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US EPA - REGION IX  
HEARING CLERK

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UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION IX

In the Matter of:  
  
Fry's Electronics, Inc.,  
  
Respondent.

Docket No.: FIFRA-09-2012-00-06

RESPONDENT FRY'S ELECTRONICS,  
INC.'S ANSWER TO COMPLAINT

**HEARING REQUESTED**

Respondent Fry's Electronics, Inc. ("Fry's" or "Respondent") hereby responds to the Complaint and Notice of Opportunity for Hearing ("Complaint") issued by the United States Environmental Protection Agency ("Agency") and makes its request for hearing.

**PRELIMINARY STATEMENT**

This case concerns Fry's retail sale of "Cambre Game On Dirt Rags Gaming Wipes" (the "Product") manufactured by Cambre Products, Ltd. ("Cambre"). Fry's is a retailer of consumer electronics. The Agency alleges that the Product violates the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") because it is an unregistered pesticide.

Cambre warranted that the Product complied with all applicable laws and Fry's placed the Product on its shelves believing the supplier's representations to be true and accurate. Fry's did not intend to sell the product for a pesticidal purpose in violation of FIFRA.

1 Fry's does not dispute that the Product was an unregistered pesticide (because of label  
2 claims asserting that the product is "anti bacterial"). However, even assuming that Fry's is liable  
3 for a violation of FIFRA, the penalty proposed by the Agency for resolution of this matter is  
4 inappropriate under the law and grossly out of synch with the penalties assessed in comparable  
5 cases.

6 When Fry's discovered on February 9, 2010 that the Product might be in violation of the  
7 law, it took immediate action. The Product was pulled from the shelves in all of Fry's 34 stores  
8 and returned to its "return-to-vendor" location by close of business of February 10, 2010. Fry's  
9 has cooperated with the Agency in its investigation and submitted all requisite information in a  
10 timely fashion.

11 To date, Fry's has not been provided with a sample of the Product in question for Fry's  
12 analysis. Instead, Fry's took the initiative to purchase samples of later versions of the Product  
13 through Amazon.com.

14 Given the relatively small amount of Product sold by Fry's, the Product's lack of harm to  
15 the environment and to humans, Fry's immediate removal of the Product upon notice, and Fry's  
16 continued cooperation with the Agency, the proposed penalty is inconsistent with the FIFRA  
17 Enforcement Response Policy and is unfair to Fry's.

18  
19 **STATEMENT OF FACTS**

20 Fry's does not dispute any of the operative facts of which it has knowledge and that are  
21 asserted in the Complaint. Fry contends that additional facts are highly relevant to the resolution  
22 of this matter, as set forth herein.

23 1. Fry's purchased the Product from Cambre, which warranted that "all products are  
24 properly licensed with all appropriate governmental and/or regulatory agencies and do not violate  
25 any state, federal, or regulatory statute" (Vendor Agreement, Section F, Paragraph 3).

26 2. Fry's last transaction for the sale of the Product took place on February 6, 2010.

27 3. On February 9, 2010, Brian Orlando, an environmental scientist for the California  
28 Environmental Protection Agency, conducted an inspection of Fry's retail store in Roseville,

1 California. He cited the product, "Game On Cambre Dirt Rags Gaming Wipes" as an  
2 unregistered pesticide pursuant to the California Food and Agricultural Code Section 12811.

3 4. Mr. Orlando's report states that there were four units of the Product for sale in the  
4 Roseville store. Mr. Orlando marked the box on the Notice labeled "Voluntary Correction,"  
5 which states that the "Owner, manager or responsible party voluntarily removed product from  
6 sale and/or use."

7 5. On February 9, 2010, the same day, Abraham Alummoottil, the buyer for the  
8 Product in Fry's software department, informed his Director, Indy Khera, that there was an issue  
9 with the Product. Mr. Khera took immediate action and had the product pulled from the shelves  
10 in all of Fry's 34 stores.

11 6. All of the Products were returned to Fry's "return-to-vendor" location in San Jose,  
12 California by close of business on February 10, 2010.

13 7. Fry's does not have a sample of the product it sold during the time relevant to this  
14 Complaint, and the Agency has not provided it samples of the Product.

15 8. Fry's purchased and investigated samples of the more recent version of the  
16 Product.

17 9. The Product causes negligible harm to human health and the environment.

18 10. Fry's has had no previous FIFRA violations in its 27 years of doing business.

19 11. Fry's did not know that the product violated FIFRA.  
20

### 21 AUTHORITY AND PARTIES

22 (Response to paragraphs one through three of the Complaint)

23 12. Responding to paragraph one of the Complaint, the allegations in this paragraph  
24 contain legal assertions that do not require a response.

25 13. Responding to paragraph two of the Complaint, the allegations in this paragraph  
26 contain legal assertions that do not require a response.

27 14. Responding to paragraph three of the Complaint, Respondent admits that it is a  
28 corporation headquartered in San Jose, California.

1  
2 **GENERAL ALLEGATIONS**

3 (Response to paragraphs four through twenty of the Complaint)

4 15. Responding to paragraph four of the Complaint, the allegations in this paragraph  
5 contain legal assertions that do not require a response. Respondent admits that it is a corporation.

6 16. Responding to paragraph five of the Complaint, the allegations in this paragraph  
7 contain legal assertions that do not require a response. Respondent admits that it sold a product  
8 known as "Cambre Game On Dirt Rags Gaming Wipes" between July 2009 and February 2010.

