

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII

901 NORTH 5<sup>th</sup> STREET  
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

) Docket No. FIFRA-07-2006-0124

)

The Velvet Poodle, L.L.C.

) COMPLAINT AND NOTICE OF

2418 Dakota Avenue

) OPPORTUNITY FOR HEARING

South Sioux City, Nebraska 68776

)

)

)

Respondent

)

COMPLAINT

Section I

Jurisdiction

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l.
2. This Complaint serves as notice that the United States Environmental Protection Agency (EPA) has reason to believe that Respondent has violated Section 12 of FIFRA, 7 U.S.C. § 136j.

Section II

Parties

3. The Complainant, by delegation from the Administrator of the EPA and the Regional Administrator, EPA, Region VII, is the Director of the Water, Wetlands, and Pesticides Division, EPA, Region VII.
4. The Respondent is The Velvet Poodle, L.L.C., a pet groomer and pet supply distributor, located at 2418 Dakota Avenue, South Sioux City, Nebraska. The Respondent is and was at all times referred to in this Complaint, a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and a Nebraska corporation qualified to do business in the state of Nebraska.

### Section III

#### Violations

##### General Allegations

5. The Complainant hereby states and alleges that Respondent has violated FIFRA as follows:
6. 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 any pesticide that is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.
7. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines the term “to distribute or sell” to mean 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.
8. Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), states that it shall be unlawful for any person who is a producer to violate any of the provisions of Section 7 of FIFRA, 7 U.S.C. § 136e.
9. Section 7(a) of FIFRA, 7 U.S.C. § 136e(a), states that no person shall produce any pesticide unless the establishment in which it is produced is registered with the Administrator.
10. Pursuant to FIFRA Section 2(w), 7 U.S.C. § 136(w) and 40 C.F.R. § 167.3, the term “produce” means to manufacture, prepare, propagate, compound, or process any pesticide, including any pesticide produced pursuant to Section 5 of the Act, any active ingredient or device, or to package, repack, label, relabel, or otherwise change the container of any pesticide or device.
11. Respondent was not registered as a pesticide-producing establishment pursuant to the requirements of Section 7 of FIFRA, 7 U.S.C. § 136e.
12. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), states it shall be unlawful for any person to distribute or sell any pesticide which is adulterated or misbranded.
13. Section 2(q)(1)(E) of FIFRA, 7 U.S.C. § 136(q)(1)(E), states a pesticide is misbranded if any word, statement, or other information required by or under authority of this Act 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.

14. Section 2(q)(1)(F) of FIFRA, 7 U.S.C. § 136(q)(1)(F), states a pesticide is misbranded if the labeling accompanying it 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 requirements imposed under Section 3(d) of this Act, are adequate to protect health and the environment.

15. Section 2(q)(1)(G) of FIFRA, 7 U.S.C. § 136(q)(1)(G), states a pesticide is misbranded if the label does not contain a warning or caution statement which may be necessary and if complied with, together with any requirements imposed under Section 3(d) of this Act, is adequate to protect health and the environment.

16. Section 2(q)(2)(A) of FIFRA, 7 U.S.C. § 136(q)(2)(A), states a pesticide is misbranded if the label does not bear an ingredient statement on that part of the immediate container (and on the outside container or wrapper of the retail package, if there be one, through which the ingredient statement on the immediate container cannot be clearly read) which is presented or displayed under customary conditions of purchase.

17. Section 2(q)(2)(C) of FIFRA, 7 U.S.C. § 136(q)(2)(C), states a pesticide is misbranded if there is not affixed to its container, and to the outside container or wrapper of the retail package, if there be one, through which the required information on the immediate container cannot be clearly read, a label bearing the name and address of the producer, registrant, or person for whom produced.

18. FRONTLINE PLUS FOR DOGS is a pesticide registered under EPA Registration No. 65331-5, to Merial Limited, Duluth, Georgia.

19. On or about June 23, 2004, representatives of the Iowa Department of Agriculture and Land Stewardship (IDALS) and the Nebraska Department of Agriculture (NDA) conducted an investigation regarding the sale of a FRONTLINE pet product. It was documented that on or about June 1, 2004, that the respondent sold an unlabeled syringe containing FRONTLINE pet product for flea and tick control. No packaging or labeling and/or directions for use were supplied with the product during this sale.

