EXHIBIT 24

Not Reported in F.Supp.2d, 2002 WL 34364408 (S.D.Cal.)
(Cite as: 2002 WL 34364408 (S.D.Cal.))

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Only the Westlaw citation is currently available.

United States District Court,
S.D. California.
UNITED STATES of America, Plaintiff,
v.
MIRAMA ENTERPRISES, INC., a California Corporation, d/b/a Aroma Housewares Co., Defendant.
No. 00-CV-2269-K (LAB).

June 17, 2002.

Named Expert: Eileen Zimmer
U.S. Attorney CV, U.S. Attorneys Office Southern, District of California Civil Division, San Diego, CA, Patrick Jasperse, United States Department of Office of Consumer Litigation, Justice, Washington, DC, for Plaintiff.

Jeffrey B. Margulies, Parker MillikenClark Ohara and Samuelian, Los Angeles, CA, for Defendant.

ORDER:

(i) DENYING DEFENDANT'S MOTION IN LIMINE; and

(ii) GRANTING IN PART AND DENYING IN PART THE GOVERNMENT'S MOTION IN LIMINE

JUDITH N. KEEP, District Judge.

***1** On January 24, 2002, the Court granted summary judgement to the Government and found Defendant Mirama Enterprises, Inc., d/b/a Aroma Housewares Co. ("Aroma") liable for failing to meet various reporting requirements under the Consumer Product Safety Act ("CPSA" or "Act"), 15 U.S.C § 2051 *et seq. See United States v. Mirama Enterprises, Inc.*, 185 F.Supp.2d 1148 (S.D.Cal.2002). A penalty hearing is set for June 25, 2002. Currently before the Court are two motions *in limine*, one by each party: Aroma seeks to exclude the testimony of the Government's expert witness Eileen Zimmer; the Government seeks to exclude evidence of previous investigations by the Consumer Products Safety Commission related to other companies. On June 10, 2002, the Court heard oral argument; this order memorializes and expands on the Court's oral rulings, but does not supplant the oral record. The Court has federal question jurisdiction; both sides proceed through counsel.

I. Background

Aroma sold an exploding juicer which injured numerous consumers. Aroma had information regarding incidents and injuries with its juicers beginning in February 1998 but did not report any of its information to the Consumer Product Safety Commission ("CPSC" or "Commission") until November 1998. For a detailed factual background, see the Court's order granting summary judgement. *Mirama*, 185 F.Supp.2d at 1151-55. In that order, the Court granted summary judgement to the Government and found Aroma liable for failing to meet various reporting requirements under the Act. In particular, the Court found that Aroma had "overwhelming evidence" requiring it to report the "litany of phone calls and letters with which scared, angry, and often injured consumers bombarded the company." *Id.* at 1158. Aroma did not file a report with the Commission until November 18, 1998. The Court found that Aroma had enough information from consumers to trigger the reporting requirement no later than early March 1998, after receiving in less than a month "three telephone calls and two letters recounting exploding juicers, flying pieces of razor-sharp metal, and one emergency room visit." *Id.* at 1159. The Court's order granting summary judgement established the liability of Aroma for failing to report its information to the

Commission. The sole issue for trial is Aroma's penalty under the Act for failing to report. The Government calculates the maximum penalty at $1.5 million. *See* Government's Opposition to Defendant's Motion in Limine at 1.

II. Aroma's Motion in Limine to Exclude Expert Witness Testimony

In general, the admission and exclusion of evidence is left to the sound discretion of the trial court. *Raybestos Products Co. v. Younger*, 54 F.3d 1234, 1241 (7th Cir.1995). Federal Rule of Evidence 702 governs the admission of expert witness testimony and provides that to be admissible, expert testimony must assist the trier of fact and (1) be based upon sufficient data, (2) be based upon reliable principles and methods, and (3) the witness must have applied the principles and methods reliably to the facts. Pursuant to FRE 702, the trial court performs a "gatekeeper" role and must make a preliminary assessment of whether the reasoning and methodology underlying the testimony is valid and whether it can be reliably applied to the facts in this case. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The court has "broad latitude" in determining both how to determine reliability and the ultimate judgment of whether the testimony is reliable. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141-42, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). The Advisory Committee's Notes show the general manner in which the broad latitude of a trial court is to be exercised:

> ***2** Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded.

