

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7

901 NORTH 5<sup>th</sup> STREET

KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR

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ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

IN THE MATTER OF	)	Docket No. FIFRA-07-2008-0036
	)	
Advanced Products Technology, Inc.,	)	COMPLAINANT'S SUPPLEMENTAL
Keith G. Kastendieck, and Karlan C.	)	MOTION FOR PARTIAL ACCELERATED
Kastendieck	)	DECISION ON LIABILITY
	)	
Respondents	)	

**I. INTRODUCTION**

Complainant, the United States Environmental Protection Agency, Region 7 ("EPA"), submits this Supplemental Motion For Partial Accelerated Decision On Liability as to Counts 5 through 9 in this matter, pursuant to 40 C.F.R. §§ 22.16 and 22.20. Complainant requests this Court to issue an Order finding that Respondent Advanced Products Technology, Inc. ("APT" or "Respondent") is liable for five violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 *et seq.*, as alleged in Counts 5 through 9 of the EPA's Complaint and First Amended Complaint. An accelerated decision as to APT's liability for these five counts is appropriate based on APT's Answer to the First Amended Complaint<sup>1</sup> and the Prehearing Exchanges filed in this matter, and other pertinent evidence documenting five violations of FIFRA. Neither APT's Answer nor its Prehearing Exchanges raises any genuine issue of material fact regarding liability.

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<sup>1</sup> APT filed out of time a joint Answer to the First Amended Complaint on or about August 9, 2010. Though counsel for the two named corporate respondents now also represents the two individual respondents, the individuals were not so represented at the time the Answer was filed.

## II. FACTUAL BACKGROUND

EPA filed its Complaint in this matter on June 6, 2009. The Complaint was subsequently amended once, on June 3, 2010, adding Counts 5 through 9, and adding two new respondents in addition to Respondent APT.<sup>2</sup> Copies of the Complaint and First Amended Complaint are in the Court's files and are not attached to this Motion.

Pursuant to 40 C.F.R. § 22.14(c), Respondent APT's Answer to the First Amended Complaint was due within 20 days after service of the amended complaint – in this case, by June 28, 2010. On August 3, 2010, Respondent APT had not yet filed an Answer, and Complainant accordingly filed on that date a Motion for Default as to Liability against Respondent APT as to Counts 5 through 9, which had been added in the First Amended Complaint. On or about August 9, 2010, Respondent APT filed out of time an Answer to the First Amended Complaint, restating its position as to Counts 1 through 4, and addressing the new Counts 5 through 9. On August 10, 2010, Complainant filed a Motion for Partial Accelerated Decision in this matter as to Counts 1 through 4. As Complainant's August 3, 2010, Motion for Default was denied by Order of the Court dated August 25, 2010, Complainant now submits the instant Supplemental Motion for Partial Accelerated Decision addressing Counts 5 through 9. In the interest of economy, Complainant incorporates by reference the lengthy factual background related in its August 10, 2010, Motion for Partial Accelerated Decision as to Counts 1 through 4.

On or about September 1, 2010, Respondent APT, jointly with the corporate respondents

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<sup>2</sup> The two individual respondents added to the First Amended Complaint, Keith G. Kastendieck and Karlan C. Kastendieck, though they are shareholders and officers of Respondent APT, are not subject to the present motion for partial accelerated judgment against Respondent APT.

in three other matters<sup>3</sup> with which the instant matter has been consolidated, filed a supplemental prehearing exchange. The two individual respondents also filed separate supplemental prehearing exchanges on that date.

This Motion will request the Court to grant an accelerated decision on liability in favor of the Complainant for each of the five counts alleged in the First Amended Complaint as Counts 5 through 9 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 APT, 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 five counts. Complainant will show that there can be no genuine issue or dispute that: (1) APT is a "person"; (2) SODIUM HYPOCHLORITE SOLUTION is a pesticide as defined by FIFRA and its implementing regulations; (3) APT distributed SODIUM HYPOCHLORITE SOLUTION on five separate occasions as alleged in Counts 5 through 9; and (4) at the times of the distributions alleged in Counts 5 through 9 of the Complaint, SODIUM HYPOCHLORITE SOLUTION 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 Respondent's APT's Answer to the First Amended Complaint, Complainant's and Respondents' Prehearing Exchanges, 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 to the First Amended Complaint and the Prehearing Exchanges, Respondent APT has failed to raise any genuine issues of material fact to

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<sup>3</sup> In the Matter of FRM Chem, Inc., Docket No. FIFRA-07-2008-0035; 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.

