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

REPLY TO THE ATTENTION OF:
C-14J

Via UPS Overnight Delivery

November 16, 2010

Honorable Barbara A. Gunning
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1099 14th Street, NW, Suite 350
Franklin Court
Washington, D.C. 20005

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

Dear Judge Gunning:

Please find enclosed a copy of *Complainant's Motion in Limine to Exclude Testimony and Evidence*, which was filed on November 16, 2010, in the above referenced-matter.

Sincerely,

Nidhi K. O'Meara
Associate Regional Counsel

Enclosures

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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

Complainant's Motion in Limine to Exclude Testimony and Evidence

Pursuant to 40 C.F.R. Sections 22.16(a) and 22.22(a)(1), Complainant files the instant Motion. By this Motion, Complainant requests that this Honorable Court issue an Order excluding the expert testimony of Mr. Robert Haven Fuhrman and Respondent's Exhibits (RX) 40 through 42 because they relate to Mr. Fuhrman's proffered testimony. Mr. Fuhrman's proffered testimony is irrelevant, immaterial, unreliable and offers little or no probative value to the Presiding Judge and therefore is inadmissible.

In the event that Mr. Fuhrman is allowed to testify, the United States Environmental Protection Agency (U.S. EPA) may call a rebuttal witness to address Mr. Fuhrman's testimony. Therefore, in order to conserve resources relating to the travel expenses, preparation and presentation of such rebuttal witness, the U.S. EPA respectfully requests a ruling on this motion in advance of the hearing.

I. The Standard for Admissible Evidence

The *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, (Consolidated Rules) 40 C.F.R. Part 22, state in pertinent part:

> 22.22 Evidence. (a) General. (1) The Presiding Officer shall admit all evidence which is **not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value**, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence (28 U.S.C.) is not admissible.

(emphasis added).

The Consolidated Rules do not elaborate on what evidence might meet this standard, but the Presiding Judge may look to federal court practice and the Federal Rules of Evidence (FRE or Rules) as guidance. *See In the Matter of Aquakem Carbie, Inc.*, 2010 EPA ALJ LEXIS 9, at *5-6 (ALJ 2010) (quoting *In re Euclid of Virginia, Inc.*, 2008 EPA App. LEXIS 13, at *94-95 (EAB 2008). Rule 702 may guide the Presiding Judge in determining, in her discretion, if expert testimony is admissible:

> Rule 702. Testimony by Experts
> If scientific, technical, or other specialized knowledge will **assist the trier of fact to understand the evidence or to determine a fact in issue**, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702 (emphasis added).

Rule 702 was amended in 2000 as a response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993), and to many cases applying *Daubert*. The 2000 amendment memorializes the findings in *Daubert* by defining the court's role as a "gatekeeper" that must assess the reliability, relevancy and utility of expert testimony to be proffered. *Daubert* set forth a list of factors for courts to consider when assessing the reliability of the testimony.[1] They are: (1) whether the expert's theory or technique can or has been tested. Specifically, the question that must be answered is if the expert's testimony is a

[1] The Supreme Court in *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167 (1999) clarified that a trial court's gate keeping function should be applied to all expert testimony, not just scientific testimony.

subjective opinion that cannot be reasonably assessed for reliability; (2) whether the expert's theory has been subject to peer review and publication; (3) whether the potential rate of error of the theory when applied is known; (4) whether there is the existence and maintenance of standards and controls concerning the theory's operation; and (5) whether the theory has been generally accepted by the relevant scientific community. *Daubert*, 113 S. Ct. at 2796-97.

Courts before and after *Daubert* have identified other factors that may be relevant in determining if expert testimony is sufficiently reliable to assist a trier of fact. Relevant to the case at bar:

> One very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying. That an expert testifies for money does not necessarily cast doubt on the reliability of his testimony, as few experts appear in court merely as an eleemosynary gesture. But in determining whether proposed expert testimony amounts to good science, we may not ignore the fact that a scientist's normal workplace is the lab or the field, not the courtroom or the lawyer's office.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317 (9th Cir. 1995). The Court should also consider if the expert "is being careful as he would be in his regular professional work outside his paid litigation consulting." *Sheehnan v. Daily Racing, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). Also see *Kumho*, 119 S. Ct. at 1176, where the Court noted that *Daubert* requires the trier of fact to insure that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Lastly, the Court should consider if the claimed field of expertise in which the witness claims to be an expert is known to reach reliable results for the type of opinion he or she will offer to assist the trier of fact. In *Kumho*, 119 S. Ct. at 1175, the Court noted that "the presence of *Daubert*'s general acceptance factor [does not] help show that an expert's testimony is reliable where the discipline itself lacks

reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy."

