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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of	:	
DAVKO, INC.	:	Docket No. TSCA-I-92-1058
Respondent	:	Judge Greene

DECISION AND ORDER

This matter comes on for determination as a result of the parties' joint motion for a decision upon submissions, which include stipulations and the affidavit of a financial analyst,[1] as to the civil penalty herein. An earlier Order that granted Complainant's motion for summary determination of liability was issued on March 17, 1994.[2] Thereafter, the parties made sustained efforts to settle the issue of penalty

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[1] Joint Motion for Initial Decision, March 5, 1997.

[2] Order Granting (Complainant's) Motion (of December 5, 1993), for Partial "Accelerated" Decision, March 17, 1994, appended hereto and made a part hereof as Attachment B.

for the violations found, and, most recently, following "lengthy and detailed analysis,"[3] Complainant concluded (as Respondent had asserted in its answer of July 17, 1992), that Respondent can not afford to pay the penalty sought. Accordingly, the parties moved for a decision on the penalty that would reflect this conclusion.

The complaint arose under Section 16(a), 15 U.S.C. § 2615(a), of the Toxic Substances Control Act ("the Act,") which provides for the assessment of civil monetary penalties for violations of Section 15 of that Act. Respondent was charged with eleven violations of Part 761 of 40 C.F.R., i. e. the regulations which set forth restrictions pertaining to the manufacture, processing, distribution in commerce, inspection, use prohibitions, marking, disposal, and record-keeping in connection with polychlorinated biphenyls; the charges were based upon two 1991 inspections of Respondent's facility. In December, 1993, Complainant moved for summary determination as to liability for the alleged violations recited in Counts I through X of the complaint.[4]

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[3] Joint Stipulations by the parties, #11, at 4 of the Joint Motion.

[4] Count XI of the complaint was dismissed without prejudice, pursuant to Complainant's indication in its December, 1993, motion, that it would seek to withdraw that count. Order Granting Motion for Partial "Accelerated Decision," of March 17, 1994.

The parties have stipulated the facts pertaining to the penalty.[5] No dispute remains as to any aspect of this issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. EPA has jurisdiction over the subject matter of the complaint.

2. Respondent's principal asset is an approximately 73 acre former wire and tubing manufacturing facility located on Aspetuck Ridge Road in New Milford, Connecticut ("the "facility"). Respondent was formed for the purpose of purchasing, and later selling or renting, the facility.[6]

3. Section 16(a)(2)(B) of the Act requires the EPA Administrator, in determining the amount of a civil penalty, to

> take into acount the nature, circumstances, extent, and gravity of the [violations], and with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require. 15 U.S.C. § 2615(a)(2)(B).

4. EPA's April 9, 1990 "Polychlorinated Biphenyls (PCB)

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[5] The parties' joint stipulations are appended hereto and made a part hereof as Attachment A.

[6] Joint Motion, at 2, ¶ 1.

Penalty Policy"[7] provides, among other things, that penalties may be adjusted downward in light of a Respondent's ability to pay and ability to continue in business. The Penalty Policy specifically states that "[n]ormally, EPA will not seek a civil penalty that exceeds the violator's ability to pay and, therefore, to continue in business."[8]

5. On or about July 17, 1992, Respondent answered the complaint, and, in doing so, raised a claim of inability to pay the penalty proposed in the complaint for the alleged violations.

6. On or before November 29, 1993, Respondent submitted an undated cover letter addressed to the presiding administrative law judge entitled "Enclosed please find Defendant's Prehearing Exhibits in the Matter of Davko Inc. Docket No. TSCA-I-92-1058." Twelve documents pertaining to Respondent's financial condition and claim of inability to pay were attached thereto.

8. In connection with its assertion of inability to pay, respondent submitted detailed financial information to EPA to support such assertion.

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[7] See "Notice of Availability of Polychlorinated Biphenyls Penalty Policy," 55 Fed. Reg. 13,955 (April 13, 1990).

[8] Joint Motion at 3, ¶ 4.

9. During the course of this enforcement action, Complainant conducted a lengthy and detailed analysis of Respondent's financial condition which, until recently, found that Respondent could pay the penalty proposed in the complaint based upon anticipated future cash flow potential upon the sale of the facility at or near the company's asking price of $9,000,000.

10. Complainant's recent analysis of Respondent's financial condition included an independent appraisal of the fair market value of Respondent's facility and, on the basis of that appraisal, Complainant now concludes that Respondent does not have the ability to pay the penalty proposed in the Complaint. This change is due to a marked decrease in Respondent's anticipated future cash flow potential based upon the sale of the the facility. The facility is believed to have a fair market value that is significantly less than $9,000,000.

