



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
LIPHATECH, INC.,)
RESPONDENT)

DOCKET NO. FIFRA-05-2010-0016

RECEIVED JUN - 6 2011

ORDER ON COMPLAINANT'S MOTION IN LIMINE TO EXCLUDE TESTIMONY AND EVIDENCE

REGIONAL HEARING CLERK USEPA REGION 5

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") found at 40 C.F.R. part 22. Pursuant to a June 30, 2010, Prehearing Order issued by my esteemed colleague, Judge Gunning, the United States Environmental Protection Agency, Region 5 ("Complainant" or "EPA") and Liphatech, Inc., ("Respondent" or "Liphatech") submitted their initial Prehearing Exchanges ("PHEs") on September 28, 2010, and October 29, 2010, respectively. In its PHE, Respondent identified the names of five proposed expert witnesses, along with narratives of their proposed testimony, that it intends to call at hearing, including Mr. Robert H. Fuhrman. Mr. Fuhrman is Principal and CEO of the consulting firm Seneca Economics and Environment, LLC.

On November 16, 2010, Complainant filed a Motion in Limine to Exclude Testimony and Evidence ("Motion") requesting that Mr. Fuhrman's proposed expert testimony, along with Respondent's PHE Exhibits 40 through 42 ("RX 40-42"), be excluded from evidence. In support of its Motion, Complainant argues that Mr. Fuhrman's proposed testimony is inadmissible because it is "irrelevant, immaterial, unreliable and offers little or no probative value to the Presiding Judge . . ." Motion at 1. On December 2, 2010, the undersigned received Respondent's Opposition to Complainant's Motion in Limine to Exclude Testimony of Mr. Fuhrman and Related Evidence ("Response") in which Respondent proposes that Mr. Fuhrman's testimony will be relevant, in part, as a response to the proposed testimony of Complainant's enforcement officer, Ms. Claudia Niess. Response at 2. On December 10, 2010, Complainant filed its Reply to Respondent's Response to Complainant's Motion in Limine to Exclude Testimony and Evidence ("Reply").

II. MR. FUHRMAN'S PROPOSED TESTIMONY AND RELATED EXHIBITS

In its initial PHE, Respondent sets forth a nineteen-page narrative summary of the testimony that Mr. Fuhrman may offer at trial. The specific topics to which Respondent proposes to have Mr. Fuhrman testify are numerous, and at times overlapping, but can be loosely grouped into four general categories as follows:

Category 1. Topics related to case law, legal background, statutory or regulatory reading and interpretation:

- The process by which EPA develops penalty policies, R's PHE at 7;
- The public policy goals that animate these various penalty policies, *id.* at 7-8;
- The stated purposes of the 1990 and 2009 FIFRA Enforcement Response Policies ("ERPs"), *id.*;
- The notion that reasonable people might disagree on how an ERP should be applied, *id.*;
- The legal standard that governs an administrative law judge's ("ALJ") penalty determination process, *id.* at 9;
- The content of past decisions by ALJs in FIFRA enforcement cases, *id.* at 9;
- The administrative case law applying FIFRA and the ERPs, *id.* at 10-12;
- The burden of proof that applies in an administrative enforcement case, *id.* at 12;
- The warning that the number of violations found by an ALJ who does not deviate from the ERP could lead to a penalty that is disproportionate to the totality of the circumstances, *id.* at 12;
- The text of Section 12(a)(2)(E) of FIFRA, *id.* at 13;
- The different approaches that EPA has taken in other cases to calculate the number of violations alleged, *id.* at 15;
- The fact that the witness "believes it might be appropriate for the Presiding Officer to rule on whether the ERP binds the Complainant on (1) the general boundaries within which it can apply the ERP in calculating the proposed penalty in this case and (2) whether the Complainant may freely depart from the broad guidelines of the ERP by extrapolating its Table 4 to alleged violations that are not tied to the number of sales and distribution of a pesticide[.]" *id.* at 17;
- The contents of the Complaint, *id.* at 22;
- The text of two adjudicated cases that Mr. Fuhrman has read, *id.*;

Category 2. Topics related to a legal reading or analysis of the ERP itself:

- The particular provisions of the 1990 and 2009 FIFRA ERPs, *id.* at 10;
- The rigidity of the procedures embodied in an ERP, *id.* at 12-13;
- The notion that EPA may unilaterally assert prosecutorial discretion as to the number of violations it chooses to prosecute, *id.* at 15;
- The "strict reading" and "plain English reading" of the 2009 ERP, *id.* at 16;
- The incorrect application, by Ms. Niess, of the "graduated penalty table" to the

- first 2,140 counts in the Complaint, *id.* at 16;
- The different, higher proposed penalties that Complainant “might” have reached and the “absurdly high penalty” amounts that result from the “strict adherence” to the 2009 ERP, *id.* at 18;
- The fact that Mr. Fuhrman “is aware that the Respondent disagrees with the Complainant’s interpretation of certain statutory and regulatory provisions[,]” *id.* at 22-23;

Category 3. Facts or factual issues that appear to be outside the scope of this witness’ personal knowledge or stated expertise:

- The tactical decisions that EPA enforcement staff generally make in calculating proposed penalties, *id.* at 9;
- The different approaches that Ms. Niess took at different times in calculating the number of alleged violations, *id.* at 13;
- The appearance of Ms. Niess’ name “on a penalty calculation worksheet that Mr. Kevin C. Chow, Associated Regional Counsel, EPA Region 5, provided to Respondent’s counsel Jeffrey P. Clark in a letter dated October 2, 2009, in which, based on the same facts discussed in the Complainant’s Prehearing Exchange, only 132 ‘counts’ of such advertising on radio and only 16 ‘counts’ of such advertising in print publications were identified for purposes of calculating a penalty demand issued by Region 5 to Respondent related to these alleged violations of Section 12(a)(2)(E)[,]” *id.* at 14;
- The apparent substitution by EPA staff of the 2009 ERP as the basis for calculating the proposed penalty delineated in the PHE after a letter from October 2009 identified the 1990 ERP as the penalty policy initially applied in this case, *id.* at 14;
- The witness’ “understanding of the 2009 ERP” and apparent deviations by Ms. Niess from the ERP in this case, *id.* at 17;
- The possible variants of Table 4 that might have existed if the authors of the 2009 ERP had envisioned the facts of this case, *id.*;

