UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Everyday Group, LLC,	)	**Docket No. FIFRA-02-2012-5201**
	)	
Respondent.	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY

I. PROCEDURAL HISTORY

The United States Environmental Protection Agency ("EPA" or "Agency"), Region 2 ("Complainant"), initiated this proceeding on October 11, 2012, by filing a Complaint and Notice of Opportunity for Hearing ("Complaint" or "Compl.") against Everyday Group, LLC ("Respondent"), pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136*l*(a)(1). The Complaint alleges in three counts that Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and the implementing regulations set forth at 40 C.F.R. § 152.15, by engaging in the distribution or sale of three unregistered pesticides, identified therein as "Dettol Laundry Sanitiser" ("DLS"), "Fuji Lavender Moth Tablets" ("FLMT"), and "Dettol Disinfectant Multi-Action Cleaner" ("DDMAC"). The three counts of the Complaint correspond to the three purported pesticides and allege parallel claims: that Respondent imports each of the products in question; that Respondent distributed and/or sold quantities of each of the products to various retail establishments in the New York City area on a number of specified dates, for a total of 32 occasions; that Respondent had not registered the products with the Agency pursuant to Section 3 of FIFRA prior to those dates; and that each of the products constituted a pesticide requiring such registration based upon, among other considerations, claims made on the products' labels. For the 32 alleged instances of violation, the Complaint proposes the assessment of a civil penalty in the aggregate amount of $240,000.

Through counsel, Respondent filed an Answer ("Ans.") on November 9, 2012. In its Answer, Respondent admits that it previously imported the three products at issue and that it did not register Dettol Laundry Sanitiser and Fuji Lavender Moth Tablets as pesticides with the Agency. Respondent denies, however, that the three products constituted pesticides, that it distributed or sold the products to retail establishments in the New York City area on the dates enumerated in the Complaint, or that it failed to register Dettol Disinfectant Multi-Action Cleaner as a pesticide prior to the dates in question. The Answer also raises a number of purported affirmative defenses, including that "the alleged violations were caused by intervening

acts and/or omissions of third parties not subject to control by Respondent" and that a representative of the Agency informed Respondent on August 4, 2012, that the importation and sale of Dettol Laundry Sanitiser was not in violation of the statutory and regulatory provisions cited in the Complaint. Finally, the Answer objects to the proposed penalty as either not allowed by law or grossly excessive.

By Prehearing Order dated January 4, 2013, the undersigned established deadlines for a number of prehearing procedures, including the filing of a prehearing exchange of information and the filing of any dispositive motions regarding liability. At the request of the parties, these filing deadlines were extended on multiple occasions. The prehearing exchange of information ultimately concluded on May 15, 2013.[1] On July 16, 2013, Complainant filed a Motion for Accelerated Decision on Liability ("Motion" or "Mot."), to which Complainant attached the declarations of its attorney, Lee A. Spielmann ("Spielmann Declaration"), and an Environmental Scientist at Region 2, Michael Kramer ("Kramer Declaration"), along with a number of exhibits. Counsel for Respondent subsequently notified a staff attorney of the undersigned on July 31, 2013, that Respondent would not be filing a response to the Motion.[2]

II. STANDARD FOR ADJUDICATING A MOTION FOR ACCELERATED DECISION

Section 22.20(a) of the Rules of Practice authorizes Administrative Law Judges to:

> render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

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[1] In its Initial Prehearing Exchange ("IPHE") dated March 20, 2013, Complainant asserts that it will be seeking a total penalty of $162,500, rather than the amount listed in the Complaint, based upon a detailed explanation of its penalty analysis set forth in the Initial Prehearing Exchange. IPHE at 10-19. Complainant also asserts that it erroneously listed in Count 2 of the Complaint 11 separate dates on which Respondent allegedly distributed and/or sold Fuji Lavender Moth Tablets, and that it is, in fact, seeking to impose liability for only 10 separate dates as part of that Count. IPHE at 13, 18 n. 8. Thus, Complainant seeks to impose liability for a total of 31, rather than 32, instances of violation.

[2] 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"), set forth at 40 C.F.R. Part 22. Section 22.16(b) of the Rules of Practice provides that "[a] party's response to any written motion must be filed within 15 days after service of such motion," and that "[a]ny party who fails to respond within the designated period waives any objection to the granting of the motion." 40 C.F.R. § 22.16(b). By not filing a response to Complainant's Motion, Respondent has thus waived any objection to the granting of the Motion.

40 C.F.R. § 22.20(a). This standard is analogous to the standard governing motions for summary judgment prescribed by Rule 56 of the Federal Rules of Civil Procedure ("FRCP"), and while the FRCP do not apply to this proceeding, the Environmental Appeals Board ("EAB" or "Board") has consistently looked to Rule 56 and its jurisprudence for guidance in adjudicating motions for accelerated decision filed under the Rules of Practice. *See, e.g.*, *Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 285 (EAB 2004); *BWX Techs., Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Clarksburg Casket Co.*, 8 E.A.D. 496, 501-02 (EAB 1999). Federal courts have endorsed this approach. Indeed, the United States Court of Appeals for the First Circuit described Rule 56 as "the prototype for administrative summary judgment procedures" and the jurisprudence surrounding it as "the most fertile source of information about administrative summary judgment." *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995) (rejecting the argument that federal court rulings on motions for summary judgment are "inapposite" to administrative proceedings).

As for the particular standard set forth in Rule 56, it directs a tribunal to grant summary judgment upon motion by a party "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In construing this standard, the United States Supreme Court has held that a factual dispute is material where, under the governing substantive law, it might affect the outcome of the proceeding. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985). In turn, a factual dispute is genuine if a fact finder could reasonably resolve the dispute in favor of the non-moving party under the evidentiary standards applicable to the particular proceeding. *Id.* at 248, 250-52.

The Supreme Court has held that the party moving for summary judgment bears the burden of showing an absence of a genuine dispute as to any material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). This burden consists of two components: an initial burden of production, which shifts to the non-moving party once it is satisfied by the moving party, and the ultimate burden of persuasion, which always remains with the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (Brennan, J., dissenting) (citing 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727 (2d ed. 1983)). To discharge its initial burden of production, the moving party is required to support its assertion that a material fact is not genuinely disputed either by "citing to particular parts of materials in the record," such as documents, affidavits or declarations, and admissions, or by "showing that the materials cited do not establish the . . . presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Once the moving party satisfies its initial burden of production, the burden shifts to the non-moving party to show that a genuine dispute of material fact exists by similarly "citing to particular parts of materials in the record"or by "showing that the materials cited do not establish the absence . . . of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

In determining whether a genuine issue of material fact exists for trial, a tribunal is

required to construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *See Anderson*, 477 U.S. at 255 ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) ("On summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion."). The tribunal is then required to consider whether a fact finder could reasonably find in favor of the non-moving party under the applicable evidentiary standards. *Anderson*, 477 U.S. at 252-55. Where the evidence viewed in the light most favorable to the non-moving party is such that the fact finder could not reasonably find in favor of the non-moving party, summary judgment is appropriate. *See Adickes*, 398 U.S. at 158-59.

The Environmental Appeals Board has applied the foregoing principles in adjudicating motions for accelerated decision under Section 22.20(a) of the Rules of Practice, holding that the moving party "assumes the initial burden of production on a claim, and must make out a case for presumptive entitlement to summary judgment in his favor." *BWX*, 9 E.A.D. at 76. Where the moving party bears the burden of persuasion on an issue, it is entitled to an accelerated decision only if it presents "evidence that is so strong and persuasive that no reasonable [fact finder] is free to disregard it." *Id.* Where the moving party does not bear the burden of persuasion, it has the "lesser burden of 'showing' or 'pointing out' to the reviewing tribunal that there is an absence of evidence in the record to support the nonmoving party's case on that issue." *Id.* at 76. Once the moving party has discharged this burden, the burden of production shifts to the non-moving party bearing the burden of persuasion on the issue to identify specific facts from which a finder of fact could reasonably find in its favor on each element of the claim. *Id.*

As noted by the Board, "neither party can meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence." *BWX*, 9 E.A.D. at 75. Likewise, a party opposing a properly supported motion for accelerated decision is required to "provide more than a *scintilla* of evidence on a disputed factual issue to show their entitlement to a[n] . . . evidentiary hearing: the evidence must be substantial and probative in light of the appropriate evidentiary standard of the case." *Id.* at 76.

