UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
The GEO Group, Inc.,	)	Docket No. FIFRA-09-2024-0066
	)	
Respondent.	)	

MOTION TO DISMISS

Respondent, The GEO Group, Inc. ("GEO" or "Respondent"), pursuant to section 22.20, Title 40, Code of Federal Regulations ("C.F.R."), hereby files this Motion to Dismiss the Complaint and Notice of Opportunity for Hearing ("Complaint") filed by the U.S. Environmental Protection Agency, Region IX ("EPA"), and in support states as follows:

INTRODUCTION

EPA asserts that the gloves at the Adelanto Facility do not match the label for the disinfectant Halt because they are not "chemical resistant," but the fact is that the label requires "rubber *or* other chemical resistant" gloves, and the Adelanto Facility uses nitrile rubber gloves. EPA also failed to satisfy a statutory prerequisite for the assessment of a civil penalty. Furthermore, seeking such relief entitles GEO to a jury trial in an Article III court, consistent with the U.S. Supreme Court's decision in *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024).

STANDARD OF REVIEW

1. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R., part 22.

2. The Rules of Practice address motions to dismiss at 40 C.F.R. § 22.20, which provides in pertinent part that the "Presiding Officer, upon motion of the respondent, may at any

time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant." 40 C.F.R. § 22.20(a).

3. Motions to dismiss under Section 22.20(a) are analogous to motions for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP"). *In the Matter of Asbestos Specialists, Inc.*, TSCA Appeal No. 92-3, 4 E.A.D. 819, 827 (EAB, Oct. 6, 1993).

4. Rule 12 (b) (6) of the FRCP provides for dismissal when the complaint fails "to state a claim upon which relief can be granted." It is well established that dismissal is warranted for failure to state a claim when the plaintiff fails to lay out "direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007); *see also McCulloch v. PNC Bank, Inc.*, 298 F. 3d 1217, 1220 (11th Cir. 2002).

BACKGROUND FACTS

5. GEO operates the Adelanto ICE Processing Center (the "Adelanto Facility") in Adelanto, California.

6. On March 2, 2021, EPA issued GEO a Notice of Warning, alleging that GEO employees were applying a registered pesticide, HDQ Neutral (EPA Reg. No. 10324-155-5741), in a manner inconsistent with its labeling. *See* CX-7.

7. The Notice of Warning alleged that GEO did not require the use of personal protective equipment, such as goggles and chemical resistant gloves, when applying HDQ Neutral.

8. The Notice of Warning contained no opinions or conclusions regarding whether gloves available at the Adelanto Facility were chemical resistant.

9. The Notice of Warning contained no notice of rights and presented no opportunity for GEO to raise defenses against the alleged violations it described.

10. On March 15, 2023, EPA conducted a follow up inspection of the Adelanto. *See* CX-1.

11. During the inspection, EPA requested information regarding the products being used to control Coronavirus (SARS-CoV-2) at the Adelanto Facility. CX-1_Page 04 of 13.

12. Among the products identified by GEO was Halt (EPA Reg. No. 10324-93-5741), "a cleaner, disinfectant, deodorizer, Fungicide, Mildewstat, and Virucide." *Id.*

13. In conversations with GEO staff, EPA obtained information that GEO employees were required to wear nitrile gloves, masks, and face shields or goggles when applying Halt. CX-1_Page 05 of 13.

14. GEO staff represented to EPA at the inspection that the decision to use nitrile gloves was made by referring to the product label and the Material Safety Data Sheet ("SDS") for Halt provided by Halt's manufacturer, Spartan Chemical. *Id.*

15. During the inspection, EPA observed an open box of disposable Lifeguard brand nitrile exam gloves and noted in the inspection report that "the 4 mil nitrile gloves used to apply disinfectants did not appear to be chemical resistant as required by the Halt label." CX-1_Page 11 of 13.

