

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 NORTH 5th STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTERS OF)
)
FRM Chem, Inc., Keith G. Kastendieck,)
and Karlan C. Kastendieck)
)
Respondents)
)

Docket No. FIFRA-07-2008-0035

Advanced Products Technology, Inc.,)
Keith G. Kastendieck, and Karlan C.)
Kastendieck)
)
Respondents)

Docket No. FIFRA-07-2008-0036

COMPLAINANT'S REPLY TO CORPORATE RESPONDENTS ADVANCED PRODUCTS TECHNOLOGY, INC.'S AND FRM CHEM, INC.'S RESPOSNE TO COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION ON LIABILITY AND TO STRIKE CERTAIN AFFIRMATIVE DEFENSES

Complainant, the United States Environmental Protection Agency, Region 7 ("EPA"), submits this reply to Corporate Respondents' Response to Complainant's Motions For Partial Accelerated Decision On Liability as to the Respondents FRM Chem, Inc. ("FRM") and Advanced Products Technology, Inc. ("APT") (collectively, the "Corporate Respondents") in each of the two above-captioned matters, pursuant to 40 C.F.R. § 22.16(b).

Standard for Accelerated Decision

It is well-established that motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (“FRCP”). See, e.g., *In re BWX Technologies*, RCRA (3008) Appeal No. 97-5, 9E.A.D. 61, 74-5 (EAB, April 5, 2000); *In the Matter of Belmont Plating Works*, Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65at *8 (ALJ, September 11, 2002). Rule 56(c) of the FRCP provides that summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue of any material fact* and that the moving party is entitled to a judgment as a matter of law” (emphasis added). Therefore, federal court decisions interpreting Rule 56 provide guidance for adjudicating motions for accelerated decision. See *CWM Chemical Service*, TSCA Appeal 93-1, 6 E.A.D. 1 (EAB, May 15, 1995).

Once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, Rule 56(e) requires the opposing party to offer countering evidentiary material or to file a Rule 56(f) affidavit. Under Rule 56(e), “When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial.” The Supreme Court has found that the nonmoving party must present “affirmative evidence” and that it cannot defeat the motion without offering “any significant probative evidence tending to support” its pleadings. *Anderson*, 477 U.S. at 256 (quoting *First Nat’l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290(1968)).

More specifically, the Court has ruled that the mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment, as Rule 56(e) requires the

opposing party to go beyond the pleadings. *Celotex Corp. v. Catrett*, 477 U.S. 317 at 322 (1986); *Adickes*, 398 U.S. at 160. Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. *In the Matter of Strong Steel Products*, Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-0006, 2002 EPA ALJ LEXIS 57 at *22 (ALJ, September 9, 2002). A party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. *Id.* at 22-23; see *In re Bickford, Inc.*, Docket No. TSCA-V-C-052-92, 1994 TSCA LEXIS 90 (ALJ, November 28, 1994).

Respondents' Arguments Addressed

1. As to the Registration Status of the Two Pesticides at Issue

Counts 1 through 4 of the APT matter and Counts 1-56 of the FRM matter allege violations of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), which 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 each Respondent's liability for the alleged 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; and (4) the pesticides at issue are "unregistered."

In their joint Response, the Corporate Respondents concede that (1) they each are "persons"; (2) the two products at issue are "pesticides"; and (3) they each sold or distributed one or the other of the two products, as set forth in Counts 1 through 4 of the APT Complaint and in Counts 1 through 56 of the FRM Complaint.

The Corporate Respondents in their joint Response state that they "do not admit" the

fourth element, that the pesticides at issue are “unregistered.”

As an initial matter, it must be noted that, in their filed Answers, neither of the Corporate Respondents disputes the factual allegation that the pesticides are unregistered. In their respective Answers, each Corporate Respondent “denie[d] any knowledge” that the two pesticide registrations were cancelled in 1995 – but Respondents’ knowledge of the registration status of the pesticides is not an element of the violation.¹ Accordingly, in their respective Answers, neither Corporate Respondent disputes the fact that the registrations were cancelled and that the pesticides are in fact unregistered.

Complainant has met its burden of supporting its Motions for Partial Accelerated Decision by establishing the absence of a genuine issue of material fact as to whether the two pesticides at issue in the above-captioned matters are unregistered, as supported 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’ joint Prehearing Exchange. For the Court’s convenience, a copy of this cancellation order is included with this filing. Complainant further established the absence of a genuine issue of material fact by including with its Motion the affidavit of Mark Lesher, EPA Environmental Scientist, who attests therein that he had searched the Office of Pesticide Programs Information Network (OPPIN) electronic database that stores pesticide registration information, and that he thereby confirmed that neither of the two pesticide products is registered

¹ FIFRA is a strict liability statute and therefore arguments based upon lack of knowledge or intent to violate do not provide a defense to liability for violations of Section 12(a)(1)(A). *Sultan Chemists, Inc.*, 9 E.A.D. 323, 349, 2000 EPA App. LEXIS 24 *59 (EAB 2000)(“good faith cannot serve to defeat liability under a strict liability statute like FIFRA”). Therefore, Respondents’ argument that it acted without knowledge that the pesticides at issue were unregistered is immaterial to determining liability.

with EPA.

