UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
FMC Corporation,	)	**Docket No. FIFRA-03-2015-0248**
	)	
Respondent.	)	

ORDER ON COMPLAINANT'S MOTION FOR PARTIAL ACCELEARATED DECISION AS TO LIABILITY FOR VIOLATIONS 1 THROUGH 12,273 OF THE COMPLAINT AND RESPONDENT'S REQUEST FOR ORAL ARGUMENT

I. PROCEDURAL HISTORY

The Associate Director of the Office of Toxics and Pesticides at the United States Environmental Protection Agency ("EPA" or "Agency"), Region III, Land and Chemicals Division ("Complainant"), initiated this proceeding on September 24, 2015, by issuing a Complaint and Notice of Opportunity for Hearing ("Complaint") against FMC Corporation ("Respondent") pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136*l*(a). The Complaint charges Respondent with a total of 12,379 violations of FIFRA arising from Respondent's alleged failure to provide the use classification of a pesticide in advertising (violations 1-12,273) and the distribution or sale of a misbranded pesticide (violations 12,274-12,379). Through counsel, Respondent filed its Answer to Complaint and Request for Hearing ("Answer") on November 24, 2015.

The parties subsequently participated in the Alternative Dispute Resolution process offered by this Tribunal but did not achieve a settlement. I was then designated to preside over the litigation of this matter. Pursuant to the Prehearing Order issued on May 6, 2016, the parties subsequently engaged in the prehearing exchange process.[1] Then, on August 22, 2016, Complainant filed its Motion for Partial Accelerated Decision as to Liability for Violations 1 through 12,273 of the Complaint ("Motion")[2] and an accompanying memorandum in support of the Motion ("Memorandum" or "Memo"), to which Complainant attached a declaration of Christine Convery ("Convery Declaration") and a document entitled "Facts Admitted in Respondent's Answer." In response, Respondent filed an Opposition to Complainant's Motion for

[1] As part of the prehearing exchange process, the parties identified the exhibits they intend to introduce into evidence at hearing and provided Bates-stamped copies to this Tribunal. The exhibits proposed by Complainant are cited herein as "CX [proposed exhibit number] at EPA [Bates stamp number]." The exhibits proposed by Respondent are cited herein as "RX [proposed exhibit number] at FMC [Bates stamp number]." As noted below, some of the exhibits proposed by the parties are identical or nearly identical.

[2] Complainant's Motion does not address the violations alleged in the Complaint that relate to the distribution or sale of a misbranded pesticide, namely violations 12,274-12,379.

Partial Accelerated Decision as to Liability for Violations 1 through 12,273 of the Complaint ("Opposition") on September 6, 2016, to which Respondent attached a declaration of George Orme ("Orme Declaration"). Complainant filed its Reply to Respondent FMC Corporation's Opposition to Complainant's Motion for Partial Accelerated Decision as to Liability for Violations 1-12,273 of the Complaint ("Reply") on September 16, 2016.

Thereafter, on September 23, 2016, Respondent filed a Request for Oral Argument on Complainant's Motion for Partial Accelerated Decision as to Liability for Violations 1 through 12,273 of the Complaint ("Request for Oral Argument"). Complainant filed a Response to Respondent FMC Corporation Request for Oral Argument on Complainant's Motion for Partial Accelerated Decision as to Liability for Violations 1 through 12,273 of the Complaint ("Response") on September 30, 2016.[3]

II. STANDARD FOR ADJUDICATING A MOTION FOR ACCELERATED DECISION

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), set forth at 40 C.F.R. Part 22. Section 22.20(a) of the Rules of Practice authorizes Administrative Law Judges 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). This standard is analogous to the standard governing motions for summary judgment prescribed by Rule 56 of the Federal Rules of Civil Procedure ("FRCP"), and while the FRCP do not apply here, the Environmental Appeals Board ("EAB") has consistently looked to Rule 56 and its jurisprudence for guidance in adjudicating motions for accelerated decision filed under Section 22.20(a) of the Rules of Practice. *See, e.g.*, *Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 285 (EAB 2004); *BWX Techs., Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Clarksburg Casket Co.*, 8 E.A.D. 496, 501-02 (EAB 1999). Federal courts have endorsed this approach. For example, the U.S. Court of Appeals for the First Circuit described Rule 56 as "the prototype for administrative summary judgment procedures" and the jurisprudence surrounding it as "the most

[3] This Order rules on Complainant's Motion and Respondent's Request for Oral Argument. While rulings on those filings were pending, the parties continued to engage in motions practice. Specifically, Complainant filed a Motion *in Liminae* on March 31, 2017, which the parties then fully briefed. Complainant also filed a First Supplement to Prehearing Exchange. Thereafter, on May 9, 2017, Complainant filed a Motion for Discovery and memorandum in support, to which Complainant attached eight interrogatories related to the anticipated testimony of one of Respondent's proposed expert witnesses, George Orme. On May 18, 2017, Respondent filed a First Supplemental Prehearing Exchange, which purported to "provid[e] additional information about the expected testimony of . . . George Orme, pursuant to Complainant's request," and thereby "obviate the possible need for discovery." Respondent's First Supplemental Prehearing Exchange at 1-2. Respondent subsequently filed an Opposition to Complainant's Motion for Discovery, in which Respondent reiterated that its First Supplemental Prehearing Exchange is responsive to Complainant's Motion for Discovery and urged that the Motion for Discovery be denied on that basis.

fertile source of information about administrative summary judgment." *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995) (rejecting the argument that federal court rulings on motions for summary judgment are "inapposite" to administrative proceedings).

As for the particular standard set forth in Rule 56, it directs a federal court to grant summary judgment upon motion by a party "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." Fed. R. Civ. P. 56(a). In construing this standard, the U.S. Supreme Court has held that a factual dispute is material where, under the governing substantive law, it might affect the outcome of the proceeding. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985). In turn, a factual dispute is genuine if a fact finder could reasonably resolve the dispute in favor of the non-moving party under the evidentiary standards applicable to the particular proceeding. *Id.* at 248, 250-52.

The Supreme Court has held that the party moving for summary judgment bears the burden of showing an absence of a genuine dispute as to any material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). This burden consists of two components: an initial burden of production, which shifts to the non-moving party once it is satisfied by the moving party, and the ultimate burden of persuasion, which always remains with the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (Brennan, J., dissenting) (citing 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727 (2d ed. 1983)). To discharge its initial burden of production, the moving party is required to support its assertion that a material fact cannot be genuinely disputed either by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials," or by "showing that the materials cited do not establish the . . . presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Once the moving party satisfies its initial burden of production, the burden shifts to the non-moving party to show that a genuine dispute of material fact exists by similarly "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence . . . of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Id.*

In determining whether a genuine issue of material fact exists for trial, a federal court is required to construe the evidentiary material and reasonable inferences drawn therefrom in a light most favorable to the non-moving party. *See Anderson*, 477 U.S. at 255 ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) ("On summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion."). The court is then required to consider whether a fact finder could reasonably find in favor of the non-moving party under the applicable evidentiary standards. *Anderson*, 477 U.S. at 252-55. Where the evidence viewed in the light most favorable to the non-moving party is such that the fact finder could not reasonably find in favor of the non-moving party, summary judgment is appropriate. *See Adickes*, 398 U.S. at 158-59. Conversely, where conflicting inferences may be drawn from the evidence and a choice among those inferences would amount to fact-finding, summary judgment is inappropriate.

Rogers Corp. v. EPA, 275 F.3d 1096, 1105 (D.C. Cir. 2002). Even where summary judgment appears technically proper, sound judicial policy and the exercise of judicial discretion may 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).

The EAB has applied the foregoing principles in adjudicating motions for accelerated decision under Section 22.20(a) of the Rules of Practice, holding that the moving party "assumes the initial burden of production on a claim, and must make out a case for presumptive entitlement to summary judgment in his favor." *BWX*, 9 E.A.D. at 76. Where the moving party bears the burden of persuasion on an issue, it is entitled to an accelerated decision only if it presents "evidence that is so strong and persuasive that no reasonable [fact finder] is free to disregard it." *Id.* Where the moving party does not bear the burden of persuasion, it has the "lesser burden of 'showing' or 'pointing out' to the reviewing tribunal that there is an absence of evidence in the record to support the nonmoving party's case on that issue." *Id.* Once the moving party has discharged this burden, the burden of production shifts to the non-moving party bearing the burden of persuasion on the issue to identify specific facts from which a finder of fact could reasonably find in its favor on each element of the claim. *Id.*

As noted by the EAB, "neither party can meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence." *BWX*, 9 E.A.D. at 75. Likewise, a party opposing a properly supported motion for accelerated decision is required to "provide more than a *scintilla* of evidence on a disputed factual issue to show their entitlement to a[n] . . . evidentiary hearing: the evidence must be substantial and probative in light of the appropriate evidentiary standard of the case." *Id.* at 76.

Consistent with the jurisprudence of Rule 56, the EAB has held that a tribunal adjudicating a motion for accelerated decision is required to consider whether the parties have met their respective burdens in the context of the applicable evidentiary standard. *BWX*, 9 E.A.D. at 75. As prescribed by Section 22.24(b) of the Rules of Practice, 40 C.F.R. § 22.24(b), the evidentiary standard that applies here is proof by a preponderance of the evidence. Section 22.24(a) provides that the complainant bears the burdens of presentation and persuasion that a violation occurred as set forth in the complaint, and the respondent bears the burdens of presentation and persuasion for any affirmative defenses.

III. SUBSTANTIVE GOVERNING LAW

A. RELEVANT STATUTORY PROVISIONS

The Federal Insecticide, Fungicide, and Rodenticide Act governs the manufacture, sale, distribution, and use of pesticides by way of a national registration system. 7 U.S.C. §§ 136-136y. As part of the registration process, a pesticide is classified as a Restricted Use Pesticide ("RUP"), a General Use Pesticide ("GUP"), or both. 7 U.S.C. § 136a(d)(1)(A). A pesticide is classified as an RUP if "the pesticide, when applied in accordance with its directions for use, warnings and cautions and for the uses for which it is registered, . . . may generally cause, without additional regulatory restrictions, unreasonable adverse effects on the environment, including injury to the applicator." 7 U.S.C. § 136a(d)(1)(C). The statute requires that an RUP be applied only by or

under the direct supervision of a certified applicator. 7 U.S.C. § 136a(d)(1)(C)(i), (ii). In addition, Section 12(a)(2)(E) of FIFRA makes it unlawful for any person "who is a registrant . . . to advertise a product registered under this Act for restricted use without giving the classification of the product assigned to it [as part of its registration]." 7 U.S.C. § 136j(a)(2)(E).

Section 2 of FIFRA, 7 U.S.C. § 136, defines the operative terms contained in those provisions. Specifically, the term "registrant" is defined as "a person who has registered any pesticide pursuant to the provision of this Act." 7 U.S.C. § 136(y). The term "person" is defined as "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not." 7 U.S.C. § 136(s). The term "pesticide" is defined, in pertinent part, as "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest." 7 U.S.C. § 136(u)(1). The term "certified applicator" means any individual who is certified under Section 11 of FIFRA, 7 U.S.C. § 136i(a)-(c), as authorized to use or supervise the use of any pesticide classified for restricted use. 7 U.S.C. § 136(e)(1). Notably, the term "advertise" is not defined by the statute.

B. RELEVANT REGULATORY PROVISIONS

Found at 40 C.F.R. § 152.168, the regulations promulgated to implement Section 12(a)(2)(E) of FIFRA provide, in relevant part:

> Advertising of restricted use products.
>
> (a) Any product classified for restricted use shall not be advertised unless the advertisement contains a statement of its restricted use classification.
>
> (b) The requirement in paragraph (a) of this section applies to all advertisements of the product, including, but not limited to:
>
> (1) Brochures, pamphlets, circulars and similar material offered to purchasers at the point of sale or by direct mail.
>
> (2) Newspapers, magazines, newsletters and other material in circulation or available to the public.
>
> (3) Broadcast media such as radio and television.
>
> (4) Telephone advertising.
>
> (5) Billboards and posters.
>
> (c) The requirement may be satisfied for printed material by inclusion of the statement "Restricted Use Pesticide," or the terms of restriction, prominently in the advertisement. The requirement may be satisfied with respect to the broadcast or telephone advertising by inclusion in

> the broadcast of the spoken words "Restricted use pesticide," or a statement of the terms of restriction.

40 C.F.R. § 152.168(a)-(c).

Neither the term "advertise" nor any of its grammatical variations are defined by the applicable regulations.