16. At the inspection, EPA's inspector was unable to confirm with GEO staff gloves that would meet the label requirements for chemical resistance, but said that EPA "would confirm with its toxicologist or resident Environmental Health and Safety Officer to get clarification on chemical resistant glove specifications and note it in the report." *Id.*

17. The inspection report noted that "[t]he label for Halt indicates that the applicator

must wear 'chemical resistant gloves'" and that "[c]hemical resistant gloves are required to be at or above 14 mils in thickness," citing EPA's Label Review Manual at 10-9. *Id.*

18. The precautionary statements in this section of the Label Review Manual apply only to agricultural pesticides subject to the Worker Protection Standards in 40 C.F.R. Part 170. *See* CX-5_Page 01 of 161 (stating that certain precautionary statements are required by Part 156 Subpart K for products subject to the Worker Protection Standard, unless covered by a regulatory assessment document).

19. The Worker Protection Standard only applies to those working in farms, forests, nurseries, and greenhouses. *See* 40 C.F.R. §170.3 (defining agriculture, agricultural employer, agricultural establishment, and commercial pesticide handler); 40 C.F.R. §170.7 (prohibitions applying only to agricultural employers and pesticide handlers on agricultural establishments). Furthermore, the "EPA Chemical Resistance Category Selection Chart for Gloves" in the Label Review Manual relied upon by EPA indicates that it "should never be placed or referenced on the product label; it is intended for EPA and registrant guidance only." *See* CX-5_Page 05 of 161

20. On October 12, 2023, EPA issued a letter to GEO alleging violations of FIFRA for using a registered pesticide "without chemical resistant gloves," and stated its intent to file a civil administrative complaint and to seek a civil penalty for the alleged violations.

21. On June 13, 2024, EPA filed a Complaint against GEO, alleging violations of FIFRA section 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G).

22. EPA's Complaint alleges that between March 2022 and February 2023, GEO's employees wore non-chemical resistant gloves when applying Halt, and alleges a total of 1,137 violations, for which it seeks the statutory maximum penalty of $3,558 for each violation, totaling $4,045,446.

ARGUMENT

I. EPA Has Failed To Establish That GEO Used Halt In A Manner Inconsistent With Halt's Labeling.

23. EPA's Complaint, and evidence EPA has produced in support of the same, fails to establish that the use of nitrile rubber gloves is not permitted by Halt's labeling and, therefore, EPA has failed to establish a prima facie case or other grounds which show a right to relief.

24. FIFRA section 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G), provides that "[i]t shall be unlawful for any person . . . to use any registered pesticide in a manner inconsistent with its labeling."

25. The term "to use any registered pesticide in a manner inconsistent with its labeling" means to use any registered pesticide in a manner not permitted by the labeling. 7 U.S.C. § 136(ee).

26. The term "labeling" is statutorily defined to mean "all labels and all other written, printed, or graphic matter (A) accompanying the pesticide or device at any time; or (B) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United States Departments of Agriculture and Interior, the Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides." 7 U.S.C. § 136(p).

27. The SDS for Halt is prepared by Spartan Chemical and supplied to GEO along with the product, and they are kept and made available in the Adelanto Facility housing units where chemicals are stored. *See* CX-1_Page 05 of 13; CX-1_Page 08 of 13; RX2_Page 01 of 03. Furthermore, the Halt label contains instructions to "Read safety data sheet before using product." CX-2_Page 03 of 03.

28. Therefore, the SDS for Halt is considered part of Halt's labeling for the purpose of determining whether a person's use complies with FIFRA section 12(a)(2)(G). *See also* EPA Pesticide Registration Notice 2012-1 (April 9, 2012) (confirming that a SDS that accompanies a pesticide product is considered part of the pesticide's labeling).

29. Between the Halt product label and the SDS, there are four statements regarding the type of gloves that should be worn when applying Halt.

30. The Halt product label provides a precautionary statement that directs users to "[w]ear goggles or face shield and **chemical resistant gloves** and protective clothing when handling." *See* CX-2 (emphasis added).

31. The regulatory information in the SDS contains an "EPA Pesticide Label" statement that instructs users to "[w]ear goggles or face shield and **rubber gloves** and protective clothing when handling." RX15_Page 06 of 06 (emphasis added).

32. The SDS for Halt also includes recommended personal protective equipment for skin and body protection, recommending to "[w]ear **rubber *or* other chemical-resistant gloves**," as well as a precautionary statement to wear "**protective gloves**." RX15_Page 01 of 06; RX15_Page 03 of 06 (emphasis added).

