UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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U.S. ENVIRONMENTAL
PROTECTION AGENCY

IN THE MATTER OF	)	
	)	
LIPHATECH, INC.,	)	**DOCKET NO. FIFRA-05-2010-0016**
	)	
RESPONDENT.	)	

ORDER ON MOTIONS FOR ACCELERATED DECISION REGARDING ALLEGED VIOLATIONS OF FIFRA § 12(a)(1)(B)

I. PROCEDURAL HISTORY

The United States Environmental Protection Agency ("EPA" or "Agency"), Region 5 ("Complainant"), initiated this action on May 14, 2010, by filing a Proceeding to Assess a Civil Penalty Under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136*l*(a), charging Liphatech, Inc. ("Respondent" or "Liphatech"), with a total of 2,231 violations of FIFRA, arising from its allegedly improper distribution, sale, and advertisement of pesticides. The parties in this matter have filed multiple, competing, and overlapping motions for Partial Accelerated Decision on Liability covering all of the alleged violations.[1] This Order addresses the following Motions, Responses, and Replies:

1. Motion for Accelerated Decision for Counts 2,141 through 2,183

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[1] A First Amended Complaint ("Compl." or "Complaint") in this matter was filed on January 7, 2011, and replaced the original Complaint filed on May 14, 2010. The Amended Complaint eliminated the content of certain paragraphs but retained the original numbering sequence such that paragraphs 1-649 of the original Complaint correspond to paragraphs 1-649 of the Amended Complaint. On February 1, 2011, Respondent submitted an Answer to the First Amended Complaint ("Answer"), which replaced its Answer to the original Complaint filed on June 14, 2010. As with the Amended Complaint, Respondent retained the original numbering of the paragraphs. The Motions presently before the undersigned were filed prior to the filing of the amended pleadings. However, the amendment of the pleadings does not disturb the purpose, accuracy, or content of the Motions. Therefore, they will be read as if they were filed under the amended pleadings. Any reference in this Order to the paragraphs in the pleadings will refer to the amended pleadings but will also accurately reflect the location of the same paragraphs in the original pleadings to which the Motions might refer.

A. Complainant's Motion for Accelerated Decision on Liability for Counts 2,141 through 2,183 of the Complaint (filed on November 18, 2010) ("Complainant's Second Motion" or "C's 2nd Motion");

B. Memorandum of Respondent Opposing Motion of Complainant for Accelerated Decision on Liability for Counts 2,141 through 2,183 of the Complaint (received on December 6, 2010) ("Respondent's Second Response" or "R's 2nd Response");

C. Complainant's Reply to Respondent's Response to Complainant's Motion for Accelerated Decision on Liability for Counts 2,141 through 2,183 of the Complaint (filed December 13, 2010) ("Complainant's Second Reply" or "C's 2nd Reply");

2. Motion for Accelerated Decision for Counts 2,184 through 2,231

A. Complainant's Motion for Accelerated Decision on Liability for Counts 2,184 through 2,231 of the Complaint and Memorandum in Support (filed January 27, 2011) ("Complainant's Third Motion" or "C's 3rd Motion");

B. Memorandum of Respondent Opposing Motion of Complainant for Accelerated Decision on Liability for Counts 2,141 through 2,183 of the First Amended Complaint (received February 14, 2011) ("Respondent's Third Response" or "R's 3rd Response");[2] and

C. Complainant's Reply in Support of its Motion for Accelerated Decision on Liability for Counts 2,184 through 2,231 of the Complaint (filed on February 22, 2011) ("Complainant's Third Reply" or "C's 3rd Reply").

Counts 2,141 through 2,231 of the Complaint allege that Respondent violated Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136j(a)(1)(B), by distributing or selling the pesticide "Rozol" on 91 separate occasions with claims made for the product as part of that distribution or sale that substantially differed from the claims in Rozol's approved label. Compl. ¶¶ 471-649. Specifically, Counts 2,141 through 2,183, the subject of Complainant's Second Motion, allege actual sales or distributions of Rozol, EPA Reg. No. 7173-244, between October 1, 2007, and May 15, 2008. Compl. ¶¶ 471-642. Counts 2,184 through 2,231, the subject of Complainant's Third Motion, allege that both Rozol, EPA Reg. No. 7173-244, and Rozol Prairie Dog Bait, EPA Reg. No. 7173-286, were offered for sale to 48 separate distributor partners between November

[2] Respondent's Third Response, cover letter, and certificate of service are styled as a response addressing Counts 2,141 through 2,183. Inasmuch as it was filed subsequent to Complainant's Third Motion and substantively addresses the Third Motion, Respondent's Third Response is deemed a response addressing Counts 2,184 through 2,231 despite its title.

18, 2009, and February 23, 2010. Compl. ¶¶ 643-648. The remaining counts in the Complaint are not addressed in this Order.

II. STANDARDS FOR ACCELERATED DECISION

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination and Suspension of Permits, 40 C.F.R. Part 22 ("Rules"). Section 22.20(a) of the Rules authorizes the Administrative Law Judge to:

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

40 C.F.R. § 22.20(a).

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). *See, e.g., BWX Technologies, Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Belmont Plating Works*, Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65, at *8 (ALJ, Sept. 11, 2002); Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").[3] Therefore, federal court decisions interpreting FRCP 56 provide guidance for adjudicating motions for accelerated decision. *See, e.g., Mayaguez Reg'l Sewage Treatment Plant*, 4 E.A.D. 772, 780-82 (EAB 1993), *aff'd sub nom., Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995).

In support of or in opposition to a motion for summary judgment, a party must demonstrate:

> that a fact cannot be or is genuinely disputed . . . by: (A) citing to particular parts of materials in the record . . . or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

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[3] FRCP 56 was amended effective December 1, 2010, after the filing of Complainant's Second Motion and prior to the filing of Complainant's Third Motion. However, the substantive standard for summary judgment in federal court remains unchanged. *See Tropigas de Puerto Rico, Inc. v. Certain Underwriters at Lloyd's of London*, 637 F.3d 53, 56 n.5 (1st Cir. 2011) (citing FRCP 56 advisory committee's note).

Fed. R. Civ. P. 56(c)(1)(A) and (B). The Supreme Court has noted, however, that there is no requirement that the moving party support its motion with affidavits negating the opposing party's claim or that the opposing party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986). A party may move for summary judgment or successfully defeat summary judgment without supporting affidavits, provided that other evidence referenced in FRCP 56(c) adequately supports its position. Of course, if the moving party fails to carry its burden to show that it is entitled to summary judgment under established principles, then no defense is required. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 156 (1970).

The burden of showing that no genuine issue of material fact exists falls upon on the party moving for summary judgment. *Adickes,* 398 U.S. at 157. In considering such a motion, the tribunal must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1985); *Adickes*, 398 U.S. at 158-59. Summary judgment is inappropriate when contradictory inferences may be drawn from the evidence. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002). Even where summary judgment appears appropriate, sound judicial policy and the exercise of judicial discretion support denial of the motion in order for the case to be more fully developed at hearing. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

III. RELEVANT STATUTORY AND REGULATORY PROVISIONS

Complainant seeks accelerated decision in its favor on the issue of liability under FIFRA § 12(a)(1)(B), 7 U.S.C. § 136j(a)(1)(B), which makes it unlawful for any person:

> (1) . . . to distribute or sell to any person-
>
> * * *
>
> (B) any registered pesticide if any claims for it as a part of its distribution or sale substantially differ from any claims made for it as a part of the statement required in connection with its registration under [7 U.S.C. § 136a] . . . .

FIFRA § 12(a)(1)(B), 7 U.S.C. § 136j(a)(1)(B). In turn, FIFRA Section 3, 7 U.S.C. § 136a, provides, in pertinent part:

> (c) Procedure for registration
>
> (1) Statement required. Each applicant for registration of a pesticide shall file with the Administrator a statement which includes-
>
> (A) the name and address of the applicant and of any other person whose name will appear on the labeling;
> (B) the name of the pesticide;
> (C) a complete copy of the labeling of the pesticide, a statement of all claims to be

made for it, and any directions for its use;
(D) the complete formula of the pesticide;
(E) a request that the pesticide be classified for general use or for restricted use, or for both;
(F) except as otherwise provided in paragraph (2)(D), if requested by the Administrator, a full description of the tests and the results thereof upon which the claims are based, or alternatively a citation to data that appear in the public literature or that previously had been submitted to the Administrator and that the Administrator may consider in accordance with the following provisions . . . .

FIFRA Section 3(c)(1), 7 U.S.C. § 136a(c)(1)(A)-(F). Both FIFRA Section 136(gg) and its implementing regulation, found at 40 C.F.R. § 152.3, define "distribute or sell" and other grammatical variations of the term, such as "distributed or sold" and "distribution or sale," as meaning to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver. 7 U.S.C. § 136(gg); 40 C.F.R. § 152.3.

EPA issued an interpretive regulation, found at 40 C.F.R. § 168.22, that articulates the Agency's position with respect to FIFRA Sections 12(a)(1)(A) and (B) and provides, in relevant part:

(a) FIFRA sections 12(a)(1) (A) and (B) make it unlawful for any person to "offer for sale" any pesticide if it is unregistered, or if claims made for it as part of its distribution or sale differ substantially from any claim made for it as part of the statement required in connection with its registration under FIFRA section 3. EPA interprets these provisions as extending to advertisements in any advertising medium to which pesticide users or the general public have access.