Category 4. Topics related to an analysis of the relevant penalty factor in this case based on the facts of this case:

- The alleged disproportionality of the proposed penalty to “the gravity of the alleged violations, plus the amount of economic benefit allegedly obtained . . . [,]” *id.* at 18;
- The inappropriateness of the proposed penalty based on the facts in this case that “Mr. Fuhrman assumes [to be] true[,]” *id.* at 19-21;
- The contents of RX 42, *id.* at 23;
- The necessary foundation for the authentication of any documents to which Mr. Fuhrman might refer in his testimony, *id.*

In addition to excluding Mr. Fuhrman's proposed testimony, Complainant also seeks to exclude the following exhibits that were submitted as part of Respondent's initial PHE and relate directly to Mr. Fuhrman's proposed testimony:

- RX 40a: Curriculum Vitae of Mr. Robert H. Fuhrman (12 pages);
- RX 40b: An article by Mr. Fuhrman, published in the American Bar Association's newsletter *Trends*, entitled "EPA's Recent 'Final Action' on the BEN model" (2 pages);
- RX 41: A Table prepared by Mr. Fuhrman entitled "Penalties Imposed As Final Decisions in FIFRA Cases Adjudicated by EPA Administrative Law Judges (Years 2000 to 2010 and a Few Earlier Cases), and by the Environmental Appeals Board (1992 to 2010), Excluding Unpublished EAB Decisions, Consent Agreements, and Matters Not Resulting in Penalty Assessments" (20 pages);
- RX 42: A Document prepared by Mr. Fuhrman entitled "Civil Penalty Analysis RE: Docket No. FIFRA-5-2010-0016" (22 pages).

III. COMPLAINANT'S ARGUMENTS ON EXCLUSION

In its Motion, Complainant seeks to exclude the proposed expert testimony of Mr. Fuhrman, as described in the Respondent's initial PHE, as well as the proposed documentary exhibits numbered RX 40a-42. Motion at 1. In support of its Motion, Complainant argues that the proposed testimony and identified exhibits are inadmissible under Rule 22.22(a), 40 C.F.R. § 22.22(a), because it is unreliable, irrelevant, immaterial, and offers little to no probative value. Motion at 5-6, 11. Noting that the Consolidated Rules do not illustrate what evidence might meet this standard, Complainant argues that Rule 702 of the Federal Rules of Evidence, "FRE 702", and the landmark Supreme Court ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ("*Daubert*") 509 U.S. 579 (1993) and its progeny, should guide the undersigned in ruling on the instant Motion.¹ Motion at 2. Under FRE 702 and the holding in *Daubert*, Complainant argues, Mr. Fuhrman's testimony should be deemed inadmissible for several reasons.

A. Reliability

On the issue of reliability, Complainant first notes that of the three, statutory penalty factors, ability to pay, size of business, and gravity of the violation, only the gravity component is at issue here. Motion at 6, citing R's PHE at 12 ("Mr. Fuhrman understands that the size of the Respondent's business [and] Respondent's ability to [pay] are not being contested in this litigation, so that the only relevant statutory penalty factor for the purpose of this proceeding is gravity"). Therefore, Complainant argues, because Mr. Fuhrman is an economist and lacks the requisite education, scientific training, or practical experience that would give him the requisite

¹ Arguments related to *Daubert* and the appropriate standard of review to apply to this Motion will be discussed below, *infra* at 9, in Section V. Applicable Legal Standard of Review.

“specialized knowledge” to opine² on the toxicity of effects of the pesticide at issue here, he cannot offer any *reliable* testimony on pesticide toxicity, harm to human health, or harm to the environment.³ Motion at 6-7.

In further support of its Motion, Complainant argues that Mr. Fuhrman is unqualified to testify as to the development and application of the ERPs because his employment at EPA predates either ERP, his duties while employed were related only to his economics background, and he did not participate in the development or application of any of the relevant penalty policies. As such, the argument continues, Mr. Fuhrman lacks any personal experience in or knowledge about the application of the ERPs. Motion at 7.

As additional basis for excluding the testimony, Complainant argues that Mr. Fuhrman’s appearance as an expert witness in previous administrative cases does not, by itself, make him an expert for the purposes of this case, and moreover his testimony in those prior instances was related to economics and not the scientific considerations inherent to a gravity analysis.⁴ Motion at 7.

Another reason Complainant offers for excluding Mr. Fuhrman’s proposed testimony rests on the notion that an economist should not “lecture anyone much less the Presiding Judge on matters of the law.” Motion at 8. Specifically, Complainant argues that much of the proposed testimony involves the summarization of past cases, consists entirely of legal issues, and will not assist the undersigned in understanding the factual or technical circumstances of the case. *Id.* at 9 (citing *Gen. Motors [Auto.] - North America*, Docket No. RCRA-05-2005-0001, 2005 EPA ALJ LEXIS 29 (EPA ALJ May 19, 2005)). Consequently, Complainant asserts, Mr. Fuhrman’s proposed testimony does not advance the goals of judicial economy and should be excluded as irrelevant. Motion at 6.

² In its Reply, Complainant restates its opposition by asserting that Mr. Fuhrman’s “opinion is not designed to inform the Judge on a highly specialized field that relates to the facts at issue in this case, but rather it is designed to usurp the Judge’s role as trier of fact.” Reply at 2.

³ In its Motion, Complainant acknowledges that Respondent proposes to qualify Mr. Fuhrman as an expert in “gravity analysis” based on two articles written 17 years ago, but argues that these articles are focused on economic principles and are therefore irrelevant to the gravity analysis and provide no basis for asserting any relevant expertise. Motion at 7.