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

as to the 5 violations of FIFRA Section 12(a)(1)(A) in Counts 5 through 9

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 APT's liability for the five violations of this provision alleged in Counts 5 through 9, Complainant must establish that: (1) Respondent is a "person"; (2) Respondent "distributed or sold" the product at issue in each of five transactions; (3) the product at issue in each transaction is a "pesticide"; and (4) the pesticide at issue was "unregistered" at the time of each distribution or sale.

Complainant can establish the elements of the five violations through the admissions in APT's Answer and Prehearing Exchanges; by reference to documents provided to EPA by an APT customer, the Franklin County Humane Society, included in Complainant's Prehearing Exchange; 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 reference to other relevant documents in the record.

1. Respondent is a "Person"

Respondent APT admits in its Answer that it "was, at all times referred to in the Complaint, a Missouri corporation qualified to do business in the State of Missouri." *See* Answer at Page 2, paragraph 18). 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." APT is a corporation and therefore a "person" for the purposes of FIFRA.

2. Respondent Distributed or Sold SODIUM HYPOCHLORITE SOLUTION

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.”

APT, in its Answer to the First Amended Complaint, denies for each of Counts 5 through 9 that it sold or distributed a quantity of SODIUM HYPOCHLORITE SOLUTION to the Franklin County Humane Society. However, the alleged distributions are documented by Complainant's Supplemental Prehearing Exchange Exhibits 67 through 71, which are copies of Advanced Products Technology Packing Slips numbered 11354, 11355, 11364, 11376, and 11385, which have been stipulated into evidence by the parties' Joint Prehearing Stipulations, filed August 26, 2010.

A copy of the label for the APT product SODIUM HYPOCHLORITE SOLUTION was provided to EPA by APT on or about June 24, 2009. *See* SODIUM HYPOCHLORITE SOLUTION label, attached hereto. Each of the packing slips included as Exhibits 67 through 71 of Complainant's Prehearing Exchange was submitted to EPA by the Franklin County Humane Society on or about July 24, 2009. *See* Affidavit of Mark Leshner dated March 9, 2009, attached hereto. Each packing slip documents the distribution to the Franklin County Humane Society of one 55 gallon drum of a product identified as “SODIUM HYPO,” further identified thereon by the product tracking number 1004024000. The transactions are further documented by a photograph of the product label submitted to EPA by the Franklin County Humane Society on or about August 4, 2009, which corresponds to the label collected on June 24, 2009. *See* Complainant's Prehearing Exchange Exhibit 76. Accordingly, the five distributions of the

SODIUM HYPOCHLORITE SOLUTION are documented as follows:

As to Count 5: Complainant's Exhibit 67, APT Packing Slip No. 11354, dated January 27, 2009, documents the shipment to Franklin County Humane Society of one unit of Item No. 1004024000, described as "SODIUM HYPO 55 GAL DRUM."

As to Count 6: Complainant's Exhibit 68, APT Packing Slip No. 11355, dated February 3, 2009, documents the shipment to Franklin County Humane Society of one unit of Item No. 1004024000, described as "SODIUM HYPO 55 GAL DRUM."

As to Count 7: Complainant's Exhibit 69, APT Packing Slip No. 11364, dated March 25, 2009, documents the shipment to Franklin County Humane Society of one unit of Item No. 1004024000, described as "SODIUM HYPO 55 GAL DRUM."

As to Count 8: Complainant's Exhibit 70, APT Packing Slip No. 11376, dated May 27, 2009, documents the shipment to Franklin County Humane Society of one unit of Item No. 1004024000, described as "SODIUM HYPO 55 GAL DRUM."

As to Count 9: Complainant's Exhibit 71, APT Packing Slip No. 11385, dated July 14, 2009, documents the shipment to Franklin County Humane Society of one unit of Item No. 1004024000, described as "SODIUM HYPO 55 GAL DRUM."

3. The Product SODIUM HYPOCHLORITE SOLUTION is a "Pesticide"

The evidence in this matter overwhelmingly demonstrates that the product SODIUM HYPOCHLORITE SOLUTION distributed by APT is a pesticide, in that it is intended to be used to prevent, destroy, repel and/or mitigate microorganism that are deleterious to man or the environment. Complainant submits that the record shows that claims that SODIUM

HYPOCHLORITE SOLUTION can and should be used as a pesticide were made by APT in connection with its distribution, that its labeling states or implies that the product can or should be used as a pesticide, and that APT had actual or constructive knowledge that the substance would be used, or is intended to be used, for a pesticidal purpose. In the alternative, Complainant submits that the evidence demonstrates that the APT product SODIUM HYPOCHLORITE SOLUTION is the same product as the FRM Chem, Inc. (FRM) product FRM CHLOR 1250, which APT, in its Answer to the First Amended Complaint, admits to be a pesticide.

