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September 29, 2010

DELIVERED BY COURIER

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

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SEP 30 2010

**REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY**

Michael H. Simpson
Direct Dial: 414-298-8124
msimpson@reinhartlaw.com

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 Memorandum Opposing Motion of Complainant For Leave to Amend Complaint and Affidavit of Robert H. Fuhrman in support of Memorandum.

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

Respectfully submitted,

Michael H. Simpson

REINHARTV4736542LNR:JES

Encs.

cc Honorable Barbara A. Gunning (w/encs., by courier)
Ms. Nidhi K. O'Meara (C-145) (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.
Milwaukee, Wisconsin,

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) MEMORANDUM OF
) RESPONDENT LIPHATECH, INC.
) OPPOSING MOTION OF
) COMPLAINANT FOR LEAVE TO
) AMEND COMPLAINT

Respondent.

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

Normally a respondent in an enforcement action would not object to a complainant moving to reduce the penalty it is seeking from the respondent. However, in this instance, Respondent Liphatech, Inc. ("Respondent") does object to the U.S. EPA's ("Complainant") motion to reduce the proposed penalty in the form proposed.

Complainant proposes only a modest reduction in an egregiously inflated proposed penalty by deleting the purported economic benefit of noncompliance to Liphatech of \$50,226. Respondent opposes the Complainant's motion because the Complainant has not explained the manner in which it originally calculated the purported economic benefit of noncompliance to Liphatech or the nature of the new guidance on calculation of economic benefit being developed by EPA, and because the real purpose of the motion appears to be to avoid the adverse precedential impact of a recent decision in another FIFRA civil penalty case. However, Respondent has no objection to the Presiding Officer granting Complainant's Motion, provided the following four conditions are made part of the order granting that Motion:

1. Complainant must either stipulate that Respondent received no economic benefit from the violations alleged in the Complaint, or immediately provide Respondent

with all documentation and information used by Complainant to calculate the very exact economic benefit of \$50,226 that it demanded in paragraph 649 of its Complaint;

2. Complainant must immediately provide Respondent with all documentation and information related to the development of the "new guidance" that causes Complainant to now seek to eliminate the economic benefit portion of the penalty proposed by Complainant in this case;

3. Complainant shall not at any future time attempt to recover any alleged economic benefit from Respondent in this case even if, at some future date, Complainant issues new guidance that it is allegedly preparing as described in paragraph 5 of its Motion; and

4. Respondent is not precluded from introducing evidence at the hearing to demonstrate that it did not obtain any significant economic benefit from the violations alleged in the Complaint.

COMPLAINANT MISREADS EPA'S DECEMBER 2009 FIFRA ENFORCEMENT RESPONSE POLICY ("2009 ERP") IN ARGUING THAT THE ECONOMIC BENEFIT OF \$50,226 OF THE PROPOSED PENALTY BE DELETED. COMPLAINANT SHOULD NOT BE ALLOWED TO PICK AND CHOOSE WHICH PORTIONS OF THE 2009 ERP TO APPLY IN CALCULATING THE PROPOSED PENALTY

1. In paragraph 4 of its Motion, Complainant states that the 2009 ERP simply requires that:

[e]nforcement professionals should always evaluate the economic benefit of noncompliance in calculating penalties.

2. The 2009 ERP was, however, specifically adopted to mandate the recovery of any

"significant" economic benefit to the violator.
"Significant" is defined as economic benefit that totals more than \$10,000 for all violations alleged in the complaint.

2009 ERP at 20. This mandate stems from

The agency's Policy on Civil Penalties . . . dated February 16, 1984, [which] mandates the recapture of any significant economic benefit of noncompliance . . . that accrues to a violator from noncompliance with the law.

Id.

3. In the present case, Complainant calculated a very precise economic benefit of \$50,226 that allegedly accrued to the benefit of Respondent from the violations alleged in the Complaint. \$50,226 exceeds \$10,000. Therefore, Complainant should be bound by the terms of EPA's own ERP to seek recovery of this alleged economic benefit if it desires to apply the 2009 ERP to this case. By now seeking to drop the economic benefit portion of the proposed penalty, Complainant is either misreading or ignoring EPA's own 2009 ERP.

4. In Respondent's view, Complainant appears to be attempting to delete the economic benefit component of its proposed penalty because any alleged economic benefit that might have accrued to Respondent is *de minimis* in comparison to the overall gargantuan proposed penalty of \$2,941,456 proposed in the Complaint. Respondent holds this belief based upon the recently issued decision by Judge Biro in *In re: 99 Cents Only Stores*, Docket No. FIFRA-09-2008-0027, 2010 WL 2787749, *30 (ALJ June 24, 2010).

5. Complainant should not be able to pick and choose which portions of a penalty policy it applies to alleged violations, and the Presiding Officer should not countenance this effort by Complainant.

COMPLAINANT'S REASON TO DELETE THE ECONOMIC BENEFIT COMPONENT OF THE PROPOSED PENALTY IS INSUFFICIENT JUSTIFICATION WITHOUT ADDITIONAL SUPPORT

6. The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Consolidated Rules") state the following:

§ 22.5 Filing, service, and form of all filed documents; business confidentiality claims.

(c) *Form of Documents*. . . . (3) The original of any filed document (other than exhibits) shall be signed by the party filing or by its attorney or other representative. The signature constitutes a representation by the signer that he has read the document, that to the best of his knowledge, information and belief, the statements made therein are true, and that it is not interposed for delay. (Emphasis added.)

7. In light of the representations made by the Complainant in signing the Complaint, Respondent assumes the Complainant had, in good faith, calculated an economic benefit that it believed accrued to Respondent from the alleged violations, especially because the amount of the alleged economic benefit had been so precisely stated in the Complaint – \$50,266.

8. In paragraph 5 of its Motion, Complainant simply states that it is seeking to reduce the proposed penalty by the amount of this alleged economic benefit because it is developing

new guidance . . . on how to calculate the economic benefit
in FIFRA cases.

This is a very curious rationale, and Complainant should not be allowed to prevail in this Motion by making such a vague proclamation.

