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STATE OF NEW MEXICO
COUNTY OF SANAT FE
FIRST JUDICIAL DISTRICT

No. D-0101-CV-2010-00029

Arthur Firstenberg,
Plaintiff,

v.

Raphaela Monribot,
Defendant.

Decision and Order Denying
Motion for Preliminary Injunction

This matter was considered on Plaintiff's Motion for Preliminary Injunction. The plaintiff appeared in person and through counsel. The defendant appeared in person and through counsel. The Court considered the affidavits and supporting documentation that was filed, heard testimony and argument of counsel, and reviewed counsel's post-hearing letters. The Court's ruling appears below.

Before explaining its ruling the Court wishes to state that at this stage of the litigation it is not making the type of determination that would be made if a *Daubert-Alberico* motion were being decided. The Court believes that before such a determination could be made much more in-depth proof and argument on the validity of both sides' experts would have to be presented and considered. Rather this ruling is based on the requirements for a preliminary injunction which differ from those associated with a *Daubert-Alberico* analysis.

A preliminary injunction may issue only if the moving party demonstrates the presence of four criteria:

(1) The plaintiff will suffer irreparable injury unless the injunction is granted;

(2) The threatened injury outweighs any damage the injunction might cause the defendant;
(3) Issuance of the injunction will not be adverse to the public's interest; and
(4) There is a substantial likelihood plaintiff will prevail on the merits.

LaBalbo v. Hymes, 115 N.M. 314, 318, 850 P.2d 1017, 1021 (Ct. App. 1993). If a plaintiff fails to establish one of the required factors, the injunction should be denied. *Id.*

Because I believe that Plaintiff has failed to make the requisite showing under the fourth criterion, I need not address the other three. In this case, I do not believe Plaintiff has shown that he is likely to prevail on the issue of causation – did Defendant's use of electrical devices cause the symptoms about which Plaintiff complains. While ultimately this question will have both a medical and an electrical engineering component, the Court's determination at this time will only review the medical side of the question.[1]

DISCUSSION OF EVIDENCE

According to Plaintiff's witnesses and other doctors who have examined Plaintiff, he has symptoms that reflect electromagnetic sensitivity ("EMS"). Plaintiff has a long history of being diagnosed with chemical sensitivity[2] and sensitivity to electromagnetic fields ("EMF"). Plaintiff claims that Defendant's use of various electronic devices in her house causes him to have severe adverse reactions. Specifically, he complains of her use of an iPhone, a cordless phone, an iPhone charger, a Wi-Fi modem, laptop computer, desk top computer, scanner, dimmer switches, and compact fluorescent bulbs. He also complains that he would be bothered by her use of a television if she had one and by the use of other unspecified wireless devices that Defendant might obtain.

[1] The Court does have serious reservations about the validity of the engineering conclusions tendered by Plaintiff.
[2] Plaintiff's Multiple Chemical Sensitivity condition does not appear to be at issue in this litigation.

Plaintiff lives in a high-density neighborhood. On one side of Plaintiff's house is an eight unit condominium complex. At least one of those condo owners uses a cell phone while on a balcony that overlooks Plaintiff's house. Nevertheless, Plaintiff claims that he is particularly influenced by Defendant's use of these devices, as opposed to other people in the neighborhood

Plaintiff claims he can tell that the electromagnetic waves that are bothering him are coming from Plaintiff's because he has tracked the source of the waves with devices he has.[3]

For historical reasons Plaintiff's electric meter is mounted on Defendant's house, and Plaintiff's house and the Defendant's house share a common service drop from the transformer and are served by the same wiring. Electromagnetic fields generated by appliances in Defendant's house will be conducted from her house through the connection to Plaintiff's house, according to an affidavit filed by an expert for Plaintiff. According to this expert, the wiring in Plaintiff's house will emit electromagnetic radiation from his neighbor's electronic devices.[4]

Plaintiff's family history also reveals two aunts and a grandmother with mental problems. Further, at least since 1999 he has been advised to live in a location which does not have significant electromagnetic fields. This advice appears to have referred initially to cell towers, radio towers, and high voltage lines.

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[3] There was an inadequate foundation that these devices are capable of rendering the findings that Plaintiff claims or that Plaintiff is an expert at using these devices.

[4] This information comes from an affidavit from Bill Curry. While Dr. Curry appears to have the education required to be an expert, his affidavit is generally based on his "understandings" most of which seem to be gleaned from Plaintiff. His discussion does not explain the bases for many of his conclusions. Nor does it explain if the type of information on which he is relying is the type usually relied upon by experts.

DISCUSSION OF DIFFERENTIAL DIAGNOSIS

The physicians who testified to Plaintiff's EMS condition did so based on a "differential diagnosis." "Differential diagnosis, or differential etiology, is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated." *Westberry v. Gislaved Gummi AB*, 178 F3d 257, 262 (4th Cir. 1999). "A reliable differential diagnosis . . . generally is accomplished by determining the possible causes for the patient's symptoms and then eliminating each of these potential causes until reaching one that cannot be ruled out or determining which of those that cannot be excluded is the most likely." *Id.* "The core of differential diagnosis is a requirement that experts at least consider alternative causes." *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717, 759 (3d Cir.1994).

