



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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REPLY TO THE ATTENTION OF:

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C-14J

September 28, 2010

Honorable Barbara A. Gunning
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

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

Dear Judge Gunning:

Enclosed, please find true, accurate and complete copies of Complainant's Initial Prehearing Exchange, together with true, accurate and complete copies of Complainant's Exhibits 1 through 115.

Should the Court have any questions, please do not hesitate to contact me at (312) 886-0568.

Sincerely,

A handwritten signature in black ink, appearing to read "Midhi K. O'Meara", written over a horizontal line.

Midhi K. O'Meara
Associate Regional Counsel

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

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:)
)
LIPHATECH, INC.) COMPLAINANT'S INITIAL
MILWAUKEE, WISCONSIN) PREHEARING EXCHANGE
)
Respondent.)
_____) Docket No. FIFRA-05-2010-0016

COMPLAINANT'S INITIAL PREHEARING EXCHANGE

In accordance with the Prehearing Order issued by this Honorable Court on June 30, 2010, Complainant, the Director, Land and Chemical Division, Region 5, United States Environmental Protection Agency (U.S. EPA, Complainant or Agency), through his undersigned attorneys, hereby files this Complainant's Initial Prehearing Exchange pursuant to Section 22.19 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), codified at 40 C.F.R. § 22.19.

I. The names of any expert or other witnesses that Complainant intends to call at the hearing, together with a brief narrative summary of each witness's expected testimony.

A. Fact Witnesses

Complainant may call the following individuals to testify as fact witnesses in the hearing in this matter:

1. **Mr. Shawn E. Rich**
Field Investigator
Kansas Department of Agriculture

Mr. Shawn Rich is a field investigator for the Kansas Department of Agriculture (KDA). Mr. Rich's testimony may include, but not be limited to, the matters described in the following paragraphs.

Mr. Rich may testify that on November 9, 2007, he was asked to investigate a complaint, received by KDA's Topeka office, that Liphatech, Inc. was broadcasting radio advertisements for one of its registered pesticides without advertising that it was a "Restricted Use Pesticide." He may testify that the initial complaint originated from the Nebraska Department of Agriculture. He may testify that as a result of the complaint, he contacted Golden Plains Ag Network (Golden Plains), the radio network alleged to have broadcast the advertisements, in Garden City, Kansas on November 19, 2007.

He may testify that on November 21, 2007, he met with Mr. John Jenkinson, the Farm Director of Golden Plains, at the Golden Plains office in Dodge City, Kansas. Mr. Rich may testify that Mr. Jenkinson informed him that Liphatech bought air time from Golden Plains. He may testify that Liphatech provided Mr. Jenkinson with 30 second and 60 second digital audio files of advertisements to broadcast and promote its pesticide product, Rozol¹ to control prairie dogs. He may testify that Mr. Jenkinson informed him that the radio network played the 30 and 60 second advertisements for Rozol twice a day at its Kansas and Colorado stations in accordance with a schedule worked out with Liphatech. He may testify that Mr. Jenkinson

¹ Complainant's Initial Prehearing Exchange references several products labeled with the trade name Rozol: (1) Rozol Pocket Gopher II, EPA Reg. No. 7173-244, also known as "Rozol Pocket Gopher Burrow Builder Formula," sold for control of black-tailed prairie dogs as "Rozol Prairie Dog Bait" under special local needs labeling in certain states as provided for by Section 24(c) of FIFRA, 7 U.S.C. § 136v(c); (2) Rozol Pocket Gopher Bait, EPA Reg. No. 7173-184; and (3) Rozol Prairie Dog Bait, EPA Reg. No. 7173-286, which superseded the special local needs products. Unless otherwise indicated, Rozol refers to EPA Reg. No. 7173-244, and the special local needs registrations associated with this registration.

informed him that the network broadcast the 30 and 60 second advertisements for Rozol to control prairie dogs at its Kansas radio stations located in Goodland, Colby, Dodge City, Pratt and Great Bend. He may testify that Mr. Jenkinson informed him that the network broadcast the 30 and 60 second advertisements at its Colorado radio stations located in Wray, Yuma and Sterling.

Mr. Rich may testify that he listened to both the 30 and 60 second audio files with Mr. Jenkinson. Mr. Rich may testify that Mr. Jenkinson informed him that the audio files that Liphatech provided to the radio network were not edited by the radio station and were broadcast on the radio unedited. Mr. Rich may testify that the 30 and 60 second advertisements did not state that Rozol was a "Restricted Use Pesticide," nor did they make a statement about any terms of restrictions. He may further testify that Mr. Jenkinson emailed him the Liphatech 30 and 60 second audio advertisements for Rozol after the meeting. Mr. Rich may testify that he then sent this email on to Mr. Shawn Hackett, a field staff supervisor for the KDA, so that Mr. Hackett could record the files on a compact disc (CD).

He may testify that he learned that the original sales records relating to the Liphatech radio advertisements were kept at the radio station's main office, Rocking M Radio, located in Manhattan, Kansas. He may also testify that he collected a statement from Mr. Jenkinson attesting to the facts Mr. Rich learned during the meeting. Mr. Rich may also testify that he drafted a report documenting his investigation. See Complainant's Exhibit (CX) 8 and 9 for all supporting documentation and a CD containing the 30 and 60 advertisements for Rozol to control prairie dogs.

Mr. Rich may also testify to additional facts as necessary to respond to assertions or arguments raised by Respondent. To the extent deemed necessary by the Court, Mr. Rich will

provide testimony sufficient to authenticate the documents that he refers to during his testimony at the hearing in this matter. See Mr. Rich's declaration at CX 103.

2. **Mr. Shawn Hackett**
Environmental Scientist III
Kansas Department of Agriculture

Mr. Shawn Hackett is a field staff supervisor for the KDA. Mr. Hackett's testimony may include, but not be limited to, the matters described in the following paragraphs.

Mr. Hackett may testify that he was contacted by Mr. Shawn Rich of the KDA regarding an investigation that Mr. Rich conducted at the Golden Plains office on November 21, 2007. He may testify that he agreed to follow up on Mr. Rich's investigation by conducting an investigation at Golden Plains' main office in Manhattan, Kansas.

Mr. Hackett may further testify that on November 28, 2007, he arrived at the main office of Golden Plains in Manhattan, Kansas. He may testify that he then met with the President/CEO of Rocking M Radio, Mr. Monte Miller. He may testify that Mr. Miller informed him that the records he was seeking were not at the Manhattan location after all. He may further testify that he learned that the records were at KXXX, the Colby, Kansas radio station where the contract between Liphatech and the radio stations originated.

Mr. Hackett may further testify that Mr. Miller communicated with Ms. Radonda Thomas at KXXX in Colby, Kansas to obtain the documents Mr. Hackett was seeking. He may further testify that he received an email from Ms. Thomas on November 28, 2007, which contained a list of dates and stations that aired the Liphatech radio advertisements for its Rozol product to control prairie dogs.

He may also testify that he received an email from Mr. Shawn Rich which contained audio files of the two radio advertisements that were being broadcast by Golden Plains and its

affiliates on behalf of Liphatech. He may further testify that he transferred the two audio files that contained the Liphatech radio advertisements onto a CD on November 29, 2007. Mr. Hackett may testify that he completed a report to document his investigation. See CX 8 and 9 for all supporting documentation.

Mr. Hackett may also testify to additional facts as necessary to respond to assertions or arguments raised by Respondent. To the extent deemed necessary by the Court, Mr. Hackett will provide testimony sufficient to authenticate the documents that he refers to during his testimony at the hearing in this matter. See Mr. Hackett's declaration at CX 104.

3. **Mr. Mark Klapperich**
Agricultural Program Specialist
Colorado Department of Agriculture

Mr. Mark Klapperich is an agricultural program specialist for the Colorado Department of Agriculture (CDA). Mr. Klapperich's testimony may include, but not be limited to, the matters described in the following paragraphs.

Mr. Klapperich may testify that on December 4, 2007, he attended the Colorado Weed Management Association Fall Conference in Pueblo, Colorado. He may testify that he spoke with Mr. Nick Bryars, a Northern High Plains sales associate, at the convention. He may testify that Mr. Bryars was a sales associate for Liphatech, Inc. He may testify that Mr. Bryars was advertising Liphatech's Rozol products at his booth. He may testify that he obtained a folder of information from Mr. Bryars' booth, which included: (1) Mr. Bryars' business card; (2) a "Rozol Prairie Dog Bait" special local needs label under FIFRA Section 24(c), 7 U.S.C. § 136v(c); (3) a "Black-tailed Prairie Dog Control Research Bulletin," dated October 17, 2007; (4) a pamphlet entitled "Understanding the true cost of treatment: Doing Prairie Dog Control Saves Time and Money," dated November 5, 2007; and (5) a copy of an article entitled "Are livestock weight

gain affected by black-tailed prairie dogs?” He may further testify that he took several photographs of Mr. Bryars’ booth at the conference with his cell phone camera.

He may further testify that he noticed that both the informational packet that he got from Mr. Bryars’ booth and the poster being displayed at Mr. Bryars’ booth did not advertise the product as a “Restricted Use Product,” nor did the poster or packet specify that the “Rozol Prairie Dog Bait” could only be used in specific counties in Colorado. He may further testify that he came back to the office and reported his observations to Ms. Laura Quakenbush, the pesticide registration coordinator for CDA. See CX 12 for all supporting documentation.

Mr. Klapperich may also testify to additional facts as necessary to respond to assertions or arguments raised by Respondent. To the extent deemed necessary by the Court, Mr. Klapperich will provide testimony sufficient to authenticate the documents that he refers to during his testimony at the hearing in this matter. See Mr. Klapperich’s declaration at CX 105.

4. **Mr. Charles King**
Program Specialist
Division of Agricultural Services
South Dakota Department of Agriculture

Mr. Charles King works in the Division of Agricultural Services at the South Dakota Department of Agriculture (SDDA). Mr. King’s testimony may include, but not be limited to, the matters described in the following paragraphs.

He may testify that on September of 2009, he was reviewing a registration application submitted by Liphatech for “Rozol Prairie Dog Bait,” EPA Reg. No. 7173-286.² As a result of reviewing the application materials, Mr. King went to Liphatech’s website at www.liphatech.com and reviewed Liphatech’s advertising material on its website. He may

² As noted above, this registration superseded the special local needs supplemental registration under FIFRA Section 24(c), 7 U.S.C. § 136v(c), which allowed Liphatech to sell the product under EPA Reg. No. 7173-244 previously.

testify that one of the advertisements he reviewed on Liphatech's website was "Understanding the true cost of treatment: Proper Prairie Dog Management Saves Time and Money." He may testify that he identified potential violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 *et seq.*, in that advertisement for "Rozol Prairie Dog Bait." He may testify that one of the violations he identified was that the advertisement compared the use of "Rozol Prairie Dog Bait" to Zinc Phosphide. He may also testify that he was also concerned that the advertisement promoted the use of baiting equipment that was mounted on an all-terrain vehicle, despite the fact that the label for "Rozol Prairie Dog Bait" requires that the pesticide be applied by hand and at least six inches down a burrow. He may further testify that on October 19, 2009, he printed a copy of this advertisement from Liphatech's website for his records.

