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January 19, 2011



Via Federal Express

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

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

Dear Regional Hearing Clerk:

On behalf of Non-Parties CropLife America and Responsible Industry for a Sound Environment, I enclose an original and two copies of the Reply in Support of Motion for Leave To File a Non-Party Brief Opposing Complainant's Construction of FIFRA Section 12(a)(1)(B).

Please file stamp one of the enclosed copies of the reply and return it to me in the enclosed prepaid envelope. Thank you for your assistance.

Respectfully submitted,

Timothy D. Backstrom
Counsel for CropLife America and
Responsible Industry for a Sound Environment

Enclosures
cc: Honorable Barbara A. Gunning (w/enclosures) (via Federal Express)
Ms. Nidhi K. O'Meara (C-14J), Counsel for Complainant (w/enclosures) (via Federal Express)
Mr. Michael H. Simpson, Counsel for Respondent (w/enclosures) (via Federal Express)

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**BEFORE THE ADMINISTRATOR**

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| **IN THE MATTER OF:** | ) | |
| **Liphatech, Inc.** | ) | Docket No. FIFRA-05-2010-0016 |
| **Milwaukee, Wisconsin** | ) | |
| | ) | Honorable Barbara A. Gunning |
| **Respondent.** | ) | |



**REPLY OF CROPLIFE AMERICA AND RISE IN SUPPORT OF MOTION FOR LEAVE TO FILE A NON-PARTY BRIEF OPPOSING COMPLAINANT'S CONSTRUCTION OF FIFRA SECTION 12(a)(1)(B)**

Non-parties CropLife America (CLA) and Responsible Industry for a Sound Environment (RISE) hereby reply pursuant to 40 C.F.R. § 22.11(b) and 40 C.F.R. § 22.16(b)[1] in support of their motion for leave to file a non-party brief filed on January 6, 2011. CLA and RISE attached to their motion a proposed non-party brief (CLA/RISE Brief) opposing the construction of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) Section 12(a)(1)(B), 7 U.S.C. § 136j(a)(1)(B), proposed by the Director of the Lands and Chemicals Division of Region 5 (Complainant) of the U.S. Environmental Protection Agency (EPA) in Complainant's Motion for Accelerated Decision on Liability for Counts 2,141 through 2,183 of the Complaint (Complainant's Motion or Comp. Mot.) and Complainant's Reply to Respondent's Response to that Motion (Complainant's Reply or Comp. Reply). On January 12,

[1] The provision governing motions for leave to file a non-party brief states that the "Consolidated Rules of Practice shall apply to the motion as if the movant was a party," 40 C.F.R. § 22.11(b), and the provision of those rules governing responses to a motion states that a reply to a response to a motion may be filed "within 10 days after service of such response." 40 C.F.R. § 22.16(b). Complainant's Opposition to the motion of CLA and RISE was served on counsel for CLA and RISE on January 13, 2011.

2011, Complainant filed a Response in Opposition to the Motion of CLA and RISE (Opposition), and this reply by CLA and RISE addresses arguments made by Complainant in that Opposition.

CLA and RISE are both national non-profit trade associations that represent producers and suppliers of pesticide products. CLA primarily represents registrants of agricultural pesticide products, while RISE primarily represents producers of specialty pesticides and fertilizers. CLA and RISE have requested leave to file a non-party brief only because the construction of FIFRA Section 12(a)(1)(B) proposed by Complainant is contrary to the vital interests of their respective members, the distributors and retailers who sell their members' registered pesticide products, and the customers who use those products.

In their brief, CLA and RISE demonstrate that the Complainant's suggested construction is inconsistent with the intent and legislative history of FIFRA Section 3(c)(5), 7 U.S.C. § 136a(c)(5), conflicts with a provision in EPA's interpretive rule concerning pesticide advertising, 40 C.F.R. § 168.22(b)(5), and is more severe than the established EPA policy concerning pesticide advertising. CLA and RISE also demonstrate that adoption of Complainant's construction would be highly disruptive for both the pesticide industry and the EPA pesticide program, and that this construction would raise very serious questions of constitutionality. Rather than addressing these arguments, Complainant has instead requested that the presiding Administrative Law Judge deny the motion of CLA and RISE for leave to file their brief.

