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UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 HAWTHORNE STREET  
SAN FRANCISCO, CA 94105

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U.S. EPA REGION IX  
REGIONAL HEARING CLERK

In the matter of: ) Docket No. FIFRA-09-2011- 0005  
)  
) CONSENT AGREEMENT  
Kinetic Solutions Inc. ) and  
)  
doing business as Rabbit Air, ) FINAL ORDER PURSUANT TO  
)  
Respondent. ) SECTIONS 22.13 AND 22.18  
)  
\_\_\_\_\_)

**I. CONSENT AGREEMENT**

Complainant, the Associate Director for Agriculture of the Communities and Ecosystems Division, United States Environmental Protection Agency, Region 9, ("EPA") and Respondent Kinetic Solutions Inc. doing business as Rabbit Air (hereafter "Respondent") seek to settle this case and consent to the entry of this Consent Agreement and Final Order ("CAFO").

**A. APPLICABLE STATUTES AND REGULATIONS**

1. This administrative proceeding is initiated pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136, *et seq.* (hereinafter referred to as "FIFRA" or the "Act"), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22.

**B. AUTHORITY AND PARTIES**

2. Respondent is a California corporation. Respondent is a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and as such is subject to FIFRA and the regulations promulgated thereunder. Respondent distributed or sold air purifiers containing the Nano Silver Pre Filter with claims that silver nano ions in the Nano Silver Pre Filter sterilizes over 650 types of bacteria; destroys bacteria and mold while inhibiting any new growth for up to one month;

kills bacteria; and is completely non-toxic.

3. The authority to take action under Section 14(a) of FIFRA, 7 U.S.C. § 136 l(a), is vested in the Administrator of EPA ("Administrator"). By EPA Delegation Order Number 5-14, dated May 11, 1994, the Administrator delegated to the Regional Administrator of EPA Region IX the authority to commence administrative proceedings under Section 14 of FIFRA and to sign consent agreements memorializing settlements in such proceedings. By EPA Regional Order Number 1255.08 dated June 9, 2005, the Regional Administrator of EPA Region IX redelegated this authority to the Director and the Associate Director for Agriculture of the Communities and Ecosystems Division. The Associate Director for Agriculture of the Communities and Ecosystems Division has the authority to commence and settle an enforcement action in this matter.

4. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), states that it shall be unlawful for any person to distribute or sell to any person any pesticide that is not registered under section 3 of FIFRA, 7 U.S.C. § 136a, or whose registration has been canceled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator under this subchapter.

5. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg) states that 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.

6. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), states that the term "pesticide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.

7. Section 2(t) of FIFRA, 7 U.S.C. §136(t), states that the term “**pest**” means (1) any insect, rodent, nematode, fungus, weed, or (2) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism (except viruses, bacteria, or other micro-organisms on or in living man or other living animals) which the Administrator declares to be a pest under FIFRA section 25(c)(1).

8. Section 152.5 of the Title 40 of the Code of Federal Regulations states that “**pesticide product**” means 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. 40 C.F.R. § 152.5.

9. Section 2(q)(1)(D) of FIFRA, 7 U.S.C. § 136(q)(1)(D), states that a pesticide is misbranded if its label does not bear the registration number assigned under section 136e of FIFRA to each establishment in which it was produced.

10. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), states that it shall be unlawful for any person to distribute or sell to any person any **pesticide** that is misbranded.

11. Section 12(a)(1)(F) of FIFRA, 7 U.S.C. § 136j(a)(1)(F), states that it shall be unlawful for any person to distribute or sell to any person any **device** that is misbranded.

12. Section 2(h) of FIFRA, 7 U.S.C. § 136(h), states that a “**device**” is any instrument or contrivance (other than a firearm) which is intended for trapping, destroying, repelling, or mitigating any pest or any other form of plant or animal life (other than man and other than bacteria, virus, or other microorganism on or in living man or other living animals) but not including equipment used for the application of pesticides when sold separately therefrom. See also 40 C.F.R. § 152.500(a).