9. The 2009 ERP, which was published by EPA only nine short months ago, does not state that the policy on calculation of economic benefit was still under development. In fact, one of the reasons the EPA issued the 2009 ERP was to modify the July 1990 Environmental Response Policy to specifically require that significant economic benefit be recovered. How can it be that a government agency revises its own ERP after 19 years and then within nine short months realizes that it still needs to develop guidance on calculating economic benefit, especially when capturing economic benefit was one of the reasons for modifying the FIFRA ERP in the first place?¹ Again the only logical conclusion is that Complainant is attempting to delete the economic benefit component of the proposed penalty in order to avoid the consequences of the *99 Cents Only Stores* decision that was issued this past June. The decision in the *99 Cents Only Stores* case was issued after EPA published the 2009 ERP and after Complainant filed its Complaint in this case.

10. If the Presiding Officer is inclined to grant Complainant's Motion, at a minimum, the Presiding Officer should require a full and complete explanation by Complainant of the circumstances surrounding the development by EPA of this "new guidance."

¹ One could argue that the EPA came to this realization within the last three months because the Complaint was filed in May of this year seeking recovery of the alleged economic benefit and that was followed on June 24th by the issuance of the *99 Cents Only Stores* decision. It is curious that on the day the EPA issued its press release for the *99 Cents Only Stores* decision, September 15, 2010, Complainant filed its motion to strike recovery of the economic benefit component of the proposed penalty from this case.

11. Respondent respectfully urges the Presiding Officer to require that the Complainant disclose to Respondent the following:

(a) All documentation and information related to the initial calculation by Complainant of the alleged economic benefit of \$50,226; and

(b) All documentation and information related to the development of the "new guidance" that causes the Complainant to now seek to eliminate the economic benefit portion of the proposed penalty in this case.

IT APPEARS COMPLAINANT IS ATTEMPTING TO DELETE THE ECONOMIC BENEFIT PORTION OF THE PROPOSED PENALTY IT CALCULATED UNDER THE 2009 ERP TO AVOID THE CONSEQUENCES OF THE *99 Cents Only Stores* CASE WHICH REQUIRES THAT A PENALTY NOT BE DISPROPORTIONATE TO THE ECONOMIC BENEFIT RECEIVED BY RESPONDENT

12. EPA's September 15, 2010 press release concerning the *99 Cents Only Stores* decision stated in pertinent part:

EPA Judge Levies Nation's Largest Pesticide Fine on "99¢ Only Stores"/Largest Contested Penalty Ever Ordered for Sale of Illegal International Pesticidal Products.

SAN FRANCISCO – A federal judge has ordered "99-cent Only Stores" to pay \$409,490 in penalties for the sale of illegal unregistered and misbranded pesticides contained in household products.

The fine is the largest contested penalty ever ordered by an EPA administrative law judge against a product retailer under the Federal Insecticide, Fungicide, and Rodenticide Act.

News Releases by Date, <http://yosemite.epa.gov/opa/admpress.nsf/d0cf661>

8525a9efb85257359003fb69d/3b92cb417ca584ba8525779900747a34!OpenDocument.

(Emphasis added.)

13. In *In re: 99 Cents Only Stores*, Chief Administrative Law Judge Susan L.

Biro stated in pertinent part:

In particular, this penalty amount seems inappropriate in relation to the rather nominal economic benefit Respondent obtained as a result of its violations.

Id. at *30. In that case, the complainant proposed a \$969,930 penalty and alleged the respondent received an economic benefit of approximately \$44,627.31. *Id.* Chief Administrative Law Judge Biro concluded that the proposed \$969,930 penalty was inappropriate in relation to the \$44,627.31 economic benefit received by the respondent. Clearly, the economic benefit of \$50,226 alleged by Complainant in this case (which Complainant now proposes to eliminate) cannot support a proposed, and stunningly disproportionate, penalty of \$2,941,456 (which Complainant now proposes to reduce to the still draconian amount of \$2,891,200).

14. Without further explanation from Complainant, Complainant appears to be attempting to eliminate the economic benefit portion of its proposed multi-million dollar penalty in order to prevent Respondent from demonstrating that the Complainant's wildly excessive proposed penalty is grossly disproportionate to the *de minimis* amount of any economic benefit that Respondent may have received from the alleged violations.

15. If Complainant can modify EPA's penalty policies at will and as it sees fit to avoid the consequences of tribunal decisions, then the use of the 2009 ERP should be viewed skeptically. If Complainant has doubts about one portion of EPA's new penalty policy, then perhaps the use of the 2009 ERP itself is premature.

16. Complainant must explain in more detail how it in good faith previously calculated Respondent's alleged economic benefit to be \$50,226 and why it now wants to summarily delete it from consideration.

RESPONDENT HAS BEEN PREJUDICED BY COMPLAINANT'S ACTION IN SEEKING TO RECOVER AN ECONOMIC BENEFIT FROM RESPONDENT AND NOW SEEKING TO ELIMINATE RECOVERY OF THAT ECONOMIC BENEFIT

17. In paragraph 8 of its Motion, Complainant states that since this is a motion to reduce the proposed penalty, there is no prejudice to Respondent. Respondent strongly disagrees with this assertion. Because Complainant alleged in its Complaint that Respondent received an economic benefit, Respondent has incurred legal and expert consultant fees and expenses to prepare a defense to this allegation. Respondent has engaged an economic consulting expert, Robert H. Fuhrman, to assist Respondent to defend against Complainant's allegations. Part of the work performed by Mr. Fuhrman to date is to attempt to evaluate any economic benefit that Respondent might have received from the alleged violations. Mr. Fuhrman has prepared an affidavit, attached as Exhibit A, which demonstrates that Respondent could not have received any significant economic benefit from the violations alleged in the Complaint. Exhibit A also contains Mr. Fuhrman's curriculum vitae.

