UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	Docket No. FIFRA-03-2015-0248
FMC Corporation,	)	
	)	
Respondent.	)	
	)	

RESPONDENT FMC CORPORATION'S OPPOSITION TO COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION AS TO LIABILITY FOR VIOLATIONS 1 THROUGH 12,273 OF THE COMPLAINT

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I. INTRODUCTION

Complainant ("EPA" or "the Agency") has not met its burden for Partial Accelerated Decision as to Respondent FMC Corporation's ("FMC") liability for alleged violations 1 through 12,273. Its Motion should be denied due to genuine issues of material fact with regard to both: (a) whether the challenged communications constituted "advertising" in violation of FIFRA and (b) the number of such alleged violations. Nearly all of the advertising allegations for which EPA seeks Partial Accelerated Decision on liability involve a single design "plate" associated with one of FMC's insecticide products – *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 – that displayed a horseshoe imprint on soil and stated "stomp more" insects (the "Stomp Plate"). *See* RX 060. FMC authorized the Stomp Plate's use in two print documents (one included in periodicals and the other in a direct mailer). EPA also challenges two website communications. Extrapolating from this handful of communications, EPA alleges 12,273 separate individual violations.

First, there are genuine issues of material fact about whether FMC's communications and conduct constituted "advertisements" and "advertising" under FIFRA.[1] Neither Congress nor EPA has defined these terms and EPA has not suggested definitions to be applied in this case. Thus, EPA has not established what facts are material, let alone whether they are undisputed. EPA's failure to define the alleged offense also violates FMC's due process and First Amendment Rights. Finally, even if EPA were correct that the communications at issue constituted advertisements, there are genuine issues of material fact as to whether FMC complied with the requirement in 40 C.F.R. § 152.168 by cross-referencing the restricted use statement on the product labels.

[1] For example, neither the Stomp Plate nor the two website communications included information on the product's price or any specific offer for sale, let alone any inducements or incentives to purchase the product.

Second, and as importantly, genuine issues of material fact exist regarding the number of violations associated with each alleged act of advertising under FIFRA. This is true even under EPA's own theory of how to assess the unit of violation, evidenced in part by EPA's failure to consider relevant evidence that is already in the record regarding returned and duplicative mailers. How to count the potential violations -- regarding the mailer in particular -- has been the biggest source of contention between FMC and the Agency, as is evident in the pleadings and the record already before the Tribunal. In addition, FMC intends to present testimony on these and other factors that are relevant to counting the units of violation. Because there is a clear genuine issue of material fact regarding the number of potential violations, the Presiding Officer should reject EPA's attempt to resolve this issue without consideration of all the evidence.

II. STANDARD OF REVIEW FOR ACCELERATED DECISION

The Presiding Officer may render an accelerated decision "without further hearing or upon such limited additional evidence, such as affidavits, . . . if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Consolidated Rules"), 40 C.F.R. § 22.20(a). "A factual dispute is material where, under the governing law, it might affect the outcome of the proceeding." *In re Mayaguez Reg'l Sewage Treatment Plant Puerto Rico Aqueduct and Sewer Auth.*, 4 E.A.D. 772, 1993 WL 343204, at *5 (EAB 1993). "A factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in either party's favor." *Id.* at *6.

Motions for accelerated decision under the Consolidated Rules are analogous to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *See, e.g., In re BWX Techs., Inc.*, 9 E.A.D. 61, 2000 WL 365958, at *10 (EAB 2000) ("though the Federal Rules do not apply to these proceedings, we have in our previous rulings turned to Rule 56 and its

copious jurisprudence for guidance."). In considering a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in [its] favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The Supreme Court has emphasized "at the summary judgment stage the judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."[2] *Id.* at 249. The party seeking summary judgment bears the burden of showing that no genuine issue of material fact exists. *Id.* at 256.