Rule 702 applies equally to both scientific expertise and other forms of expertise such as "other specialized knowledge." See *Kumho*, 119 S. Ct. at 1174. The trier of fact's gate keeping obligations in these instances are the same as they are for experts in fields of science. The Court is left to decide if the proffered testimony is well grounded and well reasoned based on whether the expert has sufficient practical experience to justify the conclusions he or she reaches and he or she is able to explain in detail how he or she reached such conclusions. See *United States v. Jones*, 107 F.3d 1147, 1160-1161 (6th Cir. 1997).

II. Mr. Robert H. Fuhrman's Proposed Testimony

In its initial prehearing exchange, Liphatech, Inc. (Respondent) lists Mr. Fuhrman as an expert witness. Respondent identifies Mr. Fuhrman as a consultant that "focuses on economics, finance and regulatory policy analysis." Respondent's Prehearing Exchange (PHX), 6. Respondent lists Mr. Fuhrman's credentials to include (1) being employed by the U.S. EPA for seven years almost three decades ago, (2) working for various consulting firms for the bulk of his career, (3) working as a consultant "on many environmental civil penalty cases, performing economic benefit, ability-to-pay, and 'gravity component' analyses," (4) publishing over thirty articles and (5) providing testimony as an expert witness in previous cases.

In particular, Respondent's witness description states that Mr. Fuhrman will provide a dissertation of the how penalty policies have not gone through notice and comment rulemaking,[2]

[2] This proposition is undisputed and clearly established by the Environmental Appeals Board (EAB). See *In re Employers Insurance of Wausau and Group Eight Technology, Inc.*, 6 E.A.D. 735, 761-762 (EAB, 1997). Also see *Employers Insurance of Wausau*, 6 E.A.D. at 762, where the EAB quotes *Community Nutrition Institute v. Young*, 818 F.2d 943, 949 (D.C Cir. 1987) ("The D.C. Circuit, for example, has made clear that the development of non-legislative agency guidelines is entirely proper, provided that the issuing agency does not seek to invest those guidelines with 'binding effect.'")

the goals of penalty policies,[3] how U.S. EPA enforcement staff calculate penalties,[4] previously adjudicated cases (see Respondent's Exhibit (RX) 41),[5] what Complainant's burden of proof is with respect to proposed penalties,[6] what a unit of violation might be,[7] how Ms. Claudia Niess calculated the penalty,[8] how U.S. EPA should have exercised its prosecutorial discretion,[9] how the Judge should deviate from the 2009 FIFRA penalty policy (2009 ERP) (see page 17 of the prehearing exchange: "Mr. Fuhrman may testify that he believes it might be appropriate for the Presiding Officer to rule ..."),[10] what is meant by his own penalty analysis provided in RX 42,[11] and how the judge should interpret the law with the respect to the violations alleged in the complaint (See Page 22 of the PHX).[12] See pages 5 through 25 of Respondent's prehearing exchange for a full description of Mr. Fuhrman's proposed testimony.

III. Mr. Fuhrman's Proposed Testimony is Inadmissible

In its role as "reliability" gatekeeper, the trier of fact must decide if testimony proffered by an expert is admissible. In making this assessment, the trier of fact must determine if the proffered expert testimony (1) is relevant to the task at hand and (2) offers a reliable basis in the knowledge and experience of the relevant area of expertise.

