

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)	DOCKET NO: FIFRA-03-2015-0248
)	
FMC Corporation)	COMPLAINANT’S MOTION FOR
1735 Market Street)	PARTIAL ACCELERATED DECISION
Philadelphia, PA 19103)	AS TO LIABILITY FOR VIOLATIONS
)	1 THROUGH 12,273 OF THE COMPLAINT
Respondent)	

**COMPLAINANT’S MOTION FOR PARTIAL ACCELERATED DECISION
AS TO LIABILITY FOR VIOLATIONS 1 THROUGH 12,273 OF THE COMPLAINT**

Complainant, the Director of the Land and Chemicals Division, United States Environmental Protection Agency, Region III (“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 of Practice”) and in accordance with Administrative Law Judge Christine Coughlin’s May 6, 2016 Prehearing Order (“Prehearing Order”), files this Motion for Partial Accelerated Decision as to Liability seeking the issuance of an Order granting accelerated decision in favor of Complainant as to liability for the 12,273 violations of Section 12(a)(2)(E) of the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA” or “the Act”), 7 U.S.C. § 136j(a)(2)(E), alleged in the Administrative Complaint and Notice of Opportunity for Hearing (“Complaint”) filed in the above-captioned matter.

As set forth in Complainant’s accompanying Memorandum of Law filed in support of, and concurrently with, this Motion, which relies on the pleadings and documents in the record, the facts and law set forth therein and the Declaration of Christine Convery for its support, there is no genuine issue of material fact and Complainant is entitled to judgement as a matter of law

as to FMC Corporation's ("FMC" or "Respondent") liability for violations 1 through 12,273 of the Complaint.

WHEREFORE, for the foregoing reasons, Complainant requests that this Court issue an Order granting Complainant's Motion for Partial Acceleration Decision as to Liability for violations 1 through 12,273 of the Complaint, in full, or in part.

As directed by the Prehearing Order, Complainant contacted Respondent's counsel to determine Respondent's position as to the granting of the relief sought in this Motion, and hereby states that Respondent OBJECTS to the granting of such relief.

Respectfully submitted,

AUG 22 2016

Date



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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:

FMC Corporation
1735 Market Street
Philadelphia, PA 19103

Respondent

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DOCKET NO: FIFRA-03-2015-0248

**MEMORANDUM OF LAW IN SUPPORT OF COMPLAINANT'S MOTION FOR
PARTIAL ACCELERATED DECISION AS TO LIABILITY
FOR VIOLATIONS 1 THROUGH 12,273 OF THE COMPLAINT**

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I. Introduction

Complainant hereby submits this Memorandum of Law in support of its Motion for Partial Accelerated Decision as to Liability for Violations 1 through 12,273 of the Complaint. In this civil administrative enforcement action brought under FIFRA, Complainant seeks an administrative civil penalty for Respondent's illegal advertisements and distributions or sales of an insecticide originally registered as *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545. *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 is an agricultural insecticide registered for use on alfalfa, corn, cotton, sorghum, soybeans, wheat, sunflowers and other crops. At the time of its registration on January 21, 2011, the United States Environmental Protection Agency ("EPA") determined that *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 could generally cause, without additional regulatory restrictions, unreasonable adverse effects on the environment, including injury to the applicator. Accordingly, EPA classified *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 as a restricted use pesticide ("RUP") under Section 3(d)(1)(C) of FIFRA, 7 U.S.C. § 136a(d)(1)(C).

The Complaint filed in this matter alleges *inter alia*¹ that Respondent, the registrant for *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545, advertised *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 on at least 12,273 separate occasions without including the statement "Restricted Use Pesticide" or its "terms of restriction", constituting 12,273 unlawful acts under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E). Based on the pleadings and documents in the record, the facts and law set forth herein, and the Declaration of Christine Convery attached hereto², Complainant seeks an Order granting partial accelerated decision in its favor as to

¹ The Complaint also alleges that Respondent distributed or sold *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 as *Stallion Insecticide*, an alternate brand name that EPA considered to be false or misleading and that was not approved, on at least 106 separate occasions, constituting 106 unlawful acts under Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E). Complainant's Motion does not address these alleged violations.

² See Attachment 1.

liability for the 12,273 violations of Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), alleged in the Complaint.

II. Statutory, Regulatory and Policy Background

FIFRA regulates the manufacture, sale, distribution, and use of pesticides through a national product registration process. Sections 1-35 of FIFRA, 7 U.S.C §§ 136-136y. Section 3(a) of FIFRA, 7 U.S.C. § 136a(a), provides that no person in any State may distribute or sell to any person any pesticide that is not registered under FIFRA. Section 3(d)(1)(C) of FIFRA, 7 U.S.C § 136a(d)(1)(C), provides that if it is determined that a 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, EPA shall classify the pesticide, or the particular uses to which the determination applies, for restricted use. Generally, RUPs are limited to retail sale to and use only by certified applicators³, or persons under their direct supervision and only for those uses covered by the certified applicator's certification. *See* Section 3(d)(1)(C) of FIFRA, 7 U.S.C. § 136a(d)(1)(C), and 40 C.F.R. § 156.10(j)(2).

Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), makes it 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

³ Section 2(e)(1) of FIFRA, 7 U.S.C. § 136(e)(1), defines "certified applicator" to mean any individual who is certified under Section 11 of FIFRA, 7 U.S.C. § 136i, as authorized to use or supervise the use of any pesticide which is classified for restricted use.

assigned to it under Section 3 of FIFRA, 7 U.S.C. § 136a. EPA's implementing 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) applies to all advertisements of the product, including, but not limited, to:
 - (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.
- (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.

In December 2009, EPA issued the *FIFRA Enforcement Response Policy* ("FIFRA ERP"), which sets forth guidance for EPA to use in determining the appropriate enforcement response and penalty amount for violations of the FIFRA, "to provide fair and equitable treatment of the regulated community, predictable enforcement responses, and comparable penalty assessments for comparable violations." CX37 at EPA 1176. Under Section IV.A.1 "Independently Assessable Violations", the FIFRA ERP states that "[a] separate civil penalty, up to the statutory maximum, will be assessed for each independent violation of the Act. A violation is considered independent if it results from an act (or failure to act) which is not the

result of any other violation for which a civil penalty is to be assessed or if at least one of the elements of proof is different from any other violation.” CX37 at EPA 1188.

III. Relevant Factual and Procedural Background

A. Information Obtained through EPA’s Investigation⁴

EPA’s investigation included the following activities which yielded factual information relevant to Complainant’s Motion.

1. Documents obtained from EPA’s Office of Pesticide Programs show that FMC’s product *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 was registered as a pesticide on January 21, 2011, and that FMC submitted a Notification to EPA under “PRN 98-10” to add *Stallion Insecticide* as an alternate brand name for *F9047-2 EC Insecticide* on or about January 24, 2011.

Declaration of Christine Convery (“Convery Declaration”) at ¶ 6.c.; Cx9 at EPA 0495–EPA 0521; Cx10 at EPA 0522–EPA 0550.

2. On June 6, 2013, EPA issued a Request for Information letter to FMC requesting that it provide *inter alia* “copies of all FMC-generated promotional/advertising materials . . . including press releases” for Stallion Insecticide.

Convery Declaration at ¶ 7; CX24 at EPA 0678.

3. On July 18, 2013, FMC sent a response to EPA’s June 6, 2013 Request for Information letter which included *inter alia* electronic files that FMC characterized in its narrative response as “promotional and advertising materials” regarding Stallion Insecticide, including the following:

- a. **F100-22694-01_Stallion_DM-Vs3-X1A.pdf** (EPA 0691-EPA 0692);
- b. **F100-22694-02_Stallion_DM-Retailers-X1A.pdf** (EPA 0693-EPA 0694);
- c. **F100-22333-1_Stallion_PrintAd_ProgressiveForageGrower-X1A.pdf** (EPA 0689);
- d. **F100-22333-1_Stallion_PrintAd_Sunflower-X1A.pdf** (EPA 0690);
- e. **F100-027552-2_Stallion Testimonial Sell Sheet-X1A.pdf** (EPA 0696); and
- f. **STALLION_NRFinal.docx** (EPA 0702-EPA 0703).

Convery Declaration at ¶ 8; CX25 at EPA 0681, and *generally* EPA 0681-EPA 0738.

⁴ As *Stallion Insecticide* was the brand name used by FMC on the pesticide label and in advertising at all times relevant to the violations alleged in the Complaint, as well as the name used by EPA throughout its case development in this matter, this section uses “Stallion Insecticide” or “Stallion” in most instances to refer to *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545.

4. None of the six (6) “promotional and advertising materials” identified in Section III.A.3.a.-f., *supra.*, included the statement “Restricted Use Pesticide” or terms of restriction for the registered pesticide *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 (i.e., Stallion).

Convery Declaration at ¶ 8; CX25 at EPA 0691-EPA 0692, EPA 0693-EPA 0694, EPA 0689, EPA 0690, EPA 0696, and EPA 0702-EPA 0703.

5. On May 7, 2014, EPA issued an Opportunity to Show Cause/Request for Information letter asking that FMC provide *inter alia* additional information about its use of the advertisements it provided to EPA in its July 18, 2013 response⁵.

Convery Declaration at 9; CX26 at EPA 0751.

6. On July 15, 2014, FMC sent a response to EPA’s May 7, 2014 Request for Information letter in which FMC indicated, in relevant parts, that:
 - a. **F100-22694-01_Stallion_DM-Vs3-X1A.pdf** was a print advertisement that was mailed to growers in March 2012;
 - b. **F100-22694-02_Stallion_DM-Retailers-X1A.pdf** was a print advertisement that was mailed to retailers in March 2012;
 - c. **F100-22333-1_Stallion_PrintAd_ProgressiveForageGrower-X1A.pdf** was a print advertisement that appeared in the April, May and June 2012 editions of *Progressive Forage Grower* magazine;
 - d. **F100-22333-1_Stallion_PrintAd_Sunflower-X1A.pdf** was a print advertisement that appeared in the March and April 2012 editions of *The Sunflower* magazine;
 - e. **F100-027552-2_Stallion Testimonial Sell Sheet-X1A.pdf** was an electronic .PDF image that was posted on the Stallion webpage in January 2012, and
 - f. **STALLION_NRFinal.docx** was a print news release that was emailed to seven different media outlets, including PR Newswire, from February 10, 2011 through February 18, 2011.

Convery Declaration at ¶ 10; CX27 at EPA 0755-EPA 0756.

7. On June 23, 2015, EPA issued a Request for Information letter to FMC requesting that FMC *inter alia* “[r]efine and clarify the number [of] individuals, retailers and growers sent the following advertisements”:
 - a. **F100-22694-01_Stallion_DM-Vs3-X1A.pdf**; and
 - b. **F100-22694-02_Stallion_DM-Retailers-X1A.pdf**.

Convery Declaration at ¶ 13; CX28 at EPA 0758.

