UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:
C-14J

Via UPS Overnight Delivery

August 24, 2012

Honorable Susan L. Biro
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 Chief Judge Biro:

Enclosed please find a copy of *Complainant's Reply Brief In Opposition to Respondent's Post-Hearing Brief*, which was filed on August 24, 2012, in the above referenced-matter.

Sincerely,

Gary E. Steinbauer
Assistant Regional Counsel

Enclosure

cc: Mr. Mark A. Cameli
Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 1700
Milwaukee, WI 53202
(*via UPS overnight delivery*)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
Liphatech, Inc.	)	Docket No. FIFRA-05-2010-0016
Milwaukee, Wisconsin	)	
	)	Hon. Susan L. Biro
Respondent.	)	
	)	

COMPLAINANT'S REPLY BRIEF IN OPPOSITION TO RESPONDENT'S POST-HEARING BRIEF

In accordance with the Chief Judge's April 16, 2012 Order Scheduling Post-Hearing Briefs, the United States Environmental Protection Agency, Region 5 ("Complainant" or "EPA"), through its undersigned attorneys, files the instant Reply Brief in Opposition to Respondent's Post-Hearing Brief, pursuant to Section 22.26 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation, Termination or Suspension of Permits, 40 C.F.R. § 22.26. Complainant limits this brief to the issues raised in Respondent's Post-Hearing Brief that were not addressed initially in Complainant's Post-Hearing Brief. All arguments made in Complainant's Post-Hearing Brief are incorporated herein by reference.

I. 40 C.F.R. § 168.22 Is a Binding Interpretive Rule

Respondent's characterization of 40 C.F.R. § 168.22 as a non-binding, interpretive rule is incorrect. (Resp.'s Post-Hrg. Br. at 31(citing *Vietnam Veterans of Am. v. Sec'y of the Navy*, 843 F.2d 528, 537 (D.C. Cir. 1988)). The "final interpretive rule" label that EPA placed on 40 C.F.R. § 168.22(a) when it was promulgated more than 20 years ago, after notice and comment, does not render it "non-binding" on Respondent or in this proceeding. "All rules which interpret the underlying statute must be binding because they set forth what the agency believes is

congressional intent." *Metro. School Dist. v. Davilla*, 969 F.2d 485, 493 (7th Cir. 1992). Respondent's arguments to the contrary are without merit.

II. Respondent's Reliance On a 1973 Office of General Counsel Memorandum Is Misplaced

Respondent's reliance on a 1973 Office of General Counsel ("OGC") memorandum should be rejected for the same reasons that the Environmental Appeals Board ("EAB") rejected the respondent's similar arguments in *Microban II*. (*See* Resp.'s Post-Hrg. Br. at 35-36). Furthermore, even if Respondent's attempt to resurrect the 1973 OGC memorandum was not foreclosed by *Microban II*, the 1973 OGC memorandum supports Complainant's position with respect to the proper interpretation of FIFRA § 12(a)(1)(B).

In *Microban II*, the EAB rejected the respondent's attempt to rely on the 1973 OGC memorandum to support its argument "that 'unapproved claims must 'accompany' a sale or distribution of a pesticide product to support an independent violation of section 12(a)(1)(B).'" *Microban II*, 11 E.A.D. at 444 n. 26. Although the respondent in *Microban II* relied on the 1973 OGC memorandum for a different purpose, the EAB's final reason for rejecting the respondent's argument is illustrative and casts considerable doubt on Respondent's ability to rely on the memorandum in this case. In no uncertain terms, the EAB rejected the respondent's contention by stating that "in 1989, the Agency interpreted [FIFRA § 12(a)(1)(B)] in a different manner from the Agency's 1973 theory . . . . *See* 40 C.F.R. § 168.22(a) (interpreting the claims referenced under 12(a)(1)(B) to 'extend[] to advertisements in any advertising medium to which pesticide users or the general public have access')." *Id.* (alteration in original). Therefore, the EAB has already determined that to the extent that the 1973 OGC memorandum is ever relied on for the purpose urged by Respondent, i.e., that EPA does not have the authority to police substantially different claims made in advertisements, the subsequent interpretation of FIFRA §

12(a)(1)(B) promulgated in 40 C.F.R. § 168.22(a) controls. Respondent's arguments to the contrary must be rejected.

