

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2

September 29, 2021 @ 8:24 am

USEPA – Region II
Regional Hearing Clerk

In the Matter of

Reckitt Benckiser LLC,

Respondent.

CONSENT AGREEMENT AND
FINAL ORDER

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

Docket No. FIFRA-02-2021-5191

Consent Agreement

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. § 136I(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 (CROP)* as codified at 40 C.F.R. Part 22. Pursuant to Section 22.13(b) of the Consolidated Rules of Practice, where the parties agree to settlement of one or more causes of action before the filing of an administrative complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a Consent Agreement and Final Order pursuant to 40 C.F.R. §§ 22.18(b)(2) and (3).
2. The Complainant is the Director of the Enforcement and Compliance Assurance Division, United States Environmental Protection Agency (EPA), Region 2.
3. Respondent is Reckitt Benckiser LLC, a Delaware limited liability company, with an office located at 399 Interpace Parkway, Parsippany, New Jersey 07054.
4. 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.
5. Respondent consents to the assessment of the civil penalty specified in this Consent

Agreement and to its terms and requirements, and further consent to the issuance of the accompanying Final Order ratifying this Consent Agreement.

Jurisdiction and Waiver of Right to Hearing

6. Respondent admits the jurisdictional allegations set forth in this Consent Agreement, and it neither admits nor denies the factual allegations set forth in this Consent Agreement.

7. Respondent waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c), and any right it may have to contest the allegations in this Consent Agreement and to seek and obtain review by the Environmental Appeals Board or judicial review in any federal court.

Statutory Background

8. Section 2(p)(1) of FIFRA, 7 U.S.C. § 136(p)(1), defines “label” as “the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.”

9. Section 2(p)(2)(A) of FIFRA, 7 U.S.C. § 136(p)(2)(A), defines, in relevant part, “labeling” to “mean[] all labels and all other written, printed, or graphic matter...accompanying the pesticide...at any time; or which reference is made on the label or in literature accompanying the pesticide or device [exceptions not relevant here not listed].”

10. Section 2(q)(1)(A) of FIFRA, 7 U.S.C. § 136(q)(1)(A), states, in relevant part, that “[a] pesticide is misbranded if...its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading....”

11. The regulation codified at 40 C.F.R. § 156.10(a)(5)(i) through (x) states that a pesticide is misbranded if its labeling is false or misleading in any particular manner, including with regard to both pesticidal and non-pesticidal claims.

12. Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines the term “person” to “mean[] any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.”

13. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines the term “pest” to include any rodent.

14. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines, in relevant part, the term “pesticide” to mean[] “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest....”

15. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines, in relevant part, the term “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.”

16. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), provides, in relevant part, that “it shall be unlawful for any person in any State to distribute or sell to any person...any pesticide which is...misbranded....”

17. Section 14(a)(l) of FIFRA, 7 U.S.C. § 136l(a)(l), provides, in relevant part, that “[a]ny...wholesaler, dealer, retailer, or other distributor who violates any provision of this subchapter may be assessed a civil penalty by [EPA] of not more than \$5,000 for each offense....” The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, 28 U.S.C. § 2461 *note*, and its implementing regulations at 40 C.F.R. Part 19, have increased this amount to \$20,528 for each offense occurring after November 2, 2015, where penalties are assessed on or after December 23, 2020.

Factual Allegations and Alleged Violations

18. Respondent is, and has been for all times relevant to the matters asserted below, a limited liability company, and therefore, a “person” as that term is defined at Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

19. Reckitt is a supplemental distributor of two products for which the BASF company is the primary registrant: the “d-CON XVI Kills House Mice” (also known as “d-CON Kills House Mice,” a refillable bait station; EPA Registration Number 7969-383-3282; hereinafter “d-383”) and “d-CON XVII Kills House Mice” (a disposable bait station also known as “d-CON Disposable Bait Stations”; EPA Registration Number 7969-384-3282; hereinafter “d-384”). For these two products, Respondent has a supplemental distribution agreement with BASF.

