

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

IN THE MATTER OF)
)
FRM Chem, Inc.,) FIFRA-07-2008-0035
Keith G. Kastendieck and)
Karlán C. Kastendieck,)
)
)
Respondents.)

Advanced Products Technology, Inc.,) FIFRA-07-2008-0036
Keith G. Kastendieck and)
Karlán C. Kastendieck,)
)
)
Respondents.)

**CORPORATE RESPONDENTS ADVANCED PRODUCTS TECHNOLOGY, INC.'S
AND FRM CHEM, INC.'S RESPONSE TO COMPLAINANT'S MOTION
FOR PARTIAL ACCELERATED DECISION ON LIABILITY
AND TO STRIKE CERTAIN AFFIRMATIVE DEFENSES**

COME NOW Corporate Respondents Advanced Products Technology, Inc. ("APT") and FRM Chem, Inc. ("FRM Chem")(collectively, "Corporate Respondents"), by and through their undersigned counsel, and for their Response to Complainant's Motion for Accelerated Decision on Liability and to Strike Certain Affirmative Defenses, state as follows:

1. Complainant correctly notes that the two Corporate Respondents have answered that the Corporations: (1) Admitted they were corporations and, therefore, "persons" as that term is defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s); (2) Admitted STERI-DINE DISINFECTANT and FRM CHLOR 1250 were pesticides; and (3) Admitted that the two Corporate Respondents sold or distributed STERI-DINE DISINFECTANT and FRM CHLOR 1250 as set forth in Counts 1

through 4 of the APT case (FIFRA-07-2008-0036) and Counts 1 through 56 of the FRM case (FIFRA-07-02008-0035).

To do otherwise would have been disingenuous by these Corporate Respondents and would have wasted the parties' and this tribunal's time and resources. Registration of the Pesticide, however, remains at issue. Corporate Respondents do not admit this element of the Complaints and it must be proven to the satisfaction of this tribunal.

The affidavit of Mr. Leshar dated August 9, 2010 is subject to cross-examination as to its veracity and other proof can be proffered at the hearing in response to Mr. Leshar's testimony.

This alone presents a genuine issue of material fact.

Likewise, Corporate Respondents believe that laches in this case is or should be a defense to these allegations. If, in fact, the "Federal Government is seeking to enforce laws that protect the environment" (page 19 of Complainant's FRM Chem's Motion), then it should see fit to notify sub-registrants of cancellations.

Moreover, this problem is compounded in these cases. In addition to "seeking to enforce laws that protect the environment," the Federal Government has or should have a responsibility to protect and inform its citizens or "persons."

Here, the Federal Government ("EPA") created a form for "persons" to notify EPA of the pesticides it was selling and/or distributing.

Corporate Respondents completed these forms truthfully and mailed them to the Federal Government (as they were required to do) informing EPA they were still selling/distributing the pesticides. For over ten years, the Federal Government did nothing and now wants to impose a +/- \$500,000 civil penalty on Corporate Respondents for their "strict liability."

A Stop Sale Order (notification of a violation) was served on Corporate Respondents before October 8, 2008 would have been appreciated. In which case, this controversy would not have come to pass.

AS TO COUNTS 57 AND 58 AND CORPORATE RESPONDENT FRM CHEM, INC.

Again, FRM Chem admitted it was a "person" and admitted it was issued a "Stop Sale, Use or Removal Order" on October 8, 2008. However, FRM Chem denies that it violated that Order as alleged in Counts 57 and 58.

It is clear from the pleadings of the parties that a conversation took place with the companies' representative and the Government's representative on or about October 8, 2008 about the ramifications of the Order. FRM Chem and Keith Kastendieck deny the allegations regarding statements made by FRM Chem's representative on that date.

It is also clear the FRM CHLOR 1250 in question in Count 57 was sold to the customer before the Stop Sale Order was served.

As to Count 58, the product donated was SODIUM HYPO, not FRM CHLOR 1250. The Prehearing Exchanges of both parties state that Mr. Nachreiner and Mr. Kastendieck are expected to testify on this issue as to what was said regarding the Stop Sale Order on October 8, 2008.

Therefore, this issue is a genuine issue of material fact as to Counts 57 and 58.

WHEREFORE, Complainant's Motions for Accelerated Decision and to Strike Affirmative Defenses should be denied.

Respectfully submitted,

JENKINS & KLING P.C.

By: _____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served via Federal Express upon:

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this 23rd day of August, 2010.
