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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
MICRO PEN OF U.S.A., INC.,	)	DOCKET No. FIFRA-09-0881-C-98-06
	)	
Respondent	)	

ORDER ON COMPLAINANT'S MOTIONS FOR ACCELERATED DECISION AND TO STRIKE EXHIBITS

I. BACKGROUND

The Complaint initiating this proceeding was filed on September 29, 1998, pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136*l*(a). The Senior Associate, Cross Media Division, United States Environmental Protection Agency Region IX ("Complainant"), charges Respondent, Micro Pen of U.S.A., Inc., with twenty-five counts of violating Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by selling an unregistered pesticide. Complainant proposes a total penalty of $123,750 for the alleged violations.

Respondent is a California corporation, with a place of business at 7340 Melrose Street, Buena Park, California 90612 ("the facility"). On or about December 1, 1997, EPA authorized representatives conducted an inspection of the facility pursuant to Section 9(a) of FIFRA. During the inspection, Respondent furnished to an inspector 25 invoices relating to sales of a pen referred to as "Cleen Ball."

The Complaint alleges that Respondent sold or distributed a product, "Cleen Ball Pen," to twenty five different places of business from April 3, 1997 through May 28, 1997, that the labeling and packaging on the product states, or implies, that Cleen Ball Pen can or should be used as a pesticide, and therefore that Cleen Ball Pen is a pesticide under FIFRA. The Complaint alleges further that "Cleen Ball Pen" was not registered as a pesticide with EPA.

In its Answer to the Complaint, Respondent responds to each numbered paragraph of the Complaint, challenges the proposed penalty, and requests a hearing. The parties

each filed prehearing documents, pursuant to a Prehearing Order issued November 5, 1998.

On February 16, 1999, along with its Rebuttal Prehearing Exchange, Complainant submitted a Motion to Strike Exhibits ("Motion to Strike"). The next day, February 17, 1999, Complainant filed a Motion for Accelerated Decision, requesting judgment as a matter of law only on the issue of Respondent's liability for each of the twenty-five alleged violations. Respondent responded to both Motions on March 3, 1999.

II. COMPLAINANT'S MOTION FOR ACCELERATED DECISION

The Consolidated Rules of Practice, 40 C.F.R. Part 22, provide at Section 22.20(a) that the Presiding Judge "may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of a proceeding, without further hearing . . . 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 a proceeding."

Complainant requests in its Motion for Accelerated Decision judgment as a matter of law that "Cleen Ball Pen" is a pesticide, and that each of the 25 sales of that product referenced in the Complaint was a sale of an unregistered pesticide in violation of Section 12(a)(1)(A) of FIFRA. The term "pesticide" is defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u), as "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest." The definition of "pest" in Section 2(t) of FIFRA, 7 U.S.C. § 136(t) includes "virus, bacteria or micro-organism (except viruses, bacteria, or other micro-organisms on or in living man or other living animals)." *See also*, 40 C.F.R. § 152.5(d). The Federal regulations promulgated under FIFRA provide in pertinent part as follows, at 40 C.F.R. § 152.15:[(1)]

> A substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if:
>
> > (a) The person who distributes or sells the substance claims, states or implies (by labeling or otherwise):
> >
> > (1) That the substance (either by itself or in combination with any other substance) can or should be used as a pesticide . . . .

Section 12(a)(1) of FIFRA provides in pertinent part:

> Except as provided by subsection (b) of this section, it shall be unlawful for any person in any State to distribute or sell to any person
>
> > (A) any pesticide that is not registered under section 136a of this title. . . .

See, 7 U.S.C. §136j(a)(1).

Respondent admits that it "has, in the past, sold products bearing the trademark "Cleen Ball;" that products bearing the trademark "Cleen Ball" are stamped with the words "Antibacterial Pen;" that "some of the literature concerning the products bearing the trademark 'Cleen Ball' contain the statement 'Micro Cleen-Ball Begins Killing Bacteria on Contact;'" and that Respondent has never registered as a "pesticide" with EPA any of its products bearing the trademark "Cleen Ball." Answer ¶¶ 4, 5, 6, 14. Respondent admits that "packaging for some of the products bearing the trademark 'Cleen Ball'" contains the following statements: "Total pen body is

made out of antibacterial plastic," "Fights bacteria for the life of the pen," and "Reduces the risk of these bacterial infections: food poisoning, skin infections, eye infections, ear infections, bronchitis, urinary tract infections." Answer ¶ 5. Respondent also admits that each invoice referenced in the Complaint "relates to the sale of products bearing the trademark 'Cleen Ball'" to each of the places of business referenced in the Complaint. Answer ¶¶ 16, 19, 22, 25, 28, 31, 34, 37, 40, 43, 46, 49, 52, 55, 58, 61, 64, 67, 70, 73, 76, 79, 82, 85, 88.

