

INITIAL DECISION¹

This matter is before me on a Motion for Accelerated Decision filed by the Complainant, which seeks a ruling in its favor both as to liability and the assessment of a penalty.

The Respondent replied to the motion and advised that it had no problem with the Court issuing a decision as to its liability, which it concedes, but vigorously disputes the validity of the proposed penalty. In this regard, the Respondent argues that: (1) the Complainant seeks to penalize it twice for the same offense and (2) that it cannot afford to pay the penalty.

Early on, counsel for the Respondent expressed a strong desire to negotiate a settlement of the penalty issue. However, his prior experience with EPA counsel in another case convinced him that dealing with him again would produce no meaningful results. He advised that he would gladly negotiate with any other attorney in the Regional Office. The Court, in an effort to practice judicial efficiency, asked the Regional Counsel to look into the matter and see if she could arrange for another attorney to negotiate for the Agency. This effort met with no success. The Agency apparently felt that such a change would prejudice their prosecutorial discretion. I'm not sure just why this would be so, but accepted their position.

Failing in that exercise, I directed the Respondent to provide to the Agency any and all data or documentation to support its

¹ Since this decision disposes of all issues before me, it will be, pursuant to 40 CFR § 22.20(b), considered an Initial Decision.

argument that it could not afford to pay the proposed penalty of \$14,240.00, pointing out to it that the burden of making such a showing rests with it. By reply dated March 22, 1991, the Respondent advised that all of its financial records are in the hands of the U.S. Postal Service and thus not available to it. Counsel went on to say that "the Respondent has not conducted business for the past two years and has financial records for that period." No information was provided as to why the Postal Service has their records nor what kind of financial records could exist for a company that does no business. Since the answers to these questions were not critical to my disposition of the case, I did not inquire further.

FACTUAL BACKGROUND

Since the Complainant's motion accurately^{*} and succinctly sets for the historical facts in this matter, I will incorporate that language in this decision, as follows:

STATEMENT OF MATERIAL FACTS

On November 22, 1988, Dianne Ohiosumua, Pesticide Use Specialist, Department of Food and Agriculture, State of California, Credential No. F2223, conducted a producer established inspection at Somas Labs, a subsidiary of Gentre Laboratories, Inc. located at 2740 South Harbor Boulevard, Suite F in Santa Ana, California. The inspection was conducted in response to a referral from EPA Headquarters, Washington, D.C.

Inspector Ohiosumua obtained labeling, receiving records and sales brochures showing that Somas Labs had received and offered for sale the unregistered pesticide products VIRACYDIN SURFACE CLEANSER AND VIRACYDIN SPRAY DISINFECTANT.

^{*} Except for two errors identified below.

On November 3, 1988, Inspector Ohiosumua conducted a producer establishment inspection at Jean Pierre Products, Inc., another subsidiary of Centre Laboratories, Inc., located at 1950 Magellan Drive, in Torrance, California.

Inspector Ohiosumua obtained production and shipping records showing that Jean Pierre Products produced and distributed the products known as VIRACYDIN SURFACE CLEANSER AND VIRACYDIN LIQUID SOAP.

On June 28, 1989, Complainant filed a Complaint and Notice of Opportunity for Hearing (Complaint) with the Regional Hearing Clerk, Region 9, charging Respondent with the violation of FIFRA in six counts. In paragraphs 5, 6, and 7 of the Complaint, Complainant set forth the pesticidal claims which appear on the label or labeling of the three products that are charged to be in violation of the statute. Paragraph 11 of the Complaint sets forth the provision of FIFRA, which precludes the sale of any pesticide that is not registered with EPA under Section 3 of FIFRA [7 U.S.C § 136a]. The Record of Communication from Schoenholz dated May 5, 1989, and the letter from Registration Division, EPA dated February 2, 1989, attached hereto and marked Attachment No. 14, are the basis for the charge that the products were not registered with EPA.

Count I charged that Respondent distributed and offered for sale the unregistered pesticide VIRACYDIN SURFACE CLEANSER through Somas Labs. Count II charged that Respondent distributed and offered for sale the unregistered pesticide VIRACYDIN LIQUID SOAP[#] through Somas Labs. Count III charged that Respondent distributed and offered for sale the unregistered pesticide VIRACYDIN SPRAY DISINFECTANT through Somas Labs.* Counts IV and V charged sale and distribution of the Cleanser and Soap products through Jean Pierre Products, Inc. Count VI charged Respondent with failure to report the production of pesticides at Jean Pierre Products, Inc. as required by Section 7 of FIFRA [7 U.S.C. § 136(e)]. The proposed civil penalty was \$21,280.00.

