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Nadel

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

STATE OF OHIO, ex. rel. JIM PETRO
ATTORNEY GENERAL OF OHIO

CASE NO.: A0603011

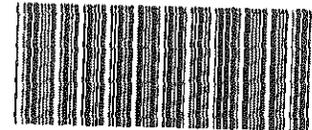
Plaintiff,

JUDGE: NADEL

v.

JUDGMENT ENTRY

MASS REALTY, LLC, et al.,



D92681756

Defendants.

This matter has come before the Court on all issues presented at a Trial held on March 18 & 19, 2008, and all issues presented at a Hearing for Civil Penalty held on February 18, 2011.

This Entry incorporates by reference herein the Court's previous Findings of Fact and Conclusions of Law, which were filed on March 3, 2009. A copy of these Findings of Fact and Conclusions of Law are attached hereto as Exhibit "A."

Based on all of the foregoing, the Court hereby:

- 1) Finds in favor of Jeffrey J. Robinson on all claims of Plaintiff against him, and that Jeffrey J. Robinson be dismissed as a party from this action.
- 2) On Plaintiff's claims for injunctive relief against defendant Mass Realty, LLC ("Mass"), the Court finds in favor of Mass since there is no evidence in the record that the Western Plume contaminants are hazardous wastes, that they have ever mixed or formed a junction with any other deeper well waters, or that the failure of Mass to address them in accordance with the Director's Final Findings and Orders issued on February 12, 2001 ("2001 Orders") has caused any suffering, injury, or loss to the State of Ohio and the Ohio Environmental Protection Agency

("Ohio EPA"). Plaintiff's request for injunctive relief directing Mass to further comply with the 2001 Orders, R.C. 3734, and 6111 is therefore denied as to Mass and its agents, representatives, employees, successors, or assigns, under the names that they presently use or any other names they use through any corporate or other device, and those acting in concern and participation with Mass directly or indirectly.

- 3) On Plaintiff's claim that the Court order Defendants to pay a civil penalty for violations of R.C. 6111 and R.C. 3734, in an amount up to \$10,000.00 for each day of each violation, the Court first notes that civil penalties under these two statutory provisions are "designed to deter conduct which is contrary to a regulatory scheme."¹ In determining whether a penalty is appropriate, the Court should consider "the good or bad faith of the defendant, the financial gain to the defendant, as well as the environmental harm."² For each element, the Court finds as follows:

- a. **Good/Bad Faith:** There is no evidence in the record of any bad faith on the part of the Defendants; indeed, the only substantial remediation performed on the property since the contamination was discovered decades ago was done by Mass, and it remediated over 90% of the contamination. In addition, the failure of Defendants to perform enough post-remediation tests under the 2001 Orders was the result of the financial hardship of the company. Its sole tenant broke a five-year lease after only two years, and the anticipated costs of rehabilitating the structure on the property, as computed by Mass' expert and verified by the

¹ *State ex rel. Celchreze v. Thermal Tron, Inc.* (1992), 71 Ohio App.3d 11, 19.

State of Ohio, was underestimated by \$30,000.00 when Mass secured construction financing. This left the company nearly insolvent. Even then, however, Mass did not abandon the property: it provided as many reports to the Ohio EPA as it could, but it could not afford to produce them quarterly. Accordingly, the Court finds that the Defendant acted in good faith, despite its non-compliance.

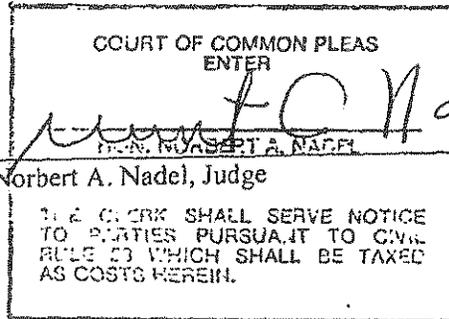
- b. **Financial Gain of Defendant:** As already discussed above, Mass' financial problems began shortly after it took over the property, and all of the evidence presented at trial established that the company operated with either an insignificant profit or an outright loss between 2001 and 2005. To the extent the company had any money to spend, it directed it toward the rehabilitation of the building so it could develop a revenue stream again which could be used to address the contamination. Finally, neither member of Mass took any income from the business for any reason, including their work trying to remediate the property, and there was no evidence that either member took a distribution from the company at any time. Accordingly, the Court finds that there was no net financial gain to the Defendant arising from its failure to comply with the 2001 Orders.
- c. **Environmental Harm:** The Court found in its Findings of Fact and Conclusions of Law that there was no evidence the water in the Western Plume combined or effected a junction with natural surface or underground waters, which classifies it as a "private water" under R.C. 6111. In addition, the Plaintiff stipulated that it was "unlikely" that the

² Id.

contamination from the Mass Property would ever reach the Wyoming Aquifer, and that there is no existing evidence that the Wyoming Aquifer has ever been contaminated by the wells on the Mass property. Finally, there is no evidence that the contamination here has ever caused or significantly contributed to an increase in serious, irreversible, or incapacitating disease, or that it poses a substantial or even potential hazard to human health or safety or to the environment. Accordingly, the Court finds very minimal environmental harm in this case arising from the failure of Mass to carry out the 2001 Orders as written.

