UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
99 CENTS ONLY STORES,	)	**Docket No. FIFRA-9-2008-0027**
	)	
Respondent.	)	

ORDER ON MOTION FOR PARTIAL ACCELERATED DECISION AND REQUEST FOR ORAL ARGUMENT

I. Procedural History

The U.S. Environmental Protection Agency, Region 9 ("EPA" or "Complainant") initiated this action on September 30, 2008 by filing an Administrative Complaint charging Respondent, 99 Cents Only Stores, with a total of 166 violations of Section 12(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136j(a)(1), arising from its alleged distribution or sale of unregistered or misbranded pesticides. The Complaint proposes imposition of an aggregate penalty of $ 969,930 for these violations.

On October 29, 2008, Respondent filed an Answer to the Complaint. In its Answer, Respondent admitted some allegations, asserted that it lacked sufficient information to either admit or deny the truth of many others, and raised a few defenses. Thereafter, consistent with the Prehearing Order issued on January 15, 2009, the parties filed their Prehearing Exchanges.

On May 4, 2009, Complainant filed a Motion for Partial Accelerated Decision on Liability ("Motion") alleging that there is no genuine issue of material fact regarding Respondent's liability for the violations. On or about May 26, 2009, Respondent filed its Opposition to Complainant's Motion ("Opposition"), supported by the Declaration of its Counsel, Susan Traub Boyd ("Respondent's Declaration") with numerous exhibits attached thereto, along with a Request for Oral Argument on the Motion.

II. Standards for Accelerated Decision

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22 ("Rules of Practice," or "Rules"). Section 22.20(a) of the Rules of Practice authorizes an Administrative Law Judge to "render an accelerated decision in favor of a party as to any or all parts of the proceeding, without

further hearing or upon such limited additional evidence such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a).

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are analogous to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). *See, e.g.*, *BWX Technologies, Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Belmont Plating Works*, EPA Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65, *8 (ALJ, Order Granting in Part and Denying in Part Complainant's Motion for Accelerated Decision on Liability, Sept. 11, 2002). Therefore, federal court rulings on motions for summary judgment under FRCP 56 provide guidance for adjudicating motions for accelerated decision under Rule 22.20(a) of the Rules of Practice. *See CWM Chemical Services, Inc.*, 6 E.A.D. 1, 95 EPA App. LEXIS 20, *25 (EAB 1995).[1] Rule 56(c) of the FRCP provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law." Thus, summary judgment is to be decided on the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits" (FRCP 56(c)), but in addition, a court may take into account any material that would be admissible or usable at trial. *Horta v. Sullivan,* 4 F.3d 2, 8 (1st Cir. 1993)(citing, 10A Charles A. Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure § 2721 at 40 (2nd ed. 1983)); *Pollack v Newark,* 147 F. Supp. 35 (D.N.J. 1956)(In considering a motion for summary judgment, a tribunal is entitled to consider exhibits and other papers that have been identified by affidavit, or otherwise made admissible in evidence), *aff'd,* 248 F.2d 543 (3rd Cir. 1957), *cert. denied*, 355 U.S. 964 (1958). Such material may include documents produced in discovery. *Hoffman v. Applicators Sales & Service, Inc.,* 439 F.3d 9, 15 (1st Cir. 2006)(citing, 11 James M. Moore, *et al.*, Moore's Federal Practice § 56.10 (Matthew Bender 3rd ed.)(courts generally accept use of documents produced in discovery as proper summary judgment material)).

A motion for summary judgment puts a party to its proof as to those claims on which it bears the burdens of production and persuasion. For the EPA to prevail on a motion for accelerated decision where there is an affirmative defense as to which Respondent ultimately bears such burdens, EPA initially must show that there is an absence of evidence in the record for the affirmative defense. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002). If the EPA makes this showing, then Respondent, as the non-movant bearing the ultimate burden of

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[1] *See also, Patrick J. Neman, d/b/a The Main Exchange*, 5 E.A.D. 450, 455, n.2, 1994 EPA App. LEXIS 10, *14 (EAB 1994) ("In the exercise of ... discretion, the Board finds it instructive to examine analogous federal procedural rules and federal court decisions applying those rules); *Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 524, n.10, 1993 EPA App. LEXIS 6, *26 n.10 (EAB 1993)(although the Federal Rules of Civil Procedure do not apply to Agency proceedings under Part 22, the Board may look to them for guidance); *Detroit Plastic Molding*, 3 E.A.D. 103, 107, 1990 EPA App. LEXIS 4, *9 (CJO 1990).

persuasion on its affirmative defense, must meet its countervailing burden of production by identifying "specific facts" from which a reasonable fact finder could find in its favor by a preponderance of the evidence. *Id.*

Finally, while the Tribunal may look to the record as a whole in deciding upon a motion for accelerated decision, the burden of coming forward with the evidence in support of their respective positions rests squarely upon the litigants. *See*, *Northwestern Nat'l Ins. Co. v. Baltes*, 15 F.3d 660, 662-63 (7th Cir. 1994) (noting that judges "are not archaeologists. They need not excavate masses of papers in search of revealing tidbits -- not only because the rules of procedure place the burden on the litigants, but also because their time is scarce.").

III. <u>FIFRA Section 12(a)(1)</u>

The Complaint alleges that Respondent violated subsections (A) and (E) of FIFRA Section 12(a)(1) as a result of its distribution or sale of three pesticide products between September 2004 and May 2008. Those subsections provide in pertinent part as follows:

> . . . it shall be unlawful for any *person* in any State to *distribute or sell* to any person--
>
> (A) any *pesticide* that is *not registered* under [FIFRA § 3]
>
> * * *
>
> (E) any pesticide which is . . . *misbranded.*

7 U.S.C. §§ 136j(a)(1)(A), (E)(italics added). *See also*, 40 C.F.R. § 152.15.

The term "person" under FIFRA is defined to include individuals and corporations. 7 U.S.C. § 136(s). "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)(italics added). *See also*, 40 C.F.R. § 152.3(j).

FIFRA Section 2(u) defines a "pesticide" in pertinent part as -

> any substance or mixture of substances *intended* for preventing, destroying, repelling, or mitigating any *pest* . . .

7 U.S.C. § 136(u)(1)(italics added). *See also*, 40 C.F.R. § 152.3. Under FIFRA, the term "pest" is defined to include any "virus, bacteria, or other micro-organism." 7 U.S.C. § 136(t). *See also*, 40 C.F.R. § 152.5 (the Administrator has declared that "any insect . . . bacteria, or other micro-organism" is a "pest under circumstances that make it deleterious to man or the environment").

Additionally, the implementing regulation to FIFRA Section 2(u) provides in pertinent part:

> A substance is considered to be *intended* for a pesticidal purpose, and *thus to be a pesticide requiring registration*, if:
>
> > (a) The person who distributes or sells the substance *claims, states*, or *implies (by labeling* or otherwise):
> >
> > > (1) That the substance (either by itself or in combination with any other substance) *can or should be used as a pesticide*; or
> >
> > * * *
> >
> > (c) The person who distributes or sells the substance has actual or constructive knowledge that the substance *will be used,* or is *intended to be used,* for a pesticidal purpose.

40 C.F.R. § 152.15 (italics added). *See also*, *N. Jonas & Co. Inc.*, EPA Docket No. I.F.&R. III-121C, 1978 EPA ALJ LEXIS 3, *28-29 (ALJ, July 27, 1978; on remand, March 4, 1981), *aff'd*, 666 F.2d 829 (3rd Cir. 1981)(chlorine product held to be pesticide despite disclaimer because label indirectly implied product could be used to control algae).

