

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)	DOCKET NO: FIFRA-03-2015-0248
)	
FMC Corporation,)	
)	Complainant's Motion for Discovery
Respondent)	

COMPLAINANT'S MOTION FOR DISCOVERY


In accordance with Rules 22.16(a) and 22.19(e) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation/Termination or Suspension of Permits, 40 C.F.R. §§ 22.16(a) and 22.19(e), the Director of the Land and Chemicals Division of U.S. EPA, Region III ("Complainant"), submits this Motion for Discovery. Specifically, Complainant requests that this Court issue an order requiring that FMC Corporation ("Respondent") answer the propounded interrogatories (Attachment A hereto). Such interrogatories seek the opinions and bases thereof of Mr. George Orme, one of three expert witnesses identified by Respondent in its Prehearing Exchange. Complainant requests this information in order to adequately prepare for hearing.

On March 10, 2017, counsel for Complainant sent an email to Respondent's counsel of record to ascertain whether Respondent would object to the granting of this Motion. In its responsive email of March 13, 2017, Respondent's counsel stated in part that "FMC is willing to augment the narrative description of George Orme's testimony, which FMC believes should obviate the need for EPA to file a motion to compel discovery. Consistent with that undertaking, FMC requests that EPA voluntarily provide additional information as it relates to the expected testimony of three of its witnesses . . ." On April 6, 2017, Complainant voluntarily provided the requested additional information about the expected testimony of its three expert witnesses in its First Supplemental Prehearing Exchange. To date, Respondent has not voluntarily provided the information regarding Mr. Orme's testimony initially requested by Complainant on December 21, 2016.

For the reasons set forth in the accompanying Memorandum of Law, Complainant respectfully requests that this Court issue an Order granting Complainant's Motion for Discovery.

5/9/2017
Date

Respectfully submitted,



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ATTORNEYS FOR COMPLAINANT

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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In the Matter of:)	DOCKET NO: FIFRA-03-2015-0248
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**MEMORANDUM OF LAW IN SUPPORT OF
COMPLAINANT'S MOTION FOR DISCOVERY**

In accordance with Rules 22.16(a) and 22.19(e) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation/Termination or Suspension of Permits ("Rules of Practice" or "Rules"), 40 C.F.R. §§ 22.16(a) and 22.19(e), the Director of the Land and Chemicals Division of U.S. EPA, Region III ("Complainant"), submits this Memorandum of Law in Support of Complainant's Motion for Discovery. Specifically, Complainant requests that this Court issue an order requiring that FMC Corporation ("Respondent") answer eight proposed interrogatories (Attachment A hereto) each of which seeks the opinion of George Orme, an expert witness identified by Respondent in its Prehearing Exchange. Complainant requests this information in order to adequately prepare for hearing.

I. Relevant Procedural Background

On September 24, 2015, Complainant filed an Administrative Complaint and Notice of Opportunity for Hearing commencing this matter.

On November 20, 2015, Respondent filed its Answer and Request for Hearing.

On May 6, 2016, Administrative Law Judge Coughlin issued a Prehearing Order ("PO").

On June 15, 2016, Complainant filed its Initial Prehearing Exchange.

On July 8, 2016, Respondent filed its Prehearing Exchange ("R's PE").

On July 22, 2016, Complainant filed its Rebuttal Prehearing Exchange.

On August 22, 2016, Complainant filed its Motion for Partial Accelerated Decision as to Liability for Violations 1 through 12,273 of the Complaint ("PAD").

On September 6, 2016, Respondent filed its Opposition to Complainant's PAD ("R's Opp. to PAD").

On September 16, 2016, Complainant filed its Reply to R's Opp. to PAD.

On April 6, 2017, Complainant filed its First Supplemental Prehearing Exchange.

II. Legal Standard

The Rules of Practice provide that a party may move for additional discovery after the prehearing exchange required by 40 C.F.R. § 22.19(a). 40 C.F.R. § 22.19(e)(1). Such motion shall “specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought ...” *Id.* The Presiding Officer may order such other discovery only if it:

- (i) Will neither unreasonably delay the proceeding nor unreasonably burden the nonmoving party;
 - (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
 - (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.
- Id.*

Complainant seeks an Order requiring Respondent respond to the eight proposed Interrogatories set forth in Attachment A. Complainant describes in detail the nature of the information sought and how this request satisfies the criteria for additional discovery as set forth below.

