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December 1, 2010

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DELIVERED BY COURIER

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, IL 60604

Dear Regional Hearing Clerk:

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

On behalf of Respondent, Liphatech, Inc., I enclose for filing an original and two copies of Respondent's Opposition to Complainant's Motion in Limine to Exclude Testimony of Mr. Fuhrman and Related Evidence.

Please file-stamp one of the enclosed copies and kindly return it to me in the enclosed postage prepaid envelope. Thank you for your assistance.

Respectfully submitted,

Michael H. Simpson

REINHART\5381227LNR:JES

Encs.

cc Honorable Barbara A. Gunning (w/encs., by courier)
Ms. Nidhi K. O'Meara (C-14J) (w/encs., by courier)
Mr. Carl Tanner (w/encs., by courier)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:	)	**Docket No. FIFRA-05-2010-0016**
	)	
Liphatech, Inc.	)	**Hon. Barbara A. Gunning**
Milwaukee, Wisconsin,	)	
	)	
Respondent.	)	
	)	
	)	

RESPONDENT'S OPPOSITION TO COMPLAINANT'S MOTION IN LIMINE TO EXCLUDE TESTIMONY OF MR. FUHRMAN AND RELATED EVIDENCE

I. Introduction

On November 16, 2010, Complainant filed a motion in limine ("Complainant's Motion") to exclude certain testimony of Mr. Robert H. Fuhrman and related evidence in the form of Respondent's Exhibits (RX) 40-42. For the reasons set forth herein, Complainant's motion should be denied.

The Presiding Officer must determine whether Respondent's truthful advertising of its lawfully registered pesticide product violated the Federal Insecticide Fungicide and Rodenticide Act ("FIFRA") and, if so, to assess an appropriate penalty. Complainant will call a relatively inexperienced EPA enforcement officer, Ms. Claudia Niess, an engineer, to testify about how the EPA's FIFRA Enforcement Response Policy ("ERP") should be applied in determining an appropriate penalty for any proven violation. See Complainant's Exhibits (CX) 55.a. and 55.b. Respondent plans to rebut the testimony of

Ms. Niess, in part, through the testimony of Mr. Fuhrman, a highly experienced former EPA economist who is an acknowledged expert on the application of EPA civil penalty policies. See RX 40.a. for a copy of Mr. Fuhrman's curriculum vitae. Despite the fact that two EPA ALJs and several federal district court judges have received expert testimony from Mr. Fuhrman in EPA penalty cases without objection from EPA or its federal court litigation counsel, the U.S. Department of Justice, complainant wrongly accuses Mr. Fuhrman of being unqualified and surprisingly seeks to prevent Mr. Fuhrman from rebutting the testimony of Ms. Niess concerning the application of EPA's ERP in this case. Complainant's motion lacks merit and Mr. Fuhrman should be permitted to testify.

Mr. Fuhrman's expertise and specialized knowledge in economics and EPA civil penalty policies are relevant, material, reliable and of significant probative value in determining an appropriate penalty if Complainant meets its burden to prove that any violations of FIFRA occurred as alleged in the Complaint. Moreover, the majority of Complainant's concerns about Mr. Fuhrman's testimony are not objections to admissibility – rather, they are criticisms of his anticipated testimony, which Complainant is free to develop on cross-examination and to advance at the hearing when Mr. Fuhrman testifies.

II. The Applicable 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, provide the starting point for

denying Complainant's motion. The Consolidated Rules state that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value ..." 40 C.F.R. § 22.22(a)(1) (emphasis added). The Consolidated Rules do not specifically address the issue of motions in limine and therefore the Presiding Officer may look to analogous federal court practice, the Federal Rules of Civil Procedure and the Federal Rules of Evidence (FRE) for guidance.

In federal court practice, a motion in limine "should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Noble v. Sheahan,* 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000) Such motions are generally disfavored by the federal courts. *Hawthorne Partners v. AT&T Tech. Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). If evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial. *See e.g., In re: General Motors Automotive – North America,* Docket No. RCRA-05-2004-0001, 2005 EPA ALJ LEXIS 29 at *3 (ALJ 2005) (citation omitted).

Despite the high standard required to grant a motion in limine seeking to exclude expert witness testimony, Complainant urges the Presiding Officer to consider, at her discretion, the effect of Rule 702 of the FRE and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, (9th Cir. 1995). Rule 702 states:

> 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).

Importantly, experts who offer testimony on the application of civil penalty policies are not required to "satisfy standards applied in federal courts for scientific expert testimony, such as [*Daubert*]", but must simply be shown to have some specialized knowledge regarding the application of civil penalty policies. *In re: Strong Steel Products, LLC*, 2003 EPA ALJ, LEXIS 191, *15 (ALJ 2003) (citation omitted).

Boiled down, Complainant essentially asserts that Mr. Fuhrman, an economist, is not qualified as an expert because (1) he may be compensated for his expertise in a field that is closely connected with litigation; (2) he is not a physical scientist and (3) Complainant does not like his testimony. Complainant's assertions lack merit.

The Ninth Circuit Court of Appeals has aptly addressed the first concern of Complainant by observing:

> [t]hat 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.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317 (9th Cir. 1995). The court goes on to state in a footnote:

> FN5. There are, of course, exceptions. Fingerprint analysis, voice recognition, DNA fingerprinting and a variety of other scientific endeavors closely related to law enforcement may indeed have the courtroom as a principal theatre of operations ... As to such disciplines, the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration.

Id.

