UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Carbon Injection Systems LLC,	)	**Docket No. RCRA-05-2011-0009**
Scott Forster,	)	
and Eric Lofquist,	)	
	)	
Respondents.	)	

ORDER ON COMPLAINANT'S MOTION *IN LIMINE* TO PRECLUDE CERTAIN TESTIMONY EVIDENCE, AND DOCUMENTS, AND RESPONDENTS MOTION *IN LIMINE* TO BAR EVIDENCE OF THE FINANCIAL WORTH OR ASSETS OF SCOTT FORSTER AND ERIC LOFQUIST

The hearing in this matter is scheduled to commence on June 18, 2012. On May 4, 2012, Complainant filed a Motion *in Limine* to Prec[l]ude Certain Testimony, Evidence, and Documents ("Motion" or "Mot."). On May 14, 2012, this Tribunal received Respondents' Opposition to Complainant's Motion *in Limine* ("Response" or "Resp."). In its Motion, Complainant first argues that the proposed testimony of Dr. Joseph J. Poveromo and Mr. Frederick Rorick will be duplicative and requests "an order barring one of these witnesses from testifying at all or, alternatively, from providing duplicative testimonies, as appropriate." Mot. at 2. Complainant also seeks an order barring the introduction of evidence regarding the ability of Respondents Forster and Lofquist to pay the proposed penalty. Mot. at 5. Finally, Complainant seeks to exclude certain exhibits (identified as RX 19, 20, 24-28, 30, and 32) on the grounds that they are clearly inadmissible for any purpose. *Id.* In their Response, Respondents deny the redundancy of the expected testimony by Dr. Poveromo and Mr. Rorick, and attempt to differentiate the topics that each witness intends to cover. Resp. at 3. Respondents also assert that the exhibits identified by Complainant (RX 19, 20, 24-28, 30, and 32)[1] are relevant to "either ths issue of liability or the determination of penalty, and should not be excluded." *Id.* at 5. Lastly, Respondents do not oppose excluding evidence "Scott Forster's and Eric Lofquist's individual ability to pay the proposed penalty." *Id.* at 4. However, Respondents request a parallel order precluding Complainant "from introducing evidence of Respondents' financial worth and assets for any other purpose." *Id.*

[1] At one point on page 5 of their Response, Respondents include RX 31 in the list of proposed exhibits Complainant seeks to exclude. However, all other references by Respondents identify RX 32 instead. Resp. at 5-6. The list of exhibits at issue in this Order are read to include RX 32, but not RX 31.

In a separate motion, Respondents seek an order barring Complainant "from adducing any evidence at hearing as to any financial information regarding either individual respondent." Respondents' Motion *in Limine* to Bar Evidence of the Financial Worth or Assets of Scott Forster and Eric Lofquist ("Second Motion" or "2nd Mot.") (filed May 4, 2012). Respondents identify, as examples, CX 75-79 as exhibits that should be excluded. 2nd Mot. at 2. On May 17, 2012, Complainant filed its Response to Respondents' Motion *in Limine* to Bar Evidence of the Financial Worth or Assets of Scott Forster and Eric Lofquist ("Second Response" or "2nd Resp.") in which Complainant agrees that "evidence containing information *only* about the financial worth or assets of Respondents Forster and Lofquist which is relevant *only* for purposes of proving their ability to pay should be barred" but arguing that evidence relevant for other purposes should not be barred. 2nd Resp. at 3 (emphasis in original).

I. Positions of the Parties

With respect to the proposed expert testimony of Dr. Poveromo and Mr. Rorick, Complainant argues that the narrative description of their testimonies presented in Respondents Prehearing Exchange ("Rs' PHE") are "virtually identical." Mot. at 2-3 (quoting Rs' PHE included as Attachment "A" to the Motion). In addition, Complainant cites each witness's respective expert reports or declarations, tracking the similarity of language used and topics covered. *Id.* at 3-4 (citing and quoting the Rorick Report (Attachment "B"), the Rorick Declaration (Attachment "C"), and the Poveromo Declaration (Attachment "D")). Moreover, Complainant argues, if both expert witnesses are allowed to offer identical testimony, not only would this be a waste of judicial resources, it would also be "an unfair 'piling on' by allowing the trial record to be loaded with the weight of duplicative testimony." *Id.* at 4. Complainant then requests an order barring one of these witnesses from testifying, but does not suggest a method for making such a determination. Alternatively, Complainant requests an order "directing that the testimony of these two witnesses not retread the same ground at trial." *Id.*

