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October 13, 2010

Jeffrey P. Clark
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DELIVERED BY COURIER

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

Dear Regional Hearing Clerk:

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

On behalf of Respondent, Liphatech, Inc., I enclose for filing an original and two copies of Reply of Respondent to Response of Complainant in Opposition to Motion of Respondent for Partial Accelerated Decision on an Issue of Liability in Favor of Respondent with Respect to the Alleged Violations of § 12(a)(2)(E) of FIFRA set forth in Counts 1 through 2,117 of the Complaint and Memorandum of Law in Support and Response of Respondent to Combined Motion of Complainant for Accelerated Decision as to Counts 1 through 2,140 of the Complaint.

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

Respectfully submitted,

Jeffrey P. Clark

Jeffrey P. Clark

REINHART\4897816LNR:JES

Encs.

cc Honorable Barbara A. Gunning (w/encs., by courier)
Ms. Nidhi K. O'Meara (C-145) (w/encs., by courier)
Mr. Carl Tanner (w/encs., by courier)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:	)	**Docket No. FIFRA-05-2010-0016**
	)	
Liphatech, Inc.	)	**Hon. Barbara A. Gunning**
Milwaukee, Wisconsin,	)	
	)	
Respondent.	)	
	)	
	)	

REPLY OF RESPONDENT TO RESPONSE OF COMPLAINANT IN OPPOSITION TO MOTION OF RESPONDENT FOR PARTIAL ACCELERATED DECISION ON AN ISSUE OF LIABILITY IN FAVOR OF RESPONDENT WITH RESPECT TO THE ALLEGED VIOLATIONS OF § 12(A)(2)(E) OF FIFRA SET FORTH IN COUNTS 1 THROUGH 2,117 OF THE COMPLAINT AND MEMORANDUM OF LAW IN SUPPORT

AND

RESPONSE OF RESPONDENT TO COMBINED MOTION OF COMPLAINANT FOR ACCELERATED DECISION AS TO COUNTS 1 THROUGH 2,140 OF THE COMPLAINT

I. Introduction.

On September 16, 2010, Respondent Liphatech, Inc. ("Respondent") moved for an accelerated decision dismissing Counts 1-2,117 of the Complaint as a matter of law ("Respondent's Motion to Dismiss RUP Claims"). The grounds for that motion were that (a) there is no genuine issue of material fact concerning the actual content of the advertisements that Complainant alleged violated FIFRA, and (b) as a matter of law, all of the radio advertisements referenced in Counts 1-2,117 included a statement of the "terms of restriction" as required by FIFRA and, therefore, the advertisements complied with FIFRA.

On October 1, 2010, Complainant responded with a document that combined both Complainant's response to Respondent's Motion to Dismiss RUP Claims ("Complainant's Response") and a separate motion by Complainant for accelerated decision as to Counts 1-2,140 of the Complaint ("Complainant's Motion for Accelerated Decision").

Respondent's reply to Complainant's Response is set forth in Sections II through VIII below. Respondent's response to Complainant's Motion for Accelerated Decision is set forth in Sections IX and X below.

II. Background.

As Respondent stated in its Motion to Dismiss RUP Claims, Respondent complied with the FIFRA requirement to disclose the classification of the pesticide in its broadcast advertising by stating that the listeners should "always read and follow the label." Because the approved label for this product identifies the restricted use classification of the product and also includes all of the terms of restriction for the product, this language was sufficient to put listeners on notice that the product was a restricted use pesticide. For these reasons, Complainant's Response should be disregarded and Respondent's Motion to Dismiss the RUP Claims in Counts 1-2,117 should be granted.

III. Respondent and Complainant Both Agree on the Specific Law That Applies to the Issue of Whether Respondent's Products Gave the Appropriate Classification of Its Products in Its Advertising.

Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), states that it is unlawful for any person who is a registrant, wholesaler, dealer, retailer or other

distributor to advertise a product registered under FIFRA for restricted use without giving the classification of the product assigned to it under Section 3 of FIFRA, 7 U.S.C. § 136(a).

EPA promulgated a regulation, 40 C.F.R. § 152.168, to implement this requirement. This regulation, in pertinent part, reads:

> (a) Any product classified for restricted use shall not be advertised unless the advertisement contains a statement of its restricted use classification. . . .
>
> (c) The requirement [set forth in § 152.168(a)] may be satisfied for print material by inclusion of the statement "Restricted Use Pesticide," or the terms of restriction, prominently in the advertisement. The requirement may be satisfied with respect to broadcast or telephone advertising by inclusion in the broadcast of the spoken words "Restricted use pesticide," or a statement of the terms of restriction.

This regulation was adopted as part of 53 Fed. Reg. 15951, 15987 (May 4, 1988). This is the only language in FIFRA and its implementing regulations that deals with the disclosure of a product's classification in advertising.

IV. Respondent Has Admitted In Its Answer and In Its Motion to Dismiss RUP Claims That Its Broadcast Advertisements Did Not Contain the Words "Restricted Use Pesticide" But Respondent's Broadcast Advertising Did Include a Reference to the Terms of Restriction.

While Respondent's broadcast advertisements did not contain the words "restricted use pesticide," Respondent's advertising complied with the second method afforded registrants under 40 C.F.R. § 152.168(c) to comply with the requirement to provide the product's classification by including in its broadcast

advertisements a statement of the terms of restriction for Rozol.[1] For the reasons set forth below, Respondent's advertising complied with the requirements of 40 C.F.R. § 152.168(c).

V. Both Respondent and Complainant Agree That There Is No Genuine Issue of Material Fact That Needs To Be Decided in Order to Resolve the Issue That Is the Subject of Respondent's Motion to Dismiss RUP Claims.

Respondent at page 5 of its Motion to Dismiss RUP Claims stated that there is no genuine issue of material fact concerning what its advertisements said and that each of Respondent's radio advertisements referenced in Counts 1-2,117 of the Complaint included a statement of the "terms of restriction" of the pesticide in accordance with 40 C.F.R. § 152.168. Likewise, Complainant agrees that there is no genuine issue of material fact regarding the statements made in Respondent's advertising and that the only question is whether a registrant can satisfy the statutory and regulatory requirements by referring recipients to the product label in its radio advertisements. (*See* Complainant's Response at 12).

Therefore, both Respondent and Complainant agree that this legal question is ripe for accelerated decision because there is no outstanding genuine issue of material fact with respect to this question.

[1] As used herein, Rozol refers to Rozol Pocket Gopher Bait II, also known as Rozol Pocket Gopher Bait Burrow Builder Formula, EPA Reg. No. 7173-244.

VI. Respondent's Radio Advertisements Complied With 40 C.F.R. § 152.168 by Referring Advertisement Listeners To the Requirements Included on the Product Label.

As stated in Respondent's Motion to Dismiss RUP Claims, its radio advertisements incorporated a "statement of the terms of restriction" of Rozol according to 40 C.F.R. § 152.168(c) by alerting advertisement listeners to the fact that the product is subject to a special registration for use in certain states with a reference to the terms of restriction on the product label. Hence, Respondent did not violate FIFRA Section 12(a)(2)(E).

Each of Respondent's broadcast advertisements referenced in Counts 1-2,117 of the Complaint included the spoken words:

> Approved under a special local needs 24C label for the states of Colorado, Kansas, Oklahoma and Texas. . . . ALWAYS FOLLOW AND READ LABEL DIRECTIONS. SEE YOUR LOCAL AG CHEM DEALER.

(Respondent's Motion to Dismiss RUP Claims at 6; Complainant's Response at 5-6).

These words not only refer the listener to read the label but they also put the listener on notice that this is not a typical product and that it is being sold subject to the conditions of a special registration. This language also informs the listener that Rozol's use is restricted to certain areas, and that important additional information is contained on the label.