20. Each of d-383 and d-384 is a “pesticide” within the meaning of Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

21. Respondent “distributes or sells,” and has “distributed or sold” during the time periods set forth below, within the meaning of Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg).

22. Respondent is, and has been during the time periods set forth below, a “registrant,” “wholesaler,” or “other distributor” of pesticides within the meaning of Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).

23. On December 18, 2018, pursuant to Sections 8 and 9 of FIFRA, duly designated Region 2 inspectors conducted an inspection at the Home Depot retail store in South Plainfield, New Jersey.

24. The Region 2 inspectors observed d-384 being offered for sale at Home Depot with a shipping box that was also a product display box bearing the claim “10x Tastier Than Lead Competitor” (hereinafter “10x Tastier”).

25. Several months later, on March 8, 2019 EPA Region 2 conducted an inspection at

Respondent's Parsippany, New Jersey office.

26. At the inspection at Respondent's office, EPA's inspectors reviewed labels and records related to the sale and distribution of the d-383 and d-384 products and requested representative advertising material for the d-383 and d-384 products and additional sales information which was provided after the inspection.

27. Prior to the Region 2 inspections, on October 16, 2018 and March 4, 2019, EPA Headquarters staff in the Office of Pesticide Programs, based on preliminary information received from other sources, advised Respondent that the use of the "10x Tastier" claim in conjunction with the sale and distribution (or offering for sale and distribution) was considered by EPA to be a false and misleading claim, and thus not in conformity with FIFRA provisions. Thereafter, Respondent voluntarily discontinued use of the claim.

28. Subsequent to the inspection at Respondent's facility, the requested representative advertising materials were provided for the d-383 and d-384 products. Three examples were included: one of a display unit and two print advertisements, all with the "10x Tastier" claim.

29. As a result of the two inspections and upon review of all the materials received, Region 2 staff documented that Respondent had sold and distributed, and had offered to sell and distribute, the and d-383 and d-384 with advertising claims that it was "10x Tastier Than Lead Competitor."

30. More specifically, through these inspections and information Respondent voluntarily provided, EPA learned that in calendar year 2018, on at least 239 separate instances, Respondent sold and distributed the d-383 and/or d-384 products with shipping containers bearing the "10x Tastier" advertising claim.

31. EPA interprets, consistent with applicable provisions, the "10x Tastier" statement to be a false and misleading comparison claim within the meaning of 40 C.F.R. 156.10(a)(5)(iv).

32. Each of the 239 sales or distributions of the d-383 and d-384 described in Paragraph 30, above, constitutes a sale or distribution of a misbranded pesticide within the meaning of Section 2(q)(1)(A) of FIFRA, 7 U.S.C. § 136(q)(1)(A).

33. Each of Respondent's sales or distributions of d-383 and d-384 with the "10x Tastier" claim, as alleged herein, constitutes an unlawful act as provided for in Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

34. Each of Respondent's aforementioned sales or distributions of d-383 and d-384, as alleged herein, constitutes a separate and distinct violation for which EPA may assess a penalty pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).

Civil Penalty

35. 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 to be \$458,000. In determining the penalty amount Complainant has, consistent with Section 14(a), considered the appropriateness of the penalty to the size of Respondent's business, the effect on Respondent's ability to continue in business, the gravity of the violations, and, further, in accord with the guidance of EPA's Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act, dated December 2009 (FIFRA ERP), Respondent's good faith and timely efforts to address and mitigate the allegations.

36. Respondent shall pay, by any one of the three methods set forth below, a civil penalty in the amount of **FOUR HUNDRED FIFTY-EIGHT THOUSAND DOLLARS (\$458,000)**. Such payment must be received by EPA on or before thirty (30) days from the date on which the Acting Regional Administrator signs the Final Order which is located at the end of this CAFO (Due Date).

a. Cashier's or Certified Check: If payment is made by cashier's check or by certified check, such check shall be made payable to the "Treasurer, United States of America,"

and shall be identified with a notation thereon listing the following: **In the Matter of Reckitt Benckiser LLC, Docket No. FIFRA-02-2021-5191**. If payment is made by either form of check, such payment shall be mailed by wither of the following methods:

STANDARD DELIVERY

United States Environmental Protection Agency
Fines & Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

SIGNED RECEIPT CONFIRMATION DELIVERY (Fedex, DHL, UPS, USPS, Certified, Registered, etc.)

