UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTATOR

In the Matter of:	)	Docket No.: FIFRA-03-2015-0248
	)	
FMC Corporation,	)	COMPLAINANT'S REBUTTAL
	)	PREHEARING EXCHANGE
Respondent.	)	

COMPLAINANT'S REBUTTAL PREHEARING EXCHANGE

In accordance with Administrative Law Judge Christine Coughlin's May 6, 2016 Prehearing Order ("Prehearing Order"), Complainant hereby sets forth its Rebuttal Prehearing Exchange. Complainant respectfully reserves the right to supplement its initial and rebuttal prehearing exchanges in accordance with Section 22.19(f) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. Part 22, and with the Prehearing Order.

I. RESPONSE TO RESPONDENT'S PREHEARING EXCHANGE

A. Witnesses

Respondent indicates that both Aaron Locker, Director, FMC North America Crop Marketing and George Orme, Founder and Managing Director of Strategic Marketing Partners may be called to testify that the "number of intended direct mailer recipients is smaller than EPA alleged in its Complaint." FMC PHE at 5 and 10. Complainant based the number of advertising violations alleged in the Complaint on information provided directly by Respondent. *See* Cx29 (Rx075). Though Complainant maintains that for purposes of liability an individual illegal act of advertising occurred each time Respondent sent a violate direct mailer to an intended recipient, it is not assessing penalties for the 48 violative direct mailers that were "returned" as reflected in Rx061, and referenced in Rx076. See Section II. PENALTY DISCUSSION below. If the expected testimony of either Mr. Locker or Mr. Orme will be that the "number of intended direct mailer recipients is smaller than EPA alleged in its Complaint" for reasons *other than* what is reflected or referred to in Rx061 and Rx076, Complainant invites Respondent to provide such information to Complainant for consideration in advance of hearing so to avoid using judicial resources to litigate factual matters which may not be in dispute.

Complainant has concerns about the respective qualifications of Debra F. Edwards, Former Director, EPA Office of Pesticide Programs; Dale Burnett, Former Director of Pesticide Enforcement, Texas Department of Agriculture; and George Orme, Founding and Managing Director of Strategic Marketing Partners, Inc. to provide expert opinion testimony on some of the subjects areas identified in Respondent's Prehearing Exchange. Complainant anticipates filing

Motions seeking relief to address these concerns in accordance with 40 C.F.R. § 22.16 and the Prehearing Order.

Complainant is currently seeking to retain expert witnesses to rebut the expected testimonies of Respondent's expert witnesses but is unable to identify any such witnesses at the time of this filing. Complainant anticipates supplementing its prehearing hearing to add expert witnesses in accordance with 40 C.F.R. § 22.19(f) and the Prehearing Order.

B. Exhibits

Complainant notes that Respondent's exhibits Rx001 and Rx002 are EPA regulatory provisions from the 2000 (year) edition of the Code of Federal Regulations, which may or may not accurately reflect the applicable regulatory requirements at the time of the violations at issue in this matter, or currently.

Complainant is confused and therefore concerned as to what is meant by Respondent's use of the term "Relevant Jurisdictions[1]" in its description of Rx010. FMC PHE at 12. To be able to adequately prepare for hearing, Complainant anticipates filing a Motion to seek relief to address this concern in accordance with 40 C.F.R. § 22.16 and the Prehearing Order.

Complainant takes issue with Respondent's use of the term "Duplicates" in its description of Rx061. FMC PHE at 15. The term duplicate implies that the subset of intended recipients so identified are identical to or otherwise redundant to other intended recipients of Respondent's direct mailers, which Complaint maintains is both erroneous and misleading. Complainant's understanding is that the intended recipients on the "Retailer List" in Tab A and "Grower List" in Tab C whose names have been shaded in grey or yellow are additional intended recipients - beyond the first, that are associated with a particular "Retailer" or "Grower". Although Respondent designates this subset of intended recipients as "duplicates", it sent a separate direct mailer to each of the 2,622 intendent recipients on the Retailer List in Tab A and to each of the 9,645 intended recipients on the Grower List in Tab C. *See* Cx29 (Rx075).

Complainant is concerned about the appropriateness and relevance of "Table of Largest Civil and Criminal FIFRA Enforcement Cases and Settlement" in Rx068. The EAB has consistently held that "penalty assessments are sufficiently fact and circumstance dependent that the resolution of one case cannot determine the fate of another." *In re Chem Lab Products,* 10 E.A.D. 711, 728 (EAB 2002) *quoting In re Newell Recycling Co.,* 8 E.A.D. 598, 642 (EAB 1999). The EAB has further noted that "the inappropriateness of comparing settled versus litigated cases has also long been established. EPA administrative case law holds that penalties assessed in litigated cases cannot profitably be compared to penalties assessed via settlements." *In re Chem Lab Products* at 730. Complainant anticipates filing a Motion to seek relief to

[1] According to Respondent's website, "Stallion Brand" insecticide is registered in the following states: AR, AZ, CA, CO, CT, DE, FL, GA, HI, IA, ID, IL, IN, KS, KY, LA, MA, MD, ME, MI, MN, MO, MS, MT, NC, ND, NE, NH, NJ, NM, NV, NY, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VA, VT, WA, WI, WV, WY. *See* http://www.fmccrop.com/grower/Products/Insecticides-Miticides/Stallion-Brand.aspx

address this concern in accordance with 40 C.F.R. § 22.16 and the Prehearing Order.

C. FMC Defenses

1. *The design "plate" at issue was intended to raise brand awareness and neither it nor the website posting rise to the level of advertising under FIFRA*. FMC PHE at 18-19.