33. Based on the statements on the Halt label and SDS, Halt's labeling clearly permits the use of rubber gloves when applying Halt.

34. Nitrile is synthetic rubber and for all intents and purposes is rubber. *See* Merriam-Webster.com, Merriam Webster, www.merriam-webster.com, accessed November 22, 2024 (defining nitrile rubber as "any class of synthetic rubbers that are made by copolymerizing butadiene and acrylonitrile, are characterized by good resistance to swelling caused by oils, solvents, and greases…."). The use of rubber gloves is permitted by Halt's labeling and, therefore,

the use of nitrile gloves is not inconsistent with Halt's labeling as defined in 7 U.S.C. § 136(ee).

35. EPA has the burden of proof to show that GEO used Halt in a manner inconsistent with its labeling. 40 C.F.R. § 22.24(a). EPA's Complaint alleges that during the period of March 2022 to February 2023, "Respondent's employees wore 'Life Guard Nitrile Exam Gloves' when applying the registered pesticide, 'Halt.'" EPA Complaint at ¶20.

36. EPA alleges that the Lifeguard brand nitrile exam gloves are not chemical resistant, a position with which strongly Respondents disagree, but EPA does not allege that the Lifeguard brand nitrile gloves are not made of rubber.

37. Halt's primary label requires the use of "chemical resistant gloves." To read this direction consistently with the SDS, *in pari materia*, chemical resistant is best understood to be the same as rubber, i.e., that chemical resistant gloves are rubber gloves. Alternatively, this instruction is inconsistent with the requirements on the SDS. In either case, GEO is entitled to rely on the SDS, which is part of Halt's labeling. EPA has the burden of proof and failed to explain why such reliance is improper.[1]

38. Because Halt's labeling permits the use of rubber gloves, and because EPA's Complaint alleges the use of rubber gloves only, EPA failed to establish that GEO used Halt in a manner inconsistent with its labeling and failed to establish a prima facie case in its Complaint. For this reason, EPA's Complaint should be dismissed.

II. EPA Failed to Satisfy a Statutory Prerequisite for the Assessment of Civil Penalties Under FIFRA Section 14(a)(2), 7 U.S.C. § 136*l*(a)(2).

[1] In its Complaint, EPA relies on language on the box of Lifeguard brand nitrile exam gloves that states, "not for use as a general chemical barrier." This allegation is irrelevant because it presumes that some rubber gloves are not chemical resistant, contrary to the SDS label and the best interpretation of the labeling provisions as a whole. Even if Halt's labeling required proof that rubber gloves are chemical resistant – and it does not – EPA's argument would still fail because EPA has failed to allege and cannot show that the gloves were being used as a general chemical barrier.

39. Notwithstanding that EPA has failed to establish a prima facie violation of FIFRA, EPA has also failed to provide the statutorily-required written notice of a prior violation for the assessment of civil penalties under FIFRA Section 14(a)(2).

40. EPA's sole claim for relief from the alleged violation is the assessment of civil penalties under FIFRA section 14(a)(2), making the failure to satisfy the requirements of that subsection grounds for dismissal of EPA's Complaint.

41. FIFRA section 14(a)(2) authorizes the assessment of civil penalties only "subsequent to receiving a written warning from the Administrator or following a citation for a prior violation."

42. In the present case, the Notice of Warning issued to GEO did nothing more than put GEO on notice of the existence of FIFRA section 12(a)(2)(G), to use registered pesticides in a manner consistent with their labeling.

43. The Notice of Warning did not put GEO on notice that the gloves made available at its Adelanto Facility were purportedly inconsistent with Halt's labeling, and communicated no corrective action which would have prompted GEO to change the gloves being used. If anything, by asserting that it was a violation not to require gloves be worn, the Notice of Warning encouraged GEO to use the gloves that it had available at the Adelanto Facility at the time the Notice of Warning was issued.

44. While a citation for a violation provides the opportunity to present defenses, the Notice of Warning did not. Thus, while GEO had defenses it could have raised to the March 2021 Notice of Warning, it never needed to present those defenses, nor was it given the opportunity to do so.

