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 12, 2010

Honorable Barbara A. Gunning
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 Judge Gunning:

Please find enclosed a copy of *Complainant's Response in Opposition to the Motion of CropLife America and Responsible Industry for a Sound Environment for Leave to File a Non-Party Brief Opposing Complainant's Construction of FIFRA Section 12(a)(1)(B)*, which was filed on January 12, 2011, in the above referenced-matter.

Sincerely,

Nidhi K. O'Meara
Associate Regional Counsel

Enclosures

cc: Mr. Timothy D. Backstrom *(via UPS overnight delivery)*
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
Liphatech, Inc.	)	**Docket No. FIFRA-05-2010-0016**
Milwaukee, Wisconsin	)	
	)	
Respondent.	)	

COMPLAINANT'S RESPONSE IN OPPOSITION TO THE MOTION OF CROPLIFE AMERICA AND RESPONSIBLE INDUSTRY FOR A SOUND ENVIRONMENT FOR LEAVE TO FILE A NON-PARTY BRIEF OPPOSING COMPLAINANT'S CONSTRUCTION OF FIFRA SECTION 12(a)(1)(B)

I. Introduction

On January 5, 2011, CropLife America (CLA) and Responsible Industry for a Sound Environment (RISE) (collectively Movants) filed a motion seeking leave to file a non-party brief "in opposition to the Motion for Accelerated Decision on Liability for Counts 2,141 through 2,183 of the Complaint … submitted on November 18, 2010." Proposed Non-Party Brief at 1. Pursuant to 40 C.F.R. §§ 22.11(b) and 22.16(b), Complainant submits this response in opposition to Movants' motion for leave to file a non-party brief.

Complainant respectfully requests that this Court deny Movants' motion for the following reasons. ***First***, Movants' and counsel for Movants' apparent partiality for Respondent Liphatech, Inc. (Respondent) weighs heavily against granting leave to file the proposed non-party brief. As explained below, Movants seek leave to file a non-party brief not as "friends of the court," but as surrogates for Respondent.

Second, the interests identified by Movants are overstated and comparable to countless other regulated entities that could be affected by the outcome of this case. Such is the nature of litigation. Once this Court has ruled on the merits of this case, case law will be created, a party will prevail and others in the pesticide industry may well be affected by the outcome. Movants

point to nothing unique about their members or their position that warrants their participation in this proceeding.

Third, Movants fail to demonstrate that their proposed brief is relevant to the disposition of the case. Movants offer nothing more than what was argued by Respondent in opposition to Complainant's motion for accelerated decision on liability for Counts 2,141 through 2,183 of the Complaint, apart from some reference to legislative history and a couple of new citations to cases.

Finally, the proposed brief will not in any way benefit the Court. The Court is fully aware of the possible implications of granting Complainant's motion for accelerated decision on liability for Counts 2,143 through 2,183 of the Complaint. On the other hand, granting Movants' request for leave will unnecessarily interfere with this matter. If leave to file is granted, months will be lost before this Honorable Court can actually rule on the subject motion for accelerated decision. In the interim, the Court will face the task of studying extrinsic filings as a result of the non-party brief, not to mention the responses and replies that will follow. A delay in the actual hearing could result. There appears to be no compelling reason to allow Movants to inject themselves into this proceeding. Doing so may invite a flurry of such non-party briefs in this and future administrative cases.

For all of the foregoing reasons, Movants' request for leave should be denied. Alternatively, should this Court be inclined to grant Movants' request for leave to file the proposed non-party brief, Complainant respectfully requests that this Court require that any brief filed by Movants comply with Rule 29 of the Federal Rules of Appellate Procedure (Fed.R.App.P.), namely the requirements set forth in Fed.R.App.P. 29(c)(1) and (5).

II. Standard of Review

Movants' request for leave to file a non-party brief was filed pursuant to Rule 22.11(b) 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. § 22.11(b). Rule 22.11(b) provides:

> (b) Non-party briefs. Any person who is not a party to a proceeding may move for leave to file a non-party brief. The motion shall **identify the interest of the applicant** and shall **explain the relevance of the brief to the proceeding**. All requirements of these Consolidated Rules of Practice shall apply to the motion as if the movant were a party. If the motion is granted, the Presiding Officer or Environmental Appeals Board shall issue an order setting the time for filing such brief. Any party to the proceeding may file a response to a non-party brief within 15 days after service of the non-party brief.