Respondent contends that neither the use of its "Stomp Plate[2]" nor the two "website documents[3]" *rise to the level* of "advertising" under FIFRA because they were developed to raise brand awareness of the product at issue. FMC PHE at 18-19. As the applicable regulations apply without distinction as to the intended purpose of advertisements and as common sense dictates that the ultimate goal of Respondent's 'awareness of brand' campaign was to promote the eventual purchase of its misbranded *Stallion Insecticide* product, Respondent's position is unpersuasive both legally and practically. EPA regulations at 40 C.F.R. § 152.168 state in pertinent part:

> (a) Any product classified for restricted use shall not be advertised unless the advertisement contains a statement of its restricted use classification.
>
> (b) The requirement in paragraph (a) of this section applies to all advertisements of the product, including, but not limited, to:
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> (1) Brochures, pamphlets, circulars and similar material offered to purchasers at the point of sale or by direct mail.
>
> (2) Newspapers, magazines, newsletters and other material in circulation or available to the public.
>
> (3) Broadcast media such as radio and television.
>
> (4) Telephone advertising.
>
> (5) Billboards and posters.

The applicable regulations are clear that they apply to *all* advertisements of a restricted use product, without regard as to whether the intended purpose is to convince customers that a company's products are best, to point out and create a need for a company's products, to raise brand awareness about a company's products, or otherwise. 40 C.F.R. § 152.168(b). Though the list at 40 C.F.R. § 152.168(b) is not exhaustive, Complainant notes that each of Respondent's communications is included on the list as either "material offered to purchasers . . . by direct mail" and "magazines . . . and other material . . . available to the public." *Id.* While Respondent states that neither its Stomp Plate nor its website documents included any detailed information on

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[2] *See* RX060.

[3] Presumably, Respondent is referring to the FMC Website Advertisement and the PRWeb Website Advertisement implicated with alleged Violations 12,272 and 12,273 in the Complaint.

price, specific offers for sale, or inducements or ways to purchase products[4], the same could be said for virtually all television commercials and magazine pieces featuring a specific product - which undeniably are considered to be advertising. Complainant is unclear what Respondent means by "rise to the level" of advertising under FIFRA but speculates that Respondent is conflating elements necessary to establish unlawful acts under Section 12(a)(1) and/or 40 C.F.R. 168.22 (e.g., "offer for sale") with unlawful acts under Section 12(a)(2)(E) which do not require a distribution or sale.

Moreover, Complainant points out that, while now referring to them as "communications", Respondent, in its July 18, 2013 response to EPA's Request for Information Letter, was the first to identify and characterize the violative direct mail, print, and website materials alleged in the Complaint as "promotional and advertising materials" and consistently treated/referred to them as such in its subsequent responses to EPA's Request for Information letters. *See* Cx024 – Cx27.

2. *Respondent constructively met the requirement to include RUP language on communications at issue in the advertising allegations.* FMC PHE at 19.

Respondent contends that it "constructively met the requirement to include a statement of the terms of the restriction in accordance with Section 12(a)(2)(E) of FIFRA and 40 C.F.R. § 152.168 . . . because all its "communications included language directing the potential audience to 'always read and follow label directions' and the actual product labels included the statement 'Restricted Use Pesticide' and detailed directions." FMC PHE at 19. An analogous argument was rejected by Chief Administrative Law Judge in the recent *Liphatech* case[5]. In *Liphatech*, many of the violations involved radio advertisements that stated "APPROVED UNDER SPECIAL LOCAL NEEDS 24C LABEL FOR THE STATES OF . . . ALWAYS FOLLOW AND READ LABEL DIRECTIONS. SEE YOUR LOCAL AG CHEM DEALER." *In re Liphatech, Inc.*, Docket No.: FIFRA-05-2010-0016, 2011 EPA ALJ LEXIS 5, at *27-31 (ALJ, May 6, 2011) (Order on Motions for Accelerated Decision Regarding Alleged Violations of FIFRA § 12(A)(2)(E) at 11-12). The Chief Administrative Law Judge noted that "[s]uch language does not convey even an inkling of a sense that there is a legally enforceable restriction as to who may use the product, as most all products have labels and directions, and suggesting such be followed is trite." *Id.*

Liphatech argued that it complied with 40 C.F.R. § 152.168 "by *referring* advertisement listeners to the pesticide label which *included* the restricted use classification of Rozol and the limitations upon its sale and use . . ." *Id.* (emph original). However, the court found that:

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[4] Although unnecessary to establish a violation of Section 12(a)(2)(e) of FIFRA, Complainant disagrees that no inducements or ways to purchase product were included. The direct mailers sent to farm/grower consumers state "[f]or the full list of pest and crops approved for Stallion, talk to your FMC Star Retailer, call 888-59-FMC-AG or visit FMCcropPro.com/Stallion". *See* Rx058, Cx25 EPA 0691-0692. The direct mailers sent to retail purchasers state "[f]or the full list of pest and crops approved for Stallion, talk to your FMC Representative, call 888-59-FMC-AG or visit FMCcropPro.com/Stallion". *See* Rx059, Cx25 EPA 0693-0694. The PRWeb website posting states "Stallion insecticide is available in 2.5 gallon, 15 gallon and 110 gallon containers. For more information on Stallion and other FMC agricultural products, please visit your local retailer,
local FMC Retail Market Manager or log on to www.FMCcrop.com." *See* Cx25 EPA 0702-0705.

[5] *In re Liphatech, Inc.* Docket No.: FIFRA-05-2010-016 (March 12, 2014).

> [T]he erroneous nature of this argument is inherent in its very syntax, *i.e.* that the label "included" the terms of the restricted use, where as the advertisement "referenced" such terms. To "include" means "to contain as part of something." . . . To refer or a reference, on the other hand, means "[t]he act of sending or directing to another for information." . . . Section 152.168(c) requires the "inclusion" of "the terms of restriction, prominently in the advertisement," in the ads for Rozol, not a mere reference to them. . . . Therefore, it is concluded that reference to the label in the radio advertisements does not meet the requirements of Section 152.168 for radio broadcasts."
> *Id.* (emph. original, citations omitted).

