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 PARTIAL ACCELERATED DECISION ON LIABILITY AND TO STRIKE CERTAIN AFFIRMATIVE DEFENSES

On August 10, 2010, Complainant filed a Motion for Partial Accelerated Decision on Liability and to Strike Certain Affirmative Defenses ("Motion 1") in *Advanced Products Technology, Inc., et al.*, Docket No. FIFRA-07-2008-0036 ("Matter 0036"). Motion 1 seeks an Order finding that Respondent Advanced Products Technology, Inc. ("APT") is liable for the violations alleged in Counts 1 - 4 of the First Amended Complaint. Also on August 10, 2010, Complainant filed a similarly titled Motion ("Motion 2") in *FRM Chem, Inc., et al.*, Docket No. FIFRA-07-2008-0035 ("Matter 0035"). Motion 2 seeks an Order finding that Respondent FRM Chem, Inc. ("FRM") is liable for the violations alleged in Counts 1 - 58 of the Second Amended Complaint.

On August 24, 2010, Respondents APT and FRM (sometimes "Corporate Respondents" or "Respondents") submitted a Response to Complainant's Motion for Partial Accelerated Decision on Liability and to Strike Certain Affirmative Defenses ("Response"). On August 25, 2010, Complainant submitted its Reply to 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 ("Reply").

On September 1, 2010, following the issuance of an Order that postponed the hearing by one week, Complainant submitted a Motion for Partial Accelerated Decision on Liability and to Strike Certain Affirmative Defenses ("Motion 3") in *Custom Compounders, Inc., et al.*, Docket No. FIFRA-07-2009-0042 ("Matter 0042"). Motion 3 seeks an Order finding that Respondent APT is liable for the violations alleged in Counts 1 - 5 of the Amended Complaint. On September 3, 2010, Complainant submitted a similarly titled Motion ("Motion 4") in *Synisys, Inc., et al.*, Docket No. FIFRA-07-2009-0041 ("Matter 0041") (Matters 0035, 0036, 0041, and 0042 collectively referred to as "the consolidated cases"). Motion 4 seeks an Order finding that Respondents FRM and Keith G. Kastendieck ("Respondent Keith Kastendieck") are both liable for the violations alleged in Counts 1 - 7 of the Amended Complaint. On September 9, 2010, with only 25 days remaining before the hearing, this Tribunal received Complainant's Supplemental Motion for Partial Accelerated Decision on Liability ("Motion 5") in Matter 0036. Motion 5 seeks an Order finding that Respondent APT is liable for the violations alleged in Counts 5 - 9 of the Amended Complaint.

Motions 1 and 2 have been fully briefed and will be decided in this Order. Motions 3, 4, and 5, however, have been filed with insufficient time to permit full briefing and decision prior to hearing.[1/] Therefore, Motions 3, 4 and 5 will not be considered and are **DENIED**.

Applicable Standard

Section 22.20(a) of the Rules of Practice authorizes the Administrative Law Judge to:

> render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further

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[1/] The Certificates of Service for Motions 3, 4, and 5 indicate that they were served on Respondents and this Tribunal "via UPS," but do not indicate that this service achieves overnight delivery. Therefore, five days must be added to the computation of the briefing deadlines. A Response to Motion 3 would be due on September 21, 2010. The Reply would be due 15 days later, or October 6, 2010, the third day of the hearing as currently scheduled. The briefing period for Motions 4 and 5 would extend even longer. Even if the parties were to shorten their response time voluntarily, there would be insufficient time for this Tribunal to issue an Order.

> hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a).

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). *See, e.g., BWX Technologies, Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Belmont Plating Works*, Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65 at *8 (EPA ALJ Sept. 11, 2002). Rule 56(c) of the FRCP provides that summary judgment:

> shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). Therefore, federal court decisions interpreting Rule 56 provide guidance for adjudicating motions for accelerated decision. *See CWM Chemical Service*, 6 E.A.D. 1 (EAB 1995).

The United States Supreme Court has held that the burden of showing that no genuine issue of material fact exists is on the party moving for summary judgment. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). In considering such a motion, the Tribunal must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1985); *Adickes*, 398 U.S. at 158-59. Summary judgment on a matter is inappropriate when contradictory inferences may be drawn from the evidence. *Rogers Corp. v. Envtl. Prot. Agency*, 275 F.3d 1096, 1103 (D.C. Cir. 2002).

