

Counts 2959 through 2117

399. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 398 of this Answer.

400. Denied.

401. Denied.

Count 2118

402. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 401 of this Answer.

403. Denied.

404. Denied.

Count 2119

405. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 404 of this Answer.

406. Denied.

407. Denied.

Count 2120

408. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 407 of this Answer.

409. Denied.

410. Denied.

Count 2121

411. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 410 of this Answer.

412. Denied.

413. Denied.

Count 2122

414. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 413 of this Answer.

415. Denied.

416. Denied.

Count 2123

417. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 416 of this Answer.

418. Denied.

419. Denied.

Count 2124

420. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 419 of this Answer.

421. Denied.

422. Denied.

Count 2125

423. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 422 of this Answer.

424. Denied.

425. Denied.

Count 2126

426. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 425 of this Answer.

427. Denied.

428. Denied.

Count 2127

429. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 428 of this Answer.

430. Denied.

431. Denied.

Count 2128

432. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 431 of this Answer.

433. Denied.

434. Denied.

Count 2129

435. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 434 of this Answer.

436. Denied.

437. Denied.

Count 2130

438. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 437 of this Answer.

439. Denied.

440. Denied.

Count 2131

441. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 440 of this Answer.

442. Denied.

443. Denied.

Count 2132

444. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 443 of this Answer.

445. Denied.

446. Denied.

Count 2133

447. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 446 of this Answer.

448. Denied.

449. Denied.

Count 2134

450. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 449 of this Answer.

451. Denied.

452. Denied.

Count 2135

453. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 452 of this Answer.

454. Denied.

455. Denied.

Count 2136

456. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 455 of this Answer.

457. Denied.

458. Denied.

Count 2137

459. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 458 of this Answer.

460. Denied.

461. Denied.

Count 2138

462. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 461 of this Answer.

463. Denied.

464. Denied.

Count 2139

465. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 464 of this Answer.

466. Denied.

467. Denied.

Count 2140

468. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 467 of this Answer.

469. Denied.

470. Denied.

Count 2141

471. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 470 of this Answer.

472. Denied.

473. Denied.

474. Denied.

Count 2142

475. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 474 of this Answer.

476. Denied.

477. Denied.

478. Denied.

Count 2143

479. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 478 of this Answer.

480. Denied.

481. Denied.

482. Denied.

Count 2144

483. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 482 of this Answer.

484. Denied.

485. Denied.

486. Denied.

Count 2145

487. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 486 of this Answer.

488. Denied.

489. Denied.

490. Denied.

Count 2146

491. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 490 of this Answer.

492. Denied.

493. Denied.

494. Denied.

Count 2147

495. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 494 of this Answer.

496. Denied.

497. Denied.

498. Denied.

Count 2148

499. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 498 of this Answer.

500. Denied.

501. Denied.

502. Denied.

Count 2149

503. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 502 of this Answer.

504. Denied.

505. Denied.

506. Denied.

Count 2150

507. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 506 of this Answer.

508. Denied.

509. Denied.

510. Denied.

Count 2151

511. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 510 of this Answer.

512. Denied.

513. Denied.

514. Denied.

Count 2152

515. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 514 of this Answer.

516. Denied.

517. Denied.

518. Denied.

Count 2153

519. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 518 of this Answer.

520. Denied.

521. Denied.

522. Denied.

Count 2154

523. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 522 of this Answer.

524. Denied.

525. Denied.

526. Denied.

Count 2155

527. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 526 of this Answer.

528. Denied.

529. Denied.

530. Denied.

Count 2156

531. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 530 of this Answer.

532. Denied.

533. Denied.

534. Denied.

Count 2157

535. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 534 of this Answer.

536. Denied.

537. Denied.

538. Denied.

Count 2158

539. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 538 of this Answer.

540. Denied.

541. Denied.

542. Denied.

Count 2159

543. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 542 of this Answer.

544. Denied.

545. Denied.

546. Denied.

Count 2160

547. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 546 of this Answer.

548. Denied.

549. Denied.

550. Denied.

Count 2161

551. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 550 of this Answer.

