

THE COURT OF COMMON PLEAS
PIKE COUNTY, OHIO

STATE OF OHIO, EX REL
RICHARD CORDRAY,
ATTORNEY GENERAL OF OHIO,
PLAINTIFF

CASE NO.: 493-CIV-01

-VS-

FRED T. MILLER, ET AL.,
DEFENDANTS

DECISION AND JOURNAL ENTRY

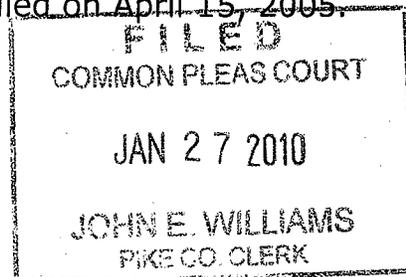
This cause came on for hearing upon the Plaintiff, State of Ohio's, Written Charges In Contempt, Motion To Show Cause and Request For Hearing filed on behalf of the Plaintiff against Defendants, Fred T. Miller and Miller Salvage, Inc., on November 7, 2006.

Miller Land Company was added as a party Defendant on March 19, 2007.

The Plaintiff's motion asserts two charges of contempt.

In the first charge, the Plaintiff asserts that the Defendants should be found in contempt of court as in violation of Article IV, Paragraph 5j, Page 5 of the "Consent Order" filed on April 15, 2005, in that the Defendants have failed to comply with the required management of leachate levels.

In the second charge of contempt, the Plaintiff asserts that the Defendants should be found in contempt for failing to pay stipulated penalties as provided in such "Consent Order" filed on April 15, 2005.



VOL 201 060437

The Plaintiff's motion requests the following relief:

- A. Pursuant to R.C. 2705.05(A)(1) of the Court's inherent power to coerce compliant conduct, impose a fine in the amount of Two Hundred Fifty Dollars (\$250.00) per day and a term of imprisonment of thirty (30) days on Defendant, Fred Miller, to coerce compliance with the terms of the Consent Order on April 15, 2005.
- B. Order the Defendants to come into full compliance with all terms and conditions of the Consent Order April 15, 2005, including payment of stipulated penalties.
- C. Order Defendants to provide for and implement additional measures as are necessary to comply with Consent Order 4/15/05, including, but not limited to, the immediate and legal removal of the leachate.
- D. Order Defendants to comply completely with all applicable state and local laws, regulations and ordinances;
- E. Order Defendants to pay all court costs associated with this case, including witness fees, extraordinary enforcement and litigation costs, and attorneys fees for prosecution of this contempt action;
- F. Grant such other relief as this Court may deem necessary and appropriate.

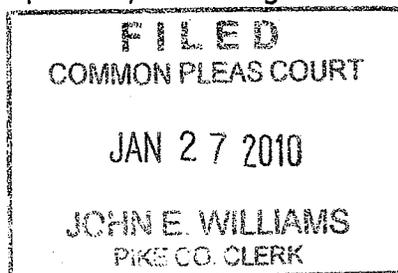
VOL 20100438

In its closing arguments, the Plaintiff has amended in certain respects its request for relief, as follows:

RELIEF SOUGHT

Plaintiff, State of Ohio, moves the Court to:

- a. Order Defendants to comply with the Preliminary Injunctive Relief provisions of the April 15, 2005 Agreed Judgment Entry;



