

2012 DEC 31 AM 9: 53

US EPA - REGION IX
HEARING CLERK

1 NANCY J. MARVEL
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 3
 4 Margaret Alkon
 5 Assistant Regional Counsel
 6 U.S. Environmental Protection Agency
 7 Region IX
 8 75 Hawthorne Street
 9 San Francisco, CA 94105
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 11

12 **UNITED STATES**
 13 **ENVIRONMENTAL PROTECTION AGENCY**
 14 **REGION IX**
 15 **75 HAWTHORNE STREET**
 16 **SAN FRANCISCO, CA 94105**
 17

18 In the matter of:) Docket No. FIFRA-09-2013- 0003
 19)
 20 SMM Distributors LLC and) **CONSENT AGREEMENT**
 21 SMM Manufacturing, Inc.) and
 22 d/b/a Biocide Systems) **FINAL ORDER PURSUANT TO**
 23 Respondent.) **SECTIONS 22.13 AND 22.18**
 24)
 25

26
 27 **I. CONSENT AGREEMENT**

28 Complainant, the Director of the Communities and Ecosystems Division, United States
 29 Environmental Protection Agency, Region 9, ("EPA") and Respondents SMM Distributors LLC
 30 and SMM Manufacturing, Inc. each doing business as Biocide Systems (collectively
 31 "Respondents") seek to settle this case and consent to the entry of this Consent Agreement and
 32 Final Order ("CAFO").

33 **A. APPLICABLE STATUTES AND REGULATIONS**

34 1. This administrative proceeding is initiated pursuant to Section 14(a) of the Federal
 35 Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136, et seq. (hereinafter referred to as
 36 "FIFRA" or the "Act"), and the Consolidated Rules of Practice Governing the Administrative

1 Assessment of Civil Penalties, 40 C.F.R. Part 22.

2 **B. AUTHORITY AND PARTIES**

3 2. Respondents are SMM Distributors, a California limited liability corporation, and its
4 corporate successor, SMM Manufacturing, Inc., a California corporation, each doing business as
5 Biocide Systems. Biocide Systems distributed or sold RoomSHOCKER quick release,
6 rvSHOCKER quick release, marineSHOCKER quick release, Auto Vaccine/autoSHOCKER
7 quick release, and ClO₂ Liquid Shocker (formerly Avanflex Liquid) and kits and bundles of
8 chlorine dioxide products and offered for sale autoShocker 30 Day Time Release, Room Shocker
9 30 Day Time-Release, RV Shocker 30 Day Time Release, and Marine Shocker 30 Day Time
10 Release (hereafter, the "Chlorine Dioxide products"). Respondents are each a "person" as
11 defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and as such is subject to FIFRA and the
12 regulations promulgated thereunder.

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

22 4. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), states that it shall be
23 unlawful for any person to distribute or sell to any person any pesticide that is not registered

1 under section 3 of FIFRA, 7 U.S.C. § 136a, or whose registration has been canceled or
2 suspended, except to the extent that distribution or sale otherwise has been authorized by the
3 Administrator under this subchapter.

4 5. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg) states that the term "to distribute or sell"
5 means to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment,
6 ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or
7 offer to deliver.

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

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

16 8. EPA has promulgated regulations setting forth procedures, requirements and criteria
17 concerning the registration of pesticide products under FIFRA section 3, found at 40 CFR Part
18 152 ("Pesticide Registration Regulations").

19 9. Section 152.15 of the Pesticide Registration Regulations states that a substance is
20 considered to be *intended for a pesticidal purpose*, and thus to be a pesticide requiring
21 registration, if: (a) The person who distributes or sells the substance claims, states, or implies (by
22 labeling or otherwise): (1) That the substance (either by itself or in combination with any other
23 substance) can or should be used as a pesticide; or (2) That the substance consists of or contains

1 an active ingredient and that it can be used to manufacture a pesticide; or (b) The substance
2 consists of or contains one or more active ingredients and has no significant commercially
3 valuable use as distributed or sold other than (1) use for pesticidal purpose (by itself or in
4 combination with any other substance), (2) use for manufacture of a pesticide; or (c) The person
5 who distributes or sells the substance has actual or constructive knowledge that the substance
6 will be used, or is intended to be used, for a pesticidal purpose. 40 CFR 152.15.

7 **C. COMPLAINANT'S ALLEGATIONS**

8 Complainant alleges:

9 10. SMM Distributors and its corporate successor, SMM Manufacturing, Inc., do
10 business as Biocide Systems. Biocide Systems distributed or sold the Chlorine Dioxide products
11 to various persons for use in residential and commercial buildings (including schools, hotels,
12 motels, apartment buildings, commercial buildings, and health care facilities), automobiles, RVs,
13 and marine vessels.