Paragraph 17 of the Complaint alleges as follows: "The sale or distribution of the CLEEN BALL PEN by Respondent on or about May 28, 1997 to Office Depot, Inc. #24 was in violation of Section 12(a)(1)(A) of FIFRA." Paragraphs 20, 23, 26, 29, 32, 35, 38, 41, 44, 47, 50, 53, 56, 59, 62, 65, 68, 71, 74, 77, 80, 83, 86, and 89 of the Complaint are identical except for the date and place of business referenced. Respondent answers each of these allegations with the following statement:

> Micro Pen responds that it contains legal conclusions which do not require a response. If such contentions are later determined to be factual allegations, Micro Pen denies each and every such allegation.[(2)]

Complainant contends that such statement fails to respond to the allegations of the Complaint, and is "a mere sham and do[es] not put in issue the allegations in the Complaint." Motion for Accelerated Decision at 13. Complainant argues that Respondent has not set forth specific facts showing that there is a genuine issue for trial.

Complainant contends further that the Answer does not comply with 40 C.F.R. § 22.15(b) and thus allegations of the Complaint are admitted pursuant to 40 C.F.R. § 22.15(d), which provisions state as follows:

> (b) *Contents of the answer.* The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. . . .
>
> (d) *Failure to admit, deny or explain.* Failure of respondent to admit, deny or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.

Finally, Complainant asserts that Respondent's Answer fails to comply with 40 C.F.R. § 22.05(c)(3), which requires a signature on a pleading, representing that to the best of the signer's knowledge, information and belief, the statements made in the pleading are true. Complainant contends that the responses to Paragraph 17 and similar paragraphs of the Complaint are untrue.

It is not necessary to determine whether Respondent complied with 40 C.F.R. §§ 22.05(c)(3) and 22.15(b), because, in response to the Motion for Accelerated Decision, Respondent does not contest a finding of liability. In response to Complainant's Motion, Respondent indicated that "[w]ithout any admission of fault . . . [it] does not oppose the USEPA's Motion, save and except for the USEPA's request that an 'Initial Decision . . . as to liability' be issued in its favor." Response to Motion for Accelerated Decision at 1. Respondent asserts, "[t]he central issue in this matter has always been, and remains, the question of whether any fine should be imposed on Micro Pen and, if so, the amount of such fine." Respondent does not raise any genuine issues of material fact with regard to its liability for the violations alleged in the Complaint.

In that Complainant's request for judgment in its favor as to liability is unopposed, it is concluded that Respondent is liable for the 25 violations alleged in the Complaint. Respondent's condition that it does not admit any "fault" does

not preclude such a finding of liability. The term "fault" is defined as "[n]egligence; an error or defect of judgment or of conduct" and connotes "an act to which blame, censure, impropriety, shortcoming or culpability attaches." Black's Law Dictionary p. 313 (Abridged 5th ed. 1983). FIFRA is a strict liability statute, so a finding of fault or negligence on the part of a respondent is not necessary to a finding of liability. *Green Thumb Nursery, Inc.,* FIFRA Appeal No. 95-4a, slip op. at 20 (EAB, March 6, 1997)("The environmental statutes . . . including FIFRA, consistently have been construed as imposing strict liability for failure to meet their requirements.").

Respondent correctly observes that an accelerated decision on liability is not an "initial decision." Only an accelerated decision as to all issues and claims in the proceeding, including the assessment of any civil penalty, is an initial decision. 40 C.F.R. § 22.20(b). Where the issue of the penalty remains for further proceedings, an accelerated decision is interlocutory.

It is concluded that there are no genuine issues of fact material to the issue of Respondent's liability for the twenty five violations alleged in the Complaint, and that Complainant is entitled to judgment as a matter of law on that issue. The amount of any penalty to assess for the violations remains in dispute and is reserved for further proceedings.

