6/14/92

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF Gold Crest Chemical Corporation and Embalmers Supply Company, Respondents	))))))))	Docket Nos. EPCRA-III-0160 and CERCLA-III-002

ORDER DISPOSING OF OUTSTANDING MOTIONS

There are currently pending a variety of outstanding motions. Three have been filed by the Complainant: a motion to compel production of documents, a motion for leave to supplement its Prehearing Exchange (PHE) and a motion for accelerated decision against both Respondents. Respondent, Gold Crest Chemical Corporation (Gold Crest), has filed a motion to bar Complainant's motion to supplement its prehearing exchange list. And, Respondent, Embalmers Supply Company (ESCO), has filed a motion for accelerated decision.

The several motions will be treated, insofar as practicable, in the order presented and to the extent they are connected. Also, the arguments of the parties will be set out only as deemed necessary.

I. MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Complainant's first motion seeks an order to compel Gold Crest to produce the following: an appraisal and title abstract of Gold Crest's property, as well as the individual tax returns for the last three years of Mr. Paul Ryals, President of Gold Crest. The basis for Complainant's motion is that these documents are necessary to evaluate properly Gold Crest's settlement offer and Gold Crest's claim of inability to pay the proposed penalty.

In response to a prior request by the Complainant for corporate tax returns of Gold Crest and a title abstract and appraisal of its property, Gold Crest provided in its PHE copies of its corporate income tax statements for 1987 through 1989, financial statements ending June 30, 1989, and a report of a certified public accountant. But, Gold Crest has refused to provide an appraisal of the property or title abstract, since these documents have not been prepared and do not presently

exist. Nor is Gold Crest willing to produce Mr. Ryals' individual tax returns.

In support of its motion, Complainant relies on Section 22.19(f)(1) of the EPA Rules of Practice (Rules), 40 C.F.R. §22.19(f)(1), which provides for discovery beyond the prehearing exchange when there is a determination: that such discovery will not unreasonably delay the proceeding; that the information is not otherwise obtainable; and that the information has significant probative value.

Complainant contends that it made the appropriate showing under the three prong test of Section 22.19(f)(1). First, Complainant avers that no unreasonable delay will occur under the circumstances of this case; that these documents are otherwise unobtainable because (1) Mr. Ryals' tax returns are unavailable without his consent and (2) the title abstract and appraisal are Gold Crest's responsibility to produce since Gold Crest put forth the settlement offer; and that these documents have significant probative value in that Gold Crest's assets are unknown. Complainant asserts the documents on Gold Crest's property status are crucial to assess Gold Crest's settlement offer and alleged inability to pay the proposed civil penalty. Moreover, Complainant claims Mr. Ryals' tax returns are necessary because Mr. Ryals is receiving payments from Gold Crest. These payments stem from royalty payments made by ESCO to Gold Crest as a result of the asset acquisition sale on June 1, 1989. Yet, these royalty payments are unaccounted for on the corporate tax returns and financial statement that Gold Crest submitted to Complainant. Hence, Complainant charges that Mr. Ryals' tax returns, listing the amount of these payments, are also essential to making an informed decision on settlement and Gold Crest's alleged inability to pay the proposed civil penalty.

In its response, Gold Crest urges that Complainant's motion be denied. Gold Crest opposes the production of the title abstract and appraisal of its property on the basis that these documents do not exist. Gold Crest further notes that the information Complainant seeks is readily available, as Complainant has access to the public land records and has resources to order an appraisal.

Gold Crest opposes the production of Mr. Ryals' tax returns by arguing that these returns are not relevant to any of the issues herein. In addition, because Mr. Ryals' is not a party to this case, Gold Crest contends that there is no jurisdiction in this forum to compel production of documents from a nonparty.

On analysis, Gold Crest's position is better taken with regard to the title abstract and property appraisal. These documents do not exist at present, and are as readily available to Complainant as to Gold Crest, since Complainant itself can

order an appraisal and title abstract. As a result, Complainant's motion to compel production of a title abstract and appraisal of Gold Crest's property is denied.

As for Mr. Ryals' tax returns, Complainant has not made the appropriate showing that the financial information it seeks from these returns is otherwise unobtainable. The information on payments made by ESCO and/or Gold Crest to Mr. Ryals could well be obtained by interrogatories or by a further request to Gold Crest and/or ESCO seeking production of any documents reflecting such payments to Mr. Ryals.

