UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
LIPHATECH, INC.,	)	**DOCKET NO. FIFRA-05-2010-0016**
	)	
	)	
RESPONDENT	)	

ORDER ON RESPONDENT'S MOTION TO LIMIT TESTIMONY AT TRIAL BASED UPON JOINT STIPULATIONS

I. Background

The First Amended Complaint ("Amended Complaint") in this matter was filed on January 7, 2011, and replaces the original Complaint filed on May 14, 2010. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules" or "Rules of Practice") found at 40 C.F.R. part 22. By an Order Scheduling Hearing issued June 10, 2011 ("Scheduling Order"), this matter was initially scheduled for hearing beginning October 31, 2011. Included in that Scheduling Order were several deadlines applicable to pre-hearing practice, including an August 31, 2011, deadline for motions *in limine*, a deadline for joint stipulations, and a deadline for optional prehearing briefs. Pursuant to the Scheduling Order, the parties submitted an extensive set of Joint Stipulations to facts and exhibits on October 6, 2011. By Order issued October 20, 2011, exhibits subject to the joint stipulation on admissibility were admitted into the record and the motion to accept the joint stipulations of fact was granted. In that same Order, the hearing was postponed due to the sudden health complications experienced by Respondent's former lead counsel. On November 2, 2011, the undersigned issued an Order rescheduling the hearing to commence on February 7, 2012.

On January 12, 2012, Respondent submitted a Motion to Limit Testimony at Trial Based Upon Joint Stipulations ("Motion" or "Mot.") in which Respondent requests that this Tribunal enter an order in advance of hearing that excludes most of Complainant's proposed witnesses and limits testimony at hearing "to those relevant issues of material fact, if any, that remain in dispute." Mot. at 9. On January 18, 2012, Complainant filed a Response in Opposition to Respondent's Motion ("Response" or "Resp.") in which Complainant asserts that the Motion is untimely and, alternatively, that the Motion should be denied as premature. Resp. at 1, 4. On

January 24, 2012, Respondent submitted a Reply to Complainant's Response ("Reply").

II. Positions of the Parties

The crux of Respondent's argument is that the Joint Stipulations of fact, submitted in October 2011, render the testimony of Complainant's proposed witnesses cumulative and, therefore, judicial resources should be conserved by limiting or excluding the testimony of several witnesses. Mot. at 1 (citing 40 C.F.R. §§ 22.16(a) and 22.22(a)(1)). As Respondent notes, Complainant has identified 18 proposed witnesses for hearing. *Id.* Respondent explains that because liability has already been established for Counts 1 - 2,140, the only remaining issues relate to the proper unit of violation and the appropriate penalty, if any, for those violations. *Id.* at 3. With respect to Counts 2,141 - 2,231, Respondent identifies multiple stipulations of fact that have, in its view, substantially reduced the number of genuine issues of material fact that must be resolved at hearing. *Id.* at 3, 5. Lastly, Respondent notes that the "gravity" of the alleged violations remains the only penalty factor at issue for any count. *Id.* at 4.

Respondent then identifies each of Complainant's 18 proposed witnesses and suggests why that particular testimony should be excluded or limited. Specifically, in the Motion at 6-8, Respondent argues that:

1. testimony related to the investigation of the alleged violations is immaterial (proposed witnesses Mr. Shawn E. Rich, Mr. Shawn Hackett, Mr. Mark Klapperich, Mr. Charles King and Mr. Arthur J. Fonk);
2. testimony related to the content of advertisements and product information is cumulative (proposed witness Ms. Claudia Niess);
3. testimony regarding the legal standard used to determine violations of FIFRA Section 12(a)(1)(B) is not probative (proposed expert witnesses Mr. John D. Hebert, Dr. William W. Jacobs, Ms. Meredith F. Laws and Mr. Daniel B. Peacock);
4. testimony about the EPA reviews conducted during Rozol's registration process is irrelevant (proposed expert witnesses Dr. Thomas Steeger, Dr. William Allen Erickson, and Mr. J. Andrew Shelby);
5. testimony related to Respondent's ability to continue in business is not at issue (proposed expert witness Ms. Gail Coad);
6. opinion testimony regarding the drafting of FIFRA's Enforcement Response Policy is not probative (proposed expert witness Mr. Dyer); and
7. testimony capturing the research and investigation into the effects of Rozol on other animals is irrelevant (proposed expert witnesses Dr. Nimish B. Vyas, Dr. Mark A. Kirms and Ms. Bonnie C. Yates).

Respondent also includes a detailed attachment, Exhibit A, that compares the narratives of proposed testimony against the content of the Joint Stipulations. Mot. at Ex. A. Respondent concludes by requesting an order to limit testimony to "relevant issues of material fact, if any, that remain in dispute." Mot. at 9.

In its Response, Complainant first argues that the Motion is untimely. Complainant points to the June 10, 2011, Scheduling Order that set August 31, 2011, as the deadline for pre-hearing motions. Resp. at 1. In support of its argument, Complainant asserts that Respondent has improperly delayed its Motion until the final days before hearing, arguing that all but three of the Joint Stipulations were admitted in the June 2010 Answer or the February 2011 Amended Answer and, therefore, the date of the actual submission of the Joint Stipulations is irrelevant. Resp. at 2. Complainant also emphasizes that Respondent has not offered to limit its own witnesses in a similar manner. *Id.*

If the Motion is deemed timely, Complainant argues, in the alternative, the Motion should be denied for several other reasons: (1) Respondent has failed to meet the high burden placed on a party seeking such a drastic remedy; (2) the proposed testimony is, in fact, relevant to important issues in the case; and (3) any determination as to the relevancy of specific testimony must be made in context at the hearing, thus rendering the Motion unripe. Resp. at 1-7.

