

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

**In re FIFRA Section 6(b) Notice of Intent )  
to Cancel Pesticide Registrations for )  
Chlorpyrifos Products )  
)  
Gharda Chemicals International, Inc., and )  
Red River Valley Sugarbeet Growers )  
Association, et al., )  
)  
Petitioners. )  
\_\_\_\_\_ )**

**Docket No. FIFRA-HQ-2023-0001**

**PETITIONERS' OMNIBUS OPPOSITION TO  
RESPONDENT'S MOTION FOR ACCELERATED DECISION AND  
INTERVENORS' MOTION FOR ACCELERATED DECISION**

## TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	1
II. BACKGROUND .....	3
a. Chlorpyrifos .....	3
b. EPA’s Regulatory Processes Concerning Chlorpyrifos.....	4
c. Gharda’s Discussions with EPA Concerning a Potential Voluntary Cancellation of Chlorpyrifos Uses.....	6
i. Initial Discussions .....	6
ii. EPA Signals Maintaining Uses Consistent with PID .....	8
iii. Unrelated to Any Actions by Gharda, EPA Begins to Change its Position .....	10
iv. After Further Discussions, EPA Signals Gharda to Be Ready to Quickly Submit a Voluntary Cancellation Request Consistent with the PID .....	11
v. EPA Ends Discussions With Gharda in a Troubling Way.....	13
d. Eighth Circuit Lawsuit.....	15
e. NOIC Proceeding.....	16
III. STANDARD FOR ACCELERATED DECISION .....	17
IV. ARGUMENT.....	17
a. Respondent is Not Entitled to Judgement as a Matter of Law.....	17
i. The Final Rule is Arbitrary and Capricious and Contrary to Law.....	17
ii. The NOIC Violates FIFRA and Due Process .....	19
1. EPA Failed to Meaningfully Consult with USDA for the NOIC.....	20
2. The NOIC Fails to Consider Alternatives to Cancellation .....	21
3. The NOIC Does Not Account for the Economic Impact of Cancellation on Agriculture.....	22
4. EPA Based its Conclusion in the NOIC on Inappropriately Limited Analysis.....	23
b. There Are Genuine Issues of Material Fact Raised in the Motions.....	24
c. An Accelerated Decision is Inappropriate Because The NOIC Should Be Decided on a Fully Developed Record (If The NOIC is Not Dismissed) .....	26
V. CONCLUSION.....	27

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Bell v. Burson</i> , 402 U.S. 535 (1971) .....	20
<i>League of United Latin American Citizens v. Regan</i> , 996 F.3d 673 (9th Cir. 2021) .....	7
<i>Red River Valley Sugarbeet Growers Ass’n, et al. v. Regan, et al.</i> , Nos. 22-1422, 22-1530 (8th Cir. Dec. 15, 2022) .....	<i>passim</i>
<i>Reckitt Benckiser Inc. v. EPA</i> , 613 F.3d 1131 (D.C. Cir. 2010) .....	20
<i>Reckitt Benckiser, Inc. v. Jackson</i> , 762 F. Supp. 2d 34 (D.D.C. 2011) .....	20
<b>Statutes</b>	
7 U.S.C. § 136a .....	20
7 U.S.C. § 136d .....	19, 20, 22, 23
21 U.S.C. § 346a .....	8, 19
21 U.S.C. § 408(b) .....	5
<b>Other Authorities</b>	
40 C.F.R. Part 164 .....	20
40 C.F.R. § 164.91 .....	1, 17
Final Rule for Chlorpyrifos Tolerance Revocations, 86 Fed. Reg. 48,315 (Aug. 30, 2021) .....	<i>passim</i>

**PETITIONERS’ OMNIBUS OPPOSITION TO  
RESPONDENT’S MOTION FOR ACCELERATED DECISION AND  
INTERVENORS’ MOTION FOR ACCELERATED DECISION**

Pursuant to 40 C.F.R. § 164.91, Petitioners<sup>1</sup> hereby oppose Respondent’s Motion for Accelerated Decision and Intervenor’s Motion for Accelerated Decision,<sup>2</sup> and submit this memorandum in opposition to the Motions.

**I. INTRODUCTION**

Respondent and Intervenor ignore the interconnected and interdependent nature of the NOIC and the Final Rule.<sup>3</sup> The NOIC depends in its entirety on the Final Rule—that is, without the Final Rule there would be absolutely no basis for the NOIC. Respondent even *admits* that “Petitioners are correct that the NOIC is ultimately based on the Final Rule.” Resp’t Mot. at 15. Yet both Motions try to divorce the NOIC from the Final Rule in an attempt to inappropriately limit the scope of the NOIC proceeding and support a decision in their favor. The fact that the Final Rule is currently before the U.S. Court of Appeals for the Eighth Circuit (“Eighth Circuit”) is not a reason to ignore whether the Final Rule serves as a valid predicate for the NOIC, but it

---

<sup>1</sup> Petitioners are Gharda Chemicals International, Inc. (“Gharda”) and Red River Valley Sugarbeet Growers Association, U.S. Beet Sugar Association, American Sugarbeet Growers Association, Southern Minnesota Beet Sugar Cooperative, American Crystal Sugar Company, Minn-Dak Farmers Cooperative, American Farm Bureau Federation, American Soybean Association, Iowa Soybean Association, Minnesota Soybean Growers Association, Missouri Soybean Association, Nebraska Soybean Association, South Dakota Soybean Association, North Dakota Soybean Growers Association, National Association of Wheat Growers, Cherry Marketing Institute, Florida Fruit and Vegetable Association, and Georgia Fruit and Vegetable Growers Association, and National Cotton Council of America (“Growers” and together with Gharda, “Petitioners”).

<sup>2</sup> Hereinafter, Respondent’s Motion for Accelerated Decision shall be referenced as “Respondent’s Motion” and Intervenor’s Motion for Accelerated Decision shall be referenced as “Intervenor’s Motion.” Together the Respondent’s Motion and Intervenor’s Motion are referred to as the “Motions.”

<sup>3</sup> The “NOIC” is the EPA December 14, 2022 Notice of Intent to Cancel Pesticide Registrations; the “Final Rule” is the Final Rule for Chlorpyrifos; Tolerance Revocations, 86 Fed. Reg. 48,315 (Aug. 30, 2021) (JX 3).

certainly serves as a compelling basis to delay the NOIC until the Eighth Circuit decides the case.

EPA does not seriously rebut Petitioners' proof that registration cancellation before an Eighth Circuit decision in Petitioners' favor would render new registrations financially unattainable,<sup>4</sup> nor has EPA ever offered any assurances that it would immediately reinstate the current registrations upon Eighth Circuit reversal of the Final Rule. Similarly, EPA acknowledges that Petitioners have properly followed all administrative and judicial requirements to preserve their rights to challenge the Final Rule, but then ignores that those rights are obliterated by a premature NOIC that vacates the registrations. This result would be an unfair, significantly burdensome, and unduly prejudicial outcome to the Petitioners—especially when the product has not been sold for many months. There is simply no reason that the NOIC cannot await the outcome of the Eighth Circuit case.