11. Respondent having advanced a valid claim of inability to pay, the assessment of a civil penalty of zero (0) dollars is appropriate in the circumstances.

12. Respondent waives any defenses it may have as to jurisdiction and venue, and waives its right to a judicial or administrative hearing on any issue of law or fact set forth

in the complaint.[9]

13. This Decision and Order [hereafter "Order"] relates only to those claims for civil penalties under section 16(a) of TSCA based on the violations alleged in the complaint, and found by the Order Granting Partial "Accelerated Decision" of March 17, 1994. Accordingly, this Order does not prevent or limit the application of section 7 of the Act (15 U.S.C. § 2606) or prevent the United States or EPA from bringing any action regarding claims not addressed by the complaint filed in this action (including any criminal liability of Respondent) or claims arising or violations which continue after the date of this Order.

14. This Order does not limit any other rights or remedies available to the United States including, but not limited to, institution of proceedings for civil or criminal contempt or injunctive relief for violations which continue after the date of this Order or for violations of any provisions of applicable law.

15. This Order does not limit Respondent's right to defend against claims brought by the United States or EPA in any such subsequent enforcement action.

16. Each party shall bear its own costs and fees in this

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[9] Stipulation 15, at 5 of the Joint Motion.

action.[10]

ORDER

1. Accordingly, it is ordered that no penalty is to be assessed against Respondent Davko, Inc., for the violations previously found, since Respondent's inability to pay the penalty proposed for such violations reduces the appropriate assessment to zero.

2. Each party shall bear its own costs and fees in this action.

J. F. Greene
Administrative Law Judge

Dated: May 13, 1997
Washington, D.C.

[10] Stipulation 19, Joint Motion at 6.

Attachment A - Stipulations

Joint Stipulations by Complainant and Respondent

The Parties to the above-entitled proceeding hereby stipulate that the following statements of fact and law are not in dispute:

9. EPA has jurisdiction over the subject matter alleged in the Complaint.

10. Respondent has asserted a claim of inability to pay in this action and submitted detailed financial information to EPA relating to such claim.

11. During the course of this enforcement action, Complainant conducted a lengthy and detailed analysis of Respondent's financial condition which, until recently, found that Respondent could pay the penalty proposed in the Complaint based on anticipated future cash flow potential upon the sale of Davko's facility at or near the company's asking price of $9,000,000.

12. Complainant's analysis of Respondent's financial condition recently culminated in an independent appraisal of the fair market value of Respondent's facility and, on the basis of that appraisal, Complainant now concludes that Respondent does not have the ability to pay the penalty proposed in the

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[2] Note that Count XI alleges Respondent's failure to mark a PCB transformer but that, based on information provided by Respondent after issuance of the Complaint, EPA has determined it appropriate to drop Count XI. Count XI was dismissed by the Presiding Officer in the Liability Order.

Complaint. This change is due to a marked decrease in Respondent's anticipated future cash flow potential upon the sale of the Davko facility which is believed to have a fair market value that is significantly less than the aforementioned asking price. See Attachment A (Affidavit of EPA Financial Analyst Kimberly A. Zanier).

13. The Consolidated Rules of Practice, at 40 C.F.R. § 22.20(a), provide that an accelerated decision may be rendered "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."

14. As to Counts I through X of the Complaint, inclusive, the Parties find it appropriate that this Court grant an accelerated decision on the issue of penalty on the grounds that no genuine issue of material fact exists and the Parties are entitled to judgment as a matter of law. Based on the above, the Parties agree that Respondent has advanced a valid inability to pay claim and that the assessment of a civil penalty of zero (0) is appropriate herein.

15. Respondent hereby waives any defenses it might have as to jurisdiction and venue and waives its right to request a judicial or administrative hearing on any issue of law or fact set forth in the Complaint.

16. This Joint Motion encompasses only those claims for civil penalties under Section 16(a) of TSCA based on the TSCA violations set forth in the Complaint, as established by the Presiding Officer in the March 17, 1994 Liability Order. Accordingly, a ruling on this Joint Motion will not prevent or limit the application of Section 7 of the Act, 15 U.S.C. § 2606, or prevent the United States or EPA from bringing any action regarding claims not addressed by the Complaint filed in this action (including any criminal liability of Respondent) or claims arising or violations continuing after the date of the Initial Decision.

17. A ruling on this Joint Motion also will not limit any other rights or remedies available to the United States including, but not limited to, institution of proceedings for civil or criminal contempt or injunctive relief for violations continuing after the date of the Initial Decision or for violations of any provisions of applicable law.

18. A ruling on this Joint Motion will not limit Respondent's rights to defend against claims brought by the United States or EPA in any such subsequent enforcement action.

