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 OPPOSITION TO COMPLAINANT'S MOTION IN LIMINE

I. INTRODUCTION

Complainant's Motion in Limine seeks to hide the fact that Complainant is seeking a draconian penalty – $4,709,400 – that would rank as the *third highest* in the history of the FIFRA program, even though Complainant has not alleged any harm to human health or the environment, or any willful or egregious conduct. The advertising allegations in this case largely involve a single design "plate" associated with one of Respondent's insecticide products, which displayed a horseshoe imprint on soil and stated "stomp more" insects, as well as two website communications. Complainant also alleges that the alternate brand name "Stallion Insecticide" was false and misleading, even though EPA has previously approved numerous other pesticide product names referencing animals – which are not for use on such animals – and subsequently approved FMC's functionally equivalent alternate brand name "Stallion Brand Insecticide."

If Respondent is found liable, FIFRA would require the Presiding Officer to make a determination as to the "appropriateness" of the penalty amount based on an assessment of the "gravity of the violation." 7 U.S.C. § 136l(a)(4). As this Tribunal has made clear, significant FIFRA penalties, "including the maximum penalty allowed by law . . . should normally be reserved for the most horrific violator, who has committed the most horrific violations such as a respondent with a long history of committing serious FIFRA violations, who then commits other egregious violations, which were knowing and willful, involving a pesticide of the highest toxicity, and/or which caused actual serious or widespread harm to human health and the environment." *In re: Rhee Bros., Inc.*, No. FIFRA-03-2005-0028, 2006 WL 2847398, at *27 (Sept. 19, 2006).

Respondent's RX 068 is highly relevant and provides necessary context to allow the Presiding Officer to make a reasoned assessment of the gravity of the alleged violations. This exhibit simply summarizes the largest civil and criminal FIFRA enforcement cases and

settlements ever imposed by EPA,[1] and helps show that Complainant's proposed penalty in this case is excessive and grossly disproportionate to the conduct alleged. Complainant's real objective in seeking to suppress this information is to obscure the fact that the penalty it seeks is orders of magnitude greater than virtually any penalty ever assessed by EPA in the history of FIFRA, even in the most egregious cases.

The Environmental Appeals Board ("EAB") has stated that "fairness and equity are appropriate considerations in assessing civil penalties under FIFRA." *In re Johnson Pac., Inc.*, 5 E.A.D. 696, 1995 WL 90174, at *6 (EAB 1996). Despite not being "specifically mentioned in the penalty provisions of FIFRA, [fairness and equity] are nonetheless fundamental elements of the regulatory scheme. Why else would the statute require the Agency to hold a hearing before imposing a penalty, except to ensure that the proceedings and the penalty itself are fair?" *Id.*; *see also In re Rhee Bros., Inc.*, 13 E.A.D. 261, 2007 WL 1934711, at *3 (EAB 2007) ("the Board's case law clarifies that equity and fairness, though not specifically mentioned in the main calculations of the ERP, may also be considered in making a penalty determination under FIFRA."). Not only does RX 068 illustrate how Complainant's proposed penalty is inequitable, it also reveals how Complainant's proposed penalty is inconsistent with the objective of the FIFRA ERP to be fair as between members of the regulated community, who in this industry are in direct competition with one another.

This Tribunal should reject Complainant's Motion in Limine. Complainant has not met its burden to show that RX 068 is inadmissible. Contrary to Complainant's assertion, Respondent does not seek to "draw in the penalty calculations, legal arguments, or holdings from

[1] The cases on RX 068 represent the largest FIFRA cases and settlements Respondent identified based on publicly available information as of July 8, 2016, when it filed its Prehearing Exchange.

previous cases." Complainant's Mot. in Limine at 1. Respondent merely believes the Presiding Officer should have available basic and incontrovertible facts demonstrating that the proposed penalty here is grossly disproportionate to nearly every prior penalty imposed in the history of FIFRA, and could only be deemed fair and equitable in a case involving willful or egregious conduct, or harm to human health and the environment.

Pursuant to 40 C.F.R. § 22.16(d), and in accordance with the May 6, 2016, Prehearing Order, Respondent requests that the Presiding Officer permit oral argument on Complainant's Motion in Limine. FMC proposes that oral argument be held in Washington, D.C., Philadelphia, or by telephone, at the Presiding Officer's discretion.