(b) EPA regards it as unlawful for any person who distributes, sells, offers for sale, holds for sale, ships, delivers for shipment, or receives and (having so received) delivers or offers to deliver any pesticide, to place or sponsor advertisements which recommend or suggest the purchase or use of:

* * *

(5) A registered pesticide product for an unregistered use, unless the advertisement is one permitted by paragraph (b) (2) or (3) of this section. However, as a matter of policy, the Agency will not regard as unlawful the advertisement of uses permitted by FIFRA section 2(ee) provided the product is not an antimicrobial pesticide targeted against human pathogens (see 51 FR 19174; May 28, 1986).

40 C.F.R. §§ 168.22(a), (b).

IV. UNDISPUTED FACTS

1. Respondent is a corporation with a place of business at 3600 West Elm Street, Milwaukee, Wisconsin ("Site"), and is a "person" as defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s). Compl. ¶¶ 3, 22-23; Answer ¶¶ 3, 22-23.

2. During the calendar years 2007 and 2008, Respondent was a "registrant," as that term is defined by FIFRA Section 2(y), 7 U.S.C. § 136(y), of "Rozol Pocket Gopher Bait II" ("Rozol"), assigned EPA Registration Number 7173-244. Compl. ¶¶ 24-25; Answer ¶¶ 24-25.

3. During the calendar years 2007 and 2008, Rozol was a "pesticide," as that term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u). Compl. ¶¶ 32; Answer ¶¶ 32.

4. During the calendar years 2009 and 2010, Respondent was a "registrant," as that term is defined by FIFRA Section 2(y), 7 U.S.C. § 136(y), of Rozol, assigned EPA Registration Number 7173-244. Compl. ¶ 258; Answer ¶ 258.

5. During the calendar years 2009 and 2010, Respondent was a "registrant," as that term is defined by FIFRA Section 2(y), 7 U.S.C. § 136(y), of "Rozol Prairie Dog Bait" ("Rozol PD"), assigned EPA Registration Number 7173-286. Compl. ¶ 262; Answer ¶ 262.

6. During the calendar years 2009 and 2010, Rozol and Rozol PD were both "pesticides," that term is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u). Compl. ¶¶ 266-67; Answer ¶¶ 266-67.

7. Rozol, at all times relevant to the Complaint, and Rozol PD, during calendar years 2009 and 2010, were each classified as a restricted use pesticide ("RUP") under Section 3(d) of FIFRA, 7 U.S.C. § 136a(d). Compl. ¶ 27, 263; Answer ¶ 27, 263.

8. Pursuant to 40 C.F.R. § 156.10(j)(2), as a result of this RUP classification, Rozol and Rozol PD can only be sold to and be used by "Certified Applicators," as that term is defined by FIFRA Section 2(e), 7 U.S.C. § 136(e), or persons under the direct supervision of Certified Applicators and only for those uses covered by the Certified Applicator's certification. Compl. ¶ 28, 265; Answer ¶ 28, 265.

9. During calendar years 2007 and 2008, Rozol was also registered for additional uses under the authority of Section 24(c) of FIFRA, 7 U.S.C. § 136v(c), to control black-tailed prairie dogs under "Special Local Needs" supplemental labels in the States of Kansas, Nebraska, Wyoming, Oklahoma, as well as certain counties in Colorado and Texas. Compl. ¶¶ 29-31; Answer ¶¶ 29-31.

10. On or about March 2, 2005, Respondent submitted, and the EPA Office of Pesticides Programs, Registration Division accepted, a label regarding Rozol. Compl. ¶ 135;

Answer ¶ 135.

11. On 40 occasions, Respondent distributed or sold Rozol to various entities by physically shipping or moving the pesticide to the recipients. Compl. ¶¶ 213-15, 217-49, and 252-56; Answer ¶¶ 213-15, 217-49, and 252-56.[4]

12. During a June 19, 2008 inspection, an EPA inspector collected copies of Direct Mail Packages and cover letters ("Cover Letters") stating that Rozol was intended both "For Black - Tailed Prairie Dogs (BTPD) Control" and "For Control of Pocket Gophers" and included literature entitled "*Black-tailed Prairie Dog Control - Research Bulletin*" ("Bulletin"). Compl. ¶¶ 140-44; Answer ¶¶ 140-44.

13. The Cover Letters contained the following text:

- "Provides the most control available in a single application"
- "Poses low primary poisoning potential to birds and other non-targets"
- "Both restricted-use and general-use Rozol products are formulated using proven anticoagulant chlorophacinone at 50 PPM (parts per million) - unlike other half-strength, diphacinone-based baits containing as low as 25PPM"

Compl. ¶¶ 146, 149, 152 (emphasis in original); Answer ¶¶ 146, 149, 152.

14. The Bulletin contained the following text:

- "Rozol consistently controlled Prairie Dog populations using a single application"
- "Conclusion: Rozol delivers proven single application effectiveness"
- "Secondary Hazard / Nearly all Prairie Dogs expired underground"
- Conclusion: Above-ground exposure risk to non-targets from Rozol is insignificant"
- "Over all sites, 95% average population reduction was achieved as measured by the 'plugged burrow' census method"
- "Over all sites, 94% average population reduction was achieved when measured by the 'visual count' census method"
- "Comparative Toxicity Profile Overall Risk to Birds and Mammals / Rozol is ranked over 50% lower than zinc phosphide in the EPA's overall risk index and 1/3 lower than Diphacinone (Kaput-D)"
- "Rozol's active ingredient (chlorophacinone) is ten times (10X) less toxic to dogs

[4] Respondent disputes that a distribution or sale occurred as alleged in paragraphs 216 and 250, which contain the factual allegations underlying Counts 2,144 and 2,178. Compl. ¶¶ 216, 250; Ans. ¶¶ 216, 250. In response to paragraph 251 of the Complaint, Respondent disputes the date on which the distribution or sale occurred but does not dispute that it distributed or sold Rozol to an entity called Estes. Compl. ¶ 251; Ans. ¶ 251.

as Kaput-D's (diphacinone)"
- "Chlorophacinone is over 100X more effective on mice than dipachinone [sic]"
- "Conclusion: Rozol - the lowest risk profile among Black Tailed Prairie Dog bait alternatives... Why risk potential harm to employees, livestock, birds, pets or other non-targets?"

Compl. ¶¶ 155, 158, 161, 164, 167, 170, 182, 185, 188, 191 (emphasis in original); Answer ¶¶ 155, 158, 161, 164, 167, 170, 182, 185, 188, 191.

15. The Bulletin contained the following statements:

- "Traditional control products such as zine phosphide or Diphacinone-based anticoagulants have not been proven to effectively prevent population recovery, leading to the need to costly re-treatment"
- "Kaput-D Prairie Dog Bait (25 PPM) achieved only 53% to 56% control"
- "Kaput-D Pocket Gopher Bait* (50 PPM) 2X the rate of active ingredient, achieved only 56% to 57% control. *Not labeled for Black-Tailed Prairie Dog"

Compl. ¶¶ 173, 176, 179; Answer ¶¶ 173, 176, 179.

16. The Bulletin contained the following language regarding a chart:

- "Chart entitled 'Compare the products for yourself - there are many differences'"

Compl. ¶ 194; Answer ¶ 194.

17. Respondent made the following statements in radio advertisements for Rozol that began broadcasting on or about September 26, 2007:

- "Rozol - proven single application effectiveness for the control of black-tailed prairie dogs"
- "Proven in university studies on over 10,000 burrows to get 94% control with a single treatment"

Compl. ¶¶ 199, 202; Answer ¶¶ 199, 202.

18. Respondent operates the website found at "www.liphatech.com," which it uses to advertise its pesticide products to the public. Compl. ¶ 273; Answer ¶ 273.

19. Between November 18, 2009, and February 23, 2010, Respondent's website contained electronically available documents that included the following text regarding Rozol PD, which was not approved or authorized by EPA:

- "**Proven Single Application Effectiveness** - When properly applied in all active

burrows of a colony, control typically exceeds 85%, and can be as high as 100%"

- "**Low cost per acre** - Savings in time, labor and fuel exceed comparative total costs of other methods such as zinc phosphide, diphacinone, phos-toxin, and foam or propane-based systems"
- "**Superior Weatherability** - Rozol does not lose its effectiveness when wet. It outlasts Zinc Phosphide"
- "**Provides control, regardless** - With many alternative methods, if the target rodent is not in the burrow during application - success is reduced or control is lost altogether"
- "**Best Bait Acceptance & Favorable Toxicity Profile** - According to the EPA's overall risk assessment, Rozol offers lower overall risk than Zinc Phosphide or Diphacinone, And Prairie dogs will eat it in the burrow, so there is less risk to non-target wildlife"
- "**Lower Primary Poisoning Potential** - Rozol's toxicity to birds is 20X (times) less than for ZP. Rozol less toxic to dogs than ZP or Diphacinone"
- "**Outstanding Single Application Effectiveness**"
- "**Proven Reliability** - In university trials on over 11,400 burrows to provide over 94% control in one treatment (when properly and thoroughly applied to all active burrows in a colony)"
- "**Highly Palatable** - Food-grade winter wheat grain (10% protein) is a preferred feed source for field rodents and provides excellent acceptance and control"
- "**Superior Weatherability** - Rozol does not lose its effectiveness when wet - it outlasts zinc phosphide and can be used under diverse weather conditions"
- "**Easy-to-Use/Less Work** - No need to pre-treat and less repeat applications"
- "**Lowers Primary Poisoning Potential to Non-Target Birds and Livestock** - Rozol's primary toxicity to birds is much less than that of acute toxicants"

Compl. ¶¶ 275, 278, 281, 284, 287, 290, 293, 296, 299, 302, 305, 308, 349-51 (emphasis in original); Answer ¶¶ 275, 278, 281, 284, 287, 290, 293, 296, 299, 302, 305, 308, 349-51.