Consistent with the jurisprudence of Rule 56, the Board has held that a tribunal adjudicating a motion for accelerated decision is required to consider whether the parties have met their respective burdens in the context of the applicable evidentiary standard. *BWX*, 9 E.A.D. at 75. As prescribed by Section 22.24(b) of the Rules of Practice, 40 C.F.R. § 22.24(b), the evidentiary standard that applies here is proof by a preponderance of the evidence. Section 22.24(a) provides that the complainant bears the burdens of presentation and persuasion that a violation occurred as set forth in the complaint, and the respondent bears the burdens of presentation and persuasion for any affirmative defenses. Accordingly, in order for the Agency to prevail on a motion for accelerated decision as to a respondent's liability, the Agency "must show that it has established the critical elements of [statutory] liability" by a preponderance of the evidence and that "[the respondent] has failed to raise a genuine issue of material fact on its

affirmative defense." *BWX*, 9 E.A.D. at 77-78. As explained by the Board, the Agency's task with respect to an affirmative defense is "to show that there is an absence of support in the record for the defense." *Id.* at 78. Once the Agency has satisfied this burden, the respondent, "as the non-movant bearing the ultimate burden of persuasion on its affirmative defense, must meet its countervailing burden of production by identifying 'specific facts' from which a reasonable factfinder could find in its favor by a preponderance of the evidence." *Id.* at 78.

III. GOVERNING SUBSTANTIVE LAW

A. STATUTORY AUTHORITY

This proceeding arises under the authority of Section 14(a)(1) of FIFRA, which provides, "Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of this Act may be assessed a civil penalty by the Administrative of not more than $5,000 for each offense." 7 U.S.C. § 136*l*(a)(1). One such provision is Section 3(a) of FIFRA, 7 U.S.C. § 136a(a). That provision provides, in pertinent part:

> [N]o person in any State may distribute or sell to any person any pesticide that is not registered under this Act. To the extent necessary to prevent unreasonable adverse effects on the environment, the Administrator may by regulation limit the distribution, sale, or use in any State of any pesticide that is not registered under this Act . . . .

7 U.S.C. § 136a(a). Section 12(a)(1)(A) of FIFRA, which Respondent is alleged to have violated, similarly prohibits the distribution or sale of any unregistered pesticide, providing, in pertinent part, "[I]t shall be unlawful for any person in any State to distribute or sell to any person [] any pesticide that is not registered under [the Act] . . . ." 7 U.S.C. § 136j(a)(1)(A).

Section 2 of FIFRA, 7 U.S.C. § 136, defines the operative terms contained in these provisions. Specifically, the term "person" is defined as "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not." 7 U.S.C. § 136(s). The phrase "to distribute or sell" means "[t]o distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver." 7 U.S.C. § 136(gg). The term "pesticide" is defined, in pertinent part, as "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest." 7 U.S.C. § 136(u)(1). Finally, the term "pest" is defined as follows:

> The term "pest" means (1) any insect, rodent, nematode, fungus, weed, or (2) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism (except viruses, bacteria, or other micro-organisms on or in living man or other living animals) which the Administrator declares to be a pest under section 25(c)(1) [7 U.S.C. § 136w(c)(1)].

7 U.S.C. § 136(t).

B. REGULATORY AUTHORITY

Pursuant to Section 25 of FIFRA, 7 U.S.C. § 136w, the Agency promulgated regulations to implement the requirements and prohibitions of the statute. The particular regulations applicable to this proceeding are codified at 40 C.F.R. Part 152 and mirror the statutory provisions set forth above. Specifically, the regulations at 40 C.F.R. § 152.15, which Respondent is alleged to have violated, provide, in pertinent part, "No person may distribute or sell any pesticide product that is not registered under the Act . . . ." 40 C.F.R. § 152.15. The regulations at 40 C.F.R. § 152.3 define the phrase "distribute or sell" and the term "pesticide" in a manner consistent with the statutory definitions. The phrase "distribute or sell" is defined as an act of "distributing, selling, offering for sale, holding for sale, shipping, holding for shipment, delivering for shipment, or receiving and (having so received) delivering or offering to deliver, or releasing for shipment to any person in any State." 40 C.F.R. § 152.3. The term "pesticide" is defined, in turn, as "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest . . . ." 40 C.F.R. § 152.3.

The regulations at 40 C.F.R. § 152.15 elaborate upon the type of substances that constitutes a "pesticide":

> A pesticide is any substance (or mixture of substances) intended for a pesticidal purpose, i.e., use for the purpose of preventing, destroying, repelling, or mitigating any pest . . . . A substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if:
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> (a) The person who distributes or sells the substance claims, states, or implies (by labeling or otherwise):
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> (1) That the substance (either by itself or in combination with any other substances) can or should be used as a pesticide; or
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> * * *
>
> (c) The person who distributes or sells the substances has actual or constructive knowledge that the substances will be used, or is intended to be used, for a pesticidal purpose.

40 C.F.R. § 152.15. The regulations at 40 C.F.R. § 152.3 define the phrase "pesticide product" as "a pesticide in the particular form (including composition, packaging, and labeling) in which the pesticide is, or is intended to be, distributed or sold." Finally, the regulations at 40 C.F.R. § 152.5 define the term "pest," in pertinent part, as follows:

> An organism is declared to be a pest under circumstances that make it deleterious to man or the environment, if it is:
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> (b) Any invertebrate animal, including but not limited to, any insect, other arthropod, nematode, or mollusk such as a slug or snail, but excluding any internal parasite of living man or other living animals; [or]
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> * * *
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> (d) Any fungus, bacterium, virus, or other microorganism, except for those on or in living man or other living animals and those on or in processed food or processed animal feed, beverages, drugs . . . and cosmetics . . . .

40 C.F.R. § 152.5.

IV. COMPLAINANT'S *PRIMA FACIE* CASE

As previously discussed, in order to prevail on its Motion, Complainant is first required to show that it has established the critical elements of statutory liability. The statutory prohibition against the distribution or sale of unregistered pesticides set forth at Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), can be divided into four elements: (1) the respondent is a "person"; (2) the respondent "distributed or sold" the products at issue; (3) the products at issue are "unregistered"; and (4) the products at issue were "pesticides" and, thus, were required to be registered at the time of the distribution or sale. *The Bullen Companies, Inc.*, 9 E.A.D. 620, 622 (EAB 2001). Complainant contends in its Motion that the evidence it has submitted demonstrates that no genuine issue of material fact exists concerning these elements for each of the three products at issue in this proceeding and that the undisputed facts show that Complainant has met its burden of establishing the critical elements of liability. The evidence presented by Complainant as it relates to each element is discussed below.

A. RESPONDENT IS A "PERSON"

With respect to the first element of liability, Complainant notes that Respondent admitted in its Answer that it "is a limited liability company organized, and existing since January 2009, under the laws of the State of New York." Mot. at 27 (citing Spielmann Declaration ¶ 14; Compl. ¶ 20; Ans. ¶ 20). As such, Complainant argues, Respondent constitutes an "association" or "any organized group of persons," which falls squarely within the meaning of the term "person" as that term is defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s). Mot. at 28 n. 23. Complainant further notes that Respondent admitted in its Answer that it is a "person" for purposes of this proceeding. Mot. at 28 (citing Compl. ¶ 21; Ans. ¶ 21).

As correctly observed by Complainant, the statutory definition of the term "person" includes "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not." 7 U.S.C. § 136(s). Given this definition and the admissions of Respondent, the first element of liability clearly is uncontroverted and has been established.

B. RESPONDENT "DISTRIBUTED OR SOLD" THE PRODUCTS AT ISSUE

As for the second element of liability, Complainant notes that Respondent admitted in its Answer that it "is engaged in the commercial importation of a number of products and substances that are intended for sale to, *inter alia*, household consumers," that "such products include health, beauty and hygiene products," and that it "commercially distributes or sells [the products] to retail establishments in the New York City area." Mot. at 28 (citing Spielmann Declaration ¶¶ 17, 18; Ans. ¶¶ 23, 24). Complainant further notes that Respondent admitted in its Answer that it had previously imported the three products at issue in this proceeding. Mot. at 28-29 (citing Spielmann Declaration ¶¶ 20-21, 23-24, 25-26; Ans. ¶¶ 29, 41, 53). Respondent denied, however, that it possessed knowledge or information as to the truth of the allegations that it distributed and/or sold quantities of those products in the New York City area on the dates set forth in the Complaint. Compl. ¶¶ 30, 42, 54; Ans. ¶¶ 30, 42, 54. Accordingly, Respondent denied these allegations and demanded strict proof of this element. Ans. ¶¶ 30, 42, 54.