Even if the 1973 OGC memorandum could somehow trump a subsequently promulgated regulation, the memorandum supports Complainant's theory in this case. As indicated in the 1973 OGC memorandum, FIFRA § 12(a)(1)(B) does not give EPA the authority "to control deceptive advertising formed from claims identical to or not substantially different from ones submitted in the registration application." 1973 WL 21961, at *2; *see also id.* at *1 ("[A]s part of the registration procedure, each application must detail *all* claims that will be made in connection with a particular pesticide.") (citing 7 U.S.C. § 136a(c)(1)(C)). The 1973 OGC memorandum, however, makes it abundantly clear that the claims approach explained in the memorandum, *id.* at *1-2, which is the approach Complainant has taken in this case, "does allow the agency to police contradictory claims made for pesticide products." *Id.* at *2. Consequently, the 1973 OGC memorandum lends additional support for Complainant's use of FIFRA § 12(a)(1)(B) to police the numerous contradictory claims Respondent made in its advertisements.

III. Actual Reliance On a Substantially Different Claim Is Not Required to Prove Nexus

Contrary to binding precedent, Respondent attempts to create a rigid, inflexible test for determining nexus, where only direct evidence of actual reliance on the substantially different claims by a recipient is adequate to show nexus. In *Microban I*, the EAB held that "a rigid test, applicable to all situations, for determining whether claims have been made as part of the distribution or sale of a pesticide is *not* contemplated as part of the statutory scheme." *Microban I*, 9 E.A.D. at 688 (emphasis added). Actual reliance on the substantially different claim or claims is not required to demonstrate the requisite nexus under FIFRA § 12(a)(1)(B). *See Sporicidin*, 3 E.A.D. at 604 (noting that "[t]he same hospital personnel who read and *may* have been influenced by respondent's literature were also employed there at the time that the

pesticides were sold or distributed there"); *Microban II*, 11 E.A.D. at 448 (finding "it more likely than not that there is a sufficiently close link between the unapproved claims . . . and the thirty-two distributions or sales . . . ."). Although Respondent attempts to transform the facts adduced in *Microban* into evidentiary thresholds for the nexus requirement, the EAB has made it clear that "it is necessary to examine all of the surrounding facts and circumstances to make" a determination regarding nexus. *Microban I*, 9 E.A.D. at 688. A careful examination of all the surrounding facts and circumstances shows that, more likely than not, a sufficiently close link exists between Respondent's substantially different claims and the shipments of Rozol in 2007 and 2008 and the "offers for sale" for Rozol in 2009 and 2010.

The record evidence shows that Respondent made substantially different claims as part of a targeted "sales promotion" and "advertising" campaign. *Sporicidin*, 3 E.A.D. at 605 (stating that "'distribution' includes both marketing and merchandising a commodity" and "merchandising means 'sales promotion as a comprehensive function' and includes 'coordination of manufacture and marketing and effective advertising and selling'") (quoting WEBSTER'S THIRD INTERNATIONAL DICTIONARY (1966)). Twenty-one of the shipments of Rozol that are at issue in Counts 2,141 through 2,183 were preceded by the receipt of Respondent's Research Bulletin.[1] The remaining shipments of Rozol were to different locations of Respondent's authorized and existing distributors and during Respondent's targeted radio and print advertising campaign that spanned the entire six-state area in which Rozol was registered under FIFRA § 24(c).[2] Finally, all of the "offers for sale" at issue in Counts 2,184 through 2,231 were received

[1] *Compare* CX17, EPA378 *with* CX23, EPA450-51, 454, 458, 460-61, 463-68, 470, 473, 475, 477-79, 480, 485, 492; *see also* Compl.'s Post-Hrg. Br. at 76-78.