In its Reply, Respondent accuses Complainant of misunderstanding the parties' "obligations of transparency" under Rule 22.19. Reply at 1. Respondent then declares that Complainant's actions suggest a plan to present evidence in violation of the Rules of Practice. *Id.* On the issue of timeliness, Respondent implies that it would not have been feasible to file this type of Motion prior to the submission of the Joint Stipulations, which were not due until October 2011. Reply at 2. By way of explanation, Respondent offers that following the postponement of the hearing, Respondent reevaluated the record and "concluded it would be worth suggesting to the Court that narrowing the issues for trial might be in order." *Id.*

III. Discussion

The June 10, 2011, Scheduling Order gave the parties until August 31, 2011, to file any pre-hearing motions, including motions *in limine*. Both parties took advantage of the opportunity to file multiple motions in this case, including motions to limit or expand proposed evidence. The allotted time for such motions expired on September 1, 2011. At that time, the scope of potential evidence was fixed and the parties were able to assemble a substantial and detailed set of Joint Stipulations of Facts and Exhibits. As indicated in the Scheduling Order, the parties were at liberty to include stipulations as to specific testimony. The record reflects that no such stipulations were included in the Joint Stipulations filed October 6, 2011.

The Joint Stipulations serve a critical function in streamlining the issues for hearing and the parties are commended for crafting such a detailed set of stipulations. However, the Joint Stipulations are not intended to be the premise for subsequent pre-hearing motions related to the evidence. The delay of the hearing was based solely on the need to afford Respondent's new counsel the time necessary to prepare for hearing, not to reopen the pre-hearing motions phase of this proceeding. The August 31, 2011, deadline was intended to establish an endpoint for preliminary motions *in limine*. As such, the current Motion is untimely. Nevertheless, the postponement of the hearing in this particular case could reasonably have contributed to

Respondent's confusion, particularly as the postponement coincided with the substitution of new counsel for Respondent. However, even assuming, *arguendo*, that the Motion is timely, it would be denied on the merits.

While the stated purpose of the Motion, i.e., to conserve judicial resources and streamline the issues for hearing, is important and laudable, the remedy requested in the Motion is inappropriate. One of the central purposes of administrative hearings is to build a complete factual record on which a Final Agency Decision can be made. *See* 40 C.F.R. § 22.4(c) ("The Presiding officer shall . . . assure that the facts are fully elicited . . ."); *see also* 22.22(a)(1) (the ALJ "shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value" except in certain circumstances not relevant here). As the moving party, Respondent bears the burden of demonstrating that the testimony at issue is "clearly inadmissible for any purpose." *See, e.g., Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000). "Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." *Id.* (quoting *Hawthorne Partners v. AT & T Techs., Inc.*, 831 F.Supp. 1398, 1400 (N.D.Ill.1993). Here, Respondent has not demonstrated that Complainant's proposed witnesses will only offer testimony that is clearly inadmissible for any purpose. *See* Resp. at 5-7.

Respondent concedes that there are genuine disputes with respect to each of the 2,231 alleged violations. Mot. at 3-5 (appropriate unit of violation and penalty still at issue for Counts 1-2,140, and substantial questions related to six elements of the alleged violations in Counts 2,141-2,231 as well as calculating the appropriate penalty, if any). As Complainant notes, the issue of the appropriate penalty includes the multi-faceted "gravity" factor, which implicates a variety of factual issues. Resp. at 5. Moreover, Complainant acknowledges the need to present its case "in accordance with the Consolidated Rules and as necessary given the Chief Judge's rulings." Resp. at 4.[1] Complainant bears the burden of proof at hearing and must be accorded the opportunity to present all necessary aspects of its case against Respondent. 40 C.F.R. § 22.24(a). As Complainant makes clear, it "will present testimony and evidence to set the contextual framework for the case" as well as evidence to meet its burden of proof. Resp. at 3 n.4. As this implies, the relevance of particular testimony, as well as whether it is cumulative of other testimony in the record, must be determined in the context of the hearing, making this Motion an inappropriate vehicle to decide such issues preemptively. Therefore, Respondent's requested remedy, an order essentially directing Complainant to follow the Rules of Practice and avoid the introduction of unduly repetitious evidence at the hearing, is deemed premature.

Accordingly, the Motion is **DENIED**. Both parties retain the right to challenge particular testimony at hearing under Rule 22.22(a)(1) and 22.23(a). The parties are reminded that general

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[1] It is noted that Complainant's list of proposed witnesses, like the deadline for motions *in limine*, predates the Joint Stipulations. Thus, the earlier list does not benefit from any tactical decisions Complainant may have made following the submission of the Joint Stipulations. *See* Resp. at 4 (Complainant acknowledges the streamlining effect of events and developments that post-date the prehearing exchange).

practice, as well as prior rulings in the instant case, clearly set forth the requirement to limit testimony at the hearing to factual issues that are in dispute, with careful attention paid to the impacts of the Joint Stipulations.

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge

Dated: February 1, 2012
Washington, DC

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

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Respondent's Motion To Limit Testimony At Trial Based Upon Joint Stipulations**, dated February 1, 2012, was sent this day in the following manner to the addressees listed below.

Maria Whiting-Beale
Staff Assistant

Dated: February 1, 2012

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