IF COMPLAINANT'S MOTION IS GRANTED, THE PRESIDING OFFICER SHOULD PRECLUDE COMPLAINANT FROM EVER ATTEMPTING TO SEEK RECOVERY OF ANY ALLEGED ECONOMIC BENEFIT FROM RESPONDENT IN THIS CASE

18. Complainant's Motion leaves open the possibility that if EPA develops "new guidance" on the calculation of economic benefit that Complainant would at some

point during these proceedings attempt to again amend its Complaint in order to seek recovery of any alleged economic benefit under this "new guidance."

19. If the Presiding Officer grants Complainant's Motion, Respondent respectfully requests that the Presiding Officer also attach a condition to the order to preclude Complainant from attempting to recover any alleged economic benefit from Respondent in the future. Respondent should not be left to dangle in the wind to deal with policy decisions made by the EPA after the dates on which the alleged violations occurred.

20. Respondent has no ability to control policy decisions of EPA. That is obvious. However, Respondent should not be prejudiced in its defense of the alleged violations asserted by Complainant by having to evaluate, anticipate or be concerned about policy decisions that EPA may make in the future and that Complainant might then attempt to apply retroactively to the facts of this case.

**RESPONDENT SHOULD NOT BE PRECLUDED FROM INTRODUCING
EVIDENCE AT THE HEARING TO DEMONSTRATE THAT IT DID NOT
OBTAIN ANY ECONOMIC BENEFIT FROM THE VIOLATIONS ALLEGED IN
THE COMPLAINT**

21. Regardless of the outcome of the Presiding Officer's decision on Complainant's Motion, Complainant can always decide not to introduce evidence of any economic benefit that it otherwise might believe may have accrued to Respondent from the alleged violations. However, Respondent respectfully asks the Presiding Officer to confirm that Respondent continues to have the right, despite any objection from Complainant, to introduce evidence at the hearing that (a) it received no, or only *de minimis*, economic benefit from the alleged violations and (b) any penalty that might

be imposed on Respondent must not be grossly disproportionate from any economic benefit that accrued from the alleged violations.

RESPONDENT'S REQUEST TO THE PRESIDING OFFICER

22. Respondent objects to the Motion of Complainant in its current form. However, Respondent has no objection to the Presiding Officer granting Complainant's Motion, provided the following four conditions are made part of the order granting that Motion:

(a) Complainant must either stipulate that Respondent received no economic benefit from the violations alleged in the Complaint, or immediately provide Respondent with all documentation and information used by Complainant to calculate the very exact economic benefit of \$50,226 that it demanded in paragraph 649 of its Complaint;

(b) Complainant must immediately provide Respondent with all documentation and information related to the development by EPA of the "new guidance" that causes Complainant to now seek to eliminate the economic benefit portion of the penalty proposed by Complainant in this case;

(c) Complainant shall not at any future time attempt to recover any economic benefit from Respondent in this case even if, at some future date, EPA issues new guidance that it is allegedly preparing as described by Complainant in paragraph 5 of its Motion; and

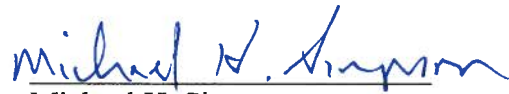
(d) Respondent is not precluded from introducing evidence at the hearing to demonstrate that it did not obtain any significant economic benefit from the violations alleged in the Complaint.

Dated this 29th day of September, 2010.

Respectfully submitted,

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Attorneys for Respondent Liphatech, Inc.

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Exhibit A

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

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

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PROTECTION AGENCY**

**AFFIDAVIT OF ROBERT H. FUHRMAN OF SENECA ECONOMICS
AND ENVIRONMENT, LLC IN SUPPORT OF LIPHATECH, INC.'S
OPPOSITION TO COMPLAINANT'S MOTION FOR LEAVE
TO AMEND COMPLAINT TO REDUCE PROPOSED PENALTY**

State of Maryland)
 : SS
Montgomery County)

Robert H. Fuhrman, being first duly sworn on oath, deposes and says:

1. I am and have been Principal and CEO of Seneca Economics and Environment, LLC, a consulting firm, since January 2002. A copy of my curriculum vitae is attached to this affidavit.

2. Between 1997 and 2001, I was a Principal and Director of The Brattle Group, Inc., an economic, environmental and management consulting firm. Between 1987 and 1997, I was employed by a very similar entity, Putnam, Hayes and Bartlett, Inc. Between 1977 and 1983, I was employed as an economist at the United States Environmental Protection Agency ("EPA") in Washington, D.C. While employed by EPA, I served in various capacities, including as an Economist on the Energy Policy Staff, as Acting Chief of the Industrial Analysis Branch of the Economic Analysis Division in the Office of Planning and Evaluation, as Acting Director of the Economic Analysis Division, and, on an approximately

one-year detail, as a Special Assistant to the Deputy Administrator. I left EPA as a GM-15 level economist.

3. I received an MBA from Harvard Business School and a Bachelor of Arts degree from Columbia College (of Columbia University), where I took 24 semester hours of coursework in economics and 27 semester hours of political science.

4. I have worked on environmental civil penalty cases since the mid-1980s and have provided expert testimony in litigation in federal and state courts, and before EPA Administrative Law Judges. My testimony has included such subjects as the calculation of the economic benefit a company may have obtained due to noncompliance with environmental requirements and the application of EPA civil penalty policies, including the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") Environmental Response Policy ("ERP"), to specific situations, among other topics.

5. In August 2010, I was retained by the law firm Reinhart Boerner Van Deuren s.c., counsel to Respondent Liphatech, Inc., to provide consulting services and to provide expert testimony in this case, if called upon to do so.

6. At the time of my retention, I understood that my potential testimony might cover several topics, one of which is the amount of economic benefit, if any, that Respondent, Liphatech, Inc., may have obtained due to violations of FIFRA as alleged in the Complaint in this case dated March 13, 2010 ("Complaint") and signed by Margaret M. Guerriero, Director, Land and Chemicals Division, Region V, United States Environmental Protection Agency (EPA).

7. Based on information provided on page 103 of the Complaint, the Complainant must have performed one or more economic benefit calculations that support the assertion that the Respondent may have obtained an economic benefit of \$50,256 due to its alleged violations of FIFRA as asserted in that document.