- b. Order Defendants to pay a stipulated penalty of \$637,500 for failure to comply with Paragraph 5.e. of the April 15, 2005 Agreed Judgment Entry from January 1, 2006 through December 1, 2007.
- c. Order Defendants to pay a stipulated penalty of \$219,500 for failure to comply with Paragraph 5.f. of the April 15, 2005 Agreed Judgment Entry from January 15, 2007 through October 15, 2007.
- d. Order Defendants to pay a stipulated penalty of \$25,000 for failure to comply with Paragraph 5.j. of the April 15, 2005 Agreed Judgment Entry from October 19, 2006 through November 28, 2006, from December 6 through December 11, 2006, from December 16 through December 22, 2006, and from January 5 through January 17, 2007.
- e. Order Defendants to pay a stipulated penalty of \$724,500 for failure to comply with Paragraph 5.l. of the April 15, 2005 Agreed Judgment Entry from October 15, 2005 through December 1, 2007.
- f. Order Defendants to pay a stipulated penalty of \$93,500 for failure to comply with Paragraph 5.m. of the April 15, 2005 Agreed Judgment entry from November 1, 2006 through March 26, 2007;
- g. Order Defendants to pay the costs of this action;
- h. Order Defendants to pay the reasonable attorney fees assessed by the Office of the Attorney General;
- i. Grant such other relief as this Court may deem necessary and appropriate; and
- j. Retain jurisdiction of this case until such time that Defendants fully comply with the Court's Orders.

There appears to be little or no controversy concerning much of the background of the case. As indicated in the post-hearing brief of Defendants, Miller Salvage, Inc., and Fred Miller:

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COMMON PLEAS COURT
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VOL 201 PG 0439

Defendant Fred Miller began operating a wood waste recycling business at the Laparrell Road site in approximately 1993. In 1999, Defendant, Fred Miller, sold the subject site to his brother, Doug Miller, in 1999. At that time, the size of the wood waste pile was 2.5 acres. 11/30/07 Tr. at p 195.

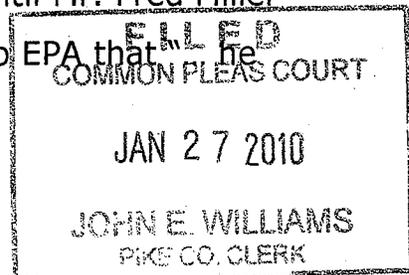
When Defendant Fred Miller sold the wood waste recycling and mulch business to Mr. Douglas Miller in 1999 for sum of three million dollars (\$3.0 million). \$1.2 million of this amount was in notes for which Mr. Fred Miller did not receive payment. 11/30/07 Tr. at p 196.

Mr. Douglas Miller executed a "Consent Order For Preliminary Injunction" ("COPI") with the State on November 18, 2001, which contained various requirements which Mr. Douglas Miller was to meet. Defendant Fred Miller was not a signatory to the COPI. See State's Exhibit No. 3.

After executing the COPI, Mr. Douglas Miller operated the site for two weeks before abandoning the site. 12/19/06 Tr. at p. 157.

Before abandoning the site, Mr. Douglas Miller did not comply with any of the requirements of the COPI. 12/19/06 Tr. at p. 156.

No one operated the site thereafter until Mr. Fred Miller approached the Ohio EPA and stated to Ohio EPA that he



VOL 201 PG 0440

would do what he could to comply with the terms of the 2001 Orders [COPI]." 12/19/10 Tr. at p. 157.

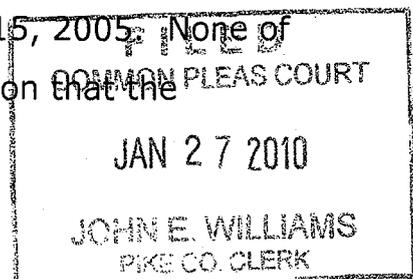
Defendant Fred Miller took the business back over and agreed with Mr. Dan Bergert, Ohio EPA to clean up the site. Mills Pride agreed to start paying Mr. Fred Miller at that time to take dry sawdust and mix it with wet sawdust at the site and sent it off-site to Stone Container. 11/30/07 Tr. at p. 197.

When Defendant Fred Miller re-assumed control over the site in early 2002, the wood waste pile had grown to more than 94 feet and covered 5 acres. 11/30/07 Tr. at p. 198.

As further showed by the Court's docket on January 24, 2005, the Plaintiff filed a Motion For Preliminary Injunction in this action, alleging, *inter alia*, that "Defendants Fred Miller and Miller Salvage, Inc. ... continue to violate R.C. Chapter 6111 and the rules promulgated there under as a result of Defendants improper maintenance of a leachate collection pond at 1617 Laparrell Road in Latham, Pike County, Ohio."