45. FIFRA section 14(a)(2) subjects private applicators and "other persons" to a different standard under subsection 14(a)(2) than the regular handlers of pesticides, i.e., registrants, commercial applicators, wholesalers, dealers, retailers, or other distributors under 14(a)(1), requiring prior notice be provided to less experienced individuals and entities in the former category, while subjecting individuals and entities in the latter category to civil penalties without prior notice.

46. This statutory scheme recognizes that private applicators and other persons using regulated pesticides may not have adequate notice of conduct that is proscribed under the statute and, therefore, requires that such notice be provided before penalties can be assessed.

47. To implement this statutory intent, the ALJ should ask whether the Notice of Warning relied upon for the assessment of civil penalties was too vague to put the respondent on notice of the proscribed conduct alleged in EPA's Complaint. This inquiry is the same as the legal standard for determining whether a law is void for vagueness under the Due Process Clause of the U.S. Constitution.

48. Under the void-for-vagueness doctrine, a statute is unconstitutionally vague so as to violate due process if it: (1) does not provide a person of ordinary intelligence a reasonable opportunity to know what is prohibited, or (2) fails to provide explicit standards to prevent arbitrary and discriminatory enforcement by those enforcing the statute. *United States v. Plummer*, 581 F.3d 484, 488 (7th Cir. 2009) (internal quotations omitted).

49. In determining the sufficiency of the notice afforded by a statute, it "must of necessity be examined in the light of the conduct with which a defendant is charged." *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963).

50. Here, the Notice of Warning issued to GEO did not involve the adequacy of the gloves being used at the facility, but rather, as it relates to the conduct that is the subject of EPA's Complaint, served only to inform GEO that it was unlawful to use a registered pesticide in a manner inconsistent with its labeling.

51. Furthermore, as shown above, Halt's labeling, inclusive of the product label and SDS, communicates that rubber gloves are chemical resistant and that the use of rubber gloves is permitted when applying Halt.

52. This conclusion is further supported by publicly available regulatory and commercial information regarding chemical resistant gloves that would indicate to a person of ordinary intelligence that nitrile rubber gloves are, in fact, chemical resistant.

53. For instance, environmental regulations promulgated by the EPA refer to nitrile gloves as chemically resistant. *See* 40 C.F.R. 156.212(f)(1) (describing chemical resistant gloves as including nitrile, butyl, neoprene, etc.).

54. Guidance from the Occupational Safety and Health Administration also recognizes that rubber gloves, which include nitrile rubber gloves, are considered chemically resistant. *See* OSHA, Personal Protective Equipment, OSHA 3151-02R (2023) (available at https://www.osha.gov/sites/default/files/publications/osha3151.pdf).

55. Finally, the marketing materials for Lifeguard brand nitrile rubber gloves communicates that the gloves offer "Excellent Chemical & Puncture Resistance." *See* RX18_Page 01 of 01.

56. Therefore, EPA's position that the use of nitrile rubber gloves is inconsistent with Halt's labeling is arbitrary and discriminatory, and reveals that the issuance of the Notice of Warning did not provide a reasonable opportunity to know what conduct was prohibited.

57. The precondition to the assessment of civil penalties in FIFRA section 14(a)(2) has been incorrectly interpreted in a prior case before an EPA ALJ as being satisfied whenever EPA issues a Notice of Warning involving a violation of FIFRA, regardless of whether a subsequent alleged violation involves the same chemical or similar conduct. *See In the Matter of: Martex Farms, Inc.*, Respondent, 2006 WL 1582510 (FIFRA-02-2005-5301), at *5.

58. The *Martex Farms* holding reduces the prior written warning requirement in section 14(a)(2) to a general FIFRA awareness provision and, when applied to the facts of this case, allows the assessment of civil penalties regardless of whether an individual or entity was put on notice that their conduct was potentially unlawful.

59. This interpretation of FIFRA section 14(a)(2) is inconsistent with the statutory intent evident from the plain text of the statute. If a written warning could be as broad as the FIFRA-awareness notice provided in the *Martex Farms* decision, then because a written warning is a precondition to a citation, the language providing for notice by prior citations would be unnecessary statutory surplusage. Unnecessary surplusage is to be avoided when interpreting statutes. *See Arkansas Best Corp. v. C.I.R.*, 485 U.S. 212, 218 (1988).