Since Complainant has met its burden of showing the absence of a genuine issue of material fact as to the unregistered status of the two products, in order for Respondents to defeat the Motion, they must set forth specific facts showing that there is a genuine issue for trial, by producing some evidence which places Complainant's evidence in question and raises a question of fact for an adjudicatory hearing. Respondents have failed to do so with regard to the unregistered status of the two products, instead making the bare assertion that Mr. Leshner's affidavit is "subject to cross-examination" and that "other proof can be proffered at the hearing" in response to his testimony. As noted above, the mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment or accelerated decision. Since Respondents have not even disputed that the pesticides at issue are unregistered, either in their Answers or in the Response to the Motion, but simply state that they "do not admit this element of the Complaints," Complainant submits that they have not raised a genuine issue of material fact as to the registration status of the two pesticides, FRM CHLOR 1250 and STERI-DINE DISINFECTANT.

2. As to Count 57 and 58 of the FRM Complaint

Counts 57 and 58 of the FRM Complaint allege violations of Section 12(a)(2)(I) of FIFRA, 7 U.S.C. § 136j(a)(2)(I), which provides that it shall be unlawful for any person to violate any order issued under Section 13 of FIFRA, 7 U.S.C. § 136k. Accordingly, to establish FRM Chem's liability for the two violations of this provision, Complainant must establish that: (1) FRM Chem is a "person"; (2) an order was issued to Respondent FRM Chem under Section 13 of FIFRA; and (3) Respondent FRM Chem violated the terms of that order.

Respondent FRM admits the first two elements, that it is a "person," and that an order

was issued to Respondent under Section 13 of FIFRA on October 8, 2008. Respondent FRM contests the third element for both Counts 57 and 58, denying that it violated the “Stop Sale, Use or Removal Order.”

With regard to Count 57, Respondent FRM simply restates the argument set forth in its Answer, that the sales transaction took place before the “Stop Sale, Use or Removal Order” was served on Respondent’s representative Keith Kastendieck. As noted in its Motion for Partial Accelerated Decision, Complainant agrees that the invoice documenting the transaction documents that the product FRM CHLOR 1250 was ordered by the customer from Respondent FRM on October 7, 2008, the day before the issuance of the Order. However, the invoice also documents that the product FRM CHLOR 1250 was shipped on October 13, 2008, a week after the Order was issued. As Complainant states in its Motion, the “Stop Sale, Use or Removal Order” expressly directed that FRM CHLOR 1250 “shall not be [...] shipped” by Respondent FRM following receipt of the Order.

Since Complainant has met its burden of showing the absence of a genuine issue of material fact regarding the violation of the “Stop Sale, Use or Removal Order” alleged in Count 57, in order for Respondent FRM to defeat the Motion, it must set forth specific facts showing that there is a genuine issue for trial, by producing some evidence which places Complainant’s evidence in question and raises a question of fact for an adjudicatory hearing. Respondent FRM has failed to do so. As noted above, the mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment or accelerated decision. Since Respondent FRM has not disputed that the “Stop Sale, Use or Removal Order” prohibits the shipment of FRM CHLOR 1250 on or after October 8, 2008, and it does not dispute that that it shipped FRM CHLOR 1250 on October 13, 2008, Complainant submits that Respondent FRM has not raised a

genuine issue of material fact as to the violation alleged in Count 57 of the Complaint.

With regard to Count 58, Respondent FRM in its Response to the Motion “denies that it violated” the “Stop Sale, Use or Removal Order” as alleged therein. However, Respondent FRM sets forth no facts and produces no evidence to place Complainant’s evidence in question and to raise a question of fact for an adjudicatory hearing. All it does is make the bare assertion that “the product donated was SODIUM HYPO, not FRM CHLOR 1250,” and states that both Complainant and Respondent FRM will have witnesses to testify as to what was said regarding the “Stop Sale, Use or Removal Order.” As Complainant documented in its Motion for Partial Accelerated Decision, the Corporate Respondents use “SODIUM HYPO” and “FRM CHLOR 1250” interchangeably to refer to the same unregistered 12.5% Sodium Hypochlorite pesticide product. Since Respondent FRM fails to set forth facts that place into question Complainant’s evidence for the violation alleged in Count 58 or otherwise to raise a question of fact for an adjudicatory hearing, Complainant submits that Respondent FRM has failed to raise a genuine issue of material fact as to the violation alleged in Count 58 of the Complaint.

3. As to the Laches Defense

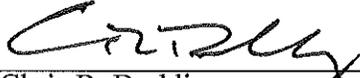
Corporate Respondents “believe that laches in this case is and should be a defense” to the allegations in the Complaints. As Complainant notes in its Motion for Partial Accelerated Decision as to Respondent FRM², the defense of laches is not available as a defense against liability where the Federal Government is seeking to enforce laws to protect the environment.