Even if it is determined that the Final Rule is not irreversibly intertwined with the NOIC regardless of the outcome in the Eighth Circuit litigation, EPA *still* did not comply with statutorily-mandated cancellation procedures as it relates to the NOIC itself. For example, EPA did not conduct the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") required analysis of economic impact on agriculture as part of the NOIC, did not sufficiently consult with the U.S. Department of Agriculture ("USDA") regarding its very negative views on the impact of cancellation, and failed to consider lesser alternatives to cancellation (like suspending the NOIC until the Eighth Circuit decides). Petitioners are entitled to a fully developed record (including

---

<sup>4</sup> PX 16 (describing the prohibitively expensive costs and time associated with re-registering chlorpyrifos products). This is in addition to the significant harm already caused to the Petitioners. *See, e.g.*, Verified Witness Statements of Ram Seethapathi, Michael Aerts, Johnnie Walter Boatright, III, Chris Butts, Neil Brodie Griffin, Luther Markwart, Peter Nelson, Ben Scholz, and Jordan Scott.

through discovery) in advance of the scheduled public hearing to demonstrate the flaws in EPA's application of FIFRA's cancellation requirements to this matter.

Moreover, as set forth below, both Motions rely on and ignore material facts that are actually and genuinely disputed. An accelerated decision on the NOIC is therefore inappropriate.

## **II. BACKGROUND**

### **a. Chlorpyrifos**

Chlorpyrifos is a vitally important agricultural tool, protecting over fifty valuable U.S. food crops from destruction due to insect pests, including alfalfa, cotton, soybeans, sugarbeet, and wheat. Verified Witness Statement of Ram Seethapathi ("Seethapathi Statement") ¶ 6. Chlorpyrifos had value to growers in protecting their crops and income, as well as value to consumers who enjoy affordable, healthy, and high-quality produce throughout the year. Seethapathi Statement ¶ 6.

Chlorpyrifos's critical importance as an insect pest management tool is due to its broad-spectrum efficacy, favorable environmental characteristics, and affordability for growers. *Id.* ¶ 7. It was the leading active ingredient to control a broad spectrum of difficult-to-control insect pests, and for some destructive pests it was the only effective pest management tool available. *Id.*; PX 40 at 3. Because of its broad-spectrum effectiveness, chlorpyrifos was often the first tool growers employed to control new or unknown insect pests, a long-standing problem but one that may be exacerbated by climate change. Seethapathi Statement ¶ 8; PX 40 at 13–14 (removal of "broad spectrum materials such as chlorpyrifos . . . from pest management programs can result in unexpected outbreaks of previously minor pests or even the emergence of new pests"). Chlorpyrifos is also less harmful to beneficial insect populations than other insecticides.

Seethapathi Statement ¶ 8. It requires fewer applications and avoids the use of multiples chemistries to control certain pests, reducing overall insecticide use. *Id.*

Gharda has long supported the registration of chlorpyrifos in the United States, including through an industry task force that provided financial and other support for comments, scientific data, and other materials submitted to EPA by Dow AgriSciences, LLC, now Corteva Agriscience (“Corteva”). *Id.* ¶ 9. Gharda has invested significantly in the development of data and other information to support the registration of chlorpyrifos in the United States. *Id.* In February 2020, Corteva announced that it would end production of chlorpyrifos by 2021. *Id.* ¶ 10. At that time, chlorpyrifos continued to be a critically important agricultural tool for many growers. *Id.* As a result, many distributors and farm input suppliers began looking to Gharda to meet the market demand for chlorpyrifos. *Id.* In response to this increase in demand, Gharda significantly increased its production of chlorpyrifos to meet the demands of growers who relied on chlorpyrifos as an important pest management tool. *Id.* Immediately prior to the Final Rule, Gharda was the primary supplier of chlorpyrifos for agricultural use in the United States. *Id.*

b. EPA’s Regulatory Processes Concerning Chlorpyrifos

Petitioners have a vital interest in pesticide regulatory procedures and food safety standards, and in actions taken by EPA with respect to agricultural crop protection tools, including actions that relate to pesticide residues found in or on food and the regulation of those residues under the Federal Food, Drug, and Cosmetic Act (“FFDCA”) and Food Quality Protection Act (“FQPA”), and associated pesticide registration actions under FIFRA.

On December 7, 2020, as part of its Registration Review of chlorpyrifos pursuant to FIFRA, EPA published its Proposed Interim Registration Review Decision for Chlorpyrifos (the “PID”). PX 41. The PID is supported by analyses included in EPA’s September 21, 2020 Third Revised Human Health Risk Assessment (the “2020 RHHRA”), PX 38, which in turn relies on,

among other documents, a September 15, 2020 Updated Chlorpyrifos Refined Drinking Water Assessment for Registration Review (the “2020 DWA”), PX 39. EPA’s PID and 2020 DWA reflected a fulsome, measured, scientific assessment of the human health and drinking water risks of chlorpyrifos by EPA’s expert scientists. In its 2020 RHHRA and PID, EPA continued to use 10% red blood cell acetyl cholinesterase inhibition (“RCA AChE”) as a regulatory endpoint or point of departure for human health risk assessments for chlorpyrifos. PX 38 at 2. This long-standing conservative and health-protective endpoint is supported by decades of scientific study. Seethapathi Statement ¶ 16. Moreover, EPA stated that it “remains unable to verify the reported findings” of epidemiology studies claiming links between prenatal exposure to chlorpyrifos and neurodevelopmental effects. PX 38 at 89–90.

EPA’s PID relied on the 2020 DWA, which updated and refined the Agency’s 2016 DWA. Seethapathi Statement ¶ 17. In the 2020 DWA, EPA focused on eleven uses (alfalfa, apple, asparagus, cherry, citrus, cotton, peach, soybean, sugar beet, strawberry, and wheat) that EPA determined to be high-benefit, critical crop uses. PX 41 at 15–17. The 2020 DWA focused on select regions of the country where estimated drinking water concentrations of chlorpyrifos are below the drinking water level of concern. *Id.* In the 2020 RHHRA and PID, EPA conducted an assessment of potential risk to human health from aggregate exposure to chlorpyrifos residues, taking into account all anticipated dietary exposures from food, drinking water, and residential sources, pursuant to FFDCA Section 408(b). *Id.* EPA determined that there were *no* potential risks of concern from exposure to chlorpyrifos in food or residential uses alone. PX 38 at 12; PX 41 at 14, 18. EPA determined that risks from drinking water exposure exceeded safe levels taking into account *all* registered uses but, relying on its 2020 DWA, EPA found that risks were *below* the drinking water level of concern benchmark anticipating use only



on the eleven high-benefit crops set forth above in certain identified regions of the country. PX 41 at 18.

