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

REPLY TO THE ATTENTION OF:

C-14J

VIA POUCH MAIL

October 1, 2010

Honorable Barbara A. Gunning
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

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

Dear Judge Gunning:

Enclosed, please find a copy of **COMPLAINANT'S COMBINED MOTION FOR ACCELERATED DECISION AS TO COUNTS 1 THROUGH 2,140 OF THE COMPLAINT** and **RESPONSE IN OPPOSITION TO MOTION OF RESPONDENT FOR PARTIAL ACCELERATED DECISION ON AN ISSUE OF LIABILITY IN FAVOR OF RESPONDENT WITH RESPECT TO THE ALLEGED VIOLATIONS OF § 12(A)(2)(E) OF FIFRA SET FORTH IN COUNTS 1 THROUGH 2,117 OF THE COMPLAINT** and **MEMORANDUM OF LAW IN SUPPORT**, filed on October 10, 2010, in the above referenced-matter.

Sincerely,

Gary Steinbauer
Assistant Regional Counsel

cc: Mr. Michael H. Simpson
Reinhart Boerner Van Deuren s.c
1000 North Water Street, Suite 1700
Milwaukee, WI 53202
(*via UPS*)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

COMPLAINANT'S COMBINED

MOTION FOR ACCELERATED DECISION AS TO COUNTS 1 THROUGH 2,140 OF THE COMPLAINT

AND

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

Complainant, the Director, Land and Chemicals Division, Region 5, United States Environmental Protection Agency, Region 5 (Complainant), pursuant to 40 C.F.R. §§ 22.16 and 22.20 of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (Consolidated Rules or Rules), codified at 40 C.F.R. §§ 22.16 and 22.20, hereby respectfully requests that this Court enter an order granting accelerated decision in favor of Complainant on liability for Counts 1 through 2,140 of the Complaint. In addition, Complainant respectfully requests that the Presiding Officer enter an order denying, in its entirety, the Motion of Respondent to Partial Accelerated Decision on an Issue of Liability in Favor of Respondent with Respect to the Alleged Violations of § 12(a)(2)(E) of FIFRA Set Forth in Counts 1 through 2,117 of the Complaint, which was filed on September 16, 2010. Finally, Complainant respectfully requests

that this Court hold a hearing as to any remaining issues. In support of this Combined Motion for Accelerated Decision as to Counts 1 through 2,140 of the Complaint and Response in Opposition to Motion of Respondent for Partial Accelerated Decision on an Issue of Liability in Favor of Respondent with Respect to the Alleged Violations of § 12(a)(2)(E) of FIFRA Set Forth in Counts 1 through 2, 117 of the Complaint filed on this date, Complainant relies on the Consolidated Rules, the pleadings and documents in the record, and the facts and law set forth in the attached Memorandum of Law and Declaration of Ms. Claudia Niess.

Respectfully submitted,

DATED: 10/1/2010

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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	)	
	)	Hon. Barbara A. Gunning
Respondent.	)	
	)	
	)	

MEMORANDUM OF LAW

IN SUPPORT OF COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION ON LIABILITY FOR COUNTS 1 THROUGH 2,140 OF THE COMPLAINT

AND

IN OPPOSITION TO THE MOTION OF RESPONDENT FOR PARTIAL ACCELERATED DECISION ON ISSUE OF LIABILITY IN FAVOR OF RESPONDENT WITH RESPECT TO THE ALLEGED VIOLATIONS OF § 12(a)(2)(E) OF FIFRA SET FORTH IN COUNTS 1 THROUGH 2,117 OF THE COMPLAINT

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I. Introduction

This case involves 2,140 illegal advertisements for a rodenticide known as "Rozol Pocket Gopher Bait II" ("Rozol").[1] Rozol, in addition to being designed to control pocket gophers, is designed to control black-tailed prairie dogs. Because it may cause unreasonable adverse effects on the environment without additional regulatory restrictions on its use, Rozol is registered as a restricted use pesticide under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 *et seq.* A restricted use pesticide, such as Rozol, cannot be sold to or used by anyone other than a certified applicator or a person under the direct supervision of a certified applicator, nor can it be used in any manner inconsistent with the certified applicator's certification. *Id.* § 136a(d)(1)(C).

On at least 2,140 separate occasions, Liphatech, Inc. ("Liphatech" or "Respondent"), the registrant for Rozol, caused radio and print advertisements for Rozol to be broadcasted and distributed to the public in at least six States, without including the statement "Restricted Use Pesticide" or the "terms of restriction" as required by Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), and its implementing regulations. Liphatech's after-the-fact justification for failing to include the required language in its advertisements is based on a self-serving, myopic interpretation of the law and is contrary to the plain, unambiguous language of FIFRA and its implementing regulations. Based

[1] For ease of reference, Complainant will use Rozol in this Memorandum to refer to "Rozol Pocket Gopher Bait II" (Alternative name: "Rozol Pocket Gopher Burrow Builder Formula"), EPA Registration Number 7173-244

on the undisputed facts and the clear language of FIFRA and its implementing regulations, Complainant[2] respectfully requests that this Court enter an order granting accelerated decision in its favor on liability for Counts 1 through 2,140 of the Complaint and/or denying, in its entirety, Respondent's motion for partial accelerated as to liability for Counts 1 through 2,117 of the Complaint.

II. General Statutory and Regulatory Background

"FIFRA establishes a comprehensive scheme for registering and regulating pesticides in order 'to provide for the protection of' humans and their environment." *Doe v. Veneman*, 380 F.3d 807, 816 (5th Cir. 2004) (citation omitted). FIFRA grants enforcement authority to the United States Environmental Protection Agency ("U.S. EPA"), including the authority to register pesticides and ensure that any registered pesticides comply with FIFRA's mandates. *See generally* 7 U.S.C. §§ 136a, 136j-*l.* As part of its comprehensive regulatory scheme, Section 3(a) of FIFRA, 7 U.S.C. § 136a(a), provides that no person[3] may distribute or sell to any person any pesticide that is not registered under FIFRA, and provides for procedures for proper registration of pesticides. During the registration process, pesticides may be classified as restricted use pesticides.

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[2] For ease of reference, "Complainant" is used in this document to mean and refer to the Director, Land and Chemical Division, Region 5, United States Environmental Protection Agency.

[3] The term "person" as defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s), "means any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not." In addition, the term "registrant" is defined at Section 2(y) of FIFRA, 7 U.S.C. § 136(y), as a person who has registered any pesticide pursuant to the provisions of FIFRA.