The topic of Ms. Zimmer's expert testimony is the financial ability of Aroma to pay a penalty and the gist of her testimony is that Aroma can afford to pay a penalty of $500,000, half upfront and half over the course of a year. Ms. Zimmer is a chartered financial analyst employed by the U.S. Department of Justice as a senior financial analyst. She has a Masters of Business Administration in finance and investments from George Washington University and has been employed as a financial analyst by DOJ for over seven years. She has testified as a financial expert numerous times, usually on the topic of the ability of a company to pay damages. *See generally* Ex. 1 to Ex. A of Government's Opposition.

Aroma objects to her testimony on several grounds and the Court will deal with each in turn. First, Aroma contends that Ms. Zimmer's opinion that Aroma can afford to pay $500,000 is speculative and not scientific, because there is no formula by which Ms. Zimmer arrives at her figure. Ms. Zimmer based her report on a variety of figures over several years, looking at both the numbers and the trends in the numbers. *See* Ex. A to Gov's Opposition. For example, she examined Aroma's total assets, including cash, accounts receivable, and inventory, as well as the company's liabilities. She noted that the company has a $4 million revolving line of credit that is essentially untouched. She looked at the company's earnings and operating expenses from 1996 through 2000, as well as net cash flow from the company's operations. In looking at these figures, Ms. Zimmer did not rely on a formula, instead exercising her own judgement based on these financial considerations. The Court finds that the absence of a defined mathematical formula in determining a company's ability to pay a fine does not make Ms. Zimmer's testimony speculative

or ungrounded. Ms. Zimmer relied on basic financial information of the kind available on many publicly traded companies. Many sophisticated, experienced investors trade stocks every day based on similar financial statements of cash flows, earnings, sales, etc. and many of these expert investors diverge in their valuation of a company-for every buyer there is a seller, and the two must disagree on the value of the company (and hence the stock) for there to be a price at which one will buy and the other sell. Thus, there is no mathematical precision to evaluating the financial worth or health of a company. In the similar case of *United States v. Gulf Park Water Co., Inc.*, 14 F .Supp.2d 854 (S.D.Miss.1998), the court found a company liable on summary judgement for violations of the Clean Water Act and at issue was the testimony of a financial expert on the company's ability to pay at a penalty hearing. The Court agrees with the conclusion of the *Gulf Park* court: "While the experts offered calculations on the ability to pay ..., to these findings there must be applied a degree of reason and common sense without the benefit of precise mathematical equations." *Id.* at 868-69. The gravamen of Aroma's objections to the expert testimony really goes to the weight to be accorded the testimony, rather than its admissibility.

***3** Aroma also objects to the expert testimony on the grounds that Ms. Zimmer's opinion is based on insufficient data. Aroma contends that "Ms. Zimmer considered no recent financial data of Aroma ...." Motion at 6, and she "considered no information for 2001 and 2002 to date ..." (Reply at 4). Aroma contends that Ms. Zimmer should have considered recent financial data from 2001 and 2002, and should have taken into account the financial health of other companies in the same market segment. Reply at 5-6. The Court denies Aroma's objection of insufficient data and finds again that this really goes to the weight, and not the admissibility, of the testimony. Ms. Zimmer considered a wide variety of data. Aroma is certainly free to challenge the accuracy of her opinion by introducing evidence of the financial health of other companies in the same market segment and arguing the importance of that data.

Aroma's objection that Ms. Zimmer has not used the most recently available data, 2001 and 2002 to date, is a more serious objection. The Government provides considerable detail on its repeated discovery requests for this very data, and the continued failure of Aroma to comply with the requests. Opposition at 1-3. Aroma does not address this issue in its papers, though it had the opportunity to do so in its Reply brief. The objection itself goes to the weight, not the admissibility, of the testimony. Moreover, on June 10, 2002, the Court ordered that Defendant either turn-over to the Government financial statements and tax returns from 2000 and 2001 by Thursday, June 13 at 9 a.m. PST, or provide a sworn statement stating that such evidence is not available and the reasons why the information is not available. The Court will hold a telephonic hearing on Friday, June 14 at 1:30 p.m. to determine whether Ms. Zimmer's expert opinion has materially altered because of the subsequent information and if so, what impact that should have on the trial date.

