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August 23, 2011

DELIVERED BY COURIER

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

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AUG 24 2011

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

Michael H. Simpson
Direct Dial: 414-298-8124
jclark@reinhartlaw.com

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 Motion For Leave to File Its Second Supplemental Prehearing Exchange, together with true, accurate and complete copies of Respondent's Second Supplemental Prehearing Exchange and Respondent's Exhibits 91 through 103.

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,

Jeffrey P. Clark

REINHART\7678483

Encs.

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

Motions to supplement a prehearing exchange should be granted unless there is evidence of bad faith, delay tactics or undue prejudice. *In re Service Oil, Inc.*, Docket No. CWA-08-2005-0010, 2006 EPA ALJ LEXIS 16, at *9 (April 12, 2006). Because Respondent submits this motion more than 15 days prior to the hearing, it need not demonstrate good cause for failing to supply the documents sooner. *See* 40 C.F.R. § 22.22(a)(1).

II. Discussion

The information that is submitted as part of Respondent's Second Supplemental Prehearing Exchange: (i) was not in Respondent's possession at the time Respondent filed its Initial Prehearing Exchange on October 28, 2010 and its First Supplemental Prehearing Exchange on February 17, 2011; or (ii) based on the Presiding Officer's recent Order, Respondent deems it necessary to introduce additional documents into evidence to confirm certain issues at hearing. Furthermore, the information offered by Respondent will provide a more complete and accurate record in this proceeding.

Complainant will not suffer any prejudice as a result of this submission. Because the hearing date in this proceeding is scheduled to begin on October 31, 2011, Complainant will have ample opportunity to review the information prior to hearing.

III. Additional Exhibits

Respondent hereby supplements its Prehearing Exchange to add the following exhibits:

RX NO.	Title of Document	Date of Document	Bates No.
91	Rozol Terms and Conditions of Sale		
	a. Original Copy	Various	4321a-4329a
	b. Redacted Version	Various	4321b-4329b
92	Liphatech, Inc. - Work Instruction Procedure	07/26/11	
	a. Original Copy		4330a-4331a
	b. Redacted Version		4330b-4331b
93	Authorized Distributor List	n/a	
	a. Original Copy		4332a-4333a
	b. Redacted Version		4332b-4333b
94	W-2 Statements of Mark Newman (Business Confidential)	2007-2010	
	a. Original Copy		4334-4339
	b. Redacted Version		4340-4344
95	W-2 Statements of Jim Knuth (Business Confidential)	2007-2010	
	a. Original Copy		4345-4350
	b. Redacted Version		4351-4355
96	Chlorophacinone Registration Summary Report	n/a	4356-4421
97	Excerpt From EPA Label Review Manual	n/a	4422-4424

98	Certified Copy of Kansas Special Local Needs Registration Packet for Rozol Prairie Dog Bait	n/a	4425-4945
99	Certified Copy of Nebraska Special Local Needs Registration packet for Rozol Prairie Dog Bait	n/a	4946-5199
100	Certified Copy of Wyoming Special Local Needs Packet for Rozol Prairie Dog Bait	n/a	5200-5289
101	Certified Copy of Colorado Special Local Needs Packet for Rozol Prairie Dog Bait	n/a	5290-5568
102	Certified Copy of Texas Special Local Needs Packet for Rozol Prairie Dog Bait	n/a	5569-5812
103	Curriculum Vitae of James V. Aidala	n/a	5813-5816

III. Additional Fact Witness.

Respondent proposes to add Kelly Bornhofer as a fact witness to its pre-hearing information exchange. Ms. Bornhofer is currently Director of Administration for Liphatech, Inc. and has been employed by Liphatech for over 35 years. Ms. Bornhofer's testimony may include, but may not be limited to the following:

Ms. Bornhofer may testify as to her educational background, her relevant work experience and her role as an employee of Respondent. Ms. Bornhofer may testify as to the internal procedures followed by Respondent with regard to the sale of restricted use pesticides and identify the distributors of Respondent that were authorized to purchase Rozol Pocket Gopher Bait Burrow Builder Formula, EPA Reg. No. 7173-244 ("Rozol") to control Black Tailed Prairie Dogs pursuant to the approved 24(c) supplemental label. Ms. Bornhofer may also testify as to the pricing and the terms and conditions of sale and distribution of Rozol. She may also testify as to the distribution of pricing information and terms and conditions of sale to distributors.

Ms. Bornhofer may also testify as to the content of Respondent's website and confirm that Rozol may not be purchased electronically through the website. In addition,

Ms. Bornhofer may testify that Respondent's website does not, and did not during the period relevant to the Complaint, contain product pricing information or terms and conditions of sale. Ms. Bornhofer may also testify that Mark Newman and Jim Knuth were each employees of Liphatech, Inc. from 2007-2010.

Ms. Bornhofer may testify to additional facts as necessary to respond to assertions or arguments raised by Complainant. To the extent deemed necessary by the Presiding Officer, Ms. Bornhofer will provide testimony sufficient to authenticate the documents that she refers to during her testimony at the hearing.

