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THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 4

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| In the matter of: |) | DOCKET NO: FIFRA-04-2011-3020 |
| |) | |
| United Global Trading, Inc. |) | Proceeding under Section 14(a) |
| |) | of the Federal Insecticide, Fungicide, |
| |) | and Rodenticide Act (FIFRA), 7 U.S.C. |
| |) | § 1361(a) |
| Respondent |) | |
| _____ |) | |

**MOTION FOR ACCELERATED DECISION ON LIABILITY AND PENALTY
AMOUNT**

Complainant, the United States Environmental Protection Agency (EPA), Region 4, hereby makes this motion and submits the accompanying brief pursuant to 40 C.F.R. Sections 22.16(a) and 22.20(a). Complainant seeks an Order for accelerated decision on liability and penalty amount for Respondent's acts or omissions with reference to all of the Counts contained in the Complaint. In its Answer, Respondent admitted all statements of fact contained in the Complaint. Therefore, no issues of material fact exist with respect to Respondent's liability. Similarly, no issues of material fact exist with respect to Complainant's assessment of a penalty of \$55,900, which is reasonable and appropriate pursuant to the statutory factors and the applicable penalty policy. Respondent has elected not to furnish Complainant or the court with any information that would go to a reduction of the penalty. Accordingly, Complainant is entitled to a judgment as a matter of law on both liability and penalty amount.

Respectfully Submitted,

D. Benjamin

Deborah S. Benjamin
Associate Regional Counsel
U.S. Environmental Protection Agency, Region 4

8/27/13
Date

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 4

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BEFORE THE ADMINISTRATOR

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| In the Matter of: |) | DOCKET NO.: FIFRA-04-2011-3020 |
| UNITED GLOBAL TRADING, INC., |) | PROCEEDING UNDER SECTION |
| Respondent. |) | 14(a) OF THE FEDERAL |
| |) | INSECTICIDE, FUNGICIDE, AND |
| |) | RODENTICIDE ACT, 7 U.S.C. 136l(a) |
| |) | |

**COMPLAINANT'S BRIEF IN SUPPORT OF ITS MOTION FOR ACCELERATED
DECISION ON LIABILITY AND PENALTY AMOUNT**

Complainant, the Director of the Air, Pesticides and Toxics Management Division, United States Environmental Protection Agency Region 4 ("EPA"), by and through the undersigned attorney, hereby submits this brief in support of its Motion for Accelerated Decision on liability and penalty amount with reference to the allegations contained in the Complaint. Respondent has admitted all the factual allegations contained in the Complaint, and no material issues of fact exist regarding liability. Additionally, no issues of material fact exist regarding the penalty. Accordingly, Complainant is entitled to judgment as a matter of law on liability and penalty amount. Complainant moves for a finding that Respondent violated the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) as described in the Complaint, and for the issuance of an Order assessing a penalty of \$55,900.

I. BACKGROUND

On May 10, 2011, EPA filed a Civil Complaint and Notice of Opportunity for Hearing against United Global Trading, Inc., (Complaint).¹ On June 15, 2011, Mr. Augustine Paldano, president and owner of Respondent United Global Trading, Inc., faxed Ms. Dawn Johnson, a representative of EPA Region 4's pesticide program, a copy of a letter apparently intended to be Respondent's Answer to the Complaint. See Complainant's Prehearing Exchange (PHE) Exhibit (Ex.) 39 [Affidavit of Ms. Johnson] at ¶ 5. In its Answer, Respondent agreed with the facts set forth in the Complaint, Section B ("Statement of Facts"), as stated in Paragraphs 5 through 19 of the Complaint. See PHE Ex. 38 [Respondent's Answer/letter]. Additionally, Respondent agreed with and did not contest any of the violations alleged in Counts 1 through 9. *Id.* The Complaint contains nine Counts. Counts 1 through 4 allege Respondent's unlawful distribution or sale of an unregistered pesticide, on at least four occasions, in violation of Section 12(a)(1)(A) of FIFRA. Counts 5 through 8 allege Respondent's unlawful sale of a misbranded pesticide on at least four occasions, in violation of Section 12(a)(1)(E) of FIFRA. Count 9 alleges Respondent's unlawful importation of a pesticide into the United States without submitting a Notice of Arrival as required by FIFRA Section 17(e), and the regulations promulgated thereto at 19 C.F.R. § 12.112(a). Accordingly, Respondent admitted all of the facts and allegations of violation for each of the Counts contained in the Complaint. Finally, Respondent stated that it would adhere to any penalty resulting from the violations, but that it may have difficulty paying the penalty if it exceeds Respondent's income. *Id.*