Moreover, given that there are no other regulations which describe how "a statement of terms of restriction" should be interpreted under 40 C.F.R. § 152.168

and that there are no documents publicly available from the EPA that describe what is meant by "a statement of the terms of restriction" under this regulation, Respondent's reasonable attempts to comply with this requirement must prevail as set forth in Respondent's Motion to Dismiss RUP Claims at pages 6-9.

Complainant argues that Respondent can only satisfy the option in 40 C.F.R. § 152.168(c) to include the "a statement of the terms of restriction" by using an exact statement which Complainant has excerpted from the language in 40 C.F.R. § 156.10(j)(2). In making this argument, Complainant references Respondent's comment in its Motion to Dismiss RUP Claims that:

> There is no reason to presume that EPA intended the phrase "terms of restriction" to have a meaning under this regulation different than the meaning it intended for the same phrase in the labeling regulation.

The Complainant takes this statement out of context and fails to combine it with the last sentence in the paragraph on page 8 of Respondent's Motion to Dismiss RUP Claims which states:

> Therefore, it must be assumed that all "terms of restriction" referred to in the advertising regulation are included in the appropriate label for the product.

The point Respondent was making was that the label always contains all of the "terms of restriction" for a product, and, if Respondent refers listeners to the label, the listener will thereby be put on notice of any and all terms of restriction. The authorities cited by Respondent show that there can never be restrictions placed on a restricted use pesticide that are not set forth on the label. Indeed, as

Respondent explained in the following paragraph on page 9 of Respondent's Motion to Dismiss RUP Claims, the exact meaning of the phrase "terms of restriction" for advertisements in 40 C.F.R. § 152.168(c) is uncertain, but it is clear that the approved labeling for the product must include all such terms. Complainant must agree with this conclusion because in Complainant's Response it states at page 20 that the requirements for advertising are not as strict as for labeling. (Complainant's Response at 20).

Respondent has established that including in its advertisements a direction to users to follow the approved label necessarily references all "terms of restriction," whatever meaning that term may be given. In contrast, Complainant has not established that the only words that Respondent may use in its advertisements to provide an acceptable "statement" of the terms of restriction under 40 C.F.R. § 152.168(c) are the specific words suggested by Complainant. Respondent's construction of the words in the applicable advertising regulation is reasonable, and Respondent cannot reasonably be sanctioned for acting in conformity with that construction.

VII. Complainant's Reasons That Respondent's Motion Should Be Dismissed Are Without Merit.

Complainant generally asserts that Respondent's reasonable interpretation of FIFRA is not appropriate for two reasons. First, Complainant asserts that Respondent's interpretation of FIFRA is contrary to the purpose of § 12(a)(2)(E) because, according to Complainant, Congress intended to allow "U.S. EPA to take

enforcement actions before such restricted use products make it into the stream of commerce." (Complainant's Combined Motion at 28-29). Second, Complainant generally asserts that the FIFRA labeling regulations, Federal Register notices regarding labeling, EPA's Label Review Manual and PR Notice 93-1 regarding labeling constitute fair notice of EPA's interpretation of an advertising regulation. These assertions lack merit.

A. Respondent's reasonable interpretation of FIFRA does not inhibit EPA's ability to regulate advertising under § 12(a)(2)(E) before the pesticide enters the stream of commerce.

Complainant erroneously asserts that Respondent's reasonable interpretation of FIFRA would prohibit EPA from enforcing FIFRA § 12(a)(2)(E) prior to the time a registered pesticide enters the stream of commerce and would, therefore, frustrate Congress' intent. *Id.* Even if Complainant correctly characterizes the intent of Congress, Respondent's reasonable interpretation of FIFRA § 12(a)(2)(E) would not preclude EPA from taking action against registrants that fail to incorporate the terms of restriction in advertising before the product enters the stream of commerce.