[2] For shipments of Rozol to different locations of Respondent's authorized distributors *compare* CX17, EPA378 *with* CX23, EPA462, 469, 471-72, 474, 476, 481-84, 488-90. For the remaining shipments of Rozol at issue in Counts 2,141 through 2,183 that occurred during Respondent's targeted radio and print advertising campaign *see* CX23, EPA452-53, 455-57, 459, 486-87, 491. *See also* Compl.'s Post-Hrg. Br. at 74-79.

by the 48 distributors. (*See* CX53, EPA994, 996; CX145, EPA3522; *see also* Compl.'s Post-Hrg. Br. at 79-81).

These facts show that it is more likely than not that Respondent's unapproved and substantially different claims in its radio advertisements and the Research Bulletin, and its unapproved and substantially different claims on its website, in the New Slim Jim, and in the Product Information Sheets, were sufficiently linked to the 43 shipments at issue in Counts 2,141 through 2,183 and 48 "offers for sale" at issue in Counts 2,184 through 2,231. *See, e.g., Microban II*, 11 E.A.D. at 450. Complainant need not "dispel all contradictory inferences" that Respondent claims can be drawn from the record evidence. *Ford Motor Co. v. Mondragon*, 271 F.2d 342, 345 (8th Cir. 1959).

IV. Respondent's Attempt to Invoke the United States Sentencing Guidelines As A Basis for Determining the Penalty Is Misplaced

Respondent's argument that the United States Sentencing Guidelines ("U.S.S.G." or "Sentencing Guidelines") should be used "as a compass for determining a corporate fine" is a complete misunderstanding of how those guidelines function. (Resp.'s Post-Hrg. Br. at 84-86 and n.30). First, as Respondent acknowledges, the section of the guidelines cited in footnote 30 of its brief – U.S.S.G. §5E1.2 – only applies to individuals. Criminal defendants that are "organizations" typically are governed by a different section of the Guidelines, U.S.S.G. §8C1. Nevertheless, even U.S.S.G §8C1 is inapposite, as the Sentencing Guidelines state unequivocally that the provisions for determining fines against organizations (U.S.S.G. §§ 8C2.2 through 8C2.9) "do not apply to counts for which the applicable offense level is determined under Chapter Two, Part Q (Offenses Involving the Environment)." *See* Application Notes to U.S.S.G. §8C2.1. Therefore, fines against organizations for criminal violations of FIFRA are never calculated through the Sentencing Guidelines. Rather, the Sentencing Guidelines instruct that, in

environmental crimes cases, fines against organizations should be determined by applying the statutory sentencing factors under 18 U.S.C. §§ 3553 and 3572. *See* U.S.S.G. §8C2.10; *see also United States v. Hong*, 242 F.3d 528, at 532-33 (4th Cir. 2001) (applying the Alternative Fines Act to impose a criminal fine of $1.3 million against an individual for 13 misdemeanor violations of Clean Water Act ($100,000 per offense) and rejecting the argument that maximum fine was limited to the $25,000 per day of violation limit in the Clean Water Act).

Complainant respectfully submits that the Chief Judge should reject Respondent's attempt to rely on inapplicable Sentencing Guidelines, and instead determine the appropriate civil penalty in accordance with 7 U.S.C. §136*l*(a) and the December 2009 FIFRA Enforcement Response Policy.

V. Conclusion

For the reasons set forth above and in Complainant's Post-Hearing Brief, filed on June 15, 2012, Complainant respectfully requests that the Chief Judge enter an initial decision finding Respondent liable for Counts 2,141 through 2,231 of the Complaint and imposing a $2,891,200 penalty for Respondent's violations of FIFRA.

Respectfully Submitted,

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

CERTIFICATE OF SERVICE

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

Honorable Susan L. Biro
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
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1099 14th Street, NW, Suite 350
Franklin Court
Washington, D.C. 20005

Mr. Mark A. Cameli
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1000 North Water Street, Suite 1700
Milwaukee, WI 53202

Dated in Chicago, Illinois, this 24 day of August, 2012.

Gary E. Steinbauer
Assistant Regional Counsel