8. However, the Complaint lacked any credible support for the notion that the Respondent may have obtained an economic benefit due to its alleged violations of FIFRA totaling \$50,256 – a very precise number. I surmised that the Complainant’s September 29, 2010 pre-hearing exchange would illuminate this matter and provide information that I could analyze to test its accuracy.

9. Based on the allegations in the Complaint, it is my professional opinion, as an economist, to a reasonable degree of probability, that there is no basis for concluding that the Respondent obtained any economic benefit due to the alleged FIFRA violations.

10. Complainant’s September 15, 2010 Motion for Leave to Amend Complaint to Reduce Proposed Penalty and Memorandum in Support of Complainant’s Motion ("Motion") contained sparse rationale for eliminating the economic benefit portion of the proposed penalty by merely stating in paragraph 5 of that Motion:

Based on new guidance that is currently being developed by the United States Environmental Protection Agency on how to calculate the economic benefit in FIFRA cases, Complainant seeks to reduce the proposed penalty by the amount of the economic benefit calculated in this matter.

11. The Complainant’s stated rationale implies that the “new guidance” that EPA might adopt may lead to a different conclusion about economic benefit than the one identified in the formally-issued, publicly-available December 2009 ERP promulgated by EPA. The ERP gave no indication to the public that the calculation or recovery of any alleged economic benefit would be subject to new guidance that would be developed and issued in the future.

12. Furthermore, neither paragraph 5 of the Motion nor any other paragraph of the Motion states whether the “new guidance” that EPA might adopt would lead to the conclusion that the economic benefit that the Respondent may

have obtained was higher, lower, or nonexistent according to this unveiled and currently not adopted new approach.

13. In paragraph 7 of the Motion, Complainant implies that granting of the Motion would not prejudice the Respondent in the underlying litigation. However, as an economist, to a reasonable degree of probability, it is my professional opinion that elimination of economic benefit as a consideration in determining any penalty in this case would be prejudicial to the Respondent. Judge Biro, on page 49 of her decision in *In the Matter of: 99 Cents Only Stores* (Docket No. FIFRA-09-2008-0027), dated June 24, 2010, stated:

Unfortunately, the FIFRA [1990] ERP provides no specific guidance on how to deal with a penalty calculated under it which the Tribunal finds is disproportionately high in light of the circumstances of the case. *Rhee, 2007 EPA App. LEXIS 17*. It only states that the penalty calculated under the ERP may be departed from when there are compelling reasons to do so. The totality of the circumstances in this case, including the rather nominal economic benefit, provides a compelling reason to depart from the high penalty calculated under the ERP.

Clearly, Judge Biro believes that equity may require that the proposed gravity-based penalty not be highly disproportionate to the economic benefit, if any, that the Respondent may have realized from any proven violations under FIFRA.

14. Allowing the Complainant to withdraw its economic benefit claim from the Complaint without requiring the Complainant to either (a) provide an alternative economic benefit figure in this case (even though it is no longer seeking to recover economic benefit as part of the penalty), or (b) agree that there was no economic benefit realized in this case, might impair the ability of the

Tribunal to fashion a fair and appropriate penalty for any violations that the Tribunal may find to have occurred.

15. It is my professional opinion, as an economist, to a reasonable degree of probability, that the Respondent realized little or no economic benefit from the alleged violations and that the elimination of economic benefit as a consideration in the determination of any penalty in this case might deprive the Tribunal of critical information that might suggest a compelling reason to deviate from the ERP.

Robert H. Fuhrman
Robert H. Fuhrman

Subscribed and sworn to before me by R. H. Fuhrman this 24th day of Sept., 2010.

Jae Kyung Chung
Notary Public, State of Maryland

My commission expires on IAE KYUNG CHUNG
NOTARY PUBLIC
STATE OF MARYLAND
My Comm. Expires 5/2/2011 4

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ROBERT H. FUHRMAN
Seneca Economics and Environment, LLC

Mr. Fuhrman has worked as a consultant for twenty-four years, specializing in economic, financial, and regulatory policy analysis. His diverse background as a government economist, trade association executive, and consultant, as well as his training in economics, political science, and business administration, have given him a broad background in both public and private sector issues. He has worked in many engagements as a testifying expert witness, has extensive negotiation experience, and has authored over thirty published articles. In the environmental arena, Mr. Fuhrman has worked on cases involving civil penalties, ability-to-pay determinations, and monetary valuations of mitigation projects; Superfund cost recovery; hazardous waste insurance; and commercial litigation. In other consulting engagements, among other things, he has worked on matters related to tort damages, breach-of-contract, illegal strip search, and Federal False Claims Act cases.

Mr. Fuhrman's background includes seven years of experience as an economist at the U.S. Environmental Protection Agency (EPA), three years at the Pharmaceutical Manufacturers Association (PMA), two years at General Electric's Center for Advanced Studies, fourteen years at two large, nationally-known economic consulting firms, eight years at his own consulting firm, and several years as an independent consultant.

He founded Seneca Economics and Environment, LLC, in January 2002, and has been a principal and CEO of the firm since that time.

From 1997 to 2001, Mr. Fuhrman was a principal and director of The Brattle Group, Inc., an economic, environmental, and management consulting firm. Before that time, he was a principal and director of Putnam, Hayes & Bartlett, Inc., a consulting firm he joined in 1987. From 1983 to 1986, he served as Director of Finance and Administration at the Pharmaceutical Manufacturers Association (now known as the Pharmaceutical Research and Manufacturers Association). In that capacity, he managed the business and financial affairs of that trade association.