¹ United Global Trading, Inc., was administratively dissolved in 2012, the year after the complaint was filed. Pursuant to FLA. STAT. § 607.1405(2)(e) (2013) "dissolution of a corporation does not prevent commencement of a proceeding by or against the corporation in its corporate name." Accordingly, this proceeding against United Global Trading, Inc., continues despite the fact that the corporation has been administratively dissolved.

On June 27, 2011, Mr. Augustine Paldano contacted Keri Powell, the EPA attorney assigned to the case at that time. *See* PHE Ex. 40 [Affidavit of Keri N. Powell], ¶¶ 6-7. Ms. Powell invited Mr. Paldano to join her and Ms. Johnson on a teleconference later that week to discuss the Complaint. *Id.* at ¶ 8. On June 30, 2011, Mr. Paldano participated in a teleconference with Ms. Powell and Ms. Johnson. *Id.* at ¶ 9. The parties discussed the proposed penalty set forth in the Complaint, and the EPA representatives explained that the penalty could be reduced to reflect Respondent's cooperation. *Id.* at ¶ 11. Mr. Paldano indicated that he was interested in demonstrating that Respondent is unable to pay the penalty. *Id.* at ¶ 12. Mr. Paldano stated that he would provide support for his inability-to-pay claim within two or three weeks; specifically, Mr. Paldano agreed to provide EPA with copies of Respondent's tax returns from the previous three years. *Id.*

The June 30, 2011, teleconference was the last contact between the EPA and Respondent. *Id.* at ¶ 13. Following that call, Respondent did not provide EPA with copies of Respondent's tax returns. *Id.* at ¶¶ 14-15. Ms. Powell attempted to contact Respondent using the phone number provided by Mr. Paldano on the June 30, 2011, teleconference, but no one answered or returned her phone message. *Id.* at ¶ 16.

In accordance with the Prehearing Order dated May 22, 2013, which directed Complainant to contact Respondent to explore the possibility of settlement, Complainant again attempted to contact Respondent. On June 7, 2013, the undersigned left a detailed voice mail message for Mr. Paldano at his residence, and also tried the phone number for United Global Trading, Inc., and found that it had been disconnected. On that date the undersigned also attempted to find the phone numbers of two other businesses Mr. Paldano has interests in (RMX Global Trading, Inc., and Sunshine Steam Cleaners, Inc.), to see if he could be reached through

those companies. Phone numbers could not be found through phone book searches, or thorough various other internet searches.

On June 12, 2013, the undersigned tried seven additional phone numbers for Mr. Paldano that had been identified by EPA through a public records search. A male answered one of the mobile numbers and said that he was not Augustine Paldano, and that EPA had the wrong number. The undersigned was able to leave a detailed voice mail message on two of the mobile phone numbers (one of which was the same number that Mr. Paldano had provided to the State of Florida during a 2011 site visit). A third mobile number had a recording that said the owner was not accepting calls at this time. Of two numbers identified as land lines, one number could not be completed as dialed, and the other was disconnected. A final number, not specified as mobile or land line, was not in service. To date Complainant has not been able to establish any contact with Mr. Paldano.

The Prehearing Order directed Respondent to file its Prehearing Exchange by August 2, 2013. Respondent failed to file a Prehearing Exchange, in violation of the Prehearing Order.