Id. (emphasis added).

Complainant's research reveals no administrative case from the Environmental Appeals Board (Board) or the Office of Administrative Law Judges interpreting this particular subsection of the Consolidates Rules. As the Board has done with other provisions in the Consolidated Rules, Complainant will look to federal court procedural rules and case law for guidance. *See, e.g., In re Carroll Oil Co.*, 10 E.A.D. 635, 649 (EAB 2002); *In re Lazarus, Inc.*, 7 E.A.D. 318, 330 (EAB 1997); *In re Asbestos Specialists*, 4 E.A.D. 819, 827 n.20 (EAB 1993). More specifically, because previous iterations of Rule 22.11(b) used the terms "amicus curiae" and "amicus brief," (see 64 Fed. Reg. 40,138, 40,150 (July 23, 1999)), Complainant will look to federal court procedure and practice in this specific area for guidance.

Federal courts hold that the decision "to allow the filing of an amicus brief is a matter of 'judicial grace.'" *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003)

(Posner, J.) (chambers opinion) (quoting *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 616 (7th Cir. 2000)). Although there is no Federal Rule of Civil Procedure that addresses non-party or amicus briefs, federal district courts look to Fed.R.App.P. 29[1] and the case law interpreting the same to determine whether to grant leave to file an amicus brief. *See, e.g., Youming Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136-37 (D.D.C. 2008) (citations omitted). As the Seventh Circuit Court of Appeals has stated:

> The policy of this court is, therefore, not to grant rote permission to file an amicus curiae brief; never to grant permission to file an amicus curiae brief that essentially merely duplicates the brief of

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[1] Fed.R.App.P. 29 provides, in pertinent part:

> **RULE 29. Brief of an Amicus Curiae**
>
> **(b) Motion for Leave to File.** The motion must be accompanied by the proposed brief and state:
> (1) the movant's interest; and
> (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.
>
> . . .
>
> **(c) Contents and Form.** An amicus brief . . . must include the following:
>
> **(1)** if the amicus curiae is a corporation, a disclosure statement like that required by parties by Rule 26.1;
>
> . . .
>
> **(5)** unless the amicus curiae is [the United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia], a statement that indicates whether:
>
> **(A)** a party's counsel authored the brief in whole or in part;
>
> **(B)** a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and
>
> **(C)** a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person . . . .

> one of the parties . . . .; to grant permission to file an amicus brief only when (1) a party is not adequately represented (usually, is not represented at all); or (2) when the would-be amicus has a direct interest in another case, and the case in which he seeks permission to file an amicus curiae brief may, by operation of stare decisis or res judicata, materially affect that interest; or (3) when the amicus has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do.

Nat'l Org. for Women, Inc., 223 F.3d at 616-17 (citations omitted).

Amicus briefs are often solicited (and sometimes funded) by parties to the litigation, consume already scarce judicial resources, drive up the cost of litigation, and are often attempts to inject interest group politics into the federal court process. *See, e.g., Voices for Choices*, 339 F.3d at 544 (citing *Nat'l Org. for Women, Inc.*, 223 F.3d at 616). Furthermore, "[a]t the trial level, where issues of fact as well as law predominate, the aid of amicus curiae may be less appropriate than at the appellate level...." *Bryant v. Better Bus. Bureau*, 923 F. Supp. 720, 727(D. Md. 1996) (quoting *Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985), *aff'd*, 782 F.2d 1033 (3d Cir.), *cert denied*, 476 U.S. 1141 (1986)). Courts caution that a trial court "lacking joint content of the parties should go slow in accepting, and even slower in inviting, an amicus brief unless, as a party, although short of a right to intervene, the amicus has a special interest that justifies his having a say, or unless the court feels that existing counsel may need supplementing assistance." *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970).

III. Movants' Request for Leave to File a Non-Party Brief Should Be Denied

A. Movants Are Mere Surrogates for Respondent

Noticeably absent from Movants' motion and brief is any reference to Movants' and counsel for Movants' close association with Respondent. A description of the close association among Respondent, Movants, and Movants' counsel illustrates why Movants simply are unable

to present an "objective, dispassionate, neutral discussion" of the specific issue they seek to brief.