Proceedings upon the Plaintiff's Motion for Preliminary Injunction resulted in the "Agreed Judgment Entry Resolving the State's Motion for Preliminary Injunction" filed in this action on April 15, 2005, upon which the Plaintiff's present contempt Motion is based.

Upon the evidence, the Court finds that there has been a failure to comply with the Agreed Judgment Entry of April 15, 2005. None of the Defendants contest the Plaintiff's asserted position that the



VOL 201 PG 0441

Defendants have not caused the provisions of paragraphs 5e, 5f, 5j, 5l and 5m of Article IV or the stipulated penalties provisions of Article V to be complied with.

The injunctive provisions of Article IV, paragraphs 5e, 5f, 5j, 5e and 5m, state as follows:

e. Within thirty (30) days after completion of the new leachate collection pond, Defendants shall remove and properly dispose, land apply, or treat all remaining accumulated leachate, solid waster, and sediments from the existing pond. Within seven (7) days of the removal of all solid waste and leachate from the old pond, either 1) remove the existing pond, or 2) repair and reline the existing pond in accordance with the standards set forth in PTI Application number 06-4142 to use as a back up to the new pond.

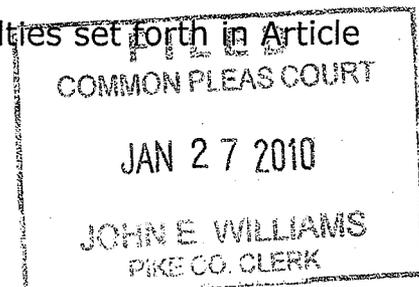
f. Within three (3) months after the effective date of this Order, and every three (3) months thereafter, Defendants shall cause the removal of at least 9,000 tons of wood waste material from the new wood waste stockpile.

j. Defendants shall maintain at least two (2) feet of freeboard space in the new leachate pond and at least one (1) foot of freeboard space in the existing leachate pond. Defendants shall immediately commence proper removal of leachate for authorized land application, treatment, or permitted disposal should the freeboard space become less than two (2) feet in the new pond or one (1) foot in the existing pond.

l. Within one hundred eighty (180) days after the effective date of this Order, the Defendant shall completely remove all remaining wood waste material from the old footprint located between the new wood waste stockpile and Kincaid Creek.

m. Defendants are prohibited from constructing and/or using impoundments in the waste pile for purposes of storing leachate.

The provisions concerning stipulated penalties set forth in Article V are as follows:



VOL 20100442

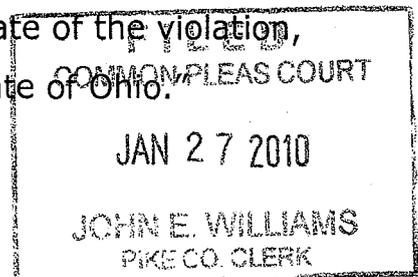
STIPULATED PENALTIES

7. In the event that Defendants fail to comply with any of the requirements imposed by this Agreed Entry, Defendants shall immediately be liable for and shall pay stipulated penalty according to the following payment schedule:

- a. for each day of failure to meet a requirement, up to thirty (30) days, Two Hundred Fifty Dollars (\$250.00) per day for each requirement not met;
- b. for each day of failure to meet a requirement, from thirty-one (31) to ninety (90) days, Five Hundred dollars (\$500.00) per day for each requirement not met;
- c. for each day of failure to meet a requirement, over ninety (90) days, One Thousand Dollars (\$1,000.00) per day for each requirement not met.

8. In the event Defendants fail to meet any of the requirements of this Agreed Entry, the Defendants shall immediately be liable for payment of stipulated penalties imposed by this Order without prior demand by the State of Ohio. The imposition, payment and collection of stipulated penalties pursuant to violations of this Agreed Entry shall not prevent the State from pursuing additional remedies, civil, criminal or administrative, for violations of applicable laws.