Respondent's argument here fails for the same reasons. Respondent states that all its "communications included language *directing* . . . [potential users] to 'always read and follow label directions.'" FMC PHE at 19. The definition of "refer" set forth in *Liphatech* includes the word "directing" as synonymous with "sending." *Id.* Accordingly, Respondent's advertisements did not *include* (*i.e.*, contain as part of the advertisements) the terms of the restricted use but merely *directed* (*i.e.*, sent to another for information) the readers to the label and hence did not comply with 40 C.F.R. § 152.168 or Section FIFRA 12(a)(2)(E) of FIFRA. Moreover, Respondent's interpretation would render ineffective a key safeguard of FIFRA: to guard against the sale of restricted use pesticides to unqualified and uninformed consumers[6].

3. *Complainant's allegations that Respondent's product was misbranded are arbitrary and capricious.* FMC PHE at 20-21.

Respondent argues that Complainant is arbitrary and capricious in alleging that its use of the brand name *Stallion Insecticide* caused its product to be misbranded. FMC PHE at 20. Respondent submitted the proposed alternate brand name *Stallion Insecticide* by Notification under PRN 98-10 and was permitted to use such name as of the date of EPA's receipt on January 26, 2011 so long as it was consistent with both PRN 98-10 and 40 C.F.R. § 152.46, and was not disapproved. *See* Cx07 (Rx006) and Cx10 (Rx028). Both 40 C.F.R. 156.10(a)(5) and PRN 98-10 make clear that brand names may not be false or misleading. On April 28, 2011, EPA informed Respondent that it considered *Stallion Insecticide* to be false or misleading since the product is not used on horses, and that it determined Respondent's Notification to fall outside the scope of PRN 98-10 and to be therefore denied. *See* Cx12 (Rx031). The determinations in EPA's April 28, 2011 letter were made in consideration of applicable laws and policies. Though Respondent eventually proposed alternate brand names that EPA determined to be acceptable (e.g., name *Stallion Insecticide (Not for use on horses)*, *Stallion Brand Insecticide*, *Chariot Insecticide),* it continued to illegally sell the product as *Stallion Insecticide* after receiving EPA's

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[6] In *Liphatech,* the Chief Administrative Law Judge observed "that Respondent's position, that a 'statement' advising listeners to read the EPA-approved label is equivalent to including a 'statement of' the terms of restriction, shoots wide of the mark and misses the protective intent of the relevant statutory provision and its implementing regulation. The statute and regulation governing advertising are clearly intended as prophylactic health and safety measures designed to communicate the risks inherent in the product's use and discourage even preliminary interest in the product by those who are not legally permitted to use it. The pesticide label, on the other hand, while indicating limitations on use, contains far more detailed information and is primarily intended to convey specific instructions on proper use by purchasers." *Id.*

April 28, 2011 letter and through at least March 2, 2012. By opting to continue to knowingly sell the product as *Stallion Insecticide* for a ten (10) month period (during which it acknowledged EPA's denial) instead of ceasing sales and working to resolve its disagreement with EPA over the acceptability of the brand name, Respondent assumed the risk of an eventual enforcement action. Both 40 C.F.R. § 152.46(c) and PRN 98-10 explicitly authorize EPA to take enforcement action without first providing a registrant with an opportunity to submit an application for amended registration if it determines that a product has been modified through notification in a manner inconsistent with 40 C.F.R. § 152.46 and PRN 98-10[7]. Notwithstanding, Complainant did not begin assessing misbranding violations until April 29, 2011, *the day after* Respondent received notice that its Notification was denied, was notified that EPA considered the brand name *Stallion Insecticide* to be false or misleading, and was provided an opportunity to submit an application for amended registration.

Complainant disagrees that *Stallion Brand Insecticide* is a "functionally equivalent alternate brand name" to *Stallion Insecticide.* EPA's Pesticide Regulation (PR) Notice 93-6 makes clear that the use of the word "brand" has significance as a modifier to otherwise false or misleading brand names[8]. *See* Cx22. Though Complainant does not dispute that EPA "has previously approved and has maintained approvals for numerous pesticide product brand names that refer to animals, including horses, that are not for use on such animals", Respondent nevertheless continued illegally selling its product as *Stallion Insecticide* after being notified that EPA found the proposed brand name to be potentially false or misleading to consumers since the name contained an actual pesticide use site (i.e., horses) for which the product is not registered.

For these reasons and others, including harm to the integrity of the pesticide registration program, Complainant's allegations with respect to Respondent's use of the brand name *Stallion Insecticide* are not arbitrary and capricious.

4. *Complainant's interpretation of the proposed number of alleged violations is arbitrary and capricious and not in accordance with law.* FMC PHE at 21-23.

Respondent's stated objections to Complainant's interpretation of the proposed number of violations are conflated with issues relevant to and concerns over the resulting penalty[9], and are

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[7] Respondent also made the following certification in connection with its Notification "I further understand that if this notification is not consistent with the terms of PR Notice 98-10 and 40 CFR 152.46, this product may be in violation of FIFRA and I may be subject to enforcement action and penalties under sections 12 and 14 of FIFRA." *See* Cx10, EPA 0524.

[8] Complainant notes that DRAFT Pesticide Registration (PR) Notice 2002-X and DRAFT Pesticide Registration (PR) Notice 2010-X, both posted on EPA's website at: https://www.epa.gov/pesticide-registration/pesticide-registration-notices-year, similarly suggest that the word "brand" has significance to otherwise false or misleading brand names. *See* Cx07 (Rx006) and Rx008.

