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April 11, 2012

Lucas N. Roe
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DELIVERED BY COURIER

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

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 (a) Respondent's Response in Opposition to Complainant's Motion to Conform Transcript And Request Related to Schedule for Submission of Post-Hearing Briefs and (b) Respondent's Reply to Complainant's Response in Opposition to Respondent's Motion to Conform Transcript.

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\8531561

Encs.

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

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

In the Matter of:)	Docket No. FIFRA-05-2010-0016
)	
Liphatech, Inc.)	Hon. Susan Biro
Milwaukee, Wisconsin,)	
)	
Respondent.)	
)	
)	
)	

RESPONDENT'S RESPONSE IN OPPOSITION TO COMPLAINANT'S MOTION TO CONFORM TRANSCRIPT AND REQUEST RELATED TO SCHEDULE FOR SUBMISSION OF POST-HEARING BRIEFS

Pursuant to 40 C.F.R. §§ 22.16 and 22.25 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/ Termination or Suspension of Permits (the "Consolidated Rules"), Respondent, Liphatech, Inc. ("Liphatech"), respectfully submits this Response in Opposition to Complainant's Motion to Conform Transcript and Request Related to Schedule for Submission of Post-Hearing Briefs.

I. RESPONSE IN OPPOSITION TO COMPLAINANT'S MOTION TO CONFORM TRANSCRIPT.

In its motion, Complainant requests that five changes be made to conform the hearing transcripts "because good cause exists." (Compl. Mot. at 2). Respondent respectfully disagrees with Complainant's suggested revisions.

With respect to the change proposed in page 108, line 4 of the transcript of Ms. Claudia Niess dated February 7, 2012, Respondent has no independent memory of such testimony and cannot determine that the testimony at hearing is not accurately reflected in the transcript.

With respect to the four proposed changes to the transcript of Dr. Thomas Steeger dated February 8, 2012, all of such changes are proposed to arguments made by Complainant's counsel, Mr. Steinbauer. Respondent has no independent memory of such testimony and cannot determine that the testimony at hearing is not accurately reflected in the transcript. In addition, because such revisions are proposed to the argument of Complainant's counsel, Mr. Steinbauer, rather than to the fact or opinion testimony of a witness, Complainant will have adequate opportunity to clarify its argument in post-hearing briefing.

For all of the foregoing reasons, Respondent respectfully requests that the Presiding Officer enter an order denying Complainant's Motion to Conform Transcript.

II. RESPONSE TO SPECIFIC REQUESTS RELATED TO SCHEDULE FOR SUBMISSION OF POST-HEARING BRIEFING.

In its Motion, Complainant requested 60 days from the date that a scheduling order is entered to file and serve its initial post-hearing brief. Respondent does not oppose Complainant's request, but respectfully requests that it be given an equal period of time to file and serve its response to Complainant's initial post-hearing brief.

Dated this 11 day of April, 2012.

Respectfully submitted,

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Attorneys for Respondent Liphatech, Inc.

Docket No. FIFRA-05-2010-0016
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 (a) Respondent's Response in Opposition to Complainant's Motion to Conform Transcript And Request Related to Schedule for Submission of Post-Hearing Briefs and (b) Respondent's Reply to Complainant's Response in Opposition to Respondent's Motion to Conform Transcript 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 11th day of April, 2012.



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

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Liphatech, Inc.)	Hon. Susan Biro
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Respondent.)	
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**RESPONDENT'S REPLY TO COMPLAINANT'S RESPONSE IN OPPOSITION
TO RESPONDENT'S MOTION TO CONFORM TRANSCRIPT**

Pursuant to 40 C.F.R §§ 22.16 and 22.25 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Consolidated Rules"), Respondent, Liphatech, Inc. ("Liphatech"), respectfully submits this Reply to Complainant's Response in Opposition To Respondent's Motion to Conform Transcript.

Complainant asserts that it consulted with Mr. Hebert regarding the change requested in page 158, line 22 of the transcript of Mr. John Hebert's testimony on February 8, 2012 and that Mr. Hebert recalls the question being asked as originally transcribed. (Compl. Resp. at 2). If the question asked of Mr. Hebert in page 158, lines 22-25 was not changed as set forth in Respondent's motion, Mr. Hebert's answer at line 1 of page 159 would be inconsistent with his prior testimony and the enforcement case review ("ECR") found at Complainant's Exhibit 19. Mr. Hebert previously testified that the Office of Pesticide Programs ("OPP") reviewed the research bulletin to determine if it was false and misleading under the standard for pesticide labeling. (2/8/12 Hebert Tr. at 158:1-21). Moreover, the ECR does not ever mention the words "substantially different."

The context of the line of questioning set forth on pages 157-159 supports changing the words "involve making" at 158:22 to "do not involve" as requested by Respondent.

With respect to the proposed change to page 23, line 21 of the transcript of Ms. Claudia Niess, the context indicates that the change is necessary to conform the transcript to the actual testimony presented at hearing. The sentence currently reads: "So because the complainant can't show that the website didn't offer to sell Rozol, the complainant can't show that sale or distribution occurred for purposes of Counts 2,184 to 2,231, in addition to those earlier reasons I mentioned." (2/7/12 Niess Tr. At 23:20-24).

In order to prove a violation of Counts 2,184 - 2,231, Complainant must prove that Respondent's website rises to the level of an offer to sell Rozol under FIFRA. To accurately reflect the testimony at hearing and to accurately reflect the relevant inquiry, the sentence should be modified to read: "So because the complainant can't show that the website offer [sic] to sell Rozol, the complainant can't show that sale or distribution occurred for purposes of Counts 2,184 to 2,231, in addition to those earlier reasons I mentioned." For all of the foregoing reasons, Respondent respectfully requests that the Presiding Officer enter an order granting Respondent's Motion.

Dated this 11 day of April, 2012.

Respectfully submitted,

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Attorneys for Respondent Liphatech, Inc.

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Dated this 11th day of April, 2012.



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