In their Response, Respondents argue that their PHE "expressly details the differences in the particular areas of expertise of the two experts." Resp. at 2. While Respondents concede that Dr. Poveromo and Mr. Rorick are both "blast furnace experts" overall, Respondents argue that the actual testimony offered at trial will "provide different perspectives as to the issues involved in this hearing." *Id.* at 3. Specifically, Respondents argue that Dr. Poveromo will focus on "the raw materials used in a blast furnace, the chemistry of the reactions and the economic aspects of iron-making." *Id.* Respondents then assert that Mr. Rorick is "particularly knowledgeable on blast furnace operations and has extensive field experience." *Id.* Respondents conclude that such testimony would not be cumulative. Moreover, given that the issue of burning for energy recovery is central to this matter, Respondents argue that they should be granted a "reasonable degree of latitude to present the evidence necessary for their case." *Id.*

With respect to Respondents' proposed exhibits (RX 19 and 20), Complainant argues these exhibits represent a small number of supplier invoices that "Respondents hand-picked from thousands." Mot. at 6. Complainant argues that this small set of invoices is not representative of

prices paid by CIS over the course of the relevant time period.[2] Complainants go on to argue that if RX 19 and 20 are deemed admissible, that Respondents should be required to produce the remainder of the invoices, as appropriate, in order to create "the entire document or related documents." *Id.* at 6 n.1 (citing Fed. R. Evid. 106). With respect to Respondents proposed exhibits (RX 24-28 and 30), Complainant asserts that the trademark and material safety information related to materials called Sylvablend and Rosintene are not relevant to this proceeding. Complainant argues that RX 29 already contains the relevant trademark information for Unitene. Finally, with respect to RX 32, an article from Wikipedia.org, Complainant argues that Wikipedia is "a completely unreliable source of evidence in any legal proceeding" and concludes that RX 32 should be barred. Mot. at 7.

In their Response, Respondents argue that all of the disputed exhibits contain relevant information. Specifically, RX 19 (a pricing chart) and RX 20 (one sample invoice for each material on the pricing chart) are relevant because Complainant claims that the purchase of Unitene was motivated by price. Resp. at 5. Though vague, Respondents seem to characterize Complainant's argument implicitly as: CIS paid a lower price because the Unitene materials were (in reality) hazardous waste and not a generally marketable product. With respect to the remaining exhibits (RX 24-28, 30, and 32), Respondents argue that these documents are relevant to establishing the historical market for terpenes, which Respondents assert is relevant to the issue of whether Unitene is a co-product or a by-product. *Id.* at 5-6.

With respect to the evidence related to ability to pay, the parties agree that evidence of Respondent Forster and Lofquist's individual ability to pay is no longer an issue before this Tribunal. 2nd Mot. at 2. Further, during the prehearing conference call conducted by the undersigned's staff on May 22, 2012, counsel for Respondents stated that the remaining contention that the corporate Respondent CIS is unable to pay the proposed penalty is similarly withdrawn. Given this development, it appears that all Respondents have fully abandoned the issue of ability to pay and, therefore, Complainant need not address any Respondent's ability to pay the proposed penalty. Nevertheless, because Complainant makes an affirmative distinction between evidence relevant *only* to a party's ability to pay and evidence relevant *both* to ability to pay and other issues before this Tribunal, it is unclear the extent to which the parties are in agreement. 2nd Resp. at 3-4. Respondents seek to bar "any financial information" whereas Complainant would only bar evidence that served no purpose other than establishing an ability or inability to pay. 2nd Mot. at 2; 2nd Resp. at 3-4.

