. The Presiding Officer also determined that "when those values are placed in the Civil Penalty Matrix for Section 14(a)(1), a base penalty of $5,000, the statutory maximum results." *Id.* at 21. We see no error in the Presiding Officer's application of the ERP with respect to these factors.

3. *Gravity Adjustments*

a. *Pesticide Toxicity*

As the pesticide products at issue were not registered, their toxicity had not been determined. Consequently, the Presiding Officer determined that pesticide toxicity was not available as an adjustment factor and assigned a value of zero. Initial Decision at 23. We find no error in the Presiding Officer's application of the pesticide toxicity criterion of the gravity adjustment factor.

b. *Environmental Harm and Harm to Human Health*

The Presiding Officer assigned a value of 3 for the criteria of harm to the environment and harm to human health. The Presiding Officer first determined that neither the risks to human health nor the risks to the environment could be quantified with specificity, because a full data review had not been done with respect to the unregistered Products as they were unregistered. Initial Decision at 23. However, the Presiding Officer considered that Sultan's failure to register the unregistered Products was harmful to the FIFRA regulatory program, and assigned a value of 3. *See In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782 (EAB 1997) ("[F]ailure to register either the establishment or the pesticide under FIFRA deprives the Agency of necessary information and therefore weakens the statutory scheme."). We find no error in the Presiding Officer's application of the environmental harm and harm to human health criteria of the gravity adjustment factor.[30]

c. *Compliance History*

Sultan argues on appeal that "it is undisputed that Sultan has an exemplary compliance history" as a basis for a further reduction of the penalty. Appellant's Brief at 24. However, we find that the Presiding Officer duly considered Sultan's

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[30] In addition we take notice of the Presiding Officer's finding that the unregistered Products were:

> [L]abeled for such uses as disinfecting hard surfaces like countertops, hospital operating tables, and medical equipment in hospitals. * * * The risks are clear. In the first instance, there is the risk of adverse effects to health or the environment as a result of exposure to the pesticide. Second, and perhaps more important, there are the risks of infection when the pesticide does not perform as expected. The purpose of FIFRA as it applies to the Product Line is to assure that the products were properly registered with EPA which means that they have received scientific and regulatory scrutiny from EPA to ensure that these products are properly labeled and bear appropriate warnings and proper use designations. Since the products in question were not properly registered with EPA, they present an unreasonable risk of harm to human health and the environment.

Initial Decision at 21-22.

compliance history in the context of the gravity adjustment, as well as in the context of other mitigating factors.[31] The Presiding Officer assigned a value of zero for the criterion, "compliance history," because Sultan had no prior FIFRA violations. Initial Decision at 23. We find no error in the Presiding Officer's application of the compliance history criterion of the gravity adjustment factor.

d. *Culpability*

We are not persuaded by Sultan's argument that "[t]he ALJ also failed to properly consider the non-culpability of Sultan's conduct." Appellant's Brief at 27. In fact, the Presiding Officer considered the evidence relative to Sultan's culpability in the context of the gravity adjustment, as well as in the context of mitigating factors.[32]

The criterion, "culpability," is measured on a scale of 4 (knowing or willful violation or knowledge of the general hazardousness of the action) to 2 (culpability unknown or violation resulting from negligence) to zero (violation was not knowing or willful nor the result of negligence, and violator took immediate steps to correct the violation as soon as it was discovered). ERP at Appendix B-2. The Presiding Officer assigned a value of 2 for this criterion because he determined that the facts of the case suggest that "a presumption of negligence is appropriate." Initial Decision at 24.

In addition, Sultan argues that it was "at least as careful as the law requires." Appellant's Brief at 26-27. We disagree. Sultan's witness, Gabriel Kaszovitz, the attorney who assisted in the drafting of the Agreement, admitted that not only had he "never read the FIFRA statute," but he had not even considered FIFRA when he was drafting the Agreement. Hearing Tr. at 180. This alone refutes Sultan's contention that it was as careful as the law requires. Accordingly, we find no error in the Presiding Officer's application of the culpability criterion of the gravity adjustment factor.

e. *Total Gravity*

The Presiding Officer determined that the sum of the gravity adjustment factors was 8. After reviewing Table 3 of the ERP, the Presiding Officer determined that a gravity adjustment value of 8 calls for no adjustment of the penalty. At that point in the calculation, the Presiding Officer determined that the penalty was $445,000 (the product of 89 counts x $5,000 per count). Initial Decision at

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[31] *See infra* Section III.D.5.

