



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY BEFORE THE ADMINISTRATOR

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IN THE MATTER OF LIPHATECH, INC., RESPONDENT. DOCKET NO. FIFRA-05-2010-0016

ORDER ON COMPLAINANT'S SIXTH MOTION TO SUPPLEMENT THE PREHEARING EXCHANGE

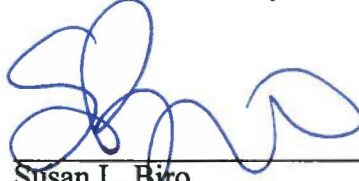
On September 29, 2011, Complainant filed a Motion for Leave to File Motion for Leave to File Sixth Supplemental Prehearing Exchange Instanter ("Sixth Motion" or "Sixth Mot."), seeking to add to its prehearing exchange an additional exhibit, identified as CX No. 150: Materials discovered on Respondent's website on or about February 25, 2010. Sixth Mot. Atchmt. A at 2. Complainant states that CX No. 150 was not included in any of the previous supplemental prehearing exchanges due to "inadvertent oversight by Complainant." Sixth Mot. at 2.

Respondent opposes the Sixth Motion in a response submitted on October 3, 2011, entitled Respondent's Opposition to Complainant's Motion for Leave to File Motion for Leave to File Sixth Supplemental Prehearing Exchange ("Response"). In its Response, Respondent argues that the Sixth Motion should be denied because Complainant has failed to show good cause why it should be allowed a sixth opportunity to supplement its prehearing exchange. Respondent cites Jiffy Buildings, Inc., 8 E.A.D. 315, 320 n.8 (EAB 1999), for the proposition that "inadvertent oversight" is insufficient to show good cause why a default judgment should be vacated. Response at 2.

Section 22.19(f) of the Rules of Practice states that a party must supplement prior exchanges "when the party learns that the information exchanged or response provided is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section." 40 C.F.R. § 22.19(f). Complainant states that the proposed exhibit, CX No. 150, was discovered on Respondent's website on or about February 25, 2010. As Respondent notes, this discovery predates the Second, Third, Fourth, and Fifth Supplemental Prehearing Exchanges. While the "good cause" standard is not strictly applicable to a motion to supplement filed more than 15 days before the hearing, (compare 40 C.F.R. § 22.19(f) with § 22.22(a)), Complainant has failed to remedy its asserted "inadvertent oversight" on any of the four previously allowed supplemental exchanges.

Unlike previous motions to supplement, Complainant does not assert that CX No. 150 is newly discovered or recently made relevant by any Order issued by the undersigned. Moreover, unlike previous motions, Respondent opposes the Sixth Motion. I also note that the hearing is

scheduled to commence in 25 days, on October 31, 2011. These facts, combined with Complainant's repeated failure to identify and include CX No. 150 in any of the multiple opportunities it was given to supplement its exchange, indicate that the proposed exhibit is of little important to Complainant's case. As such, denial of the Sixth Motion is unlikely to cause undue prejudice to Complainant. Accordingly, the Sixth Motion is hereby **DENIED**.



Susan L. Byro
Chief Administrative Law Judge

Dated: October 6, 2011
Washington, DC

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PROTECTION AGENCY

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

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Complainant's Sixth Motion To Supplement The Prehearing Exchange**, dated October 6, 2011, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: October 6, 2011

Original And One Copy By Pouch Mail To:

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Regional Hearing Clerk
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