IV. UNDISPUTED FACTS[4]

Respondent is a Delaware corporation headquartered at 1735 Market Street in Philadelphia, Pennsylvania, and a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s). Complaint and Answer ¶¶ 8, 9. Respondent operates as a diversified chemical company that provides products for agricultural, consumer, and industrial markets. Complaint and Answer ¶ 8. On January 21, 2011, EPA registered one of Respondent's products, *F9047-2 EC Insecticide*, as a pesticide and assigned it the registration number EPA Reg. No. 279-9545 (hereafter referred to in this Order as "Stallion Insecticide"[5]). Complaint and Answer ¶ 10; CX 9 at EPA 495-521; RX 27 at FMC 1665-1691. At all times relevant to the violations alleged in the Complaint, Respondent was the "registrant" of Stallion Insecticide, as that term is defined by Section 2(y) of FIFRA, 7 U.S.C. § 136(y), and a "registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor" under Section 14(a)(1) of FIFRA, 7 U.S.C. § 136*l*(a)(1). Complaint and Answer ¶¶ 14, 15.

At all times relevant to the violations alleged in the Complaint, Stallion Insecticide was a "pesticide" and "pesticide product," as those terms are defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. § 152.3. Complaint and Answer ¶ 13. As of the date of its registration with EPA as a pesticide on January 21, 2011, and at all times relevant to the violations alleged in the Complaint, Stallion Insecticide was classified as an RUP under Section 3(d)(1)(C) of FIFRA, 7 U.S.C. § 136a(d)(1)(C). Complaint and Answer ¶ 18; CX 9 at EPA 495-521; RX 27 at FMC 1665-1691. The label for Stallion Insecticide identified it as a "Restricted Use Pesticide" and provided related instructions. Answer ¶¶ 25-27, 35-37, 44-46, 52-54, 60-62, 68-70; *see also* Memo at 14 (stating that Complainant does not dispute this fact).

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[4] These undisputed facts are drawn from allegations contained in the Complaint and admitted by Respondent in its Answer, as well as from documents identified in the parties' prehearing exchanges as potential exhibits that are consistent with Respondent's admissions.

[5] The Complaint alleges that on or about January 24, 2011, Respondent submitted a "request" to EPA that the name "Stallion Insecticide" be added as an alternate brand name for *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545. Complaint ¶ 11. In its Answer, Respondent denies only Complainant's characterization of this submittal, asserting that it submitted a "notification" of its intent to add "Stallion Insecticide" as an alternate brand name for *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545, on or about January 24, 2011. Answer ¶ 11. Both Complainant and Respondent produced documentation in their respective prehearing exchanges in support. CX 10 at EPA 0522-0550; RX 28 at FMC 1692-1721. The distinction drawn by the parties is immaterial for purposes of this Order. Further, Respondent acknowledges in its prehearing exchange that Respondent began referring to *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545, as "Stallion Insecticide," among other names, in advertising at least as of February 10, 2011. Respondent's Prehearing Exchange at 17 (noting that the Complaint alleges that such references began on or about January 24, 2011, and that Respondent's Answer erroneously asserts that such references began on February 16, 2011).

During the calendar years 2011 and 2012, Respondent caused certain materials concerning Stallion Insecticide to be disseminated. None of the subject materials included the phrase "Restricted Use Pesticide" or any statement of the terms of restriction of Stallion Insecticide. Complaint and Answer ¶¶ 25, 26, 35, 36, 44, 45, 52, 53, 60, 61, 68, 69. They did, however, include the language "always read and follow label directions." Answer ¶¶ 25-27, 35-37, 44-46, 52-54, 60-62, 68-70; *see also* Memo at 14 (stating that Complainant does not dispute this fact). Those materials consisted of the following:

- A direct mailer about Stallion Insecticide sent to agricultural farms. In March of 2012, Respondent caused a direct mailer about Stallion Insecticide to be sent to individuals associated with various agricultural farms. Complaint and Answer ¶ 22.[6] In response to a Request for Information from EPA on June 6, 2013, Respondent provided an electronic file containing the direct mailer to EPA on July 18, 2013, and Complainant produced a copy of the direct mailer from that electronic file as part of its prehearing exchange. CX 25 at EPA 068, 0691-92; Convery Declaration ¶ 8 (stating that CX 25 at EPA 0691-92 represents a true and accurate printout of the electronic file). As part of its prehearing exchange, Respondent provided the direct mailer in the form of a pamphlet. RX 58 at FMC 2261.

- A direct mailer about Stallion Insecticide sent to retailers. In March of 2012, Respondent caused a direct mailer about Stallion Insecticide to be sent to individuals associated with retailers in Respondent's product distribution chain. Complaint and Answer ¶ 32.[6] In response to a Request for Information from EPA on June 6, 2013, Respondent provided an electronic file containing the direct mailer to EPA on July 18, 2013, and Complainant produced a copy of the direct mailer from that electronic file as part of its prehearing exchange. CX 25 at EPA 0681, 0693-94; Convery Declaration ¶ 8 (stating that CX 25 at EPA 0693-94 represents a true and accurate printout of the electronic file). As part of its prehearing exchange, Respondent provided the direct mailer in the form of a pamphlet. RX 59 at FMC 2262.

- An advertisement for Stallion Insecticide printed in the *Progressive Forage Grower* magazine. Respondent caused an advertisement for Stallion Insecticide to be printed in the April, May, and July 2012 issues of the *Progressive Forage Grower* magazine. Complaint and Answer ¶ 41;[7] CX 31 at EPA 1148-50; RX 63 at FMC 2641; RX 64 at FMC 2687; RX 65 at FMC 2740; *see also* Convery Declaration ¶ 11 (stating that CX 31 at EPA 1148-50 represents a true and accurate copy of screen shots that were captured from the website of

[6] The Complaint refers to "direct mailers," but in its Answer, Respondent denies Complainant's use of the plural form, asserting that "it took a single action to cause a single direct mailer to be sent." This argument relates to the appropriate manner of counting the number of violations for each alleged act of unlawful advertising and is addressed in the Discussion section below. Given Respondent's admission, the singular form of "direct mailer" is used in this Undisputed Facts section. However, such use is not a reflection of the number of violations that I have found Respondent to have committed.

[7] The Complaint refers to "ads," but in its Answer, Respondent denies Complainant's use of the plural form, asserting that "it took a single action to cause a single advertisement to appear in the April, May, and July 2012 issues of the *Progressive Forage Grower* magazine." This argument also relates to the appropriate manner of counting the number of violations for each alleged act of unlawful advertising and is addressed in the Discussion section below. Given Respondent's admission, the singular form of "advertisement" is used in this Undisputed Facts section. As before, such use is not a reflection of the number of violations that I have found Respondent to have committed.

Progressive Forage Grower magazine and that consist of relevant pages from the April, May, and July 2012 issues). In response to a Request for Information from EPA on June 6, 2013, Respondent provided an electronic file containing the advertisement to EPA on July 18, 2013, and Complainant produced a copy of the advertisement from that electronic file as part of its prehearing exchange. CX 25 at EPA 0689; Convery Declaration ¶ 8 (stating that CX 25 at EPA 0689 represents a true and accurate printout of the electronic file).

- An advertisement for Stallion Insecticide printed in *The Sunflower* magazine. Respondent caused an advertisement for Stallion Insecticide to be printed in the March/April 2012 issue of *The Sunflower* magazine. Complaint and Answer ¶ 49; CX 32 at EPA 1153; RX 66 at FMC 2759; *see also* Convery Declaration ¶ 12 (stating that CX 32 at EPA 1151-53 represents a true and accurate copy of screen shots that were captured from the website of *The Sunflower* magazine and that consist of relevant pages from the March/April 2012 issue). In response to a Request for Information from EPA on June 6, 2013, Respondent provided an electronic file containing the advertisement to EPA on July 18, 2013, and Complainant produced a copy of the advertisement from that electronic file as part of its prehearing exchange. CX 25 at EPA 0690; Convery Declaration ¶ 8 (stating that CX 25 at EPA 0690 represents a true and accurate printout of the electronic file).

- A testimonial sell sheet about Stallion Insecticide posted on Respondent's website. In January of 2012, Respondent caused a testimonial sell sheet about Stallion Insecticide to be posted on Stallion Insecticide's product page on Respondent's website. Complaint and Answer ¶ 57. In response to a Request for Information from EPA on June 6, 2013, Respondent provided an electronic file containing the testimonial sell sheet to EPA on July 18, 2013, and Complainant produced a copy of the testimonial sell sheet from that electronic file as part of its prehearing exchange. CX 25 at EPA 0696; Convery Declaration ¶ 8 (stating that CX 25 at EPA 0696 represents a true and accurate printout of the electronic file). Respondent also produced a copy of the testimonial sell sheet as part of its prehearing exchange. RX 67 at FMC 2779.

- An article about Stallion Insecticide posted on the *PRWeb* online news distribution and publicity website. Respondent caused an article about Stallion Insecticide that was entitled "FMC Announces Stallion™ Insecticide for Multi-Crop Use," and dated February 10, 2011, to be posted on the *PRWeb* online news distribution and publicity website. Complaint and Answer ¶ 65; Respondent's Prehearing Exchange at 18 (noting that the Complaint alleges that the article was dated February 10, 2011, and that Respondent's Answer erroneously asserts that the article was dated February 16, 2011); CX 35 at EPA 1159-63; *see also* Convery Declaration ¶ 17 (stating that CX 35 at EPA 1159-63 represents true and accurate copies of the article printed from the *PRWeb* website as it appeared on March 14, 2012, and March 9, 2015). In response to a Request for Information from EPA on June 6, 2013, Respondent provided an electronic file containing the article to EPA on July 18, 2013, and Complainant produced a copy of the article from that electronic file as part of its prehearing exchange. CX 25 at EPA 0702-03; Convery Declaration ¶ 8 (stating that CX 25 at EPA 0702-03 represents a true and accurate printout of the electronic file); *see also* Convery Declaration ¶ 17 (noting that the version of the article posted on the

PRWeb website is dated February 10, 2011, while the version represented by the electronic file is dated February 16, 2011).

V. CRITICAL ELEMENTS OF LIABILITY

In order to prevail on its Motion, Complainant is required to establish that genuine issues of material fact do not exist with respect to the critical elements of liability for violations 1 through 12,273 and that it is entitled to judgment as a matter of law under the preponderance of the evidence standard. Violations 1 through 12,273 charge Respondent with violating Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), by advertising a pesticide through direct mailers, periodicals, and website posts without including a statement of the pesticide's restricted use classification in the materials. Specifically, violations 1 through 9,645 relate to the direct mailer sent in March of 2012 to individuals associated with various agricultural farms. Violations 9,646 through 12,267 relate to the direct mailer sent in March of 2012 to individuals associated with retailers in Respondent's product distribution chain. Violations 12,268 through 12,270 relate to the material printed in the April, May, and July 2012 issues of the periodical *Progressive Forage Grower*. Violation 12,271 relates to the material printed in the March/April 2012 issue of the periodical *The Sunflower*. Violation 12,272 relates to the testimonial sell sheet posted on Stallion Insecticide's product page on Respondent's website. Finally, violation 12,273 relates to the article about Stallion Insecticide dated February 10, 2011, and posted on the *PRWeb* online news distribution and publicity website.

Based upon the substantive governing law described above, the critical elements of liability for violations 1 through 12,273 are as follows:

(1) Respondent is a "person," as that term is defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s);

(2) Respondent is the "registrant" of Stallion Insecticide, as that term is defined by Section 2(y) of FIFRA, 7 U.S.C. § 136(y);

(3) Stallion Insecticide is a product registered under Section 3 of FIFRA, 7 U.S.C. § 136a, and classified for restricted use;

(4) Respondent "advertised" Stallion Insecticide within the meaning of Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E); and

(5) such advertisements did not include the statement "Restricted Use Pesticide" or any statement of the terms of restriction of Stallion Insecticide.

VI. DISCUSSION

A. FIRST, SECOND, AND THIRD CRITICAL ELEMENTS

In support of its Motion, Complainant first argues that the first, second, and third critical elements are uncontested, as shown by admissions in Respondent's Answer. Memo at 11 (citing

Complaint and Answer ¶¶ 8, 9, 10, 14, 18). While Respondent argues in its Opposition that Complainant has not met its burden for an accelerated decision as to liability for alleged violations 1 through 12,273, it does not challenge Complainant's position with respect to the first, second, and third critical elements. Rather, Respondent's objections appear to relate only to the fourth and fifth critical elements of liability.

The Undisputed Facts set forth above – as supported by the admissions of Respondent in its Answer and such other materials in the administrative record as the Notice of Pesticide Registration identifying Respondent as the registrant for Stallion Insecticide, CX 9 at EPA 0495-0521; RX 27 at FMC 1665-1691 – reflect that the facts material to the first, second, and third critical elements are uncontroverted. Those facts establish that (1) Respondent is a "person," as that term is defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s); (2) Respondent is the "registrant" of Stallion Insecticide, as that term is defined by Section 2(y) of FIFRA, 7 U.S.C. § 136(y); and (3) Stallion Insecticide is a product registered under Section 3 of FIFRA, 7 U.S.C. § 136a, and classified for restricted use.