While at EPA from 1977 to 1983, Mr. Fuhrman served as an economist on the Energy Policy Staff, as Acting Chief of the Industrial Analysis Branch of the Economic Analysis Division, as Acting Director of that Division, and as Special Assistant to the Deputy Administrator (on an approximately one-year detail). During his tenure as Acting Chief of the Industrial Analysis Branch, he directed a staff that analyzed the environmental, economic, and financial effects of existing and potential EPA regulations affecting major industries, including chemicals, petroleum refining, iron and steel, copper and aluminum smelting. When he was Acting Director of EPA's Economic Analysis Division in the Agency's central policy office, he directed and coordinated the efforts of approximately 40 economic analysts in their evaluation of the economic and financial effects of the Agency's policies. As a Special Assistant to the EPA Deputy Administrator, on an approximately one-year detail, Mr. Fuhrman analyzed conflicts between national energy and environmental policies, and provided advice on subjects such as the regulation of air emissions from coal-fired power plants.

From 1975 to 1976, Mr. Fuhrman was a staff associate at Developing World Industry and Technology, Inc., where he wrote case studies on corporate transfers of U.S. unique technologies to non-affiliated foreign firms, analyzing their implications for the U.S. economy. While at General Electric's Center for Advanced Studies from 1973 to 1975, Mr. Fuhrman performed classified studies for the Office of the Secretary of Defense. He also has worked as an independent consultant to such organizations as the Federal Energy Administration, the United Nations Environment Program, and the Center for Clean Air Policy.

Mr. Fuhrman received a B.A. from Columbia College, where he studied economics and political science, and an M.B.A. from Harvard Business School.

REPRESENTATIVE CONSULTING EXPERIENCE

Mr. Fuhrman has participated in numerous studies for public and private clients.

- He is currently working on civil penalty and ability-to-pay analyses for several clients.
- For over 200 private-sector clients and for one public interest group, he has analyzed public and private entities' economic savings due to alleged noncompliance with environmental laws. For many entities, he also calculated their ability to pay civil penalties. Due to these engagements, Mr. Fuhrman has developed a high level of expertise on EPA enforcement matters, including EPA's media-specific civil penalty settlement policies and various computer models used by the Agency in calculating the economic benefit of noncompliance, entities' ability-to-pay penalties, and the value of supplemental environmental projects. These cases have involved firms in many different industries, including metals, mining, chemicals, pulp and paper, oil and gas, and diversified manufacturing. Together with counsel, Mr. Fuhrman has participated in settlement negotiations on behalf of many of these clients with EPA, the U.S. Department of Justice, state and local regulatory authorities, and environmental groups.
- He has performed ability-to-pay analyses for over twenty-five clients. His private sector clients have included such diverse firms as a petroleum refining company, a steel mill, a race track, a foundry, an auto repair shop, a manufacturer of brass facets, a seller of marine vessels, a chemical company, a lumber company, several "Jiffy Lube"-type enterprises, and several food processing companies. Other engagements have involved ability-to-pay analyses of counties in Indiana, Kentucky, Maryland, and New Mexico; a major city in Pennsylvania; a major city in New Mexico; the City of Los Angeles, California; the Office of the Criminal Sheriff of Orleans Parish, Louisiana (which has the same geographical contours as the City of New Orleans); and various individuals. These cases were performed in various contexts, including environmental civil penalty disputes, Superfund cost recovery, and illegal strip search cases.

-
- On behalf of a very large mining operation in Alaska that produces zinc, lead, and other metals, Mr. Fuhrman calculated the contribution of that mine to the local, regional, and national economy, and on various affected entities. He also assessed the effects of the potential closure of that mine on employment, international prices for the affected metals, and other potentially affected entities.
 - He calculated damages in a case in which fraudulent nondisclosure of environmental liabilities in the sale of a business entity was a major issue.
 - In July 2007, on behalf of the American Chemistry Council and the Corporate Environmental Enforcement Council, Mr. Fuhrman drafted comments for the EPA public docket on “Enhancing Environmental Outcomes from Audit Policy Disclosures through Tailored Incentives for New Owners.”
 - In July 2004, on behalf of the Manufacturers Ad Hoc Group (comprised of the Alliance of Automobile Manufacturers, the American Chemistry Council, the Corporate Environmental Enforcement Council, the National Association of Manufacturers, and the National Ready Mixed Concrete Association), Mr. Fuhrman drafted the “Comments of the Manufacturers Ad Hoc Group” that were submitted to the U.S. EPA Science Advisory Board’s Illegal Competitive Advantage Economic Benefit Advisory Panel.
 - In 1999, on behalf of ten trade associations that comprised the “Ad Hoc Group,” Mr. Fuhrman co-authored comments with Paul Wallach, Esq. (now deceased), of Hale and Dorr, LLP, that were submitted to EPA concerning “wrongful profits” and “illegal competitive advantages” that EPA associated with environmental noncompliance in a Federal Register notice appearing at 64 Fed. Reg. 32,948.
 - In 1997, on behalf of the 12 trade associations and organizations that comprised the “BEN Coalition,” Mr. Fuhrman co-authored comments that were submitted to EPA concerning its economic benefit recovery program.
 - In 1995, for the American Automobile Manufacturers Association, American Forest and Paper Association, Chamber of Commerce of the United States, Chemical Manufacturers Association, and the National Association of Manufacturers, Mr. Fuhrman analyzed theoretical and practical problems with EPA’s computerized software (the “BEN Model”) for analyzing companies’ economic savings due to noncompliance. As part of this activity, he met with senior officials of EPA’s Office of Enforcement and the U.S. Department of Justice to present his analysis of the model’s analytic shortcomings.
 - Mr. Fuhrman served as an expert witness in a Superfund cost recovery case involving hundreds of thousands of documents that the U.S. government provided in support of its cost claim.