He may testify that after discovering these potential violations, he brought them to the attention of his supervisor, Mr. Brad Berven. He may testify that he provided a copy of the advertisement that he printed from Liphatech's website to Mr. Berven. He may also testify that he drafted a letter, which Mr. Berven signed, that referred these potential violations to U.S. EPA. He may further testify that he attached the following documents to the referral to U.S. EPA: (1) a copy of the label for "Rozol Prairie Dog Bait," EPA Reg. No. 7173-286; and (2) a copy of "Understanding the true cost of treatment: Proper Prairie Dog Management Saves Time and Money," dated September 24, 2009. See CX 26 for all supporting documentation.

Mr. King may also testify to additional facts as necessary to respond to assertions or arguments raised by Respondent. To the extent deemed necessary by the Court, Mr. King will provide testimony sufficient to authenticate the documents that he refers to during his testimony at the hearing in this matter. See Mr. King's declaration at CX 106.

5. **Mr. Arthur J. Fonk**
Environmental Enforcement Specialist
State of Wisconsin
Department of Agriculture, Trade and Consumer Protection

Mr. Arthur Fonk is an environmental enforcement specialist for the State of Wisconsin, Department of Agriculture, Trade and Consumer Protection (WDATCP). Mr. Fonk's testimony may include, but not be limited to, the matters described in the following paragraphs.

Mr. Fonk may testify that on June 2, 2008, he conducted an inspection at Liphatech's facility located at 3600 West Elm Street, Milwaukee, Wisconsin. He may testify that when he arrived at the facility, he met Ms. Rachel Callies (an assistant to Liphatech's Manager of Regulatory Compliance, Mr. Thomas Schmit) and Mr. Carl Tanner (the CEO of Liphatech). He may further testify that he issued a Federal Stop Sale, Use and Removal Order (SSURO) to Liphatech for Rozol, EPA Reg. No. 7173-244, for control of both pocket gophers and black-tailed prairie dogs. He may testify that this product was also registered under a FIFRA Section 24(c), 7 U.S.C. § 136v(c), "special local needs" supplemental label under the parent product, Rozol, EPA Reg. No. 7173-244, to control black-tailed prairie dogs. He may further testify that he was taken to the warehouse where the Rozol was stored and that he photographed the inventory in the warehouse. He may also testify that at that time, Ms. Callies gave him an inventory list for Rozol that she printed from the computer system that day. He may further testify that he requested certain information relating to the Rozol product. He may further testify that he scheduled another meeting to return and pick up the information that he requested.

Mr. Fonk may further testify that he returned to the facility on June 9, 2008. On that day, he met with Mr. Tanner, Ms. Callies and Mr. Schmit. He may testify that during that visit, Mr. Schmit asked him to provide Liphatech with a written request of the information U.S. EPA was

seeking. Mr. Fonk provided him with a written request and agreed to return on a subsequent date to collect the information that was requested.

Mr. Fonk may further testify that he returned on June 19, 2008, to collect the information that he had requested. He may testify that on that day, he met with Mr. Schmit and Ms. Callies. He may testify that on that day, Mr. Schmit provided him a number of documents, which included: (1) a written statement by Mr. Schmit regarding advertising and regulatory compliance at Liphatech; and (2) a three ring binder containing information regarding Rozol for the control of both pocket gophers and black-tailed prairie dogs, which included: information posted on Liphatech's website; information relating to its Direct Mail Packages for Rozol; information relating to print advertising for Rozol; and information relating to radio advertisements for Rozol to control prairie dogs, including transcripts of the radio advertisements that were broadcast. See CX 14, 14a and 112 for all supporting documentation.

Mr. Fonk may also testify to additional facts as necessary to respond to assertions or arguments raised by Respondent. To the extent deemed necessary by the Court, Mr. Fonk will provide testimony sufficient to authenticate the documents that he refers to during his testimony at the hearing in this matter.

6. **Ms. Claudia Niess**
Enforcement Officer
U.S. EPA, Region 5
Pesticides and Toxics Compliance Section

Ms. Claudia Niess is an Enforcement Officer with the Pesticides and Toxics Compliance Section at U.S. EPA, Region 5. Ms. Niess' testimony may include, but not be limited to, the matters described in the following paragraphs.

Ms. Niess may testify that in the early part of 2008, both Regions 7 and 8 contacted Region 5 to inform Region 5 of potential violations relating to Liphatech's product Rozol, EPA Reg. No. 7173-244, and in particular, for its special local needs use of the product to control black-tailed prairie dogs in certain States and counties within those States. See CX 8 and 12. She may also explain that in calendar years 2007 and 2008, Rozol, EPA Reg. No. 7173-244, was also registered under the authority of Section 24(c) of FIFRA, 7 U.S.C. § 136v(c), to control black-tailed prairies dogs under special local needs supplemental labels for the States of Kansas, Nebraska, Wyoming, Colorado, Texas and Oklahoma. She may explain how and why certain pesticides are registered under the authority of Section 24(c) of FIFRA, 7 U.S.C. § 136v(c).

She may testify that once Region 5 received these referral from Regions 7, she was assigned to be the case officer for the Liphatech matter. She may testify that the Region 7 referral to Region 5 included a CD from KDA that contained copies of the Rozol radio advertisements being broadcast by Golden Plains. See CX 9. She may testify that she listened to this CD and then she duplicated the CD for the enforcement file. See CX 10. She may also testify that she transcribed the audio advertisements on the CD for the enforcement file. See CX 11.

She may testify that from January 23 through January 24, 2008, she went to Liphatech's website at www.liphatech.com. She may testify that on those days she printed out a number of documents from the website. See CX 52.

She may testify that she began to review the registration files related to Liphatech's Rozol products, including EPA Reg. Nos. 7173-184, 7173-244, and 7173-286. She may explain how she determined which Rozol products were involved in this case, and she may explain the various labels she found that are associated with each of these products. See CX 1 through 7,

27a and 107. She may testify as to why certain products were labeled under the special local needs provisions of FIFRA Section 24(c), 7 U.S.C. § 136v(c), while others were labeled under FIFRA Section 3, 7 U.S.C. § 136a. She may testify that she also reviewed the Material Safety Data Sheets (MSDSs) for two Rozol products, EPA Reg. Nos. 7173-184 and 7173-244 (she may also testify that at a later date she reviewed the MSDSs for EPA Reg. No. 7173-286). See CX 72 and 73. She may testify that she was able to locate these MSDSs from Liphatech's website at www.liphatech.com.

She may testify that after reviewing the documentation that was sent to Region 5 from Regions 7 and 8, she requested that WDATCP conduct an inspection at the Liphatech facility located in Milwaukee, Wisconsin. She may testify that she also requested that WDATCP issue a SSURO to Liphatech at the time of its inspection. See CX 13.

She may further testify that as a result of Region 5's request WDATCP conduct an inspection at the Liphatech facility and she received WDATCP's inspection report and documentation that WDATCP collected at the Liphatech facility during its inspections from June 2 through June 19, 2008. See CX 14 and 14a. She may testify that she also received a copy of the fully executed Federal SSURO, which was issued to Liphatech by WDATCP on June 2, 2008. See CX 15. She may testify that she reviewed the documentation collected by WDATCP at Liphatech's facility. She may testify that she reviewed the transcripts of versions 1 through 4 of the radio advertisements and copies of the print advertisements that were provided by Liphatech in the documentation that WDATCP collected. See CX 42 through 45. She may also testify that she created a list of dates that each radio station broadcast radio advertisements for Liphatech regarding Rozol. See CX 46 through 49.

She may also testify that on or about June 11, 2008, she had a telephone conversation with Mr. Thomas Schmit, Manager for Regulatory Compliance for Liphatech. She may testify that they discussed the information that Region 5 was seeking from Liphatech, through WDATCP. She may testify that they also discussed the SSURO that was issued to Liphatech on June 2, 2008. She may testify that she learned that Liphatech advertises its Rozol products through (1) brochures that are sent to its dealers; (2) print advertisements; and (3) radio advertisements. She may testify that she and Mr. Schmit discussed the need to advertise Liphatech's "Restricted Use Products" with the required restricted use language as specified in FIFRA and its regulations. She may testify that she and Mr. Schmit also discussed the fact that Liphatech had failed to specify in its advertisements that Rozol could only be used in limited counties in Colorado and Texas to control prairie dogs, as required by the conditions of the applicable special local needs supplemental registrations. She may testify that Mr. Schmit told her that he did not feel it was necessary to disclose the counties in the advertisements because Rozol was so closely controlled at the point of sale. She may testify further that Mr. Schmit told her that he depends on the print labels to communicate the "Restricted Use Pesticide" status of the product since the special local needs supplemental label is required to be distributed with the sale of Rozol. See CX 16.

She may further testify that she received a letter from Mr. Schmit dated August 5, 2008. She may testify that, with this letter, Mr. Schmit provided her with certain information which included: (1) a copy of all the "Rozol Prairie Dog Bait" special local needs labels; (2) a list of companies that distribute Rozol to control prairie dogs; (3) a photograph of a draft revised poster with the language "Restricted Use Pesticide" included in the poster (she may testify that she noted that the revised poster still did not list the specific counties in Colorado and Texas that

were allowed to use Rozol to control prairie dogs); (4) examples of advertising that shows Rozol to control prairie dogs as a “Restricted Use Pesticide” (the revised advertisement still did not list the specific counties in Colorado and Texas in which the use of Rozol was authorized for control of prairie dogs); (5) four different revised versions (varying for the States in which it would be broadcast) of radio advertisements which included a statement that Rozol is a “Restricted Use Pesticide” (the revised advertisements still did not list the specific counties in Colorado and Texas that were allowed to use Rozol to control prairie dogs); (6) a sample letter that would be sent out to all of Liphatech’s distributors requesting that they destroy all non-compliant advertising and marketing literature; (7) a copy of a “Communications Approval Form” to be used by Liphatech to ensure that future advertising and marketing materials (including print and broadcast) are complying with FIFRA requirements; and (8) a list of radio stations that were broadcasting advertisements for Rozol. See CX 17.

Ms. Niess may also testify that she submitted an enforcement case review (ECR) to the Office of Pesticides Program (OPP) at U.S. EPA’s Headquarters in Washington D.C. She may explain the ECR process. In the ECR, she requested that OPP review Liphatech’s advertising and marketing materials to opine as to whether or not Liphatech was making claims that were false or misleading. See CX 18. She may further testify that she received a response to her ECR request on October 16, 2008, in which OPP opined that a number of claims made in Liphatech’s advertising and marketing materials were false or misleading. See CX 19.