III. EPA HAS NOT CARRIED ITS BURDEN FOR A PARTIAL ACCELERATED DECISION AS TO LIABILITY FOR ALLEGED VIOLATIONS 1 THROUGH 12,273

A. There Are Genuine Issues Of Material Fact Regarding The Number Of Violations For Each Alleged Act Of Advertising Under FIFRA

EPA's assessment of the number of violations for each alleged act of advertising under FIFRA is internally inconsistent, unreasonable, arbitrary and capricious – and certainly not free of genuine issues of material fact. For example, EPA correctly alleges a single violation for FMC's decision to "cause[] an advertisement about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to be printed in the March/April 2012 issue of *The Sunflower* magazine" (Compl. ¶ 49), focused on FMC's single act to request that print. Yet EPA alleges 9,645 separate violations for FMC's single act "to cause[] direct mailers . . . to be sent to [intended recipients] associated with various agricultural farms." Compl. ¶ 22. Although nearly all the advertising allegations in this matter involve a single design plate that FMC authorized for use in two print documents (one

[2] EPA cites *In re Harpoon Partnership*, TSCA-05-2002-0004, 2003 WL 21967038 (EPA ALJ, Aug. 4, 2003) for the proposition that "a party moving for accelerated decision must establish through the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law by the preponderance of the evidence." EPA Mot. at 9. This simply reflects the ultimate burden of proof that underlies the determination of whether a party is entitled to judgment as a matter of law; *Harpoon Partnership* does not suggest that the Tribunal is to weigh evidence under a preponderance standard on summary judgment.

included in periodicals and the other in a direct mailer), and two website posts, EPA alleges that FMC's conduct constituted 12,273 individual "acts of advertising" and seeks partial accelerated decision as to liability for 12,273 alleged violations. EPA Mot. at 31.

Putting aside for the sake of argument the fundamental disagreement between the parties about how to fairly and appropriately assess the unit of violation (FMC asserts there are four violations if EPA meets its burden to prove advertising liability -- one violation for FMC's decision to cause the Stomp Plate to be included in periodicals, one violation for FMC's decision to cause the Stomp Plate to be included in the direct mailer, and two violations associated with FMC's decision to cause the two website communications to be posted), EPA has not met its burden to show that there are no genuine issues of material fact regarding the number of violations for each alleged act of advertising, even under its own theory. EPA inexplicably ignores facts already in the record about returned and duplicative direct mailers, as discussed further below. This and other evidence about the direct mailers (described below) that would be provided by FMC's witnesses further illustrates why a partial accelerated decision is inappropriate. *See, e.g.*, Declaration of George Orme ¶ 8.

1. Even Under EPA's Theory Of How To Count Units Of Violation, There Are Genuine Issues Of Material Fact About How Many Acts Of Alleged Advertising Occurred For The Direct Mailer

In seeking a partial accelerated decision on liability with respect to the 12,267 alleged violations involving the direct mailer, EPA ignores relevant evidence that is already in the record showing: (1) after removing direct mailers that were sent to one or more individuals associated with the same retailer as well as returned direct mailers, there were at most 346 intended retailer recipients (*see* RX 061, Tab B ("Retailer List without Duplicates and Returned Mailers")); and (2) after removing mailers that were sent to one or more individuals associated with the same agricultural farm and returned direct mailers, there were at most 6,379 intended agricultural farm

recipients. *See* RX 061, Tab D ("Grower List without Duplicates and Returned Mailers"). This record evidence is directly relevant to the number of alleged acts of advertising under EPA's approach and raises genuine issues of material fact. FMC intends to call Mr. George Orme, who has over 25 years of experience in marketing and advertising, to offer testimony on the reduction in numbers due to the returned mail and duplicate mailers, as well as other evidence demonstrating EPA's alleged number of violations is inflated, even under EPA's theory of how units of violations should be counted. *See* Declaration of George Orme ¶ 8.

