UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
LIPHATECH, INC.,	)	DOCKET NO. FIFRA-05-2010-0016
	)	
	)	
RESPONDENT	)	

ORDER ON PREHEARING MOTIONS RELATED TO AMENDING THE COMPLAINT

The parties in this matter have filed numerous interrelated and combined prehearing motions that require separate and specific identification before this Order can resolve the issues raised therein. This order addresses the following list of Motions, Responses, and Replies filed by the United States Environmental Protection Agency, Region 5 ("Complainant") and Liphatech, Inc. ("Respondent"):

1. The First Motion to Amend

   a. Complainant's Motion for Leave to Amend Complaint to Reduce Proposed Penalty and Memorandum in Support of Complainant's Motion (filed September 15, 2010) ("First MtAmd");

   b. Memorandum of Respondent Liphatech, Inc. Opposing Motion of Complainant for Leave to Amend Complaint (received October 5, 2010) ("Response to First MtAmd"); and

   c. Complainant's Reply to Respondent's Memorandum Opposing Complainant's Motion for Leave to Amend Complaint (filed October 7, 2010) ("Reply to First MtAmd").

2. Respondent's Motion to Dismiss or for Accelerated Decision on the Misbranded Sales Claims (FIFRA § 12(a)(1)(E)) & The Second Motion to Amend

   a. Motion of Respondent to Partially Dismiss the Complaint or in the Alternative for Partial Accelerated Decision on an Issue of Liability in Favor of Respondent with

Respect to the Alleged Violations of § 12(a)(1)(E) of FIFRA (received September 23, 2010) ("Motion to Dismiss" or "MTD");

b. Complainant's Motion for Leave to Amend the Complaint and Complainant's Response to Motion of Respondent to Partially Dismiss the Complaint or in the Alternative for Partial Accelerated Decision on an Issue of Liability in Favor of Respondent with Respect to the Alleged Violations of § 12(a)(1)(E) of FIFRA (received October 4, 2010) ("Response to MTD" and "Second Motion to Amend" or "Second MtAmd"), along with a Proposed First Amended Complaint;

c. Respondent's Reply to Complainant's Response to Motion of Respondent to Partially Dismiss the Complaint or in the Alternative for Partial Accelerated Decision on an Issue of Liability in Favor of Respondent with Respect to the Alleged Violations of § 12(a)(1)(E) of FIFRA And Respondent's Response to Complainant's Motion for Leave to Amend the Complaint (received October 14, 2010) ("Reply to MTD" and "Response to Second MtAmd"); and

d. Complainant's Reply to Respondent's Response to Complainant's Motion for Leave to Amend the Complaint (dated October 21, 2010) ("Reply to Second MtAmd").

Pending motions by the parties for accelerated decision on claims related to Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), will be addressed in a subsequent order.

I. First Motion to Amend

Complainant's First Motion to Amend requests leave to make a single change to the Complaint: to reduce the proposed penalty by eliminating the economic benefit component, originally stated as $50,226. First MtAmd at 1. Complainant cites the imminency of "new guidance" related to FIFRA penalty calculations as the justification for this amendment. *Id.* at 2. According to Complainant, Respondent will suffer no prejudice from this amendment because the proposed penalty will be reduced. *Id.* at 3.

Respondent takes an admittedly unconventional tack in its Response to the Motion to Amend, stating that it objects to reducing the proposed penalty because Complainant does not explain how it calculated the economic benefit it now seeks to eliminate and does not explain "the nature of the new guidance"

referred to in the Motion. Response to MtAmd at 1. Respondent surmises that the impetus for the Motion is in fact "to avoid the adverse precedential impact of" the initial decision issued in *99 Cents Only Stores*, Docket No. FIFRA-09-2008-0027, 2010 WL 2787749 (EPA ALJ June 24, 2010). Response to MtAmd at 1. Respondent states that it would agree to the Motion only if four conditions are met:

1. Complainant must stipulate that no economic benefit accrued to Respondent in this matter, or provide Respondent with all relevant information used to calculate the economic benefit pled in the initial Complaint;

2. Complainant must provide Respondent will all relevant information related to the "new guidance" referred to in the Motion;

3. Complainant must not seek recovery for any economic benefit in this case at some future date; and

4. Respondent must not be precluded from arguing at hearing that no economic benefit accrued from the alleged violations.

See Response to MtAmd at 1-2.