FIFRA Section 3, 7 U.S.C. § 136a, sets forth the general procedure for the registration of a pesticide by the Administrator of EPA after examination of, *inter alia,* its ingredients, packaging and labeling, and determination that the product will not have an unreasonable effect on humans and the environment. *See also*, 40 C.F.R. §§ 152.112-114. Registered pesticide products may be lawfully distributed or sold *only* with the composition, packaging and labeling *as approved by the Administrator*. 40 C.F.R. § 152.130. Thus, FIFRA Section 2(q)(1)(E) describes a pesticide as being "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.

7 U.S.C. § 136(q)(1)(E).

IV. Complainant's Motion

The Complaint divides the 166 Counts of violation alleged therein into three groups, one for each of the three alleged pesticides Respondent distributed or sold. Count 1 of the Complaint alleges that Respondent violated FIFRA Section 12(a)(1)(A)(sale or distribution of an unregistered pesticide) in September 2004, when it offered for sale or distribution from its store in Gardena, California, the product "Farmer's Secret Berry & Produce Cleaner," with a label indicating it "inhibits mold, fungus & bacteria including Ecoli." Counts 2-165 allege that, between September 2005 and May 2006, Respondent repeatedly violated FIFRA Section 12(a)(1)(A)(sale or distribution of an unregistered pesticide) when it offered for sale or distribution and/or sold from its various stores in California, Nevada and/or Arizona, 164 units of the product "Bref Limpieza Y Desinfección Total con Densicloro®," with labels claiming it "disinfects." Count 166 of the Complaint alleges that Respondent violated FIFRA Section 12(a)(1)(E)(sale or distribution of a *misbranded* pesticide) on May 8, 2008, when it offered for sale in its store in Las Vegas, Nevada, 11 units of the registered pesticide "PiC® BORIC ACID Roach Killer III" with labels which were "inside out, upside down, and/or misaligned."

In its Motion, Complainant alleges that for each of the first 165 counts of the Complaint alleging sale of an unregistered pesticide, it can establish as undisputed the following four elements establishing a FIFRA Section 12(a)(1)(A) violation: (1) that Respondent is a "person;" (2) that Respondent "distributed or sold" the products at issue; (3) that the products at issue are "unregistered;"and (4) that the products at issue are "pesticides," and thus were required to be registered at the time of sale. 7 U.S.C. § 136j(a)(1)(A). Motion at 5-9.

As to the first element, Complainant notes that Respondent has admitted that it is a corporation and therefore a "person," within the meaning of FIFRA as that term is defined under FIFRA Section 2(s), 7 U.S.C. § 136(s). Motion at 5. citing Answer ¶ 10. *See also*, Complainant's Prehearing Exchange Exhibit ("C's PHE Ex.") 16 (Respondent's 2008 SEC Form 10-K filing indicating its incorporation in California).

As to the second element, Complainant cites to documentation produced with its Prehearing Exchange evidencing that Respondent held for sale the product Farmer's Secret Berry & Produce Cleaner ("Farmer's Secret Cleaner") in September 2004, and sold 164 units of Bref Limpieza Y Desinfección Total con Densicloro®" ("Bref") between September 2005 and May 2006. Motion at 5-6. Such documentation includes state inspection reports, photographs, violation notices, correspondence, and invoices. *See*, C's PHE Exs. 5, 6, 8, and 21. *See also*, Answer ¶¶ 29, 30-40 (wherein Respondent admits that its sales records show that it sold at least 164 units of a product called Bref between September 2005 and May 2006).

As to these two products being unregistered as pesticides with the Administrator, Complainant relies upon the Affidavit of Julie Jordan, an EPA Environmental Protection Specialist with EPA, Region 9, dated February 27, 2009, in which she states --

9. As an Environmental Protection Specialist, I regularly use the Office of Pesticide Programs Information Network ("OPPIN") electronic database, an EPA internal database that stores comprehensive information regarding federal pesticide regulation.

11. In 2004 and 2005, I conducted a search in OPPIN with respect to "Farmer's Secret Cleaner" and "Bref"by searching by product name, manufacturer name and active ingredients for both products.

12. According to OPPIN, "Farmer's Secret Cleaner" is not registered as a pesticide under FIFRA.

13. According to OPPIN, "Bref" is not registered as a pesticide under FIFRA.

C's PHE Ex. 13, ¶¶ 9-13. On this point, EPA also cites as authority the Enforcement Case Reviews conducted by the Office of Pesticide Programs, Antimicrobials Division, which concluded that neither product was a registered pesticide. Motion at 6, citing C's PHE Exs. 17 and 18.

The fourth and final element of Complainant's *prima facie* case establishing the FIFRA §12(a)(1)(A) violations is that the products sold were "pesticides." As proof of that element in regard to the "Farmer's Secret Cleaner," Complainant offers a photograph of the product taken during the state inspection of Respondent's facility evidencing that the product's label displayed the phrase "inhibits Mold, Fungus & Bacteria, including Ecoli." Motion at 7 citing C's PHE Ex. 5. Relying upon a dictionary source, Complainant states that to "inhibit" means to "retard or prevent the formulation of," further noting that under FIFRA § 2(t) viruses, bacteria and other micro-organisms are "pests." Therefore, EPA argues, the label states or implies that the product is "intended" for a "pesticidal purpose," and thus it is a "pesticide" as that term is defined by 40 C.F.R. § 152.15. Motion at 7.

With regard to this same element and the Bref product sold by Respondent, Complainant offers photographic evidence that the product's label prominently displayed the phrase "LIMPIEZA Y DESINFECCIÓN TOTAL" and the word "Mexico," which, to EPA, suggests the label is in Spanish, the official language of Mexico. Motion at 7, citing C's PHE Exs. 6, 9, 21 and 25. Again citing dictionary sources, Complainant proffers that, when translated from Spanish into English, this phrase means "Complete Cleaning and Disinfection," and "disinfection" means "to free from infection esp. by destroying harmful microorganisms." Motion at 7-8, citing C's PHE Exs. 13, 14, 24, 25. Therefore, EPA posits, the Bref product's label "plainly claims, states or implies that it can and should be used as a pesticide (disinfectant)." Motion at 8. The fact that this conclusion rests on a single Spanish word is of no import, Complainant asserts, noting that similar findings have been based upon a single word. Motion at 9-10, citing *Four Quarters Wholesale, Inc.*, EPA Docket No. FIFRA-09-2007-0008, 2008 EPA ALJ LEXIS 21, *15-22 (ALJ, May 29, 2008) (Order on Motion for Accelerated

decision finding that the Spanish word "desinfecta" on a label makes a pesticidal claim) and *Behnke Lubricants, Inc.*, EPA Docket. No. FIFRA-05-2007-0025, 2008 EPA ALJ LEXIS 42, *44 (ALJ, Dec. 30, 2008) (Initial Decision finding the name "Micronox" implies a pesticidal claim).

Additionally, Complainant reports that the Mexican website of the product's manufacturer, Henkel Capital, S.A. de C.V., describes the Bref product as intended for a pesticidal purpose in that it states that it "maximizes the power of a cleaner with chlorine disinfection to ensure thorough cleaning and disinfecting surfaces . . . " Motion at 8. Based thereon, and the fact that Respondent purchased and re-sold the product in "extremely large quantities," Complainant suggests that Respondent must have had "at least constructive knowledge that it is intended for use as [a] pesticide (disinfectant)." *Id.*

Finally, with regard to the sole misbranding count of the Complaint (Count 166), Complainant acknowledges that the product ""PiC® BORIC ACID Roach Killer III" ("PiC Boric Acid") sold by Respondent is a registered pesticide (Reg. No. 3095-20201). Motion at 1; C's PHE Ex. 10, 11. However, relying upon a Nevada Department of Agriculture Report of a May 8, 2008 inspection, and photographs taken in connection therewith, Complainant alleges that the labels on at least 11 units of the product being offered for sale at Respondent's store in Las Vegas at that time were "inside out, upside down and/or misaligned." Motion at 2-3, 9 citing C's PHE Ex. 10. As such, EPA argues, the labels were not "likely to be read and understood by the ordinary individual under customary conditions of purchase and use," and so were "misbranded" as that term is defined in FIFRA 2(q)(1)(E). Motion at 2-3, 9.