[#] This is incorrect. The Amended Complaint alleges that spray disinfectant was sold.

* This is incorrect. The Amended Complaint alleges that Count III arises from sales through facility #2 Jean Pierre Products, Inc.

Respondent duly filed their Answer and Request for Hearing wherein it was stated that "VIRACYDIN LIQUID SOAP is a cosmetic, and advertised, promoted and labeled only as a cosmetic." Upon determining that the LIQUID SOAP was not subject to regulation under FIFRA, Complainant filed a Motion for Leave to Amend Complaint and Notice of Opportunity for Hearing wherein all counts pertaining to the LIQUID SOAP were dropped. (This reduced the proposed penalty to \$14,240.00, Court's note.)

In their Answer to First Amended Complaint and Request for Hearing, Respondent contends, "that it has never produced, sold, distributed, offered for sale, shipped or held for sale any pesticide, as that term is defined in FIFRA, including VIRACYDIN SURFACE CLEANSER or VIRACYDIN SPRAY DISINFECTANT, at or from any facility named in the First Amended Complaint."

THE PENALTY ISSUE

As previously stated, the Respondent offers no objection to the issuance of an Order finding it liable for the violations set forth in the Amended Complaint, and I, therefore, will GRANT the Agency's motion as to that issue.

As to the proposed penalties, the Complainant proposed that the four violations be assessed as follows:

Count I	- Distribution of an unregistered pesticide	- \$2,800.00
Count II	- Distribution of an unregistered pesticide	- \$2,800.00
Count III	- Distribution of an unregistered pesticide	- \$2,800.00
Count IV	- Failure to report production of the product VIRACYDIN SURFACE CLEANSER in its 1988 annual report	- \$5,000.00

These penalty base figures were derived from the 1974 Civil Penalties Policies published in the Federal Register (39 Fed. Reg. 27711, July 31, 1974). The penalty policy contains, inter alia, a "civil penalty assessment schedule", which lists in the left-hand column a "charge code" identified by the letter E, followed by a

number. The schedule then divides the various violations into general descriptions and sets forth a matrix describing the specific violation under each general heading, followed by a line of five dollar figures according to the size of the Respondent's business as measured in annual gross sales. In this case, the first three counts fall under the general section of Registration Violations. It is uncontested that the Respondent here had annual sales of over one million dollars, thus placing it in Category V. Under the charge code E-1 distributing a non-registered pesticide, the Agency picked the violation line called "application pending" since at the time of the violation, the Respondent had applications pending for these products, which were later rejected for lack of sufficient data. Following along the appropriate line under Category V, we have the proposed penalty of \$2,800.00. This baseline penalty is in accordance with the relevant penalty policy, and I find nothing in this record to persuade me to alter that figure. Since the first three counts all relate to the distribution of an unregistered pesticide, I will adopt the \$2,800.00 baseline amount as being an appropriate penalty for those violations.

As to the failure to provide an annual production report, which is an E-37 charge code, reference to the penalty matrix reveals that the proper penalty is \$5,000.00, the figure proposed by the Complainant. However, this number was subsequently altered by an April, 1975 memorandum from Headquarters, which reduced this figure to \$3,200.00. That is the amount which the Complainant now

seeks, based upon its recent motion. As was the case with the above-discussed \$2,800.00 penalty for Counts I-III, this proposed penalty will be adopted by the Court as being consistent with the penalty policy in the absence of any mitigating factors shown by the record.

The Complainant also added a 10% increase to the three \$2,800.00 baseline penalties on the theory that the promotional materials associated with the above-referenced products make false efficacy claims suggesting that the products are effective against herpes and the AIDS virus. Section I C(2) of the penalty policy authorizes a 10% deviation from the baseline penalty either up or down depending on various factors set out therein. In this case the Respondent's literature falsely states that it will be effective in controlling the viruses of two incurable and, in the case of AIDS, fatal diseases. Such an allegation poses a clear and serious danger to humans, in that it may prevent them from seeking proper medical treatment for their diseases or lull them into a false sense of security as to whether or not they still are infected, thus making them a hazard to the rest of the population.