60. Instead, to give effect to both preconditions, written warnings and prior citations, a written warning must be at least as specific as a prior citation, putting the potential violator on notice of the specific violation. EPA's Notice of warning fails this test because it only directed use of personal protective equipment with HDQ Neutral, but its Complaint alleges that the personal protective equipment, *i.e.*, gloves, being used are not consistent with Halt's label. Because it fails to accomplish the statutory goals of FIFRA, invites arbitrary and discriminatory enforcement of the statute's civil penalty provisions, and is not entitled to deference under the U.S. Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), the *Martex*

Farms decision should be disregarded.

61. Because the Notice of Warning relied upon by EPA for the assessment of civil penalties was unrelated to the conduct that is the subject of this Complaint, and because the Notice of Warning could not have possibly put GEO on notice that the gloves it used at the Adelanto Facility were inconsistent with Halt's labeling, the Notice of Warning cannot provide the basis for an assessment of civil penalties under FIFRA section 14(a)(2).

III. GEO Is Entitled To A Trial By Jury On The EPA's Claims Pursuant To The Seventh Amendment Of The United States Constitution.

62. EPA's claims seeking civil penalties against GEO before an administrative law judge ("ALJ") and Environmental Appeals Board, rather than by trial by jury before an Article III federal judge, violates GEO's Seventh Amendment rights. Accordingly, EPA's claims should be dismissed.

63. The Seventh Amendment provides: "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ." U.S. Const. VII amend. The right to a jury trial is "of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right . . . should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

64. The Supreme Court has construed the text of the Seventh Amendment to require a jury trial "in those actions that are analogous to 'Suits at common law.'" *Tull v. United States*, 481 U.S. 412, 417 (1987). To be sure, this construction is broad. As the Supreme Court recently reaffirmed, the Seventh Amendment "embraces ***all suits*** which are not of equity or admiralty jurisdiction." *S.E.C. v. Jarkesy*, 144 S. Ct. 2117, 2128 (2024) (emphasis added). *See also Parsons v. Bedford*, 28 U.S. 433, 447 (1830) (stating the Seventh Amendment "embrace[s] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may

assume.").

65. Accordingly, the right to a jury trial "extends to a particular statutory claim if the claim is legal in nature." *Id.*; *see also Curtis v. Loether*, 415 U.S. 189, 193 (1974) ("[T]he applicability of the constitutional right to jury trial in actions enforcing statutory rights" is "a matter too obvious to be doubted."); *Granfinanciera, SA v. Nordberg*, 492 U.S. 33, 53 (1989) (recognizing Seventh Amendment rights extended to statutory claims that are "legal in nature").

66. To determine whether a claim is legal in nature, courts must examine both (1) the nature of the action, and (2) the remedy sought. *Tull*, 481 U.S. at 417. In particular, the court must consider whether the cause of action resembles common law causes of action, and whether the remedy is the sort that was traditionally obtained in a court of law. *Jarkesy*, 144 S. Ct. at 2136. However, "the remedy [is] the more important consideration." *Id.* at 2129; *see also Curtis*, 415 U.S. at 196; *Granfinanciera*, 492 U.S. at 42.

67. The EPA's claims against GEO are legal in nature; therefore, the Seventh Amendment right to a jury trial applies.

68. First, the nature of the action here is consistent with enforcement of GEO's Seventh Amendment rights. Admittedly, courts have occasionally (and wrongly) focused their analysis too heavily on whether the nature of the action is sufficiently analogous to a specific common law claim existing when the Seventh Amendment was ratified. But the Supreme Court has reiterated for more than thirty years that "[t]he right to a jury trial includes more than the common-law forms of action recognized in 1791" when the Seventh Amendment was ratified. *Teamsters v. Terry*, 494 U.S. 558, 564 (1990); *see also Curtis*, 415 U.S. at 193 (recognizing Seventh Amendment is not limited to "common-law forms of action" that were recognized when the Seventh Amendment was ratified). And the analysis of the nature of the action "need not rest . . . on what has been called an

'abstruse historical' search for the nearest 18th-century analog." *Tull*, 481 U.S. at 421.