Accordingly, Complainant's motion to compel the production of Mr. Ryals' tax returns is denied. However, this denial is without prejudice to Complainant renewing its motion to compel if the information sought cannot be obtained by other methods of discovery. In this regard, to eliminate the need for further pleading, permission is hereby granted to Complainant to file interrogatories or a further more specific motion to compel seeking the information on the royalty payments from ESCO and on payments thereof to Mr. Ryals. Complainant is given until July 15, 1994 to pursue these further means of discovery, if Complainant considers such action necessary.

II. MOTION FOR LEAVE TO SUPPLEMENT PHE

Complainant's second motion seeks leave to supplement its prehearing exchange with five documents and six witnesses. The basis for Complainant's motion is that these items were inadvertently omitted from its PHE. Complainant argues that its motion can be granted under Section 22.19(f)(1) of the Rules, since there would be no unreasonable delay resulting from the supplementation of the PHE. In addition, Complainant alleges that the information to be obtained from these witnesses and documents is not otherwise available and has significant probative value.

Gold Crest submitted an opposition to Complainant's motion to supplement and a cross motion to exclude the proposed amendments to Complainant's PHE. Gold Crest takes the position that Complainant has not established good cause explaining why the supplemental documents were not listed in the PHE. As a consequence, Gold Crest alleges that it will be substantially prejudiced because it has already submitted its PHE without an adequate opportunity to obtain rebuttal witnesses or documents. In its motion to exclude, Gold Crest alleges that Complainant's supplement consists of certain documents that were withheld from Gold Crest when it previously requested them under the Freedom of Information Act (FOIA), 5 U.S.C. §552, including: the report on investigation of the fire; testing on site as a result of the fire; and all inquiries and correspondence between State and Federal Agencies concerning the fire and its aftermath. Gold Crest argues that it would be unjust to allow documents that were

previously withheld to be amended to Complainant's PHE, especially when Gold Crest has not had adequate time to obtain rebuttal witnesses and documents.

On analysis, it would appear that Complainant's position is better taken. The crux of Gold Crest's opposition relies on insufficient time to prepare its defense. However, this argument is not persuasive. Since Complainant's motion has been filed, Gold Crest has had ample time to review Complainant's proposed supplement. As Complainant correctly states, the purpose of the PHE is to facilitate the hearing through a thorough pretrial exchange of proposed evidence. Often the PHE requires supplementation where good cause exists and where no significant prejudice ensues. In the instant case, Complainant attempted to supplement its inadvertent omission just nine days after the PHE due date. Moreover, no significant prejudice has resulted since Gold Crest has had ample time to review the supplemental information. Therefore, Complainant's motion to supplement is granted and Gold Crest' motion to exclude is denied. However, to eliminate further any prejudice, Gold Crest is hereby granted permission to supplement its PHE to rebut the supplemental material submitted by Complainant. In this regard, Gold Crest is given until July 15, 1994 to supplement its PHE.

III. MOTIONS FOR ACCELERATED DECISION

ESCO filed a motion for accelerated decision, seeking its dismissal as a Respondent for Complainant's failure to state a prima facie case against it or, in the alternative, for a decision in its favor on the issue of liability as a matter of law. Complainant submitted an opposition to the ESCO motion and its own motion requesting accelerated decision in its favor against both Respondents. For clarity, Complainant's accelerated decision motion relating to ESCO will be addressed together with the ESCO motion and Complainant's request for accelerated decision against Gold Crest will be dealt with separately. Initially, though, the principles relating to accelerated decision and dismissal will be briefly reviewed.

The resolution of motions for accelerated decision is governed by Section 22.20(a) of the Rules, which provides in pertinent part that the Presiding Judge may render an accelerated decision in favor of any party 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. In addition, under Section 22.20(a), the Presiding Judge may, on motion by a Respondent, dismiss an action on the basis of failure to establish a prima facie case or other grounds which show Complainant has no right to relief.

A. The Motions Involving ESCO

With regard to ESCO's motion, the question at issue is whether ESCO should be held liable in this action under the corporate successor liability doctrine. ESCO alleges in its motion that, on June 1, 1989, Gold Crest sold to ESCO, a competing corporation, only certain of its assets. Therefore, under the theory of successor liability, ESCO urges no liability should attach.