- a. APT (1) Distributed SODIUM HYPOCHLORITE SOLUTION in Connection with Claims that it Can or Should be Used as a Pesticide; and/or (2) Had Actual or Constructive Knowledge that the Product Would be Used, or is Intended to be Used, for a Pesticidal Purpose

The regulation at 40 C.F.R. § 152.15 states, in relevant part, that:

*A substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if:*

*(a) The person who distributes or sells the substance claims, states, or implies (by labeling or otherwise):*

*(1) That the substance (either by itself or in combination with any other substance) can or should be used as a pesticide; or*

\* \* \*

*(c) The person who distributes or sells the substance has actual or constructive knowledge that the substance will be used, or is intended to be used, for a pesticidal purpose.*

Complainant submits that the record in this matter shows that Respondent APT, through its representative, distributed the product SODIUM HYPOCHLORITE SOLUTION with express statements that the product was to be used as an antimicrobial pesticide by the recipient, the Franklin County Humane Society. Complainant further submits that the label of the product SODIUM HYPOCHLORITE SOLUTION states or implies that the product can or should be used as a pesticide. Finally, Complainant submits that Respondent APT had actual or constructive knowledge that the product SODIUM HYPOCHLORITE SOLUTION, distributed to the Franklin County Humane Society, would be used for a pesticidal purpose.

On or about July 24, 2009, EPA received a response to an information request letter and questionnaire sent to the Franklin County Humane Society, in which the Humane Society confirmed that it was the recipient on multiple occasions of a 12.5% sodium hypochlorite solution product. *See* Complainant's Prehearing Exchange Exhibit 72; March 9, 2010 affidavit of Mark Leshner, attached hereto (also included as Attachment S to Complainant's Rebuttal Prehearing Exchange). In its answer to the query, "please explain in detail the intended use of the product as represented to you by the provider," the Humane Society replied that it was intended to be used "for cleaning/sanitizing." *See* Complainant's Prehearing Exchange Exhibit 72. Subsequently, on or about August 4, 2009, EPA received an email from the Director of the Humane Society with a photograph of the label of the 12.5% sodium hypochlorite solution

product it had received from Respondent APT, which identifies the product by the name SODIUM HYPOCHLORITE SOLUTION. *See* Complainant's Prehearing Exchange Exhibit 76.

On or about August 4, 2009, EPA received a separate email from the Director of the Franklin County Humane Society, Ms. Karen Tudor. In that email, Ms. Tudor included as an attachment a pdf copy of the July/August 2003 *Animal Sheltering* magazine published by the Humane Society of the United States, which included a 16-page article on the proper use of disinfectant in animal shelters, including the use of sodium hypochlorite bleach. *See* Complainant's Prehearing Exchange Exhibit 74. She characterized this document in her email as "the Bible for shelter cleaning, with bleach being the standard." In that email, she also stated that "everything we were ever told by Mr. Kastendieck and the company was totally consistent with the information" on using bleach as a disinfectant that she included in her email, and that "[a]dditional emphasis was always made by them [Mr. Kastendieck and the company] on the requirement that any organic material be removed first" prior to use of the sodium hypochlorite disinfectant. *See* Complainant's Prehearing Exchange Exhibit 73. Complainant submits that this representation to the Humane Society, in connection with the distribution of the APT product SODIUM HYPOCHLORITE SOLUTION by a representative of APT, constitutes a claim made in connection with the product's distribution that the product can or should be used for a pesticidal purpose by the Humane Society, and that the product SODIUM HYPOCHLORITE SOLUTION is thereby a pesticide requiring registration, pursuant to 40 C.F.R. § 152.15(a)(1).

Complainant also submits that a review of the directions on the label of the APT product SODIUM HYPOCHLORITE SOLUTION demonstrates that the language thereon claims, states,

or implies that the product is to be used for a pesticidal purpose. As with the similarly-formulated 12.5% sodium hypochlorite solution product FRM CHLOR 1250, the directions for use state that prior to using the product on "facilities occupied or transversed by animals or poultry," the surfaces to be treated are first to be cleaned "with soap or detergent and rinse with water." Then, all surfaces are to be saturated "with a solution of at least 1000 ppm available chlorine for a period of 10 minutes." *See* SODIUM HYPOCHLORITE SOLUTION label, attached hereto. These instructions are consistent with Ms. Tudor's account above of APT's instructions that "any organic material be removed first" prior to use of the product, and imply that the product's intended use is not as a cleaner, but as a disinfectant for surfaces that have previously been cleaned.

