UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
C.F. Industries, Inc.,	)	Docket No. FIFRA-09-0465-C-86-5
	)	
Respondent	)	

RECOMMENDED DECISION

This is an application for attorney fees and expenses pursuant to the Equal Access to Justice Act ("EAJA"), as amended, 5 U.S.C., section 504, and the Agency's implementing regulations, 40 C.F.R. Part 17.

The applicant, C.F. Industries ("CFI"), now known as Country Farm Supply Inc., was the respondent in an adjudicative proceeding under the Federal, Insecticide, Fungicide and Rodenticide Act ("FIFRA"), section 14(a), 7 U.S.C. 136 l(a), for the assessment of civil penalties for alleged violations of FIFRA.

The administrative complaint charged CFI in six counts with altering the labeling on and on two occasions selling and distributing 5 one gallon containers of a misbranded pesticide that it had unlawfully repackaged at its unregistered establishment, in violation of several subsections of section 12 of FIFRA. A civil penalty totaling $28,160 was proposed pursuant to FIFRA section 14(a) and the Agency's guidelines for the assessment of civil penalties under section 14(a), 39 Fed. Reg. 27711 (July 31, 1974). CFI answered and denied the violations and its liability for a penalty. On March 23, 1987, the parties entered into a Consent Agreement and Final Order assessing a civil penalty of three thousand dollars ($3,000)

against respondent. CFI contends that under the settlement it has prevailed in this proceeding and that the EPA was not justified in bringing it.

To be entitled to an award of attorney's fees and expenses, the applicant must be an eligible prevailing party. 1/ The grounds on which fees and expenses are awarded are set forth in 5 U.S.C. section 504(a)(1), which provides as follows:

> An Agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

The first question to consider is whether CFI is eligible for an award of fees and expenses under subsection 504(b)(1)(B) of the Act. CFI submitted with its application an affidavit and net worth financial statement showing a new worth of less than $5 million and stating that respondent has fewer than 500 employees. I find, accordingly, that CFI is eligible for an award. 2/

1/ 5 U.S.C. sections 504(a)(1) and (2); 40 C.F.R. 17.5

2/ The EPA's contention that CFI's application is totally deficient in the form submitted is rejected. No substantial deficiency in the papers has been shown.

The next matter to be considered is whether CFI "prevailed" within the meaning of the Equal Access to Justice Act and the regulations so as to be entitled to reimbursement for expenditures in defending against the charges that culminated in the consent agreement.

In Wyoming Wildlife Federation v. United States, 3/ the Court affirmed the principle that a party does not have to win a final judgment following a trial on the merits in order to qualify as a "prevailing party." The Court said,

> Even when plaintiffs settle a case with the Government, they may still be prevailing parties within the meaning of the EAJA. The question is whether the plaintiffs, through settlement, achieve some of the benefit the parties sought in bringing the suit. The courts make this determination by comparing the plaintiff's complaint with the settlement agreement. 4/ (citation omitted.)

This same principle applies when, as here, the Environmental Protection Agency is the complainant seeking assessment of a civil penalty against CFI in order to stop respondent's alleged activities in violation of FIFRA and to deter future transgressions.

Although CFI, in the consent agreement, neither admits nor denies the factual allegations set forth in the complaint, the terms are sufficiently favorable for the complainant to rebut CFI's contention that it is the prevailing party. Section IV of the consent agreement contains CFI's certification that it has recalled to the extent possible all of

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3/ 792 F.2d 981 (10th Cir. 1986).

4/ Id. at 983; accord, Environmental Defense Fund v. Watt, 554 F. Supp. 36 (ED NY 1982), affirmed 722 F.2d 1081 (2nd Cir., 1983).

the products which may have been repackaged by it and all of the photocopies of labels and any and all other documentation or information used in connection with the alleged sale or distribution of the repackaged products. CFI also agrees to cease and desist from any alleged repackaging activities with respect to any products which have been registered with the EPA in accordance with section 3 of FIFRA, 7 U.S.C. section 136a. The inclusion of section IV plus the addition of a $3,000 penalty enables complainant to achieve the purpose for which it brought the proceeding, namely, the cessation of any alleged violations and deterrence from future transgressions.

