



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
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CHICAGO, IL 60604-3590

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Via UPS Overnight Delivery

REPLY TO THE ATTENTION OF:
C-14J

July 25, 2011

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

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

Dear Chief Judge Biro:

Please find enclosed a copy of *Complainant's Unopposed Motion for Leave to File its Third Supplemental Prehearing Exchange*, together with Attachment A: Complainant's proposed *Third Supplemental Prehearing Exchange* and Complainant's Exhibits 139-146, which was filed on July 25, 2011, in the above referenced-matter.

Sincerely,

Nidia K. O'Meara
Associate Regional Counsel

Enclosures

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

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

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

**COMPLAINANT’S UNOPPOSED MOTION FOR LEAVE TO FILE ITS
THIRD SUPPLEMENTAL PREHEARING EXCHANGE**

Complainant, the Director, Land and Chemicals Division, Region 5, United States Environmental Protection Agency (U.S. EPA, Complainant, or Agency), through its undersigned attorneys, hereby files this *Unopposed Motion for Leave to File its Third Supplemental Prehearing Exchange* pursuant to Section 22.19(f) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules”), codified at 40 C.F.R. § 22.19(f). For the reasons set forth below, Complainant respectfully requests that the Presiding Officer grant its unopposed Motion and allow it to file the accompanying *Third Supplemental Prehearing Exchange*. A copy of Complainant’s proposed *Third Supplemental Prehearing Exchange*, along with exhibits 139 through 146, is attached as Attachment A.

On July 15, 2011, counsel for Complainant contacted counsel for Liphatech, Inc. (Respondent) to determine if Respondent has any objection to the relief sought in this Motion. In response, Respondent’s counsel stated: “Respondent stipulates to Complainant so supplementing its prehearing exchange with these exhibits. Respondent reserves its right to

object to the admission into evidence of particular exhibits on grounds such as relevancy, foundation or weight.”

Standard of Review

The Consolidated Rule governing supplementation of prehearing exchanges is found at 40 C.F.R. § 22.19(f), which provides in pertinent part as follows:

(f) Supplementing prior exchanges. A party who has made an information exchange under paragraph (a) of this section [22.19], ... shall promptly supplement or correct the exchange when the party learns that the information exchanged ... is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.

Because Complainant submits this Motion more than 15 days prior to the hearing, it need not demonstrate good cause for failing to supply the documents sooner. *See* 40 C.F.R. § 22.22(a)(1). Motions to supplement a prehearing exchange should be granted unless there is evidence of bad faith, delay tactics, or undue prejudice. *In re Service Oil, Inc.*, Docket No. CWA-08-2005-0010, 2006 EPA ALJ LEXIS 16, at*9 (April 12, 2006).

I. Complainant’s Proposed Third Supplemental Prehearing Exchange

Complainant’s proposed *Third Supplemental Prehearing Exchange* includes the following exhibits:

CX No.	Title of Document	Date of Document	Bates No.
139.	Colorado SLN packet for 7173-286	June 22, 2011	3325-3334
140.	Kansas SLN packet for 7173-286	December 14, 2010	3335-3346
141.	Letter from J. Hebert to Kansas Department of Agriculture	February 4, 2011	3347-3348

142.	Letter from Kansas Department of Agriculture to J. Hebert	February 22, 2011	3349-3351
143.	Excerpts from www.liphatech.com (printed on July 12, 2011)	July 12, 2011	3352-3477
144.	Excerpts from www.integreadvertising.com	July 7, 2011	3478-3515
145.	Email forwarding to Claudia Niess the list of distributors who received the "destroy/destruct" letter from Liphatech, Inc.	March 10, 2010	3516-3522
146.	PR Notice 93-11	September 7, 1993	3523-3555

II. Discussion

The documents in the proposed *Third Supplemental Prehearing Exchange* were not previously submitted for one of two reasons: (1) the documents were not available to the Complainant at the time Complainant filed its *Initial Prehearing Exchange* and its *Rebuttal Prehearing Exchange* on September 28, 2010 and November 10, 2010, and despite the exercise of reasonable diligence, Complainant did not become aware of these documents until recently, or (2) based on the Presiding Officer's recent Order, Complainant feels it is necessary to introduce additional documents into evidence on certain issues at the time of hearing.