---

[3] These goals can be easily ascertained by reading the relevant penalty polices.
[4] U.S. EPA enforcement staff, who have actually calculated the penalties, are better suited to testify on this topic.
[5] Surely, the trier of fact whose name appears in no less than 170 different environmental matters on the administrative law judge website does not need the assistance of an "expert" to illuminate the meaning and application of such case law to the facts in this case.
[6] This information is both easily ascertainable and understood.
[7] This is an issue more properly left for argument by the lawyers through legal briefs and opening and closing statements as it requires the legal interpretation of Section 12(a)(2)(E) of FIFRA.
[8] Ms. Niess can testify as to how she calculated the penalty in this matter with unneeded speculation by Respondent's "expert" witness. Respondent will then have an opportunity to cross-examination the witness at the hearing.
[9] An "expert" cannot argue how the government **should have** exercised it prosecutorial discretion as it is counter intuitive to dictate to the government's discretion.
[10] Again, it is wildly presumptuous to imply that the judge would need illumination by an "expert" on this issue. Arguments such as these are best saved for briefs.
[11] While Respondent is not precluded from presenting its own penalty calculations, it should do so by presenting evidence with regard to elements such as toxicity, harm to human health and the environment via qualified toxicologists or scientists and then arguing its conclusions in closing arguments and briefs.
[12] This is highly inappropriate because it usurps the function of the trier of fact.

Mr. Fuhrman is an economist. Principles relating to economics are not at issue in this case. Mr. Fuhrman is being proffered to testify about the application of FIFRA as it relates to this case. Such testimony is being offered to justify a lower penalty than the one proposed by Complainant. In this case, Mr. Fuhrman's proposed testimony is so far outside the bounds of admissible expert testimony that it must be excluded as it is irrelevant, immaterial, unreliable and offers little or no probative value. Additionally, allowing Mr. Fuhrman to testify does not advance the goals of judicial economy because his testimony is not needed to assist the Presiding Judge in applying the law to the facts of this case.

A. Mr. Fuhrman's proposed testimony is unreliable

Respondent proposes to elicit extensive testimony from Mr. Fuhrman regarding both penalty and liability in this case. However, with respect to penalty, he does not have the requisite expertise to offer an opinion as to how the gravity factor in Section 14(a)(4) of FIFRA should apply to this case. Similarly, with respect to liability, he does not have the requisite expertise to offer an opinion as to how Sections 12(a)(1)(B) and 12(a)(2)(E) of FIFRA should be interpreted.

1. *Mr. Fuhrman is not a an expert in any field of science*

A review of Mr. Fuhrman's curriculum vitae clearly reveals that he is not a scientist. By Respondent's own admission, ability to pay and size of business are not at issue in this case, leaving the "gravity" of the violations as the sole penalty factor in Section 14(a)(4) for the Presiding Judge to consider. PHX, 12. The gravity component of the FIFRA 2009 Enforcement Response Policy (ERP) focuses on, among other things, pesticide toxicity, harm to human health and harm to the environment. Mr. Fuhrman goes through an extensive dissertation as to these

specific factors in RX 42, 7-10, and 17-18. In RX 42, Mr. Fuhrman gets into matters of toxicity, law, and the potential harm that Rozol[13] can cause to human health and the environment.

In an attempt to justify Mr. Fuhrman's testimony, Respondent offers him as an expert in "gravity analysis" holding him out as possessing "specialized knowledge" in this area. In an effort to demonstrate this "specialized knowledge," Respondent points to two articles authored and co-authored by Mr. Fuhrman, respectively, almost 17 years ago. Both articles, "Improving EPA's Civil Penalty Policies - And its No-So-Gentle-BEN Model" and "Avoiding the Pitfalls of EPA Civil Penalty Assessment Procedures" are focused on economic principles[14]. Nonetheless, the Supreme Court has stated that a "[p]ublication (which is but one element of peer review) is not a *sine qua non* of admissibility; it does not necessarily correlate with reliability." *Daubert*, 113 S. Ct. at 2797.

In addition, not only does Mr. Fuhrman lack the requisite education or training to opine about the toxicity or effects of Rozol, he lacks any practical experience that constitutes "specialized knowledge" to justify any opinions he may offer to this court. Mr. Fuhrman worked for the U.S EPA almost to 30 years ago, well before the inception of the 1990 and 2009 FIFRA ERPs. His duties as U.S. EPA were related to his economics background. He did not draft, develop or utilize any of the relevant penalty policies to carry out his duties at U.S. EPA.