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

b. Fedwire: If Respondent chooses to make payment electronically through Fedwire, Respondent shall provide the following information to its remitter bank (Federal Reserve Bank of New York) when each payment is made:

- a. Amount of payment
- b. SWIFT address: **FRNUS33, 33 Liberty Street, New York, NY 10045**
- c. Account Code for Federal Reserve Bank of New York receiving payment: **68010727**
- d. Federal Reserve Bank of New York ABA routing number: **021030004**
- e. Field Tag 4200 of the Fedwire message should read: **“D 68010727 Environmental Protection Agency”**
- f. Name of Respondent: **Reckitt Benckiser LLC**
- g. Case Docket Number: **FIFRA-02-2021-5191**

c. On-line payment: If Respondent chooses to make on-line payment, Respondent shall go to **www.pay.gov** and enter SFO 1.1 in the search field on the tool bar on the Home Page; select Continue under “EPA Miscellaneous Payments – Cincinnati Finance Center;” and open the form and complete the required fields. Once payment has been made, Respondent shall email

proof of payment to Spielmann.Lee@epa.gov and Wise.Milton@epa.gov and shall note on the subject line **In the Matter of Reckitt Benckiser LLC, FIFRA-02-2021-5191**.

37. Failure to pay the full amount of the penalty, according to the above provisions, will result in the referral of this matter to the United States Department of Justice and/or the United States Department of Treasury for collection and/or other appropriate action. The validity, amount and appropriateness of the civil penalty are not reviewable in a collection action.

38. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, EPA is entitled to assess interest, administrative costs and late payment penalties on outstanding debts owed to the United States, including the United States Environmental Protection Agency, and a charge to cover costs of processing and handling delinquent claims. Forty C.F.R. § 13.119(a)(1) provides for assessing the annual rate of interest that is equal to the rate of the current value of funds to the United States Treasury (*i.e.*, the Treasury tax and loan account rate) on installment payments, which is one percent (1%) per annum for calendar year 2021.

a. Interest: Any unpaid portion of a civil penalty must bear interest at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1). Interest will therefore begin to accrue on any portion of the civil penalty not paid by the relevant Due Date(s) specified above. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a).

b. Handling Charges: Pursuant to 31 U.S.C. § 3717(e)(1), a monthly handling charge of fifteen dollars (\$15.00) shall be assessed for each thirty (30) day calendar period, or any portion thereof, following the date the payment was to have been made, in which payment of the amount remains in arrears.

c. Late Penalty Charge: A late penalty charge of six percent (6%) per year will be assessed monthly on any portion of the civil penalty that remains delinquent more than ninety

(90) calendar days. 40 C.F.R. § 13.11(c). The late payment penalty on any portion of the civil penalty that remains delinquent more than ninety days shall accrue from the first day payment is delinquent. 31 C.F.R. § 901.9(d).

39. The civil penalty, including any payment(s) for interest or late payment and handling charges that come due, constitutes a penalty within the meaning of 26 U.S.C. § 162(f) and does not constitute a deductible expenditure for purposes of federal or state law.

General Provisions

40. Respondent certifies that, to the best of its knowledge, it is currently in compliance with applicable provision of FIFRA, 7 U.S.C. §§ 136-136y, and its implementing regulations.

41. Respondent explicitly and knowingly consents to the assessment of the civil penalty as set forth in this Consent Agreement and agrees to pay the penalty in accordance with the terms of this Consent Agreement. Full payment of the penalty shall only resolve Respondent's liability for federal civil penalties for the violations described in paragraphs 29-34, above. Full payment of this penalty shall not in any case affect the authority of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

42. This Consent Agreement is not intended and is not to be construed to waive, extinguish, or otherwise affect Respondent's obligation to comply with all applicable federal, state, or local laws, rules, or regulations, nor shall it be construed to be a ruling on, or a determination of, any issue related to any federal, state, or local permit. This Consent Agreement is not intended and is not to be construed to waive, extinguish, or otherwise affect Respondent's obligation to comply with all applicable provisions of FIFRA and the regulations promulgated thereunder.