Once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, Rule 56(e) requires the opposing party to offer countering evidentiary material or to file a Rule 56(f) affidavit. The Supreme Court has found that the non-moving party must present "affirmative evidence" and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. *Anderson*, 477 U.S. at 256 (quoting *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)).

More specifically, the Court has ruled that the mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment, as Rule 56(e) requires the opposing party to go beyond the pleadings. *Celotex Corp. v. Catrett*, 477 U.S. 317 at 322 (1986); *Adickes*, 398 U.S. at 160. Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. *Strong Steel Products*, Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-0006, 2002 EPA ALJ LEXIS 57 at *22 (EPA ALJ Sept. 9, 2002). A party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. *Id.* at 22-23; see *Bickford, Inc.*, Docket No. TSCA-V-C-052-92, 1994 TSCA LEXIS 90 (EPA ALJ Nov. 28, 1994).

The Supreme Court has noted, however, that there is no requirement that the opposing party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Celotex*, 477 U.S. at 323-324. The parties may move for summary judgment or successfully defeat summary judgment without supporting affidavits provided that other evidence referenced in Rule 56(c) adequately supports its position. Of course, if the moving party fails to carry its burden to show that it is entitled to summary judgment under established principles, then no defense is required. *Adickes*, 398 U.S. at 156.

The evidentiary standard of proof in the matter before me, as in all other cases of administrative assessment of civil penalties governed by the Rules of Practice, is a "preponderance of the evidence." 40 C.F.R. § 22.24. In determining whether or not there is a genuine factual dispute, as the finder of fact I must consider whether I could reasonably find for the non-moving party under the "preponderance of the evidence" standard.

Accordingly, a party moving for accelerated decision must establish through the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law by the preponderance of the evidence. On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the existence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence. Even if a judge believes that summary judgment is technically proper upon review of the

evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. *See Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

Background

I. Motion 1

The Complaint in Matter 0036 was filed on June 26, 2009, against Respondent APT. Counts 1 - 4 allege that APT violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by distributing or selling the unregistered pesticide product STERI-DINE DISINFECTANT in four separate transactions in 2007. Motion 1 at 2. On December 16, 2009, counsel for APT submitted an Answer to the Complaint, which admitted several factual allegations but denied the violations alleged in Counts 1 - 4. On June 3, 2010, Complainant filed a First Amended Complaint. On August 9, 2010, Respondent APT filed an Answer to the First Amended Complaint ("Second Answer").

Although the First Amended Complaint made multiple changes[2/] to the parties, factual allegations, and alleged violations, APT did not change its responses to the allegations at issue in Motion 1. Specifically, APT admitted in its original Answer and admits now in its Second Answer that:

- it is a "person" as defined by FIFRA. Second Answer ¶ 18.
- STERI-DINE DISINFECTANT was registered as a pesticide (EPA Reg. No. 48211-70). *Id.* ¶ 14.
- it sold or distributed STERI-DINE DISINFECTANT as alleged in Counts 1 - 4. *Id.* ¶¶ 49, 54, 59, and 64.

APT states that it "denies any knowledge whatsoever that the registration of Steri-Dine was cancelled or that supplemental distribution agreements were cancelled by the EPA on July 19, 1995." *Id.* ¶ 16. APT also argues in its Second Answer that "APT does not believe the proposed penalty is appropriate." *Id.* ¶ 104. Complainant construes these last two statements as affirmative defenses and seeks to strike them in its Motion. Motion 1 at 10-11.

[2/] The propriety of these changes is addressed below in the Discussion.

In support of its Motion 1, Complainant includes an August 9, 2010 affidavit from Mark Lesher, a case review officer for EPA Region Seven's Toxics and Pesticides Branch ("Lesher Affidavit"). The affidavit states that in 2006 and 2008, Mr. Lesher searched the database of registered pesticides and determined that the products at issue in this case ("FRM CHLOR 1250" and "STERI-DINE DISINFECTANT") were not registered. Lesher Affidavit at 1.