B. Neither FIFRA Nor Its Implementing Regulations Define "Advertisements" Or "Advertising" And EPA Did Not Suggest Any Such Definitions

As EPA acknowledges, neither FIFRA nor EPA's implementing regulations define the terms "advertisements" or "advertising." EPA Mot. at 15. Remarkably, EPA itself fails to advocate for any definitions to be applied in this case, and instead engages in an ad-hoc and internally inconsistent evaluation of the communications at issue. Given the complete absence of any legal definition or standard for determining whether a given communication constitutes advertising under FIFRA, EPA has failed to establish which facts are material to that inquiry, let alone that they are undisputed. EPA's failure to meet its burden to identify the elements that must be shown to establish liability logically precludes any finding that the elements have been satisfied and that there are no genuine issues of material fact. *In re BWX Techs.*, 2000 WL 365958 at *12 ("In order for the Region to prevail on its motion for an accelerated decision on liability, the Region must show that it has established the critical elements of . . . liability."); *cf. In re Mayaguez*, 1993 WL 343204, at *5 ("A factual dispute is material where, under the governing law, it might affect the outcome of the proceeding").

The absence of any governing legal definitions underscores the genuine issues of material fact regarding whether FMC issued "advertisements" and whether its conduct constituted

"advertising." These issues have been, and remain, disputed. In this regard, FMC intends to call Mr. Orme, who, due to his extensive experience with marketing and advertising initiatives, can offer testimony based on his knowledge and professional experience as to what these terms mean. *See* Declaration of George Orme ¶ 7.

1. EPA Regulations Only Define The Media In Which "Advertising" May Occur -- Not The Content

According to EPA, the "pertinent" regulation is 40 C.F.R. § 152.168. EPA Mot. at 15. That regulation, which governs "advertising of restricted use products," does not address the *content* of advertising. Instead, it merely provides that "advertisements" include:

> (1) Brochures, pamphlets, circulars and similar material *offered to purchasers* at the point of sale or by direct mail.
> (2) Newspapers, magazines, newsletters and other material in circulation or available to the public.
> (3) Broadcast media such as radio and television.
> (4) Telephone advertising.
> (5) Billboards and posters.

40 C.F.R. § 152.168(b) (emphasis added).

Pesticide registrants can and do issue various communications by these means that are not "advertisements" under any definition of the term. Declaration of George Orme ¶ 7. For instance, SEC-required communications regarding business performance (which could include reference to particular pesticide products) are an example of "material in circulation or available to the public" but cannot reasonably be considered advertisements. The same is true for Material Data Safety Sheets ("MSDS"). These documents, which give detailed information about a chemical's properties as well as its health, safety, fire and environmental hazards, are also examples of "material in circulation or available to the public" (and often posted online) but cannot be considered advertisements either. Neither in the regulation nor in its Complaint does

EPA identify the elements that make a given communication the "advertising of restricted use products" under FIFRA.

The only aspect of the regulation that goes beyond identifying media is the requirement that a direct mailer must be "offered to purchasers" to qualify as an advertisement. This calls for a factual inquiry into whether the direct mailer here was "offered to purchasers."[3] EPA quotes this element but does not attempt to explain or address this requirement in its assessment of the communications here. For instance, EPA has not addressed whether any potential recipient "actually received the mailer, actually read the mailer, actually attempted to purchase *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545, or actually purchased *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545," which are genuine issues of material fact. FMC Answer ¶¶ 29, 38.[4]

2. EPA's Ad-hoc Evaluation Of The Materials At Issue Further Demonstrates There Are Genuine Issues Of Material Fact

EPA's own analysis of each of the "direct mail, print and website materials" further illustrates that there are genuine issues of material fact as to whether these communications constituted "advertisements" and whether FMC's conduct constituted "advertising." *See* EPA Mot. at § V.C. The Agency's ad-hoc analysis demonstrates that whether FMC's materials and conduct amounted to "advertisements" and "advertising" calls for a case-by-case inquiry based

[3] Principles of statutory or regulatory construction require that each word or clause of a statute or regulation be given effect. *See, e.g., United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute'") (internal citations omitted); *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751–52 (1st Cir. 1985) ("All words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous.").

[4] There is no evidence in the record that any potential recipient who was not a certified applicator actually attempted to purchase the product as a result of the mailer or any evidence of sales to noncertified applicators. Notably, a noncertified applicator would not have been able to purchase the product as FIFRA § 12(a)(2)(F) prohibits the sale of a restricted use pesticide to a noncertified applicator and there are robust procedures in place to prevent such illegal sales.

on factual evidence outside of the evidence included in the pre-hearing submissions.