Nothing precludes the EPA from taking action before the product enters the stream of commerce. Under Respondent's reasonable interpretation of FIFRA § 12(a)(2)(E), the EPA is not prohibited from reviewing pesticide advertising material and bringing enforcement actions against persons who fail to alert listeners to the terms of restrictions set forth on the product label (as Respondent did).

Importantly, there is no requirement under FIFRA that EPA pre-approve advertisements. In fact, the EPA, as a matter of policy, does not require advertising of a restricted product be approved before it is used. In addition, selling Rozol to an unlicensed individual is a violation of FIFRA. FIFRA § 12(a)(2)(F) prohibits distributing or selling, or making available for use any registered pesticide classified for restricted use other than in accordance with § 3(d) of FIFRA. Both Respondent and Complainant agree that Rozol is a restricted use pesticide. Therefore, Rozol cannot be sold to or used by anyone other than a certified applicator or a person under the direct supervision of a certified applicator. Nor can Rozol be used in any manner inconsistent with the certified applicator's certification. FIFRA § 3(d)(1)(C).

EPA may and does bring enforcement actions against persons who violate § 12(A)(2)(F) of FIFRA by selling restricted use pesticides to individuals who do not possess a license in order to ensure that restricted use pesticides are only applied by highly trained individuals.

As a result, under Respondent's reasonable interpretation of FIFRA, EPA may continue to enforce § 12(a)(2)(F) of FIFRA at the point of sale and it may continue to enforce § 12(a)(2)(E) of FIFRA if a registrant fails to appropriately alert potential users to the terms of restriction of a pesticide in its advertising. Therefore, Complainant's first reason for resisting Respondent's Motion to Dismiss RUP Claims is not applicable to resolving the issue at hand.

B. Complainant's reliance on EPA's labeling guidance is misplaced and such guidance failed to provide Respondent fair notice of EPA's interpretation of § 12(a)(2)(E) – an advertising statute.

When EPA proposed the regulation currently set forth as 40 C.F.R. § 152.168, it stated in the Federal Register that it was proposing regulations "pertaining to advertising to help clarify the responsibility of registrants in this area." 49 Fed. Reg. 37916, 37927 (Sept. 26, 1984). By doing so, EPA clarified that there are two ways a registrant could comply with FIFRA section 12(a)(2)(E). However, in adopting this regulation, the EPA failed to articulate with specificity what type of "statement" is necessary for a registrant to alert potential users to the terms of restriction of a pesticide in advertising.

Complainant has provided absolutely no guidance related to pesticide advertising to support its position. Instead, Complainant refers to material that illustrates how a registrant may comply with pesticide labeling requirements. As support for its interpretation of an advertising regulation, Complainant cites the following EPA labeling guidance: (1) 40 C.F.R. § 156.10(j)(2) – regarding "Labeling Requirements for Pesticides and Devices" (Complainant's Combined Motion at 17); (2) language from the Federal Register regarding pesticide labeling (Complainant's Combined Motion at 18); (3) Chapter 6 of EPA's Label Review Manual (Complainant's Combined Motion at 19); (4) PR Notice 93-1 regarding the requirements for pesticide labels

(Complainant's Combined Motion at 20); and (5) a letter from EPA to Respondent regarding the product label (Complainant's Combined Motion at 21).[2]

Furthermore, a regulation cannot be construed to mean what an agency may now intend it to mean but did not express at the time of its promulgation. "It is not enough that the [agency's] interpretation of the regulation be reasonable, the regulation itself must provide the regulated community with adequate notice of the conduct required by the agency." *In re CWM Chem. Servs., Inc.*, 6 E.A.D. 1, 1995 WL 302356 at *9 (EAB 1995).