In addition, Complainant sets forth in its Motion its arguments as to why each of the two affirmative defenses to liability raised by Respondent in its Answer does not create a contested issue of fact preventing the entry of judgment on liability at this point. To the extent applicable, those arguments are discussed below.

V. <u>Respondent's Opposition</u>

In its Opposition to Complainant's Motion, Respondent indicates that "99 Cents does not contest liability with respect to the singled [sic] alleged violation related to the sale of Farmer's Secret Cleaner." Opposition ("Opp.") at 1, n. 1.

However, Respondent states it does contest Complainant's entitlement to accelerated decision as to its liability on the 164 violations arising from its sale of Bref based upon the fact that the product was a "pesticide" because it makes a "pesticidal claim." Opp. at 1, 6-11. Specifically, Respondent argues that "[w]hether a product makes a pesticidal claim must be judged under the 'collectivity of all the circumstances.'" Opp. at 2, quoting *N. Jonas & Co. v. U.S. EPA*, 666 F.2d 829, 833 (3rd Cir. 1981). It asserts that the test of whether a product is "intended" as a pesticide is a "fact-specific inquiry" into whether under such collective circumstances "a reasonable consumer would believe the product was intended as a pesticide."

Opp. at 6, quoting *Jonas*, 666 F.2d at 833-34. Moreover, such "test must be applied with particular care where, as here, the product is a cleaning agent and thus eligible for the statutory exemption specified in 40 C.F.R. §152.10" which Respondent claims applies "in full force" here since the cleaner was not intended to be used as a pesticide nor did its label contain a "pesticidal claim." Opp. at 7. Further, Respondent states that Bref is not inherently dangerous, and is basically bleach (sodium hypochlorite) which is expressly exempt from regulation. Opp. at 8. Therefore, Respondent suggests these claims can only be "fully ventilated at a hearing," and so are not amenable to summary adjudication. Opp. at 7, quoting *A & V, Inc.*, EPA Docket No. I.F.&R.V-017-93, 1995 WL 605627 (ALJ, June 14, 1995)(Order Denying Complainant's Motion for Accelerated Decision and Denying Respondent's Motion to Dismiss Count III).

Among the circumstances pertinent to this inquiry, Bref was "marketed and sold as a cleaning product, and not as a pesticide," and placed for sale in Respondent's stores among other household cleaners. Opp. at 7, citing the Declaration of its Counsel, Susan Traub Boyd ("R's Decl."), Ex. E. *See also*, Opp. at 8 n. 6, citing R's Decl. Ex. S (Respondent asserts that the "Henkel English Language website" demonstrates that "Bref is marketed as a cleaning agent targeted at 'dirt.'"). The single Spanish word "desinfección," on the product's label does not transform the cleaning product into a pesticide, Respondent argues, because it "lacks sufficient specificity to convey a pesticide claim," suggesting that is "unlikely that a reasonable consumer would infer a pesticidal claim from a single Spanish word." Opp. at 9. Further, Respondent argues, "in circumstances far clearer than here, the English language words 'infection control' and 'decontaminate' used to market hospital cleaning towels were held insufficient to support a pesticidal claim." Opp. at 2, citing *Caltech Industries, Inc.*, EPA Docket No. 5-IFFRA-97-006, 1998 EPA ALJ LEXIS 51, 1998 WL 422215 (ALJ, June 9, 1998)(Order Denying Complainant's Motion for Accelerated Decision). Moreover, Respondent claims that any suggestion that all customers, including those not fluent in Spanish, would infer equivalence between the Spanish word "desinfección," and the English word "disinfection," is belied by Complainant's assertions "elsewhere" that the label's precautionary instructions are deficient because they are written in Spanish. Opp. at 2.

In further support for its position, Respondent contrasts the Bref product label from which EPA seeks to *infer* a pesticidal claim from the single word "desinfeccion" thereon, with that of the product Clorox Bleach, which it states "expressly makes pesticidal claims." Opp. at 9. It notes that the Clorox product label not only specifies which pests are being eradicated but also the product's efficacy in pest eradication, claiming the product "Kills 99.9% of Household Germs" [such as] "staphylococcus aereus, Streptoccocus pyogenes, salmonella enterier and Escherichia coli O157:H7" "that can make kids sick." Opp. at 9, citing R's Decl. Exs. T, U. Moreover, Respondent argues, the facts underlying this Tribunal's decision in *Four Quarters Wholesale, Inc., supra*, upon which Complainant relies in its Motion, is distinguishable from those in the instant case. Opp. at 2, 9. *Four Quarters* involved a product called "Clorox Concentrado," with the Spanish term "desinfecta" on the label. In that case the Tribunal's determination that the product made a pesticidal claim relied heavily upon the prevalent public association between the Clorox product name and germ prevention resulting from nearly 100

years of advertising, Respondent states, which are "circumstances not present here." Opp. at 9-10.

In addition, Respondent alleges that Complainant's assertion that it had "constructive knowledge" that Bref was intended to be used for a pesticidal purpose "is both factually unsupported and legally irrelevant." Opp. at 6, n.5. "As a 'cleaning agent,' within the meaning of 40 C.F.R. 152.10(a), Bref must be registered only *if* the product makes a 'pesticidal claim.' [] 'Constructive knowledge,' cannot provide an independent ground for requiring registration," Respondent declares. *Id.*

Finally, Respondent goes to great lengths in its Opposition to recite what it alleges are the circumstances of the alleged Bref violations documenting the purported inequity of the Agency instituting this action against it, where it has not taken a similar action against the "upstream suppliers [who] were the source of the claimed violations." Opp. at 1. Specifically, Respondent states that in 2005, Henkel, a multinational manufacturing company of "well-recognized brands, such as Dial Soap," "introduced [and marketed] a line of household cleaners under the 'Bref' name including . . . "Limpiador Liquido Multiusos" [which translates as] "Multi-Use Liquid Cleaner." Opp. at 3, citing R's Decl. Ex. A. Bref's "active ingredient sodium hypochlorite, commonly known as bleach, routinely is used as an ingredient in household cleaners," Respondent states. *Id.,* citing R's Decl. Ex. B at p. 4. Henkel distributed Bref in the United States through Grow-Link, a multi-million-dollar importer, from which Respondent, and only Respondent, purchased the product. Opp. at 4-5. In June 2005, Respondent purchased a total of 21,600 units of Bref, pursuant to an agreement that specified that Grow-Link would comply with all applicable "federal, state, and local laws." *Id.*, citing R's Decl. Exs. C at pp. 9-10 and Ex. D, § 12; Opp. at 4, n.3.

