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October 12, 2010

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DELIVERED BY COURIER

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

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

Dear Regional Hearing Clerk:

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

On behalf of Respondent, Liphatech, Inc., I enclose for filing an original and two copies of Respondent's Reply to Complainant's Response to Motion of Respondent to Partially Dismiss the Complaint or in the Alternative For Partial Accelerated Decision on an Issue of Liability in Favor of Respondent with Respect to the Alleged Violations of § 12(a)(1)(E) of FIFRA and Respondent's Response to Complainant's Motions for Leave to Amend the Complaint.

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

Respectfully submitted,

Michael H. Simpson

REINHART\4883402LNR:BJM

Encs.

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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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

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RESPONDENT'S REPLY TO COMPLAINANT'S RESPONSE TO
MOTION OF RESPONDENT TO PARTIALLY DISMISS THE
COMPLAINT OR IN THE ALTERNATIVE FOR PARTIAL
ACCELERATED DECISION ON AN ISSUE OF LIABILITY IN FAVOR
OF RESPONDENT WITH RESPECT TO THE ALLEGED VIOLATIONS
OF § 12(a)(1)(E) of FIFRA

AND

RESPONDENT'S RESPONSE TO COMPLAINANT'S MOTION FOR
LEAVE TO AMEND THE COMPLAINT

I. Introduction

On September 16, 2010, Respondent Liphatech, Inc. ("Respondent") moved to dismiss all of the allegations in the Complaint that assert that Rozol Pocket Gopher Bait II, EPA Reg. 7173-244 ("Rozol"), was misbranded¹ ("Respondent's Motion to Dismiss Misbranding Claims"). The 87 full paragraphs and 44 partial paragraphs of the Complaint that Respondent moved to dismiss are attached and described in Exhibit A to Respondent's Motion to Dismiss Misbranding Claims.

¹ This motion by Respondent is entitled "Motion to Partially Dismiss the Complaint or In the Alternative for Partial Accelerated Decision on an Issue of Liability in Favor of Respondent With Respect to the Alleged Violations of Section 12(A)(1)(E) of FIFRA."

On October 1, 2010, Complainant responded with a document that combined both Complainant's response to Respondent's Motion to Dismiss Misbranding Claims ("Complainant's Response") and a separate motion for leave to amend the Complaint ("Complainant's Motion to Amend"). In that combined document, Complainant did not object to or disagree with any of the arguments set forth in Respondent's Motion to Dismiss Misbranding Claims. In fact, Complainant sidestepped all of Respondent's arguments by stating that in submitting Complainant's combined response and motion, it

should not in any way be construed to mean that Complainant agrees with the arguments made by Respondent in Respondent's motion.

(Complainant's Response at 3). In lieu of responding directly to any of Respondent's arguments, Complainant asserted that its proposed First Amended Complaint would render Respondent's Motion to Dismiss Misbranding Claims moot. By not responding to Respondent's arguments, Complainant has waived its opportunity to respond to Respondent's Motion to Dismiss Misbranding Claims. *Wojtas v. Capital Guardian Trust Co.*, 42 Fed.3d 924, 926 (7th Cir. 2007) (citation omitted). A failure to oppose an argument permits the inference of acquiescence and acquiescence operates as a waiver. *Id.* Complainant's failure to respond to Respondent's arguments raised in Respondent's Motion to Dismiss Misbranding Claims must result in the granting of Respondent's Motion to Dismiss Misbranding Claims in its entirety.

This conclusion is further supported by the Consolidated Rules of Practice governing this proceeding. 40 CFR Part 22. Section 40 CFR § 22.16 governs motions and requires that "responses" and "replies" to motions be accompanied by an "affidavit, certificate, other evidence, or legal memorandum" to support the position of the party making the response or reply. Complainant has failed to comply with this requirement and, for this reason, Respondent's Motion to Dismiss Misbranding Claims must again be granted in its entirety.

Respondent is concerned that Complainant may attempt to respond to the arguments made in Respondent's Motion to Dismiss Misbranding Claims under the guise that Complainant's arguments are simply its reply to Respondent's Response to Complainant's Motion to Amend the Complaint. If this were to happen, Respondent would be foreclosed from replying to arguments that Complainant should have made in Complainant's response to Respondent's Motion to Dismiss Misbranding Claims. Complainant should not be allowed to game the Consolidated Rules of Practice to achieve this unfair result.

Respondent's Reply to Complainant's Response to Respondent's Motion to Dismiss Misbranding Claims is set forth in Sections II to V below. Respondent's Response to Complainant's Motion to Amend the Complaint is set forth in Section VI below.

II. Summary of Complainant's Response to Respondent's Motion to Dismiss Misbranding Claims and Complainant's Motion to Amend

Rather than responding to arguments made by Respondent in its Motion to Dismiss Misbranding Claims, the Complainant simply states that it agrees with the concept of streamlining the case and will amend its Complaint as Respondent requested, except that Complainant will not delete paragraph 208 of the Complaint. Complainant simply states that:

The only paragraph that Complainant does not move for leave to amend but that was listed by Respondent in its motion is paragraph 208 of the Complaint.

