

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 7  
901 NORTH 5<sup>th</sup> STREET  
KANSAS CITY, KANSAS 66101

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BEFORE THE ADMINISTRATOR

IN THE MATTER OF ) Docket No. FIFRA-07-2009-0042  
)  
Custom Compounders, Inc., ) COMPLAINANT'S MOTION FOR  
Advanced Products Technology, Inc., ) PARTIAL ACCELERATED DECISION ON  
Keith G. Kastendieck, and Karlan C. ) LIABILITY  
Kastendieck ) AND TO STRIKE CERTAIN  
) AFFIRMATIVE DEFENSES  
)  
Respondents )

### I. INTRODUCTION

Complainant, the United States Environmental Protection Agency, Region 7 ("EPA"), submits this Motion For Partial Accelerated Decision On Liability. Pursuant to 40 C.F.R. §§ 22.16 and 22.20, Complainant requests this Court to issue an Order finding that Respondent Advanced Products Technology, Inc. ("APT") is liable for five violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 *et seq.*, as alleged in Counts 1 through 5 of the EPA's First Amended Complaint and Notice of Opportunity for Hearing ("First Amended Complaint") in the above-captioned matter. An accelerated decision as to APT's liability is appropriate based on the Respondents' joint Prehearing Exchange and the Answer of APT and Respondent Custom Compounders Inc. ("CCI," and collectively with APT, the "Corporate Respondents") to the First Amended Complaint<sup>1</sup>, and other pertinent evidence

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<sup>1</sup> APT and Custom Compounders, Inc. filed out of time a joint Answer to the First Amended Complaint on or about August 9, 2010. Though counsel for the two named corporate respondents now also represents the two individual respondents, the individuals were not so represented at the time the Answer was filed.

documenting five violations of FIFRA. Neither the Corporate Respondents' Answer nor their joint Prehearing Exchange raise any genuine issue of material fact regarding liability.

Furthermore, the Corporate Respondents in their Answer raise two affirmative defenses, neither of which is relevant to the question of APT's liability for the violations alleged. Accordingly, Complainant seeks an accelerated decision as to APT's liability and to strike the two affirmative defenses.

## II. FACTUAL BACKGROUND

On June 6, 2009, EPA filed two complaints, in the matters of FRM Chem, Inc., Docket No. FIFRA-07-2008-0035, and Advanced Products Technology, Inc., Docket No. FIFRA-07-2008-0036, in each case alleging multiple distributions to several common customers of one or both of two unregistered pesticides produced by FRM Chem, Inc. (FRM): FRM CHLOR 1250 and STERI-DINE DISINFECTANT. On September 23, 2009, EPA filed its initial Complaint and Notice of Opportunity for Hearing ("initial Complaint") in the above-captioned matter on September 23, 2009 with CCI as the sole initial respondent, alleging multiple distributions of FRM CHLOR 1250.

Respondent CCI filed an initial Answer to the initial Complaint on or about November 20, 2009. In its initial Answer, CCI denied the transactional allegations set forth in the initial Complaint, and asserted that, for each invoice number cited by the Complainant as documenting each alleged transaction, that number "is not a Custom Compounders' invoice number." *See* initial Answer at Pages 3-5. A copy of CCI's Answer to the initial Complaint is in the Court's files and are not attached to this Motion.

On November 30, 2009, Complainant moved for consolidation of the above-captioned matter and three other matters<sup>2</sup> pursuant to Rule 22.12 of the Consolidated Rules of Practice (CROP), 40 C.F.R. § 22.12, noting that the named corporate Respondents in the four matters share common officers, directors, and supervisors, engage in substantially the same business operations, share the same principal place of business, and are charged with similar violations of selling one or both of two unregistered pesticides, FRM CHLOR 1250 and STERI-DINE DISINFECTANT, to several common customers. By Order of the Presiding Officer issued December 2, 2009, the four matters were consolidated and a common prehearing schedule was issued.

On January 15, 2010, Complainant filed its consolidated prehearing exchange for the four matters. The four Respondents<sup>3</sup>, including FRM, APT and CCI, filed a joint prehearing exchange on or about February 15, 2010. Respondents' joint Prehearing Exchange included five invoices that indicated that APT, not CCI, was the entity responsible for the distributions of FRM CHLOR 1250 alleged in the above-captioned matter. On March 15, 2010, Complainant filed a motion to file amended complaints in the four matters, in which it proposed that APT be added as a respondent to the above-captioned matter initially filed against CCI alone. Neither APT nor CCI objected to amending the complaint in the instant matter to add APT as respondent, stating that they "concur with Complainant that these amendments are appropriate in light of Respondents' Prehearing Exchange." *See* Respondents' Reply to Complainant's Motion

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<sup>2</sup> In the Matter of FRM Chem, Inc., Docket No. FIFRA-07-2008-0035; In the Matter of Synisys, Inc., Docket No. FIFRA-07-2009-0041; and In the Matter of Advanced Products Technology, Inc., Docket No. FIFRA-07-2008-0036.

