

**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

|                   |   |                               |
|-------------------|---|-------------------------------|
| In the Matter of: | ) |                               |
|                   | ) |                               |
| ECCO USA, Inc.,   | ) | Docket No. FIFRA-HQ-2016-5022 |
|                   | ) |                               |
| Respondent.       | ) |                               |
|                   | ) |                               |

**CONSENT AGREEMENT AND FINAL ORDER**

**CONSENT AGREEMENT**

Complainant, United States Environmental Protection Agency (“EPA”) and Respondent, ECCO USA, Inc. (“ECCO”), agree to this action and consent to the entry of this Consent Agreement and Final Order (“CAFO”) before taking testimony and without any adjudication of any issues of law or fact herein.

**I. NATURE OF ACTION**

1. This is a civil administrative action instituted under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA” or the “Act”), as amended, 7 U.S.C. § 136/(a) and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. part 22. This action imposes civil penalties pursuant to Section 14(a)(1) of FIFRA.
2. Complainant and Respondent have conferred for the purpose of settlement pursuant to 40 C.F.R. § 22.18 and desire to settle this action. Accordingly, before any testimony has been taken and without any admission of violation, or adjudication of any issue of fact or law, and in accordance with 40 C.F.R. § 22.13(b), Complainant and Respondent have agreed to the execution of this CAFO. Respondent hereby agrees to comply with the terms of this CAFO.

**II. THE PARTIES**

3. Gregory A. Sullivan, Acting Director, Waste and Chemical Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, EPA, is authorized by lawful delegation to initiate and settle civil administrative actions brought pursuant to Section 14(a) of FIFRA.



4. Respondent is ECCO, USA, Inc., a corporation doing business in Londonderry, New Hampshire.

### III. PRELIMINARY STATEMENT

5. Respondent stipulates that Complainant has jurisdiction over the subject matter of this Consent Agreement.
6. Respondent waives any defenses it might have as to venue and jurisdiction.
7. Pursuant to 40 C.F.R. § 22.18(b)(2), Respondent waives its right to contest the allegations herein, its right to appeal the Final Order, and its right to request a judicial or administrative hearing on any issue of law or fact set forth in, and resolved by, this Consent Agreement.
8. Respondent neither admits nor denies the allegations and determinations set forth in Section V of this Consent Agreement.

### IV. STATUTORY AND REGULATORY BACKGROUND

9. Pursuant to FIFRA Section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A), it shall be unlawful for any person to in any State to distribute or sell to any person any pesticide that is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.
10. The term “person” means “any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.” 7 U.S.C. § 136(s).
11. The term “pesticide” means, in part, “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.” 7 U.S.C. § 136(u).
12. The term “to distribute or sell” means “to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver.” 7 U.S.C. § 136(gg).
13. Pursuant to 40 C.F.R. § 152.15(a)(1), a substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if the person selling or distributing the product claims, states, or implies that the product can or should be used as a pesticide.
14. The Administrator is authorized to assess a civil penalty against any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of FIFRA. The maximum statutory civil penalty is \$7,500 for each offense occurring after January 12, 2009, and on or before November 2, 2015. 7 U.S.C. § 136l(a)(1).

## V. EPA ALLEGATIONS AND DETERMINATIONS

15. Respondent is a “person” as that term is defined by FIFRA, 7 U.S.C. § 136(s).
16. From January 1, 2015 through November 1, 2015, Respondent sold and distributed ECCO USA brand shoe products that featured one or more of the terms “antimicrobial,” “antifungal,” and “antibacterial” on the shoe insole (“the Shoes”) to individuals and retailers throughout the United States on at least 302 occasions.
17. At the time of their sale and distribution, the Shoes were “pesticides” as that term is defined by FIFRA, 7 U.S.C. § 136(u).
18. At the time of their sale and distribution, the Shoes were not registered under FIFRA Section 3, 7 U.S.C. § 136a.
19. Respondent sold and distributed unregistered pesticides in violation of FIFRA Section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A), and is therefore subject to the imposition of civil penalties pursuant to FIFRA Section 14(a)(1), 7 U.S.C. § 136l(a)(1).

## VI. TERMS OF SETTLEMENT

20. Respondent consents to issuance of this Consent Agreement and to its terms, and consents, for the purposes of settlement, to the payment of the civil penalty set forth in Section VII.
21. Full payment of the penalty proposed in this CAFO shall only resolve Respondent's liability for Federal civil penalties for the violations alleged in Section V of this CAFO.
22. Compliance with this CAFO shall not be a defense to any subsequent action EPA may commence pursuant to federal law or regulation for violations occurring after the date of this Consent Agreement, or any violations of FIFRA not alleged in this Consent Agreement that may have occurred prior to the date that this Consent Agreement is fully executed by both Parties.
23. Nothing in this CAFO is intended to, nor shall be construed to operate in any way to, resolve any criminal liability of Respondent.

