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5  
 6 UNITED STATES  
 ENVIRONMENTAL PROTECTION AGENCY  
 7 REGION IX  
 8

9 In the Matter of:

Docket No. FIFRA-09-2008-0025

10 AbTech Industries, Inc.,

**ANSWER AND REQUEST FOR  
HEARING**

11 Respondent.  
12

GALLAGHER & KENNEDY, P.A.  
 2575 EAST CAMELBACK ROAD  
 PHOENIX, ARIZONA 85016-9225  
 (602) 530-8000

13 Respondent AbTech Industries, Inc. ("AbTech"), through undersigned counsel,  
 14 hereby answers the Complaint in this case. AbTech's responses to each of the numbered  
 15 paragraphs of the Complaint are set forth below:  
 16

17 I. AUTHORITY AND PARTIES

- 18 1. Paragraph 1 of the Complaint requires no response.
- 19 2. AbTech is without sufficient information to admit or deny the allegations in  
 20 Paragraph 2 of the Complaint.
- 21 3. AbTech admits the allegations of Paragraph 3 of the Complaint.  
 22

1 **II. GENERAL ALLEGATIONS**

2 4. AbTech admits the allegations of Paragraph 4 of the Complaint.

3 5. In response to Paragraph 5 of the Complaint, AbTech admits only that it sold  
4 products known as "Smart Sponge Plus" in the period from April to November 2007 to  
5 persons in the United States and denies the remaining allegations of Paragraph 5.

6 6. In response to Paragraph 6 of the Complaint, AbTech alleges that to the  
7 extent any of the allegations are true, the products fell within the "treated articles"  
8 exemption contained in 40 C.F.R. § 152.25(a), or are otherwise not subject to regulation  
9 under FIFRA. AbTech denies the remaining allegations of Paragraph 6. AbTech  
10 affirmatively alleges that it consulted with employees at EPA who are knowledgeable  
11 regarding FIFRA, registration requirements under FIFRA, and the treated articles  
12 exemption. Those employees informed AbTech that its products would qualify for the  
13 treated articles exemption when sold, distributed and/or used for the purposes alleged in  
14 the Complaint.

15 7. AbTech is without sufficient information to respond to the allegations of  
16 Paragraph 7.

17 8. AbTech admits that the quoted definition of "pesticide" in Paragraph 8 is  
18 accurate.  
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1           16. In response to Paragraph 16, AbTech admits that it sold Smart Sponge Plus  
 2 products to Fire Prevention Services on or about the referenced date and denies the  
 3 remaining allegations of Paragraph 16.

4           17. AbTech denies the allegations of Paragraph 17.

5                           COUNTS 11 - 12: Sale and/or Distribution of an Unregistered Pesticide

6           18. In response to Paragraph 18, AbTech incorporates its responses to  
 7 Paragraphs 1 through 11 of the Complaint by reference.

8           19. In response to Paragraph 19, AbTech admits that it sold Smart Sponge Plus  
 9 products to Hydrophix on or about the referenced date and denies the remaining  
 10 allegations of Paragraph 19.

11           20. AbTech denies the allegations of Paragraph 20.

12   IV. PROPOSED CIVIL PENALTY

13           21. In response to Section IV of the Complaint, AbTech denies that the specified  
 14 proposed civil penalty is appropriate under the circumstances and, if any alleged violations  
 15 are proven, requests a hearing regarding full consideration of the relevant factors regarding  
 16 a penalty assessment.  
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18   V. NOTICE OF OPPORTUNITY TO REQUEST A HEARING

19           22. AbTech requests a hearing as provided in Section V of the Complaint.

20           23. AbTech denies all allegations of the Complaint not expressly admitted  
 21 herein.  
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DATED this 21st day of January, 2009.

GALLAGHER & KENNEDY, P.A.

By:   
Jerald C. Thompson  
Dalva L. Moellenberg  
2575 East Camelback Road  
Phoenix, Arizona 85016-9225  
Attorneys for Respondent

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CERTIFICATE OF SERVICE

I certify that on January 21, 2009, the original and one copy of the foregoing Answer and Request for Hearing was sent via overnight mail, fax, and via electronic mail to:

Danielle Carr  
Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region IX  
75 Hawthorne Street  
San Francisco, California 94105

and that a true and correct copy of the foregoing Answer and Request for Hearing was sent via overnight mail, fax, and via electronic mail to:

Edgar P. Coral  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region IX  
75 Hawthorne Street  
San Francisco, California 94105

Dated: 1/21/09

By: *Carly E. Hedrick*

2007966

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PLEASE SEE THE ATTACHED ANSWER TO BE FILED ON BEHALF OF ABTECH INDUSTRIES, INC..

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