Montgomery County Common Pleas Court
General Division

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IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

CIVIL DIVISION

STATE OF OHIO, ex rel.
NANCY ROGERS,
ATTORNEY GENERAL OF OHIO,

Plaintiff,

-vs-

REPUBLIC ENVIRONMENTAL
SYSTEMS (OHIO), INC., et al.,

Defendants.

CASE NO. 98 CV 3449

(Judge Mary Wiseman)

FINDINGS OF FACT AND CONCLUSIONS OF LAW; DECISION, ORDER AND ENTRY HOLDING DEFENDANTS REPUBLIC ENVIRONMENTAL SYSTEMS, INC., REPUBLIC ENVIRONMENTAL SYSTEMS OHIO, INC., BRAC, INC., McCABE CORP., McCABE ENGINEERING CORP., AND EDWARD McCABE JOINTLY AND SEVERALLY LIABLE IN CONTEMPT

FINDINGS OF FACT

General Facts Concerning the Site and the Consent Order[1]

1. On July 12, 1990, the Ohio Hazardous Waste Facility Board issued a hazardous waste installation and operation permit for a facility located at 636 North Irwin Street, Dayton, Ohio

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1 This Court took testimony and evidence in this case on November 27, 2007. On that date, the Court heard testimony from Mr. Harold O'Connell, a supervisor within OEPA's Department of Hazardous Waste Management; Mr. Ike Wilder, employed by OEPA's Central Office as an Environmental Specialist II; and Brian Gitzinger, an OEPA Environmental Specialist II. On April 29, 2008, the Court took additional proof. On April 29, 2008, the Court heard testimony from Mr. Harold O'Connell and Mr. Brian Gitzinger. On April 30, 2008 the following witnesses testified: Ms. Elizabeth L. Rothschild, a former OEPA Environmental Specialist III; Mr. Ike Wilder; and Mr. Edward McCabe, President of McCabe Corp. On September 16, 2008, the Court heard additional testimony from Mr. McCabe.

(the "Facility") to Ecolotec, Inc., with an effective date of October 5, 1990. [States' Exhibit 9,¶ 1 *(Letter dated June 11, 2007 from McCabe Corp. To Ohio EPA);* McCabe Testimony, September 16, 2008 Hearing Transcript, p. 191.]

2. Ecolotec, Inc., was subsequently renamed Republic Environmental Systems (Ohio), Inc., Republic Environmental Systems, Inc., and/or BRAC, Inc. (collectively the "Republic Defendants"). [State's Exhibit 9, ¶ 2 (*Letter dated June 11, 2007 from McCabe Corp. To Ohio EPA).*

3. The terms and conditions of the 1990 permit remained effective and are binding on any owner of the Facility until any and all contamination is removed or controlled through a regulatory process known as closure and post-closure.

4. On September 18, 1998, Plaintiff State of Ohio filed a civil complaint against the Republic Defendants for alleged violations of Ohio's hazardous waste laws. See Plaintiff Exhibit 1, 9. On September 18, 1998, the State and Republic Defendants filed a Consent Order to resolve environmental concerns at the Facility. The terms "Defendant" or "Defendants," as used herein, denotes the Republic Defendants, Defendant Edward M. McCabe, Defendant McCabe Engineering Corp., and Defendant McCabe Corporation unless specified otherwise. Testimony Harold O'Connell, November 27, 2007, First Hearing Transcript p. 20, ¶¶ 23-24; Plaintiff's Exhibit 1; Plaintiff's Exhibit 9.

5. The Facility at 636 North Irwin Street, Dayton Montgomery County, Ohio is a "hazardous waste facility." Testimony Harold O'Connell, November 27, 2007, First Hearing Transcript p. 21 ¶¶ 1-4. It is a classic brownfield site in an urban area. The Facility sits in the City of Dayton's Well Field Protection Zone, nearby a drinking water aquifer that must be protected from contamination.

6. The Consent Order required the Republic Defendants to take numerous steps to address suspected and confirmed contamination at the Facility and to otherwise come into compliance and maintain compliance with Ohio hazardous waste laws and rules as set forth in R.C. Chapter 3734 and Ohio Adm. Code Chapters 3745-50 through 3745-69, including Facility closure. Testimony Isaac Wilder, November 27, 2007, First Hearing Transcript p. 80 ¶¶ 309; Plaintiff's Exhibit 1.

7. In addition to the Republic Defendants, persons bound by the Consent Order, as identified therein, included " the parties to this action, their agents, officers, employees, assigns, successors in interest and any person acting in concert, privity or participation with them who receives actual notice of this Consent Order whether by personal service or otherwise." Testimony O'Connell, November, 27, 2007, First Hearing Transcript p. 24 ¶¶ 11-25; Plaintiff's Exhibit 1, *Consent Order, III. Persons Bound,* p. 3 ¶ 3.

8. The Consent Order required the Republic Defendants to provide a copy of the Consent Order to each contractor employed to perform any work required by the Consent Order. Plaintiff's Exhibit 1, *Consent Order, III. Persons Bound,* p.3, ¶ 3.