Complainant further notes that Respondent APT, in supplying the Franklin County Humane Society with 55-gallon drums of 12.5% SODIUM HYPOCHLORITE SOLUTION, had actual or constructive knowledge that the product would be used by the Humane Society for a pesticidal purpose. As Ms. Tudor attested in her email to the EPA, APT's representative was not only aware that the Humane Society's intended use of the 12.5% sodium hypochlorite solution product was as an antimicrobial disinfectant for the animal shelter, but also he gave express instructions to the Humane Society on the proper use of the product for that purpose. *See* Complainant's Prehearing Exchange Exhibit 73.

- b. SODIUM HYPOCHLORITE SOLUTION and FRM CHLOR 1250 are the Same Product

APT admits in its Answer that the FRM Chem, Inc. product FRM CHLOR 1250 is a pesticide. *See Answer to the First Amended Complaint at Page 2, paragraph 15.*

Complainant submits that an examination of the record and a comparison of the two products' labels and shipping information shows that the product SODIUM HYPOCHLORITE SOLUTION to be the same 12.5% sodium hypochlorite solution product as FRM CHLOR 1250.

Each of the packing slips included as Exhibits 67 through 71 of Complainant's Prehearing Exchange documents the distribution to the Franklin County Humane Society of one 55 gallon drum of a product identified as "SODIUM HYPO," further identified by the product tracking number 1004024000. Keith Kastendieck, manager and part owner of APT, FRM, and Custom Compounders, Inc. (CCI), when he provided shipping invoices to Missouri Department of Agriculture inspector Mark Nachreiner following the October 8, 2008 inspection, explained that the businesses used internal tracking numbers on their 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 Prehearing 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 in the related case at Docket No. FIFRA-07-2008-0035 (the "FRM matter") indicate that FRM 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 of the FRM matter, which violations were admitted by FRM Chem in its Answer, 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 of the FRM matter, which are violations are admitted by FRM Chem in its Answer in that matter, each identify the product FRM CHLOR 1250 as "SODIUM HYPO," with a product tracking number prefixed with "1004."

Indeed, Complainant notes that all invoices in the record that document sales of 55 gallon containers of products identified as "SODIUM HYPO" or as "FRM CHLOR 1250," whether those documents record sales or distributions by APT, CCI, or FRM, indicate the product by the tracking number "1004024000," identical to the product tracking number indicating the 55 gallon drum of "SODIUM HYPO" in Respondent APT Invoices Nos. 22129, 22329, 22342, 22361, and 22395, documenting five distributions of FRM CHLOR 1250 to the Franklin County Humane Society in 2007 and 2008, as alleged in the First Amended Complaint filed in the CCI matter, FIFRA-07-2009-0042. *See* Complainant's Prehearing Exchange Exhibits 37, 38, 39, and 40 (documenting multiple distributions admitted by FRM of 55 gallon drums of FRM CHLOR 1250 in 2006, each of which is indicated by the tracking number "1004024000" and "SODIUM

HYPO”), and Complainant’s Prehearing Exchange Exhibits 58, 59, 60, 61, and 62 (invoices collected from Keith Kastendieck by the MDA inspector on October 8, 2008, documenting multiple product distributions by CCI in 2007 and 2008, each of which is identified by the tracking number “1004024000” and “SODIUM HYPO”).

Complainant notes that, pursuant to 40 C.F.R. § 152.10(a), the sale or distribution of unregistered sodium hypochlorite solution, a common bleaching agent, is not prohibited by FIFRA unless a pesticidal claim is made on its labeling or in connection with its sale and distribution. However, Complainant submits that, a comparison of the label of FRM CHLOR 1250, included in Complainant’s Prehearing Exchange as Exhibit 1f, to the label of the APT product SODIUM HYPOCHLORITE SOLUTION, shows that both products provide near-identical instructions for disinfecting food-contact surfaces and “facilities occupied or transversed by animals our poultry.” Indeed, it is evident from an examination of the two labels that the only difference between the two is that Respondent has deleted explicit references to “santitizing” or “disinfecting” in the label of FRM CHLOR 1250 from the label of SODIUM HYPOCHLORITE SOLUTION, though the product clearly is still intended to be used as an antimicrobial disinfectant:

- The labels for both products state the product formulation as “Active Ingredient: Sodium Hypochlorite ... 12.5%” and “Inert Ingredients ... 87.5%.”
- The labels for both products, under the heading “Rinse Method” for non-porous food contact surfaces directs that, following cleaning of non-porous food contact equipment “in the normal manner,” a solution of 100 parts per million available chlorine be used on the equipment prior to use, maintaining contact for at least two minutes.
- The labels for both products under the heading “Clean-in-Place Method” for non-porous food contact surfaces directs that equipment be thoroughly cleaned, and then that a solution of 200

parts per million available chlorine be used to completely fill the interior of food contact equipment, ensuring contact with all internal surfaces for at least 10 minutes.