² Respondent ATP does not appear to have raised a laches defense in its Answer, and accordingly Complainant did not address this potential affirmative defense in the Motion for Partial Accelerated Decision submitted as to Respondent ATP.

WHEREFORE, Complainant's Motions for Accelerated Decision and to Strike Affirmative Defenses submitted in the above-captioned matters should be granted in their entirety.

8/25/10
Date

Respectfully submitted,


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


Kent Johnson
Assistant Regional Counsel
U.S. EPA, Region 7



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 19 1995

OFFICE OF
PREVENTION, PESTICIDES AND
TOXIC SUBSTANCES

Dear Sir or Madam:

SUBJECT: Cancellation Order for Section 3 Pesticide Product
Registration(s)

This letter is a final cancellation order, advising you that under Section 4(i)(5)(D) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended, EPA hereby cancels the registrations listed on the enclosure for non-payment of the annual registration maintenance fee due January 15, 1995. The effective date of this cancellation order is the date of this letter.

As the registrant of the listed product(s) you may legally distribute or sell existing stocks of the cancelled products until January 15, 1996, the due date for the next annual registration maintenance fee. Existing stocks are defined as those stocks of a registered pesticide product which are currently in the United States and which have been packaged, labeled, and released for shipment prior to the effective date of this cancellation order.

Some registrations listed on the enclosure may actually have been cancelled in the past for reason other than non-payment of the maintenance fee. If this is true for any of your registrations, the effective date of cancellation, the disposition date for existing stocks, and all other provisions of any earlier cancellation order are controlling.

It would be a violation of FIFRA for you or any supplemental distributor of your product(s) to distribute or sell any stocks currently in the United States which have been produced, packaged, labeled or released for shipment after the effective date of cancellation or to distribute or sell any existing stocks after the indicated disposition date. The Agency also expressly reserves the right to amend the existing stocks provisions of this Order if events should so warrant.

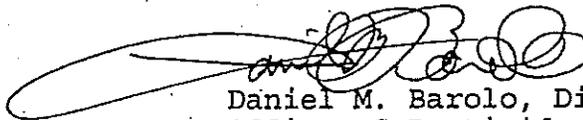
It is your responsibility as the registrant to notify any and all supplemental distributors of your product(s) that this cancellation order also applies to their distributor product(s). You may be held liable for violations committed by such distributors.



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Unless the provisions of an earlier order apply, dealers and users may continue to legally distribute, sell or use existing stocks of the listed pesticide(s) on hand until their supply is exhausted, provided that such further sale and use comply with the EPA-approved label and labeling of the affected product(s).

Sincerely,

A handwritten signature in black ink, appearing to read 'Daniel M. Barolo', with a large, sweeping flourish extending to the left.

Daniel M. Barolo, Director
Office of Pesticide Programs

Enclosure

EPA CO NR: 048211

INTERCON CHEMICAL
1100 CENTRAL INDUSTRIAL DR
ST. LOUIS MO

63110

EPA REGISTRATION	PRODUCT DISP DATE	PRODUCT NAME
*****	*****	*****
048211-00005	01/15/96	PERFORM
048211-00010	01/15/96	WINTERGREEN
048211-00011	01/15/96	BIG PINE
048211-00014	01/15/96	DOUBLE PINE
048211-00017	01/15/96	RPA
048211-00020	01/15/96	LDC - 39
048211-00021	01/15/96	LDC-19
048211-00024	01/15/96	HNS 256
048211-00025	01/15/96	XTRACTSAM
048211-00026	01/15/96	BRUTE
048211-00027	01/15/96	LIQUI-CIDE 1.5%
048211-00028	01/15/96	LIQUI-CIDE 2.5%
048211-00029	01/15/96	LIQUI - CIDE 3.75%
048211-00031	01/15/96	BRUTE
048211-00033	01/15/96	INTERDYNE
048211-00034	01/15/96	HNS 128
048211-00037	01/15/96	WINTERGREEN CLEANER, DISINFECTANT DEOD., VIRUSIDE,
048211-00063	01/15/96	NO-BAC BACTERIACIDE
048211-00070	01/15/96	STERI-DINE DISINFECTANT
048211-00074	01/15/96	MOSQUITO LARVICIDE 98
048211-00075	01/15/96	SYNTHA-FOG 20
048211-20001	01/15/96	CHLOR 1250.

CERTIFICATE OF SERVICE

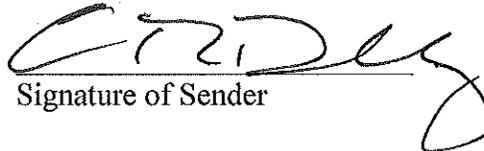
I hereby certify that on this 25th day of Aug., 2010, I hand-delivered the original and one true copy of this Document to the Regional Hearing Clerk, and sent one true and correct copy:

via UPS, to:

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

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

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


Signature of Sender