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 FOR DISCOVERY

I. INTRODUCTION

Shortly after Complainant filed its Motion For Discovery, Respondent FMC Corporation ("FMC" or "Respondent") voluntarily submitted its First Supplemental Prehearing Exchange, which addresses Complainant's proposed interrogatories and eliminates the basis for Complainant's motion. FMC respectfully requests that the Tribunal deny Complainant's motion in light of this development.

First, FMC voluntarily provided this sought-after information, and therefore the legal standard for "other discovery" is not met. Second, FMC's First Supplemental Prehearing Exchange came on the heels of Complainant's First Supplement to Prehearing Exchange and provides a comparable level of detail. These submissions obviate the potential need for discovery, which would be unnecessarily resource intensive for both parties. Third, Respondent respectfully submits that FMC's First Supplemental Prehearing Exchange: (1) clarifies the issues that FMC's expert witness, George Orme, may address at the hearing; and (2) provides sufficient detail about his expected testimony such that Complainant may adequately prepare for a hearing, which has not yet been scheduled.

II. LEGAL STANDARD UNDER WHICH DISCOVERY IS ALLOWED

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Consolidated Rules") require a party to submit a prehearing information exchange, which is intended to "clarify[y] the issues to be addressed at hearing and allow[] the parties and the court an opportunity for informed preparation for hearing." *In re JHNY, Inc.*, 12 E.A.D. 372, 382 (EAB 2005). The prehearing exchange must include the name of any witness a party intends to call at the hearing and "a brief narrative summary" of his or her expected testimony, although the Consolidated Rules do not set a standard for the degree of specificity required for such a

summary. 40 C.F.R. § 22.19(a)(2)(i). The Prehearing Order similarly only requires a "brief narrative summary" of each witnesses' expected testimony. Prehearing Order at 2.

A party may move for "other discovery" after the prehearing exchange, but the Rules of Practice only authorize such discovery in limited circumstances. 40 C.F.R. § 22.19(e). The Presiding Officer may only order "other discovery" where it "neither unreasonably delay[s] the proceeding nor unreasonably burden[s] the non-moving party", and only to the extent the requested information "has significant probative value on a disputed issue of material fact relevant to liability or the relief sought [that] is most reasonably obtained from the non-moving party, *and which the non-moving party has refused to provide voluntarily*." *Id.* at § 22.19(e)(1)(i)-(iii) (emphasis added).

Under the Consolidated Rules, the standard for discovery is "much more restrictive" than under the Federal Rules of Civil Procedure. *In Re Tennessee Valley Auth.*, CAA-2000-04-006, 2000 WL 968329, at *2 (EAB 2000). Whereas in federal court, a party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case" (F.R.C.P. 26(b)(1)), the standard for discovery here, by contrast, is narrower. That is because "[i]n general, the information provided through the prehearing exchange and the ability to cross-examine witnesses at the hearing is sufficient." *In Re Motiva Enters. LLC*, RCRA-3-2000-0004, 2001 WL 1557780, at *3 (ALJ Aug. 17, 2001). Applying the Consolidated Rules, the Environmental Appeals Board has recognized that discovery will be granted if "'a refusal to do so would so prejudice a party as to deny him due process.'" *In Re ICC Indus., Inc.*, TSCA Appeal No. 91-4, 1991 WL 280349, at *5 n.5 (EAB 1991) (*quoting McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979)).

III. COMPLAINANT HAS NOT MET THE STANDARD UNDER WHICH "OTHER DISCOVERY" MAY BE AUTHORIZED

A. FMC HAS VOLUNTARILY PROVIDED ADDITIONAL INFORMATION ABOUT GEORGE ORME'S EXPECTED TESTIMONY

Pursuant to Complainant's request, on May 18, 2017, FMC submitted its First Supplemental Prehearing Exchange, augmenting the narrative summary of Mr. George Orme's expected testimony. FMC respectfully submits that this First Supplemental Prehearing Exchanges obviates the need for discovery. In any event, the legal standard under which discovery may be ordered is not been met because FMC has "voluntarily" provided the information Complainant's seeks. 40 C.F.R. § 22.19(e)(1)(ii).

As noted in Complainant's Motion for Discovery, on March 13, 2017, counsel for FMC advised counsel for Complainant that FMC was voluntarily "'willing to augment the narrative description of George Orme's testimony.'" Complainant's Motion for Discovery at 1. Counsel for FMC contemporaneously requested that Complainant voluntarily provide additional information about the expected testimony of three of Complainant's witnesses.[1] On April 6, 2017, Complainant submitted its First Supplement to Prehearing Exchange. On May 9, 2017, Complainant filed its Motion For Discovery, even though it was aware that FMC was voluntarily willing to augment the narrative description of Mr. Orme's testimony and a hearing has not yet been set. On May 18, 2017, Respondent submitted its First Supplemental Prehearing Exchange, which is comparable in detail to Complainant's First Supplement to Prehearing Exchange. Because FMC has voluntarily provided the information Complainant sought in its Motion For Discovery, Complainant's Motion does not satisfy the standard for discovery and should be denied. *See, e.g., Aylin, Inc.*, Docket No. RCRA-03-2013-0039, 2016 WL 2759696, at *15

[1] This is one part of constructive discussions that the parties have been having to seek to narrow issues for the hearing.

