



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
FRM CHEM, INC., *et al.*) DOCKET NO. FIFRA-07-2008-0035
ADVANCED PRODUCTS) DOCKET NO. FIFRA-07-2008-0036
TECHNOLOGY, INC., *et al.*)
SYNISYS, INC., *et al.*) DOCKET NO. FIFRA-07-2009-0041
CUSTOM COMPOUNDERS, INC., *et al.*) DOCKET NO. FIFRA-07-2009-0042
)
RESPONDENTS)

ORDER ON COMPLAINANT'S MOTIONS FOR DEFAULT

On August 2, 2010, Complainant filed a Motion for Default as to Liability ("Motion 1") in *Synisys, Inc., et al.*, Docket No. FIFRA-07-2009-0041 ("Matter 0041"). Motion 1 seeks a default judgment against Respondent FRM Chem, Inc. ("FRM") for counts one through seven (1-7) based on FRM's alleged failure to timely file an answer to the First Amended Complaint. On August 3, 2010, Complainant filed another Motion for Default as to Liability ("Motion 2") in *Advanced Products Technology, Inc., et al.*, Docket No. FIFRA-07-2008-0036 ("Matter 0036"). Motion 2 seeks a default judgment against Respondent Advanced Products Technology, Inc. ("APT") for counts five through nine (5-9) based on APT's alleged failure to timely file an answer to the First Amended Complaint. Also on August 3, 2010, Complainant filed a third Motion for Default as to Liability ("Motion 3") in *Custom Compounders, Inc., et al.*, Docket No. FIFRA-07-2009-0042 ("Matter 0042"). Motion 3 seeks a default judgment against APT for counts one through five (1-5) based on APT's alleged failure to timely file an answer to the First Amended Complaint. This Order addresses all three Motions for Default.

The Complaint in Matter 0036 was filed on June 26, 2009, against Respondent APT. On December 17, 2009, counsel for APT filed an Answer to the Complaint, which addressed each of the 46 paragraphs of factual allegations. The Complaint in Matter 0041 was filed on September 23, 2009, against Respondent Synisys, Inc. ("Synisys"). On November 23, 2009, counsel for Synisys filed an

Answer to the Complaint, which addressed each of the 76 paragraphs of factual allegations. The Complaint in Matter 0042 was also filed on September 23, 2009, against Respondent Custom Compounders, Inc. ("CCI"), which responded through counsel on November 23, 2009, again answering each of the 60 paragraphs of factual allegations contained in the Complaint. (Respondents FRM, APT, Synisys, and CCI, in any combination, are hereafter referred to as "Corporate Respondents"). These cases were consolidated by Order issued December 2, 2009. Despite consolidation, the counts in each matter remain unique to that case.

On May 27, 2010, Complainant was given leave to file amended complaints in each of the consolidated cases. A First Amended Complaint was filed in each matter on June 3, 2010. The Amended Complaints made several common changes and some changes specific to each case. First, two individual respondents, Keith and Karlan Kastendieck were added to each of the consolidated cases. Second, Respondent FRM was added to Matter 0041 and Respondent APT was added to Matter 0042. Third, five (5) additional counts were added against APT in Matter 0036. Under the Rules of Practice, 40 C.F.R. part 22, if the respondent contests any material fact alleged in a particular complaint, it must file an answer to that complaint within 30 days after service of the complaint. 40 C.F.R. § 22.15(a).

After two months, Corporate Respondents had not submitted any amended answers to the Amended Complaints. Thus, on August 2 and 3, 2010, Complainant filed Motions 1-3 as described above. Motion 1 seeks a default in Matter 0041 only as to FRM, the corporate respondent added by the First Amended Complaint in that case. Motion 2 seeks a default in Matter 0036 only as to the new counts against APT, which were added by the First Amended Complaint in that case. Motion 3 seeks a default in Matter 0042 only as to APT, the corporate respondent added by the First Amended Complaint in that case. No default is sought for the remaining parties whether corporate or individual.

As the basis for each Motion, Complainant cites each respective corporate respondent's failure to file an Amended Answer as of the date of the Motion. Under the Rules of Practice a respondent "may be found to be in default . . . upon failure to file a timely answer to the complaint." 40 C.F.R. § 22.17(a). The Rules further provide that:

[w]hen the Presiding Officer finds that default has occurred, [s]he shall issue a default order against the defaulting party as to any or all parts of the

proceeding unless the record shows good cause why a default order should not be issued.

40 C.F.R. § 22.17(c).

On August 9, 2010, counsel for the Corporate Respondents submitted a joint Reply of FRM Chem, Inc., Advanced Products Technology, Inc., Synisys, Inc., and Custom Compounds, Inc. to Complainant's Motion for Default Liability ("Response"). In that Response, Corporate Respondents offer three arguments as to why the Motions for Default should be denied.

First, Corporate Respondents argue that they have "previously answered 99% of the substantive allegations in these pleadings" and that the remaining, "new" allegations primarily concerned the individual respondents, whom counsel for the corporate respondents did not represent as of the date of the Motion. Response at 2. Second, unexpected health issues affected Corporate Respondents' counsel and delayed his attention to an alternative response-time agreement allegedly established by the parties. Response at 3. Third, counsel for Corporate Respondents intended to, and subsequently did, submit Amended Answers by August 9, 2010. Response at 3.

Corporate Respondents' first argument, that they had already answered the vast majority of factual allegations, is problematic because FRM and APT had not, prior to the Motions for Default, answered the specific allegations at issue in these Motions. Still, Corporate Respondents offer a unified and coherent defense common to all the consolidated cases, namely that it disputes the registration status of the pesticides identified in each complaint. Accordingly, because Corporate Respondents have uniformly denied this element and the Amended Complaints do not enhance Complainant's *prima facie* case, Corporate Respondents may fairly be treated as having substantively answered the underlying allegations.

Corporate Respondents' second argument, that counsel "experienced a substantial medical issue/concern" on July 25, 2010, Response at 3, while not necessarily a justification for missing earlier deadlines, does provide cause when considered in the context of the adjusted response timeline established by the parties. Motions at 3-4; Response at 3. Most importantly, Corporate Respondents have attempted to cure the failure to file timely answers by submitting Amended Answers on August 9, 2010.

Default judgment is a harsh remedy, particularly where the respondents have been actively engaged in the prehearing process.

Finding that Respondents have filed a responsive Amended Answer in each of the cases at issue, and for good cause shown by Corporate Respondents, I hereby **DENY** Complainant's Motions for Default as to Liability.

Barbara A. Gunning
Administrative Law Judge

Dated: August 25, 2010
Washington, DC