B. FOURTH AND FIFTH CRITICAL ELEMENTS

As previously noted, the parties' disputes in this proceeding appear to center only on the fourth and fifth critical elements of liability. Their arguments can be grouped generally as follows: (1) whether the subject materials and Respondent's conduct with respect to those materials constituted "advertisements" and "advertising," respectively; (2) whether the reference in the materials to the use classification appearing on Stallion Insecticide's labels satisfied the requirements of 40 C.F.R. § 152.168; and (3) whether Complainant appropriately counted the number of violations for each alleged act of unlawful advertising under FIFRA. These issues are addressed below.

1. Whether the Subject Materials and Respondent's Conduct with Respect to those Materials Constituted "Advertisements" and "Advertising," Respectively

a. Positions of the Parties

i. Complainant's Motion

Complainant argues that no genuine disputes exist with respect to the material facts underlying its allegations that each of the communications at issue constituted an "advertisement" under 40 C.F.R. § 152.168 and that Respondent's conduct with respect to those materials constituted "advertising" under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E). Memo at 13. For support, Complainant points to Respondent's admissions in its Answer and the absence of any defenses to the allegations that Respondent caused the direct mailer at issue in alleged violations 1-9,645 to be sent to individuals associated with various agricultural farms; that Respondent caused the direct mailer at issue in alleged violations 9,646-12,267 to be sent to individuals associated with retailers in Respondent's product distribution chain; that Respondent caused the material at issue in alleged violations 12,268-12,270 to be printed in the periodical *Progressive Forage Grower*; that Respondent caused the material at issue in alleged violation

12,271 to be printed in the periodical *The Sunflower*; that Respondent caused the testimonial sell sheet at issue in alleged violation 12,272 to be posted on Stallion Insecticide's product page on Respondent's website; and finally, that Respondent caused the article at issue in alleged violation 12,273 to be posted on the *PRWeb* online news distribution and publicity website. Memo at 11-12 (citing Complaint and Answer ¶¶ 22, 32, 41, 49, 57, 65). Complainant then points to the Convery Declaration and proposed exhibits in its prehearing exchange as demonstrating that Respondent produced certain electronic files on July 18, 2013, in response to EPA's June 6, 2013 Request for Information, and that those files contain the direct mailers, periodical materials, testimonial sell sheet, and article in question. Memo at 12-13 (citing numerous materials).

While acknowledging that neither FIFRA nor the implementing regulations define the terms "advertisements" and "advertising," Complainant contends that the undisputed facts above consist of all of the facts material to reaching the legal conclusion that the subject communications constitute "advertisements" and that Respondent's conduct with respect to the communications constitutes "advertising." Memo at 15. To advance its position, Complainant first notes that Respondent identified the communications as "promotional and advertising materials" and/or "advertisements" for Stallion Insecticide in its responses to EPA's requests for information and, in the case of the periodical materials, incorporated the term "PrintAd" into the names of the electronic files. Memo at 15-16, 18, 21, 23 (citing numerous materials). "Based on these admissions and supporting documentation provided outside of the pleadings," Complainant argues, "it is evident" that Respondent considers each of the communications to be an advertisement. Memo at 15-16, 18, 21, 23.

Complainant then proceeds to analyze the content of each of the communications, observing that each focuses exclusively on Stallion Insecticide; makes statements regarding the product's efficacy, uses, and benefits; and instructs readers on how to learn more about the product. Memo at 16-17, 19, 23-24 (citing numerous materials). According to Complainant, "[i]t is clear" that the communications were intended to inform readers of the existence, uses, and benefits of Stallion Insecticide in order to promote their subsequent purchase of Stallion Insecticide from Respondent and, thus, are examples of what "reasonable and objective observers" would consider to be advertisements. Memo at 17, 19, 22, 24. Complainant further argues that each of the communications falls within a category of advertisements identified in 40 C.F.R. § 152.168(b) as being subject to the requirement to contain a statement of a product's restricted use classification. Memo at 17, 20, 22, 24-25. For the foregoing reasons, Complainant concludes, the communications at issue constitute "advertisements" under 40 C.F.R. § 152.168, and in causing the communications to be transmitted, Respondent "advertise[d]" under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E). Memo at 17-18, 20-22, 25.

ii. Respondent's Opposition

Emphasizing the absence of any statutory or regulatory definitions for the terms "advertisement" or "advertising," Respondent contends that Complainant fails to advance one and instead engages in an ad-hoc analysis relying on factual evidence outside of the administrative record, such as speculation about Respondent's intentions with respect to the communications. Opposition at 5, 7-8. Such guesswork, Respondent argues, confirms that "there are issues of material fact that should be addressed at a hearing through witness testimony." *Id.* at 8. To the

extent that Complainant proposes that the appropriate inquiry is what a reasonable and objective observer would recognize as an advertisement, Respondent urges that it is entitled to address that inquiry through testimony at a hearing. *Id.* at 8.

Respondent further argues that Complainant erroneously looks to the regulation at 40 C.F.R. § 152.168 as "pertinent." Opposition at 5-6 (quoting Memo at 15). Respondent counters that while that regulation identifies the media in which advertising may occur, it fails to describe the content that a communication must contain for it to be considered an "advertisement" under FIFRA. Opposition at 6 (citing 40 C.F.R. § 152.168). According to Respondent, "[t]he only aspect of the regulation that goes beyond identifying media is the requirement that a direct mailer . . . be 'offered to purchasers' to qualify as an advertisement," which "calls for a factual inquiry" that Complainant ignores. Opposition at 7. Respondent further claims that it intends to present expert testimony at the hearing bearing on the meaning of the terms "advertisement" and "advertising" and demonstrating that pesticide registrants issue communications by way of the media identified in 40 C.F.R. § 152.168 that do not, in fact, qualify as "advertisements" under any definition of the term. *Id.* at 6 (citing Orme Declaration ¶ 7).

Respondent next opposes the "novel theory" advanced by Complainant that Respondent's descriptions of the subject materials during the investigation of its activities and this litigation be treated as legally binding admissions concerning the nature of those communications. Opposition at 8. Respondent maintains that in its June 6, 2013 Request for Information, EPA described the materials it sought as "promotional/advertising materials" but neglected to define that phrase or the term "advertisement" in any of its requests for information. Opposition at 8-9 (citing RX 69 at FMC 2788, 2790; CX 26 at EPA 753; RX 74 at FMC 2807). Even if such terms had been defined, Respondent argues, "[its] use of EPA's own terms in its response – for clarity and consistency purposes – does not amount to relevant evidence or legally binding admissions," and Complainant fails to cite any authority to support such a claim. Opposition at 9-10 (citing Memo at 16, 18, 21, 23). To treat Respondent's descriptions of the materials as legally binding admissions "would also be unjust and discourage the regulated community from casting an appropriately wide net to produce potentially-responsive documents in accordance with EPA Requests for Information." Opposition at 10. Respondent argues that it "did just that" and that it "should not be punished for casting a broad net to produce documents that EPA may deem responsive to its Requests for Information and for facilitating EPA's review of the produced documents by using EPA's own language to organize the responses." Opposition at 10-11 (citing various materials).

Finally, Respondent contends that the absence of any statutory or regulatory definitions for the terms "advertisement" or "advertising" deprived Respondent of fair notice of the communications and actions subject to regulation. Opposition at 12-13. Arguing that "[f]air notice about the meaning of these definitions is critical to both [its] due process rights and its First Amendment right to commercial speech," Respondent urges that the question of fair notice presents a genuine issue of material fact rendering accelerated decision inappropriate. *Id.* at 12. Respondent further objects to Complainant's purported failure to articulate how it proposes to define the terms "advertisement" or "advertising." *Id.* at 13. According to Respondent, "[a]bsent notice of what facts [Complainant] believes are necessary to demonstrate whether a particular communication constitutes a regulated 'advertisement,' [Respondent] cannot fairly defend itself against [Complainant's] allegations." *Id.*

iii. Complainant's Reply

To advance its position, Complainant points to the "legally binding admissions in Respondent's Answer, admissions and supporting documentation provided by Respondent outside the pleadings, and information obtained through EPA's investigation," and argues that Respondent has failed to raise any genuine issues with respect to those facts. Reply at 3, 5, 16. Complainant then argues that those undisputed facts are sufficient to resolve the question of whether the materials at issue were subject to regulation as "advertisements." Reply at 4. Noting the EAB's practice of relying on dictionaries to construe regulatory language in the absence of a legal definition of a particular term, Complainant maintains that the materials at issue satisfy common dictionary definitions of the term "advertisement" and, "when analyzed more closely[,] are clearly of a nature that were intended to be regulated under 40 C.F.R. § 152.168." Reply at 4 (citing various authorities).

Complainant then proceeds to counter the objections raised by Respondent in its Opposition. For example, Complainant argues that the proposed expert testimony identified by Respondent as bearing on the proper interpretation of the terms "advertisement" and "advertising" is inappropriate. Reply at 4-5 (citing various authorities). Complainant also acknowledges Respondent's claim that not all communications issued by pesticide registrants by way of the media identified in 40 C.F.R. § 152.168 are "advertisements" subject to regulation, but argues that the fact that the communications were conveyed by way of such media was "one of several bases, in addition to an analysis of their content, context, and use, supporting Complainant's position." Reply at 6 (citing Opposition at 6; Orme Declaration ¶ 7). Complainant next argues that Respondent misconstrues the significance that Complainant attributed to Respondent's descriptions of the materials in its responses to EPA's requests for information, maintaining that its responses "are viewed as evidence to be considered and weighed by the trier of fact, akin to party admissions," and that Respondent's descriptions were again just one of several bases cited as supporting Complainant's position. Reply at 7. Complainant also suggests that Respondent's arguments on this particular subject are disingenuous in view of such considerations as Respondent's failure to seek clarification from EPA regarding the scope of EPA's requests for information or to provide caveats in its responses to reflect any uncertainty it had at the time, as well as its continued reference to some of the communications as "advertisements" after receiving EPA's "show cause" letter dated May 7, 2014. Reply at 7-8 (citing various materials).

Finally, Complainant challenges the fair notice defense raised by Respondent in its Opposition. Urging that the defense be rejected on procedural grounds, Complainant argues that Respondent effectively waived it by failing to raise it in Respondent's Answer or prehearing exchange or to amend its Answer to include the defense. Reply at 8 (citing 40 C.F.R. § 22.15(b); *J. Phillip Adams*, 13 E.A.D. 310, 326 n.19 (EAB 2007); *Lazarus, Inc.*, 7 E.A.D. 318, 331 (EAB 1997)). Complainant also challenges the defense on substantive grounds, arguing that while the regulations do not define the term "advertisement," it "is not a technical term or a term of art[,] and its general meaning and ubiquitous manifestations are so widely understood and recognized that Respondent should have been easily able to understand the conduct that was prohibited." Reply at 9. Complainant further argues that Respondent had over 25 years from the date on which the regulation took effect to seek clarification from EPA as to the applicability of 40 C.F.R. § 152.168

to its activities, and it was put on notice of EPA's interpretation of the term "advertisement" when EPA filed a complaint on May 14, 2010, against Liphatech, Inc., for violations similar to those alleged here. Reply at 9. In fact, Complainant continues, Respondent did understand the type of communications subject to regulation as "advertisements," as shown by its inclusion of the phrase "restricted use pesticide" in "the very same type of direct mail and print 'communications' as those at issue in violations 1-12,271." Reply at 9-10 (citing various materials).

b. Analysis and Conclusion

As reflected above, the parties disagree on both the legal standard to apply in determining whether the materials in question constituted "advertisements" under FIFRA and whether genuine disputes exist with respect to the facts material to that analysis. The only point upon which the parties appear to agree is that neither FIFRA nor the implementing regulations define the term "advertise" or any of its grammatical variations for purposes of the statute.

i. Proper interpretation of the terms "advertise" and "advertisement" as used in FIFRA and the implementing regulations

The proper interpretation of the terms "advertise" and "advertisement" as used in FIFRA and the implementing regulations seemingly is an issue of first impression before this Tribunal. As previously noted, neither FIFRA nor the implementing regulations define those terms. Moreover, neither the legislative history of FIFRA nor the regulatory history of 40 C.F.R. § 152.168 expound on their meaning for purposes of the statute. Finally, the parties have not cited any cases that directly address the issue. Nevertheless, the question appears to be less complex than portrayed by Respondent.