⁵ Specifically, EPA requested that FMC identify “(a) exactly what kind of advertisement it is, (b) each specific forum (e.g., trade conference, publication or other media, print or electronic) in which the advertisement appeared, and (c) the date(s) upon which the advertisement appeared in each forum.” CX26 at EPA 0751.

8. On July 21, 2015, FMC sent a response to EPA's June 23, 2015 Request for Information letter which indicated and documented that:
 - a. the print advertisement **F100-22694-01_Stallion_DM-Vs3-X1A.pdf** was sent to 9,645 individuals; and
 - b. the print advertisement **F100-22694-02_Stallion_DM-Retailers-X1A.pdf** was sent to 2,622 individuals.

Convery Declaration at ¶ 14; CX29 at EPA 0762-EPA 0764, EPA 0960-EPA 1145, and EPA 0783-EPA 0833

9. EPA verified that the print advertisement **F100-223331_Stallion_PrintAd_ProgressiveForageGrower-X1A.pdf** appeared in the April, May and July 2012 issues of the *Progressive Forage Grower* magazine.

Convery Declaration at ¶ 11; CX31 at EPA 1148-EPA 1150.

10. EPA verified that the print advertisement **F100-22333-1_Stallion_PrintAd_Sunflower-X1A.pdf** appeared in the March/April 2012 issue of *The Sunflower* magazine

Convery Declaration at ¶ 12; CX32 at EPA 1151-EPA 1153.

11. On August 11, 2015, FMC sent EPA a letter clarifying that it mistakenly stated in its July 15, 2014 response that the print news release **STALLION_NRFinal.docx** was emailed to PR Newswire, when in fact, it was emailed to *PRWeb*.

Convery Declaration at ¶ 15; CX30 at EPA 1146.

12. EPA verified that the print news release **STALLION_NRFinal.docx** FMC emailed to PR Web was a paid news release, and that it appeared on the *PRWeb* website from at least 3/14/2012 to 3/9/2015.

Convery Declaration at ¶¶ 16 and 17; CX34 at EPA 1155-1158; CX35 at EPA 1159-1163.

13. EPA determined that content from the print news release **STALLION_NRFinal.docx** was picked up by other online media outlets, including *AgriMarketing*, *Farm Chemicals International* and *Angus Beef Bulletin*.

Convery Declaration at ¶ 18; CX36 at EPA 1164-EPA 1172.

B. Pleadings

On September 24, 2015, Complainant filed an administrative civil complaint against Respondent alleging *inter alia* that it committed 12,273 unlawful acts under Section 12(a)(2)(E)

of FIFRA, 7 U.S.C. § 136j(a)(2)(E), by advertising *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545, an RUP, without giving its classification. More specifically, the Complaint alleges that the following materials did not include the statement “Restricted Use Pesticide” or “terms of restriction” of *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545: the direct mailer advertisements FMC caused to be sent to 9,645 farm/grower consumers in March 2012; the direct mailer advertisements FMC caused to be sent to 2,622 retail purchasers in March 2012; the print advertisements FMC caused to be printed in the April, May and July 2012 issues of the *Progressive Forage Grower* magazine; the print advertisement FMC caused to be printed in the March/April 2012 issue of *The Sunflower* magazine; the testimonial advertisement FMC caused to be posted on its website on the product’s webpage in January 2012; and the *PRWeb* website advertisement, dated February 10, 2011, FMC caused to be posted on the *PRWeb* online news distribution and publicity website.

Respondent filed an Answer to the Complaint on November 20, 2015 (“Answer”). In its Answer, Respondent denies liability for the alleged violations of Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), asserts defenses and arguments as to proposed number of violations in the Complaint; and requests a hearing to contest certain matters of law and fact in the Complaint and Complainant’s proposed number of violations. Respondent’s Answer also includes a number of admissions⁶ that when taken together with other evidence referenced in and/or attached to this Memorandum of Law demonstrate that no genuine issue of material fact exists as to establishing Respondent’s liability as a matter of law for the 12,273 unlawful acts under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. §136j(a)(2)(E), alleged in the Complaint.

⁶ See Attachment 2.

IV. Standard of Review for Accelerated Decision

Under Section 22.20(a) of the Consolidated Rules of Practice, 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 [s]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).

The Consolidated Rules of Practice further provide:

If an accelerated decision . . . is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted. The partial accelerated decision . . . shall specify the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed.” 40 C.F.R. § 22.20(b)(2).

The standard for motions for accelerated decision under 40 C.F.R. § 22.20 is similar to the standard for motions summary judgment under Rule 56 of the Federal Rules of Civil Procedure (“FRCP”), which states that “the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *See, e.g., In re Clarksburg Casket*, 8 E.A.D. 496, 501–502 (EAB 1999), *citing In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 793 (EAB 1997); FRCP 56(a). Thus, federal FRCP Rule 56 jurisprudence provides useful guidance for adjudicating motions for accelerated decision. *Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772, 781 (EAB 1993).

The burden of showing that no genuine issue of material fact exists rests on the party moving for summary judgment. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). The Environmental Appeals Board (“EAB”) has defined the words “material” and “genuine” as used in this context as follows:

A factual dispute is *material* where, under the governing law, it might affect the outcome of the proceeding. . . . A factual dispute is *genuine* if the evidence is such that a reasonable finder of fact could return a verdict in either party's favor. . . . If so, summary judgment is inappropriate and the issue must be resolved by the finder of fact. If, on the other hand, the evidence, viewed in a light most favorable to the non-moving party, is such that no reasonable decision maker could find for the nonmoving party, summary judgment is appropriate." *Mayaguez*, 4 E.A.D. at 781 (citations omitted).

Moreover, the EAB has stated that:

In order for the Region to prevail on its motion for an accelerated decision on liability, the Region must show that it has established the critical elements of . . . liability and that [Respondent] has failed to raise a genuine issue of material fact on its affirmative defense. *In re BWX Techs., Inc.*, 9 E.A.D. 61, 77-78 (EAB 2000).

The evidentiary standard of proof in cases for the administrative assessment of civil penalties governed by the Consolidated Rules of Practice is a "preponderance of the evidence." 40 C.F.R. § 22.24. Accordingly, a party moving for accelerated decision must establish through the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law by the preponderance of the evidence. *In the Matter of Harpoon P'ship*, Docket No. TSCA-05-2002-0004, 2003 EPA ALJ LEXIS 52, at *19-20 (ALJ, August 4, 2003). On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the existence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence. *Id.*

In considering a motion for summary judgment, the court must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Adickes*, 398 U.S. at 158-159. Summary judgment is inappropriate when contradictory inferences may be drawn from the evidence. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002). However, the

nonmoving party cannot defeat the motion without offering “any significant probative evidence tending to support” its pleadings. *Anderson*, 477 U.S. at 256 (1985). A party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. *Harpoon*, 2003 EPA ALJ LEXIS at *18, citing *In the Matter of Strong Steel Products*, Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-0006, 2002 EPA ALJ LEXIS 57, at *22-23 (September 9, 2002).

V. Complainant is Entitled to Partial Accelerated Decision as to Liability for Violations 1 through 12,273 of the Complaint

A. The Five Elements for Establishing Liability Under Section 12(a)(2)(E) of FIFRA and Respondent's Admissions as to Elements One, Two and Three

Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), and EPA's implementing regulation at 40 C.F.R. § 152.168 make it unlawful for any person who is a registrant 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. EPA's implementing regulation at 40 C.F.R. § 152.168 provides that this requirement applies to all advertisements of the product, including, but not limited to “material offered to purchasers . . . by direct mail” and “magazines . . . and other material . . . available to the public.” 40 C.F.R. § 152.168(b).

To meet the standard for accelerated decision as to liability for the unlawful acts under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), alleged in the Complaint, Complainant must establish that there are no genuine issue of material fact and that Complainant is entitled to judgement as a matter of law as to the following five elements:

- (1) FMC is a “person” as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s);
- (2) FMC is a “registrant” as defined by Section 2(y) of FIFRA, 7 U.S.C. § 136(y);

- (3) *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 is a product that is registered under Section 3 of FIFRA, 7 U.S.C. § 136a, and classified as a restricted use pesticide;
- (4) FMC “advertised” *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 (i.e., *Stallion Insecticide*) within the meaning of Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E); and
- (5) FMC’s advertisement did not include the statement “Restricted Use Pesticide” or any statement of the terms of restriction of *F9047-2 EC Insecticide* EPA Reg. No. 279-9545.

Respondent admits the first, second, and third elements identified above in its Answer.

Regarding the first element, FMC’s Answer admits that it is a Delaware corporation; and that it is a “person” as defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s). Complaint and Answer ¶¶ 8 and 9. Regarding the second element, Respondent’s Answer admits that at all times relevant to the violations alleged in the Complaint, it was the “registrant” as defined in Section 2(y) of FIFRA, 7 U.S.C. § 136(y), for *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545. Complaint and Answer at ¶ 14. Regarding the third element, Respondent admits that as of the date of its registration with EPA as a pesticide on January 21, 2011, and at all times relevant to the Complaint, *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 was classified as a restricted used pesticide under Section 3(d)(1)(C) of FIFRA, 7 U.S.C § 136a(d)(1)(C). Complaint and Answer at ¶¶ 10 and 18.

B. The Facts are Undisputed as to Elements Four and Five

Regarding the fourth element, Respondent’s Answer admits: that it caused direct mailer(s)⁷ about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to be sent to individuals

⁷ Respondent’s Answer denied Complainant’s use of the plural form in reference to its “direct mailers” and “ads” asserting that “it took a single action to cause a single direct mailer to be sent” and that “it took a single action to cause a single advertisement to appear in the April, May and July 2012 issues of the *Progressive Forage Grower* magazine.” Complaint and Answer at ¶¶ 22, 32 and 41. As such denials don’t bear on the question of whether the underlying materials are “advertisements” under 40 C.F.R. § 152.168 or whether Respondent’s conduct with respect such materials constitute “advertis[ing]” under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), they will not be addressed here, but will be addressed in Section V.F. of this Memorandum instead.

associated with various agricultural farms (“farm/grower consumers”) in March 2012; that it caused direct mailer(s)⁷ about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to be sent to individuals associated with retailers in Respondent’s product distribution chain (“retail purchasers”) in March 2012; that it caused ad(s)⁷ about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to be printed in the April, May and July 2012 issues of the *Progressive Forage Grower* magazine; that it caused an advertisement about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to be printed in the March/April 2012 issue of *The Sunflower* magazine; that it caused a testimonial sell sheet about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to be posted on Respondent’s website on the product’s webpage in January 2012; and that it caused an article about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 entitled “FMC Announces Stallion™ Insecticide for Multi-Crop Use”, dated February 10, 2011⁸, to be posted on the *PRWeb* online news distribution and publicity website (collectively, the “direct mail, print and website materials”). Complaint and Answer at ¶¶ 22, 32, 41, 49, 57 and 65. Further, Respondent’s Answer fails to state any facts suggesting, or raise any defenses arguing, that its direct mail, print, and website materials were not “advertisements” under 40 C.F.R. § 152.168, or that its conduct in regard to its direct mail, print and website materials was not “advertis[ing]” under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E).