7 U.S.C. § 136a(d). Under FIFRA, pesticides are classified as restricted use when U.S. EPA's "Administrator determines that the pesticide may generally cause 'unreasonable adverse effects on the environment.'" *Venemen*, 380 F.3d at 816 (quoting 7 U.S.C. § 136a(d)).

In addition to regulating the distribution and sale of restricted use and other pesticides in Section 12(a)(1) of FIFRA, 7 U.S.C. § 136j(a)(1), Congress made certain acts related to the advertisement of restricted use pesticides unlawful. Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), states that it is unlawful for any person who is a registrant, wholesaler, dealer, retailer, or other distributor to advertise a product registered under FIFRA for restricted use without giving the classification of the product assigned to it under Section 3 of FIFRA, 7 U.S.C. § 136a. To implement Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), U.S. EPA promulgated regulations, one of which is codified at 40 C.F.R. § 152.168.

Section 152.168(a) states that the requirement that any advertisement for any product classified for restricted use contain a statement of restricted use classification. 40 C.F.R. § 152.168(a). Section 152.168(b) further provides that this requirement applies to all advertisements of the product, including, but not limited to "[b]rochures, pamphlets, circulars and similar material offered to purchasers at the point of sale or by direct mail." 40 C.F.R. § 152.168(b)(1). Additionally, this requirement applies to "[n]ewspapers, magazines, newsletters and other material in circulation or available to the public," "[b]roadcast media such as radio and television," "[t]telephone advertising," and

"[b]illboards and posters." *Id.* § 156.168(b)(2)-(5). Section 152.168(c) specifies what is required to convey the restricted use classification in both print and radio advertisements:

> (c) The requirement may be satisfied for printed material by inclusion of the statement "Restricted Use Pesticide," or the terms of restriction, prominently in the advertisement. The requirement may be satisfied with respect to broadcast or telephone advertising by inclusion in the broadcast of the spoken words "Restricted use pesticide," or a statement of the terms of restriction.

40 C.F.R. § 152.168(c).

Although "terms of restriction" is not defined in FIFRA or in 40 C.F.R. § 152.168, U.S. EPA defined "terms of restriction" for the purposes of labeling for restricted use pesticides in 40 C.F.R. § 156.10. As relevant to the instant Motion and Response, 40 C.F.R. § 156.10 provides:

> [A] summary statement of the terms of restriction imposed as a precondition to registration shall appear. If use is restricted to certified applicators, the following statement is required: **"For retail sale to and use only by Certified Applicators or persons under their direct supervision and only for those uses covered by the Certified Applicator's certification."** If, however, other regulatory restrictions are imposed, the Administrator will define the appropriate wording for the terms of restriction by regulation.

40 C.F.R. § 156.10(j)(2)(i)(B) (emphasis added).

In addition to granting U.S. EPA authority to regulate pesticides, FIFRA, in Section 24, 7 U.S.C. § 136v, grants the States limited authority to regulate pesticides. More specifically, Section 24(c) of FIFRA, 7 U.S.C. § 136v(c), states, in pertinent part, that a State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of FIFRA. Such registration shall be deemed registration under

Section 3 of FIFRA, 7 U.S.C. § 136a, but shall authorize distribution and use only within such State. *See also* 40 C.F.R. § 162.153 for U.S. EPA's regulations pertaining to the State registration procedures for pesticides, including the procedures related to situations where there is a special local need for the State registration.

III. Relevant Factual and Procedural Background

A. The Complaint and the Counts Related to Liphatech's Advertisements for Rozol

On May 14, 2010, Complainant filed a civil administrative complaint ("Complaint") against Liphatech. The Complaint alleges that Liphatech violated FIFRA by, among other things, advertising Rozol, a restricted use pesticide, without giving its classification as required by Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E).[4] The advertisements were broadcast on the radio and distributed in various print publications. Liphatech broadcasted four separate versions of its radio advertisements on at least 11 radio stations. (Complaint, Attachments A-D). As transcribed by Liphatech, one of the four versions of Liphatech's radio advertisements was as follows:

> FARMER'S [sic] AND RANCHERS, IF YOU'RE LIVING IN THE STATES OF COLORADO, KANSAS, OKLAHOMA, or TEXAS AND YOU'VE GOT A PRAIRIE DOG PROBLEM. . . . WELL YOU DON'T ANYMORE BECAUSE ROZOL POCKET GOPHER BAIT, BURROW-BUILDER FORMULA FROM LIPHATECH IS APPROVED FOR CONTROL OF BLACK-TAILED PRAIRIE DOGS. THAT'S RIGHT GUYS, ROZOL, THIS FOOD GRADE WHEAT BAIT FLAT WORKS ON PRAIRIE DOGS. THESE FURRY LITTLE BUGGERS ACTUALLY EAT THIS STUFF IN THE BURROW. 'PROVEN IN

[4] The Complaint also alleges that on at least 91 separate occasions, Respondent violated Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136j(a)(1)(B) or alternatively Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E). These 91 violations will not be addressed in this document.

> UNIVERSITY STUDIES ON OVER 10,000 BURROWS TO GET OVER 94 PERCENT CONTROL WITH A SINGLE TREATMENT! ROZOL HAS BEEN USED ON OVER HALF A MILLION ACRES WITHOUT A COMPLAINT, WITH THE EXCEPTION OF THE PRAIRIE DOGS OF COURSE. APPROVED UNDER A SPECIAL LOCAL NEEDS 24C LABEL FOR THE STATES OF COLORADO, KANSAS, OKLAHOMA, AND TEXAS.
>
> Accept no substitutes. Don't risk having to do the job over again. ***Rozol "Proven Single Application Effectiveness" for the control of Black tailed Prairie Dogs.*** ALWAYS FOLLOW AND READ LABEL DIRECTIONS. SEE YOUR LOCAL AG CHEM DEALER.

(Complaint, Attachment C; CX[5] 14a, 000347, 353 and 362) (emphasis in original). One or more of the different versions of Liphatech's radio advertisements for Rozol were broadcast to the public on 2,117 separate occasions from at least September 26, 2007 to April 26, 2008.

The print advertisements were published in stockmen and cattlemen trade journals that are circulated in at least six different States: Colorado, Kansas, Nebraska, Oklahoma, Texas, and Wyoming. The majority of the print advertisements occupied almost an entire page of the journal and included pictures of a prairie dog and a burrow, as well as certain statements. In large font, the print advertisements urged the public to "[p]ut an end to Prairie dog damage with rozol®." (See Attachment A, Declaration of Ms. Claudia Niess ("Niess Decl."), Print Advertisements Referenced in Paragraph 12 and CX 14a, EPA000286-EPA000328; *see also* CX 14a, EPA000330 (classified-type advertisement

[5] For ease of reference, Complainant uses "CX" in this document to refer to Exhibits included in Complainant's Initial Prehearing Exchange, which was filed and served on September 28, 2010.

for Rozol)[6]). In bold letters, the majority of Liphatech's print advertisements also stated as follows:

> Rozol delivers:
>
> - Outstanding control, is
> - Easy-to-Use, and has
> - Low primary poisoning potential to non-target birds and livestock.