First, given the absence of a governing legal definition, the terms "advertise" and "advertisement" do not appear to be used for purposes of FIFRA as terms of art with distinct meanings that differ meaningfully from their common usage. Indeed, as observed by Complainant, the EAB has held that where a particular term is not specifically defined by the applicable statute or regulations, it is appropriate to ascribe the commonly understood meaning to the term. *See, e.g.*, *Mayes*, 12 E.A.D. 54, 86 (EAB 2005) ("We look to the ordinary, contemporary, common meaning of a word used in a statute or regulation but not specifically defined therein."), *aff'd*, 2008 U.S. Dist. LEXIS 700 (E.D. Tenn. Jan. 4, 2008); *Odessa Union Warehouse Co-Op, Inc.*, 4 E.A.D. 550, 557 (EAB 1993) (Order on Interlocutory Appeal) ("[I]n the absence of a statutory or regulatory definition, it is appropriate to use the common meaning of the terms at issue."); *accord Perrin v. United States*, 444 U.S. 37, 44 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). The common meaning of the term then governs "unless there is clear evidence of a clearly expressed legislative intent to the contrary or unless such an interpretation of the language would lead to absurd results or would thwart the obvious purpose of the statute." *Odessa Union Warehouse Co-Op, Inc.*, 1993 EPA ALJ LEXIS 501, at *12 (Order Denying Motion to Dismiss) (footnotes omitted), *aff'd*, 4 E.A.D. 550 (EAB 1993) (Order on Interlocutory Appeal).

In order to ascertain the common meaning of a term, "[c]ourts have traditionally relied on dictionaries as generally providing an objective extrinsic guide to the ordinary, non-technical meaning of a word." *Carbon Injection Sys., LLC*, 17 E.A.D. RCRA Appeal No. 15-01, 2016 EPA App. LEXIS 7, at *46-47 (EAB). Likewise, the EAB has frequently looked to dictionaries for that purpose. *See, e.g.*, *Chase*, 16 E.A.D. 469, 479-80 (EAB 2014) (relying on various dictionary definitions for guidance in defining the term "annual" as used in a regulation requiring an "annual test" of certain equipment associated with underground storage tanks).

Applying these principles to this matter, the appropriate first step is to consult a dictionary to determine the common meanings of the terms "advertise" and "advertisement." As observed by Complainant, many dictionaries are available to choose from, but based on a representative sample, the term "advertise" has been defined to include "call[ing] public attention to especially by emphasizing desirable qualities so as to arouse a desire to buy or patronize," MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/advertise; "[d]escrib[ing] or draw[ing] attention to (a product, service, or event) in a public medium in order to promote sales or attendance," OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/advertise; and "mak[ing] something known generally or in public, [especially] in order to sell it," CAMBRIDGE DICTIONARY, http://dictionary.cambridge.org/us/dictionary/english/advertise. Drawing from these definitions, I may reasonably conclude that the common meaning of the term "advertise" for purposes of this proceeding is to draw public attention to a product, especially in order to promote sales.

In turn, the term "advertisement" has been defined to include "a public notice, *especially*: one published in the press or broadcast over the air," MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/advertisement; "[a] notice or announcement in a public medium promoting a product, service, or event or publicizing a job vacancy," OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/advertisement; and "a paid notice that tells people about a product or service," CAMBRIDGE DICTIONARY, http://dictionary.cambridge.org/us/dictionary/english/advertisement. Drawing from these definitions, I may reasonably conclude that the common meaning of the term "advertisement" for purposes of this proceeding is a notice in a public medium that promotes a product.

Nothing in the legislative history of Section 12(a)(2)(E) of FIFRA or the regulatory history of 40 C.F.R. § 152.168 suggests that the terms "advertise" and "advertisement" were intended to be construed in any manner differing from how those terms are commonly understood. Further, I see nothing to suggest that ascribing the common meaning to those terms "would lead to absurd results or . . . thwart the obvious purpose of the statute." Finally, at least one other regulatory provision underlying FIFRA reflects an ordinary, non-technical interpretation of "advertising" and "advertisements." Specifically, the regulation set forth at 40 C.F.R. § 168.22, which was promulgated to explain EPA's policy with regard to enforcing Sections 12(a)(1)(A) and (B) of FIFRA,[8] describes "advertising" and "advertisements" in terms that are consistent with the definitions above. The regulation at 40 C.F.R. § 168.22 provides:

[8] Section 12(a)(1)(A) of FIFRA provides that "it shall be unlawful for any person in any State to distribute or sell to any person . . . any pesticide that is not registered under section 3 or whose registration has been canceled or suspended, except to the extent that distribution or sale otherwise has been authorized by the Administrator under this Act." 7 U.S.C. § 136j(a)(1)(A). In turn, Section 12(a)(1)(B) of FIFRA provides that "it shall be unlawful for any

> 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.

40 C.F.R. § 168.22(a). The regulation proceeds to state that "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, [from] plac[ing] or sponsor[ing] advertisements which recommend or suggest the purchase or use of [certain types of pesticides]." 40 C.F.R. § 168.22(b). Based on the plain language of 40 C.F.R. § 168.22, it is evident that EPA considers an "advertisement" for purposes of FIFRA to be a notice in an advertising medium to which pesticide users or the general public have access that recommends or suggests the purchase or a use of a pesticide. Such a view comports with the common meaning of the term.

The regulatory history of 40 C.F.R. § 168.22 also supports this interpretation. For example, in the Federal Register notice for the proposed rulemaking for 40 C.F.R. § 168.22, EPA describes the materials covered by the rule and equates "advertising" with "promotional material." Pesticide Advertising, 51 Fed. Reg. 24,393, 24,393 (July 3, 1986) ("Advertising 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 interpretative rule."). The term "promotion" or "promotional" has been defined to include "the act of furthering the growth or development of something; *especially*: the furtherance of the acceptance and sale of merchandise through advertising, publicity, or discounting," MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/promotional; "[r]elating to the publicizing of a product, organization, or venture so as to increase sales or public awareness," OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/promotional; and "designed to advertise something in order to sell it," CAMBRIDGE DICTIONARY, http://dictionary.cambridge.org/us/dictionary/english/promotional. These definitions are consistent with those of the terms "advertise" and "advertisement."

Based on the foregoing discussion, I do not see a compelling reason for anything other than the common meanings of "advertise" and "advertisement" to govern in this proceeding. Notably, Respondent does not propose any other interpretation in its Opposition. While Respondent does assert in its Opposition that it intends to call George Orme as an expert witness at the hearing to

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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 from any claims made for it as a part of the statement required in connection with its registration under section 3." 7 U.S.C. § 136j(a)(1)(B). As used in these provisions, the phrase "to distribute or sell" is a term of art defined by the statute as follows: "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) (emphasis added).

testify about the proper interpretation of the terms "advertisement" and "advertising,"[9] I am not persuaded that such purported opinion testimony would be instructive on the issue given that all signs point to those terms not being terms of art, being scientific or technical in nature, or otherwise carrying any specialized meaning for purposes of FIFRA. As noted by Complainant, the EAB recently rejected the notion of relying on expert testimony to expound on the ordinary, common meaning of an undefined statutory or regulatory term. *Carbon Injection Sys., LLC*, 17 E.A.D. RCRA Appeal No. 15-01, 2016 EPA App. LEXIS 7, at *45-46 (EAB) (citing cases). Thus, Respondent's objection to entry of an accelerated decision on that basis is unpersuasive.

To the extent that Respondent suggests in its prehearing exchange materials that a communication is required to contain an "offer for sale" in order to be regulated as an "advertisement" under Section 12(a)(2)(E) of FIFRA,[10] such a narrow construction lacks support. Section 12(a)(2)(E) establishes a general proscription against advertising a product registered for restricted use without giving the classification of the product, and unlike other provisions of the statute, the text of Section 12(a)(2)(E) does not contain any qualifying words like "as part of its distribution or sale," a phrase that is defined by the statute as including an "offer for sale" but not

[9] Specifically, Respondent asserts that Mr. Orme, "due to his extensive experience with marketing and advertising initiatives, can offer testimony based on his knowledge and professional experience as to what these terms mean." Opposition at 6 (citing Declaration of George Orme ¶ 7).

[10] In its Prehearing Exchange, Respondent identifies Aaron Locker, Respondent's Director of Marketing for the North American Crop business, as a potential fact witness who may testify "about FMC marketing efforts that are intended to raise brand and product awareness as contrasted with offers for sale and directions for product use." Respondent's Prehearing Exchange at 4. Similarly, Respondent identifies Mr. Orme, founder and Managing Director of Strategic Marketing Partners, Inc., as a potential expert witness who may testify "from a marketing perspective about the nature of the materials involved" and "about marketing efforts that are used to raise brand and product awareness, compared to efforts that are intended to be offers for sale." Respondent's Prehearing Exchange at 10. Respondent elaborates on the anticipated testimony of Mr. Orme in its First Supplemental Prehearing Exchange as follows:

> Mr. Orme may be called to provide a general overview about marketing based on his extensive experience advising companies on marketing strategies. He would explain that marketing is a discipline that involves evaluating and making a series of decisions about how to: (1) position a brand vis-à-vis competition; and (2) promote brand advantages in various media so the intended audience will become aware of and interested in using the brand. This may include discussing the developmental process underpinning a specific marketing effort, contrasted with the roll-out or distribution of that effort. Such an overview also may include, for instance, a discussion about marketing efforts that are used to raise brand and product awareness, compared to efforts that are intended to be offers for sale. Mr. Orme may explain that efforts intended to be offers for sale generally include information relevant to making purchasing decisions and enable the intended audience to make such decisions, for instance by providing pricing information and ordering instructions as well as quantity and volume options. Efforts that are intended to raise brand and product awareness, by contrast, generally do not provide such information, and do not enable the intended audience to directly purchase the product. Mr. Orme may also testify that the materials associated with the violations alleged in the complaint were not efforts that were intended to be offers for sale.

Respondent's First Supplemental Prehearing Exchange at 2-3.

"advertising."[11] *See Sporicidin Int'l*, 1988 EPA ALJ LEXIS 14, at *49-50 (describing an underlying order that contrasted Section 12(a)(2)(E), which does not contain the words "as part of its distribution or sale," with Section 12(a)(1)(B), which does contain those words and was found "not [to be] a general proscription on advertising claims for a pesticide differing substantially from those accepted in connection with the product's registration," primarily in order to give those words effect), *aff'd*, 3 E.A.D. 589 (CJO 1991). The omission of the term "advertise" from the definition of the phrase "to distribute or sell" is telling, as is the omission of any qualifying words like "as part of its distribution or sale" from the text of Section 12(a)(2)(E), especially when contrasted with the inclusion of those words in other sections of the statute and the exclusion of the term "advertise" from those sections. *See, e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (alteration and internal quotation marks omitted). These considerations suggest that Congress viewed advertising as being distinct from and broader in scope than the activities delineating the distribution or sale of a pesticide, as Congress defined that phrase for purposes of FIFRA, and that Congress did not intend for the prohibition contained in Section 12(a)(2)(E) to be narrowed from advertising generally to advertising occurring only as part of a distribution or sale. In other words, Congress seemingly did not intend to require that an advertisement for a pesticide contain an offer for sale, and therefore be a part of the distribution or sale of the pesticide, in order for the advertisement to fall within the ambit of Section 12(a)(2)(E).