(ALJ, Mar. 2, 2016) (determining that certain interrogatories "appear to seek information that . . . has now been provided [; a]ccordingly, they do not satisfy the standard for additional discovery set forth" in the Consolidated Rules); *cf. In re Advanced Elecs., Inc.*, 10 E.A.D. 385 (EAB 2002) (finding where information sought in discovery was provided during the prehearing exchange process, there is no "basis for a due process claim" in denying the discovery request).

IV. FMC HAS CLARIFIED THE ISSUES MR. ORME MAY ADDRESS AT THE HEARING AND ADEQUATELY DETAILED THE SUBSTANCE OF HIS EXPECTED TESTMONY

Even if Complainant were able to meet the "other discovery" standard, FMC's First Supplemental Prehearing Exchange renders unnecessary Complainant's request for written discovery. FMC has already addressed the information sought in Complainant's proposed interrogatories, by voluntarily supplementing Mr. Orme's expected testimony. Thus the allegation that Mr. Orme's narrative summary fails "to clarify the issues to be addressed at hearing", while tenuous before, now fully lacks merit in light of FMC's supplemental submission.[2] Complainant's Memo at 4. This Tribunal should therefore deny Complainant's Motion For Discovery.

The narrative summary of Mr. Orme's expected testimony provides sufficient detail about the "substance of that testimony" to enable Complainant "a meaningful opportunity to prepare for hearing." *Aylin, Inc.*, at *11. Interrogatory #1, for example, asks for additional information regarding: (1) the testimony Mr. Orme may give regarding a general overview of marketing, including "specifically addressing the definition of marketing"; and (2) the differences between brand/product awareness efforts and offers for sale as they relate to this case. Complainant's First Interrogatories #1. Responsive to this request, FMC has stated:

[2] Complainant reserved the right to seek leave to depose Mr. Orme. *See* Complainant's Memo at 4. Respondent reserves the right to oppose any such request.

> 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.

Respondent FMC Corporation's First Supplemental Prehearing Exchange at 2-3.

Interrogatory #2 sought additional information relating to what is meant by "marketing metrics" and the efficacies of the different types of marketing as they relate to this case. Complainant's First Interrogatories #2. FMC has provided the following responsive information:

> 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).

Respondent FMC Corporation's First Supplemental Prehearing Exchange at 3.

In Interrogatory #3, Complainant requested FMC state Mr. Orme's opinion regarding the factors that influence customer decision making. Complainant's First Interrogatories #3. In this regard, FMC has stated: "These include factors such as marketing parameters, *e.g.*, price, channel, promotion offers, target audience, sales and marketing support and customer responses." Respondent FMC Corporation's First Supplemental Prehearing Exchange at 4.

Interrogatory #4 requested further information about "marketing in the pesticide industry in general and by FMC's competitors." Complainant's First Interrogatories #4. Responsive to this request, FMC has explained that Mr. Orme's testimony 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.

Respondent FMC Corporation's First Supplemental Prehearing Exchange at 4.

Interrogatory #5, which seeks additional information regarding Mr. Orme's opinion about the process through which companies develop product names, also has been addressed. FMC has explained:

> 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.

Respondent FMC Corporation's First Supplemental Prehearing Exchange at 4.

Interrogatory #6 sought information about the specific alternate brand names involved in this case. Complainant's First Interrogatories #6. Relevant to this inquiry, FMC's has stated:

> 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.

Respondent FMC Corporation's First Supplemental Prehearing Exchange at 4.

Interrogatory #7 requested additional information about the "lists used to identify potential recipients of the direct mailer referenced in the Complaint and the efficacy of such lists" including specially addressing the meaning of the term "potential recipients."

Complainant's First Interrogatories #7. FMC's Supplemental Prehearing Exchange addressed this topic as follows:

> With respect to the "direct mailer", Mr. Orme may be called to testify about the lists used to identify potential recipients[]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)." [In a corresponding footnote, FMC explained:] 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.

Respondent FMC Corporation's First Supplemental Prehearing Exchange at 3.

Finally, with respect to Interrogatory #8, Complainant requested clarification about Mr. Orme's expected testimony relating to "facts in the record about returned and duplicative mails and such facts' meaning."[3] Complainant's First Interrogatories #8. FMC has made clear Mr. Orme may testify as follows:

> [T]hat the number of intended "direct mailer" recipients is smaller than Complainant alleged 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).

Respondent FMC Corporation's First Supplemental Prehearing Exchange at 3-4.

[3] Interrogatory #8 belies Complainant's contention that no genuine issues of material fact exist as to liability. *See* Complainant's Memo at 4, n.2. As FMC stated in its Opposition to Complainant's Motion For Partial Accelerated Decision, there are genuine issues of material fact regarding the number of violations for each alleged act of advertising under FIFRA, which is underscored by the Complainant's request for information in this regard. *See generally* Respondent FMC Corporation's Opposition to Complainant's Motion For Partial Accelerated Decision As To Liability For Violations 1 Through 12,273 Of The Complaint at § III.A (explaining there are genuine issues of material fact regarding the number of violations for each alleged act of advertising under FIFRA).

In sum, FMC has voluntarily submitted its First Supplemental Prehearing Exchange before a hearing has been scheduled and addressed the information Complainant sought in the proposed interrogatories accompanying the Motion For Discovery. Respondent therefore respectfully submits that Complainant can meaningfully and adequately prepare for the hearing, and Complainant's Motion For Discovery should be denied.

V. CONCLUSION

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

Dated: May 25, 2017

Respectfully Submitted,

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