

LAW OFFICES  
FRANCIS T. GIULIANO  
102 HILLTOP ROAD  
POST OFFICE BOX 340  
RAMSEY, NEW JERSEY 07446

TELEPHONE: (201) 825-0300

TELEFAX: (201) 236-0129

February 22, 2010

By CM-RRR:#70062150000527757075

Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 16<sup>th</sup> Floor  
New York, New York 10007-1866

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REGION 2  
2010 FEB 24 PM 2:15  
REGIONAL HEARING  
CLERK

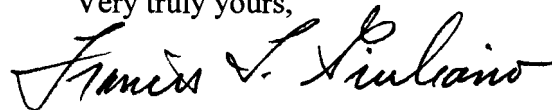
Re: U.S. Environmental Protection Agency v. The Okonite Company, Inc.  
Docket No. TSCA-02-2010-9104

Dear Regional Hearing Clerk:

We represent The Okonite Company, Inc. in defense of the referenced Complaint.

We enclose for service upon you an original and two copies of Answer to Complaint, Counterclaims and Request for Hearing. We would appreciate your having a member of your staff return the extra copy to us stamped "filed" in the envelope provided.

Very truly yours,



Enclosures  
G100187/F126

Courtesy Copy:  
Ann Finnegan, Life Scientist  
Pesticides and Toxic Substances Branch  
U.S. Environmental Protection Agency, Region 2  
2890 Woodbridge Avenue MS 105  
Edison, NJ 08837-3679

In the Matter of The Okonite Company, Inc.  
Docket No. TSCA-02-2010-9104

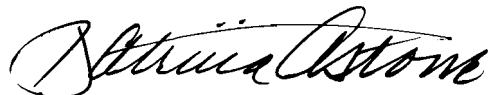
CERTIFICATE OF SERVICE

This is to certify that on the 22<sup>nd</sup> day of February, 2010, I have served a true and correct copy of the foregoing Answer, bearing Docket No. TSCA-02-2010-9104, by Certified Mail, Return Receipt Requested #70062150000527757075, to:

Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 16<sup>th</sup> Floor  
New York, New York 10007-1866

On the same date I mailed via U.S. Mail, a courtesy copy of the foregoing Answer to:

Ann Finnegan, Life Scientist  
Pesticides and Toxic Substances Branch  
U.S. Environmental Protection Agency, Region 2  
2890 Woodbridge Avenue MS 105  
Edison, NJ 08837-3679



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Patricia Astone

U.S. ENVIRONMENTAL PROTECTION AGENCY  
Region 2

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG. 2  
2010 FEB 24 PM 2:45  
REGIONAL HEARING  
CLERK

-----X  
In the Matter of: : ANSWER TO COMPLAINT,  
: COUNTERCLAIMS  
: AND  
The Okonite Company, Inc., : REQUEST FOR HEARING ON BEHALF OF  
: THE OKONITE COMPANY, INC.  
Respondent. :  
: Proceeding under Section 16(a) of : Docket No.  
the Toxic Substances Control Act. : TSCA-02-2010-9104  
-----X

ANSWER

Respondent, The Okonite Company, Inc. ("Okonite"), having its principal place of business at 102 Hilltop Road, Ramsey, New Jersey 07446, hereby answers the Complaint of the United States Environmental Protection Agency ("EPA") as follows:

1. The statements contained in Paragraph 1 of the Complaint are EPA's characterization of this proceeding, and as such Okonite is not required to admit, deny or otherwise comment on the accuracy of such statements.
2. Okonite is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 2 of the Complaint.
3. The statements contained in Paragraph 3 of the Complaint are EPA's characterization of this proceeding, and as such Okonite is not required to admit, deny or otherwise comment on the accuracy of such statements.
4. Answering Paragraph 4 of the Complaint, Okonite admits that it owns and operates a three-story office building containing approximately 100 employees, and a small ancillary building which houses its heating plant (referred to in the Complaint as the Utility Building), at 102 Hilltop Road, Ramsey, New Jersey 07446. Okonite states that its business is the manufacture of highly engineered electrical wire and cable, but that it does not engage in any manufacturing whatsoever at the 102 Hilltop Road premises. Okonite denies that it owns, operates or controls any other facility "in and around 102 Hilltop Road."

5. Okonite admits the allegations of Paragraph 5 of the Complaint.

6. Answering Paragraph 6 of the Complaint, Okonite states that it is an employee-owned corporation, through an Employee Stock Ownership Trust, and that it is a corporation of the State of New Jersey. As supplemented, Okonite admits the allegations of Paragraph 6 of the Complaint.