13. Section 152.500(b) of Title 40 of the Code of Federal Regulations states that EPA has issued a policy statement concerning its authority and activities with respect to devices, which was published in the Federal Register of November 19, 1976 (41 FR 51065). A device is distinguished from a pesticide as follows: If an article uses physical or mechanical means to trap, destroy, repel, or mitigate any plant or animal life declared to be a pest, it is considered to be a device. If the article incorporates a substance or mixture of substances intended to prevent, destroy, repel or mitigate any pest, it is considered to be a pesticide. 41 Fed. Reg. 51065 (November 19, 1976).

14. A device is subject to the pesticide labeling requirements set forth in FIFRA section 2(q)(1). 40 C.F.R. § 152.500(b)(1). Devices subject to 2(q)(1) include air filters (except those containing substances or mixtures of substances which are pesticides) for which claims are made to kill, inactivate, entrap, or suppress the growth of fungi, bacteria, or viruses in various sites. 41 Fed. Reg. 51065.

15. A device is subject to the requirements set forth in FIFRA sections 12, 13, and 14, with respect to violations, enforcement activities, and penalties. 40 C.F.R. § 152.500(b)(5).

### **C. COMPLAINANT'S ALLEGATIONS**

16. Bacteria are "pests" as that term is defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t). Fungus, including molds, are "pests" as that term is defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t).

17. At the times relevant to this enforcement action, Respondent distributed or sold air purifiers containing the Nano Silver Pre Filter with claims that silver nano ions in the Nano Silver Pre Filter sterilizes over 650 types of bacteria; destroys bacteria and mold while inhibiting any new growth for up to one month; kills bacteria; and is completely non-toxic. According to

Respondent's claims, the Nano Silver Pre Filter is not exclusively using a physical or mechanical means to trap, destroy, repel, or mitigate bacteria and mold. According to Respondent's claims, the Nano Silver Pre Filter incorporates a substance called by Respondents "nano silver" or "silver nano ions." (hereinafter, "Nano Silver"). Nano Silver is a substance or mixture of substances intended to prevent, destroy, repel or mitigate bacteria and mold. The Nano Silver Pre Filter is a pesticide. The Nano Silver Pre Filter is not a registered pesticide.

18. At the times relevant to this enforcement action, Respondent distributed or sold air purifiers containing the BioGS HEPA filter with claims that the BioGS HEPA filter traps and destroys fungus, bacteria, dust mites, and mold. According to Respondent's claims, the BioGS HEPA filter uses a physical or mechanical means to trap, destroy, repel, or mitigate fungus, bacteria, dust mites, and mold. The BioGS HEPA filter is a device.

19. Respondent distributed or sold the following air purifiers containing the Nano Silver Pre Filter and BioGS HEPA Filter: SPA-582A BioGS air purifiers, SPA-421A BioGS air purifiers, SPA-780A Minus AS air purifiers, SPA-700A Minus AS air purifiers, and AP-1004 Minus AS air purifiers. At the times relevant to this enforcement action, each of these air purifiers is a pesticide product containing the Nano Silver Pre Filter and BioGS HEPA Filter. At the times relevant to this action, each of the labels of these air purifiers does not bear the registration number assigned under section 136e of FIFRA to the establishment (or establishments) in which it, the Nano Silver Pre Filter, and the BioGS HEPA Filter were produced.

20. Respondent "distributed or sold," as that term is defined in Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), **unregistered pesticides**, air purifiers containing the Nano Silver Pre Filter, to persons on or about the following dates: (1) BioGS air purifier model SPA-421A on January 1,

2009; (2) BioGS air purifier model SPA-421A on February 1, 2009; (3) BioGS air purifier model SPA-582A on March 1, 2009; (4) BioGS air purifier model SPA-582A on April 27, 2009; (5) BioGS air purifier model SPA-421A on June 10, 2009; (6) BioGS air purifier model SPA-582A on July 24, 2009; (7) BioGS air purifier model SPA-582A on August 26, 2009; (8) BioGS air purifier model SPA-421A on September 1, 2009; (9) BioGS air purifier model SPA-421A on October 14, 2009; and (10) BioGS air purifier model SPA-421A on December 22, 2009; (11) Minus AS air purifier model AP-1004 on January 1, 2009; (12) Minus AS air purifier model SPA-780A on February 1, 2009; (13) Minus AS air purifier model SPA-700A on March 26, 2009; (14) Minus AS air purifier model SPA-780A on April 27, 2009; (15) Minus AS air purifier model SPA-700A on May 17, 2009; (16) Minus AS air purifier model SPA-780A on August 2, 2009; (17) Minus AS air purifier model SPA-780A on September 30, 2009; (18) Minus AS air purifier model SPA-700A on October 19, 2009; and (19) Minus AS air purifier model SPA-700A on November 8, 2009. Respondent violated section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), each time Respondent distributed or sold an **unregistered pesticide**, the air purifiers containing the Nano Silver Pre Filter.

