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

REPLY TO THE ATTENTION OF:
C-14J

Via UPS Overnight Delivery

January 18, 2012

Honorable Susan L. Biro
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1099 14th Street, NW, Suite 350
Franklin Court
Washington, D.C. 20005

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

Dear Chief Judge Biro:

I have enclosed a copy of *Complainant's Response In Opposition to Respondent's Motion to Limit Testimony at Trial Based Upon Joint Stipulations*, which was filed on January 18, 2012, in the above referenced-matter.

Sincerely,

Gary E. Steinbauer
Assistant Regional Counsel

Enclosure

cc: Mr. Mark A. Cameli
Reinhart Boerner Van Deuren s.c
1000 North Water Street, Suite 1700
Milwaukee, WI 53202
(*via UPS overnight*)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Liphatech, Inc.	)	Docket No. FIFRA-05-2010-0016
Milwaukee, Wisconsin	)	
	)	Hon. Susan L. Biro
Respondent.	)	
	)	

COMPLAINANT'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO LIMIT TESTIMONY AT TRIAL BASED UPON JOINT STIPULATIONS

Complainant, the Director, Land and Chemicals Division, Region 5, United States Environmental Protection Agency (EPA or Complainant), through its undersigned attorneys, hereby files this Response in Opposition to Respondent's Motion to Limit Testimony At Trial Based Upon Joint Stipulations (Respondent's Motion), pursuant Section 22.16(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), 40 C.F.R. § 22.16(b).

I. Respondent's Motion Should Be Stricken As Untimely

Respondent's Motion should be stricken as untimely pursuant to the Presiding Officer's June 10, 2011 Scheduling Order.[1] Filed just 25 days before hearing and almost five months after the Presiding Office closed motion practice on August 31, 2011, Respondent's Motion seeks the extraordinary relief of limiting, or in some cases excluding, the proposed testimony of all of Complainant's listed witnesses. In accordance with Section 22.19 of the Consolidated Rules and Judge Gunning's June 30, 2010 Prehearing Order, Complainant identified a majority of its possible witnesses with a narrative of their proposed testimony as early as September 28, 2010.

[1] It is worth noting that Respondent failed to file a "motion for leave to file out of time," failed to contact Complainant prior to filing its Motion, and failed to provide any reason as to why it filed its Motion this late in the proceeding.

Furthermore, while Respondent attempts to avoid this fact by claiming that its Motion is based upon the parties' Joint Stipulations, it fails to mention that of the approximately 165 Joint Stipulations it references in its Motion, all but three of these Joint Stipulations were admitted by Respondent in its original Answer dated June 11, 2010 and/or its Amended Answer dated February 1, 2011.[2] Respondent's Motion is based on information that Respondent has had in its possession since well before motion practice closed on August 31, 2011. Respondent had ample time to file this Motion within the deadlines established by this Tribunal, but it failed to do so. Therefore, Respondent's Motion should be stricken.

In addition, Respondent's Motion is nothing more than another untimely attempt to obtain a ruling from this Tribunal that would benefit Respondent exclusively. On October 20, 2011, Chief Judge Biro denied Respondent's previous motion seeking to require the parties to exchange written notices of the order in which each party intends to present its witnesses at the hearing within three days of each witness's testimony. The Chief Judge denied Respondent's previous motion on grounds that "Complainant would be forced to present significant testimony and exhibits without the benefit of Respondent's litigation plan in hand, a benefit that Respondent would enjoy exclusively." Oct. 20, 2011 Order at 2. Respondent's current Motion is another attempt to obtain what this Tribunal previously denied and goes even further by seeking to exclude or limit the testimony of Complainant's witnesses. Notably, Respondent's Motion does not offer to limit the presentation and testimony of its own listed witnesses.[3] Respondent's second untimely attempt to improperly extract Complainant's trial strategy before

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[2] Ironically, absent joint stipulations for these three facts (Resp.'s Mot. at 3-4; Joint Stipulations at 15), it would have been Respondent who likely would have had to present witness testimony, not Complainant.

[3] If Respondent's own reasoning was applied to the witnesses it has listed, Respondent should have offered to remove Mr. Charles Lee, Dr. James Hobson, Mr. Henry Jacoby, and Mr. James Aidala from its own witness list and limit the testimony of many of its remaining seven witnesses.

trial and improperly dictate the manner in which Complainant presents its case-in-chief should be denied.