⁴ Complainant attaches to its Motion a filing in *Rhee Bros., Inc.*, FIFRA-03-2005-0028, by the respondent in that case, that sets forth a narrative summary of Mr. Fuhrman’s anticipated testimony. Complainant notes that in *Rhee Bros.*, Mr. Fuhrman was described as an expert witness who would address the various factors relevant to the calculation of the penalty in that matter. By contrast, Complainant argues, Mr. Fuhrman lacks the requisite scientific foundation or expertise to testify about the *gravity* of the violations alleged in the Complaint. Motion at 8.

In addition, Complainant argues that Mr. Fuhrman's testimony on certain topics would be unreliable, and therefore inadmissible, because it rests on speculation as to another person's state of mind. Specifically, Complainant asserts that the testimony on the topics identified above in Category 4, *supra* at 3, "attempt to discuss what the enforcement staff [or other EPA employees past and present] w[ere] thinking and are therefore pure conjecture." Motion at 10. Therefore, concludes Complainant, the testimony is unreliable. *Id.*

B. Relevance and Materiality

Aside from its challenges to Mr. Fuhrman's qualifications, and by extension his reliability, Complainant also asserts that the proposed testimony is irrelevant and immaterial because it consists largely of legal conclusions. Motion at 11. Citing a long string of federal court decisions on the issue, Complainant argues that "expert testimony as to legal conclusions that will determine the outcome of the case is inadmissible." *Id.* (quoting *Good Shepherd Manor Found., Inc., v. City of Mومence*, 323 F.3d 557, 564 (7th Cir. 2003)). Because it is irrelevant, Complainant continues, Mr. Fuhrman's proposed testimony will actually be "detrimental to the hearing process." Motion at 12 (citing *Specht v. Jensen*, 853 F.2d 805, 809 (10th Cir. 1988)).

In further support of its argument that Mr. Fuhrman's opinions lack any probative value, Complainant points out that the extensive testimony on legal arguments that Respondent proposes to have Mr. Fuhrman offer are an improper usurpation of the attorney's role and "should be saved for legal briefs." Motion at 13.

With respect to any testimony about prior cases and assessed penalties, Complainant notes that "[c]ourts have long held that case by case comparisons of assessed penalties are irrelevant." Motion at 13. Complainant goes on to quote liberally from the syllabus in *In re Chem Lab Prods., Inc.*, 10 E.A.D. 711 (EAB 2002), in which the EAB set forth detailed, foundational principles supporting the notion that "penalty assessments are sufficiently fact- and circumstance-dependent that the resolution of one case cannot determine the fate of another." 10 E.A.D. at 728.

Additionally, Complainant argues that any testimony regarding EPA's use of prosecutorial discretion or tactical changes is irrelevant and immaterial. Motion at 14. Specifically, Complainant disputes Respondent's assertion that application of the 2009 ERP in this case yielded a higher proposed penalty than would have been applied under the 1990 ERP. *Id.* at 15. Secondly, Complainant argues that the proposed testimony "usurp[s] this Court's decision making function [and] attempts to usurp the government's prosecutorial discretion" because Mr. Fuhrman may discuss the different calculation methods used by Ms. Niess and may testify that she incorrectly applied the graduated penalty table. *Id.* In short, Complainant argues, "[t]he fact that Respondent disagrees with EPA's exercise of its prosecutorial discretion is not relevant to the determination of the appropriate penalty here." *Id.* at 16 (quoting *Intl. Paper Co. Mansfield, Louisiana*, Docket No. RCRA-06-2000-007, 2000 EPA ALJ LEXIS 10, at *28 n.5 (EPA ALJ Jan. 19, 2000)).

Lastly, Complainant argues that Mr. Fuhrman's anticipated testimony will include extensive legal arguments regarding his reading and interpretation of FIFRA and certain terms related to the applicable "unit of violation." Motion at 16-17 (citing R's PHE at 13, 15; RX 42 at 4-7). Because this testimony is an attempt by Respondent "to have Mr. Fuhrman testify on behalf of counsel from the stand[,]” Complainant asserts, it is unreliable, irrelevant, and, again, "should be saved for legal briefs." Motion at 17.⁵

IV. RESPONDENT'S ARGUMENTS ON EXCLUSION

In its Response, Respondent generally argues that Complainant's motion lacks merit because Mr. Fuhrman possesses the expertise, qualifications, and specialized knowledge in economics and EPA civil penalty policies necessary to offer relevant, material, reliable, and significantly probative testimony on the issue of the appropriate penalty. Response at 2. Respondent asserts that the thrust of Complainant's objection is simply a disagreement over Mr. Fuhrman's analysis, as opposed to an attack on the admissibility of his testimony, and Complainant "will have the opportunity to develop its position on cross-examination" Motion at 7.

A. Qualifications and Expertise

As to credentials, Respondent argues that Mr. Fuhrman is a "Harvard-educated," Response at 7, "highly experienced former EPA economist who is an acknowledged expert on the application of EPA civil penalty policies" and Respondent finds it "surprising[]" that Complainant would "seek[] to prevent Mr. Fuhrman from rebutting the testimony of Ms. Niess" considering Ms. Niess is a "relatively inexperienced EPA enforcement officer" who will "testify about how the [ERP] *should* be applied in *determining* an appropriate penalty for any proven violation." Response at 1-2 (emphasis supplied).⁶

⁵ Complainant, in its Reply, reiterates this argument in its effort to exclude RX 42. According to Complainant, RX 42, "Mr. Fuhrman's 'analysis' of the proposed penalty" is in the form of a legal brief or memorandum and will not assist the ALJ in "determining an fact at issue." Reply at 2, 4.