If the EPA intended in 40 C.F.R. § 152.168 to require that advertising may only reference the terms of restriction by including the specific words suggested by Complainant (and only those words), EPA should have stated this in the regulation or the preamble to the regulation. The labeling regulation was promulgated prior to the advertising regulation, and EPA could have easily stated in 40 C.F.R. § 152.168 that the exact label language regarding "terms of restriction" that Complainant has excerpted from 40 C.F.R. § 156.10(j)(2) would also be required in advertising under 40 C.F.R. § 152.168. EPA did not do so. It would be manifestly unfair to impose a monetary penalty on Respondent for failing to interpret a regulation in a manner identical to the EPA's interpretation

[2] While Complainant focuses on the requirements for a product label, Complainant does not allege that the label for Rozol failed to comply with the requirements of FIFRA. Moreover, Complainant is estopped from alleging a deficiency with the product label because as long as there is no cancellation proceeding in effect, FIFRA provides that "registration shall be prima facie evidence that the pesticide, its labeling and packaging comply with the registration provisions of [FIFRA]." FIFRA § 3(f)(2).

when the agency had an easy way to inform the public of its intent, assuming that was its intent at the time of promulgation, but failed to provide it.

VIII. If the Presiding Officer Determines That a Violation of FIFRA § 12(a)(2)(E) Occurred, Complainant Has Incorrectly Determined the Appropriate Number of Violations.

If the Presiding Officer determines that a violation of FIFRA § 12(a)(2)(E) occurred despite Respondent's reasonable interpretation of 40 C.F.R. § 152.168, and if the Presiding Officer determines that the various materials concerning labeling cited by Complainant could have provided Respondent with fair notice concerning Complainant's construction of an otherwise ambiguous advertising regulation, the Presiding Officer must still determine whether Complainant has incorrectly interpreted the "unit of violation" under § 12(a)(2)(E) by counting each radio ad and each print ad as a separate violation of FIFRA. In the absence of such a determination, Complainant cannot be entitled to the accelerated decision it has requested on the first 2,117 counts in the Complaint.

FIFRA does not define what constitutes a single offense and EPA's regulations do not provide any guidance on the issue. *In re: 99 Cents Only Stores*, FIFRA-09-2008-0027, 2010 WL 2787749 *25 (June 24, 2010). Moreover, the FIFRA Enforcement Response Policy dated December 2009 provides no instructions or criteria to be used by the enforcement staff in determining the number of violations to be charged in a particular case. Furthermore, no reported case law supports Complainant's view that each separate broadcast of the same

30-second or 60-second radio ad could result in a separate violation of FIFRA § 12(a)(2)(E).

Section 12(a)(2)(E) of FIFRA states that a person may not "advertise a product registered under this Act for restricted use without giving the classification of the product assigned to it under section 3." FIFRA § 12(a)(2)(E). The Presiding Officer is left with a multitude of options for concluding how many "units of violation" occurred for purposes of determining an appropriate and reasonable penalty if Respondent inadvertently failed to comply with FIFRA § 12(a)(2)(E). The following options are only several of the options that the Presiding Officer might consider:

(a) One unit of violation. Whether Respondent advertised Rozol through one radio advertisement or 2,117 radio advertisements, the single act of alleged violation under FIFRA was the failure to disclose the appropriate product classification rather than each radio advertisement being its own separate alleged violation.

(b) Four units of violation. The Presiding Officer might find that the underlying facts in this case resulted in four "units of violation" because there were four versions of the broadcast ads that were aired.

(c) Six units of violation. The Presiding Officer might find that the underlying facts resulted in six "units of violation," because the advertisements were broadcast in six different states.

(d) Eleven units of violation. The Presiding Officer might find that the underlying facts resulted in eleven "units of violation" because the advertisements were broadcast through eleven different radio stations.

