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U.S.EPA - Region 09

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
SAN FRANCISCO, CALIFORNIA

In the Matter of:	)	
	)	
Ensystem II, Inc.	)	Docket No. FIFRA-09- <u>2017-0009</u>
	)	
	)	CONSENT AGREEMENT AND FINAL
	)	ORDER PURSUANT TO
	)	40 C.F.R. §§ 22.13 AND 22.18
Respondent.	)	
_____	)	

I. CONSENT AGREEMENT

The United States Environmental Protection Agency, Region IX (“EPA”), and Ensystem II, Inc. (“Respondent”) agree to settle this matter and consent to the entry of this Consent Agreement and Final Order (“CAFO”), which simultaneously commences and concludes this matter in accordance with 40 C.F.R. §§ 22.13 and 22.18.

A. AUTHORITY AND PARTIES

1. This is a civil administrative action instituted pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA” or “the Act”), as amended, 7 U.S.C §§ 136 et seq., for the assessment of a civil administrative penalty against Respondent for violations of Section 12 of the Act.

2. Complainant is the Acting Assistant Director of the Water and Pesticides Branch of the Enforcement Division, EPA Region IX, who has been duly delegated the authority to bring this action and to sign a consent agreement settling this action.
3. Respondent is a North Carolina corporation that imports pesticides into the State of California.

**B. APPLICABLE STATUTORY AND REGULATORY SECTIONS**

4. Section 17(c) of FIFRA and regulations promulgated at 19 C.F.R. Part 12 pursuant to Section 17(e) of FIFRA, 7 U.S.C. § 136o(e), by the Secretary of the Treasury in consultation with the EPA Administrator govern the importation of pesticides into the United States.
5. 19 C.F.R. § 12.111 provides that “certain imported pesticides are required to be registered under the provisions of section 3 of the Act.”
6. 19 C.F.R. § 12.112 provides that “an importer or the importer’s agent desiring to import pesticides or devices into the United States must submit to the Administrator, prior to the arrival of the shipment in the United States, a Notice of Arrival of Pesticides and Devices.”
7. Under section 2(u) of FIFRA, 7 U.S.C. §136(u), the term “pesticide” is, among other things, any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.
8. Under section 2(t) of FIFRA, 7 U.S.C. §136(t), the term “pest” includes (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).

9. Section 3(a) of FIFRA, 7 U.S.C. § 136a(a), provides that except as provided by FIFRA, no person in any State may distribute or sell to any person any pesticide that is not registered under FIFRA.
10. Under section 2(gg) of FIFRA, 7 U.S.C. §136(gg), 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.
11. Regulations promulgated at 40 C.F.R. Parts 152 and 156 pursuant to the Act govern the registration and labeling of pesticides. Pursuant to 40 C.F.R. 152.30(b), an unregistered pesticide may be transferred between registered establishments not operated by the same producer if (1) the transfer is solely for the purpose of further formulation, packaging, or labeling into a product that is registered; (2) each active ingredient in the pesticide, at the time of transfer, is present as a result of incorporation into the pesticide of either (i) a registered product; or (ii) a pesticide that is produced by the registrant of the final product; and (3) the product as transferred is labeled in accordance with 40 C.F.R. Part 156.
12. The term “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. 40 CFR 153.3.

13. Pursuant to 40 C.F.R. 156.10(a)(1)(v), every pesticide product must bear a label that shows the producing establishment number.
14. Pursuant to 40 C.F.R. § 156.10(a), every pesticide product must bear a label that shows clearly and prominently the directions for use as prescribed in 40 C.F.R. § 156.10(i). Pursuant to 40 C.F.R. 156.10(i)(1)(iii)(C), when detailed directions for use are omitted from the labeling of pesticide products which are intended for use only by formulators in preparing pesticides for sale to the public, the label must clearly state the type(s) of pesticide products involved.
15. A pesticide is misbranded under Section 2(q) of FIFRA, 7 U.S.C. § 136(q) if: (a) its label does not bear the registration number assigned under FIFRA Section 7, 7 U.S.C. § 136e, to each establishment in which it was produced [Sec. 2(q)(1)(D)]; (b) any word, statement, or other information required by FIFRA to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or graphic matter in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use [Sec. 2(q)(1)(E)]; or (c) the labeling accompanying the pesticide does not contain directions for use which are necessary for effecting the purpose for which the product is intended and, if complied with (together with any required use classification(s) under Section 3(d) of FIFRA, 7 U.S.C. § 136a(d)), are adequate to protect health and the environment [Sec. 2(q)(1)(F)].
16. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), provides that it shall be unlawful for any person to distribute or sell to any person a pesticide which is not registered under section 3 of FIFRA, 7 U.S.C. § 136a.

17. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), provides that it shall be unlawful for any person to distribute or sell to any person a pesticide which is adulterated or misbranded.
18. Under section 2(s) of FIFRA, 7 U.S.C. §136(s), the term “person” means “any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.”
19. Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of the Act may be assessed a civil penalty of not more than \$7,500 for violations that occurred after December 6, 2013 through November 2, 2015, or are assessed before August 1, 2016; not more than \$18,750 for violations that occurred after November 2, 2015 and are assessed on or after August 1, 2016 but before January 15, 2017; and \$19,057 for violations that occurred after November 2, 2015 and are assessed on or after January 15, 2017. Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), as amended by the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19.

### C. ALLEGATIONS

20. Respondent is a corporation and therefore, a “person” as defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).
21. Linhai Limin Chemicals Company manufactures “Sulfuryl Fluoride” at its facility in China for Respondent.
22. “Sulfuryl Fluoride” is a fumigant used to kill insects and rodents.
23. Insects and rodents are “pests” and therefore “Sulfuryl Fluoride” is a “pesticide” as those terms are defined by Sections 2(t) and (u) of FIFRA, 7 U.S.C. §§ 136(t) and (u).
24. On or about April 14, 2017, approximately 160 cylinders of “Sulfuryl Fluoride” that

Respondent imported to the United States from China arrived at the Port of Long Beach in California.

25. On or about April 14, 2017, Respondent "distributed or sold" the pesticide product "Sulfuryl Fluoride", as that term is defined in 2(gg) of FIFRA, 7 U.S.C. § 136(gg).

*Distribution and Sale of Misbranded Pesticide*

26. On or about April 14, 2017, the label on the "Sulfuryl Fluoride" that arrived at the Port of Long Beach contained no establishment number as required by 40 C.F.R.

156.10(a)(1)(v). In addition, the label omitted detailed directions for use and did not state the type(s) of pesticide products involved, as required by 40 C.F.R. 156.10(i)(1)(iii)(C) when detailed directions for use are omitted from the labeling of pesticide products which are intended for use only by formulators in preparing pesticides for sale to the public.

27. Therefore, the pesticide, "Sulfuryl Fluoride" that Respondent imported from China to the Port of Long Beach on or about April 14, 2017, is a "misbranded" pesticide pursuant to FIFRA Section 2(q) and its shipment constitutes one violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

*Distribution and Sale of Unregistered Pesticide*

28. On or about April 14, 2017, the label on the "Sulfuryl Fluoride" that arrived at the Port of Long Beach stated it was not registered for use as pesticide in the United States and it was being imported into the United States by Respondent pursuant to 40 C.F.R. Section 152.30(b).

29. The "Sulfuryl Fluoride" that Respondent imported from China to the Port of Long Beach on or about April 14, 2017 was not labeled in accordance with 40 C.F.R. Part 156 because the label had no establishment number as required by 40 C.F.R. 156.10(a)(1)(v)

and did not show directions for use as required by 40 C.F.R. § 156.10(i). In addition, the active ingredient in the “Sulfuryl Fluoride” that Respondent imported from China to the Port of Long Beach on or about April 14, 2017 was not, at the time of transfer, present as a result of incorporation into the pesticide of either a registered product or a pesticide that was produced by the registrant of the final product, as required by 40 C.F.R. Section 152.30(b)(2). Therefore, it fails to meet the criteria of 40 C.F.R. Section 152.30(b).

30. The “Sulfuryl Fluoride” that Respondent imported from China to the Port of Long Beach on or about April 14, 2017 is an unregistered pesticide.
31. Therefore, the shipment of the pesticide “Sulfuryl Fluoride” that Respondent imported from China to the Port of Long Beach on or about April 14, 2017 constitutes one violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

#### D. RESPONDENT’S ADMISSIONS

32. 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 the CAFO; (iii) consents to any and all conditions specified in this CAFO and to the assessment of the civil administrative penalty under Section I.E of this CAFO; (iv) waives any right to contest the allegations contained in Section I.C of the CAFO; and (v) waives the right to appeal the proposed final order contained in this CAFO.

