

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

2/28/96
FILED
1995 FEB 28 11 09 AM '95

In the Matter of)
)
Taylor Medical, Incorporated) Docket No. FIFRA-95-H-09
Beaumont, Texas)
)
Respondent)

ORDER DENYING MOTIONS FOR A STAY
AND FOR ACCELERATED DECISION

This proceeding commenced with the filing of a Complaint by the United States Environmental Protection Agency (the "Complainant" or "EPA") on February 14, 1995, on Taylor Medical, Incorporated (the "Respondent" or "Taylor"). The Complaint alleges that the Respondent distributed or sold an unregistered pesticide product, Wipeout Disinfectant Towelettes, on 93 occasions, in violation of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") Section 12(a)(1)(A), 7 U.S.C. §136j(a)(1)(A). The Complaint seeks assessment of a civil penalty of \$465,000 against Respondent. The Respondent filed an Answer and request for hearing on March 16, 1995.

The previous designated presiding officer, Chief Administrative Law Judge Jon G. Lotis issued an Order Establishing Procedures dated September 28, 1995. That Order set out a schedule under which, if the case was not settled by February 16, 1996, the parties were directed to prepare for trial by filing prehearing exchanges of documents pursuant to the EPA Rules of Practice, 40 C.F.R. Part 22, §22.19(b). Those prehearing exchanges are due March 19, 1996, with replies due April 19, 1996. Since no settlement was reached by February 16, the schedule for filing prehearing exchanges is now in effect.

By order dated February 26, 1996, the undersigned has been redesignated the presiding Administrative Law Judge in this proceeding. These rulings address and deny Respondent's motion to stay these proceedings, and Complainant's motion for accelerated decision, as discussed below.

Respondent's Motion to Stay this Proceeding

On February 13, 1996, Respondent filed a motion for an order staying this proceeding until a related case is resolved. Respondent points out that the registration of the Wipeout Disinfectant Towelettes is at issue in the case of In the Matter of Celltech Media, Inc., aka Health Care Products, Inc., Through its Agent: Meditox, Inc., Docket No. FIFRA-95-H-04, filed February 15,

1995 (the "HCP" case). Health Care Products, Inc. ("HCP") was the manufacturer of the Towelettes and supplied them to Taylor. The Complaint in the HCP case¹ also charges HCP with distributing the Towelettes as an unregistered pesticide. On February 23, 1996 the EPA filed an Opposition to Respondent's motion for a stay. Complainant contends that granting such a stay would not promote judicial efficiency in these proceedings.

A review of the nature and status of this proceeding and the HCP litigation indicates that it would not be appropriate to stay the Taylor case until resolution of the HCP case. As pointed out by Complainant, the instant proceeding is much more narrowly focussed and procedurally simpler than the HCP litigation. The HCP case is consolidated with two earlier enforcement actions against HCP under FIFRA and is also procedurally intertwined with a pesticide cancellation proceeding involving the Wipeout disinfectant solution.² The charges alleging distribution of unregistered Wipeout Disinfectant Towelettes comprise only 8 of 151 counts of alleged FIFRA violations (3 of which allege sales to Taylor) in the consolidated HCP enforcement actions. Most of the charges in the HCP litigation allege distribution by HCP of misbranded Wipeout Disinfectant Solution, bearing false or misleading statements on the product labels. Also pending in the HCP litigation are several motions by both parties including: Complainant's motions for partial accelerated decision, to dismiss affirmative defenses, and to recaption actions; and Respondent's motions to dismiss, to change venue, and to appoint a settlement judge. These motions (and several related spin-offs) have all been contested and extensively briefed by the parties. Currently, a filing schedule is in effect anticipating further motion practice concerning discovery and additional filings in the cancellation proceeding extending to April 1996.

The above summary of the posture of the HCP litigation demonstrates the impracticality of staying this proceeding while awaiting resolution of those proceedings. Although it is true that HCP, as the producer, does presumably have more direct knowledge of the registration status of the Towelettes than Taylor, that does not mean that the issue could not be addressed more expeditiously in this case. HCP has asserted, among its defenses and in its filings in opposition to EPA's motions, that the Towelettes were registered. It has supported that position with an affidavit by

¹ HCP later changed its name to Celltech Media, Inc.