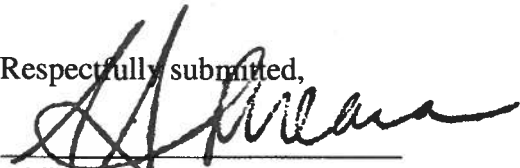
Finally, given that the hearing is scheduled for October 31, 2011, Respondent will have ample time to review the documents provided in the proposed *Third Supplemental Prehearing Exchange*, respond if necessary, and prepare any rebuttal testimony and exhibits.

III. Conclusion

For all of the foregoing reasons, Complainant respectfully requests that the Presiding Officer grant it leave to file its *Third Supplemental Prehearing Exchange*.

Dated: July 25, 2011

Respectfully submitted,



Nidhi K. O'Meara

Erik H. Olson

Associate Regional Counsels

Gary E. Steinbauer

Assistant Regional Counsel

United States EPA – ORC Region 5

77 W. Jackson Blvd. (C14-J)

Chicago, IL 60604

(312) 886-0568

Attorneys for Complainant

Attachment A

Complainant's Third Supplemental Prehearing
Exchange and copies of Exhibits 139 through 146

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

2011 JUL 25 PM 1:11
REGION 5

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

COMPLAINANT'S THIRD SUPPLEMENTAL PREHEARING EXCHANGE

Complainant, the U.S. Environmental Protection Agency, Region 5 (Complainant), hereby files the instant *Complainant's Third Supplemental Prehearing Exchange* pursuant to Sections 22.16(a) and 22.19(f) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules), codified at 40 C.F.R. §§ 22.16(a) and 22.19(f).

I. Additional Exhibits

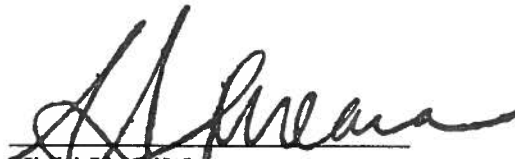
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145.	Email forwarding to Claudia Niess the list of distributors who received the "destroy/destroy" letter from Liphatech, Inc.	March 10, 2010	3516-3522
146.	PR Notice 93-11	September 7, 1993	3523-3555

II. Reservation of Rights

Complainant respectfully reserves the right to supplement its list of witnesses and/or its list of exhibits upon reasonable notice to the Tribunal and Respondent, or by order of the Presiding Officer, as allowed by the Consolidated Rules. Complainant further reserves the right to call any of the witnesses listed in and documents provided with its prehearing exchange in its case in chief and/or in any rebuttal.

Respectfully submitted,



Nidhi K. O'Meara
 Erik H. Olson
 Associate Regional Counsels
 Gary E. Steinbauer
 Assistant Regional Counsel
 United States EPA – ORC Region 5
 77 W. Jackson Blvd. (C14-J)
 Chicago, IL 60604
 (312) 886-0568
Attorneys for Complainant

DATED: July 25, 2011

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

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CERTIFICATE OF SERVICE

I hereby certify that the original and a true, accurate and complete copy of *Complainant's Unopposed Motion for Leave to File its Third Supplemental Prehearing Exchange*, together with true, accurate and complete copies of Attachment A: Complainant's proposed *Third Supplemental Prehearing Exchange* and Complainant's Exhibits 139-146 thereto, were filed with the Regional Hearing Clerk, U.S. EPA, Region 5, on the date indicated below. True, accurate and complete copies were sent to Honorable Susan Biro, Administrative Law Judge (via UPS overnight delivery) at the following address:

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

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

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

on the date indicated below:

Dated in Chicago, Illinois, this 25th day of July, 2011.



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