- The labels for both products, under the heading "Farm Premises" directs that surfaces be thoroughly cleaned with soap or detergent and water, then that the surfaces be saturated for a period of 10 minutes with a solution of at least 1000 parts per million available chlorine.

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 the product referenced on APT and FRM invoices and shipping documents as "SODIUM HYPO" and with the prefix "1004-" is FRM CHLOR 1250, and that FRM CHLOR 1250 and SODIUM HYPOCHLORITE SOLUTION are the same antimicrobial disinfectant product. Accordingly, there is no genuine issue of material fact as to whether the product distributed by APT as alleged in Counts 5 through 9 of the instant matter is identical to FRM CHLOR 1250, which APT, in its Answer to the First Amended Complaint, admits is a pesticide.

4. The Pesticide at Issue is Unregistered

At the time of each sale or distribution alleged by Complainant in Counts 5 through 9 of the Complaint, the Advanced Products Technology, Inc. product SODIUM HYPOCHLORITE SOLUTION was not registered under Section 3 of FIFRA, 7 U.S.C. § 136a. Evidence for this is provided by the copy of the product label provided to EPA by Respondent APT and attached to this motion, which provides no EPA Registration Number.

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 September 7, 2010, in which he states:

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. In 2010, I conducted a similar search in OPPIN with respect to the company Advanced Products Technology, Inc. and the product name "SODIUM HYPOCHLORITE SOLUTION."*

4. *According to OPPIN, "FRM CHLOR 1250" is not registered as a pesticide under FIFRA.*

6. *According to OPPIN, the Advanced Products Technology, Inc. product "SODIUM HYPOCHLORITE SOLUTION" is not registered as a pesticide under FIFRA, and Advanced Products Technology, Inc. is not registered as a pesticide producer.*

See Affidavit of Mark Leshner dated September 7, 2010, attached to this motion.

D. Conclusion

In sum, there is overwhelming evidence demonstrating that the product SODIUM HYPOCHLORITE SOLUTION, distributed by Respondent APT in five separate transactions between January 27, 2009, and July 14, 2009, is a pesticide as that term is defined under FIFRA, and 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 5 through 9, it has established Respondent APT'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" the pesticide at issue in each of five transactions; and (4) the pesticide at issue is "unregistered." There is no genuine issue of material fact regarding APT'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.
2. In five separate transactions between January 27, 2009, and July 14, 2009, as alleged in Counts 5 through 9, Respondent APT distributed a 12.5% sodium hypochlorite solution product under the product name SODIUM HYPOCHLORITE SOLUTION.
3. The 12.5% sodium hypochlorite solution product distributed by Respondent APT, as alleged in Counts 5 through 9, is intended to be used to prevent, destroy, repel, and mitigate microorganisms that are deleterious to man or the environment.
4. At all times relevant to the Counts alleged in the Complaint, Respondent had not registered and was not authorized by a registrant to produce or distribute the 12.5% sodium hypochlorite solution product SODIUM HYPOCHLORITE SOLUTION as a pesticide.

##### 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.” Section 2(mm) of FIFRA, 7 U.S.C. § 136(mm) sets forth the definition of an “antimicrobial 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 Advanced Products Technology, 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. The 12.5% sodium hypochlorite solution product distributed by APT under the name SODIUM HYPOCHLORITE SOLUTION is a “pesticide” and an “antimicrobial pesticide” as those terms are defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u).
5. Each of the transactions by Respondent alleged in Counts 5 through 9 of the First Amended Complaint was a sale or distribution of an unregistered pesticide.
6. Each of the transactions by Respondent alleged in Counts 5 through 9 of the First Amended Complaint constitutes a violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

## V. CONCLUSION

Complainant respectfully requests this Court to issue an Initial Decision holding that Respondent Advanced Products Technology, 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

Complainant's Motion for Partial Accelerated Decision  
*In re Advanced Products Technology, Inc., et al., Docket No. FIFRA-07-2008-0036*

five separate occasions, as alleged in Counts 5 through 9 of the First Amended Complaint.

