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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Chempace Corporation	)	Docket No. 5-IFFRA-96-017
	)	
Respondent	)	

ORDER GRANTING MOTION TO SUPPLEMENT RECORD

The hearing in this matter took place in Toledo, Ohio on April 7 and 8, 1998. The Respondent, with its post-hearing brief, submitted a motion to supplement the record by offering into evidence an additional document. The document is an agreement between the Respondent, the Chempace Corporation ("Chempace"), and a former principal shareholder in the company, Jack Y. Stone. The Region 5 Office of the United States Environmental Protection Agency (the "Complainant" or "Region") filed a response objecting to receiving this additional document into evidence.

In this proceeding, the Region is seeking assessment of a civil penalty of $200,000[(1)] against Chempace for a series of violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). One of the chief issues for determination is the ability of the Respondent to pay a penalty of this magnitude. FIFRA §14(a)(4) requires the Administrator to consider the appropriateness of the amount of the penalty with respect to the size of the respondent's business, and the respondent's ability to continue in business.

In describing the history of his company and its financial circumstances, the Respondent's Chairman, Robert Shall, testified about a transaction in which the company purchased the stock held by the former principal, Mr. Stone. Mr. Shall testified that the agreement, entered into "in 1989 or thereabouts" required payment to Mr. Stone of $180,000 over three years to buy him out, or $5000 per month into 1992. (Tr. 334). Chempace's financial statement for 1990 to 1991, however, indicates that the stock was purchased for a total of only $75,000 in a series of payments ending on August 1, 1990. (Ex. 1). In its initial post-hearing brief, the Region seized on this discrepancy by characterizing Mr. Shall's testimony concerning this transaction as "entirely fictitious" (p. 30) and "substantially at odds with the facts." (p. 63, note 36). This matter was not further addressed at the hearing by any testimony or other documentary evidence.

The Respondent's motion seeks admission into evidence of the actual agreement between Chempace and Mr. Stone, executed on September 1, 1987 (the "Agreement"). It indicates that the sale of stock, for $75,000, was only a part of the entire transaction. In addition, Chempace was required to pay Mr. Stone a total of $112,000 over three years for a covenant not to compete and a consulting agreement, as well as a $21,800 retirement benefit paid by retiring a debt Mr. Stone owed the company. The total cost of the buyout Agreement was thus $209,000. The Agreement was structured so that the payments to Mr. Stone for each component of the contract were staggered, resulting in roughly equal monthly payments of $5000 (or slightly more in some months) each month for three years, ending July 1, 1990.

This document thus shows that Mr. Shall's account of the buyout transaction with Mr. Stone was not entirely fictitious. Although he was off by two years in his recollection of the dates, he was essentially correct in the total amount Chempace paid Mr. Stone. In his testimony Mr. Shall did not mention that the payments were actually for a covenant not to compete and a consulting agreement, in addition to the stock purchase. The Agreement was signed on behalf of Chempace by its President, Ralph Wooddell, rather than Mr. Shall. The Chempace financial statement for 1990 and 1991 corroborates that a $35,000 debt was paid in 1990, when the payments ceased, and no such debt was owed in 1991. (Ex. 1).

Respondent's motion to supplement the record should be considered under the guidelines for a motion to reopen a hearing, authorized under the EPA's Consolidated Rules of Practice at 40 CFR §22.28. That rule provides as follows:

> "A motion to reopen a hearing to take further evidence . . . shall (1) state the specific grounds upon which relief is sought, (2) state briefly the nature and purpose of the evidence to be adduced, (3) show that such evidence is not cumulative, and (4) show good cause why such evidence was not adduced at the hearing."

Respondent's motion sufficiently satisfies these requirements.

The motion seeks only to introduce a single document into evidence, without reopening the hearing further to take additional testimony. Complainant has raised no dispute over the authenticity of the agreement. The agreement speaks for itself, and is corroborated by other evidence as discussed above. The Respondent did not introduce it earlier because the discrepancy between Mr. Shall's testimony and the financial evidence concerning the stock purchase was not raised during the hearing. While the agreement could have been offered into evidence at the hearing if Respondent had been more vigilant, there is no prejudice in receiving it now, simply to clarify a discrepancy in the evidence. I also note that the Respondent had stipulated to the receipt into evidence of Complainant's proposed exhibits before the hearing.

The document may or may not turn out to have significance to the ultimate decision in this matter. However, it as at least potentially relevant to the issues of Chempace's financial condition, and Mr. Shall's credibility. The object of the hearing is not to gain tactical advantage through inadvertent procedural lapses, but, where possible, to enable a search for the truth. That objective is served by receiving into evidence the Agreement between Chempace and Jack Y. Stone, dated September 1, 1987. It will be received as Exhibit 30. There is no need to further reopen the record of the hearing to take further testimony concerning this document.

Order

The Respondent's motion to supplement the record is granted. The Agreement, dated September 1, 1987, between Chempace and Jack Y. Stone, is received into evidence as Exhibit 30.

Andrew S. Pearlstein
Administrative Law Judge

Dated: November 3, 1998
Washington, D.C.

1. The Complaint seeks assessment of a $200,000 penalty. In its post-hearing brief, the Complainant argued that the penalty should be $495,000, which was the amount calculated by the Region before reducing it to $200,000 based on its assessment of Respondent's ability to pay.