III. COMPLAINANT'S MOTION TO STRIKE EXHIBITS

Complainant moves to strike certain exhibits contained in Respondent's Prehearing Exchange, namely Respondent's Prehearing Exhibits 7 through 12, on grounds that they are irrelevant to this proceeding.

Respondent's Prehearing Exhibit 7 appears to be a report from United States Testing Company to Respondent, of Antimicrobial Efficacy Validation Testing of pens with and without germicidal plastic. Exhibit 8 appears to be a test report from SGS U.S. Testing Company, Inc., to Respondent, reporting results of an Acute Oral Toxicity Test of Cleen Ball pen barrels.

Respondent's Prehearing Exhibit 9 appears to be an EPA document, entitled "Questions and Answers, Enforcement Action Against Hasbro, Inc., for Public Health Claims on Antibacterial Toys," which contains terms of an agreement between that company and EPA, including the agreed penalty. Exhibit 10 appears to be a Consent Agreement and Consent Order (CACO) between EPA and a company which produces antibacterial products, and Exhibits 11 and 12 are a CACO and Complaint concerning a company which produces sponges with labeling claiming to kill germs.

The Prehearing Order directs Respondent to submit in its prehearing exchange "any documents in support of Respondent's allegations in response to Paragraph 6 of the Complaint." Paragraph 6 of the Complaint alleges that Respondent's labeling states that it "begins killing bacteria on contact." Respondent's Answer admits that some of the literature contains that statement, and further responds to that allegation by referring to and stating the conclusion in the antimicrobial testing report Respondent later submitted as Prehearing Exhibit 7. Complainant asserts that such further response does not relate to Paragraph 6 of the Complaint, and therefore Exhibits 7 and 8 do not relate to the allegations in the Complaint.

As to Exhibits 9 through 12, Complainant argues that each enforcement action "stands on its own merit" in regard to a penalty, and that penalty assessments in other actions cannot support a contention that the penalty proposed in a complaint is excessive. Complainant points out that the products involved and size of business, which may differ from those of the present action, result in variation of elements to be considered in assessing a penalty. Therefore, Complainant asserts that these exhibits are irrelevant.

Respondent opposes striking Exhibits 7 and 8 on the basis that they were included in Complainant's Prehearing Exchange as part of Complainant's Prehearing Exhibits,[(3)] that they are responsive to the Prehearing Order directive, and that they are relevant to the "gravity" of the alleged violations, which is a factor

required to be considered in penalty assessment. Respondent asserts in its Prehearing Exchange Memorandum that Complainant erred in calculating the penalty under the FIFRA Enforcement Response Policy by stating that the harm to human health and the environment resulting from the violations is "unknown," resulting in a high level of gravity of the alleged violations. Respondent urges that the gravity component of the penalty should be adjusted downward in consideration of the toxicity test report, Exhibit 8, establishing that the Micro-Cleen pens are non-toxic.

Respondent opposes striking Exhibits 9 through 12, asserting that they are particularly relevant as to the penalty, because the products involved in those cases present more significant health issues than the pens at issue in the present case, and the financial health and size of the companies involved in those cases is "much greater" than Respondent's, but the penalties imposed were comparable to the penalty proposed in the present action.

The Rules of Practice provide at 40 C.F.R. § 22.22(a) that the Presiding Judge "shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value . . . ." Complainant seeks to strike the prehearing exhibits on the basis that they are irrelevant. As to Respondent's Prehearing Exhibits 7 and 8, the fact that Complainant included them as parts of exhibits in its own prehearing exchange negates its argument that they are irrelevant to this proceeding. Furthermore, it cannot be concluded, at least at this point in the proceeding, that they would have no effect on the assessment of a penalty. Complainant's motion to strike is **denied** as to Respondent's Prehearing Exhibits 7 and 8.

As to Respondent's Prehearing Exhibits 9 through 12, the Environmental Appeals Board has stated that settlement agreements and decisions in other administrative cases under the same statute cannot be used to prove a fact bearing on the issue of the appropriateness of the proposed penalty; "[w]hat has happened in other cases can have no bearing on any factual issues in [the present] case," and information about such other cases does not have "significant probative value" within the meaning of 40 C.F.R. § 22.19(f)(1)(iii), which is one of the criteria for requesting discovery. *Chatauqua Hardware Corporation,* 3 E.A.D. 616, 626-627 (EAB 1991).