Ms. Niess may further testify that on August 22, 2008, Region 5 issued an amended Federal SSURO to Liphatech. The amended Federal SSURO allowed Liphatech to distribute or sell Rozol, EPA Reg. No, 7173-244, as long as the distribution and sale of the pesticide was in full compliance with the registration of the product under Sections 3 and 24 (c) of FIFRA, 7

U.S.C. §§ 136a and 136v(c), including, but not limited to, proper labeling under its registrations. The amended Federal SSURO also required that all future advertising of the product comply with FIFRA. The amended Federal SSURO specified that Liphatech could not distribute the following marketing materials or labeling for Rozol, EPA Reg. No. 7173-244: (1) the handout titled “Black-tailed Prairie Dog Control Research Bulletin” (Research Bulletin); (2) the handout titled “Understanding the True Cost of Treatment;” (3) the booklet titled “Control Pocket Gophers & Black-Tailed Prairie Dogs;” and (4) any other similar labeling for the product, until further notice from U.S. EPA. The amended Federal SSURO also stated that any and all future references to Rozol being advertised in Colorado and Texas explicitly state that the product is not registered for such use in all counties or, in the alternative, explicitly state the counties in Colorado and Texas where Rozol could be used. See CX 21.

Ms. Niess may testify that on or about November 12, 2008, she received a call from Mr. Schmit. She may testify that Mr. Schmit left a voicemail stating that he was calling to inquire about Liphatech’s advertising brochures and Liphatech’s ability to use the advertising brochures in the future. Ms. Niess may testify that she returned Mr. Schmit’s call and told him that the advertising materials identified in the amended SSURO contained language that EPA considered violative of FIFRA and could not be distributed. She may testify that Mr. Schmit told her that the brochures were expensive and that Liphatech wanted to be able to distribute them. Ms. Niess may testify that she again told Mr. Schmit that Liphatech could not distribute the advertising material because doing so would be a violation of FIFRA. See CX 25.

Ms. Niess may further testify that on November 18, 2008, she emailed a file to Mr. Schmit at Liphatech. She may testify that this email and the accompanying file highlighted claims in the Research Bulletin that OPP identified as false or misleading. She may testify that

she informed Mr. Schmit that Liphatech may not distribute any informational or advertising material that contained this violative language for the Rozol products, because the claims identified are substantially different from the claims made as part of the registration for Rozol. She may further testify that she and Mr. Schmit exchanged emails regarding Liphatech's advertising material and she provided further clarification that the same or similar claims that were identified by OPP as false or misleading in the Research Bulletin were also found in "Understanding the Cost of Treatment" and "Control Pocket Gopher & Black Tailed Prairie Dogs." She may testify that she then reiterated that all three brochures were making claims that violated both Sections 12(a)(1)(B) and (E) of FIFRA, 7 U.S.C. §§ 136j(a)(1)(B) and (E). See CX 20.

Ms. Niess may also testify that she received a letter from Mr. Schmit dated February 5, 2009. See CX 23. This letter provided information requested by U.S. EPA in a letter dated January 6, 2009. See CX 22. This letter also provided U.S. EPA with shipping records for Rozol, EPA Reg. No. 7173-244, from October 1, 2007 through June 2, 2008. The letter also included a certification signed by Mr. Schmit verifying that the information provided in the February 5, 2008 letter and its attachments was true, accurate and complete. See CX 23.

Ms. Niess may further testify that on September 18, 2009, U.S. EPA issued a Notice of Intent to File an Administrative Complaint to Liphatech. See CX 24.

She may testify that on November 18, 2009, she went on Liphatech's website located at www.liphatech.com to monitor the compliance of the advertising and marketing materials on Liphatech's website, including Rozol promotional information. She may testify that she discovered that Liphatech was continuing to make claims on its website that did not comply with FIFRA. She may testify that she found many of the claims that were being made on Liphatech's

website were similar to, if not the same as, language she had previously pointed out to Mr. Schmit in her November 18, 2008 email (CX 20) as violative of FIFRA. She may testify that she printed a number of advertisements she found on Liphatech's website on November 18, 2009, which included advertisements entitled: (1) "Rozol Prairie Dog Bait;" (2) "Understanding the True Cost of Treatment: Proper Prairie Dog Management Saves Time and Money;" and (3) "Control Range Rodents." She may testify as to how she navigated through Liphatech's website to find these various advertisements. See CX 28.

She may further testify that she also received an additional referral from Region 8 on December 2, 2009, regarding a newly registered Rozol Prairie Dog Bait product, EPA Reg. No. 7173-286. See CX 26.

She may further testify about Liphatech's new Rozol Prairie Dog Bait, EPA Reg. No. 7173-286. See CX 27. She may explain how the new registration superseded the previous special local needs registrations under FIFRA Section 24(c), 7 U.S.C. 136v(c), under Rozol, EPA Reg. No. 7173-244, for the control of prairie dogs. See CX 108.

She may further testify that on February 10, 2010, she again visited Liphatech's website. She may testify that she found that the website was the same as it was on November 18, 2009. She may testify that she printed out the following advertisements on that day: (1) "Rozol Prairie Dog Bait;" (2) "Understanding the True Cost of Treatment: Proper Prairie Dog Management Saves Time and Money;" and (3) "Control Range Rodents." She may testify as to how she navigated through Liphatech's website to find these various advertisements. See CX 29.

She may testify that on February 19, 2010, she visited Liphatech's website again. She may testify that on this day she found that the website remained the same and she continued to see the same or similar violative language that she had previously identified for Mr. Schmit. See

CX 20. She may testify that she printed out the following advertisements from Liphatech's website on that day: (1) "Rozol Prairie Dog Bait;" (2) "Understanding the True Cost of Treatment: Proper Prairie Dog Management Saves Time and Money;" and (3) "Control Range Rodents." She may testify as to how she navigated through Liphatech's website to find these various advertisements. See CX 30.

She may testify that on February 23, 2010, she again visited Liphatech's website. She may testify that on this day, she found that the website remained the same and she continued to see the same or similar violative language that she had previously identified for Mr. Schmit. See CX 20. She may testify that on this day she navigated to a few additional portions of the website and found that there was additional language that she believed violated FIFRA regarding Liphatech's other Rozol products that included "Rozol Pocket Gopher Bait," EPA Reg. No. 7173-184, and "Rozol Pocket Gopher Bait II – Burrow Builder Formula," EPA Reg. No. 7173-244. She may testify that she printed out the following advertisements from Liphatech's website on that day: (1) "Rozol Prairie Dog Bait;" (2) "Understanding the True Cost of Treatment: Proper Prairie Dog Management Saves Time and Money;" and (3) "Control Range Rodents;" (4) "Rozol Pocket Gopher Bait;" and (5) "Rozol Pocket Gopher Bait – Burrow Builder Formula." She may also testify that website listed the names and contact information for the Liphatech sales people by territory. She may testify as to how she navigated through Liphatech's website to find these various advertisements. See CX 31.

She may testify that she spoke with the OPP, Registration Division about these advertisements that she found on Liphatech's website from November 2009 through February 2010.

She may testify that after having contacted Liphatech about the violative language identified on Liphatech's website, U.S. EPA, Region 5 issued another Federal SSURO on March 4, 2010. The Federal SSURO pertained to all of the Rozol products under EPA Reg. Nos. 7173-184, 7173-244 and 7173-286 and prohibited the sale and distribution of these products as long as they were in violation of FIFRA. See CX 32.

She may testify that in response to the March 4, 2010 Federal SSURO, she learned that Liphatech had sent the advertisements found on its website, in print form, to its distributors. She may testify that Liphatech provided U.S. EPA with a list of distributors that were sent these print advertisements. See CX 54. She may testify that Liphatech again told U.S. EPA that they would contact the distributors and request that the distributors each destroy/disregard any and all literature, flyers, and advertisements regarding its Rozol products, EPA Reg. Nos. 7173-244 and 7173-286, including brochures entitled "Control Range Rodents." See CX 53. She may testify that she created a list of these 48 distributors that received the advertisements. See CX 50.

She may testify that she calculated the penalty associated with Liphatech's violations. She may testify that she finalized the penalty calculations and, in doing so, prepared the FIFRA Civil Penalty Calculation Worksheets and a Penalty Calculation Analysis that are included in the prehearing exchange for this matter. See CX 55a and 55b. She may testify in detail as to how she calculated the penalty calculation based on the statutory factors set forth in FIFRA and the factors in the new FIFRA Enforcement Response Policy (ERP or FIFRA ERP), dated December 2009. See ERP at CX 51. She may testify as to how she researched public records to determine Liphatech's size of business and ability to pay for the purposes of her calculations. See CX 63 through 68.

Ms. Niess may testify that on April 1, 2010, U.S. EPA, Region 5 issued an Updated Notice of Intent to File an Administrative Complaint to Liphatech. See CX 33. Ms. Niess may also testify that on May 14, 2010, U.S. EPA, Region 5 filed a Complaint against Liphatech in this matter. See Complaint filed on May 14, 2010, In the Matter of Liphatech Inc., FIFRA-05-2010-0016.

She may also testify that Region 5 received a number of other documents from several States throughout the investigations regarding the Rozol products. She may testify to the information that was received from these States. See CX 74 and 102.

Ms. Niess may also testify to additional facts as necessary to respond to assertions or arguments raised by Respondent. To the extent deemed necessary by the Court, Ms. Niess will provide testimony sufficient to authenticate the documents that she refers to during her testimony at the hearing in this matter.

B. Expert Witnesses

Complainant may call the following individuals to testify as expert witnesses or hybrid fact and expert witnesses.

- 1. Mr. John D. Hebert,
Dr. William W. Jacobs,
Ms. Meredith F. Laws, and/or
Mr. Daniel B. Peacock,
Office of Pesticides Programs
Registration Division
United States Environmental Protection Agency**

Mr. John Hebert is a product manager in the Registration Division of the Office of Pesticides Program (OPP) at U.S. EPA. See CX 34. Dr. William Jacobs is a biologist in the Registration Division of OPP at U.S. EPA. See CX 36. Ms. Meredith Laws is the branch chief of the Insecticide - Rodenticide Branch in the Registration Division of OPP at U.S. EPA. See

CX 39. Mr. Daniel Peacock is a biologist in the Registration Division of OPP at U.S. EPA. See CX 35. One or a combination of all of these witnesses may be called at the hearing to testify to all or portions of the following matters. OPP's testimony may include, but may not be limited to, the following:

Each OPP witness may testify as to his or her own educational background, his or her work experience with handling rodenticide registrations and his or her duties in the Registration Division.

Each OPP witness may explain the Registration Division's role in the rodenticide registration process. The OPP witness may explain the review and approval process that occurs when a registrant submits an application to register a rodenticide. The witness may also explain how the Registration Division decides if a pesticide should be classified as a "Restricted Use Pesticide" under Section 3 of FIFRA, 7 U.S.C. § 136a. The witness may explain that the Registration Division will normally classify products that are not restricted as "unclassified." The witness may also explain that if the Registration Division determines that the pesticide, when applied in accordance with the label's directions for use, warnings and cautions, or in accordance with a widespread and commonly recognized practice, may generally cause, without additional regulatory restrictions, unreasonable adverse effects to human health and the environment, it will classify the pesticide as a "Restricted Use Pesticide" under Section 3 of FIFRA, 7 U.S.C. § 136a. The witness may explain that when labeling on the product cannot sufficiently mitigate the risk, special training in handling and applying the pesticide product may become necessary to ensure the safe use of the product. See CX 87 and 109. The witness may also explain when a product might be registered under Section 24(c) of FIFRA, 7 U.S.C. §

136v(c), for special local needs and explain the process followed when an applicant wishes to register its product under Section 24(c). See CX 110.