Based on Respondent’s admissions and supporting documentation provided outside the pleadings and on information obtained through EPA’s investigation, it is undisputed that the electronic file **F100-22694-01_Stallion_DM-Vs3-X1A.pdf** represents the direct mailer(s) about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 described in paragraph 22 of the Complaint;

⁸ Though FMC’s Answer initially denied this document date asserting that the document was dated February 16, 2011, FMC later clarified in its prehearing exchange that it no longer denies the document date of February 10, 2011. Complaint and Answer at ¶ 65; Respondent FMC Corporation’s Prehearing Exchange at 18; *See also* Convery Declaration at ¶ 17. Complainant submits that the document date – whether February 10, 2011 or February 16, 2011 – is a nonmaterial fact.

that the electronic file **F100-22694-02_Stallion_DM-Retailers-X1A.pdf** represents the direct mailer(s) about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 described in paragraph 32 of the Complaint; that the electronic file **F100-223331_Stallion_PrintAd_ProgressiveForageGrower-X1A.pdf** represents the ad(s) about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 described in paragraph 41 of the Complaint; that the electronic file **F100-22333-1_Stallion_PrintAd_Sunflower-X1A.pdf** represents the advertisement about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 described in paragraph 49 of the Complaint; that the electronic file **100-027552-2_Stallion Testimonial Sell Sheet-X1A.pdf** represents the testimonial sell sheet about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 described in paragraph 57 of the Complaint; and that the electronic file **STALLION_NRFinal.docx** represents article about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 described in paragraph 65 of the Complaint. See Section III.A.2, 3, 5, 6, 9, 10, 11 and 12, *supra.*; Convery Declaration at ¶¶ 7, 8, 9, 10, 11, 12, 15, 16 and 17; CX24; Cx25; CX26, CX27, Cx30, CX31, CX32, Cx34 and CX35.

As the facts discussed in the paragraphs above are undisputed, there is no genuine issue concerning any of the material facts that underly Complainant's allegations that Respondent's direct mail, print and website materials constituted "advertisements" under 40 C.F.R. § 152.168, or that Respondent's conduct in regard to its direct mail, print and website materials constituted "advertis[ing]" under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), which is argued in Section V.C., *infra.*

Regarding the fifth element, Respondent's Answer admits that the following materials did not include the statement "Restricted Use Pesticide" or any statement of the terms of restriction of

F9047-2 EC Insecticide, EPA Reg. No. 279-9545: the direct mailer(s)⁹ about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that were sent to farm/grower consumers in March 2012; the direct mailer(s)⁹ about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that were sent to retail purchasers in March 2012; the ad(s)⁹ about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that were printed in the April, May and July 2012 issues of the *Progressive Forage Grower* magazine; the advertisement about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that was printed in the March/April 2012 issue of *The Sunflower* magazine; the testimonial sell sheet about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that was posted on the product's webpage in January 2012; and the article about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545, dated February 10, 2011¹⁰, that was posted on the *PRWeb* website. Complaint and Answer at ¶¶ 25-26, 35-36, 44-45, 52-53, 60-61 and 68-69. See also Section III.a.4., *supra.*, Convery Declaration at ¶ 8; CX25 at EPA 0691-EPA 0692, EPA 0693-EPA 0694, EPA 0689, EPA 0690, EPA 0696 and EPA 0702-EPA 0703

Respondent's Answer asserts that each of its direct mail, print and website materials instructed the intended recipient to "always read and follow label directions" and asserts that the label contained the phrase "Restricted Use Pesticide" related directions and explanations of terms of restriction of *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545. Complaint and Answer at ¶¶ 25-27, 35-37, 44-46, 52-54, 60-62 and 68-70. Complainant does not dispute these factual assertions.

As the facts discussed in the paragraphs above are undisputed, there is no genuine issue concerning any of the material facts that underly Complainant's allegations that each of

⁹ Respondent's Answer denied Complainant's use of the plural form in reference to "direct mailers" and "ads" asserting that "it took a single action to cause a single direct mailer to be sent" and that "it took a single to cause the advertisement to appear." Complaint and Answer at ¶¶ 25-26, 35-36, 44-45. As such denials don't bear on the question of whether the direct mailer(s)/ad(s) provided the restricted use classification under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), and 40 C.F.R. § 152.168, they will not be addressed here, but will be addressed in Section V.F. of this Memorandum instead.

¹⁰ See footnote 8, *supra.*

Respondent's direct mail, print and website materials violated 40 C.F.R. § 152.168, which is argued in Section V.D., *infra*.

C. The Undisputed Facts Support the Legal Conclusions that the Direct Mail, Print and Website Materials Constituted “Advertisements” and that Respondent’s Conduct in Regard to Such Materials Constituted “Advertising” (Element Four)

Respondent's Answer states “[t]his is a legal conclusion to which no response is required” in response to Complainant's allegations that its direct mail, print and website materials constituted “advertisements” under 40 C.F.R. § 152.168, and that Respondent's conduct in regard to such direct mail, print and website materials constituted “advertis[ing]” under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E). Complaint and Answer at ¶¶ 23-24, 33-34, 42-43, 50-51, 58-59 and 66-67. Though neither FIFRA nor EPA's implementing regulations define the terms “advertisements” or “advertis[ing]”, the undisputed facts discussed in Section V.B., *supra*, include all of the facts material to determining that the direct mail, print and website materials constituted “advertisements” under 40 C.F.R. § 152.168, and that Respondent's conduct in regard to such materials constituted “advertis[ing]” under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E).

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:
 - (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.

Direct Mailer(s) for Farm/Grower Consumers and Direct Mailer(s) for Retail Purchasers

In its July 18, 2013 response to an EPA Request for Information letter, FMC was the first

to identify its direct mailer(s) sent to farm/grower consumers described in paragraph 22 of the Complaint, represented by the electronic file **F100-22694-01_Stallion_DM-Vs3-X1A.pdf**, as well as its direct mailer(s) sent to retail purchasers described in paragraph 32 of the Complaint, represented by the electronic file **F100-22694-02_Stallion_DM-Retailers-X1A.pdf**, as part of its “promotional and advertising materials” for Stallion Insecticide. *See* Section III.A.3., *supra.*; Convery Declaration at ¶ 8; CX25 at EPA 0681. In subsequent responses to EPA Request for Information letters dated July 15, 2014 and July 21, 2015, FMC used the term “advertisement” to describe both of these direct mailers. *See* Sections III.A.6. and 8., *supra.*; Convery Declaration at ¶¶ 10 and 14; CX27 at EPA 0755; CX29 at 0763. Based on these admissions and supporting documentation provided outside of the pleadings, it is evident that Respondent considers the direct mailer(s) sent to farm/grower consumers described in paragraph 22 of the Complaint, as well as the direct mailer(s) sent to retail purchasers described in paragraph 32 of the Complaint, to be advertisements.

According to EPA’s implementing regulations at 40 C.F.R. § 152.168(a), the requirement for advertisements to include a statement of a product’s restricted use classification applies to “*all* advertisements of the product” without distinction or limitation. 40 C.F.R. § 152.168(a). Examining the content of **F100-22694-01_Stallion_DM-Vs3-X1A.pdf** and **F100-22694-02_Stallion_DM-Retailers-X1A.pdf**, it is observed that they both focus exclusively on Respondent’s product “Stallion Insecticide”, both make statements about the product’s efficacy (e.g., “Stallion® insecticide is one of the most effective weevil insecticides on the market. It doesn’t show mercy to aphids, leafhoppers and more than 25 other insects either”), uses (e.g., “It’s usage list is just as impressive with approval on alfalfa and 27 other crops”) and benefits (e.g., “Thanks to a well-devised formula with dual modes of action, you’ll also gain longer residual control, convenient application and, most importantly, maximized plant health for

greater yields”), and both include a ‘call to action’ by providing their respective intended audiences with instructions about how to learn more about the product’s uses (e.g., for farm/grower consumers: “For 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”, for retail purchasers: “For 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”). CX25 at EPA 0691-EPA 0692, EPA 0693-EPA 0694. *See also* RX058 and RX59. It is clear that the direct mailers were created to make the existence, use and benefits of the product known to farm/grower consumers and to retailer purchasers with an intention to promote eventual purchases of *Stallion Insecticide* product from Respondent, and are examples of what reasonable and objective observers would consider to be advertisements.

The direct mailer(s) sent to farm/grower consumers described in paragraph 22 of the Complaint, represented by the electronic file **F100-22694-01_Stallion_DM-Vs3-X1A.pdf**, as well as the direct mailer(s) sent to retail purchasers described in paragraph 32 of the Complaint, represented by the electronic file **F100-22694-02_Stallion_DM-Retailers-X1A.pdf**, are both clearly a type of advertisement specifically identified in 40 C.F.R. § 152.168(b)(1) as “[b]rochures, pamphlets, circulars and similar material offered to purchasers at the point of sale or by direct mail” subject to the requirement to contain a statement of a product’s restricted use classification.

For the reasons discussed above, Respondent’s direct mailer(s) sent to farm/grower consumers described in paragraph 22 of the Complaint, and direct mailer(s) sent to retail purchasers described in paragraph 32 of the Complaint should both be found to be “advertisements” under 40 C.F.R. § 152.168.

Respondent's Answer admits that in March 2012, it caused direct mailer(s) about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to be sent to farm/grower consumers; and that in March 2012, it caused direct mailer(s) about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to be sent to retail purchasers. Complaint and Answer at ¶¶ 22 and 32. In causing the direct mailer advertisements to be sent to farm/grower consumers in March 2012, Respondent "advertise[d]" under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E). Additionally, in causing the direct mailer advertisements to be sent to retail purchasers in March 2012, Respondent "advertise[d]" term under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E).

Progressive Forage Grower Magazine and The Sunflower Magazines

In its July 18, 2013 response to an EPA Request for Information letter, FMC was the first to identify the ad(s) printed in the *Progressive Forage Grower* magazine described in paragraph 41 of the Complaint, represented by the electronic file **F100-223331_Stallion_PrintAd_ProgressiveForageGrower-X1A.pdf**, as well as the advertisement printed in *The Sunflower* magazine described in paragraph 49 of the Complaint, represented by the electronic file **F100-22333-1_Stallion_PrintAd_Sunflower-X1A.pdf**, as part of its "promotional and advertising materials" for Stallion Insecticide. See Section III.A.3., *supra.*; Convery Declaration at ¶ 8; CX25 at EPA 0681. In a subsequent response to an EPA Request for Information letter dated July 15, 2014, FMC used the term "advertisement" to describe both of these ads. See Section III.A.6., *supra.*; Convery Declaration at ¶ 10; CX27 at EPA 0755. Based on these admissions and supporting documentation provided outside of the pleadings and the file names themselves - both which incorporate the term "PrintAd", it is evident that Respondent considers both the ad(s) printed in the *Progressive Forage Grower* magazine described in paragraph 41 of the Complaint, as well as the advertisement printed in the *The Sunflower* magazine described in paragraph 49 of the Complaint, to be advertisements.