CLA and RISE seek to participate in this proceeding solely to dispute the validity, legality, and practicality of Complainant's proposed construction of FIFRA Section 12(a)(1)(B). CLA and RISE do not wish to take a position on any of the other legal issues or factual questions that may be at issue in this proceeding. CLA and RISE are disappointed that Complainant has elected to oppose their ability to participate even for this limited purpose.

CLA and RISE often file briefs as *amicus curiae* in federal District Courts and Courts of Appeal in cases that present legal questions that are likely to have a significant impact on their members. In some instances, these cases involve a dispute between one or more pesticide registrants and EPA, and CLA and RISE take a position that is adverse to the position taken by EPA. Nevertheless, EPA does not normally oppose this participation, presumably because EPA and its counsel at the U.S. Department of Justice recognize that it is desirable to allow other parties who may be affected by the outcome of a case to fully ventilate their concerns.

In its Opposition, Complainant asserts that CLA and RISE seek to participate in this proceeding only as surrogates for the Respondent Liphatech, Inc. (Respondent or Liphatech). Complainant also suggests that the CLA/RISE Brief may have been prepared in whole or in part by Respondent's counsel and that the brief may have been funded by Respondent. As CLA and RISE will demonstrate below, these arguments are without any foundation. Moreover, although Complainant dismisses the CLA/RISE Brief as nothing more than an elaboration of arguments previously made by Respondent, careful comparison of the CLA/RISE Brief to prior filings concerning Complainant's motion establishes that CLA and RISE raise important arguments and cite to pertinent authorities not previously addressed in any way by either Complainant or Respondent.

Although the CLA/RISE Brief identifies some significant generic problems with Complainant's proposed construction of FIFRA Section 12(a)(1)(B), CLA and RISE are principally concerned about the damaging impact this construction would have on the ability of pesticide registrants, distributors, and retailers, and those researchers and experts who work with them, to provide accurate, timely, and detailed information on product efficacy to pesticide users. Complainant insists that this proposed construction would also apply to claims regarding product

efficacy, even though EPA has exercised the authority provided by FIFRA Section 3(c)(5), 7 U.S.C. § 136a(c)(5), to waive the requirement that most registrants submit or that EPA review data on product efficacy. In the Opposition, Complainant suggests that claims that a product is efficacious may be distinguished from claims that concern the degree to which the product is efficacious. This proposed distinction is irrational and it does nothing to resolve the conflict between Complainant's suggested construction of FIFRA Section 12(a)(1)(B) and the text, intent, and legislative history of FIFRA Section 3(c)(5). Moreover, this distinction cannot be reconciled with Complainant's proposed construction itself.

## ARGUMENT

### I. CLA and RISE are Seeking Leave to File a Non-Party Brief to Protect the Vital Interests of All of Their Members, and Their Brief Was Neither Prepared Nor Funded by Respondent or its Counsel

Complainant argues that the motion of CLA and RISE for leave to file a non-party brief should be denied because CLA and RISE are mere "surrogates for Respondent." Opposition at 1, 5. Complainant also argues that counsel for CLA and RISE are "an advocate" for Respondent, Opposition at 6-7, and implies that counsel for Respondent may have participated in preparation of the CLA/RISE Brief and that Respondent may have funded preparation of the brief. Opposition at 5, 11. Moreover, according to Complainant, because a non-party brief is analogous to a brief by an *amicus curiae*, leave to file such briefs should be denied when the movant is not "objective" and has a "partisan" attitude. Opposition at 6-7. None of these allegations by Respondent can withstand careful scrutiny.

In support of the allegation that CLA and RISE are just surrogates for the Respondent, Complainant cites a series of connections. Complainant observes that the counsel for CLA and RISE, Bergeson & Campbell, P.C. (B&C), also represents Liphatech as an intervenor in a federal

District Court case, that the CEO of Liphatech serves as one of the Directors of RISE, that one of the Declarants for CLA and RISE, James V. Aidala now works for B&C, that one of the consultants retained by Respondent's counsel also works for an affiliate of B&C, and that B&C is a member of CLA. Opposition at 6.