The foregoing conclusions weigh against a heavy fine since under the circumstances it would be unlikely to have any deterrent effect. The Defendant was the only party who ever managed to substantially reduce the contamination, and it did so despite the fact that it received no financial gain for its effort. Furthermore, Mass' violation of the 2001 Orders was not willful; it was the result of factors beyond its control which are as likely to happen again with a large fine as they are with a smaller one. In light of the foregoing, the Court finds that Defendant Mass Realty, LLC should be assessed a civil penalty of \$5,000.00.

- 4) On Plaintiff's request for response costs, the Court finds in favor of the Defendant. The identification, compilation, implementation, and recovery procedures for response costs are the result of routine, agency-wide policies for which no administrative rules have been promulgated by the Ohio EPA as required by R.C. 3734.12 and R.C. 6111.03(G). Under R.C. 119.02, actions taken under any such policies are invalid. Accordingly, Plaintiff is not entitled to recover its response costs.



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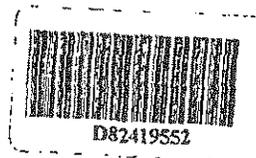
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Exhibit "A"



COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO



STATE OF OHIO, ex. rel. JM PETRO	:	Case No. A0603011
ATTORNEY GENERAL OF OHIO	:	(Judge Nadcl)
Plaintiff	:	
-vs-	:	
MASS REALTY, LLC, et al.	:	<u>FINDINGS OF FACT AND</u>
Defendants	:	<u>CONCLUSIONS OF LAW</u>

This matter came on for trial and the Court having heard the evidence, the following is submitted as the Court's findings of fact and conclusions of law:

FINDINGS OF FACT

1. Mass Realty, LLC, an Ohio limited liability company ("Mass"), purchased 614 Shepherd Drive, Lockland, Ohio (the "Site") on February 5, 2001. The Ohio Environmental Protection Agency ("EPA") issued Director's Final Findings and Orders ("Orders") to Mass on February 12, 2001 ("2001 Orders"), directing Mass to perform remediation at the Site to reimburse the EPA for \$89,296.50 in "Response Costs" for its prior activities on the property. Mass is comprised of two members: Jeffrey J. Robinson and Michael Story.

2. The Site was already subject to EPA Orders at the time of Mass' purchase. Mass did not contribute to the contamination on the Site, which is situated amidst a heavily contaminated area.

3. Mass successfully remediated the contamination at the end of 2002 and the EPA gave Mass permission to shut down the ground water gradient control system ("GWGC") on the property as a result.

Exhibit "A" (continued)

4. Contamination levels were measured at well MW-3 located within the "Western Plume" contamination area. Testing from 2002 to present shows that contaminant levels declined significantly in 2002 and have remained near those levels ever since.

5. The 2001 Orders required Mass to submit eight consecutive quarterly test results to the Ohio EPA once remediation standards were met before the 2001 Orders would terminate. While Mass performed tests after remediation, it did not do so quarterly. Mass did retain Tencon Environmental Services and Kemron Environmental Services after 2003 to test the Site. The EPA received copies of their results, which showed that the contamination remained substantially unchanged from its remediated levels in 2002.

6. The present contamination is in a shallow well having a depth of ten feet and it is unlikely to contaminate the Wyoming Aquifer eighty feet below.

7. The EPA allocates an hourly wage to each contaminated site for every EPA employee assigned to it, regardless of function, and this hourly wage includes charges for administrative and overhead costs.

8. The EPA's collection of administrative expenses as a portion of Response Costs is the result of an established policy, as set forth in attachments to their annual billings to Mass.

9. No rule has been promulgated by the Ohio EPA pertaining to the collection of Response Costs and no provisions relating thereto appear in the Ohio Administrative Code.

10. Mass had a checking account at Fifth Third Bank, and checks written on this account required the signature of both Members. Mass regularly sent various items of correspondence on company letterhead and signed by Jeffrey J. Robinson as a member. Mass filed tax returns for the years 1999 to present in the name of Mass Realty, LLC.

