



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

FEB 16 2010

REPLY TO THE ATTENTION OF:

LC-8J

CERTIFIED MAIL

Receipt No. 7001 0320 0006 0189 9897

Mr. Neal Weiss
Fun In Motion, Inc.
4352 Lindenwood Lane
Northbrook, IL 60062

Consent Agreement and Final Order **FIFRA-05-2010-0007**

Dear Mr. Weiss:

Enclosed please find a copy of a fully executed Consent Agreement and Final Order, in resolution of the above case. This document was filed on February 16, 2010 with the Regional Hearing Clerk.

In accordance with paragraph 49 of the CAFO, no penalty has been assessed.

Thank you for your cooperation in resolving this matter.

Sincerely,

A handwritten signature in cursive script that reads "Terry Bonace".

Terry Bonace
Pesticides and Toxics Compliance Section

Enclosures

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:)

Fun In Motion, Inc.)
d/b/a F.I.M. Stores)
Bloomington, Illinois,)

Respondent.)
_____)

Docket No. FIFRA-05-2010-0007

Proceeding to Assess a Civil Penalty
Under Section 14(a) of the Federal
Insecticide, Fungicide, and Rodenticide
Act, 7 U.S.C. § 136f(a)

RECEIVED
FEB 16 2010

REGIONAL HEARING CLERK
USEPA
REGION 5

Consent Agreement and Final Order
Preliminary Statement

1. This is an administrative action commenced and concluded under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136f(a), and Sections 22.13(b) and 22.18(b)(2) and (3) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (Consolidated Rules) as codified at 40 C.F.R. Part 22.

2. The Complainant, the Director of the Land and Chemicals Division, U.S. Environmental Protection Agency, Region 5, has been delegated the authority to settle this matter.

3. The Respondent is Fun In Motion, Inc., d/b/a/ F.I.M. Stores (FIM), a corporation doing business in the State of Illinois and located at 140 East Lake Street, Bloomington, Illinois 60108.

4. Where the parties agree to settle one or more causes of action before the filing of a complaint, the administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO). 40 C.F.R. § 22.13(b).

5. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

6. Respondent consents to the assessment of the civil penalty specified in this CAFO, and to the terms of this CAFO.

Jurisdiction and Waiver of Right to Hearing

7. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO.

8. Respondent waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO, and its right to appeal this CAFO.

9. Respondent certifies that it is complying with FIFRA, 7 U.S.C. §§ 136 to 136y.

Statutory and Regulatory Background

10. 40 C.F.R. §152.132 states that the registrant may distribute or sell his registered product under another person's name and address instead of (or in addition to) his own. Such distribution and sale is termed “supplemental distribution” and the product is referred to as a “distributor product.”

11. 40 C.F.R. §152.132 states that the distributor is considered an agent of the registrant for all intents and purposes under FIFRA, and both the registrant and the distributor may be held liable for violations pertaining to the distributor product.

12. 40 C.F.R. §152.132 states that supplemental distribution is permitted upon notification to the EPA if all the following conditions are met:

(a) The registrant has submitted to the EPA for each distributor product a statement signed by both the registrant and the distributor listing the names and addresses of the

registrant and the distributor, the distributor's company number, the additional brand name(s) to be used, and the registration number of the registered product.

(b) The distributor product is produced, packaged and labeled in a registered establishment operated by the same producer (or under contract in accordance with 40 C.F.R. §152.30) who produces, packages, and labels the registered product.

(c) The distributor product is not repackaged (remains in the producer's unopened container).

(d) The label of the distributor product is the same as that of the registered product, except that: (1) The product name of the distributor product may be different (but may not be misleading); (2) The name and address of the distributor may appear instead of that of the registrant; (3) The registration number of the registered product must be followed by a dash, followed by the distributor's company number (obtainable from the EPA upon request); (4) The establishment number must be that of the final establishment at which the product was produced; and (5) Specific claims may be deleted, provided that no other changes are necessary.

(e) Voluntary cancellation of a product applies to the registered product and all distributor products distributed or sold under that registration number. The registrant is responsible for ensuring that distributors under his cancelled registration are notified and comply with the terms of the cancellation.

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

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

15. Section 2(q)(2)(C) of FIFRA, 7 U.S.C. § 136(q)(2)(C), states that a pesticide is “misbranded” if there is not affixed to its container, and to the outside container or wrapper of the retail package, a label bearing the registration number assigned to the pesticide under FIFRA.

16. The term “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).

17. A “pesticide” is, among other things, any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest. 7 U.S.C. § 136(u).

18. A “pest” is any insect, rodent, nematode, fungus, weed, or any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism which the Administrator of EPA declares to be a pest under Section 25(c)(1) of FIFRA. 7 U.S.C. § 136(t).