[9] At FMC PHE at 23, Respondent states: "In summary: (i) Complainant's proposed number of advertising violations would lead to a civil penalty that is disproportionate to the actual gravity of the alleged violations and therefore at odds with FIFRA; (ii) no harm to any person, any non-target animal or the environment resulted from any use of the Stomp Plate or other communications; (iii) all communications directed potential readers to "always read and follow label directions," and the labels made clear that the product was an RUP and provided detailed direction for use; and (iv) any penalty should take into account the fairness of the amount vis-à-vi other members of the regulated community of pesticide company competitors." FMC PHE at 23.

largely misguided. Specifically, Respondent makes the fundamentally flawed argument that "the proposed number of violations disregard FIFRA's mandate to consider the appropriateness of the penalty on the 'gravity of the violation,'" which fails to recognize that the "gravity of violation" penalty factor under Section 14(a)(4) of FIFRA is a function of *inter alia* the number of violations, and not vice versa.

The determination of whether alleged acts or omissions constitute a single or, alternatively, multiple violations of a statutory provision is not matter of enforcement discretion but that of statutory interpretation. *In re Chempace Corp.*, 9 E.A.D. 119, 128 (EAB 2000); *In re McLaughlin Gormley King Co.*, 6 E.A.D. 339, 350 (EAB 1996). The recent decision in *Liphatech* served as a case of first impression on the issue of determining the 'unit of violation' under Section 12(a)(2)(E) of FIFRA and found, for various articulated reasons, that the unit of violation is to be based on each "individual separate act of advertising" *In re Liphatech, Inc.* at 97-98, Docket No.: FIFRA-05-2010-016 (March 12, 2014). Complainant's position that an individual illegal act of advertising occurred each time Respondent sent a direct mailer to an intended recipient is consistent with *Liphatech*, and there is neither basis in the statute nor in case law to support Respondent's alternative suggestion that the unit of violation be based on its "decision to cause the [direct mailers] to be printed[10]." FMC PHE at 23. Though there doesn't appear to be any factual dispute that the 12,267 direct mailer advertisements, four (4) magazine advertisements, and two (2) web advertisements failed to include the statement "Restricted Use Pesticide" or a statement of the terms of restrictions of *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 (advertised as *Stallion Insecticide*), Respondent nevertheless argues that in alleging 12,273 violations of Section 12(a)(2)(E) of FIFRA, Complainant is being "unfair".

It is well settled that the number of violations with which an agency chooses to charge a respondent in a particular matter is within its prosecutorial discretion[11]. Complainant disagrees that its interpretation of the number of violations alleged in the Complaint is arbitrary and capricious. The number of violations alleged in the Complaint directly corresponds with the evidence, is consistent with applicable law and policies, and is based on a careful consideration of the unique facts and circumstances of this case.

5. *Complainant's assessment of the alleged violations is flawed, not supported by law or fact, and arbitrary and capricious*. FMC PHE at 23.

Complainant disagrees that its assessment of the alleged violations is flawed, not supported by law or facts and arbitrary and capricious. In support of the advertising violations alleged in

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[10] In considering alternatives proposed by *Liphatech* for basing the "unit of violation" on the number of different radio stations and publications that contained or aired the advertisement, the failure to include RUP language in advertising generally, the number of versions of violative radio and print ads, the number of States the violative advertisements were broadcast or distributed, and the medium the advertisement was run; Complainant notes that the Court rejected each as being unsupported by the statute. *Liphatech* at 85-86, 97, 100. Complainant further notes that whether the direct mailers Respondent sent came from a single 'design plate' or 12,267 separate 'design plates' is of no moment from the consumer protection standpoint from which FIFRA operates.

[11] *See Martex Farms, S.E.*, 13 E.A.D. 464, 488 (EAB 2008) (*citing B&R Oil Co.*, 8 E.A.D. 39, 51 (EAB 1998) ("[C]ourts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom to undertake enforcement action,")).

the Complaint, the facts are clear that each of Respondent's 12,267 direct mailer advertisements, four (4) magazine advertisements, and two (2) web advertisements failed to include the statement "Restricted Use Pesticide" or a statement of the terms of restrictions of *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 (advertised as *Stallion Insecticide*). In support of the misbranding violations alleged in the Complaint, the facts show that Respondent began selling *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 as *Stallion Insecticide* on or about March 11, 2011[12]. Complainant did not begin assessing misbranding violations until April 29, 2011, *the day after* Respondent was notified that its Notification was denied, and was notified that EPA considered the brand name *Stallion Insecticide* to be false or misleading. Accordingly, Complainant disagrees that it did not take the timing of EPA's response to FMC's Notification into account.

6. *Respondent argues that Complainant's interpretation of applicable statutory and regulatory provisions infringe on FMC's right to commercial free speech under the First Amendment to the U.S. Constitution.* FMC PHE at 24.

Respondent argues that "Complainant's incorrect interpretation of FIFRA and its implementing regulations with respect to FMC's selection of 'Stallion Insecticide' as an alternate brand name for its product impermissibly infringes on FMC's right to commercial free speech under the First Amendment to the Constitution." FMC PHE at 24. Complainant concedes that Respondent's proposed alternate brand name *Stallion Insecticide* was neither inherently misleading nor related to unlawful activity, and therefore is subject to consideration as to whether and to what extent it constitutes protected commercial speech. Complainant maintains that EPA acted in compliance with First Amendment jurisprudence by not imposing an absolute ban on Respondent's use of the brand name *Stallion Insecticide* but by instead requiring the inclusion of clarifying disclaimers or other qualifiers[13] after it found *Stallion Insecticide* to be potentially misleading to consumers in light of similarly named products that are registered with EPA for use on horses[14], and other reasons. Complainant further maintains that these clarifying disclaimers or other qualifiers directly advanced EPA's substantial interest in advancing FIFRA's consumer protection goals by making sure consumers would not mistake this product for one that is for use on horses. As there is a reasonable fit between EPA's consumer protection goals and its actions described above, Complainant maintains that EPA acted in compliance with the analytical framework established in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980). For these reasons, Complainant disagrees that its interpretation of the applicable statutory and regulatory provisions infringe on Respondent's right to commercial free speech under the First Amendment to the U.S. Constitution.