The fact that Mr. Fuhrman previously testified in two ALJ cases does not in it of itself make him an expert. In both cases, he was to testify on issues of economics. In *In re Rhee Bros., Inc.*, Docket No. FIFRA-09-2008-0027 (2010), the witness description that was submitted was sparse, consisting of a mere 3 sentences, touting him as a "consultant specializing in

[13] For ease of reference, Complainant will use Rozol here to refer to "Rozol Pocket Gopher Bait II" (Alternative name: "Rozol Pocket Gopher Burrow Builder Formula"), EPA Registration Number 7173-244.
[14] The remaining 28 articles also appear to be focused on economic principles.

economic, financial, and regulatory policy analysis." See attachment A. The fact that he testified in a previous cases and provided irrelevant, immaterial, unreliable testimony based on legal arguments does not qualify him to testify with regard to the statutory factors set forth in Section 14(a)(4)of FIFRA in this case. Respondent's prior qualifications, largely based on Mr. Fuhrman's economic background, are not dispositive in this instant and must be viewed in the totality of the circumstances in this case.

Mr. Fuhrman lacks the requisite **scientific** foundation or expertise to testify about the gravity of the violations alleged in the Complaint. Remarkably, much of what he argues in RX 42 is reminiscent of the arguments counsel has made in its recent filings. Such testimony is inadmissible and should be barred.

2. *Mr. Fuhrman is not a an expert in any field of law*

While it would not be appropriate for a lawyer to testify as an expert on the law, the situation is worse here. Mr. Fuhrman does not even have the requisite knowledge needed to lecture anyone much less the Presiding Judge on matters of the law. Respondent intends to have Mr. Fuhrman testify to a litany of decisions in prior cases, in an effort to impart his "specialized knowledge[15]" regarding these decisions. The purpose of expert testimony is to assist the trier of fact to understand a subject matter that may be so specialized that a Judge may not understand without enlightenment by an expert in the field. Clearly, Mr. Fuhrman is neither an expert in the area of law nor is the Presiding Judge in need of any assistance in understanding the subject matter through expert testimony.

[15] Based on Respondent's witness description, all Mr. Fuhrman has done to gain the "specialized knowledge" is **read** and perhaps summarize the case law. Under these low standards, virtually any person could easily gain such "specialized knowledge."

This Honorable Court has previously addressed a similar question in *In the Matter of General Motors Automotive - North America*, Docket No. RCRA-05-2004-0001, 2005 EPA ALJ LEXIS 29 (ALJ 2005). In *GM*, this Honorable Court was faced with deciding if a lawyer should be able to testify as an expert as to the law. While this Court deferred the motion *in limine* until hearing in that case[16], Your Honor did state as follows:

> However, I agree with and would adopt Judge Biro's relevant language expressed in the *Strong Steel* order ... *See Strong Steel,* 2003 EPA ALJ LEXIS 191, at *60-61. Moreover, I agree with EPA's position that testimony about the law should be ancillary to factual or expert testimony. Significantly, the witness discussed in *Strong Steel* was to testify to explain the regulations at issue in that case but within the context of discussing the reasonableness of the proposed penalty for the alleged violations and her review of the facts supporting the alleged violations. *Id.* at *57. Furthermore, the EPA correctly observes that she was not admitted as a legal expert. Accordingly, her explanation of the regulations would appear to be ancillary to her factual or technical testimony. *See id.* at *57, *60. Testimony concerning only legal principles will not be admissible, but rather should be heard within the confines of the parties' legal briefs and opening and closing statements at the hearing. With regards to 'background' testimony, typically such testimony is quite limited in nature, as the testimony should only inform the witness' factual or expert testimony. I emphasize that the parties have had and will have sufficient opportunity to brief the relevant legal principles and the regulatory scheme at issue in this matter.

Id. at *12-13 (footnotes omitted.).

In this case, Mr. Fuhrman's proposed testimony will not provide any factual or expert testimony **apart** from legal testimony. Mr. Fuhrman's proposed discussion of legal issues is not ancillary to his expert testimony but rather is the very testimony that will be offered by Mr. Fuhrman. As a result, his proposed testimony is unreliable and irrelevant.