According to EPA’s implementing regulations at 40 C.F.R. § 152.168(a), the requirement for advertisements to include a statement of a product’s restricted use classification applies to “all advertisements”, without distinction or limitation. 40 C.F.R. § 152.168(a). Examining the content of **F100-223331_Stallion_PrintAd_ProgressiveForageGrower-X1A.pdf** and **F100-22333-1_Stallion_PrintAd_Sunflower-X1A.pdf**, which appear to be identical¹¹, it is observed that they both focus exclusively on Respondent’s product “Stallion Insecticide”, both make statements about the product’s efficacy (e.g., “Stallion® insecticide is one of the most effective weevil insecticides on the market. It doesn’t show mercy to aphids, leafhoppers and more than 25 other insects either”), uses (e.g., “It’s usage list is just as impressive with approval on alfalfa and 27 other crops”) and benefits (e.g., “Thanks to a well-devised formula with dual modes of action, you’ll also gain longer residual control, convenient application and, most importantly, maximized plant health for greater yields”), and both include a ‘call to action’ by providing their respective intended audiences with instructions about how to learn more about the products uses (e.g., “For 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). CX25 at EPA 0689 and EPA 690. It is clear that these ad(s)/advertisement were created to make the existence, use and benefits of the product known to the subscribers of *Progressive Forage Grower* and *The Sunflower* magazines to promote eventual purchases of *Stallion Insecticide* from Respondent, and are examples of what reasonable and objective observers would consider to be advertisements.

The ad(s) printed in the *Progressive Forage Grower* magazine described in paragraph 41 of the Complaint, represented by the electronic file **F100-223331_Stallion_PrintAd_ProgressiveForageGrower-X1A.pdf**, as well as the advertisement printed in the *The*

¹¹ The content of these ads also appear to be identical to the direct mailer for farm/grower consumers (i.e., F100-22694-01_Stallion_DM-Vs3-X1A.pdf). See CX25 at EPA 0691-EPA 0692.

Sunflower magazine described in paragraph 49 of the Complaint, represented by the electronic file **F100-22333-1_Stallion_PrintAd_Sunflower-X1A.pdf**, are both clearly a type of advertisement specifically identified in 40 C.F.R. § 152.168(b)(2) as “[n]ewspapers, magazines, newsletters and other material in circulation or available to the public” and therefore subject to the requirement to contain a statement of a product’s restricted use classification. In fact, magazine advertisements such as these were considered to be advertisements subject to the requirements 40 C.F.R. § 152.168(b) in the recent case of *In re Liphatech, Inc.*, Docket No.: FIFRA-05-2010-0016, 2014 EPA ALJ LEXIS 12 (ALJ, March 12, 2014)¹².

For the reasons discussed above, Respondent’s ad(s) printed in the *Progressive Forage Grower* magazine described in paragraph 41 of the Complaint and advertisement printed in the *The Sunflower* magazine described in paragraph 49 of the Complaint should both be found to be “advertisements” under 40 C.F.R. § 152.168.

Respondent’s Answer admits that it caused its ad(s) about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to appear in the April, May and July 2012 issues of the *Progressive Forage Grower* magazine¹³ and that it caused its advertisement about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to appear in the March/April 2012 issue of the *The Sunflower* magazine¹⁴. Complaint and Answer at ¶¶ 41 and 49. In causing its ad(s) to appear in the April, May and July 2012 issues of the *Progressive Forage Grower* magazine, it should be found that

¹² The magazine advertisements at issue were for Liphatech’s RUP ‘Rozol Pocket Gopher Bait II’ product that were published in 23 separate issues of various cattle and livestock trade journals. Order on Motions for Accelerated Decision Regarding Alleged Violations of FIFRA § 12(a)(2)(E), 2011 EPA ALJ LEXIS 5, at *12-13 (ALJ, May 6, 2011).

¹³ EPA verified through the advertising intermediary that the print ad(s) **F100-223331_Stallion_PrintAd_ProgressiveForageGrower-X1A.pdf** appeared in the April, May and July 2012 issues of the *Progressive Forage Grower* magazine. See Section III.A.9., *supra.*; Convery Declaration at ¶ 11; CX31 at EPA 1148-EPA 1150.

¹⁴ EPA verified through the advertising intermediary that the print advertisement **F100-22333-1_Stallion_PrintAd_Sunflower-X1A.pdf** appeared in the March/April 2012 issue of *The Sunflower* magazine. See Section III.A.10., *supra.*; Convery Declaration at ¶ 12; CX32 at EPA 1151-EPA 1153.

Respondent “advertise[d]” under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E).

Additionally, in causing its advertisement to appear in the March/April 2012 issue of the *The Sunflower* magazine, it should be found that Respondent “advertise[d]” under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E).

Testimonial Sell Sheet

In its July 18, 2013 response to an EPA Request for Information letter, FMC was the first to identify the testimonial sell sheet posted on the product’s webpage described in paragraph 57 of the Complaint, represented by the electronic file **F100-027552-2_Stallion Testimonial Sell Sheet-X1A.pdf**, as part of its “promotional and advertising materials” for Stallion Insecticide and treated it as such in a subsequent response. *See* Sections III.A.3. and 6., *supra.*; Convery Declaration at ¶¶ 8 and 10; CX25 at EPA 0681; Cx27 at EPA 0756. Based on these admissions and this supporting document provided outside the pleadings, it is evident that Respondent considers the testimonial sell sheet posted on the product’s webpage described in paragraph 57 of the Complaint to be an advertisement.

According to EPA’s implementing regulations at 40 C.F.R. § 152.168(a), the requirement for advertisements to include a statement of a product’s restricted use classification applies to “all advertisements”, without distinction or limitation. 40 C.F.R. § 152.168(a). Examining the content of **F100-027552-2_Stallion Testimonial Sell Sheet-X1A.pdf**, it is observed that it is comprised of four testimonials that highlight the benefits of fall applications of “Stallion Insecticide” on controlling weevil (e.g., “Excellent weevil and aphid control. I will treat again this fall with Stallion” – Doug Meyer of Andale Kansas”, “I will treat again this fall with Stallion to reduce my alfalfa weevil numbers - Lenny Miller of McPherson, Kansas”, “We had excellent weevil and aphid control from the fall treatments - Bruce Seiler of Sedgwick Kansas”, “It took the timing pressure off the table for the spring treatments and I plan to spray again this fall to

reduce my alfalfa weevil numbers for spring 2013 –John Roy of Larned Kansas”). CX25 at EPA 0696. It is clear that the testimonial sell sheet was intended to raise awareness about the benefits of fall applications of the product to visitors of Respondent’s website, particularly among the alfalfa farm/grower consumer community as well as to retailer purchasers who service such growers, in order to promote eventual purchases of *Stallion Insecticide* from Respondent, and is an example of what reasonable and objective observers would recognize as a testimonial advertisement.

The testimonial sell sheet posted on Respondent’s website on the products webpage described in paragraph 57 of the Complaint, represented by the electronic file **F100-027552-2_Stallion Testimonial Sell Sheet-X1A.pdf**, is of a type of advertisement identified in 40 C.F.R. § 152.168(b)(2) as “other material in circulation or available to the public” and therefore subject to the requirement to contain a statement of a product’s restricted use classification.

For the reasons discussed above, Respondent’s testimonial sell sheet posted on Respondent’s website on the product’s webpage described in paragraph 57 of the Complaint should be found to be an “advertisement” under 40 C.F.R. § 152.168.

Respondent’s Answer admits that in January 2012 it caused its testimonial sell sheet about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to be posted on Respondent’s website on the product’s webpage¹⁵. Complaint and Answer at ¶ 57. In causing its testimonial sell sheet to be posted on Respondent’s website on the product’s webpage, it should be found that Respondent “advertise[d]” under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E).

¹⁵ It is noted that the direct mailer(s) sent to farm/grower consumers, direct mailer(s) sent to retail purchasers, *Progressive Forage Grower* magazine ads, and *The Sunflower* magazine advertisement all direct their respective audiences to visit this webpage. See CX25 at EPA 0691-EPA 0692, EPA 0693-EPA 0694, EPA 0689, and EPA 0690.

PRWeb Website

In its July 18, 2013 response to an EPA Request for Information letter, FMC was the first to identify the article entitled “FMC Announces Stallion™ Insecticide for Multi-Crop Use” described in paragraph 65 of the Complaint, represented by the electronic file **STALLION_NRFinal.docx**, as part of its “promotional and advertising materials” for Stallion Insecticide, and treated it as such in a subsequent response. See Sections III.A.3. and 6., *supra.*; Convery Declaration at ¶¶ 8, and 10; CX25 at EPA 0681; CX27 at EPA 0755. Based on these admissions and this supporting document provided outside the pleadings, it is evident that Respondent considers the article entitled “FMC Announces Stallion™ Insecticide for Multi-Crop Use” described in paragraph 65 of the Complaint to be an advertisement.

According to EPA’s implementing regulations at 40 C.F.R. § 152.168(a), the requirement for advertisements to include a statement of a product’s restricted use classification applies to “all advertisements”, without distinction or limitation. 40 C.F.R. § 152.168(a). Examining the content of **STALLION_NRFinal.docx**, it is observed that while titled a “news release” closer scrutiny reveals that it is an advertisement in the context of its posting on the *PRWeb* website¹⁶ for the reasons discussed below. First, the article includes language such as:

In two recent trials, alfalfa treated with Stallion showed increased yields and superior control against alfalfa weevil, leafhoppers and other insects;

In addition to alfalfa, Stallion is an effective choice for corn, cotton, sorghum, soybeans, wheat and sunflowers;

In addition to preventing losses by insects, using Stallion also reduced plant stress and increased stored energy in alfalfa, resulting in greater dollar per acre return;

Stallion can be applied alone or in tank mixes with fungicides, post herbicides and foliar fertilizers, offering flexibility in application;

¹⁶ Complainant notes that FMC’s July 15, 2014 response indicates that the article was emailed to six media outlets in addition to *PRWeb*. See Sections III.A.6. and 11., *supra.*; Convery Declaration at ¶¶ 10 and 15; CX27 at EPA 0755; CX30.

This convenient premix allows for convenient applications with no posting restrictions;

Its ease of use and broad label on many early and late season crops improves inventory management; and

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.

These statements about the product's efficacy, uses, and benefits, and particularly the 'call to action' which provides instructions about how to learn more about the product, make clear that the intended audience is not the news media or journalists but growers of alfalfa, corn, cotton, sorghum, soybeans, wheat and sunflowers who receive content directly or indirectly¹⁷ from the *PRWeb* website. Additionally, EPA's investigation revealed that *PRWeb* website postings are a paid service so, unlike 'news releases', Respondent knew that the article would be posted¹⁸ and that the content of the article would appear on the *PRWeb* website verbatim as submitted¹⁹. See Section III.A.12., *supra.*; Convery Declaration at ¶ 16, CX34 at EPA 1155- EPA 1158. As it is clear that the article was intended to make the existence, use, benefits and availability of the product known to growers who receive content from the *PRWeb* website to promote eventual purchases of *Stallion Insecticide* from Respondent, it is an advertisement.