9. The Republic Defendants provided a copy of the Consent Order to Defendant Edward M. McCabe, owner of McCabe Corporation, a contractor employed to perform any work required by the Consent Order. Moreover, the Consent Order was a public record available in the Court records and at OEPA. Edward McCabe testified that McCabe Engineering Corp. does not exist but was accidentally used as the name for McCabe Corp. at one point in time. This Court will consider McCabe Engineering Corp. a fictitious name used for McCabe Corp.

10. On or about June 29, 1998, prior to the entry of the Consent Order, Defendant Republic Ohio transferred ownership of the Facility to Defendant McCabe Engineering, Inc.

Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 197, ¶ 22-24, p. 198, ¶ 1; Testimony Wilder, Nov. 27, 2007, First Hearing Trans. p. 86, ¶¶ 13-25, p. 87, ¶¶ 1-15.

11. On December 17, 1997, Republic Environmental Systems Ohio, Inc. had entered into a Purchase Agreement with Edward McCabe or his designated company, whereby McCabe agreed to purchase from Republic the Facility located at 636 North Irwin Street, Dayton, Ohio. Republic was the Seller and McCabe the Purchaser.

12. The Purchase Agreement states in Section 7 that " the Premises will be transferred 'as is', and Purchaser will accept the property in the current condition without any other warranty as to the condition (including environmental) of the Premises, any improvements, or personal property thereon." There is no evidence that McCabe conducted any independent environmental assessment of the property at or prior to the time of purchase, as one would think a reasonable prudent purchaser would do for an "as is" purchase of an urban brownfield property. The Purchase Agreement incorporates two Exhibits. Exhibit II is dated December 17, 1997 and signed by Edward McCabe.

13. Exhibit II to the Real Estate Purchase Agreement states " Purchaser hereby assumes all of Seller's responsibilities and liabilities to complete closure and other remedial requirements at the Premises, all as detailed in Seller's closure plan for the facility and any consent agreements with governmental authorities." The evidence clearly establishes that the McCabe Defendants purchased the Facility and, as between Republic and McCabe, McCabe assumed responsibility for the closure and clean-up. That sale, however, did not relieve the Republic Defendants from their commitments to OEPA under the Consent Decree and Closure Plan. Republic has provided no authority holding that its sale of the property legally eliminated its obligations to OEPA under the Consent Decree and Closure Plan. There is no evidence that OEPA ever consented to replace the Republic Defendants' obligations for closure with those of the purchaser, the McCabe Defendants. Moreover, this Court

rejects the McCabe Defendant's argument that they purchased the real estate, but not the Facility subject to the Consent Decree and Closure Plan. The McCabe Defendant's argument in that respect is belied by Exhibit II to the Purchase Agreement. Additionally, if responsibility for facility clean-up and closure could be so easily skirted, Ohio's environmental clean-up and protection laws would be meaningless and hollow. Instead, Ohio law considers the buildings and grounds of a once permitted facility to remain a hazardous waste facility until final closure and defines the actual life of a facility as the period between permit issuance and final closure. O.A.C. § 3745-50- 10(A)(2), (39), (41); See also R.C. § 3734.01 (N). Both owners and operators of a Facility are required to file an application to modify the Facility's permit to transfer the operation and ownership of a hazardous waste facility. The Republic Defendants and the McCabe Defendants are jointly and severally liable to OEPA for the Consent Decree obligations in the first instance. The duties and obligations imposed by the Consent Order are imposed jointly and severally. Plaintiff's Ex. 1, p. 2 ¶ I (1)(e) ("Unless otherwise specifically noted in this Consent Order, any requirement, obligation or liability imposed in this Consent Order upon Defendants is imposed jointly and severally.") As between the Republic Defendants and the McCabe Defendants, responsibility will be determined by the terms of their Purchase Agreement and contractual arrangements.

14. The McCabe Defendants amended the approved closure plan, seeking to adjust closure strategies in an effort to accommodate the site's changed conditions. Although the McCabe Defendants amended the closure plan, OEPA found the amended plan deficient. An approved amended closure plan is required by Ohio law and the Consent Decree.

15. McCabe Engineering, Inc., also known as McCabe Engineering Corporation, is a fictitious name of Edward M. McCabe and/or McCabe Corporation. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 198, ¶¶ 22-24, p. 199, ¶¶ 1-15.

16. Defendant Edward M. McCabe is, and at all times relevant to this action, was, the sole shareholder of McCabe Corporation. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 187, ¶¶ 6-8.

17. In conjunction with the transfer of ownership of the Facility, the Republic Defendants entered into a contract in which Defendants Edward M. McCabe and/or McCabe Corporation were to perform closure at the Facility. This agreement was part of the consideration for the transfer of ownership of the Facility. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 139, ¶¶ 15-24. Plaintiff's Exhibit 7, Exhibit II therein.

18. The purchase agreement provides that Defendant Edward M. McCabe and/or McCabe Corporation agreed to perform closure activities at the Facility. Plaintiff's Exhibit 7, Exhibit II, therein.

19. Defendant Edward M. McCabe acknowledged that he had received the final Consent Order by September 1998.

20. Defendant Edward M. McCabe acknowledged that he was aware of the final Consent Order by "November-ish" 1998. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 119, ¶¶ 5-23, p. 180, ¶¶ 22-24, p. 181, ¶ 1.