II. Legal Standard

A motion *in limine* is the appropriate vehicle for excluding testimony or evidence from

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[2] Complainant also notes that RX 99 includes hundreds of invoices for the Unitene materials and demonstrates that the price fluctuated over time, implying that a complete collection of invoices for the other materials Respondents identify in RX 19 is necessary to provide a complete picture of the relative costs. Mot. at 6 (citing RX 99; CX 9).

being introduced at hearing on the basis that it lacks relevancy and probative value. "[A] motion in limine should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000). Motions *in limine* are generally disfavored. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). "Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so questions of foundation, relevancy, and potential prejudice may be resolved in proper context." *Id.* at 1400-01. Thus, denial of a motion *in limine* does not mean that all evidence contemplated by the motion will be admitted at trial. Rather, denial of the motion *in limine* means only that, without the context of trial, the court is unable to determine whether the evidence in question should be excluded. *United States v. Connelly*, 874 F.2d 412, 416 (7th Cir. 1989).

III. Discussion and Conclusion

A. Testimony of Dr. Poveromo and Mr. Rorick

Initially I note that the description of the proposed testimony and respective declarations from Dr. Poveromo and Mr. Rorick are remarkably similar in the language used and the topics covered, particularly on the issue of burning for energy recovery. *Compare* Rorick Declaration (Attachment C) at 3, *with* Poveromo Declaration (Attachment D) at 9 (both authors refer to the published work of Jeschar and Dombrowski, with Poveromo going so far as to note that "[t]his has been well explained by Rorick in his declaration"). In addition, Respondents devote minimal text in their Response to actually identifying the scope of each witness's intended testimony, simply arguing that "[e]ach expert witness will testify as to his area of expertise." Resp. at 3. Nevertheless, the data and opinions included in these attachments to the Motion are not wholly identical. For example, Mr. Rorick devotes substantial attention to the "Cadence" issue, Rorick Report at 16-18 (citing Hazardous Waste Management System; Burning of Waste Fuel and Used Oil Fuel in Boilers and Industrial Furnaces, 50 Fed. Reg. 49164, 49171-74 (Nov. 29, 1985)), a subject left unaddressed in the Poveromo Declaration. Moreover, as this matter will culminate in a bench trial, there is little risk of realizing Complainant's concern that "if you repeat something often enough, it will be taken as true." Mot. at 4. In addition, any such risk of duplicative testimony can be eliminated by having the second witness promptly endorse the testimony of the first upon taking the stand. Because it cannot be concluded at this time that the proposed testimony of these two witnesses is clearly inadmissible for any purpose, I find it premature to enter an order barring one witness's testimony over another. Accordingly, Complainant's Motion with respect to the testimony of Dr. Poveromo and Mr. Rorick is **DENIED**.[3]

B. Proposed Exhibits RX 19, 20, 24-28, 30, and 32

[3] Complainant retains its right to object to specific testimony at hearing based on the standard articulated in 40 C.F.R. § 22.22(a).

With respect to RX 19 and 20, evidence that is probative of whether Unitene was underpriced, therefore indicating that it was valued as a waste, is relevant to this proceeding. Complainant appears to be most concerned that the "sample" invoices (RX 20) of other materials identified in RX 19 present an incomplete, and implicitly biased, picture of Unitene's relative value. This is evident from Complainant's alternative request that if RX 19 and 20 are admitted, Respondents should be required to produce "the remainder of the invoices [as] appropriate." Mot. at 6 n.1. The propriety of this request depends on the purpose for which Respondents use RX 19 and 20 at hearing. If Respondents offer RX 19 merely to organize and represent the prices stated in the RX 20 invoices in identical units (i.e., dollars per gallon), then the completeness of the exhibits is not an issue and the exhibits will carry whatever weight is appropriately accorded to them. On the other hand, if Respondents are offering RX 19 and 20 to demonstrate that overall, Unitene AGR (on average) was purchased for $0.48/gallon and Unitene LE (on average) was purchased for $0.60/gallon over the course of the entire relevant period, and that those average prices when compared to the other average prices of products listed in RX 19 routinely lined up as represented in RX 19, then Complainant's concern that the invoices in RX 20 were cherry-picked has merit.[4] Complainant could then reasonably request access to the bulk of invoices that form the basis for the average prices reflected in RX 19. However, it is unclear at this juncture the purpose for which Respondents intend to offer these exhibits. Because it cannot be concluded that RX 19 and 20 are clearly inadmissible for any purpose, Complainant's Motion with respect to these exhibits must be **DENIED**. Complainant's alternative request, that Respondents be ordered to produce all invoices for the materials listed in RX 19 is deferred until Complainant chooses to raise it at hearing.