In its Reply on the Motion to Amend, Complainant defends its good faith basis for requesting leave to amend, stating that it lacks sufficient evidence to prove the alleged economic benefit and thus seeks to dispose of the issue by its Motion. Reply to MtAmd at 3-4. In the event the Motion is denied or any of the conditions identified in Respondent's Response are imposed by an order from this tribunal, Complainant asks that such an order require the production of certain documents related to calculations by Respondent's economic consulting expert, Mr. Fuhrman. *Id.* at 5.

A. Legal Standard

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32. Section 22.14(c) of the Rules of Practice allows the complainant to amend the complaint once as a matter of right at any time before the answer is filed, and otherwise "only upon motion granted by the Presiding Officer." 40 C.F.R. § 22.14(c). The Rules of Practice

do not, however, illuminate the circumstances when amendment of the complaint is or is not appropriate. In the absence of administrative rules on this subject, the Environmental Appeals Board ("EAB") has offered guidance by consulting the Federal Rules of Civil Procedure ("FRCP")[1] as they apply in analogous situations. *In re Carroll Oil Co.*, RCRA (9006) Appeal No. 01-02, 2002 EPA App. LEXIS 14 at *35 (EAB, July 31, 2002); *In the Matter of Asbestos Specialists, Inc.*, TSCA Appeal No. 92-3, 4 E.A.D. 819, 827 n. 20 (October 6, 1993).

The FRCP adopt a liberal stance toward amending pleadings, stating that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).[2] The Supreme Court has also expressed this liberality in interpreting Rule 15(a), finding that "the Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Foman v. Davis*, 371 U.S. 178, 181-82 (1962) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)).

In considering a motion to amend under Rule 15(a), the Court has held that leave to amend shall be freely given in the absence of any apparent or declared reason, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by previous amendment, undue prejudice, or futility of amendment. *Id.* at 182; *accord Carroll Oil,* 2002 EPA App. LEXIS 14 at *37; *see also Yaffe Iron and Metal Co. v. U.S. EPA*, 774 F.2d 1008, 1012 (10th Cir. 1985) (administrative

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[1] The FRCP are not binding on administrative agencies, but many times these rules provide useful and instructive guidance in applying the Rules of Practice. *See Oak Tree Farm Dairy, Inc. v. Block*, 544 F.Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); *Wego Chemical & Mineral Corp.*, 4 E.A.D. 513, 524 n.10 (EAB 1993).

[2] FRCP 15(a) provides that:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

pleadings should be "liberally construed" and "easily amended"). Similarly, the EAB has found that a complainant should be given leave to freely amend a complaint in EPA proceedings in accordance with the liberal policy of FRCP 15(a), as it promotes accurate decisions on the merits of each case. *In the Matter of Asbestos Specialists, Inc.*, 4 E.A.D. at 830; *In the Matter of Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. 170, 205 (EAB 1992).

B. Discussion

Complainant argues in its Motion to Amend that the elimination of the economic benefit component from the proposed penalty works no prejudice on the Respondent. First MtAmd at 3. Complainant also summarily states that the request "is not the product of undue delay, bad faith, or dilatory motive." *Id.* Respondent both claims it would suffer prejudice and disputes Complainant's good faith while implying a dilatory motive. Response to First MtAmd at 4-8.

With respect to prejudice, Respondent claims that because it has retained an expert consultant and incurred costs associated with developing its defense of the Complaint as originally drafted, that the elimination of the economic benefit component from the proposed penalty would cause Respondent such prejudice that Complainant should be denied leave to amend the Complaint. *Id.* at 8. This argument lacks merit. A respondent is free to prepare its case as it sees fit without turning a complainant's proper exercise of prosecutorial discretion into an act of prejudice. Presumably, if Complainant in this case sought to drop multiple counts from the Complaint (or Respondent were to prevail on a partial motion for accelerated decision) Respondent would not simultaneously lament the costs it had expended on its legal defense and claim undue prejudice. I find that no prejudice would result from granting the First Motion to Amend.

With respect to bad faith and dilatory motive, Respondent claims that Complainant purposefully misapplies the December 2009 FIFRA Enforcement Response Policy ("2009 ERP") when it seeks to eliminate the previously proposed economic benefit component. Response to First MtAmd at 2-4. According to Respondent, the 2009 ERP "mandate[s] the recovery of any significant economic benefit . . . that accrues to a violator from noncompliance . . . ." *Id.* at 2-3 (internal citations omitted). Respondent also argues that Complainant's reference to "new guidance" is too "vague [a] proclamation" to justify the Motion, *Id.* at 5, and that the recentness of the 2009 ERP's publication militates against any reasonable need for revision only nine months later.

Id.