21. Defendant Edward M. McCabe was solely responsible for the management and operation of Defendant McCabe Corporation and was solely accountable to Ohio EPA regarding environmental compliance issues originating at the former Ecolotec Facility on behalf of McCabe Corporation. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 186, ¶¶ 21-24, p. 187, ¶¶ 1-23.

22. With actual knowledge of the Consent Order, on or about January 5, 2000, Defendant McCabe Engineering Corporation transferred title of the Facility, buildings and land, to Defendant

McCabe Corporation, current owner of the Facility. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 198, ¶¶ 8-11 & 18-21, p. 200, ¶¶ 4-14. Plaintiff's Exhibit 6.

23. On or about February 8, 2002, Defendants BRAC and Republic Ohio released, for the benefit of Defendant McCabe Engineering Corporation an interest in the closure trust fund, once established to close the Facility, upon which Edward M. McCabe relied by later recovering reimbursement from the fund. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 210, ¶¶ 10-19, p. 211, ¶¶ 19-21, p. 212, ¶¶ 16-18; Testimony Wilder, Nov. 27, 2007, First Hearing Trans. p. 100, ¶¶ 12-17, p. 101, ¶¶ 6-7 & 25, p. 102, ¶¶ 1-3. Plaintiff's Exhibit 11.

24. Defendants Edward M. McCabe, McCabe Engineering Corporation, and McCabe Corporation failed to comply with the terms of the Consent Order even after multiple requests to do so by the Ohio EPA. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 188, ¶ 16, p. 189, ¶¶ 13 & 18-21. The McCabe Defendants are the current facility owners, successors in interest, assignees of, and acting in concert, privity, or participation with the Republic Defendants. This Court rejects the McCabe Defendants' argument that they are not successors in interest of the Republic Defendants regarding the Facility.

25. The Director of the Ohio Environmental Protection Agency ("Director") approved the Republic Defendant's Closure Plan on September 9, 1998. Testimony O'Connell, Nov. 27, 2007, First Hearing Trans. p. 26, ¶¶ 7-9; Plaintiff's Ex. 2.

26. Defendant Edward M. McCabe understood what the term "closure plan" meant, and what a facility owner's responsibility was with respect to the Facility. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 28, ¶¶ 6-24, p. 29, ¶¶ 1-2.

27. Defendant Edward M. McCabe identified the Closure Plan approval cover letter and the approved Closure Plan for the Facility. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 37, ¶¶ 12-24, p. 38 (entirety), p. 39 ¶¶ 1-3; Plaintiff's Exhibit 2.

28. Defendant Edward M. McCabe testified that he understood the requirements in the Closure Plan when he signed the real estate purchase agreement. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 44, ¶¶ 16-22.

29. Defendant Edward M. McCabe testified that he received drafts of the Closure Plan prior to executing the real estate purchase agreement in 1997. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 41, ¶¶ 18-22

30. Defendant Edward M. McCabe identified the real estate purchase agreement, and validated his signature and the date of his endorsement therein. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 30, ¶¶ 14-24, p. 31, ¶¶ 1-3, p. 42, ¶¶ 10-24; Plaintiff's Exhibit 7.

31. Defendant Edward M. McCabe testified that he or his companies commenced the work required by the closure plan at the facility. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 42, ¶¶ 10-24, p. 43, ¶¶ 1-5; Plaintiff's Exhibit 2.

32. Defendant Edward M. McCabe testified that he or his companies worked for and performed as a contractor for the Republic Defendants for services completed in support of closure requirements at the Facility. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 191, ¶¶ 5-17.

33. Defendant Edward M. McCabe testified that he understood what financial obligations are required relative to a Facility requiring closure activities through a closure plan. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 50, ¶¶ 15-24, p. 51, ¶¶ 1-10.

34. Defendant Edward M. McCabe testified that when he or his companies commenced work required by the Closure Plan at the Facility, a black tar-like substance was discovered before December 29, 1998, which was not described in the approved Closure Plan. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 96, ¶¶ 5-15, p. 98, ¶¶ 13-15; Plaintiff's Exhibit 2.

35. Defendant Edward M. McCabe testified that he was aware closure cost estimates were lower than what would logically be required on or by March 8, 1999 based on the results obtained from the activities completed by him or his companies at the Facility. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 114, ¶¶ 23-24, p. 115 ¶¶ 1-7.

36. In 1998, OEPA had determined that subsoil remediation was unnecessary. Subsequently, however, OEPA determined that subsoil remediation was required, in addition to the groundwater remediation that was supposed to be underway. O'Connell Testimony (4-28-08). The addition of soil/sub-soil remediation would increase the cost of the Facility's closure. The McCabe Defendants "plead the defenses of fraud and/or misrepresentation, such as bars any right of Plaintiff to recover against these Defendants." McCabe Defendants Answer and Counterclaim, ¶ 107. The factual grounds for this defense appears to be the argument that the Republic Defendants and OEPA, prior to finalizing the Consent Order and Closure Plan, knew about the potential for soil or sub-soil contamination at the Facility, but the Closure Plan did not address that potential assessment and remediation. When the McCabe Defendants began the closure activities, they encountered soil or sub-soil contamination, although it is unclear in the evidence whether all, part, or none of the subsurface contamination that the McCabes encountered was related to the soil/sub-soil contamination that had been observed and documented by OEPA's Ms. Rothschild. In any event, the Court finds no credible evidence that OEPA intentionally made material misrepresentations to the McCabe Defendants, upon which they reasonably relied, in purchasing the Facility. In fact, the McCabe Defendants did not have communications with OEPA about the Facility until after the McCabes had purchased it. OEPA did not know of the McCabe Defendants involvement with the Facility until <u>after</u> the Consent Order and Closure Plan had been finalized and filed. The Court finds no fraud or misrepresentation by OEPA to the McCabe Defendants that would serve as a bar to

OEPA enforcing the Consent Order against them by way of contempt. As to the claims between the McCabe Defendants and the Republic Defendants, the Court makes no findings at this time.