On August 7, 2013, the undersigned performed an internet search for "Augustine Paldano" using the Google search engine. Eight positive results came up including listings on the following websites: Facebook; LinkedIn; Intelius, MyLife; Corporationwiki; Sales Spider; and Onesource. It appears that Respondent has made a conscious decision to simply ignore this matter.

II. STANDARD OF REVIEW

The Consolidated Rules of Practice at 40 C.F.R. § 22.20(a) provide that the Presiding Officer may render an accelerated decision as to any or all parts of a proceeding "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." A motion for

accelerated decision is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *In re CWM Chemical Serv., Inc.*, 6 EAD 1, 12 (1995); *In re Cenex/Land O'Lakes Agronomy Co.*, 1998 EPA ALJ LEXIS 48, Docket No. 5-EPCRA-076-97 (June 29, 1998).

Although the burden of showing the absence of genuine issues of material fact rests on the moving party, the mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. Rather, the party responding to a motion for accelerated decision must produce some evidence that places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. *Cenex/Land O'Lakes*, at 3. "Bare assertions, conclusory allegations or suspicions" are insufficient to raise a genuine issue of material fact precluding summary judgment. *Id.* citing *Jones v. Chieffo*, 833 F. Supp. 498, 503 (E.D. Pa. 1993).

As the following sections of this brief will show, no genuine issue of material fact exists with respect to Respondent's liability. This brief will also show that no genuine issue of material fact exists with reference to EPA's calculation of a reasonable and appropriate penalty.

III. STATUTORY AND REGULATORY AUTHORITY

FIFRA establishes a comprehensive scheme for registering and regulating pesticides in order to provide for the protection of human beings and the environment. *See Doe v. Veneman*, 380 F.3d 807, 816 (5th Cir. 2004). FIFRA grants enforcement authority to EPA, including the authority to register pesticides and ensure that any registered pesticides comply with FIFRA's mandates. *See generally* 7 U.S.C. §§ 136a, 136j-1. As part of its comprehensive regulatory scheme, Section 3(a) of FIFRA, 7 U.S.C. § 136a(a), provides that no person may distribute or sell to any person any pesticide that is not registered under FIFRA, and provides for procedures

for proper registration of pesticides. FIFRA also prohibits any person from selling or distributing mislabeled pesticide. *See* FIFRA Section 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E). Additionally, FIFRA requires that regulations be promulgated addressing the importation of pesticides. *See* FIFRA Section 17(e), 7 U.S.C. § 136o(e). The regulations found at 19 C.F.R. §§ 12.110-12.117 were promulgated to satisfy this requirement. Specifically, 19 C.F.R. §112(a) requires that an importer desiring to import pesticides or devices must submit a Notice of Arrival to the EPA Administrator prior to the arrival of the shipment into the United States.

Pursuant to FIFRA Section 14(a)(4), 7 U.S.C. § 136l(a)(4), in calculating FIFRA penalties EPA is directed to consider “the appropriateness of such penalty to the size of the business of the person charged, the effect on the person’s ability to remain in business, and the gravity of the violation.”

IV. RESPONDENT HAS ADMITTED ALL OF THE FACTUAL ALLEGATIONS CONTAINED IN THE COMPLAINT

In its Answer, Respondent “agree[d] with the statement of facts set forth in Section B (“Statement of Facts”) of the Complaint, **paragraphs 5 through 19.**” *See* Respondent’s Answer/letter included as PHE Ex. 38. Furthermore, Respondent “agree[d] with all the facts stated from **Count 1 to 9.**” *Id.* The Complaint contains a total of nine Counts. Accordingly, Respondent admitted all of the facts which establish all of alleged violations contained in the Complaint. Thus, there are no issues of material fact as to liability, and an Order should be issued finding that Respondent violated Section 12 of FIFRA as alleged in Count 1 through Count 9 of the Complaint.