In its Response to both Motions 1 and 2, APT reaffirms that it does not dispute that it is a "person" under FIFRA, that the products sold are pesticides, and that the sales alleged in Counts 1 - 4 did occur. Response at 1-2. However, APT argues, "Corporate Respondents do not admit [that the pesticides were unregistered] and [this element] must be proven to the satisfaction of this tribunal." APT then raises the defense of laches, arguing that for over ten years, the Federal Government had accepted annual forms from the Corporate Respondents, which stated that they were engaged in selling and distributing the products at issue, and no action was taken.

In its Reply to the joint Response, Complainant lays out the standard for granting summary judgment under Rule 56 of the FRCP. Complainant argues that in order to defeat a properly stated Motion for Accelerated Decision, the non-moving party must "go beyond the pleadings" and "produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing." Reply at 3 (internal citations omitted). Attached to the Reply is a Letter from the Director of EPA's Office of Pesticide Programs, dated July 19, 1995, along with a Maintenance Fee Cancellation Order, which lists STERI-DINE DISINFECTANT and CHLOR 1250 as cancelled pesticides as of January 15, 1996.

II. Motion 2

The Complaint in Matter 0035 was filed on June 6, 2009, against Respondent FRM. Counts 1 - 2 allege that FRM violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by holding for sale or distribution each of two unregistered pesticide products, FRM CHLOR 1250 and STERI-DINE DISINFECTANT. Counts 3 - 56 allege that FRM violated Section 12(a)(1)(A) of FIFRA by distributing or selling those two products in 54 separate transactions from 2004 to 2008. Motion 2 at 2. On November 17, 2009, Complainant filed a First Amended Complaint, adding Counts 57 and 58. On December 17, 2009, counsel for FRM submitted an Answer. On June 3, 2010, Complainant filed a Second Amended Complaint. On August 9, 2010, Respondent FRM submitted an Answer to the Second Amended Complaint ("Third Answer").

Although the Second Amended Complaint made multiple changes[3/] to the parties, factual allegations, and alleged violations, FRM did not change its responses to the allegations at issue in Motion 2. Specifically, FRM admitted in its earlier Answers and admits now in its Third Answer that:

- it is a "person" as defined by FIFRA. Third Answer ¶ 4.
- STERI-DINE DISINFECTANT was registered as a pesticide (EPA Reg. No. 48211-70). *Id.* ¶ 19.
- CHLOR 1250 was registered as a pesticide (EPA Reg. No. 48211-20001). *Id.* ¶ 20.
- it held for sale or distribution the product FRM CHLOR 1250. *Id.* ¶ 41.
- it sold or distributed FRM CHLOR 1250 as alleged in Counts 3 - 56. *Id.* at 5-6.

However, FRM denies the underlying allegations in Counts 2, 57, and 58. FRM also states that it "denies any knowledge whatsoever that the registration of Steri-Dine [or FRM Chlor 1250] was cancelled or that supplemental distribution agreements were cancelled by the EPA on July 19, 1995." *Id.* ¶¶ 19-20. FRM also argues in its Third Answer that "the penalty is disproportionate to the situation. . . ." *Id.* ¶ 329. FRM also states that "[y]early, FRM would fill out EPA forms and notify the EPA by its registration number that it was holding for sale and/or distributing Steri-Dine" yet EPA never notified Respondent that the product was unregistered. *Id.* ¶ 35. Complainant construes these arguments as affirmative defenses and seeks to strike them in its Motion. Motion 2 at 17.

In support of its Motion 2, Complainant includes the Lesher Affidavit, which states that in 2006 and 2008, Mr. Lesher searched the database of registered pesticides and determined that the products at issue in this case ("FRM CHLOR 1250" and "STERI-DINE DISINFECTANT") were not registered. Lesher Affidavit at 1. Complainant also includes the Affidavit of Mark Nachreiner ("Nachreiner Affidavit"), a Pesticide Use Investigator employed by Missouri Department of Agriculture, who inspected the facility that houses the Corporate Respondents APT and FRM.

In its Response, FRM reaffirms that it does not dispute that it is a "person" under FIFRA, that the products sold are pesticides, and that the sales alleged in Counts 1 - 56 did

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[3/] The propriety of these changes is addressed below.

occur.[4/] Response at 1-2. However, FRM argues, "Corporate Respondents do not admit [that the pesticides were unregistered] and [this element] must be proven to the satisfaction of this tribunal." FRM then raises the defense of laches, arguing that for over ten years, the Federal Government had accepted annual forms from the Corporate Respondents, which stated that they were engaged in selling and distributing the products at issue, and no action was taken.