The OPP witness may explain that when an application is received by the Registration Division, it is assigned to a product manager, whose team reviews the pesticide application, assists the applicant to determine the requirements for registration, ensures that the applicant has submitted a complete application and reviews the complete application and the associated label. The witness may also explain that if the application is for a pesticide that addresses a public health pest, efficacy data must either be submitted or cited. See CX 101 and 110. The witness may explain that the Registration Division will review the efficacy data and labels submitted by the applicant for the registration of its pesticide when the target pest is recognized as a public health pest.

The OPP witness might also explain that as part of the registration process, the product may also be reviewed by the Environmental Fate and Effects Division (EFED) of OPP to determine the potential effects of the product to the environment before the product is registered. The witness may explain that the recommendations of EFED (when consulted) are taken into consideration when determining the registration of the product, the classification of the product and the label/labeling of the product. See CX 96 and 111.

The OPP witness may testify that once the review is complete, the Registration Division will determine if the product should be registered under FIFRA. The witness may testify that if the Registration Division registers the pesticide, the product will be given an EPA Registration Number and the registration file will contain, among other things, an accepted label, which will contain a statement of all acceptable claims to be made for the product and any other necessary language required by the FIFRA regulations such as directions for use, restrictions and

precautions. A Registration Notice will outline the terms and conditions of registration. See CX 87.

The OPP witness may testify regarding the registration process that took place when Liphatech registered its Rozol products under EPA Reg. No. 7173-184 (See CX 107); EPA Reg. No. 7173-244 (See CX 1); and EPA Reg. No. 7173-286 (See CX 27a). The witness may provide a history of registration for these products. The witness may specifically explain that when Rozol, EPA Reg. No. 7173-244, was registered by the U.S. EPA, it was classified as a “Restricted Use Pesticide.” The witness may explain why the Registration Division decided to classify the product as a “Restricted Use Product.” The witness may also discuss the numerous special local needs registrations that were submitted to U.S. EPA under FIFRA Section 24(c), 7 U.S.C. § 136v(c), by various States for Rozol. The witness may discuss the accepted label for EPA Reg. No. 7173-244 (See CX 1) and the accepted labels associated with the FIFRA Section 24(c), 7 U.S.C. § 136v(c), registrations for the special local needs use of the product for control of black-tailed prairie dogs. See CX 2 through 7. The witness may discuss the special local needs reviews that were completed by EFED for EPA Reg. Nos. 7173-184 and 7173-244. See CX 75 through 79. The witness may explain that all the special local needs registrations under EPA Reg. No. 7173-244 were moved to a new Rozol product under EPA Reg. No. 7173-286 in May 2009. See CX 27a. The witness may discuss the efficacy data reviews performed by the Registration Division for Rozol Prairie Dog Bait, EPA Reg. No. 7173-286. See CX 80. The witness may discuss the accepted label for EPA Reg. No. 7173-286. See CX 27a. The witness may discuss changes to the accepted label for EPA Reg. No. 7173-286 updated September 10, 2010.

The witness may testify that OPP received an ECR request from Region 5 on August 7, 2008. See CX 18. The witness may testify that OPP reviewed the request and responded to it in October 2008. See CX 19. The witness may testify that Region 5 requested OPP review Liphatech's "Research Bulletin," which advertised its Rozol product under EPA Reg. No. 7173-244 for the control of black-tailed prairie dogs (under the FIFRA Section 24(c), 7 U.S.C. §136v(c), special local needs registrations). The witness may testify that Region 5 was seeking OPP's expert opinion as to whether the advertisement made claims that were false and misleading. The witness may testify that OPP reviewed the information that was sent to it by Region 5. The witness may explain how the review was conducted.

The witness may explain that OPP routinely receives and responds to ECR requests from all of U.S. EPA's Regional Offices. The witness may testify that when reviewing such requests, it is OPP's protocol to go back to the registration file for the product to determine what claims were permitted under the registration process. The witness may testify that all claims that are submitted during the registration process are normally reviewed for acceptability and only acceptable claims are allowed as part of the accepted label for the product.

The witness may explain that when a special local needs label is also involved, the reviewer will review the accepted label for the underlying product and the supplemental labels that may have become part of the registration under Section 3 of FIFRA, 7 U.S.C. § 136a. The witness may testify that, generally speaking, claims that are false and misleading are also claims that differ substantially from the claims made as part of the statement required by Section 3 of FIFRA, 7 U.S.C. § 136a, which are contained in the accepted label for the product at the time of registration and in any subsequent amendments to the label. The witness may testify that the Registration Division's policy is to consider advertising when determining compliance with

Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136j(a)(1)(B). See also 40 C.F.R. 168.22 and CX 88. The witness may testify that the process for determining whether claims made in advertising are substantially different from claims allowed as part of the statement required by Section 3 of FIFRA, 7 U.S.C. § 136a, is to compare the claims that are the subject of the inquiry with the accepted label and any subsequent amendments to the label.

The witness may also testify that sometimes the registrant will request that U.S. EPA accept a list of optional marketing claims as part of its accepted label. The witness may review and discuss examples of such optional marketing claims. See CX 92 and 93. The witness may testify that, when accepting a label, the Registration Division will send a “Notice of Pesticide Registration” (Notice) or letter to the registrant, which will transmit the accepted label to the registrant. The Notice or letter will often be a conditional registration that identifies any changes the Registration Division requires the registrant to make to the label before the product is distributed or sold. The Notice or letter will also inform the registrant that any changes in labeling that differ in substance from claims accepted in connection with the registration must be submitted to and accepted by the Registration Division prior to any sale or distribution.

The witness may testify that such a Notice or letter was sent to Liphatech when EPA Reg. Nos. 7173-244 and 7173-286 were registered. See CX 1 and 27. The witness may also testify that Liphatech did not submit any optional marketing claims, either at the time of the registration of its Rozol products or at any subsequent time, as instructed in Liphatech’s initial registration packets for EPA Reg. Nos. 7173-244 and 7173-286.

The witness may testify that in this specific review, the reviewer went back to the registration file, which contains the accepted labels and any FIFRA Section 24(c), 7 U.S.C. § 136v(c), supplemental special local needs labels, to determine if claims made in the

advertisements were false and misleading. The witness may testify that OPP reviewed Liphatech's "Research Bulletin" and concluded that, among other statements made in Liphatech's advertisements, statements such as "single application," "proven single application," "nearly all prairie dogs expired underground," "above-ground exposure to non-target from Rozol is insignificant," "100% control," and comparisons to specific actives and other pesticide products were all problematic under FIFRA.

The OPP witness may also testify that in his or her expert opinion not only were these and many other statements in the advertisement false and misleading if made as part of a pesticide label and were also substantially different from the claims made as part of the statement required by Section 3 of FIFRA, 7 U.S.C. § 136a.

The OPP witness may also testify that there are certain labeling and advertising requirements that must be met for pesticides that are classified as "Restricted Use Pesticides." See CX 83 through 86. The witness may testify that after reviewing the print and radio advertisements found at CX 14 and 14a, it is his or her expert opinion that Liphatech failed to include restricted use language, as required by FIFRA, in its print and radio advertisements.

The OPP witness may also testify that he or she reviewed additional advertising materials that Region 5 found on Liphatech's website in November 2009. The OPP witness may testify that after reviewing the copies of the advertisements found on Liphatech's website in November 2009 (See CX 28), it is his or her expert opinion that Liphatech was continuing to make claims that were substantially different from the claims made as part of the statement required by Section 3 for FIFRA, 7 U.S.C. § 136a, as part of the registrations of both EPA Reg. Nos. 7173-244 and 7173-286. The OPP witness may also refer to U.S. EPA policy and guidance on labeling matters. See CX 88.

The OPP witness may also testify to additional facts as necessary to respond to assertions or arguments raised by Respondent. To the extent deemed necessary by the Court, the OPP witness or witnesses will provide testimony sufficient to authenticate the documents that he or she refers to during his or her testimony at the hearing in this matter.

2. **Dr. Thomas A. Bailey,
Dr. William Allen Erickson, and/or
Mr. J. Andrew Shelby
Office of Pesticides Programs
Environmental Fate and Effects Division
United States Environmental Protection Agency**

Dr. Thomas A. Bailey is a chemist and biologist and the acting Associate Director of the Environmental Fate and Effects Division (EFED) of OPP at the U.S. EPA. See CX 41. Dr. William Allen Erickson was a biologist in EFED of OPP at U.S. EPA and one of the authors of “Potential Risks of Nine Rodenticides to Birds and Nontarget Mammals: a Comparative Approach.” See CX 37 and 38. Mr. J. Andrew Shelby is a physical scientist/ biologist in EFED of OPP at U.S. EPA. See CX 40. One or a combination of all of these witnesses may be called at hearing to testify to all or portions of the following matters. The EFED witness(es)’ testimony may include, but may not be limited to the following:

Each EFED witness may testify as to his own educational background, his work experience with handling rodenticide registrations and his duties in EFED.

The EFED witness may explain EFED’s role in OPP. The witness may explain that EFED conducts screening-level risk assessments on the ecological risks to non-target species in accordance with U.S. EPA guidelines. See CX 96 and 97. In doing so, EFED integrates scientific ecological effects and exposure information into an environmental risk assessment for potential impacts on the environment. The risk assessments undergo a process of internal peer

review by scientific experts. The assessments are conducted using data that is required based on the uses of the pesticide in question. These assessments are sent to the Registration Division which is then responsible for making the final risk management decisions on pesticides through the registration process. See CX 96.

The witness may explain that the Registration Division consults with EFED on questions relating to environmental assessments and potential mitigation options once the risk assessments have been submitted to the Registration Division.

The witness may testify that EFED completed a number of environmental risk assessments for Rozol products, EPA Reg. Nos. 7173-244 and 7173-286. See CX 75 through 79 and 81, 95. The witness may testify that in doing so, EFED also considered a number of studies and incident data relating to chlorophacinone, which is the active ingredient in the Rozol products, EPA Reg. No. 7173-244 and 7173-286. See CX 38, 89-91, 98-100 and 114.

The EFED witness may testify about the characteristics of chlorophacinone and explain that it is an anticoagulant. The witness may offer his expert opinion on the effects of chlorophacinone poisoning on target and non-target animals. The witness may explain that when chlorophacinone is ingested by the animal, it disrupts the normal blood clotting mechanisms and induces capillary damage. The witness may explain the poison must be ingested by the animal for several days in order for it to have a lethal effect. The witness may explain that because the poison is a slow acting poison, it takes days, not hours, for the poison to cause death. The witness may explain that the animal begins to die slowly due to internal, and sometimes external, hemorrhaging. The witness may explain that the anticoagulant remains in the tissue of the animal as it is taking effect. This makes carnivores or scavengers who prey on dead or dying

prairie dogs (or other animals that may have ingested the poison) susceptible to secondary poisoning.

