UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Office of Administrative Law Judges
Washington, DC 20460

In the Matter of	)	
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Rizing Sun, L.L.C.,	)	**Docket No. FIFRA-9-2004-0024**
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	)	
Respondent	)	

Appearances:

For Complainant:

David Kim, Esq.
Assistant Regional Counsel
United States Environmental Protection Agency
Region IX
San Francisco, CA

For Respondent:

Allen Smith
Pro Se
Peoria, AZ

INITIAL DECISION

I. INTRODUCTION AND PROCEDURAL BACKGROUND

This proceeding under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA" or "Act"), 7 U.S.C. § 136 *et seq.*, was commenced on September 28, 2004, by the filing of a complaint by the Associate Director for Agriculture, Cross Media Division, U.S. Environmental Protection Agency, Region 9 ("Complainant"). The complaint charges Rizing Sun, L.L.C. ("Respondent" or "Rizing Sun") with the distribution or sale of an unregistered pesticide in violation of FIFRA Section 12(a)(1)(A) and the sale or distribution of misbranded pesticides in violation of Section 12(a)(1)(E) of FIFRA. The registration and misbranding charges are for the distribution or sale of the same pesticide in the same transaction.

Complainant alleges that Respondent distributed or sold products under the Frontline label, which are marketed as topical flea and tick treatments for dogs and cats. Specifically, the products at issue contain "fipronil" for Frontline Top Spot products and "fipronil and (S)-methropene," for Frontline Plus products, which ingredients are pesticides. Complainant asserts

that these products are pesticides which are not registered and are misbranded. Moreover, Complainant asserts that Respondent is liable for sixty-two violations and proposes to assess Rizing Sun a civil administrative penalty of up to $5,500 for each violation occurring on or before March 14, 2004, and up to $6,500 for each violation occurring after March 14, 2004. The initial penalty totaled $357,000. In a supplemental prehearing exchange, Complainant reduced the proposed penalty to $214,000.

Rizing Sun, acting *pro se*, filed an answer by letter ("answer"), dated November 24, 2004. The answer denied all jurisdictional allegations in the complaint and requested a jury trial.

On February 15, 2005, the Administrative Law Judge ("ALJ") issued a letter-order directing the parties to exchange prehearing information on or before March 11, 2005. Complainant filed its prehearing exchange in a timely manner. Complainant amended its prehearing exchange on May 3, 2005, to add three exhibits, including a Stop Sale, Use, and Removal Order ("SSURO"), dated April 14, 2005, and an Enforcement Case Review for Frontline products at issue in this proceeding. On July 22, 2005, Complainant amended its prehearing exchange a second time to include a 2003 Profit and Loss Statement for Respondent and a revised penalty calculation sheet. Complainant amended its prehearing exchange a third time on November 9, 2005, whereby Complainant added the curriculum vitae of an expert witness and records documenting Respondent's incorporation.[1]

Rizing Sun responded by letter, dated April 22, 2005, which challenged allegations in the complaint ("Response"). First, Rizing Sun denied that it ever distributed an unregistered pesticide. Second, Rizing Sun asserted that the Frontline products, which are manufactured by Merial Limited ("Merial"), are only made in France. Respondent stated that products known as "Frontline Plus for Dogs and Cats" are registered as EPA Reg. No. 65331-5 (Est. No. 65331-FR-2) and that products known as "Frontline Top Spot or Spot On for Dog and Cats" are registered as EPA Reg. No. 65331-3 (Est. No. 65331-FR-2).[2] Rizing Sun quoted 7 U.S.C. § 136e, which requires that the establishment where pesticides are produced be registered, and asserted that to "our" knowledge, Merial has met all of the requirements for the legal distribution and

[1] Complainant's Fourth Motion to Supplement Prehearing Exchange, dated January 26, 2006, was denied by an Order, dated January 31. 2006, for failure to comply, without a showing of good cause, with Consolidated Rule 22.22(a) requiring that documents, proposed exhibits and summaries of testimony be exchanged with all other parties at least 15 days prior to the hearing.

[2] The complaint alleges that "Frontline Top Spot for Dogs" (EPA Reg. No. 65331-3). "Frontline Top Spot for Cats" (EPA Reg. No. 65331-2), "Frontline Plus for Dogs" (EPA Reg. No. 65331-5), and "Frontline Plus For Cats" (EPA Reg. No. 65331-4) are EPA registered pesticides (Complaint, ¶ 1). It is further alleged that Merial Limited ("Merial") is the registrant of these pesticides and owns the registered trademark "Frontline". Merial produces "Frontline" products at its registered establishments in France (EPA Establishment Number 65331-FR-2), Germany (EPA Establishment Number 65331-DEU-1), and Georgia (EPA Establishment Number 65331-GA-1) for sale within the United States (id.).

registration of these products. Rizing Sun denied that it had ever manufactured, repackaged or distributed this product under any other name or modified container (Response at 2). Third, Respondent cited 7 U.S.C. § 136o[3] and stated that any illegally imported products would be the responsibility of the distributor from whom Rizing Sun acquired the product. Rizing Sun identified the distributor as Tidalwave Distribution, Inc., Torrance, California ("Tidalwave") (Response at 6 and 9). Under Section 17 of FIFRA, the Secretary of Treasury is obligated to notify the EPA Administrator of the importation of pesticides and devices and to refuse delivery to the consignee of any pesticides or devices that are determined to be adulterated, misbranded, or otherwise not in compliance with FIFRA (supra, note 3). Thus, Respondent crafted an argument that the allegations of the complaint are within the jurisdiction of the Secretary of the Treasury and U.S. Customs, but not of EPA.

Next, Respondent quoted the lengthy definition of "Misbranded" in FIFRA § 2 (q) and focused on the labeling and packaging allegations allegedly pertinent to the complaint (Response at 4, 5). Respondent asserted that all labeling was representative of the ingredients and not misleading in any way. Additionally, Rizing Sun alleged that the package conformed to [FIFRA § 25(c)(3) (7 U.S.C] [§] 136w(c)(3)), which requires that packaging standards established under FIFRA § 25(c)(3) be consistent with those established under the Poison Control Act (15 U.S.C. § 1471 et seq.). Rizing Sun alleged that packaging was in a poison prevention package in that both (apparently the package containing three pipettes or applicators and the package containing an individual pipette) are individually foil sealed and are the same as the tube containing the

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[3] Entitled "Importation of pesticides and devices," FIFRA Section 17(c), 7 U.S.C. § 136o(c), provides, in pertinent part:

> The Secretary of the Treasury shall notify the Administrator of the arrival of pesticides and devices and shall deliver to the Administrator, upon the Administrator's request, samples of pesticides or devices which are being imported into the United States, giving notice to the owner or consignee, who may appear before the Administrator and have the right to introduce testimony. If it appears from the examination of a sample that it is adulterated, or misbranded or otherwise violates the provisions set forth in this Act, or is otherwise injurious to health or the environment, the pesticide or device may be refused admission, and the Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any pesticide or device refused delivery which shall not be exported by the consignee within 90 days from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe. The Secretary of the Treasury may deliver to the consignee such pesticide or device pending examination and decision in the matter on execution of bond for the amount of the full invoice value of such pesticide or device, together with the duty thereon, and on refusal to return such pesticide or device for any cause to the custody of the Secretary of the Treasury, when demanded, for the purpose of excluding them from the country, or for any other purpose, said consignee shall forfeit the full amount of said bond . . . .

pesticide. Rizing Sun emphasized that all packages clearly stated "KEEP OUT OF REACH OF CHILDREN"(Response at 6). Respondent asserted that the product was not offered for sale under any other name nor was it an imitation (id.). Denying Complainant's claim that the product was counterfeit, Rizing Sun acknowledged that certain packaging was counterfeit.[4] According to Rizing Sun, the product in the package manufactured by Merial was exactly the ingredient as listed and therefore would not pose an unreasonable risk when used according to label directions. Rizing Sun denied repackaging the product. Moreover, Respondent challenged Complainant's claims that the labels were printed in a foreign language.[5] Rizing Sun asserted that all language and labeling were in English and understandable. Respondent noted that the metric system is a unit of measurement and not a foreign language.[6] In addition, Rizing Sun alleged that a Hawaiian corporation, Pang & Sons, Inc. ("Pang & Sons") repackaged the materials. According to Respondent, Pang & Sons was investigated by U.S. Customs and has agreed to pay a criminal penalty of $10,000 payable over two years. Rizing Sun also alleged that EPA fined Pang & Sons but the proposed civil penalty of $341,000 has not been paid. In addition, Respondent asserted that Tidalwave, which is responsible for mass distribution to Rizing Sun and eighteen other U.S. companies, agreed to pay a penalty of $50,000 for selling and distributing unregistered and misbranded products, without either admitting or denying liability.

Lastly, Rizing Sun claimed an inability to pay the civil penalty, alleging that EPA's proposed penalty would cause it to go out of business. Moreover, Respondent claimed that it is no longer selling the repackaged products, even if other companies are. Rizing Sun insisted that it is no longer purchasing from Tidalwave or selling any products that cannot be verified as legally imported from France. Arguing for mitigation of the penalty, Respondent pointed out that it has no history of prior violations, that all retailers in the complaint were issued a full refund for any products considered to be in violation, and that any FIFRA violations were

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[4] "Only the reboxed packaging was counterfeit."(Response at 6). Rizing Sun quoted the dictionary definition of counterfeit as "To make a copy of, usually with intent to defraud, forge, counterfeits money."

[5] The EPA Fact Sheet (C-7) refers to foreign languages, *i.e.*, most likely French or German, on the product tubes of "Advantage" products, which are not involved here. No mention is made in the EPA Fact Sheet that there are foreign languages on the labels of Frontline products. It is noted, however, that an Investigation Summary of Pets Plus, Mililani, Hawaii, by the Hawaiian Department of Agriculture, on February 18, 2004, states, inter alia, that "inserts provided in a foreign language, contents in metric units, and order box and insert lot nos. do not match." (C-2).