The Reply is equally applicable to the Response to Motion 2.

Discussion

I. Consistency and Specificity of the Pleadings

Complainant states in its Motions 1 and 2 that:

> [o]n March 15, 2010, Complainant filed a motion to file amended complaints in the [consolidated cases] and for discovery pursuant to Section 22.19(e) of the CROP, which was granted by Order issued May 27, 2010.

Motion 1 at 3, Motion 2 at 3. This recitation of the procedural history is incomplete. On March 17, 2010, Complainant did submit a Motion to Amend Complaints, but did not file a Proposed Amended Complaint in any of the cases. By Order dated April 15, 2010, I denied the Motion to Amend Complaints finding that without the proposed amended complaints, the new allegations could not be deemed to have been pled.

Complainant re-filed its Motion to Amend Complaints on April 27, 2010, and included Proposed Amended Complaints. The Motion to Amend Complaints identified three changes that Complainant sought to make to the pleadings:

> (1) add two additional parties, Keith G. Kastendieck and Karlan C. Kastendieck, to the caption of each case;
> (2) add Respondent APT to the caption in Matter 0042, and add Respondent FRM to the caption in Matter 0041; and

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[4/] The inclusion of Count 1 in this statement suggests that FRM's denial of paragraph 34 of the Second Amended Complaint was a mistake. However, in this instance, the pleadings and not the legal arguments presented in a brief govern the outcome.

(3) add five counts to the Complaint in Matter 0036 for additional sales of an unregistered pesticide.

Order on Complainant's Renewed Motion to Amend Complaints and Motion for Other Discovery Pursuant to 40 C.F.R. § 22.19(e), issued May 27, 2010, at 2-3.

I note that in each of the Amended Complaints (the Second Amended Complaint in the case of Matter 0035) Complainant appears to have made multiple changes to the original Complaints that were not specifically identified in its Motions to Amend Complaints nor allowed by the Order of May 27, 2010. These changes included adding new factual allegations, adding new regulatory and statutory background paragraphs, and altering the content and sequence of several existing factual allegations. As experienced practitioners, counsel for both Complainant and Respondents surely know that pleadings cannot be altered beyond the scope of the amending ruling. Moreover, it is not incumbent upon the Judge or the respondent to reread and compare verbatim the original and amended complaints. Even where changes are cast as unintentional or not substantive, they must be specifically permitted. Such inconsistencies cannot be condoned and raise serious concerns about the basis for the present Motions. Where Motions for Accelerated Decision rest on Complaints that may contain unexpected changes to the allegations, granting judgment as a matter of law becomes a questionable proposition.

Even if the pleadings were clear and consistent, it is not established that Complainant has met its *prima facie* burden, nor is it clear that Respondents have admitted all the elements of the underlying claims.[5/] For example, Respondents specifically do not admit that the pesticides at issue were not registered at the time of the alleged sales. Response at 2. Complainant does proffer sworn affidavits from witnesses who appear to have personal knowledge about the relevant facts of these cases. *See* the Lesher Affidavit and the Nachreiner Affidavit. Complainant also includes a copy of the 1995 Cancellation Order from Daniel Barolo, EPA's Director of the Office of Pesticide Programs along with a printout purporting to cancel over 20 different pesticides. The inclusion of affidavits and additional documentary evidence is good practice when moving for accelerated

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[5/] On August 26, 2010, the parties submitted Joint Prehearing Stipulations in which certain stipulated facts were set forth representing all the factual allegations to which the parties could agree. The elements of the underlying violations are conspicuously absent from these Stipulations.

decision. However, the inclusion of such submissions does not require their acceptance.[6/]

At this juncture I find that there are material facts that must be resolved at hearing and that accelerated decision, even limited to liability, is not appropriate in these cases.