For example, with regard to the direct mailer, EPA relies on its own assumptions regarding FMC's intentions with respect to these materials, *e.g.*, why the direct mailer was created, and how the intended potential recipients were chosen. In regard to the "Testimonial Sell Sheet," EPA provides different speculation about why the document was created and whom it was intended to influence. The guesses of EPA's lawyers cannot substitute for testimony and evidence regarding the communications in dispute; indeed, EPA's interpretations confirm there are issues of material fact that should be addressed at a hearing through witness testimony. At a minimum, if the Tribunal were to adopt what seems to be EPA's proposed test – *i.e.*, "what reasonable and objective observers would recognize as a testimonial advertisement" – FMC is entitled to present fact and expert testimony regarding what a "reasonable and objective observer" would consider to be an advertisement.

The kinds of facts asserted by EPA throughout its motion must be addressed through testimony (*see, e.g.*, Declaration of George Orme at ¶ 7 (stating "not all communications made by pesticide registrants are 'advertisements' under any definition of the term")), and not based on the inconsistent evaluation and conjecture of EPA personnel, none of whom claim to or appear to have any experience in marketing or advertising.

C. FMC's Production Of Documents In Response To EPA Requests For Information Does Not Establish That The Materials Constituted Advertisements Within The Meaning Of FIFRA

This Tribunal should reject EPA's novel theory that general descriptions of items produced in good faith responses to EPA Requests for Information should be treated as legally binding admissions. First, contrary to EPA's assertion, *it was EPA*, not FMC, that described the items as "promotional/advertising materials." *See* EPA letter to FMC (June 6, 2013) (requesting "FMC-generated promotional/advertising materials for 'Stallion Insecticide' (EPA Reg. No. 274-

9545), including press releases"). RX 069 at FMC 002788. Moreover, although EPA's Requests for Information provided a list of definitions, neither "promotional/advertising materials" nor "advertisement" was defined in any of EPA's Requests. *See* RX 069 at FMC 002790 (only defining "distribute or sell," "pesticide," "pesticide product," "pest," "produce," and "producer"); CX 26 at EPA 0753 (same); RX 74 at FMC 002807 (same). Even if such terms had been defined, FMC's use of EPA's own terms in its response -- for clarity and consistency purposes -- does not amount to relevant evidence or legally binding admissions that the documents FMC produced constitute "advertisements" within the meaning of 40 C.F.R. § 152.168, let alone whether the use of those materials by FMC was "to advertise a product" within the meaning of FIFRA Section 12(a)(2)(E).

The Tribunal should not deem FMC's production of information as admissions particularly in light of the context of FMC's responses at the time of the initial Request for Information. As of that date, no publicly reported EPA enforcement proceeding regarding advertising had ever imposed any penalty even remotely approximating the amount proposed here. As described generally in FMC's submissions and as will be explained further at the hearing, EPA's approach here represents a dramatic departure from past enforcement activity regarding alleged pesticide advertising and EPA's decision to seek imposition of a penalty of this magnitude – after FMC cooperated in providing requested information – makes it all the more unfair to seek to use FMC's cooperative production of information as tantamount to an admission of liability.

1. EPA Cites No Authority To Support Its Theory That Descriptions Accompanying Documents Produced In Response To Information Requests Constitute Evidence Or Binding Admissions About The Contents Of The Documents

Tellingly, EPA's Motion is bereft of any authority supporting its claim that FMC's

statements amount to "admissions." *See* EPA Mot. at 16, 18, 21, 23. Perhaps recognizing the precarious nature of its argument, EPA asserts that based on the "admissions" and "supporting documentation provided outside of the pleadings" it is "evident" that FMC "considers" the materials to be advertisements. *Id.* To the contrary: (1) FMC does not consider the materials to be advertisements under FIFRA;[5] (2) FMC never made such a legally binding admission; and (3) FMC disputes EPA's characterization of these materials as "advertisements." As discussed above, whether the materials are advertisements within the meaning of FIFRA presents a genuine issue of material fact. *See supra* § III.B.