III. Argument

A. Respondent’s Narrative Summary of George Orme’s Testimony is Deficient

In its Prehearing Exchange, Respondent identified George Orme as one of its expert witnesses. R’s PE at 9. Respondent described Mr. Orme as a “[m]arketing expert with over 25 years of experience . . . [and] an expert in direct mail and branding.” *Id.* Respondent included Mr. Orme’s resume (RX 079) but no expert report. Respondent stated that Mr. Orme may be called to “provide a general overview about marketing . . . [including] a discussion about marketing efforts that are used to raise brand and product awareness, compared to efforts that are intended to be offers for sale.” *Id.* Respondent stated that Mr. Orme may also be called to testify about:

. . . marketing metrics and the efficacy of different types of marketing, both in general and as they relate to this case¹...[;]

the nature of the materials involved in the advertising allegations in this case and responses to such documents [from a marketing perspective]...[;]

the lists used to identify potential recipients [of the direct mailer] and their efficacy...[;]

that the number of intended direct mailer recipients is smaller than EPA alleged in its Complaint ...[;]

¹ Presumably Mr. Orme will testify about the “Response Rate 2012 Report” included as RX 054 to R’s PE, but this is not mentioned in the narrative summary.

the process through which companies develop product names, including brand names...[;]

factors that influence customer decision making...[;]

the specific alternate brand names involved in this case, including among others “Stallion Insecticide” and “Stallion Brand Insecticide”...[; and]

marketing in the pesticide industry in general and by FMC’s competitors.”
Id. at 10-11.

The applicable Rule of Practice, 40 C.F.R. § 22.19(a)(2)(i), requires that a party provide a brief narrative summary of the expected testimony of each proposed witness but “do[es] not set a standard for the degree of specificity required” for each such summary. *Aylin, Inc., et al.*, Docket No. RCRA-03-2013-0039, 2016 EPA ALJ LEXIS 23 at *30 (ALJ, March 2, 2016). Likewise this Court’s Prehearing Order requires only a “brief narrative summary” of each witness’s testimony. PO at 2. Complainant submits that Respondent’s description of Mr. Orme’s expected testimony is so lacking in specificity that it does not comply with 40 C.F.R. § 22.19(a)(2)(i) and this Court’s Prehearing Order. As noted by the Environmental Appeals Board,

[W]e do not regard a prehearing exchange as a procedural nicety. Rather, because federal administrative litigation developed as a truncated alternative to Article III courts that intends expedition and does not allow for the kind of discovery available, for example, under the Federal Rules of Civil Procedure, the prehearing exchange plays a pivotal function – ensuring identification and exchange of all evidence and other related information (e.g., identification of witnesses). By compelling the parties to provide this information in one central submission, *the prehearing exchange clarifies the issues to be addressed at hearing* and allows the parties and the court an opportunity for informed preparation for hearing.

In re JHNY, Inc., 12 E.A.D. 372, 382 (EAB 2005)(emph. added).

Respondent’s narrative summary discloses neither the opinions of Mr. Orme nor the bases for such opinions thereby utterly failing to clarify the issues to be addressed at hearing. Mr. Orme does not disclose his opinions or the bases thereof in his written testimony filed in support of Respondent’s opposition to Complainant’s motion seeking partial accelerated decision (“Declaration”). Without the additional information requested herein, Complainant will be greatly prejudiced and deprived of an informed, meaningful opportunity to adequately prepare for hearing because Complainant will: 1) have no opportunity to review Mr. Orme’s opinions and material forming the bases of such opinions in advance of hearing for truthfulness, accuracy, relevance and completeness; 2) be effectively precluded from any independent inquiry into Mr. Orme’s opinions and materials forming the bases for his opinions in advance of hearing in order to verify or refute the proposed testimony and supporting evidence; 3) be unable to engage its own expert witness in advance of hearing to perform a critical analysis of Mr. Orme’s opinions and materials forming the bases of such opinions to formulate his or her own expert opinions and prepare rebuttal testimony to be presented at hearing; and 4) be unable to prepare adequately for trial without such documents, evidence or information.

Accordingly, Complainant seeks written discovery – the proposed eight interrogatories attached hereto – in order to clarify the issues to be addressed at hearing. Complainant reserves the right to seek leave to depose Mr. Orme pursuant to 40 C.F.R. § 22.19(e)(3).