II. Allegations of holding for sale a misbranded pesticide

In addition to the reasons stated above, there are other reasons to deny Motion 2. As to Count 1, FRM denies all the allegations. As to Count 2, FRM admits that it held FRM CHLOR 1250 for sale or distribution, but denies all other allegations. Complainant has not presented or cited sufficient evidence that the products were misbranded, Second Amd. Compl. ¶¶ 37-38, to overcome these denials and is therefore not entitled to judgment as a matter of law at this time.

III. Allegations of selling or distributing pesticides in violation of a Stop-Sale Order

In addition to the reasons stated above, there are other reasons to deny Motion 2. As to Count 57, although FRM does not dispute that the Stop-Sale Order prohibits the shipment of FRM CHLOR 1250 on or after October 8, 2008, and it does not dispute that it shipped FRM CHLOR 1250 on October 13, 2008, the Stop-Sale Order itself, issued pursuant to Section 13(a), 7 U.S.C. § 136k(a), is premised on the fact that the pesticide at issue is not registered. As the disposition of the registration issue must await hearing, so must the validity of the Stop-Sale Order and, therefore, Respondents' potential liability for Count 57.

As to Count 58, whether the product "Sodium Hypo" is in fact "FRM CHLOR 1250" is a question of fact to be decided at hearing and Complainant cannot be given the benefit of the doubt on a Motion for Accelerated Decision.

[6/] The accuracy of these documents is not guaranteed simply because they are submitted and consideration remain. For example, the Lesher Affidavit postdates his electronic database search by four years; the Letter from Mr. Barolo is unaddressed; the enclosure is difficult to read; the alleged pesticide FRM CHLOR 1250 is not specifically identified on the printout; the affiants are subject to cross examination; the meaning of the documents is not necessarily self-evident and may require testimony to elucidate.

IV. Affirmative Defenses

A. Awareness of Cancellation & Appropriateness of Penalty

In Motions 1 and 2, Complainant seeks to have stricken two "affirmative defenses," common to both cases, Motion 1 at 10-11 and Motion 2 at 18-19, defenses it describes as "lack of knowledge of noncompliance" and "dispute[] [over] the proposed penalty." *Id.* However, these are not affirmative defenses because (as described) they would not defeat the cause of action even if true. Therefore, it is not appropriate to address them in a Motion to Strike Affirmative Defenses, particularly at this stage of the proceedings. Moreover, the issues articulated by Respondents are appropriate for the presentation of evidence during the consideration of the penalty at the hearing. There is no benefit to be gained, nor any prejudice to the Complainant, by denying the Motion to Strike Affirmative Defenses.

B. Laches in Motion 2

In its Answer to the Second Amended Complaint, FRM asserts that it would complete EPA forms every year and notify the EPA by its registration number that it was holding for sale and/or distributing Steri-Dine, but at no time did EPA inform Respondent that the product was not registered. Third Answer ¶ 35. Complainant, in its Motion 2, "construes this argument to be a laches defense" and seeks to strike it as "clearly invalid." Motion 2 at 19. Complainant cites *United States v. Stringfellow*, 661 F. Supp. 1053 (C.D. Cal. 1987), for the proposition that laches, as an equitable defense, is unavailable in cases where the government acts in its sovereign capacity to protect the public health and safety. *Id.* In their Response, FRM and APT implicitly accept Complainant's characterization of their defense stating that "laches in this case is or should be a defense to these allegations." Response at 2. In its Reply, Complainant asserts that "the defense of laches is not available as a defense against liability where the Federal Government is seeking to enforce laws to protect the environment." Reply at 7.

As a general rule, to mount a defense of laches, the defending party must show (1) an unreasonable delay by the plaintiff in filing suit and (2) undue prejudice to the defendant attributable to the delay. *See, e.g., Hurst v. U.S. Postal Serv.*, 586 F.2d 1197, 1199 (8th Cir. 1978). Respondents argue that EPA accepted the annual notices from Respondents for over ten years, but "did nothing." Response at 2. Complainant does not address either element. Rather, it argues that the defense

is void *ab initio* because it cannot be asserted against the Federal Government.

Initially, I note that the *Stringfellow* case arose under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.*, which explicitly limits the available defenses to those listed in Section 107(b), 42 U.S.C. § 9607(b), and therefore constrained the *Stringfellow* court to considering only those defenses. Additionally, in explaining the decision to strike the defendants' affirmative defenses, the court reasoned that they were "not relevant to the determination of the defendants' joint and several liability under section 107(a)." *U.S. v. Stringfellow*, 661 F. Supp. at 1062. Such circumstances are not present to these consolidated cases nor relevant to these Motions.