552. Denied.

553. Denied.

554. Denied.

Count 2162

555. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 554 of this Answer.

556. Denied.

557. Denied.

558. Denied.

Count 2163

559. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 558 of this Answer.

560. Denied.

561. Denied.

562. Denied.

Count 2164

563. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 562 of this Answer.

564. Denied.

565. Denied.

566. Denied.

Count 2165

567. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 566 of this Answer.

568. Denied.

569. Denied.

570. Denied.

Count 2166

571. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 570 of this Answer.

572. Denied.

573. Denied.

574. Denied.

Count 2167

575. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 574 of this Answer.

576. Denied.

577. Denied.

578. Denied.

Count 2168

579. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 578 of this Answer.

580. Denied.

581. Denied.

582. Denied.

Count 2169

583. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 582 of this Answer.

584. Denied.

585. Denied.

586. Denied.

Count 2170

587. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 586 of this Answer.

588. Denied.

589. Denied.

590. Denied.

Count 2171

591. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 590 of this Answer.

592. Denied.

593. Denied.

594. Denied

Count 2172

595. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 594 of this Answer.

596. Denied.

597. Denied.

598. Denied.

Count 2173

599. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 598 of this Answer.

600. Denied.

601. Denied.

602. Denied.

Count 2174

603. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 602 of this Answer.

604. Denied.

605. Denied.

606. Denied.

Count 2175

607. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 606 of this Answer.

608. Denied.

609. Denied.

610. Denied.

Count 2176

611. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 610 of this Answer.

612. Denied.

613. Denied.

614. Denied.

Count 2177

615. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 614 of this Answer.

616. Denied.

617. Denied.

618. Denied.

Count 2178

619. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 618 of this Answer.

620. Denied.

621. Denied.

622. Denied.

Count 2179

623. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 622 of this Answer.

624. Denied.

625. Denied.

626. Denied.

Count 2180

627. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 626 of this Answer.

628. Denied.

629. Denied.

630. Denied.

Count 2181

631. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 630 of this Answer.

632. Denied.

633. Denied.

634. Denied.

Count 2182

635. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 634 of this Answer.

636. Denied.

637. Denied.

638. Denied.

Count 2183

639. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 638 of this Answer.

640. Denied.

641. Denied.

642. Denied.

Counts 2184 through 2231

643. Respondent incorporates by reference the admissions, denials and assertions contained in paragraphs 1 through 642 of this Answer.

644. Denied.

645. Denied.

646. Denied.

647. Denied.

648. Denied.

Proposed Civil Penalty

649. Respondent lacks knowledge or information sufficient to determine what the Complainant considered in proposing an extremely disproportionate, wildly exaggerated and harshly draconian penalty of \$2,941,456 on a small company, from an industry-wide perspective, for a very limited number of radio and print ads that Respondent asserts complied with FIFRA and for truthful statements that are consistent with the materials required by EPA as part of the registration of the affected products. Respondent also asserts that EPA's *Enforcement Response Policy* is not legally binding in this proceeding and is entitled to no weight in determining those evidentiary factors that may be considered in calculating a penalty for any of the purported violations. Respondent further asserts that, even if EPA's *Enforcement Response Policy* is entitled to some weight, the Complainant has made numerous errors of fact and judgment in the manner it has applied that policy.

**The Circumstances or Arguments Which Constitute Grounds of Defense
and the Basis for Opposing the Proposed Penalty**

Substantial Compliance with FIFRA and Applicable Regulations

650. The Complainant's claims are barred, in whole or in part, because the advertisements and information that are the subject of this Complaint substantially complied with FIFRA and the applicable regulations during all times relevant to this Complaint.

651. Respondent's statements in its advertisements and other informational pieces about its registered products were truthful and not misleading.

652. Respondent's advertisements and other informational pieces did not contain claims for its products that differed substantially from claims for the products that were made in connection with their registration under FIFRA.

Excessive, Unreasonable and Disproportionate Penalty

653. The proposed penalty is excessive, unreasonable and disproportionate and violates the Eighth Amendment to the U.S. Constitution.