14 11. The Chlorine Dioxide products contain the active ingredient sodium chlorite.

15 12. At the times relevant to thisCAFO, Biocide Systems' website stated that "Chlorine
16 Dioxide, the main ingredient in all our products is the strongest and yet safest antimicrobial
17 known." At the times relevant to thisCAFO, Biocide Systems's website stated (under "What
18 Chlorine Dioxide Does" and "Best Odor Eliminator"): Chlorine Dioxide vaporizes, removing
19 odors through oxidation, eliminating the bacteria and fungi that cause odors [.] Chlorine Dioxide
20 easy-to use portable device releases the most powerful and safest antimicrobial vapor existing
21 today [.] Chlorine Dioxide quick release vapor penetrates through deeply into any materials
22 removing dangerous pathogens safely and effectively [.] Chlorine Dioxide can change the air
23 quality in any car, truck, RV or enclosed space by safely penetrating any porous material or

1 surface, eliminates all bacteria, mold, mildew and chemical compounds that contaminate and
2 cause odors. At the times relevant to this CAFO, the Chlorine Dioxide product labels
3 (specifically, RoomSHOCKER quick release, rvSHOCKER quick release, marineSHOCKER
4 quick release, Auto Vaccine/autoSHOCKER quick release) included the statements "Eliminates
5 severe odors at the source, not a masking agent...Clean Air without a Care! Eco-friendly
6 Chlorine Dioxide vapors eliminate odors with no dangerous residue. Works on smoke, mold,
7 mildew, bacterial and chemical odors."

8 13. Statements that a product's main ingredient is an antimicrobial, eliminates bacteria
9 and fungi that cause odors, releases antimicrobial vapor, removes dangerous pathogens,
10 eliminates all bacteria, mold, mildew and chemical compounds that contaminate and cause odors,
11 and eliminates odors at the source, and works on mold, mildew and bacteria, are all pesticidal
12 claims.

13 14. At the times relevant to this enforcement action, the Chlorine Dioxide products are
14 each a pesticide.

15 15. The Chlorine Dioxide products are each not a registered pesticide.

16 16. In 3232 instances, Biocide Systems distributed or sold the Chlorine Dioxide products
17 between April 1, 2011 and September 5, 2011. In each of these 3232 instances, Biocide Systems
18 violated section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by distributing or selling an
19 unregistered product.

20 **D. RESPONDENT'S ADMISSIONS**

21 17. In accordance with 40 C.F.R. § 22.18(b)(2), and for the purpose of this proceeding,
22 Respondents (i) admit that EPA has jurisdiction over the subject matter of this CAFO and over
23 Respondents; (ii) **neither admit nor deny** the specific factual allegations contained in Section

1 I.C. of this CAFO; (iii) consent to any and all conditions specified in this CAFO, (iv) agree to
2 pay, and consents to the assessment of, the civil administrative penalty under Section I.E of this
3 CAFO; (v) waive any right to contest the allegations contained in Section I.C. of this CAFO; and
4 (vi) waive the right to appeal the proposed final order contained in this CAFO.

5 **E. CIVIL ADMINISTRATIVE PENALTY**

6 18. A. Respondents consent to the assessment of a joint and several penalty in the
7 amount of **SIXTY THOUSAND DOLLARS (\$60,000)** plus interest, paid in installments as
8 specified in as Attachment 1 of this CAFO, as final settlement and complete satisfaction of the
9 civil claims against Respondents arising from the facts alleged in Section I.C. of the CAFO and
10 under the Act, as alleged in Section I.C. of the CAFO.

11 B. Respondent shall pay each installment of the assessment penalty in accordance with
12 the schedule attached as Attachment 1 of this CAFO. However, if Respondents choose to pay off
13 the assessed penalty earlier than the period provided for in the CAFO and **Attachment 1**, but
14 later than thirty (30) days after the effective date of the CAFO, Respondents shall pay interest
15 only on the outstanding, unpaid balance of the assessed penalty at the time when payment is
16 made.