[6] Rizing Sun also alleged that there was no reference in FIFRA stating that the unit of measurement on a label must be strictly in U.S. pounds (Response at 6). This assertion, however, overlooks 40 C.F.R. Part 156, Subpart A, which provides requirements for a label's net weight or measure of contents. If the net content statement is in liquid, then it "shall be expressed in conventional American units of fluid ounces, pints, quarts, and gallons." 40 C.F.R. § 156.10(d)(1). If the net content statement is "solid or semi-solid, viscous or pressurized, or is a mixture of liquid and solid, the net content statement shall be in terms of weight expressed as avoirdupois pounds." 40 C.F.R. § 156.10(d)(3).

inadvertent. Therefore, Respondent requested that the ALJ issue a warning, or, in the alternative, significantly reduce the penalty below the $10,000 criminal penalty paid over two years by Pang & Sons.

On November 4, 2005, Complainant filed a Motion for Accelerated Decision on Liability and a Memorandum in Support thereof. Although noting that Respondent had denied all of the jurisdictional allegations in the complaint, Complainant asserted that there was no genuine issue of material fact which would preclude a judgment on liability because (1) Respondent was a "person"; (2) that the products at issue are pesticides; (3) that Rizing Sun "distributed or sold" the pesticides at issue in 31 transactions; (4) that the pesticides were "unregistered"; and (5) that the pesticides were "misbranded." Respondent did not file a response to the motion.

By an order, dated February 1, 2006, Complainant's Motion for Accelerated Decision on Liability was granted in part : Order Granting in Part Complainant's Motion for Accelerated Decision on Liability and Reducing the Number of Counts for Which a Penalty May Be Assessed ("Accelerated Decision"). The ALJ found that, viewing the circumstances in a light most favorable to Respondent, there were material issues of fact as to whether the Frontline products sold or distributed were registered pesticides. The ALJ did find that Complainant had sufficiently established that Rizing Sun sold or distributed misbranded pesticides in violation of Section 12(a)(1)(E). However, the ALJ concluded that Complainant may not assess a penalty for both the sale and distribution of a pesticide which is not registered in violation of FIFRA § 12(a)(1)(A) and for the sale or distribution of a misbranded pesticide in violation of FIFRA § 12(a)(1)(E) for the same distribution or sale. The ALJ rejected Complainant's argument that Sections 12(a)(1)(A) and (E) are independent from each other. Specifically, EPA maintained that the plain meaning and legislative history behind the statute demonstrates that a single transaction of sale or distribution violates both 12(a)(1)(A) and (E). The ALJ noted that the language of FIFRA Section 12(a)(1)(A)-(F) indicates that the unit of violation is the "sale" or "distribution" of a pesticide., and pointed out that, although a sale or distribution may be unlawful for several reasons, those reasons do not increase the number of sales or distributions which is the only basis upon which a penalty may be assessed. The ALJ found that there was no basis for dividing a single sale or distribution into separate components for the purpose of multiplying the number of penalties. Thus, the ALJ required that Complainant elect whether to seek a penalty for the distribution or sale of a pesticide which is not registered or of a misbranded pesticide but ruled that it may not seek penalties under both Sections of the Act for the same sale or distribution.[7]

A hearing on this matter was held in Phoenix, Arizona, on February 7, 2006. Based upon the entire record including the proposed findings, conclusions, and briefs of Complainant,[8] I make the following:

[7] Complainant's Motion for Accelerated Decision pertained only to liability and did not refer to penalty assessment. Thus, the amount of an appropriate penalty was the only issue to be resolved by the hearing.

[8] Respondent contented itself with arguments previously made and did not file a post-hearing brief.

II. FINDINGS OF FACT

1. Rizing Sun, L.L.C. is a Nevada corporation that owns, operates, and is responsible for a business in Peoria, Arizona (C-10). The corporation is operated by Mr. Allen H. Smith and his wife in Peoria, Arizona.

2. Rizing Sun engages in the sale and distribution of various products for the control of fleas and ticks on dogs and cats. Among these products, Rizing Sun sold and distributed Frontline products, which contain the chemical fipronil and/or S-Methoprene. Respondent received these products from another distributor, Tidalwave Distributions, Inc. of Torrance, California (Transcript ("Tr.") 7).

3. Merial Limited of Duluth, Georgia, is the United States registrant of Frontline products containing fipronil (Tr. 45).

4. Mr. Smith testified on behalf of the Respondent, Rizing Sun, LLC. According to Mr. Smith, his wife had a car accident while pregnant and suffered medical problems as a result (Tr. 184-185). Rizing Sun was started as a way to provide alternate and supplemental sources of income (Tr. 185). Rizing Sun would receive Frontline products in bulk and then redistribute the packages to feed stores and small pet shops (Tr. 185). Acting as "middlemen," Mr. Smith and his wife would get the products from wholesale companies in shrink-wrapped packages of ten cartons per sleeve (Tr. 186). Since their customers requested a few boxes at a time, Mr. Smith and his wife would break open the shrink-wrap, remove cartons, and sell the boxes individually (Tr. 186-187). Excess cartons would be stored in a bedroom closet of the Smith residence (Tr. 188).

5. On February 17, 2004, an inspector from the Hawaii Department of Agriculture ("HDA"), Raynette N. Y. Ching, inspected City Feed, Inc. ("City Feed"), a pet store located at 1827 South Beretania Street, Honolulu, Hawaii (C- 4). Ms. Ching then hand-delivered to City Feed's president, Mr. Raymond M. Sato, a SSURO for Advantage and Frontline products offered for sale (*id.*). The SSURO had been issued because HDA suspected that the Advantage and Frontline products were not registered and were misbranded. Mr. Sato is reported to have stated that City Feed did not sell Advantage products and that Frontline products were obtained from Pang and Sons and from Rizing Sun, LLC.

6. Seven Frontline products were identified as having been obtained from Rizing Sun: (1) Frontline Spot on Dog, under 22 lbs, EPA Reg. No 65331-3; (2) Frontline Spot on Dog, 23-44 lbs, EPA Reg. No. 6533-3; (3) Frontline Spot on Dog, 45-88 lbs;, EPA Reg. No. 65331-3 (4) Frontline Plus for Cats, EPA Reg. No. 65331-4; (5) Frontline Plus for Dogs under 22 lbs;, EPA Reg. No. 65331-5; (6) Frontline Plus for Dogs, 23-44 lbs , EPA Reg. No. 65331-5; and (7) Frontline Plus for Dogs, 45-88 lbs, EPA Reg. No. 65331-5 (Ex C-4). Ms. Ching took photographic samples of three of these Frontline products obtained from Rizing Sun, specifically, Frontline Plus for Dogs (45-88 lbs.), EPA Reg. No. 65331-

5; Frontline Plus for Cats, EPA Reg. No. 65331-4; and Frontline Spot on Dog (0-10 kg.), EPA Reg. No. 65331-3 (*Id.*). Labels of the Frontline Spot on Dog, EPA Reg. No. 65331-3, provide, inter alia, "Kills 98-100% of fleas within 24 hours for approximately 2 months"; "Kills ticks within 48 hours for up to 1 month minimising (sic) the risk of disease transmission" ; Fully controls infestations of lice within 48 hours". Labels on the Frontline Plus for Cats, EPA Reg. No. 65331-4, include the following: "Kills fleas for at least 1 month including all flea stages in the pet's surroundings." Labels on the Frontline Plus for dogs, EPA Reg. No 65331-5, includes the quoted statement from the label of the Frontline Plus for Cats and the following: "Controls and treats flea allergy dermatitis" and "Controls paralysis ticks for up to two weeks." The side panel of the Frontline Spot on Dog (0-10 kg.) sample reads "**Merial Animal Health Limited**, PO Box 327, Sandringham House, Harlow Business Park, HARLOW, CM19 STG(C-4). The side panel of the Frontline Spot on Dog (0-10 kg.) sample reads "**Merial Animal Health Limited**, PO Box 327, Sandringham House, Harlow. The address listed on the side panel of Frontline Plus For Cats and Frontline Plus For Dogs (45-88 lbs) is "**Merial Australia LTD.,** Level 6, 79 George Street, Parramatta, NSW 2150" (C-4). However, side labels of Frontline Plus for Dogs state "Made in France." Mr. Sato signed a Dealer's Statements identifying each product and supplied an invoice, No. 1578, dated October 14, 2003, verifying the purchase from Rizing Sun.[9]

7. On February 18, 2004, HDA inspector Melvin Tokuda inspected Pets Plus, which is located at 250 Ward Avenue, Honolulu, Hawaii (C-3). Mr. Tokuda initiated the inspection to investigate the possible sale and distribution of unregistered pesticides. He interviewed Stacy Sterrett, the Shift Manager, and delivered to her an SSURO regarding both Frontline and Advantage products (*Id.*). Mr. Tokuda sampled by taking photographs of Frontline Plus for Cats, EPA Reg. No. 653331-4; Frontline Plus for Dogs (11-22 lbs.), EPA Reg. No. 65331-5; Frontline Plus for Dogs (23-44 lbs.), EPA Reg. No. 65331-5; Frontline Plus for Dogs (45-88 lbs.), EPA Reg. No. 65331-5; Frontline Plus for Dogs (40-60 kg.), EPA Reg. No. 65331-5; Frontline Plus for Dogs (89-132 lbs.), EPA Reg. No. 65331-5; and Frontline Plus for Dogs (20-40 kg.), EPA Reg. No. 65331-5. Labels on these products contained language similar or identical to that quoted from samples taken by Ms. Ching at City Feed (finding 6). The labels identified Merial Limited, Duluth, Georgia as the registrant, stated "Made In France" and identified the establishment as "EPA Est. 65331-FR-2. " Ms. Sterrett is reported to have stated that she did not know from whom the Frontline products were purchased.

8. Mr. Tokuda conducted a follow-up inspection at Pets Plus on April 20, 2004. During the inspection, the manager of Pets Plus, Stanley Uyehara, traced the products referred to in finding 7 to Rizing Sun and supplied an invoice, dated November 28, 2003, verifying the purchase (*id.*). Mr. Uyehara also signed seven Dealer's Statements which verify that each of the products was purchased from Rizing Sun (*id.*).

