12-23-91

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of	Docket II TSCA-8(a)-90-0109
DIC AMERICAS, INC.	Judge Greene
Respondent	

ORDER
GRANTING COMPLAINANT'S MOTIONS TO AMEND PRETRIAL EXCHANGE AND TO APPEND SUPPLEMENTAL EXHIBIT TO COMPLAINANT'S MOTION FOR PARTIAL ACCELLERATED DECISION; and DENYING RESPONDENT'S MOTION FOR DISCOVERY

Pursuant to motion, complainant seeks to amend its pre-trial exchange for the second time, in order to add the names of two U. S. Environmental Protection Agency (EPA) officials to the list of proposed witnesses. Their testimony is offered to support the $85,000 civil penalty assessment sought by complainant for five alleged violations of 40 C.F.R. § 710.33(a).

In this proceeding, respondent has vigorously sought additional information regarding the use of Toxic Substances Control Act (TSCA) chemical substance inventories, which it is accused of having failed to update as required by applicable regulations, and has filed at least one Freedom of Information Act request in connection with its effort. Here, however, respondent objects to the addition of two witnesses as a "belated attempt to shore-up its proofs regarding appropriateness of the penalty in this matter." Because the proferred testimony goes to the function of the inventory and its place in the regulatory schema imposed by TSCA, such testimony necessarily also goes to the level of penalty sought. There can be no doubt that such testimony is relevant and could even be helpful in determining the appropriate level of any penalty if violations of the Act are found. Complainant will be permitted to amend its pretrial exchange to include the names of these officials and statements of their proposed testimony.

Complainant also seeks to amend pretrial exchange to add (1) copies of consent agreements which show that corporations which are subsidiaries of respondent agreed to civil penalties in connection with charges of TSCA violations; and (2) a copy of a 1985 TSCA notice of noncompliance involving respondent. Respondent objects to the addition of the consent agreements, based upon its having acquired these corporations after the alleged violations occurred. 1/ Complainant properly points out, however, that a determination as to the liability of a successor corporation under various circumstances requires more information than has been provided in respondent's objection. Moreover, as both parties also note, these documents were not taken into account when the amount of the proposed pealty was calculated. Complainant's chief purpose in offering them at this point is that " . . . . (T)his information should be before the Court if not to provide a basis for upward adjustment, then at least to militate against any downward adjustments of the penalty amount." 2/

1/ Respondent acquired Reichhold Chemicals, Inc., on September 9, 1987 (affidavit of William Saltzman, attached to respondent's Opposition to Plaintiff's Motion . . . to Amend Pretrial Exchange). The consent agreement in Reichhold was issued on April 24, 1989 (Complainant's exhibit 10 for identification, attached to Motion to Amend Prehearing Exchange).

2/ Reply to Respondent's Opposition to Complainant's Motion to Amend Prehearing Exchange, at 6.

Under these circumstances, complainant will be permitted to amend pretrial exchange by the addition of the two consent agreements and the notice of noncompliance. A determination as to whether the consent agreements will be admitted in evidence will be made at the time they are offered, when presumably the parties will be prepared to support their positions more fully.

Respondent has moved for depositions with respect to the testimony of the two EPA officials. However, no showing was made that complainant will not provide further information as to their testimony without formal discovery procedures. Accordingly, no discovery will be ordered at this time. It is expected that complainant will informally make these officials available, or will further describe their testimony so that respondent's defense may be fully prepared. Failing this, further consideration will be given to formal discovery. 3/

3/ Complainant's statement that it has offered previously to convene a conference call or to meet to address respondent's concerns regarding penalty assessment is noted. Id. at 10.

ORDER

Accordingly, it is hereby ordered that complainant's motion to amend pretrial exhange by the addition of the names of two EPA officials and certain documents relating to the penalty issue is hereby granted.

Respondent's motion for discovery is denied at present.

J. F. Greene
Administrative Law Judge

Washington, D. C.
December 23, 1991

In the Matter of DIC AMERICAS, INC.
Docket No. II TSCA-8(a)-90-0109

CERTIFICATE OF SERVICE

I certify that the foregoing Order Granting Complainant's Motions to Amend Pretrial Exchange and to Append Supplemental Exhibit to Complainant's Motion for Partial Accelerated Decision; and Denying Respondent's Motion for Discovery, dated December 23, 1991, was sent this day in the following manner to the addresses below:

(1st Class Mail) Karen Maples
Regional Hearing Clerk
U.S. Environmental Protection Agency - Region II
26 Federal Plaza - Room 505
New York, New York 10278

(Certified Mail) Vincent Gentile, Esq.
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Susan Eggen for
Shirley Smith, Secretary

Date: January 2, 1992