Under the rule of successor liability, asset purchasers are not liable as successors unless one of the following four exceptions applies: (1) the purchasing corporation expressly or impliedly agrees to assume the liabilities of the predecessor; (2) the transaction amounts to a de facto consolidation or merger; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction was fraudulently entered into to escape liability, U.S. v. Mexico Feed and Seed Co., 980 F.2d 478, 487 (8th Cir. 1992); Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990); and Mozingo v. Correct Mfg. Corp., 752 F.2d 168, 174 (5th Cir. 1985). In the present proceeding, the only exception at issue is number 3, the continuing business enterprise exception, as refined by the substantial continuity theory discussed infra.

In the purchase agreement, ESCO explicitly refused to assume any liabilities of Gold Crest (paragraph numbered 10 of the Addendum to the Purchase and Sale Agreement between ESCO and Gold Crest, which agreement is attached as Exhibit A to ESCO's Answer to the Complaint - hereinafter for brevity referred to as "Addendum to Purchase Agreement"). In addition, ESCO purchased Gold Crest's assets in reliance upon the following representations and warranties of Gold Crest: that no litigation or investigation was pending as to the assets of Gold Crest and that Gold Crest had complied with all Federal and State laws and regulations (Addendum to Purchase Agreement, paragraphs numbered 2c and 2d). Furthermore, ESCO avers that it had no connection with Gold Crest at the time of the fire on January 26, 1989, which occurred about four months before the purchase. Therefore, ESCO contends that it had no ability to prevent the violations by Gold Crest.

Complainant in response takes the position that ESCO is liable as a successor to Gold Crest. Complainant alleges that ESCO purchased substantially all of Gold Crest's assets, which included: customer lists, formulas, trademarks, goodwill, catalogs, labels and a covenant not to compete. Although Complainant admits that, under the traditional rule, no successor liability is triggered for asset purchases, Complainant avers that ESCO nonetheless falls within the continuing business enterprise exception for successor liability, since this exception has been refined and broadened by the substantial

continuity theory. As a result, Complainant argues that ESCO is liable as a successor to Gold Crest for the violations of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§101 et seq., and the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. §§11001 et seq., alleged in the Complaint brought herein.

The traditional continuing business enterprise exception involves several factors including: (1) continuance of employees, supervisors or physical plant; (2) production of the same product; (3) retention of the same name; (3) continuance of general business operations; and (5) purchaser holds itself out as a continuation of the seller, Mozingo v. Correct Manufacturing Corp., supra at 175. This traditional mere continuation exception emphasizes an identity of officers, directors and stock between the selling and purchasing corporations, U.S. v. Mexico Feed and Seed Co., supra at 487; Tucker v. Paxson Machine Co., 645 F.2d 620, 626 (8th Cir. 1981). It is clear that the traditional business continuation exception is not applicable to ESCO since there is no identity of officers, directors and stock and most of the other factors, except for some limited production under the Gold Crest name, do not apply to ESCO.

However, as noted earlier, the traditional mere business continuation exception has been broadened to include successor liability under a "substantial continuity" test, in contexts where public policy is involved, such as labor relations, Federal environmental regulation, and product liability, Golden State Bottling Co. v. NLRB, 414 U.S. 168, 182-85 (1973) (labor relations); U.S. v. Mexico Feed and Seed Co., supra at 487-88 (Federal CERCLA regulation); and Mozingo v. Correct Mfg. Corp., supra at 173, 176 (product liability). This substantial continuity test requires that the purchasing corporation have knowledge or notice that the wrong involved remains unremedied and that the successor corporation be responsible for the violations involved, Golden State Bottling Co. v. NLRB, supra at 185; U.S. v. Mexico Feed and Seed Co., supra at 488; and Mozingo v. Correct Mfg. Co., supra at 176.