[32] *Id.*

24. We find no error in the Presiding Officer's application of the statutory total gravity factor.

4. *Ability to Stay in Business/Ability to Pay*

The Presiding Officer then turned to the issue of Sultan's ability to pay the civil penalty and stay in business. The Presiding Officer chose the "four percent of gross sales" method for determining Sultan's ability to pay, rather than a detailed tax, accounting and financial analysis or the "ABEL" method.[33] The Presiding Officer noted that the evidence in the record indicated that the four-year average of Sultan's gross sales for the years 1990-1993 was $4,935,538. As such, the Presiding Officer calculated that four percent of that figure was $197,421, and reduced the penalty accordingly.

Sultan argues that "Sultan is not Dow Chemicals — it is not a huge business, having [a] net income of only $27,000 last year," and "[a]t worst, Sultan [is] a small business." Appellant's Brief at 25. The Presiding Officer, however, determined that Sultan's argument regarding its net income was not persuasive. Initial Decision at 25. According to the Presiding Officer:

> The record reflects that the salary of Mr. Seid, Respondent's president and sole shareholder (Tr. 184), as reported on the financial statement for 1992 (when Respondent claimed a profit of only $5,515) contained a pass through of operating profits of approximately $300,000 to $400,000. Also, Respondent's assets exceed its liabilities by approximately $1,500,000. Tr. 237. Respondent is well able to pay the penalty of $175,000 without its ability to stay in business being threatened.

Id. We find no error in the Presiding Officer's application of the statutory ability-to-stay-in-business/ability-to-pay factor.

5. *Adjustments to Penalty Under "Gravity" Factor — Principles of Equity*

The Presiding Officer reduced the figure of $197,421 by 11% to account for the following mitigating factors: (1) Sultan was not the actual manufacturer of the pesticides; (2) Sultan did not intentionally violate the law; and (3) Sultan's representatives who negotiated the Agreement thought they had a guaranty that the

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[33] *See*, U.S. EPA, Office of Compliance Monitoring & Office of Pesticides and Toxic Substances, *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA*) (July 2, 1990) at 23.

unregistered Products had been properly registered. Initial Decision at 24. After the 11% reduction, the penalty stood at $175,000.

The Presiding Officer stated, "[t]his adjustment is made under the statutory factor of 'gravity' and reflects a deviation from a strict application of the [ERP], but [is] one that is well supported by principles of equity, as well as the record in this proceeding." *Id*. at 25. Sultan characterizes this reduction as "insufficient." Appellant's Brief at 24.

First, that Sultan was not the actual manufacturer of the unregistered Products is irrelevant to the issue of its liability for violating FIFRA section 12(a)(1)(A). That section makes it unlawful to sell or distribute an unregistered pesticide; the status of the violator is immaterial. Moreover, the Presiding Officer's consideration of Sultan's alleged unintentional violation of the law[34] was already considered in the context of the "culpability" element of the "gravity adjustments" criterion.

Thus, not only is the further mitigation argued by Sultan unwarranted, but the 11% mitigation undertaken by the Presiding Officer is itself questionable. Nevertheless, since Appellee has declined to appeal this portion of the Initial Decision,[35] we will defer to the Presiding Officer's discretion to use these factors as a basis to reduce the penalty.

6. *Sultan's Argument That it Committed One Error Directly Conflicts with FIFRA section 12(a)(1)(A)*

Sultan makes an additional argument in favor of reducing the $175,000 penalty assessed by the Presiding Officer. Sultan argues that:

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[34] As we stated earlier, FIFRA is a strict liability statute, and as such, Sultan's intent is not relevant. *See In re Arapahoe County Weed Dist.*, 8 E.A.D. 381, 388 (EAB 1999) ("FIFRA is a strict liability statute").