At 40 C.F.R. § 152.168(b), EPA's implementing regulations provide examples of types of advertisements that are subject to the requirement to contain a statement of a product's restricted use classification, and specifically includes "[n]ewspapers, magazines, newsletters and

¹⁷ Though there is no evidence that these media outlets picked up content of the article from *PRWeb*, EPA found that the full article or parts thereof were posted on AgriMarketing, Farm Chemicals International and Angus Beef Bulletin websites. See Section III.A.13., *supra.*; Convery Declaration at ¶18; Cx36 at EPA 1164 – EPA 1172.

¹⁸ EPA verified through the advertising intermediary that article entitled "FMC Announces Stallion™ Insecticide for Multi-Crop Use" appeared on the *PRWeb* website from at least 3/14/2012 to 3/9/2015. See Section III.A.12., *supra.*; Convery Declaration at ¶ 17; CX35 at EPA 1159- EPA 1163.

¹⁹ This can be verified by comparing the content of the article Respondent submitted to *PRWeb* (i.e., CX25, EPA 0702-EPA 0703) with the article that appeared on the *PRWeb* website (i.e., CX35, EPA 1159-EPA 1163). *But see* footnote 8, *supra.*

other material in circulation or available to the public.” 40 C.F.R. § 152.168(b)(2). The article entitled “FMC Announces Stallion™ Insecticide for Multi-Crop Use” posted on the *PRWeb* website described in paragraph 65 of the Complaint, represented by the electronic file **STALLION_NRFinal.docx**, is a type of advertisement identified in 40 C.F.R. § 152.168(b)(2) as “other material available to the public” and therefore subject to the requirement to contain a statement of a product’s restricted use classification.

For the reasons discussed above, Respondent’s article entitled “FMC Announces Stallion™ Insecticide for Multi-Crop Use” posted on the *PRWeb* website described in paragraph 65 of the Complaint should be found to be an “advertisement” under 40 C.F.R. § 152.168.

Respondent’s Answer admits that it caused the article entitled “FMC Announces Stallion™ Insecticide for Multi-Crop Use”, dated February 10, 2011²⁰ to be posted on the *PRWeb* website²¹. Complaint and Answer at ¶ 65. In causing the article entitled “FMC Announces Stallion™ Insecticide for Multi-Crop Use” to be posted on the *PRWeb* website, it should be found that Respondent “advertise[d]” under Section 12(a)(2)(E) of FIFRA, 7 U.S.C § 136j(a)(2)(E).

D. The Undisputed Facts Support the Legal Conclusion that Respondent Did Not Include the RUP Classification in its Direct Mail, Print and Website Advertisements (Element Five)

Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), makes it unlawful for any person who is a registrant 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. EPA’s implementing regulations at 40 C.F.R. § 152.168 give two options for avoiding liability for illegal advertising, either to include the statement “Restricted Use Pesticide” or to include the

²⁰ See footnote 8, *supra*.

²¹ See footnote 18, *supra*.

terms of restriction prominently in the advertisement. 40 C.F.R. § 152.168(c). The undisputed facts discussed in Section V.B., *infra.*, include all of the facts material to determining whether Respondent's direct mail, print and website advertisements for *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 complied with such requirements. Factually, there is no dispute that the following materials did not include the statement "Restricted Use Pesticide" or any statement of the terms of restriction of *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545: Respondent's direct mailer(s) sent to farm/grower consumers in March 2012; Respondent's direct mailer(s) sent to retail purchasers in March 2012; Respondent's print ad(s) that appeared in the April, May and July 2012 issues of the *Progressive Forage Grower* magazine; Respondent's print advertisement that appeared in the March/April 2012 issue of *The Sunflower* magazine; Respondent's testimonial sell sheet posted on its website on the product's webpage in January 2012; and Respondent's article entitled "FMC Announces Stallion™ Insecticide for Multi-Crop Use", dated February 10, 2011, posted on the *PRWeb* online news distribution and publicity website. See discussion in Section V.B., *supra.* Having failed to comply with either of the two allowable options under 40 C.F.R. § 152.168, each of Respondent's direct mail, print and website advertisements should be found to be in violation of the requirement to give the restricted use classification under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E).

Though it is also not disputed that each of Respondent's direct mail, print and website advertisements included the statement "always read and follow label directions", and that the EPA approved label for *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 contained the phrase "Restricted Use Pesticide", and related directions and explanations, such facts fail to establish Respondent's compliance with the requirement to give the restricted use classification under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E). This very issue was recently addressed

in case of *In re Liphatech*. In *Liphatech*, the violations involved *inter alia* thousands of 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.*, Order on Motions for Accelerated Decision Regarding Alleged Violations of FIFRA § 12(a)(2)(E), 2011 EPA ALJ LEXIS 5, at *11 (ALJ, May 6, 2011). *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.* at *28 (emph original). However, the court found that:

[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). *Id.* at *28-29.

An interpretation that Respondent complied with the requirement to give the restricted use classification under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), in its direct mail, print and website advertisements here should fail for the same reasons. While its direct mail, print and website advertisements included language directing readers to ‘always read and follow label directions’, the definition of “refer” set forth in *Liphatech* includes the word “directing” as synonymous with “sending.” *Id.* Accordingly, Respondent’s direct mail, print and website advertisements did not *include* (*i.e.*, contain as part of the advertisements) either the statement “Restricted Use Pesticide” or the terms of restriction 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 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E). In addition to the

substantive compliance issues described above, the orientation and font size of the “always read and follow label directions” instruction in Respondent’s direct mail, print and testimonial sell sheet advertisements *clearly* fail to meet the 40 C.F.R. § 152.168(c) requirement that the restriction statement be displayed prominently. 40 C.F.R. § 152.168(c); *See* CX25 at EPA 0691-EPA 0692, EPA 0693-EPA 0694, EPA 0689, EPA 0690, and EPA 0696.

Pesticides classified for restricted use such as *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 are subject to heightened restrictions due to inherent risks of unreasonable adverse effects on the environment, including injury to the applicator. Section 3(d)(1)(C) of FIFRA, 7 U.S.C § 136a(d)(1)(C). These restrictions include the limitation that RUPs can only be sold to and used by certified applicators or persons under the direct supervision of certified applicators (and only for uses covered by the certified applicator’s certification), and that advertisements for RUPs are subject to statutory and regulatory regulation. *See* Section 3(d)(1)(C) of FIFRA, 7 U.S.C. § 136a(d)(1)(C); 40 C.F.R. § 156.10(j)(2); Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E) and 40 C.F.R. § 152.168. The Chief Administrative Law Judge in *Liphatech* observed that “[t]he 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.” *Id.* at *31. As was noted of the radio advertisement in *Liphatech*, the language “always read and follow label directions” included in Respondent’s direct mail, print and website advertisements “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.* at *28. Respondent should not be found to have complied with the requirement to give the restricted use classification under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), in its direct mail, print and website

advertisements as doing so would render ineffective a key safeguard of FIFRA: to guard against the sale of restricted use pesticides to unqualified and uninformed consumers.

E. The Unit of Violation under Section 12(a)(2)(E) of FIFRA is Based on Each Individual Act of Advertising

Though there is no binding judicial or administrative precedent, FIFRA's statutory provisions, purpose and recent case law indicate that the 'unit of violation' under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), ought to be based on each individual act of advertising. The EAB has held that the determination of "whether alleged acts or omissions give rise to a single or, alternatively, multiple violations of a statutory provision is a question of statutory construction." *In re Chempace Corp.*, 9 E.A.D. 119, 128 (EAB 2000). As with other questions of statutory interpretation, the inquiry begins with the plain language of the statute itself and the EAB has consistently started here in determining the 'unit of violation' for unlawful acts under Section 12 of FIFRA, 7 U.S.C. § 136j. *See e.g., In re Chempace, 9 E.A.D. at 129; In re Microban Products Co.*, Decision and Remand Order ("Microban 1"), 2001 EPA App. LEXIS 62, at *18 (EAB, February 23, 2001). Section 12(a)(2)(E) of FIFRA, 7 U.S.C.

§ 136j(a)(2)(E), provides –

It shall be unlawful for any person ...

(E) 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.

In previous inquiries as to the unit of violation for other unlawful acts under Section 12 of FIFRA, 7 U.S.C. § 136j, administrative precedent indicates that the specific act designated to be unlawful is a central to the determination. *See In re McLaughlin Gormley King Co.*, 6 E.A.D., 339, 346 (EAB 1996) (finding the act of falsifying a compliance statement submitted to EPA determines the unit of violation under Section 12(a)(2)(Q); *Microban 1, 2001 EPA App. LEXIS*

62, at *19-20 (finding the act of distributing or selling determines the unit of violation under Section 12(a)(1)(B) of FIFRA); *Chempace*, 9.E.A.D. at 129 (finding the act of distributing or selling determines the units of violation under Sections 12(a)(1)(A) and 12(a)(1)(E) of FIFRA). As the specific act designated unlawful under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), (i.e., “to advertise”) is the act of advertising, it should be determined that the unit of violation be based on the number of proven instances of advertising. Notably, this interpretation of the plain language of the statute is fully consistent with the consumer protection goals of FIFRA’s advertising provisions, which are intended to ensure that the risks inherent with a RUP’s use are clearly communicated and to discourage interest in the product by those who are not legally permitted to use it. *See Liphatech*, 2011 EPA ALJ LEXIS at *31. The EAB has stated that “FIFRA is a remedial statute and, as such, “should be construed liberally so as to effectuate its purposes.” *In re Microban Products Co.*, 11 E.A.D. 425, 444 (EAB 2004) (“*Microban II*”). Just as the EAB has rejected an interpretation of the unit of violation under Sections 12(a)(1)(A) and (E) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) and (E), that would permit multiple distributions or sales to constitute single violations, it should be found here that each instance of advertising constitutes a separate violation - not only to follow the plain language of FIFRA and fulfill its purpose but also - to preserve the deterrent purposes civil penalties are intended to effectuate²². *See Chempace*, 9.E.A.D. at 129-130.

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 , 7 U.S.C.

²² In addressing this very issue, the *Liphatech*, court noted “[i]f this tribunal were to find that each advertisement did not constitute a separate violation of FIFRA section 12(a)(2)(E), that interpretation would not deter a party who unlawfully advertises a registered pesticide once from continuing to publish or broadcast the unlawful advertisement as many times as it desires because the penalty would remain the same.” *Liphatech*, 2014 EPA ALJ LEXIS at *251.