II. PENALTY DISCUSSION

As allowed by 40 C.F.R § 22.14(a)(4)(ii), Complainant did not propose a specific penalty in the Complaint. In accordance with 40 C.F.R. § 22.19(a)(4) of the Consolidated Rules of Practice and the Prehearing Order, this statement specifies the dollar amount of the penalty Complainant

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[12] *See* Cx29, Enclosure A.

[13] For example, Respondent eventually proposed as alternate brand names *Stallion Insecticide (not for use on horses)* and *Stallion Brand Insecticide* which EPA determined to be acceptable.

[14] *See* Cx23.

is proposing for the violations alleged in the Complaint, and includes a detailed explanation of the factors and policies considered and methodology utilized in calculating the proposed penalty. In calculating the proposed penalty, Complainant has taken into account the particular facts and circumstances of this case as known and understood at the time of this filing. To the extent that facts or circumstances unknown to Complainant at the time of this filing become known at a later time, such facts and circumstances may also be considered as a basis for adjusting the civil penalty proposed herein. EPA will consider, among other factors, Respondent's ability to pay as a basis for adjusting the civil penalty proposed in this Rebuttal Prehearing Exchange. The proposed penalty included herein reflects a presumption of Respondent's ability to pay the penalty and to continue in business. The burden of raising and demonstrating an inability to pay rests with the Respondent. The proposed penalty is not a demand as that term is defined in the Equal Access to Justice Act, 28 U.S.C. § 2412.

Section 14(a)(1) of FIFRA, 7 U.S.C. § 136*l*(a)(1), provides that any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of FIFRA may be assessed a civil penalty of not more than $5,000 for each offense. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, the Debt Collection Improvement Act of 1996, amendments to the Federal Civil Penalties Inflation Adjustment Act enacted in 2015, and the Civil Monetary Penalty Inflation Adjustment Rule promulgated at 40 C.F.R. Part 19[15], violations of FIFRA which occur subsequent to January 12, 2009 through November 2, 2015 are subject to a statutory maximum penalty of $7,500 per violation. 78 *Fed. Reg.* 66643, 66647 (November 6, 2013).

As required by Section 14(a)(4) of FIFRA, 7 U.S.C. § 136*l*(a)(4), Complainant has considered 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 violations ("FIFRA statutory penalty factors") in its determination of the amount of the proposed penalty. Complainant has also taken into account the particular facts and circumstances of this case with specific reference to EPA's December 2009 *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act* ("FIFRA ERP"), and EPA's December 6, 2013 *Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective December 6, 2013)*. These policies seek to provide a rational, consistent and equitable methodology for applying the FIFRA statutory penalty factors to particular cases while accounting for inflation.

A. Initial Penalty Calculation

Complainant calculated an initial penalty in accordance with the methodology described on pages 15 and 16 of the FIFRA ERP, also making use of the optional graduated penalty tables described on pages 25 and 26 of the FIFRA ERP. This methodology included (1) determining the number of independently assessable violations; (2) determining the size of business category

[15] On July 1, 2016, EPA issued a Civil Monetary Penalty Inflation Adjustment Rule to adjust the level of statutory civil monetary penalty amounts for statutes administered by the Agency, as mandated by amendments enacted in 2015 to the Federal Civil Penalties Inflation Adjustment Act. 81 Fed. Reg. 43091 (July 1, 2016). Though this interim final rule is effective on August 1, 2016, the adjustments to the statutory penalty amounts do not apply to this matter as all of the violations alleged in the Complaint occurred prior to November 2, 2015. *See* 81 Fed. Reg. 43091, 43093 (July 1, 2016).

for the violator, using TABLE 1; (3) determining the gravity level of the violation for each independently assessable violation, using APPENDIX A; (4) determining the "base" penalty amount associated with the size of business (Step 2) and the gravity of violation level (Step 3) for each independently assessable violation, using the matrices in TABLE 2; (5) determining the "adjusted" penalty amount based on case-specific factors using the gravity adjustment criteria in APPENDIX B and TABLE 3; (6) making use of the graduated penalty tables in TABLE 4 to determine the total penalty amount[16]; (7) calculating the economic benefit on noncompliance; and (8) considering the effect that payment of the total penalty amount plus economic benefit derived from noncompliance derived from the above calculation will have on the violator's ability to continue in business.

Step 1. Complainant determined the number of independently assessable violations in accordance with Section IV.A.1. of the FIFRA ERP. As each of the Section 12(a)(2)(E) of FIFRA violations ("advertising violations") and each of the Section 12(a)(1)(E) violations ("misbranding violations") alleged in the Complaint resulted from an act which was not the result of any other violation for which a penalty is being assessed and each involves at least one element of proof that is different from any of the other violations, Complainant determined that there are 12,273 independently assessable advertising violations and 106 independently assessable misbranding violations. Notwithstanding, Complainant decided not to assess penalties for the 48[17] "violative direct mailers (i.e., advertising violations) that were "returned" as reflected in Rx061, and referenced in Rx076.

Step 2. Complainant determined the appropriate size of business category in accordance with Section IV.A.2. of the FIFRA ERP. As information included in FMC Corporation's 2015 Annual Report states that, for the year ending December 31, 2105, Respondent posted $3.3 *billion* dollars in annual sales and as Respondent is a registrant, detailer or other distributor or a "Section 14(a)(1) of FIFRA" violator, Complainant determined that according to TABLE 1 Respondent is *clearly* a "category I" (i.e., gross revenues over $10,000,000 a year) size of business.