21. Respondent "distributed or sold," as that term is defined in Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), **misbranded pesticide products**, air purifiers containing the Nano Silver Pre Filter and the BioGS HEPA Filter that had labels without establishment number(s) to persons on or about the following dates: (1) BioGS air purifier model SPA-421A on January 1, 2009; (2) BioGS air purifier model SPA-421A on February 1, 2009; (3) BioGS air purifier model SPA-582A on March 1, 2009; (4) BioGS air purifier model SPA-582A on April 27, 2009; (5) BioGS air purifier model SPA-421A on June 10, 2009; (6) BioGS air purifier model SPA-582A on July 24, 2009; (7) BioGS air purifier model SPA-582A on August 26, 2009; (8) BioGS air purifier

model SPA-421A on September 1, 2009; (9) BioGS air purifier model SPA-421A on October 14, 2009; (10) BioGS air purifier model SPA-421A on December 22, 2009; (11) Minus AS air purifier model AP-1004 on January 1, 2009; (12) Minus AS air purifier model SPA-780A on February 1, 2009; (13) Minus AS air purifier model SPA-700A on March 26, 2009; (14) Minus AS air purifier model SPA-780A on April 27, 2009; (15) Minus AS air purifier model SPA-700A on May 17, 2009; (16) Minus AS air purifier model SPA-780A on August 2, 2009; (17) Minus AS air purifier model SPA-780A on September 30, 2009; (18) Minus AS air purifier model SPA-700A on October 19, 2009; and (19) Minus AS air purifier model SPA-700A on November 8, 2009. Respondent violated section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), and section 12(a)(1)(F) of FIFRA, 7 U.S.C. § 136j(a)(1)(F), each time Respondent distributed or sold a **misbranded pesticide product**, the air purifiers that failed to bear the establishment number for the establishment(s) in which the air purifier containing the Nano Silver Pre Filter and BioGS HEPA Filter was produced.

#### **D. RESPONDENT'S ADMISSIONS**

22. In accordance with 40 C.F.R. § 22.18(b)(2), and for the purpose of this proceeding, Respondent (i) admits that EPA has jurisdiction over the subject matter of this CAFO and over Respondent; (ii) **neither admits nor denies** the specific factual allegations contained in Section I.C. of this CAFO; (iii) consents to any and all conditions specified in this CAFO, (iv) agrees to pay, and consents to the assessment of, the civil administrative penalty under Section I.E of this CAFO; (v) waives any right to contest the allegations contained in Section I.C. of this CAFO; and (vi) waives the right to appeal the proposed final order contained in this CAFO.

#### **E. CIVIL ADMINISTRATIVE PENALTY**

23. Respondent consents to the assessment of a penalty in the amount of **EIGHTY**

**TWO THOUSAND FOUR HUNDRED DOLLARS (\$82,400)** as final settlement and complete satisfaction of the civil claims against Respondent arising from the facts alleged in Section I.C. of the CAFO and under the Act, as alleged in Section I.C. of the CAFO.