Under CERCLA, an essential purpose is to place the cost of clean-up measures on those **responsible** for creating or maintaining the condition, U.S. v. Mexico Feed and Seed Co., supra at 486 (emphasis added). Similarly, EPCRA has the same goal of holding responsible parties accountable for their actions. As noted above, a key factor in determining responsibility is whether the successor had prior knowledge or notice of the harm, Golden State Bottling Co. v. NLRB, supra at 180; Mozingo, supra at 173; U.S. v. Carolina Transformer Co., 978 F.2d 832, 838 (4th Cir. 1992); and Louisiana-Pacific Corp. v. Asarco, Inc., supra at 1265-66. The underlying rationale is that knowledge of pending wrongs unremedied makes broadening the net of liability fair, Golden State Bottling Co., v. NLRB, supra at

182-185. Thus, the substantial continuity test should be invoked should be invoked to establish liability when it furthers CERCLA's essential purpose of holding responsible parties liable, U.S. v. Mexico Feed and Seed Co., supra at 489.

In the instant proceeding, ESCO cannot be deemed a responsible party. ESCO had no knowledge or notice of Gold Crest's potential CERCLA or EPCRA liability at the time of the asset purchase, as Gold Crest had not been identified as a responsible party. The asset purchase agreement between ESCO and Gold Crest was entered into on June 1, 1989, and the Complaint against Gold Crest was not filed herein until May 8, 1990. Indeed, before agreeing to purchase Gold Crest's assets, ESCO took affirmative steps to avoid connection to any potential liability by requiring a warranty from Gold Crest that no investigation or litigation was pending as to Gold Crest's assets, and that Gold Crest had complied with all applicable laws and regulations (Addendum to Purchase Agreement, paragraphs numbered 2c and 2d). Moreover, to further protect itself, ESCO expressly rejected the assumption of any liabilities of Gold Crest (id. at paragraph numbered 10). Furthermore, it is clear that the violations alleged against Gold Crest occurred well in advance of the sale of the Gold Crest assets to ESCO.

Before acquiring the assets of Gold Crest, ESCO was an existing, competing corporation. ESCO made this purchase of Gold Crest's assets at arm's length and for adequate consideration (see the Purchase Agreement attached to ESCO's Answer). Thus, in contrast to those cases finding liability under this exception, ESCO was neither incorporated for the purpose of continuing Gold Crest's products nor was there any substantial nexus between ESCO and Gold Crest. ESCO retained no employees or supervisors of Gold Crest and has its own manufacturing facility. While ESCO currently produces some Gold Crest products, under the Gold Crest name, the factors discussed above strongly outweigh holding ESCO a responsible party for Gold Crest's CERCLA and EPCRA violations under the substantial continuity test. ESCO had neither knowledge of or responsibility for the violations alleged against Gold Crest, and no liability should attach to ESCO under the general concept of the substantial continuity test.

Further, the product liability theory relied upon by Complainant as a refinement of the substantial continuity test is not applicable herein. The product liability rationale holds a successor corporation liable for the defective product of the predecessor corporation when the party which acquires a manufacturing business and continues its line of products, assumes strict tort liability for defects in the same product line previously manufactured and distributed by the entity from which the business was acquired, Nelson v. Tiffany Industries, Inc., 778 F.2d 533, 535 (9th Cir. 1985). The alleged environmental violations in this case were not caused by any

defects in the assets or product line that ESCO acquired. As a result, the product liability theory must be rejected as far as ESCO is concerned.

Upon review, the facts concerning the assets purchase by ESCO from Gold Crest, the timing involved therein in relation to the alleged violations, and the corporate connections between ESCO and Gold Crest are uncontested. As a result, no material issue of fact exists as to ESCO's liability in this cause. And, since ESCO cannot be held responsible for the alleged violations under any aspect of the corporate successor liability rule, ESCO is entitled as a matter of law to an accelerated decision in its favor on liability. Therefore, ESCO's motion for accelerated decision is granted and a decision is hereby entered in favor of ESCO on the issue of liability in this proceeding.[1] Correspondingly, Complainant's motion for accelerated decision against ESCO is denied.