43. Compliance with the requirements and provisions of this Consent Agreement shall not constitute a defense to any subsequent (*i.e.*, following the filing of this document) action, suit or

proceeding EPA (or the United States on behalf of EPA) may commence pursuant to any applicable federal statutory or regulatory provision for any violation(s) occurring after the date of the execution of the Final Order accompanying this Consent Agreement, or for any violation(s) of FIFRA statutory or regulatory requirements or prohibitions not alleged herein but that may have occurred prior to the date of the execution of the Final Order accompanying this Consent Agreement.

44. Respondent consents to the use of electronic signatures in this matter and to service upon it of a copy of this Consent Agreement and Final Order by an EPA employee other than the Regional Hearing Clerk via electronic mail to the following addressee(s):

lawrence.culleen@arnoldporter.com. Delivery of the fully executed documents to the email addresses in this paragraph shall constitute Respondent's receipt and acceptance of the CAFO.

45. Any responses, documentation, and other communication submitted to EPA in connection with this Consent Agreement shall be sent by regular mail and email to:

Kristen Ridarick
Lead Paint & Pesticides Compliance Section
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency – Region 2
2890 Woodbridge Avenue, MS 500
Edison, NJ 08837
ridarick.kristen@epa.gov

and

Lee A. Spielmann
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency – Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866
spielmann.lee@epa.gov

Unless the above-named EPA contact is later advised otherwise by electronic mail, EPA shall address any written future correspondence (including any correspondence related to payment of the penalty in accordance with the provisions of this Consent Agreement), to the addressee identified in the preceding

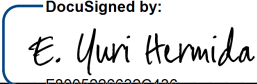
paragraph.

46. Respondent has read the Consent Agreement, understands its terms, finds it to be acceptable, and consents to its issuance and its terms. Respondent agrees that this Consent Agreement, as it is subsequently to be ratified with execution of the accompanying Final Order, constitutes the entire agreement between the parties and all terms of settlement are set forth herein.

47. The terms of this Consent Agreement binds Respondent, its successors, and assigns. 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.

48. Each party agrees to bear its own costs and attorney fees in this action.

RESPONDENT:

BY: 
F8005220632C436
(Signature)

NAME: E. Yuri Hermida

TITLE: President & C.E.O.

COMPANY NAME: Reckitt Benckiser LLC

DATE: 9/27/2021

COMPLAINANT:

For Dore LaPosta, Director
Enforcement & Compliance Assurance Division
U.S. Environmental Protection Agency Region 2

DATE: _____

FINAL ORDER

The Regional Administrator of EPA, Region 2, concurs in the foregoing Consent Agreement in the case of **In the Matter of Reckitt Benckiser LLC, FIFRA-02-2021-5191**. Said Consent Agreement, having been duly accepted and entered into by the parties, is hereby ratified and incorporated into this Final Order, which is hereby issued and shall take effect when filed with the Regional Hearing Clerk of EPA, Region 2. 40 C.F.R. § 22.31(b). This Final Order is being entered pursuant to the authority of 40 C.F.R. § 22.18(b)(3).

Walter Mugdan
Acting Regional Administrator
U.S. Environmental Protection Agency – Region 2
290 Broadway, 26th Floor
New York, New York 10007-1866

DATED: _____
New York, New York

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing fully executed Consent Agreement and Final Order, bearing the above-referenced docket number, in the following manner to the respective addressees listed below:

By Electronic Mail:

Karen Maples
Office of the Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 2
290 Broadway, 16th Floor
New York, New York 10007-1866
maples.karen@epa.gov

By Electronic Mail

Lawrence Culleen, Esq.
Arnold & Porter
lawrence.culleen@arnoldporter.com

Dated: _____, 2021
New York, New York