IV. Additional Expert Witness.

Respondent proposes to add James V. Aidala as an expert witness to its pre-hearing exchange. Mr. Aidala worked for over 30 years on matters related to the registration and regulation of pesticides by the U.S. Environmental Protection Agency. From 1991 to 1993 he worked for the Subcommittee on Environment, Energy, and Natural Resources in the U.S. House of Representatives where he was involved in Congressional oversight of EPA's implementation of FIFRA. In 1993 he was appointed by President Clinton as an Associate Assistant Administrator in the EPA Office of Prevention, Pesticides, and Toxic Substances (OPPTS). In 2000, he was nominated by President Clinton to be the Assistant Administrator for OPPTS. Since leaving EPA, he has been a consultant representing clients concerning a variety of agricultural, industrial and biological product approval matters involving pesticides. Mr. Aidala's curriculum vitae is included as Respondent's Exhibit 103 in this supplement. Mr. Aidala's testimony may include, but shall not be limited to, the following:

Mr. Aidala may testify as to his educational and work experience relevant to his expertise in this matter. Mr. Aidala may testify regarding Complainant's proposed construction of FIFRA Section 12(a)(1)(B), 7 U.S.C. § 136j(a)(1)(B) and EPA's narrow and limited authority to regulate advertising. He may testify that Complainant's proposed construction of Section 12(a)(1)(B) is inconsistent with the legislative history of the 1978 amendments to FIFRA and EPA's own interpretive rule concerning pesticide efficacy. Mr. Aidala may testify regarding the pesticide registration process and EPA's authority to waive efficacy data pursuant to FIFRA Section 3(c)(5). Mr. Aidala may also testify as to the importance of efficacy information to pesticide users. In addition, Mr. Aidala may testify as to the impact of Complainant's proposed construction of FIFRA Section 12(a)(1)(B) on EPA's administration of the pesticide program.

Mr. Aidala may also testify to additional facts or opinions as appropriate to respond to assertions or arguments raised by Complainant. To the extent deemed necessary by the Presiding Officer, Mr. Aidala will provide testimony sufficient to authenticate the documents to which he refers during his testimony at the hearing in this matter.

V. Claim of Business Confidentiality.

Pursuant to 40 C.F.R. § 22.5(d) and 40 C.F.R. § 2.203, Respondent asserts that Exhibits 91 through 95 contain confidential business information. As such, two versions of Exhibits 91 through 95 are being submitted herewith, one including the information claimed confidential and a second version containing all information except that which is claimed confidential.

VI. Complainant's Response to Motion.

On August 15, 2011, counsel for Respondent contacted counsel for Complainant to determine if Complainant has any objection to the relief sought in this Motion. In an email dated August 17, 2011, counsel for Complainant indicated that Complainant does not oppose Respondent's request to supplement its prehearing exchange with Respondent's Exhibits 91-97 or 103. In addition, counsel for Complainant indicated that Complainant does not oppose Respondent's request to add Ms. Bornhofer and Mr. Aidala to its witness list.

On August 23, 2011 counsel for Complainant notified counsel for Respondent that Complainant would not have time to review Respondent's Exhibits 98-102 prior to Respondent's planned submission of such documents on August 25, 2011. As a result, Respondent is submitting such documents without being able to determine if Complainant has any objection to Respondent's Exhibits 98-102.

VII. Additional Exhibits.

On March 4, 2011, Respondent submitted a Freedom of Information Act request to EPA Headquarters for the following certified documents:

Certified or authenticated copies of the following pesticide registration files: EPA Reg. No. 7173-286; EPA Reg. No. 7173-244; SLN No. KS-040004; SLN No. KS-070003; SLN No. NE-060001; SLN No. Wy-060004; SLN No. CO-060009; SLN No. TX-070008 and SLN No. OK-080002.

The FOIA request was identified as FOIA Request HQ-FOI-1006-11. Respondent has not yet received copies of the certified documents requested. Respondent has been notified by Kimberly Smith of U.S. EPA/OPP that the request is being processed. On August 9, 2011, counsel for Respondent notified counsel for Complainant by email that

Respondent intended to supplement its prehearing exchange with the additional certified documents obtained from such FOIA request. As of the date of this Motion, Respondent has not obtained the requested documents from EPA Headquarters. As a result, Respondent respectfully reserves its right to supplement its list of exhibits upon reasonable notice to the Presiding Officer and Complainant with the documents obtained from such FOIA request.

VIII. Conclusion.

For the foregoing reasons, Respondent respectfully requests that the Presiding Officer grant it leave to file its Second Supplemental Prehearing Exchange.

Dated this 23 day of August, 2011.

Respectfully submitted,

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Attorneys for Respondent Liphatech, Inc.

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**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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U.S. ENVIRONMENTAL
PROTECTION AGENCY**

RESPONDENT'S SECOND SUPPLEMENTAL PREHEARING EXCHANGE

Respondent, Liphatech, Inc. ("Liphatech"), through its undersigned attorneys, hereby submits Respondent's Second Supplemental Prehearing Exchange pursuant to Section 22.19(f) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), codified at 40 C.F.R. § 22.19(f).

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Clinton as an Associate Assistant Administrator in the EPA Office of Prevention, Pesticides, and Toxic Substances (OPPTS). In 2000, he was nominated by President Clinton to be the Assistant Administrator for OPPTS. Since leaving EPA, he has been a consultant representing clients concerning a variety of agricultural, industrial and biological product approval matters involving pesticides. Mr. Aidala's curriculum vitae is included as Respondent's Exhibit 103 in this supplement. Mr. Aidala's testimony may include, but shall not be limited to, the following:

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Dated this 23 day of August, 2011.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I, Jeffrey P. Clark, one of the attorneys for the Respondent, Liphatech, Inc., hereby certify that I delivered one copy of the foregoing Respondent's Motion For Leave to File Its Second Supplemental Prehearing Exchange and Respondent's Second Supplemental Prehearing Exchange and Respondent's Exhibits 91 through 103, to the persons designated below, 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

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I further certify that I filed the original and one copy of the Respondent's Motion For Leave to File Its Second Supplemental Prehearing Exchange and one copy of Respondent's Second Supplemental Prehearing Exchange and Respondent's Exhibits 91 through 103 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 23 day of August, 2011.



Jeffrey P. Clark
One of the Attorneys for Respondent
Liphatech, Inc.