The EFED witness may also explain the behavior patterns of the black-tailed prairie dog as they relate to chlorphacinone exposure to non-target animals.

The witness may explain the potential risks chlorophacinone poses to non-target animals (such as wildlife) through primary poisoning (animals that may consume the poison but are not the target of the poison) and secondary poisoning (animals that may feed on other animals, such as prairie dogs, that have consumed the poison) when the active ingredient is being used to control black-tailed prairie dogs. The witness will also discuss potential risks that exist to endangered and/or threatened animals that are exposed to chlorophacinone.

The EFED witness may offer his expert opinion regarding the potential threat that chlorophacinone presents to the environment based on EFED's risk assessments, U.S. EPA guidance, policies, scientific studies and evidence of non-target poisoning to animals. See CX 75 through 79, 81, 82, 90, 91 , and 96 through 102.

The EFED witness may also testify to additional facts as necessary to respond to assertions or arguments raised by Respondent. To the extent deemed necessary by the Court, the EFED witness will provide testimony sufficient to authenticate the documents to which he refers to during his testimony at the hearing in this matter.

4. **Ms. Gail B. Coad**
Industrial Economics, Inc.
2067 Massachusetts Avenue
Cambridge, MA 02140

Ms. Coad is a Principal of Industrial Economics, Inc., a consulting firm located at 2067 Massachusetts Avenue, Cambridge, Massachusetts 02140. Ms. Coad may be called to testify as

an expert witness in the areas of the forensic analysis of financial information, the analysis of ability to pay (or, the effect of a penalty on a person's ability to continue in business)³ and determining the size of a business for the purpose of the FIFRA ERP. Ms. Coad has been qualified as an expert in these areas in both administrative hearings before the Office of Administrative Law Judges, and in trials in federal district courts. See CX 56. Ms. Coad may testify about her review of the limited financial information available to U.S. EPA relating to Liphatech (CX 63 through 68). She may testify about her assessment of the sufficiency or reliability of any financial information that Respondent may submit in its prehearing exchange, and she may identify other categories of information or areas of inquiry that are relevant to an assessment of Respondent's ability to pay and/or size of business. Ms. Coad may also provide her expert opinions and conclusions as to Respondent's financial status, Respondent's ability to pay the penalty proposed in the Complaint and Respondent's size of business for the purpose of the FIFRA ERP.

More specifically, if called to testify as an expert witness at the hearing in this matter, Ms. Coad may testify about the work of Industrial Economics, Inc., as an economics and environmental consulting firm which provides consulting work on various subjects, including (but not limited to) evaluating economic damages and losses sustained in breach of contract cases; providing expert witness services in environmental enforcement litigation; performing regulatory impact analyses for a variety of governmental agencies; performing natural resource damage assessments for trustees and international bodies; assessing lost profits in economic damage cases; performing financial analyses in enforcement cases to determine economic benefit

³ As noted below in Section VI, on August 3, 2010, Respondent filed a Response of Liphatech, Inc. to Complainant's Request for Voluntary Production of Financial Information. In that response, Respondent specifically stated that "it does not intend to take the position that it is unable to pay the proposed penalty or that payment will adversely affect its ability to continue in business."

from noncompliance; and assessing the ability to pay of corporations, partnerships and individuals in enforcement cases. She may also testify as to her experience in evaluating the financial situation and ability to pay of various types of entities for cases litigated in administrative tribunals and federal district courts. Ms. Coad has performed analyses of ability to pay in more than 200 cases during her tenure with Industrial Economics, Inc.

Ms. Coad may also testify about her efforts to analyze the financial status and ability to pay of Respondent in this case. She may testify about the standard methodology used by professionals in her field to evaluate the financial status and ability to pay of individuals, corporations or partnerships. She may testify about the different types of financial documentation, and the extent of such financial data, that are necessary to conduct any reasonably accurate assessment of a respondent's financial condition and ability to pay, including the reasons why at least three to five years of complete tax returns and complete financial statements are needed to begin any meaningful evaluation of a corporation's ability to pay. She may also testify about the relevance of the financial evidence requested by Complainant on June 21, 2010, in Complainant's Notice of Complainant's Request for Voluntary Production of Financial Information. She may testify about the need in any ability to pay analysis to identify potential sources of funds available to the subject of the analysis, and about the need to fully and accurately identify that party's expenses and assess whether or not all such expenses are reasonable. She may testify that analyzing ability to pay also necessarily involves an analysis of the net worth of the party, which entails an accurate and complete identification of all assets (including real estate and personal property) and liabilities. She may testify about her assessment of the sufficiency or reliability of financial information which may be submitted by

Respondent in its prehearing exchange, and she may identify other categories of information or areas of inquiry that are relevant to an assessment of Respondent's ability to pay.

Ms. Coad may also testify to additional facts or opinions as necessary to respond to assertions or arguments raised by Respondent. To the extent deemed necessary by the Court, Ms. Coad will provide testimony sufficient to authenticate the documents that she refers to during her testimony at the hearing in this matter.

II. Copies of all documents and exhibits which Complainant intends to introduce into evidence at the hearing.

Complainant expects to offer the following documents/exhibits into evidence either during or prior to the hearing. Complainant may also make reference to these documents in any motions, post hearing briefs or arguments. Copies of some portions of the exhibits may be presented at the time of hearing in enlarged poster size to allow for easy reference for the witness and the judge. The exhibits are numbered as CX 1 through 115:

| CX No. | Title of Document | Date of Document | Bates No. |
|--------|--|------------------|-----------|
| 1. | Packet for "Rozol Pocket Gopher Bait II," EPA Reg. No. 7173-244 | | 1-11 |
| | a. Letter from U.S EPA to Liphatech regarding registration of 7173-244 | January 12, 2005 | 1-1a |
| | b. Accepted Label for "Rozol Pocket Gopher Bait II," EPA Reg. No. 7173-244 | March 2, 2005 | 2-3 |
| | c. Notification of an Alternate Name | April 14, 2005 | 4-5 |
| | d. Request to amend the 7173-244 label and new accepted label | July 2009 | 6-11 |

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| 2. | Kansas Special Local Needs Packet For Rozol Prairie Dog Bait | | 12-26 |
| | a. Application for/Notification of State Registration of a Pesticide to Meet a Special Local Need for Rozol Prairie Dog Bait, EPA Reg. No. 7173-184; Special Local Needs (SLN) No. KS-040004 | April 1, 2004 | 12 |
| | b. FIFRA § 24(c) Supplemental Label for Rozol Prairie Dog Bait, EPA Reg. No. 7173-184; SLN No. KS-04004 | Revised March 17, 2004 | 13 |
| | c. Letter from Kansas Department of Agriculture and Decision and Order | April 1, 2001 | 14-17 |
| | d. Letter from U.S. EPA to Kansas Department of Agriculture | July 30, 2004 | 17-20 |
| | e. Application for/Notification of State Registration of a Pesticide to Meet a Special Local Need for Rozol Prairie Dog Bait, EPA Reg. No. 7173-244; SLN No. KS-070003 | August 30, 2007 | 21 |
| | f. Letter from Kansas Department of Agriculture to U.S. EPA | August 29, 2007 | 22-23 |
| | g. FIFRA § 24(c) Supplemental Label, EPA Reg. No. 7173-244; SLN No. KS-070003 and U.S. Fish and Wildlife Service List of Threatened and Endangered Species in Kansas | n/a | 24-26 |
| 3. | Nebraska Special Local Needs Packet For Rozol Prairie Dog Bait | | 27-34 |
| | a. Application for/Notification of State Registration of a Pesticide to Meet a Special Local Need for Rozol Prairie Dog Bait, EPA Reg. No. 7173-184; SLN No. NE-060001 | February 14, 2006 | 27 |
| | b. FIFRA § 24(c) Supplemental Label for Rozol Prairie Dog Bait, EPA Reg. No. 7173-184; SLN No. NE-060001 | Effective February 15, 2006 | 28-29 |
| | c. Letter from U.S. EPA to Nebraska Department of Agriculture | November 16, 2006 | 30 |
| | d. Letter from Nebraska Department of Agriculture to U.S. EPA revising the SLN | June 21, 2007 | 31 |
| | e. FIFRA § 24(c) Supplemental Label for Rozol Prairie Dog Bait, EPA Reg. No. 7173-244; SLN No. NE- | Effective October | 32 |

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| | 060001 | 1, 2007 | |
| | f. Letter from Nebraska Department of Agriculture to U.S. EPA renewing the SLN | July 1, 2008 | 33 |
| | g. Renewed FIFRA § 24(c) Supplemental Label for Rozol Prairie Dog Bait, EPA Reg. No. 7173-244; SLN No. NE-060001 | Effective October 1, 2008 | 34 |
| 4. | Wyoming Special Local Needs Packet For Rozol Prairie Dog Bait | | 35-42 |
| | a. Application for/Notification of State Registration of a Pesticide to Meet a Special Local Need for Rozol Prairie Dog Bait, EPA Reg. No. 7173-184; SLN No. WY-06-0004 | May 23, 2006 | 35 |
| | b. FIFRA § 24(c) Supplemental Label for Rozol Prairie Dog Bait, EPA Reg. No. 7173-184; SLN No. WY-06-0004 | n/a | 36 |
| | c. Memorandum from Wyoming Department of Agriculture to U.S. EPA | May 23, 2006 | 37 |
| | d. Letter from U.S. EPA to Wyoming Department of Agriculture | November 16, 2006 | 38-39 |
| | e. Application for/Notification of State Registration of a Pesticide to Meet a Special Local Need for Rozol Prairie Dog Bait, EPA Reg. No. 7173-244; SLN No. WY07-0005 | July 30, 2007 | 40 |
| | f. Memorandum from Wyoming Department of Agriculture to U.S. EPA | July 30, 2007 | 41 |
| | g. FIFRA § 24(c) Supplemental Label, EPA Reg. No. 7173-244; SLN No. WY-070005 | n/a | 42 |
| 5. | Colorado Special Local Needs Packet For Rozol Prairie Dog Bait | | 43-50 |
| | a. Application for/Notification of State Registration of a Pesticide to Meet a Special Local Need for Rozol Prairie Dog Bait, EPA Reg. No. 7173-244; SLN No. CO-060009 | November 1, 2006 | 43-44 |
| | b. Letter from Colorado Department of Agriculture to U.S. EPA | November 2, 2006 | 45-47 |
| | c. FIFRA § 24(c) Supplemental Label for Rozol Prairie Dog Bait, EPA Reg. No. 7173-244; SLN No. CO- | Expired March 15, 2007 | 48 |