In addition, the Presiding Officer, based on the underlying facts, could look at the number of days that the ads were broadcast and decide that each day constituted a "unit of violation" independent of the number of specific times the ads were run on that particular day. In fact, this method of calculating "units of violation" was the Complainant's initial position as set forth in its initial Notice of Intent to File an Administrative Complaint against Respondent on September 18, 2009. (Complaint at ¶ 357). A copy of this Initial Notice is attached to Respondent's Answer as Exhibit A. Attached to this reply as Attachment A is Complainant's initial penalty calculation sheet identifying 132 days of alleged violation based on those same radio ads for which Complainant now alleges 2,117 violations. This served as the basis for the Complainant's initial demand for a penalty in September of 2009. Complainant thus acknowledged at that time that it would not be appropriate to count each radio advertisement for Rozol as a separate violation of FIFRA when it provided Respondent with Complainant's Initial Notice of Intent to File an Administrative Complaint against Respondent. Based on the same facts, Complainant now alleges that 2,117 violations of FIFRA occurred as a result of Respondent's radio ads.

The reason the "unit of violation" is so important in this case is that Complainant proposes civil penalties based upon a simple multiplication of the

"units of violations" by the "penalty per unit of violation" under EPA's Enforcement Response Policy. Given the potential importance of the "unit of violation" determination in this case and the issues that surround the determination of the appropriate "unit of violation" for the alleged violations of § 12(a)(2)(E) of FIFRA, Respondent respectfully requests that if the Presiding Officer does not dismiss Counts 1-2,117 of the Complaint, the Presiding Officer withhold decision on the appropriate "unit of violation" until after the hearing.

IX. Respondent's Response to Complainant's Motion for Accelerated Decision.

For the same reasons as set forth above and in Respondent's Motion to Dismiss RUP Claims, Respondent's print advertisements complied with FIFRA § 12(a)(2)(E) by informing potential users of the terms of restriction on the product label. The majority of Respondent's print advertisements referenced in Counts 2,118-2,140 of the Complaint included the following language, enclosed within a solid bold line and placed prominently in the advertisement:[3]

> Approved under a Special Local Needs (SLN) 24(c) Prairie Dog Bait label for use in the states of Colorado, Kansas, Nebraska, Texas and Wyoming.

[3] Complainant erroneously asserts that the terms of restriction set forth in Liphatech's print advertisements were not "prominently" displayed in the advertisement as required by 40 C.F.R. § 152.168(c). Notably, the terms of restriction are enclosed within a solid bold line that projects the statements to the forefront of the advertisement. In addition, it is worth noting that the proposed rule that is now codified at 40 C.F.R. § 152,168(c) would have required that the terms of restriction be enclosed within a solid black outline. This requirement, however, was dropped in the final regulation. *Compare* 49 Fed. Reg. 37916, 37945 (Sept. 26, 1984) *with* 53 Fed. Reg. 15951, 15987 (May 4, 1988). Liphatech made certain that the terms of restriction were prominently placed in its print advertising by enclosing them within a solid bold outline even though the final regulation does not require it.

> In Order to use this product for the control of Black-Tailed Prairie Dogs, you must have a 24(c) Prairie Dog Bait label in your possession.

(Complainant's Response at 7).

As set forth in greater detail above, by referring to the terms of restriction set forth in the product label and stating that the use of Rozol is restricted pursuant to its 24(c) label, Respondent complied with FIFRA § 12(a)(2)(E) and 40 C.F.R. § 152.168.

For those reasons set forth above with regard to the appropriate unit of violation for radio advertising, if Respondent's print advertisements failed to comply with FIFRA § 12(a)(2)(E), Complainant has incorrectly interpreted the "unit of violation." The Presiding Officer could reasonably conclude that one violation occurred because of the single act of advertising Rozol in print ads, or that six violations occurred as a result of six publications that included allegedly non-compliant print ads, among others. Given the factual and legal issues surrounding the appropriate "unit of violation," Respondent respectfully requests that if the Presiding Officer does not rule in Respondent's favor with regard to the violations alleged in Counts 2,118-2,140, that the Presiding Officer withhold decision on the issue of the appropriate "unit of violation" (or number of alleged violations) until after the hearing.