There are at least ***six*** reasons that support such an assertion. ***First***, the same signatories on Movants' instant motion and the proposed brief, lawyers from Bergeson and Campbell (Bergeson), represent Respondent, as a defendant-intervenor, in a lawsuit against the United States Environmental Protection Agency (U.S. EPA), regarding one of the same products that is the subject of this lawsuit.[2] (*See* Attachment A). ***Second***, the CEO of Respondent is on the board of directors of RISE, one of the Movants. (*See* Attachment B). (Thus, contrary to Movants' statement, Respondent is much more than a mere member of RISE. *See* Motion for Leave at 2.) ***Third***, Mr. James V. Aidala, whose declaration is submitted with Movants' proposed non-party brief, is on the staff of Bergeson as a non-attorney professional. His ability to provide helpful, objective insight is questionable at best. (*See* Attachment C). ***Fourth***, Respondent has identified Mr. Henry M. Jacoby, a staff member of ACTA Group, L.L.C. (ACTA), as a potential expert witness in its Prehearing Exchange. (Resp.'s Prehearing Exchange, p. 27). Like Mr. Aidala, Mr. Jacoby is on the staff of Bergeson. (*See* Attachment C and RX 45). ***Fifth***, ACTA is a consulting affiliate of Bergeson and all the staff members listed on ACTA's website are also on the staff of Bergeson. (*See* Attachment D). ***Sixth***, Bergeson is a member of CLA. (*See* Attachment E).

Federal courts have denied leave to file an amicus brief when the individual or association seeking to file "is an advocate for one of the parties." *Sierra Club v. Fed. Emer.*

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[2] The issue in the other lawsuit is whether U.S. EPA should have allowed for the registration of Rozol Black Tailed Prairie Dog Bait, EPA Reg. No. 7173-286, in the first place. Whether Respondent violated FIFRA in this case does not have a foreseeable impact on the outcome of the case against U.S. EPA regarding proper registration of Rozol Black Tailed Prairie Dog Bait.

Mgmt. Agency, 2007 U.S. Dist. LEXIS 84230, at *6 (S.D. Tex. Nov. 14, 2007) (Attachment F) (citing *CARE v. Southview Farm*, 834 F. Supp. 1410, 1413 (W.D.N.Y. 1993)). While the exact line between advocate for a party and friend of the court has not been delineated, "[s]ome district courts express strong reservations about permitting the submission of amicus briefs that strongly favor one side over the other." *Id.* Where the attitude of a purported amicus "is patently partisan" and does not "provide the court with an 'objective, dispassionate, neutral discussion of the issues,'" federal courts have denied leave to file an amicus brief. *Id.* at *8 (quoting *Yip*, 606 F. Supp. at 1568; *United States v. Gotti*, 755 F. Supp. 1157, 1158 (E.D.N.Y. 1991)).

It should come as no surprise that the arguments set forth in Movants' proposed brief are squarely aligned with those of Respondent. When viewed in their totality, Movants' and counsel for Movants' varied and numerous affiliations with Respondent should lead this Court to deny Movants' motion for leave to file the proposed non-party brief.

B. Movants' Interests are Exaggerated

In their Motion, Movants assert that they wish to submit a brief because the Complainant's proposed construction of Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136j(a)(1)(B), is "contrary to the vital interests of pesticide registrants, distributors, retailers, and users." Motion for Leave at 1. Similar to what Respondent has been arguing, Movants assert that the proposed construction of Section 12(a)(1)(B) of FIFRA argued by Complainant is incorrect as a matter of law. Movants, however, exaggerate the effect that any adverse ruling in this matter may have on their members' "vital" interests.

Without getting too far into the merits of the brief[3], the only truly new reference made by

[3] Complainant reserves the right to fully brief the issues raised in Movants' non-party brief should this Court grant leave. Nothing stated in this response should be construed as a waiver of any right, claim, or argument.

Movants in the proposed brief is worth discussing: their reference to FIFRA Section 3(c)(5), 7 U.S.C. § 136a(c)(5). Movants argue that if Complainant's interpretation of this statutory provision is accepted, their members will not be able to advertise efficacy information because in many cases registrants are only required to submit efficacy information to U.S. EPA upon request.[4] [5] This simply is incorrect.