In its 2020 RHHRA and PID, EPA presented two potential approaches for assessing potential risks: (i) application of a 10X FQPA safety factor and limiting use of chlorpyrifos to the eleven high-benefit agricultural uses in select regions of the country due to “uncertainty” in “the science addressing neurodevelopment effects,” or (ii) application of a 1X FQPA safety factor, which would allow for the retention of all currently registered uses. Seethapathi Statement ¶ 18. Regarding the first approach, EPA was unequivocal that “the agency has determined” that limiting use to the eleven “high-benefit agricultural uses” in the select geographic regions “will not pose potential risks of concerns with an FQPA safety factor of 10X.” PX 41 at 40. EPA committed to “consider registrant and stakeholder input on the subset of crops and regions from the public comment period” and stated that it “may conduct further analysis to determine if any other limited uses may be retained.” *Id.* EPA also indicated that it may further refine its assessment based on feedback and recommendations from the September 2020 FIFRA Scientific Advisory Panel. *Id.*

c. Gharda’s Discussions with EPA Concerning a Potential Voluntary Cancellation of Chlorpyrifos Uses

i. Initial Discussions

In April 2021, EPA regulatory personnel reached out to Gharda’s President Ram Seethapathi to discuss whether Gharda would entertain an agreement to voluntarily cancel some uses of chlorpyrifos. Seethapathi Statement ¶ 20. These discussions focused initially on uses identified in the PID as the 1X uses.<sup>5</sup> *Id.* EPA proposed a meeting with Gharda on April 20,

---

<sup>5</sup> The “1X uses” refer to uses for chlorpyrifos for which the FQPA safety factor was reduced to 1X. *See* PX 10 at 14.

2021, and requested that Gharda confirm in writing in advance of that meeting Gharda’s commitment to voluntarily cancel the 1X uses (while retaining the eleven high-benefit crop uses identified as the 10X uses). *Id.* In response, even though Gharda was confident that all 1X uses are well supported, Gharda indicated that it would consider phasing out some of the 1X uses on a reasonable timetable and adopting potential geographic restrictions on crop uses and other risk mitigation measures. *Id.*; see PX 10 at 23–25. Gharda expressed concern in a letter with the Agency’s proposed rushed timetable, however, given the impact of a phase-out on its business and on the grower community, and given that EPA had not yet reviewed stakeholder comments on the PID. Seethapathi Statement ¶ 20. EPA cancelled the proposed meeting with Gharda in order to discuss Gharda’s letter further internally. *Id.*

On April 29, 2021, the Ninth Circuit issued a decision in the lawsuit *League of United Latin American Citizens v. Regan*, consolidated Case Nos. 19-71979, 19-71982 (“*LULAC*”), which concerned EPA’s handling of an administrative petition to revoke all tolerances filed by several nongovernmental organizations. Seethapathi Statement ¶ 21. In a 2-1 decision, a three-judge panel of the Ninth Circuit found that EPA’s denial of objections to a 2017 order denying the administration petition was at odds with the FFDCA because EPA did not make an affirmative finding that chlorpyrifos tolerances were “safe” in response to the petition, outside of its normal regulatory processes. *LULAC*, 996 F.3d 673 (9th Cir. 2021). The Ninth Circuit ordered EPA “either to modify chlorpyrifos tolerances and concomitantly publish a finding that the modified tolerances are safe,” “or to revoke all chlorpyrifos tolerances.” *Id.* at 678 (emphasis added). In making this ruling the court expressly recognized the importance of the PID. Seethapathi Statement ¶ 21. Indeed, the court stated that:

[D]uring the pendency of this proceeding, in December 2020, the EPA issued a Proposed Interim Registration Review Decision proposing to modify certain chlorpyrifos

tolerances. The EPA also convened another SAP in 2020. If, based upon EPA's further research the EPA can now conclude to a reasonable certainty that modified tolerances or registrations would be safe, then it may modify chlorpyrifos registrations rather than cancelling them.

*Id.* at 703. (emphasis added). The court ordered EPA to “correspondingly modify or cancel related FIFRA registrations for food use in a timely fashion consistent with the requirements of 21 U.S.C. § 346a(a)(1).” *Id.* at 678.

After the Ninth Circuit issued its decision in *LULAC*, EPA reached back out to Gharda to resume discussions about a potential voluntary cancellation of certain chlorpyrifos uses.

Seethapathi Statement ¶ 22. EPA career supervisory personnel strongly urged Gharda to agree to voluntarily cancel the 1X uses and emphasized that the Agency had limited time to decide how to implement the court's decision. *Id.* In response, Gharda expressed its disagreement with the Ninth Circuit decision in the hope that EPA would seek rehearing of and/or appeal the flawed decision. *Id.*; see PX 10 at 26–29. Nevertheless, in an effort to work cooperatively with EPA and believing it had little choice but to accept voluntary cancellation terms, Gharda committed to voluntarily cancel additional 1X crop uses, pursuant to scheduled phase-outs in accordance with appropriate existing stocks orders. Seethapathi Statement ¶ 22. EPA strongly implied during these discussions the 10X uses would remain in place as long as Gharda voluntarily cancelled all 1X uses. *Id.*

ii. EPA Signals Maintaining Uses Consistent with PID

In further discussions with EPA career supervisory personnel in late May 2021, EPA expressed to Gharda that EPA was willing to consider retention of only the 10X uses, and reiterated that it was under pressure to act quickly as a result of the Ninth Circuit decision. Seethapathi Statement ¶ 23. EPA urged Gharda to confirm in writing its agreement to voluntarily cancel all 1X uses. *Id.* In response, and even though such a reduction in uses would

eliminate more than 50% of Gharda's U.S. chlorpyrifos business, Gharda committed to continue working in good faith with EPA towards an agreement to voluntarily cancel all 1X uses. *Id.* To that end, on June 7, 2021, Gharda confirmed in writing to EPA that it would voluntarily cancel all currently approved agricultural uses of chlorpyrifos, other than the uses identified in the PID as 10X uses. *Id.* In turn, Gharda requested that EPA (i) work with it to address the orderly exhaustion of its inventories for the uses to be voluntarily cancelled, particularly given its unique role in the U.S. agrochemical industry; (ii) agree on orderly processes and timing for revising labels; and (iii) agree on an existing stocks provision for the uses to be voluntarily cancelled, to mitigate disruption on growers and other uses. *Id.*

EPA career supervisory personnel were receptive to Gharda's June 7 commitment, responding the next day to ask "if Gharda is prepared to move forward with discussing voluntary use cancellations" and proposing a call with EPA legal counsel. Seethapathi Statement ¶ 24. By an email dated June 8, 2021, EPA indicated that it was "considering the following dates for existing stocks:

- Technical grade active ingredient: Phase out most [1X] uses by the end of 2021; allow until the end of 2022 (12 to 18 months) for the remaining [1X] uses
- End-use products: 12 to 18 months from the technical registrants for sale/distribution of products
- End users, growers: Until exhausted

*Id.* Gharda responded to EPA's June 8 email proposing a meeting with its attorneys, with the expectation that the parties were close to reaching final agreement on terms and could begin work on modifying labels. *Id.* ¶ 25.

iii. Unrelated to Any Actions by Gharda, EPA Begins to Change its Position

Then, on June 14, 2021, EPA career supervisory personnel advised Gharda that Gharda's commitment regarding the "voluntary" cancellation of uses was not sufficient for EPA's "leadership," and asked Gharda to consider voluntarily cancelling additional uses, this time including some 10X uses, or face possible revocation of all tolerances. *Id.* ¶ 26. EPA urged Gharda to agree to voluntarily cancel all but five to six of its most important crop uses. *Id.* This was the first time that EPA asked Gharda to consider voluntarily cancelling 10X crop uses. *Id.* EPA also said that its leadership had raised occupational exposure concerns and asked that Gharda agree to eliminate the use of aerial application methods, even though these are not issues to be addressed under FFDCA but are instead issues to be addressed in Registration Review under FIFRA's risk/benefit standard. *Id.* In subsequent calls, EPA also expressed concerns regarding ecological risks from chlorpyrifos, even though the ecological risk assessment for chlorpyrifos has yet to be completed. *Id.* EPA nevertheless continued to indicate openness to an extended phase-out period for any voluntarily cancelled uses. *Id.*

