UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
CALTECH INDUSTRIES, INC.,	)	Docket No. 5-IFFRA-97-006
	)	
Respondent	)	

Order Denying Complainant's Motion For Accelerated Decision

Federal Insecticide, Fungicide, and Rodenticide Act, as amended. Complainant, the U.S. Environmental Protection Agency, filed a Motion for Accelerated Decision on Liability pursuant to 40 C.F.R. § 22.20(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22. **Held**: As genuine issues of material fact exist, and a hearing on the merits of Respondent's liability is necessary, Complainant is not entitled to judgment as a matter of law. Therefore, Complainant's Motion for Accelerated Decision on Liability is **DENIED**.

Before: Stephen J. McGuire
Administrative Law Judge

Date: June 9, 1998

Appearances:

For Complainant:

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For Respondent:

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I. Introduction

On September 9, 1996, a Michigan Department of Agriculture inspector, conducted an inspection under the authority of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), to obtain samples of any pesticide or devises packaged, labeled and released for shipment. During this inspection, the inspector obtained an invoice (Number 026608), dated August 30, 1996, documenting the sale of the unregistered product, "Hospital Cleaning Towels with Bleach" (HCTB) to Henry Schein Inc., a medical products distribution company in New York. HCTB was manufactured by Caltech Industries Inc., a Michigan corporation located in Midland, Michigan, which manufactures and distributes a variety of infection control products for surface cleaning and disinfecting in health care facilities.

Complainant, the U.S. Environmental Protection Agency (EPA), filed a Complaint against Caltech Inc. on April 30, 1997, charging Respondent with one count of selling and distributing an unregistered pesticide in violation of FIFRA § 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A). Complainant assessed a proposed penalty of $4,500 pursuant to FIFRA § 14. Respondent filed its Answer on May 29, 1997, wherein Respondent denied, *inter alia*, that HCTB was a pesticide as defined in § 2(u) of the Act.

On March 5, 1998, Complainant filed a Motion for Accelerated Decision on Liability and Memorandum in Support. In its Motion, Complainant asserts that there is no genuine issue of material fact and as a matter of law, Respondent is liable for selling and distributing an unregistered pesticide in violation of § 12(a)(1)(A) of the Act. In support of its Motion, Complainant attached the statement of Mr. Robert Bennis of EPA's Office of Prevention, Pesticides, and Toxic Substances, who concluded, at Exhibit 3, that the marketing claims associated with sale of HCTB were pesticidal in nature, including the terms "decontaminate" and "infection control".

Respondent filed its Response to EPA's motion on March 25, 1998, asserting that Caltech's intent was not to market a pesticide, that the Complainant's argument is misplaced when it fails to consider the issue in the context of the intended use of the product in the directed marketplace, i.e., the health care industry, and that no pesticidal claims were made on the product or in its promotional material. Further briefing was ordered and filed by the parties on June 1, 1998.

II. Standard for Accelerated Decision

The Consolidated Rules of Practice, § 22.20(a) authorizes the Administrative Law Judge to "render an accelerated decision in favor of the Complainant or Respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law as to all or any part of the proceeding."

It is well-established that this procedure is analogous to the motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. In the Matter of CWM Chemical Services, Inc., Docket No. TSCA-PCB-91-0213, TSCA Appeal No. 93-1, 1995 EPA App. LEXIS 20; 6 E.A.D. 1, May 15, 1995; and In the Matter of Harmon Electronics, Inc., RCRA Docket No. VII-91-H-0037, 1993 RCRA LEXIS 247, August 17, 1993.

The burden of showing there exists no genuine issue of material fact is on the party moving for summary judgment. Adickes v. Kress, 398 U.S. 144, 157 (1970). In considering such a motion, the tribunal must construe the factual record and reasonable inferences therefrom in the light most favorable to the non-moving party. Cone v. Longmont United Hospital Assoc., 14 F.3d 526, 528 (10th Cir., 1994). A simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. A party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. In the Matter of Bickford Inc., Docket No. TSCA-V-C-052-92, 1994 TSCA LEXIS 90, November 28, 1994.

The decision on a motion for summary judgment or accelerated decision must be based on the pleadings, affidavits and other evidentiary materials submitted in support or opposition to the motion. Calotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); 40 C.F.R. § 22.20(a); F.R.C.P. 56(c). Upon review of the evidence in a case, even if a judge believes that summary judgment is technically proper, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. See, Roberts v. Browing, 610 F.2d 528, 536 (8th Cir. 1979).

In its opposition to Complainant's motion, Respondent has raised, as a question of fact, the intended use of HCTB, pursuant to 7 U.S.C. Section 136 (u), and the proper legal standard from which to determine such intended use. Specifically, Respondent's has argued that the intended use of its product must be considered applying the "reasonable consumer" objective standard set forth in N. Jonas & Co. v. U.S. EPA , 666 F.2d 829 (3rd Cir. 1981). In this case, Respondent asserts that the reasonable consumer is the health care industry (Response at 3).

In determining objective intent, the Jonas Court stated "labeling, industry representations, advertising materials, effectiveness and the collectivity of all the circumstances are therefore relevant." Jonas at 833. Similarly, "whether a product is a pesticide, is to be determined by all claims made for the product on labels or otherwise, and the intent of the user, if the seller distributor has actual or constructive knowledge of the intent of the user." See, In the Matter of Predex Corporation, Docket No. I.F.&R.-V-004-93, 1997 FIFRA LEXIS 6 (Initial Decision, June 18, 1997).

Respondent's introduction of Exhibits A-E in its Response to Complainant's motion places EPA's evidence in question and raises legitimate issues of fact regarding the intended use of HCTB by the health care industry and application of such alleged pesticidal terms as "decontaminate".

As such, the arguments of the parties can be measured properly only against the backdrop of an evidentiary hearing on the merits, which is necessary to fully develop the genuine issues of fact and law that are presented in this matter. Accordingly, EPA's motion for accelerated decision on liability is denied.

Order

Pursuant to 40 C.F.R. §22.20 of the Consolidated Rules of Practice, Complainant's Motion for Accelerated Decision on Liability is **DENIED**.

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Stephen J. McGuire
Administrative Law Judge

Washington, D.C.