4/8/96

UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Avril, Inc.	)	Docket No. IF&R III-441-C
	)	
Respondent	)	

RULINGS ON MOTIONS FOR ACCELERATED DECISION

Proceedings

The Environmental Protection Agency, Region III ("Complainant" or the "Region"), commenced this proceeding by filing a Complaint dated January 21, 1992 against Avril, Inc. (The "Respondent" or "Avril"), a corporation headquartered in Odenton, Maryland. The Complaint charged Respondent with ten counts of violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). There are five counts of distributing an unregistered pesticide in violation of FIFRA Sections 3(a) and 12(a)(1)(a), 7 U.S.C. §§136a(a) and 136j(a)(1)(A); and five counts of distributing a misbranded pesticide in violation of FIFRA Section 12(a)(1)(E), 7 U.S.C. §136j(a)(1)(E). The Complaint seeks a total civil penalty of $35,000 for these alleged violations.

The Respondent filed an initial Answer *pro se* on February 7, 1992. After retaining counsel, Respondent filed an Amended Answer dated March 24, 1993, upon leave granted by the former presiding officer, Administrative Law Judge Daniel M. Head, in an order dated September 9, 1993. The parties have both filed prehearing exchanges in this matter. The undersigned redesignated Administrative Law Judge, in an order dated January 30, 1996, set this proceeding for hearing on April 23, 1996.

Complainant filed a Motion for Partial Accelerated Decision on February 27, 1996, seeking a decision that Respondent was liable for the violations alleged in the Complaint. On March 12, 1996 Respondent filed its Opposition to Complainant's Motion for Partial Accelerated Decision and its own Motion for Summary Judgment seeking dismissal of all charges alleged in the Complaint. Complainant filed a reply to Respondent's pleadings on March 21, 1996.

Standard for Accelerated Decision

The EPA Rules of Practice, at 40 C.F.R. §22.20(a), empower the Presiding Officer to render an acclerated decision "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." Numerous decisions by the EPA Office of Administrative Law Judges and Environmental Appeals Board have noted that this procedure is analagous to the motion for summary judgment under Section 56 of the Federal Rules of Civil Procedure. See, *e.g.*, In re CWM Chemical Serv., TSCA Appeal 93-1 (EAB, Order on Interlocutory Appeal, May 15, 1995).

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). The mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). 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. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); 40 C.F.R. §22.20(a); F.R.C.P. §56(c).

Summary of Rulings

In this case, there is no genuine dispute concerning the material facts that establish Respondent's bare liability for the charges of distributing an unregistered and misbranded pesticide. However, such liability is subject to resolution of disputed facts surrounding the propriety of the notice of inspection that gave rise to these charges, under FIFRA §9(a), 7 U.S.C. §136g(a)(2). In addition, the facts and circumstances surrounding the distribution of the subject disinfectant "EZ-Clean" will still need to be explored at hearing in order to determine the appropriate penalty, if the improper inspection defense is not ultimately upheld. Therefore, although Respondent may be considered conditionally liable, Complainant's motion for accelerated decision, as well as Respondent's cross-motion for summary judgment are both denied.

For these reasons, and in light of the short time before the scheduled hearing, these rulings will not include formal findings of fact, which will await the conclusion of the proceedings. Rather, these rulings will serve as guidance to the parties for the conduct of the hearing.

Respondent's Liability

In its Amended Answer (e.g., ¶¶ 9, 11, 12) Avril essentially admits that it sold AV-102, a duly registered pesticide, under the trade name "EZ-Clean Disinfectant." In its opposition to Complainant's Motion, Respondent does not dipute that the "EZ-Clean"

product was never supplementally registered pursuant to FIFRA §3(e), 7 U.S.C. §136a(e), and the supplemental distribution procedures in 40 C.F.R. §152.132. Respondent raised this issue itself in its Amended Answer, Third Affirmative Defense. Respondent does not directly dispute the legal proposition that the distribution of a pesticide not properly supplementally registered for a different brand name, constitutes distribution of an unregistered pesticide in violation of FIFRA §12(a)(1)(A). Thus, for purposes of guidance during the hearing, Respondent may be considered conditionally liable for these violations, Counts I through V of the Complaint.[1]