Mr. Fuhrman is an expert on the application of EPA civil penalty policies. Civil penalty policies are often utilized by the EPA for purposes of enforcement and associated litigation. Therefore, the fact that Mr. Fuhrman has an expertise applicable to litigation should not be a substantial consideration in this case.[1] Moreover, Mr. Fuhrman has demonstrated his expertise on civil penalty policies outside his work in litigation. See Declaration of Mr. Robert H. Fuhrman attached hereto as Exhibit A.

Second, federal courts have emphasized that an individual does not need to be a physical scientist to provide valuable guidance to the court. "The notion that [*Daubert*], requires particular credentials for an expert witness is radically unsound." *Tuf Racing Products, Inc. v. American Suzuki Motor Corporation*, 223 F.3d 585, 591 (7th Cir. 2000). "Anyone with relevant expertise enabling him to offer reasonable opinion testimony helpful to judge or jury may qualify as an expert witness." *Id.* The FRE "do not require that expert witnesses be academics or PhDs, or that their testimony be 'scientific' (natural scientific or social

[1] Complainant has offered two witnesses to testify with regard to the application of the EPA's FIFRA Enforcement Response Policy, Claudia Niess and Bryan Dyer. See Complainant's Initial Prehearing Exchange (CIPHX), 18; Complainant's Rebuttal Prehearing Exchange (CRPHX), 2. Both Claudia Niess and Bryan Dyer are paid EPA employees – not disinterested third-party experts. *Id.*

scientific) in character." *Id.* (holding that an accountant, while not conducting real science, could credibly offer an opinion of value to the trier of fact).

While Mr. Fuhrman is not a physical scientist, as an economist he is a social scientist.[2] In fact, Mr. Fuhrman is a well-respected social scientist who has published over 30 articles related to environmental enforcement actions, including two on EPA civil penalty policies. Fuhrman Decl.

Moreover, Mr. Fuhrman was previously qualified as an expert witness in the application of civil penalty policies by two different administrative law judges. Mr. Fuhrman was qualified as an expert witness by Administrative Law Judge Frank W. Vanderheyden in *In re: Outboard Marine Corp.*, Docket No. V-W-91-C-123B, 1995 WL 492976 (ALJ 1995) ("[Mr. Fuhrman] was qualified as an expert in the application of EPA penalty policies."), a copy of which is attached hereto as Exhibit B. More recently, Mr. Fuhrman was permitted to testify as an expert witness on the application of civil penalty policies by Chief Administrative Law Judge Susan Biro in *In re: Rhee Bros., Inc.*, Docket No. FIFRA-03-2005-0028, 2006 WL 2847398 (ALJ 2006), a copy of which is attached hereto as Exhibit C.

Federal courts have held that while "[e]xperience and knowledge establish the foundation for an expert's testimony, the accuracy of such testimony is a matter

[2] The Merriam-Webster Collegiate Dictionary defines "economics" as "a social science." Merriam-Webster's Collegiate Dictionary 365 (10th ed. 1998). Webster's New Twentieth Century Dictionary defines "economics" as "the science that deals with the production, distribution, and consumption of wealth, and with the various related problems of labor, finance, taxation, etc." Webster's New Twentieth Century Dictionary 574 (2nd Ed. 1983).

of weight and not admissibility." *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1308 (7th Cir. 1987) (citation omitted). Not only has Mr. Fuhrman been previously qualified as an expert witness on the application of EPA civil penalty policies, including the 1990 FIFRA Enforcement Response Policy, the administrative law judges presiding over those cases found his testimony to be credible. *See In re: Outboard Marine*, 1995 WL 492976 at *11 ("[Mr. Fuhrman] was qualified as an expert in the application of EPA penalty policies...The ALJ concurs in Fuhrman's reasoning and assessment."); *In re: Rhee Bros.*, 2006 WL 2847398 at *30 ("[Mr. Fuhrman's] point is well taken that the FIFRA ERP appears to compress violators and violations into a few select categories and thereby, in the circumstances of this case, is too inflexible and over-inflates the penalty ...").

Mr. Fuhrman's proposed testimony is well-grounded based on his substantial experience and extensive research regarding the application of EPA's civil penalty policies. At hearing, Mr. Fuhrman will explain his analysis and conclusions in detail. If Complainant disagrees with Mr. Fuhrman's analysis, it will have the opportunity to develop its position on cross-examination of him at the hearing.

III. Mr. Fuhrman's Credentials

Mr. Fuhrman is a Harvard-educated former EPA economist who has over thirty years of relevant economic and related consulting experience. RX 40; Fuhrman Decl. at ¶¶ 2-18. As previously noted, Mr. Fuhrman has been accepted on prior occasions as an expert on EPA civil penalty policies. Respondent will not

belabor the point – Mr. Fuhrman's curricula vitae speaks for itself. *Id.* For a full description of Mr. Fuhrman's credentials, please see Respondent's Prehearing Exchange at 5-7, RX 40, and Fuhrman Decl.

In an attempt to unfairly attack Mr. Fuhrman's impressive credentials, Complainant would make much of the fact that Mr. Fuhrman was employed at EPA for seven years almost three decades ago. Importantly, and by way of contrast, Complainant's proposed EPA witness on the application of the ERP in this case, Ms. Claudia Niess, graduated with a Bachelor of Science degree in 2005 and has been employed by the EPA for less than seven years. *See e.g.,* Decl. of Ms. Claudia Niess, Attach. A of Complainant's Combined Motion for Accelerated Decision as to Counts 1 through 2,140 of the Complaint ("In 2005, I received a Bachelor of Science degree ... I have been employed as an Environmental Engineer and Enforcement Officer in this capacity since 2005.").