19. The Parties agree to bear their own costs and fees in this action.

FOR COMPLAINANT:

Harley F. Laing, Director
Office of Environmental Stewardship
U.S. EPA - New England Office

Date: 2-27

Hugh W. Martinez, Senior Attorney
Office of Environmental Stewardship
U.S. EPA - New England Office

Date: 2-27-97

FOR RESPONDENT:

V PRES

James M. Davenport
Davko, Inc.
4 Ridgewood Street
Danbury, CT 06801

Date: 2/12/97

PRES

Robert G. Kovacs
Davko, Inc.

Date: 2-14-97

SEC

Paul B. Kovacs
Davko, Inc.

Date: 2/12/97

Attachment B

Order Granting Motion
for Partial "Accelerated Decision"
March 17, 1994

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of

DAVKO, INC.	:	Docket No. TSCA-I-92-1058
	:	
	:	Judge Greene
Respondent	:	

ORDER GRANTING MOTION FOR PARTIAL "ACCELERATED DECISION"

This matter arises under Section 16(a) of the Toxic Substances Control Act ("TSCA," or "the Act"), 15 U.S.C. § 2615(a), which provides for the assessment of civil penalties for violations of Section 15 of TSCA (15 U.S.C. § 2614) and duly promulgated regulations in an amount not to exceed $25,000 per day for each such violation.[1]

The complaint charged respondent with eleven violations of 40 C.F.R. Part 761, which sets forth regulations pertaining to the manufacture, processing, distribution in commerce, inspection,

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[1] Section 16(a) of TSCA, 15 U.S.C. §2615(a), provides that "(A)ny person who violates a provision of section 2614 [section 15] of this title shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such a violation continues shall, for purposes of this subsection, constitute a separate violation of section 2614 of this title."

Section 15 of TSCA, 15 U.S.C. §2614, provides that it shall be " . . . . unlawful for any person to . . . fail or refuse to comply with . . . any rule promulgated or order issued under section 2604 (section 6 of TSCA) of this title . . . ."

use prohibitions, marking, disposal, and recordkeeping in connection with polychlorinated biphenyls ("PCBs"),[2] based upon inspections of respondent's facility on November 26 and November 29, 1991. The inspections allegedly revealed that respondent had violated the use, recordkeeping, disposal, and marking requirements of the PCB regulations with respect to five PCB transformers[3] in use at respondent's facility in that respondent had failed to repair or replace the transformers, all of which were leaking to the extent that PCBs were running off or were about to run off (Counts I-IV), in violation of 40 C.F.R. § 761.30(a)(1)(x); had improperly disposed of PCBs in that the spills at 50 or more parts per million [ppm] from the transformers had not been cleaned up promptly, in violation of 40 C.F.R. §§ 761.20 and 761.60(a), based upon § 761.60(d) [see Counts V - VIII]; had failed to prepare annual reports and other documents as required by 40 C.F.R. § 761.180(a) [Counts IX, X]; and had failed to mark one of the transformers as required at 40 C.F.R. § 761.40(c)(1) [Count XI]. A civil penalty of $86,000 for the eleven charges was proposed by complainant. In its answer to the complaint, respondent denied that it had violated the regulations as alleged, and indicated that it would "leave(s) complainant to its proof" with respect to

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[2] These regulations were promulgated pursuant to section 6 of the Act, 15 U.S.C. § 26005, on February 17, 1978, and May 31, 1979. See 43 **Federal Register** 7150 and **44 Federal Register** 31514.

[3] "PCB transformer" is defined at 40 C.F.R. § 761.3 as " . . . . any transformer that contains 500 ppm [parts per million] PCB or greater".

certain allegations in each of the counts.[4] Affirmative defenses going to the manner in which the proposed penalty was calculated with respect to the transformers, all of which are asserted to be in the same building, were set forth, but these need not be considered in connection with the present motion.[5]

The parties have been unable to settle. Pretrial exchange was made according to schedule. Thereafter, complainant moved for partial "accelerated decision" as to Counts I - X, asserting that no genuine issue of material fact exists with respect to those counts and that complainant is entitled to judgment as a matter of law.[6] Complainant also indicated that it would seek to withdraw Count XI, in view of information provided by respondent.[7]

The motion for partial "accelerated decision" is based upon complainant's contention that respondent's pretrial exchange, which was limited to various documents purporting to show respondent's financial position, raises nothing to place in issue any of the allegations of violations recited in the complaint. In view of this contention, and because respondent did not file a response to

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[4] Respondent's **Answer and Request For Hearing**, at 4 - 8.

[5] **Id.** at 8-11.

[6] **Complainant's Motion and Supporting Memorandum for Partial Accelerated Decision as to Liability on Counts I through X,** December 6, 1993.