Step 3. Complainant determined the "gravity level" for each independently assessable violation in accordance with Section IV.A.3. of the FIFRA ERP. Considering the relative severity of the violations, Complainant determined that according to APPENDIX A the advertising violations and the misbranding violations (i.e., the label had a statement that was false or misleading) are both "gravity level 2" violations.

Step 4. Complainant determined the "base penalty amount" for each independently assessable violation in accordance with Section IV.A.4. of the FIFRA ERP. Using the applicable civil penalty matrix for "Section 14(a)(1) of FIFRA" violators and applying the size of business

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[16] As making use of the graduated penalty tables took place prior to calculating economic benefit of noncompliance and to considering the effect of the overall penalty plus economic benefit would have on Respondent's ability to continue in business, Complainant inserted this step as a new "**Step 6**", rendering the calculation of economic benefit of noncompliance "**Step 7**" and the consideration of the effect of the overall penalty plus economic benefit on Respondent's ability to continue in business "**Step 8**".

[17] Complainant counted the number of entries with "blue shading" in Tab A and in Tab C of Rx061in reaching this number.

category and gravity level determinations from Steps 2 and 3, Complainant determined that according to TABLE 2 the base penalty amount for each advertising and misbranding violation is $7,150 (per violation).

Step 5. Complainant determined the "adjusted penalty amount" for each of the advertising and misbranding violations in accordance with Section IV.A.5. of the FIFRA ERP[18] as follows:

Pesticide Toxicity: As the pesticide involved in this case is a restricted use pesticide "RUP"), Complainant assigned a pesticide toxicity value of "3" of a possible maximum of "3" under APPENDIX B. This value applies to both the advertising violations and to the misbranding violations.

Harm to Human Health: As Respondent's failure to give the pesticide's RUP classification in its advertisements increased the risk that it would be improperly sold, purchased or used resulting in minor potential harm to the human health of applicators, Complainant assigned a harm to human health value of "1" of a possible maximum of "5" under APPENDIX B for the advertising violations.

Due to the negligible harm to human health anticipated with Respondent's use of the false or misleading brand name *Stallion Insecticide*, Complainant assigned a harm to human health value of "0" of a possible maximum of "5" under APPENDIX B for the misbranding violations.

Environmental Harm: As Respondent's failure to give the pesticide's RUP classification in its advertisements increased the risk that it would be improperly sold, purchased or used resulting in minor potential environmental harm, particularly to fish and toxic organisms, Complainant assigned an environmental harm value of "1" of a possible maximum of "5" under APPENDIX B for the advertising violations.

As Respondent's distributions or sales using the false or misleading brand name *Stallion Insecticide* increased the risk that the product would be used on horses resulting in minor potential harm to horse health, Complainant assigned an environmental harm value of "1" of a possible maximum of "5" under APPENDIX B for the misbranding violations.

Compliance History: As Respondent has at least one prior documented violation of FIFRA within the five years of the present violations, Complainant assigned a compliance history value of "2" of a possible maximum of "4" under APPENDIX B. This value applies to both the advertising violations and to the misbranding violations.

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[18] Under APPENDIX B of the FIFRA ERP, gravity adjustment values are assigned based on the severity of circumstances for each of five case-specific gravity adjustment factors (i.e., pesticide's toxicity, potential for harm to human health and the environment, and the violator's compliance history and culpability), then totaled and used in TABLE 3 to determine the appropriate adjusted penalty amount.

Culpability: As Respondent's failure to give the pesticide's RUP classification in its advertisements resulted from negligence, Complainant assigned a culpability value of "2" of a possible maximum of "4" under APPENDIX B for the advertising violations.

As Respondent's distributions or sales using the false or misleading brand name *Stallion Insecticide* was a knowing violation of the statute, Complainant assigned a culpability value of "4" of a possible maximum of "4" under APPENDIX B for the misbranding violations.

	Section 12(a)(2)(E) of FIFRA Advertising violations	Section 12(a)(1)(E) of FIFRA Misbranding Violations
	Assigned (Maximum)	Assigned (Maximum)
Pesticide Toxicity	3 (3)	3 (3)
Harm to Human Health	1 (5)	0 (5)
Environmental Harm	1 (5)	1 (5)
Compliance History	2 (4)	2 (4)
Culpability	2 (4)	4 (4)
TOTAL	9 (21)	10 (21)

Using the sum total of the gravity adjustment values above, Complainant determined that according to TABLE 3 the matrix value (from Step 4) applied and that the adjusted penalty amounts for the advertising violations and the misbranding violations are both $7,150 (per violation). As instructed by the FIFRA ERP, Complainant rounded this base penalty amount to the nearest $100, making the adjusted based penalty $7,200 (per violation).

Step 6. Complainant determined the total penalty amount using graduated penalty calculations as described in Section IV.B.1. of the FIFRA ERP[19]. Using the applicable graduated penalty table for category I size of business respondents under TABLE 4 and applying the numbers of independently assessable violations and adjusted penalty amounts from Steps 1 and 5, Complainant calculated the total penalty amount of $10,504,800 (i.e., $9,774,000 + $730,800) as follows:

[19] Section IV.B.1 of the FIFRA ERP provides for graduating penalties "[i]n instances where inspectors or case developers obtain records which evidence multiple sales or distributions for the same violations." While the FIFRA ERP appears to contemplate graduated penalties *only* for violations involving 'sales or distributions', Complainant opted to apply the graduated penalty method to the advertising violations in this matter due in part to the large number of violations alleged to have been committed by Respondent. For category I size of business violators, TABLE 4 states that for the first 100 violations, 100% of the gravity adjusted penalty amount be assessed; for the next 300 violations, 25% of the gravity adjusted penalty amount be assessed; and for all remaining violations, 10% of the gravity adjusted penalty amount be assessed. Complainant notes that without graduating penalties, the FIFRA ERP calculated penalty would be $7,200 x (12,225 + 106) or $88,783,200.