Notwithstanding the connections cited by Complainant, B&C is not representing Respondent in this proceeding. The issues in the District Court case in which B&C does represent Liphatech do not overlap with the issues in this proceeding. Indeed, the brief that was filed by B&C in that proceeding (Attachment A to Opposition) *supports* the position taken by EPA. The fact that B&C is a member of CLA hardly disqualifies it from representing CLA in this matter. Complainant may dismiss the opinions of Mr. Aidala as "questionable at best," but he was the most senior political appointee in the EPA Office of Prevention, Pesticides, and Toxic Substances for two years, and thus is highly qualified to give a declaration on the practical effect of Complainant's proposed construction on the operation of EPA's pesticide program.

As for the purpose of CLA and RISE for seeking leave to file a non-party brief, this is apparent on the face of their motion and the appended brief. CLA and RISE believe that the aggressive construction of FIFRA Section 12(a)(1)(B) advocated by Complainant represents a very serious threat to the business interests of their members and the ability of their customers to obtain essential information concerning use of their products. The fact that the commercial interests of other members of CLA and RISE will sometimes be aligned with those of Respondent is hardly surprising. Moreover, the mere fact that the position taken by CLA and RISE is coincident in some instances with that of Respondent does not demonstrate that CLA and RISE are acting as agents of Respondent or its counsel. The decision of CLA and RISE to seek leave to file a non-party brief was made following appropriate consultation with their

members, and CLA and RISE gave independent instructions to B&C concerning the matters to be addressed and the positions to be taken in their brief.

Although nothing in 40 C.F.R. § 22.11(b) or any other provision of the Consolidated Rules of Practice that govern this proceeding, 40 C.F.R. Part 22, requires that CLA and RISE make the disclosures that are required by Fed. R. App. P. 29(c) for an *amicus curiae* in the federal Courts of Appeal, Complainant asks the presiding Administrative Law Judge to order that CLA and RISE make the disclosures required by Fed. R. App. P. 29(c)(1) and 29(c)(5)(A), (B), and (C). Because CLA and RISE do not object to this request, they are voluntarily providing the requested disclosure in Exhibit A to this reply.

CLA and RISE hereby represent through their counsel that not one word of the CLA/RISE Brief was written by counsel for Respondent. Moreover, although a draft of the CLA/RISE Brief was shared as a courtesy with counsel for Respondent immediately before it was filed, no comment was solicited and none was provided. Further, CLA and RISE hereby represent through their counsel that preparation of the CLA/RISE Brief was not funded to any degree by Liphatech or by any of its officers, employees, or affiliates.

In any case, the notion being promoted by Complainant that an *amicus curiae* should not be permitted to participate in briefing unless it will provide an "objective, dispassionate, neutral discussion" of the issues, Opposition at 6, 7, is anachronistic and does not comport with the routine practice in federal courts today. The leading case examining the question of potential "partiality" by a proposed *amicus* is a bench decision by Circuit Judge (now Justice) Alito in Neonatology Associates v. Comm. of Internal Revenue, 293 F.3d 128 (3d Cir. 2002). In that decision, Judge Alito states:

> I begin with the appellants' argument that an amicus must be "an impartial individual who suggests the interpretation and status of the law, gives information

> concerning it, and whose function is to advise in order that justice may be done, rather than to advocate a point of view so that a cause may be won by one party or another." Opp. at 3-4. This description of the role of an amicus was once accurate and still appears in certain sources, see 3A C.J.S. Amicus Curiae § 2 at 422-23 (1973), but this description became outdated long ago. See Samuel Krislov, the Amicus Curiae Brief: From Friendship to Advocacy, 72 Yale L. J. 694, 703 (1962). Today, as noted, Rule 29 requires that an amicus have an "interest" in the case, see Fed. R. App. Proc. 29(b)(1) and (c)(3), and the appellants' argument that an amicus must be "impartial" is difficult to square with this requirement. An accepted definition of the term "impartial" is "disinterested," Black's Law Dictionary 752 (6th ed. 1990), and it is not easy to envisage an amicus who is "disinterested" but still has an "interest" in the case.

293 F.3d at 131. Judge Alito also disposes of the argument that an *amicus* should not have a financial interest in the outcome:

> The argument that an amicus cannot be a person who has "a pecuniary interest in the outcome" also flies in the face of current appellate practice. A quick look at Supreme Court opinions discloses that corporations, unions, trade and professional associations, and other parties with "pecuniary" interests regularly appear as amici. ... Parties with pecuniary, as well as policy, interests also appear as amici in our court. ... I thus reject the appellants' argument that an amicus must be an impartial person not motivated by pecuniary concerns.