IV. Mr. Fuhrman's Proposed Testimony Is Admissible

Complainant has inaccurately characterized Mr. Fuhrman's testimony in an attempt to lead the Presiding Officer into believing that Mr. Fuhrman is being offered as an expert witness to testify as to legal conclusions. Complainant's Motion at 8-9, 11. This is not true.

If Complainant meets its burden and establishes a violation of FIFRA as alleged in the Complaint, it has offered the ERP as justification for the unprecedented and draconian penalty of nearly $3,000,000 which it proposes be assessed against Respondent. Essentially, Complainant asserts that the EPA may,

without public notice and comment, draft and revise its ERP at will and offer its application of the ERP to this case through the testimony of Ms. Niess, a so-called "fact" witness, without allowing Respondent to rebut such opinion testimony with its own expert witness (an expert who has been previously qualified on two occasions as an expert on EPA civil penalty policies). *See In re: Strong Steel Products, LLC*, Docket Nos. RCRA-5-2001-0016, CAA-5-2001-0020, and MM-5-2001-0006, 2003 EPA ALJ LEXIS 191, *15 (ALJ 2003) ("The Environmental Appeals Board has referred to witnesses who testify as to the calculations of the proposed penalty on behalf of EPA as 'experts'") (citation omitted). Any critique of the reliability, relevance, materiality and/or probative value of Mr. Fuhrman's proffered testimony applies equally to the proffered testimony of Ms. Niess (and Mr. Dyer) on behalf of Complainant.

In addition, Complainant would have the Presiding Officer apply the ERP as a guideline for the gravity factor under FIFRA § 14(a)(4) without a thorough discussion of the drawbacks of the ERP that will be examined by Mr. Fuhrman at the hearing. Importantly, "it must be kept in mind that the ERP has never been put out for notice and comment, lacks the force of law and is merely 'a non-binding agency policy whose application is open to attack in any particular case.'" *Rhee Bros.*, 2006 WL 2847398 at *29-30. Mr. Fuhrman's testimony is particularly relevant in explaining how Complainant has failed to follow EPA's own ERP in this case and why the ERP may not appropriately be applied to the facts of this

case if Complainant meets its burden to prove that any violation of FIFRA occurred as alleged in the Complaint.

A. Mr. Fuhrman's Testimony Is Reliable

Complainant erroneously asserts that Mr. Fuhrman's testimony is unreliable because (1) he is not a physical scientist; (2) he is not an expert in any field of law and (3) he cannot testify as to a person's state of mind. In doing so, Complainant miscomprehends Mr. Fuhrman's proffered testimony.

First, Complainant mistakenly asserts that Mr. Fuhrman lacks the scientific expertise to apply the ERP to the facts of this case. As an economist, Mr. Fuhrman is a social scientist. Notably, Complainant proffers the testimony of Ms. Claudia Niess, who is designated as a fact witness (not as an expert witness) to explain how she applied the ERP in this case. In CX 55, Ms. Niess, an engineer, sets forth her calculation of the pesticide toxicity, harm to human health and harm to the environment components of the ERP. Ms. Niess has not been proffered as an expert witness by the Complainant and she has not cited to any guidance offered by a technical expert to justify her application of the ERP to the facts of this case. Essentially, Complainant asserts that it may support its application of the ERP through a so-called "fact" witness, Ms. Niess, but Respondent should be prohibited from proffering an "expert" witness to rebut her testimony.

As discussed above, an expert witness does not need to be a physical scientist to provide reliable testimony on the application of the ERP to this case.

To the extent that Ms. Niess relied upon the input of any EPA "expert" in her application of the ERP, Respondent respectfully requests that Complainant disclose such information to Respondent and the Presiding Officer.

Second, Mr. Fuhrman is an acknowledged expert in the application of EPA civil penalty policies. Contrary to Complainant's inaccurate assertion, Mr. Fuhrman's discussion of legal issues will be ancillary to his scientific and technical testimony and will be provided for purposes of placing his testimony in context considering the totality of the circumstances of this case. Mr. Fuhrman's secondary analysis of legal issues involved in this case falls within the context of primarily discussing the reasonableness of the proposed penalty for the alleged violations of FIFRA and his review of the facts regarding the alleged violations. *See In re: General Motors Automotive – North America*, Docket No. RCRA-05-2004-0001, 2005 EPA ALJ LEXIS 29 (ALJ 2005); *In re: Strong Steel Products, LLC,* 2003 EPA ALJ LEXIS 191 (ALJ 2003).

Further, Mr. Fuhrman is not proffered as an expert witness to testify as to any EPA enforcement staff members' state of mind. Instead, Mr. Fuhrman will testify with regard to his experience with and expertise in applying EPA civil penalty polices, his analysis of the shortcomings of civil penalty policies and his opinions as to why the ERP cannot appropriately be applied to the facts of this case.