#### E. CIVIL ADMINISTRATIVE PENALTY

33. Respondent agrees to the assessment of a penalty in the amount of **FIFTEEN THOUSAND SEVEN HUNDRED THIRTY THREE DOLLARS (\$15,733)** as final

settlement of the civil claims against Respondent arising under the Act as alleged in Section I.C. of the CAFO.

34. Respondent shall pay the assessed penalty no later than thirty (30) days from the effective date of this CAFO. Payment shall be made by cashier's or certified check payable to the "Treasurer, United States of America," or be paid by one of the other methods listed below:

a. Regular Mail:

U.S. Environmental Protection Agency  
P.O. Box 979077  
St. Louis, MO 63197-9000

b. 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  
Beneficiary = US Environmental Protection Agency

c. Certified or Overnight Mail:

U.S. Environmental Protection Agency  
Government Lockbox 979077  
1005 Convention Plaza  
SL-MO-C2-GL  
St. Louis, MO 63101

d. Automated Clearinghouse (ACH) (also known as REX or Remittance Express):

Automated Clearinghouse (ACH) payments to EPA can be made through the US Treasury using the following information:

US Treasury REX/ Cashlink ACH Receiver  
ABA = 051036706  
Account Number = 31006, Environmental Protection Agency  
CTX Format Transaction Code 22 - checking

Physical location of US Treasury Facility:  
5700 Rivertech Court  
Riverdale, MD 20737

Remittance Express (REX) = 1-866-234-5681

e. On Line Payment:

This payment option can be accessed from the information below:

[www.pay.gov](http://www.pay.gov)  
Enter "SFO1.1" in the search field  
Open form and complete required fields

If any clarification regarding a particular method of payment remittance is needed, Please contact the EPA Cincinnati Finance Center at 513-487-2091. The payment shall be accompanied by a transmittal letter identifying the case name, the case docket number, and this CAFO. Concurrent with delivery of the payment of the penalty, Respondent shall send a copy of the 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, and transmittal letter to the following addresses:

Regional Hearing Clerk  
Office of Regional Counsel (ORC-1)  
U.S. Environmental Protection Agency, Region IX  
75 Hawthorne Street  
San Francisco, CA 94105

Allison Watanabe  
SDWA/FIFRA Section (ENF-3-3)  
U.S. Environmental Protection Agency, Region IX  
Southern California Field Office  
600 Wilshire Blvd., Suite 1460  
Los Angeles, CA 90017

35. Payment of the above civil administrative penalty shall not be used by Respondent or any other person as a tax deduction from Respondent's federal, state, or local taxes.
36. If Respondent fails to pay the assessed civil administrative penalty as specified in Paragraph 33, then Respondent shall pay to EPA the stipulated penalty of FIVE HUNDRED DOLLARS (\$500.00) for each day the default continues, in addition to the assessed penalty upon written demand by EPA. In addition, failure to pay the civil administrative penalty by the deadline specified in Paragraph 34 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; or (ii) suspend or disqualify Respondent from doing business with EPA or engaging in programs EPA sponsors or funds. 40 C.F.R. § 13.17.

d. In accordance with the Debt Collection Act of 1982 and 40 C.F.R. Part 13 interest, penalties charges, and administrative costs will be assessed against the outstanding amount that Respondent owes to EPA for Respondent's failure to pay the civil administrative penalty by the deadline specified in Paragraph 34. Interest will be assessed at an annual rate that is equal to the rate of current value of funds to the United States Treasury (i.e., the Treasury tax and loan account rate) as prescribed and published by the Secretary of the Treasury in the Federal Register and the Treasury Fiscal Requirements Manual Bulletins. 40 C.F.R. § 13.11(a)(1). Penalty charges will be assessed monthly at a rate of 6% per annum. 40 C.F.R. § 13.11(c). Administrative costs for handling and collecting Respondent's overdue debt will be based on either actual or average cost incurred, and will include both direct and indirect costs. 40 C.F.R. § 13.11(b). In addition, if this matter is referred to another department or agency (e.g., the Department of Justice, the Internal Revenue Service), that department or agency may assess its own administrative costs, in addition to EPA's administrative costs, for handling and collecting Respondent's overdue debt.