With respect to RX 24-28, general trademark information related to other products not at issue in this matter is not relevant. Nevertheless, Respondents argument that these exhibits help establish the historical uses and market for similar terpene products is not without merit. While the relevance of RX 24 and 28 is difficult to see, Material Safety Data Sheets (RX 25-27) that describe the characteristics, composition, disposal considerations, and transport information of products that are substantially similar to Unitene may prove probative in determining whether Unitene was a product as opposed to a waste. While Respondents would have to lay the proper foundation at hearing before moving to admit these exhibits, it cannot be concluded at this time that they are clearly inadmissible for any purpose. Accordingly, Complainant's Motion with respect to these exhibits must be **DENIED**.

With respect to RX 30, the origin and authorship of this exhibit is unknown. Similarly, its content does not shed any light on its authenticity or admissibility. Nevertheless, it appears to be aimed at demonstrating that the Union Camp Corporation once held a patent to a dipentine identified as Unitene, which suggests that the United States Patent and Trademark Office, at one time, recognized a substance called Unitene as a material capable of being patented. While this conjecture finds little support in the exhibit itself, Respondents will have the opportunity to lay a

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[4] It may prove relevant that the invoices captured in RX 20 all date to the same period of time: September - December of 2007.

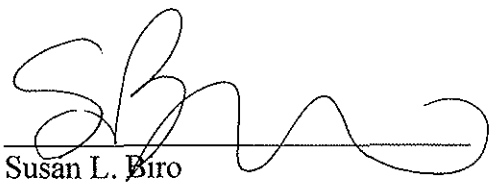
proper foundation through testimony at hearing. Again, Complainant's Motion with respect to RX 30 must be **DENIED**.

With respect to RX 32, if Respondents can authenticate the origin of this document and its relevance can be established, then it will carry whatever weight an article from Wikipedia can properly be accorded.[5] Complainant's Motion with respect to RX 32 is **DENIED**.

C. Evidence of Respondents' Ability to Pay

Given that no Respondent now asserts the affirmative defense of "inability to pay," evidence relevant only to establish the ability or inability to pay the proposed penalty is irrelevant and, on such basis alone, inadmissible. By withdrawing this defense, all three Respondents admit that they are able to pay the proposed penalty. *See New Waterbury, Ltd.*, 5 E.A.D. 529, 541 (EAB 1994). Therefore, CX 75-79 (real estate listings for various residential properties, which I find relevant only to establish Respondents' ability to pay) are properly excluded. However, where proposed evidence may be admissible for some other purpose, such as establishing whether the individual Respondents are "operators" under RCRA, such evidence (including CX 71) will not be barred by this Order. Accordingly, Complainant's Motion with respect to evidence *only* related to a Respondent's ability to pay is **GRANTED**. Similarly, Respondents request in their Second Motion to exclude CX 75-79 is **GRANTED**. The Order does not affect other proposed testimony or exhibits, such as CX 71, for which a party could establish a proper foundation for admission.

SO ORDERED.



Susan L. Biro
Chief Administrative Law Judge

Dated: May 31, 2012
Washington, D.C.

[5] While Wikipedia has been cited as a resource with more frequency in court decisions, many federal courts have been "troubled by Wikipedia's lack of reliability." *United States v. Lawson*, – F.3d –, 2012 U.S. App. Lexis 8021, *53-54 and n.28 (4th Cir. Apr. 20, 2012).

In the Matter of Carbon Injection Systems LLC, Scott Forster and Eric Lofquist, Respondents
Docket No. RCRA-05-2011-0009

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Complainant's Motion In Limine To Preclude Certain Testimony Evidence, And Documents, And Respondents Motion In Limine to Bar Evidence of the Financial Worth Or Assets Of Scott Forster and Eric Lofquist,** dated May 31, 2012, was sent this day in the following manner to the addressees listed below.

Maria Whiting-Beale
Staff Assistant

Dated: May 31, 2012

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