II. Alternatively, Respondent's Motion Should Be Denied On The Merits[4]

A. Applicable Legal Standard of Review[5]

"Motions *in limine* are generally disfavored." *In re Liphatech, Inc.*, Docket No. FIFRA-05-2010-0016, 2011 EPA ALJ LEXIS 7, at *23 (Chief ALJ June 2, 2011) (citing *Hawthorne Partners v. AT&T Techs., Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993)). The Consolidated Rules provide that "the Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value." 40 C.F.R. § 22.22(a)(1). "[A] motion *in limine* 'should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose.'" *Id.* (quoting *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000)).

The party moving to limit or exclude certain evidence bears "the burden of establishing the evidence is not admissible for any purpose." *Mason v. City of Chicago*, 631 F. Supp. 2d 1052, 1056 (N.D. Ill. 2009). If the movant fails to satisfy the high standard necessary to grant a motion *in limine*, "evidentiary rulings must be deferred until trial so questions of foundation,

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[4] To avoid revealing Complainant's specific trial strategy, thereby giving Respondent a benefit that only it would enjoy, Complainant has decided that it will not respond point by point to each of Respondent's arguments relating to witnesses and topics covered in its motion. Rather, Complainant has chosen to address Respondent's motion in a more general manner, outlining why the motion should be stricken or denied. At the hearing, Complaint will present testimony and evidence to set the contextual framework for the case and testimony and evidence necessary to meet its burdens of presentation and persuasion. Complainant's decision to decline a point by point response to Respondent's Motion should not be construed to mean that Complainant does not object to Respondent's arguments regarding any specific witness or topic. Complainant objects to the entirety of Respondent's Motion.

[5] Respondent's Motion is a motion *in limine*, because it seeks to limit or exclude testimony on the basis that the projected testimony lacks relevancy, reliability and/or probative value. *See Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000).

relevancy, and prejudice may be resolved in context." *Liphatech, Inc.*, 2011 EPA ALJ LEXIS 7, at *23.

B. Respondent's Motion is not ripe for consideration and the evidentiary rulings Respondent requests should be denied

The Consolidated Rules are clear that while most evidence is admissible, "unduly repetitious" evidence is not. 40 C.F.R. § 22.22(a)(1). As Respondent acknowledges, this case has been streamlined since the parties presented their initial prehearing exchanges over one year ago. Respondent's liability has been determined for its violations of FIFRA Section 12(a)(2)(E); only the appropriate penalty remains at issue. The facts surrounding Respondent's alleged violations of FIFRA Section 12(a)(1)(B) remain at issue, as do the facts supporting the appropriate penalty for such violations. Complainant is well aware of this evolution. Consequently, Respondent's Motion should be denied as unnecessary and is itself a needless waste of the Tribunal's and the parties' resources as well as the public's resources.

Furthermore, Respondent's motion is the product of pure speculation and is premature. Complainant will present its case in accordance with the Consolidated Rules and as necessary given the Chief Judge's rulings. To the extent it is necessary to address Respondent's arguments regarding the presentation of potentially "repetitious" evidence, it is clear that Respondent has not satisfied the high standard necessary to grant its motion *in limine*. Therefore, even if Respondent's Motion was necessary, the alleged evidentiary rulings that Respondent seeks "must be deferred until trial" so questions of relevancy can be resolved in context. *Liphatech, Inc.*, 2011 EPA ALJ LEXIS 7, at *23.

Finally, to the extent Respondent is seeking to limit Complainant's listed expert witnesses from testifying on grounds that the testimony of such witnesses is allegedly "unreliable" (Resp.'s Mot. at 8), Respondent has failed to provide any analysis under the factors

established by the Supreme Court in *Daubert* (and its progeny) and applied by this Tribunal. Contending that an expert witness's proposed testimony will be "unreliable," without engaging in any analysis of the well-established authority, does not satisfy the high standard necessary to grant a motion *in limine*.

C. Testimony on the penalty to be imposed is highly relevant and admissible

Even if Respondent's Motion is considered timely and necessary (it is not), it should be denied. Notwithstanding the fact that it acknowledges that the penalty for its violations of FIFRA Section 12(a)(2)(E) and alleged violations of FIFRA Section 12(a)(1)(B) remains at issue (Resp.'s Mot. at 5), Respondent inappropriately seeks to limit Complainant's ability to present its case to demonstrate that the relief it seeks is warranted. Respondent does so by attempting to limit testimony that is germane to the issue of penalty.