2. FMC Should Not Be Punished For Casting A Broad Net In Responding To EPA Requests For Production Of Documents

EPA's attempt to characterize as legally binding statements made by FMC's counsel in response to EPA Requests for Information not only lacks legal support, it would also be unjust and discourage the regulated community from casting an appropriately wide net to produce potentially-responsive documents in accordance with EPA Requests for Information. Here, FMC did just that – it provided well-organized documents, accompanied with the narrative response EPA requested, and used the language EPA suggested in its Requests for Information simply to ensure that each response was clearly associated with the corresponding EPA request. *See* EPA letter to FMC (June 6, 2013) (requesting "FMC-generated promotional/advertising materials for 'Stallion Insecticide' (EPA Reg. No. 274-9545), including press releases"), RX 069 at FMC 002788; FMC letter to EPA (July 18, 2013) (responding to EPA's request, parroting EPA's language, and specifically stating "[e]nclosed please find a disc containing the requested

[5] That FMC does not consider the materials to be advertisements under FIFRA should come as no surprise to EPA. *See, e.g.*, FMC Prehearing Exchange at 19 ("Under these circumstances and given the overall context here, FMC disagrees that the use of this design plate should be considered advertising under FIFRA. . . . FMC also disagrees that the two website documents should be considered advertising. FMC will provide expert testimony to support this defense.").

promotional and advertising materials, as well as a training presentation regarding Stallion Insecticide."), RX 070 at FMC 002791; EPA letter to FMC (May 7, 2014) (requesting information about "advertisements provided to EPA by FMC in [FMC's] July 18, 2013 IR response), RX 071 at FMC 002796; FMC letter to EPA (July 15, 2014) (responding to EPA's request and parroting EPA's use of the term "advertisement"), RX 072; EPA letter to FMC (June 23, 2015) (requesting FMC "[r]efine and clarify the number [of] individuals, retailers and growers sent the following advertisements") RX 074 at FMC 002805; FMC letter to EPA (July 21, 2015) (responding to EPA's request and parroting EPA's use of the term "advertisement"), RX 075. In effect, EPA's position is that FMC should have unilaterally defined EPA's terms and fought production as opposed to cooperating with the Agency. FMC should not be punished for casting a broad net to produce documents that EPA may deem responsive to its Requests for Information and for facilitating EPA's review of the produced documents by using EPA's own language to organize the responses.

D. EPA's Failure To Define The Alleged Offense Violates FMC's Due Process And First Amendment Rights

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). "This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment." *Id.* It is "a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). As the Third Circuit explained: "Although the 'void-for-vagueness' doctrine was originally constructed to invalidate penal statutes that do not 'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited,' courts have transplanted this due

process principle into the First Amendment setting." *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1266 (3d Cir. 1992) (internal citation omitted); *see also Grayned*, 408 U.S. at 108-09 ("where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.'") (internal citations omitted). "[A] meritorious First Amendment vagueness challenge will annul an unclear law that 'chills' protected First Amendment activities . . . . [and] a vagueness challenge will succeed when a party does not have actual notice of what activity the statute prohibits." *Kreimer*, 958 F.2d at 1266.

As discussed above, neither FIFRA nor EPA's implementing regulations define either "advertisement" or "advertising" and EPA did not put forward any definitions in this case. *See supra* § III.B. Fair notice about the meaning of these definitions is critical to both FMC's due process rights and its First Amendment right to commercial speech. At the very least, whether FMC did in fact have "fair notice" about what EPA considered to be "advertisements" or "advertising" presents a genuine issue of material fact that should preclude the Tribunal from granting EPA's Motion.