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| | 060009 | | |
| | d. Letter from Colorado Department of Agriculture revising SLN | September 21, 2007 | 49 |
| | e. Revised FIFRA § 24(c) Supplemental Label for Rozol Prairie Dog Bait, EPA Reg. No. 7173-244; SLN No. CO-060009 | Expired March 15, 2009 | 50 |
| 6. | Texas Special Local Needs Packet For Rozol Prairie Dog Bait | | 51-55 |
| | a. Application for/Notification of State Registration of a Pesticide to Meet a Special Local Need for Rozol Prairie Dog Bait, EPA Reg. No. 7173-244; SLN No. TX-070008 | April 27, 2007 | 51 |
| | b. FIFRA § 24(c) Supplemental Label for Rozol Prairie Dog Bait, EPA Reg. No. 7173-244; EPA SLN NO. TX-070008 | n/a | 52 |
| | c. Letter from Texas Department of Agriculture to U.S. EPA | April 27, 2007 | 53-54 |
| | d. Letter from Texas Department of Agriculture to U.S. EPA | March 24, 2008 | 55 |
| 7. | Oklahoma Special Local Needs Packet For Rozol Prairie Dog Bait | | 56-58 |
| | a. Application for/Notification of State Registration of a Pesticide to Meet a Special Local Need for Rozol Prairie Dog Bait, EPA Reg. No. 7173-244; SLN No. OK-080002 | January 15, 2008 | 56 |
| | b. FIFRA § 24(c) Supplemental Label for Rozol Prairie Dog Bait, EPA Reg. No. 7173-244; SLN No. OK-080002 | n/a | 57 |
| | c. Letter from Oklahoma Department of Agriculture to U.S. EPA | January 15, 2008 | 58 |
| 8. | Region 7 U.S. EPA referral to Region 5 U.S. EPA containing two Kansas Department of Agriculture investigations dated November 21, 2007 and November 28, 2007 | January 10, 2008 | 59-79 |
| 9. | CD-R collected by Kansas Department of Agriculture on the November 28, 2007 inspection | n/a | 80 |

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| 10. | Statement by Claudia Niess regarding the duplication of the CD-R collected by Kansas Department of Agriculture on the November 28, 2007 inspection | May 26, 2010 | 81 |
| 11. | Transcript of Rozol Radio Advertisements made from CD-R collected by Kansas Department of Agriculture on the November 28, 2007 inspection, transcribed by Claudia Niess | January 25, 2008 | 82 |
| 12. | Region 8 U.S. EPA referral to Region 5 U.S. EPA | March 5, 2008 | 83-118 |
| 13. | Request from Region 5 to Wisconsin Department of Agriculture, Trade and Consumer Protection to inspect Liphatech and issue a Stop Sale, Use and Removal Order (SSURO) | April 15, 2008 | 119-128 |
| 14. | Inspection Packet from Wisconsin Department of Agriculture, Trade and Consumer Protection from June 2, 2008 through June 19, 2008 | June 24, 2008 | 129-149 |
| | a. Three ring binder collected by Wisconsin Department of Agriculture, Trade and Consumer Protection on June 19, 2008 | June 19, 2008 | 150-362 |
| 15. | Federal SSURO, dated April 11, 2008 | Issued on June 2, 2008 | 363-368 |
| 16. | Record of conversation authored by Claudia Niess, U.S. EPA, Region 5, Pesticides and Toxics Compliance Section | June 11, 2008 | 369 |
| 17. | Letter from Thomas Schmit to Claudia Niess, U.S. EPA, Region 5, Pesticides and Toxics Compliance Section, re: the status of compliance with the June 2, 2008 SSURO | August 5, 2008 | 370-409 |
| 18. | Enforcement Case Review (ECR) request made by Region 5 U.S. EPA | August 7, 2008 | 410-414 |
| 19. | ECR from Daniel Peacock of U.S. EPA's Insecticide-Rodenticide Branch of the Registration Division | October 16, 2008 | 415-427 |
| 20. | Electronic mail between Claudia Niess, U.S. EPA, Region 5, Pesticides and Toxics Compliance Section, and Thomas Schmit regarding Liphatech's advertising claims | From November 18, 2008 through December 4, 2008 | 428-432 |
| 21. | Amended Federal SSURO | August 22, 2008 | 433-437 |

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| 22. | Letter from Region 5 U.S. EPA to Liphatech | January 6, 2009 | 438-445 |
| 23. | Letter from Liphatech responding to Region 5's January 6, 2009 letter | February 5, 2009 | 446-492 |
| 24. | Prefiling letter from Region 5 U.S. EPA to Liphatech | September 18, 2009 | 493-494 |
| 25. | Record of conversation authored by Claudia Niess, U.S. EPA, Region 5, Pesticides and Toxics Compliance Section | November 12, 2008 | 495 |
| 26. | Referral from Region 8 U.S. EPA entitled "Misleading Claims- Rozol Internet Advertising" | December 2, 2009 | 496-503 |
| 27. | a. Notice of Pesticide Registration and Accepted Label for "Rozol Prairie Dog Bait," EPA. Reg. No. 7173-286 | May 13, 2009 | 504-510 |
| | b. Updated Accepted Label for "Rozol Prairie Dog Bait," EPA Reg. No. 7173-286 | September 10, 2010 | 510a |
| 28. | Information gathered from www.liphatech.com by Claudia Niess, U.S. EPA, Region 5, Pesticides and Toxics Compliance Section | Printed on November 18, 2009 | 511-532 |
| 29. | Information gathered from www.liphatech.com by Claudia Niess, U.S. EPA, Region 5, Pesticides and Toxics Compliance Section | Printed on February 10, 2010 | 533-552 |
| 30. | Information gathered from www.liphatech.com by Claudia Niess, U.S. EPA, Region 5, Pesticides and Toxics Compliance Section | Printed on February 19, 2010 | 553-572 |
| 31. | Information gathered from www.liphatech.com by Claudia Niess, U.S. EPA, Region 5, Pesticides and Toxics Compliance Section | Printed on February 23, 2010 | 573-597 |
| 32. | Federal SSURO | March 4, 2010 | 598-606 |
| 33. | Amended Prefiling letter | April 1, 2010 | 607-610 |
| 34. | Curriculum Vitae of Mr. John Hebert, U.S. EPA, Office of Pesticides Programs, Registration Division | n/a | 611-612 |
| 35. | Curriculum Vitae of Mr. Daniel Peacock, U.S. EPA, Office of Pesticides Programs, Registration Division | n/a | 613-616 |
| 36. | Curriculum Vitae of Dr. William Jacobs, U.S. EPA, Office of Pesticides Programs, Registration Division | n/a | 617-621 |

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| 37. | Curriculum Vitae of Dr. William Erickson, U.S. EPA, Office of Pesticides Programs, Environmental Fate and Effects Division | n/a | 622-623 |
| 38. | <u>Dr. William Erickson and Douglas Urban, U.S. EPA, Office of Pesticides Program, Environmental Fate and Effects Division, Potential Risks of Nine Rodenticides to Birds and Nontarget Mammals: a Comparative Approach,</u> | July 2004 | 624-853 |
| 39. | Curriculum Vitae of Ms. Meredith Laws, U.S. EPA, Office of Pesticides Programs, Registration Division | n/a | 854 |
| 40. | Curriculum Vitae of Mr. Andrew Shelby, U.S. EPA, Office of Pesticides Programs, Environmental Fate and Effects Division | n/a | 855-856 |
| 41. | Curriculum Vitae of Dr. Thomas Bailey, U.S. EPA, Office of Pesticides Programs, Environmental Fate and Effects Division | n/a | 857-859 |
| 42. | Attachment A of Complaint: Transcript of version 1 of Radio Advertisements regarding "Rozol," EPA Reg. No. 7173-244 | n/a | 860-861 |
| 43. | Attachment B of Complaint: Transcript of version 2 of Radio Advertisements regarding "Rozol," EPA Reg. No. 7173-244 | n/a | 862-863 |
| 44. | Attachment C of Complaint: Transcript of version 3 of Radio Advertisements regarding "Rozol," EPA Reg. No. 7173-244 | n/a | 864-865 |
| 45. | Attachment D of Complaint: Transcript of version 4 of Radio Advertisements regarding "Rozol," EPA Reg. No. 7173-244 | n/a | 866-867 |
| 46. | Attachment E of Complaint: List of dates that Golden Plains AC Network broadcast radio advertisements for Respondent regarding "Rozol," EPA Reg. No. 7173-244 | n/a | 868-871 |
| 47. | Attachment F of Complaint: List of dates that Western Kansas Broadcast broadcast radio advertisements for Respondent regarding "Rozol," EPA Reg. No. 7173-244 | n/a | 872-878 |
| 48. | Attachment G of Complaint: List of dates that High Plain Radio broadcast radio advertisements for Respondent regarding "Rozol," EPA Reg. No. 7173- | n/a | 879-922 |

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| | 244 | | |
| 49. | Attachment H of Complaint: List of dates that KGNC-AM and KXGL-FM in Texas broadcast radio advertisements for Respondent regarding "Rozol," EPA Reg. No. 7173-244 | n/a | 923-930 |
| 50. | Attachment I of Complaint: List of forty-eight (48) distributor partners that were asked to destroy/disregard advertisements regarding "Rozol," EPA Reg. No. 7173-244 and "Rozol Prairie Dog Bait," EPA Reg. No. 7173-286 after EPA issued a Federal SSURO on March 4, 2010, to the Respondent | n/a | 931-933 |
| 51. | U.S. EPA FIFRA Enforcement Response Policy | December 2009 | 934-972 |
| 52. | Information gathered from www.liphatech.com by Claudia Niess, U.S. EPA, Region 5, Pesticides and Toxics Compliance Section, | January 23 – 24, 2008 | 973-993 |
| 53. | Electronic mail from Liphatech providing a plan to respond to the March 4, 2010 Federal SSURO | March 8, 2010 | 994-997 |
| 54. | Electronic mail from Liphatech providing U.S. EPA with a list of distributors that Liphatech planned to contact in an effort to comply with the March 4, 2010 SSURO | March 10, 2010 | 998-1005 |
| 55. | Penalty Documents | | 1006-1103 |
| | a. Penalty Calculation Analysis prepared by Claudia Niess | August 4, 2010 | 1006-1098 |
| | b. FIFRA Civil Penalty Calculation worksheet | June 9, 2010 | 1099-1103 |
| 56. | Curriculum Vitae of Gail Coad, Industrial Economics | April,20, 2010 | 1104-1109 |
| 57. | Reserved | | |
| 58. | Electronic mail from Gail Coad, Industrial Economics, entitled "Gross Profit for inorganic chemical producer" | March 22, 2010 | 1110-1111 |
| 59. | Declaration of Gail Coad, Industrial Economics, re: Ability to Pay | July 20, 2010 | 1112-1116 |