Respondent's arguments are unpersuasive. First, Respondent mischaracterizes the 2009 ERP. The ERP's guidelines with respect to economic benefit are precatory and specifically provide for instances where an economic benefit need not be recovered when reaching settlement. Most relevant is exception number three, which reads: "[i]t is unlikely, based on the facts of the particular case as a whole, that EPA will be able to recover the economic benefit in litigation . . . ." U.S. EPA, Office of Enforcement and Compliance Assurance: FIFRA Enforcement Response Policy 21 (2009). Complainant identifies this circumstance in its Reply. *See* Reply to First MtAmd at 4. The elimination of the economic benefit component from the proposed penalty does not render the 2009 ERP inoperative, nor does it provide a basis for denying the Motion to Amend. More importantly, the propriety of the application of the ERP is not a valid basis for denying a motion to amend where it does not involve the *Foman v. Davis* factors.

Second, Respondent offers no evidence that Complainant's decision to eliminate the economic benefit component was motivated by bad faith or dilatory motive. Complainant states that "new guidance [is] currently being developed by the United States Environmental Protection Agency on how to calculate the economic benefit in FIFRA cases . . . ." First MtAmd at 2. Respondent calls this "very curious rationale" insufficient as a basis for seeking to amend the Complaint to remove the economic benefit component. Response to First MtAmd at 5. Respondent implies that EPA is not actually developing new guidance and displays incredulity that "a government agency revises its own ERP after 19 years and then within nine short months realiz[es] that it still needs to develop guidance on calculating economic benefit . . . ." *Id.* Contrary to Respondent's speculative assertions, there is no evidence of bad faith nor is it illogical to discover errors or oversights that require reconsideration soon after the issuance of new guidance documents. I find no dilatory motive or bad faith in Complainant's request to amend the Complaint.

Respondent's final argument concerns the recent decision in *99 Cents Only Stores* ("*99 Cents*"), Docket No. FIFRA-09-2008-0027, 2010 WL 2787749 (EPA ALJ June 24, 2010). According to Respondent, this case requires a civil penalty under FIFRA to have a proportionate relationship to the underlying economic benefit. Response to First MtAmd at 3, 7. Therefore, Respondent argues, eliminating the proposed penalty from the Complaint would disallow Respondent from arguing at hearing that the total

proposed penalty is "stunningly disproportionate" and therefore improper. *Id.* at 7.

Respondent's arguments are unpersuasive.[3] In *99 Cents*, Chief Judge Susan Biro calculated a penalty based on the statutory criteria. *See* 7 U.S.C. § 136*l*(a)(4). Judge Biro's finding that the proposed penalty was "disproportionately high in light of all the circumstances of the case," *99 Cents*, 2010 WL 2787749, *49, was made independent of the proposed penalty calculated in the complaint using the ERP that preceded the 2009 ERP. The reasoning in that case does not affect the ability of Complainant to amend the Complaint here. As Complainant concedes in its Reply, "nothing precludes Respondent from arguing its theory under *99 Cents* if the economic benefit component of the proposed penalty is eliminated." Reply to First MtAmd at 4. I further observe that the complainant has the burden of presentation and persuasion that the relief sought is appropriate and that the presiding Administrative Law Judge must determine the amount of the recommended civil penalty based on the evidence in the record, in accordance with any penalty criteria set forth in FIFRA, and in consideration of any penalty guidelines issued under FIFRA. 38 C.F.R. §§ 22.24 (a), 22.27(b).

Accordingly, I find no basis for denying the Motion to Amend. However, Respondent fairly points out that it would be unfair for Complainant to reverse course at some later date and surprise the Respondent with a new amendment seeking an economic benefit component calculated using some as-yet-unpublished guidance document. *See* Response to First MtAmd at 9. Thus, the First Motion to Amend is **GRANTED** and Complainant is advised that future requests to amend the Complaint to add a new economic benefit component will not be granted.[4]

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[3] Although consideration is given to my esteemed colleague's opinion and rulings, I note that I am not strictly bound by the reasoning set forth by another ALJ in another matter.

[4] The parties are reminded that any documentation or testimony that a party intends to present at hearing must be disclosed as a supplement to its respective prehearing exchange in accordance with the Rules of Practice.