§ 136j(a)(2)(E), and found, after considering judicial and administrative precedent relevant to determining the unit of violation for unlawful acts under FIFRA, analyzing the plain language of the statute, considering the purpose of FIFRA and other factors, that the unit of violation is based on each “individual separate act of advertising²³” *Liphatech*, 2014 EPA ALJ LEXIS at *238-260. Though not binding on this tribunal, this finding by EPA’s Chief Administrative Law Judge ought to serve as persuasive precedent. For the reasons discussed above, this court should find that the ‘unit of violation’ under Section 12(a)(2)(E) of FIFRA, 7 U.S.C.

§ 136j(a)(2)(E), is based on each individual act of advertising.

F. Respondent’s Conduct Constituted 12,273 Individual Acts of Advertising

Violations 1-9,645

At issue with these violations are the direct mailer(s) sent to farm/grower consumers in March 2012. Complainant maintains that each direct mailer Respondent caused to be sent to an individual associated with an agricultural farm (i.e., a farm/grower consumer) constitutes an individual separate act of advertising. In its July 21, 2015 response, Respondent provided a Microsoft Excel spreadsheet with the names of the individuals that were sent these mailers, and stated that the number of entries in such spreadsheet totaled 9,645. *See* Section III.A.8.a., *supra.*; Convery Declaration at ¶ 14.b; Cx29, EPA at 0960–EPA 1145, EPA 0763. EPA’s case development officer verified this number through her own counting exercise prior to the filing the Complaint, and Respondent’s Answer fails to provide any facts suggesting that the number of

²³ In reaching this conclusion, the Chief Administrative Law Judge specifically rejected 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 (i.e., 10), the failure to include RUP language in advertising generally (i.e., 1), the number of versions of violative radio and print ads (i.e., 6), the number of States the violative advertisements were broadcast or distributed (i.e., 6), and the medium the advertisement was run (i.e., 2) finding “no indication in the statutory that unlawful advertisements should be grouped on anything less than a per advertisement basis.” *Liphatech*, 2014 EPA ALJ LEXIS at *220.

direct mailers sent to a farm/grower consumers was different from 9,645²⁴. *Id.*; Complaint and Answer at ¶ 28. As such, there doesn't appear to be any factual dispute that Respondent sent the direct mailer(s) to farm/grower consumers in March 2012 – which Respondent admits in its Answer at ¶ 22, or that number of mailers Respondent caused to be sent was 9,645. The preponderance of the evidence establishes that Respondent should be found liable for 9,645 individual illegal separate acts of advertising with respect to the direct mailer(s) sent to farm/grower consumers.

The assertion in Respondent's Answer that "it took no more than one action in deciding to cause a single direct mailer to be sent" misses the mark as to the relevant act that determines the unit of violation which is *to advertise* (i.e., cause a direct mailer to be sent) - not *to decide* to advertise (i.e., decide to cause direct mailers to be sent to farm/grower consumers). Complaint and Answer at ¶ 30; *See* discussion in Section V.E., *supra*. Though Respondent asserts throughout its Answer that "it took a single action to cause a single direct mailer to be sent"²⁵, such assertion is inconsistent with the admissions and evidence included in its July 21, 2015 response, administrative precedent for determining the unit of violation under Section 12 of FIFRA, 7 U.S.C. § 136j, and the recent decision in *Liphatech*²⁶.

Respondent's Answer further asserts that sending the direct mailer(s) "is distinct from the extent to which potential recipients actually received the mailer, actually read the mailer, actually attempted to purchase *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 , or actually purchased *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545." Complaint and Answer ¶ 28. As such assertions potentially address the risk of harm associated Respondent's illegal acts of advertising

²⁴ In its Prehearing Exchange, Respondent included a "Grower List" (i.e., "Tab C") that includes names of 9,645 individuals sent these direct mailers. Respondent's PHE at page 15, RX061, FMC 002331-FMC 002513.

²⁵ *See e.g.*, Complaint and Answer at ¶¶ 22, 25, 26, and 28.

²⁶ *See* footnote 23, *supra*.

and therefore may be relevant to issues of penalty, they are not relevant to the issue of liability - which attached at the time Respondent sent each direct mailer and can't be 'undone' even if each advertisement didn't achieve Respondent's desired result.

In describing what constitutes an independently assessable violation, the FIFRA ERP states that EPA considers a violation to be independent "if it results from an act (or failure to act) which is not the result of any other violation for which a penalty is to be assessed or if at least one of the elements of proof is different from any other violations." CX37 at EPA 1188. As each direct mailer sent to a farm/grower consumer involves a separate act and an element of proof that is different from any other violations (i.e., a separate entry in the Microsoft Excel spreadsheet), each of 9,645 violations alleged as violations 1-9,645 in the Complaint should be considered to be independent.

Violations 9,646 -12,267

At issue with these violations are the direct mailer(s) sent to retail purchasers in March 2012. Complainant maintains that each instance Respondent caused a direct mailer to be sent to an individual associated with a retailer in Respondent's product distribution chain (i.e., retail purchasers) constitutes an individual separate act of advertising. In its July 21, 2015 response, Respondent provided a Microsoft Excel spreadsheet with the names of the individuals that were sent these mailers, and stated that the number of entries in such spreadsheet totaled 2,622. *See* Section III.A.8.b, *supra.*; Convery Declaration at ¶ 14.a; Cx29 at EPA 0783–EPA 0833, EPA 0763. EPA's case development officer verified this number through her own counting exercise prior to the filing the Complaint, and Respondent's Answer failed to any facts suggesting that the number of direct mailers sent to retailer purchasers was different from 2,622²⁷. *Id.*; Complaint

²⁷ In its Prehearing Exchange, Respondent included a "Retailer List" (i.e., "Tab A") that includes names of 2,622 individuals sent these direct these mailers. Respondent's PHE at page 15, RX061, FMC 002265-FMC 002322.

and Answer at ¶ 38. As such, there doesn't appear to be any factual dispute that Respondent sent the direct mailer(s) to retail purchasers in March 2012 – which Respondent's admits in its Answer at ¶32, or that number of mailers Respondent caused to be sent was 2,622. The preponderance of the evidence establishes that Respondent should be found liable for 2,622 individual illegal separate acts of advertising with respect to the direct mailer(s) sent to retail purchasers.

The assertion in Respondent's Answer that "it took no more than one action in deciding to cause a single direct mailer to be sent" misses the mark as to the relevant act that determines the unit of violation which is *to advertise* (i.e., cause a direct mailer to be sent) - not *to decide* to advertise (i.e., decide to cause direct mailers to be sent to farm/grower consumers). Complaint and Answer at ¶ 39; *See* discussion in Section V.E., *supra*. Though Respondent asserts throughout its Answer that "it took a single action to cause a single direct mailer to be sent"²⁸, such assertion is inconsistent with the admissions and evidence included in its July 21, 2015 response, administrative precedent for determining the unit of violation under Section 12 of FIFRA, 7 U.S.C. § 136j, and the recent decision in *Liphatech*²⁹.

Respondent's Answer further asserts that sending the direct mailer(s) "is distinct from the extent to which potential recipients actually received the mailer, actually read the mailer, actually attempted to purchase *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 , or actually purchased *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545." Complaint and Answer ¶ 38. As such assertions potentially address the risk of harm associated Respondent's illegal acts of advertising and therefore may be relevant to issues of penalty, they are not relevant to the issue of liability - which attached at the time Respondent sent each direct mailer and can't be 'undone' even if

²⁸ *See e.g.*, Complaint and Answer at ¶¶ 32, 35, 36, and 38.

²⁹ *See* footnote 23, *supra*.

each advertisement didn't achieve Respondent's desired result.

In describing what constitutes an independently assessable violation, the FIFRA ERP states that EPA considers a violation to be independent "if it results from an act (or failure to act) which is not the result of any other violation for which a penalty is to be assessed or if at least one of the elements of proof is different from any other violations." CX37 at EPA 1188. As each direct mailer sent to a retail purchaser in March 2012 involves a separate act and an element of proof that is different from any other violations (i.e., a separate entry in the Microsoft Excel spreadsheet), each of the 2,622 violations alleged as violations 9,646 – 12,267 in the Complaint should be considered to be independent.

Violations 12,268-12,270

At issue with these violations are the ad(s) printed in the April, May and July 2012 issues of *Progressive Forage Grower* magazine. Complainant maintains that each issue in which Respondent caused the ad to appear in *Progressive Forage Grower* magazine constitutes at least an individual separate act of advertising. Respondent's Answer admits that it caused its ad(s) to be printed in the April, May and July 2012 issues of the *Progressive Forage Grower* magazine. Complaint and Answer at ¶ 41. The preponderance of the evidence establishes that Respondent should be found liable for three (3) individual illegal separate acts of advertising with respect to the magazine ad(s) printed in the *Progressive Forage Grower*.

The assertion in Respondent's Answer that "it took no more than one action in deciding to cause the advertisement to appear" misses the mark as to the relevant act that determines the unit of violation which is *to advertise* (i.e., cause an advertisement to appear in an issue of a magazine) - not *to decide* to advertise (i.e., decide to cause an advertisement to appear in multiple issues of a magazine). Complaint and Answer at ¶ 47; *See* discussion in Section V.E., *supra*. Though Respondent asserts throughout its Answer that "it took a single action to cause"

either “a single advertisement” or “the advertisement” to appear³⁰”, such assertions are inconsistent with its factual admissions in its Answer, administrative precedent for determining the unit of violation under Section 12 of FIFRA, 7 U.S.C. § 136j, and the recent decision in *Liphatech*³¹ in which liability was found (from the evidence presented³²) based on the number of issues (i.e., dates) the illegal advertisements appeared in a particular publication. *Liphatech*, 2014 EPA ALJ LEXIS at *255-260.

In describing what constitutes an independently assessable violation, the FIFRA ERP states that EPA considers a violation to be independent “if it results from an act (or failure to act) which is not the result of any other violation for which a penalty is to be assessed or if at least one of the elements of proof is different from any other violations.” CX37 at EPA 1188. As each issue in which Respondent’s ad appeared in *Progressive Forage Grower* has at least one element of proof than is different from any other violation (i.e., the date of the publication in which the violative advertisement appeared), each of the three (3) violations alleged as violations 12,268-12,270 in the Complaint should be considered to be independent.

Violation 12,271

At issue with this violation is the advertisement printed in the March/April 2012 issue of *The Sunflower* magazine. Complainant maintains that each issue in which Respondent caused the advertisement to appear in *The Sunflower* magazine constitutes at least an individual separate act of advertising. Respondent’s Answer admits that it caused its advertisement to be printed in the March/April 2012 issue of *The Sunflower* magazine. Complaint and Answer at ¶ 49. The preponderance of the evidence establishes that Respondent should be found liable for an

³⁰ See e.g., Complaint and Answer at ¶¶ 41, 44, and 45.

³¹ See footnote 23, *supra*.

³² In *Liphatech*, the Chief Administrative Law Judge noted that the Complainant had focused on the particular issue and not the individual copies of each issue that were likely printed and circulated to subscribers and other customers of the particular trade journal. *Liphatech*, 2014 EPA ALJ LEXIS *257.

individual illegal act of advertising with respect to the magazine advertisement printed in *The Sunflower*.