9/7/2010  
Date

Respectfully submitted,

  
Chris R. Dudding

  
Kent Johnson

Assistant Regional Counsels  
U.S. EPA, Region 7

**LIST OF EXHIBITS**

1. Affidavit of Mark Lesher dated March 9, 2010
2. Affidavit of Mark Lesher dated September 7, 2010
3. Affidavit of Mark Nachreiner
4. FRM CHLOR 1250 label
5. SODIUM HYPOCHLORITE SOLUTION LABEL

## 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. On or about July 10, 2009, I sent an information request letter to the Franklin County Humane Society in Union, Missouri, inquiring whether the Society had purchased or received a product labeled or advertised as either 12.5% Sodium Hypochlorite Solution or FRM Chlor 1250 from FRM Chem, Inc., Advanced Products Technology, Inc., Custom Compounders, Inc., V.L. Clark Chemical Company, or Synisys, Inc., or from any of the following individuals: Raymond Kastendieck, Keith Kastendieck, Karlan Kastendieck, or Ann Kastendieck.

3. On or about July 24, 2009, I received a response to an information request letter in which the Humane Society responded in the affirmative to my query and attached multiple packing slips it had received documenting shipments of products from Advanced Products Technology, Inc., including shipments of Sodium Hypochlorite solution on January 27, 2009, February 3, 2009, March 25, 2009, May 27, 2009, and July 14, 2009. I include a copy of the correspondence and the packing slips with this affidavit.

3. On August 4, 2009, I received an email from Karen Tudor, who identified herself as the Director of the Franklin County Humane Society. In that email, she included as an attachment a pdf copy of the July/August 2003 *Animal Sheltering* magazine published by the Humane Society of the United States, which included a 16-page article on the proper use of disinfectant, including sodium hypochlorite bleach, in animal shelters. She characterized this document in her email as "the Bible for shelter cleaning, with bleach being the standard." In that email, she also stated that "everything we were ever told by Mr. Kastendieck and the company was totally consistent with the information" on using bleach as a disinfectant that she included in her email, and that "[a]dditional emphasis was always made by them [Mr. Kastendieck and the company] on the requirement that any organic material be removed first ... prior to bleaching." I understood Mr. Kastendieck to refer to Karlan Kastendieck. I include a printout of this email and of the *Animal Sheltering* article with this affidavit.

4. Also on August 4, 2009, I received three further emails from Karen Tudor of the Franklin County Humane Society, in which she attached photographs of the products Brite San 75 (identified on the label as produced by Custom Compounders, Inc. of Union, Missouri) and Sodium Hypochlorite Solution, both distributed to the Humane Society by Advanced Products

Technology, Inc. pursuant to the packing slips I had previously received. I attach copies of these three emails along with one photo of each product as sent by Ms. Tudor.

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 9<sup>th</sup> day of March, 2010.

Kent Johnson  
Notary Public

My Commission Expires: 7/23/11

KENT JOHNSON  
NOTARY PUBLIC  
STATE OF KANSAS  
My Appt. Exp. 7/23/11

## 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. In 2010, I conducted a similar search in OPPIN with respect to the company Advanced Products Technology, Inc. and the product name "SODIUM HYPOCHLORITE SOLUTION."

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. According to OPPIN, the Advanced Products Technology, Inc. product "SODIUM HYPOCHLORITE SOLUTION" is not registered as a pesticide under FIFRA, and Advanced Products Technology, Inc. is not registered as a pesticide producer.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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."

12. 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 7<sup>th</sup> day of <sup>September</sup>~~August~~, 2010.

Kent Johnson  
Notary Public

My Commission Expires: 7/23/11

## 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

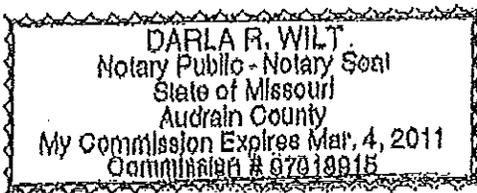
Mark Nachreiner  
Pesticide Use Investigator  
Missouri Department of Agriculture  
Division of Plant Industries  
Bureau of Pesticide Control  
P.O. Box 630  
Jefferson City, MO 65102

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

Darla R. Wilt

Notary Public

My Commission Expires: March 4, 2011



Doc, 122105 F447101

REL 122105 F447101  
This Label Relates to sample #122105 F447101-02

12/21/05  
Label (this label)  
is for 5 gal. container (provided)



Label for 1 gal is silk screened label

# FRM CHLOR 1250

ACTIVE INGREDIENT:  
Sodium Hypochlorite ..... 12.5%  
INERT INGREDIENTS ..... 87.5%

See photos  
of 1 gal  
container.

KEEP OUT OF REACH OF CHILDREN

DANGER

### STATEMENT OF PRACTICAL TREATMENT (FIRST AID)

IF CONTACT WITH EYES OCCURS, flush with water for at least 15 minutes. Get prompt medical attention.

