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

VIA POUCH MAIL

REPLY TO THE ATTENTION OF:
C14-J

October 7, 2010

Honorable Barbara A. Gunning
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

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 Memorandum Opposing Complainant's Motion for Leave to Amend Complaint, which was filed on October 7, 2010, in the above-referenced matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Gary E. Steinbauer".

Gary E. Steinbauer
Assistant Regional Counsel

Enclosure

cc: Mr. Michael H. Simpson
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. Barbara A. Gunning
Respondent.)	
)	

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**REPLY TO RESPONDENT'S MEMORANDUM OPPOSING
COMPLAINANT'S MOTION FOR LEAVE TO AMEND COMPLAINT**

I. Introduction

In an unusual attempt to prevent Complainant from amending its own Complaint to *reduce* the proposed penalty, Respondent suggests that Complainant's request was based on ulterior motives. However, Respondent offers only pure speculation to support this proposition. In addition, Respondent argues that this Court should only grant Complainant's motion upon four conditions. Complainant does not believe that the imposition of any of the requested conditions is appropriate, much less warranted under the circumstances. For the reasons stated below, Complainant requests that this Court grant it leave to reduce the penalty by the amount of the economic benefit previously calculated in this matter. In the event this Court denies Complainant's request for leave to amend the Complaint to eliminate the economic benefit portion of the penalty, or grants Complainant's motion but imposes one or more of the conditions urged by Respondent, Complainant respectfully requests that Respondent voluntarily disclose full and complete information on the issue of the calculation and review of the information related to economic benefit by its economic consulting expert, Mr. Robert H. Fuhrman.

II. At This Stage of the Case, Complainant is Well Within Its Right to Seek Leave to Amend Its Own Complaint to Reduce the Proposed Penalty

As discussed in Complainant's Motion for Leave to Amend the Penalty, the Consolidated Rules provide that a complaint may be amended after the Answer has been filed only upon motion granted by the Presiding Officer. 40 C.F.R. § 22.14(c). "While no standard is provided in the Rules for determining whether to grant an amendment, the general rule is that administrative pleadings are 'liberally construed and easily amended.'" *In re Scranton Prods., Inc., et al.*, Docket No. CAA-03-2008-0004, 2008 EPA ALJ LEXIS 16, at *2 (Chief ALJ, April 3, 2006) (quoting *In re Port of Oakland and Great Lakes Dredge and Dock Co.*, 4 E.A.D. 170, 205 (EAB 1992)). Absent a showing that the proposed amendment is brought in bad faith or for dilatory purposes, results in undue delay or prejudice to the opposing party, or would be futile, leave to amend should be granted. *Id.* at *2-3 (citing *Foman v. Davis*, 371 U.S. 178, 181-82 (1962)).

Complainant is not asking to increase the penalty amount in this case; it is actually seeking leave to reduce the penalty amount. Additionally, the Complainant seeks to amend the penalty in favor of Respondent well in advance of a hearing date being scheduled. Rather than demonstrating exactly how Complainant acted in bad faith in its request for leave to reduce the proposed penalty or how Respondent was prejudiced by this request to streamline the case, Respondent seemingly prefers to attempt to preserve its ability to present testimony at hearing relating to economic benefit. It persists in doing so even though the issue would be irrelevant, immaterial, and of little probative value should the Court decide to grant Complainant's motion.

Based on its own economic consulting expert's affidavit, Respondent clearly believes that

the economic benefit gained as a result of the alleged violations is not \$50,226. Given the developing guidance on this issue, coupled with a number of assumptions that must be made by Complainant because it lacks certain sales and financial information that only Respondent possesses, Complainant recognizes that demonstrating the economic benefit in this case will prove to be challenging at hearing. This does not, however, mean that Respondent did not gain an economic benefit as a result of its alleged violations; it simply means it is difficult to calculate and prove based on the information currently in Complainant's possession. Rather than agreeing to allow Complainant to eliminate the economic benefit in its proposed penalty, Respondent prefers to present testimony on this matter and unnecessarily expend the Court's and the parties' time. In doing so, it ultimately strives to get to the same point that Complainant proposes to arrive at today - the elimination of the economic benefit calculation in the proposed penalty.

III. Complainant Seeks Leave to Amend in Good Faith

Respondent suggests that Complainant has failed to provide sufficient justification to amend its Complaint. Complainant clearly stated that it was seeking to reduce the penalty because of developing guidance on the issue. The record is devoid of any evidence that the Complainant acted in bad faith when it sought leave to reduce its proposed penalty by eliminating the economic benefit component. The best Respondent is able to offer as "evidence" that Complainant acted in bad faith is pure speculation.