Charge I in Contempt

Failure to Amend the Closure Plan and Complete Closure

37. As approved by the Director, the Closure Plan contained a schedule for the completion of closure activities. Plaintiff's Ex. 2, p. 12, *see* figure I-2, therein.

38. Once the Closure Plan was approved by the Director, Paragraph 10 of the Consent Order required the Defendants to implement the Closure Plan consistent with the requirements in the Closure Plan, pursuant to time frames set forth in the Closure Plan, and consistent with Ohio Adm. Code 3745-55-13. Plaintiff's Ex. 1, *see* p. 5, ¶ 10.

39. Paragraph 11 of the Consent Order ordered the Republic Defendants to submit additional amended closure plan(s) "upon the occurrence of conditions indicated in the most recently approved closure plan requiring such submission or upon the occurrence of conditions indicated in Ohio Adm. Code 3745-55-12(C)(2)." Testimony O'Connell, Nov. 27, 2007, First Hearing Trans. p. 28, ¶¶ 22-25, p. 29, ¶¶ 1-22; Plaintiff's Ex. 1.

40. The Closure Plan at page 13, first paragraph, states that "no contaminated soils are expected to be encountered," and at page 21, second paragraph, that "no soils are expected to be contaminated by operation of the hazardous waste management units at RES (Ohio)…." Testimony O'Connell, Nov. 27, 2007, First Hearing Trans. p. 48, ¶¶ 11-19; Plaintiff's Ex. 2, *see* Attachment 5, therein.

41. Defendant Edward M. McCabe testified that, according to a closing document, no subsurface soil contamination was expected to be discovered during execution of the closure activities required by the Closure Plan. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 127, ¶¶ 5-7.

42. The presence of soil contamination detected in concentrations in excess of the clean criteria was an unexpected encounter, requiring modification of the Closure Plan. Testimony O'Connell, Nov. 27, 2007, First Hearing Trans. p. 48, ¶¶ 16-19

43. The McCabe Defendants submitted an amended Closure Plan to OEPA. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 192, ¶¶ 15-18, p. 208, ¶¶ 5-8.

44. The Ohio EPA sent a written notice of deficiency regarding the amended Closure Plan by certified mail to Defendant Republic Ohio indicating that a revised Closure Plan was due within thirty days. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 208, ¶ 9 & ¶¶ 14-16.

45. Paragraph 12 of the Consent Order states that if Ohio EPA issued a written notice of deficiency to an amended closure plan, such as the subject amended Closure Plan, then a revised plan must be submitted to Ohio EPA within thirty days of the receipt of the notice of deficiency, unless another time is established by Ohio EPA. Plaintiff's Ex. 1.

46. Defendants have not yet filed an acceptable revision to the amended Closure Plan as required by the Consent Order. Testimony O'Connell, Nov. 27, 2007, First Hearing Trans. p. 32, ¶¶ 19-25, p. 33, ¶¶ 1-2; Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 209, ¶¶ 19-24, p. 210, ¶ 1; Plaintiff's Ex. 1 ¶¶ 11-12.

Charge II in Contempt

<u>Failure to Close the Facility</u>

47. Paragraph 10 of the Consent Order required the Defendants to implement the Closure Plan consistent with the requirements in the Closure Plan, pursuant to time frames set forth in the Closure Plan, and consistent with Ohio Adm. Code 3745-55-13. Plaintiff's Ex. 1, *see* p. 5, ¶ 10.

48. The Closure Plan contained a schedule that established the closure would be completed within 180 days after receipt of the Director's approval of the closure plan. Plaintiff's Ex. 2.

49. The Director approved the Closure Plan on September 9, 1998. Testimony O'Connell, Nov. 27, 2007, First Hearing Trans. p. 26, ¶¶ 7-9.

50. Defendants failed to timely close the Facility subsequent to receiving the Director's approval of the Closure Plan as required by paragraph 10 of the Consent Order. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 217, ¶¶ 6-8, p. 218, ¶¶ 20-21, p. 219, ¶¶ 1-3.

Charge III in Contempt

Failure to Monitor Ground Water Contamination

51. On September 9, 1998, Ohio EPA approved a Compliance Monitoring Plan ("GW Plan") for the Facility. The GW Plan was attached to and made part of the Closure Plan. Plaintiff's Ex. 2, *see* Appendix I-2, therein.

52. The purpose of the GW Plan was to address ground water contamination and monitoring at the Facility. Testimony O'Connell, Nov. 27, 2007, First Hearing Trans. p. 28, ¶¶ 12-16.

53. The GW Plan requires that specified wells be sampled quarterly to determine ground water quality at the Facility. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 192, ¶¶ 19-23.