<sup>3</sup> At that time, the two individual Respondents, Keith G. Kastendieck and Karlan C. Kastendieck, had not yet been added to the complaints.

to Amend Complaints and for Other Discovery Pursuant to 40 C.F.R. § 22.19(e) (March 29, 2010), at Paragraph 1.

The initial Complaint in the present matter was accordingly amended once, on June 3, 2010, adding fellow corporate respondent APT and two individual respondents, Keith G. Kastendieck and Karlan C. Kastendieck ("Individual Respondents"). The First Amended Complaint alleges that, for counts 1 through 5, the named Respondents violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by distributing or selling the unregistered pesticide product FRM CHLOR 1250, in five separate transactions in 2007 and 2008. Copies of the initial Complaint and of the First Amended Complaint are in the Court's files and are not attached to this Motion.

On June 7, 2010, service of the First Amended Complaint was accepted by Jenkins & Kling, PC, counsel for CCI and APT. Pursuant to Rule 22.15(a) of the CROP, 40 C.F.R. § 22.15(a), a new respondent must file an answer to a complaint within 30 days after service of the complaint. Respondent APT's Answer to the First Amended Complaint was due on July 7, 2010, and was filed, jointly with Respondent CCI, out of time on or about August 9, 2010. The two Individual Respondents filed a joint Answer to the First Amended Complaint on or about August 23, 2010.

In the Corporate Respondents' Answer to the First Amended Complaint, Respondents APT and CCI both deny liability for the five violations alleged in Counts 1 through 5 therein, and state, as CCI did in its Answer to the initial Complaint, that for each count that the invoice number listed for each of the five sales transactions "is not a Custom Compounders' invoice number."

This Motion will request the Court to grant an accelerated decision on liability as to Respondent ATP in favor of the Complainant for each of the five counts alleged in its First Amended Complaint as Counts 1 through 5 and will provide a basis for which the Motion should be granted. This Motion will demonstrate that, even in a light most favorable to Respondent APT, there is no genuine issue of material fact as to any of the elements necessary to prove that a violation of FIFRA occurred as to each of the five counts. Complainant will show that there can be no genuine issue or dispute that: (1) APT is a "person"; (2) FRM CHLOR 1250 is a pesticide as defined by FIFRA and its implementing regulations; (3) APT distributed or sold FRM CHLOR 1250 on five separate occasions; and (4) at all times relevant to the distributions or sales alleged in Counts 1 through 5 of the Complaint, FRM CHLOR 1250 was not registered as a pesticide with the Administrator of EPA.

To demonstrate that there are no genuine issues of material fact in this matter, Complainant will rely on Corporate Respondents' and Individual Respondents' Answers, the Respondents' Joint Prehearing Exchange, and the affidavits of EPA Environmental Scientist Mark Leshner and of Mark Nachreiner, Pesticide Inspector for the Missouri Department of Agriculture. In both the Corporate Respondents' Answer to the First Amended Complaint and the joint Prehearing Exchange, Respondent APT has failed to raise any genuine issues of material fact to refute that such violations occurred.

This Motion will also request the Court to strike both the Corporate and the Individual Respondents' affirmative defenses raised in their Answers to the First Amended Complaint. In the arguments set forth below, Complainant will demonstrate that the Corporate and the Individual Respondents failed to support their affirmative defenses with any facts or reasoning

which show that there is a genuine issue for hearing, and that the law and interpretation of the law is so clear that a motion to strike must be granted as to each of these two affirmative defenses.

In sum, EPA has clear documentation of each of the five violations alleged in the First Amended Complaint as Counts 1 through 5, as established by Respondents' Answers and Prehearing Exchange, and by the affidavits attached to this Motion. In both the Corporate Respondents' Answer and the joint Prehearing Exchange, Respondent APT has failed to raise any genuine issues of material fact to refute that such violations occurred.