B. Mr. Fuhrman's testimony is relevant, material and of significant probative value

Complainant mistakenly asserts that Mr. Fuhrman's testimony regarding previous FIFRA case law, prosecutorial discretion and the "unit of violation" issue in this case is irrelevant and immaterial. To the contrary, Chief Administrative Law Judge Biro found such testimony in *Rhee Brothers* to be of sufficient probative value to quote it in her initial decision as follows:

> Mr. Fuhrman suggested that EPA enforcement personnel deal with the lack of flexibility in the FIFRA ERP in terms of the amount of the penalty to be charged by varying the number of violations they decide to charge in a particular case in relation to what they perceive as the egregiousness of the offense. Tr. 387-88. Thus, a violator who engaged in what the Agency perceives as a more substantial deviation from the law is charged with more violations, and a violator who is seen by the Agency as having committed a less significant deviation is charged with fewer violations. The Agency provides itself with this leeway by varying the methodology it uses to calculate the number of violations it alleges has occurred, i.e., by counting either the total number of sales, the number of sales in a given month, the number of products at issue, or a number of different type of products. Tr. 387-88. In support of this assertion, Mr. Fuhrman cited a variety of FIFRA methodologies, resulting in vastly different penalty proposals. See, Tr. 387-92.

Rhee Brothers, 2006 WL 2847398 at *29.

Moreover, "it cannot be concluded that information about other cases is *never* relevant to the assessment of a penalty." *In re: Service Oil, Inc.,* Docket No. CWA-08-2005-0010, 2006 WL 3406348 (ALJ 2006); *see also United States v. Ekco Housewares, Inc.*, 62 F.3d 806, 816 (6th Cir. 1995) ("the penalties imposed in other cases are indeed relevant"); *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1207 (6th Cir. 1988) (civil damage awards 8 to 40 times the award

made in other cases held excessive, and shocked judicial conscience); *Katzson Bros., Inc. v. U.S. EPA*, 839 F.2d 1396 (10th Cir. 1988) ("[c]onsidering Katzson Brother's spotless prior compliance record and the lack of harm caused to the environment by the violation, we question EPA's judgment in assessing a fine that is only $800 less than the maximum penalty amount. EPA has shown greater temperance in the past.").

In *ChemLab Products, Inc.*, FIFRA App. No. 02-01, 2002 EPA App. LEXIS 17, *10-11 (EAB, Oct. 31, 2002), the Environmental Appeals Board provided the following guidance:

> Juxtaposed against the principle that penalties should be assessed on an individual basis, without considering other similar penalty cases, is EPA's long-established policy favoring consistency and fairness in enforcement ... As we recently explained in another setting, '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. The "more" that would be needed has never been directly addressed by this Board, but the term recognizes that there may be circumstances so compelling as to justify, despite judicial economy concerns and Supreme Court precedent affirming agency penalty discretion, our review of other allegedly similar cases. (emphasis added)

Mr. Fuhrman's proposed testimony regarding the relevant context of FIFRA case law is admissible for several reasons. First, Mr. Fuhrman's review and analysis of several FIFRA enforcement cases involving the application by EPA of the ERP is relevant to his expertise on the application of EPA civil enforcement policies. Second, Mr. Fuhrman's holistic analysis of FIFRA case law provides a general background for the "case specific" application of the ERP provided in this

case. Third, Mr. Fuhrman's proposed testimony will explain the arbitrary manner in which Complainant has applied the ERP in this case and how such capricious discretion by Complainant has eviscerated the ability of the ERP to provide consistent and fair penalty assessments.

Importantly, Complainant offers the FIFRA ERP as an "end all, be all" to the calculation of an appropriate penalty in this case. Complainant asserts that whatever number the ERP churns out must be appropriate. Contrary to this assertion, Mr. Fuhrman's testimony will explain how various factors affecting the application of the ERP should be considered by the Presiding Officer in determining how much weight can be assigned to the Complainant's application of the ERP, given the totality of the circumstances of this case. As such, Mr. Fuhrman's proffered testimony will provide the "more" which was referenced by the EAB in *ChemLab* to justify his analysis.

In addition, Complainant misconstrues Mr. Fuhrman's testimony regarding prosecutorial discretion. While Complainant asserts that it retains broad prosecutorial discretion, Mr. Fuhrman's testimony will explain how the arbitrary and capricious application by Complainant of such prosecutorial discretion undermines the ability of the ERP to provide fair and consistent penalties. For example, the ERP has no credibility when EPA can modify the number of violations that it alleges for penalty purposes at will. *See, e.g., In re: 99 Cents Only Stores*, Docket No. FIFRA-09-2008-0027, 2010 WL 2787749, *25-26 (ALJ 2010). Moreover, when EPA inconsistently interprets the "unit of violation" under

FIFRA, the ERP provides no more guidance than would an *ad hoc* penalty determination.

Importantly, once Complainant has exercised its "prosecutional discretion" and applied the ERP, the ERP becomes a factor that the Presiding Officer may consider in assessing an appropriate penalty if any violations of FIFRA occurred. As such, Mr. Fuhrman's proffered testimony is relevant to the determination of an appropriate penalty after considering the totality of the circumstances of this case. Mr. Fuhrman will explain at the hearing that "[b]y mechanically following its Penalty Policy, EPA's analysis did not fairly take into account the reality of the particular surrounding facts" if Complainant can prove any violations of FIFRA occurred as alleged in the Complaint. *See In re: International Paper Co.*, Mansfield, Louisiana, Docket No. CAA-R6-P-9-L4-98030, 2000 WL 341014 (ALJ 2000).

V. Conclusion

Respondent respectfully requests that the Presiding Officer deny Complainant's motion. For the reasons set forth above, Mr. Fuhrman's testimony will assist the trier-of-fact in understanding the shortcomings of the ERP and in determining an appropriate penalty in this proceeding should Complainant prevail in connection with its burden to prove the violations of FIFRA alleged in the Complaint.