[9] Id. Frontline products on the invoice are identified in terms of small, medium and large dogs. Mr. Sato indicated that these references were to dogs under 22 pounds, to dogs 23-44 pounds and to dogs 45-88 pounds in size, respectively.

9. On February 18, 2004, HDA inspector Steven S. Ogata inspected Mililani Pets, Inc. ("Mililani"), which is located at 95-221 Kipapa Drive, Mililani, Hawaii (C-2). According to the Inspection Narrative, Mr. Ogata went to the establishment to hand-deliver an SSURO issued by EPA for Frontline and Advantage products purchased from Pang & Sons (*Id.*). However, no Frontline and Advantage products purchased from Pang & Sons were found at Mililani. Mr. Ogata did find on site products purchased from Rizing Sun and took photographic samples of Frontline Plus for Dogs (11-22 lbs.), EPA Reg. No. 65331-5; Frontline Plus for Dogs (23-44 lbs.), EPA Reg. No. 65331-5; Frontline Plus for Dogs (45-88 lbs.), EPA Reg. No. 65331-5; Frontline Plus for Dogs (98-132 lbs.), EPA Reg. No. 65331-5; Frontline Plus for Cats, EPA Reg. No. 65331-4; and Frontline Top Spot for Dogs (0-22 lbs.), EPA Reg. No. 65331-3. Labels on these products included "Kills fleas, flea eggs & ticks", identified the registrant as Merial Limited, Duluth, Georgia, and the establishment as "EPA Est 65331-FR-2 or "EPA Est DEU-1" At least some of these labels also included "VET –USAGE VETERINAIRE," which is French and may be the basis in part for Complainant's allegation that directions for use on the labels were printed in a foreign language (Complaint, ¶¶ 13, 17, 21, and 25). See, however, supra, note 5. The president of Mililani, David M. Ferreira, signed six Dealer's Statements, which indicate that the products were purchased from Rizing Sun (*id.*). Mr. Ferreira also produced four invoices, which verify the purchases (*Id.*).[10]

10. On May 7, 2004, the Pennsylvania Department of Agriculture ("PDA") inspected Krazy A Shop ("Krazy A"), which is located at 526 Old West Creek Road, Emporium, Pennsylvania (C-5). PDA Inspector Jeffery W. Bastian went to Krazy A in response to an EPA referral. He took photographs of Frontline Plus for Dogs (44-88 lbs.), EPA Reg. No. 65331-5 and Frontline Spot on Dog, EPA Reg. No. 65331-3,. The address listed for Frontline Spot on dogs is Merial Animal Health Limited P.O. Box 327, Sandringham House Harlow Business Park, HARLOW, CM19 5TG." (C-5). The address listed on the side panel of Frontline Plus for Dogs (45-88 lbs.) is "**Merial Australia Pty Ltd**, Level 6, 79 George Street, Parramatta, NSW 2150." (id). This information was obtained from the Pesticide Collection Report prepared by Mr. Bastion rather than from the photographs he took.. Ms. Betty D. Allen, the owner of Krazy A, supplied an invoice indicating that the products were purchased from Rizing Sun and signed a Dealer's Statement (*id.*).

[10] Complainant alleges that the four invoices and the statements obtained by Mr. Ogata at Mililani Pets prove six transactions between Mililani and Rizing Sun. The first invoice, dated December 29, 2003, indicates that Respondent distributed or sold to Mililani Frontline Plus products for dog sizes SM, MED, LG, and XL. The second invoice, dated January 13, 2004, indicates that Rizing Sun distributed or sold to Mililani Frontline Top Spot 3 Pack SM Dog; Frontline Plus 3 Pack Cat, and Frontline Plus 3 Pack MED Dog. The third invoice, dated January 21, 2004, reflects that Rizing Sun distributed or sold Frontline Plus 3 Pack SM Dog and Frontline Plus 3 Pack LG Dog. The fourth invoice, dated February 6, 2004, indicates the sale or distribution of Frontline Top Spot 3 Pack SM Dog, Frontline Plus 3 Pack SM Dog, Frontline Plus 3 Pack Med Dog, and Frontline Plus 3 Pack LG Dog..

According to Mr. Bastian, Ms. Allen presented him with three different open Frontline packages, which she believed were counterfeit product (*id.*). Ms. Allen had used two of the packages herself and the third one was returned by a customer. In her Dealer's Statement, Ms. Allen asserted that she removed all of the Frontline products that she purchased from Rizing Sun after receiving a complaint from a customer (*id.*).

11. On July 15, 2004, the Georgia Department of Agriculture ("GDA") inspected Acworth Feed, located at 5000 Acworth Road, Acworth, Georgia (C-1). GDA inspector Pamela K. Ackerman took photographs of Frontline Plus for Dogs (0-10 kg.), Frontline Plus for Dogs (10-20 kg.), Frontline Plus for Dogs (20-40 kg.), Frontline Plus for Dogs (40-60 kg.), Frontline Spot on Dog (0-10 kg.), Frontline Spot on Dog (10-20 kg.), Frontline Spot on Dog (20-40 kg.), Frontline Spot on Dog (40-60 kg.), and Frontline Plus for Cats. The side panels of the outer cartons of Frontline Plus for Dogs (0- 10 kg.), Frontline Plus for Dogs (10- 20 kg.), Frontline Plus for Dogs (20-40 kg.), Frontline Plus for Dogs (40-60 kg.), and Frontline Plus for Cats provide an address which reads as "**Merial Australia Pty Ltd**, Level 6. 79 George Street, Parramatta, NSW 2150." (C -1). Conversely, the side panels for Frontline Spot on Dog (0-10 kg.), Frontline Spot on Dog (10-20 kg.), Frontline Spot on Dog (20-40 kg.), Frontline Spot on Dog (40-60 kg.) provide a British address, which is "**Merial Animal Health Limited**, PO Box 327, Sandringham House, Harlow Business Park, HARLOW, CM19 5TG" (C-. 1). The owner of Acworth Feed, Mark Tatum, stated that the products were purchased from Rizing Sun and provided three invoices, which verified the purchases (*id.*). In addition, Mr. Tatum signed a Dealer's Statement (*id.*).

12. Counts 32-62 of the complaint concern the identical distribution or sale by Rizing Sun of the pesticides described above. The complaint alleges that these pesticides were misbranded in violation of FIFRA § 12(a)(1)(E) and that Complainant may assess a separate penalty for the identical distribution or sale of a pesticide which is not registered and which is misbranded. For reasons alluded to supra and reiterated hereinafter, it is my conclusion that Complaint may allege the distribution or sale of a pesticide which is not registered and which is misbranded but may not charge separate penalties therefore. The unit of violation is the sale or distribution of a pesticide which is not registered and which is misbranded and the fact that the sale or distribution may be unlawful for more than one reason does not increase the number of sales or distributions which is the only basis upon which a penalty may be assessed. This is in accordance with the ERP which indicates that dependent violations may be charged in the complaint, but that separate penalties may not be assessed therefore (id. 25).

13. During the hearing, Mr. Smith testified that when their customers received a SSURO the products were returned to Rizing Sun (Tr. 189). Rizing Sun would then provide a full refund (id.).

14. Ms. Ann Sibold, an Environmental Protection Specialist in EPA's Office of Pesticide Programs ("OPP"), Registration Division, testified at the hearing. She testified that she had reviewed most, if not all, of the applications for registration of fipronil Frontline

products submitted by Merial of Duluth, Georgia (Tr. 44, 45). She identified Merial of Duluth, Georgia as the US registrant for fipronil Frontline products (Tr. 45). She prepared Enforcement Case Reviews ("ECRs") for the Frontline samples on March 10, 2005, and May 3, 2005 (Tr. 41; C-11; C-12). Ms. Sibold described an ECR as a review by the Office of Pesticide Programs of pesticides found in the channels of trade to determine compliance with FIFRA.. She completed 23 ECRs for the products distributed or sold by Rizing Sun (Tr. 45). Nine of the ECRs were on samples collected by Ms. Pamela Ackerman of GDA, six were on samples collected by Mr. Stephen Ogata of HDA, five were on samples collected by Mr. Tokuda of HDA, and three were on samples collected by Ms. Ching of HDA (Tr. 46).

15. On March 10, 2005, Ms. Sibold reviewed five of the nine GDA reports for samples, i.e., Frontline Plus for Dogs (0-10 kg.), Frontline Plus for Dogs (10-20 kg.), Frontline Plus for Dogs (20-40 kg.), Frontline Plus for Dogs (40-60 kg.), and Frontline Plus for Cats (Tr. 45, 47). On May 3, 2005, Ms. Sibold reviewed the remaining four of the GDA reports: Frontline Spot on Dog (0-10 kg.), Frontline Spot on Dog (10-20 kg.), Frontline Spot on Dog (20-40 kg.), and Frontline Spot on Dog (40-60 kg.).

16. Referring to the Frontline Plus for Dogs (0-10 kg.) label as an example, Ms. Sibold explained the deficiencies in the GDA samples taken by Ms. Ackerman. She testified that the labels were not registered with the EPA because the outer carton did not bear EPA registration numbers or EPA establishment numbers.[11] Moreover, she pointed out that the bottom panel of the label designates the producer as "Merial Australia, PTY Limited, in Parramatta, NSW," which is located in Australia (id.). Ms. Sibold also noted that the label would be difficult for the average United States consumer to understand because it does not follow conventional units of measure in two ways. First, the product name [for the animal to be treated] is in terms of kilograms rather than pounds (Tr. 48, 50). Second, Ms. Sibold emphasized that the label provides the active ingredients as "100 G/L fipronil, 9 EG/LS methoprine," even though the average consumer does not understand concentration in terms of grams per liter (Tr. 51). She testified that products registered in the United States are typically presented in terms of percentage [of active ingredient] by weight (Tr. 51). According to Ms. Sibold, there are only five Frontline products registered with EPA: "Frontline Plus for Dogs," "Frontline Plus for Cats," "Frontline Top Spot for Dogs," "Frontline Top Spot for Cats," and "Frontline Spray" (Tr. 54).