### III. ARGUMENT

#### A. Standard for Issuing an Order on Accelerated Decision

Section 22.20 of the Consolidated Rules of Practice ("CROP"), 40 C.F.R. Part 22, allows the Presiding Administrative Law Judge to "at any time render an accelerated decision in favor of the complainant or respondent as to all or any part of the proceeding without further hearing or upon such limited evidence, such as affidavits, as he may require." The CROP further provide at Section 22.20(a) that when "there is no genuine issue of material fact, a party is entitled to judgment as a matter of law, as to all or any part of the proceeding." The standard for granting a motion for accelerated decision is analogous to the standard for summary judgment in Federal Rule of Civil Procedure Rule 56(c). *See In Re: Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 793 (EAB, 1997); *CWM Chem. Serv.*, 6 E.A.D. 1, 12 (EAB, 1995); and *In Re: Allen Overby*, Docket No. CWA-04-2000-1505 (ALJ May 3, 2000). In deciding such motions, the evidence must be viewed in a light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). To defeat summary judgment, the opposing party must not only raise an

issue of material fact, but that party must demonstrate that this dispute is "genuine" by referencing probative evidence in the record, or by producing such evidence. *In Re: Green Thumb Nursery, Inc.*, 6 E.A.D. at 793; *In Re: Rhee Bros., Inc.*, Docket No. FIFRA-03-2005-0028 (ALJ September 27, 2005), at 2.

B. Evidence Clearly Establishes Respondent APT's Liability in This Case

as to the 5 violations of FIFRA Section 12(a)(1)(A) in Counts 1 through 5

Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), provides that no person may distribute, sell, offer for sale, or hold for sale to any person any pesticide that is not registered with the Administrator of EPA. Accordingly, to establish Respondent APT's liability for the five violations of this provision alleged in Counts 1 through 5, Complainant must establish that: (1) Respondent is a "person"; (2) the products at issue are "pesticides"; (3) Respondent "distributed or sold" the pesticides at issue in each of five transactions; and (4) the pesticides at issue are "unregistered."

Complainant can establish the elements of the four violations through the admissions in Corporate Respondents' and Individual Respondents' Answers and documents included in Respondents' joint Prehearing Exchange; by reference to documents collected at inspections of APT's facility, included in Complainant's Prehearing Exchange; and by reference to the affidavits of EPA Environmental Scientist Mark Leshner and of Mark Nachreiner, Pesticide Inspector for the Missouri Department of Agriculture, attached hereto.

1. Respondent APT is a "Person"

Respondent APT admits in its Answer that it "was, at all times referred to in the Complaint, a Missouri corporation qualified to do business in the State of Missouri." *See*

Corporate Respondents' Answer at Page 2, paragraph 4. Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines the term "person" to include "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not." APT is a corporation and therefore a "person" for the purposes of FIFRA.

2. FRM CHLOR 1250 is a "Pesticide"

APT admits in its Answer that FRM CHLOR 1250 is a pesticide. *See* Answer to the First Amended Complaint at Page 2, paragraph 12.

Further evidence that FRM CHLOR 1250 is a disinfectant that is intended to prevent, destroy, repel and/or mitigate bacteria and other microorganisms that are deleterious to man or the environment is found in the language of the label for the product. The record shows FRM CHLOR 1250 to be a disinfectant containing as its active ingredient 12.5% Sodium Hypochlorite with 87.5% inert ingredients, as documented by the product label and photograph collected during a December 2005 inspection of FRM Chem's facility. *See* Complainant's Prehearing Exchange, Exhibits 1f and 1g. The label for FRM CHLOR 1250 further states that it may be used for "sanitation of non-porous food contact surfaces," and to "disinfect [farm premises by] saturat[ing] all surfaces with a solution of at least 1000 ppm available chlorine for a period of 10 minutes." *See* Complainant's Prehearing Exchange Exhibits 1f, 1g, and 1h. Bacteria and microorganisms that are deleterious to man or the environment are "pests" as that term is defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t) and 40 C.F.R. § 152.5(d). Because Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. § 152.3 define "pesticide" as "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest,"



FRM CHLOR 1250 is a "pesticide" for FIFRA purposes.

3. Respondent APT Distributed or Sold FRM CHLOR 1250

Section 2(gg) of FIFRA, 7 U.S.C § 136(gg), broadly 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."

