



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD

CHICAGO, IL 60604-3590

REGIONAL HEARING CLERK
U.S. EPA REGION 5

2010 DEC 10 AM 9:56

December 10, 2010

REPLY TO THE ATTENTION OF:
C14-J

VIA UPS Overnight Delivery

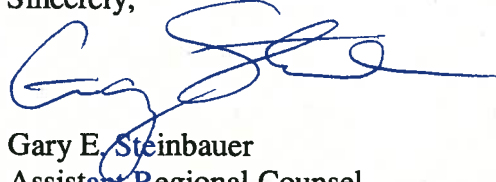
Honorable Barbara A. Gunning
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1099 14th Street, NW, Suite 350
Franklin Court
Washington, D.C. 20005

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

Dear Judge Gunning:

Enclosed please find a copy of *Complainant's Reply to Respondent's Response to Complainant's Motion In Limine to Exclude Testimony and Evidence*, which was filed on December 10, 2010, in the above-referenced matter.

Sincerely,



Gary E. Steinbauer
Assistant Regional Counsel

Enclosure

cc: Michael H. Simpson, Esq.
Reinhart Boerner Van Deuren
1000 North Water Street, Suite 1700
Milwaukee, WI 53202
(via UPS overnight delivery)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

RECEIVED
REGIONAL HEARING CLERK
2010 DEC 10 AM 9:56

IN THE MATTER OF:)

Liphatech, Inc.)

Milwaukee, Wisconsin)

Respondent.)

) Docket No. FIFRA-05-2010-0016

) Hon. Barbara A. Gunning

**Complainant's Reply to Respondent's Response to Complainant's
Motion In Limine to Exclude Testimony and Evidence**

Pursuant to 40 C.F.R. Sections 22.16(a) and 22.22(a)(1), Complainant¹ files this Reply to Respondent's Response to Complainant's Motion In Limine to Exclude Testimony and Evidence (Motion). Complainant respectfully requests that this Honorable Court issue an Order excluding the proposed expert testimony of Mr. Robert Haven Fuhrman and Respondent's Exhibits (RX) 40 through 42, because Mr. Fuhrman's proffered testimony is irrelevant, immaterial, and unreliable and is of little or no probative value. Therefore, the proffered testimony is inadmissible. 40 C.F.R. § 22.(a)(1). Complainant renews its request for a ruling on this motion in advance of the hearing date in an effort to conserve resources for all parties.

I. Mr. Fuhrman's Proposed Testimony is Inadmissible

As the gatekeeper for the admission of expert opinion testimony, the trier of fact must determine if the proffered testimony of a potential expert is both relevant and reliable. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993). In doing so,

¹ Complainant, when used in this document, refers to the Director, Land and Chemical Division, Region 5, United States Environmental Protection Agency.

the trier of fact must determine if the proffered testimony is based upon sufficient facts or data, if the proffered testimony is the product of reliable principles and methods, and if the witness has applied the principles and methods reliably to the facts of the case. Fed. R. Evid. 702.

Respondent has disclosed in its Prehearing Exchange that it plans to elicit testimony from Mr. Fuhrman relating to both the liability and the penalty in this case. Respondent intends to have Mr. Fuhrman offer his opinion as to how Sections 12(a)(1)(B) and 12(a)(2)(E) of FIFRA should be applied to the facts of this case. (*See* RX 42 at 5-6, 19, 21). As an economist, Mr. Fuhrman clearly lacks the requisite knowledge to offer an opinion on these matters. Further, his opinion is not designed to inform the Judge on a highly specialized field that relates to the facts at issue in this case, but rather it is designed to usurp the Judge's role as trier of fact. It is simply an attempt by counsel to have Mr. Fuhrman testify with respect to the legal issues that are before this Honorable Court. Even a cursory review of Mr. Fuhrman's "analysis" of the proposed penalty reveals that it reads like a legal brief or memorandum. (*See* RX 42). Such arguments should be reserved for counsel in closing arguments and legal briefs.

Respondent also disclosed that Mr. Fuhrman will offer his opinion as to how the gravity factor in Section 14(a)(4) of FIFRA should be applied to the facts of this case. (RX 42 at 7-12, 17-21). Mr. Fuhrman does not possess the requisite background to render an opinion on the toxicity of Rozol, nor does he possess any expertise on the effects of Rozol on human health or the environment, much less any other factor that

relates to the gravity portion of the proposed penalty. Simply put, any opinions he may offer will not be drawn from his experience as an economist, but rather will be based on nothing more than his subjective and unverifiable opinion as to how the penalty should have been calculated. This argument too must be saved for arguments and briefs.

