

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
REGION 7

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ENVIRONMENTAL PROTECTION
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BEFORE THE ADMINISTRATOR

IN THE MATTER OF) Docket No. FIFRA-07-2008-0035
)
FRM Chem, Inc., Keith G. Kastendieck,) COMPLAINANT'S MOTION FOR
and Karlan C. Kastendieck) PARTIAL ACCELERATED DECISION ON
) LIABILITY
Respondents) AND TO STRIKE CERTAIN
) 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 FRM Chem, Inc. ("FRM Chem" or "Respondent") is liable for fifty-eight violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 *et seq.*, as alleged in the EPA's Complaint. An accelerated decision as to FRM Chem's liability is appropriate based on FRM Chem's Answer and Prehearing Exchange, and other pertinent evidence documenting fifty-eight violations of FIFRA. Neither FRM Chem's Answer nor its Prehearing Exchange raises any genuine issue of material fact regarding liability. Furthermore, FRM Chem in its Answer raises several affirmative defenses, none of which are relevant to the question of FRM Chem's liability for the violations alleged. Accordingly, Complainant seeks an accelerated decision as to FRM Chem's liability and to strike the three affirmative defenses.

II. FACTUAL BACKGROUND

EPA filed its Complaint in this matter on June 6, 2009. The Complaint was subsequently amended twice, once on November 17, 2009, adding the two additional Counts 57 and 58 (for violations of a Stop Sale, Use, or Removal Order issued under FIFRA Section 13), and once on June 3, 2010, adding two new respondents in addition to Respondent FRM Chem.¹ The First and Second Amended Complaints contain identical allegations against FRM Chem and allege that FRM Chem violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by holding for sale or distribution each of two unregistered pesticide products (Counts 1 and 2), FRM CHLOR 1250 and STERI-DINE DISINFECTANT, and by distributing or selling in 2004-2008 those two pesticide products in fifty-four separate transactions (Counts 3 through 56). Furthermore, the Amended Complaints, in Counts 57 and 58, allege that FRM Chem twice violated Section 12(a)(2)(I) of FIFRA, 7 U.S.C. § 136j(a)(2)(I), by selling or distributing a pesticide in violation of a Stop Sale, Use or Removal Order issued under Section 13 of FIFRA, 7 U.S.C. § 136k. Copies of the First and Second Amended Complaints are in the Court's files and are not attached to this Motion.

Respondent FRM Chem filed an Answer to the First Amended Complaint on or about December 16, 2009. In its Answer, FRM Chem admitted that it held for sale or distribution the two unregistered pesticides as set forth in the First Amended Complaint, and also admitted the transactional allegations set forth in the First Amended Complaint, and asserted several

¹ The two Respondents added to the Second Amended Complaint, Keith G. Kastendieck and Karlan C. Kastendieck, though they are shareholders and officers of Respondent FRM Chem, Inc., are not represented by counsel for FRM Chem and are not subject to the present motion for partial accelerated judgment against Respondent FRM Chem, Inc.

affirmative defenses. *See Answer* at Pages 1-7. Copies of the First Amended Complaint and of FRM Chem'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 matters² 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 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.

On January 15, 2010, Complainant filed its consolidated prehearing exchange for the four matters. The four corporate Respondents, including FRM Chem, 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 Second Amended Complaint in the above-captioned matter, adding two individuals as respondents. On June 7, 2010, service of the Second Amended Complaint was accepted by Jenkins & Kling, PC, counsel for FRM Chem. 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

² In the Matter of Advanced Products Technology, Inc., Docket No. FIFRA-07-2008-0036; In the Matter of Synisys, Inc., Docket No. FIFRA-07-2009-0041; and In the Matter of Custom Compounds, Inc., Docket No. FIFRA-07-2009-0042.

Complainant's Motion for Partial Accelerated Decision
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amended complaint to file its answer. No answer to the Second Amended Complaint has been filed by FRM Chem. Copies of Complainant's and Respondents' Prehearing Exchanges and of the Second 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 fifty-eight counts alleged in its Complaint 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 FRM Chem, 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 fifty-eight counts. Complainant will show that there can be no genuine issue or dispute that: (1) FRM Chem is a "person"; (2) FRM Chem distributed or sold FRM CHLOR 1250 or STERI-DINE DISINFECTANT on fifty-eight separate occasions; (3) FRM CHLOR 1250 or STERI-DINE DISINFECTANT were not registered as pesticides at all times relevant to the distribution or sales alleged in the Amended Complaints; (4) FRM CHLOR 1250 or STERI-DINE DISINFECTANT are both pesticides as defined by FIFRA and its implementing regulations; (5) an order prohibiting the distribution, sale, use, or removal of FRM CHLOR 1250 or STERI-DINE DISINFECTANT was issued to FRM Chem under to Section 13(a) of FIFRA, 7 U.S.C. § 136k(a) on October 8, 2008; and (6) subsequent to the issuance of the order prohibiting the distribution, sale, use, or removal of FRM CHLOR 1250 or STERI-DINE, FRM Chem distributed or sold FRM CHLOR 1250 on two occasions.

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 affidavits of EPA Environmental Scientist Mark Leshner and of Mark

Nachreiner, Pesticide Inspector for the Missouri Department of Agriculture. In both its Answer and the joint Prehearing Exchange, Respondent FRM Chem, Inc. 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 FRM Chem's affirmative defenses raised in the Respondent's Answer to the First Amended Complaint. In the arguments set forth below, Complainant will demonstrate that Respondent FRM Chem 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 three affirmative defenses.

In sum, EPA has clear documentation of each of the fifty-eight violations alleged in the Complaint, as established by Respondent's Answer and Prehearing Exchange, and other exhibits attached to this Motion. In both its Answer and the joint Prehearing Exchange, Respondent FRM Chem 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

1. As to the 56 violations of FIFRA Section 12(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 fifty-six 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 each of fifty-six transactions; and (4) the pesticides at issue are “unregistered.”

Complainant can establish the elements of the fifty-six violations through the admissions in FRM Chem's Answer and Prehearing Exchange, and by reference to documents and invoices collected at inspections of FRM Chem's facility and from various purchasers of FRM Chem's

products, included in Complainant's Prehearing Exchange.

a. Respondent is a "Person"

Respondent FRM Chem admits in its Answer that it is "a pesticide producer and distributor, located at 50-60 Highline Drive, Union, Missouri," and that it "is and was at all times referred to in [the] complaint a 'person' as defined by Section 2(s) of FIFRA." *See* Answer (at Page 1), referencing Paragraph 4 of the First Amended Complaint. FRM Chem also includes in Respondents' Prehearing Exchange several of its corporate Federal tax returns, as Exhibits 27-30. 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." FRM Chem is a corporation and therefore a "person" for the purposes of FIFRA.

b. The Products at Issue are "Pesticides"

FRM Chem admits in its answer to the First Amended Complaint that FRM CHLOR 1250 and STERI-DINE DISINFECTANT are pesticides. *See* Answer at Paragraphs 19 and 20.

Further evidence that FRM CHLOR 1250 and STERI-DINE DISINFECTANT are disinfectants that are 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 labels for the two products. The label for STERI-DINE DISINFECTANT collected during the 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. The label for FRM CHLOR 1250 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 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 and STERI-DINE DISINFECTANT are "pesticides" for FIFRA purposes.

c. Respondent Distributed or Sold the Pesticides at Issue

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."

FRM Chem in its Answer to the First Amended Complaint admitted that, for each of the counts 1 through 56, it sold or distributed either FRM CHLOR 1250 or STERI-DINE DISINFECTANT, as follows:

As to Count 1: on Page 3 of its Answer, FRM Chem "admits the allegations contained in Paragraph 30" of the First Amended Complaint, which alleges that "[o]n or about December 21, 2005, Respondent held for sale or distribution a quantity of the product STERI-DINE

DISINFECTANT.”

As to Count 2: on Page 4 of its Answer, FRM Chem “admits the allegations contained in Paragraph 37” of the First Amended Complaint, which alleges that “[o]n or about December 21, 2005, Respondent held for sale or distribution a quantity of the product FRM CHLOR 1250.”

As to Counts 3-6: on Page 5 of its Answer, FRM Chem “admits that it sold or distributed FRM CHLOR 1250 to McFleeg, Inc., of Watertown, South Dakota as alleged in Counts 3 through 6.”

As to Counts 7-56: on Page 5 of its Answer, FRM Chem “admits that it sold or distributed FRM CHLOR 1250 to Allen’s Sales & Service, Ottawa, Kansas; to Funk Sales & Service, Ottawa, Kansas; to Dairy Concepts, Lesueur, Minnesota; to L W Chemicals, Mt. Olive, Illinois; to Preston Dairy Supply, Monticello, Iowa; to Tony Howell Equity Group, East Gadsden, Alabama; to Charles Rademacher, Owensville, Missouri; to Riegel Farms, South Solon, Ohio; to Billy Palmer Equity Group, East Gadsden, Alabama; and to Weir Farm Supply, La Veta, Colorado, as set forth in the Amended Complaint.” Complainant notes that, for the sales or distributions to L W Chemicals (Counts 17-25), Tony Howell - Equity Group (Counts 28-31), and to Billy Palmer - Equity Group (Counts 42-52), the product alleged to have been sold in those transactions was not FRM CHLOR 1250 but STERI-DINE DISINFECTANT. Given that FRM Chem on Page 5 of its Answer is clearly admitting to the sales or distributions alleged for each of Counts 7 through 56, it is apparent that Respondent FRM Chem inadvertently omitted a reference to STERI-DINE DISINFECTANT in that paragraph, which, in order to make sense, should read “admits that it sold or distributed FRM CHLOR 1250 or STERI-DINE

DISINFECTANT.”

Moreover, as with the sales or distributions of FRM CHLOR 1250 in Counts 7-16, 26-27, 32-41, and 53-56, each sale or distribution of STERI-DINE DISINFECTANT is clearly documented by evidence in the record. The nine sales or distributions to L W Chemicals alleged in Counts 17 through 25 are documented by an affidavit and statement of Leonard Weiss, and by multiple bills of lading. (See Complainant's Prehearing Exchange Exhibits 19 through 19k) The four sales or distributions to Tony Howell Equity Group alleged in Counts 28 through 31 and the eleven sales or distributions to Billy Palmer Equity Group alleged in Counts 42 through 52 are documented by the statements of Victor Turner and Billy Palmer, and the Affidavit of Victor Turner. See Complainant's Prehearing Exchange Exhibits 23, 24, 35 and 36.

d. The Pesticides at Issue are Unregistered

At the time of each sale or distribution alleged by Complainant and admitted by Respondent FRM Chem in Counts 1 through 56 of the Complaint, the products FRM CHLOR 1250 and STERI-DINE DISINFECTANT were 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 the two products, FRM CHLOR 1250 and STERI-DINE DISINFECTANT, were prohibited after January 15, 1996. Further evidence as to these two products being unregistered as pesticides 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 (OPPIN) 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.*

4. *According to OPPIN, "STERI-DINE DISINFECTANT" is not registered as a pesticide under FIFRA.*

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

In sum, neither of the two products, FRM CHLOR 1250 and STERI-DINE DISINFECTANT, distributed or sold by FRM Chem in fifty-six separate transactions between July 7, 2004, and November 26, 2008, was 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 56, it has established Respondent FRM Chem'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 products at issue are "pesticides"; (3) Respondent "distributed or sold" the pesticides at issue in each of fifty-six transactions; and (4) the pesticides at issue are "unregistered."

2. As to the 2 violations of FIFRA Section 12(a)(2)(I)

Section 12(a)(2)(I) of FIFRA, 7 U.S.C. § 136j(a)(2)(I), 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.

a. FRM Chem is a "Person"

As demonstrated above, Respondent FRM Chem is a "person" as defined by Section 2(s) of FIFRA.

b. FRM Chem was issued an order under Section 13 of FIFRA

Respondent FRM Chem admits in its Answer that Keith G. Kastendieck, corporate vice-president and plant manager for FRM Chem, was served with a "Stop Sale, Use, or Removal Order" (or "Order") on October 8, 2008. This Order, included in Exhibit 25 to Respondents' Prehearing Exchange and as Exhibit 41 to Complainant's Prehearing Exchange, was issued under Section 13 of FIFRA.

c. FRM Chem violated the terms of the Section 13 order

The "Stop Sale, Use, or Removal Order" issued to Respondent FRM Chem on October 8, 2008, ordered Respondent FRM Chem "not to distribute, sell, use, or remove" the pesticides FRM CHLOR 1250 and STERI-DINE DISINFECTANT. The Order further specified that the two pesticides "shall not be sold, offered for sale, held for sale, shipped, delivered for shipment, received and, having been so received, delivered, offered for delivery, or removed from the premises, for any reason." (emphasis added)

As to Count 57

In Count 57 of the First Amended Complaint, Complainant alleges that, on October 13, 2008, after FRM Chem was issued the "Stop Sale, Use or Removal Order," FRM Chem sold or distributed a quantity of the product FRM CHLOR 1250. This transaction is documented in the record by FRM Chem Invoice No. 35762, included as Exhibit 43 to Complainant's Prehearing Exchange and in Exhibit 23 to Respondents' Prehearing Exchange. Invoice 35762 documents that the products therein, including two 15-gallon containers of FRM CHLOR 1250, indicated by FRM product tracking number 1004021000, were shipped on October 13, 2008, a week after Respondent FRM Chem was served with the Stop Sale, Use, or Removal Order.

In its Answer, FRM Chem "disputes the date of this transaction," stating that "[t]he date of this transaction was October 7, 2008."³ See FRM Chem's Answer at page 6. Complainant agrees that Invoice 35762 documents that the product FRM CHLOR 1250 was ordered by the customer on October 7, 2008, but that fact does not constitute a defense to the violation alleged, since the Stop Sale, Use, or Removal Order expressly directed that FRM CHLOR 1250 "shall not be sold, offered for sale, held for sale, [or] shipped" by Respondent FRM Chem following

³ Complainant notes that Keith Kastendieck, in his position as part owner and manager of FRM Chem, provided the following statements to Missouri Department of Agriculture inspector Mark Nachreiner during the October 8, 2008 inspection when he was served with the Stop Sale, Use, or Removal Order:

- "FRM Chem has had no production in two years and the company ceased operation on December 31, 2006."
- "We no longer produce the STERI-DINE DISINFECTANT or the FRM CHLOR 1250."
- "We do not have any inventory for STERI-DINE or FRM CHLOR 1250." "[W]e last produced FRM CHLOR 1250 Dec 06."
- "We are not presently producing, labeling, selling, or distributing [FRM CHLOR 1250]."
- "Frm Chem Inc. ceased operations on December 31, 2006. All inventory of Frm Chlor 1250 and Steridine had been sold before that date."

See Complainant's Prehearing Exchange, Exhibit 2c.

receipt of the Order. Invoice 35762 clearly documents that the FRM CHLOR 1250 ordered on October 7, 2008 was shipped by Respondent FRM Chem on October 13, 2008, in violation of the Stop Sale, Use, or Removal Order issued to FRM Chem on October 8, 2008. Accordingly, Complainant submits that, even when the evidence is viewed in a light most favorable to Respondent FRM Chem, there is no genuine issue of material fact as to any of the elements necessary to prove that a violation of Section 12(a)(2)(I) of FIFRA, 7 U.S.C. § 136j(a)(2)(I) was committed by FRM Chem, as alleged in Count 57 of the First and Second Amended Complaints.

As to Count 58

In Count 58 of the First Amended Complaint, Complainant alleges that, on or about November 26, 2008, after Respondent FRM Chem was issued the Stop Sale, Use or Removal Order forbidding the sale or distribution of FRM CHLOR 1250, FRM Chem sold or distributed a quantity of that product to Graber Equipment. This transaction is documented in the record by FRM Chem Invoice No. 35782, included as Exhibit 44 to Complainant's Prehearing Exchange and in Exhibit 23 to Respondents' Prehearing Exchange. Invoice 35782 documents that the products therein, including four 5-gallon drums of a product identified as "SODIUM HYPO," further identified by FRM product tracking number 1004011000, were shipped on November 26, 2008, over a month after Respondent FRM Chem was served with the Stop Sale, Use, or Removal Order.

In its Answer, FRM Chem denies Complainant's allegation that it sold or distributed FRM CHLOR 1250, arguing that Invoice 35782 instead proves that a product called "Sodium Hypochloride" [sic] was sold to Graber Equipment. However, a review of the available evidence

shows that Respondent FRM has failed to raise a genuine issue of material fact, in that the product indicated on Invoice 35782 as "SODIUM HYPO 5 GAL DRUM" and by the FRM product tracking number 1004011000 is in fact the same 12.5% sodium hypochlorite solution product identified on other invoices as "FRM CHLOR 1250." Moreover, as Complainant notes below, several invoices documenting sales or distributions of FRM CHLOR 1250 to which FRM Chem admits in its Answer identify therein the product as "SODIUM HYPO," just as does Invoice 35782.

As an initial matter, Complainant submits that 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. Keith Kastendieck, manager and owner of FRM Chem, when he provided shipping invoices to Missouri Department of Agriculture inspector Mark Nachreiner following the October 8, 2008 inspection, explained that FRM Chem used internal tracking numbers on its invoices, and that products beginning with the prefix "1004" were FRM CHLOR 1250 and those with the prefix "1014" indicated STERI-DINE DISINFECTANT. *See* Affidavit of Mark Nachreiner, attached hereto; *see also* Complainant's 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 Chem indicate that FRM Chem 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, which violations were admitted by FRM Chem in its Answer as documented above, 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, which are violations are admitted by FRM Chem in its Answer as documented above, each identify the product FRM CHLOR 1250 as "SODIUM HYPO," with an FRM Chem product tracking number prefixed with "1004."

Indeed, Complainant notes that all invoices in the record that document sales of 5 gallon containers of products identified as "SODIUM HYPO" or as "FRM CHLOR 1250" indicate the product by the tracking number "1004011000," identical to the product tracking number indicating the 5 gallon drum of "SODIUM HYPO" in Invoice No. 35782, documenting the shipment of FRM CHLOR 1250 to Graber Equipment on November 26, 2008, as alleged in Count 58. *See* Complainant's Prehearing Exchange Exhibits 25, 46, 47, and 50. Moreover, further underscoring the fact that Respondent FRM Chem used the terms "SODIUM HYPO" and "FRM CHLOR 1250" interchangeably on its invoices is the Affidavit of Nick Graber of Graber Equipment, included as Complainant's Prehearing Exchange Exhibit 42, wherein the affiant

states that he “understand[s] the products ‘FRM Chlor 1250’ and ‘Sodium Hypo’ on the FRM Chem, Inc. invoices referenced [...] to be 12.5% sodium hypochlorite solutions used to disinfect and sanitize food contact surfaces in the dairy industry.”

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 Respondent used “Hypochlorite Solution” and “SODIUM HYPO” interchangeably with “FRM CHLOR 1250” on its invoices and bills of lading to indicate the same product, FRM CHLOR 1250. Accordingly, there is no genuine issue of material fact as to any of the elements necessary to prove that a violation of Section 12(a)(2)(I) of FIFRA, 7 U.S.C. § 136j(a)(2)(I) was committed by FRM Chem when it sold or distributed the 12.5% sodium hypochlorite solution product identified on invoice No. 35782 as “SODIUM HYPO” to Graber Equipment on or about November 26, 2008, as alleged in Count 58 of the First and Second Amended Complaints.

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

FRM Chem argues that: (1) it was unaware that the products were not properly registered; (2) the penalties and fines sought are excessive; and (3) that it filled out EPA forms in several years notifying EPA that it held for sale in inventory the products FRM CHLOR 1250 and STERI-DINE, and that it was never notified by EPA during this period that it was selling unregistered pesticides. Complainant construes this argument as an appeal to the equitable doctrine of laches. As will be discussed below, even if all of FRM Chem's factual allegations were true, none of the arguments raised by FRM Chem raise a genuine issue of material fact

concerning FRM Chem's liability.

1. Awareness is Not Relevant to Liability

In its Answer, FRM Chem raises as an affirmative defense that it "denies any knowledge whatsoever" that sales of STERI-DINE DISINFECTANT and FRM CHLOR 1250 were prohibited after January 15, 1996. *See* Answer at Page 2. Assuming Respondent'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 FRM Chem's liability does not require that FRM Chem 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, FRM Chem raises as an affirmative defense that it "disputes the proposed penalty," and further that it "disputes the method of calculation of penalties." *See* Answer at Page 7. Complainant notes that it has filed a motion for discovery under Section 22.19(e) of the CROP, requiring Respondent FRM Chem 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 FRM Chem 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.

3. Laches Defense is Not Available

In its Answer, FRM Chem raises as an affirmative defense that “[y]early, Respondent would fill out EPA forms and notify the EPA by its registration number that it was holding for sale and/or distributing” the two pesticides at issue in this matter. *See Answer at Pages 2, 3, and 6.* 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 or STERI-DINE DISINFECTANT. The defense of laches, like other equitable defenses, is unmistakably not available to FRM Chem as a defense against liability where the Federal 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 dismiss this defense.

D. Conclusion

In sum, there is overwhelming evidence demonstrating that Respondent held two unregistered pesticides for distribution or sale (and therefore, “distributed or sold,” as defined in FIFRA) on December 21, 2005, in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), as alleged in Counts 1 and 2; that it distributed or sold unregistered pesticides on fifty-four separate occasions between July 7, 2004, and November 26, 2008, in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), as alleged in Counts 3-56; and that it sold or distributed an unregistered pesticide on two occasions in violation of a “Stop Sale, Use, or Removal Order” issued pursuant to Section 13 of FIFRA, 7 U.S.C. § 136k, a violation of Section 12(a)(2)(I) of FIFRA, 7 U.S.C. § 136j(a)(2)(I), as alleged in Counts 57 and 58. There is no genuine issue of material fact regarding FRM Chem’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.

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2. On or about December 21, 2005, Respondent held for sale or distribution: (1) FRM CHLOR 1250, a 12.5% Sodium Hypochlorite product; and (2) STERI-DINE DISINFECTANT.
3. In fifty-four separate transactions between July 7, 2004, and November 26, 2008, Respondent distributed or sold: (1) FRM CHLOR 1250, a 12.5% Sodium Hypochlorite product; and/or (2) STERI-DINE DISINFECTANT.
4. (1) FRM CHLOR 1250, a 12.5% Sodium Hypochlorite product; and/or (2) STERI-DINE DISINFECTANT are used to prevent, destroy, repel, and mitigate microorganisms that are deleterious to man or the environment.
5. From or about January 15, 1996 to present, Respondent had not registered and was not authorized by a registrant to produce or distribute: (1) FRM CHLOR 1250, a 12.5% Sodium Hypochlorite product; and/or (2) STERI-DINE DISINFECTANT.
6. On October 8, 2008, Keith Kastendieck, manager of FRM Chem, Inc., was issued a Stop Sale, Use, or Removal Order issued pursuant to Section 13 of FIFRA, 7 U.S.C. § 136k, prohibiting the distribution or sale of the products FRM CHLOR 1250 and STERI-DINE DISINFECTANT.
7. On October 13, 2008, and again on November 26, 2008, Respondent distributed a quantity of FRM CHLOR 1250 to Graber Equipment.

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 FRM Chem, 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. (1) FRM CHLOR 1250, a 12.5% Sodium Hypochlorite solution product; and/or (2) STERI-DINE DISINFECTANT are "pesticides" as that term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).
5. Holding for sale or distribution by Respondent FRM Chem of: (1) FRM CHLOR 1250, a 12.5% Sodium Hypochlorite solution product; and/or (2) STERI-DINE DISINFECTANT, as alleged in counts 1-2 of the First and Second Amended Complaints, each constitutes an instance of selling or distributing an unregistered pesticide.
6. Each of the fifty-four transactions by Respondent of selling or distributing: (1) FRM CHLOR 1250, a 12.5% Sodium Hypochlorite solution product; and/or (2) STERI-DINE DISINFECTANT alleged in counts 3-56 of the First and Second Amended Complaints was a sale or distribution of an unregistered pesticide.

7. Each instance of holding for sale or distribution by Respondent alleged in Counts 1-2 of the Amended Complaints and of the fifty-four transactions by Respondent of: (1) FRM CHLOR 1250, a 12.5% Sodium Hypochlorite solution product; and/or (2) STERI-DINE DISINFECTANT alleged in counts 3-56 of the Amended Complaints was a violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).
8. Each of the two distributions by Respondent of FRM CHLOR 1250 alleged in Counts 57 and 58 were committed in violation of a "Stop Sale, Use, or Removal Order" issued pursuant to Section 13 of FIFRA, 7 U.S.C. § 136k, and consequently were violations of Section 12(a)(2)(I) of FIFRA, 7 U.S.C. § 136j(a)(2)(I).

V. CONCLUSION

Complainant respectfully requests this Court to issue an Initial Decision holding that Respondent FRM Chem, Inc. is liable for the sale or distribution or holding for sale or distribution of an unregistered pesticide on fifty-six separate occasions, and for sale or distribution of pesticides in violation of a Stop Sale, Use, or Removal Order issued pursuant to Section 13 of FIFRA, 7 U.S.C. § 136k, on two occasions, as alleged in counts 1 through 58 of the Complaint. Complainant further requests this Court find that Respondent FRM Chem's affirmative defenses raised in its Answer to the First Amended Complaint do not raise any genuine issues of material fact relevant to FRM Chem's liability for the violations alleged in counts 1 through 58 of the Complaint.

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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
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

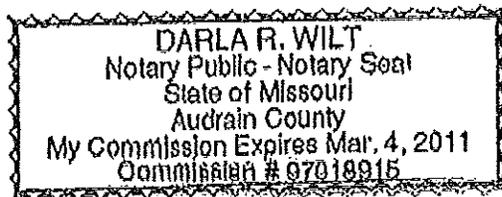
Mark Nachreiner
Pesticide Use Investigator
Missouri Department of Agriculture
Division of Plant Industries
Bureau of Pesticide Control
P.O. Box 630
Jefferson City, MO 65102

Subscribed and sworn to before me this 10th 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, 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 Compounds, 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 Leshner
Mark Leshner
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 10th 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:

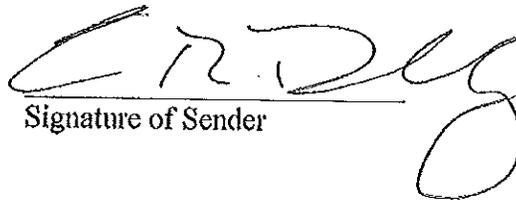
Keith Kastendieck
P.O. Box 1656
Washington, MO 63090

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 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