3. *Mr. Fuhrman can not testify as to a person's state of mind*

Respondent implies that Mr. Fuhrman may testify to the enforcement staff members' state of mind. For example, the witness description states that "Mr. Fuhrman may testify that in

[16] Ultimately, counsel in that case did not proffer the witness at hearing.

calculating proposed penalties for use in pleadings, such as complaints, EPA enforcement staff members generally try to argue for high penalties within the broad guidelines of the applicable ERP, but they do not try to fill in the gaps in an ERP that were left by the authors." PHX, 9. "Mr. Fuhrman may testify that if the authors of the 2009 ERP had envisioned that a Complainant might allege and a Respondent may be found liable for hundreds or perhaps thousands of advertising-related violations in a particular case, they might have created a very different graduated penalty matrix....[17]" PHX, 17 and RX 42 at 14. "Ms. Niess attempted to apply the December 2009 ERP...." RX 42 at 2. Mr. Fuhrman may offer possible explanations for why EPA charged Respondent for all the violations for which it had evidence. PHX, 15. All of these statements (and any testimony that may follow) attempt to discuss what the enforcement staff was thinking and are therefore pure conjecture. Such testimony is unreliable and therefore inadmissible.

In sum, in the context of *Daubert* and subsequent cases such as *Kumho*, it is evident that Mr. Fuhrman cannot offer reliable testimony relating to the gravity factor in Section 14(a)(4) of FIFRA. Similarly, he cannot offer reliable testimony relating to liability in this case. Any opinion he may offer is subjective and cannot reasonably be assessed for reliability. His publications relating to this "gravity analysis" do not demonstrate any expertise in this area. His proffered testimony does not grow naturally and directly out of research that he conducted independent of litigation. Rather, it is evident that his opinions were developed so he could

[17] The EAB in *Employers Insurance of Wausau*, 6 E.A.D. at 759, (EAB, Feb. 11, 1997), stated "[a]mong the principles we have just surveyed, there is nothing that would have required Region V to substantiate the 'underpinnings' of the PCB Penalty Policy as a matter of course." Therefore, speculation regarding what the authors of the 2009 ERP "might have created" is superfluous noise that is unreliable, irrelevant and carries little to no probative value.

testify as an expert. Ultimately, he fails to possess any "specialized knowledge" that would assist this trier of fact on disputed issues of this case.

B. Mr. Fuhrman's testimony is irrelevant, immaterial and offers little to no probative value

In addition to being unreliable, Mr. Fuhrman's proposed testimony is inadmissible because it is irrelevant, immaterial and offers little or no probative value. It is evident that Mr. Fuhrman is being cloaked as an "expert" in an effort to testify on behalf of Respondent's counsel. Mr. Fuhrman's proffered testimony consists entirely of opinion testimony regarding legal conclusions as to how to interpret the statutory factors for penalty under section 14(a) of FIFRA and how to interpret Sections 12(a)(2)(E) and 12(a)(1)(B)[18] of FIFRA.

Nearly every federal circuit court of appeals has explicitly held that such proposed "expert testimony" on legal conclusion is inadmissible under the FRE. Particular to the Seventh Circuit, the Court in *In Good Shepherd Manor foundation Inc., v. City of Momence*, 323 F.3d 557, 564 (7th Cir. 2003) held that it was proper to exclude proposed testimony on a legal conclusion, where the plaintiffs attempted to call a law professor to testify as an expert witness that the city's decision to shut off water supply to the plaintiffs violated the Fair Housing Amendments Act (FHAA).

> The proffered testimony was based largely on purely legal matters and made up solely of legal conclusions, such as conclusions that the city's actions violated the FHAA. The district court correctly ruled that **expert testimony as to legal conclusions that will determine the outcome of the case is inadmissible.**

Id. at 564 (emphasis added). *See also Aguilar v. Int'l Longshoremen's Union Local No. 10*, 966 F. 2d 443, 447 (9th Cir. 1992) (concluding that the issue of whether the plaintiffs' reliance on

[18] As an example, based on Mr. Fuhrman's witness description and RX 42, he may discuss Section 12(a)(1)(B) of FIFRA in the context of two previous decisions relating to violations of this Section of FIFRA. PHX, 22. Further, "Mr. Fuhrman may testify that he is aware that the Respondent disagrees with the complainant's interpretations of certain statutory and regulatory provisions and ..." PHX, 22 - 23.

representations were reasonable and foreseeable were matters of law for the court's determination, and expert testimony on this issue were properly excluded); *AUSA Life Ins. Co. v. Dwyer*, 899 F. Supp. 1200, 1202 (S.D.N.Y. 1995) ("The use of expert testimony ... must be carefully circumscribed to assure that the expert does not usurp ... the role of the trial judge in instructing the jury as to the applicable law") (citing Advisory Committee Note to FRE 704, which states that "opinions which would merely tell the jury what result to reach" are inadmissible); *GST Telecommunication, Inc. v. Irwin*, 192 F.R.D. 109, 110 (S.D.N.Y. 2000) (excluding testimony of "experts" called to express legal conclusions); *see also United States v. Hauert*, 40 F.3d 197, 201 (7th Cir. 1994) (finding that it is proper to exclude lay testimony as to the defendant's understanding of the tax law).