20. On or about June 23, 2004, representatives of IDALS and NDA conducted an investigation of the pesticide sale mentioned in paragraph 19 at the Respondent's place of business in South Sioux City, Nebraska, to determine the status of Respondent's compliance with FIFRA. It was documented in a statement by Heather Campbell, owner/manager of The Velvet Poodle, and with photographs of the FRONTLINE PLUS FOR DOGS product, EPA Registration No. 65331-5, that the product was being sold in unpackaged and unlabeled syringes to customers of the Respondent.

#### Count 1

21. The facts stated in paragraphs 6 through 20 are realleged and incorporated as if fully stated herein.

22. Respondent violated Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), in that it was considered a producer and failed to comply with the provisions of Section 7 of FIFRA by producing a pesticide in an unregistered establishment.

23. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based upon the facts stated in paragraphs 21 and 22, it is proposed that a civil penalty of \$3,250 be assessed against Respondent.

### Count 2

24. The facts stated in paragraphs 6 through 20 are realleged and incorporated as if fully stated herein.

25. On or about June 1, 2004, Respondent sold a syringe containing FRONTLINE PLUS FOR DOGS to customers, as documented by statement mentioned in paragraph 20.

26. The repackaged pesticide FRONTLINE PLUS FOR DOGS described in paragraphs 18 and 25 was not encompassed within the terms of the product registration under EPA Registration No. 65331-5, and required separate product registration under Section 3 of FIFRA.

27. Title 40 C.F.R. § 152.44 states that any modification in the composition, labeling, or packaging of a registered product must be submitted by application to and approved by the Agency before the product as modified may be distributed or sold.

28. Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by distribution or sale of an unregistered pesticide.

29. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based upon the facts stated in paragraphs 24 through 28, it is proposed that a civil penalty of \$3,250 be assessed against Respondent.

### Count 3

30. The facts stated in paragraphs 6 through 20 are realleged and incorporated as if fully stated herein.

31. During the investigations mentioned in paragraphs 19 and 20, the representatives of IDALS and NDA documented the June 1, 2004, sale or distribution of an unlabeled syringe containing FRONTLINE PLUS FOR DOGS, EPA Registration No. 65331-5, to a customer. No prescription was provided by a veterinarian for treatment with this pesticide product.

32. Respondent violated Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by selling or distributing a pesticide which was adulterated or misbranded.

33. Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, and based upon the facts stated in paragraphs 30 through 32, it is proposed that a civil penalty of \$3,250 be assessed against Respondent.

#### Section IV

##### Total Proposed Penalty

34. Section 14 of FIFRA, 7 U.S.C. § 136l, and the Debt Collection Improvement Act of 1996, as implemented by the Civil Monetary Penalties Inflation Adjustment Rule, 40 C.F.R. Part 19, authorize the issuance of this Complaint for the assessment of a civil penalty for each violation. For any such violation occurring on or after March 15, 2004, the maximum statutory penalty per violation is Six Thousand Five Hundred Dollars (\$6,500). The EPA proposes to assess a total civil penalty of \$9,750 against Respondent for the above-described violations.

##### Appropriateness of Proposed Penalty

35. The penalty proposed above has been calculated after consideration of the statutory factors set forth in Section 14 of FIFRA, 7 U.S.C. § 136l. Specifically, EPA considered the size of the business of Respondent, the effect of the proposed penalty on Respondent's ability to continue in business and the gravity of the alleged violations. In its calculation of the proposed penalty, EPA has taken into account the particular facts and circumstances of the alleged violations, with specific reference to EPA guidance for the calculation of proposed penalties under FIFRA (See Enclosure, July 2, 1990, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)).

36. For purposes of calculating the proposed penalty, Respondent was placed in Category I size of business (total business revenues in excess of \$1,000,000 per year) when Complainant was unable to obtain specific information as to Respondent's gross revenues. If this categorization is incorrect, the proposed penalty will be adjusted upon submittal of reliable financial information indicating another category is appropriate.

37. Respondent has the right, upon submittal of certified financial information, to consideration of Respondent's financial condition in mitigation of the proposed penalty insofar as is necessary to permit Respondent to continue in business.

38. The proposed penalty constitutes a demand *only if* Respondent fails to raise *bona fide* issues of ability to pay, or other *bona fide* affirmative defenses relevant to the determination of any final penalty.

39. Said issues of ability to pay or other affirmative defenses relevant to a final penalty may and should be brought to the attention of Complainant at the earliest opportunity in this proceeding.