Thereafter, Respondent placed Bref for sale in its stores among other household cleaners. Opp. at 3, citing R's Decl. Ex. E. Approximately three months later, in September 2005, upon receipt of an EPA request arising from its concern as to the use of the word "Desinfeccion" on the product's label, Respondent "immediately launched a voluntary recall" resulting in its return to Grow-Link of 6,400 units of the product. Opp. at 4, citing R's Decl. Exs. F, C, G, and H. The company nevertheless acknowledges that approximately 2000 units of the product were sold after the recall, noting however that the majority were sold in October 2005, as the recall process was being fully implemented. *Id.*, citing R's Decl. Ex. I, pp. 8, 13. Further, Respondent alleges that it "took further steps to ensure that future recalls would be even more effective," which it alleges has resulted in no further recalls being necessary in the ensuing four years. *Id.* In addition, it prepared a "Buyer Product Caution Guide," containing sections on compliance with laws pertaining to pesticides and other health, safety and consumer protection matters. *Id.*

Respondent notes that the Agency did not institute any enforcement action against Henkel or Grow-Link, and the State of California's enforcement efforts resulted in a settlement pursuant to which Grow-Link paid a fine of only $1,500. Opp. at 3-5, citing R's Decl. Exs. K, L, H, N-O. In contrast, despite its good faith actions, and its lack of a history of violations, Respondent

decries, EPA instituted this action against it seeking a "draconian fine" of almost $1 million dollars, which exceeds "by orders of magnitude" the penalties requested or received in similar matters. Respondent asserts that "[g]iven the outrageous penalties being sought here," granting accelerated decision is "particularly inappropriate as principles of 'sound judicial policy and the exercise of judicial descretion permit a denial of such motion for the case to be fully developed at trial." Opp at 11, citing *Caltech*, 1998 WL 422215 and *A & V*, 1995 WL 605627..

Respondent's Opposition also challenges entry of accelerated decision on the single misbranding count relating to its sale of PiC Boric Acid, asserting that a hearing is also required to consider the "context of the purported violation." Opp. at 11. The product is a properly registered pesticide, Respondent declares, and the 11 containers at issue were mere "outliers," where the vast majority of the voluminous product it sold had properly applied labels. Opp. at 2. Further, the mislabeling was not its fault, Respondent emphasizes; the containers were mislabeled by the manufacturer, who is "uniquely and solely" in control of the content and application of the pesticide's labeling. Opp. at 11. "[I]t should not be liable for failure to police the misapplication of a few labels, by a manufacturer . . ., the true source of the violation," Respondent argues. Opp. at 2. Moreover, it is inequitable to hold it liable for the mislabeling, Respondent asserts, where it was extremely cooperative during the Agency's inspection and EPA has instigated no enforcement action against the manufacturer. Opp. at 2, 11. Therefore, Respondent posits, "these issues should, at a minimum, be further developed at a hearing." Opp. at 11.

VI. Respondent's Liability on Counts 2-165 (Sale of Bref)

The fundament of Respondent's Opposition to Complainant's Motion is its contention that accelerated decision is "rarely" appropriate in cases involving the issue of whether a product is intended as a pesticide because such issue requires a "fact-specific inquiry" into what a "reasonable consumer" would believe the product was intended for, taking into account the "collectivity of all the circumstances," which can only be "fully ventilated at a hearing." Opp. at 6-7. As authority for this proposition, it cites *N. Jonas & Co. v. U.S. EPA*, 666 F.2d 829 (3rd Cir. 1981) and *A & V, Inc., supra*.

The *Jonas* case involved a FIFRA penalty action brought by EPA against a distributor of an unregistered product, with a label which the circuit court noted "eschewed pesticidal claims" and contained the disclaimer "SCORCH IS NOT TO BE USED FOR DAILY DISINFECTION OR ALGAE CONTROL OF YOUR POOL." As such, the distributor argued that whether the product is a pesticide should turn on the subjective intent of the company as gleaned from the label of the product and the representations made by it. Rejecting this argument, the court held that the Act and its regulations "focus the inquiry on the intended use-implied or expressed. We take this to mean the use which a reasonable consumer would undertake. The subjective intent standard would emasculate the Act. A manufacturer or distributor cannot avoid the reach of the Act by pointing to its own subjective intent that a product have a given use. Even if it were

possible to gauge this subjective intent, the public weal requires that even those who inadvertently produce goods which the public perceives as pesticidal be subject to the jurisdiction and regulations of the EPA." *Jonas*, 666 F.2d at 833.

Further, the court stated -

> In determining intent objectively, the inquiry cannot be restricted to a product's label and to the producer's representations. Industry claims and general public knowledge can make a product pesticidal *notwithstanding the lack of express pesticidal claims by the producer itself.* Labeling, industry representations, advertising materials, effectiveness and the collectivity of all the circumstances are therefore relevant.

Jonas, 666 F.2d at 833 (italics added). Noting that the record contained evidence that the product in fact mitigated algae and bacteria and that its literature indicated that it had pesticidal effects and functions, the federal court upheld the finding of the Administrative Law Judge that the product was a pesticide and the imposition of a penalty for its sale, despite the label's disclaimer and the distributors' subjective intent. *Id.* at 833-34.

In the *A & V* Order cited by Respondent, the Administrative Law Judge summarily denied both the Agency's request for accelerated decision and the respondent's cross motion to dismiss in a three count FIFRA enforcement action, based upon the existence of genuine issues of material fact. *A & V, Inc.*, EPA Docket No. I.F.& R.-V-017-93, 1995 EPA ALJ LEXIS 89, *3 (ALJ, June 14, 1995). As to the first two counts, the judge noted that the respondent contested the accuracy of complainant's testing methods and procedures which form the basis of whether or not respondent sold an alleged "adulterated" and/or "misbranded" pesticide. As to the third count, alleging sale of an unregistered pesticide, he noted the respondent had asserted that its product had no pesticidal properties and its label made no pesticidal claims. In the Order, the judge stated:

> a decision on whether a product is a pesticide is a fact intensive issue. All the factual circumstances surrounding the sale of A&V's alleged pesticide product, GO-BROM, must be examined in order for the finder of fact to reach a determination on the product's status under FIFRA. Such issues can only be fully ventilated at a hearing. Further, it is emphasized that a case should not be made hard by deciding difficult or doubtful questions that might not survive factual determination. Even where it is technically proper to grant a motion for summary judgment, [accelerated decision], "sound judicial policy and the proper exercise of judicial discretion" may permit the denial of the motion and allow the case to be fully developed at the hearing.

A & V, 1995 EPA ALJ LEXIS 89, *3 (quoting *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir.

1979)).[2]

The import of the language used in the foregoing decisions must be determined in conjunction with the statutory provisions and regulations being interpreted and applied by those tribunals in the cases before them. Such provisions are FIFRA § 2(u), 7 U.S.C. § 136(u)(1), providing that a pesticide is "any substance . . . *intended* for preventing, destroying, repelling, or mitigating any pest," and 40 C.F.R. § 152.15, which provides in pertinent part as follows:

> A substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if:
>
> (a) The person who distributes or sells the substance claims, states, *or* implies (by labeling or otherwise):
>
> (1) That the substance . . . can or should be used as a pesticide; *or*
>
> (2) That the substance . . . contains an active ingredient and that it can be used to manufacture a pesticide; *or*
>
> (b) The substance . . . contains . . . active ingredients and has no significant commercially valuable use as distributed or sold other than (1) use for pesticidal purpose . . . , [or] (2) use for manufacture of a pesticide; *or*
>
> (c) The person who distributes or sells the substance has actual or constructive knowledge that the substance will be used, or is intended to be used, for a pesticidal purpose.

(emphasis added). *See, Jonas*, 666 F.2d at 831-32 (citing and quoting 7 U.S.C. § 136(u)(1) and 40 C.F.R. § 152.15), and *A & V*, 1995 EPA ALJ LEXIS 89, *2 (citing 7 U.S.C. § 136j(a)(1)(A) (sale of an unregistered pesticide is a violation)).