54. Defendants failed to monitor ground water quality in accordance with the GW Plan. Testimony O'Connell, Nov. 27, 2007, First Hearing Trans. p. 33, ¶¶ 18-25, p. 34, ¶¶ 1-19.

55. Paragraph 23 of the Consent Order required Defendants to implement the GW Plan in accordance with the approved plan and Ohio Adm. Code 3745-54-90 through Ohio Adm. Code 3745-55-02. Plaintiff's Ex. 1.

56. Defendants failed to conduct any monitoring during the second, third, and fourth quarters of 1998. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 219, ¶¶ 17-21.

57. Defendants conducted no events in 2002. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 219, ¶¶ 23-24, p. 220, ¶ 1.

Charge IV in Contempt

Failure to Remediate Ground Water Contamination

58. Once contaminant concentrations occurring in the ground water beneath the Facility were detected at levels in excess of the permissible limits established in the GW Plan, Defendants must have implemented remedial activities, which prevent the escape of contaminants past the facility boundary and reduces contaminant concentrations in the ground water to permissible concentrations through a process of remediation. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 195, ¶ 7-15; Plaintiff's Ex. 1, ¶10, requiring compliance with Plaintiff's Exhibit 2, *see* pg. 38, therein, indicating that pursuant to the GW Plan:

> Compliance monitoring AND PERIODIC MAINTENANCE ACTIVITIES WILL BE CONDUCTED IN ACCORDANCE AT THE FREQUENCIES SPECIFIED BY THE COMPLIANCE MONITORING PLAN, AND will continue until such time as the compliance monitoring goals specified in the Compliance Monitoring Plan have been achieved, or until it has been conclusively determined that the groundwater contamination present beneath the facility is solely the result of migration of offsite contamination onto the facility and not the result of facility operations, and the Director of the Ohio EPA formally concurs with this determination.

The methodology for implementation is included in Appendix I-2, therein, *see* p. 15, Section 5.2 requiring submittal of corrective action plan.

59. The ground water beneath the Facility has been contaminated in excess of permissible concentrations as a result of activities originating on the Facility. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 192, ¶ 24, p. 193, ¶¶ 1-3.

60. No remedial activities are currently being implemented with respect to the ground water beneath the Facility. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 195, ¶¶ 23-24, p. 196, ¶ 1.

Charge V in Contempt

Failure to Maintain Written Estimate of Closure Cost, And Adequate Financial Assurance

61. Since the entry of the Consent Order, Defendants have failed to update the written cost estimate for closing the Facility to account for inflation as required by paragraph 8 of the Consent Order. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 220, ¶¶ 17-21; Testimony Wilder, Nov. 27, 2007, First Hearing Trans. p. 78, ¶¶ 21-25, p. 80, ¶¶ 24-25

62. Since September 1998, Defendants have failed to increase financial assurance as necessary to account for inflation and other increases in the cost estimate of closure as required by paragraph 8 of the Consent Order. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 221, ¶¶ 5-10.

63. The Republic Defendants maintained a trust fund as a form of financial assurance. McCabe Ex.s 15 & 18.

64. At one time, the balance of the trust fund exceeded the closure cost estimate in the closure plan. McCabe Ex.s 15 & 18.

65. Based on observations made subsequently during closure activities at the Facility by the McCabe Defendants, a discovery of previously unreported black tar-like substance causing environmental impairment requiring additional remediation suggested that the closure cost estimate was no longer accurate, and as a result the Defendants failed to maintain sufficient funds in the trust

to satisfy the requirements in Ohio Adm. Code 3745-55-40, *et seq.* Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 221, ¶¶ 13-17.

Charge VI in Contempt

Illegal Transfer of a Hazardous Waste Facility

66. Defendants failed to apply for a permit modification to transfer the operation and ownership of the Facility. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 206, ¶¶ 21-24.

Charge VII in Contempt

Failure by McCabe to Submit Initial Background Disclosure

67. The Facility is an "off-site facility," meaning it is a facility where hazardous waste that was not generated on the premises is stored, treated, or disposed. Testimony Wilder, Nov. 27, 2007, First Hearing Trans. p. 86, ¶¶ 4-7.

68. Defendants never filed a disclosure statement with the Attorney General or the Director of Ohio EPA regarding the two changes of ownership as required by paragraph 8 of the Consent Order. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 207, ¶¶ 1-8; Testimony Wilder, Nov. 27, 2007, First Hearing Trans. p. 79 ¶¶ 5-12, p. 84, ¶ 25, p. 85 ¶¶ 1-21.

Charge VIII in Contempt

Failure to Submit Background Disclosure Updates to the Attorney General

69. Defendants have never updated nor provided updated background disclosures to the Attorney General. Testimony McCabe, Sept. 16, 2008, Third Hearing Trans. p. 207, ¶¶ 22-24, p. 208, ¶ 1; Testimony Wilder, Nov. 27, 2007, First Hearing Trans. p. 86 ¶¶ 8-12.

Charge IX in Contempt

Failure to Secure Against Unauthorized Entry

70. Since at least August, 2006 and continuing until at least April 10, 2008, Defendants failed to secure the Facility against unauthorized entry. Testimony Brian Gitzinger, May 16, 2008, Second Hearing Trans. p. 193, ¶¶ 10-25, p. 194, ¶¶ 1-13.