APT, in the Corporate Respondents' Answer to the First Amended Complaint, denies for each of Counts 1 through 5 that it sold or distributed a quantity of FRM CHLOR 1250 to the Franklin County Humane Society. However, Keith G. Kastendieck and Karlan C. Kastendieck, the Individual Respondents, in their joint Answer to the First Amended Complaint, "admit that Advanced Products Technology, Inc. [...] distributed the product" FRM CHLOR 1250 as alleged in each of Counts 1 through 5 of the First Amended Complaint. *See* Individual Respondents' Answer at Page 3. Both Individual Respondents are directors, officers, and shareholders of both Corporate Respondents, as established by the Corporate Respondents' Financial Data Request Forms included as Attachments K and L to Complainant's Rebuttal Prehearing Exchange,<sup>4</sup> and as admitted in Paragraph 15 of Corporate Respondents' Answer to the First Amended Complaint.<sup>5</sup> Furthermore, Keith G. Kastendieck, at all times referred to in the Complaint, was the plant manager and part owner of the two Corporate Respondent businesses and of FRM

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<sup>4</sup> APT's and CCI's Financial Data Request Forms, included in Complainant's Rebuttal Prehearing Exchange as Attachments K and L, respectively, have both been stipulated into evidence by the Joint Prehearing Stipulations filed by the parties on August 26, 2010.

<sup>5</sup> Complainant notes that in Individual Respondents' joint Answer, Keith G. Kastendieck admits to his role as a director, officer, and shareholder of the two Corporate Respondents, but Karlan C. Kastendieck denies same.

Chem, Inc. *See* Individual Respondents' Answer at Page 2, Paragraph 18.

Furthermore, Corporate Respondents, in their joint Prehearing Exchange, submit Exhibits 17 through 21, which are copies of invoices numbered 22129, 22329, 22342, 22361, and 22395, on Advanced Products Technology, Inc. letterhead, which correspond to the numbers of the Custom Compounders, Inc. invoices collected in the October 2008 inspection, as referenced in Complainant's initial Complaint and First Amended Complaint in this matter, and included as Exhibits 58 through 62 of Complainant's Prehearing Exchange. Exhibits 17 through 21 of Respondents' joint Prehearing Exchange and Exhibits 58 through 62 of Complainant's Prehearing Exchange have been stipulated into evidence by the parties' Joint Prehearing Stipulations, filed August 26, 2010.

Each of the invoices included as Exhibits 17 through 21 of Respondents' joint Prehearing Exchange and as Exhibits 58 through 62 of Complainant's Prehearing Exchange documents the sale or distribution of one 55 gallon drum of a product identified as "SODIUM HYPO," further identified by the product tracking number 1004024000. Keith Kastendieck, manager and part owner of APT, CCI, and FRM, when he provided shipping invoices to Missouri Department of Agriculture inspector Mark Nachreiner following the October 8, 2008 inspection, explained that the businesses used internal tracking numbers on their invoices, and that products beginning with the prefix "1004" were FRM CHLOR 1250 and those with the prefix "1014" indicated STERILIZING DISINFECTANT. *See* Affidavit of Mark Nachreiner, attached hereto; *see also* Complainant's Prehearing Exhibit 10, containing Nachreiner's notation of the "1004" and "1014" prefix.

Invoices or bills of lading submitted in support of multiple counts admitted by Respondent FRM in the related case at Docket No. FIFRA-07-2008-0035 (the "FRM matter") indicate that FRM refers on multiple occasions to the product FRM CHLOR 1250 as "Hypochlorite Solution" or "SODIUM HYPO" in its documentation. For example, Complainant's Prehearing Exchange Exhibits 5, 8, 21, and 22, documenting respectively the transactions alleged in Counts 3, 7, 26, and 27 of the FRM matter, which violations were admitted by FRM Chem in its Answer, are bills of lading referencing "Hypochlorite Solution," and Exhibit 22, a bill of lading collected by the Missouri inspector in December of 2005, contains a contemporaneous note by the inspector that "FRM CHLOR 1250 is hypochlorite solution," which he was told by Karlan Kastendieck, Sales Manager for FRM Chem, Inc. *See* Affidavit of Mark Nachreiner, attached hereto. Furthermore, in the invoices included as Complainant's Prehearing Exchange Exhibits 10-18, 25-34, and 37-40, documenting respectively the transactions alleged in Counts 8-16, 32-41, and 53-56 of the FRM matter, which are violations are admitted by FRM Chem in its Answer, each identify the product FRM CHLOR 1250 as "SODIUM HYPO," with a product tracking number prefixed with "1004."