⁶ I note that this is a mischaracterization of Ms. Niess' proposed testimony. Complainant identifies Ms. Niess as the enforcement officer assigned to this case who may testify, as a fact witness, to facts related to inspections, investigations, communication among the parties, and "may testify in detail as to how she calculated the penalty calculation based on the statutory factors set forth in FIFRA and the factors in the new [2009 EPR]." Complainant's initial PHE at 18. Were Ms. Niess slated to offer an opinion, as asserted by Respondent, as to how the ERP *should* be applied by the ALJ charged with *determining* any actual, assessed penalty, then Respondent would more properly be warranted in calling a competing expert to offer his own views on how the ALJ *should* apply the ERP. This is not the case here. Nevertheless, to the

Respondent points out that Mr. Fuhrman has been qualified as an expert in the application of EPA penalty policies in both *Outboard Marine Corp.*, Docket No. V-W-91-C-123B, 1995 WL 492976 (EPA ALJ July 25, 1995), and *Rhee Bros., Inc.*, Docket No. FIFRA-03-2005-0028, 2006 WL 2847398 (EPA ALJ Sept. 19, 2006). Response at 7. Moreover, Respondent argues, the ALJs in those cases “found his testimony to be credible.” *Id.* Therefore, Respondent concludes, his “proposed testimony is well-grounded based on his substantial experience and extensive research regarding the application of EPA’s civil penalty policies.” *Id.*

Respondent states that it will not “belabor the point - Mr. Fuhrman’s curricula vitae speaks for itself.” Response at 8 (citing RX 40). Instead, Respondent appends to its Response, as Exhibit A, a 12-page Declaration by Mr. Fuhrman (“Exh. A”), signed November 29, 2010, offered to dispute the “many inaccurate statements about (a) [his] qualifications, experience, and expertise, and (b) [his] prior and proposed testimony” Exh. A at 2. The Declaration reads as a point-by-point counter-argument to Complainant’s Motion and stands separately from the 15-page Response offered by Counsel, ostensibly for the same purpose.

B. Admissibility of Proposed Testimony

Respondent asserts that Mr. Fuhrman’s testimony on the use of the ERP is appropriate because Complainant relies on the ERP to justify the proposed penalty and “would have the Presiding Officer apply the ERP as a guideline for the gravity factor under FIFRA § 14(a)(4) without a thorough discussion of the drawbacks of the ERP that will be examined by Mr. Fuhrman at the hearing.” Motion at 9.⁷ Moreover, Respondent argues, the testimony is “particularly relevant” in explaining how the ERP has been misapplied to the facts in this case. *Id.* at 9-10.

In further support of its position, Respondent argues that any discussion in Mr. Fuhrman’s testimony of “legal issues will be ancillary to his scientific and technical testimony and will be provided for purposes of placing his testimony in context considering the totality of the circumstances of this case.” Response at 11. The focus of the testimony, Respondent asserts, will be the “reasonableness of the proposed penalty” and not his “secondary analysis of legal

extent that Mr. Fuhrman’s testimony communicates his interpretation of the penalty policies at issue and their application to Respondent’s activities and operations and provides perspective or context to the *facts* to which he testifies, the admissibility of such testimony cannot be determined presently and must be addressed at hearing. *See Minnesota Metal Finishing, Inc.*, Docket No. RCRA-05-2005-0013, 2007 EPA ALJ LEXIS 14, at *21 (EPA ALJ Apr. 23, 2007) (“Order on Motions to Supplement Prehearing Exchange and Complainant’s Motion in Limine”).

⁷ Respondent emphasizes what it views as an inequity in Complainant’s position: that Complainant “may support its application of the ERP through a so-called ‘fact’ witness, Ms. Niess, but Respondent should be prohibited from proffering an ‘expert’ witness to rebut her testimony.” Motion at 10.

issues.” *Id.*

With regard to the testimony concerning previous FIFRA cases, Respondent argues that “it cannot be concluded that information about other cases is *never* relevant to the assessment of a penalty.” Response at 12 (quoting *Service Oil, Inc.*, Docket No. CWA-08-2005-0010, 2006 WL 3406348 (EPA ALJ March 17, 2006) (emphasis in original decision). Respondent goes on to argue that Mr. Fuhrman’s testimony will be aimed not at irrelevant comparisons to penalties assessed in other FIFRA cases but instead at the relevant goals of demonstrating his qualifications,⁸ providing general context of the application of the ERP in this case, and demonstrating the “arbitrary manner in which Complainant has applied the ERP” in this case. This testimony, Respondent claims, will demonstrate “circumstances so compelling” that the “principle that penalties should be assessed on individual basis, without considering other similar penalty cases” should yield to overarching concerns about EPA’s “policy advocating fair and equitable penalty assessment.” Response at 13 (quoting *In re Chem Lab Prods.*, 10 E.A.D. at 732). Respondent argues that Mr. Fuhrman “will explain how various factors affecting the application of the ERP should be considered by the Presiding Officer in determining how much weight can be assigned” to the propose penalty calculation. Response at 14.

As to the issue of prosecutorial discretion, Respondent asserts that Mr. Fuhrman’s testimony will demonstrate that Complainant’s application of prosecutorial discretion was “arbitrary and capricious” and “undermines the ability of the ERP to provide fair and consistent penalties.” Response at 14. In short, Respondent argues that “Mr. Fuhrman’s testimony will assist the trier-of-fact in understanding the shortcomings of the ERP and in determining the appropriate penalty [if liability if found]” and therefore the testimony is admissible. Response at 15.

V. APPLICABLE LEGAL STANDARD OF REVIEW

Motions in limine are not referenced in the Consolidated Rules of Practice. As to admission of evidence, the Rules provide that “the Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value” 40 C.F.R. § 22.22(a)(1). In the absence of administrative rules on a subject, it is appropriate to consult Federal court practice, Federal Rules of Civil Procedure, or the Federal Rules of Evidence as guidance in analogous situations. *See, e.g., In re Lazarus, Inc.*, 7 E.A.D. 318, 330 (EAB 1997); *In re Asbestos Specialists*, 4 E.A.D. 819, 827 n.20 (EAB 1993); *In re Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 524 n.10 (EAB 1993). In Federal court practice, 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

⁸ Respondent appears to argue for the questionable proposition that Mr. Fuhrman’s review and analysis of FIFRA enforcement case decisions involving the ERP forms part of the basis for his expertise in the application of EPA civil enforcement policies. Response at 13.

are generally disfavored. *Hawthorne Partners v. AT&T Techs., Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). If evidence is not clearly inadmissible, evidentiary rulings must be deferred until trial so questions of foundation, relevancy, and prejudice may be resolved in context. *Id.* at 1401. 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 the 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).