CONCLUSIONS OF LAW

71. In a civil contempt proceeding, the movant bears the initial burden of proving by clear and convincing evidence that the other party violated a court order. *Carroll v. Detty* (1996), 113 Ohio App. 3d 708, 711, 681 N.E.2d 1383 citing *Brown v. Executive 200, Inc.* (1980), 64 Ohio St. 2d 250, 416 N.E.2d 610; *Stewart v. Syderstricker,* 1996 Ohio App. Lexis 1992.

72. "Clear and convincing evidence" is a degree of proof which is more than a mere preponderance of the evidence, but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases. *State v. Schiebel* (1990), 55 Ohio St. 3d 71, 74, 564 N.E.2d 54; *Ohio State Bar Ass'n v. Reid* (1999), 85 Ohio St 3d 327, 331, 708 N.E.2d 193.

73. "Clear and convincing evidence" is that which will produce in the mind of the trier-of-fact a firm belief or conviction as to the facts sought to be established. *Id.* Once the *prima facie* case has been established by clear and convincing evidence, the burden shifts to the non-moving party to either rebut the initial showing of contempt or establish an affirmative defense by a preponderance of the evidence. *Pugh v. Pugh* (1984), 15 Ohio St. 3d 136, 140, 472 N.E.2d 1085; *Haynes v. Kaiser*, 1996 Ohio App. LEXIS 4603 (Oct. 18, 1996), Geauga App. No. 96-G-1984, unreported.

74. The Ohio Supreme Court has ruled that proof of a purposeful, willing or intentional violation of a court order is not a prerequisite for a finding of civil contempt. *Pugh v. Pugh* (1984), 15 Ohio St. 3d 136, 140, 472 N.E.2d 1085. *Pedone v. Pedone* (1983), 11 Ohio App. 3d 164, 165,

463 N.E.2d 656. In fact, the contemnor may even have acted innocently and still be guilty of civil contempt. *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St. 2d 55, 271 N.E.2d 815, syllabus 3.

75. Pollution prevention statutes have long been recognized as strict liability designed to prohibit public welfare offenses. In *United States v. United States Steel Corp.* (N.D. Ind. 1970), 328 F. Supp. 354, 356, the Court stated that "[t]he public is injured just as much by unintentional pollution as it is by deliberate pollution." In *United States v. Liviola* (N.D. Ohio 1985), 605 F. Supp. 96, 100, the court found that federal hazardous waste laws, like other environmental statutes dealing with water or air pollution imposed strict liability, and that Congress had made intent irrelevant to the question of civil penalties. Under Ohio Law, environmental liability is also strict. *See, e.g., Professional Rental, Inc. v. Shelby Insurance Co.* (1991), 75 Ohio App. 3d 365, 376. When Ohio's statutes proclaim "no person shall" engage in certain conduct, without reference to mental state, then the statute imposes strict liability. *State v. Chesaro* (1988), 43 Ohio App. 3d 221, 223; *State v. Grimsley*(1982), 3 Ohio App. 3d 265. R.C. Chapter 3734, therefore, imposes strict liability. There is no requirement that violations be intentional, deliberate, knowing or purposeful. R.C. § 3734.10 entitles plaintiff to injunctive relief against any person violating Chapter 3734 or any rule adopted under it. Plaintiff's statutory right to this injunctive relief, as well as the relief provided under Chapter 3752, lends additional support to the propriety of enforcing the Consent Decree against both the Republic Defendants and the McCabe Defendants.

76. Jurisdiction and venue is proper before this Court.

77. Defendants McCabe Corporation and Edward M. McCabe and the Republic Defendants had actual notice of the instant charges in contempt asserted by Plaintiff.

78. Defendants McCabe Corporation and Edward M. McCabe and the Republic Defendants had actual notice of the Consent Order.

79. Defendants McCabe Corporation and Edward M. McCabe and the Republic Defendants were provided the right to appear and defend against the charges of contempt raised by Plaintiff.

80. Republic Environmental Systems (Ohio) Inc. ("Republic Ohio") is an Ohio business corporation, formerly known as Ecolotec, Inc., and is a "person" as that term is defined in R.C. Sections 3734.01(G) and 3752.01®).

81. Republic Environmental Systems, Inc. ("Republic") is an Ohio corporation and is a "person" as that term is defined in R.C. Sections 3734.01(G) and 3752.01®).

82. BRAC, Inc. ("BRAC") is an Ohio corporation and is a "person" as that term is defined in R.C. Sections 3734.01(G) and 3752.01®).

83. Defendant Edward M. McCabe is an individual with a residence of 3470 Brecksville Road, Richfield, Ohio 44286, and is a "person" as that term is defined in R.C. Sections 3734.01(G) and 3752.01®).

84. McCabe Corporation is an Ohio corporation, and is a "person" as that term is defined in R.C. Sections 3734.01(G) and 3752.01®).

85. McCabe Engineering, Inc., also known as McCabe Engineering Corporation, is a fictitious name of McCabe Corporation.

86. Paragraph 8 of the Consent Order required Defendants to comply with R.C. Chapter 3734 and Ohio Adm. Code Chapters 3745-50 through 3745-69.