Section 12(a)(2)(E) of FIFRA Advertising Violations

Violations	Percentage	Amount/Violation	Total
1-100	100%	$7,200	$720,000
101- 400	25%	$1,800	$540,000
Violations 401 – 12,225[20]	10%	$720	$8,514,000
TOTAL			$9,774,000

Section 12(a)(1)(E) of FIFRA Misbranding Violations

Violations	Percentage	Amount/Violation	Total
1-100	100%	$7,200	$720,000
101- 106	25%	$1,800	$10,800
TOTAL			$730,800

Step 7. Complainant considered the economic benefit of noncompliance in accordance with Section IV.A.6. of the FIFRA ERP. Without any evidence to support an analysis of possible illegal profits gained by Respondent due to its illegal advertisements and distributions or sales, Complainant is unable to calculate what, if any, economic benefit accrued to Respondent.

Step 8. Complainant considered the effect a payment of a penalty of $10,504,800 will have on Respondent's ability to continue in business in accordance with Section IV.A.7. of the FIFRA ERP. As Respondent has not raised its ability to pay/ability to continue in its Answer to the Complaint (or otherwise) and as a $10,504,800 penalty represents only 0.3 percent (i.e., less than one half of one percent) of Respondent's annual sales, Complainant determined that payment of a penalty in this amount will have a negligible impact on Respondent's ability to continue in business.

TOTAL INITIAL PENALTY CALCULATION: $10,504,800

B. Additional Considerations and Alternative Penalty Calculation

As discussed in Section II.A. above, Complainant's initial penalty calculation made use of the graduated penalty tables as described in Section IV.B.1. of the FIFRA ERP, which reduced the initial calculated penalty from $88,783,200[21] to $10,504,800. Though evident that the FIFRA ERP's graduating penalty provisions effectively reduced the overall penalty while preserving the deterrent purpose of civil penalties for each independently assessed violation, Complainant determined that the unique facts and circumstances of this case warranted additional consideration. *The additional consideration provided by Complainant is based on and limited to the unique facts and circumstances of this case, and shall not in any way be construed to apply to or otherwise effect the calculation of penalties for any future matter.*

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[20] This number was calculated by subtracting the 48 violative direct mailers that were returned from the total 12,273 advertising violations alleged in the Complaint.

[21] Calculated by adding the 12,225 assessed advertising violations x $7,200 (base penalty) with the 106 misbranding violation x $7,200 (base penalty) = $88,783,200.

Per Violation Penalty Amount. As discussed in Section II.A. above, the per violation penalty amount for each of the 12,225 assessed advertising violations and each of the 106 assessed misbranding violations was determined to be $7,200 under the FIFRA ERP. *See* Section II.A. **Step 5** *supra*. In keeping with concerns raised by the Chief Administrative Law Judge in cases involving large numbers of identical FIFRA violations[22], Complainant reconsidered the per violation penalty amount with greater flexibility than that is strictly permitted by the FIFRA ERP in an effort to more appropriately correspond the overall penalty with the significance of the "gravity of the violation[s]" at issue in this matter. Specifically, Complainant revisited the case specific gravity adjustment factors and noted that the summed total value was a 9 of a total maximum value of 21 for the advertising violations, and was a 10 of a total maximum value of 21 for the misbranding violations. Operating under the theory that the statutory maximum per violation penalty amount of $7,500 is to be reserved for the most egregious cases (i.e., where the total summed value of the case specific gravity adjustment factors is a 21[23]), Complainant recalculated the per violation penalty amounts to directly correspond with the respective summed total values of the case specific gravity adjustment factors for the advertising and misbranding violations relative to the total maximum value of 21. This can be expressed mathematically as follows:

$$\frac{\$X}{\$7{,}500} : \frac{\text{Total Summed Value Case Specific Gravity Adjustment Factors}}{21}$$

where X = the per violation penalty amount.

Applied to advertising violations:

$$\frac{\$X}{\$7{,}500} : \frac{9}{21}$$

$9 \times \$7{,}500 = 21 \times X$; $X = \$3{,}214$ per advertising violation.

Applied to misbranding violations:

$$\frac{\$X}{\$7{,}500} : \frac{10}{21}$$

$10 \times \$7{,}500 = 21 \times X$; $X = \$3{,}571$ per assessed misbranding violation.

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[22] See e.g., *In re Liphatech, Inc.*, Docket No.: FIFRA-05-2010-0016, 2014 EPA ALJ LEXIS 12 (ALJ March 12, 2014), *In re Rhee Bros. Inc.*, Docket No. FIFRA-03-2005-0028, 2006 EPA ALJ LEXIS 32 (ALJ September 19, 2006).

[23] Such cases have been described as those involving "the most horrific violator, who has committed the most horrific violations such as a respondent with a long history of committing serious FIFRA violations, who then commits other egregious violations, which were knowing and willful, involving a pesticide of the highest toxicity, and/or which caused *actual* serious or widespread harm to human health and the environment" *Liphatech, Inc.*, Docket No.: FIFRA-05-2010-0016, 2014 EPA ALJ LEXIS 12, at *272 (ALJ March 12, 2014), *quoting In Rhee Bros. Inc.*, Docket No. FIFRA-03-2005-0028, 2006 EPA ALJ LEXIS 32, at *101-102 (ALJ September 19, 2006).