The subject of the instant Motion is a proposed expert witness and his proposed testimony. Complainant argues that FRE 702, dealing with the admissibility of testimony by experts, is an appropriate source of guidance for the Presiding Officer when ruling on such a motion. Motion at 2. According to Complainant, FRE 702, as amended in 2000, reflects the holding by the Supreme Court in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) and its progeny, including *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). *Id.* FRE 702 reads:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

Complainant notes that Rule 702 applies not just to scientific experts but to experts asserting expertise based on “other specialized knowledge” where the court must also “decide if the proffered testimony is well grounded and well reasoned based on whether the expert has sufficient practical experience to justify the conclusions [reached] and [the expert] is able to explain in detail how he or she reached such conclusions.” Motion at 4 (quoting *United States v. Jones*, 107 F.3d 1147, 1160-61 (6th Cir. 1997)). It is precisely because of this “gatekeeper” role played by the trial judge, argues Complainant, that Mr. Fuhrman’s proposed testimony must be examined in light of the *Daubert* principles in order to determine its admissibility. Motion at 5. Complainant concludes that Mr. Fuhrman’s testimony will not satisfy the requirements of *Daubert* or FRE 702 and must be excluded from this administrative proceeding.⁹

⁹ Specifically, Complainant asserts in its Reply, Mr. Fuhrman’s “subjective interpretation of the facts and law certainly is not a ‘theory’ capable of being tested . . . [g]iven that [his] opinion is not based on any generally accepted methodology, it is impossible to calculate any potential rate of error [and his] publications primarily are in various environmental law reporters.” Reply at 3-4.

Respondent takes a broader view of the limits on testimony applied in the administrative law context. Respondent resists the notion that *Daubert* sets the standard applicable in this proceeding. Response at 4 (quoting *Strong Steel Prods., LLC*, Docket No. RCRA-5-2001-0016, 2003 EPA ALJ LEXIS 191, at *55 (EPA ALJ Oct. 27, 2003) (a penalty witness for EPA need not satisfy standards applied in Federal courts for scientific expert testimony, such as *Daubert*, but must be shown to have expertise as to penalty assessments under the statute)). Instead, Respondent argues that Mr. Fuhrman “is an expert on the application of EPA civil penalty policies” independent of his title and experience as “an economist.” Response at 5 (citing Exh. A). As Respondent notes, in Federal court “[a]nyone with relevant expertise enabling him to offer reasonable opinion testimony helpful to judge or jury may qualify as an expert witness.” *Id.* (quoting *Tuf Racing Prods., Inc. v. American Suzuki Motor Corp.*, 223 F.3d 585, 591 (7th Cir. 2000)).

Complainant’s resort to *Daubert* and FRE 702 is not unreasonable. Federal courts have held that “‘the spirit of Daubert’ does apply to administrative proceedings because ‘junk science’ has no more place in administrative proceedings than in judicial ones.” *Lobsters, Inc. v. Evans*, 346 F. Supp. 2d 340, 344 (D. Mass. 2004) (quoting, *Niam v. Ashcroft*, 354 F.3d 652, 660 (7th Cir. 2004)). The court in *Lobsters* stated that it is the reliability requirement in the procedural rule of evidence applicable in that case, which is almost identical to 40 C.F.R. § 22.22(a)(1), which “adopts the ‘spirit of Daubert’ as the standard to be used in connection with administrative hearings.” *Id.* While that court also stated that the *Daubert* factors can be used by an ALJ to exclude testimony from a hearing if she finds it to be unreliable, the EAB has explicitly held that the *Daubert* factors are not *controlling* in administrative hearings. *In re Solutia, Inc.* 10 E.A.D. 193 (EAB 2001). Moreover, the *Daubert* factors may not be pertinent in certain cases where they are not reasonable measures of the proffered expert testimony. *See Mr. C. W. Smith, et al.* (“*Smith*”), Docket No. CWA-04-2001-1501, 2004 EPA ALJ LEXIS 128, at *165 (EPA ALJ July 15, 2004). Whether the *Daubert* test applies in the instant case cannot be determined at this point in the proceedings and must be deferred until the hearing where Complainant is free to raise the issue again.

VI. DISCUSSION

In this case, Respondent has laid a detailed, yet preliminary foundation for Mr. Fuhrman’s proposed testimony in its PHE, its Response and attached Declaration by Mr. Fuhrman, and in the proposed exhibits RX 40-42. Complainant, in its Motion has provided specific challenges to the reliability of Mr. Fuhrman’s “penalty analysis” captured in RX 42 and described in moderate detail in the other filings. Thus, because there is substantial information in the record that outlines the actual content of the proposed testimony Rule 22.22(a) may be considered in ruling on the instant Motion. *Cf. Smith*, 2004 EPA ALJ LEXIS 128, at *164-65. Nevertheless, the full extent of Mr. Fuhrman’s testimony cannot be encapsulated in the filings to date. Consequently, it is not possible to conclude at this point in the proceedings that *all* of Mr. Fuhrman’s testimony is clearly inadmissible for *any* purpose. *Zaclon, Inc.*, Docket No. RCRA-05-2004-0019, 2006 EPA ALJ LEXIS 21, at *14 (EPA ALJ Feb. 23, 2006) (Order on Motions to Supplement

Prehearing Exchange as to Count 2 and Respondents' Motion in Limine). Therefore, Complainant's request to preclude Mr. Fuhrman from testifying at all must be **DENIED**. In looking to the specific topic areas of the proposed testimony, however, it is possible to set the contours for what testimony Mr. Fuhrman could offer that would be relevant, reliable, material, probative, and, consequently, admissible.