V. POSITIONS OF THE PARTIES

Complainant alleges in Counts 2,141 through 2,231 of the Complaint that Respondent made claims about Rozol's efficacy and safety, as part of its distribution or sale, that substantially differ from Rozol's Notice of Pesticide Registration dated March 2, 2005 ("Registration" or "2005 Registration").[5] C's 2nd Motion at 11-12, C's 3rd Motion at 17-18.

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[5] Covering Counts 2,141 through 2,183, Complainant's Second Motion deals with 43 alleged distributions or sales of Rozol, occurring between October 1, 2007, and May 30, 2008, where Respondent made claims that substantially differed from the Registration. C's 2nd Motion (continued...)

The parties disagree in several respects on the proper interpretation of FIFRA Section 12(a)(1)(B), which, as noted above, makes it unlawful for any person to distribute or sell a registered pesticide to any person "if any claims made for it as part of its distribution or sale substantially differ from any claims made for it as part of the statement required in connection with its registration under [7 U.S.C. § 136a] . . . ." 7 U.S.C. § 136j(a)(1)(B).

On this issue of liability, Complainant submits that no genuine issue as to any material fact exists for the alleged violations in Counts 2,141 through 2,231 of the Complaint. C's 2nd Motion at 18; C's 3rd Motion at 10. Respondent both disputes the legal standards upon which Complainant relies in its Motions and argues that Complainant has failed to carry its burden of demonstrating the absence of any genuine issue of material fact as to liability for the violations alleged in Counts 2,141 through 2,231. R's 2nd Response at 4; R's 3rd Response at 1-2. The parties vigorously debate each element of FIFRA Section 12(a)(1)(B) and address separate

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[5](...continued)
at 1-3. Complainant argues that it must prove five elements in order to carry its burden of establishing a *prima facie* case: (1) Respondent is a "person" under FIFRA Section 2(s); (2) Respondent is located in a State; (3) Respondent "distributed or sold" under FIFRA Section 2(gg); (4) a registered pesticide (Rozol), (5) using claims made for Rozol as part of its distribution or sale that substantially different from claims made for Rozol as part of the statement required in connection with its registration application. *See* C's 2nd Motion at 4.

Covering Counts 2,184 through 2,231, Complainant's Third Motion deals with the alleged offers for sale of Rozol and Rozol PD to 48 distributors between November 18, 2009, and February 23, 2010, where Respondent made claims that substantially differed from the Registration. C's 3rd Motion at 2. Counts 2,184 - 2,231 do not involve the physical movement of Rozol itself. *Id.* Complainant argues that it must prove four elements in order to carry its burden of establishing a *prima facie* case: (1) Respondent is a "person" under FIFRA Section 2(s); (2) Respondent is located in a State; (3) Respondent "offered for sale" and therefore "distributed or sold" under FIFRA Section 2(gg) a registered pesticide; (4) using claims made for Rozol as part of its distribution or sale that substantially different from claims made for Rozol as part of the statement required in connection with its registration application. *See* C's 3rd Motion at 10.

Complainant combines elements three (3) and four (4) from its Second Motion into a single element, element three (3), in its Third Motion. However, because the parties do not dispute the fact that Rozol and Rozol PD were both registered pesticides, this numerical difference is irrelevant. *See* Undisputed Facts 2-6. Additionally, the parties do not dispute either of the first two elements, namely that Respondent is a person and located in a State. Undisputed Fact 1. Rather, both of the present Motions are primarily concerned with the final element, the "substantially differed" argument. With respect to Complainant's Third Motion, Respondent also disputes whether a distribution or sale, in the form of an "offer for sale," occurred in all of the instances alleged in Counts 2,184 - 2,231.

arguments on the following issues:

1. Whether there was a "distribution or sale," C's 2nd Motion at 6, R's 2nd Response at 13-16, C's 2nd Reply at 8-9, C's 3rd Motion at 11-14, R's 3rd Response at 6-15;
2. Whether Respondent's statements constituted "advertising," as contemplated by 40 C.F.R. § 168.22, C's 3rd Motion at 12-14, R's 3rd Response at 11-15;
3. Whether those statements constituted "claims," C's 2nd Motion at 7-13, R's 2nd Response at 11-12, C's 3rd Motion at 14-15, R's 3rd Response at 15;
4. Whether those statements were "made for it [Rozol]," R's 2nd Response at 11-13, C's 2nd Reply at 8;
5. Whether those statements were made "as part of" the distribution and sale, C's 2nd Motion at 13-18, R's 2nd Response at 16-19, C's 3rd Motion at 15-16; and
6. What is the "statement required" by FIFRA Section 3, 7 U.S.C. § 136a, and whether those statements "substantially differ from any claims made" in that "statement required," C's 2nd Motion at 10-13, R's 2nd Response at 10-11, C's 2nd Reply at 2-7, C's 3rd Motion at 16-20, R's 3rd Response at 16-24.

Despite the variety and complexity of the issues in dispute, Complainant nevertheless maintains that it is entitled to judgment as a matter of law on the issue of liability based on the Motions, the Rules, the pleadings, admissions, documents, and declarations on file with this Tribunal. C's 2nd Reply at 12; C's 3rd Motion at 1.

A. COMPLAINANT'S ARGUMENTS

1. Whether there was a "distribution or sale"

Complainant asserts that Respondent admits to the distribution or sale of Rozol to customers, as alleged in Counts 2,141 through 2,143, Counts 2,145 through 2,177, and Counts 2,180 through 2,183 of the Complaint. C's 2nd Motion at 5 (citing Answer ¶¶ 213-15, 217-49, 252-56). Complainant further asserts that Respondent admits to the distribution or sale of Rozol to Estes on April 25, 2010, rather than April 2, 2008, as alleged in Count 2,179 of the Complaint. *Id.* (citing Answer ¶ 251). As for Counts 2,144 and 2,178, Complainant states that Respondent contests whether it "distributed or sold" Rozol because the recipients of the pesticide in those two instances were company representatives and, therefore, no distribution or sale, as that term is defined by FIFRA, occurred. C's 2nd Motion at 5-6; *see also* Compl. ¶¶ 216, 250, Answer ¶¶ 216, 250. Complainant counters that the fact that the recipients were not customers is of no consequence because, "when determining if a product is distributed or sold [under FIFRA], the focus is movement of the product, not the recipient of the product." C's 2nd Motion at 6.

Pursuant to FIFRA's broad definition of the term "distribute or sell," Complainant contends, Complainant need only prove that Respondent "shipped" Rozol to "any person," which would include the individuals in question. *Id.* (citing 7 U.S.C. § 136(gg)). Complainant asserts that, by its own admission, Respondent has shipped Rozol to the two individuals, and as such, it has "distributed or sold" a registered pesticide, leaving no genuine dispute as to that element for Counts 2,144 and 2,178. *Id.* (citing CX 23).

As for Counts 2,184 through 2,231, Complainant argues that Respondent's distribution of advertising materials to 48 distributors constituted an "offer for sale" under FIFRA to each distributor. C's 3rd Motion at 11. Complainant notes that the term "offer for sale" falls within the definition of "distribution or sale" set forth at 7 U.S.C. § 136(gg). *Id.* Complainant argues that, while neither the statute nor the implementing regulations define "offer for sale," the term should be "broadly construed to effectuate the purpose of FIFRA." *Id.* (citing *Sporicidin Int'l* ("*Sporicidin*"), 3 E.A.D. 589, 604 (CJO 1991)). As support for its position, Complainant points to 40 C.F.R. § 168.22(a), which states that "EPA interprets [FIFRA § 12(a)(1)(B)] as extending to advertisements in any advertising medium to which pesticide users or the general public have access." *Id.* (quoting 40 C.F.R. § 168.22(a)) (internal quotations omitted). Complainant also cites *Sporicidin* for the proposition that "distribution" under FIFRA "includes both marketing and merchandising a commodity," where "merchandising means sales promotion as a comprehensive function." C's 3rd Reply at 6 (citing *Sporicidin*, 3 E.A.D. at 605) (internal quotations omitted).

In further support of its argument, Complainant asserts that Respondent admits that, in response to a series of Stop Sale, Use, and Removal Orders ("SSUROs"), it twice sent letters to 48 of its distributors instructing them to destroy all flyers, literature, and advertisements regarding Rozol. C's 3rd Motion at 8-9 (citing CX 17, 32, 53). Complainant states that, along with these letters, Respondent also mailed to the distributors a "confirmation form" to complete and return to Respondent, which Respondent agreed to forward to Complainant. *Id.* Complainant claims that, as of January 27, 2011, "Respondent ha[d] not sent Complainant any returned and executed 'confirmation forms' despite repeated requests by Complainant to do so." *Id.* Complainant argues that the undersigned "can infer from Respondent's request to these distributors to destroy the Advertisements" that the distributors had, in fact, received the advertisements and that, accordingly, Complainant has established "the basis for the final 48 counts of the Complaint (Counts 2,184-2,231)." *Id.* at 9.

