

3/17/94

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY



In the Matter of

DAVKO, INC.

Respondent

: Docket No. TSCA-I-92-1058  
:  
: Judge Greene  
:

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.<sup>1</sup>

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,

<sup>1</sup> 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"),<sup>2</sup> 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<sup>3</sup> 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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<sup>2</sup> 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.

<sup>3</sup> "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.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> Complainant also indicated that it would seek to withdraw Count XI, in view of information provided by respondent.<sup>7</sup>

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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<sup>4</sup> Respondent's Answer and Request For Hearing, at 4 - 8.

<sup>5</sup> Id. at 8-11.

<sup>6</sup> Complainant's Motion and Supporting Memorandum for Partial Accelerated Decision as to Liability on Counts I through X, December 6, 1993.

<sup>7</sup> Id. at 1.

the motion, respondent was given additional time to respond.<sup>8</sup> 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 liability in order to avoid a decision in complainant's favor with respect to recitations in the complaint other than those regarding the penalty.<sup>9</sup> And while respondent's answer does offer various conclusory allegations in response to some of the charges<sup>10</sup>, 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.'"<sup>11</sup>

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

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<sup>8</sup> Order Granting Extension of Time in Which to Respond, January 11, 1994,

<sup>9</sup> 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 significantly probative will not preclude summary judgment. *Id.* at 115, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250, (1986).

<sup>10</sup> 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.

<sup>11</sup> *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.<sup>12</sup> 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."<sup>13</sup>

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 transformers.<sup>14</sup> Respondent failed to repair or replace the leaking transformers, in violation of 40

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<sup>12</sup> Complaint and Notice of Opportunity for Hearing, at 1.

<sup>13</sup> Complainant's pretrial exchange exhibit 1, at 1 - 3. Complaint and Notice of Opportunity for Hearing, at 2.

<sup>14</sup> Complainant's pretrial exchange exhibit 1, at (unnumbered) 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,<sup>15</sup> 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,<sup>16</sup> 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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<sup>15</sup> Id. at 3-4.

<sup>16</sup> 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.

  
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Administrative Law Judge

Washington, D. C.  
March 17, 1994

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on March 17, 1994.

Shirley Smith  
Shirley Smith  
Legal Staff Assistant  
for Judge J. F. Greene

NAME OF RESPONDENT: Davko, Inc.  
DOCKET NUMBER: TSCA-I-92-1058

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