Movants' concern for their members is misplaced because they fail to recognize that claims in advertising that a product **is efficacious** are entirely different from claims in advertising regarding **the level of a product's efficacy**. While their members can advertise that their products work, they cannot make claims in advertising regarding their product's **level or degree of efficacy** unless such claims have been approved by U.S. EPA. Nor can they compare their products' efficacy to competitor products in their product advertising.

Examples may help illustrate this crucial distinction. If a person registered a product that kills Japanese beetles, certainly the registrant could advertise that the product is efficacious in achieving its intended purpose. What it could not advertise, as is the case with Respondent, are the following types of claims, unless approved[6]:

(1) the product "Provides the most control of Japanese beetles in a single application;" or

(2) the product is "Proven to kill Japanese beetles in a single application."

These claims would not be allowed if the label was approved for multiple applications because

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[4] It is noteworthy that efficacy data **was** required for Rozol because black tailed prairie dogs are considered public health pests because they can transmit the plague. See CX 101.

[5] It is critical to note that the submission efficacy data in support of an application for pesticide registration is never waived per se. Such data must be developed and retained by each registrant but only needs to be submitted upon the request of U.S. EPA.

[6] The examples of claims listed are similar to those made by Respondent in its advertisements.

such claims would be in direct conflict with label claims. The hypothetical registrant also could not make the following types of claims in its advertising[7]:

(3) "when properly applied, the product typically kills 85% of the Japanese beetle population, but control can reach 100%;" or

(4) the product is "Safer than Product X;" or

(5) that "Product X has not been proven to kill Japanese beetles;" or

(6) that "Product X only kills 50% of the population of Japanese beetles;" or

(7) that "Product X is not as effective" as the registrant's product.

Claims such as these would have to be approved before they could appear in product advertising. In all likelihood, however, these claims would not be approved because they are false and misleading pursuant to 40 C.F.R. § 156.10(a)(5).

Additionally, claims made that are contrary to the label itself, as is the case of many of the claims made by Respondent, would not be approved for obvious reasons. As one might imagine, if Movants' members actually believed that claims such as those enumerated above would be permissible under FIFRA, surely such claims would litter every registered pesticide label and related labeling on the market. Additionally, based on correspondence, like a letter dated May 15, 2009 from U.S. EPA to RISE, RISE and its members, including Respondent, had notice as to U.S. EPA's interpretation of Section 12(a)(1)(B) of FIFRA, well before it joined CLA in filing the instant motion and the proposed brief. (*See* Attachment G, also located at http://www.epa.gov/opp00001/regulating/labels/rise-letter.pdf) (informing RISE that claims such as "Professional Grade," which implies "that the products are more efficacious than competitors'

[7] See footnote 6.

products," have to be approved by U.S. EPA before they can be made in product advertising).

The above-referenced examples demonstrate that Movants are unable to provide "a unique perspective or specific information that can assist the court beyond what the parties can provide." *Voices for Choices*, 339 F.3d at 544. Therefore, leave to file the proposed non-party brief should be denied.

C. Even a Cursory Review of the Proposed Non-Party Brief Reveals That it Lacks Relevance to the Current Proceeding

Movants suggest that the ripple effect of Complainant's construction, as described above, must be brought to the attention of the Court. Complainant disagrees. Movants speculate that Complainant's position would be "disruptive" to the pesticide registration process. Movants, however, fail to articulate "a distinctive perspective or present[] specific information, ideas, arguments, etc. that go beyond what the parties whom the amici are supporting have been able to provide." *Voices for Choices*, 339 F.3d at 545. Indeed, most, if not all, of the arguments contained in the proposed brief are a mere reiteration and extension of the arguments already made by Respondent. Where, as here, the proposed amicus brief contains "a few additional citations not found in the parties' briefs and slightly more analysis on some points," courts do not hesitate to deny leave. *Id.* at 545.

Even Justice Alito, who believes that leave to file an amicus brief should be freely granted at the federal appellate level, *see Neonathology Ass'ns, P.A. v. Commissioner of the Internal Revenue*, 293 F. 3d 128, 131-33 (3d Cir. 2002) (chambers opinion), acknowledges that "some amicus briefs make little if any contribution." *Id.* at 133; *compare Animal Protection Institute v. Martin*, 2006 U.S. Dist. LEXIS 95724, *10 n.4 (D. Minn. Nov 16, 2006) (Attachment H) (holding that Justice Alito's views in *Neonathology*, which deals with the role of amicus brief

in federal appellate practice, do not equate to the interests of the federal trial courts).