A. Relevant Penalty Issues

Evidence as to the penalty issue must be relevant and of probative value as to the criteria set forth in the statute for determining a penalty. The criteria set forth in Section 14(a)(4) of FIFRA are "the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation." 7 U.S.C. § 136l(a)(4). The Amended Complaint governing this proceeding withdraws all claims that Respondent incurred an economic benefit from its alleged noncompliance. In the Order on Prehearing Motions Related to Amending the Complaint ("Order on Complaint"), issued on December 29, 2010, by Judge Gunning, Complainant was advised that it may not reallege or litigate this issue at hearing. Order on Complaint at 7. As noted above, *supra* at 4, Respondent concedes that only the "gravity" factor is at issue in this matter. Motion at 6, citing R's PHE at 12. Therefore, only testimony relating to the "gravity" factor, and not more traditional economic issues, would be relevant in any testimony related to the penalty.¹⁰

The 2009 FIFRA ERP delineates the relevant considerations that inform a "gravity" determination in a FIFRA enforcement action. The five gravity adjustment criteria are: toxicity, harm to human health, environmental harm, compliance history, and culpability. 2009 FIFRA ERP at 34-35. Therefore, any relevant testimony addressing the "gravity" factor would focus on one or more of those criteria.

B. Mr. Fuhrman's Stated Qualifications

Mr. Fuhrman's academic qualifications are set forth in RX 40a and his Declaration attached to the Response (Exh. A); neither indicates any academic training that bears on the "gravity" factor criteria. Exh. A at 1; *see also* RX 40a at 2. Mr. Fuhrman's work experience includes a tour at EPA in the following positions: "economist on the Energy Policy Staff . . . in the Office of Planning and Evaluation ["OPE"]. . . Acting Chief of the Industrial Analysis Branch of the Economic Analysis Division of [OPE] . . . Acting Director of that Division; and, on an approximately one-year detail, as a Special Assistant to the Deputy Administrator." Exh. A at 2.¹¹ As Complainant points out, Mr. Fuhrman's employment at EPA predated both the 1990 and 2009 FIFRA ERP's by at least eight years and that Mr. Fuhrman did not "draft, develop or utilize

¹⁰ RX 42 appropriately reflects this limitation. *See* RX 42 at 7, 13, 16, 21.

¹¹ I note that OPE is a centralized planning entity within the Office of the Administrator and is not part of any enforcement arm of the Agency.

any of the relevant penalty policies to carry out his duties at U.S. EPA.” Motion at 7. Respondent does not dispute this. Moreover, Mr. Fuhrman’s Declaration, Exh. A at 3, includes “a brief summary [that] is illustrative of my activities at EPA” none of which relate to FIFRA or pesticides.¹² Nevertheless, it is not possible at this stage in the proceedings to conclude that Mr. Fuhrman’s experience at EPA gave him *no* experience that might be relevant to the “gravity” factor criteria.

With respect to work experience beyond EPA, the information provided in Mr. Fuhrman’s Declaration, his curriculum vitae (RX 40a), and the other filings in this case, all describe his 24 years of experience as an “economic, environmental, and management” consultant. RX 40a at 1. The vast majority of the “representative consulting experience” listed in his curriculum vitae relates to economic benefit calculations, ability to pay determinations, calculated damages, wrongful profits, cost recovery, potential Superfund liabilities, and damage estimates - in short economic analyses unrelated to the toxicity of pesticides, their harm to human health or the environment, or the culpability or compliance history of the Respondent in this matter. RX 40a at 2-6. Nevertheless, not all of his consulting experience is limited to the traditional fare of a professional economist. At hearing, Respondent will have the opportunity to elicit relevant credentials before it offers Mr. Fuhrman as an expert witness. Complainant, of course, remains free to challenge the scope or strength of such credentials during *voir dire*.

Aside from work experience, Respondent vigorously points to Mr. Fuhrman’s past testimony in federal judicial court and administrative proceedings before the EPA as a primary basis for allowing him to testify as an expert in this case. Response at 6-7, 12; Exh. A at 5-7. In particular, Respondent points out that in two administrative cases, EPA ALJs have accepted testimony from Mr. Fuhrman as an expert witness. Response at 6. I note initially that in both of these cases, no objection was raised to Mr. Fuhrman’s testimony as an expert in the application of EPA penalty policies. *Rhee Bros.*, at 93; *Outboard Marine Corp.*, Docket No. V-W-91-C-123B, 1995 EPA ALJ LEXIS 42, at *53 (EPA ALJ July 25, 1995). In the instant case, Complainant objects strenuously to the proffered witness and the proposed testimony. Because Complainant objects to the admissibility of Mr. Fuhrman’s proposed testimony, it is necessary to consider whether it meets the standard set forth in Rule 22.22. 40 C.F.R. § 22.22.

While Mr. Fuhrman’s prior qualification as an *unchallenged* expert witness in the application of EPA penalty policies may militate against a finding that his proposed testimony is wholly unreliable and irrelevant, such prior qualifications are not dispositive. Mr. Fuhrman may have expertise in the application of the ERP to the facts in this case, or he may not.¹³ The

¹² Mr. Fuhrman even states that his experience at EPA “has been indispensable to my ability to understand and to analyze EPA documents *since I left EPA . . .*” Exh. A at 4 (emphasis supplied).

¹³ Respondent argues also that any discussion in Mr. Fuhrman’s testimony of “legal issues will be ancillary to his scientific and technical testimony.” Response at 11. Yet in his

arguments presented by the parties are not persuasive in either way based on the information offered. As noted above, *supra* at 11, Mr. Fuhrman is not precluded from appearing as a witness at hearing. Nonetheless, Mr. Fuhrman will have to demonstrate his expertise anew as it applies to the circumstances of this case in order to offer expert opinion(s) on the application of the 2009 FIFRA ERP. Having determined that Mr. Fuhrman cannot, at this point in the proceedings, be precluded from testifying, and given that Respondent must have the opportunity to qualify him as an expert in some relevant field, RX 40a, which is a memorialization of his qualifications, may be relevant and cannot be excluded. Similarly, RX 40b is merely the text of one of the publications listed in RX 40a and provides more context for qualifications; it cannot be deemed inadmissible at this time.

C. Relevance of the Proposed Testimony

Concluding that the information in the record is insufficient to determine Mr. Fuhrman's qualifications at this time does not resolve the all issues presented in the Motion. Whether Mr. Fuhrman is qualified as an expert, his proposed testimony and their attendant exhibits must still be weighed against the standard for admissibility set forth in the Rules.¹⁴ As described above, *supra* at 2-3, Mr. Fuhrman's proposed testimony can be generally separated into four categories.

