UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
	)	
CALTECH INDUSTRIES, INC.	)	Docket No. 5-IFFRA-97-006
	)	
	)	
Respondent	)	

ORDER DENYING RESPONDENT'S MOTION TO STRIKE PROPOSED WITNESS AND DENYING MOTIONS TO COMPEL DISCOVERY

On January 7, 1998, Respondent, Caltech Industries, Inc., filed a Motion to Strike a Name From EPA's Witness List. Specifically, Respondent seeks to remove Mr. Robert Brennis from Complainant's list of witnesses provided during prehearing exchange. Mr. Brennis is currently employed by the U.S. Environmental Protection Agency's Office of Prevention, Pesticides, and Toxic Substances as a Product Manager, Antimicrobial Division.

In addition, on January 12, 1998, Respondent filed First and Second Motions to Compel Discovery, seeking "historical enforcement information" with respect to previous EPA enforcement actions where alleged product literature addressing the terms "decontaminate" and "infection control" were used. On January 28, 1998, Complainant filed its response to each of Respondent's motions urging their denial.

Addressing first, the Motion to Strike, Respondent expresses concern over the prospect of subjecting Mr. Brennis to cross-examination during the hearing on this matter, given the adversarial nature of the proceeding and the fact that Mr. Brennis may have the final say over the registration of Respondent's existing products and the majority of the pesticide registrations that Respondent will file in the near future.

Although not alleging any current bias on the part of the witness, simply stated, Respondent asserts that as a due process concern, it is a conflict of interest for Mr. Brennis to testify in this proceeding and maintain an objective decision making position with respect to the registration of Respondent's *future* antimicrobial

products. As such, Respondent argues that to allow Mr. Brennis to testify would cause it to unfairly weigh the costs and benefits of proceeding with a given defense involving the examination of Mr. Brennis as a witness.

Respondent's argument is specious and without merit. Pursuant to Section 22.22 of the Consolidated Rules of Practice, 40 C.F.R. Section 22.22, "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value....

Here, Respondent has not asserted that the testimony of Mr. Brennis will be immaterial or of little probative value, but rather, that as a result of his participation in the evidentiary hearing, he might violate his ethical responsibilities and unfairly treat Respondent in *future* dealings. Thus, Respondent has failed to demonstrate how the testimony of Mr. Brennis would be inadmissible under the Rules of Practice.

Federal officials are presumed to act in good faith in carrying out their official duties. Moreover, administrative decision makers are afforded the presumption of honesty, and integrity, so that unsubstantiated allegations of bias or misconduct are insufficient to state a claim upon which relief can be granted. Ostrer v. Luther, 668 F. Supp. 724, 733-734 (1987). Here, Respondent's motion not only fails to assert a claim of bias by Mr. Brennis, but merely speculates that bias against Respondent *might* occur *in the future* as a result of his participation as a witness in this hearing.

Respondent has thus failed to show how the prospective testimony of Mr. Brennis raises any conflict of interest issue or deprives Respondent of its due process rights. As Respondent's motion fails to state a claim upon which relief can be granted, and casts potentially unfair aspersions on Mr. Brennis, it is therefore **DENIED** and stricken from the record.

Respondent's First and Second Motions to Compel Discovery are similarly without merit. In these motions, Respondent seeks "the following information with regard to each of [EPA's] last five (5) enforcement actions taken against any manufacturer or distributor of cleaning products viewed by the Complainant as making pesticidal claims where the operative term in the product literature was "infection control" or "decontaminate"

A. A copy of the alleged pesticidal claim

B. A copy of the Complaint and the Respondent's Answer

C. A copy of the Administrative Law Judge's opinion on the matter, and

D. If it exists, a copy of any Article III judge's opinion on the matter."

Respondent states that based on its review of the case law and FIFRA regulations, that this case may be the first time Complainant has tried to classify the terms "decontaminate" or "infection control" as *pesticidal claims*. As such, Respondent asserts that it is entitled to know the basis of the claim against it in order to better prepare its defense.

In response, Complainant urges that Respondent's motions be denied for failure to provide the facts necessary for relief pursuant to Section 22.19(f) of the Rules of Practice, 40 C.F.R. Section 22.19(f).

Pursuant to Section 22.19(f)(1)(i),(ii) and (iii), the undersigned may only grant discovery if such discovery would not "unreasonably delay the proceeding," and if the materials sought would have "significant probative value" and would be "not otherwise obtainable." 40 C.F.R. Section 22.19(f)(1)(i),(ii) and (iii).

In its benchmark decision, Chautauqua Hardware Corporation, EPCRA Appeal 91-1, 3 E.A.D. 616, (June 24, 1991), the Environmental Appeals Board (EAB), addressed the fundamental issue of the scope of discovery under the Consolidated Rules of Practice. In Chautauqua, the EAB held that the phrase "probative value" denotes the

tendency of a piece of information to prove a *fact* that is of consequence to the case. Supra, at 622.[(1)]

As in Chautauqua, Respondent in the instant case is not trying so much to prove a fact, as attempting to make a legal or policy argument of whether the terms "infection control" or "decontaminate" are properly *pesticidal claims* under FIFRA regulations. Indeed, the great majority of Respondent's brief in support of its motions address the merits of its case.

Respondent is attempting to show, through the cloak of discovery, that EPA's legal or policy decision to interpret the above-disputed terms as *pesticidal claims* is inappropriate, for lack of a precedential basis. There may well exist a factual question of whether EPA has ever cited a manufacturer under similar circumstances. However, the requests for materials above, in addition to being overly broad, cannot be used to prove a *fact* bearing on the appropriateness of the alleged violations in the instant case. What has happened in other cases can have no bearing on any factual issues in this case. See, Chautauqua, supra, at 627.

The ultimate issue of whether the alleged violations constituted proper interpretations of the statute and regulations is clearly a legal one. As such, the information sought by Respondent does not have "significant probative value" within the meaning of Section 22.19(f)(1)(iii).

In addition, Respondent's discovery requests do not meet the requirement of Section 22.19(f)(1)(ii), as they have not demonstrated that the documents sought are "not otherwise obtainable". This is particularly true with respect to its request for copies of decisions of Administrative Law Judges and Article III Judge's opinions which are widely available on Lexis or Westlaw. Given the availability of these resources, Respondent may not use the discovery provisions of the Consolidated Rules to do research for its legal or policy arguments. As such, they are not the proper subject of a discovery request.

For the above-stated reasons, the information sought by Respondent is not discoverable within the meaning of Section 22.19(f)(1)(ii) or (iii) of the Consolidated Rules, as it does not have "significant probative value" and is "otherwise obtainable". Respondent's First and Second Motions To Compel Discovery are therefore **DENIED.**

Accordingly, Respondent's Motions to Compel Discovery and Motion to Strike are **DENIED.**

Stephen J. McGuire

Administrative Law Judge

Date: February 6, 1998
Washington, D.C.

1. Under the Federal Rules of Civil Procedure, discovery may only be obtained if the information sought "appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b). Under the Federal Rules of Evidence, "[e]vidence which is not relevant is not admissible." Fed. R. Evid. 402. The Federal Rules of Evidence define "relevant evidence" as

> evidence having any tendency to make the existence of any *fact* that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed. R. Evid. 401 (Emphasis supplied).

Thus, discovery may not be obtained under the Federal Rules of Civil Procedure unless it will lead to information tending to make the existence of a *fact* more or less probable than it would be without the evidence. See, Chautauqua, supra,

Footnote No. 10.