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| 60. | Policy on Civil Penalties, U.S. EPA General Enforcement Policy #GM-21 | February, 16, 1984 | 1117-1125 |
| 61. | A Framework for Statute-Specific Approaches To Penalty Assessments: Implementing U.S. EPA's Policy On Civil Penalties, U.S. EPA General Enforcement Policy #GM-22 | February 16, 1984 | 1126-1156 |
| 62. | U.S. EPA Guidance on Determining a Violator's Ability to Pay a Civil Penalty | December 16, 196 | 1157-1166 |
| 63. | Dun & Bradstreet, Inc., Corporate Leads Portal on Liphatech | Printed on April 2, 2008 | 1167-1168 |
| 64. | Printout from www.liphatech.com entitled "About Us" | Printed on August 7, 2009 | 1169 |
| 65. | Printout from www.desangosse.com | | 1170-1175 |
| | a. General Information | Printed on March 25, 2010 | 1170-1174 |
| | b. Subsidiaries and Holdings | Printed on March 25, 2010 | 1175 |
| 66. | Corporate Records on Liphatech, Inc. | Printed on July 14, 2010 | 1176-1177 |
| 67. | Property Recording Information from the Department of Neighborhood Services, 3600 W. Elm Street, Milwaukee, Wisconsin | Printed on July 14, 2010 | 1178 |
| 68. | Glossary of Statistical Terms – Turnover Definition | Printed on July 8, 2010 | 1179 |
| 69. | Declaration of Richard T. Westlund, U.S. EPA, Office of Environmental Information, Collection Strategies Division, Information Collection Request Team Leader | June 9, 2010 | 1180-1181 |
| 70. | FIFRA Delegation No. 5-14 | May 11, 1994 | 1182 |
| 71. | FIFRA Delegation No.5-14/15-A | October 22, 2007 | 1183-1185 |
| 72. | Material Safety Data Sheet for Rozol Pocket Gopher Bait, EPA Reg. 7173-184 and Rozol Pocket Gopher Bait Borrow Builder Formula, EPA Reg. No. 7173-244 | December 1, 2005 | 1186 |

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| 73. | Material Safety Data Sheet for Rozol Prairie Dog Bait, EPA Reg. No. 7173-286 | July 8, 2009 | 1187 |
| 74. | Copy of Bi-Fold Advertising Brochure for Rozol products given to Nebraska Department of Agriculture in early 2006 | February 17, 2006 | 1188-1195 |
| 75. | Rozol Pocket Gopher Bait for Prairie Dog Control in Nebraska and Wyoming SLN Review – U.S. EPA SLNs NE060001 and WY060004 | July 27, 2006 | 1196-1215 |
| 76. | SLN Review Conducted by U.S. EPA Environmental Fate and Effects Division (EFEDs) - KS 07-0003 | November 28, 2007 | 1216-1231 |
| 77. | SLN Review Conducted by U.S. EPA Environmental Fate and Effects Division (EFEDs) – WY07-0005 | November 28, 2007 | 1232-1248 |
| 78. | SLN Review Conducted by U.S. EPA Environmental Fate and Effects Division (EFEDs) – TX-070008 | August 1, 2007 | 1249-1262 |
| 79. | Ecological Risk Assessment Conducted by U.S. EPA Environmental Fate and Effects Division (EFEDs) Evaluating Expanded Uses of Rozol Black Tailed Prairie Dog Bait | November 6, 2008 | 1263-1330 |
| 80. | Institutional Review Board (IRB) Efficacy Review of Rozol Prairie Dog Bait | February 11, 2009 | 1331-1357 |
| 81. | Chlorophacinone (067707): Non-target exposure review of “Field Efficacy and Hazards of Rozol Bait for Controlling Black-Tailed Prairie Dogs” Conducted by U.S. EPA Environmental Fate and Effects Division (EFEDs) | September 3, 2009 | 1358-1367 |
| 82. | EFEDs Reply to Formal Response Concerning Use of Avian Reproduction Studies to Fulfill Notice of Registration Requirement for Chlorophacinone | October 2, 2009 | 1368-1506 |
| 83. | Labeling Requirements for Pesticides and Devices, 49 Fed. Reg. 37960 (Sept. 26, 1984) | September 26, 1984 | 1507-1542 |
| 84. | Pesticide Advertising, 51 Fed. Reg. 24393 (July 3, 1986) | July 3, 1986 | 1543-1549 |
| 85. | Advertising of Unregistered Pesticides, Unregistered Uses, of Registered Pesticides and FIFRA Section 24(c) Registrations, 54 Fed. Reg. 1122 (Jan. 11, 1989) | January 11, 1989 | 1550-1553 |
| 86. | Pesticide Regulation (PR) Notice 93-1: Statement of Restricted Use Classification | February 11, 1993 | 1554-1555 |

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| 87. | U.S. EPA Label Review Manual: Chapter 6: Use Classification | n/a | 1556-1560 |
| 88. | U.S. EPA Label Review Manual: Chapter 12: Labeling Claims | n/a | 1561-1572 |
| 89. | Daryl D. Fisher and Robert M. Timm, <u>Laboratory Trial of Chlorophacinone as a Prairie Dog Toxicant</u> , Internet Center for Wildlife Damage Management, Great Plains Wildlife Damage Control Workshop Proceedings | 1987 | 1573-1576 |
| 90. | Red Willow County (Nebraska) Bald Eagle Necropsy | | 1577-1612 |
| | a. Certified copy of Red Willow County Bald Eagle - Report of Investigation – Fish and Wildlife Case #2007600155 (Sealed certified copy retained by Complainant) | April 6, 2007 | 1577-1594 |
| | b. Certified copy of FWS Forensics Lab - Veterinary Medical Examination Report Case #2007600155 and Chemistry Examination Report (certified copy retained by Complainant) | March 22, 2007 and March 19, 2007 | 1595-1612 |
| 91. | Logan County (Kansas) Raptor Deaths | | 1613-1687 |
| | a. Certified copy of Report of Investigation – Fish and Wildlife Case #2009600498 (Sealed certified copy retained by Complainant) | Investigation initiated January 27, 2009 | 1613-1638 |
| | b. Certified copy of FWS Forensics Lab Veterinary Medical Examination Report Case #2009600498, Final Chemistry Examination Report and Morphology Examination Report (certified copy retained by Complainant) | September 11, 2009 | 1639-1687 |
| 92. | Example of an accepted label with optional marketing claims: Hawk Rodenticide Ag | January 23, 2009 | 1688-1695 |
| 93. | Example of an accepted label with optional marketing claims: Saturn II (Bromethalin) | September 23, 2009 | 1696-1715 |
| 94. | Endangered and Threatened Wildlife and Plants; 90-day Finding on a Petition to List the Black-Tailed Prairie Dog as Threatened or Endangered, 73 Fed. Reg. 73211 (Dec. 2, 2008) | December 2, 2008 | 1716-1724 |
| 95. | Ecological Effects Branch (EEB) Review of Rozol Pocket Gopher Bait | November 19, 1981 | 1725-1738 |

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| 96. | U.S. EPA Overview of the Ecological Risk Assessment Process in the Office of Pesticides Programs – Endangered and Threatened Species Effects Determinations | January 23, 2004 | 1739-1830 |
| 97. | U.S. EPA Reregistration Eligibility Decision (RED) Rodenticide Cluster, EPA738-R-98-007 *** There a number of pages at page 190 and beyond that are blank in the original text. | July 1998 | 1831-2149 |
| 98. | Liphatech, Inc. Final Report: Assessment of the Potential Impact of Chlorophacinone on Burying Beetles | March 28, 2007 | 2150-2164 |
| 99. | Liphatech, Inc. Secondary Hazard Study Using Chlorophacinone – Killed Laboratory Rats Fed to Domestic Ferrets | October 22, 1996 | 2165-2248 |
| 100. | U.S. Fish and Wildlife Service Biological Opinion, <u>Effects of 16 Vertebrate Control Agents on Threatened and Endangered Species</u> | March 1993 | 2249-2438 |
| 101. | U.S. EPA Pesticide Registration Notice 2002-1: List of Pests of Significant Public Health Importance | Undated | 2439-2470 |
| 102. | Final Order for In the Matter of Gary Withers, Kansas Department of Agriculture Certified copy retained by Complainant | April 22, 2009 | 2471-2475 |
| 103. | Shawn E. Rich, Kansas Department of Agriculture, Declaration for CX 8 and 9 | August 24, 2010 | 2476-2480 |
| 104. | Shawn Hackett, Kansas Department of Agriculture, Declaration for CX 8 and 9 | August 24, 2010 | 2481-2485 |
| 105. | Mark Klapperich, Colorado Department of Agriculture, Declaration for CX 12 | August 19, 2010 | 2486-2489 |
| 106. | Charles King, South Dakota Department of Agriculture, Declaration for CX 26 | August 30, 2010 | 2490-2492 |
| 107. | Packet for “Rozol Pocket Gopher Bait,” EPA Reg. No. 7173-184 | | 2493-2510 |
| | a. Accepted Label for “Rozol Pocket Gopher Bait,” EPA Reg. No. 7173-184 | August 18, 1982 | 2493- |

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| | b. Accepted Label with comments | August 27, 2003 | 2495-2496 |
| | c. Accepted Label with comments | June 4, 2004 | 2497-2500 |
| | d. Accepted Label with comments | April 17, 2007 | 2501-2503 |
| | e. Application for Pesticide Notification and Notification | June 18, 2007 | 2504-2506 |
| | f. Accepted Label with comments | September 29, 2008 | 2507-2510 |
| 108. | Notice of Receipt of Requests to Voluntarily Cancel Certain Pesticide Registrations , 75 Fed. Reg. 5318 (Feb. 2, 2010) | February 2, 2010 | 2511-2513 |
| 109. | U.S. EPA Label Review Manual: Chapter 3: General Labeling Requirements | n/a | 2514-2526 |
| 110. | U.S. EPA Label Review Manual: Chapter 4: Types of Label Reviews | n/a | 2527-2537 |
| 111. | U.S. EPA Label Review Manual: Chapter 8: Environmental Hazards | n/a | 2538-2552 |
| 112. | Memorandum from Arthur Fonk, Wisconsin Department of Agriculture, Trade and Consumer Protection to amend Exhibit 14 | August 10, 2010 | 2553 |
| 113. | Advertising Cost Analysis prepared by Claudia Niess | September 7, 2010 | 2554-2555 |
| 114. | Thomas M. Primus, <i>et al.</i> , <u>Chlorophacinone Residues in Rangeland Rodents: An Assessment of the Potential Risk of Secondary Toxicity to Scavengers</u> , Internet Center for Wildlife Damage Management, USDA National Wildlife Research Center – Staff Publications | 2001 | 2556-2566 |
| 115. | Summary Report of all active chlorophacinone registrations with the U.S. EPA | Printed on September 16, 2010 | 2567-2650 |

III. Complainant's statement explaining how the proposed penalty was determined, including a description of how the specific provisions of the FIFRA Enforcement Policy were used in calculating the penalty.

Complaint alleges that Respondent violated certain requirements of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.* Based on the information in U.S. EPA's possession at the time, Complainant has calculated a proposed penalty in the amount of \$2,891,200. A narrative justification of this proposed penalty and the penalty worksheets can be found at CX 55a and 55b. It should be noted that on September 15, 2010, Complainant filed Complaint's Motion for Leave to Amend Complaint to Reduce Proposed Penalty and Memorandum in Support of Complainant's Motion, in which it seeks to reduce the proposed penalty from \$2,941,456 to \$2,891,200. U.S. EPA has decided to reduce the penalty by \$50,256 because it does not wish to pursue an economic benefit in this case based on new guidance that is currently being developed on how to calculate economic benefit in FIFRA cases.