To support the accuracy of the allegations, Complainant points to the Declaration of Michael Kramer and documentation related to the distribution or sale of the three products at issue that Mr. Kramer attached to his Declaration and that Complainant had also submitted as part of its Initial Prehearing Exchange. Mot. at 30-32, 39-43, 47-49 (citing Kramer Declaration ¶¶ 19, 24, 28, 42, 46-61, 64-79, 80-87, 89-114, Ex. 3, 16-19; IPHE, Ex. 21-23, 31). In his Declaration, Mr. Kramer explains that he and Aarti Reddy, an Environmental Engineer at Region 2, inspected Respondent's headquarters at 63 Flushing Avenue, Unit 148, Brooklyn, New York ("Respondent's facility"), on November 9, 2010, July 19, 2011, and August 4, 2011. Kramer Declaration ¶¶ 16, 22, 26. Mr. Kramer further explains that he and/or Ms. Reddy requested as part of those inspections that Respondent produce documentation related to the distribution or sale of the three products at issue, which Respondent subsequently submitted to him. Kramer Declaration ¶¶ 19, 24, 28, 42.

This documentation consists primarily of a series of invoices that provide the name and address of Respondent in the heading, list the name and quantity of the goods subject to shipment, and identify the business to which the bill and goods are to be sent. Kramer Declaration, Ex. 16, 17, 19; IPHE, Ex. 21-23. Eight of these invoices - dated December 10, 2009, June 18, 2010, July 16, 2010, July 23, 2010, September 4, 2010, September 15, 2010, October 29, 2010, and April 12, 2011 - list "Dettol Laundry Sanitiser Fresh Lemon," bearing item code number 105499, as one of the goods subject to shipment and the number of cases of the product to be shipped. Kramer Declaration, Ex. 16; IPHE, Ex. 21. Complainant contends that "[t]hese invoices are sales records, and they attest that Respondent, on these eight separate occasions, sold DLS to various establishments in New York City, and each such sale constitutes

an incident of 'distributions or sales' within the meaning of Section 12(a)(1)(A) of FIFRA and 40 C.F.R. § 152.15." Mot. at 32. Eleven invoices - dated November 6, 2009, June 7, 2010, June 10, 2010, June 12, 2010, June 16, 2010, June 17, 2010, June 18, 2010 (including four invoices on this date, each of which identified a different business as the intended recipient of the bill and goods), and June 22, 2010 - list "Fuji Lavender Moth Tablet," bearing item code number 188874, as one of the goods subject to shipment and the number of cases of the product to be shipped. Kramer Declaration, Ex. 17; IPHE, Ex. 22. Describing these invoices also as "records of sales," Complainant contends that "they demonstrate Respondent having sold the FLMT on eight separate occasions to a number of retail establishments in New York City, and each of these sales constitute 'distributions or sales' within the meaning of Section 12(a)(1)(A) of FIFRA and 15 C.F.R. § 152.15."[3] Mot. at 40. Finally, 13 invoices - dated December 10, 2009, December 29, 2009, February 2, 2010, April 22, 2010, May 1, 2010, June 23, 2010, June 25, 2010, July 13, 2010, July 23, 2010, July 28, 2010, September 15, 2010, October 16, 2010, and October 29, 2010 - list "Dettol 4in1 Multi Action Cleaner," bearing item code number 637587, as one of the goods subject to shipment and the number of cases of the product to be shipped.[4] Kramer Declaration,

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[3] Complainant appears to be seeking to impose liability not for each individual distribution or sale of FLMT allegedly documented by the invoices but, rather, for each day on which Respondent allegedly engaged in such a distribution or sale, irrespective of the number of separate transactions that may have occurred on a given day. To determine the number of violations of FIFRA committed by a respondent, the Environmental Appeals Board has held that "[e]ach . . . sale or distribution of a pesticide to any person constitutes a distinct unit of violation, and thus is grounds for the assessment of a separate penalty." *Chempace Corp.*, 9 E.A.D. 119, 129-30 (EAB 2000) (rejecting the respondent's suggested reading of Section 12(a)(1)(A) and (E) of FIFRA as treating a course of conduct involving multiple sales or distributions as a single violation); *see also Microban Prod. Co.*, 9 E.A.D. 674, 684 (EAB 2001) ("*Microban I*") (holding that a single shipment constitutes one unit of violation, while multiple shipments constitute multiple violations, if the elements of liability are met for each shipment); *Microban Prod. Co.*, 11 E.A.D. 425, 446 (EAB 2004) ("*Microban II*") ("The plain language of FIFRA authorizes the Agency to consider each shipment as a violation of the Act."). However, the Board has also observed that "the Agency . . . retains the discretion to seek to impose liability for less than the maximum number of possible violations." *Microban II*, 11 E.A.D. at 446 n. 30 (noting that the complainant had charged the respondent with only 32 violations even though it had obtained evidence of at least 54 shipments to the same company); *see also Chempace*, 9 E.A.D. at 130 n. 16 ("The fact that the Agency has the authority to charge separate violations does not eliminate its enforcement discretion to choose not do so."). Complainant appears to have exercised that discretion here by not seeking to impose liability for each individual distribution or sale of FLMT allegedly documented by the invoices.

[4] This product is identified in the Complaint as "Dettol Disinfectant Multi-Action Cleaner" or "DDMAC." Complainant's Motion and the Declaration of Mr. Kramer note that this product is also commercially identified as "Dettol 4 in 1 Multi Action Cleaner." They

(continued...)

Ex. 19; IPHE, Ex. 23. Complainant contends that "[t]hese invoices are sales records, and they demonstrate Respondent having sold the Dettol 4 in 1 Multi Action Cleaner on 13 separate occasions to various establishments in or near New York City, and each such sale constitutes an incident of "distributions or sales" within the meaning of Section 12(a)(1)(A) of FIFRA and 40 C.F.R. § 152.15." Mot. at 48.

As further evidence of this element of liability, Complainant also points to shipping documents that, according to Complainant, reflect that Respondent imported quantities of FLMT into the country on two separate occasions. Mot. at 41-42 (referring to Kramer Declaration, Ex. 18; IPHE, Ex. 22). The first document referenced by Complainant consists of an invoice dated March 24, 2010, that provides the name of "Sunwa Marketing Co., Ltd.," and a Hong Kong address in the heading; identifies Respondent as the intended recipient of the goods listed on the invoice; and lists "Fuji Lavendar [sic] Moth Tablet" and a quantity of "600 pcs" as one of the goods subject to shipment. Kramer Declaration, Ex. 18; IPHE, Ex. 22. The second and third documents consist of a packing list and an invoice, each of which is dated September 14, 2010; provides the name of "Noah Trading Co.," and a Hong Kong address in the hearing; identifies Respondent on the left-hand side of the document below the heading; identifies the "port of loading" as Hong Kong and the "place of delivery" as New York; and lists "Fuji Lavendar [sic] moth tablet" and a quantity of 4,800 pieces as one of the goods subject to shipment. Kramer Declaration, Ex. 18; IPHE Ex. 22. Noting that the statutory and regulatory definitions of the phrase "distribute or sell" includes "the 'shipping' of items," Complainant argues that the foregoing documents evidence importations by Respondent that caused quantities of FLMT to be shipped into the United States and that "[s]uch activity is sufficient to bring these importations within the ambit of the 'distribute or sell' definition." Mot. at 42. Thus, Complainant maintains, "Respondent 'distributed or sold' the FLMT on the dates indicated on the Sunwa and Noah Trading documents, *i.e.* March 24, 2010 and September 14, 2010." Mot. at 42-43.

For purposes of FIFRA, the phrase "to distribute or sell" means to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver. 7 U.S.C. § 136(gg); 40 C.F.R. § 152.3. The documentation proffered by Complainant clearly supports a finding that Respondent engaged in activities that constitute a form of "distributing or selling," as that phrase is defined by the applicable law, and that Respondent engaged in those activities on the dates enumerated above. Respondent, in turn, has failed to present any evidence that places this documentation into question and raises an issue of fact for an evidentiary hearing. Given the ample evidence proffered by Complainant of the distributions or sales of the three products in question, and Respondent's failure to present any evidence to refute that such distributions or sales occurred, the undersigned finds that no genuine issues of material fact exist as to this element of liability and that the undisputed facts establish that Respondent "distributed or sold"

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[4](...continued)
consequently treat "Dettol Disinfectant Multi-Action Cleaner," "DDMAC," and "Dettol 4 in 1 Multi Action Cleaner" interchangeably.