The New Mexico appellate courts have referred to differential diagnosis as a basis for expert opinion but have not discussed it at length. Nevertheless, it appears that New Mexico, like most other jurisdictions, would "hold that a reliable differential diagnosis provides a valid foundation for an expert opinion." *Westberry*, 178 F.3d at 263.[5]

The issue here is whether the differential diagnosis in this case is reliable enough that it will carry the day on the fourth prong of the test for a preliminary injunction. To make that determination, it is necessary to look at what courts have required for a differential diagnosis to prove causation. To determine whether a differential diagnosis is reliable, every federal circuit seems to use basically the three-pronged test set out in ***Best v. Lowe's Home Centers, Inc.***, 563 F.3d 171 (6th Cir. 2009). This test requires that the doctor: (1) objectively ascertains, to the extent possible, the nature of the patient's injury,

[5] For contrary conclusions, see *Glastetter v. Novartis Pharm. Corp.*, 107 F. Supp.2d 1015 (E.D. Mo. 2000), *aff'd*, 252 F.3d 986, 989 (8th Cir.2001).

(2) "rules in" one or more causes of the injury using a valid methodology, and (3) engages in standard diagnostic techniques by which doctors normally rule out alternative causes to reach a conclusion as to which cause is most likely.

In this case it is the second two prongs that are most relevant. "Ruling in" is the analysis that proves that the allegedly harmful agent is capable of causing the harm. *See, e.g., Ruggiero v. Warner-Lambert Co.*, 424 F.3d 249, 254 (2d Cir.2005) ("Where an expert employs differential diagnosis to 'rule out' other potential causes for the injury at issue, he must also 'rule in' the suspected cause, and do so using scientifically valid methodology." (Internal quotation marks omitted.)

One typical scientific method used to rule in a cause is citation to published literature. In the present case both sides claim that the published literature supports their respective positions. The Court is unable to make a determination at this time as to the competing validity of the published papers.[6]

In addition, to rule in a particular harm, commonly there is testimony as to what dosage is capable of causing harm. *See, e.g., McClain v. Metabolife International, Inc.*, 401 F.3d 1233, 1241 (11th Cir. 2005). This is notably lacking in this case. For example, when Plaintiff was initially diagnosed with EMS the concern seemed to be exposure to sources of large amounts of electromagnetic radiation such as high voltage transmission lines, broadcast and radio towers, and cellular phone towers.[7] Now the concern seems to

[6] Before such conclusions could be drawn, the Court would require detailed analysis showing the reliability of each cited paper by a showing as to the credentials of the authors, the reputation of the authors in the scientific community, the conclusions reached in the paper, the relevance of the conclusions to the claims in the present case, and other traditional *Daubert* showings. For example, a paper showing that electromagnetic radiation causes cancer would not be persuasive to show that such radiation causes heart palpitations.

[7] The cases cited by Plaintiff that have recognized the possibility of recovery for microwave radiation illness have involved prolonged exposure to much more significant doses of radiation. *See, e.g.*, the descriptions of the exposure in *Yannon v. New York Telephone Co.*, 86 App. Div.2d 241, 450 N.Y. Supp.2d

encompass power sources like dimmer switches.

One of the articles provided by Plaintiff states: ""Everyone in our modern society is exposed to the electric and magnetic fields (EMFs) that surround all electric devices. Recently, scientific studies have raised questions about the possible health effects of EMFs. . . . [T]he scientific evidence does not yet show whether EMF exposures are hazardous." NIOSH Fact Sheet. This paper raises considerable question in the Court's mind as to whether Plaintiff is likely to prevail on the merits. This suggests that Plaintiff might at most be able to raise questions about EMFs as a cause of his problems. This is insufficient to obtain a preliminary injunction.

In addition the Court has serious questions as to the third prong of the test – ruling out other possible causative factors. First, as mentioned above, we live in a world where electrical devices are ubiquitous. The showing that the electromagnetic radiation emanating from Defendant's use of common electrical devices is the cause of Plaintiff's problems, as opposed to any of the other uses of electricity that occur in Plaintiff's neighborhood, is less than convincing.

In addition, and more importantly, one of the alternative potential causes for Plaintiff's problems is a psychiatric condition. According to Defendant's expert, "medical evaluation [should include] a psychological evaluation to identify alternative psychiatric/psychological conditions that may be responsible for symptoms. Thus, in any process of differential diagnosis a psychiatric/psychological evaluation should be included." (Staudenmayer Affidavit, p. 4.) Given Plaintiff's familial history of mental

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893, 1982) (13 years of thrice daily exposure to 25 microwave units with antenna that were beaming microwaves while being worked on), and in *Barnett v. Carberry*, ___ F. Supp.2d ___, 2009 WL 902396 (D. Conn. 2009)(complaint stated a claim for conspiracy where Plaintiff 's house measured very high levels of EMFs from high voltage line running through backyard).

illness, complete psychological evaluation, including testing, should have been included in the differential diagnosis. Yet, according to their testimony, neither of Plaintiff's testifying experts did this. No convincing explanation was given for why this critical step was omitted.

In this particular case, the Court has determined that Plaintiff has failed to show that he is likely to succeed on the merits.[8] For this reason, the preliminary injunction is denied.

IT IS THEREFORE ORDERED that Plaintiff's request for a preliminary injunction is denied.

Sarah M. Singleton, District Judge

Copies of this order were mailed on the date of filing to:

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[8] *Ogle v. Ohio Power Co.*, 180 Ohio App.3d 44, 903 N.E.2d 1284 (2008), is not helpful since it merely held that a plaintiff stated a claim for nuisance when he pleaded that a cell tower, which was visible from his house, might impair this health or property values. *See also Barnett v. Carberry*. By declining to dismiss the nuisance claim, the Court has recognized that Plaintiff might be able to recover for nuisance. The test for a preliminary injunction, however, is not whether Plaintiff might prevail but whether he is likely to prevail.