

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

In the Matter of:	)	
	)	Docket No. FIFRA-03-2015-0248
FMC Corporation,	)	
	)	
Respondent.	)	
_____	)	

**RESPONDENT FMC CORPORATION'S FIRST SUPPLEMENTAL  
PREHEARING EXCHANGE**

Pursuant to 40 C.F.R. § 22.19(f) of the Rules of Practice and Judge Coughlin's May 6, 2016, Prehearing Order, Respondent FMC Corporation ("FMC" or "Respondent") hereby submits its First Supplemental Prehearing Exchange.

**I. INTRODUCTION**

FMC is voluntarily providing additional information about the expected testimony of one of its expert witnesses, Mr. George Orme, pursuant to Complainant's request. On March 13, 2017, counsel for FMC advised counsel for Complainant that FMC was willing to augment voluntarily the narrative description of Mr. Orme's testimony. At the same time, counsel for FMC requested that Complainant voluntarily provide additional information related to the expected testimony of three of Complainant's witnesses. Complainant submitted its First Supplement to Prehearing Exchange on April 6, 2017, and Respondent is now submitting its First Supplemental Prehearing Exchange.

Respondent respectfully submits Complainant will not suffer prejudice due to this submission as the hearing date has not yet been set and Complainant will have sufficient time to review this information before the hearing. Moreover, FMC believes this submission and Complainant's First Supplement to Prehearing Exchange are comparable in detail and obviate

the possible need for discovery, which would be unnecessarily resource intensive for both Parties.

## **II. SUPPLEMENT TO BRIEF NARRATIVE SUMMARY OF GEORGE ORME'S EXPECTED TESTIMONY**

### **A. George Orme Founder and Managing Director of Strategic Marketing Partners, Inc.**

In Respondent's Prehearing Exchange, Respondent identified as one of its witnesses, Mr. Orme, a Marketing expert with over 25 years of experience. Respondent voluntarily supplements the brief narrative summary of Mr. Orme's expected testimony by providing the following additional information.

Mr. Orme may be called to provide a general overview about marketing based on his extensive experience advising companies on marketing strategies. He would explain that marketing is a discipline that involves evaluating and making a series of decisions about how to: (1) position a brand vis-à-vis competition; and (2) promote brand advantages in various media so the intended audience will become aware of and interested in using the brand. This may include discussing the developmental process underpinning a specific marketing effort, contrasted with the roll-out or distribution of that effort. Such an overview also may include, for instance, 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. Mr. Orme may explain that efforts intended to be offers for sale generally include information relevant to making purchasing decisions and enable the intended audience to make such decisions, for instance by providing pricing information and ordering instructions as well as quantity and volume options. Efforts that are intended to raise brand and product awareness, by contrast, generally do not provide such information, and do not enable the intended audience to directly purchase the product. Mr. Orme

may also testify that the materials associated with the violations alleged in the complaint were not efforts that were intended to be offers for sale.

Mr. Orme may also be called to testify about marketing metrics in general, such as number of inquiries, interested leads, and steps toward conversion, and the efficacy of different types of marketing. Mr. Orme may also testify about marketing metrics as they relate to this case, relying on his more than 25 years of experience, and on marketing data such as the 2012 Response Rate Report: Performance And Cost Metrics Across Direct Media (Direct Marketing Association 2012) (RX 054).

Mr. Orme may be called to testify from a marketing perspective about the nature of the materials involved in the advertising allegations in this case and responses to such materials. His testimony may also include a discussion of direct mail readership and response rates for the types of materials at issue, based on his experience and marketing data such as the 2012 Response Rate Report: Performance And Cost Metrics Across Direct Media (Direct Marketing Association 2012) (RX 054).

With respect to the “direct mailer”, Mr. Orme may be called to testify about the lists used to identify potential recipients<sup>1</sup> and their efficacy. He may testify about the sources used to inform those lists as well as the criteria used to generate them, including parameters such as crop considerations (*e.g.*, alfalfa, sunflowers and sorghum) and geographic considerations (*e.g.*, the potential recipients were located in only eight states – those listed in RX 010). He may also testify that the number of intended “direct mailer” recipients is smaller than Complainant alleged

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<sup>1</sup> The term “potential recipients” reflects the fact that: (1) the communication did not reach all of the intended recipients and instead was “returned to sender” on a number of occasions (*see* RX 076); and (2) there is no evidence that the communication was actually received or read by any intended recipient, let alone that any non-certified pesticide applicator actually attempted to purchase the product or purchased the product.

in its Complaint. This may include discussing the record evidence that shows: (1) after removing mailers that were sent to one or more individuals associated with the same retailer as well as returned mailers, there were at most 346 intended retailer recipients (*see* RX 061, Tab B); and (2) after removing mailers that were sent to one or more individuals associated with the same agricultural farm and returned direct mailers, there were at most 6,379 intended agricultural farm recipients (*see* RX 061, Tab D). Mr. Orme may also be called to testify about the process through which companies develop product names, including brand names, and explain, based on, among other things, his experience working with companies, that choosing such a name generally results from a thorough, deliberative decision-making process that has consequential business implications. Mr. Orme may also discuss factors that influence customer decision making. These include factors such as marketing parameters, *e.g.*, price, channel, promotion offers, target audience, sales and marketing support and customer responses. Mr. Orme may testify about the specific alternate brand names involved in this case, including among others “Stallion Insecticide” and “Stallion Brand Insecticide.” Mr. Orme may testify that based on his extensive experience in the marketing field, these two alternate brand names are functionally equivalent from a marketing perspective.

Mr. Orme may be called to testify about marketing in the pesticide industry in general and by FMC’s competitors. This may include discussing: (1) the excerpt from Successful Farming Magazine provided as RX 062, including by comparing it with the communications at issue in the Complaint; (2) other similar alternate brand names for different pesticide products, including “Mustang Insecticide” (*see* RX 020), that refer to animals but that are not for use on such animals; and (3) the role marketing plays in a highly regulated industry in which companies are in direct competition with one another.

### **III. RESPONDENT'S RESERVATION OF RIGHTS**

FMC respectfully submits its First Supplemental Prehearing Exchange in accordance with the Rules of Practice and the Prehearing Order and continues to reserve the right to supplement its Prehearing Exchange upon reasonable notice to the Presiding Officer and Complainant.

Dated: May 18, 2017

Respectfully Submitted,



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