Dettol Laundry Sanitiser on eight separate occasions, Fuji Lavender Moth Tablets on 10 separate occasions, and Dettol Disinfectant Multi-Action Cleaner on 13 separate occasions, for a total of 31 separate distributions or sales.

C. THE PRODUCTS AT ISSUE WERE "UNREGISTERED"

Turning to the third element of liability, Complainant points to the Declaration of Mr. Kramer as support for the allegation that the three products at issue were not registered as pesticides with EPA at any time relevant to the charges in the Complaint. Mot. at 37-38, 45, 52-54 (citing Kramer Declaration ¶¶ 7, 9, 34-35, 115, 117-20, 122-25). In his Declaration, Mr. Kramer asserts that the products' labels and packaging failed to display an EPA registration number or EPA establishment number:

> Not one of the labels or the packaging that I looked at - whether the labels on bottles of Dettol Laundry Sanitiser, the packages holding Fuji Lavender Moth Tablets, or the labels on bottles of Dettol 4 in 1 Multi Action Cleaner - indicated or had an EPA registration number or an EPA establishment number. Both an EPA registration number and an EPA establishment number were missing from all the labels/packaging I saw containing the DLS, the FLMT and/or the DDMAC.
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> Both an EPA registration number and an EPA establishment number are obtained for a given product if that product is registered with EPA pursuant to Section 3 of FIFRA.

Kramer Declaration ¶¶ 34, 35.

Based upon the absence of an EPA registration number or EPA establishment number on the products' labels and packaging, Mr. Kramer opined that "it was quite likely" that the products had never been registered as pesticides with EPA. Kramer Declaration ¶ 115. He asserts that he and Ms. Reddy confirmed the truth of this allegation most recently on July 2, 2013, by searching the database maintained by EPA's Office of Pesticides Programs Information Network for the following names: "Dettol Laundry Sanitiser," "Dettol Laundry Sanitizer," "Fuji Lavender Moth Tablets," "Dettol Multi Action Cleaner," "Dettol Disinfectant Multi Action Cleaner," and simply "DETTOL." Kramer Declaration ¶¶ 116-21. Mr. Kramer asserts that this search failed to yield any results indicating that the three products at issue had ever been registered with EPA, which, in Mr. Kramer's opinion, "confirmed beyond any doubt" that these products were never registered with EPA pursuant to Section 3 of FIFRA. Kramer Declaration ¶¶ 116, 118-22. Mr. Kramer asserts that he and Ms. Reddy also searched EPA's public website for pesticide registrations using the same terms on July 2, 2013, which "turned up nothing that revealed, or even hinted at, that any of these products has ever been registered with EPA under Section 3 of FIFRA." Kramer Declaration ¶¶ 123-24.

Upon consideration, the undersigned finds that Complainant has proffered sufficient

evidence establishing that no genuine issue of material fact exists as to whether the three products at issue were registered as pesticides with the Agency. As noted by Complainant in its Motion, Respondent did not dispute this element of liability with respect to the Dettol Laundry Sanitiser and Fuji Lavender Moth Tablets but, rather, admitted in its Answer that it had not registered those products prior to the dates of the violative transactions alleged in the Complaint. Mot. at 38 n. 31, 45 n. 37 (citing Ans. ¶¶ 37, 49). While Respondent denied in its Answer that it had failed to register the Dettol Disinfectant Multi-Action Cleaner prior to the dates at issue, Compl. ¶ 61; Ans. ¶ 61, at no point in this proceeding has Respondent produced any evidence to support its claim or to refute the accuracy of Mr. Kramer's assertions on this issue. A bald denial of an element of liability is insufficient to demonstrate that a genuine issue of material fact exists. *See Strong Steel Products*, EPA Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-006, 2002 EPA ALJ LEXIS 57, at *22 (ALJ, Sept. 9, 2002) ("[A] simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter."). Thus, the undersigned finds that no genuine issue of material fact exists as to this element of liability and that the only reasonable conclusion to be drawn from the record is that Respondent did not register the three products at issue as pesticides pursuant to Section 3 of FIFRA before distributing or selling the products on the dates set forth above.

D. THE PRODUCTS AT ISSUE ARE "PESTICIDES"

Finally, with respect to the fourth and final element of liability, Complainant contends that each of the three products at issue constitutes a "pesticide" within the meaning of Section 12(a)(1)(A) of FIFRA and a "pesticide product" within the meaning of 40 C.F.R. § 152.15. Mot. at 32-36, 43-45, 49-52. To support these allegations, Complainant relies upon a number of considerations, described below.

1. Dettol Laundry Sanitiser is a "Pesticide"

In regard to Dettol Laundry Sanitiser, Complainant first contends that the pesticidal purpose of this product is evident from the use of the term "sanitiser" (a variation of the American English spelling of "sanitizer") in its commercial name. Mot. at 33. Complainant argues that the term "sanitizer" is a variant of the verb "to sanitize," which means to "clean[] something to the point of sterilizing it." Mot. at 33. In turn, Complainant maintains, the verb "to sterilize" clearly conveys "the killing of micro-organisms," which are considered "pests" for purposes of FIFRA. Mot. at 33. As support for this argument, Complainant cites the Declaration of Mr. Kramer, in which he states:

> The word "sanitiser" in the name "Dettol Laundry Sanitiser" makes . . . a pesticidal claim. The word "sanitizer" is defined as "a sanitizing agent," and "sanitize" is defined as "to make sanitary (as by cleaning or sterilizing)." One definition of "sterilize" is to free from living microorganisms usu[ally] by physical or chemical agents." These definitions are from "Webster's Third New International Dictionary of the English Language" (unabridged), pages 2012, 2238.

Mot. at 33-34 (citing Kramer Declaration ¶ 37).

Complainant next argues that the labels affixed to bottles of Dettol Laundry Sanitiser also evidence the pesticidal purpose of this product. Specifically, Complainant notes that the labels "make additional and straightforward pesticidal claims" by describing the "germicidal qualities" of DLS. Mot. at 34 (referring to Kramer Declaration, Ex. 13; IPHE, Ex. 24, 25). As support, Complainant again cites the Declaration of Mr. Kramer, as well as copies of photographs of the labels that Mr. Kramer attached to his Declaration and that Complainant had earlier submitted as part of its Initial Prehearing Exchange.[5] Mot. at 34 (citing Kramer Declaration ¶¶ 29-31, Ex. 13;

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[5] In his Declaration, Mr. Kramer explains the circumstances under which he took the photographs. Specifically, he asserts that on November 1, 2010, he received a form entitled "Notice of Arrival of Pesticides and Devices" ("Notice of Arrival" or NOA"). Kramer Declaration ¶ 6. Mr. Kramer attached a copy of this document to his Declaration, and Complainant had previously submitted a copy as part of its Initial Prehearing Exchange. Kramer Declaration, Ex. 1; IPHE, Ex. 18. As observed by Mr. Kramer, the Notice of Arrival reflects that a product identified only as "DETTOL" entered the country through the Port of Newark on or about October 23, 2010, that the product had arrived as part of a shipment bearing Entry Number 983-2147720-4, that the term "N/L" was listed as the product's EPA Registration Number and EPA Producer Establishment Number, and that the product was being held at a location identified as "H&M Int'l Transport." Kramer Declaration ¶¶ 7, 8 (citing Kramer Declaration, Ex. 1). Mr. Kramer further observed that the form had been completed by or on behalf of Respondent, that it listed Respondent's name and the address of Respondent's facility as the "importer or consignee," and that it had been certified by Respondent. Kramer Declaration ¶ 6 (citing Kramer Declaration, Ex. 1).

Noting that Section 17 of FIFRA and the United States Customs and Border Protection regulations set forth at 19 C.F.R. § 12.113 require a "Notice of Arrival of Pesticides and Devices" to be prepared and submitted whenever pesticides are imported into the country, Mr. Kramer asserts that the particular Notice of Arrival submitted by Respondent led him to suspect that Respondent had imported an unregistered pesticide given Respondent's failure to list an EPA registration number or EPA establishment number for the product. Kramer Declaration ¶¶ 7, 9. His concern prompted him on November 4, 2010, to inspect the H&M International facility identified by the Notice of Arrival as the location where the product was being held. Kramer Declaration ¶ 9. According to the Declaration of Mr. Kramer and a document entitled "Inspection Report" that he attached to his Declaration and that Complainant had previously submitted as part of its Initial Prehearing Exchange, Mr. Kramer observed during his inspection of the H&M International facility a number of cases containing Dettol Laundry Sanitiser that had arrived as part of the shipment in question. Kramer Declaration ¶ 10, Ex. 2; IPHE, Ex. 5. Mr. Kramer asserts that he took photographs of the front and back of a bottle of the Dettol Laundry Sanitiser at that time and that the photographs in the record accurately depict what he observed.