Dated this 1st day of December, 2010.

Respectfully submitted,

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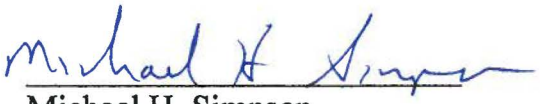

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EXHIBIT A

See Attached Declaration of Mr. Robert H. Fuhrman

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:	)	**Docket No. FIFRA-05-2010-0016**
	)	
Liphatech, Inc.	)	**Hon. Barbara A. Gunning**
Milwaukee, Wisconsin,	)	
	)	
Respondent.	)	
	)	
	)	

DECLARATION OF MR. ROBERT H. FUHRMAN

State of Maryland

Montgomery County

I, Robert H. Fuhrman, declare and state as follows:

1. The statements made in this declaration, which consists of twelve pages, are based on my personal knowledge and belief.

2. In 1971, I received a Bachelor of Arts degree from Columbia College, an undergraduate division of Columbia University, where I took 24 semester hours of economics and 27 semester hours of political science. In 1973, I received the degree of Master in Business Administration from Harvard Business School.

3. I have been employed as Principal and CEO of Seneca Economics and Environment, LLC, a consulting firm, since 2002. Between 1997 and 2001, I was a Principal and Director of The Brattle Group, Inc., an economic, environmental, and management consulting firm. From 1987 to 1997, I was employed by Putnam, Hayes and Bartlett, Inc., an economic and management consulting firm where I was a Senior Consultant, then a Principal, and then a

Director in that firm's environmental consulting practice. From 1983 to 1986, I was employed first as Director of Finance and then as Director of Finance and Administration of the Pharmaceutical Manufacturers Association. From 1977 to 1983, I served in various capacities at the U.S. Environmental Protection Agency, including as an economist on the Energy Policy Staff in the Policy Planning Division of the Office of Planning and Evaluation, a component of EPA's then-existing Office of Planning and Management; as Acting Chief of the Industrial Analysis Branch of the Economic Analysis Division in the Office of Planning and Evaluation; as Acting Director of that Division; and, on an approximately one-year detail, as a Special Assistant to the Deputy Administrator. From 1975 to 1976, I was a staff associate at Developing World Industry and Technology, a contract research/consulting firm. From 1973 to 1975, I was a member of the professional staff of General Electric's Center for Advanced Studies, a corporate "think tank" where I performed classified studies for the Office of the Secretary of Defense.

4. Complainant's Motion in Limine to Exclude Testimony and Evidence ("the Motion") includes many inaccurate statements about (a) my qualifications, experience, and expertise, and (b) my prior and proposed testimony to which I would appreciate the opportunity to respond. Therefore, I respectfully make this Declaration to this Honorable Court.

5. The Respondent's Prehearing Exchange correctly identified my years of service at EPA as being from 1977 to 1983. On page 4 of the Complainant's Motion, it pointed out that this service occurred "almost three decades ago" as if such a characterization is either necessary or appropriate. On page 7, Complainant stated, "Mr. Fuhrman worked for the U.S. EPA almost to (sic) 30 years ago, well before the inception of the 1990 and 2009 FIFRA ERPs." In making that statement, Complainant seemed to imply that my familiarity with EPA policies, programs, and activities ended with my departure from EPA and is of little current relevance. Similarly, Complainant summed up my

EPA career in one sentence: "His duties as (sic) U.S. EPA were related to his economics background."[1]

6. While serving at EPA, my responsibilities were quite varied. Among other things, I worked on legislative, regulatory, and other policy developments, and performed and/or supervised analyses of the energy, environmental, economic, and financial effects of potential EPA regulations affecting major industries. I also provided staff support to EPA's cross-program-office Energy Policy Committee; was a key member of the EPA task force and public hearing panel on implementation of Section 125 of the Clean Air Act; headed up a major multi-program office working group of EPA's Toxics Integration Project; and interacted with senior policy-making EPA and other federal and legislative officials.[2] During my time on the Energy Policy Staff and as a Special Assistant to the EPA Deputy Administrator, among other things, I worked very closely with the entity then known as the Office of Enforcement regarding implementation of Clean Air Act requirements by electric utilities in Ohio and elsewhere in the Midwest. While working in the Economic Analysis Division, I directed and coordinated the efforts of up to forty economic analysts in their evaluation of the effects of the Agency's current and potential regulatory developments involving most, if not all, of the major environmental statutes related to EPA's programmatic responsibilities (e.g., the Clean Air Act, the Clean Water Act, the Resource Conservation and Control Act, etc.). This brief summary is illustrative of my activities at EPA.

7. I was not somehow an "ivory tower" economist whose work was highly isolated from EPA's major missions. My experience at EPA provided me a broad general education on environmental protection related issues and the

[1] Complainant's Motion in Limine to Exclude Testimony and Evidence, at 7.
[2] These officials included, among others, the Assistant Administrator for Planning and Management, the Assistant Administrator for Enforcement, the Regional Administrator of Region 5, EPA's General Counsel, the Deputy Administrator and the Administrator of EPA, the Deputy Director of the Domestic Policy Staff at the White House, a member of the Council of Economic Advisors, the Chairman of the Council on Environmental Quality, two U.S. Senators and one U.S. Representative from Ohio, and one U.S. Representative from Illinois.

opportunity to understand and to engage in the work of interdisciplinary groups including lawyers, scientists, engineers, and environmental program specialists. The knowledge I obtained during my seven years at EPA has been indispensable to my ability to understand and to analyze EPA documents since I left EPA, including enforcement policy guidance documents such as the FIFRA ERPs and other EPA civil penalty policies.