7. Answering Paragraph 7 of the Complaint, Okonite admits it has owned, used and maintained two transformers containing PCBs, states that it continues to own, use and operate the said two transformers, one serving the office building, and the other serving the ancillary building at 102 Hilltop Road, and except as so admitted denies the allegations of Paragraph 7.

8. Okonite admits the allegations of Paragraph 8 of the Complaint.

9. Okonite admits the allegations of Paragraph 9 of the Complaint.

#### Response to Count I

10. Okonite repeats and realleges as though set forth verbatim here its responses to Paragraphs 1 through 9 of the Complaint.

11. Okonite admits the allegations of Paragraph 11 of the Complaint.

12. Except to state that this case does not involve “storage for reuse,” Okonite admits the allegations of Paragraph 12 of the Complaint.

13. Answering Paragraph 13 of the Complaint, Okonite admits the existence of the regulations cited by EPA in Paragraph 13, prays leave to refer to the entirety of the regulations for the applicable terms and provisions. Okonite affirmatively states that it failed to register the transformer which is the subject of the First Count of the Complaint by December 28, 1998, the date prescribed by the regulation. Okonite affirmatively states that it did register the said transformer on April 5, 2005, and that the EPA accepted the registration. Okonite further states that the registration having been accomplished on April 5, 2005, the EPA then inspected the transformer for the first time, some four years later, on May 7, 2009 as alleged in Paragraph 9 of EPA’s Complaint. Okonite further states that the EPA inspection revealed that Okonite’s operation of the transformer in question was in compliance with all the conditions of use of PCB transformers contained in the regulations, subject only to the EPA’s position adopted in this Complaint that Okonite’s registration of the said transformer was meaningless under the law because it was late. Except as so admitted and stated, Okonite denies the accuracy of the construction EPA places on the portions of the regulation it cites in Paragraph 13, and denies the accuracy of any construction of the applicable regulations under which Okonite’s use of its transformer is unauthorized because of the late registration.

14. Okonite admits that it was using the transformer in question on May 7, 2009, the date

of the EPA inspection, states that it continues to use the transformer, and that if it prevails in this proceeding will continue to use the transformer until it reaches the end of its useful life, at which time it will remove the transformer from service and dispose of it in accordance with all regulations applicable to the cessation of use and appropriate disposal of PCB-containing transformers.

15. Okonite admits the transformer which is the subject of this proceeding is a PCB transformer, and except as so admitted denies the allegations of Paragraph 15 of the Complaint.

16. Okonite admits the allegations of Paragraph 16 of the Complaint.

17. Okonite repeats and realleges as though set forth verbatim here its answer to Paragraph 13 of the Complaint, and except as so stated and admitted, denies the allegations of Paragraph 17 of the Complaint.

18. Answering Paragraph 18 of the Complaint, Okonite admits it did not register the transformer in question on December 28, 1998, affirmatively states that the omission was unintentional, states that the transformer in question was registered on April 5, 2005, as stated by EPA, and except as stated, Okonite denies the allegations of Paragraph 18 of the Complaint.

### Response to Count II

Count II alleges the same cause of action as Count I, and is identical to Count I in all respects, except that Count II relates to the transformer which serves the small ancillary building, characterized in Paragraph 23 of the EPA Complaint as the Utility Building. Count II of the Complaint relies upon all the same operative facts and the same construction of the applicable regulations as does Count I, and therefore Okonite modifies its responses to Count I to refer to the transformer which serves the Utility Building, and as so modified repeats and realleges its responses to Count I as though set forth verbatim here, and respectfully submits them to the Court as its responses to the allegations of Count II of the Complaint.

### AFFIRMATIVE DEFENSES

#### First Affirmative Defense

1. In this proceeding the EPA places the following construction on §§40 C.F.R. 761.30 (a)(1)(vi) (A) and (D) to the following effect:

A user of PCB transformers must register the transformers no later than December 28, 1998, and failure to do so requires automatic removal of the transformers from service, despite subsequent

registration, and despite compliance with the other requirements of 40 C.F.R. 761.30 (a)(1).

2. Such a construction of the applicable regulation would be a denial of due process, and would result in a taking of Okonite's property without due process of law.

#### Second Affirmative Defense

The construction which the EPA places on 40 C.F.R. §§ 761.30 (a)(1)(vi)(A) and (D) in the instant matter is inconsistent with the construction EPA places on those sections in other enforcement matters, is directly contradictory to the construction EPA places on those sections in yet other enforcement matters, and such inconsistent and contradictory construction and application of these regulations denies Okonite the equal protection of the laws under the United States and New Jersey Constitutions.