Respondent surmises that Complainant "appears to be attempting to delete the economic benefit component of the proposed penalty" (Respondent's Response at 3) because it is trying "to avoid the consequences of *The 99 Cents Only Stores* case which requires that a penalty not be disproportionate to the economic benefit received by Respondent." (*Id.* at 6). Respondent is incorrect. Complainant's motivation to amend the penalty is to dispose of an issue, i.e. the

economic benefit component of the penalty, that it does not believe it can proceed on based on the evidence Complainant has obtained thus far and developing guidance. Respondent's suggestion that Complainant's motive was somehow nefarious is unfounded.

Further, *In re 99 Cents Only Stores*, Docket No. FIFRA-09-2008-0027, 2010 WL 2787749, 2010 EPA ALJ LEXIS 10 (Chief ALJ, June 24, 2010), is distinguishable and not binding in this case. The initial decision in *99 Cents* makes clear that it is based specifically on the facts and circumstances present in that case. 2010 EPA ALJ LEXIS 10, at *134. The facts and circumstances of this case are much different than those in *99 Cents*. Furthermore, while Chief Judge Biro does suggest that the penalty amount should somehow be proportionate to the economic benefit in a particular case, this proposition does not find support in the statutory factors set forth in the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 *et seq.*, the FIFRA Enforcement Response Policy, December 2009 (ERP), or any other FIFRA case law that Complainant has discovered in its research.

Finally, nothing precludes Respondent from arguing its theory under *99 Cents* if the economic benefit component of the proposed penalty is eliminated. Certainly, it would have done so even if the original proposed penalty did not include an economic benefit component. It is difficult to understand why Respondent leads the Court and the parties down the path it has in its Response. In sum, Respondent has failed to demonstrate that Complainant sought leave to reduce the proposed penalty to eliminate the economic benefit component in bad faith.

IV. Respondent Fails to Demonstrate How it is Prejudiced

There is no prejudice to Respondent by reducing the penalty. While Respondent asserts that it is somehow prejudiced, its arguments are contradictory, at best. On the one hand, Respondent opines that it has incurred legal and expert consultant fees without providing any

further details. On the other hand, it suggests that it should be allowed to expend additional legal and expert consultant fees to present evidence at hearing to demonstrate what it believes to be the economic benefit in this case despite the fact that the Complainant is seeking to eliminate the issue by its Motion. If Respondent wishes to present testimony on this issue despite the outcome of Complainant's request to reduce the penalty, how could it possibly be prejudiced? Clearly, there is no prejudice to Respondent.

V. If Respondent Wishes to Present Testimony Regarding Economic Benefit, Complaint Requests that Respondent Disclose Information It Plans on Proffering to Support its Position

For the reasons stated above, Complainant does not believe that the four conditions Respondent suggests in its Response should be ordered. If the Court denies Complainant's Motion for Leave to Amend the Complaint, or grants it in part imposing one or more of the conditions urged by Respondent, Complainant respectfully requests that Respondent disclose the following information: (1) all information its economic consulting expert, Mr. Fuhrman, relied on to determine the amount of economic benefit gained by Respondent as a result of the violations alleged in the Complaint, (2) the amount of the economic benefit Mr. Fuhrman calculated, (3) the method by which Mr. Fuhrman arrived at his calculation, (4) any other information that Mr. Fuhrman relied on, and (5) Mr. Fuhrman's complete file on any issues relating to his consultation regarding the violations alleged in this case, including all correspondence with counsel, billing information, and a list of other instances Respondent has retained this expert.

VI. Conclusion

Complainant has demonstrated that its request for leave to amend the Complaint was not made in bad faith and does not prejudice Respondent. Complainant respectfully requests that this Court grant its request without imposing any of the conditions requested by Respondent in its Response.

Respectfully submitted,

DATED: 10/7/2010



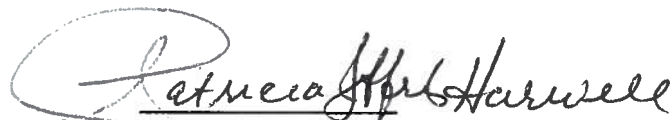
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In the Matter of Liphatech, Inc.
Docket No. FIFRA-05-2010-0016

CERTIFICATE OF SERVICE

I hereby certify that the original and one true, accurate and complete copy of **REPLY TO RESPONDENT'S MEMORANDUM OPPOSING COMPLAINANT'S MOTION FOR LEAVE TO AMEND COMPLAINT**, was filed with the Regional Hearing Clerk, U.S. EPA, Region 5, on the date indicated below, and that true, accurate and complete were served on the Honorable Barbara Gunning, Administrative Law Judge (service by Pouch Mail), and Mr. Michael H. Simpson, Counsel for Respondent, Liphatech, Inc. (service by UPS overnight delivery), on the date indicated below:

Dated in Chicago, Illinois, this 1st day of October, 2010.



Patricia Jeffries-Harwell
Legal Technician
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