X. Complainant's Proposed Findings of Fact and Conclusions of Law.

For the reasons set forth herein, Respondent respectfully requests that the Presiding Officer decline to adopt the Proposed Findings of Fact and Conclusions

of Law proffered by Complainant. Respondent's advertisements that are the subject of the Complaint complied with FIFRA § 12(a)(2)(E) and Complainant's contentions to the contrary are without merit. Moreover, Complainant improperly intertwines conclusions of law in its Proposed Findings of Fact by including the unwarranted legal assertion that Respondent's print and radio ads failed to include an appropriate statement of the terms of restriction for Rozol. That legal assertion is erroneous. For these reasons, Complainant's Proposed Findings of Fact and Conclusions of Law should not be adopted.

XI. Conclusion.

For the reasons set forth herein and in Respondent's first memorandum, Respondent respectfully requests that the Presiding Officer: (1) grant Respondent's Motion to Dismiss RUP Claims; (2) deny Complainant's Motion for Accelerated Decision As To Counts 1 Through 2,140 of the Complaint and reject its Proposed Findings of Fact and Conclusions of Law; and (3) enter a partial accelerated decision in favor of Respondent on the issue of liability for Counts 1 through 2,140 of the Complaint.

Dated this 13th day of October, 2010.

Respectfully submitted,

Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 1700
Milwaukee, WI 53202
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

October 2, 2009

REPLY TO THE ATTENTION OF:

C-14J

VIA U.S. MAIL

Jeffrey P. Clark, Esq.
Reinhart Boerner Van Deuren S.C.
P.O. Box 2965
Milwaukee, WI 53201-2965

Re: Liphatech, Inc. Milwaukee, WI

Dear Mr. Clark:

As I noted to you earlier this week, staff for the U.S. Environmental Protection Agency, Region 5 ("EPA") should be able to meet with you and other representatives for Liphatech, Inc. ("Liphatech") on any of the following dates: October 19, 20, 21, or 22, 2009. Please let me know which of these dates will suit you best.

Per your request, enclosed with this letter are materials summarizing the calculations that EPA made in reaching a proposed penalty of $1,280,500. It is not EPA's typical practice to share such information in this manner before the filing of a complaint. However, we are doing so in this instance as a courtesy and with the hope that this will improve the parties' use of time during the upcoming conference.

The first document is the "FIFRA Civil Penalty Calculation Worksheet" prepared by Claudia Niess. This worksheet summarizes the base penalty of $6,500 that EPA calculated for each count. EPA developed the per-count penalty amount using the *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)* ("FIFRA ERP"), dated July 2, 1990. The FIFRA ERP and other FIFRA guidances are available for review and downloading on EPA's website at http://cfpub.epa.gov/compliance/resources/policies/civil/fifra/. Please note that the figures in the FIFRA ERP have been recently increased to account for inflation.

The second document is the "Summary of Proposed Penalty in the Matter of Liphatech, Inc.", prepared by me. This summarizes the violations and the number of counts (at $6,500 per count) that amount to the $1,280,500 proposed penalty.

The third enclosed document may already be in your possession. It is EPA's summary of its evaluation of a number of claims made in Liphatech's Research Bulletin. It was e-mailed by Claudia Niess to Tom Schmit of Liphatech on November 18, 2008. Most of the claims identified in the summary form the basis for the violations of FIFRA Section 12(a)(1)(B) being alleged by EPA.

In general, the information and documentation supporting the alleged violations were provided to EPA by Liphatech pursuant to various EPA information requests. This includes information pertaining to the content and airings of the radio advertisements, copies of the trade publications containing the print advertisements, a copy of the Research Bulletin, and copies of shipping documents for Liphatech's sales or distributions of the product. If they are not already in your possession, copies should be available from Liphatech staff.

