10/4/91

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
FREHNER WHOLESALE, INC.,	)	Docket No. FIFRA-09-0692-C-90-01
	)	
Respondent	)	

PARTIAL ACCELERATED DECISION AND ORDER CONCERNING LIABILITY

An administrative complaint initiating this proceeding was served on January 30, 1990, by the United States Environmental Protection Agency (sometimes complainant or EPA), charging Frehner Wholesale, Inc. (respondent), in one count with violating the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended, 7 U.S.C. § 136 et seq., for selling and distributing a chlordane product whose registration with EPA had been canceled under section 6(a)(1) of FIFRA, 7 U.S.C. § 136(d)(1), and the sale of which had been banned by a ruling of the United States District Court for the District of Columbia announced on February 23, 1988, and published in the Federal Register on Friday, April 8, 1988.[1] The effective date of the ban on sale of the chlordane products

[1] 53 Fed. Reg. 11798. National Coalition Against the Misuse of Pesticides, et al. v. United States Environmental Protection Agency, et al., Civil Action No. 87-2089-LFO, February 23, 1988, is published at 53 Fed. Reg. 11800.

listed in the announcement was April 14, 1988.[2] The product, Hi-Yield Chlordane Spray (Product), registered with the EPA by Voluntary Purchasing Group, Inc., Registration No. 7401-348, was included in the April 8, 1988, Federal Register list of chlordane products included in the court's order.[3]

The Complaint alleges that respondent sold and distributed the Product after April 14, 1988, in violation of section 12(a)(2)(K) of FIFRA, 7 U.S.C. § 136j(a)(2)(K).[4] The Product was registered with EPA and assigned the registration number 7401-348.[5]

On April 15, 1991, complainant moved, pursuant to 40 C.F.R. § 22.20(a), for a partial accelerated decision on liability (motion) on the grounds that no genuine issue of material fact exists with respect to liability. Respondent submitted a response to the motion on April 24, 1991.

Respondent's current business is leasing trucks to truckers who are engaged in interstate freight business. At some time in

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[2] Id.

[3] Id. 11800.

[4] Section 12(a)(2)(K) of FIFRA makes it unlawful for any person to violate a cancellation order. Cancellation is found under section 6 of FIFRA. "Person" is defined under section 2(s) of FIFRA as being any corporation. Respondent is a Nevada corporation.

[5] Id. n.3.

the past, respondent sold products of Voluntary Purchasing Groups, Inc.[6] As noted earlier, this company is the registerer of the Product with EPA.

On June 16, 1989, an employee of the State of Nevada, holding valid EPA credentials, conducted an EPA authorized market place establishment inspection of Davis Nursery, located at 2700 E. Bonanza Road, Las Vegas, Nevada.[7] During the course of the inspection, 13 one-half gallon bottles of the Product were found.[8] Three bottles of the chlordane product were purchased from respondent. Combined Straight Bill of Lading and Freight Bill No. 205, dated March 21, 1989, with respondent's name printed boldly on the heading, was obtained during the inspection.[9] An unsworn statement on a printed EPA form signed by Venna Davis, owner of Davis Nursery, indicates that the chlordane was shipped by respondent.[10]

Respondent contends in its response to the motion that the only issue of a disputed fact in the case concerns whether or not respondent shipped the Product to Davis Nursery.[11] Respondent contends that the fact regarding who shipped the chlordane is

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[6] Response to motion at 2.

[7] Memorandum in support of motion at 1.

[8] Id. at 2.

[9] Id. n.2.

[10] Id. n.3.

[11] Response to motion at 3.

uncertain and ambiguous.[12] To bolster its argument, respondent points out that Davis Nursery did not pay respondent for the Product, nor did it return any of it as ordered by the inspector.[13] However, in its answer at 2, respondent admits delivery of the Product. That is sufficient to constitute a violation. The term "to distribute or sell" is defined, in part, to mean "deliver for shipment" or "deliver or offer to deliver." Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg).

Assuming the existence of minor factual disputes, it would not preclude an accelerated decision. To have such an effect, the disputed issues must involve "material facts" or those which have legal probative force as to the controlling issue. Stated otherwise, a "material fact" is one that makes a difference in the litigation. Genuine issues involving such facts are absent from this proceeding.

It is concluded that there exists no genuine issue of material fact as to liability in this matter. Additionally, respondent has not set forth any affirmative defenses which will shield it from liability in this proceeding. Respondent has violated section 12(a)(2)(K) of FIFRA, 7 U.S.C. § 136j(a)(2)(K), as charged in the complaint. However, respondent is entitled to a hearing on the issue of the amount of civil penalty to be assessed.

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[12] Id.

[13] Response to motion at 2.

IT IS ORDERED that:

1. Complainant's motion for an accelerated decision be **GRANTED** concerning liability.

2. The parties engage in good faith settlement negotiations concerning the amount of the civil penalty in this matter.

3. Complainant submit a status report to the undersigned no later than November 1, 1991.

Frank W. Vanderheyden

Frank W. Vanderheyden
Administrative Law Judge

Dated: October 3, 1991

IN THE MATTER OF FREHNER WHOLESALE, INC., Respondent,
Docket No. FIFRA-09-0692-C-90-01

Certificate of Service

I certify that the foregoing Partial Accelerated Decision and Order Concerning Liability, dated Oct. 3, 1991, was sent this day in the following manner to the below addressees.

Original by Regular Mail to:

Mr. Steven Armsey
Regional Hearing Clerk
U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105

Copy by Regular Mail to:

Attorney for Complainant:

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Marion Walzel
Marion Walzel
Secretary

Dated: Oct. 4, 1991