A. Counts 1 through 4: Distribution or Sale of an Unregistered Pesticide.

Counts 1 through 4 of the Complaint allege that Respondent violated Section 12(a)(1)(A) of

FIFRA, 7 U.S.C. § 136j(a)(1)(A), by distributing or selling an unregistered pesticide. That Section makes it unlawful for any person to distribute or sell any pesticide that is not registered under Section 136a of FIFRA. Royalty Black Disinfectant is a “pesticide,” and is an “antimicrobial pesticide,” as those terms are defined respectively at Sections 2(u) and (mm) of FIFRA, 7 U.S.C. § 136(u) and (mm). Royalty Black Disinfectant is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a. Respondent sold Royalty Black Disinfectant on at least four occasions. Respondent violated Section 12(a)(1)(A) of FIFRA on at least four occasions when it sold Royalty Black Disinfectant, an unregistered antimicrobial pesticide, to retail outlets which in turn sell to the general public. The factual allegations contained in Paragraphs 1 through 19 of the Complaint, which Respondent admitted, establish the facts necessary for a finding that the violations occurred as alleged in Counts 1 through 4 of the Complaint.

B. Counts 5 through 8: Distribution or Sale of a Misbranded Pesticide.

Counts 5 through 8 of the Complaint allege that Respondent distributed or sold a misbranded pesticide in violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E). Sections 2(q)(1)(E), (D), (F), and (A) of FIFRA, 7 U.S.C. §§ 136(q)(1)(E), (D), (F), and (A), specify that a pesticide is misbranded if (1) any word, statement, or other information required by or under authority of FIFRA does not appear on the label or is not prominently placed thereon; (2) its label does not bear the registration number assigned by EPA to each establishment in which it was produced; (3) its label does not include directions for use which are necessary for effectuating FIRA’s purposes; and (4) its label does not include the required ingredient statement. Respondent violated these requirements on at least four separate occasions when it sold Royalty Black Disinfectant to retail outlets, which in turn sell to the general public, where the pesticide’s label omitted information required by these Sections of FIFRA. Specifically, the

Royalty Black Disinfectant was misbranded on the dates of sale in that its label omitted information required under FIFRA, including (1) the product registration number; (2) the producing establishment number; (3) directions for use; and (4) an ingredient statement. Accordingly, Royalty Black Disinfectant was “misbranded” as that term is defined at Section 2(q) of FIFRA, 7 U.S.C. § 136(q)(2)(A). The factual allegations contained in Paragraphs 1 through 19 of the Complaint, which Respondent admitted, establish the facts necessary for a finding that the violations occurred as alleged in Counts 5 through 8 of the Complaint.

C. Count 9: Failure to File a Notice of Arrival. Count 9 of the Complaint alleges that Respondent violated Section 12(a)(2)(N) of FIFRA, 7 U.S.C. § 136j(a)(2)(N), by importing a pesticide into the United States without filing a Notice of Arrival with the EPA Administrator as required by 19 C.F.R. § 12.112(a). The importation of pesticides into the United States is governed by Sections 17(c) and (e) of FIFRA, 7 U.S.C. §§ 136o(c) and 136o(e), and the regulations prescribed thereunder. FIFRA Section 17(c) requires that the Secretary of the Treasury notify the EPA Administrator of the arrival of pesticides in the United States. FIFRA Section 17(e), 7 U.S.C. §136o(e), requires the Secretary of the Treasury, in consultation with the EPA Administrator, to promulgate regulations for the enforcement of FIFRA Section 17(c). Pursuant to FIFRA Section 17(e), the Secretary of the Treasury, through the United States Customs Service, promulgated regulations for the enforcement of Section 17(c) of FIFRA at 19 C.F.R. §§ 12.110-12.117. Under 19 C.F.R. § 12.112(a), an importer desiring to import pesticides or devices into the United States must submit a Notice of Arrival to the EPA administrator prior to the arrival of the shipment in the United States. Respondent imported Royalty Black Disinfectant without filing a Notice of Arrival with the EPA Administrator. Pursuant to Section 12(a)(2)(N) of FIFRA, 7 U.S.C. § 136j(a)(2)(N), it is unlawful for any person who is a registrant,

wholesaler, dealer, retailer, or other distributor to fail to file a report required by FIFRA. The factual allegations of Paragraphs 1 through 19 of the Complaint, which Respondent admitted, establish the facts necessary for a finding that the violation occurred as alleged in Count 9 of the Complaint.