Category 1: Topics related to case law, legal background, statutory or regulatory reading and interpretation

In administrative enforcement proceedings, each party may argue its interpretation of EPA's regulations, and the Presiding Judge in the initial decision will independently interpret the relevant regulations and apply them to the findings of fact. Usually, these arguments are made by counsel in legal briefs, not by expert witnesses. The interpretation starts with the plain language of the regulation, and any ambiguities are resolved under principles of statutory (and regulatory) construction and interpretations set forth in applicable case precedent. *Strong Steel Prods., LLC*, 2003 EPA ALJ LEXIS 191, at *60. In the same vein, the Presiding Judge does not rubber stamp the EPA's proposed penalty, but makes an independent assessment of the evidence and the statutory penalty factors, considers any applicable penalty policy, and independently calculates a penalty. Testimony, however, by a witness as to what EPA intended or expected the regulation to mean may not be considered by administrative tribunals in interpreting a regulation. *Id.* The

Declaration Mr. Fuhrman states that "I did not attempt to reach my own chemical, biological, or toxicological conclusions," suggesting that his analysis will not consider the toxicity, harm to human health, or environmental harm caused by the alleged violations. Exh. A at 11.

¹⁴ I note that there is no undue prejudice to Complainant by allowing Mr. Fuhrman to testify, as he is available for cross examination and *voir dire*. Additionally, I remind the parties that granting or denying the admission of particular testimony does not mean that the testimony will be given any weight. *See, e.g., Minnesota Metal Finishing, Inc.*, 2007 EPA ALJ LEXIS 14, at *13.

same rule extends to official agency penalty policies.

Respondent proposes to have Mr. Fuhrman testify to a broad range of topics related to case law, statutory and regulatory provisions, and the contents of certain filings. For example, Respondent states that Mr. Fuhrman may testify to:

- The text of Section 12(a)(2)E of FIFRA, R's PHE at 13;
- The official purposes of the FIFRA ERPs, *id.* at 7-8;
- The legal standard that governs an ALJ's penalty determination process, *id.* at 9;
- The burden of proof that applies in an administrative enforcement case, *id.* at 12;
- The contents of the Complaint, *id.* at 22.

Like judges in federal judicial court who may take judicial notice of certain facts, the Presiding Judge can take administrative notice of the content of statutes, regulations, and filings and no testimony is necessary to draw the Presiding Judge's attention to such uncontested information. Testimony that merely summarizes these topics simply as a matter of background is "generally not a subject of contention and therefore may be admissible *where it merely* provides an *introduction to factual or expert testimony.*" *Minnesota Metal Finishing, Inc.*, 2007 EPA ALJ LEXIS 14, at *20 (emphasis supplied). Where such testimony *is* contested (i.e., the testimony represents an interpretation not shared by the opposing party), the opposing party may object to the testimony at hearing. *Id.* The nature of this testimony cannot be determined at this time.

However, Respondent also seeks to have Mr. Fuhrman testify to certain other topics, including:

- The content of past ALJ decisions in FIFRA cases, R's PHE at 9;
- The case law applying FIFRA and the ERPs, *id.* at 10-12;
- The different approaches EPA has taken in other cases to calculate the penalty, *id.* at 15;
- The text of two cases that Mr. Fuhrman has read, *id.* at 22.

These topics are clearly irrelevant. The Presiding Judge will not consider penalties and sanctions imposed in similar cases because penalty policies function to ensure that penalties are assessed uniformly for cases with similar basic facts, because the complexity of the additional facts considered and weighed in each penalty assessment is unique to each case, and because consideration of such additional facts in other cases would require additional time and effort on the part of the parties and the tribunal, which is inconsistent with the purpose of efficiency in administrative proceedings. *See Valimet, Inc.*, Docket No. EPCRA-09-2007-0021, 2008 EPA ALJ LEXIS 38, at *32-33 (EPA ALJ Nov. 6, 2008). Because RX 41 is offered as a digest of Mr. Fuhrman's read through FIFRA administrative cases, it is similarly irrelevant. Accordingly, Complainant's Motion is **GRANTED** as to RX 41 and any testimony that attempts to draw in the penalty calculations, legal arguments, or holdings from past cases. To the extent that testimony that would fall under Category 1 is not explicitly excluded herein, a ruling on the Motion as it

relates to those topics is **DEFERRED** until hearing and will not be ruled upon unless Complainant renews its objections at the hearing.

Category 2: Topics related to a legal reading or analysis of the ERP itself

Mr. Fuhrman's proposed testimony also covers several issues that appear to be a legal reading or analysis of the ERP itself. Specifically, Mr. Fuhrman may also be called to testify about:

- The particular provisions of the ERPs, R's PHE at 10;
- The scope of EPA's prosecutorial discretion, *id.* at 15;
- The "plain English reading" of the 2009 ERP, *id.* at 16;
- The higher penalties that Complainant "might" have reached from a "strict adherence" to the ERP, *id.* at 18;
- The fact that Mr. Fuhrman "is aware that the Respondent disagrees with the Complainant's interpretation of certain statutory and regulatory provisions[.]" *id.* at 22-23.

It is settled law that legal opinion testimony, or testimony by an expert as to the legal interpretation of a statute or regulation, is not admissible. *See, e.g., United States v. Scop*, 846 F.2d 135, 139-42 (2d Cir. 1988); *United States v. Farinella*, 558 F.3d 695, 700 (7th Cir. 2009) (the judge decides the law, an expert witness does not offer a legal opinion); *Minnesota Metal Finishing, Inc.*, 2007 EPA ALJ LEXIS 14, at *20; *Leed Foundry, Inc.*, Docket No. RCRA-03-2004-0061, 2007 EPA ALJ LEXIS 13, at *19 n.13 (EPA ALJ Apr. 24, 2007) (matters of legal interpretation not involving a finding of fact are not the subject for an expert's opinion). Our Rules of Practice exclude this type of testimony because no expert witness can offer probative opinion evidence on the bare meaning of the law or regulation. However, where an expert can offer opinion testimony that helps address the relevant facts in the case, any ancillary legal issues may properly be included in the testimony to provide context. *Gen. Motors Auto. - North America*, 2005 EPA ALJ LEXIS 29, at *12-13; *See also Minnesota Metal Finishing, Inc.*, at *20 (motion in limine denied where the proposed expert testimony would include facts as to the inspections, referrals and relationship among the parties and EPA, which may be relevant to a penalty assessment, and could not therefore be deemed inadmissible before hearing).