B. The Motion for Accelerated Decision against Gold Crest

Complainant's motion for accelerated decision against Gold Crest asserts that an accelerated decision should be entered in its favor because of Gold Crest's failure to notify the regulatory bodies of a reportable release and its failure to file Material Safety Data Sheets (MSDS) and Emergency and Hazardous Chemical Inventory Forms with the required regulatory agencies. Complainant relies on an affidavit from a representative of the Chester County Local Emergency Planning Commission setting out an alleged statement from the Gold Crest plant manager, to establish

---

[1] This proceeding involves the two dockets identified in the caption, which dockets have been consolidated for hearing. ESCO is a Respondent in both dockets and the ruling herein constitutes a decision in favor of ESCO on liability in both dockets. While issues remain in both dockets as to Gold Crest, the effect of the granting of accelerated decision in favor of ESCO is to terminate ESCO's involvement in the consolidated dockets at the hearing level, since no issues remain for decision with regard to ESCO. As a result, the decision favoring ESCO has the effect of initiating the appeals process in these dockets as far as ESCO is involved. Therefore, under Section 22.30(a) of the EPA Rules, 40 C.F.R. §22.30(a), the parties may file with Environmental Appeals Board (EAB) a notice of appeal of the accelerated decision in favor of ESCO and an appellate brief within 20 days of service of this Order Disposing of Outstanding Motions. Under Section 22.27(c) of the Rules, the accelerated decision in favor of ESCO shall become the final order of the EAB within 45 days after its service, unless an appeal is taken by the parties or unless the EAB elects, sua sponte, to review the decision in favor of ESCO pursuant to Section 22.30(b) of the Rules. After any appeal or sua sponte review, the order of the EAB shall be the final order relating to ESCO herein.

that the threshold quantities, which trigger the reporting requirements, were met (Exhibit B of Complainant's Motion for Accelerated Decision).

Gold Crest submitted an opposition to this motion on the grounds that there is an issue of material fact as to whether the threshold quantities that trigger the reporting requirements have been met. Gold Crest notes that, for a party to a have a duty to notify specified agencies of a reportable release, there must be an amount equal to or greater than the reportable quantity listed in Section 103 of CERCLA and Section 304 of EPCRA. Likewise, a duty arises to file a form with the specified agencies under Sections 311 and 312 of EPCRA, only if the hazardous substances are present in an amount equal to or greater than the threshold reporting quantity.

On analysis, Gold Crest's position is more persuasive. Whether the threshold reporting quantities are involved is a disputed issue of material fact. Gold Crest contests that the threshold quantities were met and this matter has not been adequately established to warrant the entry of an accelerated decision. The affidavit relied upon by Complainant not only rests upon a hearsay statement but it cannot be cross-examined nor can it resolve issues of credibility. Therefore, this issue will have to be determined at the evidentiary hearing. Accordingly, Complainant's motion for accelerated decision against Gold Crest must be, and hereby is, denied.

IV. FURTHER PROCEDURES

In addition to the further discovery and PHE supplementation being authorized by this Order, the parties are directed to confer and submit in writing by July 15, 1994, a suggested date for the evidentiary hearing. If an agreed upon date cannot be reached, the parties should file their separate proposals.

SO ORDERED.

Daniel M. Head
Administrative Law Judge

Dated: June 14, 1992
Washington, D.C.

IN THE MATTERS OF GOLD CREST CHEMICAL CORP. AND THE EMBALMERS SUPPLY CO., Respondents
Docket Nos. CERC-III-002 [CERCLA] and EPCRA-III-016

CERTIFICATE OF SERVICE

I certify that the foregoing Order Disposing of Outstanding Motions, dated June 14, 1994, 1990, were sent in the following manner to the addresses below:

Original by Regular Mail to:

Lydia Guy
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 3
841 Chestnut Building
Philadelphia, PA 19107

Copy by Certified Mail-Return Receipt Requested:

Counsel for Complainant:

Margaret Cardamone, Esquire
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region 3
841 Chestnut Building
Philadelphia, PA 19107

Counsel for Respondent: Gold Crest Chemical Corp.

Joel Schneider, Esquire
Manta and Welge
One Commerce Square
2005 Market Street
Philadelphia, PA 19103

Counsel for Respondent: The Embalmers Supply Co.:

Christopher J. Jarboe, Esquire
Lovejoy, Hefferan, Rimer & Cuno, P.C.
P.O. Box 390
148 East Avenue
Norwalk, CT 06852

Copy by Pouch Mail to:

Environmental Appeals Board
U.S. EPA, M/C 1103B

Aurora Jennings
Legal Staff Assistant

Dated: June 14, 1994
Washington, D.C.