654. On its face, the proposed penalty of \$2,268,500 for allegedly failing to state in four radio advertisements (two of 30 seconds duration and two of 60 seconds duration) and several print advertisements that a product is a "restricted use product," when the label was incorporated by reference into the advertisements, would not serve any legitimate regulatory objective and is completely disproportionate to the actual gravity of the alleged violations. Moreover, if the Kansas Department of Agriculture would have simply issued Respondent a warning letter in November 2007, the vast majority of the acts which Complainant alleges are violations would have been avoided.

*The EPA Penalty Policy Is Flawed and Fails to Take
Into Account Facts Unique to This Case*

655. The Complainant has applied the EPA penalty policy in an arbitrary and capricious manner that, among other things, fails to take into account the pervasive regulatory controls that are placed on the handling, distribution, sale and use of the products in question when calculating a proposed penalty for the alleged violations. These controls preclude any harm to human health or the environment from occurring as a result of the violations alleged in the Complaint. The Complainant has also applied the EPA penalty policy in a manner that fails to take into account the limited size and nature of the markets in which the advertisements were broadcast and distributed in calculating the proposed penalty in this case. To the extent that the EPA penalty policy may be construed to preclude Complainant from properly considering these facts, it is flawed and should be disregarded.

656. The Complainant has applied the EPA penalty policy in a manner that disregards the facts underlying the Complaint, where, for example, only four radio advertisements were broadcast multiple times, and the Complainant has based the proposed penalty on alleged multiple violations resulting from broadcasting and placing the advertisements in small, rural markets. To the extent that the EPA penalty policy affords the Complainant no flexibility to consider these facts in determining the number of discrete violations that should be alleged, it is flawed and should be disregarded.

Complainant Misinterprets and Misapplies the EPA Penalty Policy

657. Complainant's selection, application, and interpretation of the penalty policy as applied to this case is arbitrary and capricious. In addition, the Complainant has misinterpreted and misapplied the EPA penalty policy to the facts of this case. The

Complainant has made numerous errors of fact and judgment in applying the policy, resulting in an excessive, unreasonable and disproportionate penalty to the extent Respondent has violated FIFRA and its applicable regulations (which Respondent denies). The Complainant has greatly overestimated the potential harm that might have or could have occurred to human health or the environment from the alleged violations, if any. The Complainant has also greatly overstated the potential toxicity of the products involved in this case. The Complainant has also applied the incorrect penalty policy to the facts of this case.

Complainant's Interpretation of the Number of Alleged Violations In This Case Is Arbitrary and Capricious

658. The Complainant's identification and selection of the number of alleged violations in this case is inconsistent, unreasonable, arbitrary and capricious.

Complainant's Delay in Instituting Enforcement Action Negates Its Allegation that Respondent Allegedly Endangered Human Health or the Environment

659. Regulatory authorities apparently became aware of alleged potential issues with Respondent's print and broadcast advertisements as early as November 2007. However, the regulators did not contact Respondent about its advertisements until June 2008. Respondent does not dispute the right of regulatory authorities to wait approximately eight months (during which time a large percentage of the advertisements were broadcast) to commence an enforcement action. Nevertheless, this significant delay evidences an acknowledgement on the part of the regulators that the alleged violations that are set forth in the Complaint were neither serious nor of a substantial nature. This delay by the regulators must be taken into account in determining a reasonable and

appropriate penalty for any acts of Respondent that are determined to have violated FIFRA and its applicable regulations.

Complainant's Interpretation of Applicable Statutory and Regulatory Provisions is Incorrect and Infringes Upon Respondent's Right to Commercial Free Speech Under the First Amendment to the U.S. Constitution

660. The Complainant's interpretation of FIFRA and its applicable regulations is incorrect and infringes upon Respondent's right to commercial free speech under the First Amendment to the U.S. Constitution.