As seen in the foregoing regulation, there are numerous *alternative* bases upon which a substance can be found to be "intended for a pesticidal purpose" under the statute. One such basis is if the product label itself implies that it "can or should be used as a pesticide." 40 C.F.R. § 152.15(a)(1). Another basis is consideration of the seller's actual or constructive knowledge of

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[2] This Order on the two motions is quite abbreviated, consisting of less than 500 words and 26 sentences. *A & V*, 1995 EPA ALJ LEXIS 89. It contains no analysis of the particular facts of the case at hand. *Id.* Such extreme brevity is perhaps understandable in light of the fact that the accuracy of scientific tests was in dispute mandating an evidentiary hearing on two of the three counts. *Id.* at 89, *1-2. Further, the necessity of holding a hearing on those two counts may explain the judge's decision to also delay until after hearing consideration and resolution of the issue raised by the third count as to whether the product's label stated a pesticidal claim.

the substance's intended use as a pesticide. 40 C.F.R. § 152.15(c).

It is observed that in both the *Jonas* and *A & V* cases, the tribunal accepted that the labels on the products at issue did not clearly state or imply a pesticidal claim, and they made no analysis or ruling thereon. In the *Jonas* case, the court noted that the label explicitly disclaimed it was a pesticide. *Jonas*, 666 F.2d at 831. In *A & V,* the tribunal stated that "respondent asserts that its product, GO-BROM, has no pesticidal properties, and its corresponding label makes no pesticidal claims," although Complainant alleges otherwise. *A & V*, 1995 EPA ALJ LEXIS 89, *2. Under such circumstances, the tribunals decided that other factual circumstances surrounding the sale were relevant.

What this Tribunal takes from *Jonas* and *A & V* is that where a product's label, *by itself,* does *not* clearly state a pesticidal claim, then a factual hearing may be warranted in order to determine whether the product is, *nevertheless,* a "pesticide" based upon implied claims or the seller's actual or constructive knowledge. Contrary to Respondent's assertion, these authorities do not stand for the proposition that "fact-intensive" hearings into the "collective circumstances" are routinely necessary in order to determine whether a product was intended as a pesticide and/or that summary adjudication would be inappropriate in cases where the product's label clearly contains a pesticidal claim. In fact, in such latter cases, a hearing would be superfluous, because whatever other circumstances were adduced at the hearing would be immaterial as they could not overcome the legal effect of the placement of a pesticidal claim on the product's label - which is to unimpeachably make the product a pesticide requiring registration under FIFRA. *See*, 40 C.F.R. § 152.15(a)(1). *Cf., United States v. 681 Cases, et al.*, 63 F. Supp. 286, 287 (D. Mo. 1945)(holding that the Insecticide Act (FIFRA's predecessor) applied not only to products which were in fact fungicides, but also to those "intended to be," *i.e.* holding themselves by their labeling out to be fungicides, whether they were efficacious or not, noting that '[a]ny other construction of this Statute would lead to the absurd result that a manufacturer could actually label his product a fungicide and yet avoid the application of the Act by reservations and his own knowledge of its inefficacy."). Therefore, if, as Complainant alleges, the undisputed facts establish that the Bref product label made a pesticidal claim, then no further hearing on the matter would be required and entry of accelerated decision as to Respondent's liability would be appropriate at this point, since Respondent does not contest any of the other elements of the Section 12(a)(1)(A) violations.

The Motion and Opposition indicate that both Complainant and Respondent agree that the front label on the Bref product sold by Respondent in its store in Los Angeles, California, and elsewhere, prominently stated (right under the product name) *"LIMPIEZA Y DESINFECCIÓN TOTAL.*" Motion at 1, Opp. at 8. Furthermore, Complainant asserts and photographic evidence submitted by both parties confirm, that the product's rear label stated "Hecho en Mexico." Motion at 7; C's PHE Exs. 6, 9, 14, 18, 21, 25; R's Decl. Ex. A. Based upon this, Complainant states that the labeling suggests that it is in the Spanish language, commonly known to be the official language of the country of Mexico. Motion at 7. *See also, Four Quarters Wholesale, Inc., supra,* 2008 EPA ALJ LEXIS 21 *18 (Spanish is commonly known to be the official

language of Mexico). Respondent does not deny that this is the case.

Citing as authority therefor, *inter alia*, Webster's OnLine Spanish English dictionary, Complainant further asserts that the Spanish word "disinfección" translates to "disinfection" in English. Motion at 7-8. *See also*, C's PHE Ex. 19. Respondent does not challenge this translation and, in fact, translates the word the same. *See*, R's Decl. Ex. A. Thus the last portion of the label's prominent phrase in Spanish translates in English to "DISINFECTION TOTAL" or, using proper English grammar, "TOTAL DISINFECTION," (since the Spanish word "total," is also a word in English). Additionally, Complainant proffers that, in English, "disinfection" means "the act or process of disinfecting," and "disinfect" means "to free from infection esp. by destroying harmful microorganisms," citing as support therefor Webster's Third New International Dictionary 650 (Unabridged, 2002)).[3] Motion at 8. Respondent's Opposition also does not challenge the accuracy of this definition, which is consistent with prior decisions. *See*, *Four Quarters*, 2008 EPA ALJ LEXIS 21 *21("disinfects" means "to free from infection esp. by destroying harmful microorganisms."); *Mt. Olympus Waters v. Utah State Tax Comm'n*, 1994 Utah App. LEXIS 99, 14-15 (Utah Ct. App. 1994)(pasteurization of water is defined as "the disinfection of the water using heat as the killing agent against the micro-organisms that would be harmful"), *Clampitt v. St. Louis S. R. Co.*, 185 S.W. 342, 344 (Tex. Civ. App. 1916)(The term "disinfected" is defined by Webster [as] "To remove from or destroy in (a substance) the poison of injurious or of contagious diseases; purified from infection").

Following on with this argument, Complainant's Motion quotes FIFRA § 2(t) to the effect that "bacteria, viruses, and other micro-organisms" are "pests," and § 2(u) that "pesticides" are substances intended to "prevent, destroy, repel or mitigate" pests. Motion at 6-7. Therefore, it concludes that the Bref product is a pesticide under FIFRA because by using the term "disinfectant," its label claimed, stated, or implied that it could or should be used as a "pesticide." Motion at 8.

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[3] To any extent necessary, this Tribunal takes "official notice" of this translation and the meaning of any other words as to which this Tribunal cites a dictionary as a reference source therefor, pursuant to Rule 22.22(f) which provides in pertinent part that "[o]fficial notice may be taken of any matter which can be judicially noticed in the Federal courts." 40 C.F.R. § 22.22(f). Rule 201 of Federal Rules of Evidence in turn provides that Federal courts may take judicial notice of facts "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Dictionaries are such sources. *See e.g. Wilshire Westwood Assocs. v. Atlantic Richfield Corp.*, 881 F.2d 801, 803 (9th Cir. 1989)(Relying upon a dictionary to take judicial notice of the meaning of the word "fraction"); *Hancock v. American Steel & Wire Co.*, 40 C.C.P.A. 931, 934 (C.C.P.A. 1953)(relying on a dictionary to define "cyclone" and "tornado," noting "Courts take judicial notice of the meaning of words . . . and the court may always refer to standard dictionaries or other recognized authorities to refresh its memory and understanding as to the common meaning of language.")(*citing*, *Nix v. Hedden*, 149 U.S. 304 (1893)).

In an attempt to avoid entry of accelerated decision on its liability based upon the foregoing analysis of the product label's claims, Respondent raises a number of arguments suggesting there are questions of law or fact precluding entry of accelerated decision, each of which are be discussed in turn below.