17. Moreover, Ms. Sibold noted that there are problems with the first aid statement on the carton as well. The first aid statement provides a six digit telephone number in the case of a poisoning emergency and a second number in the case of emergency (Tr. 52). These telephone numbers do not operate in the United States. Ms. Sibold opined that the faulty telephone number constitutes a danger because in the case of "an emergency situation of a poisoning, time is of the essence and if you tried to call either of these numbers, you

[11] Tr. 48. The lack of EPA registration and establishment numbers also demonstrate that the products were misbranded, FIFRA §§ 2 (q)(1)(D) and 2(q)(2)(c)(iv).

will be wasting time." (Tr. 52). In comparison, she pointed out that U.S. registered products bear a telephone number that operate domestically and will connect to a knowledgeable person who can provide assistance[12]

18. Ms. Sibold recited additional problems with the Frontline Spot on Dog products. This product is not to be confused with the Frontline Top Spot for Dogs and Ms. Siebold testified that the name "Frontline Spot on Dog" is not a name associated with the U.S. registration held by the Merial Limited based in Duluth, Georgia (Tr. 53). She stated that she was not aware of any registrations under the "Frontline Spot on Dog" name or any applications under that name (Tr. 54). It is noted, however, that Frontline Spot on Dog products were among products sampled by Ms. Ching at the time of her inspection of City Feed on February 17, 2004, and that these products bear EPA registration numbers (finding 5). This is an indication that Frontline Spot on Dog is an imitation of another pesticide and thus misbranded for that reason (FIFRA § 2(q)(1)(c)).

19. On March 10, 2005, Ms. Sibold reviewed the HDA samples collected by Mr. Ogata at Mililani Pets and completed the ECRs. The six samples consisted of Frontline Plus for Dogs (11-22 lbs.), Frontline Plus for Dogs (23-44 lbs.), Frontline Plus for Dogs (45-88 lbs.), Frontline Plus for Dogs (89-132 lbs.), Frontline Plus for Cats, and Frontline Top Spot on Dog (0-22 lbs.) (Tr. 55).

20. Referring to the Frontline Plus for Dogs (11-22 lbs.) label as an example, Ms. Sibold described the deficiencies in the HDA samples taken by Mr. Ogata at Mililani Pets which convinced her that the samples were not registered and were counterfeit. Specifically, Ms. Sibold pointed out that the foil package insert is typical of a product that is manufactured outside of this country (Tr. 57). Bolstering the allegation that the products are counterfeit, Ms. Sibold testified that Merial Limited in Duluth, Georgia, has not indicated any intent to import foreign products into the United States (Tr. 57). At the hearing, Ms. Sibold referred to a 2004 Fact Sheet that was prepared to guide the public in trying to distinguish counterfeit products from legal Frontline products (Tr. 58; C-7). The 2004 Fact Sheet provides a picture depicting the typical foil package inserts of U.S. registered products (C-7 at 2). Ms. Sibold stated that the applicator packages of U.S. products have a characteristic shape and notched edge, [i.e., a package of three pipettes has indents between the pipettes] (Tr. 59). The child resistant packaging of the samples taken from Mililani do not have that same characteristic shape or notch (Tr.59, 61). She also maintained that the lack of child resistant packaging on a Frontline product would be dangerous because the concentration of fipronil is high enough to cause serious harm to a child (Tr. 61). Moreover, Ms. Sibold asserted that the foil package insert is typical of a product that is manufactured for use outside of the country (Tr. 57). She noted that the samples say "Usage veterinaire," which is French, even though typically all the language

[12] Tr. 52. According to Ms. Sibold, it is not necessary to provide a telephone number to legally sell a pesticide (Tr. 118). However, she explained that providing a telephone number is EPA policy and part of the first aid statement guidance (Tr. 118).

on these products is English (Tr. 60). In addition, Ms. Sibold noted that the foil package specified the contents in terms of metric measure while in the United States the statement is in fluid ounces (Tr. 59, 60). She also supported her contention that the products are counterfeit by pointing out that the lot number on the exterior package does not match the lot number on the foil blister packaging.[13]

21. On May 3, 2005, Ms. Sibold reviewed the HDA samples collected by Ms. Ching at City Feed and completed three ECRs. She reviewed the reports for Frontline Plus for Dogs (0-22 lbs.), Frontline Plus for Dogs (44-89 lbs.), and Frontline Plus for Cats (Tr. 62).

22. Much like the samples taken by GDA, Ms. Sibold pointed out that the samples from City Feed are misbranded because the ingredient statement indicates the concentration in grams per liter, denotes the manufacturer as Merial Australia on the outer carton, and the first aid statement provides telephone numbers which do not operate in the United States (Tr. 67, 69). According to Ms. Sibold, these deficiencies pose the same dangers and risks as the products inspected by GDA. Additionally, she opined that the samples are Australian products that are being passed off as United States product. She testified that the foil package insert resembled Australian packaging, which is different from the typical United States child resistant packaging (Tr. 68). She noted that on the front of the outer carton there is a sticker that bears an EPA registration number, an EPA establishment number, and excerpts from preliminary statements (Tr. 67). However, she asserted that the "addition of a little sticker does not transform an Australian product into a U.S. registered product." (Tr. 67). Ms. Sibold made it clear that, if the Frontline products are Australian, there is an inherent danger because EPA employees "don't know what's really in these Australian products" and do not have access to a confidential statement of formula or contact information (Tr. 71-72).

23. In addition, Ms. Sibold reviewed the PDA samples collected by Mr. Bastian at Krazy A. The two samples inspected were Frontline Plus for Dogs (44-88 lbs.) and Frontline Spot on Dog (Tr. 72). She concluded that the samples were not registered for sale within the United States because the ingredient statement is in grams per liter, the back panel lists telephone numbers that do not work within the United States, and the end panel denotes the manufacturer as Merial, Australia (Tr. 73). As in the samples taken at City Feed, the front of the carton has a sticker that provides an EPA registration number and an EPA establishment number (Tr. 74). Again, Ms. Sibold stated that "the addition of a small sticker to a foreign product does not convert it into a U.S. registered product." (id.). She

[13] Tr. 57. Ms. Sibold acknowledged that lot numbers are not a requirement of FIFRA (Tr. 128). However, she testified that the fact that the lot numbers on the inside and the outside do not match is relevant because it "indicates something fishy's going on, that the product was produced, the foil package insert was produced in . . . one place and the exterior package, in this case, was a duplicate of a totally different package . . . ." (Tr. 129). She opined that the foil package insert came from a different source than the exterior package and that this presented issues as to the integrity of the product (Tr. 130).

also noted a discrepancy on the Frontline Plus for Dogs (44-88 lbs.) product. In the section that provides directions for use, the label states that it is intended "For Dogs and Puppies 10 weeks or older and 44-88 lbs." (Tr. 74; C-5, Attachment O). However, the back panel states that it is for use on puppies from eight weeks of age (Tr. 74). In further testimony, Ms. Sibold stated that this product bears drug claims, and safety and efficacy claims that are not supported by any data that we have seen in the United States (Tr. 77). Additionally, she pointed out that the foil package insert is not child-resistant packaging and that the absence of child resistant packaging presents an unreasonable risk to children who may be residing in the house where the product is used.

24. Therefore, upon all of its reviews, OPP concluded that the products 1) Frontline Plus for Dogs (11-22 lbs.); 2) Frontline Plus for Dogs (23-44 lbs.); 3) Frontline Plus for Dogs (45-88 lbs.); 4) Frontline Plus for Dogs (89-132 lbs.); 5) Frontline Plus for Cats; 6) Frontline Top Spot for Dogs (0-22 lbs.); 7) Frontline Plus for Dogs (0-10 kg.); 8) Frontline Plus for Dogs (10-20 kg.); 9) Frontline Plus for Dogs (20-40 kg.); 10) Frontline Plus for Dogs (40-60 kg.); 11) Frontline Spot on Dog (0-10 kg.); 12) Frontline Spot on Dog (10-20 kg.); 13) Frontline Spot on Dog (20-40 kg.); and 14) Frontline Spot on Dog (40-60 kg.) acquired by GDA, HDA, and PDA were "not registered" and were "misbranded" within the meaning of FIFRA.

25. The complaint alleges and the evidence reflects that the 14 pesticides identified in finding 24 were distributed and/or sold by Rising Sun during the period September 23, 2003, to July 7, 2004, to identified retail establishments in 31 transactions.[14] The first such transaction involved the distribution or sale of FRONTLINE PLUS FOR DOGS (45-88 lbs) to Krazy A on September 23, 2003 (Complaint, Count 1; C-5); the second through the fourth transactions involved the distribution or sale of (1) FRONTLINE PLUS FOR DOGS (45-88 lbs); (2) FRONTLINE PLUS FOR CATS; and (3) FRONTLINE SPOT ON DOG (0-10 kg) to City Feed on October 14, 2003 (Complaint Counts 2-4; C- 4); the fifth through the ninth transactions involved the distribution or sale of (1) FRONTLINE PLUS FOR DOGS (11-22 lbs); (2) FRONTLINE PLUS FOR DOGS (22-44 lbs); (3) FRONTLINE PLUS FOR DOGS (45-88 lbs); (4) FRONTLINE PLUS FOR DOGS (89-132 lbs); and (5) FONTLINE PLUS FOR CATS to Pets Plus on November 28, 2003 (Complaint, Counts 5-9; C- 3); the tenth transaction involved the distribution or sale of FRONTLINE PLUS FOR DOGS (89-132 lbs) to Mililani Pets on December 29, 2003 (Complaint, Count 10; C- 2); the 11th transaction involved the distribution or sale of FRONTLINE PLUS FOR CATS to Mililani Pets on January 13, 2004 (Complaint, Count 11; C- 2); the 12th- through the 15th transactions involved the distribution or sale of (1) FRONTLINE SPOT FOR DOGS (0-22 lbs); (2) FRONTLINE PLUS FOR DOGS (11-22 lbs); (3) FRONTLINE PLUS FOR DOGS (23-44 LBS) and (4) FRONTLINE PLUS FOR DOGS (45-88 lbs) to Mililani Pets on February 6, 2004 (Complaint, Counts 12 -15,

[14] The complaint does not charge FIFRA violations for the sales by Rizing Sun to Krazy A of Frontline Plus Medium Dog 3 Pack and Frontline Plus Large Dog 3 Pack represented by an invoice, dated August 8, 2003 (C-5, Attachment O). This may be an oversight.