Indeed, Complainant notes that all invoices in the record that document sales of 55 gallon containers of products identified as "SODIUM HYPO" or as "FRM CHLOR 1250," whether those documents record sales or distributions by APT, CCI, or FRM, indicate the product by the tracking number "1004024000," identical to the product tracking number indicating the 55 gallon drum of "SODIUM HYPO" in Respondent APT Invoices Nos. 22129, 22329, 22342, 22361, and 22395, documenting the five distributions of FRM CHLOR 1250 to the Franklin

County Humane Society in 2007 and 2008, as alleged in the First Amended Complaint *See* Complainant's Prehearing Exchange Exhibits 37, 38, 39, and 40 (documenting multiple distributions admitted by FRM of 55 gallon drums of FRM CHLOR 1250 in 2006, each of which is indicated by the tracking number "1004024000" and "SODIUM HYPO"), and Complainant's Prehearing Exchange Exhibits 58, 59, 60, 61, and 62 (invoices collected from Keith Kastendieck by the MDA inspector on October 8, 2008, documenting multiple product distributions by CCI in 2007 and 2008, each of which is identified by the tracking number "1004024000" and "SODIUM HYPO").

In light of the above, Complainant submits that, even when the evidence is viewed in a light most favorable to Respondent, it is clear that the product referenced on APT and FRM invoices as "SODIUM HYPO" and with the prefix "1004-" is FRM CHLOR 1250. Accordingly, there is no genuine issue of material fact as to whether Respondent APT distributed FRM CHLOR 1250 on five separate occasions, as alleged in Counts 1 through 5 of the First Amended Complaints.

In sum, Respondents' Exhibits 17 through 21 establish the distribution of FRM CHLOR 1250 by Respondent APT as follows:

As to Count 1: Respondents' Exhibit 17, APT Invoice No. 22129, documents the shipment to Franklin County Humane Society of one unit of Item No. 1004024000, described as "SODIUM HYPO 55 GAL DRUM," with a ship date of November 14, 2007.

As to Count 2: Respondents' Exhibit 18, APT Invoice No. 22329, documents the shipment to Franklin County Humane Society of one unit of Item No. 1004024000, described as

“SODIUM HYPO 55 GAL DRUM,” with a ship date of May 22, 2008.

As to Count 3: Respondents' Exhibit 19, APT Invoice No. 22342, documents the shipment to Franklin County Humane Society of one unit of Item No. 1004024000, described as “SODIUM HYPO 55 GAL DRUM,” with a ship date of June 19, 2008.

As to Count 4: Respondents' Exhibit 20, APT Invoice No. 22361, documents the shipment to Franklin County Humane Society of one unit of Item No. 1004024000, described as “SODIUM HYPO 55 GAL DRUM,” with a ship date of July 24, 2008.

As to Count 5: Respondents' Exhibit 21, APT Invoice No. 22395, documents the shipment to Franklin County Humane Society of one unit of Item No. 1004024000, described as “SODIUM HYPO 55 GAL DRUM,” with a ship date of September 29, 2008.

4. The Pesticide at Issue is Unregistered

At the time of each sale or distribution alleged by Complainant in Counts 1 through 5 of the Complaint, the product FRM CHLOR 1250 was not registered under Section 3 of FIFRA, 7 U.S.C. § 136a. Evidence for this is provided by the “Cancellation Order for Section 3 Pesticide Product Registrations” issued by EPA on July 19, 1995, provided as Exhibit 3 to Complainant's Prehearing Exchange and as Exhibit 2 to Respondents' Prehearing Exchange. The July 19, 1995 cancellation order stated that sales of FRM CHLOR 1250 were prohibited after January 15, 1996. Further evidence as to this product being unregistered as a pesticide with the Administrator is supplied by the Affidavit of Mark Leshner, an EPA Environmental Scientist with EPA, Region 7, dated August 9, 2010, in which he states:

1. *In my position as a case review officer, I regularly use the Office of Pesticide Programs Information Network (OPP) electronic database, an EPA internal database that stores comprehensive information regarding federal pesticide regulation.*

2. *In 2006 and 2008, I conducted a search in OPPIN with respect to "FRM CHLOR 1250" and "STERI-DINE DISINFECTANT" by searching by product name, manufacturer name and active ingredients for both products.*

3. *According to OPPIN, "FRM CHLOR 1250" is not registered as a pesticide under FIFRA.*

See Affidavit of Mark Leshar dated August 9, 2010, attached to this motion.

In sum, the product FRM CHLOR 1250, distributed by Respondent APT in five separate transactions between November 14, 2007, and September 29, 2008, was not properly registered pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a, at the time of any of the alleged transactions. Accordingly, Complainant submits that, for Counts 1 through 5, it has established Respondent APT's liability in each instance for a violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by showing that: (1) Respondent is a "person"; (2) the product at issue is a "pesticide"; (3) Respondent "distributed or sold" the pesticide at issue in each of five transactions; and (4) the pesticide at issue is "unregistered."