Under FIFRA Section 14(a)(4), the criteria for determining the amount of a penalty are "the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation." 7 U.S.C. § 136*l*. Pursuant to these criteria, the FIFRA Enforcement Response Policy (FIFRA ERP or ERP) provides a process for calculating penalties. CX 51; EPA948-49. The "gravity level" represents the "relative severity of each violation," considering "the actual or potential harm to human health and the environment which could result from the violation and the importance of the requirement for achieving the goals of the statute." *Id.* at EPA951. Under the ERP, the gravity can be adjusted to account for the pesticide's toxicity, harm to human health, environmental harm, compliance history, and culpability. *Id.* at EPA952, EPA967.

Respondent seeks to unduly limit Complainant's ability to present testimony supporting Complainant's proposed penalty. In its discussion of the gravity resulting from its violations of FIFRA Section 12(a)(2)(E) and its alleged violations of FIFRA Section 12(a)(1)(B), Respondent

blatantly omits any reference to culpability or to actual or potential harm to human health and the environment. (Resp.'s Mot. at 7-8). Instead, Respondent suggests that because the validity of the underlying registrations of Rozol are not at issue in this case and this case does not involve allegations of misuse of Rozol, Complainant should somehow be barred from presenting fact and expert testimony on the gravity of Respondent's violations of FIFRA. Respondent fails to cite any authority supporting its contentions. Respondent also ignores the fact that the statutory requirements at issue in this matter, FIFRA Sections 12(a)(2)(E) and 12(a)(1)(B), are critical components of FIFRA's statutory scheme, designed to protect consumers and the environment from the adverse effects of pesticides. *See* CX51; EPA951 (stating that the "gravity" of a violation takes into consideration the requirement's importance for achieving the statute's goals).

In sum, Respondent's conclusory arguments on why Complainant's case regarding penalty should be limited do not satisfy the high standard for a motion *in limine* to be granted. Therefore, to the extent that Respondent moves to exclude or limit the testimony of Complainant's witnesses that may testify regarding the appropriate penalty in this matter, Respondent's motion should be denied.

D. Testimony related to liability for Respondent's alleged violations of FIFRA Section 12(a)(1)(B) is highly relevant and admissible

Respondent also moves to exclude witness testimony that relates to one of the elements needed to demonstrate liability for Respondent's alleged violations of FIFRA Section 12(a)(1)(B) (Resp.'s Mot. at 6-7), i.e., that Respondent made claims for Rozol as part of its distribution or sale that were substantially different from claims made for Rozol as part of the statement required in connection with its registration application. Quoting the language out of context, Respondent argues that Chief Judge Biro's June 24, 2011 Order denying Complainant's motions for accelerated decision on the alleged violations of FIFRA Section 12(a)(1)(B)

somehow prevents Complainant from presenting testimony regarding this element. Respondent confuses the issue at hand with respect to FIFRA Section 12(a)(1)(B). The over-arching issue for this element of the alleged FIFRA Section 12(a)(1)(B) violations is whether Respondent made claims in its advertisements that substantially differed from any claims made for Rozol as part of the statement required in connection with its registration, **not** whether the claims in question had to be approved by the EPA. In fact, Chief Judge Biro's June 24, 2011 Order stated that "this issue will benefit from additional argument at hearing." (June 24, 2011 Order at 24).

Therefore, Respondent's narrow interpretation of the Presiding Officer's June 24, 2011 Order misses the mark. Respondent is incorrect that Complainant's witnesses will "testify at hearing regarding a legal standard that the Presiding Officer has already determined to be incorrect." (Resp.'s Mot. at 6). Complainant will offer witness testimony to not only meet its burden of proof for each and every element of its FIFRA Section 12(a)(1)(B) claims, but to also respond to arguments that the claims Respondent made in its advertisements were supported by the information submitted as a result of the registration process. Respondent's attempt to bar Complainant from presenting fact and expert witnesses to meet its burden of proof for the alleged violations of FIFRA Section 12(a)(1)(B) should be denied.

III. Conclusion

For all of the foregoing reasons, Complainant respectfully requests that the Chief Judge enter an order striking Respondent's Motion as untimely. In the alternative, Complainant respectfully requests that the Chief Judge enter an order denying Respondent's Motion.

[Signature page follows.]

Respectfully submitted,

DATE: January 18, 2012

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

CERTIFICATE OF SERVICE

I hereby certify that the original and one true, accurate and complete copy of *Complainant's Response In Opposition to Respondent's Motion to Limit Testimony at Trial Based Upon Joint Stipulations* were filed with the Regional Hearing Clerk, U.S. EPA, Region 5, on the date indicated below. True, accurate and complete copies also were sent to the persons listed and in the manner provided below on this date:

Sent via UPS overnight delivery and facsimile to:

Honorable Susan L. Biro
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Dated in Chicago, Illinois, this 18th day of January, 2012.

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