

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 NORTH 5<sup>th</sup> STREET  
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	Docket No. FIFRA-07-2008-0036
	)	
Advanced Products Technology, Inc.,	)	COMPLAINANT'S MOTION FOR
Keith G. Kastendieck, and Karlan C.	)	PARTIAL ACCELERATED DECISION ON
Kastendieck	)	LIABILITY
	)	AND TO STRIKE CERTAIN
Respondents	)	AFFIRMATIVE DEFENSES

**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" or "Respondent") is liable for four violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 *et seq.*, as alleged in Counts 1 through 4 of the EPA's Complaint and First Amended Complaint. An accelerated decision as to APT's liability is appropriate based on APT's Answer and Prehearing Exchange, and other pertinent evidence documenting four violations of FIFRA. Neither APT's Answer nor its Prehearing Exchange raises any genuine issue of material fact regarding liability. Furthermore, APT in its Answer raises several affirmative defenses, none of which are 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

EPA filed its Complaint in this matter on June 6, 2009. The Complaint was subsequently amended once, on June 3, 2010, adding Counts 5 through 9,<sup>1</sup> and adding two new respondents in addition to Respondent APT.<sup>2</sup> The original Complaint and First Amended Complaint contain identical allegations in Counts 1 through 4 against Respondent APT and allege that, for those four counts, APT violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by distributing or selling the unregistered pesticide product STERI-DINE DISINFECTANT, in four separate transactions in 2007. Copies of the Complaint and First Amended Complaint are in the Court's files and are not attached to this Motion.

Respondent APT filed an Answer to the original Complaint on or about December 16, 2009.<sup>3</sup> In its Answer, APT admitted the transactional allegations set forth in the Complaint, and asserted two affirmative defenses. *See Answer at Pages 1-5.* Copies of the Complaint and of

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<sup>1</sup> The First Amended Complaint, with the new counts 5 through 9, was served on counsel for respondent APT on June 7, 2010. Pursuant to 40 C.F.R. § 22.14(c), a respondent must file an answer to an amended complaint within 20 days after service of the complaint – in this case, by June 28, 2010. On August 3, 2010, Respondent APT had still not filed an answer, and Complainant accordingly filed a Motion for Default as to Liability against Respondent APT as to Counts 5 through 9. That default Motion is currently pending before the Court.

<sup>2</sup> The two Respondents added to the First Amended Complaint, Keith G. Kastendieck and Karlán C. Kastendieck, though they are shareholders and officers of Respondent APT, are not represented by counsel for APT and are not subject to the present motion for partial accelerated judgment against Respondent APT.

<sup>3</sup> Complainant notes that, on July 12, 2009, Complainant received a letter from Ann Kastendieck in response to the Complaint filed by EPA in this matter, which it construed as an Answer to the Complaint and filed accordingly. Subsequently, after obtaining counsel, Respondent APT petitioned the Court for permission to file an amended Answer to the original Complaint. Complainant did not object, and the amended Answer was filed by Respondent APT on or about December 16, 2009.

APT's Answer thereto are 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>4</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 corporate Respondents, including APT, filed a joint prehearing exchange on or about February 15, 2010. On March 15, 2010, Complainant filed a motion to file amended complaints in the four matters and for discovery pursuant to Section 22.19(e) of the CROP, which was granted by Order issued May 27, 2010. On June 3, 2010, Complainant filed a First Amended Complaint in the above-captioned matter, adding two individuals as respondents, and also adding Counts 5 through 9. On June 7, 2010, service of the First Amended Complaint was accepted by Jenkins & Kling, PC, counsel for APT. Pursuant to Rule 22.14(c) of the CROP, 40 C.F.R. § 22.14(c), a respondent shall have 20 additional days from the date of service of the amended complaint to file its answer. No answer to the First Amended Complaint has been filed

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<sup>4</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 Custom Compounders, Inc., Docket No. FIFRA-07-2009-0042.

by APT. Copies of Complainant's and Respondents' Prehearing Exchanges and of the First Amended Complaint are in the Court's files and are not attached to this Motion.

This Motion will request the Court to grant an accelerated decision on liability in favor of the Complainant for each of the four counts alleged in its Complaint as Counts 1 through 4 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 four counts. Complainant will show that there can be no genuine issue or dispute that: (1) APT is a "person"; (2) APT distributed or sold STERI-DINE DISINFECTANT on four separate occasions; (3) at all times relevant to the distributions or sales alleged in Counts 1 through 4 of the Complaint, STERI-DINE DISINFECTANT was not registered as a pesticide with the Administrator of EPA; and (4) STERI-DINE DISINFECTANT is a pesticide as defined by FIFRA and its implementing regulations.