II. STANDARD OF REVIEW FOR ADMISSIBLE EVIDENCE

The Presiding Officer must "admit all evidence" unless it is "irrelevant, immaterial, unduly repetitious, unreliable or of little probative value." Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Consolidated Rules"), 40 C.F.R. § 22.22(a)(1). The Consolidated Rules do not address motions in limine. Under such circumstances, it is appropriate for this Tribunal to consult Federal Rules and case law for guidance. *See, e.g., In re Asbestos Specialists, Inc.*, 4 E.A.D. 819, 1993 WL 473845, at *5 (EAB 1993) (where the Consolidated Rules do not address a particular issue the EAB "look[s] to the Federal Rules of Civil Procedure (FRCP) and related case law as an aid in interpreting the Agency's rules.").

Federal jurisprudence makes clear that evidence "should not be excluded pursuant to a motion in limine, unless it is clearly inadmissible on all potential grounds." *Leonard v. Stemtech Health Scis., Inc.*, 981 F. Supp. 2d 273, 276 (D. Del. 2013); *see also United States v. Tartaglione*, No. CR 15-0491, 2017 WL 105741, at *2 (E.D. Pa. Jan. 11, 2017) ("The trial court should exclude evidence on a motion in limine only when the evidence is clearly inadmissible on

all potential grounds."). The moving party "bears the burden of demonstrating that the evidence is inadmissible on any relevant ground." *Leonard,* 981 F. Supp. at 276. Unless the evidence "is clearly inadmissible on all potential grounds . . . evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." *Hawthorne Partners v. AT&T Techs., Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993).

III. COMPLAINANT'S ASSERTION OF A LACK OF FOUNDATION IS MERITLESS

A. RESPONDENT IS ENTITLED TO HAVE THE OPPORTUNITY AT THE HEARING TO LAY THE PROPER FOUNDATION FOR ITS EVIDENCE

Complainant asserts it is unclear which witness Respondent intends to call at the hearing to admit RX 068, and questions whether any witness would be qualified to testify as to the "penalty calculations, legal arguments, or holding in the cases in the table," or that RX 068 represents the largest FIFRA cases and settlements. Complainant's Mot. in Limine at 2. As a preliminary matter, Complainant's premature foundational challenge is without merit at this stage in the proceeding. Complainant would have an opportunity to object to RX 068's introduction at the hearing, if Respondent failed to establish any necessary foundation for its admission into evidence. But raising such an anticipatory challenge now puts the cart before the horse.

Furthermore, Respondent made clear in its Prehearing Exchange that it expects to call as an expert witness, Dr. Debra F. Edwards, the Former Director of EPA's Office of Pesticide Programs ("OPP"), and thus complied with the Consolidated Rules' requirement to identify witnesses it intends to call, and to provide "a brief narrative summary of their expected testimony." 40 C.F.R. § 22.19(a)(2)(i). As discussed throughout this Opposition, Respondent does not seek to offer evidence or testimony about "the penalty calculations, legal arguments, or holdings from previous cases." Instead, Dr. Edwards, who worked continuously at EPA from

1985-2010 (except for a two-year assignment as a United States Peace Corps Volunteer in Guatemala), "may be called to testify about how OPP coordinates with EPA's Office of Enforcement and Compliance Assurance on pesticide matters, and discuss her opinion of the alleged violations, including putting them into context with EPA's history of FIFRA enforcement and EPA's FIFRA Enforcement Response Policy." Respondent FMC Corporation's Prehearing Exchange at 7-8. Dr. Edwards' extensive experience at EPA more than qualifies her to testify as to RX 068 and related topics.

B. THE FACTS IN RX 068 ARE SUBJECT TO JUDICIAL NOTICE AND REQUIRE NO FURTHER FOUNDATION TO BE ADMISSIBLE

Complainant's foundational challenge also lacks merit because the Consolidated Rules authorize this Tribunal to take judicial notice of the facts set forth in RX 068. "[O]fficial notice may be taken of any matter which can be judicially noticed in the Federal courts." 40 C.F.R. § 22.22(f); *see also In re: Peace Indus. Grp. (USA) Inc.*, CAA-HQ-2014-8119, 2016 WL 7441011, at *17, n.13 (EAB 2016) ("official notice may be taken of any matter that can be judicially noticed in the federal courts"). Under Federal Rule of Evidence 201(b)(2), a court may take judicial notice of "a fact that is not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). The publicly available cases and settlements in RX 068 meet this standard for judicial notice. In sum, Complainant has not carried its burden to show that RX 068 is clearly inadmissible based on an alleged lack of foundation. This Tribunal should therefore deny the Motion and defer ruling on RX 068's admissibility until the hearing "so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." *Hawthorne Partners v. AT&T Techs., Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993).