#### F. RETENTION OF RIGHTS

37. In accordance with 40 C.F.R. § 22.18(c), this CAFO only resolves Respondent's liability for federal civil penalties for the violations and facts specifically alleged in Section I.C of the CAFO. Nothing in this CAFO is intended to or shall be construed to resolve (i) any civil liability for violations of any provision of any federal, state, or local law, statute, regulation, rule, ordinance, or permit not specifically alleged in Section I.C of the CAFO; or (ii) any criminal liability. EPA specifically reserves any and all authorities, rights, and

remedies available to it (including, but not limited to, injunctive or other equitable relief or criminal sanctions) to address any violation of this CAFO or any violation not specifically alleged in Section I.C of the CAFO.

38. This CAFO does not exempt, relieve, modify, or affect in any way Respondent's duty to comply with all applicable federal, state, and local laws, regulations, rules, ordinances, and permits.

#### G. ATTORNEYS' FEES AND COSTS

39. Each party shall bear its own attorneys' fees, costs, and disbursements incurred in this proceeding.

#### H. EFFECTIVE DATE

40. In accordance with 40 C.F.R. §§ 22.18(b)(3) and 22.31(b), this CAFO shall be effective on the date that the final order contained in this CAFO, having been approved and issued by either the Regional Judicial Officer or Regional Administrator, is filed.

#### I. BINDING EFFECT

41. The undersigned representative of Complainant and the undersigned representative of Respondent each certifies that he or she is fully authorized to enter into the terms and conditions of this CAFO and to bind the party he or she represents to this CAFO.
42. The provisions of this CAFO shall apply to and be binding upon Respondent and its officers, directors, employees, agents, trustees, servants, authorized representatives,

successors, and assigns.

FOR RESPONDENT, ENSYSTEX II, INC.

7/19/2017  
DATE

  
NAME:

TITLE: Chairman

FOR COMPLAINANT, EPA REGION IX:

8-21-2017  
DATE

  
Elizabeth Berg  
Acting Assistant Director  
Water and Pesticides Branch  
Enforcement Division  
U.S. Environmental Protection Agency, Region IX

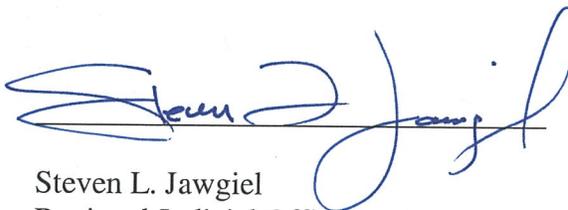
II. FINAL ORDER

Complainant and Respondent, Ensystex II, Inc., having entered into the foregoing Consent Agreement,

IT IS HEREBY ORDERED that this CAFO (Docket No. FIFRA-09-2017-0009) be entered, and that Respondent shall pay a civil administrative penalty in the amount of **FIFTEEN THOUSAND SEVEN HUNDRED THIRTY THREE DOLLARS (\$15,733)** and comply with the terms and conditions set forth in the Consent Agreement.

09/05/17

DATE



Steven L. Jawgiel  
Regional Judicial Officer  
U.S. Environmental Protection Agency, Region IX

CERTIFICATE OF SERVICE

I certify that the original of the fully executed Consent Agreement and Final Order (Docket No. FIFRA-09-2017-~~0009~~) was filed with the Regional Hearing Clerk, U.S. EPA, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, and that a true and correct copy of the same was sent to the following parties:

A copy was mailed via CERTIFIED MAIL to:

David R. Nimocks, III  
Chairman  
Ensystem II, Inc.  
2175 Village Dr.  
Fayetteville, NC 28304  
Certified Mail Number:

An additional copy was hand-delivered to the following U.S. EPA case attorney:

Margaret Alkon  
Assistant Regional Counsel (ORC-2)  
U.S. EPA, Region IX  
75 Hawthorne Street  
San Francisco, CA 94105

  
\_\_\_\_\_  
Regional Hearing Clerk  
U.S. EPA, Region IX

9-6-2017  
\_\_\_\_\_  
Date