Lending support to this conclusion is Chief Administrative Law Judge Susan L. Biro's discussion in *Liphatech, Inc.*, 2014 EPA ALJ LEXIS 12, as to whether to construe the regulation promulgated at 40 C.F.R. § 168.22 as meaning that an "advertisement" for a pesticide appearing in any medium is synonymous with an "offer for sale," and that if the advertisement contains substantially different claims than those approved by EPA, those claims have been made "as part of a distribution or sale" of the pesticide, in violation of Section 12(a)(1)(B) of FIFRA. Judge Biro ultimately rejected that construction of 40 C.F.R. § 168.22 after conducting a thorough analysis of

[11] As noted above, the full statutory definition of the phrase "to distribute or sell" is as follows: "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) (emphasis added). Notably absent from this definition is the term "advertise." Meanwhile, the phrase "offer for sale," which is included in the definition, is not defined by the statute. Relying on general principles of contract law for guidance in construing the phrase, the EAB observed in *Tifa Limited*, 9 E.A.D. 145 (EAB 2000), that "[t]he determination of whether a given communication by one party to another is an operative offer, and not merely a step in the preliminary negotiations, is a matter of interpretation in light of all the surrounding circumstances." *Tifa*, 9 E.A.D. at 159 (citing 1 *Corbin*, *Contracts* § 2.2 (ed. rev. 1993)). The EAB further observed that "'an offer must be definite and certain, and must be made under circumstances evidencing the express or implied intent of the offeror that its acceptance shall constitute a binding contract.'" *Tifa*, 9 E.A.D. at 159 (quoting *Maurice Elect. Supply Co., Inc. v. Anderson Safeway Guard Rail Corp.*, 632 F. Supp. 1082, 1087 (D.D.C. 1986). Recognizing the generally accepted principle that a mere quotation of prices is not an offer because it "leaves unexpressed many terms that are necessary to the making of a contract," *Tifa*, 9 E.A.D. at 159 (citing 1 *Corbin*, *Contracts* § 2.2 (ed. rev. 1993)), the EAB noted that a seller's quotation of prices could constitute a valid offer to sell under some circumstances, such as where "it was sufficiently detailed and explicitly provided that its offer was subject to immediate acceptance by the buyer," *Tifa*, 9 E.A.D. at 159 (citing *White Consol. Indus., Inc., v. McGill Mfg. Co. Inc*., 165 F.3d 1185, 1190 (8th Cir. 1999)). Based on the EAB's reasoning, it appears that a necessary condition for determining that a communication rises to the level of an "offer for sale" is that the communication contain a quotation of prices, without which a communication could not be sufficiently "definite and certain" such that a potential customer could accept the offer and form a contract. *Liphatech, Inc*., 2014 EPA ALJ LEXIS 12, at *83-84 (citing *Tifa*, 9 E.A.D. at 159).

various considerations. *Liphatech*, 2014 EPA ALJ LEXIS 12, at *68. Among other matters discussed, Judge Biro observed that EPA recognizes the distinction between advertisements generally and advertisements that contain offers for sale based on the following language in the Federal Register notice for the final rulemaking for 40 C.F.R. § 168.22:

> EPA believes that claims made in the *kinds of advertising* covered by this interpretative rule are "*part of [the] distribution or sale*" of the pesticide to which the advertising relates. The rule limits its coverage to advertisements that (1) are placed by persons who are in the pesticide business *and* (2) recommend or suggest the purchase of pesticides for certain purposes. FIFRA does not grant EPA plenary authority to regulate advertising as such, and *it is arguable that there can be advertising that is separate from and not a part of the distribution of [sic] sale of a pesticide* . . . . In this rule, EPA is not seeking to define the outer reaches of its FIFRA jurisdiction over advertising claims, but merely to state clearly its position with regard to claims in advertising that are made to "induce the * * * sale and use" of a pesticide and that therefore *are a part of the distribution or sale of the pesticide*.

Liphatech, 2014 EPA ALJ LEXIS 12, at *52-53 (quoting Advertising of Unregistered Pesticides, 54 Fed. Reg. 1,122, 1,124 (Jan. 11, 1989) (first, second, fourth, and fifth emphasis added). Judge Biro also considered the regulatory text of 40 C.F.R. § 168.22(a) – namely, the language that "EPA interprets [Sections 12(a)(1)(A) and 12(a)(1)(B) of FIFRA] as extending to advertisements in any advertising medium to which pesticide users or the general public have access" – and found that it clearly reflected EPA's view of advertisements as a potential medium in which offers for sale could occur, which thereby allowed EPA to regulate those particular advertisements pursuant to Sections 12(a)(1)(A) and 12(a)(1)(B). *Liphatech*, 2014 EPA ALJ LEXIS 12, at *53-54. Judge Biro's reasoning is persuasive, and her discussion reinforces the conclusion herein that advertising is broader in scope than the distribution or sale of a pesticide under FIFRA's regulatory scheme and that the prohibition set forth in Section 12(a)(2)(E) is not so limited.

For the foregoing reasons, I hereby reject any contention that for purposes of regulation under FIFRA, the term "advertisement" should be read narrowly to mean only those materials constituting advertisements that also contain offers for sale. I am similarly unmoved by Respondent's argument that it was deprived of fair notice concerning the types of materials and actions subject to regulation as "advertisements" and "advertising," respectively, such that accelerated decision is inappropriate. The law is well-settled that the constitutional principle of due process bars an administrative agency from penalizing a regulated party for its conduct unless the party had adequate notice that such conduct was unlawful. *Howmet Corp.*, 13 E.A.D. 272, 303-04 (EAB 2007) (citing *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995). The regulated party bears the burden of establishing that it was deprived of adequate notice because the issue serves as an affirmative defense to liability. *Howmet*, 13 E.A.D. at 303. In determining whether the regulated party was deprived of adequate notice, the EAB has applied the standard of review articulated by the U.S. Court of Appeals for the D.C. Circuit in *General Electric*: "If, by reviewing the regulations and other public statements issued by the agency, a regulated party

acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation." *See, e.g.*, *Howmet*, 13 E.A.D. at 304 (quoting *Gen. Elec. Co.*, 53 F.3d at 1329); *V-1 Oil Co.*, 8 E.A.D. 729, 752 (EAB 2000) (same). Going further, the EAB has explained that "the question is not whether a regulation is susceptible to only one possible interpretation, but rather, whether the particular interpretation advanced by the regulator was ascertainable by the regulated community." *Coast Wood Preserving, Inc.*, 11 E.A.D. 59, 81 (EAB 2003) (quoting *Tenn. Valley Auth.*, 9 E.A.D. 357, 412 (EAB 2000)). To make that determination, the EAB has considered such factors as the text of the applicable regulation, the overall structure of the regulatory scheme, the regulatory history of the regulation and other publicly-released statements by EPA reflecting its understanding of the regulation, and any efforts by the regulated party to inquire about the meaning of the regulation. *Howmet*, 13 E.A.D. at 305-09.

After considering the relevant factors, I find that Respondent could have determined EPA's view of the terms "advertise" and "advertisement" with ascertainable certainty at the time it disseminated the materials in question. As discussed above, while FIFRA and the implementing regulations do not specifically define those terms, ample legal authority explains that it is appropriate to look to a dictionary for the commonly understood meaning of a term under such circumstances. Having consulted multiple dictionaries to define "advertise" and "advertisement" myself, I am hard-pressed to see how those terms could be considered by a regulated party to embody complex concepts or even be open to a variety of plausible interpretations, thus obfuscating their meaning for purposes of FIFRA. As observed by Complainant, "[the] general meaning and ubiquitous manifestations [of the terms at issue] are so widely understood and recognized that Respondent should have been easily able to understand the conduct that was prohibited." Reply at 9. Complainant has not sought to deviate from those meanings in this proceeding. *See* Memo at 17, 19, 22, 24 (looking to what "reasonable and objective observers" would consider to be advertisements); Reply at 4 (looking to dictionary definitions of the term "advertisement"). Furthermore, as previously discussed, when one considers how those terms were used in the context of the other statutory and regulatory provisions, it becomes clear that both Congress and EPA understood "advertising" and "advertisements" to take their ordinary, everyday meaning and not be limited in scope to advertisements disseminated as part of the distribution or sale of a pesticide for purposes of regulation under Section 12(a)(2)(E). Complainant raises a number of other salient arguments on this point, including that Respondent does not appear to have sought clarification from EPA as to whether its activities were subject to regulation between the time that 40 C.F.R. § 152.168 took effect in 1988 and the dissemination of the materials at issue in 2011 and 2012. *See* Reply at 9. Together, these considerations compel the conclusion that the interpretation advanced in this proceeding was ascertainably certain to the regulated community, and Respondent was not deprived of fair notice concerning the types of materials and actions subject to regulation as "advertisements" and "advertising," respectively.

Consistent with the foregoing discussion, the common meanings of the terms "advertise" and "advertisement" are deemed to control for purposes of this matter, and Respondent's arguments in opposition are rejected.

ii. Application of the common meanings of "advertise" and "advertisement" to Respondent's conduct and the disseminated materials

Having concluded that the common meanings of the terms "advertise" and "advertisement" govern in this proceeding, I turn now to the next question presented: whether genuine disputes of material fact exist with respect to the allegations that each of the communications at issue and Respondent's actions concerning the communications fall within those common meanings and Complainant is entitled to judgment as a matter of law that Respondent's actions and the communications are subject to regulation under the applicable law. On this point, I agree with Complainant. The Undisputed Facts set forth above – as supported by the admissions of Respondent in its Answer and such other documents in the administrative record as Respondent's July 18, 2013 submission to EPA and the copies of the direct mailers, periodical materials, testimonial sell sheet, and article produced by the parties as part of their prehearing exchanges – reflect the parties' agreement that Respondent caused the materials identified in the Complaint to be disseminated as charged and that the copies in the record are duplicates of those materials. By extension, the parties seemingly do not dispute the wording and graphics appearing in the materials. These uncontroverted facts are sufficient to establish that each of the subject materials consisted of a notice in a public medium that promoted Stallion Insecticide, and thus constituted an "advertisement" as that term is commonly understood, and that Respondent's actions with regard to the materials consisted of drawing public attention to Stallion Insecticide in order to promote sales, and thus Respondent "advertised" as that term is commonly understood.

First, each of the subject materials was distributed to members of the public by way of media contemplated by the applicable regulation at 40 C.F.R. § 152.168 as that in which advertising may occur. As set forth above, 40 C.F.R. § 152.168 establishes the regulatory requirement that advertisements for a product classified for restricted use include a statement of the product's restricted use classification, a duty that it then imposes on "*all* advertisements, including, but not limited to," those described in the regulation. The pamphlet at issue in paragraph 22 of the Complaint was sent directly to individuals associated with various agricultural farms, while the pamphlet at issue in paragraph 32 of the Complaint was sent directly to individuals associated with retailers in Respondent's product distribution chain. That mode of dissemination was specifically identified in the regulation. *See* 40 C.F.R. § 152.168(b)(1) ("[b]rochures, pamphlets, circulars and similar material offered to purchasers[12] at the point of sale or by direct mail"). Likewise, the communications printed in the issues of the *Progressive Forage Grower* periodical described in paragraph 41 of the Complaint and the issue of *The Sunflower* periodical described in paragraph 49 of the Complaint were circulated, at a minimum, to

[12] In its Opposition, Respondent homes in on the phrase "offered to purchasers" included in 40 C.F.R. § 152.168(b)(1), arguing that it imposes a requirement that a direct mailer be "offered to purchasers" to qualify as an advertisement, which "calls for a factual inquiry" that Complainant ignores. Opposition at 7. Complainant counters in its Reply that Respondent has admitted that it caused the direct mailers at issue in paragraphs 22 and 32 of the Complaint to be sent to individuals associated with various agricultural farms and individuals associated with retailers in Respondent's product distribution chain, respectively, and "[a]s there can be no question that farm/grower consumers or retail purchasers are potential purchasers (versus stockholders, first responders, etc.), this issue has been determined conclusively and requires no further evidence." Reply at 6. Complainant also points to the inclusive language of 40 C.F.R. § 152.168(b), arguing that "not all 'regulated' advertisements are explicitly listed." *Id.* I find Complainant's arguments persuasive.

subscribers of those issues by way of media specifically identified in the regulation. *See* 40 C.F.R. § 152.168(b)(2) ("[n]ewspapers, magazines, newsletters and other material in circulation or available to the public"). As for the testimonial sell sheet posted on Stallion Insecticide's product page on Respondent's website, as described in paragraph 57 of the Complaint, and the article posted on the *PRWeb* online news distribution and publicity website, as described in paragraph 65 of the Complaint, those communications were available to members of the public who visit Respondent's website and receive content from the *PRWeb* website, respectively, and thus were also distributed by way of media contemplated by 40 C.F.R. § 152.168. *See* 40 C.F.R. § 152.168(b)(2) ("other material in circulation or available to the public").

Second, the content and context of the subject materials amply support the conclusion that the materials promoted Stallion Insecticide and that Respondent acted to draw attention to Stallion Insecticide for purposes of inducing sales. Based on the copies produced by the parties in their prehearing exchanges, the direct mailer sent to the individuals associated with various agricultural farms and the direct mailer sent to the individuals associated with retailers in Respondent's product distribution chain are identical in all material respects.[13] As observed by Complainant, the direct mailer focuses exclusively on Stallion Insecticide, makes statements about its efficacy ("Stallion® insecticide is one of the most effective weevil insecticides on the market. It doesn't show mercy to aphids, leafhoppers and more than 25 other insects either."); uses ("Its usage list is just as impressive with approval on alfalfa and 27 other crops."); and benefits ("Thanks to a well-devised formula with dual modes of action, you'll also gain longer residual control, convenient application and, most importantly, maximized plant health for greater yields"); and then instructs recipients on how to learn more about the product. It also compares Stallion Insecticide favorably with competing products ("For power unlike the rest of the herd, always look for Stallion."). Based on the copies produced by the parties in their prehearing exchanges, the communications printed in the *Progressive Forage Grower* and *The Sunflower* periodicals are identical to each other. Like the direct mailer, the periodical communication focuses exclusively on Stallion Insecticide; contains the same statements about the product's efficacy, uses, and benefits as those appearing in the direct mailer; contains the same statement comparing Stallion Insecticide favorably with competing products as that appearing in the direct mailer; and then instructs readers on how to learn more about the product. The language employed in the direct mailers and periodical communications plainly draws attention to the desirable qualities of Stallion Insecticide and suggests that the purpose of doing so was to raise awareness about the product among the recipients of the direct mailers and readers of the periodicals and generate interest in its purchase and use.