Finally, Complainant contends that the holding of the Environmental Appeals Board ("EAB" or "Board") in *Tifa Ltd.* ("*Tifa*"), 9 E.A.D. 145 (EAB 2000), should not apply to this case. C's 3rd Motion at 11, n.10. In *Tifa*, the EAB was faced with defining "offer for sale" under FIFRA as a matter of first impression. 9 E.A.D. at 159. Finding no relevant authority on point, the Board consulted general contract law to assist in determining whether the record evidence supported a finding of an "offer for sale." *Id.* Complainant argues that *Tifa* is distinguishable from the present case because the parties there did not refer the EAB to 40 C.F.R. § 168.22, the underlying Federal Register notices, or *Sporicidin*, and therefore, the conclusion reached by the EAB based on general common law contract principles "is of limited, if any,

precedential value to this matter." C's 3rd Motion at 11; *see also* C's 3rd Reply at 5 (citing *Tifa*, 9 E.A.D. at 160) (noting that the EAB's decision was based "solely on the authorities cited by it and the parties") (internal quotations omitted).

2. Whether Respondent's statements constituted improper "advertising"

Complainant contends that the materials Respondent sent to the 48 distributors identified in Counts 2,184 through 2,231 constitute "advertisements" as contemplated by 40 C.F.R. § 168.22(a). C's 3rd Motion at 12.[6] Because "advertisement" is not a defined term under FIFRA, Complainant argues that this Tribunal "should give 'advertisement' its ordinary meaning" and points out that the root word, "advertise," is defined to include calling public attention to, especially by emphasizing desirable qualities, so as to arouse a desire to buy or patronize *Id.* at 12 (quoting MERRIAM WEBSTER'S COLLEGE DICTIONARY 18 (10th Ed. 1994)) (internal quotations omitted).

Assuming that Respondent disputes whether the materials constituted advertisements,[7] Complainant first notes that the materials in question include the Bulletin and Cover Letters, copies of which were collected by EPA inspectors. C's 3rd Motion at 12; *see also* Undisputed Facts 12-16. Complainant argues that these materials were both available to the general public on Respondent's website and included in the Direct Mail Packages sent to the 48 distributors. *Id.*; *see also* Undisputed Facts 18-19. Second, those materials, according to Complainant, constituted "advertisements" because "they were intended to promote Rozol's sale" by comparing the benefits of using Rozol with the disadvantages of using competing products. C's 3rd Motion at 13 (citing CX 28-31; CX 54). Finally, Complainant argues that:

> in light of EPA's interpretation of what constitutes an 'offer for sale' as set forth in § 168.22(a), and based on Respondent's admission that the materials in question are advertising (Answer ¶¶ 349-51), this Tribunal should conclude that, as a matter of law, Complainant has established that Respondent offered Rozol . . . for sale (i.e., distributed or sold Rozol) when it posted the Advertisements on its website and sent

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[6] In support of its contention that Respondent's advertisements should be subject to 40 C.F.R. § 168.22, Complainant cites additional language from the proposed version of 40 C.F.R. § 168.22, which stated: "[a]dvertising or promotional material in media to which pesticide users or the general public have access, such as television, radio, newspapers, trade journals, industry magazines, or billboards, would be covered by this interpretive rule." C's 3rd Motion at 4 (citing 51 Fed. Reg. 24,393, 24,393-94 (July 3, 1986)).

[7] Complainant notes that, although Respondent admitted that the materials in question are "advertisements" in its Answer, Respondent relied on a subsequent declaration by Respondent's Chief Executive Officer ("CEO"), Carl Tanner, to argue that the materials were not advertisements because they were sent not to "induce sales" but "to inform and educate." C's 3rd Motion at 12 n.11 (citing December 3, 2010 Declaration of Carl Tanner, ¶ 4).

the Advertisements to 48 of its distributors, each of which are persons as that term is defined by FIFRA section 2(s), 7 U.S.C. § 136(s).

C's 3rd Motion at 14.

3. Whether Respondent's statements constituted "claims"

Complainant describes various statements made by Respondent through its print, radio, and website advertisements, set forth above in Undisputed Facts 14-17 and 19, as "claims" under FIFRA Section 12(a)(1)(B). C's 2nd Motion at 7-10. In its Second Reply and Third Motion, Complainant argues that these statements constitute "claims" based on the definition of the term adopted by Board Member Ronald L. McCallum in his concurring opinion in *Roger Antikiewicz & Pest Elimin. Prods. of Am., Inc.* ("*Antikiewicz*"), 8 E.A.D. 218 (EAB 1999).[8] C's 2nd Reply at 7 and C's 3rd Motion at 15 (both citing *Antikiewicz*, 8 E.A.D. at 242-43).

4. Whether those statements were "made for Rozol"

In its Second Reply, Complainant responds to Respondent's contention that statements made about pesticidal products *other than* Rozol do not fall within the scope of FIFRA Section 12(a)(1)(B) because such statements are not claims *made for* Rozol. C's 2nd Reply at 8; *see also* Undisputed Fact 15. Complainant argues that "[s]uch an assertion is disingenuous" because such statements, when viewed in the context of the advertisements, were clearly "intended to induce the sale of Rozol based on its alleged superiority to the compared products." *Id.*

5. Whether those statements were made "as part of" the distribution and sale of Rozol

Complainant relies upon the EAB's decision in *Microban Products Co.* ("*Microban I*"), 9 E.A.D. 674 (EAB 2001), to support its position that Respondent made the above-described statements "as part of" the distribution and sale of Rozol. C's 2nd Motion at 17 and C's 3rd Motion at 15. In *Microban I*, the EAB held that "[t]he statutory term 'as part of' requires that a nexus exist between the unapproved claims and the distribution or sale of the pesticide" and that one must consider "all of the surrounding facts and circumstances" to determine whether such a nexus exists. 9 E.A.D. at 688. The EAB also held that "claims and corresponding distribution or sales need not be contemporaneous." *Id.* (citing *Sporicidin*, 3 E.A.D. at 603).

With respect to Counts 2,141 through 2,183, Complainant argues that, "[c]onsidering all of the relevant facts in the record, it is clear that the unapproved claims in Liphatech's

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[8] Specifically, Judge McCallum states that "the term 'claim' connotes an affirmative representation, whether express or implied, as to certain attributes, results, and so on. [Certain statements constitute claims] because they provide the reader with definitive, EPA-validated information about the product's efficacy, safety, or other qualities." *Antikiewicz*, 8 E.A.D. at 242-43.

advertising materials were made as part of the distribution or sale of Rozol." C's 2nd Motion at 17. As for the claims at issue in Counts 2,184 through 2,231, Complainant contends that those claims were "made in the 'offers for sale' themselves," and therefore, Complainant has shown a "sufficiently close link" between the claims and offers for sale. C's 3rd Motion at 16 (citing *Microban I*, 9 E.A.D. at 688 and *Sporicidin*, 3 E.A.D. at 602-05).[9]

6. What is the "statement required" by FIFRA Section 3 and did the claims made "substantially differ" from that statement

Complainant argues that the undersigned need only look to the Notice of Pesticide Registration, which includes the accepted label(s), "to determine what claims were approved in connection with the products' registration." C's 2nd Motion at 11 (citing *Microban Products Co.* ("*Microban Order*"), EPA Docket No. FIFRA-98-H-01, 1998 EPA ALJ LEXIS 135, at *20-21 (ALJ, Sept. 18, 1998) (Order on Motions for Discovery, Filing of Sur-Reply and Partial Accelerated Decision) ("[The] notice of pesticide registration represents the base line from which allegations of Section 12(a)(1)(B) violation must be measured."). Complainant contends that, because claims made by Respondent in its marketing materials "have not been approved by U.S. EPA," Respondent has made claims that substantially differ from any claims made as part of the statement required in connection with its registration under FIFRA Section 3, 7 U.S.C. § 136a. *Id.* at 12.[10]

Complainant emphasizes in its Second Reply that the undersigned should use the "exact method" employed by the presiding officer in *Microban Order* to determine whether Respondent has violated Section 12(a)(1)(B), namely: "hold[] up, on the one hand, the terms of the EPA's registration approval and then . . . determin[e] whether [respondent] made any claims as part of its distribution or sale which substantially differ from those made in connection with its registration approval." C's 2nd Reply at 6 (quoting *Microban Order* at *21). Complainant specifically attacks Respondent's contention that EPA must consider all of the data that an applicant submits in its registration application in order to determine whether a violation of Section 12(a)(1)(B) has occurred. *Id.* at 2. Complainant asserts that, if Respondent prevails on this argument, "the mere submittal of data by an applicant for registration renders it approved by the U.S. EPA and gives the registrant *carte blanche* to pick and choose among the various data it

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[9] Counts 2,184 through 2,231 of the Complaint state the allegations of violation as Respondent's offering for sale both Rozol and Rozol PD to 48 distributors with substantially differing claims from the claims approved for the accepted label. Compl. ¶¶ 643-48. The list of distributors is attached to the Complaint as Attachment I. Compl. Attachment I. I note that Attachment I is a table ostensibly created by EPA and is not *prima facie* evidence of a particular fact. Moreover, Respondent does not concede the accuracy of Attachment I.

