

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-07-2009-0042  
)  
Custom Compounders, Inc., ) MEMORANDUM IN SUPPORT  
Advanced Products Technology, Inc., ) OF COMPLAINANT'S  
Keith G. Kastendieck, and Karlan C. ) MOTION FOR DEFAULT  
Kastendieck ) AS TO LIABILITY  
)  
Respondents )

**I. INTRODUCTION**

This memorandum is filed in support of a motion for default filed by the United States Environmental Protection Agency (EPA). As set forth below, Respondent Advanced Products Technology, Inc. (APT) has failed to answer the First Amended Complaint and Notice of Opportunity for a Hearing (the First Amended Complaint) that EPA filed on June 3, 2010.

For the reasons presented below, EPA requests a ruling that APT is liable under Counts one through five of the First Amended Complaint for violating Section 12(a)(1)(A) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 12(a)(1)(A).

**II. BACKGROUND**

On September 23, 2009, Complainant filed a Complaint and Notice of Opportunity for Hearing against Custom Compounders, Inc. (CCI), alleging five violations of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), for sale or distribution of an unregistered pesticide. In its answer, dated November 20, 2009, CCI denied the violations alleged in the

Complaint, stating for each count that the invoice number listed for each of the five sales transactions “is not a Custom Compounders invoice number.”<sup>1</sup>

Respondent CCI shares a place of business and common officers and corporate shareholders with multiple other corporate entities, including Advanced Products Technology, Inc., FRM Chem, Inc, and Synisys, Inc. Complainant filed complaints against FRM Chem, Inc. and Advanced Products Technology, Inc. on June 6, 2009, and against Custom Compounders, Inc. and Synisys, Inc. on September 23, 2009, in each matter alleging multiple sales of one or both of two unregistered pesticides, FRM Chlor 1250 and STERI-DINE DISINFECTANT.<sup>2</sup>

On November 30, 2009, Complainant moved for consolidation of the four matters pursuant to Rule 22.12 of the Consolidated Rules of Practice (CROP), 40 C.F.R. § 22.12, noting that four named corporate Respondents 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 the two FRM-produced 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.

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<sup>1</sup> Complainant notes that in the joint Prehearing Exchange filed by Respondents APT, CCI, Synisys, Inc., and FRM Chem, Inc., the Respondents include as Exhibits 17 through 21 five invoices, on APT letterhead, with numbers matching those of the five CCI invoices collected from Respondents in the October, 2008 inspection and which are included as Complainant’s Exhibits 58-62 in Complainant’s Prehearing Exchange.

<sup>2</sup> In the Matter of FRM Chem, Inc., Docket No. FIFRA-07-2008-0035; In the Matter of Advanced Products Technology, Inc., Docket No. FIFRA-07-2008-0036; and In the Matter of Custom Compounders, Inc., Docket No. FIFRA-07-2009-0042.

On January 15, 2010, Complainant filed its consolidated prehearing exchange for the four matters. The four Respondents 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 as respondents APT and two individuals, Keith G. Kastendieck and Karlan C. Kastendieck. On June 7, 2010, service of the First Amended Complaint was accepted by Jenkins & Kling, PC, counsel for both APT and CCI.<sup>3 4</sup>

As of July 15, 2010, neither Respondent APT nor CCI had filed an answer to the First Amended Complaint in the above-captioned matter, nor had Respondents complied with the terms of the discovery order issued by the Court on May 27, 2010. Complainant, via email, contacted counsel for the corporate Respondents on July 15, 2010, regarding the discovery submittals, and also noted that no answer to the First Amended Complaint in this matter nor to the three amended complaints in the other consolidated matters had been filed by the Respondents. On July 16, 2010, Respondents' counsel replied via email, stating that he was "aware of the deadlines for discovery and pleadings," and citing an obligation to attend a funeral the morning of July 19, 2010. In a telephone conversation on July 21, 2010, Respondents'

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<sup>3</sup> The UPS "Proof of Delivery" downloaded from the UPS.com website, showing that the First Amended Complaint was delivered to Jenkins & Kling, PC at 12:06 P.M. on June 7, 2010, is included with this filing.

<sup>4</sup> On July 16, 2010, counsel for the four corporate Respondents informed Complainant via email that he did not represent the two named individual Respondents, Keith G. Kastendieck and Karlan C. Kastendieck, both of whom are officers and shareholders of the corporate Respondents. Accordingly, the two individual Respondents are being served separately.

counsel informed Complainant that he would have discovery materials and answers to the amended complaints filed by July 28, 2010. On July 28, 2010, Respondents' counsel informed Complainant by email that he would need a further extension in which to file answers, citing medical issues. As of August 3, 2010, no answer has been filed to the First Amended Complaint in the above-captioned matter by Respondent APT.<sup>5</sup>

### III. STANDARD FOR FINDING DEFAULT

A respondent may be found in default upon failure to file a timely answer to an administrative complaint. A respondent's default constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of the respondent's right to contest such factual allegations. 40 C.F.R. § 22.17(a).

A motion for default may seek resolution of all or part of the proceeding. 40 C.F.R. § 22.17(b). In promulgating 40 C.F.R. § 22.17, EPA intended to allow parties to move for a determination of default, without necessarily requesting a ruling on a penalty amount. 64 Fed. Reg. 40138, 40155 (July 23, 1999).