(*Id.*) At the bottom of the print advertisements, Liphatech stated that Rozol has "Proven Single Application Effectiveness." (*Id.*) Also at the bottom of the print advertisements, but in font much smaller than any of the other statements in the print advertisements, Liphatech's print advertisements stated:

> Approved under Special Local Needs (SLN) 24(c) Prairie Dog Bait label for use in the States of Colorado, Kansas, Nebraska, Texas and Wyoming[7].
>
> In order to use this product for control of Black-Tailed Prairie Dogs, you must have a 24(c) Prairie Dog Bait label in your possession.

(*Id.*) Liphatech's print advertisements were published in at least 23 separate issues of the various stockmen and cattlemen trade journals.

B. Respondent's Answer, its Admissions, and its Motion for Partial Accelerated Decision Regarding Radio Advertisements for Rozol

On June 11, 2010, Respondent filed its Answer to the Complaint. In its Answer,

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[6] A number of Liphatech's print advertisements for Rozol that are at issue in this case were published in of the weekly issues of the *Wyoming Livestock Roundup* from February 16, 2008 through April 5, 2008. These particular advertisements are small and do not occupy the majority of an entire page of a trade journal. (*See* Niess Decl., Attachments, EPA 000330 and CX 14a, EPA00330; *see also* EPA 00328-329 (contracts for these print advertisements)).

[7] The State of Oklahoma was included in the *Oklahoma Cowman* advertisement. (CX 14a, EPA000301).

Respondent generally denied liability for its alleged violations of Section 12(a)(2)(E), 7 U.S.C. § 136j(a)(2)(E), but nonetheless made several critical admissions that are relevant to Respondent's liability for the Counts 1 through 2,140 in the Complaint. Respondent admitted that it advertised Rozol on 2,140 occasions through radio and print advertisements from September 26, 2007 to April 26, 2008.[8] More specifically, Respondent admitted that it contracted with the following radio stations for the broadcast of one or more of the different versions of its radio advertisements for Rozol:

> (1) Golden Plains AG Network, 120 broadcasts, from October 8, 2007 to December 21, 2007 (Answer ¶ 44);
>
> (2) Western Kansas Broadcast, 229 broadcasts, from January 15, 2008 to March 2, 2008 (Answer ¶ 46);
>
> (3) High Plains Radio, 1,521 broadcasts, from September 26, 2007 to December 31, 2007 (Answer ¶ 48); and
>
> (4) KGNC-AM and KXGL-FM, 247 broadcasts, from November 12, 2007 to April 26, 2008 (Answer ¶ 56).

Respondent admitted that transcripts of the four different versions of its radio advertisements for Rozol are accurately portrayed in Attachments A through D of the Complaint. (Answer ¶¶ 38-41; *see also* CX 14a, EPA000347, 348, 352, 353, 361, and 362).

In addition, Respondent admitted that it contracted with the following stockmen and cattlemen organizations to publish its print advertisements for Rozol in their trade journals:

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[8] (Answer ¶¶ 39, 44, 46, 48, 56, 59-61, 64-65, 68, 71, 74, 78, 81, 84, 87, 90, 93, 94, 97, 98, 101, 104, 107, 110-11, 114, 117, 120, 123, 126, 129, and 132; *see also* Complaint, Attachments E-H).

(1) Colorado Cattlemen's Association, *Cattle Guard*, October 2007 (Answer ¶ 61);

(2) Kansas Livestock Association, *Kansas Stockman*, October 2007 through February 2008 (Answer ¶ ¶ 65, 68, 71 and 74);

(3) Nebraska Cattlemen Publication, *Nebraska Cattleman*, October 2007 through February 2008 (Answer, ¶¶ 78, 81, 84, 87, and 90); and

(4) Oklahoma Cowman Publication,, *Oklahoma Cowman*, February 2008 (Answer ¶ 94).

(5) The Cattleman Publication, *The Cattleman*, October 2007, November 2007, March 2008, and April 2008 (Answer, ¶¶ 98, 101, 104 and 107).

(6) Wyoming Livestock Publication, *Wyoming Livestock Roundup*, February 16, 2008 through April 5, 2008 (weekly) (Answer, ¶¶ 111, 114, 117, 120, 123, 126, 129, and 132).

As it did for its radio advertisements, Respondent admitted that the print advertisements forming the basis for Counts 2,118 through 2,140 of the Complaint were collected directly from it during the investigation that preceded the filing of the Complaint. (Answer ¶ 59; *see also* Niess Decl. (referring to attached print advertisements)).

On September 16, 2010, Respondent filed two motions for partial accelerated decision, one of which is entitled Motion of Respondent for Partial Accelerated Decision on an Issue of Liability in Favor of Respondent with Respect to the Alleged Violations of § 12(a)(2)(E) of FIFRA Set Forth in Counts 1-2,117 of the Complaint (hereinafter "Respondent's Motion" or "its Motion"). In Respondent's Motion, it suggests that its radio advertisements for Rozol, transcribed above, did not violate Section 12(a)(2)(E) of FIFRA, because the radio advertisements referred the general public to the label that Respondent was required to affix to its Rozol product. *See* 40 C.F.R. § 156.10(j)(2).

IV. Standard of Review for Motions for Accelerated Decision

Under the Consolidated Rules of Practice at 40 C.F.R. Part 22, an accelerated decision is appropriate "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a). The regulation specifically provides that:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a). As the Environmental Appeals Board ("EAB" or "the Board") and U.S. EPA Administrative Law Judges have explained, the standard for deciding motions for accelerated decision is similar to the standard for granting summary judgment set forth in Rule 56 of the Federal Rules of Civil Procedure. *See, e.g., In re BWX Techs., Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 793 (EAB 1997).

Summary judgment is appropriate for the moving party when "it demonstrates that the record shows no genuine issue as to any material fact and that it is entitled to judgment as a matter of law." *Ass'n Benefit Servs. v. Caremark RX*, 493 F.3d 841, 849 (7th Cir. 2007) (citations omitted). Although courts must resolve all evidentiary ambiguities and "must take the facts and all reasonable inferences from those facts in the light most favorable to the non-moving party," *id.*, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported

motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986). The non-moving party "may not avoid summary judgment by resting on the allegations of its pleadings; it must come forward with specific facts showing that there is a genuine issue for trial." *Ass'n Benefit Servs.*, 493 F.3d at 849.