9. Any such stipulated penalty shall be paid by delivering to Amy Laws or her successor, Attorney General's Office, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3400, a certified check for the appropriate amount immediately upon the date of the violation, made payable to the order of "Treasurer, State of Ohio."



VOL 20 | PG 0443

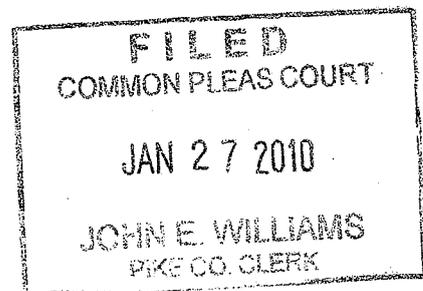
Pursuant to Article VII at page 7 of the Agreed Judgment Entry, the Court retains jurisdiction of this action for the purpose of enforcing the provisions of the Agreed Judgment Entry.

The ultimate, contested issues in this action are: First, whether the failure to comply with the relevant provisions of the Agreed Judgment Entry is contemptuous. Second, the related issue of identifying the contemnor(s), if any. Third, the appropriate sanction, if contempt is found.

Considering the second issue, it is clear that, of the three defendants now named in this action, only Defendants Fred Miller and Miller Salvage, Inc. were parties defendant in the action at the time of issuance of the Agreed Judgment Entry filed April 15, 2005. Defendants Fred Miller and Miler Salvage, Inc., through its agents, appeared in court and entered into the Agreement; and the Agreed Judgment Entry was approved by and on behalf of them.

So far as the evidence shows, Rob Miller had not seen the terms of the Agreed Judgment Entry until Miller Land Company was joined in the action on March 19, 2007.

The Court further finds that the evidence is insufficient to show that Miller Land Company was an aider and abettor with respect to any violation of the Agreed Judgment Entry of April 15, 2005, or that Miller Land Company was in active concert or participation with the other Defendants, as concerns the failure to comply with the Agreed Judgment Entry.



The Court concludes that Miller Land Company is not in contempt of court for failure to comply with the provisions of the Agreed Judgment Entry and, accordingly, it is ordered that the Plaintiff's written charges in contempt be, and hereby are, dismissed as to Defendant Miller Land Company.

Upon further consideration of the evidence the Court finds that there has been a significant failure on the part of Defendant Miller Salvage, Inc. and Defendant Fred T. Miller to comply with the injunctive provisions of Article IV, paragraphs 5e, 5f, 5j, 5l and 5m of the Agreed Judgment Entry filed on April 15, 2005. The Court further finds that there has been a total failure on the part of such Defendants to comply with the stipulated penalty provisions of Article V of such Agreed Judgment Entry.

The Court finds that the termination of the contract between Mills Pride and Defendants Fred T. Miller and Miller Salvage, Inc. for the hauling of saw dust to Stone Container, although a mitigating circumstance, does not excuse the magnitude of the failure of these Defendants to comply with the injunctive provisions of the Agreed Judgment Entry, as shown by the Plaintiff's post-hearing brief.

Whether or not a conscious decision was made on the part of Defendants Fred T. Miller and Miller Salvage, Inc. to minimize business losses once the clean-up measures at the sawdust/leachate site ceased to be income-producing, the Court finds that an insufficient effort was made by these Defendants to comply with the provisions of the Agreed Judgment Entry as to the injunctive provisions of Article IV, paragraphs 5e, 5f, 5j, 5l and 5m, after termination

of the Mills Pride
COMMON PLEAS COURT
JAN 27 2010
JOHN E. WILLIAMS
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VOL 201 PG 0445

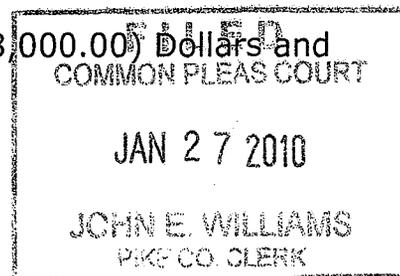
contract. The Court further finds that such Defendants' failure in this regard is willful.