Violation 12,272

At issue with this violation is the testimonial sell sheet Respondent caused to be posted on its website on the products webpage. Complainant maintains that the testimonial sell sheet Respondent caused to be posted on its website constitutes at least an individual separate act of advertising. Respondent's Answer admits that it caused the testimonial sell sheet to be posted on its website on the product's webpage in January 2012. Complaint and Answer at ¶ 57. The preponderance of the evidence establishes that Respondent should be found liable for an individual illegal act of advertising with respect to the testimonial sell sheet posted on its website on the products webpage.

Violation 12,273

At issue with this violation is the article entitled "FMC Announces Stallion™ Insecticide for Multi-Crop Use", dated February 10, 2011, posted on the *PRWeb* online news distribution and publicity website. Complainant maintains that this article that Respondent caused to be posted on the *PRWeb* website constitutes at least an individual separate act of advertising. Respondent's Answer admits that it caused the article entitled "FMC Announces Stallion™ Insecticide for Multi-Crop Use", dated February 10, 2011³³, to be posted on the *PRWeb* website. Complaint and Answer at ¶ 65. The preponderance of the evidence establishes that Respondent should be found liable for an individual illegal act of advertising with respect to the article posted on the *PRWeb* website.

³³ See footnote 8, *supra*.

VI. Respondent's Defenses Raise No Genuine Issues of Material Fact Exist That Would Preclude Granting Complainant's Motion.

As set forth at length, *supra*, Complainant has established its prima facie case for the 12,273 unlawful acts under Section 12(a)(2)(E) FIFRA, 7 U.S.C. § 136j(a)(2)(E), plead in the Complaint as Violations 1-12,273, meeting both its burdens of presentation and persuasion as required by Section 22.24 of the Consolidated Rules of Practice. 40 C.F.R. § 22.24.

Accordingly, the burden shifts to Respondent to present its defenses and any evidence in support.

Id.

As the EAB has stated,

[i]n order for the Region to prevail on its motion for an accelerated decision on liability, the Region must show that it has established the critical elements of . . . liability and that [Respondent] has failed to raise a genuine issue of material fact on its affirmative defense. *In re BWX Techs., Inc.*, 9 E.A.D. 61, 77-78 (EAB 2000).

Respondent raises the following four defenses in its Answer³⁴:

1. *Excessive, Unreasonable and Disproportionate Penalty* (Answer at 14-16);
2. *Complainant's Interpretation of the Proposed Number of Alleged Violations is Arbitrary and Capricious and Not in Accordance with the Law* (Answer at 16-17);
3. *Complainant's Assessment of Alleged Violations is Flawed, Not Supported by Law or Fact, and Arbitrary and Capricious* (Answer at 17); and
4. *Complainant's Interpretation of Applicable Statutory and Regulatory Provisions Infringes on Respondent's Right to Commercial Free Speech under the First Amendment to the U.S. Constitution* (Answer at 17-18).

Of these, only the second and third defenses are relevant to the relief sought by Complainant's Motion, and both take issue with the *number* of violations. Respondent's Answer states:

“Complainant's interpretation of the proposed *number* of violations is internally inconsistent, unreasonable, arbitrary and capricious and not in accordance with law.” Answer at 16 (emph. added).

³⁴ To the extent relevant to Complainant's Motion, Complainant reiterates and incorporates by reference those portions of its Rebuttal Prehearing Exchange that address defenses raised by Respondent in its Prehearing Exchange. See Complainant's Rebuttal Prehearing Exchange at 3 -8.

“Complainant’s approach to assessing the alleged violations is grossly inconsistent with EPA’s past enforcement actions, without precedent, legally unsupportable, and unreasonable in light of the facts of this case. . . [and] Complainant’s proposed *number* of advertising violations is based in part on a mis-statement of the factual record.” *Id.* at 17 (emph. added).

In Sections V.E. and F., *supra.*, Complainant has explained how it determined the number of advertising violations – based on Respondent’s own admissions and submissions – and further, how such determination is fully consistent with FIFRA, applicable policy (*e.g.*, FIFRA ERP), and limited caselaw (*e.g.*, *Liphatech*). To the extent that Complainant has somehow “mis-stated” the factual record, Complainant invites Respondent to clarify or correct any such mis-statement. Short of any such clarification or correction, neither defense raises a factual issue that would preclude a finding of liability for Respondent’s 12,273 advertising violations based on the record before this Court.

In other words, Complainant has demonstrated that such violations are both factually and legally sufficient for this Court to render a decision finding FMC liable for each and every one of the 12,273 advertising violations alleged in the Complaint.

VII. Conclusion

Based on Respondent’s admissions in its Answer, Respondent’s admissions and supporting documentation provided to EPA outside of the pleadings, and factual information obtained by EPA as part of its investigation, there are no genuine issues of material fact as to Respondent’s liability for violations 1-12,273 alleged in the Complaint. For the reasons discussed herein, Complainant is entitled to judgment as a matter of law based on FIFRA and EPA’s implementing regulations and as to liability for violations 1-12,273 alleged in the Complaint.

Complainant hereby requests that its Motion for Partial Accelerated Decision as to Liability for Violations 1-12,273 of the Complaint be granted.

Respectfully submitted,

AUG 22 2016

DATED: _____



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**BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029**

FMC Corporation) DOCKET NO: FIFRA-03-2015-0248
1735 Market Street)
Philadelphia, PA 19103)
)
Respondent)
)

DECLARATION OF CHRISTINE CONVERY

Commonwealth of Pennsylvania
County of Philadelphia

I, Christine Convery, declare and state as follows:

1. The statements made in this declaration (which consists of five pages) are based on my personal knowledge.
2. In 1999, I received a Bachelor of Science degree in Biology from the University of Massachusetts, Amherst, MA. In 2004, I received a Master of Business Administration from Rosemont College, Rosemont, PA. I am a Board Certified Entomologist under the Entomological Society of America’s certification program.
3. I am currently employed as a Life Scientist and I am credentialed as an Inspector/Enforcement Officer with the Pesticides and Asbestos Programs Branch, Land and Chemicals Division, U.S. EPA, Region III. I have been employed in this capacity since October 2010.
4. As an Inspector/Enforcement Officer in the Pesticides and Asbestos Programs Branch (PAPB), my duties include conducting inspections and other investigative work to determine compliance with the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as well as other environmental statutes. I have conducted approximately 38 inspections under FIFRA, specifically. I am also responsible for managing the FIFRA Section 7 program and the Pesticides in Water/Water Quality program at EPA Region III.
5. This case involving FMC Corporation was assigned to me as the case development officer by my supervisor, Dr. Fatima El-Abdaoui, on or about December 18, 2012, after EPA Region III was notified by EPA Headquarters of suspected FIFRA violations in connection with the registered pesticide *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 (“Stallion”).

6. In the ordinary scope of my case development activities in the PAPB:
- a. I help prepare Request for Information letters which are issued in lieu of or in addition to performing inspections depending on the circumstances of the case and the type of information sought. Once issued, copies of Request for Information letters and responses thereto are typically maintained in my and the assigned attorney's case files. Copies of issued Request for Information letters are also typically kept in a general file maintained by PAPB called the "Chron File". In connection with this case involving FMC Corporation, I helped prepare the Request for Information letters described in paragraphs 7, 9 and 13, below.
 - b. I conduct online research and communicate with individuals and entities both by E-mail and by telephone to obtain relevant information. Records of such activities and communications are typically maintained in my case file, and I typically share this information, or parts thereof, with the assigned attorney for inclusion in his or her case file. In connection with this case involving FMC Corporation, records of my online research and communications are described in paragraphs 11, 12, 16, 17 and 18, below.
 - c. I access pesticide registration information from EPA's Office of Pesticide Programs (OPP) through informational databases such as the Office of Pesticide Programs Information Network ("OPPIN") and EPA's Pesticide Registration Information System ("PRISM"). The information I obtain from OPP is typically maintained in my case file, and I typically share this information, or parts thereof, with the assigned attorney for inclusion in his or her case file. In connection with this case involving FMC Corporation, the pesticide registration information I obtained about the registered pesticide *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 from the PRISM database included:
 - i. Notice of Pesticide Registration - F9047-2 EC Insecticide (01/21/11) **Cx9 (EPA 0495-EPA 0521)**
 - ii. Letter to Thomas Harris (EPA) from Jill Holihan (FMC) re: F9047-2 EC Insecticide (01/24/11) (attachments) **Cx10 (EPA 0522-EPA 0550)**

The above-listed exhibits represent true and accurate copies of the documents obtained from PRISM.

7. On June 6, 2013, EPA Region III issued a Request for Information letter to FMC Corporation. **Cx24 (EPA 0677-EPA 0680) represents a true and accurate copy of the June 6, 2013 Request for Information letter referenced in this paragraph except that it does not include a copy of "SBREFA" enclosure.**
8. On July 18, 2013, FMC Corporation sent a response to EPA Region III's June 6, 2013 Request for Information letter, which included a written narrative response and a compact disc with numerous electronic files. The electronic files included "promotional and advertising materials" as well as a training presentation regarding Stallion Insecticide that

were separated into two folders labeled “ARCHIVED Projects” (19 files) and “CURRENT Projects” (6 files). **Cx25 (EPA 0681-EPA 0682)** represents a true and accurate copy of the July 18, 2013 written narrative response referenced in this paragraph. **Cx25 (EPA 0683-EPA 0738)** represents true and accurate printouts of the electronic files referenced in this paragraph. After reviewing the “promotional and advertising materials” as well as a training presentation regarding Stallion Insecticide (25 files), I determined that the following six (6)¹ “promotional and advertising materials” did not include the words “restricted use pesticide” and did not include any language that resembled terms of restriction for the registered restricted use pesticide *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545:

- i. **F100-22333-1_Stallion_PrintAd_ProgressiveForageGrower-X1A.pdf** (EPA 0689);
- ii. **F100-22333-1_Stallion_PrintAd_Sunflower-X1A.pdf** (EPA 0690);
- iii. **F100-22694-01_Stallion_DM-Vs3-X1A.pdf** (EPA 0691-EPA 0692);
- iv. **F100-22694-02_Stallion_DM-Retailers-X1A.pdf** (EPA 0693-EPA 0694);
- v. **F100-027552-2_Stallion Testimonial Sell Sheet-X1A.pdf** (EPA 0696); and
- vi. **STALLION_NRFfinal.docx**² (EPA 0702-EPA 0703).

Cx25 (EPA 0689, EPA 0690, EPA 0691-EPA 0692, EPA 0693-EPA 0694, EPA 0696 and EPA 0702-EPA 0703) represents true and accurate printouts of the six (6) electronic files referenced in this paragraph.