V. Complainant is Entitled to Accelerated Decision on Liability for Counts 1 through 2,140 of the Complaint

Complainant's instant motion for accelerated decision deals with Respondent's liability for the Counts 1 through 2,140. For each of the first 2,140 Counts in the Complaint alleging that Respondent's radio and print advertisements for Rozol violated Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), the Complainant must demonstrate that there is no genuine issue of material fact as to the following: (1) Liphatech is a "person," as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s); (2) Liphatech is a "registrant" as defined by Section 2(y) of FIFRA, 7 U.S.C. § 136(y); (3) Rozol is a product registered under Section 3 of FIFRA, 7 U.S.C. § 136a; (4) Rozol is registered under Section 3 of FIFRA, 7 U.S.C. § 136a, as a restricted use product; (5) Liphatech advertised Rozol on 2,140 separate occasions; and (6) on each of these 2,140 separate occasions, the radio and print advertisements did not give the restricted use classification for Rozol.

As explained below, Liphatech's unequivocal admissions establish the first five elements of Complainant's claims related to Liphatech's advertisements for Rozol. With respect to the sixth element, Complainant can demonstrate the requirement in Section 12(a)(2)(E), 7 U.S.C. 136j(a)(2)(E), and the meaning of "terms of restrictions" as set

forth in 40 C.F.R. § 152.168 are clear when viewed in tandem and compared with other provisions of FIFRA and the FIFRA regulations related to labeling requirements for registered pesticides, namely 40 C.F.R. § 156.10. Liphatech's contentions to the contrary are without merit.

The only real question before this Honorable Court, is whether a registrant can satisfy the statutory requirement under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), to include the restricted use classification of its product in advertisements by referring the recipient to the product label at the time of purchase. This proposition is advanced by Respondent in its Motion. As described in detail below, it is incorrect for at least two reasons: (1) it is contrary to FIFRA, its implementing regulations, various Federal Register notices, and documents made available to the public by U.S. EPA; and (2) it defeats the purpose of Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), because Congress, in requiring that registrants include the restricted use classification in any advertisements for restricted use pesticides, sought to minimize unreasonable adverse effects to the user and the environment by allowing U.S. EPA to take enforcement actions before, not after, restricted use products enter the marketplace.

A. There is No Genuine Issue of Material Fact Regarding the First Five Elements of Counts 1 through 2,140 of the Complaint

The first five elements needed to establish liability for Liphatech's violations of Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), as alleged in Counts 1 through 2,140 of the Complaint, are easily satisfied. In its Answer, Liphatech admitted that it is a corporation doing business in the State of Wisconsin. (Answer ¶ 3). Furthermore,

Liphatech admitted that at all times relevant to the Complaint, it was a "person" as that term is defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s). (*Id.* ¶ 22). Liphatech also admitted that all times relevant to the Complaint, it was a "registrant" as that term is defined in Section 2(y) of FIFRA, 7 U.S.C. § 136(y). (*Id.* ¶ 24). More specifically, Liphatech admitted that during calendar years 2007 through 2010, it was the registrant for Rozol. (*Id.* ¶¶ 25, 258). In addition, Liphatech admitted that Rozol is a product registered under Section 3 of FIFRA, 7 U.S.C. § 136a. (*Id.* ¶¶ 25, 135, 258). Similarly, Liphatech admitted that, during calendar years 2007 and 2008, Rozol was also registered under the authority of Section 24(c) of FIFRA, 7 U.S.C. § 136v(c), to control black-tailed prairie dogs under "Special Local Needs" (SLN) supplemental labels for the states of Kansas, Nebraska, Wyoming, Colorado, Texas and Oklahoma. (*Id.* ¶ 30). Under Section 24(c) of FIFRA, 7 U.S.C. § 136v(c), a state registration for additional uses of a federally registered pesticide formulated for distribution and use within that State to meet a special local need is deemed a registration under Section 3 of FIFRA, 7 U.S.C. § 136a. Thus, Liphatech's admissions establish that it was the registrant of Rozol.

In addition, Liphatech has admitted that at the time of registration of Rozol and all times relevant to the Complaint, Rozol was classified as a restricted use product under Section 3(d) of FIFRA, 7 U.S.C. § 136a(d). (Answer ¶ 26). Liphatech also admitted that it advertised Rozol, on 2,140 separate occasions, through radio advertisements and print advertisements from September 26, 2007 through April 26, 2008. (*Id.* ¶¶ 39, 44, 46, 48, 56, 59 60, 61, 64, 65, 68, 71, 74, 77, 78, 81, 84, 87, 90, 93, 94, 97, 98, 101, 104, 107, 110,

111, 114, 117, 120, 123, 126, 129, 132; *see also* Complaint, Attachments E- H).

In sum, and based on the unequivocal admissions by Liphatech in its Answer, Complainant has demonstrated that there is no genuine issue of material fact as to the first five elements that it must prove for Liphatech to be held liable for Counts 1 through 2,140 of the Complaint.

B. There is No Genuine Issue of Material Fact Regarding the Sixth Element of Counts 1 through 2,140 of the Complaint

The only question that remains is whether Liphatech included the restricted use classification of Rozol in its radio and print advertisements as required by Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E). This inquiry turns on the answers to two questions: (1) how could Liphatech have satisfied the requirement to give the restricted use classification of Rozol in its radio and print advertisements; and (2) did Liphatech satisfy this requirement in its radio and print advertisements for Rozol?

1. *How could Liphatech have satisfied the requirement to give the restricted use classification of Rozol in its radio and print advertisements?*

As with any question of statutory and regulatory interpretation, this Court should begin by analyzing the language of the relevant provisions of FIFRA and its implementing regulations. "The Supreme Court has repeatedly emphasized the importance of the plain meaning rule, stating that if the language of a statute or regulation has a plain and ordinary meaning, courts need look no further and should apply the regulation as it is written." *Textron Inc. v. Comm'r*, 336 F.3d 26, 31 (1st Cir. 2003) (citing *Gitlitz v. Comm'r*, 531 U.S. 206, 220 (2001); *Comm'r v. Soliman*, 506 U.S. 168,

174 (1993); *United States v. Ron Pair Enters.*, 489 U.S. 235, 241-42 (1989)). "All words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words meaningless, redundant or superfluous." *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751-52 (1st Cir. 1985). There is no reason to believe the same is not true for purposes of interpreting regulations.