19. The Administrator of EPA may assess a civil penalty against any registrant, wholesaler, retailer, or other distributor who violates any provision of FIFRA of up to \$6,500 for each offense that occurred after March 15, 2004 through January 12, 2009, pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), and 40 C.F.R. Part 19.

Factual Allegations and Alleged Violations

20. Respondent is a “person” as defined at Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

21. On or about February 18, 1968, Alden, located at 55 Jacobus Avenue, South Kearny, New Jersey, 07032, registered its pesticide product, "NUCLO 7 Days Tablets 3" Chlorinating 5.7 oz." with EPA

22. The EPA assigned EPA Registration Number (EPA Reg. No.) 7124-18 to Alden's pesticide product, "NUCLO 7 Days Tablets 3" Chlorinating 5.7 oz."

23. On or about August 1, 1989, Alden and FIM submitted a "Notice of Supplemental Distribution of a Registered Pesticide Product" (EPA Form 8570-5) to EPA, which allowed FIM to distribute Alden's registered pesticide product, "NUCLO 7 Days Tablets 3" Chlorinating 5.7 oz.," EPA Reg. No. 7124-18, under FIM's brand name, "H2O Specialties Slow Dissolving Chlorinating Large Tabs."

24. FIM's distributor company number is 59273.

25. Therefore, the EPA Reg. No. for the pesticide product "H2O Specialties Slow Dissolving Chlorinating Large Tabs" is 7124-18-59273.

26. "NUCLO 7 Days Tablets 3" Chlorinating 5.7 oz.," also known as "H2O Specialties Slow Dissolving Chlorinating Large Tabs," is a "pesticide" as that term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

27. On December 18, 2007, an inspector employed by the Illinois Department of Agriculture and authorized to conduct inspections under FIFRA conducted an inspection at FIM's place of business located at 1500 N. Larkin Avenue in Joliet, IL 60435.

28. During the December 18, 2007 inspection, the inspector observed the product "H2O Specialties Slow Dissolving Chlorinating Large Tabs" on the retail store shelf.

29. The containers of the product “H2O Specialties Slow Dissolving Chlorinating Large Tabs” bore the UPC code 2533612040.

30. During the December 18, 2007 inspection, the product “H2O Specialties Slow Dissolving Chlorinating Large Tabs” was being distributed or sold.

31. During the December 18, 2007 inspection, the inspector observed that the containers of “H2O Specialties Slow Dissolving Chlorinating Large Tabs,” did not bear the EPA Reg. No. 7124-18-59273.

32. During the December 18, 2007 inspection, the inspector observed that the containers of “H2O Specialties Slow Dissolving Chlorinating Large Tabs,” did not bear an EPA Establishment Number (Est. No.).

33. On or about December 18, 2007, FIM was distributing or selling “H2O Specialties Slow Dissolving Chlorinating Large Tabs,” EPA Reg. No. 7124-18-59273, as those terms are defined in Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg).

34. On December 20, 2007, an inspector employed by the Illinois Department of Agriculture and authorized to conduct inspections under FIFRA conducted an inspection at FIM’s place of business at 700 W. Highway (Route 30), New Lenox, Illinois 60451.

35. During the December 20, 2007 inspection, the inspector observed the product “H2O Specialties Slow Dissolving Chlorinating Large Tabs” on the store shelf.

36. During the December 20, 2007 inspection, the product “H2O Specialties Slow Dissolving Chlorinating Large Tabs” was being distributed or sold.

37. During the December 20, 2007 inspection, the inspector observed that the containers of “H2O Specialties Slow Dissolving Chlorinating Large Tabs,” did not bear the EPA Reg. No. 7124-18-59273.

38. During the December 20, 2007 inspection, the inspector observed that the containers of “H2O Specialties Slow Dissolving Chlorinating Large Tabs,” did not bear an EPA Est. No.

39. On or about December 20, 2007, FIM was distributing or selling “H2O Specialties Slow Dissolving Chlorinating Large Tabs,” EPA Reg. No. 7124-18-59273, as those terms are defined in Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg).

40. On February 6, 2008, an inspector employed by the Illinois Department of Agriculture and authorized to conduct inspections under FIFRA conducted an inspection at FIM’s place of business at 490 Windy Point Drive, Glendale Heights, IL 60139.

41. During the February 6, 2008 inspection, the warehouse manager at this FIM facility confirmed that Alden Leeds manufactured “H2O Specialties Slow Dissolving Chlorinating Large Tabs,” EPA Reg. No. 7124-18-59273.

42. During the February 6, 2008 inspection, the inspector collected shipping records showing the shipment of “H2O Specialties Slow Dissolving Chlorinating Large Tabs” from Alden to FIM.