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

1 Regular Mail:

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

7
8 Wire Transfers:

9 Wire transfers must be sent directly to the Federal Reserve Bank in New
10 York City with the following information:
11 Federal Reserve Bank of New York
12 ABA = 021030004
13 Account = 68010727
14 SWIFT address = FRNYUS33
15 33 Liberty Street
16 New York, NY 10045
17 Field Tag 4200 of the Fedwire message should read "D 68010727
18 Environmental Protection Agency"

19
20 Overnight Mail:

21 U.S. Bank
22 1005 Convention Plaza
23 Mail Station SL-MO-C2GL
24 ATTN Box 979077
25 St. Louis, MO 63101

26
27 ACH (also known as REX or remittance express):

28 Automated Clearinghouse (ACH) for receiving U.S. currency
29 PNC Bank
30 808 17th Street, NW
31 Washington, DC 20074
32 ABA = 051036706
33 Transaction Code 22 – checking
34 Environmental Protection Agency
35 Account 31006
36 CTX Format

37
38 On Line Payment:

39 This payment option can be accessed from the information below:
40 www.pay.gov
41 Enter "sfol.1" in the search field
42 Open form and complete required fields

43
44 If clarification regarding a particular method of payment remittance is
45 needed, contact the EPA's Cincinnati Finance Center at (513) 487-2091.

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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 Respondents' names, the case title, and docket number, 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

William Lee
Communities and Ecosystems Division (CED-5)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

Margaret Alkon
Office of Regional Counsel (ORC-2)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

19. In the event that Respondents fail to pay the civil administrative penalty assessed above by its due date, Respondents shall pay to Complainant an additional stipulated penalty in the amount of **ONE HUNDRED AND SEVENTY DOLLARS (\$170)** for each day that payment is late. Upon Complainant's written demand, payable shall immediately become due and payable.

20. Respondents' 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

1 the Department of Justice for filing of a collection action in the appropriate United States District
2 Court. 40 C.F.R. §§ 13.13, 13.14, and 13.33. In any such collection action, the validity, amount,
3 and appropriateness of the assessed penalty and of this CAFO shall not be subject to review.

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

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

14 **F. CERTIFICATION OF COMPLIANCE**

15 21. In executing this CAFO, Respondents each certify (1) that it is not distributing or
16 selling unregistered Chlorine Dioxide products *intended for a pesticidal purpose*, as the phrase
17 "*intended for a pesticidal purpose*" is defined by 40 CFR 152.15; and 2) that it is complying with
18 all other FIFRA requirements at all facilities under its control.

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

20 22. This Consent Agreement constitutes the entire agreement between the Respondents
21 and EPA. This CAFO is for the purpose of fully and finally settling the civil claims against
22 Respondents arising from the facts alleged in section I.C. of this CAFO. Full payment of the
23 civil penalty and any applicable interest charges or late fees or penalties as set forth in this CAFO

1 shall constitute full settlement and satisfaction of civil penalty liability against Respondents for
2 the violations alleged in Section I.C. of this CAFO.

3 23. In accordance with 40 C.F.R. § 22.18(c), this CAFO only resolves Respondents'
4 liabilities for federal civil penalties for the violation and facts specifically alleged in Section I.C
5 of this CAFO. Nothing in this CAFO is intended to or shall be construed to resolve: (i) any civil
6 liability for violations of any provision of any federal, state, or local law, statute, regulation, rule,
7 ordinance, or permit not specifically alleged in Section I.C of this CAFO; or (ii) any criminal
8 liability. EPA specifically reserves any and all authorities, rights, and remedies available to it
9 (including, but not limited to, injunctive or other equitable relief or criminal sanctions) to address
10 any violation of this CAFO or any violation not specifically alleged in Section I.C of this CAFO.
11 This CAFO does not exempt, relieve, modify, or affect in any way Respondents' duties to
12 comply with all applicable federal, state, and local laws, regulations, rules, ordinances, and
13 permits.

14 24. The provisions of this CAFO shall be binding on Respondents and on Respondents'
15 officers, directors, employees, agents, servants, authorized representatives, successors, and
16 assigns.

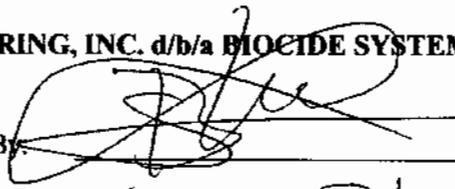
17 25. Except as set forth in Paragraph 20 above, each party shall bear its own fees, costs,
18 and disbursements in this action.

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

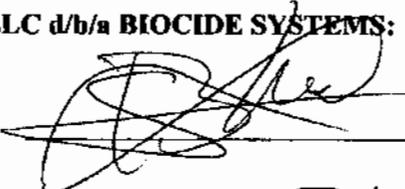
21 27. In accordance with 40 C.F.R. §§ 22.18(b)(3) and 22.31(b), the effective date of this
22 CAFO shall be the date on which the accompanying Final Order, having been signed by the
23 Regional Judicial Officer, is filed.