293 F.3d at 131-32.

In contrast to the restrictive view of an *amicus* advocated by Complainant, Courts of Appeal have long recognized that "by the nature of things an *amicus* is not normally impartial," Strasser v. Doorley, 432 F.2d 567, 569 (1st Cir. 1970), and that "[t]here is no rule... that amici must be totally disinterested." Hoptowit v. Ray, 682 F.2d 1237, 1260 (2d Cir. 1982). This same view is generally prevalent in federal District Courts. See U.S.A. v. Alkaabi, 223 F. Supp. 2d 583, 592 (D. N.J. 2002) ("Parties with pecuniary and policy interests have been regularly allowed to appear as *amici* in our courts."); Waste Management of Pennsylvania v. City of York, 162 F.R.D. 34, 36-37 (M.D. Pa. 1995); Concerned Area Residents for the Environment v. Southview Farm, 834 F. Supp. 1410, 1413 (W.D.N.Y. 1993), *rev'd on other grounds*, 34 F.3d 114 (2d Cir. N.Y. 1994).

Some have suggested that because the term *amicus curiae* means "friend of the court," this implies a lesser degree of partiality. Judge Alito addresses this question in the Neonatology decision as well:

> [T]his suggestion is contrary to the fundamental assumption of our adversary system that strong (but fair) advocacy on behalf of opposing views promotes sound decision making. Thus, an amicus who makes a strong but responsible presentation in support of a party can truly serve as the court's friend.

293 F.3d at 131.

Indeed, the language in EPA's Consolidated Rules of Practice appears to recognize the changed role of an *amicus*. As Complainant observes, Opposition at 3, EPA replaced the terms "amicus curiae" and "amicus brief" in an earlier version of 40 C.F.R. § 22.11(b) with "non-party" and "non-party brief" in the current provision. EPA explained that it made the change "on its own initiative" and that the change was "intended to improve the clarity and specificity of the CROP." 64 Fed. Reg. 40138, 40150 (July 23, 1999).

Complainant cites cases from the Seventh Circuit in support of a more restrictive view of the role of an *amicus*. See Opposition at 3-5, 10-11, citing Voices for Choices v. Illinois Bell, 339 F.3d 542 (7th Cir. 2003) and National Organization for Women v. Scheidler, 223 F.3d 615 (7th Cir. 2000), *rev'd on other grounds*, 537 U.S. 393 (2003). In Neonatology, Judge Alito characterized the NOW case as one of a "small body of judicial opinions that look with disfavor on motions for leave to file amicus briefs." 292 F.3d at 130. The approach taken in the Voices for Choices decision has also been characterized as a "minority view." In Re: Heath v. American Express Travel, 2005 Bankr. LEXIS 1943, at 12 n.4 (Bank.App.Panel 9th Cir. 2005).

In any case, CLA and RISE should be granted leave to file their non-party brief even if this tribunal were to adopt the more restrictive approach taken in the Voices for Choices decision:

> No matter who a would-be amicus curiae is, therefore, the criterion for deciding whether to permit the filing of an amicus brief should be the same: whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs.

339 F. 3d at 545. Under this standard, it would clearly be beneficial to grant leave to CLA and RISE. There is no question that the CLA/RISE Brief presents important issues and identifies pertinent precedents not discussed in the any of the briefs on Complainant's motion filed by the parties.

II. The CLA and RISE Non-Party Brief Discusses Important Issues and Precedents Not Addressed by Either Complainant or Respondent and is Highly Relevant to the Disposition of Complainant's Motion

Complainant suggests that the CLA/RISE brief presents little argument or perspective that is new when compared to the prior briefing concerning Complainant's motion by Respondent. Complainant asserts that "[m]ovants offer nothing more than what was argued by Respondent ... apart from some reference to legislative history and a couple of new citations to cases." Opposition at 2. Complainant further opines that "most, if not all, of the arguments contained in the proposed brief are a mere recitation and extension of the arguments already made by Respondent." Opposition at 10. These statements are not a fair or a reasonable characterization of the content of the CLA/RISE Brief.