Gharda was confused, surprised, and disappointed at EPA's request that Gharda voluntarily cancel 10X uses that EPA had confirmed, in a robust scientific assessment in its PID, were safe. Seethapathi Statement ¶ 27. Gharda was also concerned that EPA appeared to be relying on occupational and ecological concerns as the basis for its request, neither of which relate to the regulation of tolerances under the FFDCA. *Id.* Despite this dramatic and unexpected shift in the discussions, Gharda remained willing to work with EPA to try to meet its demands. *Id.* Gharda repeatedly urged EPA to ensure an orderly phase-out for manufacturers, distributors, growers, and others in the agricultural supply chain for the uses to be voluntarily cancelled, as EPA's demand would eliminate nearly 80-85% of the U.S. market for chlorpyrifos. *Id.*

iv. After Further Discussions, EPA Signals Gharda to Be Ready to Quickly Submit a Voluntary Cancellation Request Consistent with the PID

Gharda and EPA had a meeting on June 24, 2021, to further discuss the terms of Gharda’s voluntary cancellation of registered crop uses. *Id.* ¶ 28. In a follow-up email dated June 24, 2021, approximately two months from the deadline for EPA to act in response to the Ninth Circuit order, EPA’s Chemical Review Manager wrote Gharda “to confirm the uses that Gharda has agreed upon for retention following our discussions over the past few weeks and on our call this afternoon” and outlined the following terms:

- Retain alfalfa, apple, asparagus, cherry (tart), citrus, peach, soybean, sugarbeet, and wheat (summer and winter) in select states as outlined in the December 2020 PID
- Cotton and strawberry will be phased out over two years (until 2023)
- Aerial application will be phased out over 2 years (until 2023)
- Provisions for existing stocks:
  - o Technical products [with current labels] may be sold or distributed until 12/23/2021
  - o End-use products [with current labels] may be sold or distributed until 12/31/2022

*Id.* In emails dated June 25, 2021, Gharda sought clarification from EPA on some aspects of its June 24 proposal, including the details of various phase-out periods. *Id.* ¶ 29. In these emails, Gharda thanked EPA “for our good faith negotiations over the last few weeks” and said that it “looks forward to working with the Agency to finalize the above terms.” *Id.* EPA proposed a meeting with its Office of General Counsel. *Id.* It was Gharda’s expectation that in involving legal counsel, the parties would be working to finalize a written agreement reflecting the agreed terms. *Id.*

At EPA's request, on July 2, 2021, Gharda had a further call with EPA career supervisory personnel, during which EPA pressed Gharda to agree to voluntarily cancel even more 10X crop uses because of demands from EPA's leadership. *Id.* ¶ 30. EPA also indicated that it would not be able to agree to an extended phase-out period and that chlorpyrifos applications would need to cease after six months, instead of the phase-out periods that EPA had proposed one week earlier in its June 24 email. *Id.*; PX 10 at 40–42. EPA also raised concerns with air blast applications on orchard crops. Seethapathi Statement ¶ 30. Gharda offered to provide data on mitigation measures that would address EPA's concerns regarding occupational exposure, but EPA said it would not consider mitigation data. *Id.* EPA asked Gharda to put forward its best, final proposal that EPA would take back to its leadership. *Id.* Gharda was especially surprised and disappointed with this turn of events, as it in good faith believed that EPA's June 24 email, *id.* ¶ 28; PX 10 at 40–42, had set forth the final terms of crop use retention and voluntary cancellation. Seethapathi Statement ¶ 30.

At EPA's request, Gharda had a call with EPA and its counsel on July 6, 2021. *Id.* ¶ 31. During the call EPA pressed Gharda to accept voluntary cancellation of all but three 10X uses and reiterated that it would be unable to allow uses beyond six months from the effective date of a final rule. *Id.* EPA explained that the six-month period was based on the WTO Agreement on the Application of Sanitary and Phytosanitary measures, not because of a need for the orderly phase-out of chlorpyrifos inventories and existing stocks. *Id.* Gharda explained that six months would not be a meaningful time period, given that it would largely overlap with the off-season for chlorpyrifos use and because its customers purchase the product at least one to two years in advance of each growing season. *Id.* Following this call, Gharda followed up in writing to offer voluntary cancellation of additional 10X uses and eliminate aerial and air blast methods of

application; Gharda urged EPA to extend the phase-out periods for formulation, distribution, and use, to allow for an orderly exhaustion of inventories and to minimize potentially catastrophic economic losses to Gharda and others in the supply chain, at a minimum until July 2022 to cover part of the next growing season. *Id.*; see PX 10 at 48–50. After this exchange, EPA indicated that it was “very close” to reaching final agreement with Gharda. Seethapathi Statement ¶ 31.

At EPA’s request, Gharda had a further call with EPA and its counsel on July 14, 2021, during which EPA indicated that Gharda’s proposal was under review by EPA leadership, but that EPA hoped to have a final response within a week. *Id.* ¶ 32. EPA indicated that it would likely need a voluntary cancellation letter from Gharda quickly, to reference the voluntary cancellation in the published final rule. *Id.* During the call, EPA, for the first time, indicated that its leadership believed that import tolerances would also need to be voluntarily cancelled. *Id.* EPA could not explain the basis for this last-minute request, given that import tolerances do not raise drinking water or occupational concerns, and given that the PID did not identify any dietary (non-drinking water) risks associated with chlorpyrifos for import tolerances, even with the retention of the 10X safety factor. *Id.* Nevertheless, believing it was very close to reaching final agreement with EPA and to avoid derailing months of negotiations, Gharda submitted a proposal to EPA for the cancellation of certain import tolerances. *Id.* Gharda followed up asking EPA to consider its points concerning import tolerances but stressed that it did not want the import tolerance issue to stand in the way of resolving voluntary cancellation of uses pursuant to the terms discussed, as summarized in Gharda’s July 6 email. *Id.* EPA responded stating that it appreciated Gharda’s engagement on this challenging issue. *Id.*

v. EPA Ends Discussions With Gharda in a Troubling Way

Following this submission and response, Gharda heard nothing further from EPA for weeks. Seethapathi Statement ¶ 33. Growing increasingly concerned as the court deadline for



EPA to issue a final rule was approaching, Gharda requested a meeting with EPA leadership. *Id.*

¶ 34. After Gharda’s repeated outreach, EPA finally allowed Gharda to have a twenty-five-minute meeting with Assistant Administrator Michal Freedhoff and others from EPA on August 16, 2021. *Id.* During the meeting, Gharda reiterated its commitment to voluntarily cancel uses as set forth above, urged EPA to make a decision consistent with science and law, and again stressed the major supply chain disruptions and catastrophic losses that would result from a revocation of tolerances with immediate effect. *Id.* EPA was silent during this meeting, indicating only that it was willing to “work collaboratively” with Gharda going forward. *Id.* The next day after its meeting with EPA leadership, Gharda discovered a posting on EPA’s website announcing the April 2021 revocation of all tolerances for chlorpyrifos, which Gharda also discovered was posted days *before* its August 16 meeting with EPA leadership. *Id.* ¶ 35. When Gharda reached out to senior career leadership at EPA about the posting, EPA apologized for the posting and immediately removed it, but confirmed that the forthcoming Final Rule would be consistent with the website posting. *Id.* EPA indicated that there would be “elbow room” on the timing of the final rule’s implementation. *Id.* The next day, the EPA Final Rule was announced. *Id.* ¶ 36. In the Final Rule, EPA stated that it was revoking all food use tolerances for chlorpyrifos, as “[b]ased on the currently available data and taking into consideration the currently registered uses for chlorpyrifos,” it was unable to make a safety finding under the FFDCA. JX 3 at 1. The Final Rule stated that revocation of the tolerances would take effect on February 28, 2022, six months from the date of publication, to comply with international trade obligations. *Id.* at 20.