IF CONTACT WITH SKIN OCCURS, wash with plenty of soap and water.

IF SWALLOWED, drink large quantities of milk or gelatin solution, if these are not available, drink large quantities of water. DO NOT give vinegar or other acids. DO NOT induce vomiting. Get prompt medical attention.

### HAZARDS TO HUMANS AND DOMESTIC ANIMALS

**DANGER:** Corrosive, may cause severe skin and eye irritation or chemical burns to broken skin. Causes eye damage. Wear safety glasses or goggles and rubber gloves when handling this product. Wash after handling. Avoid breathing vapors. Vacate poorly ventilated areas as soon as possible. Do not return until strong odors have dissipated.

**ENVIRONMENTAL HAZARDS:** This product is toxic to fish. Do not discharge into lakes, streams, ponds or public water-ways unless in accordance with a NPDES permit. For guidance, contact the regional office of the U.S. Environmental Protection Agency.

### PHYSICAL AND CHEMICAL HAZARDS:

**STRONG OXIDIZING AGENT:** Mix only with water according to label directions. Mixing this product with chemicals (e.g. ammonia, acids, detergents, etc.) or organic matter (e.g. urine, feces, etc.) will release chlorine gas which is irritating to eyes, lungs and mucous membranes.

**STORAGE AND DISPOSAL:** Store in a cool, dry area away from direct sunlight. In case of spill, flood area with large quantities of water. Rinse empty container thoroughly with water and discard by placing in trash collection or burying in an approved landfill. Product or rinsate that cannot be used, should be diluted with water and disposed of in a sanitary sewer. Do not contaminate food or feed by storage, disposal or cleaning of equipment.

### DIRECTIONS FOR USE

It is a violation of federal law to use this product in a manner inconsistent with its labeling. Note: This product degrades with age. Use a chlorine test kit and increase dosage as necessary, to obtain the required level of available chlorine.

#### SANITATION OF NON-POROUS FOOD CONTACT SURFACES

**RINSE METHOD-** A solution of 100 ppm available chlorine may be used in the sanitizing solution if a chlorine test kit is available. Solutions containing an initial concentration of 100 ppm available chlorine must be tested and adjusted periodically to insure that the available chlorine does not drop below 50 ppm. Prepare a 100 ppm sanitizing solution by thoroughly mixing 1 oz. of the product with 10 gallons of water. If no test kit is available, prepare a sanitizing solution by thoroughly mixing 2 oz. of this product with 10 gallons of water to provide approximately 200 ppm available chlorine by weight.

Clean equipment surfaces in the normal manner. Prior to use, rinse all surfaces thoroughly with the sanitizing solution, maintaining contact with the sanitizer for at least 2 minutes. If solution contains less than 50 ppm available chlorine, as determined by a suitable test kit, either discard the solution or add sufficient product to reestablish a 200 ppm residual. Do not rinse equipment with water after treatment and do not soak equipment overnight.

Sanitizers used in automated systems may be used for general cleaning but may not be re-used for sanitizing purposes.

**CLEAN-IN-PLACE METHOD-** Thoroughly clean equipment after use. Prepare a volume of 200 ppm available chlorine sanitizing solution equal to 110% of volume capacity of the equipment by mixing the product in a ratio of 2 oz. product with 10 gallons of water. Pump solution through the system until the full flow is obtained at all extremities, the system is completely filled with the sanitizer and all air is removed from the system. Close drain valves and hold under pressure for at least 10 minutes to insure contact with all internal surfaces. Remove some cleaning solution from drain valve and test with a chlorine test kit. Repeat entire cleaning/sanitizing process if effluent contains less than 50 ppm available chlorine.

**FARM PREMISES-** Remove all animals, poultry, and feed from premises, vehicles, and enclosures. Remove all litter and manure from floors, walls and surfaces of barns, pens, stalls, chutes and other facilities occupied or transversed by animals or poultry. Empty all troughs, racks and other feeding and watering appliances. Thoroughly clean all surfaces with soap or detergent and rinse with water. To disinfect, saturate all surfaces with a solution of at least 1000 ppm available chlorine for a period of 10 minutes. A 1000 ppm solution can be made by thoroughly mixing 12 1/2 oz. of this product with 10 gallons of water. Immerse all halters, ropes and other types of equipment used in handling and restraining animals or poultry, as well as the cleaned forks, shovels and scrapers used for removing litter and manure. Ventilate building, cars, boats and other closed spaces. Do not house livestock or poultry or employ equipment until chlorine has been dissipated.