While the FRE only guide this Honorable Court, 40 C.F.R. Section 22.22(a) clearly provides for the exclusion of Mr. Fuhrman's testimony. Mr. Fuhrman's testimony is nothing more than his subjective, unreliable and irrelevant interpretation of the federal statute. Such testimony is completely unhelpful to the Court and actually detrimental to the hearing process. *See Specht v. Jenson*, 853 F.2d 805, 809 (10th Cir. 1988) ("[T]estimony on ultimate issues of law by the legal expert is inadmissible because it is detrimental to the trial process.").

Perhaps, Mr. Fuhrman is better suited as a consulting witness for Respondent, as he was originally identified in Respondent Reply to Complainant's Request to Reduce the Penalty, dated September 29, 2010.

1. *Mr. Fuhrman's testimony regarding previous case law is irrelevant and immaterial*

Any dissertation by Mr. Fuhrman on previous case law is not only unreliable but also irrelevant. If Mr. Fuhrman is allowed to testify, he will attempt to reference extensive case law

as he opines about how the Presiding Judge should arrive at an alternative penalty amount based on the statutory factors set forth in Section 14(a) of FIFRA. See as examples, PHX 9, 10, 11, 12, 15, 22 and 23 and RX 41, RX 42. Allowing him to do so is essentially allowing Respondent's attorneys to masquerade their legal arguments and opinions as evidence through this expert. These types of arguments should not come from the stand. They should be saved for legal briefs.

Further, Mr. Fuhrman may discuss previous cases to demonstrate that the proposed penalty in this case is too high. Courts have long held that case by case comparisons of assessed penalties are irrelevant. The EAB in *In re Chem Lab Products, Inc.,* 2002 EPA App. LEXIS 17, *2-4 (EAB, 2002), made it very clear that it is improper to compare previous cases to the case at bar:

> Three other foundational principles provide support for the proposition that penalty assessments are sufficiently fact- and circumstance-dependent that the resolution of one case cannot determine the fate of another. Those principles are, first, that the environmental statutes EPA is charged with administering set forth a variety of penalty factors that must be carefully and collectively evaluated in assessing administrative penalties. As applied to a particular case, the penalty evaluation will yield unique results, and any attempt to compare one penalty outcome to another would necessarily entail comprehensive, detailed comparisons of the unique facts and circumstances of such cases. The second principle is that of judicial economy. If every respondent in a penalty case were to submit comparative penalty information on a case or cases allegedly similar to its own, the Board and ALJs would soon be mired in details pertaining to cases other than the ones immediately before them. The third rationale for disfavoring case-to-case comparisons is the long-established principle that unequal treatment is not an available basis for challenging agency law enforcement proceedings; i.e., as long as a particular administrative sanction is warranted in law and fact, it will not be overturned simply because it is more severe than sanctions imposed in other cases.
>
> The ALJ in this case found dispositive the EPA policy, spelled out in the Agency's general and FIFRA-specific penalty guidelines, favoring uniformity of penalties for like violations. The Board, however, is not persuaded that the policy of uniformity should overcome all the important principles just mentioned. Agency penalty policies do not, by aiming for consistency and fairness, necessarily suggest identical penalties in every case. The Board recently explained that "variations in the amount of penalties assessed in other cases, even those involving violation of the same statutory provisions or regulations, do

not, without more, reflect an inconsistency" with the EPA policy advocating fair and equitable penalty assessment.

Additionally, the EAB in *Chem Lab*, 2002 EPA App. LEXIS at *39-40, points out that "[t]he regulatory requirement that an ALJ 'consider' a penalty policy is not perfunctory. By requiring that such policies be considered, and further requiring an ALJ to explain his or her reasons for imposing a penalty different than the one proposed by complainant (which would typically be based on a penalty policy), the regulations clearly intend a serious consideration of any applicable penalty policy." Therefore, this Honorable Court must make decisions relating to the penalty based on the facts specific to this case and not on the unreliable and irrelevant testimony of Respondent's "expert" witness regarding previous cases.