[10] Complainant goes on to highlight several examples of statements made in advertising materials and compare them to the specific language that was approved for use in Rozol's official label as well, as the labels used under the Special Local Needs permit. C's 2nd Motion at 12.

submitted to use in its advertising materials," a result that, according to Complainant, is contrary to congressional intent. *Id.* Rather, Complainant contends, the claims themselves must be separately submitted for EPA to review and approve. *Id.* at 3.[11] Complainant then cites two examples of other Notices of Pesticide Registration in which approved claims were specifically set forth in the label in order to support the proposition that EPA routinely includes a list of approved claims if a registrant properly includes a statement of proposed claims in accordance with Section 3(c)(1). *Id.* at 4.

Complainant further develops this argument in its Third Motion, wherein it asserts that FIFRA Section 3(c)(1) delineates specific information that must be submitted by each applicant for registration of a pesticide, including "a complete copy of the labeling of the pesticide, *a statement of all claims to be made for it*, and any directions for its use" and "a full description of the tests and the results thereof *upon which the claims are based*, or alternatively a citation to data that appear in the public literature or that previously had been submitted to the Administrator." 7 U.S.C. §§ 136a(c)(1)(C) and (F) (emphasis added). Complainant argues that the language in Section 3(c)(1) requiring a "statement of all claims" is a direct reference to the requirement set forth in Section 12(a)(1)(B) that a registrant may not sell or distribute a pesticide if any claims made as part thereof substantially differ from the "statement required in connection" with the registration. C's 3rd Motion at 17; *compare* 7 U.S.C. § 136(c)(1) *with* 7 U.S.C. § 136j(a)(1)(B). Any other reading of these two sections, Complainant argues, "would render the phrase 'a statement of all claims to be made for it' void or insignificant" in contravention of basic statutory construction principles. C's 3rd Motion at 17. Importantly, Complainant contends that "Respondent did not submit *any* of the claims made in its Advertisements [either] when it applied to register Rozol Pocket Gopher Bait or Rozol Prairie Dog Bait[,]" *id.* at 18 (citing RX 1-2) (emphasis added), or "when it sought 'special local needs' registration of" Rozol, *id.* (citing RX 3-9).[12] Complainant asserts that, "[b]ecause Respondent failed to submit any statement of claims when it applied to register Rozol, the Presiding Officer need only look to the accepted labels contained in the notices of pesticide registration for Rozol to determine whether the claims in Respondent's Advertisements substantially differed from those submitted." *Id.* at 19 (citing *Microban Products Co.*, Docket No. FIFRA-98-H-01, 1998 EPA ALJ LEXIS 9, at *17 (ALJ, Apr. 3, 1998) (Order on Motion)).

Complainant also objects to Respondent's reliance on a 2007 study to support certain

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[11] Complainant notes that Respondent relies upon Section 3(c)(1)(F) of FIFRA as support for its position that the entire body of data is the proper universe from which it may draw acceptable claims. C's 2nd Reply at 2. Complainant counters that Section 3(c)(1)(f) contains the phrase "all data to support the statement of claims," which indicates that the data itself is not the "statement of claims" contemplated in Section 3(c)(1)(C). C's 2nd Reply at 3.

[12] Complainant also disputes Respondent's argument that "EPA does not 'routinely' review advertising claims" and cites two examples of registration applications that include proposed advertising claims and subsequent EPA responses. *Id.* (citing CX 92-93).

claims made in its advertisements on the grounds that (1) the study post dates the initial registration of Rozol, (2) EPA reviewed the study only for Rozol PD's 2009 registration application, and (3) the study "is merely data submitted in support of any claims in Respondent's registration application, not an approved claim or the basis upon which Respondent may make claims that were not submitted with its registration statement. C's 2nd Reply at 5. Therefore, Complainant concludes, "despite any data that might have been submitted, the violative claims that form the basis of Counts 2,141 through 2,183 of the Complaint were never submitted for approval, much less approved by U.S. EPA as part of the registration of Rozol." *Id.* Complainant repeats this argument with respect to Counts 2,184 through 2,231. C's 3rd Motion at 17-19.

In its Third Reply, Complainant addresses two additional arguments relevant to this issue. First, Complainant asserts that Section 12(a)(1)(B) must apply to advertising generally (and not just claims made on the label), because the provision would otherwise overlap entirely with Section 12(a)(1)(E) and render the former redundant. C's 3rd Reply at 3 (citing 7 U.S.C. §§ 136j(a)(1)(B) and (E)). Section 12(a)(1)(E) makes it unlawful to distribute or sell misbranded pesticides and limits misbranding to false or misleading information on the pesticide label. 7 U.S.C. § 136j(a)(1)(E) and 136(q)(1)(A). According to Complainant, "[b]ecause most claims that 'differ substantially' from registration claims would be either false or misleading, Section 12(a)(1)(B) would be rendered superfluous if it did not apply to advertising claims that are not on the product's labeling." C's 3rd Reply at 3.

Additionally, Complainant contends, Sections 12(a)(1)(B) and 12(a)(2)(E) should be read to "work in tandem," with the former controlling advertising claims not approved in the registration process and the latter separately and affirmatively requiring the disclosure of a pesticide's restricted use classification. *Id.* at 4 (citing 7 U.S.C. §§ 136j(a)(1)(B) and 136j(a)(2)(E)). Reliance solely on Section 12(a)(2)(E) to limit advertising would, according to Complainant:

> send a conflicting message to the regulated community: FIFRA Section 12 would impose no sanction for advertising a pesticide without disclosing that it is a restricted use pesticide or its terms of restriction, but it would impose no sanction for advertising a pesticide using claims that substantially differed from the approved label.

C's 3rd Reply at 4.

B. RESPONDENT'S ARGUMENTS

1. Whether there was a "distribution or sale"

For Counts 2,144 and 2,178, Respondent disputes that a distribution or sale of Rozol occurred, as alleged in the Complaint, on the basis that the shipments were mere "product

transfers that were made by Respondent to two of its employees." R's 2nd Response at 13 (citing Exhibit C, Declaration of Alan Smith). Respondent contends that it is a single, corporate "person" that includes all of its employees. *Id.* at 14 (citing *Saucier v. Coldwell Banker JME Realty*, 644 F. Supp. 769, 784 (S.D. Miss. 2007) (holding that, in the context of conspiracy law, a corporation cannot conspire with itself and the acts of the employees are acts of the corporation)). Respondent further argues that FIFRA Section 12(a)(1)(B) only makes it "unlawful for 'any person . . . to distribute or sell to any person . . .' [and it] is impossible to 'sell,' 'distribute' or 'ship' products to oneself." *Id.* at 13.

Respondent contends that, if the undersigned accepts Complainant's position and considers only the "movement of the product," any transfers of product by a company from one manufacturing location to another "would violate FIFRA should there be 'differing claims' literature in the marketplace," a result that, according to Respondent, would be "absurd." R's 2nd Response at 14 (citing *Compton v. Unified Sch. Dist. v. Addison*, 598 F.3d 1181, 1184 (9th Cir. 2010) (holding that avoid statutory interpretations that produce "absurd results" should be avoided) and *Rouse v. Law Office of Rory Clark*, 603 F.3d 699, 704 (9th Cir. 2010) (holding that ambiguous statutes should be construed in such a way as to avoid an absurd result)). Respondent continues that, even if such transfers are deemed to be distributions, Complainant has failed to demonstrate any connection between those transfers and Respondent's literature. *Id.* at 15.

With respect to Counts 2,141 through 2,144, Respondent separately disputes whether a distribution or sale occurred as charged. Specifically, Respondent argues that, while it admits that those distributions took place between October 1 and October 29, 2007, "the literature that the Complainant is alleging violated FIFRA Section 12(a)(1)(B) was distributed no earlier than October 31, 2007." R's 2nd Response at 15. Therefore, Respondent argues, no nexus exists between the claims made in the literature and the distributions occurring before October 31, 2007. *Id.* Anticipating Complainant's reply, Respondent goes on to argue that, while the radio broadcasts identified in the Complaint occurred during October 2007, "there is no evidence that these distributors ever heard any of the radio broadcasts[,] . . . read or even received any of the print advertisements[,] . . . [or] viewed any information that may have been on Respondent's website between October 1 and October 30, 2007." *Id.* at 15-16.

With respect to Counts 2,184 through 2,231, Respondent argues that Complainant has not established that an "offer for sale" occurred. Respondent argues that, contrary to Complainant's contention, the EAB's discussion in *Tifa* is not only relevant but controlling in this case. R's 3rd Response at 7. Respondent begins by asserting that *Tifa* is the only judicial interpretation of the term "offer for sale," as that term is used in the context of FIFRA. *Id.* at 8. According to Respondent, the complainant in *Tifa* argued "that submitting a price list to a prospective customer and stating that the product was available in response to the prospective customer's request for information about the pesticide constituted an 'offer for sale,'" but the EAB rejected this contention, holding that "an offer must be definite and certain, and must be made under circumstances evidencing the express or implied intent of the offerer or [sic] that its acceptance shall constitute a binding contract." *Id.* at 9 (quoting *Tifa*, 9 E.A.D. at 159) (internal quotations omitted). Respondent argues that the present case offers even less of a basis for finding an "offer

for sale" because, unlike *Tifa*, Respondent here provided no price list or any other relevant terms of sale. *Id.* at 9-10. Additionally, Respondent asserts that, because its website is "passive," *id.* at 11 (citing Exhibit A, Declaration of Alan Smith), no binding contract could be created using the website and no "offer for sale" was possible. *Id.* at 10 (citing *See, Inc. V. Imago Eyewear Pty, Ltd.*, 167 F. App'x 518, 522 (6th Cir. 2006)).