C- 2); the 16th through the 23rd transactions involved the distribution or sale of (1) FRONTLINE PLUS FOR DOGS (0-10 kg); (2) FRONTLINE PLUS FOR DOGS (10-20 kg); (3) FRONTLINE PLUS FOR DOGS (20-40 kg), (4) FRONTLINE PLUS FOR DOGS (40-60 kg); (5) FRONTLINE PLUS FOR CATS; (6) FONTLINE SPOT ON DOG (10-20 kg); (7) FRONTLINE SPOT ON DOG (20-40 kg); and (8) FRONTLINE SPOT ON DOG (40-60 kg) to Acworth Feed on March 8, 2004 (Complaint, Counts 16-23; C- 1); and transactions 24-31 involved the distribution or sale of (1) FRONTLINE PLUS FOR DOGS (0-10 kg)) (2) FRONTLINE PLUS FOR DOGS (10-20 kg); (3) FRONTLINE PLUS FOR DOGS (20-40 kg); (4) FRONTLINE PLUS FOR DOGS (40-60 kg), (5) FRONTLINE PLUS FOR CATS; (6) FRONTLINE SPOT ON DOG (0-10 kg); (7) FRONTLINE SPOT ON DOG (20-40 kg); and (8) FRONTLINE SPOT ON DOG (40-60 kg) to Acworth Feed on July 7, 2004 (Complaint, Counts 24-31; C- 1).

26. At the hearing, Mr. Smith contended that the Frontline products at issue are not necessarily traceable to Rizing Sun (Tr. 93). As an example, he pointed to the circumstances leading to the inspection of Mililani [Pets] by Mr. Ogata of the Hawaiian Department of Agriculture. Mr. Ogata inspected Mililani for the purpose of hand-delivering a SSURO for Frontline and Advantage products purchased from Pang & Sons (finding 9, supra). No products purchased from Pang & Sons were found at the facility and it appears that Mr. Ogata discovered the Rizing Sun invoices by happenstance during the inspection (Tr. 93). According to Mr. Smith, Rizing Sun products would have been commingled with other products and inventory, and therefore, there is no way to directly attribute the samples to Rizing Sun (Tr. 93). While it is true that that the photographic samples do not appear to have any indicia linking the products to Rizing Sun, Rizing Sun as the source of the products is established by the invoices and dealer statements referred to supra.

27. Mr. Smith also contended that, even if the child- resistant packaging [on the Frontline products distributed by Rizing Sun] does not strictly comply with EPA standards, the Frontline products have packaging that is functionally the equivalent (Tr. 112). The problem with this contention is that there is no testimony or other evidence comparing the Frontline packaging with the EPA approved child-resistant packaging to support a "functionally equivalent" finding. Ms. Sibold testified that the product was intended for use according to label directions which provided a weight range for the size dog on which the product was to be used. (Tr. 51, 171). She pointed out that that to the extent you move outside that range, the dog would be getting a larger dose, which might harm the dog, or a smaller dose which would leave ticks and fleas uncontrolled (Tr. 171.). Mr. Smith referred to tests which had allegedly demonstrated that an animal could receive five times the recommended dose without harming the animal (Tr.175). Although these tests were allegedly conducted by Merial, no evidence in the record supports this uncorroborated hearsay. Moreover, although Mr. Smith denied that either he or his wife repackaged the products (Tr. 116), his own testimony is that Rizing Sun received the Frontline products in "shrink-wrapped packages" of ten cartons per sleeve and that he and his wife would remove the cartons from the sleeve and sell the individual boxes (finding 4). Under the

regulation, 40 C.F.R. § 167.3, this activity constitutes the production of a pesticide.[15]

28. Mr. Jason Gerdes, an enforcement officer in the Pesticides Program Office, EPA Region 9, calculated the proposed penalty. He determined that Rizing Sun was a distributor and thus subject to FIFRA § 14(a)(1).[16] He applied FIFRA § 14(a)(4)[17] and used EPA's Enforcement Response Policy for FIFRA (July 2, 1990) ("ERP") to determine the penalty (Tr. 137-138; C-14). From Appendix A, FIFRA Charges and Gravity Levels, of the ERP, he determined that Gravity Level for the sale or distribution of a pesticide which was not registered and the sale or distribution of a pesticide which was misbranded is two (Tr. 140). Table 2 on page 20 of the ERP separates businesses into categories based on gross revenues, businesses with gross revenues of over $1,000,000 are in Category I, businesses with gross revenues between $300,001 and $1,000,000 are in Category II, and businesses with gross revenues between $0 and $300,000 are in Category III. Because Rizing Sun's gross revenues as shown by the Profit and Loss Statement for 2003 (C-17) were under $300,000, it was placed in size of business Category III. The Penalty Matrix at 19-A of the ERP indicates that the penalty for a Level two violation by a Category III size of business occurring after January 30, 1997 is $3,300. Mr. Gerdes testified that the base penalty for a Level two violation by a Category III size of business occurring after March 15, 2004, was $3,900 (Tr. 143). He considered that Rizing Sun committed 46 violations prior to March 15, 2004, and 16 thereafter, and calculated a total base penalty of $214,200.[18] Second, he pointed out that that the base penalty may be adjusted for five

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[15] Section 167.3 provides: *Produce* means to manufacture, prepare, propagate, compound, or produce any pesticide, including any pesticide produced pursuant to section 5 of the Act, any active ingredient, or device, or to package, repackage, label, relabel, or otherwise change the container of any pesticide or device.

[16] Tr. 140. Section 14(a)(1), 7 U.S.C. § 136*l*(a)(1), provides that generally "[a]ny registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of this subchapter may be assessed a civil penalty by the Administrator of not more than $ 5,000 for each offense."

[17] Section 14(a)(4), 7 U.S.C. § 136*l*(a)(4) provides that "[i]n determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation. Whenever the Administrator finds that the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment, the Administrator may issue a warning in lieu of assessing a penalty."

[18] The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, requires EPA to periodically adjust its penalties to account for inflation. For FIFRA violations taking place between January 30, 1997, and March 15, 2004, by persons within the scope of FIFRA § 14(a)(1), 7 U.S.C. § 136*l*(a)(1) , the maximum penalties were increased to $5,500 per violation. Civil Penalty Monetary Inflation Adjustment Rule, 40 C.F.R. Part 19. For violations by persons within the listing in FIFRA § 14(a)(1) occurring after

mitigating factors: 1) pesticide toxicity; 2) human harm; 3) environmental harm; 4) history of compliance; and 5) culpability (Tr. 143-143; ERP at 18). Numerical values for each factor are set forth in Gravity Adjustment Criteria, ERP, Appendix B. The value of the penalty increases with the degree of severity.

29. Mr. Gerdes assigned a score of one out of five to pesticide toxicity because the Frontline products have the single [signal] word caution on the label (Tr. 143-144). The next gravity adjustment factor is human harm and Mr. Gerdes considered that there was a potential serious harm to human health for which he assigned a value of three (Tr. 144). For the gravity adjustment factor of environmental harm, Mr. Gerdes assigned a value of three because the degree of injury to the environment is unknown (Tr. 144). Turning to the gravity of the misconduct, Mr. Gerdes assigned a value of zero to compliance history because Rizing Sun had no prior FIFRA violations (Tr. 144). The final gravity adjustment was for culpability and Mr. Gerdes assigned a value of two. He opined that Rizing Sun's actions were, at the very least, negligent (Tr. 144).

30. The next step in the penalty calculation is to add up the values assigned for pesticide toxicity, human harm, environmental harm, compliance history, and culpability (Tr. 144; C-16). The result in Rizing Sun's case is a total of nine. The ERP indicates that for values between eight and twelve no adjustment to the base penalty are to be made. Accordingly, Mr. Gerdes did not make any adjustments (Tr. 144; C-14 at 22).Referring to Material Safety Data Sheets ("MSDS"), apparently for fipronil, Mr. Smith objected to the adjustment values used by Mr. Gerdes because they were too high (Tr. 176). He maintained that environmental health hazard should be one, fire [hazard] should be two and radioactivity zero (id.). Although these are legitimate arguments open to Rizing Sun, Respondent failed to list MSDS as a proposed exhibit prior to the hearing and, indeed, failed to proffer MSDS in evidence at the hearing. Therefore, MSDS are not in evidence and may not be relied upon. It is noted that a "Fipronil Reevaluation", dated May 7, 1998, by the Hazard Identification Assessment Review Committee, reported that chronic dietary and long-term dermal exposure of laboratory rats to fipronil resulted in increased incidence of seizure and death (C-13). The Committee recommended no changes in previous hazard assessments for fipronil.

31. The last step in the penalty determination is a consideration of the Respondent's ability to pay the penalty (Tr. 145). Mr. Gerdes stated that he called Mr. Smith on February 22, 2005, and requested three years of federal tax returns (Tr. 145). On March 8, 2005, Mr. Gerdes received from Mr. Smith forty to fifty pages of personal medical records and credit card bills (Tr. 146). Mr. Gerdes testified that he called Mr. Smith the next day and reiterated that he required federal tax returns or financial statements from Rizing Sun (Tr. 146). Mr. Gerdes testified that on March 29, 2005, Complainant sent Mr. Smith a letter explaining that the medical records and credit card bills were insufficient (Tr. 146). According to Mr. Gerdes, the letter specified a request for Rizing Sun's financial

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March 14, 2004, the maximum penalty per offense has been increased to $6,500 (id.).

statements for 2003 and 2004 (Tr. 146; C-18). In August of 2005, Respondent sent Complainant a one-page Profit and Loss Statement for the calendar year 2003. (Tr. 146). Mr. Gerdes testified that the Profit and Loss Statement "only reflected the sales for Frontline products for 2003 and didn't include sales for any other products that Rizing Sun may have sold for that year or any other year." (Tr. 146). Mr. Gerdes then stated that Complainant requested a 2004 financial statement on October 19, 2005, when this proceeding had already been initiated.[19] Rizing Sun refused to provide financial information (Tr. 147).