8. Since 1987, as a member of three different consulting firms, I have worked on over two hundred engagements for individuals, corporations, municipalities, and nonprofit entities on EPA civil penalty matters, including economic benefit and gravity component analyses, and on other environmentally-related matters.[3] My experience in EPA enforcement cases comprised significantly more than 50 percent of my work experience in most of the last twenty-three years. Both as a consultant and an expert witness,[4] I have developed insights into how penalty policies may be applied in enforcement cases.

9. As someone specifically educated in economics, finance, political science, and business administration,[5] I have significant academic training and analytic ability related to these subjects. Among other things, I am able to analyze complex civil penalty policies to determine if they have been reasonably applied to specific fact patterns. My academic training and work experience have also enabled me to understand many EPA-related issues that someone with less of an "EPA background" might have greater difficulty in understanding and viewing in an appropriate context. This expertise is highly dissimilar to applying the "generally accepted principles of astrology or

[3] During my post-EPA career, in addition to working on a significant number of environmental civil penalty cases, I also worked on matters such as hazardous waste insurance, Superfund cost recovery, environmental commercial litigation, breach-of-contract, tort damages, illegal strip search, Federal False Claims Act, and other types of cases.

[4] I testified as an expert witness five times in federal district courts, twice in EPA administrative law cases, once in a federal bankruptcy court, and once in a state court. Additionally, I have provided deposition testimony twenty-one times. All of the cases in which I testified involved environmental issues.

[5] My education in graduate school was based on the "case study method," which emphasizes the ability to draw correct inferences from very complicated materials and from one case to the next.

necromancy."[6] This expertise, when used to apply an ERP to a fact pattern, may be evaluated and "tested" by a trier of fact for objectivity, reliability, fairness, intellectual rigor, and usefulness in assisting that person in making a civil penalty determination. It is not alchemy.

10. In its Motion, Complainant recognized that I am an economist.[7] *Webster's New World Dictionary* defines "economist" as "a specialist in economics." It defines "economics" as "the science that deals with the production, distribution, and consumption of wealth, and with the various related problems of labor, finance, taxation, etc."[8]

11. Complainant's Motion stated, "In this case, Mr. Fuhrman's proposed testimony will not provide any factual or expert testimony **apart** from legal testimony."[9,10] Respondent's Exhibit 42, which I wrote, does not provide *fact testimony*. Whether it provides *expert testimony*, as I believe it does, is a matter for the Presiding Officer to determine, not the Complainant. My reliance on ALJ decisions is addressed below in paragraph 22 of this Declaration.

12. In stating that I lack "any practical experience that constitutes 'specialized knowledge' to justify any opinions that [I] may offer to this court,"[11] Complainant glossed over and trivialized my experience and expertise. For example, it wrote:

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[6] The reference here is to a quote from *Kumho*, 119 S. Ct. at 1175, which appears on pages 3 and 4 of Complainant's Motion. With that particular quote from *Kumho*, Complainant seemed to imply that my testimony in this case would constitute "pseudo-science."
[7] Complainant's Motion, at 6.
[8] *Webster's New World Dictionary of American English*, Third College Edition (1991), at 430.
[9] Motion, at 9.
[10] If the Presiding Officer decides not to allow the Complainant to "reduce to zero" the amount of economic benefit the Complainant alleged in its Complaint ($50,256), the Respondent may ask me to provide testimony on that matter. This consideration is absent from the Complainant's statement.
[11] Ibid., at 7.

"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) [wrong legal citation and incorrect year of decision provided by Complainant],[12] the witness description was sparse, consisting of a mere 3 sentences, touting him as a 'consultant specializing in economic, financial, and regulatory policy analysis.' ... The fact that he testified in 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."[13]

13. According to the decision in *In re Outboard Marine*, Docket No. V-W-91-C-123B (1995), at 39, EPA ALJ Frank W. Vanderheyden found me "qualified as an expert in the application of EPA penalty policies." My testimony in that case is discussed in various paragraphs that appear on pages 39 through 44 of Judge Vanderheyden's decision. Judge Vanderheyden did not characterize my testimony in that case as irrelevant, immaterial, or unreliable. In fact, on pages 40 and 44 he noted specific areas in which he concurred with my testimony.

14. In *In re Rhee Bros., Inc.*, Docket No. FIFRA-03-2005-0028 (2006), at 34, Chief Administrative Law Judge Susan L. Biro wrote, "Without objection from Complainant, Mr. Fuhrman testified as an expert in the field of 'the application of EPA penalty policies.'" She discussed aspects of my testimony on pages 34 through 37 and 43 through 44 of her decision. At the beginning of the second full paragraph on page 37, Judge Biro noted that a specific aspect of my testimony was "well taken."[14] Although Judge Biro did not

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[12] The correct citation is Docket No. FIFRA-03-2005-0028. The date of the publication of the decision was September 19, 2006.

[13] Op. cit., at 7 and 8. Complainant stated as a fact that my previous testimony was "irrelevant, immaterial and unreliable testimony based on legal arguments."

[14] The specific sentence reads as follows: "First, Respondent's point is well taken that the [1990] FIFRA ERP appears to compress violators and violations into a few select categories and thereby, in the circumstances of this case, is too inflexible and over-inflates the penalty such that it does not adequately weigh the specific gravity factors in Respondent's favor."

accept my testimony without limitation,[15] she did not describe my testimony as irrelevant, immaterial, or unreliable "based on legal arguments" or for any reason. Nor did she attempt to constrain my testimony to issues of economics.