#### Third Affirmative Defense

The construction which the EPA places on 40 C.F.R. §§ 761.30 (a)(1)(vi)(A) and (D) in this proceeding is inconsistent with the EPA's policy on Incentives for Self-Policing, is directly contradictory of and in violation of that Policy, and therefore such construction is invalid.

#### Fourth Affirmative Defense

To the extent that any penalty sought to be imposed by virtue of the EPA Complaint relates to any time period before the registration of the transformers on April 5, 2005, the Complaint is barred by the applicable statute of limitations, 28 U.S.C. § 2462.

#### Fifth Affirmative Defense

If the EPA prevails in this Court in the construction it is imposing on the applicable regulations, then no penalty whatsoever is warranted.

#### Sixth Affirmative Defense

The imposition of any penalty is barred by the doctrine of unclean hands.

## COUNTERCLAIMS

### COUNT I

(The Appropriate Construction of 40 C.F.R. 761.30)

1. Okonite is an employee-owned Company, incorporated in New Jersey, engaged in the manufacture of electric wire and cable.
2. The “facilities” identified in Paragraph 5 of the Complaint at 102 Hilltop Road consist of an office building containing approximately 100 employees, and a small utility building that houses essentially only the office building’s heating plant.
3. Okonite conducts no manufacturing whatsoever at its Ramsey facility.
4. The office building and the utility building are each served by one PCB transformer.
5. As stated in Okonite’s responses to Counts I and II of EPA’s Complaint, through administrative oversight the transformers were not registered with EPA as they should have been on December 28, 1998.
6. The transformers were registered on April 5, 2005.
7. Some four years later, on May 7, 2009, EPA conducted its first inspection of the transformers.
8. The EPA inspection revealed that the transformers complied with all the operational parameters of 40 C.F.R. 761.30 mandated for PCB transformers.
9. Despite Okonite’s realization that the transformers in question should be registered, and its prompt voluntary attendance to doing so, EPA seeks an adjudication by the Court that Section 761.30(a) (1)(vi)(D) means that because of the late registration the transformers in question are not now authorized for use.
10. Even a brief survey of Consent Agreements and Final Orders entered into by the EPA with PCB transformer users, and Administrative decisions involving wide ranging operational violations, including for example but not limited to leaking transformers, improperly or not labeled transformers, transformers lacking containment, storage of combustible items impermissibly close to transformers reflects that when the offending condition of the transformers or practice of the user is corrected, and the transformers are brought into compliance with the regulation, the owners/users are allowed to continue the transformers’ use. Nothing in the language of §761.30(a)(1)(vi)(D) establishes a distinction between an operational violation subsequently corrected, and a violation based on a failure to register also subsequently corrected.

11. The construction placed on 40 C.F.R. §§ 761.30(a)(1)(vi)(A) and (D) by the EPA for purposes of the instant proceeding to declare Okonite's transformers unauthorized for use is not reasonably borne by the language of the regulations, is inconsistent with the legislative purpose of Section 6(e) of TSCA 15, U.S.C.A. 2605(e), and is effectively an *ultra vires* engrafting of new language onto the applicable regulations. Each of these positions is legally invalid, and accordingly warrants a dismissal of the Complaint with prejudice.

#### COUNT II

(The Appropriate Construction of 40 C.F.R. 761.30)

12. Okonite repeats and realleges as though set forth verbatim here Paragraphs 1 through 11 of the First Count of the Counterclaim.

13. The EPA construction of 40 C.F.R. §§ 761.30(a)(1)(vi)(D) and (A) in the instant proceeding, is an arbitrary, unreasonable, unwarranted and capricious application of the applicable statutes and regulations, and of the EPA enforcement authority, is therefore invalid, and accordingly warrants a dismissal of the Complaint with prejudice.

#### COUNT III

(Continuing Obligation)

14. Okonite repeats and realleges as though set forth verbatim here Paragraphs 1 through 11 of the First Count of the Counterclaim and Paragraphs 12 and 13 of the Second Count of the Counterclaim.

15. Okonite registered the transformers which are the subject of this Complaint on April 5, 2005.

16. Okonite's failure to register the subject transformers was cured by the registration on April 5, 2005.

17. Accordingly, the subject transformers are in fact authorized for use, and the EPA Complaint should be dismissed with prejudice.

#### COUNT IV

(Assessment of Penalty)

18. Okonite repeats and realleges as though set forth verbatim here the First, Second and Third Counts of the Counterclaim.



19. Because the Complaint is invalid under the law, the EPA assessment of a penalty is invalid.

20. Accordingly, the EPA imposition of a penalty should be vacated with prejudice.

COUNT V  
(Quantum of Penalty)

21. Okonite repeats and realleges as though set forth verbatim here the First, Second, Third and Fourth Counts of the Counterclaim.