On August 18, 2021, the day the Final Rule was announced, EPA held a public briefing session regarding the Final Rule. Seethapathi Statement ¶ 37. EPA invited stakeholders to

submit questions to EPA regarding the Final Rule. *Id.* Following EPA’s public briefing, Gharda and others submitted questions to EPA, concerning the Final Rule’s scope, applicability, timing for implementation, and harmonization with FIFRA. *Id.* ¶ 38. Gharda specifically asked whether EPA would consider mitigation in light of Gharda’s commitment to accept label modifications limiting use of chlorpyrifos to the select crop uses in select regions EPA determined in the PID were safe and what additional mitigation EPA believed it needed to act on its safety finding. *Id.*

On September 20, 2021, over a month after the Final Rule was announced, EPA posted responses to “Frequent Questions about the Chlorpyrifos 2021 Final Rule” (“FAQs”) on its website, and responded directly to Gharda’s questions that were not addressed in the FAQs. *See* PX 10 at 56–58. EPA’s responses did not appear to allow any “elbow room” or opportunities to “work collaboratively” on the Final Rule’s timing and implementation, but instead directed interested parties to submit objections. Seethapathi Statement ¶ 39. EPA also did not respond to Gharda’s question concerning label modifications consistent with the Agency’s safety finding, and indicated that “due to time constraints” it was unable “to conduct additional scientific analysis beyond what was already available at the time of the court ruling.” *Id.* In October 2022, Petitioners submitted to EPA written objections to the Final Rule, all of which EPA denied. PX 8, 12, RX 57.

d. Eighth Circuit Lawsuit

Petitioners have challenged the Final Rule underlying the NOIC as arbitrary and capricious, in the lawsuit captioned *Red River Valley Sugarbeet Growers Ass’n, et al. v. Regan, et al.*, Nos. 22-1422, 22-1530 (8th Cir.) (the “Eighth Circuit Lawsuit”). The Petitioners have asked the Court to vacate the Final Rule as to the 10X uses—the eleven food uses of chlorpyrifos found safe by EPA in its PID (“Safe Uses”). Oral argument was held in the Eighth Circuit Lawsuit on

December 15, 2022. As of the time of the submission of this opposition, the Eighth Circuit has not yet rendered a decision.

In support of its positions in the Eighth Circuit Lawsuit, Gharda submitted the Declaration of Stephanie H. Stephens (“Stephens Declaration”). PX 16; PX 31 at 36. The Stephens Declaration was provided in response to the government’s argument that Gharda had the “option” of applying for new chlorpyrifos registrations, and explained the unreasonable and overly burdensome expense, resources, and time it would take for Gharda to obtain new chlorpyrifos registrations if the Eighth Circuit rules in favor of Petitioners.

e. NOIC Proceeding

On December 14, 2022, the day before oral argument in the Eighth Circuit Lawsuit, EPA published in the Federal Register the NOIC seeking cancellation of the registrations of Gharda’s chlorpyrifos products. Seethapathi Statement ¶ 42. EPA alleges that the chlorpyrifos registrations should be cancelled because the Agency had revoked tolerances for all food uses of chlorpyrifos by way of the Final Rule. *Id.* EPA also challenges the sufficiency of voluntary cancellations and label amendments Gharda submitted in March 2022 and June 2022, which brought its chlorpyrifos registrations and labels in line with the Final Rule as to all but the Safe Uses that are the subject of the Eighth Circuit Lawsuit. *Id.* ¶ 43.

On January 6, 2023, Petitioners asked EPA to stay or withdraw EPA’s NOIC pending a decision by the Eighth Circuit regarding the tolerances for the Safe Uses. PX 72. EPA denied Petitioners’ request. PX 73. Gharda submitted its objections to the NOIC and a request for stay of the NOIC on January 13, 2023. PX 42. With its objections, Gharda included amended product labels that add application rates for each of the Safe Uses in response to the NOIC’s claim that Gharda’s earlier submissions of amended labels were deficient by not doing so. Seethapathi Statement ¶ 46. Gharda’s addition of the application rates, developed by EPA in

support of the PID, leaves no doubt that EPA has everything necessary to approve labels consistent with EPA's determination of Safe Uses. *Id.* Moreover, EPA's claim that Gharda has submitted amended labels for only one of its two end-use products is not an accurate reflection of all of the label amendments (JX 9, JX 10, JX 11) that Gharda has submitted to EPA. *Id.*

### **III. STANDARD FOR ACCELERATED DECISION**

For hearings arising under FIFRA Section 6, including hearings on the cancellation or suspension of FIFRA registrations, the ALJ "may at any time render an accelerated decision in favor of Respondent as to all or any portion of the proceeding, including dismissal without hearing . . ." 40 C.F.R. § 164.91(a)(7). In order for the ALJ to enter an accelerated decision, they must find "that there is no genuine issue of material fact and that the respondent is entitled to judgment as a matter of law." *Id.*

### **IV. ARGUMENT**

#### **a. Respondent is Not Entitled to Judgment as a Matter of Law**

Respondent is not entitled to judgment as a matter of law because the NOIC is predicated on the underlying Final Rule, which is arbitrary and capricious, violates FIFRA, and is supported by facts that are actually disputed. Instead, the NOIC should be dismissed without cancellation of Gharda's registrations for chlorpyrifos, or at minimum this matter should proceed to the scheduled public hearing.

#### **i. The Final Rule is Arbitrary and Capricious and Contrary to Law**

The NOIC is entirely based on a flawed Final Rule, which unlawfully revoked tolerances for the Safe Uses. The deficiencies in the Final Rule and how those deficiencies result in the violation of the Administrative Procedures Act, FIFRA, and FFDCFA are thoroughly explained in Petitioners' submissions in the Eighth Circuit litigation, which are incorporated herein by reference. *See* PX 17–20, 23–25, 31–32. The validity of the Final Rule as to the Safe Uses is

currently under consideration by the Eighth Circuit. *Id.* Surprisingly, EPA claims that “Petitioners have conclusively failed to demonstrate anything about the litigation in the Eighth Circuit that would have any bearing on this case.” Resp’t Mot. at 15. However, it is clear that if the Eighth Circuit vacates or remands the Final Rule as to the tolerances for the Safe Uses, the NOIC’s proposed basis for the cancellation action would become moot. Seethapathi Statement ¶ 49. And, if the event the Eighth Circuit vacates the Final Rule after Gharda’s chlorpyrifos registrations are cancelled in this NOIC proceeding, Gharda would have its registrations unjustly cancelled and it will be prohibitively expensive and time consuming for Gharda to have its registrations reinstated. *See* PX 16 at 3 ¶ 6 (“If Gharda were to submit applications for registration of new food uses and associated tolerances after EPA revoked all tolerances and cancelled all food uses, it would take approximately 38 months from the time of submission of the application until possible EPA approval. EPA’s fees for reestablishing U.S. food uses and associated tolerances would be approximately \$875,000.”); *see also* Verified Witness Statement of Stephanie H. Stephens ¶ 8 (In 2023, these fees would be “approximately \$1,079,356”). Additionally, during the approximately 38 months in which Gharda would be waiting on approval of new registrations, the growers who depend on chlorpyrifos could see decreased yields and financial harms as more growing seasons pass without this essential crop protection tool.