69. Instead, "characterizing the relief sought is more important than finding a precisely analogous common-law cause of action in determining whether the Seventh Amendment guarantees a jury trial." *Id.* In *Tull*, for example, the Supreme Court recognized a developer's Seventh Amendment right to a jury trial in connection with a cause of action brought by the government against the developer under the Clean Water Act. *Id.* at 418-19. As the Court observed, "[a]ctions by the Government to recover civil penalties under statutory provisions . . . historically ha[d] been viewed as [a] type of action in debt requiring trial by jury." *Id.* So, the lack of an easy historical analogue between the Clean Water Act and the common law made no difference to the Court's analysis.

70. Here, like *Tull*, the federal government has brought a claim under an environmental protection statute allowing recovery of civil penalties. On this basis alone, the EPA's claims should be dismissed.

71. EPA's own FIFRA Enforcement Response Policy reflects its determination that causes of action seeking a civil penalty should be brought where an alleged violation "was apparently committed as a result of ordinary negligence (as opposed to criminal negligence), inadvertence, or mistake."[2] In other words, EPA's own policy reflects that it seeks civil penalties like the ones sought against GEO where it believes the party has committed acts akin to common law negligence.[3] So, if this tribunal believes a sufficient analogue is even necessary, the EPA's own application of the statute is further persuasive authority in favor of dismissal on Seventh Amendment grounds.

[2] The FIFRA Enforcement Response Policy can be found at: fifra-erp1209.pdf

[3]The statute itself imposes a strict liability standard, but EPA's policy is to not seek a civil penalty without this heightened element akin to ordinary negligence.

72. Second, the nature of the remedy sought by the EPA is "all but dispositive" of the Seventh Amendment issue in this case and supports dismissal. *See Jarkesy*, 144 S. Ct. at 2129.

73. In analyzing whether the remedy is legal in nature, courts ask whether the remedy "is the traditional form of relief offered in courts of law." *Curtis*, 415 U.S. at 196. And with respect to monetary damages, "remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo" were litigated in courts of law. *Tull*, 481 U.S. at 422. For that reason, "a civil penalty" in particular "was the type of remedy at common law that could only be enforced in courts of law." *Id.*

74. EPA's Complaint seeks civil penalties under Section 14(a)(2) of FIFRA, 7 U.S.C. § 136*l*(a)(2) and the Civil Monetary Penalty Inflation Adjustment Rule at 40 C.F.R. Part 19. Section 14(a) provides for the assessment of a "civil penalty" against any person who violates any provision of FIFRA after receiving a written warning or prior citation from EPA. The statutes allow for assessment of a civil penalty of no more than $3,558 for each offense occurring after November 2, 2015. And the Complaint here alleges 1,137 offenses for which EPA seeks the statutory maximum in penalties.

75. Because EPA seeks civil penalties of a punitive nature under federal law, the remedies at issue in this case demand a trial by jury. The Supreme Court has recognized as such in *Jarkesy* and *Tull*. In *Jarkesy*, the Court recognized that the statutory factors for assessing civil penalties for securities fraud are punitive in nature rather than designed to compensate a victim of the fraud; thus, the remedy was legal and not equitable. 144 S. Ct. at 2129-30. Similarly, in *Tull*, the Court recognized that the Seventh Amendment guaranteed the real estate developer's right to a jury trial to determine liability for civil penalties sought under the Clean Water Act. 481 U.S. at 422-23.

76. The fact that the civil penalties sought by the EPA are from a modern statutory scheme makes no difference. "Traditional legal claims" like these must be decided in an Article III court "whether they originate in a newly fashioned regulatory scheme or possess a long line of common-law forebears." *Granfinanciera*, 492 U.S. at 52 (action seeking to recover the preferential or fraudulent transfer was legal claim requiring adjudication by jury). Accordingly, the claims brought by the EPA against GEO are legal claims requiring a jury trial under the Seventh Amendment.