C. Respondents' Affirmative Defenses Raise No Genuine Issues of Material Fact Regarding Respondents' Liability in This Case

Respondents argue that: (1) FRM and the Corporate Respondents filled out EPA

pesticide reporting forms<sup>6</sup> in several years notifying EPA that they produced FRM CHLOR 1250, and that they were never notified by EPA that the registration for FRM CHLOR 1250 had been cancelled, which Complainant construes as a laches defense; and (2) the penalties and fines sought are not appropriate. As will be discussed below, even if all of Respondents' factual allegations were true, neither of the arguments raised by Respondents raise a genuine issue of material fact concerning Respondents' liability.

1. Laches Defense is Not Available

In the Corporate Respondents' Answer, Corporate Respondents raise as an affirmative defense that they with FRM "filed EPA Pesticide Report Forms [...] under the name of FRM CHEM, INC. with the EPA," reporting "each and every year to EPA the amount of FRM CHLOR 1250 produced and sold." *See* Corporate Respondents' Answer at Page 2. Moreover, both Corporate Respondents and Individual Respondents state that EPA never notified the Corporate Respondents or FRM Chem, Inc. that the registration of FRM CHLOR 1250 was cancelled. *See* Corporate Respondents' Answer at Pages 2-3, and Individual Respondents' Answer at Page 4. Complainant construes this argument to be a laches defense, and submits that such an affirmative defense is clearly invalid. It is irrelevant as to the issue of Respondents' liability on the counts alleged whether Respondent may have submitted forms to EPA reporting the production of FRM CHLOR 1250. The defense of laches, like other equitable defenses, is unmistakably not available to Respondents as a defense against liability where the Federal

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<sup>6</sup> Pursuant to Section 7 of FIFRA, 7 U.S.C. § 136e, a pesticide producer must submit pesticide production reports to EPA annually. Respondents are referencing the submission by Corporate Respondents and FRM of the reports, as noted on Page 2 of Corporate Respondents' Answer to the First Amended Complaint.

Government is seeking to enforce laws that protect the environment. It is well-settled that equitable defenses cannot “be applied to frustrate the purpose of [federal] laws or to thwart public policy.” Pan-American Petroleum and Transp. Co. v. United States, 273 U.S. 456, 506 (1927). See also Kelley v. Thomas Solvent Co., 714 F. Supp. 1439, 1451 (W.D. Mich. 1989) (applying the rule to laches). Similarly, “equitable defenses \*\*\* cannot be asserted against the government when it acts in its sovereign capacity to protect the public health and safety.” United States v. Stringfellow, 661 F. Supp. 1053, 1062 (C.D. Cal. 1987).

Therefore, the Court should strike this affirmative defense.

2. Penalty Amount is Not Relevant to Liability

In their Answers, both Corporate and Individual Respondents dispute the proposed penalty. An allegation that the penalty assessed is excessive or improperly calculated is not relevant to liability.

Therefore, the Court should strike this affirmative defense.

D. Conclusion

In sum, there is overwhelming evidence demonstrating that Respondent APT distributed an unregistered pesticide on five separate occasions between November 14, 2007, and September 29, 2008, in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), as alleged in Counts 1-4. There is no genuine issue of material fact regarding APT's liability for these violations, and the standard governing issuance of an accelerated decision, as set forth at *In Re: Green Thumb Nursery, Inc.* and other case law, has been more than satisfied.



#### IV. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

##### A. Proposed Findings of Fact

1. Respondent APT was, at all times relevant to the Counts alleged in the Complaint, a Corporation incorporated under the laws of the State of Missouri.
2. In five separate transactions between November 14, 2007, and September 29, 2008, as alleged in Counts 1 through 5, Respondent APT distributed or sold FRM CHLOR 1250.
3. FRM CHLOR 1250 is used to prevent, destroy, repel, and mitigate microorganisms that are deleterious to man or the environment.
4. At all times relevant to the Counts alleged in the Complaint, the product FRM CHLOR 1250 was not registered with the EPA.