To demonstrate that there are no genuine issues of material fact in this matter, Complainant will rely on Respondent's Answer, the corporate Respondents' Joint Prehearing Exchange, and the affidavit of EPA Environmental Scientist Mark Leshner. In both its Answer 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 grant an accelerated decision in favor of the Complainant as to APT's affirmative defenses raised in the Respondent's Answer to the original Complaint. In the arguments set forth below, Complainant will demonstrate that Respondent APT has failed to support its 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 four violations alleged in the Complaint and First Amended Complaint as Counts 1 through 4, as established by Respondent's Answer and Prehearing Exchange, and by the affidavit attached to this Motion. In both its 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's Liability in This Case

as to the 4 violations of FIFRA Section 12(a)(1)(A) in Counts 1 through 4

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's liability for the four violations of this provision alleged in Counts 1 through 4, 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 four transactions; and (4) the pesticides at issue are "unregistered."

Complainant can establish the elements of the four violations through the admissions in APT's Answer and Prehearing Exchange, by reference to documents collected at inspections of APT's facility, included in Complainant's Prehearing Exchange, and to the affidavit of EPA Environmental Scientist Mark Lesher, attached hereto.

1. Respondent 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* Answer at Page 2, paragraph 12). 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. STERI-DINE DISINFECTANT is a "Pesticide"

APT admits in its Answer that STERI-DINE DISINFECTANT is a pesticide. *See* Answer at Page 2, paragraph 11.

Further evidence that STERI-DINE DISINFECTANT 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 label for STERI-DINE DISINFECTANT collected during a 2005 inspection identifies the product as a "disinfectant" in the product name, and further states that it is to be used "for cleaning, disinfecting, and sanitizing animal housing and equipment; [...] for sanitizing food-processing equipment," and also that it "is tuberculocidal" and "destroys hog cholera virus." *See* Complainant's Prehearing Exchange Exhibits 1d and 1e. 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," STERI-DINE DISINFECTANT is a "pesticide" for FIFRA purposes.

3. Respondent Distributed or Sold STERI-DINE DISINFECTANT

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 its Answer admitted that, for each of the counts 1 through 4, it sold or distributed STERI-DINE DISINFECTANT, as follows:

As to Count 1: on Page 3 of its Answer, APT “admits the allegations contained in Paragraph 19” of the Complaint, which alleges that “[o]n or about August 27, 2007, Respondent sold or distributed a quantity of STERI-DINE DISINFECTANT” to L W Chemical of Mt. Olive, Illinois.

As to Count 2: on Page 4 of its Answer, APT “admits the allegations contained in Paragraph 24” of the Complaint, which alleges that “[o]n or about September 28, 2007, Respondent sold or distributed a quantity of STERI-DINE DISINFECTANT” to L W Chemical of Mt. Olive, Illinois.

As to Count 3: on Page 4 of its Answer, APT “admits the allegations contained in Paragraph 29” of the Complaint, which alleges that “[o]n or about October 3, 2007, Respondent sold or distributed a quantity of STERI-DINE DISINFECTANT” to L W Chemical of Mt. Olive, Illinois.

As to Count 4: on Page 5 of its Answer, APT “admits the allegations contained in Paragraph 34” of the Complaint, which alleges that “[o]n or about December 19, 2007, Respondent sold or distributed a quantity of STERI-DINE DISINFECTANT” to L W Chemical of Mt. Olive, Illinois.

4. The Pesticide at Issue is Unregistered

At the time of each sale or distribution alleged by Complainant and admitted by



Respondent APT in Counts 1 through 4 of the Complaint, the product STERI-DINE DISINFECTANT 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 STERI-DINE DISINFECTANT 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/IN) electronic database, an EPA internal database that stores comprehensive information regarding federal pesticide regulation.*

2. *In 2006 and 2008, I conducted a search in OPP/IN 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 OPP/IN, "STERI-DINE DISINFECTANT" is not registered as a pesticide under FIFRA.*

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

In sum, the product STERI-DINE DISINFECTANT, distributed or sold by Respondent APT in four separate transactions between August 27, 2007, and December 19, 2007, 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 4, 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 four transactions; and (4) the pesticide at issue is "unregistered."

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

Respondent APT argues that: (1) it was unaware that the product STERI-DINE DISINFECTANT was not properly registered; and (2) the penalties and fines sought are not appropriate. As will be discussed below, even if all of APT's factual allegations were true, neither of the arguments raised by APT raise a genuine issue of material fact concerning APT's liability.