A simple review of FIFRA demonstrates how Liphatech's advertisements could have satisfied Section 12(a)(2)(E), 7 U.S.C. § 136j(a)(2)(E). Section 3(d) of FIFRA, 7 U.S.C. § 136a(d), provides that pesticides may be classified as general use, restricted use or both. Section 3(d)(1)(C) of FIFRA describes when U.S. EPA must classify a pesticide as restricted use, and that such pesticides must be applied by or under the supervision of certified applicators:

> (C) If the Administrator determines that the pesticide, when applied in accordance with its directions for use, warnings and cautions and for the uses for which it is registered, or for one or more of such uses, or in accordance with a widespread and commonly recognized practice, may generally cause, without additional regulatory restrictions, unreasonable adverse effects on the environment, including injury to the applicator, the Administrator shall classify the pesticide, or the particular use or uses to which the determination applies, for restricted use:
>
> . . .
>
> > (ii) If the Administrator classifies a pesticide, or one or more uses of such pesticide, for restricted use because of a determination that its use without additional regulatory restriction may cause unreasonable adverse effects on the environment, the pesticide shall be applied for any use to which the determination applies only by or under the direct supervision of a certified applicator, or subject to such other restrictions as the Administrator may provide by regulation.

7 U.S.C. § 136a(d)(1)(C)(ii) (emphasis added).

Section 3(d)(1)(C)(ii) explains when the Administrator will classify a pesticide for restricted use due to possible unreasonable adverse effects on the environment. Therefore, when Section 3(d)(1)(C) is read in conjunction with what is prohibited under Section 12(a)(2)(E), it is clear what a registrant must do when advertising a restricted use product: any registrant that advertises a restricted use product must give the classification of the product assigned to it under Section 3 of FIFRA, 7 U.S.C. § 136a.

While the statute requires a registrant to give the classification of its restricted use product in its advertisements, U.S. EPA's regulations for Advertising Restricted Use Pesticides at 40 C.F.R. § 152.168 describe how to satisfy this requirement. For both radio and print advertisements, Section 152.168 gives registrants two options of language that they may use in their advertisements to avoid running afoul of Section 12(a)(2)(E). Section 152.168(a) states "that any product classified for restricted use shall not be advertised unless the advertisement contains a statement of its restricted use classification." 40 C.F.R. § 152.168(a). Furthermore, subsection (c) of section 152.168 states that "[t]he requirement may be satisfied for printed material by inclusion of the statement 'Restricted Use Pesticide' ***or*** terms of restriction, prominently in the advertisement. The requirement may be satisfied with respect to broadcast or telephone advertising by inclusion in the broadcast of the spoken works 'Restricted use pesticide' ***or*** a statement of the terms of restrictions." 40 C.F.R. § 152.168(c) (emphasis added). Thus, Section 152.168 provides clear examples of the language that must be included in

radio and print advertisements for restricted use products.

Further, 40 C.F.R. § 156.10(j)(2) floods additional light on this issue. 40 C.F.R. § 156.10(j)(2), states:

> (2) Restricted Use Classification. Pesticide products bearing direction for use(s) classified restricted shall bear statements of restricted use classification on the front panel as described below:
>
> (i) Front panel statement of restricted use classification.
>
> (A) At the top of the front panel of the label, set in type of the same minimum sizes as required for human hazard signal words (see table in paragraph (h)(1)(iv) of this section), and appearing with sufficient prominence relative to other text and graphic material on the front panel to make it unlikely to be overlooked under customary conditions of purchase and use, the statement 'Restricted Use Pesticide' shall appear.
>
> (B) Directly below this statement on the front panel, a summary statement of the terms of restriction imposed as a precondition to registration shall appear. If use is restricted to certified applicators, the following statement is required: **"For retail sale to and use only by Certified Applicators or persons under their direct supervision and only for those uses covered by the Certified Applicator's certification."** If, however, other regulatory restrictions are imposed, the Administrator will define the appropriate wording for the terms of restriction by regulation. (Emphasis added)[9].

As Respondent points out when comparing 40 C.F.R. § 152.168 to 40 C.F.R. § 156.10(j)(2), "[t]here is no reason to presume that EPA intended the phrase 'terms of restriction' to have a meaning under this regulation different than the meaning it intended for the same phrase in the labeling regulation." (Respondent's Motion at 7). Therefore, a regulated entity can look to 40 C.F.R. § 156.10(j)(2), should it have any doubt as to what "terms of restrictions" means for the purpose of 40 C.F.R. § 152.168. FIFRA and its implementing regulations notify the regulated community as to how to comply with the advertising requirements of 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E).

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[9] The Administrator has not imposed such a regulation in the case of Rozol.

In addition to the clear guidance provided in FIFRA and its implementing regulations, Federal Register notices and documents made available to the public over the years by U.S. EPA, including the Label Review Manual (LRM) and Pesticide Regulation Notice (PR[10]Notice) 93-1, (*see* CX 86), ensure that the regulated community understands what is required of it under the under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. 136j(a)(2)(E), and under the label or labeling requirements for restricted use products. Furthermore, in addition to the plethora of available public materials that Liphatech could have relied on to understand what is required under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), Liphatech could have also relied on correspondence from U.S. EPA to understand its obligations when advertising Rozol (*see* CX 1a).

On September 26, 1984, U.S. EPA proposed to revise and expand its regulations for the labeling of pesticide products and devices under FIFRA. (CX 83, 49 Fed. Reg. 37960 (September 26, 1984)). With respect to products classified for restricted use, the U.S. EPA proposed the following language: "[a] Products classified for restricted use... [2] If the phrase "RESTRICTED USE PESTICIDE" is required, directly below it must appear a statement of the terms of the restricted use. If the use is limited to certified applicators, the statement shall read, 'For use only by a certified applicator for uses authorized by his certification, or by persons under his direct supervision.' [3] Blocking the restricted use statements within a solid line is suggested as a means of emphasis." 49

[10] In 1993, the "PR" in PR Notice stood for "Pesticide Regulation." Today the "PR" in PR Notice stands for "Pesticide Registration." Both essentially serve the same purpose, which is to provide notice to the public.

Fed. Reg. 37960, 37985 (Sept. 26, 1984); *see also* 49 Fed. Reg. 37916, 37927 (Sept. 26, 1984) (discussing the advertisement of restricted use products).