(continued...)

IPHE, Ex. 24, 25). As observed by Mr. Kramer:

> The labeling on the bottle of Dettol Laundry Sanitiser included these statements: "Kills 99.9% of Germs" and that the bottle contained a "Disinfectant" (these statements were on the front of the bottle). On the back of the bottle, the labeling repeated that it "Kills 99.9% of germs," beneath which it said that these germs "includ(ed) common illness-causing germs." Beneath that latter phrase, the label listed some of these germs, including "E.coli," "Staph. Aureus," "Kiebsiella pneumoniae" and "Influenza A type H1N1 virus."

Kramer Declaration ¶ 31 (referring to Kramer Declaration, Ex. 13; IPHE, Ex. 24, 25).

Finally, Complainant contends that the Notice of Arrival supports a finding that Dettol Laundry Sanitiser is a pesticide subject to regulation under FIFRA. Mot. at 35-36. Arguing that the Dettol Laundry Sanitiser observed by Mr. Kramer at the H&M International facility was the "DETTOL" product identified in the Notice of Arrival, Complainant maintains that Respondent recognized that Dettol Laundry Sanitiser was intended to be used as a pesticide given that it submitted a form used to report the importation of pesticides at the time it imported the product. Mot. at 36. Noting that the regulations at 30 C.F.R. § 152.15(c) provide that "[a] substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if [] [t]he person who distributes or sells the substance has actual or constructive knowledge that the substance will be used, or is intended to be used, for a pesticidal purpose," Complainant maintains that Dettol Laundry Sanitiser constituted a pesticide by reason of Respondent's knowledge of the product's pesticidal purpose. Mot. at 36.

As previously discussed, the regulations at 40 C.F.R. § 152.15 describe in detail the type of substance that constitutes a "pesticide." Specifically, these regulations provide:

> A pesticide is any substance (or mixture of substances) intended for a pesticidal purpose, i.e., use for the purpose of preventing, destroying, repelling, or mitigating any pest . . . . A substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if:
>
> (a) The person who distributes or sells the substance claims, states, or implies (by labeling or otherwise):
>
> (1) That the substance (either by itself or in combination with any other substances) can or should be used as a pesticide; or
>
> (2) That the substance consists of or contains an active ingredient and that it can be

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[5](...continued)
Kramer Declaration ¶¶ 10, 29, 30 (citing Kramer Declaration, Ex. 2, 13; IPHE, Ex. 5, 24, 25).

used to manufacture a pesticide; or

(b) The substance consists of or contains one or more active ingredients and has no significant commercially valuable use as distributed or sold other than (1) use for pesticidal purpose . . ., [or] (2) use for manufacture of a pesticide; or

(c) The person who distributes or sells the substances has actual or constructive knowledge that the substances will be used, or is intended to be used, for a pesticidal purpose.

40 C.F.R. § 152.15. Thus, the regulations provide for numerous alternative bases upon which a substance can be found to be "intended for a pesticidal purpose," and thus subject to regulation as a pesticide, under the statute. One such basis is that the product's labeling claims, states, or implies that the product can or should be used as a pesticide. 40 C.F.R. § 152.15(a)(1). This consideration alone is sufficient to establish that a product is intended for a pesticidal purpose. *See 99 Cents Only Stores*, EPA Docket No. FIFRA-9-2008-0027, 2008 EPA ALJ LEXIS 45, at *31-33 (ALJ, June 2, 2008) (Order on Motion for Partial Accelerated Decision) ("[T]he legal effect of the placement of a pesticidal claim on the product's label . . . is to unimpeachably make the product a pesticide requiring registration under FIFRA.").

As evidenced by the photographs proffered by Complainant in the present proceeding, the labels affixed to the front and back of the bottle of Dettol Laundry Sanitiser clearly claim, state, or imply that the product can be used as a pesticide. The label affixed to the front of the bottle of Dettol Laundry Sanitiser identifies the product in prominent lettering as a "disinfectant," Kramer Declaration, Ex. 13; IPHE, Ex. 24, 25, a term that is defined as "an agent that frees from infection, *esp* : a chemical that destroys vegetative forms of harmful microorganisms esp. on inanimate objects," Merriam Webster's Collegiate Dictionary 157 (10th ed. 1997).[6] The label

[6] To any extent necessary, this Tribunal takes "official notice" of the meaning of any words to which this Tribunal cites a dictionary as a reference source therefor, pursuant to Section 22.22(f) of the Rules of Practice, which authorizes the undersigned to take official notice "of any matter which can be judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency." 40 C.F.R. § 22.22(f). Rule 201(b) of the Federal Rules of Evidence provides, in pertinent part, that Federal courts may take judicial notice of a fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Dictionaries qualify as such sources. *See, e.g.*, *Aves. in Leather, Inc., v. United States*, 28 C.I.T. 565, 572 n.9 (Ct. Int'l Trade 2004) (relying upon multiple English language dictionaries to take judicial notice of the meaning of the word "portfolio"); *Pyles v. Merit Systems Protection Board*, 45 F.3d 411, 415 (Fed. Cir. 1995) (relying upon medical and English language dictionaries to take judicial notice of the meaning of the word "dementia"); *Wilshire Westwood Assocs. v.*

(continued...)

also states that the product "KILLS 99.9% OF GERMS." Kramer Declaration, Ex. 13; IPHE, Ex. 24, 25. The label on the back of the bottle bears an identical claim that the product "Kills 99.9% of germs" and then proceeds to identify some of the "illness-causing germs" that it purportedly kills, including "E.coli" and "Influenza A type H1N1 virus." Kramer Declaration, Ex. 13; IPHE, Ex. 24, 25. Given that the applicable statutory and regulatory provisions define a "pesticide" as any substance "intended for preventing, destroying, repelling, or mitigating any pest" and a "pest" as any virus, bacteria, or other microorganism, the labeling of Dettol Laundry Sanitiser explicitly claims that the product can be used to destroy a category of pests under FIFRA and, therefore, that it is intended for a pesticidal purpose.

The record does not contain any evidence that the photographs taken by Mr. Kramer fail to accurately depict the labeling of Dettol Laundry Sanitiser or that the distributions or sales of Dettol Laundry Sanitiser described above involved products whose labels differed from those photographed by Mr. Kramer. As previously noted, Mr. Kramer asserts in his Declaration that the photographs of Dettol Laundry Sanitiser in the record accurately depict what he observed. Kramer Declaration ¶ 30. He also asserts that when he and/or Ms. Reddy requested documentation from Respondent during the course of their inspections of Respondent's facility, "the context and circumstances made clear that what EPA was seeking included information and documentation concerning the products distributed or sold with the labels that we (Ms. Reddy and/or I) had seen." Kramer Declaration ¶ 43. While Respondent denied in its Answer that it possessed any knowledge or information as to the truth of the allegation that the labeling of Dettol Laundry Sanitiser contained the language cited above, Compl. ¶ 33, 34; Ans. ¶ 33, 34, Respondent has not introduced any contradictory evidence into the record. Accordingly, the undersigned finds that no genuine dispute exists and that the uncontroverted facts establish that Dettol Laundry Sanitiser is intended for a pesticidal purpose based upon the pesticidal claims set forth on the product's labeling. This consideration alone is sufficient to find that Dettol Laundry Sanitiser constitutes a "pesticide" requiring registration, as that term is defined by 7 U.S.C. § 136(u)(1) and 40 C.F.R. §§ 152.3, 152.15.

2. Fuji Lavender Moth Tablets are a "Pesticide"

Turning to the second product at issue in this proceeding, Fuji Lavender Moth Tablets, Complainant first contends that the pesticidal purpose of this product is also evident from its commercial name. Mot. at 43-44. Noting that the statutory and regulatory definition of the term "pest" includes insects, Complainant argues that "[a] moth is a common household pest" and that

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[6](...continued)
Atlantic Richfield Corp., 881 F.2d 801, 803 (9th Cir. 1989) (relying upon an English language dictionary to take judicial notice of the meaning of the words "fraction" and "petroleum"); *Hancock v. American Steel & Wire Co.*, 203 F.2d 737, 740 (C.C.P.A. 1953) ("Courts take judicial notice of the meaning of words, and the court may always refer to standard dictionaries or other recognized authorities to refresh its memory and understanding as to the common meaning of language.") (citing *Nix v. Hedden*, 149 U.S. 304 (1893)).