First, Respondent asserts that the Bref product was not marketed and sold as a pesticide, but as an "ordinary household cleaner," noting it has the same active ingredient contained in bleach, and that it was placed for sale in Respondent's stores among "other cleaners." Opp. at 2, 7-8. Thus, it is eligible for the statutory exemption from pesticide registration under 40 C.F.R. §152.10, Respondent alleges. Opp. at 2, 7-8. The factual validity of this argument, however, is easily belied by the record, specifically the product's label itself, which states "*Limpieza Y Desinfección Total.*" As Respondent acknowledges, this phrase translates into English as "Complete Cleaning *and Disinfection*." R's Decl. Ex. A. As such, the label explicitly "claims, states or implies," that the product is not just for "cleaning," but also ("and") for disinfection. *See*, *Clampitt,* 185 S.W. at 344 (noting that the dictionary definition of "clean" is one of variable meaning owing to the connection in which it is used, but the term "disinfected" is defined as "To remove from or destroy in (a substance) the poison of injurious or of contagious diseases; purified from infection."). *See also*, *681 Cases,* 63 F. Supp. at 288 ("the court is at a loss to know why the claimant would waste printer's ink (and some of it red) [stating *e.g.* "Use Kitchen Klenzer for ANTISEPTION"] unless some inference was sought by this label over and beyond that of a pure cleaning agent."). Moreover, while the regulation Respondent cites as the source of its alleged exemption (40 C.F.R. §152.10) does list "cleaning agents" and "bleaches," as among the "types of products" generally "not considered to be pesticides," it explicitly caveats such exclusion with the phrase "unless a pesticidal claim is made on their labeling." Thus, if the Bref product's label is found to make a pesticidal claim, as alleged by Complainant, then the fact that it was a "cleaning product" would not prevent the entry of accelerated decision at this point.

Second, and more importantly, directly addressing Complainant's assertions about the significance of the appearance of the word "desinfección" on the product's label, Respondent argues that a "single, unmodified, Spanish language word" cannot transform a cleaning product into a pesticide, because it "lacks sufficient specificity to convey a pesticidal claim." Opp. at 2, 8-9; *see also*, Opp. at 9 ("in this context, it is unlikely that a reasonable consumer would infer a pesticidal claim from a single Spanish word."). In support of this position, Respondent cites the single case of *Caltech Industries, supra,* which according to Respondent, held that use of even the English language words "infection control" and "decontaminate" to market hospital cleaning towels was insufficient to support a pesticidal claim. Opp. at 2. It further claims that this case is not governed by this Tribunal's decision in *Four Quarters* because that case involved a "Clorox product that is typically marketed in its English language version with detailed pesticidal claims, . . . a total fine of only $33,000 for that product, and four other products, . . . far different than the relevant circumstances here." Opp. at 2. Moreover, the finding of a pesticidal claim in *Four Quarters* relied not just upon the Spanish term "disinfecta," but also upon the prevalent public association between the Clorox product name and germ prevention resulting from nearly 100 years of advertising, Respondent asserts. Opp. at 9-10. Finally, to read *Four Quarters* as

Complainant does, holding that the presence of the "single word 'disinfecta' must *always* constitute a pesticidal claim no matter what the attendant circumstances," Respondent suggests, "would place it squarely in conflict with *Caltech*. Opp. at 10 (italics in original).

Upon review, however, it appears that Respondent reads far too much into *Caltech*. In that case, EPA claimed the unregistered products at issue were intended for pesticidal use based upon "marketing claims" associated with their sale which used the terms "decontaminate" and "infection control." In opposition to accelerated decision, the seller asserted that no pesticidal claims were made *on the product* or in its promotional material, and that the context of its intended use by the consumer, *i.e.*, the health care industry, and application of the term "decontaminate" needed to be considered before a decision on whether the product was a pesticide could be made. The Administrative Law Judge agreed, finding that the seller's exhibits raised a genuine issue of material fact, and denied accelerated decision. The judge did not, however, make any ruling as to whether the words at issue in that case would have sufficed to make out a pesticidal claim *had they appeared on the product's label*, nor did he provide any guidance whatsoever as to the extent of wording required on a label to make out a pesticidal claim. As such, the decision in *Caltech* provides no guidance in deciding the instant motion.

On the other hand, *Behnke Lubricants, Inc.*, EPA Docket No. FIFRA-05-2007-0025, 2008 EPA ALJ LEXIS 42 (ALJ, Dec. 30, 2008) and *Four Quarters*, 2008 EPA ALJ LEXIS 21, the two cases cited by Complainant in its Motion for the proposition that one word alone can suffice to make out a pesticidal claim, seem far more on point. In *Behnke*, relying on testimony given at hearing and dictionary definitions, my honorable colleague Judge Barbara Gunning found the name "Micronox," by itself, implied a pesticidal claim because "micro" implied micro-organisms, and "nox" implied knockdown or mitigation. *Behnke*, 2008 EPA ALJ LEXIS 42 at *42-44.

In *Four Quarters*, based upon dictionary definitions, the undersigned held that the single Spanish word "desinfecta" on a product label made a pesticidal claim and therefore entered a finding of liability without the necessity of evidentiary hearing. As rationale therefor, the decision explained that the Spanish word "desinfecta" translates to "disinfects" in English, which word in turn means "to free from infection esp. by destroying harmful microorganisms." In that under FIFRA, "micro-organisms" are "pests" and "pesticides" are substances intended to "prevent, destroy, repel or mitigate," the undersigned held the product to be a "pesticide" which had to be registered in order to be lawfully sold. *Four Quarters*, 2008 EPA ALJ LEXIS 21 at *18-21. Contrary to Respondent's suggestion here, the fact that the product's name contained the word "*Clorox*" did not play a role in determining whether the label made a pesticidal claim. Rather, such fact merely complemented the determination, as this Tribunal indicated by stating "[i]n reaching such conclusion, I also observe that the Spanish word "desinfecta," being so close in spelling to the English word "disinfect," would be taken even by those members of the general purchasing public fluent only in the English language to mean "disinfect," *especially when appearing on a bottle labeled "Clorox."* As such, even to persons not fluent in Spanish, the label implies that the product is a pesticide, that is, that it can be used to "destroy, repel or mitigate"

micro-organisms." *Id.* at *22 (italics added).[4] Thus, that case did hold that a single Spanish word ("desinfecta") on a product's label can and did make out a "pesticidal claim." Contrary to Respondent's assertions, I do not find the facts of this case significantly different from those in *Four Quarters*. Therefore, consistent with such prior decision, after full consideration of the parties' arguments here, I find that the appearance on the Bref product label of the single Spanish word "disinfección," also makes out a pesticidal claim.

As further explanation, individual words have specific meanings and their individual use alone can have legal significance. The truth of this proposition is documented in Respondent's own "Purchasing Procedures on Labeling Compliance" guidance which indicates that "[t]here are particular claims or phrases that have required meanings and cannot be used loosely. Such terms include country of origin (e.g. "Made in the USA), Organic, Recycled, [and] New." *See*, R's Decl. Ex. J. Presumably, manufacturers thoughtfully select particular words to place on their product's label in order to convey that meaning to buyers. *See*, *681 Cases, etc.*, 63 F. Supp. at 288 ("The words [*e.g.* "Use Kitchen Klenzer for ANTISEPTION"] are certainly on the label for some purpose, and to the court they most certainly convey a meaning that Kitchen Klenzer will do more than scour.") (citing *Bradley v. United States*, 264 F. 79, 81 (5th Cir. 1920) (unless the label's words had purpose "it was a waste of printer's ink.")). The word "disinfection" has a commonly known single meaning - it implies that the substance destroys micro-organisms.[5] Thus, if a manufacturer chooses to place the word "disinfection," or conjugates thereof, on its label in the hope of benefitting from what it believes buyers would perceive as a positive attribute of its product, it is only logical and consistent therewith that it be held liable for the legal consequences of utilizing such a word.