Respondent does not dispute that the label for the EZ-Clean product does not bear the establishment number assigned to Respondent's facility as required by FIFRA §2(q)(1)(D), 7 U.S.C. §136(q)(1)(D), and 40 C.F.R. §156.10(a)(1)(v),(f). (Amended Answer ¶28). In addition, the label itself appears in both parties' prehearing exchanges (in Complainant's Exhibit 1 and Respondent's Exhibit 4). The label does not appear to include the following additional items required by FIFRA and its implementing regulations: directions for use; a complete ingredient statement; and a statement of the product's use classification. (See FIFRA §§2(q)(1)(F), 2(q)(2)(A,B); 40 C.F.R. §§156.10(a,i,j)). Thus, Respondent is considered conditionally liable for the alleged violations of distributing a misbranded pesticide, Counts VI through X of the Complaint.

In the pending motions, Respondent raises for the first time the defense that Complainant failed to provide it proper notice of the inspection of its facility pursuant to FIFRA §9(a)(2), 7 U.S.C. §136g(a)(2). The subject inspection took place on May 9, 1990. Respondent never sought to amend its answer to raise this issue as an affirmative defense. This may operate to detract from the credibility of Respondent's position, but Complainant has not argued that the defense was waived.

FIFRA §9(a), 7 U.S.C. §136g(a), subd. 1, grants the EPA the power to enter establishments for enforcement inspections at reasonable times. Subdivision 2 then provides:

> "Before undertaking such an inspection, the officers or employees must present the owner, operator, or agent in charge of the establishment or other place where pesticides or devices are held for distribution or sale, appropriate credentials and a written statement as to the

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[1] Complainant has combined invoices evidencing 22 separate sales on 13 days into five counts of violations, by combining sales within the same calendar month. Counts VI through X combine the same sales into five additional counts of distributing misbranded pesticides.

> reason for the inspection, including a statement as to whether a violation of the law is suspected. If no violation is suspected, an alternate and sufficient reason shall be given in writing."

Respondent contends that Complainant failed to provide such a written statement of the reason for the May 9, 1990 inspection that gave rise to this proceeding. Respondent therefore asserts the inspection was unlawful and the Region should be foreclosed from relying on any evidence obtained as a result of that inspection. Respondent cites a prior EPA administrative enforcement proceeding, In the Matter of Rek-Chem Manufacturing Corporation (IF&R Docket No. VI-437C; Initial Decision, May 10, 1993), in which the Administrative Law Judge did exclude evidence on the basis of an improper notice of inspection under FIFRA §9(a)(2).

In support of its Motion for Summary Judgment, Respondent has submitted an affidavit by Michael J. Guilday, President of Avril, who was present during the May 9, 1990 inspection. Factual issues arise from discrepancies between Mr. Guilday's affidavit and that of Complainant's inspector, James Lorah, concerning the notice provided by Mr. Lorah for that inspection. These factual disputes, and their application to FIFRA §9(a)(2), will have to be resolved at hearing, and will preclude the granting of accelerated decision. In addition, the appropriate amount of any civil penalty under the FIFRA penalty factors remain at issue for the hearing.

Order

The Complainant's Motion for Partial Accelerated Decision and Respondent's Motion for Summary Judgment are denied.

Hearing Location and Procedures

The hearing in this matter will convene at 9:00 A.M. on April 23, 1996 in the Administrative Hearing Room, Room 2409M, in EPA Headquarters, 401 M Street SW, Washington, D.C.

Before beginning the actual hearing, there will be a short prehearing conference to discuss narrowing the issues, stipulating to the receipt of evidence, stipulating to undisputed facts, and other measures to foster an efficient hearing. The parties are encouraged to engage in such discussions before arriving at the hearing.

The parties should bring enough copies of their intended exhibits to supply the opponent, reporter, and judge, who will maintain the official record. The exhibits will be marked at the hearing sequentially in the order of their introduction (differently than their designations in the prehearing exchanges). However, to reduce the paper load, it is not necessary to bring extra copies, other than one copy for the official record, of

exhibits already exchanged or known to be in the possession of the other party.

Andrew S. Pearlstein
Administrative Law Judge

Dated: April 8, 1996
Washington, D.C.

In the Matter of Avril, Inc.
Docket No. IF&R III-441-C

CERTIFICATE OF SERVICE

I certify that the foregoing Rulings on Motions for Accelerated Decision, dated April 8, 1996, were served in the following manner on the addressees listed below:

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Dated: April 8, 1996
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