[7] **Id.** at 1.

the motion, respondent was given additional time to respond.[8] However, no response was received.

Complainant is correct in asserting that respondent has offered nothing beyond the answer to the complaint to place liability at issue. It is also true that respondent must do more than deny the charges in response to a motion for "accelerated decision" (summary judgment) as to liabiity in order to avoid a decision in complainant's favor with respect to recitations in the complaint other than those regarding the penalty.[9] And while respondent's answer does offer various conclusory allegations in response to some of the charges[10], nothing in the way of supporting evidence has been brought forth. This requires "hard evidence of a material factual dispute; the opposition cannot be 'conjectural or problematic [but] must have substance.'"[11]

Accordingly, complainant's motion for partial accelerated decision as to Counts I through X must be granted.

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[8] **Order Granting Extension of Time in Which to Respond,** January 11, 1994,

[9] See **Griggs-Ryan v. Smith**, 904 F. 2d 112, 115-116 (1st Cir., 1990). Parties may not rest upon their pleadings; and evidence which is merely colorable, or is not significatnly probative will not preclude summary judgment. **Id.** at 115, citing **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 249-250, (1986).

[10] For instance, ¶ 56 of the Answer asserts that with respect to the transformer that is the subject of Counts I and V, a drip pan was present both before and after the inspection. **Answer**, at 8.

[11] **Griggs-Ryan v. Smith** at 115, citing **Mack v. Great Atlantic and Pacific Tea Co.**, 871 F. 2d 179, 181 (1st Cir. 1989).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is a corporation operating under and pursuant to the laws of the State of Connecticut. It has a facility located at 707 Danbury Road, Ridgefield, Connecticut.[12] Respondent is a "person" as defined in the Act and implementing regulations, and is subject to the requirements of the Act.

2. Respondent has five "PCB transformers," as that term is defined at 40 C.F.R. § 761.3. One of the transformers is located in a fenced-in area of a building in respondent's facility referred to in the complaint as "Substation A;" another of the transformers is located in an area of respondent's facility referred to in the complaint as "Substation B;" another of the transformers is located in an area identified in the complaint as "Substation C;" and two of the transformers are located in an area of the facility referred to in the complaint as the "Transformer and Main Switchgear Room."[13]

3. On November 26 and November 29, 1991, when respondent's facility was inspected, all five transformers were leaking to the extent that PCBs were running off or were about to run off the external surfaces of the tranformers.[14] Respondent failed to repair or replace the leaking transformers, in violation of 40

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[12] **Complaint and Notice of Opportunity for Hearing**, at 1.

[13] Complainant's pretrial exchange exhibit 1, at 1 - 3. **Complaint and Notice of Opportunity for Hearing**, at 2.

[14] Complainant's pretrial exchange exhibit 1, at (unumbered) page 3.

C.F.R. § 761.30(a)(1)(x).

4. Spills or other uncontrolled discharge of PCBs of 50 ppm or greater constitute "disposal" of PCBs, 40 C.F.R. § 761.60(d). PCBs at concentrations of 50 ppm or greater must be disposed of in accordance with PCB regulations, 40 C.F.R. § 761.60(a). The spills from respondent's transformers, observed during the inspections on November 26 and 29, 1991,[15] constitute disposal of PCBs. Respondent disposed of PCBs improperly by spilling PCBs at or above 50 ppm from the PCB transformers located in Substations A, B, C, and in the Transformer and Main Switchgear Room. Respondent failed to initiate proper clean up, in accordance with the PCB Spill Cleanup Policy set forth at 40 C.F.R. Part 761, Subpart G. Accordingly, respondent violated the requirements of 40 C.F.R. §§ 761.20 and 761.60.

5. Respondent failed to prepare a written annual document log for the calendar year 1990 and failed to make that annual document log available for inspection by authorized EPA representatives,[16] in violation of 40 C.F.R. § 761.180(a) during November 21 and November 26, 1991, inspections.

6. Respondent having violated 40 C.F.R. §§ 761.30(a)(1)(x), 761.20, 761.60, and 761.180(a), which violations in turn constitute violations of 15 U.S.C. § 2614 (section 15 of the Act), respondent

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[15] Id, at 3-4.

[16] Id. at 3-4.

is liable for civil penalties in accordance with 15 U.S.C. § 2615(a), section 16 of the Act.

ORDER

It is hereby ordered that the parties shall confer for the purpose of attempting to reach an agreed disposition as to the issue of the appropriate penalty to be assessed herein for the violations found.

Accordingly, they shall report upon the progress of their effort during the week ending April 15, 1994.

And it is further ordered that Count XI of the complaint shall be, and it is hereby, dismissed with prejudice.

Administrative Law Judge

Washington, D. C.
March 17, 1994