Under these circumstances, a 10% upward increase is almost ludicrously low, but all that is allowed by the regulations. Obviously, the Court will accept the 10% increase urged by the Complainant, thus raising the assessed penalty for Counts I-III to \$3,080.00, bringing the total assessed penalty to \$12,440.00.

The Respondent also raised the defense that the Complainant seeks to penalize it twice for the same violation. A reading of

the motion would lead to that conclusion. However, as noted above, counsel for the Complainant carelessly misstated the counts in the motion. Reference to the Amended Complaint demonstrates that there is no duplication of violations, since the sale of the spray disinfectant occurred at two different facilities. Since there are different elements of proof required to prove the two violations as to the spray product, they are correctly set forth as two distinct violations. The Respondent's argument on this issue is rejected. (See Helena Chemical Co., FIFRA Appeal No. 87-3, November 16, 1989.)

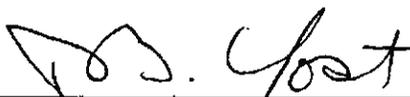
ORDER²

A civil penalty of \$12,440.00 is hereby assessed against the Respondent Gentre Laboratories, Inc. for the violations of FIFRA herein found. Payment of the penalty herein assessed shall be made within 60 days after receipt of the Final Order by forwarding a cashiers or certified check for the full amount of such penalty, payable to the Treasurer, U.S.A., and mailed to:

EPA - Region IX
Regional Hearing Clerk
P.O. Box 360863M
Pittsburg, PA 15251

Dated: _____

9/27/91



Thomas B. Yost
Administrative Law Judge

² In accordance with 40 CFR § 22.30, this Initial Decision will become the Final Order of the Administrator within 45 days after its service upon the parties unless (1) an appeal is taken by a party to the proceedings, or (2) the Administrator elects, sua sponte, to review the Initial Decision. 40 CFR § 22.30(a) provides that such appeal may be taken by filing a Notice of Appeal within 20 days after service of this decision.

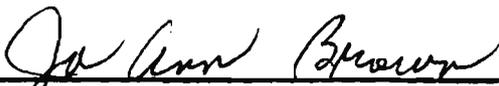
CERTIFICATION OF SERVICE

I hereby certify that, in accordance with 40 CFR § 22.27(a), I have this date forwarded via certified mail, return-receipt requested, the Original of the foregoing INITIAL DECISION of Honorable Thomas B. Yost, Administrative Law Judge, to Mr. Steven Armsey, Regional Hearing Clerk, United States Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, California 94105, and have referred said Regional Hearing Clerk to said Section which further provides that, after preparing and forwarding a copy of said INITIAL DECISION to all parties, he shall forward the original, along with the record of the proceeding to:

Hearing Clerk (A-110)
EPA Headquarters
Washington, D.C. 20460

who shall forward a copy of said INITIAL DECISION to the Administrator.

Dated: SEP 27 1991



Jo Ann Brown
Secretary, Hon. Thomas B. Yost

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing INITIAL DECISION of the Presiding Officer, dated September 27, 1991 has been filed with the Regional Hearing Clerk, and a copy was served on Counsel for EPA, and on Counsel for Respondent, as indicated below:

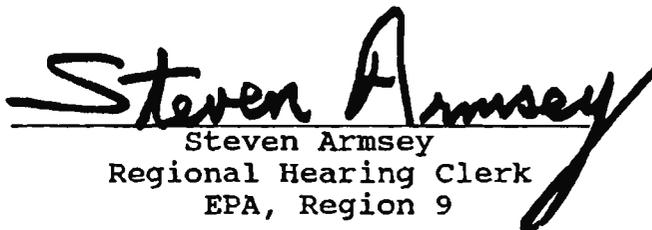
Jay H. Geller, Esq.
(A Professional Corporation)
11845 W. Olympic Blvd., Suite 1000
Los Angeles, CA. 90064

First Class Mail

David M. Jones, Esq.
Office of Regional Counsel
ENVIRONMENTAL PROTECTION AGENCY
75 Hawthorne Street
San Francisco, CA. 94105

Hand Delivered

Dated at San Francisco, California this 2nd day of October, 1991.


Steven Armsey
Regional Hearing Clerk
EPA, Region 9