22. As the EPA states in Paragraph 9 of its Complaint, it conducted an inspection of both transformers on May 7, 2009.

23. Thereafter by letter dated September 23, 2009, the EPA notified Okonite, *inter alia*, that both transformers in EPA's view were unauthorized for use. As the September 23, 2009 letter reads in relevant part:

“ \* \* \* Since the transformers were not registered within the timeframe specified in the regulations, the transformers are not authorized for use, and must be either removed or retrofilled until the PCB concentrations decrease to below 500 parts per million (ppm). Please note that we have discussed this situation with EPA Headquarters, and they are in agreement with the Region on the two aforementioned options available to you.”

24. EPA further advised in the September 23, 2009 letter that it anticipated “issuing an administrative complaint [against Okonite] seeking a civil penalty in the amount of \$16,800. \*\*\*”

25. EPA “included as an enclosure to [the] letter” a “more detailed description of the violations and potential penalties.” In relevant part the enclosure contained EPA's calculation of the penalty dollar amount, as follows:

“Circumstance: **2** (major use)  
Extent: **Significant** (between 220 and 1,100 gallons):  
    Back of Main Building Transformer (435 gallons)  
    Utility Building Transformer (315 gallons)  
Total Gravity-Based Penalty: \$16,764

\* \* \*

**Total Proposed Penalty (rounded off per EPA policy): \$16,800"**

26. The enclosure with the EPA September 23, 2009 letter indicated that the penalty calculation was based on:

“References:

1. EPA’s ‘Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act’ [September 10, 1980, in Federal Register (45 Fed. Reg. 59,770)]
2. The Civil Monetary Penalty Inflation Adjustment Rule [February 13, 2004, in Federal Register (69 FR 7121)]
3. Penalty Policy Supplements pursuant to the Civil Penalty Inflation Adjustment Rule (April 18, 1997)
4. EPA’s ‘PCB Penalty Policy’ (April 9, 1990)”

27. The September 23, 2009 EPA letter invited Okonite to informally discuss the transformer issue with it, and discussions were held, but were unavailing.

28. Accordingly, the EPA then issued the Complaint *sub judice*. In its Complaint the EPA increased the proposed penalty to \$33,500.

29. While Okonite asserts that as set forth in Count IV of the Counterclaim, no penalty whatsoever is warranted, or should be imposed, Okonite also asserts in the alternative that the proposed penalty of \$16,800 included with the EPA September 23, 2009 letter is excessive, unreasonable, capricious and arbitrary, and is inconsistent with EPA policies and practices including being inconsistent with and violative of the documents listed as “References” on the enclosure to the September 23, 2009 letter.

30. Okonite further asserts in the alternative that the increased proposed penalty of \$33,500 in the EPA Complaint also represents an excessive penalty, and an arbitrary, capricious and unreasonable application of EPA policies and practices, including but not limited to the EPA’s “Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act,” which was published on September 10, 1980 in the Federal Register (45 Fed. Reg. 59,770), and EPA’s April 9, 1990 “PCB Penalty Policy.”

31. Okonite further asserts in the alternative that the increased proposed penalty of \$33,500 represents an attempted imposition of a doubled penalty in retaliation for Okonite’s exercise in good faith of its right to obtain judicial review of the EPA construction of 40 C.F.R. §§ 761.30 (a)(1)(vi)(D) and (A) as purveyed in the EPA Complaint.

32. By virtue of the premises aforesaid, no penalty is warranted and the attempted imposition of a penalty by the EPA should be vacated with prejudice. In the alternative, in the event the Court determines that a penalty is warranted, Okonite requests that in view of the totality of all the circumstances including but not limited to the fact of no environmental insult or degradation

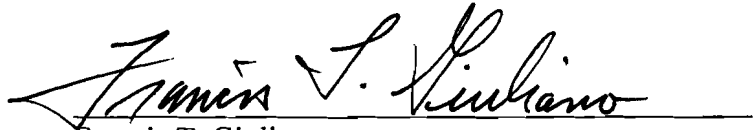
occurred in connection with the late registration, only a token penalty be imposed within the sound discretion of the Court.

RELIEF REQUESTED

By virtue of all the above, Okonite respectfully requests dismissal of the Complaint with prejudice.

REQUEST FOR HEARING

Okonite hereby requests a hearing on all issues raised by or subsumed in the Complaint, Answer, Affirmative Defenses, Counterclaims and any pleading filed by EPA in response to the Counterclaims.

A handwritten signature in black ink, reading "Francis T. Giuliano", written over a horizontal line.

Francis T. Giuliano

Attorney for Respondent The Okonite Company, Inc.