In the same vein, the EAB in *Employers Insurance of Wausau*, 6 E.A.D. at 761-62, stated:

> Further, use of a written policy to assist in developing penalty proposals should not be presumed to eliminate the exercise of sound professional judgment from that process; nor should it be presumed to result in penalty proposals that do not fairly reflect the circumstances of a particular violation or a particular violator. To the contrary, fairness in enforcement might well be better served if penalty proposals are developed in a regular and consistent manner, such as by consulting a written policy document, than if those proposals are generated *ad hoc.*

Therefore, despite what Respondent argues, the 2009 ERP should be used as a guideline in this case.

2. *Mr. Fuhrman's testimony regarding the government's use of prosecutorial discretion is irrelevant and immaterial*

Respondent's witness description states that Mr. Fuhrman may discuss *In the Matter of Associated Products, Inc.*, (Docket No. IR&R-III-412-C) (1996 and 1997 upon reconsideration) in support of his argument that Complainant should not have used the 2009 ERP because it yielded a higher penalty amount than would have the 1990 ERP. PHX, 9. According to

Respondent, Mr. Fuhrman "may testify that the rigidity of the procedures embodied in an ERP is particularly obvious where, in a case as this one, the Complainant has utilized its enforcement discretion to allege a huge number of violations." PHX, 12-13. He may testify that in *Rhee Bros.*, EPA could have charged Respondent more violations than it did and that "Region 5 has chosen not to do so in this case for no apparent reason." PHX, 15.

This type of testimony is flawed for two reasons. First, Respondent is incorrect that Complainant's use of the 2009 ERP yields a higher penalty than the 1990 ERP. An apple to apple comparison reveals that both penalty policies generate the **exact same** penalty number for the 2,231 counts alleged in the Complaint. By exercising its prosecutorial discretion, Complainant graduated the penalty under the 2009 ERP, which resulted in a far lower proposed penalty than the 1990 ERP would have.[19]

The second problem with Mr. Fuhrman's proffered testimony is that in addition to attempting to usurp this Court's decision making function, it attempts to usurp the government's prosecutorial discretion. Respondent states that Mr. Fuhrman may discuss the different methods of calculation that Ms. Niess utilized. He may also testify that Ms. Niess incorrectly applied the graduated penalty table. PHX, 16.[20] Respondent continues to opine about how the government should utilize it prosecutorial discretion. Such testimony has no place at the hearing in this matter.

"[C]ourts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement actions." *In re B&R Oil Co., Inc.*, 8 E.A.D. 39, 1998 EPA App. LEXIS106, *26 (EAB 1998). Further, the

[19] The 1990 ERP does not provide for graduated penalties.
[20] The appropriate manner to question her methodology is on cross examination.

United States Supreme Court in *Wayte v. United States*, 470 U.S. 598, 608 (1985) stated that "[t]his broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." Essentially, Respondent continues to complain that Complainant did not exercise its "prosecutorial discretion" in this case because the Complaint alleges more counts than Respondent feels it should. It attempts to introduce Mr. Fuhrman to complain and opine on its behalf. "The fact that Respondent disagrees with EPA's exercise of its prosecutorial discretion is not relevant to the determination of the appropriate penalty here." *In the Matter of: International Paper Co Mansfield, Louisiana*, 2000 EPA ALJ LEXIS 10, at *28, fn 5 (January 19, 2000).

Further, following Respondent's logic (which it intends to convey to this Court through Mr. Fuhrman), Respondent essentially argues that Complainant should reduce the number of violations alleged in this case because Respondent violated the law too many times. Respondent argues that Complainant should reduce the gravity calculation because it yields too high a number. See PHX 18. It attempts to shift the focus from its own actions to Complainant's decision to allege 2,231 counts. Simply put, Respondent tries to obfuscate the fact that it violated the law over 2,000 times. Respondent actually wants to be rewarded for its repeated violations of the law. Under Respondent's logic, a respondent would have an incentive to egregiously violate the law because it would get a "discount" for the excessive violations. Complainant cannot follow Respondent's logic.