"[a] 'Moth Tablet' logically represents a way to combat moths, either by repelling them or killing them." Mot. at 43-44. As support for this argument, Complainant cites the Declaration of Mr. Kramer, in which he states:

> In the name "Fuji Lavender Moth Tablet," the wording "moth tablet" makes a pesticidal claim. There is widespread understanding that moths are common household pests. A product that includes the words "moth tablet" can only conceivably and reasonably be understood as either repelling or killing these insects; I do not think any reasonable person would view the words "moth tablet" as conveying something intended to promote the health of moths or simply attract them.

Mot. at 44 (citing Kramer Declaration ¶ 38).

Complainant next argues that the packaging in which Fuji Lavender Moth Tablets are contained also evidences the pesticidal purpose of this product, and as support, Complainant cites the Declaration of Mr. Kramer and copies of photographs of the packaging that Mr. Kramer attached to his Declaration and that Complainant had earlier submitted as part of its Initial Prehearing Exchange.[7] Mot. at 44 (citing Kramer Declaration ¶¶ 29-30, 32, Ex. 14; IPHE, Ex. 26-28). As observed by Mr. Kramer, "The labeling on the packaging holding the Fuji Lavender Moth Tablets included a statement on the front of the package, 'Insect Repellent,' and a statement on the back of the packaging, 'Moth Preventative chemical.'" Kramer Declaration ¶ 32 (referring to Kramer Declaration, Ex. 14; IPHE, Ex. 26-28). Complainant contends that these statements constitute "direct pesticidal claims." Mot. at 44.

As previously discussed, the regulations at 40 C.F.R. § 152.15(a)(1) provide that a substance is considered to be "intended for a pesticidal purpose," and thus to be a pesticide requiring registration, where the product's labeling claims, states, or implies that the product can or should be used as a pesticide. Further, the applicable statutory and regulatory provisions define a "pesticide" as any substance "intended for preventing, destroying, repelling, or mitigating any pest" and a "pest" as including insects. As evidenced by the photographs proffered by Complainant, the label printed on the front of the packaging of Fuji Lavender Moth Tablets plainly claims, states, or implied that the product can be used as a pesticide. The photographs depict Fuji Lavender Moth Tablets as packaged in cellophane bags bearing a printed label on the front and back of the bags. Kramer Declaration, Ex. 14; IPHE, Ex. 26-28. While the

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[7] According to the Declaration of Mr. Kramer and the document entitled "Inspection Report," Mr. Kramer observed during his November 1, 2010 inspection of the H&M International facility a number of cases containing Fuji Lavender Moth Tablets that had arrived as part of the same shipment as the Dettol Laundry Sanitiser. Kramer Declaration ¶ 10, Ex. 2; IPHE, Ex. 5. Mr. Kramer claims that he took photographs of the front and back of a package of Fuji Lavender Moth Tablets at that time and that the photographs in the record accurately depict what he observed. Kramer Declaration ¶¶ 10, 29, 30 (citing Kramer Declaration, Ex. 2, 14; IPHE, Ex. 5, 26-28).

undersigned is unable to discern the writing on the back of the bag as it is depicted in the cited photographs, the writing on the front of the bag clearly identifies the product as an "insect repellent" beneath the printed name of "Fuji Lavender Moth Tablet." Kramer Declaration, Ex. 14; IPHE Ex. 26-28. The use of this phrase on the product's labeling undoubtedly conveys that the product can be used to repel a category of pests under FIFRA. Thus, it constitutes a pesticidal claim and suffices to show that the product is intended for a pesticidal purpose under 40 C.F.R. § 152.15. *See, e.g.*, *Behnke Lubricants, Inc.*, EPA Docket No. FIFRA-05-2007-0025, 2008 EPA ALJ LEXIS 42, at *42-44 (ALJ, Dec. 30, 2008) (holding that the name "Micronox," by itself, implied a pesticidal claim); *99 Cents Only Stores*, EPA Docket No. FIFRA-9-2008-0027, 2008 EPA ALJ LEXIS 45, at *38-45 (ALJ, June 2, 2008) (Order on Motion for Partial Accelerated Decision) (holding that a single Spanish word, "disinfección," appearing on a product's label can make out a pesticidal claim).

Again, the record does not contain any evidence that the photographs taken by Mr. Kramer fail to accurately depict the packaging of Fuji Lavender Moth Tablets or that the distributions or sales of Fuji Lavender Moth Tablets described above involved products whose labels differed from those photographed by Mr. Kramer. While Respondent denied in its Answer that it possessed any knowledge or information as to the truth of the allegation that the labeling of Fuji Lavender Moth Tablets contained the language cited above, Compl. ¶ 45, 46; Ans. ¶ 45, 46, Respondent has not proffered any evidence that calls the cited photographs into question. Accordingly, the undersigned finds that no genuine issue exists and that the undisputed facts establish that Fuji Lavender Moth Tablets are intended for a pesticidal purpose based upon the pesticidal claim set forth on the product's labeling. This consideration is sufficient to establish that this product constitutes a "pesticide" requiring registration, as that term is defined by 7 U.S.C. § 136(u)(1) and 40 C.F.R. §§ 152.3, 152.15.

3. Dettol Disinfectant Multi Action Cleaner is a "Pesticide"

Finally, with respect to the third product at issue in this proceeding, Complainant contends that the pesticidal purpose of Dettol Disinfectant Multi Action Cleaner "emerges in the first instance" from the commercial name of the product, which Respondent consistently identified in invoices as "Dettol 4 in 1 Multi Action Cleaner." Mot. at 49-50. Arguing that the phrase "4 in 1" references the multiple functions of this product, Complainant contends that these functions are identified on the product's label and through advertising of the product, and that the first function identified is its "ability to kill germs." Mot. at 50. As support, Complainant cites the Declaration of Mr. Kramer, in which he states:

> The "4 in 1" portion of the name of . . . "Dettol 4 in 1 Multi Action Cleaner" . . . makes an inherent pesticidal claim. The "4 in 1" part of the name conveys that this product has four distinct purposes, that this product has four major characteristics. These are identified and advertised on the label that I photographed as well as on a website.

> As can be seen from [a photograph of a bottle of the product], these are the four characteristics of the "4 in 1," and the very first characteristic makes a straightforward pesticidal claim:
>
> **KILLS 99.9% of germs**
> CLEANS & removes dirt
> POWERS through grease
> FRESH green apple fragrance[8]

Mot. at 50 (citing Kramer Declaration ¶ 39-40).

Complainant next refers to the labels directly, citing the Declaration of Mr. Kramer and copies of photographs of the labels that Mr. Kramer attached to his Declaration and that Complainant had earlier submitted as part of its Initial Prehearing Exchange.[9] Mot. at 50-52 (citing Kramer Declaration ¶¶ 18, 29-30, 33-34, Ex. 6, 15; IPHE, Ex. 29, 30, 33). As observed by Mr. Kramer:

> The labeling on a bottle of Dettol 4 in 1 Multi Action Cleaner included a statement on the front of the bottle holding this product that it "Kills 99.9% of Germs." This statement was made twice on the front label. On the back label of a bottle holding the DDMAC, some of the germs purportedly killed by this product include "E. coli." Both the front and back of the labels used with this product list the word "Disinfectant."

Kramer Declaration ¶ 33 (referring to Kramer Declaration, Ex. 15; IPHE, Ex. 29, 30). Complainant contends that the term "disinfectant" conveys "definite germicidal properties" given the dictionary definition of the term, among other considerations. Mot. at 51 n.42. Complainant maintains, "Because the terms [sic] is synonymous with something that destroys (kills)

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[8] Mr. Kramer notes in his Declaration that "Dettol 4 in 1 Multi Action Cleaner" is available in various fragrances, but that each form of the product makes a substantially similar claim of being able to kill 99.9% of germs. Kramer Declaration ¶ 41. Thus, Complainant argues, "irrespective of which fragrance Respondent distributed or sold at any given time, it seems most probable that any product bearing the '4 in 1' name touted the product's germicidal properties as paramount among the four functions." Mot. at 50 n.40.

[9] According to his Declaration, Mr. Kramer observed during his November 9, 2010 inspection of Respondent's facility a number of boxes marked to indicate that they contained Dettol Disinfectant Multi Action Cleaner. Kramer Declaration ¶ 18. Mr. Kramer asserts that he took photographs of these boxes, as well as the front and back of a bottle of Dettol Disinfectant Multi Action Cleaner, at that time, and that the photographs in the record accurately depict what he observed. ¶¶ 18, 30 (citing Kramer Declaration, Ex. 6, 15; IPHE, Ex. 29, 30, 33).

microorganisms, that term conveys ('claims, states or implies') a pesticidal purpose sufficient to bring it within the reach of FIFRA regulations." Mot. at 52.