Count 1

43. Complainant incorporates by reference the allegations contained by paragraphs 1 through 42 of the Complaint.

44. On or about December 18, 2007, Respondent was distributing or selling a pesticide product, "H2O Specialties Slow Dissolving Chlorinating Large Tabs," that was misbranded, as that term is defined by Sections 2(q)(1)(D) and 2(q)(2)(C) of FIFRA, 7 U.S.C. §§ 136(q)(1)(D) and 136(q)(2)(C) because the label on the pesticide product did not bear the EPA Reg. No. and EPA Est. No.

45. The distribution or sale of the misbranded pesticide, "H2O Slow Dissolving Chlorinating Large Tabs," constitutes an unlawful act pursuant to Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E) and subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty under Section 14(a) of FIFRA, 7 U.S.C. §136l(a).

Count 2

46. Complainant incorporates by reference the allegations contained by paragraphs 1 through 42 of the Complaint.

47. On or about December 20, 2007, Respondent was distributing or selling a pesticide product, "H2O Specialties Slow Dissolving Chlorinating Large Tabs," that was misbranded, as that term is defined by Sections 2(q)(1)(D) and 2(q)(2)(C) of FIFRA, 7 U.S.C. §§ 136(q)(1)(D) and 136(q)(2)(C) because the label on the pesticide product did not bear the EPA Reg. No. and EPA Est. No.

48. The distribution or sale of the misbranded pesticide, Slow Dissolving Chlorinating Large Tabs, constitutes an unlawful act pursuant to Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E) and subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty under Section 14(a) of FIFRA, 7 U.S.C. §136l(a).

Civil Penalty

49. Pursuant to Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), Complainant determined that an appropriate civil penalty to settle this action is \$0. In determining the penalty amount, Complainant considered the appropriateness of the penalty to the size of Respondent's business, the effect on Respondent's ability to continue in business, and the gravity of the violation. Complainant also considered EPA's *Enforcement Response Policy for FIFRA Section 7(c)*(ERP), dated June 2007. Based on an ability to pay analysis, EPA has determined that Respondent does not have an ability to pay any penalty amount and has therefore mitigated the penalty to \$0.

General Provisions

50. This CAFO resolves only Respondent's liability for federal civil penalties for the violation and facts alleged in the CAFO.

51. This CAFO does not affect the right of the EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

52. This CAFO does not affect Respondent's responsibility to comply with FIFRA and other applicable federal, state, and local laws.

53. This CAFO is a "final order" for purposes of EPA's ERP for FIFRA.

54. The terms of this CAFO bind Respondent, its successors, and assigns.

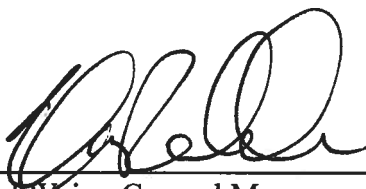
55. Each person signing this agreement certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

56. Each party agrees to bear its own costs and attorney's fees in this action.

57. This CAFO constitutes the entire agreement between the parties.

**Fun In Motion, Inc.
d/b/a/ F.I.M. Stores
Respondent**


12/15/2009
Date



Neal Weiss, General Manager
Fun In Motion, Inc.
d/b/a F.I.M. Stores

U.S. Environmental Protection Agency, Complainant

2/10/2010
Date



Margaret M. Guerriero
Director
Land and Chemicals Division

In the Matter of:
Fun In Motion, Inc.
d/b/a/ F.I.M. Stores
Docket No. FIFRA-05-2010-0007

Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

2/11/10
Date

Walter W. Kovalutz
for
Bharat Mathur
Acting Regional Administrator
U.S. Environmental Protection Agency
Region 5

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ENVIRONMENTAL
PROTECTION AGENCY
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OFFICE OF REGIONAL
COUNSEL


CERTIFICATE OF SERVICE

I hereby certify that the original signed copy of the Consent Agreement and Final Order in resolution of the civil administrative action involving Fun In Motion d/b/a F.I.M. Stores, was filed on February 16, 2010 with the Regional Hearing Clerk (E-19J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois, 60604, and that I mailed by Certified Mail, Receipt No. 7001 0320 0006 0189 9897, a copy of the original to the Respondents:

Mr. Neal Weiss
Fun In Motion, Inc.
4352 Lindenwood Lane
Northbrook, IL 60062

and forwarded copies (intra-Agency) to:

Marcy Toney, Regional Judicial Officer, ORC/C-14J
Nidhi O'Meara, Regional Judicial Officer, ORC/C-14J
Eric Volck, Cincinnati Finance/MWD


Frederick Brown
Pesticides and Toxics Compliance Section
U.S. EPA - Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Docket No. **FIFRA-05-2010-0007**

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