II. Respondent's Motion to Dismiss or for Accelerated Decision on the Misbranded Sales Claims (Section 12(a)(1)(E) of FIFRA) & The Second Motion to Amend

In its Motion to Partially Dismiss the Complaint or in the Alternative for Partial Accelerated Decision on an Issue of Liability in Favor of Respondent with Respect to the Alleged Violations of § 12(a)(1)(E) of FIFRA ("Motion to Dismiss" or "MTD"), Respondent argues that Complainant has failed to plead its *prima facie* case under Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), because the Complaint does not "allege that any of the statements made by Liphatech in its advertising constitute "labeling" as that term is defined under FIFRA. MTD at 1. Alternatively, if Complainant is found to have properly plead the elements of a claim under Section 12(a)(1)(E), then Respondent seeks a determination that Respondent's advertising materials do not, as a matter of law, constitute "labeling" under FIFRA. *Id.* at 2. The relief Respondent seeks through its Motion to Dismiss is the elimination of "those paragraphs and portions of paragraphs in the Complaint that allege misbranding violations . . . ." *Id.* at 8. Respondent attaches Exhibit A to its Motion to Dismiss, which lists the paragraphs it seeks to have dismissed in whole or in part.

Complainant subsequently filed a Response to the Motion to Dismiss combined with a second Motion for Leave to Amend the Complaint (collectively referred to as the "Second Motion to Amend" or "Second MtAmd"). In its Second Motion to Amend, Complainant states that the 91 allegations that Respondent violated Section 12(a)(1)(E) of FIFRA are alternative pleadings, the removal of which would not alter the number of counts in the Complaint nor the proposed penalty. Second MtAmd at 3. Complainant states that although it does not agree "with the arguments made by Respondent in [the Motion to Dismiss]," Complainant agrees that "the parties should streamline the issues at hand for the benefit of the Court and the parties." *Id.* Complainant intends the Second Motion to Amend to achieve that joint purpose and specifically identifies the paragraphs it seeks to eliminate in whole or in part. *Id.* at 3-5. Complainant does not actually respond to the arguments contained in Respondent's Motion to Dismiss.

A. Legal Standard

The legal standard for review of the Second Motion to Amend is identical to the standard articulated above in Section I.A. The Rules of Practice address motions to dismiss at 40 C.F.R. § 22.20, which provides in pertinent part that:

> The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

40 C.F.R. § 22.20(a). The Environmental Appeals Board ("EAB") considers motions to dismiss under Section 22.20(a) to be analogous to motions for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP"). *In the Matter of Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 (EAB 1993).

Rule 12(b)(6) of the FRCP provides for dismissal when the complaint fails "to state a claim upon which relief can be granted." It is well established that dismissal is warranted for failure to state a claim when the plaintiff fails to lay out "direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007); *see also McCulloch v. PNC Bank, Inc.*, 298 F.3d 1217, 1220 (11th Cir. 2002). This standard for dismissal further requires that the allegations in the complaint be taken as true and that all inferences be drawn in favor of the plaintiff.[5] *See Twombly*, 550 U.S. at 555; *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Accordingly, to prevail in its Motion, Respondent Liphatech must show that the EPA's allegations, assumed to be true, do not prove a violation of FIFRA as charged. In short, Respondent Liphatech must demonstrate that Complainant has failed to properly plead a *prima facie* case.

B. Discussion

The parties effectively seek identical relief by their separate motions, namely the elimination of allegations related to Section 12(a)(1)(E) of FIFRA, and a similar outcome will result regardless of which movant prevails. According to the parties, their respective lists of paragraphs to be dismissed or eliminated is identical is all respects save one: Complainant

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[5] The FRCP are not binding on administrative agencies but many times these rules provide useful and instructive guidance in applying the Rules of Practice. *See Oak Tree Farm Dairy, Inc. v. Block*, 544 F. Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); *In re Wego Chemical & Mineral Corporation*, 4 E.A.D. 513, 524 n. 10 (EAB, Feb. 24, 1993).

seeks to retain paragraph 208 and Respondent seeks to have paragraph 208 dismissed. Second MtAmd at 4 n.3; Reply to MTD at 4. Paragraph 208 states: "[o]n or about January 22, 2008, Respondent's website at www.liphatech.com also made claims that were false and misleading." *See* Compl. ¶ 208. Respondent takes the view that the "false or misleading" language invokes a standard articulated in FIFRA that applies only to labeling violations and not to advertising violations. Therefore, according to Respondent, because the website is advertising and not labeling (and Complainant has not alleged any labeling violations), allegations including the "false and misleading" language are inappropriate and fail to state a claim. Reply to MTD at 4.

The Complainant states in its Second Motion to Amend that the elimination of claims related to Section 12(a)(1)(E) will have no effect on the number of counts or the proposed penalty because each affected count is alleged, alternatively, as a violation of Section 12(a)(1)(B), which makes it unlawful for any person to distribute or sell:

> any registered pesticide if any claims made for it as part of its distribution or sale substantially differ from any claims made for it as a part of the statement required in connection with its registration. . .