87. Paragraph 9 of the Consent Order requires Defendants to comply with the environmental background investigation regulations contained in R.C 3734.41 through R.C. 3734.44.

88. The term "closure" as set forth in Ohio Revised Code Chapter 3734 and Ohio Revised Code Sections 3745-55-11 through 3745-55-20 refers to a process whereby a Facility is investigated to identify, characterize, and remove, or to further evaluate, the potential for releases of hazardous waste(s) to the environment which may have occurred over time from facility operations.

89. Defendants McCabe Corporation and Edward M. McCabe are the "owner(s)" of a hazardous waste Facility as that term is defined at Ohio Adm. Code 3745-50-10(A)(84) which means the person who owns a facility or part of a facility, including the buildings and land transferred by quit claim deed.

90. The McCabe Defendants' property, the former "Ecolotec Facility," located at 636 N. Irwin Street, Dayton, Montgomery County, Ohio, is a "facility" and a "hazardous waste facility" as that term is defined in Ohio Admin. Code Section 3745-50-10(A)(39)(a) through(c).

91. Defendants Edward M. McCabe and McCabe Corporation maintain privity of contract with the Republic Defendants through the real estate purchase agreement with respect to environmental liability, acceptance of which was identified therein as in part consideration for the transfer, at the Facility.

92. Defendants Edward M. McCabe and McCabe Corporation maintain privity through reliance on the existing trust fund established by the Republic Defendants for addressing environmental liability at the Facility. The relationship is evidenced by the McCabe Defendants use of the fund and the Republic Defendants manifestation of assent to allow the McCabe Defendants to use the fund.

93. Defendants Edward M. McCabe and McCabe Corporation had actual knowledge of the Consent Order prior to obtaining ownership of the Facility through quit claim deed in January 5, 2000, or earlier, as evidenced by Defendant Edward M. McCabe's admission that he received numerous drafts of the Consent Order prior to its finalization and filing, that he was aware of and

possessed a copy of the actual final Consent Order as filed by November-ish 1998, and that he understood the purposes of the Consent Order referenced in the documents associated with the real estate transaction, including but not limited to the real estate purchase agreement, wherein consideration for transfer of the Facility was, in part, the McCabe Defendants execution of activities detailed in the Consent Order.

94. Defendants Edward M. McCabe and McCabe Corporation, the current owner of the Facility, a hazardous waste facility as that term is defined by Ohio law, located at 636 N. Irwin Street, Dayton, Montgomery County, Ohio, are successors in interest to and assignees of the Republic Defendants, and are acting in concert, privity or participation with the Republic Defendants.

95. Defendants Edward M. McCabe and McCabe Corporation, persons, are bound by the terms of the Consent Order and liable in contempt for failing to comply with the Consent Order. *See also, Ohio v. Northway Environmental Services* (Oct. 24, 1985), Cuyahoga County Court of Common Pleas, Case No. 028 657; *Ohio v. Fisher Acquisition and Development Corp.* (July 24, 1998), 6th Dist., Case No. L-97-1411; *Ohio v. Fisher Acquisition and Development Corp.* (Oct. 21, 1997), Lucas County Court of Common Pleas, Case No. CI 96-1347. (The *Fisher* Appellate court, pages 6-9, held the individual liable for contempt using the *Belvedere* test. The three prong test laid down by the Ohio Supreme Court in *Belevedere Condominium v. R.E. Roark Cos.* (1993), 67 Ohio St.3d 274, 1993-Ohio-119 to pierce the corporate veil is the following: 1. complete control so that the corporation has no separate mind, 2. control over the corporation exercised in such a manner as to commit fraud or an illegal act, and 3. injury or unjust loss resulting to Plaintiff from such control.

The *Fisher* Common Pleas court, pages 6-7, held the individual, the sole officer and sole shareholder of the corporation, owner of regulated real estate subject to a closure plan, liable through the Personal Participation Doctrine because the parties bound provision of the consent order

also applied to agents, officers, and employees of the corporation. The court found that the individual was required to carry out the requirements of the consent order because he was an agent, officer, and employee of the corporation.)

96. Based on uncontroverted, clear and convincing evidence, Defendant Edward M. McCabe, as an individual, caused the violations of R.C. Chapter 3734, the regulations enforcing the applicable statutes, and the Consent Order, when, acting as the managing corporate officer of McCabe Corporation, the sole shareholder of McCabe Corporation, the employee in McCabe Corporation responsible for Ohio EPA compliance requirements, Edward M. McCabe, with actual knowledge of the relevant environmental requirements applicable to this Facility, with actual knowledge of the Consent Order in this case, ordered, directed, collaborated in, and/or ratified the violations and wrongful acts of McCabe Corporation itemized in the Charges listed below, and/or failed to act despite having authority and responsibility to prevent said violations and wrongful acts.