3. *Mr. Fuhrman's testimony as to what constitutes a "unit of violation" under FIFRA is irrelevant and immaterial.*

Respondent states that Mr. Fuhrman may testify that FIFRA does not define what constitutes a single offense." PHX, 13. He may then go on to interpret the statute. He may

discuss what the 2009 ERP meant by single "assessable charge." PHX, 15; RX 42, 4. In RX 42, 4-7, Mr. Fuhrman makes extensive legal arguments regarding this issue. Any testimony on this issue should be prohibited because it is unreliable and irrelevant. Again, this is an attempt to have Mr. Fuhrman testify on behalf of counsel from the stand. Such arguments should be saved for legal briefs.

IV. Conclusion

Section 40 C.F.R. Section 22.22(a) clearly provides for the exclusion of Mr. Fuhrman's testimony. His testimony will not assist the trier of fact in understanding the evidence or in making a determination as to a fact at issue. Rather, his testimony is nothing more than his unreliable, irrelevant and subjective interpretation of the federal statutes, regulations and case law. Such arguments should be saved for closing arguments and legal briefs.

Complainant respectfully requests that this Honorable Court Grant its Motion to Exclude Mr. Fuhrman's testimony and exhibits 40-42, all of which relate to his proffered testimony. In the event Mr. Fuhrman is allowed to testify, U.S. EPA may call a rebuttal witness. Due to the logistics and resources involved in responding to Mr. Fuhrman's testimony, Complainant respectfully requests a ruling on this motion prior to trial so Complainant can adequately prepare for hearing with respect to this witness.

Respectfully submitted,

DATED: November 16, 2010

Nidhi K. O'Meara
Erik H. Olson
Associate Regional Counsels
Gary E. Steinbauer
Assistant Regional Counsel
United States EPA – ORC Region 5
77 W. Jackson Blvd. (C14-J)
Chicago, IL 60604
(312) 886-4306
Attorneys for Complainant

ATTACHMENT A

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

IN RE:

Rhee Bros., Inc.	)	**DOCKET NO: FIFRA-03-2005-0028**
9505 Berger Road	)	
Columbia, MD 21046	)	**RESPONDENT'S SECOND**
	)	**AMENDMENT TO INITIAL**
	)	**PREHEARING EXCHANGE**
Respondent	)	

Pursuant to 40 C.F.R. §22.19(f) of the Consolidated Rules of Practice, and in accordance with Chief Administrative Law Judge Susan L. Biro's May 23, 2005 Prehearing Order, Respondent Rhee Bros. hereby amends for the second time Respondent's Initial Prehearing Exchange filed on July 7, 2005. An amendment to Respondent's Initial Prehearing Exchange was previously filed on November 18, 2005.

A. NAMES OF EXPECTED WITNESSES

1. In addition to the witnesses identified in Respondent's Initial Prehearing Exchange, Respondent may also call

Robert H. Fuhrman
Seneca Economics and Environment
15701 Seneca Road
Germantown, MD 20874

Mr. Furhman is a consultant specializing in economic, financial, and regulatory policy analysis. If called, Mr. Fuhrman would testify as an EXPERT WITNESS addressing the various factors relevant to the calculation of the penalty in this matter. Mr. Furhman's curriculum vitae is attached hereto as Exhibit 1.

Respectfully submitted,

Date: 11/21/05

Lowell Rothschild
Venable LLP
575 7th Street NW
Washington, DC 20004
(202) 344-4000

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

CERTIFICATE OF SERVICE

I hereby certify that the original and one true, accurate and complete copy of *Complainant's Motion in Limine to Exclude Testimony and Evidence*, was filed with the Regional Hearing Clerk, U.S. EPA, Region 5, on the date indicated below. True, accurate and complete copies were sent to Honorable Barbara Gunning, Administrative Law Judge (via UPS overnight delivery) at the following address:

Honorable Barbara A. Gunning
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1099 14th Street, NW, Suite 350
Franklin Court
Washington, D.C. 20005

and to Mr. Michael H. Simpson, Counsel for Respondent, Liphatech, Inc., (via UPS overnight delivery), at the following address:

Mr. Michael H. Simpson
Reinhart Boerner Van Deuren s.c
1000 North Water Street, Suite 1700
Milwaukee, WI 53202

on the date indicated below:

Dated in Chicago, Illinois, this 16 th day of November, 2010.

Patricia Jeffries – Harwell
Legal Technican
U.S. EPA, Region 5
Mail Code C-14J
77 West Jackson Blvd.
Chicago, IL 60604
(312) 353-7464