Contrary to what Respondent claims, “Mr. Fuhrman’s discussions of legal issues” cannot and will not “be ancillary to his scientific and technical testimony,” because his proposed testimony cannot speak with any reliability on the application of the law, the toxicity of Rozol or the potential harm Rozol can cause to human health or the environment. (*See* Respondent’s Response, 11). Further, Mr. Fuhrman’s testimony regarding “his analysis of the shortcomings of the civil penalty policies” is irrelevant “because there is nothing that would require [EPA] to substantiate the ‘underpinnings’ of the [FIFRA ERP] as a matter of course.” *In re Employers Ins. of Wausau*, 6 E.A.D. 735, 759 (EAB, Feb. 11, 1997). This Honorable Court does not need Mr. Fuhrman’s proffered testimony to understand the law or the penalty policy and how they should be applied.

In addition to the foregoing reasons, Mr. Fuhrman’s proffered opinion is wholly unreliable under each of the criteria set forth by the Supreme Court in *Daubert*. 509 U.S. at 593-94. Mr. Fuhrman’s subjective interpretation of the facts and law certainly is not a “theory” capable of being tested. *See id.* Given that Mr. Fuhrman’s opinion is not based on any generally accepted methodology, it is impossible to calculate any potential rate of error. *Id.* Finally, while it touts the number and subject matter of Mr. Fuhrman’s publications, Respondent conveniently fails to mention that the “theories” espoused in

Mr. Fuhrman's publications regarding EPA civil penalty policies were not (and could not be) subjected to peer review. *Id.* Instead, Mr. Fuhrman's publications primarily are in various environmental law reporters. (*See* RX 40, RX_002869-2873). Thus, Mr. Fuhrman's proposed testimony falls well short of any of the *Daubert* guideposts for reliability.

II. Ms. Claudia Niess is a Fact Witness Not an Expert Witness

Ms. Niess is the assigned enforcement officer to this particular case. As part of her duties as an enforcement witness, she calculated the penalty in this case. In doing so, she used the FIFRA 2009 ERP to guide her in her calculations. She will testify as to how she carried out this duty as an enforcement officer. Such testimony is vastly different from the testimony being offered through Mr. Fuhrman by Respondent. Ms Niess' testimony is grounded in the facts of this case, is part of what she is required to do as an enforcement officer and is not being offered as expert opinion. Respondent is free to rebut Ms. Niess' penalty calculations based on evidence and/or argument. It cannot, however, masquerade argument as evidence and "expert" opinion as it attempts to do here.

III. Conclusion

Under 40 C.F.R. Section 22.22(a), Mr. Fuhrman's testimony should be excluded. His testimony will not assist the trier of fact in understanding the evidence, nor will it assist in determining a fact at issue. Rather, his testimony is nothing more than his unreliable, irrelevant and subjective interpretation of FIFRA, its implementing

regulations and case law interpreting the same. Such arguments should be saved for closing arguments and legal briefs.

Complainant respectfully requests that this Honorable Court grant its Motion and enter an order excluding Mr. Fuhrman's testimony and exhibits 40-42 of Respondent's Prehearing Exchange, all of which relate to his proposed testimony. In the event Mr. Fuhrman is allowed to testify, Complainant may call a rebuttal witness. Due to the logistics and resources involved in responding to Mr. Fuhrman's testimony, Complainant respectfully requests a ruling on this Motion prior to any hearing so Complainant can adequately prepare with respect to this witness.

Respectfully submitted,

DATED: 12/10/2010



Nidhi K. O'Meara
Erik H. Olson
Associate Regional Counsels
Gary E. Steinbauer
Assistant Regional Counsel
United States EPA – ORC Region 5
77 W. Jackson Blvd. (C14-J)
Chicago, IL 60604
(312) 886-4306
Attorneys for Complainant

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

RECEIVED
REGIONAL HEARING CLERK
U.S. EPA REGION 5

2010 DEC 10 AM 9:56

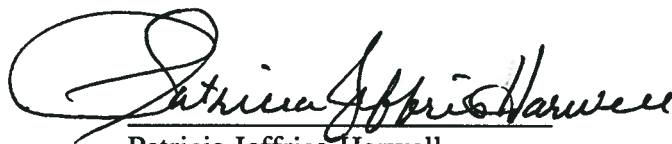
CERTIFICATE OF SERVICE

I hereby certify that the original and one true, accurate and complete copy of *Complainant's Reply to Respondent's Response to Complainant's Motion In Limine to Exclude Testimony and Evidence* was filed with the Regional Hearing Clerk, U.S. EPA, Region 5, on the date indicated below. True, accurate and complete copies were also sent to the persons designated below on this date via UPS overnight delivery:

Honorable Barbara A. Gunning
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1099 14th Street, NW, Suite 350
Franklin Court
Washington, D.C. 20005

Mr. Michael H. Simpson
Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 1700
Milwaukee, WI 53202

Dated in Chicago, Illinois, this 10th day of December, 2010.



Patricia Jeffries-Harwell
Legal Technician
U.S. EPA, Region 5
Mail Code C-14J
77 West Jackson Blvd.
Chicago, IL 60604
(312) 353-7464