

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
901 NORTH 5th STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

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| IN THE MATTERS OF |) | |
| |) | |
| FRM Chem, Inc. |) | Docket Nos. FIFRA-07-2008-0035 |
| Advanced Products Technology, Inc. |) | FIFRA-07-2008-0036 |
| Synisys, Inc. |) | FIFRA-07-2009-0041 |
| Custom Compounders, Inc. |) | FIFRA-07-2009-0042 |
| |) | |
| |) | |
| Respondents |) | |

COMPLAINANT'S REPLY TO RESPONDENTS' REPLY TO
COMPLAINANT'S MOTION TO AMEND COMPLAINTS

The Administrator's Delegated Complainant (Complainant), by undersigned Counsel, hereby replies to Respondents' Reply to Complainant's Motion to Amend Complaints and for Other Discovery Pursuant to 40 C.F.R. § 22.19(e), as set forth below:

By its instant response, Complainant refiles and adopts its original Reply to Respondent's Reply to Complainant's Motion to Amend Complaints and for Other Discovery Pursuant to 40 C.F.R. § 22.19(e) which was filed on April 6, 2010.

The filing of Respondents' Reply to Complainant's motion does not change Complainant's original position. As before, in attempting to characterize Complainant's

proposed amendments to the Complaints as futile¹, Respondents misstate the applicable legal standard as one where their liability is predicated on Complainant's ability to prove Respondents' knowledge that they were distributing products whose registration had been cancelled. This characterization is incorrect.

As noted in Complainant's previous filing, FIFRA is a strict liability statute. Pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), it is unlawful for any person to sell to any person "any pesticide that is not registered under section 136a of this title or whose registration has been canceled or suspended." Respondents' assertions regarding their purported knowledge of the registration status of the products at issue are irrelevant to the violations charged, as such knowledge is not an element of the violations alleged. What EPA must prove is (1) that the products are pesticides, (2) that the products were sold or distributed by Respondents, and (3) that at the time of sale or distribution they was not registered pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a.

Leave to amend is futile if the complaint would not survive a motion to dismiss or if the claim is frivolous. E.g. *Dow Corning Corporation v. Chemical Design, Inc.*, 3 F. Supp. 2d 361, 364 (W.D.N.Y. 1998); *Monroe v. Williams*, 705 F. Supp. 621, 623 (D.D.C. 1998); *Cowles v.*

¹ The Supreme Court has enumerated in *Foman v. Davis*, 371 U.S. 178 (1962), with regard to Rule 15(a) of the Federal Rules of Civil Procedure (FRCP), circumstances in which the amendment of pleadings is inappropriate. The EAB has specifically adopted these FRCP limits for application in environmental administrative proceedings. *Port of Oakland and Great Lakes Dredge Company*, 4 EAD 170, 205 (E.A.B. 1992); *Asbestos Specialists, Inc.* 4 E.A.D. 819, 827-830 (E.A.B. 1993). Such circumstances include: when such amendment (1) would result in undue delay, or (2) stems from bad faith or a dilatory motive on the part of the movant, or (3) there has been a repeated failure to cure deficiencies by previously allowed amendment of pleadings, or (4) granting leave would result in undue prejudice to the opposing party, or (5) the amendment is futile. *Foman*, 371 U.S. at 182. Respondent's argument that the amendment would be futile is based on a misstatement of the applicable law, and none of the other four *Foman* circumstances apply to the motion under consideration. "In the absence of any apparent reasons for denial of the motion to amend, such as undue delay, undue prejudice, bad faith, or futility of the amendment, leave to amend the pleading shall be freely given." *Dow Corning Corporation*, 3 F. Supp 2d at 364.

Cowles v. Yesford, 2001 WL 179928 *3 (S.D.N.Y. 2001); *Becker v. University of Nebraska*, 191 F.3d 904, 908 (8th Cir. 1999). The “[i]likelihood of success on the new claim or defenses is not a consideration for denying leave to amend unless the claim is clearly frivolous.” *Id.*

Complainant’s Motion to Amend is not futile under this standard. Complainant sets forth allegations which are not frivolous and are sufficient to constitute a colorable claim against each of the Respondents. Therefore, none of the circumstances which would justify the denial of Complainant’s Motion is present in this case. Complainant’s arguments are not futile and do not stem from bad faith or dilatory motive, there is no danger of undue delay or prejudice to the Respondents, and there have been no prior attempts to amend the Complaints in which EPA could have sought these proposed additions to the Complaints.²

Complainant further notes that the allegations set forth in the proposed amended Complaints are, for all intents and purposes, identical to the allegations set forth in the original Complaints.³ To the extent that the amendments proposed simply add parties to the above-captioned matters, they do not change the nature of the counts alleged in the original Complaints.