(Complainant's Response at 4 n. 3).

Complainant offers no facts, evidence or legal justification as required by the Rules of Consolidated Practice for retaining paragraph 208. Therefore Complainant's response must be deemed insufficient and any further right of Complainant to object to Respondent's Motion to Dismiss Misbranding Claims has been waived.

III. As Stated in Respondent's Motion to Dismiss Misbranding Claims, Complainant Fails to State a Claim in Paragraph 208 for Which Relief Can Be Granted

- A. The "false or misleading" standard of FIFRA only applies to "labeling." This FIFRA "false or misleading" standard does not apply to advertising.**

FIFRA distinguishes between the standards by which statements in advertising, on the one hand, and labeling, on the other hand, are judged. Under FIFRA, it is unlawful for any person to distribute or sell any pesticide if

Claims made for it (the registered pesticide) as part of its distribution or sale differ substantially from any claim made for it (the registered pesticide) as part of the statement required in connection with its registration under FIFRA Section 3.

40 CFR § 168.22.

This standard is the only standard in FIFRA or the regulations promulgated under FIFRA by which advertising statements may be judged. Even under this provision, claims made in advertising are only subject to scrutiny if they are deemed to be made as part of a specific distribution or sale of a pesticide.

Section 12(a)(1)(B), 7 U.S.C. § 136j(a)(1)(B).

On the other hand, the standard by which "labeling" is judged under FIFRA provides that a pesticide is "misbranded" if its "labeling" bears any

statement, design or graphic representation relative thereto or its ingredients which is false or misleading in any particular (emphasis added).

See Section 2(Q)(1)(A) of FIFRA, 7 U.S.C. § 136(Q)(1)(A) and 40 CFR § 156.10(a)(5). Therefore, the false and misleading standard of FIFRA only applies to determine if "labeling" statements are unlawful under FIFRA. The false and misleading standard under FIFRA does not apply to advertising. Because Complainant's proposed First Amended Complaint removes all allegations that Rozol was misbranded, paragraph 208 is irrelevant to the remainder of this proceeding and must be dismissed.

B. In paragraphs 207 through 212 of the Complaint, Complainant only alleges that Respondent's website is advertising. Complainant does not allege Respondent's website is "labeling." Therefore, paragraph 208 of the Complaint which alleges Respondent's January 22, 2008 website claims are false or misleading must be dismissed.

Throughout the Complaint, Complainant alleges that Respondent's website is advertising. Complainant does not allege that Respondent's website is "labeling," which is an underlying prerequisite to apply the "false or misleading" standard under 40 CFR § 156.10(a)(5).

For example, the heading in the Complaint preceding paragraph 208 states

Website advertisements regarding "Rozol," EPA Reg. No. 7173-244 (emphasis added).

In addition, the Complaint specifically alleges in paragraph 209 that "Respondent's website [referenced in paragraph 208] . . . is an advertisement, subject to requirements of 40 C.F.R. § 168.22."

Nowhere in the Complaint does Complainant allege that Respondent's website is "labeling." Complainant only alleges Respondent's website is advertising. For example:

338. The information on Respondent's website at www.liphatech.com, on November 18, 2009, constitutes advertisements, subject to the requirements of 40 C.F.R. § 168.22.

339. The information on Respondent's website at www.liphatech.com, on February 10, 2010, constitutes advertisements, subject to the requirements of 40 C.F.R. § 168.22.

340. The information on Respondent's website at www.liphatech.com, on February 19, 2010, constitutes advertisements, subject to the requirements of 40 C.F.R. § 168.22.

341. The information on Respondent's website at www.liphatech.com, on February 23, 2010, constitutes advertisements, subject to the requirements of 40 C.F.R. § 168.22.

Moreover, when Complainant's amended Complaint is reviewed, one can also see the contradiction in Complainant's position in attempting to retain paragraph 208 in the proposed amended Complaint. For example, in its proposed amended Complaint, Complainant deletes paragraphs 277, 295, 316 and 337 of the Complaint. These paragraphs relate to allegations that information on Respondent's website in 2009 and 2010 was false or misleading. In Complainant's proposed First Amended Complaint these paragraphs (and all other similar paragraphs) were deleted. This is clear evidence that Respondent's website is "advertising," not "labeling."

In addition, Complainant asserted that statements made in literature that were posted on Respondent's website in 2009/2010 (see generally paragraphs 275-337 of the Complaint) and used in print and radio ads in 2007/2008 (see generally paragraphs 146-206 of the Complaint) are advertising, not labeling. As a result, Complainant deleted the "false and misleading" allegations regarding these statements in its proposed First Amended Complaint.