When a Presiding Officer finds that a default has occurred, s/he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. 40 C.F.R. § 22.17(c).

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<sup>5</sup> Likewise, no answer has been filed by Respondent CCI to the First Amended Complaint, but CCI had filed an answer to the original complaint, and no new counts are alleged against CCI in the First Amended Complaint. The individual respondents added to the First Amended Complaint are not in default as of the date of filing of the motion to which this memorandum pertains.

**IV. ARGUMENT**

**A. Respondent Has Failed to File an Answer**

According to 40 C.F.R. § 22.15(a), a respondent must file an answer to a complaint with the Regional Hearing Clerk within 30 days after service of the complaint.

EPA sent a copy of the Complaint via UPS to Jenkins & Kling, PC, counsel for Respondent APT, on June 3, 2010. Respondent's counsel received his copy of this mailing on June 7, 2010, according to the UPS online tracking receipt, included with this memorandum. Accordingly, Respondent APT's answer to the First Amended Complaint was due July 7, 2010.

As noted above, EPA has contacted Respondent's counsel on multiple occasions regarding the filing of an answer to the First Amended Complaint in this matter.

As of August 3, 2010, EPA has yet to receive an answer to the First Amended Complaint from APT.

**B. Prima Facie Case of Liability**

A respondent's default constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of that respondent's right to contest the complaint's factual allegations. 40 C.F.R. § 22.17(a).

Counts 1-5 of the First Amended Complaint allege that the Respondents, on five separate occasions, sold or distributed a quantity of a pesticide whose registration has been cancelled or which is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a, a violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

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 five violations of this provision, 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 five transactions; and (4) the pesticides at issue were "unregistered" at the time of each transaction.

The First Amended Complaint alleges each of these elements. The facts alleged in the First Amended Complaint establish liability under Section 12(a)(1)(A). By failing to answer the First Amended Complaint, APT has admitted all factual allegations in the First Amended Complaint, including but not limited to the following, as of all times relevant to the First Amended Complaint:

1. APT is a Missouri business corporation. (Par. 4, First Amended Complaint.)
2. The product at issue, FRM Chlor 1250, is a pesticide. (Par. 12, First Amended Complaint)
3. Respondent distributed or sold the product at issue in five transactions. (Paras. 24, 32, 40, 48, and 56 of the First Amended Complaint)
4. On the date of the sale and/or distribution in each transaction serving as the basis for each of the five counts, the product at issue was not registered under Section 3 of FIFRA, 7 U.S.C. § 136a. (Paras. 12, 28, 36, 44, 52, and 60 of the First Amended Complaint.)

The admission that APT is a corporation establishes that APT is a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s). The admission that the product at issue, FRM Chlor

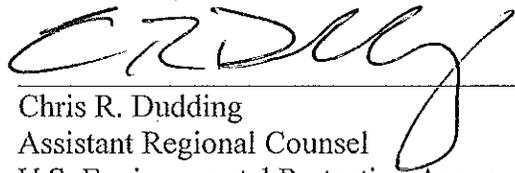
1250, is a pesticide, establishes that it is subject to registration pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a. The admission that the product at issue, FRM Chlor 1250, was not registered at the time of each of the sales transactions, establishes that each transaction was in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

APT therefore has admitted all elements of five violations of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

V. CONCLUSION

APT has failed to answer EPA's First Amended Complaint. For the reasons set forth above, EPA requests that the Presiding Officer find APT liable as a matter of law under Counts 1 through 5 of the First Amended Complaint for violating Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

Respectfully submitted,



Chris R. Dudding  
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U.S. Environmental Protection Agency  
Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, Kansas 66101  
(913) 551-7524





## Proof of Delivery

Dear Customer,

This notice serves as proof of delivery for the shipment listed below.

Tracking Number: 1Z6952072993931860  
Service: NEXT DAY AIR SAVER  
Special Instructions: SIGNATURE REQUIRED  
Weight: 2.00 Lbs  
Shipped/Billed On: 06/03/2010  
Delivered On: 06/07/2010 12:06 P.M.  
Delivered To: SAINT LOUIS, MO, US  
Signed By: LINGERER

Location: OFFICE

Thank you for giving us this opportunity to serve you.

Sincerely,

UPS

Tracking results provided by UPS: 07/15/2010 12:40 P.M. ET

CERTIFICATE OF SERVICE

I hereby certify that on this 31 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:

*& Supporting memorandum*  
*CRD*

via UPS, to:

Ronald E. Jenkins  
Jenkins & Kling, PC  
10 S. Brentwood Blvd., Ste. 200  
St. Louis, MO 63105

via First Class Mail to:

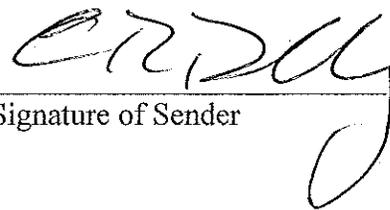
Keith Kastendieck  
P.O. Box 1656  
Washington, MO 63090

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  
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Signature of Sender