The central thesis of the CLA/RISE Brief is that Complainant's proposed construction of FIFRA Section 12(a)(1)(B), which would require that EPA review and approve all efficacy claims that are made as part of the sale and distribution of a pesticide product, conflicts with the language in FIFRA Section 3(c)(5) that authorizes EPA to waive requirements for submission and review of data on product efficacy, as well as the legislative history of the 1978 amendments to FIFRA that adopted this language. That legislative history shows that Congress expected that registrants would continue providing efficacy information to users by methods including product

advertising, and this legislative history therefore materially conflicts with Complainant's suggested construction. Because detailed efficacy information is essential to agricultural and other users, Complainant's construction would nullify the central purpose of the waiver provision adopted in the 1978 FIFRA amendments and would inevitably cause registrants to submit efficacy data and claims to EPA for review. See CLA/RISE Brief at 3-5, 12-14, 18-22.

There is no discussion of this key issue in Respondent's December 3, 2010, Memorandum Opposing Motion of Complainant for Accelerated Decision on Liability for Counts 2,141 Through 2,183 of the Complaint (Resp. Opp.) or in Complainant's Motion or Complainant's Reply. In these circumstances, the basis for Complainant's assertion that the CLA/RISE Brief "is a mere recitation and extension of arguments already made by Respondent" is difficult to fathom.

Of course, because other registrants share with Respondent an interest in effectively marketing their products, it is not surprising that CLA and RISE also make some arguments previously made by Respondent. Nevertheless, even though CLA and RISE may make some of the same arguments, the discussion in the CLA/RISE Brief is considerably more than merely cumulative. For example, Respondent and CLA/RISE both argue that any determination under FIFRA Section 12(a)(1)(B) of which claims "differ" from the statement required by FIFRA Section 3(c)(1) must be based on all of the information submitted as part of this statement. Resp. Opp. at 6-8, 10-11, CLA/RISE Brief at 10-12. In their brief, CLA and RISE also argue that the word "differ" does not mean that every advertising claim must have been previously reviewed and approved by EPA, but rather that advertising claims may not materially conflict with product labeling or the other terms and conditions of registration. CLA/RISE Brief at 9-10. As part of this discussion, CLA and RISE cite a federal court case that utilized this understanding of FIFRA

Section 12(a)(1)(B) to evaluate advertising claims. Lowe v. Sporicidin International, 47 F.3d 124, 130 (4th Cir. 1995).

There is also at least one instance where CLA and RISE have taken a position that is not entirely coincident with that of Respondent. Respondent has previously argued that any allegation that claims are "false or misleading" is necessarily limited to labeling violations that constitute misbranding under FIFRA Section 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E). See Respondent's Reply to Complainant's Response to Motion of Respondent to Partially Dismiss the Complaint (filed October 13, 2010), at 4-5. In contrast, the CLA/RISE Brief explicitly recognizes that EPA has taken the position that FIFRA Section 12(a)(1)(B) prohibits claims in advertising that would be deemed "false or misleading" under 40 C.F.R. § 156.10(a)(5) if they were included by an applicant in proposed product labeling. CLA/RISE Brief at 7. While the legal basis for this established EPA position is dubious and has never been clearly tested, CLA and RISE consider any allegation that Respondent has violated FIFRA Section 12(a)(1)(B) by making "false or misleading" claims in its advertising to be distinguishable from Complainant's more expansive view that every advertising claim must be expressly reviewed and approved by EPA. CLA and RISE note that the presiding Administrative Law Judge in this proceeding has recently issued an Order that discusses an allegation by Complainant that one of the claims made by Respondent was "false or misleading," Order on Prehearing Motions Related to Amending the Complaint (filed January 3, 2011), at 10-11, but this Order does not address or resolve the question of whether claims that are prohibited in labeling by 40 C.F.R. § 156.10(a)(5) are also prohibited in advertising by FIFRA Section 12(a)(1)(B).

A careful comparison of the proposed non-party brief submitted by CLA and RISE to the briefs filed by Respondent and Complainant concerning Complainant's motion shows that the

CLA/RISE Brief would readily satisfy even the more restrictive standard for an *amicus* brief set forth in Voices for Choices. It is clear that the CLA/RISE Brief will assist the presiding Administrative Law Judge because it includes "ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." 339 F. 3d at 545. See also Commonwealth of the Northern Mariana Islands v. U.S.A., 2009 U.S. Dist. LEXIS 125427, at 4 (D.D.C. 2009) (proposed *amicus* brief permitted to "assist the Court in this matter because it includes unique arguments not to be found in the parties' briefs"); Liberty Resources v. Philadelphia Housing Authority, 395 F. Supp. 2d 206, 209-10 (E.D. Pa. 2005) (*amicus* brief allowed to ensure a "complete and plenary discussion of difficult issues").