As to the single word making out a pesticidal claim being *in Spanish*, rather than English, it is observed that like "desinfecta," the Spanish word "desinfección," is so close in spelling to the English word "disinfection," that even those members of the general purchasing public fluent

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[4] It is noted that the same suggestive reference to Clorox, although to a lesser degree, is reflected by the product label at issue in this case, which prominently displays in broad letters the phrase "con DENSI*CLORO*.," right below the term "disinfección." C's PHE Ex. 9 (italics added). Further, some of the Bref product sold by Respondent was packaged in blue bottles, with primarily red and white lettering, which appears to be suggestive of Clorox bleach packaging. *Compare,* C's PHE Ex. 7 (Bref) with R's Decl. Ex. T (Clorox label).

[5] It is well established that to determine the common meaning of a term, a court may utilize its own understanding of the term as well as dictionaries and scientific authorities. *AGFA Corp. v. United States*, 2007 Ct. Intl. Trade LEXIS 79 (Ct. Int'l Trade 2007)(citing *Lynteq, Inc. v. United States*, 976 F.2d 693, 697 (Fed. Cir. 1992)); *Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1352 (Fed. Cir. 2002) ("To determine a term's common meaning, a court may consult 'dictionaries, scientific authorities, and other reliable information sources.'") (*quoting C.J. Tower & Sons v. United States*, 69 C.C.P.A. 128, 673 F.2d 1268, 1271 (1982)). *See also, Four Quarters,* 2008 EPA ALJ LEXIS 21 *19.

only in the English language would take it to mean "disinfection." As such, even to persons not fluent in Spanish, this single Spanish word alone *implies* that the product is a pesticide, that is, that it can be used to "destroy, repel or mitigate" micro-organisms. In so holding, I find no merit to Respondent's suggestion that this conclusion is "belied" by Complainant's claim "elsewhere" that the label's precautionary instructions are deficient because they are written in Spanish. Opp. at 9. First, Respondent has proffered no evidence of the "elsewhere" to which it is referring. Second, while I note that under FIFRA, labels on *registered* pesticides are required to be in English,[6] I am disturbed by the implication of Respondent's argument to the effect a seller would be protected from liability for selling an *unregistered* pesticide if the label's pesticidal claims are made in a language other than English. The intent of FIFRA is to protect the public, *and all members thereof*, from unsafe pesticides, through registration restricting sale. As indicated above, pesticides are defined as products *intended* to be used as such, and intent can be derived from a product's label making a pesticidal claim. Neither the Act nor the regulation limits such derivation to those claims made on the label in English. In addition, I note that Respondent, a national chain of "99 Cents Only Stores," sold its unregistered pesticide product with a Spanish label in California and Texas, states commonly known to have a large Spanish speaking population which would get the full impact of the label's pesticidal claims.[7] C's PHE Ex. 7; Opp. at 3; R's Decl. Ex. I. Such population deserves the same protection from unregistered pesticides as others. As such, I find the fact that the pesticidal claim was made in a language other than English does not shield Respondent from liability under FIFRA § 12(a)(1)(A).

The third defensive issue Respondent raises in its Opposition is the purported inequity of the Agency instituting this action against it, where it acted in good faith. In this regard, it is noted that FIFRA is a strict liability statute and thus has been held to impose liability upon the distributor or seller of an unregistered pesticide regardless of good faith or fault. *See, Sultan Chemists, Inc.*, 9 E.A.D. 323, 2000 EPA App. LEXIS 24, *59 (EAB 2000) *aff'd* 281 F.3d 73 (3rd Cir. 2002)(Seller's alleged good faith cannot serve to defeat liability under a strict liability statute like FIFRA; good faith is relevant for purposes of penalty mitigation only)(citing *Arapahoe County Weed Dist.*, 8 E.A.D. 381, 1999 EPA App. LEXIS 18 (EAB, 1999)("FIFRA is a strict

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[6] *See*, 40 C.F.R. §152.10,(a)(3))("Language to be used. All required label or labeling text shall appear in the English language. However, the Agency may require or the applicant may propose additional text in other languages as is considered necessary to protect the public. When additional text in another language is necessary, all labeling requirements will be applied equally to both the English and other-language versions of the labeling.).

[7] The word "disinfección" actually appears *twice* on the Bref label. First on the front, in the phrase "LIMPIEZA Y DESINFECCIÓN TOTAL," and then also on the rear panel in the "PRECAUCIONES" (Warnings) section, in the phrase: "No se use para desinfección de agua o alimentos," which the Respondent translates as "Don't use to disinfect water or food." R's Decl. Ex. A. A reasonable person, certainly someone fluent in Spanish, might imply from such a qualified phrase that the product could be used to disinfect things *other than consumable food or water*.

liability statute") and *Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 796, 1997 EPA App. LEXIS 4, (EAB 1997)("The environmental statutes are intended to be action forcing, and brook no excuse for failure to achieve the required result.. . . The environmental statutes . . . , including FIFRA, consistently have been construed as imposing strict liability to meet their requirements."). *See also, South Coast Chemical, Inc.*, 2 E.A.D. 139, 1986 EPA App. LEXIS 34, *7 (CJO 1986)("Good faith may be a factor to weigh in considering whether a proposed penalty should be reduced (or even eliminated); however, whether or not a complaint is justified in the first instance is, under FIFRA, a matter for the "prosecutor" to decide. In the absence of an abuse of prosecutorial discretion, [the court] will not substitute [its] judgment for that of the Region."). *See also*, *To Your Rescue! Services*, FIFRA Appeal No. 04-08, 2005 EPA App. LEXIS 25, *9 (EAB Sept. 30, 2005)(in instituting a penalty action, "Region operated well within the bounds of its prosecutorial discretion in its choice of remedial paths for reining in [the distributor of an unregistered and misbranded pesticide].).

Nevertheless, the statute does provide one narrow exemption under which an innocent seller or distributor can escape the imposition of penalties for violations. Specifically, Section 12(b)(1) provides that:

> The penalties provided for a violation of paragraph (1) of subsection (a) shall not apply to–
>
> > (1) any person who establishes a guaranty signed by, and containing the name and address of, the registrant or person residing in the United States from whom the person purchased or received in good faith the pesticide in the same unbroken package, to the effect that the pesticide was lawfully registered at the time of sale and delivery to the person, and that it complies with the other requirements of this Act, and in such case the guarantor shall be subject to the penalties which would otherwise attach to the person holding the guaranty under the provisions of this Act.

7 U.S.C. § 136j(b).

Respondent, however, has not alleged the existence of such a signed guaranty as to the product's registration and the supplier's assumption of any penalties relating thereto which would otherwise attach to Respondent. More specifically, it has not alleged that its proffered agreement with Grow-Link, the entity from which it allegedly acquired the Bref product, meets the requirement of a guaranty under 7 U.S.C. § 136j(b). A review of the "agreement," which apparently consists of Respondent's general printed Purchase Order form, appears to contain a general indemnity provision providing that the seller will indemnify and defend the purchaser and hold purchaser harmless regarding the product purchased including its packaging and labeling; however, the bulk of the paragraph, in the copy of the Order Form Respondent submitted to this Tribunal, is unreadable. *See*, Decl. Ex. D, p. 2 ¶ 13. Thus, it is nevertheless concluded that the fact that Grow-Link may be at fault for initially making the unregistered pesticide available for sale in the United States, does not by itself abrogate Respondent being

found liable for selling the product and/or having penalties imposed against it in regard thereto.