We look forward to discussing this matter with you. Please contact me at (312) 353-6181 or chow.kevin@epa.gov to inform me of your preferred meeting date, and for any further questions or discussion.

Sincerely,

Kevin C. Chow
Associate Regional Counsel

Enclosures

cc: Claudia Niess (LC-8J) (w/enclosures)

FIFRA CIVIL PENALTY CALCULATION WORKSHEET

RESPONDENT LIPHATECH
ADDRESS MILWAUKEE, WI

DOCKET NO. _____ **PREPARED BY** CLAUDIA NIESS
DATE _____

	Radio Ad Counts 1 - 132 count 1	Print Ad 133-148 count 2	Sale/Distribution 149-150 count 3	count 4
Appendix A				
1. Statutory Violation	12(a)(2)(E)	12(a)(2)(G)	12(a)(1)(B)	
2. ~~FIFRA Code~~				
3. Violation Level	2	2	2	
Table 2				
4. Violator Category - §14(a)(1) or §14(a)(2)	14(a)(1)	14(a)(1)	14(a)(1)	
5. Size of Business Category	1	1	1	
Table 1				
6. Base Penalty	$500	$500	$500	
Appendix B				
7. Gravity Adjustments:				
a. Pesticide Toxicity	2	2	2	
b. Human Harm	3	3	3	
c. Environmental Harm	3	3	3	
d. Compliance History	0	0	0	
e. Culpability	0	0	0	
f. Total Gravity Adjustment Value (add items 7a - 7e)	8	8	8	
Table 3				
g. Percent Adjustment	0	0	0	
h. Dollar Adjustment	0	0	0	
8. Final Penalty* (item 7h from item 6)	$500	$500	$500	
9. Combined Total Penalty (total of all Columns for line 8, above)				

* NOTE: The final penalty in each column of line 8 cannot exceed the statutory maximum.

CONFIDENTIAL
Attorney Work Product
For Settlement Discussion Purposes Only

SUMMARY OF PROPOSED PENALTY
IN THE MATTER OF LIPHATECH, INC.
(Product: Rozol, EPA Registration No. 7173-244)

FIFRA SECTION	TYPE OF VIOLATION	VIOLATION	# OF COUNTS	TOTAL PENALTY ($6500/ COUNT)
12(a)(2)(E)	Radio Ads that did not give Restricted Use designation	REDACTED		
	Print Ads that did not give Restricted Use Designation			
12(a)(1)(B)	Research Bulletin and Radio Ads containing claims that differ from Section 3 registration, made as part of sale or distribution of product (40 CFR 168.22(a))			
TOTAL				**1,280,500**

Prepared by Kevin Chow, EPA Region 5
October 2, 2009

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

CERTIFICATE OF SERVICE

I, Jeffrey P. Clark, one of the attorneys for the Respondent, Liphatech, Inc., hereby certify that I delivered one copy of the foregoing Reply of Respondent to Response of Complainant in Opposition to Motion of Respondent for Partial Accelerated Decision on an Issue of Liability in Favor of Respondent with Respect to the Alleged Violations of § 12(a)(2)(E) of FIFRA set forth in Counts 1 through 2,117 of the Complaint and Memorandum of Law in Support and Response of Respondent to Combined Motion of Complainant for Accelerated Decision as to Counts 1 through 2,140 of the Complaint, to the persons designated below, by depositing it with a commercial delivery service, postage prepaid, at Milwaukee, Wisconsin, in envelopes addressed to:

Honorable Barbara A. Gunning
Administrative Law Judge
Office of the Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460-2001; and

Ms. Nidhi K. O'Meara (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, IL 60604

I further certify that I filed the original of the aforementioned document and this Certificate of Service in the Office of the Regional Hearing Clerk, U.S. EPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, by depositing them with a

commercial delivery service, postage prepaid, at Milwaukee, Wisconsin, on the date below.

Dated this 13th day of October, 2010.

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