1. Awareness is Not Relevant to Liability

In its Answer, APT raises as an affirmative defense that it "denies any knowledge whatsoever that the registration of STERI-DINE was cancelled or that supplemental distribution agreements were cancelled by the EPA on July 19, 1995," and it further "denies any knowledge whatsoever that sales of existing stock of STERI-DINE were prohibited after January 15, 1996." *See Answer at Page 2, paragraph 11.* Assuming Respondent APT's argument of lack of knowledge of noncompliance to be true still does not raise a genuine issue of material fact concerning the *prima facie* elements for liability. FIFRA is a strict liability statute. *See In Re: Tifa Limited*, 9 E.A.D. 381, 388 (EAB, 2000); *In Re: Arapahoe County Weed Dist.*, 8 E.A.D. 1, 12 (EAB, 1999); and *In Re: Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 796 (EAB, 1997) ("The environmental statutes are intended to be action forcing, and brook no excuse for failure to

achieve the required result. \*\*\* The environmental statutes \*\*\* , including FIFRA, consistently have been construed as imposing strict liability to meet their requirements.”). Complainant’s demonstration of APT’s liability does not require that APT have had actual knowledge or awareness that the pesticide products at issue were not properly registered or otherwise out of compliance with federal regulations for sale.

Therefore, the Court should dismiss this defense.

2. Penalty Amount is Not Relevant to Liability

In its Answer, APT raises as an affirmative defense that it “believes no penalty should be assessed,” and further that it “does not believe the proposed penalty is appropriate.” *See* Answer at Page 5. Complainant notes that it has filed a motion for discovery under Section 22.19(e) of the CROP, requiring Respondent APT and other Respondents and related entities to produce financial information that may be relevant to any dispute Respondent may have regarding the penalty and its method of calculation. Pursuant to the Court’s Order of May 27, 2010, Respondent APT and the other entities were ordered to produce the required discovery information by July 12, 2010. In any event, an allegation that the penalty assessed is excessive or improperly calculated is not relevant to liability.

Therefore, the Court should dismiss this defense.

D. Conclusion

In sum, there is overwhelming evidence demonstrating that Respondent APT distributed or sold an unregistered pesticide on four separate occasions between August 27, 2007, and December 19, 2007, 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 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 four separate transactions between August 27, 2007 and December 19, 2007, as alleged in Counts 1-4, Respondent distributed or sold STERI-DINE DISINFECTANT.
3. STERI-DINE DISINFECTANT 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, Respondent had not registered and was not authorized by a registrant to produce or distribute STERI-DINE DISINFECTANT.

##### **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. STERI-DINE DISINFECTANT is a "pesticide" as that term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).
5. Each of the sales transactions by Respondent alleged in Counts 1-4 of the Complaint and the First Amended Complaint was a sale or distribution of an unregistered pesticide.
6. Each of the sales transactions by Respondent alleged in Counts 1-4 of the Complaint and the First Amended Complaint constitute a violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

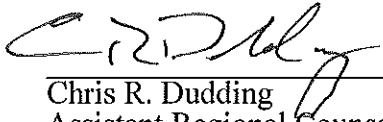
## V. CONCLUSION

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 four separate occasions, as alleged in Counts 1 through 4 of the Complaint and First Amended Complaint. Complainant further requests this Court find that Respondent's affirmative defenses raised in its Answer do not raise any genuine issues of material fact relevant to Respondent's liability for the violations alleged in Counts 1 through 4 of the Complaint.

Complainant's Motion for Partial Accelerated Decision  
*In re Advanced Products Technology, Inc., et al., Docket No. FIFRA-07-2008-0036*

8/10/10  
Date

Respectfully submitted,

  
Chris R. Dudding  
Assistant Regional Counsel  
U.S. EPA, Region 7

**LIST OF EXHIBITS**

1. Affidavit of Mark Lesher

## 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, McFleeg, 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 McFleeg, 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 10<sup>th</sup> day of Aug, 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  
10 S. Brentwood Blvd., Ste. 200  
St. Louis, MO 63105

via First Class Mail, to:

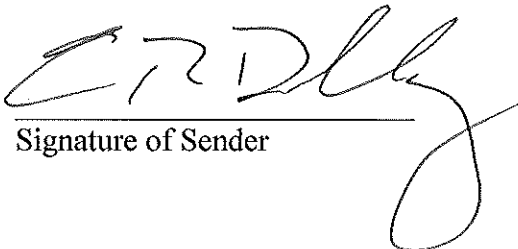
Keith Kastendieck  
P.O. Box 1656  
Washington, MO 63090

Karlan Kastendieck  
3636 Chervil Drive  
St. Charles, MO 63303

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