Respondent's Advertisements Are Not Labeling

661. Under FIFRA, labeling is defined as labels and all other written, printed or graphic matter that either accompanies the product at any time or to which reference is made on the label or in literature accompanying the pesticide. At no time relevant to the Complaint did any of the materials or information described in the Complaint accompany the product, and, at no time relevant to the Complaint, were any of the materials or information described in the Complaint either referenced on the label or in literature accompanying the product. Therefore, EPA's regulations regarding labeling do not apply to Respondent's advertising.

Labeling Requirements Under FIFRA Do Not Apply to Respondent's Advertising Claims

662. The Complainant defines the term "accepted label" in paragraphs 135-137 of its Complaint to mean the label approved by the U.S. EPA and any subsequent amendments to the label approved by the U.S. EPA. The Complainant then alleges that any advertising claims for Respondent's products that are "substantially different" from the "accepted label" constitute a violation of FIFRA. Based on this reading of FIFRA, Complainant alleges that Respondent violated FIFRA as set forth, for example, in

paragraphs 147, 150, 153, 156, 159, 162, 165, 168, 171, 174, 177, 180, 183, 186, 189, 192, 195, 200, 203 and 207 of the Complaint. Respondent asserts that the Complainant misinterprets FIFRA on the following two grounds: (a) Respondent's advertising that is described in the Complaint is not labeling and is not subject to FIFRA requirements governing labeling; and (b) the standard for comparison for "differing claims" under FIFRA is all information required in connection with the registration of the product, not just the "accepted label."

Violations Did Not Occur Where No Nexus Existed Between the Respondent's Advertising and the Sale of Product

663. The Complainant has failed to show a sufficient nexus between the Respondent's advertising and the sales of all of Respondent's products identified in the Complaint to establish that each and every one of the alleged incidents constitutes a violation of FIFRA.

Violations Did Not Occur Where the Product Was Sold or Distributed Before the Alleged Claims Were Made

664. The Complainant has incorrectly alleged that sales of Respondent's registered pesticide products that occurred prior to the time sales literature entered the stream of commerce were violations of FIFRA. Advertising materials that were disseminated after distribution and sale of Respondent's registered pesticide products cannot under any reasonable construction of FIFRA and the implementing regulations constitute a claim made as part of any prior distribution and sale of the pesticide. Any distribution and sale made prior to dissemination of the advertising materials that allegedly included improper claims was not a violation of FIFRA.

Fair Notice

665. Complainant's claims are barred, in whole or in part, because the U.S. Environmental Protection Agency did not provide and has not provided fair notice of the interpretations of FIFRA and its implementing regulations now advanced in the Complaint. Accordingly, Complainant's efforts to enforce retroactively these new interpretations deprive Respondent of due process of law and equal protection of the laws as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.*

666. EPA's claims are barred, in whole or in part, because the legal theories advanced in the Complaint represent changes in EPA's interpretation of FIFRA and associated regulations that do not comply with the requirements of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*

Incorporation of Affirmative and Other Defenses in Answer

667. Respondent incorporates by reference any and all affirmative and other defenses set forth in paragraphs 1-649 of its Answer.

Request for a Settlement Conference

Respondent acknowledges that Complainant and Respondent may continue informal settlement discussions after Respondent files its answer.

Request for a Hearing

As stated above, Respondent contests certain material facts upon which this Complaint is based and contends that the \$2,941,456 proposed penalty is inappropriate. Therefore, Respondent requests a hearing before an Administrative Law Judge.

Dated this 11th day of June, 2010.

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Attorneys for Respondent Liphatech, Inc.

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


CERTIFICATE OF SERVICE

I, Michael H. Simpson, counsel for the Respondent, Liphatech, Inc., hereby certify that I delivered one copy of the foregoing Answer, Docket Number FIFRA-05-2010-0016, to the person designated below, by depositing it with a commercial delivery service, postage prepaid, at Milwaukee, Wisconsin, in an envelope addressed to:

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

I further certify that I filed the originals of the Answer 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 11th day of June, 2010.


Michael H. Simpson
Attorney for Respondent Liphatech, Inc.

RECEIVED
JUN 14 2010

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U.S. ENVIRONMENTAL
PROTECTION AGENCY**