² See In the Matter of Health Care Products, Inc., FIFRA Docket No. 93-H-02F; In the Matter of Health Care Products, Inc., I.F. & R. Docket No. VIII-90-279C; and In the Matter of Health Care Products, Inc., FIFRA Docket No. 656, respectively.

its Director of Sales, Frank Midghall.³ While Taylor might seek to obtain Mr. Midghall's testimony or some other evidence from HCP to support its position in this case, there is no reason that could not occur first in this proceeding. The issue of registration of a pesticide product is relatively straightforward compared to the misbranding allegations that comprise the bulk of the HCP charges, which depend on underlying laboratory data and efficacy testing.

In addition, the major thrust of Respondent's defenses in this case centers on the gravity of the violations, even if the Towelettes were not in fact registered. Only the Third Defense in Respondent's Answer addresses the facts surrounding the registration status of the Towelettes. In other defenses, Taylor asserts it is a distributor who purchased the product from HCP's agent and relied on the label registration; that it acted in good faith; that there was no environmental harm; and that any violation was de minimus.⁴ Those defenses are not necessarily directly affected by the ultimate determination on the validity of the registration. They are relevant to the factors considered in determining the gravity of the violation and the appropriate amount of the civil penalty if liability is established. This proceeding is likely to focus more on those types of issues than on the registration issue itself.

While ideally it might be most logical to await resolution of the issue of the Towelette registration in the HCP case, it would not be practical due to the complexity and extended time frame of that litigation. In addition, this ruling only denies a stay as it would affect the schedule for filing the prehearing exchanges. Once those documents are submitted, and the HCP litigation proceeds, the schedules and procedures for the actual hearings could be adjusted to promote maximum efficiency and prevent duplication of testimony. The undersigned is the Presiding Administrative Law Judge in both proceedings. Neither proceeding will be scheduled for hearing until the prehearing exchanges have been completed.

Complainant's Motion for Accelerated Decision

Complainant has also filed a Motion for Accelerated Decision, dated February 23, 1996, seeking a decision in Complainant's favor on both liability and the penalty in this proceeding. In the interest of efficiency, this motion can be denied at this time without the necessity of Respondent's filing a response.

³ See Declaration of Frank Midghall in Opposition to EPA Motions to Strike Affirmative Defenses and for Partial Accelerated Decision at p. 3, par. 10 (filed November 13, 1995).

⁴ See Respondent's Answer, Second, Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh Defenses.

As discussed above, Respondent has raised a factual issue relating to the registration of the Towelettes by the product's manufacturer, HCP. Respondent asserts in its Answer, Third Defense, that, on information and belief, EPA advised HCP that the Towelettes need not be registered separately from the Wipeout Disinfectant Solution, and that EPA is now estopped from alleging that their distribution is a violation of FIFRA. This defense is supported by the Declaration of Frank Midghall filed in the HCP litigation.⁵ In considering a motion for accelerated decision, it is axiomatic that the record must be construed in the light most favorable to the non-moving party. Under this standard, a factual issue is raised concerning the registration of the Towelettes sufficient to defeat the motion on the liability of Respondent.

Since the motion for accelerated decision is denied on Respondent's liability, it must also be denied on the amount of the penalty. In addition, I note that the penalty sought is the maximum permitted under FIFRA for the alleged violations. Respondent's Answer on its face is sufficient to place the amount of the penalty at issue in these circumstances without requiring the empty exercise of opposing a motion for accelerated decision.

Summary of Rulings

1. Respondent's motion to stay this proceeding is denied. The prehearing exchanges remain due on March 19, 1996, with replies due April 19, 1996. In addition to the items required in Judge Lotis' Order of September 28, 1995, the parties are also directed to include a resume or c.v. for each proposed expert witness.

2. Complainant's motion for accelerated decision is denied with respect to both Respondent's liability and the amount of the civil penalty.

Andrew S. Pearlstein

Andrew S. Pearlstein
Administrative Law Judge

Dated: February 28, 1996
Washington, D.C.

⁵ See footnote 3 above.