Respondent argues, nevertheless, that it is the prevailing party because the EPA sought a total of $28,160 in civil penalties against CFI and subsequently settled for $3,000. Respondent, however, overlooks that the penalty named in the complaint was specifically described as the penalty proposed by the EPA pursuant to section 14(a), and the guidelines for the assessment of penalties thereunder, 39 Fed. Reg. 27711 (1974), after consideration of the statutory factors of the size of respondent's business, respondent's ability to continue in business and the gravity of the violations. 5/ It is clear from the complaint that what is an appropriate penalty is negotiable for purposes of settlement depending largely upon CFI's financial condition. 6/ CFI sought initially to have the case

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5/ Complaint at 5.

6/ See civil penalty guidelines, 39 Fed. Reg. at 27712.

settled without any penalty because of its asserted limited financial resources. 7/ It was unsuccessful in this but did persuade the EPA to accept a reduced penalty of $3,000. 8/

CFI has moved for leave to file a reply in which it asks permission to submit an affidavit by its attorney that the penalty really reflected the Agency's lack of confidence in the success and merits of the complaint. That request is denied. It is uncontested that CFI did press upon the EPA its claim that payment of the proposed penalty would be onerous because of its poor financial condition. Although the reduced penalty standing by itself might suggest some weakness in the EPA's case, the settlement agreement when read in its entirety shows a favorable settlement for the EPA on all charges of the complaint. In short, the EPA's claim that the penalty was lowered because of CFI's assertedly poor financial condition is completely consistent with CFI's representations to the EPA and the terms of the settlement agreement. It is unlikely that the affidavit CFI now seeks to introduce will add anything of value to the record on the issue of whether it has prevailed in this action, and there is no reason, therefore, to prolong this proceeding in order to allow its submission.

7/ See the file of the adjudicative proceeding, Attachment A to respondent's response to complainant's status report dated June 3, 1986, and respondent's letter of October 30, 1985, to the EPA's counsel.

8/ Affidavit of Ms. Mary Frost, Attachment No. 1 to the EPA's response to the application.

It is found, accordingly, that CFI is not the prevailing party within the meaning of the Equal Access to Justice Act and the regulations and is, therefore, not entitled to attorney's fees and expenses.

The above finding is sufficient to deny the application. Nevertheless, even if it be assumed that CFI did prevail by obtaining a sizable reduction in the proposed penalty, the application would still be denied because the EPA has shown that it was substantially justified in bringing this action.

Before the 1985 Equal Access to Justice Act extension and amendment, courts were divided on the meaning of "substantial justification." The legislative history to the 1985 amendment confirmed some lower court holdings that "substantial justification' means more than merely reasonable 9/ and should, in fact, be slightly more stringent than one of reasonableness. 10/ The test is a middle ground between an automatic award to a prevailing party and a restrictive standard which would require the prevailing party to show the government position to be frivolous and groundless. 11/ Under this standard, the government must show not

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9/ House Rep. No. 99-120, Part I, 99th Cong., 1st Sess. 9, reprinted in 1985 U.S. Code & Cong. News 138. The legislative history said that the rejection by Congress in 1980 of a standard of "reasonably justified" in favor of "substantially justified" meant that the test must be more than mere reasonableness.

10/ Massachusetts Fair Share v. Law Enforcement Assistance Administration, 776 F.2d 1066, 1068 (D.C. Cir. 1985).

11/ Bazaldua v. United States I.N.S., 776 F.2d 1266, 1269 (5th Cir. 1985).

merely that its position was marginally reasonable; but that its position was clearly reasonable and well founded in law and fact. 12/

The legislative history also states that an inquiry for EAJA purposes extends beyond litigation arguments and requires an assessment of the governmental actions that formed the basis of the suit. When the case is settled the adjudicative officer will look to the record, including the pleadings, affidavits and other supporting documents filed by the parties in both the application for fees and expenses and the case on the merits. 13/

In this case, the administrative enforcement action was initiated as a result of inspections conducted by EPA inspectors and state employees with EPA credentials. Their statements, affidavits and several exhibits were submitted by complainant and taken together establish that complainant was substantially justified in initiating and maintaining the enforcement action against respondent.

The violations charged involve CFI's sale of ROUNDUP, a pesticide registered to Monsanto Chemical Co. In May 1985, while doing a routine inspection of CFI, a state agricultural inspector noticed that CFI had purchased 30 gallon and 5 gallon containers while many sale invoices showed one gallon sales. Based on the invoice discrepancies and an anonymous phone call suggesting repackaging, the inspector contacted and

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12/ Wyoming Wildlife Federation v. United States, 792 F.2d 981, 985 (10th Cir. 1986).