24. Respondent shall pay the assessed penalty no later than thirty (30) days from the effective date of this CAFO.

25. The civil penalty shall be paid by remitting a certified or cashier's check, including the name and docket number of this case, for the amount, payable to "Treasurer, United States of America," (or be paid by one of the other methods listed below) and sent as follows:

Regular Mail:

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

Wire Transfers:

Wire transfers must be sent directly to the Federal Reserve Bank in New York City with 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"

Overnight Mail:

U.S. Bank

1005 Convention Plaza

Mail Station SL-MO-C2GL

ATTN Box 979077

St. Louis, MO 63101

ACH (also known as REX or remittance express):

Automated Clearinghouse (ACH) for receiving US currency

PNC Bank



808 17<sup>th</sup> Street, NW  
Washington, DC 20074  
ABA = 051036706  
Transaction Code 22 – checking  
Environmental Protection Agency  
Account 31006  
CTX Format

On Line Payment:

This payment option can be accessed from the information below:

[www.pay.gov](http://www.pay.gov)

Enter “sf01.1” in the search field

Open form and complete required fields

**If clarification regarding a particular method of payment remittance is needed, contact the EPA Cincinnati Finance Center at 513-487-2091.**

A copy of each check, or notification that the payment has been made by one of the other methods listed above, including proof of the date payment was made, shall be sent with a transmittal letter, indicating Respondent's name, the case title, and docket number, to both:

- a) Regional Hearing Clerk  
Office of Regional Counsel (ORC-1)  
U.S. Environmental Protection Agency, Region 9  
75 Hawthorne Street  
San Francisco, California 94105
- b) Julie Jordan  
Pesticides Program  
Communities and Ecosystems Division (CED-5)  
U.S. Environmental Protection Agency, Region 9  
75 Hawthorne Street  
San Francisco, California 94105

26. In the event that Respondent fails to pay the civil administrative penalty assessed above by its due date, Respondent shall pay to Complainant an additional stipulated penalty in the amount of **ONE HUNDRED DOLLARS (\$100)** for each day that payment is late. Upon Complainant's written demand, payable shall immediately become due and payable.

27. Respondent's failure to pay in full the civil administrative penalty by its due date also

may lead to any or all of the following actions:

a. The debt being referred to a credit reporting agency, a collection agency, or to the Department of Justice for filing of a collection action in the appropriate United States District Court. 40 C.F.R. §§ 13.13, 13.14, and 13.33. In any such collection action, the validity, amount, and appropriateness of the assessed penalty and of this CAFO shall not be subject to review.

b. The debt being collected by administrative offset (i.e., the withholding of money payable by the United States to, or held by the United States for, a person to satisfy the debt the person owes the Government), which includes, but is not limited to, referral to the Internal Revenue Service for offset against income tax refunds. 40 C.F.R. Part 13, Subparts C and H.

c. EPA may (i) suspend or revoke Respondent's licenses or other privileges; (ii) suspend or disqualify Respondent from doing business with EPA or engaging in programs EPA sponsors or funds; (iii) convert the method of payment under a grant or contract from an advanced payment to a reimbursement method; or (iv) revoke a grantee's or contractor's letter-of-credit. 40 C.F.R. §§ 13.17.

#### **F. CERTIFICATION OF COMPLIANCE**

28. In executing this CAFO, Respondent certifies (1) that it is not distributing or selling unregistered pesticides, or misbranded pesticides or devices in violation of FIFRA; and (2) that it is complying with FIFRA requirements at all facilities under its control.

#### **G. RETENTION OF RIGHTS, BINDING EFFECT, ETC.**

29. Issuance of this CAFO does not constitute a waiver by EPA of its right to enforce the terms of this CAFO or to seek other civil or criminal relief for violations, if any, of any provision of federal law not specifically settled by this Consent Agreement. Nothing in this CAFO shall

relieve Respondent of its duty to comply with all applicable provisions of the Act and other Federal, state or local laws or statutes.

30. The provisions of this CAFO shall be binding on Respondent and on Respondent's officers, directors, employees, agents, servants, authorized representatives, successors, and assigns.

31. Except as set forth in Paragraph 27 above, each party shall bear its own costs, fees, and disbursements in this action.

32. For the purposes of state and federal income taxation, Respondent shall not claim a deduction for any civil penalty payment made pursuant to this CAFO.

33. This Consent Agreement constitutes the entire agreement between the Respondent and EPA. This Consent Agreement and Final Order is for the purpose of fully and finally settling the civil claims against Respondent arising from the facts alleged in section I.C. of this CAFO. Full payment of the civil penalty and any applicable interest charges or late fees or penalties as set forth in this Consent Agreement and the Final Order shall constitute full settlement and satisfaction of civil penalty liability against Respondent for the violations alleged in Section I.C. of this CAFO.