IV. Complainant's statement regarding whether the Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. § 3501, *et seq.*, applies to this proceeding, whether there is a current Office of Management and Budget control number involved herein, and whether the provisions of Section 3512 of the PRA are applicable in this case.

The Court has directed Complainant to provide a position regarding the applicability of the Paperwork Reduction Act ("PRA"), 44 U.S.C. §§ 3501 *et seq.*, to this proceeding, including whether there is a current Office of Management and Budget (OMB) control number involved and whether the provisions of Section 3512 of the PRA may apply to this case. Complainant's position is that the provisions of the Paperwork Reduction Act (PRA), including Section 3512 of the PRA, do not apply to this proceeding, because the legal requirements alleged to have been violated (Sections 12(a)(2)(E) and 12(a)(1)(B) or alternatively, 12(a)(1)(E) of FIFRA) in this matter do not involve the collection of information.

Nonetheless, Complainant has identified all regulations involving information collection requests that relate to the pesticide registration requirements of FIFRA. Even if the PRA were found to apply to this case, Complainant's investigation has revealed that there have been no lapses in the OMB control numbers applicable to those FIFRA regulations that require the collection of information in connection with pesticide registration. OMB control numbers that apply to regulatory information collection requests (ICRs) are listed at 40 C.F.R. § 9.1. According to that regulation, the OMB control numbers governing ICRs that would have come into play Liphatech are as follows: 2070-0003; 2070-0024; 2070-28, 2070-0040; 2070-0052; 2070-0055; 2070-0057; 2070-0060; 2070-0078; 2070-0107; and 2070-0174.

U.S. EPA has investigated the status of OMB's approval of the ICRs covered by these numbers, and the investigation has revealed no lapses in OMB approval. A sworn declaration from the U.S. EPA official who researched the status of OMB approval for these ICRs and found no lapses is attached as CX 69.

Therefore, the provisions of the PRA do not affect this case.

V. Complainant's views as to the appropriate place of hearing, and an estimate of the time needed to present its direct case.

The supplemental rules governing administrative penalty actions filed under the authority of FIFRA provide that "[t]he prehearing conference and the hearing shall be held in the county, parish, or incorporated city of the residence of the person charged, unless otherwise agreed in writing by all parties." 40 C.F.R. § 22.35(b). Respondent is a corporation, and its business is located in Milwaukee, Wisconsin. Therefore, the hearing in this matter should be held in Milwaukee, Wisconsin. The City of Milwaukee is the location of a federal courthouse, the United States District Court for the Eastern District of Wisconsin, which is located at 362 United

States Courthouse, 517 East Wisconsin Avenue, Milwaukee, Wisconsin 53202. The City also has a Milwaukee County courthouse located at 901 North 9th Street, Milwaukee, Wisconsin 53233.

Complainant estimates that its case-in-chief will be presented within four to five full days.

VI. Ability to Pay or Effect of Penalty on Respondent's Ability to Continue in Business.

On July 21, 2010, Complainant filed a Notice of Complainant's Request for Voluntary Production of Financial Information, in which it requested that Respondent provide relevant and probative evidence concerning its ability to pay the proposed penalty. The Complainant requested that Respondent submit certain financial information in its initial prehearing exchange to support any inability to pay claims.

On August 3, 2010, Respondent filed a Response of Liphatech, Inc. to Complainant's Request for Voluntary Production of Financial Information. In that response, Respondent specifically stated that "it does not intend to take the position that it is unable to pay the proposed penalty or that payment will adversely affect its ability to continue in business. Therefore, the Request is moot." Therefore, ability to pay the penalty is not at issue in this matter. Out of an abundance of caution, however, Complainant has included the detailed description of expected testimony regarding Respondent's ability to pay the proposed penalty by Dr. Coad in Section I(B)(4) of this Complainant's Initial Prehearing Exchange, above.

Complainant will file a motion requesting the Court to exclude any testimony and/or arguments relating to Respondent's inability to pay the proposed penalty, based on Respondent's August 3, 2010 Response.

VII. Size of Business.

Section 14(a)(4) of FIFRA, 7 U.S.C. § 1361(a)(4), requires U.S. EPA to consider the appropriateness of the penalty to the size of business of the respondent. The December 2009 Enforcement Response Policy for FIFRA (ERP) (See CX 51) provides guidance on how to categorize Respondents' size of business for purposes of calculating the proposed penalty in a FIFRA enforcement case. The policy specifically states that the "[size] of business is determined based on an individual's or company's gross revenues from all revenue sources during the prior calendar year." It goes on to state "[f]urther, the size of business and gross revenue figures are based on the corporate family rather than a specific subsidiary or division of the company which is involved with the violation (including all sites owned or controlled by the foreign or domestic parent company) unless the subsidiary or division is independently owned." ERP, at 17.

For the purposes of calculating the proposed penalty, U.S. EPA placed the Respondent in category one for the size of business, which is "over \$10,000,000 a year." ERP, at 18. This was based on the information that was available to U.S. EPA, which included a Dun & Bradstreet Inc., Corporate Leads Portal, which reported Respondent's annual sales as \$39,500,000 (CX 63). In addition, Respondent's parent company (See CX 64), DeSangosse (See CX 65), reported its "turnover"⁴ for 2009 to be €272,000,000. The website also states that the Company was "up nearly 20% from the previous year's results." Additionally, the website depicts the "World Sales Turnover 2009: 272 M€" showing "Amerique du Nord" as having 25% of its international business, which constitutes 18% of the company's overall business. Thus, about 4.5% of DeSangosse's turnover in 2009, or about €12,000,000 is attributable to Liphatech. Finally, based on a public records search, it appears that Respondent owns the property upon which its facility at 3600 West Elm Street in Milwaukee, Wisconsin, sits. (See CX 67). This general information

⁴ See <http://stats.oecd.org/glossary/detail.asp?ID=2780> for a discussion of what "turnover" means. It is often equated with the word "sales."

shows that Respondent's size of business is over \$10,000,000 and U.S. EPA has placed the Respondent in the appropriate size of business category for the purpose of calculating the proposed penalty.

Although the Respondent has clearly stated that it does not intend to take the position that it is unable to pay the proposed penalty or that the proposed penalty will adversely affect its business, it has not addressed the issue of size of business. With respect to the size of business issue, the Complaint alleges "For purposes of calculating the proposed penalty under U.S. EPA's *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act*, dated December 2009, Respondent's gross revenues from all sources based on Respondent's entire corporate family, including its parent company, during calendar year 2009 were over \$10,000,000." (Complaint ¶ 52). In its Answer, the Respondent states: "This paragraph should be stricken from the Complaint as immaterial and unfairly prejudicial." (Answer ¶ 37). Therefore, despite Respondent's August 3, 2010 Response of Liphatech, Inc. to Complainant's Request For Voluntary Production of Financial Information, the issue of size of business has not been squarely addressed by Respondent.

Based on the information that is available about Respondent and its parent corporation and Respondent's August 3, 2010 Response, U.S. EPA believes it has placed Respondent in the appropriate size of business category under the ERP.

VIII. Designation of Agency Representative for Purposes of the Hearing.

Complainant requests that all witnesses who have not been designated as expert witnesses be excluded from the courtroom in which the hearing takes place while other witnesses are testifying, with the following exceptions:

1. Expert witnesses should be allowed to remain in the courtroom and listen to testimony.

2. A witness designated by counsel for either party as a representative of a party who is a non-natural person should be allowed to remain in the courtroom at all times and to listen to testimony.

While there is no specific provision in the Consolidated Rules that governs the circumstances of whether and when the Presiding Administrative Law Judge should exclude fact witnesses, guidance can be found in the Federal Rules of Evidence (FRE). Specifically, FRE 615 provides as follows:

Rule 615. Exclusion of Witnesses

At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

Both Complainant and Respondent are parties who are not natural persons. Complainant, U.S. EPA, is a federal agency, and therefore is not a natural person. Under FRE 615(2), an officer or employee of U.S. EPA is not required to be excluded from the hearing during the testimony of other witnesses, even if that officer or employee will testify as a witness; the only requirement is that the officer or employee be designated as the representative of Complainant, U.S. EPA, by Complainant's attorney(s). The decisions of federal courts are instructive regarding this issue. *See generally United States v. Martin*, 920 F.2d 393 (6th Cir. 1990); *United States v. Gonzalez*, 918 F.2d 1129 (3d Cir. 1990), *rehearing denied, cert. denied* 111 S. Ct. 1015, 498 U.S. 1107, 112 L.Ed.2d 1097, *cert. denied* 111 S. Ct. 1604, 499 U.S. 968, 113 L.Ed.2d 667, *cert. denied* 111 S. Ct. 1637, 499 U.S. 982, 113 L.Ed.2d 733; *United States v. Adamo*, 882 F.2d 1218 (7th Cir. 1989); *United States v. Thomas*, 835 F.2d 219 (9th Cir. 1987),

cert. denied 108 S. Ct. 1741, 486 U.S. 1010, 100 L.Ed.2d 204; *United States v. Jones*, 687 F.2d 1265 (8th Cir. 1982).

The undersigned attorneys hereby designate Ms. Claudia Niess as the representative for Complainant, U.S. EPA, for purposes of the hearing in this matter, within the meaning of FRE 615(2). Complainant respectfully requests that Ms. Niess be allowed to remain in the courtroom during the testimony of Complainant's other witnesses, and during the testimony of Respondent's witnesses.


IX. Reservation of Rights.

Complainant respectfully reserves the right to supplement its list of witnesses and/or its list of exhibits upon reasonable notice to the Court and the Respondent, or by order of this Honorable Court.

Complainant's Initial Prehearing Exchange for In the Matter of Liphatech, Inc., is hereby respectfully submitted.

DATED: Sept 28, 2010

Respectfully submitted,



Nicholas K. O'Meara

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

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

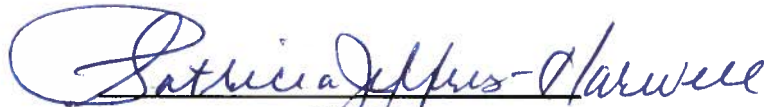
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CERTIFICATE OF SERVICE

I hereby certify that the original and one true, accurate and complete copy of Complainant's Initial Prehearing Exchange, together with true, accurate and complete copies of Complainant's Exhibits 1 through 115, were filed with the Regional Hearing Clerk, U.S. EPA, Region 5, on the date indicated below, and that true, accurate and complete copies of Complainant's Initial Prehearing Exchange and Complainant's Exhibits 1 through 115, were served on the Honorable Barbara Gunning, Administrative Law Judge (service by Pouch Mail), and Mr. Michael H. Simpson, Counsel for Respondent, Liphatech, Inc. (service by UPS), on the date indicated below:

Dated in Chicago, Illinois, this 28 day of September, 2010.



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