² Complainant notes that the proposed addition of Keith G. and Karlan C. Kastendieck as parties to the four above-captioned matters is based in part on the financial disclosure statements provided by the four corporate Respondents to Complainant in February of 2010, in which the Kastendiecks’ relationship to the four Respondents was clarified as being not just employer-employee, but also as one in which they (along with at least two other Kastendieck family members) served as primary shareholders and creditors for each Respondent, providing lines of credit that allowed the four corporate Respondents to continue operating with little to no actual operating capital.

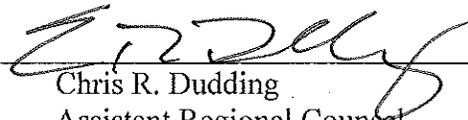
As noted in *Safe & Sure Products, Inc. and Lester J. Workman*, Docket No. I.F. & R.-04-907003-C, 1998 WL 422206, June 26, 1998, precedent exists for holding corporate officers personally liable for acts committed in violation of FIFRA, where an individual, as a corporate officer, “‘did participate fully in the violation of selling an unregistered pesticide,’ and accordingly was liable for the violation.” *Id.*, quoting from *Roger Antkiewicz and Pest Elimination Products of America, Inc.*, Docket No. I.F. & R.-V-002-95, 1997 FIFRA LEXIS 35, September 25, 1997, at *12, *13

³ The only exception being the five new counts Complainant proposes to be added to the Complaint in the matter of Advanced Products Technology, Inc. (Docket No. FIFRA-07-2008-0036), for multiple sales of an unregistered pesticide product in 2009 that first became known to Complainant on or about July 24, 2009, after the June 26, 2009 filing of the original Complaint in that matter. An amended Complaint has not yet been filed in the matter of Advanced Products Technology, Inc.

Given this fact, Complainant respectfully suggests that Respondents' argument regarding the applicable legal standard is not relevant to the question of whether the Motion to Amend the Complaints should be granted, and would be more appropriately set forth in a motion to dismiss.

In light of the above, and in light of arguments set forth in the motions and supporting documentation filed on March 15, 2010 and April 26, 2010, Complainant respectfully requests that leave be granted to file the proposed amended Complaints appended to the April 26, 2010 motion, adding FRM Chem, Inc. as a Respondent in the matter of Custom Compounders, Inc. (Docket No. FIFRA-07-2009-0042), and Advanced Products Technology, Inc. as a Respondent in the matter of Synisys, Inc. (Docket No. FIFRA-07-2009-0042); adding Keith G. and Karlan C. Kastendieck as Respondents in all four above-captioned matters; and further amending the Complaint in the matter of Advanced Products Technology, Inc. (Docket No. FIFRA-07-2008-0036) to add five counts for multiple sales in 2009 of an unregistered pesticide identical in formulation and use to the cancelled FRM Chem, Inc. product FRM Chlor 1250, the subject of multiple other counts against the other three Respondents.

Respectfully submitted,



Chris R. Dudding
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 7
901 North 5th Street
Kansas City, Kansas 66101
(913) 551-7524

CERTIFICATE OF SERVICE

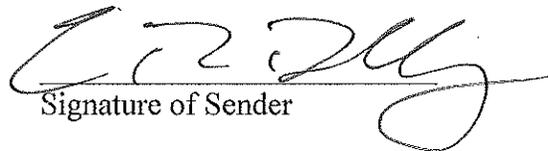
I hereby certify that on this 11th day of May, 2010, I hand-delivered the original and one copy of this document to the Regional Hearing Clerk, and sent one true and correct copy:

via Certified Mail, return receipt requested, and via email to:

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

via UPS, and via facsimile, to:

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


Signature of Sender