Manufactured by: FRM CHEM, INC.  
P.O. Box 207, Washington, MO. 63090

# SODIUM HYPOCHLORITE SOLUTION

ACTIVE INGREDIENT:

Sodium Hypochlorite ..... 12.5%

INERT INGREDIENTS ..... 87.5%

**KEEP OUT OF REACH OF CHILDREN**

**DANGER**

**STATEMENT OF PRACTICAL TREATMENT (FIRST AID)\***

**IF CONTACT WITH EYES OCCURS**, flush with water for at least 15 minutes. Get prompt medical attention.

**IF CONTACT WITH SKIN OCCURS**, wash with plenty of soap and water.

**IF SWALLOWED**, drink large quantities of milk or gelatin solution, if these are not available, drink large quantities of water. **DO NOT give vinegar or other acids. DO NOT induce vomiting.** Get prompt medical attention.

**PRECAUTIONARY STATEMENTS**

**DANGER:** Corrosive, may cause severe skin and eye irritation or chemical burns to broken skin. Causes eye damage. Wear safety glasses or goggles and rubber gloves when handling this product. Wash after handling. Avoid breathing vapors. Vacate poorly ventilated areas as soon as possible. Do not return until strong odors have dissipated.

**ENVIRONMENTAL HAZARDS:** This product is toxic to fish. Do not discharge into lakes, streams, ponds or public waterways unless in accordance with a NPDES permit. For guidance, contact the regional office of the U.S. Environmental Protection Agency.

**PHYSICAL AND CHEMICAL HAZARDS:**

**STRONG OXIDIZING AGENT:** Mix only with water according to label directions. Mixing this product with chemicals (e.g. ammonia, acids, detergents, etc.) or organic matter (e.g. urine, feces, etc.) will release chlorine gas which is irritating to eyes, lungs and mucous membranes.

**STORAGE AND DISPOSAL:** Store in a cool, dry area away from direct sunlight. In case of spill, flood area with large quantities of water. Rinse empty container thoroughly with water and discard by placing in trash collection or burying in an approved landfill. Product or rinsate that cannot be used, should be diluted with water and disposed of in a sanitary sewer. Do not contaminate food or feed by storage, disposal or cleaning of equipment.

**DIRECTIONS FOR USE**

Note: This product degrades with age. Use a chlorine test kit and increase dosage as necessary, to obtain the required level of available chlorine.

**CLEANING OF NON-POROUS FOOD CONTACT SURFACES**

**RINSE METHOD-** Prepare a 100 ppm hypochlorite solution by thoroughly mixing 1 oz. of the product with 10 gallons of water. Clean equipment surfaces in the normal manner. Prior to use, rinse all surfaces thoroughly with the hypochlorite solution, maintaining contact with the solution for at least 2 minutes. Do not rinse equipment with water after treatment and do not soak equipment overnight.

**CLEAN-IN-PLACE METHOD-** Thoroughly clean equipment after use. Prepare a volume of 200 ppm available chlorine solution equal to 110% of volume capacity of the equipment by mixing the product in a ratio of 2 oz. product with 10 gallons of water. Pump solution through the system until the full flow is obtained at all extremities, the system is completely filled with the solution and all air is removed from the system. Close drain valves and hold under pressure for at least 10 minutes to insure contact with all internal surfaces.

**FARM PREMISES**

Remove all animals, poultry, and feed from premises, vehicles, and enclosures. Remove all litter and manure from floors, walls and surfaces of barns, pens, stalls, chutes and other facilities occupied or transversed by animals or poultry. Empty all troughs, racks and other feeding and watering appliances. Thoroughly clean all surfaces with soap or detergent and rinse with water. Saturate all surfaces with a solution of at least 1000 ppm available chlorine for a period of 10 minutes. A 1000 ppm solution can be made by thoroughly mixing 12 1/2 oz. of this product with 10 gallons of water. Immerse all halters, ropes and other types of equipment used in handling and restraining animals or poultry, as well as the cleaned forks, shovels and scrapers used for removing litter and manure. Ventilate building, cars, boats and other closed spaces. Do not house livestock or poultry or employ equipment until chlorine has been dissipated.

*Manufactured by:*

**ADVANCED PRODUCTS TECHNOLOGY INC.**

P.O. Box 1656

Washington, MO 63090

NET CONTENTS: 5 GALLONS

CERTIFICATE OF SERVICE

I hereby certify that on this 7<sup>th</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:

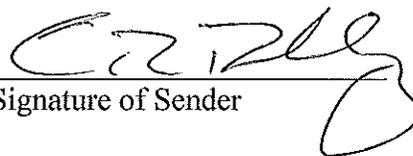
via UPS, to:

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