As previously discussed, the regulations at 40 C.F.R. § 152.15(a)(1) provide that a substance is considered to be "intended for a pesticidal purpose," and thus to be a pesticide requiring registration, where the product's labeling claims, states, or implies that the product can or should be used as a pesticide. Further, the applicable statutory and regulatory provisions define a "pesticide" as any substance "intended for preventing, destroying, repelling, or mitigating any pest" and a "pest" as any virus, bacteria, or other microorganism. As evidenced by the photographs proffered by Complainant, the labels affixed to the front and back of the bottle of Dettol 4 in 1 Multi Action Cleaner clearly claim, state, or imply that the product can be used as a pesticide. The label affixed to the front of the bottle of the product identifies it in prominent lettering as a "disinfectant." Kramer Declaration, Ex. 15; IPHE, Ex. 29, 30. As noted above, that term is defined as "an agent that frees from infection, *esp* : a chemical that destroys vegetative forms of harmful microorganisms esp. on inanimate objects." Merriam Webster's Collegiate Dictionary 157 (10th ed. 1997). The label also states both on the lefthand side and bottom of the label that the product "KILLS 99.9% of germs." Kramer Declaration, Ex. 13; IPHE, Ex. 24. The term "germ" is defined, among other meanings, as a microorganism, especially "a microorganism causing disease," Merriam Webster's Collegiate Dictionary 157 (10th ed. 1997), and it is commonly understood as such. While most of the writing on the label affixed to the back of the bottle, as it is depicted in the cited photographs, is obscured, the word "disinfectant" is easily discernable at the top of the label. Kramer Declaration, Ex. 13; IPHE, Ex. 25. The labels thus convey that Dettol 4 in 1 Multi Action Cleaner can be used to destroy a category of pests under FIFRA and, in turn, that it is intended for a pesticidal purpose.

Once again, the record does not contain any evidence that the photographs taken by Mr. Kramer fail to accurately depict the packaging of the Dettol 4 in 1 Multi Action Cleaner or that the distributions or sales of the Dettol 4 in 1 Multi Action Cleaner described above involved products whose labels differed from those photographed by Mr. Kramer. While Respondent denied in its Answer that it possessed any knowledge or information as to the truth of the allegation that the labeling of Dettol Disinfectant Multi Action Cleaner contained the language cited above, Compl. ¶ 57, 58; Ans. ¶ 57, 58, Respondent has not introduced any contradictory evidence into the record. Accordingly, the undersigned finds that no genuine dispute exists and that the uncontroverted facts establish that Dettol 4 in 1 Multi Action Cleaner is intended for a pesticidal purpose based upon the pesticidal claims set forth on the product's labeling. This consideration is sufficient to establish that this product constitutes a "pesticide" requiring registration, as that term is defined by 7 U.S.C. § 136(u)(1) and 40 C.F.R. §§ 152.3, 152.15.

V. RESPONDENT'S AFFIRMATIVE DEFENSES

Based upon the discussion above, the undersigned finds that Complainant has established as undisputed the critical elements of statutory liability for each of the products at issue in this proceeding. In order to prevail on its Motion, however, Complainant is required to show not

only that it has established the critical elements of statutory liability but also that Respondent has failed to raise a genuine issue of material fact with respect to any affirmative defenses. To do so, Complainant is required to show an absence of support in the record for such defenses. Once Complainant makes such a showing, Respondent bears the burden of identifying specific facts from which a finder of fact could reasonably find in its favor by a preponderance of the evidence.

Complainant proffered various arguments in its Motion to the effect that none of the defenses raised by Respondent in its Answer and Prehearing Exchange create a genuine issue of material fact and thereby preclude entry of an order granting accelerated decision as to Respondent's liability in this case. These defenses, and Complainant's response thereto, are set forth below.

A. RESPONDENT'S PURPORTED AFFIRMATIVE DEFENSES

As previously noted, Respondent raises a number of purported affirmative defenses in its Answer. The defenses related to Respondent's liability[10] are as follows:

> 1. Respondent states that the Complaint fails to state a claim upon which relief can be granted.
>
> 2. Respondent states that its conduct was not in violation of any of the purportedly applicable statutes or regulations set forth in the Complaint.
>
> 3. Respondent states that the products at issue in Counts 1, 2 and 3 are not regulated by any of the purportedly applicable statutes or regulations set forth in the Complaint.
>
> 4. Respondent states that during EPA's August 4, 2012 visit to Respondent's facility, the EPA official expressly advised Respondent that the importation and sale of "Dettol Laundry Sanitiser" was not in violation of any of the purportedly applicable statutes or regulations set forth in the Complaint.
>
> 5. Respondent is not liable for any of the alleged acts or omissions alleged in the Complaint given that those alleged violations were caused by the intervening acts and/or omissions of third parties not subject to control by Respondent.

[10] The sixth purported affirmative defense set forth in Respondent's Answer relates to the civil penalty proposed in the Complaint. As the appropriate penalty to assess for the alleged violations is not a subject of Complainant's Motion, the undersigned need not address that particular defense at this time.

Ans. at physical page 7.[11]

Respondent expanded upon these defenses in its Prehearing Exchange ("PHE"). In particular, with respect to the second, third, and fifth defenses, Respondent asserts that it did not intend, purchase, market, sell or distribute the products at issue in this proceeding for use as pesticide products regulated by FIFRA but, rather, that it intended, purchased, marketed, sold, and distributed the products as surface cleaners, fabric softeners and/or deodorizers. PHE at 6-7 (¶¶ 1, 2, 4). Respondent further asserts that it understood the products to be unregulated surface cleaners, fabric softeners, and/or deodorizers. PHE at 7 (¶ 4). Elsewhere in its Prehearing Exchange, Respondent made a number of similar assertions in reference to denials contained in its Answer, including that "it did not intend that the identified product[s] be used for preventing the spread of, destroying, repelling or mitigating pests . . . ." PHE at 5-6 (¶¶ 4, 6, 8).

B. COMPLAINANT'S ARGUMENTS

Complainant first addresses the fourth purported affirmative defense set forth in Respondent's Answer, arguing that even if Respondent's allegation was true,[12] the date on which the EPA official supposedly advised Respondent that the importation and sale of Dettol Laundry Sanitiser did not violate FIFRA - August 4, 2012 - was subsequent to each of the violative transactions alleged in the Complaint. Mot. at 55-56. According to Complainant, "[t]he issue of what might have been said (or not) during an inspection more than 15 months after the last distribution or sale in question is irrelevant and tangential to the issue of Respondent's liability . . . ." Mot. at 56.

Turning to the remaining defenses, Complainant contends that Respondent has failed to identify any facts corroborating these claims and that its "summary denials of the complaint's allegations are insufficient for a respondent to have met the requisite 40 C.F.R. § 22.24 burden standard." Mot. at 56-58. Conversely, Complainant argues, its Motion and the Kramer Declaration discuss in detail how the three products at issue bear pesticidal claims and, therefore, are subject to the statutory and regulatory provisions set forth in the Complaint; how Respondent's distribution and sales of the products, when none were registered with EPA, "ran afoul" of these provisions; and how the Complaint does, in fact, allege valid claims under FIFRA. Mot. at 56-57. Specifically in regard to the fifth purported affirmative defense, Complainant argues that "Respondent's attempt to allege superseding and intervening acts by third parties is of no avail" as Respondent has failed to identify any of these alleged third parties in its Answer or Prehearing Exchange. More significantly, Complainant contends, FIFRA is a strict liability statute and, as such, imposes liability once Respondent has been shown to distribute or sell unregistered pesticides, regardless of the actions of third parties. Mot. at 57.

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[11] Respondent's Answer is not paginated.

[12] Complainant notes that it denied the allegation in its Initial Prehearing Exchange. Mot. at 56, n. 45 (citing IPHE ¶ VI(D).