Accordingly, no issue of material fact exists with reference to Respondent's liability for all of the violations enumerated in Complaint as described in Counts 1 through 9, and Complainant is entitled to judgment as a matter of law.

V. NO ISSUES OF MATERIAL FACT EXIST REGARDING EPA'S ASSESSMENT OF AN APPROPRIATE PENALTY OF \$55,900

Pursuant to Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), in determining FIFRA penalties EPA is required to consider "the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to remain in business, and the gravity of the violation." To assess the penalty criteria set forth in Section 14(a)(4) of FIFRA in a manner that ensures national consistency, EPA uses its FIFRA Enforcement Response Policy, dated December 2009 ("2009 ERP") [PHE Ex. 1]. In accordance with the 2009 ERP, EPA prepared a penalty calculation worksheet that shows the amount assessed for each count in the Complaint [PHE Ex. 3]. Additionally EPA prepared a detailed narrative statement specifically describing all of the considerations that were factored into calculating the \$55,900 penalty, in accordance with the 2009 ERP [PHE Ex. 3].

As explained above, the Complaint alleges that Respondent committed nine violations of FIFRA:

- (1) **Four counts** of violating Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by distributing or selling a pesticide that is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a,
- (2) **Four counts** of violating Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), by distributing or selling a misbranded pesticide, and
- (3) **One count** of violating Section 12(a)(2)(N) of FIFRA, 7 U.S.C. § 136j(a)(2)(N), by importing a pesticide into the United States without submitting a Notice of Arrival to the EPA Administrator as required by 19 C.F.R. § 12.112(a).

The 2009 ERP [PHE Ex. 1] provides a seven-step process for computing the penalty: (1) determine the number of independently assessable violations (*see* 2009 ERP [PHE Ex. 1] at 16-17); (2) determine the size of business category for the violator (*see* 2009 ERP [PHE Ex. 1] at 18, Table 1); (3) determine the gravity of the violation for each independently assessable violation (*see* 2009 ERP [PHE Ex. 1], Appendix A); (4) determine the “base” penalty amount associated with the size of business and the gravity of violation for each independently assessable violation (*see* 2009 ERP [PHE Ex. 1] at 19);² (5) determine the “adjusted” penalty amount based on case-specific factors using the Gravity Adjustment Criteria (*see* 2009 ERP [PHE Ex. 1] at 20, Table 3, and Appendix B); (6) calculate the economic benefit of noncompliance (*see* 2009 ERP [PHE Ex. 1] at 20-23); and (7) consider the effect that payment of

² The penalty was calculated using the penalty matrix that was in effect at the time Respondent’s violations occurred in 2007. (*See* 1990 ERP, and Memorandum from Stephanie P. Brown, Acting Dir., Toxics & Pesticides Enforcement Div., Office of Civil Enforcement, U.S. EPA, *Penalty Policy Supplements Pursuant to the 2004 Civil Monetary Penalty Inflation Adjustment Rule*, 1, 6 (June 5, 2006)) [PHE Ex. 2]. However, the 2009 ERP [PHE Ex. 1] was in effect at the time EPA brought this action, and it was used to guide the calculation of the penalty instead of the 1990 ERP, because it includes additional adjustments factors that are generally more favorable to Respondents.

the total penalty amount plus economic benefit of noncompliance derived from the above calculation will have on the violator's ability to continue in business (*see* 2009 ERP [PHE Ex. 1] at 23-24).