Respondent and Intervenors try to inappropriately limit the scope of the NOIC by ignoring the interdependent nature of the NOIC and the Final Rule, while at the same time admitting that the “NOIC is ultimately based on the Final Rule.” Resp’t Mot. at 15. Due process is not met when an NOIC totally dependent on the Final Rule is forced upon Petitioners before the Eighth Circuit decides whether to vacate or uphold the Final Rule. Because the material facts

serving as the basis for the Final Rule are currently being litigated, there are still genuine issues of material fact that are dispositive of the NOIC. Therefore, the NOIC should be dismissed.

ii. The NOIC Violates FIFRA and Due Process

The NOIC violates FIFRA by ignoring several of the statutorily required steps that must precede registration cancellation. Seethapathi Statement ¶ 54. In violation of FIFRA, EPA (1) did not follow appropriate procedural requirements, (2) failed to consider alternatives to registration cancellation, (3) did not take into account the economic impact of cancellation on agriculture, and (4) based its conclusion on inappropriately limited analysis. FIFRA Section 6(b) provides that:

“[i]n determining whether to issue any such notice [of the Administrator’s intent to cancel a registration], the Administrator *shall* include among those factors to be taken into account the impact of the action proposed in such notice on production and prices of agricultural commodities, retail food prices, and otherwise on the agricultural economy . . . . [T]he Administrator shall provide the Secretary of Agriculture with [the] analysis of such impact on the agricultural economy” and “[i]n taking any final actions under this subsection, the [EPA] Administrator shall consider restricting a pesticide’s use or uses as an alternative to cancellation and shall fully explain the reasons for the restrictions, and shall include among those factors to be taken into account the impact of such final action on production and prices of agricultural commodities, retail food prices, and otherwise on the agricultural economy, and the Administrator shall publish in the Federal Register an analysis of such impact.

7 U.S.C. § 136d(b). The FFDCA does not give the Agency a license to ignore the statutory requirements of FIFRA. Congress and USDA have consistently made this abundantly clear. 21 U.S.C. § 346a(l)(1) (when revoking a tolerance for pesticide chemical residue on food, the FFDCA requires EPA to “*coordinate* such action with any related necessary action under [FIFRA]”) (emphasis added); JX 15 (EPA’s failure to conduct FIFRA-required impacts analysis as part of the NOIC for chlorpyrifos is contrary to proper process and serves as “harmful precedent”).

1. EPA Failed to Meaningfully Consult with USDA for the NOIC

The NOIC is procedurally deficient because FIFRA and due process mandate compliance with extensive statutory cancellation procedures before a registrant can be stripped of its property interest in a pesticide registration. Congress crafted rigorous cancellation procedures to protect the rights of registrants and ensure that EPA's decisions to suspend or cancel a FIFRA registration are supported by scientific evidence and account for impacts to stakeholders. Seethapathi Statement ¶ 53. The legally protectable rights conferred on registrants by a FIFRA registration cannot be revoked without due process of law. Once a pesticide registration is granted, it becomes the registrant's property interest, *see, e.g., Reckitt Benckiser Inc. v. EPA*, 613 F.3d 1131, 1133 (D.C. Cir. 2010), and cannot "be taken away without that procedural due process required by the Fourteenth Amendment." *Bell v. Burson*, 402 U.S. 535, 539 (1971). FIFRA protects these due process rights by establishing an elaborate scheme for EPA to follow before cancelling a pesticide registration. *See, e.g., 7 U.S.C. §§ 136d(b)(1), (2); 136d(d); 136a(g)(1)(v); see also Reckitt Benckiser, Inc. v. Jackson*, 762 F. Supp. 2d 34, 42 (D.D.C. 2011) (FIFRA "establishes a detailed, multi-step process that EPA *must* follow when it wants to cancel or suspend a registration.").

Further, FIFRA requires that EPA consult with USDA in making a determination to cancel a pesticide registration. FIFRA's legislative history reinforces Congress's intent that cancellation decisions be made only after thorough consideration of potential agricultural impacts and the opportunity for meaningful public input. When Congress amended FIFRA in 1975 to require consultation with USDA during the cancellation process, it sought to respond to "strong criticism directed towards EPA for its not taking sufficient account of the impact of its decisions on the agricultural economy[,]" including food cost and supply, as the House and Senate Reports leading up to that amendment each explain. Seethapathi Statement ¶ 56 (and

citations therein). Congress updated the cancellation procedures in Section 6(b) to “involve the Department of Agriculture in important phases of the decision-making process” and “tighten the degree of cooperation between the agencies.” *Id.* Contrary to the mandate from Congress, EPA failed to meaningfully or sufficiently consult with USDA here. *See* JX 15 (USDA has “overarching concerns” and “legal concerns” around the NOIC and views the NOIC as “harmful precedent” and requesting that EPA “follow historical precedent and legal procedures”); *see also* PX 32. This violates FIFRA and due process.

## 2. The NOIC Fails to Consider Alternatives to Cancellation

EPA has also ignored FIFRA’s requirement that EPA consider alternatives to registration cancellation because EPA did not consider the PID and the Safe Uses identified by the PID as an alternative to cancellation. Seethapathi Statement ¶ 57. Further, EPA did not consider Gharda’s repeated written commitment to the Agency before the Final Rule to voluntarily cancel all food uses of chlorpyrifos except the Safe Uses as an alternative to cancellation. *Id.* ¶ 58. Nor has the Agency alleged that Gharda has acted contrary to its commitment to ensure that its chlorpyrifos product does not enter the U.S. food supply while EPA’s Final Rule remains under review by the Eighth Circuit. *Id.* ¶ 59.

On March 30, 2022, Gharda submitted to EPA a request to voluntarily cancel all food uses of chlorpyrifos except the Safe Uses pending the outcome of the Eighth Circuit Lawsuit. Seethapathi Statement ¶ 63. EPA did not publish its notice of receipt of Gharda’s voluntary request for cancellation until June 9, 2023—more than 14 months after Gharda submitted the request. *Id.* The Federal Register notice provides for a 180-day comment period on the request for voluntary cancellation. JX 16. EPA did not consider Gharda’s request for voluntary cancellation in issuing the NOIC. Seethapathi Statement ¶ 63. EPA has also not considered the



amended product labels submitted by Gharda as a lesser alternative to cancellation as required by FIFRA. *Id.*

EPA's timeline in publishing and requesting comment on Gharda's voluntary request for cancellation also demonstrates the NOIC's lack of urgency. In its Federal Register notice, the Agency proposes a 180-day comment period. JX 16. If, as EPA and Intervenors argue, there was a public interest in accelerating the decision on the NOIC, EPA would not have permitted a 180-day comment period during which the chlorpyrifos registrations remain unchanged. EPA has essentially proposed the status quo in the Federal Register notice with respect to Gharda's registrations, which is contradicted by requesting an accelerated decision on the NOIC.