9. On May 7, 2014, EPA Region III issued an Opportunity to Show Cause/Request for Information letter to FMC Corporation. **Cx26 (EPA 0748-EPA 0753)** represents a true and accurate copy of the May 7, 2014 Opportunity to Show Cause/Request for Information letter referenced in this paragraph except that it does not include the SEC enclosure.
10. On July 15, 2014, FMC Corporation sent a response to EPA Region III’s May 7, 2014 Request for Information letter. **Cx27 (EPA 0754-EPA 0756)** represents a true and accurate copy of the July 15, 2014 response referenced in this paragraph.
11. I verified that the print advertisement represented by the electronic file **F100-223331_Stallion_PrintAd_ProgressiveForageGrower-X1A.pdf** had been included in the April, May and July 2012 issues of Progressive Forage Grower magazine by visiting the website <http://www.progressiveforage.com/magazine> and capturing/downloading screen shots of relevant pages from the April, May and July 2012 issues of Progressive Forage Grower magazine. **Cx31 (EPA 1148-EPA 1150)** represents a true and accurate copy of the captured/downloaded screen shots from The Progressive Forage Grower magazine referenced in this paragraph.

¹ There were additional “promotional or advertising materials” beyond the six (6) identified above that did not include the words “restricted use pesticide” and did not include any language that resembled terms of restriction for the registered restricted use pesticide *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 but after further investigation it was decided that these additional materials would not be included in the Complaint.

² The disc also included a file named **STALLION-NRFfinal.pdf**, which appears to be identical in all respects to **STALLION_NRFfinal.docx** except for the file format. See CX 25, EPA 0704-EPA 0705.

12. I verified that the print advertisement represented by the electronic file **F100-22333-1_Stallion_PrintAd_Sunflower-X1A.pdf** had been included in the March/April 2012 issue of The Sunflower by visiting the website <http://www.sunflowernsa.com/magazine/past-digital-issues/> and capturing/downloading screen shots of relevant pages from the March/April 2012 issue of The Sunflower, and by telephone conversation with John Sandbakken, Executive Director of the National Sunflower Association. **Cx32 (EPA 1151–EPA 1153) represents a true and accurate copy of the captured/downloaded screen shots from The Sunflower magazine referenced in this paragraph.**
13. On June 23, 2015, EPA Region III issued a Request for Information letter to FMC Corporation. **Cx28 (EPA 0757-EPA 0761) represents a true and accurate copy of the June 23, 2015 Request for Information letter referenced in this paragraph.**
14. On July 21, 2015, FMC Corporation sent a response to EPA Region III’s June 23, 2015 Request for Information letter, which included a written narrative response and electronic files provided via E-mail. The electronic files were three (3) Microsoft Excel files labeled as Enclosure A (“sales”), Enclosure B (“retailers”) and Enclosure C (“growers”).
- a. After reviewing Enclosure B, I used the worksheet entitled “RETAILER_ORIGINAL_FIELDS³” (i.e., “tab 1”) to verify the number of individuals who were sent the direct mailer represented by the electronic file **F100-22694-02_Stallion_DM-Retailers-X1A.pdf**. Using the count function in Microsoft Excel, I determined the number of individuals sent this mailer to be 2,622.
 - b. After reviewing Enclosure C, I used the worksheet “GROWER_ORIGINAL_FIELDS⁴” (i.e., “tab 1”) to verify the number of individuals who were sent the direct mailer represented by the electronic file **F100-22694-01_Stallion_DM-Vs3-X1A.pdf**. Using the count function in Microsoft Excel, I determined the number of individuals sent this mailer to be 9,645.

Cx29 (EPA 0762–EPA 0764) represents a true and accurate copy of the July 21, 2015 written narrative response referenced in this paragraph. Cx29 (EPA 0783-EPA 0833) represents a true and accurate copy of Enclosure B (“RETAILER_ORIGINAL_FIELDS”) and Cx29 (EPA 0960–EPA 1145) represents a true and accurate copy of Enclosure C (“GROWER_ORIGINAL_FIELDS”), however the worksheets have been converted to PDFs for ease of reading.

³ Enclosure B also included a worksheet entitled “Retailer Duplicates Removed” (i.e., “tab 2”), which appears to be a subset of the individuals listed in “RETAILER_ORIGINAL_FIELDS” (i.e., “tab 1”). See **CX29 (EPA 0762-EPA 764, EPA 0776-EPA 782)**.

⁴ Enclosure C also included a worksheet entitled “Grower Duplicates Removed” (i.e., “tab 2”), which appears to be a subset of the individuals listed in “GROWER_ORIGINAL_FIELDS” (i.e., “tab 1”). See **CX29 (EPA 0762-EPA 764, EPA 0834-EPA 0959)**.

15. On August 11, 2015, FMC provided a letter to EPA clarifying that it mistakenly stated in its July 15, 2014 response that its print news release represented by the electronic file **STALLION_NRFinal.docx** was sent to PR Newswire, when in fact, it was sent to PR Web. This letter was provided to me by the attorney assigned to this matter. **CX30 (EPA 1146- EPA 1147) represents a true and accurate copy of the August 11, 2015 letter from FMC referenced in this paragraph.**

16. Between July 10, 2015 and July 27, 2015, I corresponded with representatives of PR Web, including PR Web's General Counsel, via E-mail to verify details of the services PR Web provides. **Cx34 (EPA 1155-EPA 1158) represents a true and accurate copy of the E-mail communications between me and PR Web representatives referenced in this paragraph.**


17. I verified that the print news release represented by the electronic file **STALLION_NRFinal.docx** was posted on PR Web by visiting the website <http://www.prweb.com> and printing a copy as it appeared on March 9, 2015. An additional copy of the print news release **STALLION_NRFinal.docx** as it appeared on PR Web on March 14, 2012 was provided to me by EPA Headquarters as part of the notification discussed in paragraph 5, above. Though the content of the print news release appears to be otherwise identical, I note that the version of the print news release posted on PR Web is dated February 10, 2011 while the electronic file **STALLION_NRFinal.docx** submitted by FMC in its July 18, 2013 response is dated February 16, 2011. **Cx35, (EPA 1159-EPA 1163) represents true and accurate copies of the PR Web news releases referenced in this paragraph.**

18. Through online research, I discovered that either the full print news release represented by the electronic file **STALLION_NRFinal.docx** or portions thereof were posted on additional online media outlets, such as AgriMarketing, Farm Chemicals International and Angus Beef Bulletin, and printed these web pages out as they appeared on their respective websites. **Cx36 (EPA 1164 – EPA 1172) represents a true and accurate copy of the print outs of the web pages referenced in this paragraph.**

The assertions I make in this declaration are truthful, and, if called to testify as a witness, I am prepared to testify under oath to the accuracy of the observations and statements contained in this declaration, based on my personal knowledge.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on: August 22, 2016

By: 
Christine E. Convery
Life Scientist
Enforcement Officer

Facts Admitted¹ in Respondent's Answer

1. Respondent is a Delaware corporation, headquartered at 1735 Market Street in Philadelphia, Pennsylvania, that operates as a diversified chemical company that provides products for agricultural, consumer and industrial markets. Complaint and Answer at ¶ 8.
2. Respondent is a “person” as defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s). Complaint and Answer at ¶ 9.
3. On January 21, 2011, EPA registered Respondent's *F9047-2 EC Insecticide* as a pesticide and assigned such product the registration number EPA Reg. No. 279-9545 (“*F9047-2 EC Insecticide*, EPA Reg. No. 279-9545”). Complaint and Answer at ¶ 10.
4. At all times relevant to the violations alleged in the Complaint, *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 was a “pesticide” and a “pesticide product” as those terms are defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. § 152.3. Complaint and Answer at ¶ 13.
5. At all times relevant to the violations alleged in the Complaint, Respondent was the “registrant” as defined in Section 2(y) of FIFRA, 7 U.S.C. § 136(y), for *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545. Complaint and Answer at ¶ 14.
6. At all times relevant to the violations alleged in the Complaint, Respondent was a “registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor” under Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1). Complaint and Answer at ¶ 15.
7. As of the date of its registration with EPA as a pesticide on January 21, 2011, and at all times relevant to this Complaint, *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 was classified as a restricted use pesticide (“RUP”) under Section 3(d)(1)(C) of FIFRA, 7 U.S.C. § 136a(d)(1)(C). Complaint and Answer at ¶ 18.
8. Respondent caused an advertisement about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to be printed in the March/April 2012 issue of *The Sunflower* magazine. Complaint and Answer at ¶ 49.

¹ To avoid confusion, this list does not include facts that Respondent “Admitted in part” in its Answer. Such facts are discussed more fully in the body of the Memorandum.

9. Respondent's advertisement about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that was printed in the March/April 2012 issue of *The Sunflower* magazine did not include the statement "Restricted Use Pesticide." Complaint and Answer at ¶ 52.
10. Respondent's advertisement about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that was printed in the March/April 2012 issue of *The Sunflower* magazine did not include any statement of the terms of restriction of *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545. Complaint and Answer at ¶ 53.
11. In January 2012, Respondent caused a testimonial sell sheet about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to be posted on Respondent's website on the product's webpage. Complaint and Answer at ¶ 57.
12. Respondent's testimonial sell sheet about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that was posted on the product's webpage in January 2012 did not include the statement "Restricted Use Pesticide." Complaint and Answer at ¶ 60.
13. Respondent's testimonial sell sheet about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 that was posted on the product's webpage in January 2012 did not include any statement of the terms of restriction of *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545. Complaint and Answer at ¶ 61.
14. Respondent's article about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545, dated February 10, 2011, that was posted on the *PRWeb* website did not include the statement "Restricted Use Pesticide." Complaint and Answer at ¶ 68.
15. Respondent's article about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545, dated February 10, 2011, that was posted on the *PRWeb* website did not include any statement of the terms of restrictions of *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545. Complaint and Answer at ¶ 69.

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)	Docket No.: FIFRA-03-2015-0248
)	
FMC Corporation,)	
1735 Market Street)	
Philadelphia, PA 19103)	
)	
Respondent)	

CERTIFICATE OF SERVICE

I hereby certify that, on the date below, copies of COMPLAINANT’S MOTION FOR PARTIAL ACCELERATED DECISION AS TO LIABILITY FOR VIOLATIONS 1 THROUGH 12,273 OF THE COMPLAINT and MEMORANDUM OF LAW IN SUPPORT OF COMPLAINANT’S MOTION FOR PARTIAL ACCELERATED DECISION AS TO LIABILITY FOR VIOLATIONS 1 THROUGH 12,273 OF THE COMPLAINT were served upon the persons listed in the manner indicated.

Original and one copy of Complainant’s Rebuttal Prehearing Exchange via the OALJ E-filing System

Sybil Anderson, Headquarters Hearing Clerk

One copy of Complainant’s Rebuttal Prehearing Exchange via the OALJ E-filing System

Christine Coughlin, Administrative Law Judge

One copy of Complainant’s Rebuttal Prehearing Exchange via UPS Next Day Air

Kathryn E. Szmuszkovicz
Daniel B. Schulson
Beveridge & Diamond PC
1350 I Street, N.W., Suite 700
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AUG 22 2016

Date



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U.S. EPA, Region III