B. Complainant’s Request Meets the Standard for Other Discovery of 40 C.F.R. § 22.19(e)(1)

1. *The request will not unreasonably delay the proceeding nor unduly burden Respondent.*

Responding to this discovery request of eight interrogatories will neither unreasonably delay the proceedings nor unreasonably burden Respondent. The request will not unreasonably delay the proceedings because no hearing date has yet been set. In addition, responding to the proposed interrogatories will not unreasonably burden Respondent because the requested information is within Respondent’s control.

2. *The request seeks information that is most reasonably obtained from the non-moving party, and which the nonmoving party has not provided voluntarily.*

This discovery request seeks information completely within the control of Respondent and therefore most reasonably obtained from Respondent. Counsel for Complainant has requested via email the information sought herein from counsel for Respondent on at least the following dates: Dec. 21, 2016, Jan. 26, 2017, and March 10, 2017. Respondent has not provided the requested information voluntarily notwithstanding its apparent willingness to do so as noted in the accompanying Motion. More than four months have elapsed since Complainant first sought the information requested herein, yet such information remains outstanding.

3. *The request seeks information that has significant probative value on a disputed issue of material fact relevant to the liability or the relief sought.*

“The phrase ‘probative value’ denotes the tendency of a piece of information to prove a fact that is of consequence in the case.” *In re Advanced Electronics Inc.*, 10 E.A.D. 385, 395 (EAB 2002)(citing *In re Chautauqua Hardware Corp.*, 3 E.A.D. 616, 622 (CJO 1991)) (other citation omitted). Each of the proposed interrogatories seeks the opinion of Mr. Orme and the basis for each such opinion on topics identified by Respondent in its prehearing submittal (R’s PE at 10-11) or in Mr. Orme’s Declaration (Declaration at 1-2). Complainant submits that these topics are described so generally by Respondent as to obscure their significant probative value, if any, to *disputed* issues of *material fact*.² Nonetheless, Respondent’s failure to adequately summarize Mr. Orme’s testimony (rendering difficult Complainant’s ability to meet the criterion of 40 C.F.R. § 22.19(e)(iii)) should not act to bar the granting of this Motion.

One approach the Court is urged to consider is that taken by the presiding officer in *Joseph Oh and Holly Investments LLC*, Docket No. RCRA-10-2011-0164, 2012 EPA ALJ LEXIS 19, at *9-10 (ALJ, July 16, 2012). In that case, the presiding officer initially found that “the information sought by Complainant’s motion [for discovery] does not clearly constitute

² Complainant contends that there exist no genuine issues of material fact as to liability. See PAD.

‘information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought’ because Respondents have not demonstrated any disputed issue of material fact as to liability or the penalty. Respondents denied each and every allegation of the Complaint . . .” *Id.* at *9. However, the presiding officer then determined that Respondents’ “cursory descriptions” of witness testimony (which did not disclose any grounds for defenses, facts in dispute, or basis for opposing the penalty) did not constitute a “brief narrative summary” as required by 40 C.F.R. § 22.19(a)(2)(i). Thus, the presiding officer found that, in the “circumstances of this case, where Complainant essentially seeks to compel Respondents’ compliance with the Prehearing Order and Rules, the third criterion of 40 C.F.R. § 22.19(e)[1] is deemed to be met.” *Id.* at *9-10. Complainant contends that the pertinent circumstances of this case are not unlike that of *Joseph Oh*: Respondent’s narrative summary of Mr. Orme’s testimony (albeit not “cursory descriptions”) does not disclose any grounds for defenses, facts in dispute or basis for opposing the penalty. Accordingly, in such circumstances where Respondent has failed to comply with this Court’s Prehearing Order and the Rules, the third criterion of 40 C.F.R. § 22.19(e)(1) may be deemed to be met.

Complainant submits that the granting of this Motion will promote compliance with the Prehearing Order and Rules as well as the “efficient and timely exchange of information pursuant to 40 C.F.R. § 22.19 [which] is central to achieving timely administrative case resolutions.” *In re Ag-Air Flying Services, Inc.*, 2006 EPA App. LEXIS 40, at *13 (EAB, Sept. 1, 2006) (upholding default order issued for failure to comply with discovery order).

IV. Conclusion

WHEREFORE, for the foregoing reasons, Complainant respectfully requests that this Court issue an Order granting Complainant’s Motion for Discovery requiring Respondent to answer such discovery within twenty-one (21) calendar days, or such other time as this Court deems sufficient.