11. When Mass acquired the Site, Mass Destruction, LLC, a company owned and operated by Michael Story, was to lease the building on the property for \$5,000.00 per month.

Exhibit "A" (continued)

Beginning in 2003, Mass Destruction fell behind on its rental payments, often paying nothing or substantially less than the full rent owed per month leaving Mass unable to pay for the monitoring. In addition, unanticipated costs of rehabilitating the building increased project expenses over \$30,000.00 beyond initial estimates.

12. Mass Destruction, LLC had exclusive possession of the Site from 2001 to the end of 2005. Michael Story met regularly with Jeffrey Robinson during this time to discuss Mass' direction and various plans for complying with the 2001 Orders.

13. During Mass Destruction's occupancy, Michael Story dealt with Ohio EPA representatives on Site and also with employees of the Payne Firm, the environmental engineering company that Mass contracted to handle the Site's remediation.

14. Mass applied for a loan through the Ohio Water Development Authority ("OWDA") to purchase and remediate the Site, and this loan was material to Mass's decision to purchase the property. Mass Destruction's failure to pay rent, however, left the company unable to comply with the 2001 Orders.

15. Proceeds of the OWDA loan were used to remediate and monitor the site.

16. The State of Ohio and the EPA have suffered no injury or loss relating to Mass' noncompliance.

17. There is no evidence in the record that water from the western plume on the Mass Site is mixing with any shallow underground waters of deeper well waters, including water from the Wyoming Aquifer located eighty feet below.

18. There is no evidence in the record that water from the western plume or the contaminants in it have been directly or indirectly responsible for any illness, disease, or other threat to human health or safety, or to the environment.

Exhibit "A" (continued)

19. There is no evidence in the record that the water or contaminants in the western plume constitute hazardous wastes or waters of the state.

20. It is possible that the source of the contamination in the Western Plume is originating from a location not on the Site, and the EPA knew this possibility at the time Mass purchased the Property but did not disclose it to the Defendants.

CONCLUSIONS OF LAW

1. O.R.C. 3734.13, 6111.07, and 6111.99, under which the EPA is proceeding, contain no provisions authorizing the Director to collect Response Costs.

2. As a creature of statute, the Ohio EPA has only such authority as is conferred upon it by the General Assembly. EPA may not recover Response Charges from Defendants.

3. Under O.R.C. Chapter 1701, et seq., corporations are required to keep minute books of shareholder meetings, prepare and retain annual reports, and hold annual shareholder meetings. Limited liability companies are governed by O.R.C. Chapter 1705, which contains no such requirements.

4. Generally, the debts, obligations, and liabilities of a limited liability company are solely the responsibility of the limited liability company.

5. There is insufficient evidence to show that Jeffrey J. Robinson's control over Mass was such to hold him liable for its obligations.

6. There is also insufficient evidence to establish Robinson used Mass to perpetuate a fraud on the EPA.

7. O.R.C. 3734.13(C) allows the assessment of fines up to \$10,000.00 per day for the violation of Chapter 3734.

8. O.R.C. 6111.01(h) exempts from the definition of waters of the state those "private waters that do not combine or effect a junction with natural surface or underground waters."

Exhibit "A" (continued)

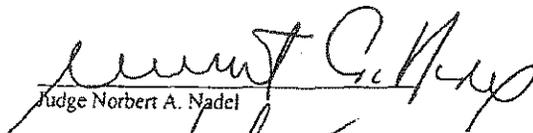
9. Since there is no evidence in the record that the Western Plume contaminants meet the criteria of either 3734.01 or 6111.01(h), they are not hazardous wastes affecting waters of the state and are not subject to the penalty provisions of the Code.

10. The EPA did not disclose the possibility to Mass that the contamination of the western plume could be originating off-Site, giving Mass reason to investigate neighboring properties before agreeing to the 2001 Orders.

11. All claims of Plaintiff against Jeffrey J. Robinson, the Court finds in favor of Defendant Jeffrey J. Robinson and he should be dismissed as a party from this action.

12. On Plaintiff's claims for injunctive relief against Defendant Mass, Mass should be ordered to continue testing and to comply with the 2001 Orders. Should Mass comply with the 2001 Orders, no penalties should be assessed against it because of its prior breach. If Mass fails to comply with the 2001 Orders, penalties should be awarded to Plaintiff.

13. The Court finds in favor of the Defendants on the remaining claims of Plaintiff.


Judge Norbert A. Nadel

Date: 3/3/08

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