##### B. Proposed Conclusions of Law

1. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), and 40 C.F.R. §§ 152.5(b) and 152.5(d) set forth a definition of a "pest"; Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. § 152.3 set forth a definition of a "pesticide."
2. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), provides that it is unlawful for any "person" to sell or distribute a "pesticide" which is not registered with EPA pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a.
3. Respondent Advanced Products Technology, Inc., a Missouri corporation, is a "person" as that term is defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).
4. FRM CHLOR 1250 is a "pesticide" as that term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

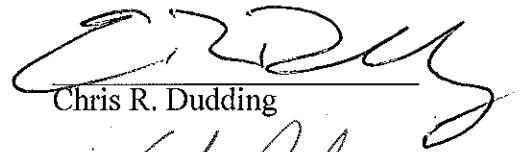

5. Each of the transactions by Respondent APT alleged in Counts 1 through 5 of the First Amended Complaint was a sale or distribution of an unregistered pesticide.
6. Each of the transactions by Respondent APT alleged in Counts 1 through 5 of the First Amended Complaint constitute a violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

### V. CONCLUSION

Complainant respectfully requests this Court to issue an Initial Decision holding that Respondent Advanced Products Technology, Inc. is liable for the sale or distribution of an unregistered pesticide in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) on five separate occasions, as alleged in Counts 1 through 5 of the Complaint and First Amended Complaint. Complainant further requests this Court find that Respondents' affirmative defenses raised in their Answers do not raise any genuine issues of material fact relevant to their liability for the violations alleged in Counts 1 through 5 of the Complaint.

9/1/10  
Date

Respectfully submitted,

  
Chris R. Dudding  
  
Kent Johnson

Assistant Regional Counsels  
U.S. EPA, Region 7

**LIST OF EXHIBITS**

1. Affidavit of Mark Lesher
2. Affidavit of Mark Nachreiner

## AFFIDAVIT OF MARK NACHREINER

COMES NOW the affiant, Mr. Mark Nachreiner, and swears and affirms as follows:

1. My name is Mark Nachreiner. I am a Pesticide Use Investigator employed with the Missouri Department of Agriculture's Bureau of Pesticide Control.
2. On December 21, and on December 28, 2005, I conducted an investigation at the FRM Chem, Inc. facility, and collected multiple bills of lading documenting, among others, sales or distributions of the products FRM CHLOR 1250 and STERI-DINE DISINFECTANT.
3. During the inspection conducted at the FRM Chem, Inc., facility in December of 2005, Karlan Kastendieck, sales manager for FRM Chem, Inc., informed me that the product identified as "Hypochlorite Solution" on the bills of lading he provided to me was FRM CHLOR 1250. I memorialized that information by a contemporaneous note on bill of lading No. 26726, documenting a July 5, 2005 shipment of products from FRM Chem, Inc. to Preston Dairy Supply, where my note states "FRM Chlor 1250 is Hypochlorite Solution."
4. On October 8, 2008, I returned to the FRM Chem, Inc. facility to conduct another inspection. The facility manager and owner, Keith Kastendieck, informed me that FRM Chem, Inc., had ceased operation on December 31, 2006, and that all production and distribution of the products FRM CHLOR 1250 and STERI-DINE DISINFECTANT had ceased prior to that date.
5. During the inspection conducted on October 8, 2008, and at a subsequent visit on October 15, 2008, Keith Kastendieck provided me with multiple invoices documenting sales and distributions of the products FRM CHLOR 1250 and STERI-DINE DISINFECTANT.
6. During the inspection conducted on October 8, 2008, and at a subsequent visit on October 15, 2008, Keith Kastendieck informed me that FRM Chem, Inc., and the several other businesses operating at the facility shared an internal product tracking system in their database and utilized in the invoices. Mr. Kastendieck informed me that the system identified particular products by the four-digit prefix to a particular tracking number, and that the remainder of the number indicated the size of the product container. In particular, he informed me that tracking numbers with the prefix "1004" indicated FRM CHLOR 1250, while the prefix 1014 indicated that the product was STERI-DINE DISINFECTANT. That statement was memorialized by me on October 15, 2008, in a contemporaneous note on invoice No. 35332.

FURTHER the affiant sayeth not.

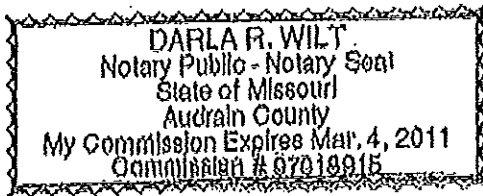
By: Mark Nachreiner

Mark Nachreiner  
Pesticide Use Investigator  
Missouri Department of Agriculture  
Division of Plant Industries  
Bureau of Pesticide Control  
P.O. Box 630  
Jefferson City, MO 65102

Subscribed and sworn to before me this 10<sup>th</sup> day of August, 2010.