(1) Independently Assessable Violations. The EPA assesses a separate civil penalty for each independent FIFRA violation. *See* 2009 ERP [PHE Ex. 1] at 16. A violation is considered independent if it results from an act (or failure to act) that is not the result of any other violation for which a civil penalty is to be assessed or if at least one of the elements of proof is different from any other violation. *Id.* The EPA considers violations that occur from each sale or shipment of a product to be independent violations. *Id.*

Counts 1–8: The EPA alleges four counts each of (1) the distribution or sale of an unregistered pesticide, and (2) the distribution or sale of a misbranded pesticide. A violation involving the distribution or sale of an *unregistered* pesticide is independent of a violation involving the distribution or sale of a *misbranded* pesticide because these two violations each require a distinct element of proof. Specifically, to demonstrate the unlawful distribution or sale of an unregistered pesticide, the EPA must prove that at the time of the distribution or sale, the pesticide was not registered under FIFRA Section 3, 7 U.S.C. § 136a. *See* FIFRA Section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A). To demonstrate the unlawful distribution or sale of a misbranded pesticide, on the other hand, Complainant need not demonstrate that the pesticide is unregistered, but instead must prove that the pesticide was “misbranded,” e.g., that a word, statement, or other information required by or under authority of FIFRA did not appear on the pesticide label or was not prominently placed thereon. *See* FIFRA Section 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E); FIFRA Section 2(q), 7 U.S.C. § 136(q). The EPA's basis for alleging four Counts each of the violations involving distribution or sale of an unregistered pesticide and

distribution or sale of a misbranded pesticide is that Respondent sold or distributed the pesticide in four separate shipments. Complaint ¶ 12.

Count 9: Count 9 alleges a single violation of FIFRA Section 12(a)(2)(N), 7 U.S.C. § 136j(a)(2)(N), based on Respondent's importation of one shipment of the pesticide Royalty Black Disinfectant into the United States without submission of a Notice of Arrival to the EPA Administrator as required by 19 C.F.R. § 12.112(a).

(2) Size of Business. Only very limited information is available regarding the size of United Global Trading Products, Inc., which is a privately held company. The Dunn & Bradstreet report [PHE Ex. 42], on this company lacks revenue information and indicates that attempts to reach the company to obtain information failed. For purposes of calculating the penalty specified in the Complaint, EPA relied on revenue information provided in a 2009 American Business Report [PHE Ex. 41], which estimated Respondent's estimated annual revenue to be \$3,410,000. Applying the procedure set forth in the 2009 ERP [PHE Ex. 1], the EPA classified Respondent as a "Category 2" business, which is the category applicable to a business with a total annual revenue of between \$1,000,000 and \$10,000,000, taking into account all revenue from the entity and the entity's affiliates. *See* 2009 ERP [PHE Ex. 1] at 19. For purposes of this motion, the EPA searched for updated revenue information. The best available information was a report from DemographicsNow [PHE Ex. 43], which provides an annual sales figure of \$333,000. Based on the DemographicsNow [PHE Ex. 43] sales figure, the EPA reclassified Respondent as a "Category 3" business, which is the category applicable to a business with total annual revenues of under \$1,000,000.

(3) Gravity of the Violation. The "gravity level" assigned to each FIFRA violation is listed on a chart in Appendix A of the 2009 ERP [PHE Ex. 1]. The gravity level assigned to a

violation reflects the violation's relevant severity based on the actual or potential harm to human health and the environment and the importance of the requirement to achieving the statutory goals. The gravity levels range from Level 1 to Level 4, with Level 1 being the most serious. The gravity levels assigned to Respondent's violations are as follows:

- **Counts 1 through 4:** Distribution or Sale of an Unregistered Pesticide (FIFRA Section 12(a)(1)(A)): Level 1. All violations involving the distribution or sale of an unregistered pesticide are assigned Level 1.
- **Counts 5 through 8:** Distribution or Sale of a Misbranded Pesticide (FIFRA Section 12(a)(1)(E)): Level 1. The gravity level for a misbranding violation varies depending upon what information was omitted or misstated on the product label. In this case, the packaging on the pesticide sold or distributed by Respondent omitted all required labeling information, including directions for use necessary to make the product effective and to adequately protect health and the environment. Thus, in accordance with the 2009 ERP [PHE Ex. 1], the violations alleged in Counts 5-8 are assigned Level 1.
- **Count 9:** Failure to File a Notice of Arrival (FIFRA Section 12(a)(2)(N)): Level 2. Under the 2009 ERP [PHE Ex. 1], any violation involving the failure to file reports (with the exception of a violation of establishment reporting requirements under FIFRA Section 7(c)) is assigned Level 2.