Complainant also argues that "months will be lost" if CLA and RISE are granted leave to file their brief. Opposition at 2. CLA and RISE do not understand the basis for this argument. If leave is granted to CLA and RISE to file their non-party brief, 40 C.F.R. § 22.11(b) provides that Complainant and Respondent will each be afforded 15 days to respond. Although 40 C.F.R. § 22.11(b) makes no express provision for a reply, the order granting leave could also provide CLA and RISE the opportunity to file a reply. If the order makes provision for such a reply, this would normally be due in ten days under the procedure set forth in 40 C.F.R. § 22.16(b).

Any additional time and resources that would be required to assure thorough briefing of the important issues presented by Complainant's proposed construction of FIFRA Section 12(a)(1)(B) will be well spent. Full consideration of these issues will establish a better record for decision, and will assist this tribunal in making a decision that is comprehensive and definitive.

III. Complainant's Suggested Construction of FIFRA Section 12(a)(1)(B) is More Severe than Established EPA Policy, and Complainant's Stated Position Concerning Efficacy Claims Is Inconsistent With FIFRA Section 3(c)(5) and Complainant's Own Construction

Complainant cites a letter from EPA to RISE (Attachment G to Opposition) as evidence

that CLA and RISE "had notice as to U.S. EPA's interpretation of Section 12(a)(1)(B) of FIFRA." Opposition at 9. Careful examination of this letter reveals that it is just one example of the established EPA position that EPA's regulations concerning "false and misleading" claims in labeling can also apply to advertising under FIFRA Section 12(a)(1)(B). CLA and RISE question the legal basis for this EPA position, but they would not be seeking leave to participate in this proceeding if Complainant was only making allegations that Respondent's advertising claims were "false or misleading." Instead, Complainant is arguing that it does not matter whether Respondent's advertising claims, including efficacy claims, are truthful because EPA has never expressly "approved" them.

It is this expansive and severe construction of FIFRA Section 12(a)(1)(B) that has caused CLA and RISE to prepare and seek leave to file their non-party brief. Complainant argues that any claim in advertising "differs" from the statement required for registration if the claim has not been expressly "approved" by EPA. Comp. Mot. at 11-12; Comp. Reply at 2. According to Complainant, no advertising claim is permissible unless it is literally included in the approved product labeling, Comp. Mot. At 11; Comp. Reply at 4, or has been approved by EPA in response to a separate statement of claims submitted by the applicant. Comp. Reply at 4-5. In Complainant's view, this construction applies with equal force to efficacy claims. Comp. Mot. at 12-13; Comp. Reply at 5. Under Complainant's proposed construction, it does not matter whether EPA has waived any requirement for submission or review of efficacy data in determining what advertising claims are permissible.

In their proposed non-party brief, CLA and RISE demonstrate that this construction of FIFRA Section 12(a)(1)(B) is inconsistent with FIFRA Section 3(c)(5) and its legislative history, is irreconcilable with EPA's own interpretive rule concerning pesticide advertising, would create

severe practical problems for pesticide registrants, distributors, retailers, and users, and for the EPA pesticide program, and would raise very serious questions of constitutionality. In the Opposition, Complainant attempts to address the special problems when this construction is applied to efficacy information by suggesting that a claim "that a product is efficacious" can be distinguished from claims regarding "the level or degree of efficacy." Opposition at 8. This idea cannot withstand careful scrutiny.

According to Complainant, it would be permissible for a pesticide registrant to create advertising that says that "my product works," but it would impermissible for the same advertising to say "my product works really well" unless EPA has expressly reviewed and approved this statement. This distinction is illogical, and this simply cannot be how Congress intended FIFRA Sections 12(a)(1)(B) and 3(c)(5) to be construed.