Finally, Complainant argues that the assertions made by Respondent in its Prehearing Exchange are "legally invalid" and, thus, do not preclude entry of an accelerated decision as to Respondent's liability. Mot. at 58-60. In particular, Complainant contends that the relevant and dispositive consideration in determining whether a product is intended for a pesticidal purpose is not Respondent's subjective intent but, rather, the claims of "pesticidal properties," such as the ability to kill germs or to repel insects, made by a product through its labeling, advertising, or other means. Mot. at 58. According to Complainant, "[t]his searching inquiry as to whether a pesticidal claim has been made arises from the inclusive and sweeping language of 40 C.F.R. § 152.15, but that inquiry does not consider subjective intent." Mot. at 58-59. Complainant further maintains, "What matters is what Respondent intended as manifested and exhibited by the product itself - whether all surrounding indicia, including such factors as labeling, packaging, advertisement, when measured with objective criteria, give rise to a pesticidal claim or such claim otherwise emerges from the pesticide itself, its labeling and packaging and such other objective factors." Mot. at 59 (emphasis in original omitted). Complainant cites *N. Jonas & Co., Inc., v. EPA*, 666 F.2d 829 (3rd Cir. 1981), as support for this proposition.

C. DISCUSSION

Upon consideration, the undersigned agrees with Complainant that the purported affirmative defenses advanced by Respondent in its Answer and Prehearing Exchange fail to raise any genuine of material fact that would preclude entry of an order of accelerated decision as to Respondent's liability. First, Respondent's claims are legally deficient. As correctly noted by Complainant, FIFRA is a strict liability statute. *See, e.g.*, *Arapahoe County Weed Dist.*, 8 E.A.D. 381, 388 (EAB 1999) ("FIFRA is a strict liability statute."); *Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 796 (EAB 1997) ("The environmental statutes are intended to be action forcing, and brook no excuse for failure to achieve the required result. . . .The environmental statutes . . ., including FIFRA, consistently have been construed as imposing strict liability for failure to meet their requirements."). Therefore, arguments based upon a lack of knowledge or intent to violate, or the intervening acts or omissions of third parties, do not provide a defense to liability. *See, e.g.*, *Sultan Chemists, Inc.*, 9 E.A.D. 323, 349 (EAB 2000) (holding that a respondent's good faith cannot serve to defeat liability under a strict liability statute like FIFRA), *aff'd*, 281 F.3d 73 (3rd Cir. 2002); *Green Thumb*, 6 E.A.D. at 796-97 (holding that the respondent's statutory duty to register its pesticide product was mandatory and could not be avoided by relying upon a third party to ensure compliance). While Section 12(b)(1) of FIFRA provides a narrow exemption under which an innocent distributor or seller can escape the imposition of penalties for violations,[13] Respondent has not raised any factual allegations to support its eligibility for such an

[13] Specifically, Section 12(b)(1) provides:

> The penalties provided for a violation of paragraph (1) of subsection (1) shall not apply to–

(continued...)

exemption.

Complainant also correctly observes that a distributor or seller's subjective intent is immaterial in determining whether a product constitutes a pesticide requiring registration. As the United States Court of Appeals for the Third Circuit held in *N. Jonas & Co., Inc., v. EPA*, 666 F.2d 829 (3rd Cir. 1981):

> The subjective intent standard would emasculate the Act. A manufacturer or distributor cannot avoid the reach of the Act by pointing to its own subjective intent that a product have a given use. Even if it were possible to gauge this subjective intent, the public weal requires that even those who inadvertently produce goods which the public perceives as pesticidal be subject to the jurisdiction and regulations of the EPA.

Jonas, 666 F.2d at 833. Further, a distributor or seller's subjective intent is notably absent from the considerations set forth in 40 C.F.R. § 152.15 for determining whether a product is considered to be intended for a pesticidal purpose. Thus, the relevant question here is not the subjective intent of Respondent but whether any of the tests set forth in 40 C.F.R. § 152.15 have been met, including whether the given product's labeling claims, states, or implies that the product can be used as a pesticide. As discussed above, the undisputed facts in the record establish that this particular test has been satisfied for the three products at issue in this proceeding.

Given that finding, Respondent also is not eligible for the exemption from registration set forth at 40 C.F.R. § 152.10 for deodorizers, bleaches, and cleaning agents. That regulation provides:

> A product that is not intended to prevent, destroy, repel, or mitigate a pest . . . is not considered to be a pesticide. The following types of products or articles are not considered to be pesticides *unless a pesticidal claim is made on their labeling or in connection with their sale and distribution*:

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[13](...continued)

> (1) any person who establishes a guaranty signed by, and containing the name and address of, the registrant or person residing in the United States from whom the person purchased or received in good faith the pesticide in the same unbroken package, to the effect that the pesticide was lawfully registered at the time of sale and delivery to the person, and that it complies with the other requirements of this Act, and in such case the guarantor shall be subject to the penalties which would otherwise attach to the person holding the guaranty under the provisions of this Act.

7 U.S.C. § 136j(b).

(a) Deodorizers, bleaches, and cleaning agents . . . .

40 C.F.R. § 152.10 (emphasis added). While the regulation lists "deodorizers" and "cleaning agents" among the "types of products" generally "not considered to be pesticides," it explicitly caveats this exemption with the phrase "unless a pesticidal claim is made on their labeling." Thus, because pesticidal claims appeared on the labels of the three products in question, the fact that those products may have been "surface cleaners," "fabric softeners," or "deodorizers" does not prevent the entry of an accelerated decision on this point.

With respect to Respondent's allegation that an EPA official advised Respondent that the importation and sale of Dettol Laundry Sanitiser did not violate FIFRA, the undersigned agrees with Complainant that the date of this alleged occurrence - August 4, 2012 - was subsequent to the distributions or sales described above and, thus, is irrelevant to Respondent's liability.

Finally, even if the arguments raised by Respondent were legally valid, the undersigned notes that Respondent has failed to produce any evidence in support. Respondent did not file any response to Complainant's Motion, and it claims in its Prehearing Exchange only that it would establish the factual assertions related to its purported affirmative defenses through direct witness testimony at the hearing. Such a claim is insufficient to satisfy its burden in the face of the instant motion. *See, e.g.*, *BWX*, 9 E.A.D. at 75 ("[N]either party can meet its burden of production by resting on mere allegations, assertions or conclusions of evidence); *Pure Gold, Inc.*, 739 F.2d 624, 626-27 (Fed. Cir. 1984) ("In countering a motion for summary judgment, more is required than mere assertions of counsel. The non-movant may not rest on its conclusory pleadings but, under Rule 56, must set out, usually in an affidavit by one with knowledge of specific facts, what specific evidence could be offered at trial."); *King v. Nat'l Indus., Inc.*, 512 F.2d 29, 33-34 (6th Cir. 1975) (holding that the burden placed on a party opposing a motion for summary judgment under FRCP 56 is not satisfied by the party's attorney "merely referring to the proposed testimony of possible witnesses").

VI. CONCLUSION

In accordance with the foregoing discussion, the undersigned finds that Complainant has shown that no genuine issue of material fact exists as to the critical elements of statutory liability and that the undisputed facts establish that:

(1) Respondent is a "person," as that term is defined by 7 U.S.C. § 136(s);

(2) Respondent "distributed or sold" within the meaning of 7 U.S.C. § 136(gg) and 40 C.F.R. § 152.15:

(a) Dettol Laundry Sanitiser on eight separate dates;

(b) Fuji Lavender Moth Tablets on 10 separate dates; and

(c) Dettol Disinfectant Multi Action Cleaner on 13 separate dates;

(3) the three aforementioned products had not been registered as pesticides pursuant to 7 U.S.C. § 136(a) prior to those dates; and

(4) the three aforementioned products each constituted a "pesticide" within the meaning of 7 U.S.C. § 136(u)(1) and 40 C.F.R. §§ 152.3, 152.15.

The undersigned further finds that each of the aforementioned distributions or sales constitutes a violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and 40 C.F.R. § 152.15, and that Respondent's purported affirmative defenses fail to raise a genuine issue of material fact with respect to its liability for these violations. Accordingly, Complainant is entitled to and will be granted an accelerated decision finding Respondent liable for 31 violations of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and 40 C.F.R. § 152.15.

VII. ORDER

1. Complainant's Motion for Accelerated Decision on Liability is hereby **GRANTED**.

2. Respondent is hereby found liable for 31 violations of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), and 40 C.F.R. § 152.15.

3. On or before **September 6, 2013**, the parties shall engage in a settlement conference and attempt in good faith to reach an amicable resolution of this matter. Complainant shall file a status report as to the status of settlement discussions on or before **September 9, 2013**.

4. The hearing of this matter is currently scheduled to begin on **September 23, 2013**, and will proceed as planned to take evidence and argument on the issue of the appropriate penalty, if any, to be imposed against Respondent for the violations found herein.

_____
Susan L. Biro
Chief Administrative Law Judge

Dated: August 21, 2013
Washington, D.C.