As for the testimonial sell sheet posted on Stallion Insecticide's product page on Respondent's website, it contains four testimonials from purported growers who applied Stallion Insecticide to alfalfa during the fall season in order to control weevil. As observed by Complainant, each of the testimonials emphasizes the benefits of that use of the product ("Excellent weevil and aphid control. I will treat again this fall with Stallion." – Doug Meyer of

[13] The only difference between the direct mailers appears to be the particular language used to instruct the recipients on how to learn more about Stallion Insecticide's uses. *Compare, e.g.*, CX 25 at EPA 0692 ("For the full list of pests and crops approved for Stallion, talk to your FMC Star Retailer, call 888-59-FMC-AG or visit FMCcropPro.com/Stallion."), *with* CX 25 at EPA 0694 ("For the full list of pests and crops approved for Stallion, talk to your FMC Representative, call 888-59-FMC-AG or visit FMCcropPro.com/Stallion.").

Andale, Kansas; "I felt there was a 30% increase in yield the first year after doing a fall application. . . . I will treat again this fall with Stallion to reduce my alfalfa weevil numbers." – Lenny Miller of McPherson, Kansas; "We had excellent weevil and aphid control from the fall treatments. . . . I will treat again this fall with Stallion Insecticide." – Bruce Seiler of Sedgwick, Kansas; "Stallion sprayed this past fall showed a noticeable difference in the spring with better green-up and healthier growth early-on. It took the timing pressure off the table for the spring treatments and I plan to spray again this fall to reduce my alfalfa weevil numbers . . . ." – John Roy of Larned, Kansas.). In doing so, the testimonial sell sheet clearly makes the advantages of fall applications of Stallion Insecticide known to visitors of Respondent's website, and I may reasonably infer that the purpose of communicating such information was to fuel their interest, and that of alfalfa growers in particular, in purchasing and using the product in the manner described.

Finally, as observed by Complainant, the article posted on the *PRWeb* online news distribution and publicity website contains language touting the efficacy, uses, and benefits of Stallion Insecticide. It also compares Stallion Insecticide favorably with competing products. This language includes the following: "FMC introduces Stallion™, an insecticide with two modes of action, providing quicker, more effective knockdown with longer residual than many other insecticides on the market"; "With 28 labeled insect pests including alfalfa weevil and potato leafhopper, protection provided by Stallion improves yield, quality and plant stand longevity"; "Stallion can be applied alone or in tank mixes with fungicides, post herbicides and foliar fertilizers, offering flexibility in application"; and "In addition to alfalfa, Stallion is an effective choice for corn, cotton, sorghum, soybeans, wheat and sunflowers." The article closes with instructions on how to learn more about the product, directing readers to visit their local retailer, local FMC Retail Market Manager, or Respondent's website. As argued persuasively by Complainant, notwithstanding the fact that Respondent designated the article as a "news release," its language suggests that "the intended audience [was] not the news media or journalists but growers of alfalfa, corn, cotton, sorghum, soybeans, wheat, and sunflowers who receive content directly or indirectly from the *PRWeb* website." Memo at 24 (footnote omitted). Complainant also points to evidence, unrebutted by Respondent, that "*PRWeb* website postings are a paid service so, unlike 'news releases,' Respondent knew that the article would be posted and that the content of the article would appear on the *PRWeb* website verbatim as submitted." *Id.* (footnotes omitted) (citing Convery Declaration ¶ 16; CX 34 at EPA 1155-58). These considerations support a finding that the article draws attention to the desirable qualities of Stallion Insecticide in order to inform growers who receive content from the *PRWeb* website of the product's existence and encourage their interest in purchasing and using it.

Based on the foregoing discussion, I find that the subject materials may properly be characterized as notices in a public medium that promoted Stallion Insecticide, and that Respondent's actions with regard to the materials consisted of drawing public attention to Stallion Insecticide in order to promote sales, thus rendering each of the materials an "advertisement" and Respondent's dissemination of the materials "advertising" as those terms have been defined herein. In reaching this conclusion, I note that Respondent itself described the materials as advertisements at various times during EPA's investigation of its activities and this proceeding, beginning with its July 18, 2013 response to EPA's Request for Information on June 6, 2013, wherein Respondent first identified the materials as "promotional and advertising materials" for Stallion Insecticide, *see* CX 25; RX 70, and continuing through the filing of its Answer, wherein Respondent admitted that

it caused an "advertisement" about Stallion Insecticide to appear in the *Progressive Forage Grower* and *The Sunflower* periodicals, *see* Complaint and Answer ¶¶ 41 and 49. In its Opposition, Respondent balks at any reliance on this consideration, but as argued persuasively by Complainant, Respondent's objections are seemingly disingenuous given that Respondent failed to seek clarification from EPA regarding the scope of EPA's requests for information during EPA's investigation of Respondent's activities or to provide caveats in its responses to reflect any uncertainty that it had at the time, and then continued to refer to some of the communications as "advertisements" as late as the filing of its Answer. In any case, while I do not view Respondent's characterization of the subject materials as being dispositive, I find that it certainly lends support to the conclusion that the materials constituted "advertisements" and that Respondent "advertised" for regulatory purposes.

Respondent's arguments in opposition simply fail to persuade that a genuine dispute of material fact exists requiring an evidentiary hearing on this issue or that the uncontroverted evidence is insufficient to establish that the subject materials and Respondent's conduct with regard to those materials constitute "advertisements" and "advertising," respectively, as a matter of law. In particular, Respondent asserts that "[p]esticide registrants can and do issue various communications by [the means identified in the applicable regulation at 40 C.F.R. § 152.168] that are not 'advertisements' under any definition of the term." Opposition at 6 (citing Orme Declaration ¶ 7). As examples of such communications, Respondent points to "SEC-required communications regarding business performance (which could include reference to particular pesticide products)" and Material Data Safety Sheets, "which give detailed information about a chemical's properties as well as its health, safety, fire and environmental hazards." Opposition at 6. Undoubtedly, "not everything a company does is directed toward promoting its product." *Sporicidin Int'l*, 3 E.A.D. 589, 605 (CJO 1991) (internal quotations omitted). As another example of an exchange of information that is not intended to promote a product, EPA has cited the dissemination of scientific information to the scientific community, noting that "the Agency does not consider the publication in scientific journals of articles reporting on scientific studies to be advertising." 54 Fed. Reg. at 1,124. Nevertheless, Respondent fails to point to any elements of the subject materials or other pieces of evidence in the administrative record that liken the materials to such communications or otherwise cast the materials in any light other than a commercial one.

Respondent also contends that Complainant relies on factual evidence outside of the administrative record, such as speculation about Respondent's intentions with respect to the subject communications, which "cannot substitute for testimony and evidence regarding the communications" and highlights that "there are issues of material fact that should be addressed at a hearing through witness testimony." Opposition at 8. I disagree. Complainant drew reasonable inferences from the undisputed evidence in the record, namely the content and context of the communications. Conversely, Respondent fails to identify any conflicting inference that could be drawn and evidence in support of such an inference, such as affidavits of those responsible for developing or disseminating the communications. A vague reference to some unspecified testimony is insufficient to carry Respondent's burden of refuting that no genuine dispute exists with respect to the intent of the communications, thus warranting an evidentiary hearing.

Consistent with the discussion above, I conclude that no genuine disputes of material fact exist with respect to the issue at hand and that as a matter of law, the direct mailers, periodical

materials, testimonial sell sheet, and article identified in the Complaint constituted "advertisements" of Stallion Insecticide and Respondent "advertised" Stallion Insecticide by causing those materials to be disseminated, such that the materials and Respondent's conduct were subject to the requirements of Section 12(a)(2)(E) of FIFRA and the regulation at 40 C.F.R. § 152.168.

2. Whether the Reference in the Subject Materials to the Use Classification Appearing on Stallion Insecticide's Labels Satisfied the Requirements of 40 C.F.R. § 152.168

a. Positions of the Parties

i. Complainant's Motion

Complainant first argues that no genuine disputes exist with respect to the material facts underlying its allegations that each of the subject communications violated 40 C.F.R. § 152.168. Memo at 14-15. For support, Complainant points to Respondent's admissions in its Answer that the direct mailers at issue in alleged violations 1-12,267, the periodical materials at issue in alleged violations 12,268-12,271, the testimonial sell sheet at issue in alleged violation 12,272, and the article at issue in alleged violation 12,273 did not include the statement "Restricted Use Pesticide" or any statement of the terms of restriction of Stallion Insecticide. Memo at 13-14 (citing various materials). Further, Complainant notes, it does not dispute Respondent's assertions in its Answer that each of the communications in question directed readers to "always read and follow label instructions" and that Stallion Insecticide's label contained the statement "Restricted Use Pesticide" and related information. Memo at 14 (citing Complaint and Answer ¶¶ 25-27, 35-37, 44-46, 52-54, 60-62, 68-70).

Complainant next argues that the undisputed facts above support the legal conclusion that Respondent failed to include Stallion Insecticide's restricted use classification in the communications at issue. First noting that Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), makes it unlawful for any person who is a registrant to advertise a product registered under FIFRA for restricted use without giving the product's restricted use classification, Complainant argues that the regulations at 40 C.F.R. § 152.168 implement that statutory prohibition by "giv[ing] two options for avoiding liability for illegal advertising, either to include the statement 'Restricted Use Pesticide' or to include the terms of restriction prominently in the advertisement." Memo at 25-26 (citing 40 C.F.R. § 152.168(c)). Having failed to comply with either of those two options, Complainant continues, each of the communications at issue violates Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E). Memo at 26.

While recognizing that the communications did direct readers to "always read and follow label directions," and that Stallion Insecticide's label contained the statement "Restricted Use Pesticide" and related information, Complainant maintains that those facts "fail to establish Respondent's compliance with the requirement to give the restricted use classification under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E)." Memo at 26. Noting that such an argument was rejected in *Liphatech, Inc.*, 2011 EPA ALJ LEXIS 5, at *11 (Order on Motions for Accelerated Decision Regarding Alleged Violations of FIFRA § 12(a)(2)(E)), Complainant

contends that the reasoning of Judge Biro in *Liphatech* supports the same result in this matter. Memo at 27-29. Complainant also objects to the orientation and font size of the phrase "always read and follow label directions" in some of Respondent's communications, arguing that they fail to satisfy the regulatory requirement that the statement of restricted use appear prominently in the advertisement. Memo at 28 (citing 40 C.F.R. § 152.168(c); CX 25 at EPA 691-92, EPA 693-94, EPA 689, EPA 690, EPA 696).

ii. Respondent's Opposition

In opposition, Respondent first cites the requirement set forth at 40 C.F.R. § 152.168(a) that any advertisement of a product classified for restricted use contain "a statement of its restricted use classification." Opposition at 13. Respondent contends that the regulation does not prescribe the contents of such a statement or limit the manner in which the requirement may be met. *Id.* Noting that the regulation provides at 40 C.F.R. § 152.168(c) that the requirement "may be satisfied for printed material by inclusion of the statement 'Restricted Use Pesticide,' or the terms of restriction, prominently in the advertisement," Respondent maintains that EPA's use of the term "may" demonstrates that the two methods of compliance identified in the regulation are not exclusive but merely suggestions of how the requirement could be met, leaving other options open to the regulated community. *Id.* at 13-14. Respondent proceeds to argue that the option it took – instructing recipients of the subject communications to read and follow the label of Stallion Insecticide, which contains the phrase "Restricted Use Pesticide" and related missives – satisfies the requirement that the communications contain a "statement of" the pesticide's restricted use classification. *Id.* at 14. According to Respondent, the instruction "was expressly written on all of [Respondent's] communications, and no less prominently than it appeared on other lawful advertisements," thus differentiating it from the "fleeting" reference to the product label in the radio advertisements at issue in *Liphatech* and rendering Complainant's reliance upon that case misplaced. *Id.*

iii. Complainant's Reply

In its Reply, Complainant argues that Respondent raises no issues of fact with respect to whether the materials at issue contain the Stallion Insecticide's restricted use classification and instead advances only a legal argument that it constructively complied with 40 C.F.R. § 152.168. Reply at 10 (citing Opposition at 14; Respondent's Prehearing Exchange at 19), 16. In response to that argument, Complainant maintains that Respondent's position "is without merit and should be dismissed on the same grounds as the Chief Administrative Law Judge did in the *Liphatech* case." Reply at 10 (citing *Liphatech, Inc.*, 2011 EPA ALJ LEXIS 5, at *27-31 (Order on Motions for Accelerated Decision Regarding Alleged Violations of FIFRA § 12(a)(2)(E)). Countering Respondent's claim that *Liphatech* is distinguishable from the present case because some of the advertisements at issue in *Liphatech* were radio broadcasts, Complainant first notes that the regulatory language addressing printed materials and broadcast advertising is "virtually identical." Reply at 10-11 (citing 40 C.F.R. § 152.168(c)). Complainant then argues that even if the communications are found to have included Stallion Insecticide's restricted use classification, "the miniscule font size of [Respondent's] 'cross-reference' is analogous to the 'fleeting' references in Liphatech's radio advertisements." Reply at 11.

b. Analysis

As observed by Complainant, the facts material to the issue at hand – namely, the wording of the subject materials – are uncontested. The Undisputed Facts set forth above reflect that while the subject materials did not include the phrase "Restricted Use Pesticide" or any statement of the terms of restriction of Stallion Insecticide, they did direct readers to "always read and follow label directions," and that the label for Stallion Insecticide then identified it as a "Restricted Use Pesticide." With these facts uncontested, the only issue remaining is whether the statement "always read and follow label directions" satisfies the requirement of 40 C.F.R. § 152.168(a) that an advertisement of a pesticide classified for restricted use "contain[] a statement of its restricted use classification." This question of law is appropriate for resolution by accelerated decision.