This Honorable Court can "strike a balance between controlling 'the abuses enumerated by Judge Posner in [*Voices for Choices*], while not unduly delimiting the best purposes served by a legitimate amicus, as recognized by now Justice Alito in [*Neonatology Associates*].'" *Animal Protection Institute*, 2006 U.S. Dist. LEXIS 95724, at *11. After weighing these competing policies, this Court should deny Movants' leave to file the proposed non-party brief.

IV. Conclusion

For the foregoing reasons, Complainant respectfully requests that this Honorable Court deny Movants' Motion For Leave to File a Non-Party Brief. In the event this Court grants leave to file the proposed non-party brief, Complaint respectfully requests that the Court order Movants to provide the following information in accordance with the Fed.R.App.P.29(c) so that the Court can make a fully informed decision as to the weight it should give Movants' brief:

(1) A disclosure statement in accordance with Fed.R.App.P. 29(c)(1);

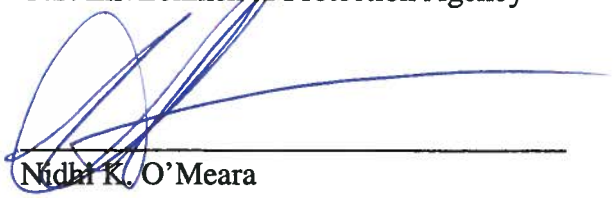
(2) A statement that indicates whether Respondent's counsel authored the non-party brief in whole or in part, in accordance with Fed.R.App.P. 29(c)(5)(A);

(3) A statement that indicates whether Respondent or Respondent's counsel contributed money that was intended to fund preparing or submitting the non-party brief, in accordance with Fed.R.App.P. 29(c)(5)(B);

(4) A statement that indicates whether a person - other than Movants or their counsel- contributed money that was intended to fund preparing or submitting the non-party brief and, if so, identify each such person, in accordance with Fed.R.App. P. 29(c)(5)(C); and

(5) Because of the unique affiliations in this matter, a statement that indicates whether any of the Board Members of CLA and RISE influenced or contributed to the inception and/or funding of the non-party brief - and if so, identify each such Board Members of CLA and RISE.

Respectfully submitted,
U.S. Environmental Protection Agency



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LIST OF ATTACHMENTS

Attachment A: INTERVENOR LIPHATECH, INC.'S STATEMENT OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF LIPHATECH'S CROSS-MOTION TO DISMISS OR FOR SUMMARY JUDGMENT, Case No. 1:09-cv-01814-ESH

Attachment B: Liphatech Press Release Announcing Mr. Carl Tanner's Election to the RISE board of Directors

Attachment C: Staff Directory of Bergeson

Attachment D: Consulting Affiliates of Bergeson and Staff Directory of ACTA

Attachment E: Members and Affiliates of CLA

Attachment F: *Sierra Club v. Fed. Emer. Mgmt. Agency*, 2007 U.S. Dist. LEXIS 84230, (S.D. Tex. Nov. 14, 2007)

Attachment G: Office of Pesticide Programs letter to RISE, dated May 15, 2009

Attachment H: *Animal Protection Institute v. Martin*, 2006 U.S. Dist. LEXIS 95724, (D. Minn. Nov 16, 2006)

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

CERTIFICATE OF SERVICE

I hereby certify that an original and a true, accurate and complete copy of *Complainant's Response in Opposition to the Motion of CropLife America and Responsible Industry for a Sound Environment for Leave to File a Non-Party Brief Opposing Complainant's Construction of FIFRA Section 12(a)(1)(B)* (Complainant's Response) were filed with the Regional Hearing Clerk, U.S. EPA, Region 5, on the date indicated below. True, accurate and complete copies of Complainant's Response were sent (via UPS overnight delivery) to:

Honorable Barbara A. Gunning
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

Counsel for CropLife America and Responsible Industry for a Sound Environment at the following address:

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Counsel for Respondent, Liphatech, Inc., at the following address:

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Dated in Chicago, Illinois, this 12th day of January, 2011.

Patricia Jeffries – Harwell
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