Complainant argues that "[i]t is well-settled that equitable defenses cannot be applied to frustrate the purpose of federal laws or to thwart public policy." Motion 2 at 19 (internal quotations and citations omitted). Complainant oversimplifies the case law on the subject. *See Nat'l Labor Relations Bd. v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 894 (7th Cir. 1990) ("laches is generally and we think correctly assumed to be applicable to suits by government agencies as well as by private parties"); *see also United States v. Admin. Enters., Inc.*, 46 F.3d 670, 672-73 (7th Cir. 1995) (collecting cases and noting that some courts regard the question as completely unsettled, while others opine that laches is inappropriate and others refuse to shut the door completely to the invocation of laches or estoppel in government suits). Similarly, I am hesitant to shut the door completely on Respondents, particularly where the styling of the defensive allegations as "laches" was done by Complainant and not Respondents.

Invoking the defense of laches is more appropriate "in such cases where the loss of evidence, death of witnesses of parties, and failure of memory . . . make it impossible for the court to pronounce a decree with confidence." *Freeman Mgmt. Corp. v. Shurgard Storage Ctrs., Inc.*, 2007 WL 1556604, *12 (M.D. Tenn., May 24, 2007) (internal citations omitted). The lengthy delay of which Respondents complain does not regard the timing of the Complainant's suit, but, rather, the time that has lapsed between the date the cancellation notice was issued and the date of the Stop-Sale Order. This argument more appropriately describes an assertion of equitable estoppel, as opposed to laches. *See City of Gettysburg, S.D. v. U.S.*, 64 Fed. Cl. 429, 445 (Fed. Cl. 2005); *see also Utah Power & Light Co. v. U.S.*, 230 F. 328 (8th Cir. 1915) (distinguishing between estoppel and "mere laches").

While "laches and estoppel are entirely separate defenses," they often turn on the same facts. *Lincoln Logs Ltd. v. Lincoln Pre-Cut Log Homes*, 971 F.2d 732, 734 (Fed. Cir. 1992). Under Missouri law, the elements of equitable estoppel are:

> (1) an admission, statement, or act (including silence or inaction) that is inconsistent with the claim that is later asserted and sued upon;
> (2) an action taken by a second party on the fair of the admission, statement or act; and
> (3) an injury to the second party if the first party is permitted to contradict or repudiate his admission, statement, or act.

Blake v. Irwin, 913 S.W.2d 923, 934 (Mo. App. W.D. 1996). The facts asserted by Respondents here may fairly fall within the scope of the doctrine of equitable estoppel. Because Complainant has not moved to strike such a defense, and Respondents' defense does not fail as a matter of law, I do not reach a decision as to the propriety of the claim raised in FRM's Third Answer at paragraph 35.

Accordingly, Complainant's Motion to Strike Affirmative Defenses is **DENIED**.

V. Judicial Discretion

As noted in the Applicable Standard section, *supra* at 4-5,

> even if [the presiding officer] feels that [accelerated decision] in a given case is technically proper, sound judicial policy and the proper exercise of the judicial discretion may prompt [her] to deny the motion and permit the case to be developed fully at trial.

Roberts v. Browning, 610 F.2d at 536. The Supreme Court has recognized this notion of judicial discretion in the context of summary judgment rulings, stating that trial courts may "deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Thus, there is ample authority to support the proposition that an ALJ may deny a motion for accelerated decision at her discretion and allow the case to be developed fully at hearing.

Here, Respondent has provided some evidence to show the existence of a genuine issue of material fact warranting an evidentiary hearing. While it may be that Respondent barely

meets this standard, it meets it nonetheless. Thus, I find that a genuine issue of material fact exists in the instant matters and that fully developing the issues within the context of a hearing is more appropriate than accelerated decision. Thus, Complainant's Motions 1 and 2 for Partial Accelerated Decision on Liability are **DENIED** as to all counts alleged in the Complaints and as to Respondents' affirmative defenses.

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Barbara A. Gunning
Administrative Law Judge

Dated: September 13, 2010
Washington, DC