In any event, Complainant's suggested distinction does not resolve any of the problems presented by Complainant's construction of FIFRA Section 12(a)(1)(B). Limiting the purported prohibition to more detailed efficacy claims not reviewed and approved by EPA does not eliminate the conflict with the legislative history of FIFRA Section 3(c)(5), does not alter the irreconcilable contradiction between Complainant's construction and EPA's own interpretive rule, and will still lead to all of the practical problems discussed in the CLA/RISE Brief and the attached Declarations. Moreover, the distinction suggested by Complainant undermines Complainant's own proposed construction. Complainant does not suggest any logical reason why the simpler claim "that a product is efficacious" would be exempt from any requirement that all claims be reviewed and approved by EPA.

## CONCLUSION

For all of the above reasons, the presiding Administrative Law Judge should issue an order granting CLA and RISE leave to file their non-party brief under 40 C.F.R. § 22.11(b), and establishing a schedule for responses to the brief by Complainant and Respondent and a reply by CLA and RISE.

DATED: January 19, 2011

Respectfully submitted,

Lynn L. Bergeson (D.C. Bar No. 320796)
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Attorneys for CropLife America and Responsible Industry for a Sound Environment

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**BEFORE THE ADMINISTRATOR**

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| **IN THE MATTER OF:** | ) | |
| **Liphatech, Inc.** | ) | Docket No. FIFRA-05-2010-0016 |
| **Milwaukee, Wisconsin** | ) | |
| | ) | Honorable Barbara A. Gunning |
| **Respondent.** | ) | |



## VOLUNTARY RULE 29(c) DISCLOSURE OF CROPLIFE AMERICA AND RESPONSIBLE INDUSTRY FOR A SOUND ENVIRONMENT

Through their counsel, non-parties CropLife America (CLA) and Responsible Industry for a Sound Environment (RISE) hereby submit this voluntary disclosure based on the requirements for a brief of an *amicus curiae* in Fed. R. App. P. 29(c).

Pursuant to Fed. R. App. P. 29(c)(1), CLA states that it is an incorporated non-profit trade association that primarily represents registrants of agricultural pesticide products. Pursuant to Fed. R. App. P. 29(c)(1), RISE states that it is an incorporated non-profit trade association that primarily represents producers of specialty pesticides and fertilizers.

Pursuant to Fed. R. App. P. 29(c)(5)(A), CLA and RISE state that neither counsel for the Respondent Liphatech, Inc. (Respondent) nor counsel for the Complainant the Director of the Lands and Chemicals Division of Region 5 of the U.S. Environmental Protection Agency (Complainant) authored in whole or in part the proposed non-party brief submitted by CLA and RISE on January 6, 2011.

Pursuant to Fed. R. App. P. 29(c)(5)(B), CLA and RISE state that neither Respondent nor Complainant contributed any money that was intended to fund preparing or submitting the proposed non-party brief submitted by CLA and RISE on January 6, 2011. CLA and RISE further state that neither counsel for Respondent nor counsel for Complainant contributed any money that was intended to fund preparing or submitting the proposed non-party brief submitted by CLA and RISE on January 6, 2011.

Pursuant to Fed. R. App. P. 29(c)(5)(C), CLA and RISE state that no person other than CLA and RISE, their respective members, and their counsel contributed any money that was intended to fund preparing or submitting the proposed non-party brief submitted by CLA and RISE on January 6, 2011.

DATED: January 19, 2011

Respectfully submitted,

Lynn L. Bergeson (D.C. Bar No. 320796)
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Attorneys for CropLife America and Responsible Industry for a Sound Environment

## CERTIFICATE OF SERVICE

I hereby certify that copies of the enclosed Reply of CropLife America and RISE in Support of Motion For Leave to File a Non-Party Brief Opposing Complainant's Construction of FIFRA Section 12(a)(1)(B), and the Exhibit thereto, were today transmitted by depositing the documents with a commercial courier in Washington, DC, with all fees prepaid, in envelopes addressed to:

Honorable Barbara A. Gunning
Office of the Administrative Law Judges
Franklin Court Building
1099 14th Street, NW, Suite 350
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Ms. Nidhi K. O'Meara (C-14J)
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I further certify that the original and one copy of each of the enclosed documents, along with the original version and one copy of this Certificate of Service, were today transmitted for filing by depositing the documents with a commercial courier in Washington, DC, with all fees prepaid, in an envelope addressed to:

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

Dated: January 19, 2011

Timothy D. Backstrom
Counsel for CropLife America and
Responsible Industry for a Sound Environment