32. Mr. Gerdes testified that the penalty was adjusted to reflect that he did not have the financial statements (Tr. 147). He stated that he "asked our financial analyst to review what Mr. Smith had submitted and assuming that the information was correct and accurate, to come up with a reasonable penalty for this case. It was at that time he (Gerdes) recommended [a penalty of] $10,000 . . . ." (Tr. 147). Mr. Gerdes testified that the proposed penalty was adjusted to reflect Rizing Sun's ability to pay. Thus, the proposed penalty was reduced from $214,000 to $10,000.

33. Mr. Jonathan S. Shefftz was accepted as an expert in financial analysis and ability to pay determinations (Tr. 154). Mr. Shefftz's credentials are in evidence as Complainant's Exhibit 19. He is currently a Senior Associate with Industrial Economics Incorporated, a consulting firm that provides economic, financial, and policy analytical service to private and public sector clients (Tr. 149-150). He stated that tax returns and financial statements are reviewed to determine a company's ability to pay a proposed penalty (Tr. 155). Noting that Rizing Sun failed to submit either of these documents, Mr. Shefftz testified that he was not able to reach his conclusions with a high degree of certainty (Tr. 158, 161). Using the Profit and Loss Statement and Mr. Allen Smith's statements on a facsimile cover sheet,[20] Mr. Shefftz concluded that it was "highly doubtful" that Rizing Sun could pay a penalty exceeding $200,00 (Tr. 159). Mr. Shefftz also recognized that this information was insufficient because it did not provide 1) a complete income statement; 2) cash flows; 3) a balance sheet showing assets, liabilities, or net worth; 4) information for a year other than 2003; 5) information submitted to the IRS; or 6) information for business activities other than Merial products (Tr. 159-160). He did, however, opine that Rizing Sun could afford a penalty of $10,000 (Tr. 160). He based this assessment on Mr. Smith's comments that Respondent had a gross profit of $36,000 in 2004 (Tr. 160). Utilizing this information, Mr. Shefftz opined that "if one were to combine that with the $10,000 approximately in expenses for the previous year . . . assuming that expenses stayed the same from year to year, since we have no other

[19] According to Mr. Gerdes, this request took place in a conference call with Complainant, Mr. Smith, and the ALJ (Tr. 146).

[20] Specifically, Mr. Shefftz said that he used several sentences that Mr. Smith wrote in the facsimile cover sheet that accompanied personal financial information that he (Smith) submitted to Complainant (Tr. 159). This facsimile is not, however, in evidence.

information, one could think that a $10,000 penalty would be affordable . . . ." (Tr. 160-61). Under cross-examination, he acknowledged that he really did not know the penalty Mr. Smith (Rizing Sun) could afford to pay (Tr. 168-69).

34. Two business days before the hearing, Mr. Shefftz received a two-sentence letter from Wells Fargo Bank, dated January 27, 2006, and a two- page checking account summary pertaining to Rizing Sun.[21] The letter stated that based on current policies and criteria, Mr. Smith would not be approved for an unsecured line of credit of $10,000 without further information. The letter further stated that Rizing Sun, LLC's average balance of $1,900 would not meet our criteria for an unsecured line for any amount at this time. The checking account summary reflected that Rizing Sun had approximately $2,000 as an available balance and a last 12 month average balance of approximately $18,000.

III. CONCLUSIONS

1. Rizing Sun, LLC. is a person as defined in FIFRA section 2(s) and subject to FIFRA.

2. The 14 Frontline products at issue herein are pesticides within the meaning of FIFRA section 2(u).

3. Rizing Sun "distributed" or "sold" the mentioned pesticides in 31 separate transactions during the period. September 23, 2003, to July 7, 2004.Twenty three of these transactions occurred prior to March 14, 2004, and the other eight took place subsequent to that date.

4. The pesticides at issue were not registered with EPA as required by FIFRA § 3a and were misbranded within the meaning of FIFRA § 2(q).

5. Rizing Sun's distribution or sale of pesticides which were not registered and which were misbranded constitute violations of FIRA §§ 12(a)(1)(A) and 12(a)(1)(E).

6. Rizing Sun is a distributor and subject to penalties for violations of FIFRA in accordance with FIFRA Section 14(a)(1).

7. Complainant's contention that it may assess a penalty for violation of Section 12(a)(1)(A) and a penalty for violation of Section 12(a)(1)(E) for the sale or distribution of the same pesticide in the same transaction or shipment is erroneous and is rejected. The unit of violation in FIFRA § 12(a)(1) is the distribution or sale of a pesticide and the fact that the

[21] Tr. 162. These documents clearly do not comply with Rule 22.22(a) which requires summaries of testimony, documents and proposed exhibits to be exchanged with all other parties at least 15 days prior to the hearing. However, counsel for Complainant examined Mr. Shefftz on the documents (Tr. 161-63) and is thereby deemed to have waived any objection to the late submission.

distribution or sales may be unlawful for several reasons does not increase the number of distributions or sales which is the only basis for assessing a penalty. This conclusion is in accordance with the ERP which provides that dependent violations may be charged in the complaint but will not result in separate penalties.

8. An appropriate penalty is the sum of $10,000.

IV. DISCUSSION

To establish liability for violations of FIFRA Section 12(a)(1)(A) and Section 12(a)(1)(E) as alleged in the complaint, Complainant must show: 1) Respondent is a "person" within the meaning of FIFRA; 2) the Frontline products are "pesticides" within the meaning of FIFRA; 3) Respondent "distributed" or "sold" the pesticides; and 4) the Frontline products were not registered with the EPA and were misbranded.

A. FIFRA Section 12(a)(1)(A) and 12)a)(1)(E) Liability

1. Respondent is a "Person"

Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines a person as "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not." Rizing Sun, LLC is a Nevada corporation and therefore this requirement is satisfied (finding 1).

2. The Frontline Products at Issue are "Pesticides"

A product used to prevent or control a pest[22] is a pesticide. FIFRA section 2(u), 7 U.S.C. § 136(u), defines a pesticide as including "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest."[23] Additionally, 40 C.F.R. § 152.15

[22] The term "pest" is statutorily defined as "(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. § 136(t)). In turn, 40 C.F.R § 152.5 makes clear that an insect that is deleterious to man in the environment qualifies as a pest.

[23] The regulation (40 C.F.R. § 152.5) defines a pesticide as "(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, (2) any substance or mixture of substance intended for use as a plant regulator, defoliant, or desiccant, and (3) any nitrogen stabilizer, except . . . any article that is a 'new animal drug' . . . or that is an animal feed . . . . The term 'pesticide' does not include liquid chemical sterilant products (including any sterilant or subordinate disinfectant claims on such products) for use on a critical or semi-critical device . . ."

defines a pesticide as "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 product is also a pesticide within the meaning of FIFRA when the labeling of the product or accompanying literature make pesticidal claims.[24]

As found in the Accelerated Decision, which is incorporated herein by reference, Complainant has adequately shown that that the products identified in finding 23 are pesticides and therefore subject to FIFRA. Complainant has shown that each of these products is used to prevent or control fleas and ticks on domestic pets. Fleas and ticks are insects and therefore are "pests" within the meaning of Section 2(t), 7 U.S.C. § 136(t), and 40 C.F.R. § 152.5. In addition, these products constitute pesticides because the packaging makes pesticidal claims and a reasonable consumer would use these products for pesticidal purposes. The front of the box states "Kills fleas, flea eggs, & ticks," "Kills fleas & ticks," or purports to achieve some form of pest control.. Thus, these products are pesticides because they act as and are represented for use as a form of pest control.

3. Respondent Distributed or Sold the Products at Issue

Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines the "term 'to distribute or sell' as 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." The regulation defines "distribute or sell" in a similar manner.[25] In the Accelerated Decision, the ALJ concluded that Complainant had adequately proven that Rizing Sun sold or distributed the Frontline products in 31 separate transactions (Accelerated Decision at 15). Specifically, the ALJ noted that the inspectors had obtained Dealer's Statements and invoices which traced sales of Frontline products to Rizing Sun. (findings 5-11). These documents indicate that Rizing Sun engaged in three transactions with City Feed, six transactions with Mililani, five transactions with Pets Plus, a single transaction with Krazy A, and sixteen transactions with Acworth Feed.

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[24] *N. Jonas & Co., Inc. v. U.S. E.P.A.*, 666 F.2d 829 (3d Cir. 1981). Under 40 C.F.R. § 152.10, a product which is not intended to prevent, destroy, repel, or mitigate a pest, or to defoliate, desiccate or regulate the growth of plants is not considered to be a pesticide. Certain products, such as deodorizers, bleaches, and cleaning agents, are not considered a pesticide unless a pesticidal claim is made on their labeling or in connection with their distribution and sale.

[25] The regulation makes clear that the term "distribute or sell", and any derivation of the term, "means the acts 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.

4. The Frontline Products Were Not Registered

FIFRA Section 3(a), 7 U.S.C. § 136a(a), requires registration of all pesticides distributed or sold in the United States.[26] According to Complainant, the registrant of a pesticide product enjoys property rights where others may not lawfully produce the product without the registrant's permission.[27] Moreover, Complainant notes that a registrant has a property interest protected by the Taking Clause of the Fifth Amendment of the United States Constitution (*Ruckelshaus v. Monsanto*, 467 U.S. 986, 1002-1003 (1984)).