40. Payment of the total penalty - \$9,750 - may be made by certified or cashier's check payable to the "Treasurer, United States of America," and remitted to:

Mellon Bank  
EPA – Region 7  
P.O. Box 371099M  
Pittsburgh, Pennsylvania 15251

41. If Respondent does not contest the findings and assessments set forth above, payment of the penalty assessed herein may be remitted as described in the preceding paragraph, including a reference to the name and docket number of the Complaint. In addition, a copy of the check should be sent to:

Regional Hearing Clerk  
EPA - Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101

and a copy to:

Rupert G. Thomas  
Assistant Regional Counsel  
EPA - Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101

#### NOTICE OF OPPORTUNITY FOR HEARING

##### Section V

##### Answer and Request for Hearing

42. Pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), Respondent has the right to request a hearing to contest any material fact contained in this Complaint or to contest the appropriateness of the penalty proposed herein. If Respondent wishes to avoid being found in default, Respondent must file a written answer and request for hearing with:

Regional Hearing Clerk  
EPA - Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101

within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing. Said answer shall clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint with respect to which Respondent has any knowledge, or shall clearly state that Respondent has no knowledge as to particular factual allegations in the Complaint. The answer shall also state:

- A. The circumstances or arguments that are alleged to constitute the grounds of defense;
- B. The facts that Respondent intends to place at issue; and
- C. Whether a hearing is requested.

Failure to deny any of the factual allegations in the Complaint constitutes an admission of the undenied allegations.

43. Any hearing that is requested shall be held and conducted in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits," 40 C.F.R. Part 22 (copy enclosed).

44. If Respondent fails to file a written answer and request for hearing within thirty (30) days of service of this Complaint and Notice of Opportunity for Hearing, such failure will constitute a binding admission of all of the allegations in this Complaint, and a waiver of Respondent's right to a hearing under FIFRA. A Default Order may thereafter be issued by the Regional Administrator, and the civil penalties proposed therein shall become due and payable without further proceedings.

45. Respondent is advised that, after the Complaint is issued, the Consolidated Rules of Practice prohibit any ex parte (unilateral) discussion of the merits of any action with the EPA Regional Administrator, members of the Environmental Appeals Board, the Regional Judicial Officer, Administrative Law Judge, or any person likely to advise these officials in the decision of the case.

## Section VI

### Settlement Conference

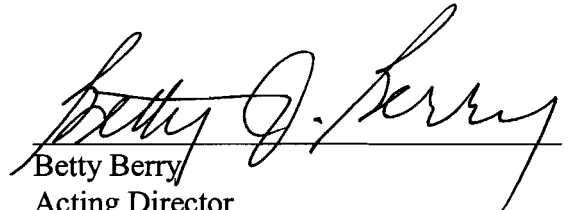
46. Whether or not a hearing is requested, an informal settlement conference may be arranged at Respondent's request. Respondent may confer with the EPA concerning: (1) whether or not the alleged violation occurred; or (2) the appropriateness of the proposed penalty in relation to the size of Respondent's business, the gravity of the violation, and the effect of the proposed penalty on Respondent's ability to continue in business. Additionally, the proposed penalty may be adjusted if Respondent establishes a bona fide issue of ability to pay. To explore the possibility of settlement in this matter, contact:


Rupert G. Thomas  
Assistant Regional Counsel  
EPA Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101  
Telephone: (913) 551-7282

47. A request for an informal settlement conference does not extend the thirty (30) day period during which a written answer and request for a hearing must be submitted. The informal conference procedure may be pursued as an alternative to and simultaneously with the adjudicatory hearing procedure.

48. EPA encourages all parties against whom a civil penalty is proposed to pursue the possibility of settlement. However, no penalty reduction will be made simply because an informal settlement conference is held. If settlement is reached, the parties will enter into a written Consent Agreement, and a Final Order will be issued. The issuance of such a Consent Agreement and Final Order shall constitute a waiver of Respondent's right to request a hearing on any matter stipulated to therein.