9 17. Responding to paragraph six of the Complaint, Respondent is without knowledge  
10 or information sufficient to form a belief as to the truth of the averments concerning the Product's  
11 label.

12 18. Responding to paragraph seven of the Complaint, Respondent is without  
13 knowledge or information sufficient to form a belief as to the truth of the averments concerning  
14 the intended use of the Product.

15 19. Responding to paragraph eight of the Complaint, the allegations in this paragraph  
16 contain legal assertions that do not require a response.

17 20. Responding to paragraph nine of the Complaint, the allegations in this paragraph  
18 contain legal assertions that do not require a response.

19 21. Responding to paragraph ten of the Complaint, the allegations in this paragraph  
20 contain legal assertions that do not require a response.

21 22. Responding to paragraph eleven of the Complaint, the allegations in this paragraph  
22 contain legal assertions that do not require a response. To the extent that this paragraph contains  
23 factual assertions, Respondent is without knowledge or information sufficient to form a belief as  
24 to the truth of the averments regarding registration.

25 23. Responding to paragraph twelve of the Complaint, the allegations in this paragraph  
26 contain legal assertions that do not require a response.

27 24. Responding to paragraph thirteen of the Complaint, the allegations in this  
28 paragraph contain legal assertions that do not require a response.



1           35.     Responding to paragraph twenty-four of the Complaint, Respondent incorporates  
2 its responses in paragraphs fifteen through thirty-one above as if they were set forth herein in full.

3           36.     Responding to paragraph twenty-five of the Complaint, the allegations in this  
4 paragraph contain legal assertions that do not require a response regarding the definition of the  
5 term pesticide. Respondent is without knowledge or information sufficient to form a belief as to  
6 the truth of the averments regarding its receipt of six shipments of the Product on July 17, July  
7 20, July 21, July 22, July 23, and July 27, 2009.

8           37.     Responding to paragraph twenty-six of the Complaint, the allegations in this  
9 paragraph contain legal assertions that do not require a response regarding the definition of the  
10 term pesticide. Respondent is without knowledge or information sufficient to form a belief as to  
11 the truth of the averments regarding that it imported six shipments of the Product into the United  
12 States from Cambre Products. Respondent is without knowledge or information sufficient to form  
13 a belief as to the truth of the averments regarding Cambre's headquarters.

14           38.     Responding to paragraph twenty-seven of the Complaint, the allegations in this  
15 paragraph contain legal assertions that do not require a response.

16           39.     Responding to paragraph twenty-eight of the Complaint, the allegations in this  
17 paragraph contain legal assertions that do not require a response.

18           40.     Responding to paragraph twenty-nine of the Complaint, the allegations in this  
19 paragraph contain legal assertions that do not require a response.

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21                   **DEFENSES AND BASIS FOR REDUCTION OF PROPOSED PENALTY**

22     Assuming that Fry's violated Section 12(a)(1)(A) of FIFRA, which it denies, the following  
23 information and defenses demonstrate that a substantial reduction from the proposed penalty is  
24 appropriate.

25           41.     Paragraphs one through eleven above are hereby incorporated by reference as if  
26 the same were set forth herein in full.

27           42.     In determining the amount of the penalty for each violation of FIFRA, the Agency  
28 is tasked with weighing the totality of the circumstances, as stated in 7 U.S.C. Section 1361(a)(4):

1 The Administrator shall consider the appropriateness of such penalty to the size of  
2 the business of the person charged, the effect on the person's ability to continue in  
3 business, and the gravity of the violation. Whenever the administrator finds that  
4 the violation occurred despite the exercise of due care or did not cause significant  
5 harm to health or the environment, the Administrator may issue a warning in lieu  
6 of assessing a penalty.

7 43. The stated purpose of the FIFRA Enforcement Response Policy to "...to provide  
8 fair and equitable treatment of the regulated community, predictable enforcement responses, and  
9 comparable penalty assessments for comparable violations."

10 44. The Administrator must consider the gravity of the violation in determining the  
11 penalty and has not correctly done so in this instance. If a violation occurred, the gravity of the  
12 violation was very small and is properly categorized with an overall score of '1' in the Material  
13 Safety Data Sheet ("MSDS") assessment. The product is properly categorized as a '0' on the  
14 MSDS with respect to its impacts because it causes negligible harm to human health and the  
15 environment. Both the Agency and Respondent agree that Fry's has had no previous FIFRA  
16 violations and therefore is properly categorized as a '0' on the MSDS for compliance history.  
17 With respect to culpability, Fry's is properly categorized as a '0' on the MSDS because the  
18 alleged violation was neither knowing nor willful and did not result from negligence.  
19 Furthermore, Fry's instituted steps to correct the violation immediately after discovery of the  
20 possible violation.

21 45. The proposed penalty is not comparable to other assessments for violations  
22 comparable to those alleged in this case. The Consent Agreements and settlements entered into  
23 with respect to Millipore's chlorine and water purification products, Logitech Cordless Desktop  
24 MX3200 Laser and A-Dec's ICX clearly demonstrate that the proposed penalty in this case is not  
25 appropriate. Furthermore, very few prior administrative decisions and Consent Agreements shift  
26 the primary responsibilities of the manufacturer to the retailer, especially when the retailer has  
27 exercised due care and acted quickly to rectify the situation, as Fry's did in this case.