Aroma also contends that Ms. Zimmer's opinion will not assist the Court in determining Aroma's ability to pay because "with little effort, the Court can review the same information Ms. Zimmer reviewed (five years worth of compiled financials and tax returns) and reach its own conclusions." Motion at 7. The Court is flattered by Aroma's confidence, but I do not have an MBA, a Bachelor's of Science in Finance, or 14 years of experience as a financial analyst. The suggestion that "with little effort" the Court can analyze five years worth of financial statements and tax returns, including such things as trends in cash flow and working capital, is rejected.

Aroma's final contention is that the Court should exclude the testimony under FRE 403 on the grounds that the danger of unfair prejudice greatly outweighs the probative value of the testimony. The Court finds no "unfair" prejudice from her proffered testimony. If Aroma feels that her opinion

is flawed, it may impeach her testimony on cross-examination, offer expert testimony from its own expert, and/or argue why the opinion is incorrect or misleading,

***4** For the above reasons, the Court finds that Ms. Zimmer's testimony is sufficiently reliable and will assist the trier of fact, and the Court accordingly **DENIES** Aroma's motion *in limine* to exclude the testimony.

III. Government's Motion in Limine to Exclude Reference to Other Investigations

The Government seeks to exclude evidence of or reference to investigations by the CPSC of similar juicer models made by other companies. Aroma opposes the motion.

> At trial, Aroma will show that several other brands of similarly designed juicers had been recalled because of CPSC's determination that they created substantial product hazards. *The facial similarity between these prior incidents and the reports regarding the Aroma juicers that CPSC received demonstrate that the CPSC was already aware of the same problem in similar juicers, it had already investigated the problem in similar juicers, and* ***it could and should have informed Aroma*** *of these facts when it first received reports of Aroma's juicer shattering.*

(italics in original, boldface added).

In its summary judgement order, the Court stated:

> Aroma seems to place much significance on the fact that the Commission knew of problems in previous years with juicer models of other companies. ***The Court fails to see the relevance of this information.*** Section 2064(b) [of the Act] places a reporting requirement on manufacturers, distributors, and retailers of consumer products to report to the Commission "immediately" in order to further the public safety. Nowhere does the Act place a requirement on the Commission to report to every manufacturer, distributor, and retailer of consumer products of problems with similar products.

Mirama, 185 F.Supp.2d at 1163 (emphasis added).

In its papers, Aroma contends that evidence which is irrelevant to liability may be relevant to damages. While this contention is correct, in its moving papers Aroma does not argue why it is relevant in this case and the Court can see none. The only possible relevance the Court can see is to Aroma's equitable defense of unclean hands. However, the equitable defense of unclean hands means that each side is blameworthy and the Court should therefore not sanction the defendant. *See generally* 11 Witkin, Summary of Cal. Law, Equity §§ 8 *et seq.* The Act imposes a requirement on companies to report to the Consumer Product Safety Commission, not vice-versa. Aroma cannot maintain a defense of unclean hands based on the "withholding" of information by the Commission where the Commission has no obligation to disclose the information. Furthermore, the doctrine of unclean hands is generally only applicable in contract actions (*id.*) and the defense is not recognized where it would be harmful to the public interest (*id.* at § 13). In sum, the Government does not have unclean hands, this is not a contract action to which the defense would be applicable, and even if the defense were applicable, it would be contrary to the public interest to recognize the defense. The Court accordingly **GRANTS IN PART** the Government's motion *in limine* to exclude evidence related to investigations by the Commission of other companies in that it will not be admissible as to the unclean hands defense.

***5** However, based on arguments by Aroma at the hearing, the Court also **DENIES IN PART** the Government's motion *in limine* and will allow Aroma to introduce evidence of other investigations in two limited ways. First, as impeachment, Aroma may cross-examine about settlements/fines in other investigations to challenge fines sought in this case to achieve the statutory goal of deterring future violations of the Act. Second, Aroma may introduce

evidence from other investigations into exploding juicers as it relates to the effect of dishwashing weakening the juicer housing. Aroma may introduce this evidence for the limited purpose of showing that it had a good-faith basis for believing that its exploding juicers were the result of consumer misuse and not defective design.

IV. Conclusion

For the aforementioned reasons, the Court **DENIES** Defendant's motion *in limine* to exclude expert witness testimony and **GRANTS IN PART** and **DENIES IN PART** the Government's motion *in limine* to exclude evidence of investigations of other companies.

IT IS SO ORDERED.

S.D.Cal.,2002.
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