- He calculated a county's ability to pay a portion of the cost of cleaning up a Superfund site in Indiana. He is currently working on similar analyses for a county in southern New Mexico and for a city in the same county.
- In a Superfund cost recovery case, Mr. Fuhrman performed a detailed analysis of a county's ability to pay its *pro rata* share of the cleanup costs at a multi-party site. As part of this analysis, he reviewed financial data provided by the county and state government, including both historical data and budgetary projections, and information generated by credit rating agencies. He examined general fund balances and determined the county's ability to raise revenues through tax increases and additional debt financing over a ten-year time frame. He also assessed indications of financial distress by performing ratio analyses and by considering population trends and other indicators.
- He worked on the prudence of past hazardous waste disposal activities. In several of these cases, Mr. Fuhrman reviewed key aspects of federal legislation and regulations related to specific toxic substances (*e.g.*, PCBs, organic solvents, metal plating wastes, and waste oil) from 1899 through the mid-1980s. He also analyzed industrial use and disposal practices related to some of these wastes for the period 1950 through 1985, and evaluated changing public perceptions of environmental hazards from the 1940s through the mid-1980s.
- Mr. Fuhrman helped to evaluate potential Superfund liabilities of several Fortune 500 companies. This work was performed in the context of hazardous waste-related insurance coverage cases and involved probabilistic cost forecasting within the analytic structure of decision analysis.
- As part of a team involving multiple consultants, he helped to develop damage estimates in coal contract litigation between a major manufacturer of steel and its chief supplier of metallurgical coal.
- Due to litigation related to an insurance claim, Mr. Fuhrman reviewed extensive cost documentation regarding the environmental cleanup associated with a fertilizer warehouse fire and opined on which costs might be recoverable in litigation.
- For American University, he helped develop a monetary claim concerning damages resulting from the disposal of mustard gas and related chemical substances on the university's campus during World War I by the U.S. Army.
- He worked on a large breach-of-contract case involving the U.S. Department of Energy's failure to remove spent nuclear fuel from three utility generating stations. Mr. Fuhrman's work on this matter was to coordinate the efforts of two teams of consultants to develop a complex methodology that simulated utilities' cash flows and modeled actual and "but-for" worlds for use in damage calculations.

- On behalf of plaintiffs in a class action law suit involving tens of thousands of illegally conducted strip searches, Mr. Fuhrman completed an expert report assessing the Orleans Parish (Louisiana) Criminal Sheriff's Office's financial capacity to pay monetary damages.
- In a large class action case involving illegal strip searches, Mr. Fuhrman analyzed Jefferson County, Kentucky's ability to pay a multi-million dollar settlement by raising taxes, borrowing, taking money from general funds, liquidating property holdings, and other means. He also worked on a similar matter involving Franklin County, Kentucky.
- He worked on a product liability/insurance recovery case involving household electric water heaters.
- Mr. Fuhrman assisted in other types of litigation with an environmental dimension, including one engagement involving alleged improper design of a wastewater treatment plant and issues related to the role that EPA construction grants would play in calculating damages. In another case, he was asked to serve as an expert witness on behalf of a paper company that sought a variance from state water pollution control regulations based on cost-effectiveness criteria.
- For the EPA's Office of Cooperative Environmental Management, he performed work in support of the Technology Innovation and Economics Committee of the National Advisory Committee on Environmental Technology Transfer.
- For the Center for Clean Air Policy, he completed an analysis of residential energy conservation measures that might be considered in developing an acid rain strategy.
- As a consultant to the United Nations Environment Program (UNEP), Mr. Fuhrman co-authored with a former Deputy Administrator of EPA a handbook on environmental impact assessment for decision makers in developing countries. He also wrote reports on cost-benefit analysis and related techniques for environmental decision-making, and on ways to integrate environmental considerations into the development planning process.
- In an earlier study for UNEP, Mr. Fuhrman interviewed government officials in France and Yugoslavia and co-authored a report on the feasibility of developing cooperative relationships among Mediterranean nations for performance of environmental impact assessments.
- Mr. Fuhrman provided deposition testimony twenty-one times, testified five times in federal district court, once in U.S. Bankruptcy Court, once in a state court, and twice in EPA administrative law proceedings. He has authored numerous expert reports, and has provided litigation support in many cases.

- Mr. Fuhrman was invited by the U.S. Environmental Protection Agency and the Russian Academy of Sciences to participate in the Third US-USSR Bilateral Conference on Environmental Economics held in Moscow. He presented a paper at this conference, which was held in Moscow during October 1991.
- From April 1999 until May 2003, Mr. Fuhrman served on the Board of Contributing Editors of *Environmental Compliance and Litigation Strategy*, a monthly publication that is now discontinued.

TESTIMONY

Provided deposition testimony in February 2008 in *Association of Irrigated Residents v. Fred Schakel Dairy et al.*, a civil penalty case in the U.S. District Court for the District of Eastern California, Fresno Division.

Provided deposition and trial testimony in January/February 2008 in *City of Akron v. Akron Thermal Limited Partnership*, a case heard in U.S. Bankruptcy Court for the Northern District of Ohio (Akron, Ohio).

Provided testimony in December 2005 in a case styled *In the Matter of Rhee Bros., Inc.*, a civil penalty case brought under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The case was tried before the Chief EPA Administrative Law Judge.

Provided deposition testimony in February 2005 in *Enoch Adams et al. v. Teck Cominco Alaska Incorporated*, a citizen suit brought under the Clean Water Act.

Provided deposition testimony in November 2004 in *United States v. Allegheny Ludlum Corporation*, an environmental civil penalty case on remand from the Third Circuit Court of Appeals.

Provided testimony in August 2004 before the EPA Science Advisory Board's Illegal Competitive Advantage Economic Benefit Advisory Panel.

Provided deposition testimony in March 2004 in *Jim Stulb, Trustee, and Fountain Valley Environmental Remediation Trust v. Schlage Lock Company, et al.*, a property damages/unjust enrichment case.

Provided deposition testimony in December 2003 in *United States v. City of Los Angeles*, an environmental civil penalty case.

Provided deposition testimony in August 2003 in *State of Illinois v. IBP, inc.*, an environmental civil penalty case.

Provided trial testimony in Portland, Oregon in May 2003 in *U.S. v. New Portland Meadows, LLC*, an environmental civil penalty case involving a race track.

Provided testimony in May 2001 at a public hearing sponsored by the EPA Science Advisory Board's Environmental Economics Advisory Committee (EEAC) regarding the need for peer review of EPA's penalty calculation model by an impartial group such as the EEAC.

Provided deposition testimony in February 2001 and trial testimony in March 2001 in *U.S. v. Bay-Houston Towing Co., Inc.*, an environmental civil penalty case involving a peat harvesting operation.