[35] According to Appellee:

> Consistent with Judge Reich's supplemental opinion in *In Re Johnson Pacific, Inc.*, 5 E.A.D. 696, Slip Op at 30-31 (EAB February 2, 1995), Appellee declined its opportunity to appeal this portion of the Initial Decision. (Even if the penalty assessed by the Presiding Officer is not the full amount sought by the Agency, the Agency should carefully evaluate the penalty relative to the particular facts and circumstances of the violator and violation and its stated goals for penalty assessment in deciding whether to appeal.) Appellee has concluded that the penalty assessed is sufficient to vindicate its interests in the matter, despite a minor flaws [sic] in the rationale in favor of Appellant.

Appellee's Brief at 24.

> [t]he ALJ found that Sultan relied upon the guarantees [sic] in the Agreement in good faith, and did not deliberately violate the law. That is, at most, one error — not 89. Sultan did not make 89 separate decisions to rely upon the guarantees [sic] in the Agreement.

Appellant's Brief at 26. (Emphasis in original). We are not persuaded by Sultan's unsupportable reading of the statute. Contrary to Sultan's assertion, it was not found liable for relying on the invalid guaranty in the Agreement. FIFRA section 12(a)(1)(A) provides that it shall be unlawful for any person in any State to distribute or sell to any person any pesticide that is not registered under FIFRA section 3, 7 U.S.C. § 136a. 7 U.S.C. § 136j(a)(1)(A). Sultan was found liable for 89 counts of distributing or selling pesticides that were not registered, in violation of FIFRA section 12(a)(1)(A). Because Sultan did not hold a valid guaranty under FIFRA section 12(b)(1), it could not escape liability for these violations. Accordingly we reject this argument.

7. *Sultan's Liability for Counts 86-89 (Sale or Distribution of the Spray, the Wand, the QuicKit and the Towelettes)*

In further support of its argument that the $175,000 penalty should be reduced, Sultan takes issue with the Presiding Officer's finding of liability for counts 86-89. Specifically, Sultan argues that "there remains the fact that four of the 'shipments' for which penalties were imposed * * * had not even been shipped." Appellant's Brief at 27. The Presiding Officer rejected this argument, and stated:

> This argument is not persuasive. A review of page 87 of the transcript wherein Respondent's counsel was cross-examining Complainant's witness Dyer, indicates that the items in question had not been shipped out, but, as Mr. Dyer testified, were collected by the inspector ". . . from a — an area at the facility where they were held for sale and distribution." Mr. Dyer indicated that he did not know how long these items had been held in this area. Tr. 87-88. This testimony does not support Respondent's argument that it withheld further shipments of the products when it discovered that a problem existed with the products.

Initial Decision at 26. We affirm the Presiding Officer's ruling on this issue. FIFRA section 2(gg), 7 U.S.C. § 136(gg) defines the term to distribute or sell as "to distribute, sell, offer for sale, *hold for distribution*, *hold for sale*, *hold for shipment*, ship, deliver for shipment, *release for shipment*, or receive and (having so received) deliver or offer to deliver." *Id*. (emphasis added). As the record contains evidence that Sultan had stored the unregistered Products in an area of its facility where it usually stored pesticide products that were held for sale and distribution,

we affirm that Presiding Officer's finding that the unregistered Products met the statutory criteria of FIFRA of being "distributed or sold."

In sum, we find that the Presiding Officer assessed the penalty within the range of penalties provided in the FIFRA ERP. We find no evidence that the Presiding Officer committed an abuse of discretion or a clear error in assessing the penalty. As such, we affirm the civil penalty of $175,000 against Sultan.

IV. *CONCLUSION*

Upon consideration of the issues raised on appeal by Sultan, we affirm the Presiding Officer's Initial Decision with respect to his finding of liability and his assessment of a civil penalty against Sultan. Pursuant to FIFRA section 14(a)(4), 7 U.S.C. § 136*l*(a)(4), a civil penalty of $175,000 is assessed against Sultan. Sultan shall pay the full amount of the civil penalty within thirty (30) days after the filing of this Final Decision. Payment shall be made by forwarding a certified or cashier's check payable to the Treasurer, United States of America, at the following address:

Bessie L. Hammiel
EPA — Washington D.C.
Hearing Clerk
P.O. Box 360277
Pittsburgh, PA 15251-6277

So ordered.