Darla R. Wilt  
Notary Public

My Commission Expires: March 4, 2011



## AFFIDAVIT OF MARK LESHER

COMES NOW the affiant, Mr. Mark Lesher, and swears and affirms as follows:

1. My name is Mark Lesher. I am an environmental scientist employed with EPA Region Seven's Toxics and Pesticides Branch (TOPE) as a case review officer.
2. In my position as a case review officer, I regularly use the Office of Pesticide Programs Information Network (OPPIN) electronic database, an EPA internal database that stores comprehensive information regarding federal pesticide regulation.
3. In 2006, and in 2008, I conducted a search in OPPIN with respect to "FRM CHLOR 1250" and "STERI-DINE DISINFECTANT" by searching by product name, manufacturer name and active ingredients for both products.
4. According to OPPIN, "FRM CHLOR 1250" is not registered as a pesticide under FIFRA.
5. According to OPPIN, "STERI-DINE DISINFECTANT" is not registered as a pesticide under FIFRA.
6. In 2008, and in 2009, I sent information request letters to L W Chemicals, Inc. in Mt. Olive, Illinois, McPleeg, Inc. in Watertown, South Dakota, and to Graber Equipment, in Odon, Indiana, inquiring whether those businesses had purchased or received "FRM Chlor 1250" or "STERI-DINE DISINFECTANT" from FRM Chem, Inc., Advanced Products Technology, Inc., Custom Compounders, Inc., Industrial Specialties, Inc., or Synisys, Inc.
7. On or about May 30, 2008, I received a response to an information request letter from Leonard Weiss of L W Chemicals, Inc., in which Leonard Weiss documented that L W Chemicals, Inc. had purchased on multiple occasions "STERI-DINE DISINFECTANT" from FRM Chem, Inc. and from Advanced Products Technology, Inc.
8. On or about September 1, 2009, I received an affidavit from Leonard Weiss of L W Chemicals, Inc., in which he attested to the information he had provided in May 2008 regarding the multiple purchases of "STERI-DINE DISINFECTANT" from FRM Chem, Inc. and from Advanced Products Technology, Inc.
9. On or about June 1, 2008 and again on July 15, 2009, I received a response to an information request letter from Jeff Buchholz, the store manager of McPleeg, Inc. in which Mr.

Buchholz documented that McFleeg, Inc. had purchased on multiple occasions "FRM CHLOR 1250" from FRM Chem, Inc.

10. On or about August 26, 2009, I received a response to an information request letter from McFleeg, Inc. in the form of an affidavit by Jeff Buchholz, the store manager of McFleeg, Inc. in which Mr. Buchholz responded in the affirmative to my query and included multiple invoices that McFleeg, Inc. had received from FRM Chem, Inc., documenting shipments of products including "FRM CHLOR 1250." Mr. Buchholz also provided multiple photographs of containers of products McFleeg, Inc. had purchased from FRM Chem, Inc., including "FRM CHLOR 1250."

11. On or about September 15, 2009, I received a response to an information request in the form of an affidavit by Nick Graber of Graber Equipment, in which Mr. Graber responded in the affirmative to my query and included multiple invoices that Graber Equipment had received from FRM Chem, Inc., documenting shipments of products including "FRM Chlor 1250."

FURTHER the affiant sayeth not.

By: Mark Lesher  
Mark Lesher  
Environmental Scientist  
EPA Region 7  
Kansas City, KS 66101

STATE OF KANSAS        )  
                                  )  
WYANDOTTE COUNTY    )

Subscribed and sworn to before me this 9th day of August, 2010.

Kent Johnson  
Notary Public

My Commission Expires: 7/23/11

KENT JOHNSON  
NOTARY PUBLIC  
STATE OF KANSAS  
My Appt. Exp. 7/23/11

CERTIFICATE OF SERVICE

I hereby certify that on this 1<sup>st</sup> day of Sept, 2010, I hand-delivered the original and one true copy of this Motion to the Regional Hearing Clerk, and sent one true and correct copy:

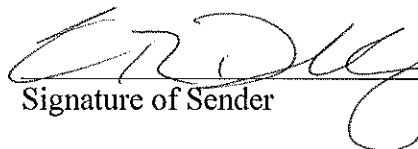
via UPS, to:

Ronald E. Jenkins  
Jenkins & Kling, PC  
150 North Meramec Ave., Ste. 400  
St. Louis, MO 63105

via UPS, to:

Judge Barbara Gunning  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
1099 14<sup>th</sup> Street, Suite 350  
Washington, D.C. 20005

Office of the Hearing Clerk  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
1099 14<sup>th</sup> Street, Suite 350  
Washington, D.C. 20005

  
Signature of Sender