## VII. CIVIL PENALTY

24. Complainant has calculated a penalty pursuant to the statutory penalty factors listed in Section 14(a)(3) of FIFRA, 7 U.S.C. § 136l(a)(3), and in accordance with the Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (December 2009) (“FIFRA ERP”).

25. Based upon the information before Complainant, and in accordance with the penalty calculations and adjustments available under the FIFRA ERP, Complainant has determined that an appropriate civil penalty to resolve the above violations is \$325,000.
26. The penalty agreed upon by Complainant and Respondent for settlement purposes is \$325,000.
27. Not more than sixty (60) calendar days following execution of the Final Order by the Environmental Appeals Board, Respondent shall either:
  - a) Dispatch a cashier's or certified check payable to the order of the "Treasurer of the United States of America" in the amount of \$325,000 and bearing the notation, "ECCO USA, Civil Penalty Docket No. FIFRA-HQ-2016-5022" to the following address:

For standard mail delivery:

U.S. Environmental Protection Agency  
Fines and Penalties  
Docket No. FIFRA-HQ-2016-5022  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000

For FedEx, DHL, UPS, USPS certified or registered, etc.:

U.S. Environmental Protection Agency  
Fines and Penalties  
Docket No. FIFRA-HQ-2016-5022  
Cincinnati Finance Center Box 979077  
SL-MO-C2-GL  
St. Louis, MO 63101

- b) Make an electronic payment by wire transfer (Fedwire) in the amount of \$325,000 with the notation, "ECCO USA, Civil Penalty Docket No. FIFRA-HQ-2016-5022," through the Federal Reserve Bank of New York by using the following information:

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



28. To ensure a record of compliance with this Consent Agreement, Respondent shall forward a copy of the check or wire transfer to EPA to the attention of:

Yolaanda Walker  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
WJC South Mail Code 2249A  
Washington, DC 20460-0001

and

Clerk of the Board  
U.S. Environmental Protection Agency  
Environmental Appeals Board  
1200 Pennsylvania Avenue, N.W.  
Mail Code 1103M  
Washington, DC 20460-0001

29. If Respondent fails to pay the civil penalty of \$325,000 within sixty (60) calendar days of the execution of the Final Order, then Respondent shall pay an additional stipulated penalty of \$5,000 per calendar day, plus interest, at the statutory judgment rate provided for in 31 U.S.C. § 3717, as in effect on the date of execution of the Final Order, unless Complainant in writing excuses or mitigates the stipulated penalty. Complainant may excuse or mitigate the stipulated penalty if Complainant determines in its sole discretion, that failure to comply occurred despite Respondent's exercise of good faith and due diligence. If additional stipulated penalties are due, Complainant will dispatch to Respondent a demand letter via certified mail, return receipt requested, which specifies the total amount due and owed by Respondent, including any interest allowed by law. Within fourteen (14) calendar days following Respondent's receipt of such demand letter, Respondent shall pay the stipulated penalty in the manner specified in this Section.
30. Failure to remit the civil penalty, or any stipulated penalty plus interest provided herein, may result in this matter being forwarded to the United States Department of Justice to recover such amount by action in federal court under Section 14(a)(5) of FIFRA, 7 U.S.C. § 1361(a)(5). The validity, amount and appropriateness of the civil penalty are not reviewable in a collection action.
31. This civil penalty is not deductible for federal tax purposes.

#### VIII. OTHER MATTERS

32. Nothing in this CAFO shall relieve Respondent of the duty to comply with all applicable provisions of FIFRA and with other federal, state, tribal, and local laws and regulations.



33. This CAFO shall bind both Parties. This includes each Party's officers, directors, employees, successors, and assigns. The undersigned representative of each Party to this CAFO certifies that he or she is duly authorized to represent and bind the Party whom he or she claims to represent.
34. This CAFO shall bind the Parties in full effect upon execution of the Final Order by EPA's Environmental Appeals Board.
35. Respondent's obligations under this CAFO shall terminate when Respondent has paid the civil penalty, and any applicable interest or late charges, as specified in Section VII of the Consent Agreement in accordance with the Final Order.
36. Each Party agrees to bear its own costs and attorney fees in this matter.



**WE AGREE TO THIS:**

FOR COMPLAINANT:



\_\_\_\_\_  
Gregory A. Sullivan, Acting Director  
Waste and Chemical Enforcement Division  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
United States Environmental Protection Agency

Sept 29, 2016  
Date:



\_\_\_\_\_  
Adrienne Trivedi, Attorney  
Waste and Chemical Enforcement Division  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
United States Environmental Protection Agency

29 Sept. 2016  
Date:

FOR RESPONDENT:



\_\_\_\_\_  
Company Representative  
ECCO USA

29<sup>th</sup> Sept 2016  
Date:



\_\_\_\_\_  
Attorney  
Counsel for ECCO USA

29 Sept, 2016  
Date: