



other pertinent evidence documenting seven violations of FIFRA, including signed statements by Respondent Keith G. Kastendieck and other documents in Complainant's Prehearing Exchange, and Respondent FRM's admissions made in its Answer filed in the related matter of *In re FRM Chem, Inc., et al.*, Docket No. FIFRA-07-2008-0035, which, as explained below, has been consolidated with the present matter. Neither the Corporate Respondents' Answer nor their joint Prehearing Exchange raises any genuine issue of material fact regarding liability. Furthermore, the Corporate Respondents and individual respondents Keith G. Kastendieck and Karlan C. Kastendieck (the "Individual Respondents") in their Answers raise two affirmative defenses, neither of which is relevant to the question of FRM's or Keith G. Kastendieck's liability for the violations alleged. Accordingly, Complainant seeks an accelerated decision as to FRM's and Keith G. Kastendieck's liability and to strike the two affirmative defenses.

## II. FACTUAL BACKGROUND

On June 6, 2009, EPA filed two complaints, in the matters of FRM Chem, Inc., Docket No. FIFRA-07-2008-0035, and Advanced Products Technology, Inc., Docket No. FIFRA-07-2008-0036, in each case alleging multiple distributions to several common customers of one or both of two unregistered pesticides produced by FRM Chem, Inc. (FRM): FRM CHLOR 1250 and STERI-DINE DISINFECTANT. On September 23, 2009, EPA filed its initial Complaint and Notice of Opportunity for Hearing ("initial Complaint") in the above-captioned matter against Synisys as the sole initial respondent, alleging multiple distributions of FRM CHLOR 1250 in 2007 and 2008.

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the two individual respondents, the individuals were not so represented at the time the Answer was filed.

Respondent Synisys filed an initial Answer to the initial Complaint on or about November 20, 2009. In its initial Answer, Synisys denied the transactional allegations set forth in the initial Complaint, and asserted that "it believes and states this product was sold and distributed by FRM Chem, Inc.," and that, for each invoice number cited by the Complainant as documenting each alleged transaction, that number "is not a Synisys invoice number." *See* initial Answer at Pages 4-7. A copy of Synisys' Answer to the initial Complaint is in the Court's files and is not attached to this Motion.

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

On January 15, 2010, Complainant filed its consolidated prehearing exchange for the four matters. The four Respondent Corporations<sup>3</sup>, including both FRM and Synisys, filed a joint prehearing exchange on or about February 15, 2010. On March 15, 2010, Complainant filed a

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

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

motion to file amended complaints in the four matters, in which it proposed that FRM be added as a respondent to the above-captioned matter, initially filed against Synisys alone. Neither FRM nor Synisys objected to amending the complaint in the instant matter to add FRM as respondent, stating that they "concur with Complainant that these amendments are appropriate in light of Respondents' Prehearing Exchange." *See* Respondents' Reply to Complainant's Motion to Amend Complaints and for Other Discovery Pursuant to 40 C.F.R. § 22.19(e) (March 29, 2010), at Paragraph 1.

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

On June 7, 2010, service of the First Amended Complaint was accepted by Jenkins & Kling, PC, counsel for FRM and Synisys. Respondent FRM's Answer to the First Amended Complaint was due on July 7, 2010, and was filed, jointly with Respondent Synisys, out of time on or about August 9, 2010. The two Individual Respondents filed a joint Answer to the First Amended Complaint on or about August 23, 2010. On August 26, 2010, all parties, through counsel, filed Joint Prehearing Stipulations as to exhibits and facts. On or about September 1,

2010, the Corporate Respondents filed a joint Supplemental Prehearing Exchange, and the Individual Respondents each filed a Prehearing Exchange. Copies of the Answers to the First Amended Complaint, the Joint Prehearing Stipulations, and of the Prehearing Exchanges are in the Court's files and are not attached to this Motion.

In the Corporate Respondents' and the Individual Respondents' Answers to the First Amended Complaint in the instant matter, the four named Respondents deny liability for the seven violations alleged in Counts 1 through 7 therein.

This Motion will request the Court to grant an accelerated decision on liability as to Respondent FRM in favor of the Complainant for each of the seven counts alleged in its First Amended Complaint as Counts 1 through 7 and, as to Respondent Keith G. Kastendieck for Counts 6 and 7 alleged in the First Amended 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 Respondents FRM and Keith G. Kastendieck, 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 counts. Complainant will show that there can be no genuine issue or dispute that: (1) FRM and Keith G. Kastendieck are "persons"; (2) FRM CHLOR 1250 is a pesticide as defined by FIFRA and its implementing regulations; (3) FRM distributed or sold FRM CHLOR 1250 on seven separate occasions, and Keith G. Kastendieck, as a corporate officer and director conducting business of the administratively-dissolved FRM Chem, Inc., distributed or sold FRM CHLOR 1250 on two occasions; and (4) at all times relevant to the distributions or sales alleged in Counts 1 through 7 of the Complaint, FRM CHLOR 1250 was not registered as a pesticide with the Administrator of EPA.

To demonstrate that there are no genuine issues of material fact in this matter, Complainant will rely on Corporate Respondents' and Individual Respondents' Answers, signed statements by Respondent Keith G. Kastendieck and other documents in Complainant's Prehearing Exchange, the Respondents' Joint Prehearing Exchange, facts stipulated by the parties in the Joint Prehearing Stipulations, the affidavits of EPA Environmental Scientist Mark Leshner and of Mark Nachreiner, Pesticide Inspector for the Missouri Department of Agriculture, and Missouri state statutes governing the dissolution of Missouri corporations. In both the Corporate Respondents' Answer to the First Amended Complaint and the joint Prehearing Exchange, Respondent FRM has failed to raise any genuine issues of material fact to refute that such violations occurred, and that Respondent FRM is liable for the violations alleged in Counts 1 through 7, and that Keith G. Kastendieck is personally liable for the violations alleged in Counts 6 and 7 of the First Amended Complaint.

This Motion will also request the Court to strike both the Corporate and the Individual Respondents' affirmative defenses raised in their Answers to the First Amended Complaint. In the arguments set forth below, Complainant will demonstrate that the Corporate and the Individual Respondents failed to support their affirmative defenses with any facts or reasoning which show that there is a genuine issue for hearing, and that the law and interpretation of the law is so clear that a motion to strike must be granted as to each of these two affirmative defenses.

### **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. Overview: Evidence Clearly Establishes the Liability of Respondents FRM and Keith G. Kastendieck as to the 7 violations of FIFRA Section 12(a)(1)(A) in Counts 1 through 7

As the analysis below demonstrates, the evidence and facts in the record clearly demonstrate that the elements of the seven violations of Section 12(a)(1)(A) of FIFRA alleged in Counts 1 through 7 of the First Amended Complaint are established as to Corporate Respondent FRM. The record further establishes that Respondent Keith G. Kastendieck is personally liable

under relevant Missouri law for the sale and distribution of an unregistered pesticide on two occasions, in October and November of 2008, as alleged in Counts 6 and 7 of the First Amended Complaint, which occurred after Respondent FRM was administratively dissolved as a corporation by the State of Missouri on July 1, 2008.

1. Evidence Clearly Establishes Respondent FRM's Liability in This Case as to the 7 violations of FIFRA Section 12(a)(1)(A) in Counts 1 through 7

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 FRM's liability for the seven violations of this provision alleged in Counts 1 through 7, 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 seven transactions; and (4) the pesticides at issue are "unregistered."

Complainant can establish the elements of the seven violations through the admissions in Corporate Respondents' and Individual Respondents' Answers and documents included in Respondents' joint Prehearing Exchange; by reference to documents collected at inspections of FRM's facility, included in Complainant's Prehearing Exchange; by reference to facts stipulated by the parties in the Joint Prehearing Stipulations; by reference to the affidavits of EPA Environmental Scientist Mark Leshner and of Mark Nachreiner, Pesticide Inspector for the Missouri Department of Agriculture, attached hereto, and by the admissions of Respondent FRM in its Answer filed in the related matter of *In re FRM Chem, et al.*, Docket No. FIFRA-07-2008-0035.

a. Respondent FRM is a "Person"

Respondent FRM is a Missouri corporation. *See* Joint Prehearing Stipulations at Page 2, Paragraphs II.1-II.3; Corporate Respondents' Answer to the First Amended Complaint at Page 2, paragraph 4. Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines the term "person" to include "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not." FRM is a corporation and therefore a "person" for the purposes of FIFRA.

b. FRM CHLOR 1250 is a "Pesticide"

The Corporate Respondents admit in their Answer that FRM CHLOR 1250 is a pesticide. *See* Corporate Respondents' Answer to the First Amended Complaint at Page 2, paragraph 12.

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

intended for preventing, destroying, repelling, or mitigating any pest,” FRM CHLOR 1250 is a “pesticide” for FIFRA purposes.

c. Respondent FRM Distributed or Sold FRM CHLOR 1250

Section 2(gg) of FIFRA, 7 U.S.C § 136(gg), broadly defines the term “to distribute or sell” as “to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver.”

In its Answer to the original Complaint, for each count, Respondent Synisys denied “ever selling or distributing FRM CHLOR 1250” to the alleged customers, and furthermore averred that it “believes and states this product was sold and distributed by FRM Chem, Inc.” *See* Synisys’ Answer at Pages 4-7.

FRM and Synisys, in the Corporate Respondents’ Answer to the First Amended Complaint, jointly deny for each of Counts 1 through 7 that they sold or distributed a quantity of FRM CHLOR 1250. However, for Counts 6 and 7, Respondent FRM has already admitted to the sales transactions alleged therein in the Answers to the First and Second Amended Complaints filed in *In re FRM Chem, et al.*, Docket No. FIFRA-07-2008-0035. Counts 57 and 58 of that matter allege that Respondent FRM violated Section 12(a)(2)(I) of FIFRA by selling or distributing the pesticide FRM CHLOR 1250 in violation of a “Stop Sale, Use, or Removal” order issued under Section 13 of FIFRA, prohibiting the distribution or sale of the pesticide. In its Answers in that matter, FRM admitted that both transactions occurred. *See* Answers of Respondent FRM in *In re FRM Chem, et al.*, Docket No. FIFRA-07-2008-0035, at Pages 6-7. Those transactions are documented by Invoices No. 35762 and 35782, which record the same

sales or distributions of products to Graber Equipment that are the basis for the violations of FIFRA 12(a)(1)(A) alleged in Counts 6 and 7 of the instant matter. Invoices No. 35762 and 35782 are included in Complainant's Prehearing Exchange as Exhibits 43 and 44, and in Respondent's Prehearing Exchange Exhibit 23, and have been stipulated into evidence in the parties' Joint Prehearing Stipulations. Copies of Respondent FRM's Answers in *In re FRM Chem, et al.*, Docket No. FIFRA-07-2008-0035, are in the Court's record and are not appended to this motion.

Accordingly, Complainant submits that the distributions for each of the Counts 1 through 7 are clearly documented in the record as follows:

- Count 1: The sale or distribution of FRM CHLOR 1250 alleged in Count 1 is documented by Complainant's Exhibit 46, FRM Invoice No. 35522, which documents the shipment to McFleeg, Inc. ("McFleeg"), in Watertown, South Dakota, of two 5-gallon drums and one case of four 1-gallon containers of FRM CHLOR 1250 on or about January 8, 2007. The 5-gallon drums are indicated thereon by internal tracking number 1004011000, and the 1-gallon containers by number 1004104000. This sale or distribution is further documented by Complainant's Exhibit 6, a McFleeg Inventory Control Report documenting the receipt into inventory of FRM CHLOR 1250 on January 10, 2007, and by Complainant's Exhibit 7, the affidavit of Jeff Buchholz, store manager for McFleeg, in which he attests to the purchase by McFleeg of FRM CHLOR 1250 on or about January 8, 2007.
- Count 2: The sale or distribution of FRM CHLOR 1250 alleged in Count 2 is documented by Complainant's Exhibit 47, FRM Invoice No. 35567, which documents

the shipment to McFleeg of two 5-gallon drums of FRM CHLOR 1250 on or about March 28, 2007. The 5-gallon drums are indicated thereon by internal tracking number 1004011000. This sale or distribution is further documented by Complainant's Exhibit 6, a McFleeg Inventory Control Report documenting the receipt into inventory of FRM CHLOR 1250 on April 2, 2007, and by Complainant's Exhibit 7, the affidavit of Jeff Buchholz, store manager for McFleeg, in which he attests to the purchase by McFleeg of FRM CHLOR 1250 on or about March 28, 2007.

- Count 3: The sale or distribution of FRM CHLOR 1250 alleged in Count 3 is documented by Complainant's Exhibit 48, FRM Invoice No. 35684, which documents the shipment to McFleeg of one case of four 1-gallon containers of FRM CHLOR 1250 on or about January 21, 2008. The 1-gallon containers are indicated thereon by internal tracking number 1004104000. This sale or distribution is further documented by Complainant's Exhibit 6, a McFleeg Inventory Control Report documenting the receipt into inventory of FRM CHLOR 1250 on January 25, 2008, and by Complainant's Exhibit 7, the affidavit of Jeff Buchholz, store manager for McFleeg, in which he attests to the purchase by McFleeg of FRM CHLOR 1250 on or about January 21, 2008.
- Count 4: The sale or distribution of FRM CHLOR 1250 alleged in Count 4 is documented by Complainant's Exhibit 50, FRM Invoice No. 35539, which documents the shipment to Graber Equipment in Oden, Indiana, of four 5-gallon drums of FRM CHLOR 1250 on or about February 6, 2007. The 5-gallon drums of the product are identified thereon by internal tracking number 1004011000. This sale or distribution is further documented by Complainant's Exhibit 42, the affidavit of Nick Graber of Graber

Equipment, in which he attests to the purchase by Graber Equipment of a quantity of FRM CHLOR 1250 on or about February 6, 2007.

- Count 5: The sale or distribution of FRM CHLOR 1250 alleged in Count 5 is documented by Complainant's Exhibit 51, FRM Invoice No. 35690, which documents the shipment to Graber Equipment of two 15-gallon drums of FRM CHLOR 1250 on or about February 13, 2008. The 15-gallon drums are indicated thereon by internal tracking number 1004021000. This sale or distribution is further documented by Complainant's Exhibit 42, the affidavit of Nick Graber of Graber Equipment, in which he attests to the purchase by Graber Equipment of a quantity of FRM CHLOR 1250 on or about February 13, 2008.
- Count 6: The sale or distribution of FRM CHLOR 1250 alleged in Count 6 is documented by Complainant's Exhibit 43, FRM Invoice No. 35672, which documents the shipment to Graber Equipment of two 15-gallon drums of FRM CHLOR 1250 on or about October 13, 2008. The 15-gallon drums are indicated thereon by internal tracking number 1004021000. This sale or distribution is further documented by Complainant's Exhibit 42, the affidavit of Nick Graber of Graber Equipment, in which he attests to the purchase by Graber Equipment of a quantity of FRM CHLOR 1250 on or about October 13, 2008. Furthermore, as noted above, Respondent FRM has already admitted to the sales transaction alleged in Count 6 of the instant matter in the Answers to the First and Second Amended Complaints filed in *In re FRM Chem, et al.*, Docket No. FIFRA-07-2008-0035, where it states merely that it "disputes that date of this transaction," and argues that the date of the transaction was in fact October 7, 2008. *See* Answers of

Respondent FRM in *In re FRM Chem, et al.*, Docket No. FIFRA-07-2008-0035, at Page 6.

- Count 7: The sale or distribution of FRM CHLOR 1250 alleged in Count 7 is documented by Complainant's Exhibit 44, FRM Invoice No. 35782, which documents the shipment to Graber Equipment of four 5-gallon drums of a product identified thereon as "SODIUM HYPO," on or about November 26, 2008. As with the sale or distribution of the 5-gallon drums of FRM CHLOR 1250 alleged in Count 4 above, the product is identified thereon by internal tracking number 1004011000. Products shipped by FRM and other companies operating at 50-60 Hi-Line Drive in Union, Missouri that are identified by a tracking number with the prefix "1004-" are FRM CHLOR 1250, as explained in greater detail below. *See* Affidavit of Mark Nachreiner, attached hereto. This sale or distribution is further documented by Complainant's Exhibit 42, the affidavit of Nick Graber of Graber Equipment, in which he attests to the purchase by Graber Equipment of a quantity of a 12.5% sodium hypochlorite disinfectant from FRM on or about November 26, 2008. Furthermore, as noted above, Respondent FRM has already admitted to the sales transaction alleged in Count 7 of the instant matter in the Answers to the First and Second Amended Complaints filed in *In re FRM Chem, et al.*, Docket No. FIFRA-07-2008-0035. *See* Answers of Respondent FRM in *In re FRM Chem, et al.*, Docket No. FIFRA-07-2008-0035, at Page 7.

Further Argument as to Count 7

In the Answers to the First and Second Amended Complaints filed in the related matter of *In re FRM Chem, et al.*, Docket No. FIFRA-07-2008-0035, FRM denies Complainant's

allegation that it sold or distributed FRM CHLOR 1250 to Graber Equipment on or about November 26, 2008, 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 Answers filed in the related matter of *In re FRM Chem, et al.*, Docket No. FIFRA-07-2008-0035, 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 G. 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 in the related matter of *In re FRM Chem, et al.*, Docket No. FIFRA-07-2008-0035, which violations were admitted by FRM Chem in its Answers thereto 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 C. 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 in the related matter of *In re FRM Chem, et al.*, Docket No. FIFRA-07-2008-0035, which are violations are admitted by FRM Chem in its Answers in that matter 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 specific 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 7 of the instant matter and Count 58 of the related matter of *In re FRM Chem, et al.*, Docket No. FIFRA-07-2008-0035. *See* Complainant's Prehearing Exchange Exhibits 25, 46, 47, and 50 (the latter three are evidence, respectively, for Counts 1, 2, and 4 of the instant matter). Moreover, further underscoring the fact that Respondent FRM 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 Respondents, it is clear that Respondents used "Hypochlorite Solution" and "SODIUM HYPO" interchangeably with FRM CHLOR 1250 on its invoices and bills of lading to indicate a 12.5% sodium hypochlorite disinfectant pesticide. 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)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) was committed by FRM 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 7 of the First Amended Complaint in the instant matter.

The McFleeg Inventory Control Report and FRM invoices 35522, 35567, 35684, 35539, 35690, 35672, and 35782, documenting the distributions of FRM CHLOR 1250 alleged in Counts 1 through 7 of the First Amended Complaint, are included in Complainant's Prehearing Exchange as Exhibits 6, 43, 44, and 46 through 50, inclusive, and have all been stipulated into

evidence by the parties. See Joint Prehearing Stipulations at Page 2. The other documents referenced above are also in the Court's record.

d. The Pesticide at Issue is Unregistered

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

1. *In my position as a case review officer, I regularly use the Office of Pesticide Programs Information Network (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.*

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

In sum, the product FRM CHLOR 1250, distributed by Respondent FRM in seven separate transactions between January 8, 2007, and November 26, 2008, was not properly registered pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a, at the time of any of the alleged transactions. Accordingly, Complainant submits that, for Counts 1 through 7, it has established

Respondent FRM'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 seven transactions; and (4) the pesticide at issue is "unregistered."

2. Evidence Clearly Establishes Respondent Keith G. Kastendieck's Personal Liability as to the 2 violations of FIFRA Section 12(a)(1)(A) in Counts 6 and 7

Liability for the Corporate Respondent FRM Chem, Inc. has been established for the violations alleged in Counts 1 through 7 above. However, FRM Chem, Inc., was administratively dissolved as a corporation by the State of Missouri on July 1, 2008. *See Joint Prehearing Stipulations at Page 2, Paragraph 3.* The sales or distributions alleged in Counts 6 and 7 of the First Amended Complaint occurred after the corporation FRM Chem, Inc. was administratively dissolved.

Under Missouri law, at section 351.486.3, RSMo, a corporation that has been administratively dissolved "continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under section 351.476 [of the Missouri statutes] and notify claimants under sections 351.478 and 351.482 [of the Missouri statutes], and *any officer or director who conducts business on behalf of a corporation so dissolved except as provided in this section shall be personally liable for any obligation so incurred.*" (emphasis added) Section 351.476 limits a corporation's post-dissolution activities to "winding up" or liquidation of the business, and similarly expressly provides that "any ... officer or director who conducts business on behalf of the corporation except as provided in this section

shall be personally liable for any obligation so incurred.” Sec. 351.476.2(3) RSMo 2009. *See Asaro v. Div. of Empl. Security, State of Missouri*, 32 S.W.3d 623, at 626 (Mo. App. W.D. 2000) (upholding state Labor and Industrial Relations Commission determination that petitioner was president of corporation and that he carried on business of corporation after it had been administratively dissolved, as required to hold petitioner personally liable for corporation’s postdissolution debts).

As explained below, Keith G. Kastendieck, in his position as officer, director, and manager for the businesses at the facility shared by FRM and other businesses at 50-60 Hi-Line Drive in Union, Missouri, was responsible for the sales and distributions of FRM CHLOR 1250 that occurred after the administrative dissolution of FRM Chem, Inc. on July 1, 2008, and otherwise satisfies the elements of a violation under FIFRA 12(a)(1)(A), and accordingly is personally liable for the violations alleged in Counts 6 and 7 of the First Amended Complaint.

a. Respondent Keith G. Kastendieck is a “Person”

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.” Respondent Keith G. Kastendieck is an individual and therefore a “person” for the purposes of FIFRA.

b. FRM CHLOR 1250 is a “Pesticide”

As demonstrated above, FRM CHLOR 1250 is a pesticide as that term is defined in FIFRA.

c. Respondent Keith G. Kastendieck is Responsible for the Distribution or Sale of FRM CHLOR 1250 Alleged in Counts 6 and 7

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.”

Counts 6 and 7 allege sales or distributions of the unregistered pesticide product FRM 1250 by Respondent FRM Chem, Inc., to Graber Equipment on or about October 13, 2008 and November 26, 2008, respectively. As noted above, in its Answers to the First and Second Amended Complaints filed in the related case, *In re FRM Chem, Inc.*, Docket No. FIFRA-07-2008-0035, Respondent FRM admitted to the sales and distributions of the product in Counts 6 and 7. *See* Answers of Respondent FRM in *In re FRM Chem, et al.*, Docket No. FIFRA-07-2008-0035, at Pages 6-7.

Complainant requests the Court to take notice of the following facts:

- FRM Chem, Inc. was administratively dissolved by the State of Missouri as of July 1, 2008. *See* Joint Prehearing Stipulations at Page 2, Paragraph 3; Complainant’s Rebuttal Prehearing Exchange Attachment A (stipulated into evidence by all parties in the Joint Prehearing Stipulations).
- Keith G. Kastendieck is the corporate Vice-President of FRM Chem, Inc., as well as a principal stockholder and member of the board of directors of FRM Chem, Inc. *See* Joint Prehearing Stipulations at Page 2, Paragraph 2, and Page 3, Paragraph 12; Complainant’s Rebuttal Prehearing Exchange Attachment A (stipulated into evidence by all parties in the Joint Prehearing Stipulations).
- Keith G. Kastendieck, at all times relevant to the Counts alleged in the Complaint, was

employed as the plant manager of FRM Chem, Inc. and the other businesses located at 50 and 60 Hi-Line Drive, in Union, Missouri. *See* Joint Prehearing Stipulations at Page 3, Paragraph 13.

- Keith G. Kastendieck, in a written statement on October 8, 2008, represented that he was part owner of the businesses located at 50 and 60 Hi-Line Drive in Union, Missouri, including FRM Chem, Inc., and responsible for the information collected that day, including information and shipping documents pertaining to sales of FRM CHLOR 1250 by FRM Chem, Inc., and other entities. *See* Complainant's Prehearing Exchange Exhibit 2c.
- FRM Chem, Inc. lists no paid employees for the year 2008 in its Financial Data Request Form provided to EPA in February of 2010. *See* Complainant's Rebuttal Prehearing Exchange Attachment J, Page 10 (stipulated into evidence by all parties in the Joint Prehearing Stipulations).
- Karlan C. Kastendieck, the sales manager and a corporate officer, shareholder, and director of FRM Chem, Inc., was no longer employed by FRM Chem after August of 2008. *See* Respondent Karlan C. Kastendieck's Prehearing Exchange, filed on or about September 1, 2010.
- Raymond E. Kastendieck, owner and corporate officer, shareholder, and director of FRM Chem, Inc., is retired. *See* Letter received July 27, 2009 (construed as Answer to the original Complaint in *In re FRM Chem, et al.*, Docket No. FIFRA-07-2008-0035, and filed July 28, 2009).
- An entity holding itself out as FRM Chem, Inc., distributed the 12.5% sodium

hypochlorite disinfectant FRM CHLOR 1250 to Graber Equipment on or about October 13, 2008, and November 26, 2008, both distributions which occurred after FRM Chem, Inc. was administratively dissolved on July 1, 2008. *See* Complainant's Prehearing Exchange Exhibits 42, 43 and 44.

Complainant submits that the record shows that Keith G. Kastendieck, in his position as Vice-President and director, as well as plant manager, and part owner of FRM Chem, Inc., conducted business on behalf of FRM Chem, Inc. on two occasions, on or about October 13, 2008, and on or about November 26, 2008, after FRM Chem, Inc. had been administratively dissolved by the State of Missouri. Complainant further submits that the sales or distributions of products to Graber Equipment alleged in Counts 6 and 7 of the First Amended Complaint do not constitute business "appropriate to wind up and liquidate [a corporation's] business and affairs,"<sup>4</sup> as contemplated in section 351.476.1, RSMo, and thus FRM Chem, Inc., as an administratively-dissolved Missouri corporation, was precluded from engaging in such sales or distributions by the provisions of section 351.486.3, RSMo.

Accordingly, Complainant submits that Keith G. Kastendieck, as an officer and director of the administratively-dissolved corporation FRM Chem, Inc., and as the owner and plant manager for FRM Chem, Inc. and the other businesses at 50-60 Hi-Line Drive in Union, Missouri, is personally liable for the violations alleged in Counts 6 and 7 of the First Amended

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<sup>4</sup> Further evidence that FRM Chem, Inc. continued to engage in "business as usual" well after its July 1, 2008, administrative dissolution is given by Complainant's Prehearing Exchange Exhibit 49, an FRM Chem, Inc. sales invoice documenting sales of products to McFleeg on or about February 16, 2009, and Exhibit 55, which is a photograph of the FRM Chem, Inc.-manufactured product "Cir-Clean" shipped to McFleeg in February of 2009, with an expiration date of February 2011, and a manufacturing date of February 12, 2009. *See also* Complainant's Prehearing Exchange Exhibit 1i (Statement by Karlan Kastendieck explaining the manufacturing code used by FRM, as seen in the "Cir-Clean" photograph in Exhibit 55).

Complaint.

d. The Pesticide at Issue is Unregistered

As demonstrated above, the pesticide product FRM CHLOR 1250 was unregistered at the time of the sales or distributions alleged in the First Amended Complaint.

In sum, the product FRM CHLOR 1250, distributed by Respondent FRM in two separate transactions in October and November of 2008, as alleged in Counts 6 and 7 of the First Amended Complaint, was not properly registered pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a, at the time of any of the alleged transactions. Furthermore, the corporation FRM Chem, Inc., was administratively dissolved by the State of Missouri on July 1, 2008, and, pursuant to section 351.486.3, RSMo, it was thereafter precluded from conducting any business except that necessary to wind up and liquidate its business and affairs. Accordingly, Complainant submits that, for Counts 6 and 7, it has established Respondent Keith G. Kastendieck'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) As Vice President of FRM Chem, Inc., and as the owner and plant manager for FRM Chem, Inc. and the other businesses at 50-60 Hi-Line Drive in Union, Missouri, Keith G. Kastendieck "distributed or sold" the pesticide at issue in each of two transactions; and (4) the pesticide at issue is "unregistered."

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

Respondents argue that: (1) Corporate Respondents filled out EPA pesticide reporting

forms<sup>5</sup> and submitted them under the name of FRM Chem, Inc., in several years notifying EPA that they produced FRM CHLOR 1250, and both Corporate and Individual Respondents state that they were never notified by EPA that the registration for FRM CHLOR 1250 had been cancelled, which Complainant construes as a laches defense; and (2) the penalties and fines sought are not appropriate. As will be discussed below, even if all of Respondents' factual allegations were true, neither of the arguments raised by Respondents raise a genuine issue of material fact concerning Respondents' liability.

1. Laches Defense is Not Available

In the Corporate Respondents' Answer, Corporate Respondents raise as an affirmative defense that they with FRM "filed EPA Pesticide Report Forms [...] under the name of FRM CHEM, INC. with the EPA," reporting "each and every year to EPA the amount of FRM CHLOR 1250 produced and sold."<sup>6</sup> See Corporate Respondents' Answer at Page 2. Moreover, both Corporate Respondents and Individual Respondents state that EPA never notified the Corporate Respondents or FRM Chem, Inc. that the registration of FRM CHLOR 1250 was cancelled. See Corporate Respondents' Answer at Pages 2-3, and Individual Respondents'

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<sup>5</sup> Pursuant to Section 7 of FIFRA, 7 U.S.C. § 136e, a pesticide producer must submit pesticide production reports to EPA annually. Respondents are referencing the submission by Corporate Respondents and FRM of the reports, as noted on Page 2 of Corporate Respondents' Answer to the First Amended Complaint.

<sup>6</sup> Complainant notes that the last pesticide report form allegedly submitted by Corporate Respondents in this and the other three consolidated matters to report production of FRM CHLOR 1250 and STERI-DINE DISINFECTANT was in 2007. However, Respondent FRM Chem, Inc. and other businesses run by the Kastendiecks continued to produce and sell FRM CHLOR 1250 and STERI-DINE DISINFECTANT well into 2008, as shown by the evidence supporting Counts 3 and 5-7 of the instant matter as documented in this motion, and as alleged in Counts 6, 52, 57, and 58 of *In re FRM Chem, et al.*, Docket No. FIFRA-07-2008-0035 (the transactions which were admitted by Respondent FRM in its Answer); Counts 5 through 9 of *In re Advanced Products Technology, Inc., et al.*, Docket No. FIFRA-07-2008-0035; and Counts 2-5 of *In re Custom Compounds, Inc., et al.*, Docket No. FIFRA-07-2009-0042

Answer at Page 4. Complainant construes this argument to be a laches defense, and submits that such an affirmative defense is clearly invalid. It is irrelevant as to the issue of Respondents' liability on the counts alleged whether Respondent may have submitted forms to EPA reporting the production of FRM CHLOR 1250. The defense of laches, like other equitable defenses, is unmistakably not available to Respondents as a defense against liability where the Federal Government is seeking to enforce laws that protect the environment. It is well-settled that equitable defenses cannot "be applied to frustrate the purpose of [federal] laws or to thwart public policy." Pan-American Petroleum and Transp. Co. v. United States, 273 U.S. 456, 506 (1927). See also Kelley v. Thomas Solvent Co., 714 F. Supp. 1439, 1451 (W.D. Mich. 1989) (applying the rule to laches). Similarly, "equitable defenses \*\*\* cannot be asserted against the government when it acts in its sovereign capacity to protect the public health and safety." United States v. Stringfellow, 661 F. Supp. 1053, 1062 (C.D. Cal. 1987).

Therefore, the Court should strike this affirmative defense.

2. Penalty Amount is Not Relevant to Liability

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

Therefore, the Court should strike this affirmative defense.

D. Conclusion

In sum, there is overwhelming evidence demonstrating that Respondent FRM distributed an unregistered pesticide on seven separate occasions between January 8, 2007, 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 1 through 7. Moreover, since the sales or distributions by FRM Chem, Inc. alleged in Counts 6 and 7 occurred after FRM was administratively dissolved as a corporation by the State of Missouri, Keith G. Kastendieck, by his actions as a corporate officer and director of FRM and as plant manager for FRM and associated businesses, is personally liable for the violations alleged in Count 6 and 7, pursuant to Missouri state law governing administrative dissolution of corporations. There is no genuine issue of material fact regarding the liability of either FRM or Keith G. Kastendieck 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 FRM 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 seven separate transactions between January 8, 2007, and November 26, 2008, as alleged in Counts 1 through 7, Respondent FRM distributed or sold FRM CHLOR 1250.
3. FRM Chem, Inc. was administratively dissolved by the State of Missouri on July 1, 2008.
4. Keith G. Kastendieck is and was, at all times relevant to the Counts alleged in the Complaint, a corporate officer and director of FRM Chem, Inc. and the plant

manager for FRM Chem, Inc., and other businesses located at 50-60 Hi-Line Drive in Union, Missouri.

5. FRM CHLOR 1250 is used to prevent, destroy, repel, and mitigate microorganisms that are deleterious to man or the environment.
6. At all times relevant to the Counts alleged in the Complaint, the product FRM CHLOR 1250 was not registered with the EPA.

B. Proposed Conclusions of Law

1. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), and 40 C.F.R. §§ 152.5(b) and 152.5(d) set forth a definition of a “pest”; Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. § 152.3 set forth a definition of a “pesticide.”
2. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), provides that it is unlawful for any “person” to sell or distribute a “pesticide” which is not registered with EPA pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a.
3. Respondent 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. Respondent Keith G. Kastendieck, an individual, is a “person” as that term is defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).
5. FRM CHLOR 1250 is a “pesticide” as that term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).
6. Each of the transactions by Respondent FRM Chem, Inc. alleged in Counts 1 through 7 of the First Amended Complaint was a sale or distribution of an unregistered pesticide.

7. Each of the transactions by Respondent FRM Chem, Inc. alleged in Counts 1 through 7 of the First Amended Complaint constitutes a violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).
8. Under Missouri law, at section 351.486.3, RSMo, a corporation that has been administratively dissolved “continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under section 351.476 [of the Missouri statutes] and notify claimants under sections 351.478 and 351.482 [of the Missouri statutes], and any officer or director who conducts business on behalf of a corporation so dissolved except as provided in this section shall be personally liable for any obligation so incurred.”
9. The sales transactions by FRM Chem, Inc. alleged in Counts 6 and 7 do not constitute “business ... appropriate to wind up and liquidate [an administratively-dissolved corporation’s] business and affairs,” as contemplated by section 351.476.1, RSMo.
10. Since FRM Chem, Inc., was administratively dissolved at the time of the transactions alleged in Counts 6 and 7 of the First Amended Complaint, and since the transactions alleged in Counts 6 and 7 of the First Amended Complaint are beyond the scope of permitted activities to “wind up and liquidate” FRM Chem, Inc.’s business and affairs, as contemplated in section 351.476.1, RSMo, Keith G. Kastendieck, as a corporate officer and director, and as the plant manager for FRM Chem, Inc., is personally liable for the violations alleged in Counts 6 and 7.

## 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 of an unregistered pesticide in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), on seven separate occasions, as alleged in Counts 1 through 7 of the First Amended Complaint, and that Respondent Keith G. Kastendieck 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 two separate occasions, as alleged in Counts 6 and 7. Complainant further requests this Court find that Respondents' affirmative defenses raised in their Answers do not raise any genuine issues of material fact relevant to their liability for the violations alleged in Counts 1 through 7 of the Complaint.

9/3/10  
Date

Respectfully submitted,

  
Chris R. Dudding

  
Kent Johnson

Assistant Regional Counsels  
U.S. EPA, Region 7

## LIST OF EXHIBITS

1. Affidavit of Mark Lesher
2. Affidavit of Mark Nachreiner
3. Sections 351.476 and 351.486, RSMo

## AFFIDAVIT OF MARK NACHREINER

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

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

FURTHER the affiant sayeth not.

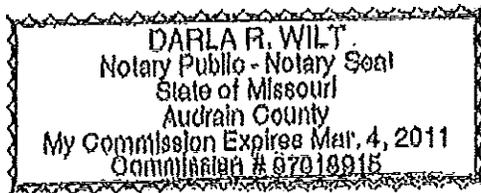
By: Mark Nachreiner

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

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

Darla R. Witt  
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 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 Appl. Exp. 7/23/11

# Missouri Revised Statutes

## Chapter 351 General and Business Corporations Section 351.476

August 28, 2009

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### Effect of dissolution.

351.476. 1. A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:

- (1) Collecting its assets;
- (2) Disposing of its properties that will not be distributed in kind to its shareholders;
- (3) Discharging or making provision for discharging its liabilities;
- (4) Distributing its remaining property among its shareholders according to their interests; and
- (5) Doing every other act necessary to wind up and liquidate its business and affairs.

2. Dissolution of a corporation does not:

- (1) Transfer title to the corporation's property;
- (2) Prevent transfer of its shares or securities, although the authorization to dissolve may provide for closing the corporation's share transfer records;
- (3) Subject its directors or officers to standards of conduct different from those applicable to directors and officers of a corporation which has not been dissolved; provided that any such officer or director who conducts business on behalf of the corporation except as provided in this section shall be personally liable for any obligation so incurred;
- (4) Change quorum or voting requirements for its board of directors or shareholders; change provisions for selection, resignation, or removal of its directors or officers or both; or change provisions for amending its bylaws;
- (5) Prevent commencement of a proceeding by or against the corporation in its corporate name;
- (6) Abate or suspend a proceeding pending by or against the corporation on the effective date of dissolution;
- (7) Terminate the authority of the registered agent of the corporation; or
- (8) Make available for use by others its corporate name for a period of one year from the effective date of its dissolution.

(L. 1990 H.B. 1432)

(1996) Statute is remedial and may be applied retroactively. *Gunter v. Bono*, 914 S.W.2d 437 (Mo.App.E.D.).

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Missouri General Assembly

# *Missouri Revised Statutes*

## **Chapter 351 General and Business Corporations Section 351.486**

August 28, 2009

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### **Procedure and effect of administrative dissolution.**

- 351.486. 1. If the secretary of state determines that one or more grounds exist under section 351.484 for dissolving a corporation, he shall serve the corporation with written notice of his determination under section 351.380.
2. If the corporation does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the secretary of state that each ground determined by the secretary of state does not exist within sixty days after service of the notice is perfected by posting with the United States Postal Service, the secretary of state shall dissolve the corporation by signing a certificate of dissolution that recites the ground or grounds for dissolution and its effective date. The secretary of state shall file the original of the certificate and serve\* a copy on the corporation under section 351.380 by posting with the United States Postal Service.
3. A corporation administratively dissolved continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under section 351.476 and notify claimants under sections 351.478 and 351.482, and any officer or director who conducts business on behalf of a corporation so dissolved except as provided in this section shall be personally liable for any obligation so incurred.
4. The administrative dissolution of a corporation does not terminate the authority of its registered agent.

(L. 1990 H.B. 1432)

\*Word "service" appears in original rolls.

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Missouri General Assembly

CERTIFICATE OF SERVICE

I hereby certify that on this 3<sup>rd</sup> day of Sept, 2010, I hand-delivered the original and one true copy of this Motion to the Regional Hearing Clerk, and sent one true and correct copy:

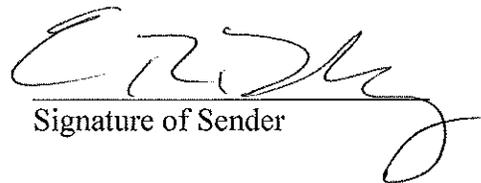
via UPS, to:

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

via UPS, to:

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

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

  
Signature of Sender