03/02/06  
Date

  
Betty Berry  
Acting Director  
Water, Wetlands, and Pesticides Division

  
Rupert G. Thomas  
Assistant Regional Counsel  
Office of Regional Counsel

Enclosures:

1. FIFRA Civil Penalty Calculation Worksheet
2. Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22
3. July 2, 1990, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act
4. SBREFA Fact Sheet
5. Notice of Securities and Exchange Commission Registrants' Duty to Disclose Environmental Legal Proceedings



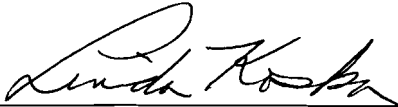
CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one copy of this Complaint and Notice of Opportunity for Hearing to the Regional Hearing Clerk, EPA, 901 North 5<sup>th</sup> Street, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent by certified mail, return receipt requested, a copy of the signed original Complaint and Notice of Opportunity for Hearing; a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22; a copy of the July 2, 1990, Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act; a copy of the FIFRA Civil Penalty Calculation Worksheet; the SBREFA Fact Sheet; and the Notice of Securities and Exchange Commission Registrants' Duty to Disclose Environmental Legal Proceedings, to the following:

Heather Campbell  
Registered Agent for The Velvet Poodle, L.L.C.  
301 Mathewson  
Walthill, Nebraska 68067

3-6-06  
Date

  
Linda Koska

**FIFRA CIVIL PENALTY CALCULATION WORKSHEET**  
**ENFORCEMENT RESPONSE POLICY for FIFRA - Reference**

RESPONDENT: The Velvet Poodle, L.L.C.  
 ADDRESS: 2418 Dakota Avenue  
 South Sioux City, Nebraska 68776

Prepared By: Mark K. Leshner  
 Date: 02/07/06

|   | Count 1          | Count 2          | Count 3                                 | Count 4 |
|---|------------------|------------------|---|---------|
| <b>Appendix A</b>   |                  |                  |   |         |
| 1. Statutory Violation  | Sec. 12(a)(2)(L) | Sec. 12(a)(1)(A) | Sec. 12(a)(1)(E)                        |         |
| 2. FTTS Code  | 2LA              | 1AA              | 1EB, 1EE, 1EF,<br>1EG, 1EI, 1EJ,<br>1EK |         |
| 3. Violation Level  | 2                | 2                | 2, 3, 2, 2, 4, 3, 4                     |         |
| <b>Appendix C - Table 2 - Size of Business Category</b>         |                  |                  |   |         |
| 4. Violator Category *<br>§ 14(a)(1) or § 14(a)(2)              | § 14(a)(1)       | § 14(a)(1)       | § 14(a)(1)                              |         |
| 5. Size of Business Category                                    | I                | I                | 1                                       |         |
| <b>Appendix C - Table 1 - FIFRA Civil Penalty Matrix</b>        |                  |                  |   |         |
| 6. BASE PENALTY   | \$6,500          | \$6,500          | \$6,500                                 |         |
| <b>Appendix B - Gravity Adjustments</b>                         |                  |                  |   |         |
| 7a. Pesticide Toxicity  | 1                | 1                | 1                                       |         |
| 7b. Human Harm  | 1                | 1                | 1                                       |         |
| 7c. Environmental Harm  | 1                | 1                | 1                                       |         |
| 7d. Compliance History  | 0                | 0                | 0                                       |         |
| 7e. Culpability   | 0                | 0                | 0                                       |         |
| 7f. Total Gravity Adjustment Value<br>(add items 7a - 7e)       | 3                | 3                | 3                                       |         |
| <b>Appendix C - Table 3 - Adjustments</b>                       |                  |                  |   |         |
| 7g. Percent Adjustment  | 50%              | 50%              | 50%                                     |         |
| 7h. Dollar Adjustment   | -\$3,250         | -\$3,250         | -\$3,250                                |         |
| 8. Final Penalty** (item 7h from item 6)                        | \$3,250          | \$3,250          | \$3,250                                 |         |
| Combined Total Penalty (total of all columns for line 8, above) | \$9,750          |                  |   |         |

\* Section 14(a)(1) of FIFRA - Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of this subchapter may be assessed a civil penalty by the Administrator of not more than \$5,000 for each offense.

Section 14(a)(2) of FIFRA - Any private applicator or other person not included in paragraph (1) who violates any provision of this subchapter subsequent to receiving a written warning from the Administrator or following a citation for a prior violation, may be assessed a civil penalty by the Administrator of not more than \$1,000 for each offense, except that any applicator not included under paragraph (1) of this subsection who holds or applies registered pesticides, or use dilutions of registered pesticides, only to provide a service of controlling pests without delivering any unapplied pesticide to any person so served, and who violates any provision of this subchapter may be assessed a civil penalty by the Administrator of not more than \$500 for the first offense nor more than \$1,000 for each subsequent offense.

\*\*The final penalty in each column of line 8 cannot exceed the statutory maximum.