Complainant asserts that the Frontline pesticide products were not registered because they were not produced under the registration issued by EPA. Merial Limited of Duluth, Georgia, is the United States registrant of Frontline products containing fipronil (findings 3 and 14). Thus, Merial Limited in Duluth, Georgia has registered the Frontline brand of flea and tick products for distribution and sale within the United States. Complainant says that none of the fourteen Frontline products Rizing Sun distributed or sold during the period September 23, 2003, to July 7, 2004, is the same product registered by Merial.

Using the ECRs as support, Complainant points out that the nine Frontline products sampled at Acworth Feed are pesticides intended solely for foreign consumption (finding 11). Specifically, Complainant contends that the products were produced either on behalf of Merial Australia or Parramatta, Australia, or Merial Animal Health Limited of Harlow, Great Britain. This contention is supported by the fact that the side panels of the nine cartons provide addresses outside of the United States (id.). Moreover, these cartons do not bear an EPA registration number or an EPA establishment number, although the regulation requires these numbers.[28]

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[26] FIFRA Section 3(a), 7 U.S.C. § 136a(a), provides, in pertinent part that "no 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 and that is not the subject of an experimental use permit under section 5 or an emergency exemption under section 18."

[27] For example, a registrant may distribute or sell the registered product under another person's name and address (40 C.F.R. § 152.132), provided certain conditions are met, referred to as "supplemental distribution." Moreover, a registrant may transfer the registration of a product to another person (40 C.F.R. § 152.135).

[28] The regulation, 40 C.F.R. § 156.10(e), provides that the "registration number assigned to the pesticide product at the time of registration shall appear on the label, preceded by the phrase 'EPA Registration No.,' or the phrase 'EPA Reg. No." The regulation has a similar requirement for EPA establishment numbers, where "[t]he producing establishment registration number preceded by the phrase 'EPA Est.", of the final establishment at which the product was produced may appear in any suitable location on the label or immediate container. It must appear on the wrapper or outside container of the package if the EPA establishment registration number on the immediate container cannot be clearly read through such wrapper or container." (40 C.F.R. §

According to Ms. Sibold, Merial Limited of Duluth, Georgia, has not indicated its intent to import any Australian product (finding 20). Moreover, Ms. Sibold testified that the name of "Frontline Spot on Dog" has never been registered with EPA. The five Frontline products registered with EPA by mail are listed in finding 16. Based on these facts, the Frontline products sampled at Acworth Feed were not registered.

5. The Frontline Products Are Misbranded

Complainant also contends that samples of Frontline Plus for Dogs (45-88 lbs.), Frontline Plus for Cats, and Frontline Spot on Dog (0-10 kg) sampled by Ms. Ching at City Feed and the sample of Frontline Plus for Dogs (44-88 lbs.) taken by Mr. Bastian at Krazy A were misbranded. Complainant alleges that these four products are products intended for foreign consumption and that the outer cartons were restickered with EPA registration numbers and other information. Again, there are some indications that the samples were produced by or on behalf of Merial Australia and not the United States registrant. Much like the samples taken from Acworth Feed (finding 11) these products contain addresses in either Great Britain or Australia on the side panel of the outer carton. (findings 6 and 10). However, some of the labels on the samples from City Feed contain writing indicating that the products were made in France (findings 6 and 7) Moreover, the products from both City Feed and Krazy A bear an ingredient statement in grams per liter or milliliters and contain telephone numbers which are inoperable in the United States.. This creates a strong presumption that the products were not made domestically, despite the American references on the stickers. Moreover, the fact that the official registrant has not indicated that it is importing Frontline products for sale in the United States supports a finding that the pesticides are not registered.

Complainant's contention that Rizing Sun sold and distributed pesticides which were not registered and which were counterfeit to Mililani Pets and Pets Plus is also valid. In the ECRs for the Mililani and Pets Plus samples, OPP observed that the outer cartons of the products carried labeling that complied with United States' products. However, OPP and Ms. Sibold also noted that the contents inside the package were deficient. The product applicators were not in the typical child resistant packaging and bore some foreign language and metric measure (findings 20, 22, 23, and 27). Because the internal components did not comply with regulation but the external packaging did so, OPP concluded that the products were counterfeit and not registered. Of course, counterfeit products are by definition misbranded (FIFRA 2(q)(1)(c)). Moreover, the products do not have consistent lot numbers. The lot number on the product applicator differs from the lot number on the outer packaging. Based on these facts, these products are counterfeit and therefore not registered within the United States.

Thus, all of the 31 distribution or sale transactions by Rizing Sun shown by the record between September 23, 2003 and July 7, 2004, involved products that were not produced by Merial Limited of Duluth, GA. Because these products were not manufactured by the registrant, the Frontline products were not registered for sale within the United States, the products were

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156.10(f)).

misbranded and the distribution or sales were in violation of FIFRA §§ 12(a)(1)(A) and 12(a)(1)(E).

B. Penalty Assessment for Violations of FIFRA Section 12(a)(1)(A) and Section 12(a)(1)(E) Arising From the Distribution or Sale of the Same Pesticide

Complainant has established that Respondent has violated both Section 12(a)(1)(A) and Section 12(a)(1)(E) of FIFRA in the 31 transactions identified above. Although Complainant's contention that both violations may be charged in the complaint is accurate, its contention that it may assess a separate penalty for the distribution or sale of a pesticide which is not registered and a separate penalty for the distribution or sale of the same pesticide which is also misbranded is erroneous and is rejected.

In *McLaughlin Gormley King Co.,* FIFRA Appeal Nos. 95-2 through 95-7, 6 E.A.D. 339 (EAB 1996), which involved FIFRA § 12(a)(2)(Q), making it unlawful to falsify all or any part of any information submitted to the Agency relating to the testing of any pesticide, the Environmental Appeals Board ("EAB") held that determining the unit or number of violations was essentially a matter of statutory construction. In that case, respondent had, in accordance with EPA regulations, submitted a compliance statement certifying that tests, which generated data used to support a pesticide registration were conducted in accordance with Good Laboratory Practice Standards ("GLPS"), 40 C.F.R. Part 160. The tests allegedly deviated from GLPS in several respects and upon the Agency's attempt to measure the number of violations of FIFRA § 12(a)(2)(Q), and thus the number of offenses for which a penalty could be assessed under FIFRA § 14(a)(1), by the number of deviations from GLPS, the EAB held that the unit of violation, i.e., the information falsified, was the compliance statement, and that the number of deviations from GLPS was not relevant to the number of counts for which a penalty could be assessed.

Here, it is evident that the unlawful act is the "distribution" or "sale" of a pesticide which in within the listing in FIFRA § 12(a)(1)(A) through § 12(a)(1)(F).[29] See, e.g.. *Microban Products Company*, FIFRA Appeal No.99-12, 2001 WL 221611, 9 E.A.D.674 (2001), involving the appropriate number of counts for violations of FIFRA § 12(a)(1), making it unlawful for any person to distribute or sell to any person (B) any registered pesticide, if claims made for it as part of its distribution or sale substantially differ from any claims made for it as part of the registration statement required in connection with its registration ("It is manifest from the

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[29] FIFRA § 12 is entitled "**Unlawful Acts**" and provides in pertinent part:

(a) **In General**

(b) Except as provided in subsection (b) of this section, it shall be unlawful for any person in any State to distribute or sell to any person-

(A) any pesticide that is not registered under section 136a of this title or whose registration has been canceled or suspended, except to the extent that distribution or sale has been authorized by the Administrator under this subchapter;

……..

(E) any pesticide which is adulterated or misbranded; or

(F) any device which is misbranded.

language and structure of FIFRA section 12(a)(1) that Congress intended the 'unit of violation' to be the statutorily defined act to 'distribute' or 'sell')." (Id. 684). The triggering act is the distribution or sale of a pesticide and the fact that the distribution or sale may be unlawful for several reasons does not increase the number of distributions or sales which is only basis for assessing a penalty. This conclusion is supported by the fact that the conjunctive "or" separates the cited listing of unlawful acts in FIFRA § 12(a)(1) and by the ERP which provides that dependent violations may be listed in the complaint, but will not result in separate civil penalties (id. 25). The ERP defines a dependent violation as a violation resulting from an act (or failure to act) which is not the result of any other charge for which a penalty is to be assessed, or if the elements of proof are different. If violations which result from the same distribution or sale are not dependent, it is difficult to envision what circumstances are encompassed by the term.

Complainant cites and quotes *Avril, Inc.*, Docket No. IF & R Docket No. III-441-C, 1997 EPA ALJ LEXIS 176 (ALJ March 24, 1997): ("The violations of selling an unregistered pesticide and a pesticide that is misbranded are not dependent on each other and may properly be charged separately for each shipment."(slip opinion at 11). While charging a violation in the complaint and assessing a penalty therefore are obviously not the same, the ALJ's opinion makes it clear that it was a matter of prosecutorial discretion whether to assess a penalty for the distribution or sale of a pesticide which was not registered and a penalty for the distribution or sale of the same pesticide which was misbranded. Accord: *Aquarium Products, Inc.*, IF & R Docket No I11-439-C, 1995 EPA ALJ LEXIS 87 (ALJ June 30, 1995). Unresolved is the application of the phrase "or if the elements of proof are different" from the quoted ERP definition of a dependent violation. In *Rek Chem Manufacturing Corp.*, IF & R Docket No.VI-437C, 1993 WL 256445, EPA (ALJ May 10, 1993), the ALJ held that separate penalties could be assessed for the distribution or sale of a pesticide which was not registered and for the distribution or sale of the same pesticide which was misbranded, because different elements of proof were involved. This decision fails to recognize that without a distribution or sale there cannot be a violation of FIFRA § 12(a)(1) and the fact that the distribution or sale may violate the cited section of the Act in more than one way does not increase the number of distributions or sales., which is the only basis for assessing a penalty. . In this regard, it is noted that multiple misbranding on a single product label is considered a single violation of FIFRA § 12(a)(1)(E) (ERP at 26), even though it might be argued that each instance of misbranding requires a separate element of proof. Accordingly, *Rek Chem*, *Avril*, and *Aquarium Products, supra*, will not be followed. See *FRM Chem, Inc, a/k/a Industrial Specialties*, FIFRA Appeal No.05-01, 2006 EPA App. LEXIS 28 (EAB June 13, 2006), where the EAB accepted the view that the statutory maximum penalty for three sales of an unregistered and misbranded pesticide was $16,500, which would not be the case if Complainant's position that separate penalties my be assessed for the distribution and sale of a pesticide which is not registered and for the distribution or sale of the same pesticide which is misbranded was accurate. Complainant's reliance on the *Blockburger Rule* is misplaced.[30]