Provided deposition testimony in September 1999 in *Hopkins v. Smithfield Foods, Inc.*, an environmental civil penalty case involving a pork slaughter house.

Provided deposition testimony in *State of Wisconsin v. I-K-I Manufacturing Co., Inc.* in June 1999 in an environmental civil penalty case involving a chemical plant.

Provided testimony in May 1999 before the Montgomery County, Maryland Planning Commission concerning the possible siting of an animal boarding kennel/veterinary clinic in an area zoned rural/residential. Mr. Fuhrman's testimony focused on the inadequacies of an economic impact study prepared on behalf of the proposed facility's proponents that claimed that property diminution could not be attributed to existing boarding kennels. Testified in September 1999 in the same matter before the Montgomery County Board of Appeals, which later rejected the siting of the facility by a unanimous vote.

Trial testimony on behalf of Amoco Oil Company in February 1999 in the Circuit Court of Missouri (Jackson County) in a toxic tort suit, *Slayton et al. v. Amoco Oil Company*. His testimony focused on "unjust enrichment." Although the plaintiffs sought over \$500 million dollars in damages, the jury awarded the plaintiffs only \$1 million.

Provided deposition testimony on behalf of WCI Steel in January 1998 in an environmental civil penalty case.

Provided deposition and trial testimony on behalf of the defendant in *U.S. v. Smithfield Foods, Inc.*, an environmental civil penalty case, in federal district court, in July 1997.

Testimony at the U.S. Environmental Protection Agency *Public Hearing on Recovery of Economic Benefit*, Washington, DC, November 6, 1996, on behalf of the American Automobile Manufacturers Association, American Forest and Paper Association, American Iron and Steel Institute, American Petroleum Institute, Chamber of Commerce of the United States, Chemical Manufacturers Association, Corporate Environmental Enforcement Council, Edison Electric Institute, National Mining Association, Utility Solid Waste Activities Group, and Utility Water Act Group.

Deposition testimony on behalf of Amoco Oil Company in September 1996 in a toxic tort case, *City of Independence, Missouri et al. v. Amoco Oil Company*.

Trial testimony on behalf of Laidlaw Environmental Services (TOC) in August 1995 in an environmental civil penalty case, *Friends of the Earth et al. v. Laidlaw*.

Deposition and trial testimony before an EPA Administrative Law Judge on behalf of Canonic Environmental Services in 1993 in a civil penalty case, *In the Matter of Outboard Marine Corporation*.

Trial testimony on behalf of Laidlaw Environmental Services in 1993 in *Friends of the Earth et al. v. Laidlaw*, a diligent prosecution/civil penalty case.

Deposition testimony in August 1993 in a civil penalty case, *U.S. v. Dext Company of Maryland*, on behalf of Dext.

Deposition testimony on behalf of Schering Plough Corporation in a Superfund cost recovery case, *U.S. v. Maryland Sand and Gravel, et al.*, in May 1993.

Deposition testimony on behalf of the defendant in a civil penalty case, *National Resources Defense Council v. Total Petroleum, Inc.*, in May 1992.

Deposition testimony on behalf of the defendant in a civil penalty case, *Public Interest Research Group v. Witco Chemical Corporation*, in May 1992.

Deposition testimony on behalf of the defendant in *U.S. v. Mobil Oil Corporation*, a civil penalty case, in November 1991.

Deposition testimony on behalf of the municipal governments of Woodbridge, Carteret, and Perth Amboy, New Jersey in a civil penalty case, *Township of Franklin Sewage Authority v. Middletown Utilities Authority, et al.* in 1991.

Deposition testimony on behalf of the defendants in *U.S. v. Menominee Paper Company and Bell Packaging Corporation* in April 1990.

PUBLICATIONS

“Perspectives on the U.S. Environmental Protection Agency’s Treatment of Ability-to-Pay Cases,” *Environmental Liability, Enforcement and Penalties Reporter*, April 2009.

“EPA’s Tools for Settling Civil Penalty Cases,” an on-line article on the web site of the Technical Advisory Service for Attorneys, March 2009.

“Will Massey Energy Company Suffer Severe Penalties in Clean Water Act Case?,” *Daily Environment Report*, September 26, 2007; and reprinted in *Environment Reporter*, September 28, 2007.

“Comments for the EPA Public Docket on ‘Enhancing Environmental Outcomes from Audit Policy Disclosures through Tailored Incentives for New Owners,’” written on behalf of The American Chemistry Council and the Corporate Environmental Enforcement Council, July 13, 2007.

“EPA’s Recent ‘Final Action’ on the BEN Model,” published in the November/December 2005 issue of *Trends*, a bimonthly publication of the American Bar Association’s Section on Environment, Energy, and Resources; and reprinted in the *Virginia Environmental Compliance Report*, a publication of the law firm Williams Mullen.

“Explanation of Recent Settlement in *U.S. v. Allegheny Ludlum*” (with John Downie), published in two different Bureau of National Affairs’ publications, *Daily Environment Report* and *Environment Reporter*, both on April 29, 2005.

“*U.S. v. The New Portland Meadows* Deviates from ‘BEN’ Methodology,” *Environment Reporter*, December 19, 2003.

“Second-Highest CWA Penalty Raises Questions about Calculation Methodology,” *Environmental Compliance and Litigation Strategy*, June 2002.

“Comparing the Economics of Nonconformance and Noncompliance Penalties,” *Environmental Compliance and Litigation Strategy*, April 2002.

Comments on EPA’s Proposed Rule on “Control of Air Pollution from New Motor Vehicle and New Motor Vehicle Engines: Proposed Non-Conformance Penalties for 2004 and Later Model Year Emission Standards for Heavy-Duty Diesel Engines and Heavy-Duty Diesel Vehicles,” submitted to the public docket A-2001-30 at the U.S. Environmental Protection Agency, March 18, 2002.

“Unfinished Business: Peer Review of EPA’s ‘BEN’ Penalty Calculation Model,” *Environmental Compliance and Litigation Strategy*, July 2001.