1 28. The undersigned representatives of each party to this Consent Agreement certify that
2 each is duly authorized by the party whom he or she represents to enter into the terms and
3 conditions of this Consent Agreement and Final Order and bind that party to it.

4
5 **SMM MANUFACTURING, INC. d/b/a BIOCIDES SYSTEMS:**

6
7
8 Date: 12/3/12 By: 
9
10 Name: Spencer Blua
11
12 Title: CEO

13
14
15 **SMM DISTRIBUTORS LLC d/b/a BIOCIDES SYSTEMS:**

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17
18 Date: 12/3/12 By: 
19
20 Name: Spencer Blua
21
22 Title: Partner

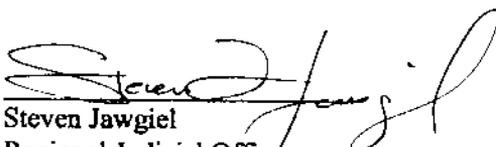
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27 **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:**

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31 Date: Dec 20, 2012 By: 
32 KATHERINE TAYLOR
33 Associate Director for Agriculture
34 Communities and Ecosystems Division
35 U.S. Environmental Protection Agency,
36 Region IX
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3 **II. FINAL ORDER**

4 IT IS HEREBY ORDERED that this Consent Agreement and Final Order be entered and
5 that Respondents shall pay a civil administrative penalty in the amount of **SIXTY THOUSAND**
6 **DOLLARS (\$60,000)** in accordance with the terms set forth in the Consent Agreement.
7
8

9 Date: 12/28/12

10 
11 Steven Jawgiel
12 Regional Judicial Officer
13 U.S. EPA, Region IX
14

1 **ATTACHMENT 1**

2 **Payment Schedule**

3
4 Respondents shall pay:

5 (A) **FIVE THOUSAND FIFTY DOLLARS (\$5,050.00)** no later than thirty (30) days from the
6 effective date of this CAFO;

7 (B) **FIVE THOUSAND FORTY SIX DOLLARS (\$5,046.00)** no later than sixty (60) days
8 from the effective date of this CAFO;

9 (C) **FIFTEEN THOUSAND EIGHTY THREE DOLLARS (\$15,083.00)** no later than April
10 **30, 2013;**

11 (D) **FIFTEEN THOUSAND EIGHTY NINE DOLLARS (\$15,089.00)** no later than **July 31,**
12 **2013; and**

13 (D) **TWENTY THOUSAND THIRTY FOUR DOLLARS (\$20,034.00)** no later than
14 **Septemher 30, 2013.**

CERTIFICATE OF SERVICE

I certify that the original of the fully executed Consent Agreement and Final Order, (Docket No FIFRA-09-2013- 0003) was filed with the Regional Hearing Clerk, U.S. EPA, Region IX, 75 Hawthorne Street, San Francisco, CA 91405, and that a true and correct copy of the same was sent to the following parties:

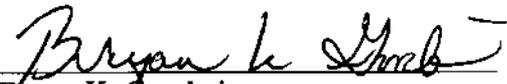
A copy was mailed via CERTIFIED MAIL to:

Mr. Spencer Blua
CFO, SMM Manufacturing, Inc. and
Partner, SMM Distributors LLC
388 Omar Ave.
Los Angeles, CA 90013

CERTIFIED MAIL NUMBER: 7010 2780 0000 8388 6828

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

Margaret Alkon, Esq.
Office of Regional Counsel
U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105


Bryan K. Goodwin
Regional Hearing Clerk
U.S. EPA, Region IX

12/31/12
Date



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

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
RECEIPT NO: 7010 2780 0000 8388 6828

Date: DEC 31 2012

Spencer Blua
CFO, SMM Manufacturing, Inc. and
Partner, SMM Distributors LLC
388 Omar Ave.
Los Angeles, CA 90013

Re: Consent Agreement and Final Order – SMM Distributors LLC and SMM Manufacturing,
Inc. d/b/a Biocide Systems
Docket No.: FIFRA-09-2013- 0003

Dear Mr. Blua:

Enclosed please find a Consent Agreement and Final Order (CAFO) concerning alleged violations of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. Sections 136 et seq., by SMM Distributors LLC and SMM Manufacturing, Inc. d/b/a Biocide Systems. The terms of the CAFO require the payment of \$60,000 in installments as described in the Payment Schedule (Attachment 1 of the CAFO). The first installment is to be received by EPA within 30 calendar days of the effective date (stamped filing date) of this CAFO.

If you have any questions, please contact William B. Lee at (415) 947-4185 of my staff or have your attorney contact Margaret Alkon, Assistant Regional Counsel at (415) 972-3890

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