In resolving the question presented, I first note that the regulation at 40 C.F.R. § 152.168(c) provides that the advertising requirement of 40 C.F.R. § 152.168(a) "*may* be satisfied for printed material by inclusion of the statement 'Restricted Use Pesticide,' or the terms of restriction, prominently in the advertisement." 40 C.F.R. § 152.168(c) (emphasis added). In its Opposition, Respondent focuses on the use of the term "may" in the regulation, arguing that it demonstrates EPA's intention of merely suggesting the two methods of compliance identified in the regulation and leaving other options open to the regulated community. If EPA had intended to limit the regulated community, Respondent maintains, it would have done so by using the term "shall" instead of "may," such that the regulation would read that the advertising requirement of 40 C.F.R. § 152.168(a) "*shall* be satisfied for printed material by inclusion of the statement 'Restricted Use Pesticide,' or the terms of restriction, prominently in the advertisement."

Respondent's reading of the term "may" as being permissive is undeniably valid. *See, e.g.*, *D.C. Water & Sewer Auth.*, 13 E.A.D. 714, 733 (EAB 2008) (Order Denying Review in Part and Remanding in Part) ("[U]se of the word 'shall' generally imposes a mandatory obligation, while use of the word 'may' generally grants discretion."); *cf. United States v. Rodgers*, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion. This common-sense principle of statutory construction is by no means invariable, however . . . and can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute."). Respondent's position nevertheless fails. First, when the use of the term "may" in 40 C.F.R. § 152.168(c) is viewed in context, the discretion that it appears to confer is ostensibly limited by the disjunctive phrase in the provision, such that the provision grants discretion to members of the regulated community to comply with the advertising requirement not by any means of their choosing, as argued by Respondent, but by electing between the two methods of compliance set forth in the regulation. In other words, in order to satisfy the advertising requirement, Respondent had the limited discretion to include in the subject materials *either* the statement "Restricted Use Pesticide" *or* a statement of "the terms of restriction" for Stallion Insecticide.

Regardless of the significance of the term "may" and the degree of discretion it confers in this instance, Respondent's position that the statement "always read and follow label directions" amounts to "a statement of [Stallion Insecticide's] restricted use classification" is simply unconvincing. As noted by Complainant, such an argument was roundly rejected by Chief Administrative Law Judge Susan L. Biro in *Liphatech, Inc.,* 2011 EPA ALJ LEXIS 5 (Order on

Motions for Accelerated Decision Regarding Alleged Violations of FIFRA § 12(a)(2)(E)), whose reasoning on this point I find to be compelling and persuasive.

In her Order, Judge Biro first observed that above all else, the lawful use of a "restricted use pesticide" is limited to certified applicators, rendering that restriction a critical term of its restricted use classification:

> [U]nder FIFRA, the phrase "restricted use pesticide" has become a term of art . . . meaning that, by law, the pesticide's use is limited, at the very least, to those who are "certified applicators" or those under the supervision of certified applicators. Therefore, the plain meaning of the regulation's disjunctive phrase, set off by commas, requiring advertisements to include either the "statement 'Restricted Use Pesticide,' or the terms of restriction, prominently in the advertisement" is to require registrants to convey either through the use of the term of art *or* other words or phrases that the lawful use of the pesticide is limited to certified applicators.

Liphatech, 2011 EPA ALJ LEXIS 5, at *26-27. Noting that the radio advertisements at issue in *Liphatech* failed to include a statement that the given pesticide's use was limited by law to certified applicators or even that its use was simply "restricted," and instead merely referred to the pesticide's label, Judge Biro found that such a reference fails to "convey even an inkling of a sense that there is a legally enforceable restriction as to who may use the product." *Id.* at *27-28. She reasoned that it also conflicted with the language of the regulation, which requires the "inclusion" (defined as "to contain as part of something) of the terms of restriction in the advertisement, as opposed to a mere "reference" (defined as "[t]he act of sending or directing to another for information"). *Id.* at *28-29 (citing Black's Law Dictionary 777, 1306 (8th Ed. 1999)).

Judge Biro proceeded to find that the print advertisements in *Liphatech* similarly lacked inclusion of a statement of the restriction on the pesticide's use, observing that the wording of the advertisements failed to convey the concept that its use was limited. *Liphatech*, 2011 EPA ALJ LEXIS 5, at *29-30. She then concluded:

> Respondent's position, that a "statement" advising listeners to read the EPA-approved label is equivalent to including a "statement" of the terms of restriction, shoots wide of the mark and misses the protective intent of the relevant statutory provision and its implementing regulation. The statute and regulation governing advertising are clearly intended as prophylactic health and safety measures designed to communicate the risks inherent in the product's use and discourage even preliminary interest in the product by those who are not legally permitted to use it. The pesticide label, on the other hand, while indicating limitations on use, contains far more detailed information and is primarily intended to convey specific instructions on proper use by purchasers.

Id. at *30-31.

Such cogent reasoning is difficult to refute. The plain meaning of the requirement that an advertisement of a restricted use pesticide "contain a statement of its restricted use classification" is that the advertisement include, at the very least, some language conveying that the pesticide's use is restricted. The words "always read and follow label directions" undoubtedly fails to communicate that message. Moreover, as noted by Judge Biro, a reference to an RUP's label containing the restricted use classification is at odds with the regulation's directive that the advertisement itself "contain" the restricted use classification. To find that such a reference satisfies the regulation is also at odds with the prophylactic intent of the regulation. For the foregoing reasons, I conclude that the subject materials failed to comply with the regulation at 40 C.F.R. § 152.168, as alleged.

3. Whether Complainant Appropriately Counted the Number of Violations for Each Alleged Act of Unlawful Advertising under FIFRA

a. Positions of the Parties

i. Complainant's Motion

To determine the number of violations arising from unlawful acts of advertising under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), Complainant urges that the "unit of violation" be based on each individual act of advertising. Memo at 29. As support for its position, Complainant cites precedent from the EAB as establishing that the determination of whether unlawful acts under Section 12 of FIFRA, 7 U.S.C. § 136j, give rise to a single or multiple violations of the statute is a question of statutory construction, beginning with the plain language of the statute itself, and that the specific act designated to be unlawful is central to the determination. Memo at 29-30 (citing numerous EAB decisions). Because the specific act designated as unlawful under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), is the act of advertising, Complainant argues, "it should be determined that the unit of violation be based on the number of proven instances of advertising." Memo at 30. According to Complainant, such a holding would be consistent with not only the plain language of the statute but also a host of other considerations, including the consumer protection goals of FIFRA; the EAB's rejection of an interpretation of the unit of violation under Sections 12(a)(1)(A) and (E) of FIFRA, 7 U.S.C. § 136j(a)(1)(A) and (E), that would permit multiple distributions or sales to amount to a single violation; and the decision of Chief Administrative Law Judge Susan L. Biro in *Liphatech*, which addressed the appropriate manner of determining the "unit of violation" under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), and found it to be based on each individual act of advertising. Memo at 30-31 (citing various authorities).

Complainant proceeds to argue that no genuine disputes of material fact exist with respect to the number of individual acts of advertising arising from the dissemination of the materials at issue and that the preponderance of the evidence supports the number of violations alleged. Memo at 31-37. First, regarding the direct mailers sent in March of 2012 to individuals associated with various agricultural farms (violations 1-9,645), Complainant points to a list of individuals' names supplied by Respondent and identified as the intended recipients of the direct mailer, which,

according to both Respondent and Complainant, consisted of 9,645 entries. *Id.* at 31 (citing Convery Declaration ¶ 14.b; CX 29 at EPA 0960-1145, EPA 0763). With respect to the direct mailers sent in March of 2012 to individuals associated with retailers in Respondent's product distribution chain (violations 9,646-12,267), Complainant similarly points to a list of individuals' names supplied by Respondent and identified as the intended recipients of the direct mailer, which, according to both Respondent and Complainant, consisted of 2,622 entries. *Id.* at 33 (citing Convery Declaration ¶ 14.a; CX 29 at EPA 0783-0833, EPA 0763). Complainant urges that each of these direct mailers be treated as a distinct act of advertising for which Respondent may be held liable, maintaining that the relevant act that determines the unit of violation is to advertise (i.e., cause a direct mailer to be sent), not to decide to advertise (i.e., decide to cause direct mailers to be sent), as Respondent argues in its Answer. *Id.* at 31-34 (citing Complaint and Answer ¶¶ 30, 39).

Turning to the material printed in the *Progressive Forage Grower* periodical (violations 12,268-12,270), Complainant points to Respondent's admission in its Answer that "it caused its ad(s) to be printed in the April, May and July 2012 issues of the *Progressive Forage Grower* magazine" and argues that each issue constitutes a distinct act of advertising for which Respondent may be held liable. Memo at 35 (citing Complaint and Answer ¶ 41). As it argued with respect to the direct mailers, Complainant contends that the relevant act that determines the unit of violation for the materials printed in the *Progressive Forage Grower* periodical is to advertise (i.e., cause an advertisement to appear in an issue of a magazine), not to decide to advertise (i.e., decide to cause an advertisement to appear in an issue of a magazine), as Respondent argues in its Answer. Memo at 35 (citing Complaint and Answer ¶ 47). As for the material printed in *The Sunflower* periodical (violation 12,271), Complainant points to Respondent's admission in its Answer that "it caused its advertisement to be printed in the March/April 2012 issue of *The Sunflower* magazine" and argues that that act constitutes at least one distinct act of advertising for which Respondent may be held liable. *Id.* at 36 (citing Complaint and Answer ¶ 49).

With respect to the testimonial sell sheet posted on Stallion Insecticide's product page on Respondent's website in January of 2012 (violation 12,272), Complainant points to Respondent's admission in its Answer that "it caused the testimonial sell sheet to be posted on its website on the product's webpage in January 2012" and argues that that act constitutes at least one distinct act of advertising for which Respondent may be held liable. Memo at 37 (citing Complaint and Answer ¶ 57). Finally, in regards to the February 10, 2011 article about Stallion Insecticide entitled "FMC Announces Stallion™ Insecticide for Multi-Crop Use" and posted on the *PRWeb* online news distribution and publicity website (violation 12,273), Complainant points to Respondent's admission in its Answer that it caused the article to be posted and argues that that act constitutes at least one distinct act of advertising for which Respondent may be held liable. *Id.* at 37 (citing Complaint and Answer ¶ 65).

ii. Respondent's Opposition

Respondent first objects to Complainant's approach to calculating the number of violations for each alleged act of advertising as "internally inconsistent, unreasonable, arbitrary and capricious – and certainly not free of genuine issues of material fact." Opposition at 3. As an example, Respondent argues that Complainant "correctly alleges a single violation" related to Respondent's decision to print a purported advertisement of the subject pesticide in an issue of *The*

Sunflower periodical, thus "focus[ing] on [Respondent's] single act to request that print." *Id.* (citing Complaint ¶ 49). Conversely, Respondent argues, Complainant inappropriately alleges 9,645 violations related to Respondent's "single act" of causing a direct mailer to be sent to certain individuals associated with various agricultural farms. Opposition at 3 (citing Complaint ¶ 22). In keeping with the former manner of counting the number of violations, Respondent maintains that only four units of violation are appropriate: one for its decision to cause the material to be printed in periodicals, one for its decision to cause the material to be printed in the direct mailer, and two for its decisions to cause the material to be posted on two websites. Opposition at 4.