On May 4, 1988, U.S. EPA finalized the regulations proposed in 49 Fed. Reg. 37960 (Sept. 26, 1984) and promulgated new sections for Part 40 of the Code of Federal Regulations. A noteworthy inclusion in this federal notice is a discussion of 40 C.F.R. § 152.160, which helped the regulated community understand types of classifications for pesticides and the kinds of restrictions that may be imposed. Specifically, it states "the Agency may restrict a product or its uses to use by a certified applicator, or by or under the direct supervision of a certified applicator, as described in FIFRA sec 3(d)(1)(C)." 53 Fed. Reg. 15952, 15985 (May 14, 1988). The publication of these Federal Register notices constituted notice to Liphatech. *In re Morton L. Friedman & Schmitt Constr. Co.*, 11 E.A.D. 302, 323 n. 27 (EAB 2004) (citing *Yakus v. United States*, 321 U.S. 414, 435 (1944) and *Fed. Crop Ins. V. Merrill*, 332 U.S. 380, 384-85 (1947)).

Chapter 6 of the LRM also touches upon this issue. (CX 87). Specifically, the LRM discusses labeling requirements for restricted use products and wording for restricted use terms of restriction. Under the heading "Wording of the RUP [restricted use pesticides] Terms of Restriction," the LRM states "the label must bear the general summary statement of the terms of restriction at the top of the front panel. *40 CFR 156.10(j)(2)(i)(B)* ... If use is restricted to certified applicators, the general RUP statement listed at *40 CFR 156.10(j)(2)(i)(B)* must appear as follows: 'For retail sale to and use only by Certified Applicators or persons under their direct supervision and only

for those uses covered by the Certified Applicator's certification'." (CX 87, LRM at 6-3 to 6-4).

In 1993, the U.S. EPA also issued PR Notice 93-1 (CX 86) "to explain EPA's policy on the content and placement of the statement required on the front panel of labeling of pesticides classified for restricted use (RU)." (CX 86, PR Notice 93-1 at 1). The notice informs the regulated public that the restricted use statement "should be followed by the reason for the restricted use classification (briefly stated). In addition, the terms of the restricted use, for example, the certified applicator's statement as required by 40 CFR 156.10(j)(2)(i)(B) or other terms imposed by EPA shall appear below the reason for restricted use classification. All of these statements should be enclosed in a box as shown below. No other statements other than these should be included in the box." *Id.* at 2 (emphasis added).

Through its registration process, U.S. EPA decided that certain products could be registered only if restrictions were imposed for the product. U.S. EPA regulations require that labels for such restricted use products include both the words "Restricted Use Pesticide" ***and*** the terms of restriction, as a precondition to registration. 40 C.F.R. § 156.10(j)(2). Advertisements for restricted use products are treated similarly under FIFRA's regulations, but the requirements for such advertisements are not as strict. A registrant choosing to advertise its restricted use pesticide has the option of including either the words "Restricted Use Pesticide" or the "terms of restriction." 40 C.F.R. § 152.168(c). Should the registrant of a restricted use pesticide decide to advertise its

product by utilizing the "terms of restriction" option in 40 C.F.R. § 152.168, FIFRA and its regulations, along with federal register notices and documents made available to the public, such as the LRM and PR Notice 93-1, clearly communicate what is meant by "terms of restriction." Liphatech cannot contend otherwise.

Finally, if there remained any doubt as to what was required of Liphatech when advertising its restricted use product, Rozol, Liphatech could have consulted a January 12, 2005 letter that it received from U.S. EPA regarding the registration of Rozol. (CX 1a). Under the heading of "Labeling," the letter informed Liphatech of specific labeling requirements as follows: "... you need to add the standard 'Restricted Use Pesticide' text for this type of use as follows:

> RESTRICED USE PESTICIDE
> Due to Hazard to Non-Target Organisms
>
> For retail sale to, and use only by, Certified Applicators or persons under their direct supervision and only for those uses covered by the Certified Applicator's Certification.

(CX 1a at 2).[11] Liphatech, however, decided to ignore this information when it prepared its advertisements for Rozol.

Liphatech's admissions throughout this proceeding demonstrate that it knew (or should have known) what was required under FIFIRA for the advertisement of Rozol.

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[11] Of course, as a final resort, Liphatech could have easily sought clarification on the issue directly from U.S. EPA, by contacting either Mr. John Hebert who is the product manager for Rozol or Mr. Daniel Peacock, who was the signatory to the January 12, 2005 letter.

(Respondent's Motion at 8). In its Motion, Liphatech concedes the label for Rozol stated that it is a Restricted Use Pesticide ***and*** stated that Rozol could only be sold and used by Certified Applicators or persons under their direct supervision and only for those uses covered by the Certified Applicator's certification. In addition, Liphatech admitted in its Answer, that "[a]s a result of its classification as a restricted use pesticide, Rozol can only be sold to and be used by Certified Applicators or persons under the direct supervision of Certified Applicators and only for uses covered by the Certified Applicator's certification." (Answer ¶ 28; *see also* Respondent's Motion at 2). Liphatech's admissions are nearly identical to the "terms of restriction" as set forth in 40 C.F.R. § 156.10(j)(2). Liphatech undoubtedly understood (or should have understood) that these were the terms of restriction that it could have used when it advertised its restricted use product, Rozol.

Based on the above discussion, Liphatech could have satisfied the requirement to include the use classification of Rozol in its radio and print advertisements in one of two ways: (1) by simply including the words "restricted use pesticide" in the radio and print advertisements; or (2) by including the language "For retail sale to and use only by Certified Applicators or persons under their direct supervision and only for those users covered by the Certified Applicator's Certification." This statement was easily accessible to Liphatech on its own Rozol label and its associated supplemental labels. (CX 1 through 7, EPA000003, 24, 32, 34, 36, 42, 46, 50, 52 and 57).

> 2. *Did Liphatech satisfy the requirement to include the restricted use classification in it radio and print advertisements for Rozol?*

The final question that remains is whether Liphatech satisfied the requirement to include the use classification in its radio and print advertisements for Rozol, as required by Section 12(a)(2)(E) of FIFRA.

a. Were the words "restricted use pesticide" included in Liphatech's radio or print advertisements for Rozol?

In its Answer, Liphatech admitted that the radio advertisements that are the subject of Counts 1-2,117 included four different versions of the advertisement to be broadcast regarding Rozol. (Answer ¶¶ 40, 41; *see also* Complaint, Attachments A-D and CX 14a, EPA000347, 348, 352, 353, 361 and 362). Liphatech further admitted that all four versions of the radio advertisements for Rozol did not include the words "restricted use pesticide." (*Id.*¶ 42). Liphatech also admitted that all the print advertisements that are the subject of Counts 2,118 through 2,140 did not include the words "restricted use pesticide." (*Id.* ¶¶ 62, 66, 69, 72, 75, 79, 82, 85, 88, 91, 95, 99, 102, 105, 108, 112, 115, 118, 121, 124, 127, 130 and 133).

b. Was a statement of the terms of restriction included in Liphatech's radio or print advertisements for Rozol?