Respondent also argues that Complainant misconstrues the meaning and scope of 40 C.F.R. § 168.22, effectively substituting the term "advertising" for the term "offer for sale" in the provision, thus rendering the latter term "meaningless." R's 3rd Response at 11-13. Respondent further contends that such an interpretation constitutes an attempt by Complainant to extend its authority beyond the statutory limits, which, consequently, is void. *Id.* at 13 (citing *Skelly Oil Co. v. Fed. Energy Admin.*, 448 F. Supp. 16 (N.D. Okla. 1977)).

Respondent adopts the position that, far from applying to all pesticide advertising, Section 168.22 simply "provide[s] public notice that advertising, in any medium, *that constitutes an 'offer for sale'* (as that term is used in FIFRA) may constitute a violation of section 12(a)(1)(B) if the advertising contains 'differing claims.'" *Id.* at 14 (emphasis added). Citing the 1986 proposed rule and the final version of the rule issued in 1989, Respondent argues that the purpose of Section 168.22 "was to provide EPA's interpretation of its narrow authority to regulate advertising in five distinct and limited areas." *Id.* (citing 40 C.F.R. § 168.22(b)); *see also* 51 Fed. Reg. 24,393-95 (July 3, 1986); 54 Fed. Reg. 1,122-25 (Jan. 11, 1989). Additionally, Respondent argues that, "[w]hen Congress amended FIFRA in 1974 to give EPA limited authority to regulate advertising as set forth in FIFRA § 12(a)(2)(E) [the RUP warning provision], Congress elected not to expand the scope of section 12(a)(1)(B) to encompass advertising." *Id.* at 12. Respondent argues that such selective amendments to FIFRA indicate that Congress "intended EPA's regulatory control over 'advertising' to be limited to those circumstances in which the 'advertising' actually constitutes an 'offer for sale.'" *Id.* In further support of its position, Respondent contends that Section 168.22 is an "interpretive rule," and as such , it is "not binding on the Presiding Officer." *Id.* at 14 (citing *Durable Mfg. Co. v. U.S. Dept. of Labor*, 584 F. Supp. 2d 1092 (N.D Ill. 2008).

2. Whether Respondent's statements constituted improper "advertising"

Attached to Respondent's Second Response as Exhibit D is a December 3, 2010 Declaration of Carl Tanner ("Tanner Decl."), discussed *supra* at 13 n.7. Mr. Tanner states that he is and has been the CEO of Liphatech since December 2003. Tanner Decl. ¶ 2. Mr. Tanner goes on to declare that Respondent "provides product literature to its distributors and/or dealers, such as the Research Bulletin, to inform and educate the distributors and/or dealers about Liphatech's products - not to induce sales or distribution of the product." *Id.* ¶ 4. The Declaration also states that no price list or order form for Rozol accompanied the Bulletin that was provided to distributors. *Id.* ¶ 5. Mr. Tanner asserts that sales of Rozol are induced by advertising directly to potential users, not by providing product information to distributors and/or dealers. *Id.* ¶ 6.

Based on this Declaration, Respondent argues that the literature cited in the Complaint, including the Bulletin and product information sheets, was "designed to inform distributors of Rozol about essential information that these certified applicators may ask." R's 2nd Response at 17. Respondent objects to Complainant's assertion that there is no dispute that the Direct Mail Packages were intended to induce sales, arguing that at hearing, Mr. Tanner will testify as to the educational purpose of the literature. *Id.* at 18. Respondent also takes issue with Complainant's reliance on the letters sent subsequent to the SSUROs in which Respondent requested that the recipients destroy certain Rozol-related literature. *Id.* Respondent argues that "there is no admissible evidence in the record to support [Complainant's] conclusory assertions" that (1) the individuals receiving the "please destroy" letter were the same individuals who received the Direct Mail Packages and (2) the individuals receiving the Direct Mail Packages were "persons [of] authority who were 'the ones making decisions as to purchasing . . . .'" *Id.* at 18 (quoting C's 2nd Motion at 15). Respondent concludes by asserting that the literature at issue in Complainant's Second Motion "is 'advertising' in a general sense, [but] is not the type of advertising that is subject to 40 C.F.R. § 168.22." R's 3rd Response at 19 (citing *Int'l Ins. Co. v. Florists' Mut. Ins. Co.*, 559 N.E.2d 7, 10 (Ill. App. Ct. 1990) (the court concluded that similar material distributed to distributors to aid them in educating salespersons to solicit purchase orders is not advertising.))[13]

3. Whether Respondent's statements constituted "claims"

Respondent contends that the statements listed in Complainant's Second Motion, captured in Undisputed Facts 13-17, "are factual assertions . . . supported by the claims made for Rozol in [Respondent's] Registration Statement and included in Respondent's Prehearing Information Exchange." R's 2nd Response at 12 (citing RX 1-12; Declaration of Thomas Schmit ("Schmit Declaration," attached to the Second Response as Exhibit B)). Respondent argues further that many of those "allegedly violative claims" are also supported by publicly available information and states that one of its proposed witnesses will testify that "the claims made in the Registration Statement support the claims made by Respondent as part of its sale or distribution or Rozol." *Id.*; *see also* R's 3rd Response at 24-25 (citing Exhibits F, G, and H) ("[T]he

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[13] Respondent also argues that Complainant's interpretation of FIFRA Section 12(a)(1)(B) conflicts with EPA's regulations regarding advertising. In support, Respondent quotes 40 C.F.R. § 168.22(b)(5): "as a matter of policy, the Agency will not regard as unlawful the advertisement of uses permitted by FIFRA Section 2(ee) provided the product is not an antimicrobial pesticide targeted against human pathogens . . . ." R's 2nd Response at 8 and R's 3rd Response at 20 (both quoting 40 C.F.R. § 168.22(b)(5)). According to Respondent, FIFRA Section 2(ee), 7 U.S.C. § 136(ee), "allows the use of a registered pesticide 'against any target pest not specified on the labeling' unless otherwise restricted by EPA." R's 3rd Response at 20. Thus, Respondent asserts, it is illogical to authorize in 40 C.F.R. § 168.22(b)(5) the advertisement of a pesticide's uses even if those uses are not specified on the label, "yet [prohibit] any claim made for a product, such as a claim that Rozol is effective in a single application, . . . unless it is approved by the EPA." *Id.* at 21.

allegedly violative statements . . . are supported by Liphatech's registration materials and other publicly available information and are therefore not substantially different or false or misleading.").

4. Whether those statements were "made for Rozol"

Respondent argues that the particular wording of Section 12(a)(1)(B) logically limits the scope of that provision to claims made only for the registered pesticide itself. R's 2nd Response at 11 (quoting 7 U.S.C. § 136j(a)(1)(B) (making it unlawful for any person in any state to distribute or sell to any person "any registered pesticide if any claims made for *it* as part of its distribution or sale substantially differ") (emphasis in Response)). Correspondingly, Respondent contends, "[t]he word 'it' does not refer to other products or things mentioned by Respondent in literature, advertising or otherwise." *Id.* Respondent then identifies three statements found in its advertising materials, set forth in Undisputed Fact 15, and argues that these statements are not "claims for" Rozol, as required by Section 12(a)(1)(B), because they are claims about *other* products. *Id.* at 11-12. Because EPA's jurisdiction to regulate advertising "ends with claims made for the registered pesticide as part of the sale or distribution of the product," Respondent continues, the claims identified in Undisputed Fact 15 are not "claims" for the purposes of Section 12(a)(1)(B). *Id.* at 12.

5. Whether those statements were made "as part of" the distribution and sale of Rozol

Respondent argues that, because its print and broadcast advertisements were not directed to any individual or organization, "such advertising could not be part of any sale or distribution of Rozol." R's 2nd Response at 16. Citing *Sporicidin* and *Microban Products Co.* ("*Microban II*"), 11 E.A.D. 425 (EAB 2004), as support, Respondent contends that, in order to establish liability under Section 12(a)(1)(B), Complainant must demonstrate a "nexus" between a particular claim and the subsequent sale by "show[ing] that a distributor that purchased Rozol to be sold for use on Black-Tailed Prairie Dogs actually received, read or listened to the allegedly violative advertisements." *Id.* at 16-17 (citing *Sporicidin*, 3 E.A.D. at 602, and *Microban II*, 11 E.A.D. at 440). Respondent argues that the only basis for Complainant's assertion that it has established the requisite "nexus" is the list of distributors that were authorized to sell Rozol for use on Black-Tailed Prairie Dogs. *Id.* at 17 (citing CX 17). Respondent dismisses Complainant's reliance on this list, however, stating that it is not the list of distributors who received Direct Mail Packages. *Id.*

6. What is the "statement required" by Section 3 and did the claims made "substantially differ" from that statement

Respondent argues that Complainant adopts a "severe construction of FIFRA Section 12(a)(1)(B)" when it asserts that any claims Respondent makes must comport with "the claims that were authorized by the EPA for Respondent to make on its 'accepted label.'" R's 2nd

Response at 10; *see also* R's 3rd Response at 16.[14] Contrary to Complainant's position, Respondent contends, FIFRA requires the claims to be compared not simply to the accepted label but to the Registration Statement as a whole. R's 2nd Response at 11.