(4) Base Penalty. Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), authorizes a civil penalty of up to \$5,000 for each FIFRA violation by a registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor. Pursuant to the Federal Civil Penalties Inflation Adjustment

Act of 1990, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 *et seq.*, and regulations promulgated pursuant thereto at 40 C.F.R. Parts 19, *see* 69 Fed. Reg. 7121, this amount was increased to \$6,500.

The 2009 ERP [PHE Ex. 1] includes a civil penalty matrix that assigns a base penalty for each FIFRA violation relative to the gravity of the violation and the size of the business. Though the 2009 ERP [PHE Ex. 1] is applicable to the calculation of penalties sought in this action, the civil penalty matrix provided the 2009 ERP [PHE Ex. 1] does not apply to the violations alleged in this Complaint because the alleged violations occurred prior to the 2009 ERP's [PHE Ex. 1] effective date. Rather, to find the appropriate penalties for the violations alleged in the Complaint, the EPA reviewed the FIFRA civil penalty matrix provided in the Memorandum from Stephanie P. Brown, Acting Dir., Toxics & Pesticides Enforcement Div., Office of Civil Enforcement, U.S. EPA, *Penalty Policy Supplements Pursuant to the 2004 Civil Monetary Penalty Inflation Adjustment Rule*, 1, 6 (June 5, 2006) ("Brown Memorandum") [PHE Ex. 2].

Based on the civil penalty matrix provided in the Brown Memorandum [PHE Ex. 2], the base penalty for a violation with a Level 1 gravity is \$6,500, regardless of the size of business. *See* Brown Memorandum [PHE Ex. 2] at 6. Thus, the appropriate gravity-based penalty for each of the four misbranding counts and each of the four counts alleging distribution or sale of an unregistered pesticide is \$6,500. For a violation with a Level 2 gravity by a Category III size of business, the base penalty established by the Brown Memorandum [PHE Ex. 2] is \$3,869. Thus, the appropriate base penalty for the count alleging failure to file a Notice of Arrival is \$3,869.

(5) Adjusted Penalty Amount Based on Case-Specific Factors. After determining the base penalty for each alleged violation, the EPA evaluated whether to adjust the base penalty in light of case-specific factors. In performing this evaluation, the EPA applied the Gravity

Adjustment Criteria provided in Appendix B of the 2009 ERP [PHE Ex. 1]. Factors accounted for by the Gravity Adjustment Criteria include pesticide toxicity, harm to human health, environmental harm, compliance history, and culpability. *Id.* Each of these factors is assigned a numerical value. *Id.* For purposes of determining adjustments to the base penalty, the values assigned to each factor are added up and Table 3 in Appendix C of the 2009 ERP [PHE Ex. 1] specifies the type of adjustment that may be applied depending on the total numerical value. For example, if adjustment factors total 17 or above, the penalty matrix value is increased by 60%. 2009 ERP [PHE Ex. 1], Appendix C. If the factors total 9 to 11, the ERP requires that the base penalty in the civil penalty matrix be assigned. *Id.*

In this case, with respect to the four misbranding counts and the four counts alleging distribution or sale of an unregistered pesticide, the EPA assigned the following values to the adjustment factors: pesticide toxicity = 3 (pesticide is unregistered and the ingredients or labeling indicate Category I toxicity); human harm = 3 (harm to human health is unknown); environmental harm = 3 (harm to the environment is unknown); compliance history = 0 (no prior violations); culpability = 2 (violation resulted from negligence). The numbers assigned to these factors total up to 11. Under Table 3 in Appendix C of the 2009 ERP [PHE Ex. 1], the appropriate penalty is the base penalty assigned by the civil penalty matrix, and no further adjustment is warranted. Therefore, the gravity-based penalty for each of the violations alleged in Counts 1-8 of the Complaint is \$6,500.