Because it did not include or say the words "Restricted Use Pesticide" in its print and radio advertisements, Liphatech was, at the very least, required to include or say the above-referenced "terms of restriction," as required by Section 12(a)(2)(E) and 40 C.F.R. § 152.168. Liphatech, however, chose not to include the required "terms of restriction" in 2,140 of its radio and print advertisements for Rozol. As explained below, Complainant has established the sixth element of the violations alleged in Counts 1

through 2,140 of the Complaint.

There is no genuine issue of material fact as to the actual content of the radio and print advertisements regarding Rozol. Both parties agree that the radio advertisements in question can be found in the Complaint, Attachments A through D. (Answer ¶¶ 38, 39, 40, 41; CX 14a, EPA000347, 348, 352, 353, 361, and 362). Indeed, on page 2 of Respondent's Motion, it acknowledges that "there is no genuine issue of material fact concerning the actual content of the advertisements." (Respondent's Motion at 2). Additionally, the actual print advertisements as they appeared in the specific publications alleged in Counts 2,118 through 2,140, were collected directly from Liphatech. (Answer ¶ 59; CX 14a, EPA 00285-293, 295-301, 303-306, and 328-330). Thus, there can be no dispute as to the actual content of each of these print advertisements. The only question is if the print advertisements included the terms of restriction for Rozol.

All four versions of the radio advertisements for Rozol that were broadcast did not contain language that even resembled the terms of restriction for Rozol, which could have been as follows: "For retail sale to and use only by Certified Applicators or persons under their direct supervision and only for those users covered by the Certified Applicator's Certification." Additionally, all the print advertisements that are the subject of Counts 2,118 through 2,140 did not contain any language that resembled the terms of restriction for Rozol, which had Liphatech made any attempt to include the language, it would have stated as follows: "For retail sale to and use only by Certified Applicators or persons under their direct supervision and only for those users covered by the Certified

Applicator's Certification." (*See* Complaint, Attachments A- D; CX 14a, EPA 00286-288, 290-93, 295-99, 301, 303, 304-06, and 330, all of which are the subject of, and attached to, the Niess Decl.).

In its Motion, for the radio advertisements, Respondent suggests that the following statement qualifies as a term of restriction: "Approved under a special local needs 24C label for the states of ... ALWAYS FOLLOW AND READ LABEL DIRECTIONS. SEE YOUR LOCAL AG CHEM DEALER." (Answer ¶¶ 43, 45, 47, 49, 50-55, 57, 58; *see also* Respondent's Motion at 4). Clearly, this language is not a term of restriction. "Always follow and read label directions" is an instruction not a restriction. Nor is it unique to restricted use pesticides as contemplated by Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), because it is applicable to all pesticides despite classification.

For print advertisements, Respondent asserts that the following statement qualifies as the terms of restriction: "in order to use this product to control Black Tailed Prairie Dogs, you must have a 24(c) Prairie Dog Bait label in your possession." (Answer ¶¶ 63, 67, 70, 73, 76, 80, 83, 86, 89, 92, 96, 100, 103, 106, 109, 113, 116, 119 122, 125, 128, 131 and 134). This statement does not inform the user that the product is restricted for use by a certified applicator or someone under the direct supervision of the certified applicator. In fact, there are SLN products on the market that are not classified as restricted use pesticides. Rather, the statement conveys an administrative instruction that must be met when using an SLN product. The statement Liphatech included in small font

in its print advertisements does not mitigate the hazards of the Rozol product like a term of restriction. Furthermore, even if the statement Liphatech contends constituted the "terms of restriction" in its print advertisements was substantively proper (it was not), it was not displayed "prominently" as required by 40 C.F.R. § 152.168(c).

Based on the discussion above, the statements "Approved under a special local needs 24C label for the states of ... ALWAYS FOLLOW AND READ LABEL DIRECTIONS. SEE YOUR LOCAL AG CHEM DEALER" and "in order to use this product to control Black Tailed Prairie Dogs, you must have a 24(c) Prairie Dog Bait label in your possession" are not the terms of restriction for Rozol, nor do they even resemble what FIFRA and its implementing regulations require for the advertisement of restricted use pesticides. Therefore, the undisputed facts demonstrate that Respondent failed to include a statement of the terms of restriction for the product as required by Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E).

VI. Respondent's Defenses Must Fail

A. If Adopted, Respondent's Argument Would Defeat the Purpose of Section 12(a)(2)(E) of FIFRA

Respondent's contention that the statement "Approved under a special local needs 24C label for the states of ... ALWAYS FOLLOW AND READ LABEL DIRECTIONS. SEE YOUR LOCAL AG CHEM DEALER" qualifies as a term of restriction, is not only contrary to the plain language of Section 12(a)(2)(E) of FIFRA and its implementing regulations, as well as the numerous documents U.S. EPA made available to the public, it is contrary to the purpose of Section 12(a)(2)(E). *United States v. Lachman*, 387 F.3d 42,

51 (1st Cir. 2004) (explaining that courts must adopt the definition most consistent with the statute's purpose and "must construe a regulation in light of the congressional objectives of its underlying statutes"). The purpose of Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), is to require notification of restricted uses in the advertisements themselves, not merely on the label of a restricted use pesticide.

In its Motion, however, Liphatech argues that its radio advertisements "incorporated the 'terms of restriction' of Rozol, as required under 40 C.F.R. § 152.168, by directing the public to consult the product label." (Respondent's Motion at 6). In making this argument, Liphatech conflates the language requirements for actual labels attached to the restricted use product, with the language requirements for its advertisements of its restricted use product. The two requirements are not interchangeable, they are separate, and there is no exemption in Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), that allows a registrant to incorporate the language of its product label by reference in its advertisements by simply referring the user to the actual label of the product at the time of purchase. Liphatech's suggested interpretation is counterintuitive and would create a gaping loophole rendering Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), "superfluous, void or insignificant." *Square D Co. & Subs. v. Comm'r*, 438 F.3d 739, 745 (7th Cir. 2006); *see also Holloway v. United States*, 526 U.S. 1, 9 (1999) (rejecting a defendant's interpretation of a statute because it "would exclude from the coverage of the statute most of the conduct that Congress obviously intended to prohibit").