FIFRA § 12(a)(1)(B). Paragraph 207 of the Complaint, which directly precedes the paragraph at issue, states:

> [o]n or about January 22, 2008, Respondent's website at www.liphatech.com also made claims that were substantially different than claims made for 'Rozol,' EPA Reg. No. 7173-244, as part of its March 2, 2005, 'accepted label.'

Compl. ¶ 207. Paragraph 210, which follows paragraph 208 and is included in the same subsection of the Complaint, states: [t]he claims made by Respondent's website on January 22, 2008, were made as a part of the distribution or sale of 'Rozol,' EPA Reg. No. 7173-244." Compl. ¶ 210.[6]

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[6] The fact that the Complaint's subheading for these paragraphs is entitled "Website Advertisements regarding 'Rozol,'" does not render the allegations themselves improper or limit the Complainant to treating the website strictly as advertising. The subheading is not controlling.

Respondent's argument that allegations of "false and misleading" statements must apply only to claims involving labeling violations is unpersuasive because Respondent's arguments are limited solely to advertising statements and Respondent conflates the term "false or misleading" with "misbranded." *See* Reply to MTD at 5. It is the issue of misbranding that is limited to labeling violations. FIFRA § 2(p)-(q). By its own terms, the Complaint alleges that the allegedly false or misleading claims were made in connection with the distribution and sale of Rozol on Respondent's website and that these same claims were "substantially different than the claims made for 'Rozol'" as part of its approved FIFRA label. Compl. ¶¶ 207-212.

Complainant need not, as Respondent argues, allege that the website identified in the Complaint is "labeling" under FIFRA. *See* Reply to MTD at 6. There is nothing infirm about Complainant's inclusion of paragraph 208 even when the remaining, jointly identified paragraphs related to Section 12(a)(1)(E) are removed. Arguing that a statement is "false or misleading" without more does not articulate an independent claim of a FIFRA violation and Respondent suffers no prejudice from the inclusion of such language in a series of paragraphs related to the alleged sale or distribution of a registered pesticide.

Additionally, Respondent's concern that the retention of paragraph 208 creates some inherent "contradiction," Reply to MTD at 8, is unfounded. In its Reply to the Motion to Amend, Complainant reiterates its intent "not to present any evidence or testimony at hearing to prove that Liphatech violated Section 12(a)(1)(E) of FIFRA. Reply to MtAmd at 1. This claim conforms with the absence in the Proposed First Amended Complaint of any allegation of violation of Section 12(a)(1)(E). Under the Proposed First Amended Complaint, Complainant cannot seek a penalty for an unpled violation of Section 12(a)(1)(E) of FIFRA.

With the issues related to paragraph 208 resolved, the remaining prayers for relief are aligned. Therefore, the outcome will be the same regardless of which motion is granted. However, because Complainant requires leave to file the Proposed First

Amended Complaint, I hereby **GRANT** Complainant's Second Motion to Amend and **DENY AS MOOT** Respondent's Motion to Dismiss. Complainant is given leave to file the Proposed First Amended Complaint.

Barbara A. Gunning
Administrative Law Judge

Dated: December 29, 2010
Washington, DC

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

CERTIFICATE OF SERVICE

I hereby certify that copies of this **Order on Prehearing Motions Related to Amending the Complaint**, issued by Barbara Gunning, Administrative Law Judge, in FIFRA-05-2010-0016, were sent to the following parties on this 29th day of December 2010, in the manner indicated:

Mary Angeles
Legal Staff Assistant

Original and One Copy by Pouch Mail to:

LaDawn Whitehead
Regional Hearing Clerk
U.S. EPA, Region V, MC-E-19J
77 West Jackson Blvd.,
Chicago, IL 60604-3590

Copy by Pouch Mail to:

Nidhi K. O'Meara, Esq.
Gary E. Steinbauer, Esq.
Cynthia King, Esq.
Associate Regional Counsel
ORC, U.S. EPA / Region V
Mail Code C-14J
77 West Jackson Blvd.
Chicago, IL 60604-3590

Copy by Regular Mail to:

Michael H. Simpson, Esq.
Reinhart, Boerner, Van Deuren, S.C.
P.O. Box 2965
Milwaukee, WI 53201-2965

and

1000 North Water Street
Suite 1700
Milwaukee, WI 53202

Dated: December 29, 2010
Washington, D.C.