The Court further finds, based upon the evidence, including the income of Fred T. Miller over the period of default, and the ability-to-pay analysis of the Defendants, that the Defendants had the ability to contribute toward the stipulated penalties, and that their failure to contribute anything at all toward the penalties is not excused and is willful.

The Court finds and concludes that Defendant Fred T. Miller and Defendant Miller Salvage, Inc. are in contempt of court for their failure to comply with the injunctive provisions of Article IV, paragraphs 5e, 5f, 5j, 5l and 5m, of the Agreed Judgment Entry filed on April 15, 2005, and that such Defendants are also in contempt of court for their total failure to comply with the stipulated penalties provisions of Article V of the Agreed Judgment Entry.

The Court further finds that there is no just reason for delay.

It is therefore **ORDERED** that Defendant Fred T. Miller is sentenced to serve thirty (30) consecutive days in jail for contempt of court. It is further **ORDERED** that execution of such 30-day jail sentence is hereby suspended, however, until further order of the Court, in order to afford Defendants Fred T. Miller and Miller Salvage, Inc. an opportunity to purge themselves of contempt. It is further ordered that such Defendants may purge themselves of the contempt of court adjudged herein by paying stipulated penalties to the State of Ohio totaling Eighteen Thousand and no/100 (\$18,000.00) Dollars and

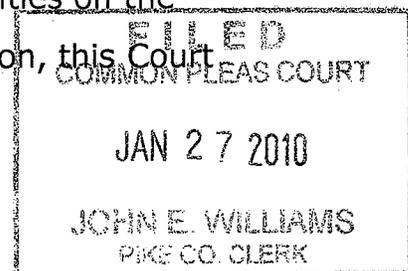


by paying the court costs of this proceeding, as hereinafter provided; and it is further ordered that, unless sooner paid, the Defendants shall pay such stipulated penalties of \$18,000.00, or cause the same to be paid on their behalf, in consecutive monthly installments of not less than One Thousand Dollars (\$1,000.00) each, commencing with a monthly payment in the amount of \$1,000.00 due on March 1, 2010, and with a payment of at least \$1,000.00 due on the 1st day of each and every month thereafter until the total sum of \$18,000.00 in stipulated penalties has been paid in full. Such Defendants shall direct all payments toward stipulated penalties as provided in Article V, paragraph 9, of the Agreed Judgment Entry of April 15, 2005.

It is further ordered that such Defendants shall pay all court costs of this proceeding within ninety (90) days after the date of filing of this Decision and Journal Entry.

It is further ordered that if such sum of \$18,000.00 as stipulated penalties and all court costs of this proceeding are paid by or on behalf of Defendants Fred T. Miller and Miller Salvage, Inc. in a timely manner as hereinabove ordered, then the 30-day jail sentence shall be vacated. If the Defendants fail to make any monthly payment of stipulated penalties when due, or fail to pay the total court costs of this proceeding within 90 days after the date of filing of this Decision and Journal Entry, then the 30-day jail sentence may be executed immediately.

Although evidence was presented at the hearing indicating that the USEPA has supervised significant clean-up activities on the sawdust/leachate site that is the subject of this action, this Court



VOL 201 PG 0447

makes no finding that the cleanup at the site is complete or that all provisions of the Agreed Judgment Entry of April 15, 2005, have been accomplished.

This Court reserves jurisdiction to enforce any and all executory provisions of the Agreed Judgment Entry of April 15, 2005, and to enforce any and all provisions of this Decision and Judgment Entry.

This Decision of Journal Entry shall constitute a final appealable order, and the Clerk of Courts is directed to serve notice of the issuance of this Decision and Journal Entry and of the date of entry of the same upon the journal, upon all parties herein not in default for failure to appear, by ordinary U.S. mail.



JUDGE 01-27-10

VOL 20 | PG 0448

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