15. Complainant's characterization of my testimony in *Outboard Marine* and *Rhee Bros., Inc.* substituted Complainant's own view of my previous testimony in ALJ cases for the actual views of Judge Vanderheyden and Chief ALJ Biro. I cannot explain the variance between what those judges wrote in their decisions and how Complainant has portrayed my testimony in those cases to this Honorable Court. Furthermore, in the two cases, I did not usurp "the role of the trial judge,"[16] a "Court's decision making function,"[17] or the "government's prosecutorial discretion."[18] What I did was provide reliable analytically-based testimony that assisted the triers of fact in those cases to make their own decisions about how best to apply specific EPA enforcement guidance documents to case-specific situations.

16. On page 7 of its Motion, Complainant pointed out that two articles[19] that I authored or co-authored on EPA civil penalty policies were written "almost seventeen years ago, well before the inception of the 1990 and 2009 FIFRA ERPs." Furthermore, Complainant stated that these two articles "are focused on economic principles."

17. While it is undeniable that these articles were published in 1994, the inference about their content is inaccurate because it is painted with too broad a brush. The article "Improving EPA's Civil Penalty Policies–and Its Not-So-Gentle

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[15] Judge Biro disagreed both with my conclusion that a penalty of $118,250 was warranted *and* with the Complainant's recommendation of a $1,306,800 penalty. Based on Judge Biro's penalty analysis, which I believe comports well with major aspects of my testimony, Judge Biro set the penalty at $235,290.
[16] This quote is from page 12 of the Motion.
[17] This quote is from page 15 of the Motion.
[18] This quote is from page 15 of the Motion.
[19] From 1991 through 2009, I authored or co-authored approximately twenty articles on environmental enforcement related issues.

BEN Model"[20] analyzed EPA's Clean Air Act (CAA), Clean Water Act[21] (CWA), and Resource Conservation and Recovery Act (RCRA)[22] civil penalty policies as well as "BEN," a computer model used by EPA to calculate the "economic benefit of noncompliance." Similarly, the article "Avoiding the Pitfalls of EPA's Civil Penalty Assessment Procedures"[23] analyzed EPA's Clean Air Act Stationary Source Civil Penalty Policy and BEN. The most recent version of that penalty policy on EPA's web site is dated October 25, 1991, which is the version of that guidance document discussed in these two articles. In discussing BEN, it is certainly true that my analysis focused on economic and financial principles, which I believe was both necessary and appropriate.

18. However, by the Complainant's statement that the two articles were "focused on economic principles," the Motion implied that the articles' discussion of the "gravity analysis" portions of specific civil penalty policies was also "focused" on economic principles. That is not true. The articles provided a general description of key relevant aspects of those EPA civil penalty policies and included analysis of both some of their more problematic features and how those policies might be improved. Attachment 1 is a copy of "Improving EPA's Civil Penalty Policies–and Its Not-So-Gentle BEN Model." The Presiding Judge may draw her own conclusion by reading the section of that article titled "The Gravity Component," which appears on the pages numbered 876 through 880.

19. It is noteworthy that Complainant chose to focus on the articles' *publication dates* rather than offering commentary on the validity of my analysis of the statute-specific civil penalty policies provided therein.

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[20] Robert H. Fuhrman, "Improving EPA's Civil Penalty Policies–and Its Not-So-Gentle BEN Model," *Environment* Reporter, September 9, 1994, at 874-884.
[21] EPA, "Clean Water Act Penalty Policy for Civil Settlement Negotiations," February 11, 1986.
[22] EPA, "RCRA Civil Penalty Policy," revised October 1990.
[23] Robert H. Fuhrman and Lawrence J. Straw, Jr., "Avoiding the Pitfalls of EPA's Civil Penalty Assessment Procedures," *California Environmental Law Reporter*, September 1994, at 285-294.

20. It is possible that Complainant does not acknowledge any substantive expertise I may have related to environmental civil penalty policies in general or the FIFRA ERP in particular, not because my expertise has not been previously demonstrated, but because Complainant does not like the results of my analytical efforts as applied to the EPA enforcement guidance documents. Complainant may prefer to think that, apart from toxicological and scientific issues, its application of the FIFRA ERP in enforcement cases consists solely of discretion that is not subject to challenge by a respondent, including in proffering expert testimony.[24]

21. Contrary to Complainant's statement that I lack "any practical experience that constitutes 'specialized knowledge' to justify the opinions that [I] may offer to this court,"[25] my "specialized knowledge" grew naturally out of my work experience at EPA as well as research and work that I performed since I left EPA. Also, in order that I could reliably apply the 2009 FIFRA ERP to the information provided in this case by the Complainant and the Respondent, I performed *additional* research to learn how the 1990 FIFRA ERP was interpreted and applied by EPA ALJs.

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[24] Complainant appears to hold this belief. According to footnote 11 on page 5 of the Motion, "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." No explanation of why the Complainant believes this must be true was provided.

Similarly, footnote 9 on page 5 of the Motion stated, "An 'expert' cannot argue how the government should have exercised its prosecutorial discretion as it is counter intuitive to dictate (sic) to the government's discretion." *Webster's New World* Dictionary, third collegiate edition (1991) at 382 provides several definitions of "dictate," including the definition I believe Complainant intended, namely, "to impose or give (orders) with or as with authority."