IV. COMPLAINANT HAS NOT CARRIED ITS BURDEN TO SHOW RX 068 IS CLEARLY INADMISSIBLE BASED ON RELEVANCE

RX 068 is offered solely to provide context for the Complainant's proposed penalty. By revealing the overall order of magnitude of penalties imposed in the most egregious FIFRA cases, Respondent will be able to demonstrate why the proposed penalty is manifestly unjust. There should be no concern that its introduction could run afoul of the EAB's common-sense admonition "'that the resolution of one case cannot determine the fate of another.'" Complainant's Mot. in Limine at 2 (quoting *In re Chem Lab Products, Inc.*, 10 E.A.D. 711, 728, 2002 WL 31474170, at *15) (EAB 2002)). The "three foundational principles" cited in *In re Chem Lab Products, Inc.* underpinning this admonition, therefore, should not impede this Tribunal from finding Complainant has not met its burden to show that RX 068 is clearly inadmissible. Furthermore, unlike *In re Chem Lab Products, Inc.*, where the EAB ruled the ALJ erred by reducing the penalty in a litigated case based on one settled case supposedly involving similar circumstances, here Respondent seeks to introduce RX 068 merely to illustrate the landscape of all of the largest FIFRA penalties ever imposed. This is relevant to illustrate the extraordinary nature of Complainant's proposed penalty, which would rank among the highest in the history of FIFRA. Respondent respectfully submits that this Tribunal should not allow Complainant to obscure this incontrovertible fact.

A. RX 068 Does Not Address How Statutory Penalty Factors Should Be Applied

With respect to the "first principle," Complainant notes that the EAB disfavors establishing a penalty by merely comparing "penalties assessed against two violators of the *same statutory or regulatory provision* . . . in the abstract simply as dollar figures, without any (or even with bits and pieces) of the unique record information that is so central to the penalty determinations." Complainant's Mot. in Limine at 2 (emphasis added) (quoting *In re Chem Lab*

Products, Inc., 10 E.A.D. 711, 728, 2002 WL 31474170, at *15) (EAB 2002)). Notably, the EAB's concern in this regard was rooted in the fact that "as applied to a particular case, [the statutory] penalty factors naturally become unique to that case on the basis of the evidence and testimony introduced into the administrative record." *Id.* Here, however, FMC is not seeking to introduce RX 068 to argue that a particular past decision should determine the penalty here. Instead, FMC's exhibit is merely meant to highlight how excessive and unreasonable Complainant's proposed $4,709,400 penalty is, compared to the body of other FIFRA cases and settlements that involved the most egregious conduct.

Context matters, and such information has been found relevant in appropriate circumstances. *See, e.g., In re Serv. Oil, Inc.*, Docket No. CWA-08-2005-0010, 2006 WL 3406348 at *11 (EPA ALJ Mar. 17, 2006) ("it cannot be concluded that information about other cases is *never* relevant to the assessment of a penalty.") (emphasis in original); *U.S. v. Ekco Housewares, Inc.*, 62 F. 3d 806, 816 (6th Cir. 1995) ("the penalties imposed in other cases are indeed relevant"). This is underscored by the Consolidated Rules' mandate that the Presiding Officer consider the FIFRA ERP (*see* 40 C.F.R. § 22.27(b)), the goal of which is "to provide fair and equitable treatment of the regulated community." FIFRA ERP at 4.

B. Deferring Judgment On RX 068 Would Not Offend Principles Of Judicial Economy

The EAB's second rationale – judicial economy – should not lead this Tribunal to grant Complainant's Motion in Limine. The Consolidated Rules encourage the "efficient, *fair* and impartial adjudication of issues arising in proceedings governed by these Consolidated Rules of Practice." 40 C.F.R. § 22.4(c)(10) (emphasis added). Here, fairness should outweigh any efficiency concerns due to the draconian nature of Complainant's proposed penalty. Respondent is not seeking to submit comparative penalty information on a case alleged to be *similar* to this

one. Rather, Respondent seeks to introduce a succinct exhibit that (i) summarizes the twelve largest civil and criminal FIFRA enforcement cases and settlements; (ii) demonstrates how dramatically different this case is from those cases; and (iii) highlights how unfair it would be if this case were placed third on that list as Complainant proposes.

C. RX 068 Provides Context For Complainant's Extreme Proposed Penalty

The EAB's third rationale[2] is in tension with the stated "goal" of the FIFRA ERP, which is "to provide fair and equitable treatment of the regulated community . . . and comparable penalty assessments for comparable violations." FIFRA ERP at 4. The EAB recognized as much and made clear that "there may be circumstances so compelling as to justify, despite judicial economy . . . [EAB] review of other allegedly similar cases." *In re Chem Lab Products, Inc.*, 10 E.A.D. 711, 2002 WL 31474170 at *18) (EAB 2002). This case compels such review, not because the cases are similar but instead because they are so *dissimilar*.