With respect to the violation alleged in Count 9 involving Complainant's failure to file a notice of arrival with the EPA Administrator as required by 19 C.F.R. § 12.112(a), the values assigned to the gravity adjustment criteria are the same as those assigned with respect to Counts 1 through 8, which resulted in a total value of 11. Thus, under Table 3 in Appendix C of the

2009 ERP [PHE Ex. 1], the appropriate penalty is the base penalty assigned by the civil penalty matrix, and no further adjustment is warranted. Therefore, the gravity-based penalty for the violations alleged in Count 9 of the Complaint is \$3,869.

The total gravity-based penalty for all of the violations alleged in the Complaint is \$55,869. To reach the final penalty sought in this case, the EPA rounded the total gravity-based penalty to the nearest \$100. *See* 2009 ERP [PHE Ex. 1] at 20. Thus, the total gravity-based penalty calculated for all of the violations alleged in the Complaint is \$55,900.

(6) Economic Benefit. Under the 2009 ERP [PHE EX. 1], an economic benefit component is added to the gravity-based penalty component when a violation results in significant economic benefit to the violator. 2009 ERP [PHE Ex. 1] at 20. “Significant” is defined as an economic benefit that totals more than \$10,000 for all violations alleged in the Complaint. *Id.* The EPA concludes that the economic benefit gained by Respondent from the alleged violations is less than \$10,000 and thus, does not affect the penalty calculation.

(7) Effect of Penalty on Ability of Respondent to Remain in Business. Respondent stated in its Answer [PHE Ex. 38] that it “would adhere to any penalty” resulting from the violations, but that it “if the penalties and fines are greater than our income, we may have difficulty paying them.” While Mr. Paldano verbally indicated that he might want to raise an inability to pay claim, he never submitted any documentation to support such a claim, *Supra* at -- --. While he at one point agreed to provide EPA with copies of Respondent’s recent tax returns, EPA never received that information. *Supra* at 3. EPA repeatedly attempted to contact Mr. Paldano by telephone, and left detailed voice mail messages for him on numerous occasions, but Mr. Paldano never returned any of EPA’s calls. As previously described, Complainant has not been able to establish any contact with Mr. Paldano.

In accordance with FIFRA Section 14(a)(4) and the 2009 ERP [PHE Ex. 1], EPA considered the effect of the proposed penalty on Respondent's ability to continue in business. In particular, because Respondent failed to submit any financial documentation, EPA consulted numerous sources in an effort to obtain information regarding Respondent's financial status, including Dunn & Bradstreet Reports [PHE Ex. 42], American Business Reports [PHE Ex. 41], and DemographicsNow [PHE Ex. 43]. The available financial information for this privately held company is sparse. *Id.* Based on the limited financial information that EPA was able to obtain regarding Respondent, EPA identified no evidence indicating that the company would be unable to pay a penalty of \$55,900.

WHEREFORE, since no material issues of fact exist regarding Respondent's liability for the violations alleged in the Complaint, and no material issues of fact exist with regard to the EPA's assessment of an appropriate penalty of \$55,900, Complainant requests that this Motion for Accelerated Decision on liability and penalty amount be granted. Complainant requests that Respondent be ordered to pay a penalty of \$55,900.

Respectfully submitted,

8/27/13
Date



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CERTIFICATE OF SERVICE

I certify that *Complainant's Brief in Support of its Motion for Accelerated Decision on Liability and Penalty Amount*, and its accompanying motion, in the matter of United Global Trading, Inc., Docket No. FIFRA-04-2011-3020, was sent on the date noted below, in the following manner to the addressees below:

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U.S. EPA, Office of Administrative Law Judges
1300 Pennsylvania Ave., NW
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One copy to: M. Lisa Buschmann, Administrative Law Judge
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One copy to: Dawn Johnson
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8/28/13
Date



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