While information about other cases would not have "significant probative value" for purposes of a discovery request, it cannot be concluded that information about other cases is *never* relevant to the assessment of a penalty. *See, United States v. Ecko Housewares, Inc.,* 62 F.3d 806, 816 (6th Cir. 1995)(In addressing claim of abuse of discretion in imposing penalty significantly higher than those imposed against others for similar violations, "[t]he penalties imposed in other cases are indeed relevant," although the "reasonableness of a penalty is a fact-driven question, one that turns on the circumstances and events peculiar to the case at hand."); *cf., Butz v. Glover Livestock Commission Co.,* 411 U.S. 182, 187-188 and n. 6 (1973)(Court stated that "employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases," and "mere unevenness in the application of the sanction does not render its application in a particular case 'unwarranted in law,'" noting government agency's practice of imposing sanctions in other administrative decisions did not support Court of Appeals' conclusion that a particular sanction was unwarranted). EPA policy favors uniform penalties for like violations. *Briggs & Stratton Corp.,* 1 E.A.D. 653, 666, TSCA Appeal No. 81-1 (EAB 1981). Indeed, the EPA's Enforcement Response Policy for FIFRA states (at p. 1) that it is "designed to provide fair and equitable treatment of the regulated community by ensuring that . . .comparable penalty assessments will be made for comparable violations."[(4)]

However, not all penalty information in other similar cases is relevant. *Briggs & Stratton,* 1 E.A.D. at 664-666 (Penalties proposed in other complaints and agreed upon in settlements of other cases do not establish that a penalty assessed by presiding judge is inconsistent with policy favoring uniform penalties for like violations; such comparisons of settlement penalties are "difficult, if not

impossible, to make"). The factors for assessing the penalties are not fully discussed in settlement agreements (CACOs) and complaints. Any single factor may significantly affect the penalty amount. Therefore such documents are unlikely to have any value for the presiding judge in assessing a penalty in another proceeding concerning similar violations.

It is concluded that Respondent's Exhibits 9 through 12 are not relevant to this proceeding, and therefore Complainant's request to strike them is **granted.**

ORDER

1. Complainant's Motion for Accelerated Decision as to liability is **GRANTED.**

2. Complainant's Motion to Strike Exhibits is **DENIED, in part**, as to Exhibits 7 and 8, and **GRANTED, in part**, as to Exhibits 9 through 12.

3. The parties shall in good faith continue negotiations to attempt to settle this matter. Complainant shall file a report on the status of settlement negotiations 30 days from the date of service of this Order.

_____

Susan L. Biro
Chief Administrative Law Judge

Dated: March 22, 1999
Washington, D.C.

1. Although this regulatory provision seems to be central to the allegations in this proceeding, it is not cited in either the Complaint or Complainant's Motion for Accelerated Decision. This omission is not fatal to Complainant's case, however, because Complainant alleges the substance of the provision in Paragraph 9 of the Complaint, *infra,* n. 2.

2. Respondent provides in its Answer the same response to Paragraph 9 of the Complaint, which alleges as follows:

> The labeling of the product and the packaging of the CLEEN BALL PEN as described in paragraph 5 above, claim state, or imply that the CLEEN BALL PEN can or should be used as a pesticide, and therefore is a pesticide within the FIFRA definition.

3. Reports which appear identical to those presented as Respondent's Prehearing Exhibits 7 and 8 are contained in Complainant's Prehearing Exchange, between exhibits marked 2 and 4. In at least the Presiding Judge's copy of Complainant's Prehearing Exchange, the reports are not marked or listed as exhibits, and presumably are attachments to other documents, although it is not clear to which of Complainant's prehearing exhibits these reports are attached. There is no document marked Exhibit 3 and no document matching the description of Exhibit 3 in Complainant's Prehearing Exchange Memorandum.

4. In contrast, the Supreme Court in *Butz v. Glover Livestock Commission* could not find any requirement, as to the violations at issue in that case, for uniformity of sanctions for similar violations. 411 U.S. at 186.

Last updated on March 24, 2014