### 3. The NOIC Does Not Account for the Economic Impact of Cancellation on Agriculture

EPA also did not consider the impact of registration cancellation compared to the alternative of maintaining the Safe Uses on production and prices of agricultural commodities, retail food prices, and otherwise on the agricultural economy. Seethapathi Statement ¶ 60. FIFRA Section 6(b) provides that “[i]n determining whether to issue any such notice [of the Administrator’s intent to cancel a registration], the Administrator *shall* include among those factors to be taken into account the impact of the action proposed in such notice on production and prices of agricultural commodities, retail food prices, and otherwise on the agricultural economy . . . . [T]he Administrator shall provide the Secretary of Agriculture with [the] analysis of such impact on the agricultural economy.” 7 U.S.C. § 136d(b) (emphasis added). This analysis is mandatory under FIFRA, but there is no evidence that it was performed here. Seethapathi Statement ¶ 61. EPA states in the NOIC that it was able to conclude that “the cancellation action being proposed in this NOIC itself does not actually result in any impact on agricultural commodities, retail food prices, or the agricultural economy.” JX 1. But EPA did

not actually perform the analysis required by FIFRA to reach this conclusion. Seethapathi Statement ¶ 61. Nor did EPA provide an impacts analysis to the Secretary of Agriculture as required by FIFRA. *Id.* Instead, EPA based its conclusion of the contention that the impacts have already occurred as a result of the revocation of tolerances and would not be attributable to the registration cancellation. *Id.* However, this *conclusion* is not the *impacts analysis* required by FIFRA; Congress did not relieve the Administrator of his statutory obligation under FIFRA or due process just because tolerance revocation precedes the NOIC. *Id.*

#### 4. EPA Based its Conclusion in the NOIC on Inappropriately Limited Analysis

EPA also contends that it could base its conclusion regarding economic impact on agriculture on a “benefits” analysis that the Agency performed as part of its PID. *See* PX 41. But this was an analysis limited to potential economic impact on growers, not the broader analysis of the impacts “on production and prices of agricultural commodities, retail food prices, and otherwise on the agricultural economy.” Seethapathi Statement ¶ 62. FIFRA clearly links the requirement of this analysis with the further requirement that the Administrator consider restricting a pesticide’s use or uses as an alternative to cancellation in taking any final action. 7 U.S.C. § 136d(b) (“*In taking any final action* under this subsection, the Administrator *shall* consider restricting a pesticide’s use or uses as an alternative to cancellation . . . and shall include among those factors to be taken into account the impact of such final action on production and prices of agricultural commodities, retail food prices, and otherwise on the agricultural economy. . .”) (emphasis added). Thus, based on the impacts analysis required by FIFRA the Administrator may decide, in taking any final action, that it is prudent to delay cancellation of the Safe Uses at issue in the Eighth Circuit Lawsuit until the court makes its decision, or that tolerances for the Safe Uses should be reinstated. Seethapathi Statement ¶ 62. Without the

fulsome impacts analysis mandated by Congress, the Administrator is not in a position to make an informed final action under FIFRA. *See* JX 15 at 2 (“Rather than proceed with the NOIC under review, USDA would strongly support an Agency-initiated action to reestablish tolerances for and ultimately retain chlorpyrifos uses that meet the Agency’s safety finding . . . (in accordance with the 2020 PID.”). Rather than attempt to defend the NOIC’s reliance on the very limited economic analysis in the PID, EPA’s Motion ignores it and similarly ignores lesser alternatives to cancellation like delay of the NOIC or reinstatement of tolerances for the Safe Uses as requested by USDA. This violates FIFRA and due process. *See, e.g.,* Verified Witness Statements of Michael Aerts, Johnnie Walter Boatright, III, Chris Butts, Neil Brodie Griffin, Luther Markwart, Peter Nelson, Ben Scholz, and Jordan Scott (describing the very serious potential impacts on the agricultural economy that will be caused by cancellation of Gharda’s products).

b. There Are Genuine Issues of Material Fact Raised in the Motions

The Motions should be denied because there are genuine issues of material fact that are crucial to any decision-making related to the NOIC. The Motions attempt to make “uncontroverted” facts “conclusive” for the NOIC, but numerous “facts” are actually genuinely disputed by Petitioners and therefore cannot form the basis for the NOIC. Both Motions make multiple references to “undisputed” facts in a veiled attempt to dispel the numerous genuine issues of material fact that exist and which make an accelerated decision inappropriate here.

Respondent argues that “there is no dispute” as to whether “necessary tolerances exist to cover residues of chlorpyrifos on food” and whether Gharda’s “registrations bear labeling for use on food.” Resp’t Mot. at 1. However, Respondent ignores that Petitioners *do* dispute these “facts”—because the Final Rule arbitrarily ignores EPA’s own science and safety findings, the Final Rule is not valid and therefore tolerances should lawfully exist to cover residues of

chlorpyrifos on food as to the Safe Uses. Further, Gharda’s registration labels have been amended to remove all food uses except for the Safe Uses. JX 4, JX 5, JX 6. Respondent’s attempts to characterize that there is “no dispute as to these facts” fails to consider the disputed validity of the Final Rule and the implications such dispute has on the NOIC.

Intervenors similarly argue that the “outcome of this proceeding turns on a single undisputed fact—EPA has revoked all chlorpyrifos tolerances *because it could not find chlorpyrifos safe.*” Intervenors’ Mot. at 1 (emphasis added). Petitioners absolutely dispute that EPA “could not find chlorpyrifos safe”; the Agency did in fact make a safety finding as to the Safe Uses in its PID and the science supporting that PID. PX 41. This disputed fact is central to the NOIC and is yet another reason an accelerated decision is inappropriate here.

Both Motions purport to present facts that Petitioners emphatically dispute, including but not limited to the following:

- “The NOIC clearly considered the impact on the agricultural economy as required in FIFRA, Section 6(b).” Resp’t Mot. at 17.
- “The NOIC also clearly responded to USDA’s comments” and “EPA did consider the statutory factors and USDA’s comment.” *Id.* at 18.
- “EPA performed” the required “analysis of the impacts of the cancellation on the agricultural economy.” *Id.* at 21.
- “EPA considered whether and how the Agency might modify tolerances by making a safety finding for a subset of uses.” *Id.* at 4.
- “[T]here is no basis in the law for allowing food uses to remain on chlorpyrifos registered products.” *Id.*
- FIFRA regulates distribution, sale, and use of pesticide products, and EPA itself has raised a fact issue regarding whether any chlorpyrifos labeled for food use is being distributed, sold, or used. *Compare* Resp’t Mot., RX 63 and Seethapathi Statement ¶ 59.
- Gharda did not provide “a viable alternative” to cancellation of all food uses. Resp’t Mot. at 12.
- “EPA did consider the economic impact of the NOIC.” *Id.* at 17–18.
- Gharda submitted “some label amendments” but for only one of its two end-use products. *Id.* at 8.
- EPA initiated discussions with Gharda “to evaluate whether there might be a basis for EPA to make a safety determination for some uses within the time period imposed by the court.” *Id.* at 5.