The next issue against liability raised by Respondent in its Opposition is the claim that the Agency has chosen to institute this action against it seeking almost $1 million dollars in penalty, but has not taken action against either Henkel, the product's foreign manufacturer, or Grow-Link, the product's United States distributor. While not stated explicitly, such accusations are implicitly suggestive of the affirmative defense of abuse of prosecutorial discretion, otherwise known as a selective enforcement. Under such defense a respondent bears the burden of establishing that it has been "singled out" by the government "invidiously or in bad faith, *i.e.*, based upon such impermissible consideration as race, religion, or the desire to prevent the exercise of constitutional rights." *Newell Recycling Company, Inc.*, 8 E.A.D. 598, 635 (EAB 1999); *B&R Oil Co.*, 8 E.A.D. 39, 51, 1998 EPA App. LEXIS 106, *26 EAB 1998)("judicial decisions establish that an affirmative defense of selective enforcement or prosecution requires proof that (1) the government "singled out" a violator while other similarly situated violators were left untouched, and (2) the selection was in bad faith based on such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights")(citing *U.S. v. Smithfield Foods, Inc.*, 969 F. Supp. 975 (E.D. Va. 1997), *U.S. v. Anderson*, 923 F.2d 450 (6th Cir. 1988), and *Schiel v. Commissioner*, 855 F.2d 364, 367 (6th Cir. 1988)). It is observed, however, that Respondent has not alleged that the Agency selected it for enforcement based upon any impermissible consideration and the record does not offer any evidence supporting this to be the case. Absent such impermissible circumstances, it is well established that it is within the Agency's prosecutorial discretion to "decide whether, and against whom, to undertake enforcement actions." *B&R Oil Co.*, 8 E.A.D. at 51, 1998 EPA App. LEXIS 106 , *26.

The final point raised by Respondent in its Opposition against entry of accelerated decision as to its liability, is that the penalty sought in this case is close to $1 million dollars, allegedly exceeds "by orders of magnitude" penalties imposed in similar cases, and in light of the pertinent facts is, in Respondent's opinion, "draconian," and "outrageous." Opp. at 10-11. "[S]ound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial." Opp. at 11 quoting *Caltech*, 1998 WL 42215. While this latter statement of policy is generally true, it is also true that it is the responsibility of this Tribunal to rule on motions, avoid delay, and conduct efficient and fair proceedings. 40 C.F.R. § 22.4(c). The amount of the penalty at issue here is simply irrelevant to a determination as to whether there are any contested issues of fact *as to liability* which would warrant both parties as well as this Tribunal expending their resources holding a hearing thereon. *See*, 40 C.F.R. § 22.20(a). Therefore, this issue alone does not justify denying Complainant's well founded motion.[8]

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[8] No finding is being made in this Order as to the appropriate penalty for the violations. If necessary, such penalty determination will be made by this Tribunal after hearing thereon and upon consideration of the applicable statutory factors and relevant precedents. *See* 7 U.S.C. §

(continued...)

Therefore, I find there is no genuine issue of material fact as to whether the Bref product at issue in this case was a pesticide which was required to be registered under FIFRA in order for it to be lawfully distributed or sold. Respondent is hereby found liable on Counts 2-165 for selling such unregistered pesticide.

VI. Respondent's Liability on Count 166 (Sale of PiC Boric Acid)

As evidence of its entitlement to accelerated decision on the sole misbranding count of the Complaint (Count 166), Complainant offers photographs of the PiC Boric Acid product found for sale in Respondent's Las Vegas store at the time it was inspected by the Nevada Department of Agriculture, and the inspection report related thereto, documenting that the labels on at least 11 units of the product were "inside out, upside down and/or misaligned." Motion at 6, 9 citing C's PHE Ex. 10.[9] As such, EPA argues, the labels were not "likely to be read and understood by the ordinary individual under customary conditions of purchase and use," and so were "misbranded" as that term is defined in FIFRA 2(q)(1)(E). Motion at 9.

In its Opposition, Respondent does not specifically contest either the factual assertion that the labels were inside out, upside down and/or misaligned, or the legal conclusion that the products therefore were "misbranded." Opp. at 2, 11. Rather, it opposes summary decision on this count only on the basis that the "context of the purported violation is critical." Opp. at 11. That context, it asserts, is that the mislabeling/misbranding was not its fault, but the fault of the manufacturer who placed the labels on the products and whom, it states, has not been the subject of an enforcement action. It further alleges that it was "extremely cooperative" during the relevant state inspection and the mislabeling represents only a few "aberrant instances" where it was otherwise compliant. *Id.*, citing R's Decl. Ex. P at 10. Respondent argues "that these issues

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[8](...continued)
136l(a)(4) and *e.g., Rhee Bros., Inc.*, 13 E.A.D. __, 2007 EPA App. LEXIS 17, *26 (EAB 2007)(questioning the Tribunal's use of the RCRA Civil Penalty Policy in FIFRA cases); *Behnke*, 2008 EPA ALJ LEXIS 42 at *88-93 (Tribunal assessed a greater penalty than that proposed by the Agency based upon its own determination as to the level of the Respondent's culpability).

[9] Complainant's PHE Ex. 10 includes a Memorandum dated May 8, 2008 from Glen G. Hymas, the Nevada Department of Agriculture Inspector, stating that he observed that of the 26 containers available for sale at Respondent's store on the date of inspection, labels on "11 units had serious problems." "Some labels were inside out, some were upside down, others had either slipped or were offset in the printing process making the label illegible." "We purchased two of the products with unreadable labels." C's PHE Ex. 10. As part of the inspection, he took photographs of the PiC Boric Acid product on sale in the store. Upon review, it is observed that the photographs confirm the accuracy of Mr. Hymas' observations as to the product labels on the 11 units. C's PHE Ex. 10; R's Decl. Ex. P.

discretion." 40 C.F.R. § 22.16(d). Looking to Federal court practice for guidance, it is noted that a district court "should have 'wide latitude' in determining whether oral argument is necessary before rendering summary judgment." *Bratt v. International Business Machines Corp.*, 785 F.2d 352, 363 (1st Cir. 1986). "Where affidavits . . . and other documentary material indicate that the only issue is a matter of law, and where the briefs have adequately developed the relevant legal arguments, it is not error to deny oral argument," whereas oral argument may be appropriate where the motions for summary judgment depend on "difficult questions of law and alleged questions of fact." *CIA.Petrolera Caribe, Inc. v. Arco Carribean, Inc.*, 754 F.2d 404, 411 (1st Cir. 1985).

As evidenced by the rulings above, the Motion and Opposition thoroughly briefed the legal issues raised and evidenced that there were no genuine issue of material fact in regard to Respondent's liability for the violations. Therefore, this Tribunal finds an oral argument would not be of any significant assistance in resolving these issues.

CONCLUSION

Respondent is found to have violated FIFRA Section 12(a)(1) as alleged in Counts 1 through 166 of the Complaint.

ORDER

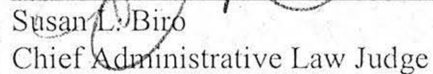
1. Respondent's Request for Oral Argument is **DENIED**.

2. Complainant's Motion for Partial Accelerated Decision is **GRANTED**.

3. Respondent is found liable on Counts 1-166 of the Complaint.

4. Within 5 days of this Order the parties shall engage in a settlement conference and attempt in good faith to reach an amicable resolution of this matter. Complainant shall file a status report as to the status of settlement discussions on or before **June 8, 2008.**

5. The hearing of this matter currently scheduled to begin on **June 23, 2009** will proceed as planned to take evidence and argument on the issue of the appropriate penalty, if any, to be imposed against Respondent for the violations found herein.



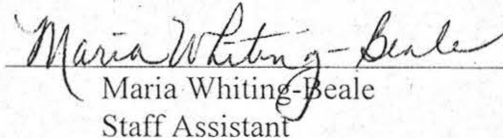
Susan L. Biro
Chief Administrative Law Judge

Dated: June 2, 2008
Washington, D.C.

In the Matter of 99 Cents Only Stores, Respondent
Docket No. FIFRA-09-2008-0027

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Motion For Partial Accelerated Decision And Request For Oral Argument**, dated June 2, 2009, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: June 2, 2009

Original And One Copy By Pouch Mail To:

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