EPA is pursuing a significant enforcement action and seeking to impose a severe penalty on FMC "as a direct consequence of its interpretation" of 40 C.F.R. § 152.168, even though that provision does not address the content of an advertisement. *In re CWM Chem. Servs., Inc.*, 6 E.A.D. 1, 1995 WL 302356, at *11 (EAB 1995). EPA's Environmental Appeals Board has made clear that in these circumstances, "it is necessary to examine not only the reasonableness of the Region's interpretation but also whether its application complies with fundamental notions of due process . . . . [I]t is not enough that [EPA's] interpretation of the regulation be reasonable, the regulation itself must provide the regulated community with *adequate notice* of the conduct

required by the agency." *Id.* (emphasis added). In this proceeding, the Tribunal should not short-circuit the hearing process to find liability where neither Congress nor EPA has defined "advertisement" or "advertising" and FMC did not have "adequate notice" about which communications and actions are in fact regulated "advertisements" and "advertising."

In addition, FMC has been denied adequate notice of the violation EPA alleges in this proceeding. While under appropriate circumstances agencies can make "law" through adjudications rather than notice-and-comment rulemaking, FMC is entitled to fair notice in this proceeding of the elements of the alleged offense. EPA must at the very least articulate how it proposes to define advertisement and advertising. Absent notice of what facts EPA believes are necessary to demonstrate whether a particular communication constitutes a regulated "advertisement," FMC cannot fairly defend itself against EPA's allegations. Among other things, it is not evident what facts FMC needs to marshal to respond to EPA's claims.

E. FMC Complied With 40 C.F.R. § 152.168 By Cross-Referencing The Restricted Use Statement On The Product Labels

Finally, even if EPA were correct that some or all of the communications at issue constituted advertisements, EPA regulations at 40 C.F.R. § 152.168 require only that "the advertisement contains *a statement* of its restricted use classification." *Id.* at § 152.168(a) (emphasis added). Notably, the regulation does not prescribe the contents of such "a statement of" the product classification. Nor does the regulation limit how this requirement may be satisfied. Rather, for printed material, EPA's regulation provides only that the requirement "*may* be satisfied" by either including the statement "Restricted Use Pesticide" or by describing the "terms of restriction." *Id.* at § 152.168(c) (emphasis added). Although section 152.168(c) offers two methods for compliance, these options are not exclusive. If EPA had intended to limit the regulated community to these two compliance options, it would have said so (by simply

requiring, for example, that the material "*shall* either contain the words 'Restricted use pesticide' or describe the terms of restrictions"). Instead, EPA simply suggested two ways in which the requirement "may" be met, leaving other options open.

Here, FMC's direct mail, print, and website communications all contained "a statement of" the restricted use classification by referring the reader to the product label. As EPA acknowledges, each of the communications at issue "included the statement 'always read and follow label directions', and that the EPA approved label for *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 contained the phrase 'Restricted Use Pesticide', and related directions and explanations." EPA Mot. at 26. In this manner, it is respectfully submitted that FMC complied with the requirement in 40 C.F.R. § 152.168(a) to include "a statement of" the restricted use classification.

EPA's emphasis on *Liphatech* (which is not binding on this Tribunal) is misplaced. *See* EPA Mot. at 27-28. There, EPA alleged thousands of radio advertisements violated 40 C.F.R. § 152.168. Liphatech argued that its advertisements complied with the regulation "by *referring* the advertisement listeners to the pesticide label which *included* the restricted use classification." *In re Liphatech, Inc.*, Order on Motions for Accelerated Decision Regarding Alleged Violations of FIFRA § 12(a)(2)(E), 2011 WL 1792069, *11 (EPA ALJ, May 6, 2011) (emphasis in original). The Liphatech advertisements EPA highlights were radio broadcasts where the audio reference to the label was fleeting. Here, by contrast the direction to "always read and follow label instructions" was expressly written on all of FMC's communications, and no less prominently than it appeared on other lawful advertisements. *Compare, e.g.*, RX 062 (excerpt From Successful Farming Magazine (Mid-March 2012, Vol. 110, No. 5)).

IV. CONCLUSION

For the reasons set forth above, EPA's Motion For Partial Accelerated Decision As To Liability For Violations 1 Through 12,273 Of The Complaint should be denied.

Dated: September 6, 2016

Respectfully Submitted,

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