

3/29/96

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Gottfredson's, Inc.,) Docket No. FIFRA-09-0828-C-94-03
)
Respondent)

hereinafter to be captioned

In the matter of)
)
Gottfredson's, Inc.,) Docket No. FIFRA-09-0828-C-94-03
and Mountain)
Mercantile, Inc.,)
)
Respondents)

Discovery -- 40 C.F.R. § 22.19(f) -- Complainant's Motion for
Discovery was granted when it was ruled to have satisfied all the
requirements of 40 C.F.R. § 22.19(f)(1), (3).

SUMMARY OF TELEPHONE CONFERENCE

STATEMENT OF AGREEMENT AND RULINGS

This document summarizes the March 27, 1996 telephone
conference, and states for the record the agreement reached and
rulings issued during the conference. Representing Complainant was
David M. Jones, and representing Respondents was Kevin J. Phillips.

This case is based on the Federal Insecticide, Fungicide, and
Rodenticide Act, 7 U.S.C. §§ 136-136y, and concerns a department
store in Caliente, Nevada owned by Respondent Gottfredson's, Inc.
The Complaint charged that this store produced a pesticide in April
1992 when it was not an establishment registered under Section 7 of
the Act, so that the production violated Section 12(a)(2) (7 U.S.C.
§ 136e). The Complaint charged further that in June 1993 the store
offered this pesticide for sale, but the pesticide was not
registered with the Agency under Section 3 of the Act, so that the
offering violated Section 12 (1)(A) (7 U.S.C. § 136j(a)(1)(A)).

In the conference, Complainant's March 20, 1996 Motion for

Discovery of certain corporate reorganization and financial documentation and information regarding Respondents was granted. Procedure for this case is governed by the Agency's Consolidated Rules of Practice (40 C.F.R. Part 22), and Complainant's discovery is subject to Section 22.19(f)(1), (3) of these Rules.

Section 22.19(f)(3) requires that a discovery motion "set forth: (I) The circumstances warranting ... the discovery; (2) The nature of the information [requested] ...; and (iii) The proposed time and place [for taking it]" It was ruled that Complainant's Motion contained all these required elements.

Section 22.19(f)(1) postulates three requirements that are sometimes less easily satisfied. This Subsection requires "(I) That such discovery ... not ...unreasonably delay the proceeding; (ii) That the information ... is not otherwise obtainable; and (iii) That such information has significant probative value."

The corporate reorganization information and documents sought by Complainant relate to a statement by Respondent Gottfredson's, Inc. that "the original firm has been divided into two smaller units" (Respondent Gottfredson's, Inc.'s February 26, 1996 letter, last paragraph). Complainant's Motion requested various items of information and corporate documents regarding this division. In the granting of Complainant's request, it was ruled that the requirements of avoidance of unreasonable delay, absence of alternative obtainability, and existence of significant probative value were all satisfied.

In the conference, Respondents confirmed that in April 1992 and June 1993 the department store was owned by Respondent Gottfredson's, Inc., and that subsequently Gottfredson's, Inc. was reorganized into two successor companies, Gottfredson's, Inc. and Mountain Mercantile, Inc. It was agreed in the conference that this situation would be resolved for this case by simply adding Mountain Mercantile, Inc. as a second Respondent, with Mr. Phillips to represent both Respondents. The addition to the case of Mountain Mercantile, Inc. is reflected in the caption of this Summary and Statement.

Complainant's financial discovery request stemmed from a statement by Respondent Gottfredson's, Inc. that in its 1994 fiscal year it had lost \$65,000 (Respondent Gottfredson's, Inc.'s February 26, 1996 letter, last paragraph). Complainant's Motion stated that, in light of this statement, it sought Respondent Gottfredson's, Inc.'s tax returns for the last five years in order to meet Complainant's burden of proof regarding Respondents' ability to pay.

In the conference, it was ruled that Complainant's request satisfied the requirements of Section 22.19(f)(1) concerning reasonableness of delay, alternative unobtainability, and probative value. It was ruled further that Complainant has already met its burden of proof on Respondents' ability to pay by submitting a Dun

& Bradstreet report on Respondent Gottfredsons, Inc. (Complainant's Prehearing Exchange, Exhibit 7 (April 12, 1995)).

It was ruled additionally that Respondents may submit the requested five years of tax returns in an effort to justify a reduction in any civil penalty otherwise payable. The deadline for such submission was set at April 30, 1996.

Finally, in the conference it was suggested to the parties that they consider a resolution of this case on the basis of their written submissions, rather than through an evidentiary hearing. The parties were told that they could defer their decision on this point until after the April 30 deadline for Respondents' submission of tax returns.

Thomas W. Hoya

Thomas W. Hoya
Administrative Law Judge

Dated: March 29, 1996

In the Matter of Gottfredson's Inc., Respondent
Docket No. FIFRA-09-0828-C-94-03

Certificate of Service

I certify that the foregoing **Summary of Telephone Conference Statement of Agreement and Rulings**, dated March 29, 1996, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

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


Copy by Regular Mail to:

Attorney for Complainant:

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Maria Whiting
Maria Whiting
Legal Staff Assistant

Dated: March 29, 1996