In this case, it is unclear how Mr. Fuhrman intends to address the topics falling within Category 2 in his testimony at hearing. In his Declaration, he explicitly states that "Exhibit 42, which I wrote, does not provide *fact testimony*" instead asserting that it "provides *expert testimony*" to be considered by the undersigned. Exh. A at 5 (emphasis in original). While Mr. Fuhrman is diligent in noting that his "analyses do not usurp the authority of the Presiding Judge," *id.* at 10, as Complainant claims it does, Motion at 5, 15, whether they are relevant and probative is another matter. At this time it is not possible to determine whether the topics that fall within Category 2 are ancillary matters that will provide perspective and context for Mr. Fuhrman's testimony as it relates to relevant issues of fact and the application of the regulations

to those facts. Therefore, a ruling on the Motion as it relates to *these* topics must be **DEFERRED** until hearing and will not be ruled upon unless Complainant renews its objections at the hearing. To the extent that RX 42 contains conclusions or statements as to what the law, its implementing regulations, or the ERPs say or *do not* say, those conclusions or statements will not be considered. The Presiding Judge can take administrative notice of the content of these provisions or documents and needs no expert to testify to such. A determination as to the relevance of the balance of RX 42 must wait until hearing.

Category 3: Facts or factual issues that appear to be outside the scope of this witness' personal knowledge or stated expertise

Unlike the topic areas that fall under either Category 1 or 2, the items grouped under Category 3 present a separate issue for consideration. The specific items that fall within Category 3 are, in part, set forth above, *supra* at 3. In its Response, Respondent states that: "Mr. Fuhrman will testify with regard to his experience with and expertise in applying EPA civil penalty policies. . . ." Response at 11. To the extent that any of the proposed testimony relies on personal knowledge or experience, Respondent will have to show at hearing that Mr. Fuhrman possesses such personal knowledge or experience in order to demonstrate that such testimony would be reliable and probative. At this time it is not possible to determine whether Mr. Fuhrman has the requisite experience, expertise, or knowledge to testify on the topics that fall within Category 3. Therefore, a ruling on the Motion as it relates to *these* topics must be **DEFERRED** until hearing and will not be ruled upon unless Complainant renews its objections at the hearing.

Category 4: Topics related to an analysis of the relevant penalty factor in this case based on the facts of this case

The topics that fall within Category 4 present yet another class of issues distinct from those identified in the other three Categories. In its Prehearing Exchange, Respondents states that Mr. Fuhrman may be called to testify on:

- The alleged disproportionality of the proposed penalty to "the gravity of the alleged violations, plus the amount of economic benefit allegedly obtained . . . [,]" R's PHE at 18;
- The inappropriateness of the proposed penalty based on the facts in this case that "Mr. Fuhrman assumes [to be] true[,]" *id.* at 19-21;
- The contents of RX 42, *id.* at 23;
- The necessary foundation for the authentication of any documents to which Mr. Fuhrman might refer in his testimony, *id.*

With the exception of testimony on "the amount of economic benefit allegedly obtained," which has been made irrelevant by an intervening order granting Complainant's request to amend the Complaint and withdraw any allegations of economic benefit, the topics under Category 4 appear

to fall within the scope of relevant testimony for an expert who is properly qualified in the area of penalty policies and their application. Whether Mr. Fuhrman will be so qualified and whether his testimony addresses these topics in a relevant manner are not determinations that can be made at this time. However, because his proposed testimony in these areas cannot be deemed inadmissible for any purpose at this juncture, Complainant's Motion as it relates to these topics is **DENIED**.

CONCLUSION

Having determined that Mr. Fuhrman cannot be precluded from testifying at hearing entirely, the admissibility of the particular elements of his proposed testimony must be considered in the context of his testimony at hearing where the parties will have a full opportunity to examine and cross-examine Mr. Fuhrman on both his qualifications and subsequent opinions, if qualified. Given that Respondent must be afforded the opportunity to qualify Mr. Fuhrman, RX's 40a and 40b are not excluded at this time. Similarly, because the context and use of RX 42 is unclear at this juncture, Complainant's request to have it excluded must be denied. However, because RX 41 contains only irrelevant information about past cases and the penalties assessed therein, it will be excluded from evidence.

ORDER

1. Complainant's Motion in Limine to exclude Mr. Robert H. Fuhrman from testifying at hearing is **DENIED**.
2. Complainant's Motion in Limine to exclude RX 41 is **GRANTED**.
3. Complainant's Motion in Limine to exclude the proposed testimony related to past cases and penalties imposed therein is **GRANTED**.
4. Complainant's Motion in Limine to exclude RX 40a, 40b, and 42, and specific proposed testimony is **DENIED** at this time and **DEFERRED** to hearing and will not be ruled upon unless Complainant renews its objections at the hearing.



Susan L. Biro
Chief Administrative Law Judge


Dated: June 2, 2011
Washington, DC

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

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Complainant's Motion In Limine To Exclude Testimony And Evidence**, dated June 2, 2011, was sent this day in the following manner to the addressees listed below.

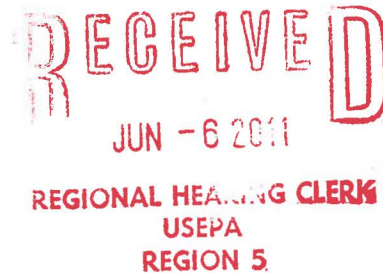


Maria Whiting-Beale
Staff Assistant

Dated: June 2, 2011

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