After rounding to the nearest $100, Complainant determined the per violation penalty amount to be $3,200 for the advertising violations and $3,600 for the misbranding violations, *amounts that directly correspond to the case specific gravity factors and that are significantly lower than the $7,200 per violation penalty amounts generated under the FIFRA ERP.*

Alternative Penalty Calculation. Using the case specific gravity adjustment factor based per violation penalty amounts above, Complainant calculated an alternative penalty as follows:

Section 12(a)(2)(E) of FIFRA Advertising Violations

Violations	Percentage	Amount/Violation	Total
1-100	100%	$3,200	$320,000
101- 400	25%	$800	$240,000
401 – 12,225	10%	$320	$3,784,000
TOTAL			$4,344,000

Section 12(a)(1)(E) of FIFRA Misbranding Violations

Violations	Percentage	Amount/Violation	Total
1-100	100%	$3,600	$360,000
101- 106	25%	$900	$5,400
TOTAL			$365,400

TOTAL ALTERNATIVE PENALTY CALCULATION: $4,709,400

Complainant is proposing a penalty of $4,709,400 which it believes is proportionate to the totality of circumstances in this case; that it appropriately reflects the gravity of the violations, given the volume, breadth and direct and personalized nature of the majority of the advertising involved, and associated risks of harm posed by Respondent's conduct - including harm to the integrity of the FIFRA regulatory program; that it is of a sufficient and necessary magnitude to serve as a deterrent to Respondent, an international pesticide company with a vast portfolio of EPA registered RUPs that grosses over $3 *billion* dollars a year in sales annually, as well as to other members of the regulated community of pesticide companies; and that it is consistent with the spirit, if not the letter, of the FIFRA ERP.

III. EXHBITS

Complainant intends to introduce the following additional exhibits at hearing, copies of which are attached hereto:

48.	Curriculum Vitae – Christine Convery	EPA 1311
49.	2015 FMC Annual Report	EPA 1312 - EPA 1427

50.	Summary Report of FMC's RUP Products	EPA 1428 - EPA 1434
51.	Examples of Website screen captures from Pesticide Distributors showing both crop pesticides and animal health products (e.g., pesticides intended for application to horses). Simplot MFA Inc. Southern States	 EPA 1435 - EPA 1438 EPA 1439 - EPA 1448 EPA 1449 - EPA 1452
52.	Examples of EPA Enforcement Cases involving violations of Section 12(a)(2)(F) of FIFRA Anderson County (Docket No.FIFRA-07-2010-0037) Arapahoe County (FIFRA Appeal No. 98-3) Basin Co-op (Docket No. IF&R-VIII-93-335-C) Carman Chemicals (Docket No. FIFRA-07-2009-0011) Cogdill Farm Supply (Docket No. FIFRA-07-2008-0018) Custom Chemical (FIFRA Appeal No. 86-3) Farley Fertilizer (Docket No. FIFRA-07-2009-0009) Farm Services Coop (Docket No. FIFRA-07-2013-0012) Farm Coop. Elevator (Docket No. FIFRA-07-2009-0007) Farmers Mill, Inc. (Docket No. FIFRA-07-2009-0005) Frontier Ag. Inc. (Docket No. FIFRA-07-2010-0036) Heartland Co-op (Docket No. FIFRA-07-2012-0005) Helena Chemical (FIFRA Appeal No. 87-3) Helena Chemical (Docket No. FIFRA-07-2009-0039) Indy Crop Care (Docket No. FIFRA-07-2008-0030) Innovative Ag. Srvs. (Docket No. FIFRA-07-2008-0027) Lindstrom Farm (Docket No. FIFRA-07-2008-0024) Lortscher Agri. Srv. (Docket No. IF&R-VII- 622C-85P) McCune Farmers (Docket No. FIFRA-07-2008-0019) MFA Enterprises (Docket No. FIFRA-07-2008-0011) Mid-Iowa Coop (Docket No. FIFRA-07-2009-0006) Depperschmidt et al (Docket No. FIFRA-07-2006-0175) Postville Farmers (Docket No. FIFRA-07-2012-0002) Pro Cooperative (Docket No. FIFRA-07-2009-0020) Producers Coop. (Docket No. FIFRA-07-2007-0023) R and F Farm Supply (Docket No. FIFRA-07-2008-0003) Sierra Pacific Turf (Docket No. FIFRA-09-2010-0017) Silverado Ranch (Docket No. FIFRA-09-2010-0011) Steinbeck & Sons, Inc. (Docket No. FIFRA-07-2009-0001) Thomas Cnty. (Docket No. FIFRA-07-2010-0030) U.S. Ag Center (Docket No. FIFRA-07-2008-0023)	 EPA 1453 - EPA 1463 EPA 1464 - EPA 1476 EPA 1477 - EPA 1483 EPA 1484 - EPA 1494 EPA 1495 - EPA 1505 EPA 1506 - EPA 1514 EPA 1515 - EPA 1524 EPA 1525 - EPA 1535 EPA 1536 - EPA 1549 EPA 1550 - EPA 1561 EPA 1562 - EPA 1569 EPA 1570 - EPA 1579 EPA 1580 - EPA 1589 EPA 1590 - EPA 1597 EPA 1598 - EPA 1607 EPA 1608 - EPA 1619 EPA 1620 - EPA 1628 EPA 1629 - EPA 1635 EPA 1636 - EPA 1648 EPA 1649 - EPA 1656 EPA 1657 - EPA 1667 EPA 1668 - EPA 1672 EPA 1673 - EPA 1682 EPA 1683 - EPA 1691 EPA 1692 - EPA 1703 EPA 1704 - EPA 1711 EPA 1712 - EPA 1720 EPA 1721 - EPA 1729 EPA 1730 - EPA 1737 EPA 1738 - EPA 1745 EPA 1746 - EPA 1757
53.	Initial Penalty Calculation Worksheet (FIFRA ERP)	EPA 1758 – EPA 1759
54.	Alternative Penalty Calculation Worksheet (COMPLAINANT'S PROPOSED PENALTY)	EPA 1760 – EPA 1761

Complainant reserves the right to introduce exhibits include by Respondent in its Prehearing Exchange.

Respectfully Submitted,

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