In Respondent's Exhibit 42, I did not "dictate" how Complainant *must* apply its prosecutorial discretion. (Complainant is free to cite as many alleged violations as it chooses.) What I did do in Respondent's Exhibit 42 was to question whether Complainant's proposed penalty analysis and its underlying assumptions, including the number of "violations" considered for penalty purposes, if adopted by this Honorable Court, would result in a penalty bearing a reasonable relationship to the "gravity of the violations" and the "totality of the circumstances" in this case.

[25] Page 7 of the Motion. See also page 8 of the Motion.

22. In Respondent's Exhibit 42, I did not hold out my understanding of case law as either definitive or worthy of special deference by this Honorable Court. Rather, I provided my understanding of specific legal decisions as I thought such context might be relevant to explain the thought processes that I pursued in Respondent's Exhibit 42. Those elements of my thinking are explicitly stated to inform the Court of what information I considered and how I reached specific conclusions. Contrary to the Complainant's Motion, I do not claim to be an expert in the field of law.[26] That does not mean that I am not capable of understanding a legal decision to determine how it might affect my analysis. Analogously, just as one needs to understand "generally accepted accounting principles" in order to understand financial statements, such as balance sheets and income statements, one must understand relevant FIFRA decisions to apply a FIFRA ERP to case-specific situations in a reliable and probative manner.

23. My analyses do not usurp the authority of the Presiding Judge. In Respondent's Exhibit 42, I provided analytical support for my conclusions for the Presiding Judge to consider and to either accept or reject.

24. For the record, and solely for the purpose of performing penalty calculations based on application of the 2009 FIFRA ERP, the starting point of my analysis in Respondent's Exhibit 42 was the assumption of liability. I did not question EPA's characterization of Rozol's toxicity as a Class III pesticide or a Restricted Use Pesticide.[27] I did not attempt to reach my own chemical, biological, or toxicological conclusions. I evaluated the Complainant's application of the 2009 ERP in light of the information that was available to me to determine whether in my expert opinion it was logically and fairly applied by the Complainant. Where I concluded that Complainant's application of the ERP was sufficiently deficient as to be open to challenge or

[26] The reference here is to various statements appearing on pages 8, 9, 11, 12, and possibly elsewhere in the Motion.
[27] The reference is to passages on page 5, 6, 7, and 12 of the Motion.

an alternative interpretation that the Presiding Officer might want to consider, I provided the reasoning and the bases for my conclusions. I view my proffered testimony as an attempt to assist the Presiding Officer in achieving such important goals as "fair and equitable treatment of the regulated community" and "predictable enforcement responses."[28]

25. Finally, I would like briefly to identify several additional statements attributed to me in the Motion that are incorrect. These comments do not cover all of the inaccurate statements but are illustrative of those statements.

- In Respondent's Exhibit 42, I did not, nor do I propose to demonstrate at the hearing, that the Complainant's proposed penalty in this case is too high by offering comparisons with individual penalty determinations.[29] Contrary to Complainant's statement, the reason I looked to the body of FIFRA case law was to evaluate whether the penalty proposed by the Complainant reflects fair and equitable treatment of the Respondent, a member of the regulated community.
- In Respondent's Exhibit 42, I did not argue that the applicable ERP in this case should be the 1990 rather than the 2009 ERP.[30] As stated in the very first paragraph of Respondent's Exhibit 42, "I have looked to aspects of the 1990 ERP to guide my judgment of how to apply elements of the 2009 ERP to the circumstances of this case."
- Similarly, contrary to a statement on page 15 of the Motion, I did not state that Complainant's application of the 2009 ERP to this case would result in a higher penalty than would application of the 1990 ERP.
- There is no document in which I stated "how the judge should interpret the law with respect to the violations alleged in the complaint."[31] The relevant passage in the Motion provides a citation to page 22 of the

[28] The quoted phrases are two of the three goals of the 2009 FIFRA Enforcement Response Policy. They appear on page 4 of that document.
[29] The reference is to page 13 of the Motion.
[30] The reference is to page 14 of the Motion.
[31] The reference is to page 5 of Motion.

Respondent's Prehearing Exchange. Having reviewed the reference, I do not understand how Complainant could reasonably have reached that conclusion.

26. 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 and brief.

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

Executed on: November 29, 2010 By: Robert H. Fuhrman

Robert H. Fuhrman

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

CERTIFICATE OF SERVICE

I, Michael H. Simpson, one of the attorneys for the Respondent, Liphatech, Inc., hereby certify that I delivered one copy of the foregoing Respondent's Opposition to Complainant's Motion in Limine to Exclude Testimony of Mr. Fuhrman and Related Evidence ("Respondent's Response"), to the persons designated below, by depositing it with a commercial delivery service, postage prepaid, at Milwaukee, Wisconsin, in envelopes addressed to:

Honorable Barbara A. Gunning
Office of the Administrative Law Judges
Franklin Court Building
1099 14th Street, NW, Suite 350
Washington, D.C. 20005; and

Ms. Nidhi K. O'Meara (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, IL 60604

I further certify that I filed the original and one copy of the Respondent's Response and the original of this Certificate of Service in the Office of the Regional Hearing Clerk, U.S. EPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, by depositing them with a commercial delivery service, postage prepaid, at Milwaukee, Wisconsin, on the date below.

Dated this 1st day of December, 2010.

Michael H. Simpson
One of the Attorneys for Respondent
Liphatech, Inc.

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