Aside from the parties' disagreement on the appropriate manner of counting the units of violation for each alleged act of advertising, Respondent continues, genuine issues of material fact exist with respect to the number of intended recipients of the direct mailers even under Complainant's approach, as demonstrated by materials in the record showing that some of the direct mailers were returned as undeliverable or were duplicative on account of being sent to more than one individual associated with the same agricultural farm or retailer. Opposition at 4-5 (citing RX 61, Tabs B and D). Respondent argues that, in addition to the foregoing documentary evidence, it intends to proffer testimony from Mr. Orme at the hearing regarding "the reduction in numbers [of the units of violation] due to the returned and duplicate mailers, as well as other evidence demonstrating [that Complainant's] alleged number of violations is inflated, even under [Complainant's] theory of how units of violation should be counted." Opposition at 4-5 (citing Orme Declaration ¶ 8).

iii. Complainant's Reply

In its Reply, Complainant challenges Respondent's position on the appropriate manner of counting the number of violations, first noting that Respondent fails to cite any "statutory basis or argument" for its position. Reply at 12. Complainant then argues:

> Not only does Respondent's position miss the mark as to the relevant act that determines the unit of violation [under] Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), which is *to advertise*, it is wholly inconsistent with the consumer protection goals of FIFRA's advertising provisions as it would permit 12,267 individual acts of violative advertising through direct mail – each failing to state the pesticide product's RUP classification and thus communicate the risks and limitations inherent with its purchase and use to potential purchasers – to be penalized as a single decision.

Reply at 12-13.

Complainant next challenges Respondent's arguments related to the presence of genuine issues of material fact concerning the direct mailers, namely those characterized by Respondent as having been returned as undeliverable or duplicative. Complainant contends that those direct mailers are irrelevant for purposes of liability, which, according to Complainant, "attached at the time each direct mailer was sent." Reply at 13. Conversely, Complainant asserts, it excluded for purposes of calculating the proposed penalty those direct mailers identified by Respondent as

having been returned. *Id.* (citing RX 61; RX 76). As for the direct mailers identified by Respondent as "duplicates," Complainant maintains that such a characterization is "both erroneous and misleading" because those direct mailers were not, in fact, duplicative:

> Respondent identifies as "duplicates" mailers sent to all individuals, beyond the first individual, that are associated with the same agricultural farm or the same retailer . . . . In counting only the mailer sent to the first individual associated with a grower or retailer regardless of how many mailers were actually sent, Respondent is essentially counting the number of growers and retailers.

Reply at 14 n.6. Complainant objects to this approach, arguing that Respondent fails to cite any "statutory basis or legal argument for using only this subset of violative mailers to determine the number of advertising violations." *Id.* at 14. To the extent that this approach has any relevance, Complainant maintains, "it would be for purposes of penalty only, not liability." *Id.* Noting that it does not dispute Respondent's factual representations on the subject, Complainant further argues that the proposed testimony of Mr. Orme is unwarranted as such testimony "does not bear on any genuine issue of material fact under either party's theory of liability." *Id.* at 14-15 (citing Opposition at 5; Orme Declaration ¶ 8).

Finally, Complainant objects to Respondent's characterization of the number of violations alleged in the Complaint as "internally inconsistent, unreasonable, arbitrary and capricious." Reply at 15. Referring specifically to the number of violations alleged with respect to the direct mailers, Complainant maintains that this number is "consistent with applicable law and policies; directly corresponds with the evidence, taking into account the volume, breadth and uniquely direct and personalized nature of the direct mailer advertisements; and is within Complainant's prosecutorial discretion." Reply at 15-16.

b. Analysis

Upon consideration of the parties' arguments, I conclude that a determination of the issue concerning the number of violations arising from Respondent's unlawful acts of advertising under Section 12(a)(2)(E) of FIFRA is appropriate to defer until after hearing. As an initial matter, such a determination is most relevant to the assessment of a penalty for Respondent's conduct, not whether genuine issues of material fact exist and Complainant is entitled to judgment as a matter of law with respect to Respondent's liability for unlawful acts of advertising, which is the question presented by Complainant's Motion. Moreover, this issue seemingly would benefit from the presentation of additional evidence and argument by the parties at hearing and in their post-hearing briefs, particularly with respect to the direct mailers at issue. As previously explained, Complainant objects to Respondent's approach to calculating the number of intended recipients of the direct mailers disseminated by Respondent. Specifically, Complainant takes issue with Respondent's use of the term "duplicates" to describe direct mailers sent to all individuals, beyond the first individual, identified as being affiliated with a particular agricultural farm or retailer in the lists of intended recipients that Respondent supplied to EPA during its investigation of Respondent's activities, and then Respondent's omission of those purported duplicates from its calculation of the number of intended recipients of the direct mailers. Such an approach, in

essence, counts only the number of agricultural farms and retailers, rather than each potential consumer affiliated with those entities, and as observed by Complainant, Respondent does not cite any legal authority for it.

Respondent's characterization and omission of some of the direct mailers as "duplicates" may not entirely be without merit, however, as some individuals do appear to have been sent multiple copies of the direct mailer at issue, as reflected in the lists of intended recipients supplied to EPA by Respondent. *See, e.g.*, CX 29 at EPA 1002 (listing the same name three times in association with a particular farm); CX 29 at EPA 1035 (listing the same name two times in association with a particular farm); CX 29 at EPA 1105 (listing the same name two times, along with a common nickname, in association with a particular corporation).[14] By way of example, under Respondent's approach, it would identify the following shaded names as "duplicates" and omit those direct mailers from its calculation:

	AGRICULTURAL FARM	FIRST NAME	LAST NAME
1	Farm of Doe	John	Doe
2	Farm of Doe	Jeffrey	Doe
3	Farm of Doe	Jeffrey	Doe
4	Farm of Doe	Joseph	Doe
5	Farm of Doe	Jane	Doe
6	Farm of Doe	Jeff	Doe

Conversely, under Complainant's approach, each of the six individuals identified would be counted in calculating the number of direct mailers disseminated by Respondent because each represents an instance where Respondent caused a direct mailer to be sent to a potential consumer. Conceivably, however, the second, third, and sixth entries represent the same individual given that those entries list names that are identical or nearly identical. Complainant does not appear to contemplate such a possibility, the extent to which it affects the number of intended recipients for the direct mailers, and under Complainant's approach, the number of individual acts of advertising carried out by Respondent. Accordingly, I find that some questions remain with respect to the material facts underlying the number of violations arising from Respondent's dissemination of the subject materials and that further development of the issue at hearing and through post-hearing briefs could be helpful in shaping my determination. For the foregoing reasons, I consider accelerated decision on this issue to be inappropriate, and I hereby defer my consideration of it until after an evidentiary hearing.

VII. REQUEST FOR ORAL ARGUMENT

As noted above, Respondent filed a Request for Oral Argument on Complainant's Motion, which Complainant opposed. The Rules of Practice provide that "[t]he Presiding Officer . . . may permit oral argument on motions in its discretion." 40 C.F.R. § 22.16(d). Pursuant to this

[14] Respondent has claimed that the lists of intended recipients consist of confidential business information ("CBI"). Identifying the intended recipients by name does not appear to be necessary for purposes of my analysis. Accordingly, in the interest of taking every precaution to protect that information from disclosure, this Order cites particular portions of the proposed exhibits purported to contain CBI but refers only generally to the intended recipients listed therein.

authority, I advised the parties in the Prehearing Order that "a party may submit a written request for oral argument upon filing a motion, a response to a motion, or a reply" and that such a request "may be granted, in my discretion, where further clarification and elaboration of arguments would be of assistance in ruling on the motion." Prehearing Order at 4.

In its Request, Respondent urges that oral argument "is warranted by the complexity and seriousness of the issues presented" by Complainant's Motion and the potential for this Tribunal's ruling on those issues to have "far-reaching consequences for FIFRA advertising jurisprudence." Request for Oral Argument at 1-2. Respondent focuses in particular on the first and third issues discussed above, first arguing that "[o]ral argument would allow the Tribunal to further evaluate whether, in the absence of any governing legal definitions, testimony is needed to determine if [Respondent] issued 'advertisements' and whether [Respondent's] conduct constituted 'advertising' within the meaning of [FIFRA]." *Id.* Respondent then notes that the appropriate manner of counting the units of violation in this proceeding presents an issue of first impression and contends that "having [the parties] elaborate on their arguments, and explain the significance of the facts in this regard, would assist this Tribunal in ruling on Complainant's Motion." *Id.* at 2.

Complainant objects to the Request for Oral Argument on various grounds, including that Respondent submitted it after briefing on Complainant's Motion was complete, in contravention of the language of the Prehearing Order stating that "a party may submit a written request for oral argument *upon filing a motion, a response to a motion, or a reply*." Response at 3 (quoting Prehearing Order at 4 (emphasis added in Response)). Complainant also points to specific sections of its Memorandum, Respondent's Opposition, and Complainant's Reply to contend that the parties "provided an ample explanation of the facts and arguments" at issue and that "no additional clarification – by oral argument otherwise – is necessary" for this Tribunal to rule on Complainant's Motion. Response at 1-2.

Upon consideration, I agree with Complainant that oral argument is unnecessary. As discussed above, applicable legal precedent dictates that I ascribe the common meanings of "advertise" and "advertisement" to those terms as used in FIFRA and the implementing regulations, and I was not persuaded by the arguments in Respondent's Opposition that testimony bearing on the meaning of those terms at a hearing is warranted or appropriate. While I appreciate that the interpretation of those terms in this proceeding may have far-reaching consequences, as argued by Respondent, I am not convinced that any elaboration of the parties' positions during oral argument would impact my ruling and thus be a fruitful exercise. As for the appropriate manner of counting the units of violation in this proceeding, I have deferred ruling on that issue until after an evidentiary hearing; therefore, it is not ripe for oral argument. For the foregoing reasons, Respondent's Request for Oral Argument is denied.

VIII. ORDER

1. Complainant's Motion for Partial Accelerated Decision as to Liability for Violations 1 through 12,273 of the Complaint is **GRANTED, IN PART**.

2. As a "person" and the "registrant" of Stallion Insecticide, a product registered under Section 3 of FIFRA, 7 U.S.C. § 136a, and classified for restricted use, Respondent

"advertised" Stallion Insecticide by causing the direct mailers, periodical materials, testimonial sell sheet, and article described in the Complaint to be disseminated, and such "advertisements" did not include the statement "Restricted Use Pesticide" or any statements of the terms of restriction of Stallion Insecticide. Respondent is thus liable for violating Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), as alleged in the Complaint.

3. Respondent's Request for Oral Argument on Complainant's Motion is **DENIED**.

4. A hearing in this matter will be held to take evidence and argument on the unresolved issues remaining, namely, the appropriate number of units of violation for the violations of Section 12(a)(2)(E) of FIFRA, 7 U.S.C. §136j(a)(2)(E), found herein; the liability of Respondent for the alleged violations of Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), charged in Violations 12,274 through 12,379 of the Complaint; and the appropriate penalty, if any, to assess against Respondent. On or before **July 28, 2017**, each party shall file a statement identifying any periods of unavailability for a hearing during the remainder of calendar year 2017, and an estimate of the amount of time needed to present the party's direct case. An order scheduling the hearing will be issued shortly thereafter.

5. A ruling on Complainant's Motion *in Liminae* is forthcoming. As for Complainant's Motion for Discovery, Respondent filed an Opposition to Complainant's Motion for Discovery and a First Supplemental Prehearing Exchange, each of which claims that the information contained in the First Supplemental Prehearing Exchange is responsive to Complainant's Motion for Discovery. Complainant did not file a reply. In Complainant's statement regarding its availability for hearing and the amount of time needed to present its case, Complainant shall also state whether the discovery sought has now been obviated either by Respondent's First Supplemental Prehearing Exchange, as purported, or by this Order.

Christine Donelian Coughlin
Administrative Law Judge

Dated: July 17, 2017
Washington, D.C.

In the Matter of *FMC Corporation*, Respondent.
Docket No. FIFRA-03-2015-0248

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Complainant's Motion for Partial Accelerated Decision as to Liability for Violations 1 through 12,273 of the Complaint and Respondent's Request for Oral Argument,** dated July 17, 2017, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following parties in the manner indicated below.

Mary Angeles
Paralegal Specialist

Original and One Copy by Hand Delivery to:
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Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
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Dated: July 17, 2017
Washington, D.C.