Respondent further develops this argument in its Third Response, asserting that Section 12(a)(1)(B) "makes no reference to information that has been 'approved' by EPA for use on the product label . . . . Rather, this statutory provision simply states that claims made as part of the sale and distribution of the pesticide cannot be substantially different than the claims made for it 'as part of the statement required in connection with its registration . . . .'" R's 3rd Response at 16 (quoting 7 U.S.C. § 136j(a)(1)(B)). Respondent contends that, in determining whether claims substantially differ from those made in "the registration statement," the approved label is merely one part of the "materials to be considered." *Id* at 16-17 (citing *Lescs v. William R. Hughes, Inc.*, 1999 U.S. App. LEXIS 475, at 28 (4th Cir. 1999) (noting that the "registration statement" included, and therefore must be broader than, the approved labeling)).[15]

Respondent goes on to quote the bulk of FIFRA Section 3(c)(1), emphasizing that the title of subparagraph (1) is "Statement required." R's 3rd Response at 17 (quoting 7 U.S.C. § 136a(c)(1)). A plain reading of Section 12(a)(1)(B), Respondent contends, "requires that the entire registration statement be reviewed to determine" whether any claims made are "substantially different." *Id.* Respondent further argues that the "statement required" by Section 3(c)(1) includes "a full description of the tests made and the results thereof . . . or alternatively a citation to data that appear in the public literature or that previously had been submitted to the

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[14] Respondent objects to measuring the claims it made against the approved product label as too narrow a base of comparison. R's 2nd Response at 11. Respondent also contends that such a narrow interpretation of the claims it can include in its advertising materials impermissibly infringes upon its First Amendment rights as a pesticide manufacturer. *Id.* at 9 (citations omitted). Additionally, Respondent argues that "seeking to restrain and sanction truthful educational material" results in a regulatory interpretation "that is more expansive than necessary to serve the governmental interest." R's 3rd Response at 25 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980)).

[15] Respondent also argues that Complainant's reliance on the *Microban* cases is misplaced because those decisions were based on the respondent's claims about its product's effectiveness for a particular *use* and EPA had expressly directed that the product was not approved for that use. R's 2nd Response at 7 (citing *Microban Order* at 4); *see also* R's 3rd Response at 22-23 ("[I]t was easy for the presiding officer in *Microban* to refer to the notice of pesticide registration as the 'base line' . . . because in *Microban*, the respondent was making claims that its pesticide was effective against a pest for which use of the product was not allowed."). Respondent attempts to distinguish itself from the registrant in *Microban* by stating that, unlike that registrant, Respondent made statements about Rozol "involv[ing] the characteristics of Rozol when used to control the pest which EPA approved it to control - Black-Tailed Prairie Dogs." R's 2nd Response at 7-8.

Administrator." *Id.* at 17-18 (quoting 7 U.S.C. § 136a(c)(1)(F)).

Respondent argues that Complainant has offered no admissible evidence, however, that demonstrates that the claims made by Respondent for Rozol as part of its sale and distribution of the product are, in fact, substantially different from the claims made in its Registration Statement. R's 2nd Response at 11. Conversely, Respondent argues, the Schmit Declaration demonstrates that the claims made in the Registration Statement support the claims made by Respondent as part of the sale or distribution of Rozol. R's 2nd Response at 10-11. Specifically, the Schmit Declaration states that an efficacy study by Charles D. Lee and Scott E. Hyngstrom, "Field Efficacy and Hazards of Rozol Bait for Controlling Black Tailed Prairie Dogs ("Lee Study")," and an EPA Report by William Erickson and Douglas Urban, "Potential Risks of Nine Rodenticides to Birds and Nontarget Mammals," support Respondent's claims made for Rozol regarding its single application effectiveness, product formulation, low primary poisoning potential, percentage effectiveness, and toxicity to non-targets. R's 2nd Response Ex. B ¶¶ 1-11.

Moreover, Respondent argues, EPA has "waived the requirement to submit efficacy data." R's 3rd Response at 18 (citing 40 C.F.R. § 158.400(e)(1), which states: EPA "has waived the requirement to submit product performance data unless the pesticide product bears a claim to control pest microorganisms that pose a threat to human health and whose presence cannot readily be observed by the user."). Nevertheless, Respondent continues, Congress intended that pesticide manufacturers would continue to inform users of the efficacy of their products not withstanding EPA's waiver. *Id.* (citing S. Rep. No. 95-334, at 65 (1977)).[16]

VI. DISCUSSION AND CONCLUSIONS

As indicated above, FIFRA Section 12(a)(1)(B) makes it unlawful for a person who is a registrant to distribute or sell, including to offer for sale, any registered pesticide "if any claims made for it as part of its distribution or sale substantially differ from any claims made for it as a part of the statement required in connection with its registration under [7 U.S.C. § 136a]." 7 U.S.C. § 136j(a)(1)(B); *see also* 7 U.S.C. § 136(gg) (defining "distribute or sell" to include "offer for sale"). The parties have engaged in a lengthy and detailed debate over the meaning of this provision and how it applies to Respondent's alleged activities. Nonetheless, I still find that genuine issues of material fact exist for Counts 2,141 through 2,231. One genuine issue that affects all Counts addressed by these Motions is determining what claims Respondent made in connection with its registration under FIFRA Section 3. Complainant argues that the phrase

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[16] Respondent argues that to interpret Section 12(a)(1)(B) as Complainant urges would force "every pesticide registrant in the United States . . . to supply EPA with its efficacy data along with a detailed statement of the claims based on the efficacy data for approval by the EPA," which "would inundate EPA with advertising material and supporting data and essentially negate EPA's waiver regarding efficacy data." R's 3rd Response at 19 n.12. According to Respondent, "[t]his is not the way EPA operates." *Id.* at 19.

"statement required" as used in the statute is equivalent to the Notice of Pesticide Registration, which contains the Accepted Label, because the Notice has been approved by the EPA. C's 2nd Motion at 11 and C's 3rd Motion at 17-18. Respondent counters that the "statement required" consists of all documents and data that were submitted to the EPA in the registration application or that is publicly available at the time of registration. R's 3rd Response at 18.

Neither formulation is persuasive as both arguments miss the mark in describing the scope and limits of the "statement of claims" contemplated in Section 3. That provision imposes a duty on the applicant to submit the requisite information. Nothing in 7 U.S.C. § 136a(c) requires claims about a registered pesticide to be affirmatively approved by the EPA. *Compare* 7 U.S.C. § 136a(c)(1) ("a statement which includes . . . a statement of all claims to be made for it) *with* 7 U.S.C. § 136a(c)(5) (If the Administrator waives the data submission requirements, she "may register the pesticide *without determining* that the pesticide's composition is such as to warrant proposed claims of efficacy.") (emphasis added). This language at least contemplates that a pesticide can be approved and registered without the Agency providing an exhaustive list of "approved" claims. Therefore, Complainant's reliance on a legal theory that bases allegations of liability on the "accepted label" is too narrow a formulation to justify a ruling in its favor as a matter of law. In focusing solely on the "accepted label" argument, Complainant has not established sufficient evidence showing an absence of material fact as to Respondent's overall compliance with 7 U.S.C. § 136a(c)(1). Therefore, its Motions cannot be granted. Moreover, this issue will benefit from additional argument at hearing and in the post-hearing briefs.

This is not, however, the only reason for denying the Motions. Additionally, Respondent argues that it did not distribute or sell Rozol, as alleged in Counts 2,144 and 2,178, because in those two instances the product was sent to company employees. Complainant asserts that the "distribute or sell" analysis does not turn on the identity of the recipient but instead on the movement of the product. Although a review of the case law does not reveal any instance where this question has been previously addressed under FIFRA, Respondent's claim that internal operations of a corporate enterprise, with dispersed employees, must be judged as the conduct of a single actor, is not without merit. *See, e.g.*, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 770 (1984). An evidentiary hearing is necessary to determine the precise nature of the recipients in the context of the corporate structure, which makes accelerated decision on these Counts inappropriate.

With respect to the "nexus" requirement between a claim and distribution or sale, Complainant also has not established the absence of any material fact. *See Microban II*, 11 E.A.D. at 440 ("FIFRA section 12(a)(1)(B) statutory phrase 'as part of' requires that a 'nexus exist between the unapproved claims and the distribution or sale of the pesticide.'"). While the phrase "as part of" does not require the claims and corresponding sales or distribution to be contemporaneous, *Microban I*, 9 E.A.D. at 688, there nevertheless must be some link between the two actions before they are brought within the ambit of Section 12(a)(1)(B), *Sporicidin*, 3 E.A.D. at 603-04.

