

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

In the Matter of:

Liphatech, Inc.  
Milwaukee, Wisconsin,

Respondent.

) Docket No. FIFRA-05-2010-0016

) Hon. Susan Biro

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PROTECTION AGENCY

RESPONDENT'S REPLY TO COMPLAINANT'S  
RESPONSE IN OPPOSITION TO RESPONDENT'S  
MOTION TO LIMIT TESTIMONY AT TRIAL  
BASED UPON JOINT STIPULATIONS

Complainant refuses to address the substantive matter of Respondent's motion.

Surprisingly, the stated reason for such refusal is "to avoid revealing Complainant's specific trial strategy" thus leaving Complainant to summarily state, without explanation, that it "objects to the entirety of Respondent's motion." (*See* Complainant Resp. at p. 3, footnote 4.) This position merely broadcasts Complainant's apparent misunderstanding of the parties' obligations of transparency in the exchange of pretrial information (see 22.19 generally) and the sanctions available to the presiding officer for their failure to comply with the same. (*See* 22.19(g).) Does Ms. O'Meara believe that she will be able to present evidence contrary to these rules? This is not the first time that such a suggestion has been made by EPA which has heightened Respondent's concern as to whether the Complainant believes such tactics will be acceptable to this Court. Respondent is well aware of information that Complainant intends to proffer, unless of course its strategy is to disregard the rules with some "surprises."<sup>1</sup>

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<sup>1</sup> As someone who has spent 13 years in the public sector representing, among others, the Complainant, I am reminded of the often repeated value of that culture so familiar to me during that service that "the government wins when justice is done,"—not that "the government should win at any cost."

While this Court is certainly free to handle the issue of cumulative evidence as it wishes, ignoring the matter as suggested by Complainant for fear of revealing its trial strategy, per se, would be improper.

### **The Timing and Process of Respondent's Motion**

Much of Complainant's remaining response is not only misinformed, it is misleading. EPA certainly has known that the stipulation upon which the motion is based was filed well after the deadline for filing motions lapsed. To suggest that it should have been filed prior to the parties' efforts at reaching such a stipulation is simply disingenuous. The instant motion is intended to cause the parties and court to simplify the issues for the hearing in an effort to avoid unnecessary proof, a practice valued by all courts and certainly promoted under 40 C.F.R. part 22. One would think that EPA also desires the proceedings to be conducted fairly, efficiently, and without waste of the parties' or Court's resources. While Respondent's counsel fully understands it is expected to work within the bounds of the record before it, all the participants in this proceeding should want to avoid the introduction of irrelevant, immaterial, unduly repetitious, or unreliable evidence, as well as evidence of little probative value, again, principles required by the rules. (*See* § 22.22.) Respondent fully expects there will be some dispute about the relevance and admissibility of certain evidence, but there is no reason to ignore the possibility of narrowing the issues in a dispute pretrial.

After the Court continued these proceedings in October over EPA's objection in order for the undersigned counsel to take over this matter, Respondent evaluated the record and concluded it would be worth suggesting to the Court that narrowing the issues for trial might be in order. In the interest of seeking a dialogue to make such a process mutually

beneficial, Respondent's counsel, in transmitting the motion to Ms. O'Meara on January 12, stated the following:

Nidhi:

Look it (the motion) over and give me a call early next week with your thoughts.

No such call or even reply e-mail was made.

So five days later, on January 17, Respondent's counsel sent an e-mail to Ms. O'Meara with the subject "Follow Up Re Respondent's Motion." Forwarding the January 12 correspondence, Respondent's counsel said the following to Ms. O'Meara:

Nidhi:

Any chance you want to chat about ways to streamline the hearing per the motion we filed? Of course, I am open to your thoughts on other matters for consideration as well. Just let me know. Mark.

Ordinarily, such outreach to opposing counsel would provoke some sort of a reply, if not a discussion on the merits of the request. Not so with Ms. O'Meara. Rather than reply, she filed the subject response, complaining about Respondent's failure to contact her prior to filing the motion and for seeking a ruling for Respondent's benefit only.

Then Complainant's counsel attempts to characterize the instant motion as an end-run to this Court's ruling on the parties' giving mutual notice of witnesses it intends to call, further revealing Complainant's misunderstanding of that earlier motion and for that matter, the pro forma protocol of such a practice in courts throughout this country.

### **Proposed Resolution**

In correspondence with Mr. Sarno, Respondent's counsel stated that it wished to have a telephonic hearing on this matter, but learned from Mr. Sarno that this matter may not be heard until the hearing on February 7. Respondent understands perfectly that the Court's schedule may prohibit an earlier hearing. That fact, coupled with Complainant's

refusal to engage in a substantive dialogue on this request, suggests that we should simply go forward with the hearing and resolve these differences as they arise in the proceedings, unless, of course, the Court is available and desires to address any of these issues prior to February 7. In that event, Respondent's counsel will make itself available on short notice.

Dated this 23rd day of January, 2012.

Respectfully submitted,

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*In the Matter of Liphatech, Inc.*

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**CERTIFICATE OF SERVICE**

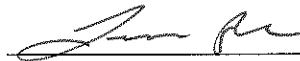
I, Lucas N. Roe, one of the attorneys for the Respondent, Liphatech, Inc., hereby certify that I delivered one copy of the foregoing by depositing it with a commercial delivery service, postage prepaid, at Milwaukee, Wisconsin, in envelopes addressed to:

Honorable Susan L. Biro  
Office of the Administrative Law Judges  
Franklin Court Building  
1099 14th Street, NW, Suite 350  
Washington, D.C. 20005; and

Ms. Nidhi K. O'Meara (C-14J)  
Office of Regional Counsel  
U.S. EPA, Region 5  
77 West Jackson Boulevard  
Chicago, IL 60604

I further certify that I filed the original and one copy of Respondent's Reply to Complainant's Response in Opposition to Respondent's Motion to Limit Testimony at Trial Based Upon Joint Stipulations and the original of this Certificate of Service in the Office of the Regional Hearing Clerk, U.S. EPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, by depositing them with a commercial delivery service, postage prepaid, at Milwaukee, Wisconsin, on the date below.

Dated this 23rd day of January, 2012.



Lucas N. Roe  
One of the Attorneys for Respondent  
Liphatech, Inc.



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January 23, 2012

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DELIVERED BY COURIER

Regional Hearing Clerk (E-19J)  
U.S. EPA, Region 5  
77 West Jackson Boulevard  
Chicago, IL 60604

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PROTECTION AGENCY

Dear Regional Hearing Clerk:

Re: *In the Matter of Liphatech, Inc.*  
Docket No. FIFRA-05-2010-0016

On behalf of Respondent, Liphatech, Inc., I enclose for filing an original and two copies of Respondent's Reply to Complainant's Response in Opposition to Respondent's Motion to Limit Testimony at Trial Based Upon Joint Stipulations.

Please file-stamp one of the enclosed copies and kindly return it to me in the enclosed postage-prepaid envelope. Thank you for your assistance.

Respectfully submitted,

Lucas N. Roe

REINHART\8219198

Encs.

cc Honorable Susan L. Biro (w/encs., by Courier)  
Ms. Nidhi K. O'Meara (C-14J) (w/encs., by Courier)