Section 3(d) of FIFRA, 7 U.S.C. § 136a(d), is designed to protect the public from pesticides that may generally cause harm to the environment, without additional regulatory restrictions. Due to the highly toxic nature of some pesticides, U.S. EPA classifies these pesticides for restricted use only. In many of these instances, as was the case with Rozol, U.S. EPA requires that the use of restricted use pesticides be limited to professionals that know how to safely use the products. In theory, this limitation increases the likelihood of proper use of the product and mitigates some of the potential hazards identified by U.S. EPA. When it enacted Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), Congress had the consumer and general public in mind. It made it clear that it is critical that advertisements of restricted use products clearly inform the consumer of the products' restricted use classification or terms of restrictions. It is not adequate for a registrant to simply refer the consumer to the product label in its advertisement.

Congress' focus on the advertisement of restricted use products in Section 12(a)(2)(E) was purposeful. Congress, by mandating that registrants include their product's restricted use classification in advertisements, provided for a stricter standard for restricted use products than it did for general use or unclassified pesticides. A violation under section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), does not even require a distribution or sale of the violative restricted use product. Failure to advertise as required by Section 12(a)(2)(E) is itself a violation under FIFRA. Only one conclusion can be drawn from Congress' focus on advertisements of restricted use pesticides:

Congress sought to ensure the safety of the consumer (who is often also the applicator) and the environment by allowing U.S. EPA to take enforcement actions before such restricted use products make it into the stream of commerce. In other words, Section 12(a)(2)(E) is Congress' express recognition that the risk of waiting until the violative restricted use products enter into the stream of commerce, given the high toxicity levels of products such as Rozol, substantially outweighs the relatively minor burden of including specific language in advertisements for such products.

B. Respondent's Fair Notice Defense is Without Merit

Respondent argues that even if the Court decides that Liphatech violated the requirements of Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), no penalty should be assessed because the U.S. EPA failed to provide fair notice of its interpretation of what is meant by "terms of restriction" in 40 C.F.R. § 152.168. Because fair notice is an affirmative defense, Liphatech bears the burden of establishing lack of fair notice in this case. *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 886 (S.D. Ohio 2003).

The fair notice doctrine provides that "[a] party may not be penalized for violating a regulation when that party has not received fair and adequate notice of what the regulation requires." *Howmet Corp. v. U.S. Envtl. Prot. Agency*, 656 F. Supp. 2d 167, 173 (D.D.C. 2009) (citing *Gen. Elec. Co. v. U.S. Envtl. Prot. Agency*, 53 F.3d 1324, 1329 (D.C. Cir. 1995)). In determining whether Liphatech received fair notice of Complainant's interpretation of 40 C.F.R. § 152.168, this Court "must ask whether [Liphatech] received, or should have received, notice of the Agency's interpretation in

the most obvious way of all: by reading the regulations." *Gen. Elec. Co. v. U.S. Envtl.*, 53 F.3d at 1329. "If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation." *Id.*

Courts look to first to the language of the regulation itself in deciding whether a regulatory party received fair notice. The plain language of the regulation alone may suffice to show fair notice. *See, e.g., United States v. S. In. Gas and Elec. Co.*, 245 F. Supp. 2d 994, 1011 (S. Ind. 2003)(citing cases). As recognized by several courts, the fair notice doctrine requires only a "fair and reasonable warning of even imprecisely drafted regulations." *Tex. E. Prods. Pipeline Co. v. Occupational Health & Safety Rev. Comm'n*, 827 F.2d 46, 50 (7th Cir. 1987). In addition to the language of the regulation itself, courts also recognize that public statements by the agency are also relevant to the fair notice determination. *Gen. Elec. Co.*, 53 F.3d at 1329. Finally, often critical to the fair notice determination is whether the regulated party itself made inquiry about the meaning of the regulation at issue. *Tex. E. Prods. Pipeline*, 827 F.2d at 50. As the EAB has "noted a member of the regulated community, when confused by a regulatory text and confronted by a choice between alternative courses of action, assumes a calculated risk by failing to inquire about the meaning of the regulations at issue." *In re Morton L. Friedman & Schmitt Constr. Co.*, 11 E.A.D. 302, 324 (EAB 2004) (citing cases).

Liphatech's defense of lack of fair notice of the meaning "terms of restriction" in

40 C.F.R. § 152.168 must fail. First, as explained above, the meaning of "terms of restriction" in 40 C.F.R. § 152.168 is and was clear. A simple reference to a counterpart regulation dealing with labeling requirements, 40 C.F.R. § 156.10, explains in no uncertain terms the meaning of "terms of restriction. *Id.* § 156.10(j)(2)(i)(B). Liphatech concedes that it was well aware of the labeling regulation and the fact that it defined "terms of restriction." (Respondent's Motion at 8). Furthermore, the Federal Register notices, LRM and PR Notice 93-1 provided additional notice to Liphatech regarding the meaning of "terms of restriction." Finally, there is nothing in the record that even remotely suggests that Liphatech even attempted to inquire as to the meaning of "terms of restriction" before it broadcasted and distributed its advertisements for Rozol.

The fair notice "doctrine does not save parties who take calculated risks." *United States v. Cinergy*, 495 F. Supp. 2d 892, 905 (S.D. Ind. 2003) (citing *United States v. Hoeschst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997)); *see also Maynard v. Cartwright*, 486 U.S. 356, 361 (1988) ("A claim of lack of notice 'may be overcome in any specific case where reasonable persons would know their conduct is at risk.") Liphatech did exactly that - it chose not to include the "terms of restriction" or the words "Restricted Use Pesticide" when it distributed and broadcasted 2,140 advertisements for Rozol. For all of the foregoing reasons, Liphatech's fair notice defense is without merit.

VII. Conclusion

Based on the current pleadings, admissions, and declarations on file, there are no genuine issues of any material fact as to Respondent's liability for the alleged violations

in Counts 1 through 2,140. The Complainant is therefore entitled to judgment as a matter of law as to liability for Counts 1 through 2,140 alleged in the Complaint. Complainant respectfully requests that this Court (1) GRANT Complainant's Motion For Partial Accelerated Decision On Liability For Counts 1 Through 2,140 (*See* Attachment B for Proposed Findings of Fact and Conclusions of Law), (2) DENY the Motion of Respondent for Partial Accelerated Decision on an Issue of Liability in Favor of Respondent with Respect to the Alleged Violations of § 12(a)(2)(E) of FIFRA Set Forth in Counts 1-2,117 of the Complaint in its entirety, and (3) hold a hearing as to any remaining issues.

Respectfully submitted,

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