For this same reason, *In re Liphatech, Inc.* is distinguishable.[3] There, the Presiding Officer stated the Tribunal would "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." *In re Liphatech, Inc.*, Order on Complainant's Motion in Limine to Exclude Testimony and Evidence, Docket No. FIFRA-05-2010-0016, 2011 WL 2626549 at *14 (ALJ, June 2, 2011) (emphasis added). As discussed, Respondent is not attempting to introduce similar cases with similar facts and therefore the Tribunal's rationale there is inapposite here.

[2] The EAB's third rationale is the general principle that "unequal treatment is not available as a basis for challenging law enforcement proceedings," which the EAB explained classically arises in the context of selective enforcement, but is equally applicable in the penalty context.

[3] In addition, *In re Liphatech, Inc.* is not binding on this Tribunal.

Complainant cites other cases that also have no bearing here. For example, in *In re Spang & Company*, Spang argued that it was "being treated unfairly" and sought to dismiss the complaint because the Agency only issued Spang a notice of noncompliance for late-filed reports associated with one facility, but filed an administrative complaint against Spang for late-filed reports associated with another facility. 6 E.A.D. 226, 1995 WL 646518, at *11 (EAB 1995). The EAB found that the "discrepancy" did not warrant dismissal of the complaint because in general, "unequal treatment is not an available basis for challenging agency law enforcement proceedings." *Id.* (internal citation omitted). Here, by contrast, Respondent is not challenging EPA's exercise of enforcement discretion, let alone seeking to dismiss the complaint on "unequal treatment" grounds.

Complainant also cites *In re Chautauqua Hardware Corp.*, but that interlocutory decision did not address the admissibility of evidence and is also not relevant here. 3 E.A.D. 616, 1991 WL 310028, at *7 (EAB 1991). Chautauqua sought *discovery* about 21 other EPCRA cases, including settlements and final orders. *Id.* The EAB of course denied that request, reasoning that other cases "can have no bearing on any factual issues in this case" and therefore "the information about other EPCRA cases does not have 'significant probative value'" within the meaning of the Consolidated Rules governing discovery. *Id.* First, Respondent is not seeking intrusive discovery into 21 past enforcement matters, nor does it seek to introduce RX 068 to inform any factual dispute in this case. Second, the Consolidated Rules require the Presiding Officer to "admit all evidence" unless it is "irrelevant, immaterial, unduly repetitious, unreliable or of little probative value" (40 C.F.R. § 22.22(a)(1)), and motions in limine should only be granted when the evidence is clearly inadmissible on all potential grounds. Here, Respondent is

seeking to introduce a highly relevant document that allows the Tribunal to place Complainant's proposed penalty in context and appreciate its magnitude in context.

The Presiding Officer must ensure any "penalty is appropriate in relation to the facts and circumstances of the case at hand." *In re FRM Chem, Inc.*, 12 E.A.D. 739, 2006 WL 1806982, at *9 (EAB 2006). But such a penalty must also be informed by the totality of the evidence, including the context of FIFRA enforcement matters. That is precisely why Respondent intends to introduce RX 068 – to highlight cases where the conduct was far more egregious than that alleged here and to demonstrate why Complainant's proposed penalty is excessive and unreasonable. RX 068 shows that this case does not belong on that list, especially not in the number three slot.

What is more, the settled cases listed on RX 068, with which Complainant takes issue, have probative value and are relevant to (i) determining an "appropriate" penalty under FIFRA based on the "gravity of the violation" and (ii) showing why Complainant's proposed penalty is at odds with the FIFRA ERP's mandate to be fair as between members of the regulated community. Respondent does not dispute that settlements involve compromise; even so, RX 068 shows that Complainant's proposed penalty is nearly in a league of its own and inappropriate considering the gravity of the violations alleged, which is made clear by a comparison of the top twelve civil and criminal cases and settlements in the history of FIFRA.

Finally, Respondent respectfully submits that comparing prior cases is always appropriate for briefing and argument, regardless of whether such information is admitted as factual evidence. If the Tribunal were to exclude RX 068 from the hearing, that would merely deprive the Presiding Officer of the ability to question expert witnesses about such evidence.

V. CONCLUSION

For the reasons set forth above, Complainant's Motion in Limine should be denied.

Dated: April 17, 2017

Respectfully Submitted,

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