- Following meetings and communications between EPA and Gharda, “EPA could not accept any of [Gharda’s] proposals due to, among other factors, Gharda’s repeated attempts to include many additional food uses for which EPA had no basis to make a safety finding and very long phase-out schedules for other uses.” *Id.*
- Gharda’s “communications with the Agency prior to the issuance of the Final Rule did not constitute enforceable ‘commitments’.” *Id.*
- “EPA did not have a sufficient basis to conclude that aggregate exposures from registered uses would be limited in order to support a safety determination as to some subset of chlorpyrifos tolerances.” *Id.*
- EPA “could not make a safety finding to support leaving the current tolerances for residues of chlorpyrifos in place.” *Id.* at 5.
- EPA found “that it could not determine that there was a reasonable certainty that no harm would result from aggregate exposure to chlorpyrifos residues.” *Id.* at 5–6.
- It “would not be good public policy” to “allow unsafe tolerances to remain in place while [the Eighth Circuit Lawsuit] was pending.” *Id.* at 7.
- The Ninth Circuit’s “directive [was] to cancel food use registrations ‘in a timely fashion’.” Intervenor’s Mot. at 14.
- The sworn witness statements submitted by both Petitioners and Respondent “address either uncontested background facts or irrelevant issues.” *Id.* at 15.

As such, the Motions are overflowing with disputed facts that amount to genuine issues of material fact and cannot allow for an accelerated decision on the NOIC.

c. An Accelerated Decision is Inappropriate Because The NOIC Should Be Decided on a Fully Developed Record (If The NOIC is Not Dismissed)

The NOIC and the Motions erroneously signal an urgent need for registration cancellation. *See, e.g.*, Intervenor’s Mot. at 12; Resp’t Mot. at 11. On the contrary, there is no urgency for the NOIC to address chlorpyrifos registration cancellation because there are currently no chlorpyrifos products used on food in the stream of commerce. Seethapathi Statement ¶ 51. On June 9, 2023, EPA published a notice of Gharda’s request for voluntary cancellation of certain registrations’ uses. JX 16. The voluntary cancellation seeks cancellation of all food uses except the 11 Safe Uses that are the subject of the Eighth Circuit Lawsuit. Seethapathi Statement ¶ 52. In EPA’s notice, the Agency proposes a 180-day comment period. *Id.* If, as EPA argues, there was a public interest in moving forward with the cancellation

proceeding before the Eighth Circuit's decision, EPA would not permit a 180-day comment period during which the chlorpyrifos registrations remain unchanged. *Id.* EPA is essentially proposing the status quo with respect to the registrations, further demonstrating no urgency for the NOIC pending the Eighth Circuit decision. *Id.*

The NOIC should be decided on a fully developed record of evidence and is therefore unsuited for an accelerated decision. Petitioners intend to seek leave to conduct discovery of EPA regarding several issues including, but not limited to, EPA's failure to conduct an analysis of the impacts of chlorpyrifos registration cancellation on production and prices of agricultural commodities, retail food prices and otherwise on the agricultural economy as required by the FIFRA, EPA's failure to provide the Secretary of Agriculture with the analysis of such impacts as required by FIFRA, EPA's failure to sufficiently consult with the USDA regarding the NOIC as required by FIFRA, communications between EPA and USDA regarding the NOIC, EPA's failure to consider lesser alternatives to cancellation with respect to chlorpyrifos as required by FIFRA, and EPA's decision to revoke all food use tolerances for chlorpyrifos despite the commitments of Petitioner Gharda to voluntarily cancel food uses other than for the Safe Uses as determined by EPA in its 2020 PID. Petitioners also intend to conduct similar discovery of USDA. Without such discovery, there are factual disputes that need to be resolved before any decision can be made on the NOIC.

## **V. CONCLUSION**

For these reasons, and the reasons stated in Petitioners' Objections to the NOIC, Petitioners request that the ALJ deny the Motions and hold a hearing on the NOIC to allow Petitioners to submit evidence in opposition to the NOIC. In the alternative, Petitioners request that the ALJ dismiss the NOIC without cancelling Gharda's registrations.

This 5<sup>th</sup> day of September, 2023,

S/ NASH E. LONG

NASH E. LONG  
HUNTON ANDREWS KURTH LLP  
101 S. Tryon Street, Suite 3500  
Charlotte, NC 28280  
(704) 378-4728  
[nlong@huntonak.com](mailto:nlong@huntonak.com)

JAVANEH S. TARTER  
HUNTON ANDREWS KURTH LLP  
2200 Pennsylvania Ave., NW  
Washington, DC 20037  
(202) 955-1500  
[jtarter@huntonak.com](mailto:jtarter@huntonak.com)

S/ DONALD C. MCLEAN

DONALD C. MCLEAN  
MATILLE G. BOWDEN  
ARENTFOX SCHIFF LLP  
1717 K Street NW  
Washington, DC 20006  
(202) 857-6000  
[donald.mclean@afslaw.com](mailto:donald.mclean@afslaw.com)  
[mattie.bowden@afslaw.com](mailto:mattie.bowden@afslaw.com)

*Attorneys for Petitioner Gharda  
Chemicals International, Inc.*

*Attorneys for Petitioners Red River Valley Sugarbeet  
Growers Association, U.S. Beet Sugar Association,  
American Sugarbeet Growers Association, Southern  
Minnesota Beet Sugar Cooperative, American Crystal  
Sugar Company, Minn-Dak Farmers Cooperative,  
American Farm Bureau Federation, American Soybean  
Association, Iowa Soybean Association, Minnesota  
Soybean Growers Association, Missouri Soybean  
Association, Nebraska Soybean Association, South  
Dakota Soybean Association, North Dakota Soybean  
Growers Association, National Association of Wheat  
Growers, Cherry Marketing Institute, Florida Fruit and  
Vegetable Association, and Georgia Fruit and Vegetable  
Growers Association, and National Cotton Council of  
America*

**CERTIFICATE OF SERVICE**

I hereby certify that on September 5, 2023, true and correct copies of the foregoing Petitioners’ Omnibus Opposition to Respondent’s Motion for Accelerated Decision and Intervenor’s Motion for Accelerated Decision was filed electronically with the EPA OALJ E-Filing System for the OALJ’s E-Docket Database, with a copy via electronic mail to the following:

Forrest Pittman  
Angela Huskey  
Office of General Counsel  
Pesticides and Tox Substances Law Office  
Environmental Protection Agency  
[Pittman.forrest@epa.gov](mailto:Pittman.forrest@epa.gov)  
[Huskey.angela@epa.gov](mailto:Huskey.angela@epa.gov)  
*Counsel for EPA*

Patti A. Goldman  
Noorulanne Jan  
Earthjustice  
[pgoldman@earthjustice.org](mailto:pgoldman@earthjustice.org)  
[njan@earthjustice.org](mailto:njan@earthjustice.org)  
*Counsel for Intervenor*

/s/ Donald C. McLean  
Donald C. McLean