Respectfully submitted,

5/9/2017

Date



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ATTORNEYS FOR COMPLAINANT

ATTACHMENT A

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:) DOCKET NO: FIFRA-03-2015-0248
)
FMC Corporation,)
) Complainant’s Motion for Discovery
Respondent)

COMPLAINANT’S FIRST INTERROGATORIES

INSTRUCTIONS

Document production in lieu of response: Whenever a full and complete answer to an interrogatory or part of an interrogatory is contained in a document or documents, the document, if properly identified as answering a specific numbered interrogatory or part of an interrogatory, referenced, in place of a written answer provided that specific sections or pages of the document or exhibit that are responsive to the interrogatory are identified.

INTERROGATORIES

1. In its prehearing exchange, Respondent FMC Corporation (“FMC”) identified George Orme as an expert who will opine as to a general overview about marketing and marketing efforts that are used to raise brand and product awareness compared to efforts that are intended to be offers for sale. Please state Mr. Orme’s opinions on these subject areas and the bases therefor, specifically addressing the definition of “marketing” as well as the differences between brand/product awareness efforts and offers for sale as they relate to the violations alleged and/or the relief sought in the Administrative Complaint and Notice of Opportunity for Hearing, EPA Docket No. 03-2015-0248 (“Complaint”), that commenced this proceeding.
2. In its prehearing exchange, FMC identified George Orme as an expert who will opine about marketing metrics and the efficacy of different types of marketing, both in general and as they relate to the violations alleged in the Complaint. Please state Mr. Orme’s opinions on these subject areas and the bases therefor, specifically addressing what is meant by “marketing metrics,” and the efficacies of the different types of marketing as they relate to the violations alleged and/or the relief sought in the Complaint.
3. In its prehearing exchange, FMC identified George Orme as an expert who will opine about factors that influence customer decision making. Please state Mr. Orme’s opinion on this subject area and the basis therefor, specifically addressing how the factors that influence customer decision making relate to the violations alleged and/or the relief sought in the Complaint.
4. In its prehearing exchange, FMC identified George Orme as an expert who will opine about marketing in the pesticide industry in general and by FMC’s competitors. Please state Mr.

Orme's opinions on these subject areas and the bases therefor, specifically addressing how marketing in the pesticide industry in general and by FMC's competitors as they relate to the violations alleged and/or the relief sought in the Complaint.

5. In its prehearing exchange, FMC identified George Orme as an expert who will opine about the process through which companies develop product names, including brand names. Please state Mr. Orme's opinion on this subject area and the basis therefor, specifically addressing how the process through which companies develop product names relates to the violations alleged and/or the relief sought in the Complaint.
6. In its prehearing exchange, FMC identified George Orme as an expert who will opine about the specific alternate brand names involved in the above-captioned matter, including among others "Stallion Insecticide" and "Stallion Brand Insecticide." Please state Mr. Orme's opinion on this subject area and the basis therefor.
7. In its prehearing exchange, FMC identified George Orme as an expert who will opine about the lists used to identify potential recipients of the direct mailer referenced in the Complaint and the efficacy of such lists. Please state Mr. Orme's opinions on these subject areas and the bases therefor, specifically addressing the meaning of the term "potential recipients," as well as how the lists and efficacy of such lists relate to the violations alleged and/or the relief sought in the Complaint.
8. In the Declaration of George Orme in Support of Respondent FMC's Opposition to Complainant's Motion for Partial Accelerated Decision, Mr. Orme stated that he is prepared to testify about the facts in the record about returned and duplicative mailers and such facts' meaning, including "reduction in the numbers [of violations] in light of returned mail and duplicates...and about other facts that typically are taken into account, such as mail that is not delivered, mail that is not read, and the different ways that mail is read or potentially used." Please state Mr. Orme's opinions and the bases therefor, specifically addressing the meaning of the term "duplicative mailers," as well as how mail that is not delivered, mail that is not read, and the different ways that mail is read or potentially used relate to the violations alleged and/or the relief sought in the Complaint.

5/5/2017
Date

Respectfully submitted,



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ATTORNEYS FOR COMPLAINANT

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I filed electronically one copy of the attached Complainant's Motion for Discovery (Docket No. FIFRA-03-2015-0248) (Motion) via the OALJ E-filing System for service to:


Sybil Anderson, Headquarters Hearing Clerk
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900R
William Jefferson Clinton Building
1200 Pennsylvania Ave., NW
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The Hon. Christine D. Coughlin
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900R
William Jefferson Clinton Building
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Washington, DC 20460

I further certify that on the date set forth below, I served via email a true and correct copy of the foregoing Motion to:

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5/9/2017
Date



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