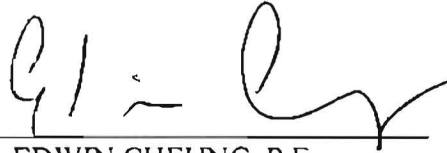
34. In accordance with 40 C.F.R. §§ 22.18(b)(3) and 22.31(b), the effective date of this CAFO shall be the date on which the accompanying Final Order, having been signed by the Regional Judicial Officer, is filed.

35. The undersigned representatives of each party to this Consent Agreement certify that each is duly authorized by the party whom he or she represents to enter into the terms and bind

that party to it.

**KINETIC SOLUTIONS INC.:**

Date: 9/29/10 By:



EDWIN CHEUNG, P.E.  
V.P., Business Development  
Kinetic Solutions Inc. doing business as Rabbit Air

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:**

Date: 10/29/10 By:

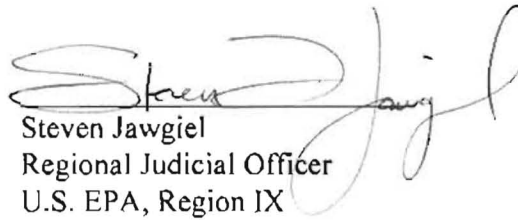


KATHERINE TAYLOR  
Associate Director for Agriculture  
Communities and Ecosystems Division  
U.S. Environmental Protection Agency,  
Region IX

**II. FINAL ORDER**

IT IS HEREBY ORDERED that this Consent Agreement and Final Order be entered and that Respondent shall pay a civil administrative penalty in the amount of **EIGHTY TWO THOUSAND FOUR HUNDRED DOLLARS (\$82,400)** in accordance with the terms set forth in the Consent Agreement.

Date: 11/23/10

  
Steven Jawgiel  
Regional Judicial Officer  
U.S. EPA, Region IX

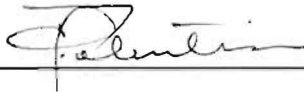
CERTIFICATION / CERTIFICATE OF SERVICE

I certify that the original of the foregoing Consent Agreement and Final Order Pursuant to 40 C.F.R. §§ 22.13 and 22.18, Docket No. FIFRA-9-2011-0005, was hand delivered to the Regional Hearing Clerk, United States Environmental Protection Agency - Region IX, 75 Hawthorne Street, San Francisco, California 94105, and that a true and correct copy thereof was placed in the United States Mail, certified mail (7010 1060 0000 5106 8320), return receipt requested, addressed to the following address:

Mr. Edwin Cheung  
Kinetic Solutions Inc. dba Rabbit Air  
201 West Garvey Ave., 102-168  
Monterey Park, CA 91754

Date: 11/24/2010

By: \_\_\_\_\_



~~FAR~~ Regional Hearing Clerk  
United States Environmental  
Protection Agency, Region IX  
75 Hawthorne Avenue  
San Francisco, California 94105-3143



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 Hawthorne Street  
San Francisco, CA 94105-3901

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED** 7010 1060 0000 5106 8320

Date: NOV 24 2010

Mr. Edwin Cheung  
Kinetic Solutions Inc. dba Rabbit Air  
201 West Garvey Ave., 102-168  
Monterey Park, CA 91754

Subject: Kinetic Solutions Inc. dba Rabbit Air  
Consent Agreement and Final Order  
Docket No. FIFRA-9-2011-0005

Dear Mr. Cheung:

Enclosed please find a Consent Agreement and Final Order (CAFO) concerning violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. Sections 136 et seq. for the above referenced case. The terms of the CAFO require the payment to be received by EPA within 30 days of the effective date of the CAFO.

If you have any questions, please contact Carol Bussey, Assistant Regional Counsel, telephone number (415) 972-3950.

Sincerely,

A handwritten signature in black ink, appearing to read "Katherine A. Taylor".

Katherine A. Taylor  
Associate Director for Agriculture  
Communities and Ecosystems Division

Enclosure

cc: Patricia J. Chen, Esq., LEED AP

Lynn Owen, California Department of Pesticide Regulation  
Patrick Thalken, California Department of Pesticide Regulation