Complainant links the Direct Mail Packages with the sale or distribution or Rozol by

arguing that Respondent shipped Rozol to the same set of distributors that received copies of the Direct Mail Packages. Complainant argues that the undersigned can "infer from Respondent's request to these distributors to destroy the Advertisements" that these 48 distributors in fact received the advertisements and that Complainant has established "the basis for the final 48 counts of the Complaint (Counts 2,184-2,231)." C's 3rd Motion at 9. Respondent argues that "Complainant mistakenly asserts that this is a list of distributors that received Direct Mail Packages when it is not." R's 2nd Response at 17. While this Tribunal need not accept a non-moving party's unsupported, conclusory denials as a basis for denying accelerated decision, the record evidence does not conclusively establish the unity and overlapping identity of the alleged distributors and militates against a finding of liability as a matter of law. *See also Sporicidin*, 3 E.A.D. at 605 ("[T]he statute leaves the door open for pesticide sellers, distributors, and others to exchange information in a non-commercial setting under appropriate circumstances."). As Complainant notes, when determining whether claims have been made as part of a distribution or sale, one must consider "all of the surrounding facts and circumstances to make such a determination." C's 2nd Motion at 17 and C's 3rd Motion at 15 (both quoting *Microban I*, 9 E.A.D. at 688). Consideration of all "facts and circumstances" is more practical at hearing.

Moreover, Respondent argues that the Direct Mail Packages were not intended to induce sales, but merely to educate distributors, thus removing them from the definition of "advertising," and by extension, "offer for sale." R's 2nd Response at 17. Respondent provides an affidavit from Respondent's Corporate Officer indicating that he will testify as to this fact at hearing. Given that the undersigned may consider the credibility of the witness when determining what weight, if any, to give such assertion, an evidentiary hearing should be held to provide that opportunity and to flesh out the factual circumstances upon which it is based.

With respect to Counts 2,184 through 2,231, the parties debate the applicability and meaning of a pesticide programs regulation, found at 40 C.F.R. § 168.22, entitled "Advertising of unregistered pesticides, unregistered uses of registered pesticides and FIFRA § 24(c) registrations." 40 C.F.R. § 168.22 ("Section 168.22"). Complainant asserts that materials posted on Respondent's website and materials sent to a list of distributors can, independently, serve as both the "claim" and the "distribution or sale" components described in FIFRA Section 12(a)(1)(B), arguing that Section 168.22 makes this possible.

As noted *supra* at 5, Section 168.22 provides, in relevant part:

> (a) FIFRA sections 12(a)(1) (A) and (B) make it unlawful for any person to "offer for sale" any pesticide if it is unregistered, or if claims made for it as part of its distribution or sale differ substantially from any claim made for it as part of the statement required in connection with its registration under FIFRA section 3. EPA interprets these provisions as extending to advertisements in any advertising medium to which pesticide users or the general public have access.
>
> (b) EPA regards it as unlawful for any person who distributes, sells, offers for sale, holds for sale, ships, delivers for shipment, or receives and (having so

received) delivers or offers to deliver any pesticide, to place or sponsor advertisements which recommend or suggest the purchase or use of:

(1) Any pesticide for a use authorized under a FIFRA section 5 experimental use permit (EUP).

(2) Any pesticide for a use authorized under a FIFRA section 18 emergency exemption, except for advertisements that:

(i) Are placed in media which address primarily persons in the geographical area to which the exemption applies.

(ii) State the name and address of one or more retail dealers who stock the pesticide.

(iii) Contain a prominent notice of the limitations on use under the section 18 emergency exemption.

(3) Any pesticide for any use authorized only by a FIFRA section 24(c) special local need registration, unless the advertisement contains a prominent notice of the limitations on use under the section 24(c) registrations.

(4) Any unregistered pesticide for any use unless the advertisement is one permitted by paragraph (b) (2) or (3) of this section.

(5) A registered pesticide product for an unregistered use, unless the advertisement is one permitted by paragraph (b) (2) or (3) of this section. However, as a matter of policy, the Agency will not regard as unlawful the advertisement of uses permitted by FIFRA section 2(ee) provided the product is not an antimicrobial pesticide targeted against human pathogens (see 51 FR 19174; May 28, 1986).

40 C.F.R. § 168.22(a)-(b).

First, it is unclear from the parties' arguments that Section 168.22 actually governs in the instant case given that its title specifically lists unregistered pesticides, unregistered uses of registered pesticides and Section 24(c) registrations, none of which is at issue in Counts 2,141 through 2,231. Even assuming, *arguendo*, that Section 168.22 was intended to apply to the advertising of registered uses for pesticides registered pursuant to Section 3, it is unclear that the regulation applies to the distribution or sale of Rozol for control of Pocket Gophers. Section 168.22(b) is specifically limited to five types of situations and pesticides, none of which are alleged in this case. Here, there are no allegations that Rozol is authorized under either an experimental or emergency use permit, Section 168.22(b)(1)-(2), and while Rozol did have a Section 24(c) SLN permit, that permit is not the basis for the counts at issue in these Motions, Section 168.22(b)(3).[17] Similarly, the parties agree that Rozol and Rozol PD were registered during the relevant period, Section 168.22(b)(4), and there are no allegations that Respondent

[17] Rozol was covered by a Section 26(c) SLN permit for certain states; however, there are no allegations that advertisements were for a "use authorized only by a FIFRA Section 24(c) [SLN] registration." 40 C.F.R. § 168.22(b)(3).

was promoting unregistered uses, Section 168.22(b)(5).

Again, assuming *arguendo* that Section 168.22 applies to Rozol and the claims that Respondent made for it, the language of the regulation does not unambiguously extend the definition of "distribution or sale" to *mean* all forms of advertising. Rather, it states that EPA "interprets these provisions as *extending* to advertisements." 40 C.F.R. § 168.22(a) (emphasis added). This does not mean that EPA interprets Section 12(a)(1)(B) to define advertising as the equivalent of "offer for sale." As the structure of the subsequent paragraph suggests, "EPA regards it as unlawful for any person *who* [engages in activities defined as distributing or selling elsewhere in the regulations] any pesticide, *to place or sponsor* advertisements which recommend or suggest the purchase or use of [five enumerates types of pesticides]." 40 C.F.R. § 168.22(b) (emphasis added). In this provision "who" is a descriptive phrase that modifies "person," whereas "to place or sponsor" denotes the prohibited activity and "which recommend" describes the limitations of that prohibition.

Respondent argues that advertising in any medium, which *also* constitutes an offer for sale, may constitute a violation. R's 3rd Response at 14. Such an argument is not without merit. Thus, it is necessary to determine whether Respondent's statements on its website independently constitute an "offer for sale" as that term is defined under FIFRA. *See* R's 3rd Response at 9 (citing *Tifa*, 9 E.A.D. at 159); *id.* at 10 (citing *See, Inc.*, 167 F. App'x at 522). Complainant cannot demonstrate as a matter of law, based on the current record evidence, that the materials themselves are both claims and distributions or sales. A factual inquiry is also necessary to determine the nature of the website.

I note that, under the standard for adjudicating motions for accelerated decision, the evidence must be viewed in the light most favorable to the non-moving party, and all reasonable inferences from the evidentiary material must be drawn in favor of the nonmovant. At the very least, conflicting inferences may be drawn from the evidence presented to support the facts material to the question of Respondent's liability, and a number of issues appear to warrant further discussion, thus making accelerated decision inappropriate. *See Rogers Corp.*, 275 F.3d at 1103. I emphasize that, in making this threshold determination, I have not weighed the evidence and determined the truth of the matter. Rather, I have simply determined that Respondent has adequately raised genuine issues of material fact for evidentiary hearing and that Complainant has not established at this point that it is entitled to judgment as a matter of law. I also note that Respondent would be well advised to understand that, in order to adequately defend itself against the charges and the assessment of the proposed penalty, it must present credible and probative evidence at the hearing on this matter to corroborate the statements made in its Responses. In accordance with the foregoing discussion, Complainant's Second and Third Motions are denied.

ORDER

1. Complainant's Second Motion for Accelerated Decision as to Liability, Counts 2,141 through 2,183, is **DENIED.**

2. Complainant's Third Motion for Accelerated Decision as to Liability, Counts 2,184 through 2,231 is **DENIED**.

3. On June 10, 2011, the undersigned issued an Order Scheduling Hearing in this matter. The parties are ordered to confer with each other and notify the undersigned's staff if either party wishes to alter its estimated time necessary to present its direct case in light of recent rulings, such that the length of the scheduled hearing would be affected. Or, if neither party elects to alter its estimated time for its direct case, Complainant shall notify the undersigned's staff that such conference has occurred and that no alteration is sought. Such notifications must be received on or before July 22, 2011.

Susan L. Biro
Chief Administrative Law Judge

Dated: June 24, 2011
Washington, DC

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

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Motions For Accelerated Decision Regarding Alleged Violations Of FIFRA § 12(a)(1)(B)**, dated June 24, 2011, was sent this day in the following manner to the addressees listed below.

Maria Whiting-Beale
Staff Assistant

Dated: June 24, 2011

Original And One Copy By Pouch Mail To:

La Dawn Whitehead
Regional Hearing Clerk
U.S. EPA
77 West Jackson Boulevard, E-19J
Chicago, IL 60604-3590

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Copy By Pouch Mail To:

Nidhi K. O'Meara, Esquire
Gary E. Steinbauer, Esquire
Cynthia King, Esquire
Office of Regional Counsel
U.S. EPA
77 West Jackson Boulevard, C-14J
Chicago, IL 60604-3590

Copy By Regular Mail To:

Michael H. Simpson, Esquire
Reinhart, Boerner, Van Deuren, S.C.
P.O. Box 2965
Milwaukee, WI 53201-2965

Reinhart, Boerner, Van Deuren, S.C.
1000 North Water Street, Suite 1700
Milwaukee, WI 53202