On the other hand, Complainant apparently asserts in paragraph 208 of the Complaint that claims on Respondent's website on January 22, 2008 were labeling

subject to the "false or misleading" standard used to determine if a pesticide is misbranded. Respondent says "apparently similar claims" because Complainant does not provide any information in the Complaint or its prehearing information exchange as to which claims on the website on January 22, 2008 were false or misleading or the basis for these claims being false or misleading.

Allowing Complainant to retain paragraph 208 in the Complaint may allow the Complainant to attempt to apply the "false or misleading" standard of "labeling" to Respondent's website on January 22, 2008 when Complainant has clearly acknowledged in all other sections of the proposed amended Complaint that Respondent's website and the claims on it are advertising. This contradiction cannot be allowed to stand by permitting Complainant to retain paragraph 208 of the Complaint.

Because Complainant has not alleged anywhere in the Complaint that the website is "labeling," and because Complainant has not provided any evidence to counter the arguments made in Respondent's Motion to Dismiss Misbranding Claims, paragraph 208 of the Complaint must also be dismissed.

IV. Complainant's Motion to Amend Complaint Will Not Streamline This Proceeding

Complainant states that its amended Complaint will streamline the presentation of each party's case at the hearing. As long as paragraph 208 of the Complaint remains in the Complaint, this proceeding will not be streamlined. If paragraph 208 of the Complaint is allowed to remain, Complainant will

undoubtedly raise the "false" or "misleading" allegations that the remainder of the proposed First Amended Complaint eliminates.

V. **False or Misleading Advertising Is Regulated by Federal and State Laws Other Than FIFRA**

One can ask, can Respondent use pesticide advertising that is "false" or "misleading" and not be in violation of the law? Of course not. Many federal and state laws control the content of advertising. However, with very limited exceptions, FIFRA is not one of those laws. The only provision in FIFRA that directly regulates advertising is Section 12(a)(2)(E), 7 U.S.C. § 136j(a)(2)(E), which requires inclusion of certain product classification information in advertising for a restricted use pesticide. FIFRA may also indirectly regulate claims made in advertising in the event such claims are deemed to be made as part of a specific distribution or sale of a pesticide. In that circumstance, FIFRA Section 12(a)(1)(B), 7 U.S.C. § 136j(a)(1)(B) provides that advertising claims cannot differ substantially from claims made in the material that Respondent submitted to the U.S. Environmental Protection Agency in order to register its pesticide. Since Liphatech's website is not labeling, and Complainant has not alleged that it is, allowing Complainant to delve into the question of whether claims on Respondent's website are false or misleading would expand EPA's jurisdiction beyond the clear boundaries of FIFRA.

VI. Respondent's Response to Complainant's Motion for Leave to Amend the Complaint

In Complainant's Motion, it asks for leave to amend the Complaint to delete or modify all of the paragraphs which Respondent requested be deleted in Respondent's Motion to Dismiss Misbranding Claims, except for paragraph 208. Respondent objects to Complainant's motion for leave to amend its Complaint as long as paragraph 208 remains in the Complaint. The reasons for Respondent objecting to Complainant retaining paragraph 208 are set forth above in Respondent's Reply to Complainant's Response to Respondent's Motion to Dismiss Misbranding Claims.

Complainant should not be allowed to object to Respondent's arguments set forth in Respondent's Motion to Dismiss Misbranding Claims in replying to Respondent's Response to Complainant's Motion to Amend. Respondent would be unfairly prejudiced should this occur. This is because Respondent would not have the opportunity to reply to arguments that Complainant should have made in its response to Respondent's Motion to Dismiss Misbranding Claims.

VII. Conclusion

For the reasons set forth above, Respondent urges and respectfully requests that the Presiding Officer:

1. Grant Respondent's Motion to Dismiss Misbranding Claims in its entirety; and

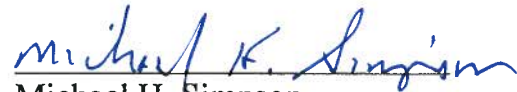
2. Deny Complainant's Motion to Amend unless Complainant also deletes paragraph 208 from the Complaint.

Dated this 12th day of October, 2010.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

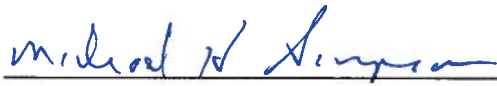
I, Michael H. Simpson, one of the attorneys for the Respondent, Liphatech, Inc., hereby certify that I delivered one copy of the foregoing Respondent's Reply to Complainant's Response to Motion of Respondent to Partially Dismiss the Complaint or In the Alternative For Partial Accelerated Decision on an Issue of Liability in Favor of Respondent with Respect to the Alleged Violations of § 12(a)(1)(E) of FIFRA and Respondent's Response to Complainant's Motion for Leave to Amend the Complaint, to the persons designated below, by depositing it with a commercial delivery service, postage prepaid, at Milwaukee, Wisconsin, in envelopes addressed to:

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

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

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

Dated this 12th day of October, 2010.



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

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