[30] Post-Hearing Brief at 28. In *Blockburger v. United States*, 284 U.S. 299 (1932), the Supreme Court said that where the same act or transaction constitutes a violation of two distinct statutory provisions, the applicable rule in determining whether there are two offenses or only one depends on whether each provision requires proof of a fact that the other does not. However, as

V. DETERMINATION OF CIVIL PENALTY

The maximum penalty for a single violation of Section 12(a)(1)[31] is $5,500 for a violation occurring between January 30, 1997 and March 15, 2004 and the maximum penalty for a single violation occurring after March 14, 2004, is $6,500.[32] Section 14(a)(4) provides that the Administrator "shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation." (7 U.S.C. § 136*l*(a)(4)). Moreover, the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, which govern this proceeding, require that civil penalty guidelines be considered,[33] including the ERP. The ERP provides five steps to evaluating a penalty: 1) determining the gravity of the violation; 2) the determination of the business size category; 3) the determination of the dollar amount associated with the gravity level of violation and the size of the business; 4) violator-specific adjustments to the gravity based penalty based on the pesticide involved, actual or potential harm to human health and/or the environment, the violator's compliance history, and the culpability of the violator; and 5) consideration of the penalty's effect on the violator's ability to continue in business (*see Tifa Limited*, Docket No. I.F. & R.-II-547-C, 1999 EPA ALJ LEXIS

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the EAB pointed out in *McLaughlin Gormley King Co., supra, Blockburge*r applies where two distinct statutory provisions are involved and is inapplicable to multiple offenses under one statutory provision. (6 E.A.D. 345, note 7). Cf. *Holmquist Grain & Lumber Co* ., FIFRA Appeal No. 83-3, 2 E.A.D. 18 (CJO, April 23, 1985) (*Blockburger* applicable because FIFRA §§ 12(a)(1)(A) (distribution or sale of an unregistered pesticide) and 12(a)(2)(L) (§ 7(a)) (pesticide production in an unregistered establishment) are distinct statutory provisions, notwithstanding the fact that proof of a distribution or sale is an element of the violation of each section).

[31] FIFRA Section 14(a)(1) provides that the maximum civil penalty for registrants, commercial applicators, wholesalers, dealers, retailers, or other distributors is $5,000 while the maximum penalty for persons not listed above and private applicators is $1,000, FIFRA Section 14(a)(2). Rizing Sun is a distributor of Frontline products to pet stores and other retail establishments, and is subject to FIFRA Section 14(a)(1).

[32] The Civil Monetary Penalty Inflation Adjustment Rule increased the maximum penalty for FIFRA violations (*see* 62 Fed. Reg. 35,038 (Jun. 27, 1997)). The maximum penalty that may be assessed for a FIFRA violation is $5,500 for violations occurring between January 1, 1997, and March 15, 2004, and $6,500 for violations occurring thereafter. 40 C.F.R. Part 19. "Between" January 31, 1997, and March 15, 2004, logically means that the $6,500 maximum applies to violations occurring after March 14, 2004.

[33] The rule, 40 C.F.R. § 22.27(b) provides, in pertinent part, that "[t]he Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease."

55, *66 n.12 (July 7, 1999)).

To establish a prima face case, Complainant must show that the proposed penalty is appropriate (*Jeffrey W. Pendergrass*, Docket No. FIFRA-05-2005-0025, 2005 EPA ALJ LEXIS 50, *13 (September 19, 2005)). An "appropriate" penalty requires an analysis of all statutory factors and a foundation of factual support (*B.J. Carney Industries*, 7 E.A.D. 171, 217 (EAB 1997), *vacated as moot*, 200 F.3d 1222 (9th Cir. 2000); *Employers Insurance of Wausau and Group Eight Technology, Inc.*, 5 E.A.D. 529, 538 (EAB 1994)). I have determined that, based on the record, that the revised penalty of $10,000 claimed by Complainant is appropriate. In reaching this conclusion, I have considered the size of Respondent's business, Respondent's ability to continue in business, the gravity of the violation, and the ERP.

Section 14(a)(4) of FIFRA requires the Administrator to consider, inter alia, the "gravity of the violation" when assessing a penalty. This factor hinges upon both the actual or potential gravity of the harm and the gravity of the misconduct (*Lerro Products*, Docket No. FIFRA 03-2002-0241, 2003 EPA ALJ LEXIS 189, *14 (October 8, 2003); *Chem Lab Products, Inc.*, Docket No. FIFRA-9-2000-0007, 2002 EPA ALJ LEXIS 2, *35 (January 2, 2002)). Complainant frames an argument that because the term "gravity of the violation" is undefined by FIFRA's statutory language and legislative history, the ALJ should rely on the ERP's procedure for determining the gravity of a violation. Thus, Complainant asserts that the gravity of the violation should be assigned a gravity level of two. This is in accordance with Appendix A of the ERP, FIFRA Charges and Gravity Levels.

As for the size of the business, the ERP provides three different classifications which depend on respondent's gross revenues for a year prior to the violation: Category I is for businesses with gross revenues exceeding one $million; Category II is for businesses with gross revenues between $300,001 and $1,000,000; and Category III for those with gross revenues up to $300,000 (C-14 at 20). The Profit and Loss Statement provided by Rizing Sun indicates that its gross revenues are less than $300,000 per year, placing it in Category III of the ERP for penalty computation purposes.

The ERP on page 19 contains the Gravity Penalty Matrix for FIFRA Violations Which Occur After January 30, 1997 ("Penalty Matrix"). This matrix assigns a dollar value for each violation by using the gravity level of the violation and the respondent's size of business as the axes. According to the Penalty Matrix for FIFRA Section 14(a)(1) violations, a level two violation committed by a Category III size business should be assigned a penalty of $3,000 per violation (C-14). Including a ten percent increase to account for inflation pursuant to the Civil Monetary Penalty Inflation Adjustment Rule at 40 C.F.R. Part 19, the penalty value is $3,300. Complainant used that figure for the 46[34] violations that occurred between January 30, 1997 and

[34] Complainant contends that Rizing Sun is liable for 46 violations between January 30, 1997, and March 15, 2004, because it committed 23 FIFRA Section 12(a)(1)(A) violations and 23 Section 12(a)(1)(E) violations during that period.

March 15, 2004. For the sixteen[35] violations occurring after March 15, 2004, Complainant increased the base penalty by 28.95% to $3,900 per violation. Thus, Complainant argues that the total unadjusted base penalty is $214,200 for 62 violations. However, as explained supra, Complainant may allege 62 violations in the complaint, but may only assess a penalty for 31. Specifically, the penalty should reflect 23 violations occurring between January 30, 1997 and March 15, 2004, and eight violations after March 14, 2004. Therefore, the base penalty should be $75,900 for violations occurring between January 30, 1997 and March 15, 2004 ($3,300 multiplied by 23) and $31,200 for violations after March 14, 2004($3,900 multiplied by 8), to total $107,100.

The next step in the penalty determination is to consider adjustment factors which are assigned numerical values and are totaled. The adjustment factors set forth in the ERP which were considered by Mr. Gerdes in the penalty calculation are set forth in findings 28 through 30 and will not be repeated here. The gravity levels assigned by Mr. Gerdes total nine and. in accordance with Table 3 on page 22 of the ERP, a gravity level of between eight and 12 does not result in an adjustment of the base penalty. Therefore, at this stage, the penalty remains at $107,100.

As stated above, FIFRA Section 14(a)(4) requires that the Administrator consider the appropriateness of the penalty to the size of business of the person charged, the effect the penalty may have on the person's ability to continue in business, and the gravity of the violation (7 U.S.C. § 136*l*(a)(4)). The former two factors are often considered as one factor and referred to as "ability to pay" (*Haveman Grain Co.*, Docket No. I.F.&R.-VII-1211C-93P, 1995 EPA ALJ LEXIS 95, *18 (December 12, 1995)). The record supports the conclusion that Rizing Sun could not afford to pay a penalty of $200,000 or more (finding 33).and Complainant has recognized this fact by drastically reducing the proposed penalty from $214,000 to 10,000. While the limited financial information submitted by Respondent leaves its ability to pay a $10,000 penalty in doubt, it is concluded that the testimony of Complainant's expert, Jonathan Shefftz, presents a prima facie case that Rizing Sun has the ability to pay penalty of $10,000. I conclude that Rizing Sun has not successfully rebutted this evidence. A penalty of $10,000 is considered appropriate and will be assessed.

Order

It having been determined that Rizing Sun, Inc. violated FIFRA Section 12(a)(1)(A) and Section 12(a)(1)(E) as alleged in the complaint, a penalty of $10,000 is assessed against it in accordance with FIFRA Section 14(a)(1).[36] Payment of the full amount of the penalty shall be made by

[35] Complainant reached the number of sixteen for violations after March 14, 2004, because it included eight violations of FIFRA Section 12(a)(1)(A) and eight violations of FIFRA Section 12(a)(1)(E).

[36] Unless appealed in accordance with Rule 22.30 of the Consolidated Rules of Practice (40 C.F.R. Part 22) or unless the Environmental Appeals Board elects to review this decision *sua sponte* as therein provided, this decision will become the final decision of the EAB and of the

sending or delivering a certified or cashier's check payable to the Treasurer of the United States in the above amount to the following address within 60 days of the date of this order:

EPA Region 9
(Regional Hearing Clerk)
P.O. Box 360863M
Pittsburgh, PA 15251

Dated this _____day of May, 2007.

_____
Spencer T. Nissen
Administrative Law Judge

Agency in accordance with Rule 22.27(c).