“EPA’s Penalty Calculation Model Must Be Fairly and Fully Reviewed,” *Legal Backgrounder* (a publication of the Washington Legal Foundation), May 18, 2001.

“Not Quite Right: EPA Treatment of Ability-to-Pay Issues in Superfund Cases,” *Toxics Law Reporter*, March 22, 2001; and *Environment Reporter*, April 6, 2001.

“Decision in *U.S. v. WCI Steel Inc.* Departs from U.S. EPA’s ‘BEN’ Methodology,” (with Kenneth T. Wise), *Environmental Compliance and Litigation Strategy*, February 2000.

“Comments of the Ad Hoc Group Submitted to the Public Docket on Calculation of the Economic Benefit of Noncompliance in EPA’s Civil Penalty Enforcement Cases,” (with Paul G. Wallach and Eric Andreas), September 1999. These comments were submitted on behalf of ten major trade associations.

“EPA’s Response to Comments: Calculation of Economic Benefit and ‘Wrongful Profits,’” *Environmental Compliance and Litigation Strategy*, August 1999.

“Explaining the Controversy Surrounding *U.S. vs. Smithfield Foods*” (with Patrick D. Traylor), the *William and Mary Environmental Law and Policy Review*, Spring 1999.

“An Approach to Environmental Civil Penalty Cases” (with Kenneth T. Wise and M. Alexis Maniatis), *Environmental Compliance and Litigation Strategy*, January 1999.

“Civil Penalty Cases Raise Issues for Plaintiffs and Defendants” (with Kenneth T. Wise and M. Alexis Maniatis), *Environmental Compliance and Litigation Strategy*, November 1998.

“Consideration of ‘Wrongful Profits’ in Environmental Civil Penalty Cases” (with M. Alexis Maniatis and Kenneth T. Wise), *Environment Reporter*, September 18, 1998; reprinted in the *National Environmental Enforcement Journal*, October 1998.

“Use of After-Tax Risk-Free Rate Theory in Calculating EPA Penalties: Counterpoint” (with M. Alexis Maniatis and Kenneth T. Wise), *Toxics Law Reporter*, November 19, 1997.

“The Economic Benefit of Noncompliance: A Response,” (with M. Alexis Maniatis and Kenneth T. Wise), *Toxics Law Reporter*, September 17, 1997.

“Almost Always ABEL: How EPA Deals with Ability-to-Pay Issues in Civil Penalty Cases,” *Toxics Law Reporter*, March 12, 1997.

Comments of the BEN Coalition (12 trade associations and organizations), (with Kathy D. Bailey, Esq.), submitted to the U.S. Environmental Protection Agency Public Docket on EPA’s Economic Benefit Recovery Program, March 3, 1997.

“Reexamining EPA’s ‘Economic Benefit’ Penalty Process” (with Kathy D. Bailey and James W. Conrad, Jr.), *The Environmental Corporate Counsel Report*, February 1997.

“EPA’s New Computer Model for Calculating Value of Supplemental Environmental Projects” (with Thomas H. Birdsall), *California Environmental Compliance Monitor*, August 7, 1995.

“Comments on EPA’s Interim Revised Supplemental Environmental Projects Policy (60 FR 24856) and Its Related Economic Methodology” (with Thomas H. Birdsall), comments submitted to EPA (Docket No. 95F-FRL-5205-5), August 4, 1995.

“A Discussion of Technical Problems with EPA’s BEN Model,” *The Environmental Lawyer*, February 1995.

“Avoiding the Pitfalls of EPA’s Civil Penalty Assessment Procedures” (with Lawrence J. Straw, Jr.), *California Environmental Law Reporter*, September 1994.

“Improving EPA’s Civil Penalty Policies—And Its Not-So-Gentle BEN Model,” *Environment Reporter*, September 9, 1994.

“EPA Penalty Calculations May Contain Significant Biases,” *Counsel’s Advisory* (a publication of the Washington Legal Foundation), October 1, 1993.

Comments submitted to the U.S. Environmental Protection Agency on Proposed Rulemaking titled: “Recovery of Costs for CERCLA Response Actions” (with David B. Hird, Esq. and Steven L. Humphreys, Esq.), Docket No. 115 CCR; FRL-3825-4, 57 Fed. Reg. 34742 (August 6, 1992), submitted on behalf of Schering-Plough Corporation and Westinghouse Electric Corporation, November 4, 1992.

“Getting It Right: EPA’s ‘BEN’ Model Still Needs Work,” *Environment Reporter*, April 2, 1993.

“The Role of Policy Analysis and Economic Instruments in the Environmental Protection Program of the United States,” November–December 1992 issue of *Economic and Mathematical Methods*, a quarterly publication of the Russian Academy of Sciences.

“EPA Proposed Rule on Cost Recovery: Streamlining or Steamrolling?” (with David B. Hird, Esq.), *Toxics Law Reporter*, September 9, 1992.

“Comments on Jonathan D. Libber’s Article on the EPA Civil Penalty Assessment Model,” *National Environmental Enforcement Journal*, December 1991.

“Penalty Assessment at the Environmental Protection Agency: A View from Outside,” *Environment Reporter*, October 18, 1991.

“Negotiated Settlements under the Clean Water Act: An Excursion into a Turkish Bazaar” (with George Hansen), *Water Environment and Technology*, August 1991.

“The Role of EPA’s BEN Model in Establishing Civil Penalties,” *Environmental Law Reporter*, May 1991, 21 ELR 10426.

24-Sep-10

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 each of the foregoing Memorandum of Respondent Opposing Motion of Complainant For Leave To Amend Complaint and Affidavit of Robert H. Fuhrman in support of the Memorandum, to the persons designated below, by depositing them with a commercial delivery service, postage prepaid, at Milwaukee, Wisconsin, in envelopes addressed to:


Honorable Barbara A. Gunning
Administrative Law Judge
Office of the Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460-2001; and

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

RECEIVED
SEP 30 2010
REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY.

I further certify that I filed the originals of the aforementioned documents and 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 29th day of September, 2010.



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