13/ House Rep. No. 99-120, Part I. 99th Cong., 1st Sess. 12-13, reprinted in 1985 U.S. Code & Cong. News 141-42.

visited Jerry Rovey, one of the growers who according to the sale invoices had bought one gallon containers of materials from CFI. Rovey had 3 full and 1 partially full gallon containers of ROUNDUP that were not in original containers and the labels appeared to be photocopies of the original. 14/

The following week an EPA inspector returned to Rovey's farm and obtained invoices dated 9/8/84 and 10/1/84 of sales by CFI to Rovey, for 5 x 1 gallon containers of ROUNDUP. The inspector acquired one of the 1 gallon containers with the photocopied ROUNDUP label attached. 15/ Mr. Rovey, in a written statement, confirmed his purchase of 5 one gallon bottles of ROUNDUP from CFI. Rovey claimed that he requested one gallon containers of ROUNDUP and CFI's president told him that they only had it in 5 gallon cans but would put it in 5 one gallon bottles and label them as having ROUNDUP in them. 16/

EPA inspectors made a third visit to CFI in May 1985, to examine the purchase and sale records of ROUNDUP, particularly the one gallon size. They noticed that several ROUNDUP sales invoices were missing. They further found by comparing sales and purchase records that approximately 92 more one gallon containers were sold than purchased. Jonavich, CFI's president, agreed to bring to the State chemist's office the missing

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14/ Complainant's response to respondent's application, Attachments 2, 5 (Exh. B).

15/ Complainant's response, Attachment 5 (Exhs. C, D1-D6).

16/ Complainant's response, Attachment 5 (Exh. D7).

invoices and a couple of statements supporting the legitimacy of the ROUNDUP repackaging. Jonavich subsequently called and said he could not get the information together and therefore, would not be coming. 17/

In its motion for leave to file a reply, the only charge in the complaint which CFI really questions is the claim that the directions for use were deleted from the labeling. On this issue CFI requests leave to file an affidavit of its president that the use directions were provided in the labeling. The EPA has shown that this charge was based upon information obtained by EPA investigators during their investigation of CFI. 18/ The EPA was fully justified in relying upon this information. Indeed, the proffered affidavit of CFI's president does not really meet the label alteration charge. For, if the use directions were not provided in the form in which they were furnished in the registered label of a booklet in a sleeve label, the EPA could still have grounds for asserting that the label had been unlawfully altered in violation of FIFRA, section 12(a)(2)(A)). Again the additional information which CFI now seeks to produce does not appear to be of sufficient significance to justify further delaying these proceedings, and CFI's request, therefore, is denied.

I find, accordingly, that the position of the EPA in bringing this complaint was substantially justified.

17/ Complainant's response, Attachment 5 (Exhs. E and F), Attachment 7.

18/ See Complainant's response at 9.

Finally, CFI accuses the EPA of unduly delaying settlement discussions, which it claims "highlights" the unreasonableness of the EPA's action. Delay in abandoning an unmeritorious position can have a bearing on whether the government's position was substantially justified. 19/ The EPA, however, refused only to accept settlement under which no penalty would be imposed. The time taken, thereafter, to reach a mutually acceptable settlement does not appear to have involved any excessive delays by the EPA. 20/

For the reasons stated above, it is recommended that CFI's application for fees and expenses be denied. 21/

Gerald Harwood
Gerald Harwood
Chief Administrative Law Judge

DATED: May 12, 1987

19/ Environmental Defense Fund, Inc. v. Watt, 722 F.2d 1081, 1086 (2d Cir. 1983).

20/ Affidavit of M. Nancy Frost, Attachment 1 to the EPA's response.

21/ CFI's request for leave to file a reply is also denied. No reply is needed to the EPA's objections that the application is totally deficient in form because those objections have been rejected. Supra, n. 2. CFI's request to furnish additional information by its attorney and by its president have been denied for the reasons set forth in this opinion. While the EPA was incorrect in assessing penalties of $5,500 instead of $5,000 for three Counts of the complaint, this was not a significant issue in view of the EPA's consent to a lower penalty.