77. Finally, the public rights exception does not overturn GEO's Seventh Amendment right.

78. The public rights exception permits Congress to assign a matter for decision before an administrative agency without a jury when a so-called "public right" is implicated. *Jarkesy*, 144 S. Ct. at 2158 (Sotomayor, J., dissenting). Beyond this vague guidance, the Supreme Court has recently admitted in *Jarkesy* that the Court's precedents defining the distinction between a "public right" versus a "private right" have frequently included "arcane distinctions and confusing precedents." *Id.* at 2133 (quoting *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 583 (1985)). In fact, the *Jarkesy* court declined to provide any helpful guidance, either. *Id.* (observing "[t]he Court has not definitively explained the distinction between public and private rights, and we do not claim to do so today" (internal quotation marks omitted)).

79. Regardless, it is well-settled that "even with respect to matters that arguably fall within the scope of the public rights doctrine, the presumption is in favor of Article III courts." *Id.* at 2134 (quoting *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 n.23 (1982)). This is because the exception "has no textual basis in the Constitution," and "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of

judicial decision making if the other branches of the Federal Government could confer the Government's judicial power on entities outside Article III." *Id.; see also Granfinanciera*, 492 U.S. at 52 (stating Congress cannot "conjure away the Seventh Amendment by mandating that traditional legal claims be . . . taken to an administrative tribunal"). Thus, even where Congress has attempted to assign a legal claim to adjudication by an administrative agency, the presumption that the matter must be tried before an Article III court remains.

80. Putting aside the lack of specific guidance on what constitutes a public right, the circumstances where the Supreme Court has recognized the exception are inapplicable (and, mostly, antiquated). *See, e.g.*, *Ex parte Bakelite Corp.*, 279 U.S. 438, 446 (1929) (imposition of tariffs); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909) (foreign commerce and immigration); *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011) (Indian tribes); *Crowell v. Benson*, 285 U.S. 22, 51 (1932) (administration of public lands and public benefits to veterans); *United States v. Duell*, 172 U.S. 576, 582-83 (1899) (patent rights).

81. By contrast, whether a suit concerns private rights is determined by whether the controversy "is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." *Jarkesy*, 144 S. Ct. at 2132. And as stated above, the EPA's claims against GEO seek civil penalties that were consistent with remedies going back to the founding of the United States. *Compare Granfinanciera*, at 2782 (in finding public rights exception did not apply and noting among other things that the remedy sought was provided by courts of law in 18th-century England).

82. Under an analogous statute – the Clean Water Act (CWA) – with a similar purpose and remedial scheme, the U.S. Supreme Court made no mention of the public rights exception, and expressly rejected a similar if not identical argument from the government: that the CWA was

more analogous under 18th-century English law to public nuisance abatement claims. *Tull*, 481 U.S. at 418-22. The *Tull* court acknowledged the resemblance of the allegedly illegal conduct to such nuisance claims, but nonetheless found the existence of civil penalties to be decisive, holding that the Seventh Amendment right to a jury trial applies. *Id*. at 420. As in *Tull*, the alleged violations in this case do not fall within the public rights (or public nuisance) exception and EPA's substantial penalties, over $4M, is decisive. Thus, the narrow public rights exception does not apply to bar GEO's Seventh Amendment right to a jury trial.

83. For more than 230 years, the United States Constitution has guaranteed the right to trial by jury. Neither Congress nor the executive branch may usurp the jurisdiction of Article III courts to adjudicate legal claims by characterizing them as administrative proceedings. The civil penalty statutory scheme provided by FIFRA is precisely the type of legal claim that may only be decided in a federal district court. As such, the EPA's claims should be dismissed for lack of jurisdiction.

Per the ALJ's Prehearing Order, GEO has contacted EPA regarding the relief sought in this motion. EPA's position in opposition is set forth in Complainant's Rebuttal Prehearing Exchange, filed on October 25, 2024.

WHEREFORE, Respondent respectfully requests the ALJ to dismiss EPA's Complaint for failure to establish a prima facie case or, in the alternative, transfer this case to an Article III court wherein Respondent can obtain a trial by jury as guaranteed by the Seventh Amendment of the U.S. Constitution.

Respectfully submitted on this 25th day of November 2024.

/s/ *Gregory M. Munson*
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been submitted electronically using the OALJ E-Filing System and was further sent by email to bussey.carol@epa.gov.

Dated: November 25, 2024 /s/ *Gregory M. Munson*