97. Revised Code Chapter 3734 provides for injunctive relief and civil penalties against the "person" committing the violations. The statute defines "person" as including both a corporation and an individual. *Young v. Featherstone Motors, Inc.*, (1954) 97 Ohio App. 158, 171, (the general rule of individual liability is that an officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefore;. ..); *In Shaefer v. D&J Produce, Inc.*, (1978) 62 Ohio App.2d 53, 60-62, (court set forth a test for imposing individual liability whereby:

> the principal or employer owes a duty of care to the third person, breach of which has caused the damage for which recovery is sought, 2) this duty is delegated by the principal or employer to the defendant, and 3) the defendant officer, agent, or employee has breached this duty through personal (as contrasted with technical or vicarious) fault. The breach occurs when the defendant has failed to discharge the obligation with the

degree of care required by ordinary prudence under the same or similar circumstances – whether such failure be due to malfeasance, misfeasance, or nonfeasance, including when the failure results from not acting upon actual knowledge of the risk to others as well as from a lack of ordinary care in discovering and avoiding such risk of harm which has resulted from the breach of the duty. (*emphasis added*));

Ohio v. Northway Environmental Services (Nov. 13, 1986), 8th Dist., Case No. 028,657, at page 24 (Under the relevant enabling statute in this case, R.C. 3734.13(C), the trial court is authorized to impose a civil penalty upon the person found to have violated Chapter 3734. Accordingly, it was not error to assess civil penalties against the appellants individually for their participation in the Northway operation); *Ohio v. Tri-State Group, Inc.* (August 20, 2004), 7thDist, Case No. 03BE61, 2004-Ohio-4441; *Ohio v. Tri-State Group, Inc.* (Sept. 2, 2003), Belmont County Common Pleas, Case No. 00 CV 0180. (Common Pleas Court held individual personally liable for corporations activity on participation doctrine.); *Centennial Ins. Co. v. Vic Tanny Int'l.* (1975), 46 Ohio App.2d 137, 141 (noting that the corporate officers may be held personally liable for fraud even though the corporation may also be liable); *Ohio v. Elsea, Inc.* (April 14, 1987), Ross County Common Pleas, Case No. 87 CI 01, (corporate officer's motion to dismiss overruled); *Ohio v. Springs Industries* (May 20, 1987), Carroll County Common Pleas, Case No. 17506-86-94, (dismissed summary judgment motion of corporate individual).

98. As a result, Defendant Edward M. McCabe, is personally liable for the tortious acts he has committed, ordered, directed, collaborated in, participated in and/or ratified. Defendant Edward M. McCabe personally participated in, ordered, committed, collaborated, directed and/or ratified of the violations by Defendant McCabe Corporation.

99. Pursuant to Section III., paragraph 3, page 3, of the Consent Order, Defendants Edward M. McCabe and McCabe Corporation are bound by the terms of the Consent Order and are liable in contempt, Charges I through IX, for failing to comply with the Consent Order as found by clear and convincing evidence.

100. The Republic Defendants, Defendants Republic Environmental Systems (Ohio), Inc., Republic Environmental Systems, Inc., and BRAC, Inc., signatories to the Consent Order, are liable in contempt, Charges I through IX, for failing to comply with the Consent Order as found by clear and convincing evidence.

Charge I in Contempt

Failure to Amend the Closure Plan and Complete Closure

101. Ohio Adm. Code 3745-55-12(C)(2)(c) states that a facility owner or operator shall request a change in an approved closure plan if, during closure, unexpected events require a modification of the approved closure plan.

102. The presence of soil contamination detected in concentrations in excess of the clean criteria was an unexpected encounter, requiring modification of the Closure Plan for the Facility.

103. Defendants have not yet filed an approvable revision to the amended Closure Plan in violation of Ohio Adm. Code 3745-55-12 and R.C. 3734.11 and Paragraphs 8, 10, 11 and 12 of the Consent Order.

Charge II in Contempt

Failure to Close the Facility

104. Ohio Adm. Code 3745-55-13(B) requires the owner or operator of a hazardous waste facility to complete closure activities in accordance with an approved closure plan within one hundred eighty (180) days after receiving the final volume of hazardous waste; however, the Director may approve a longer period for closure.

105. Defendants failed to close the Facility within the period defined by the Director and subsequent to the Director's approval of the Closure Plan in violation of Ohio Adm. Code 3745-55-13 and R.C. 3734.11 and Paragraph 10 of the Consent Order.

Charge III in Contempt

Failure to Monitor Ground Water Contamination

106. Ohio Adm. Code 3745-54-99(C)(1) requires the owner or operator to conduct a ground water sampling program, for which the GW Plan was, in part, intended to satisfy.

107. Defendants failed to comply with the ground water monitoring requirements included in the GW Plan including but not limited to conducting sufficient ground water monitoring during the second, third, and fourth quarters of 1998, or in 2002 in violation of Ohio Adm. Code 3745-54-99(C)(1) and Paragraph 23 of the Consent Order.

Charge IV in Contempt

Failure to Remediate Ground Water Contamination

108. The ground water beneath the Facility has been contaminated in excess of permissible concentrations as a result of activities originating on the Facility.

109. Ohio Adm. Code 3745-54-100 requires the owner or operator to implement remedial activities that prevents hazardous constituents from exceeding their respective concentration limits by removing them or treating them in place and to ensure that regulated units are in compliance with the ground water protection standard under section 3745-54-92 of the Ohio Administrative Code.

110. No remedial activities are currently being implemented with respect to the ground water beneath the Facility in violation of Ohio Adm. Code 3745-54-100 and Paragraph 23 of the Consent Order.

Charge V in Contempt

Failure to maintain Written Estimate of Closure Cost, And Adequate Financial Assurance

111. Ohio Adm. Code 3745-55-42 requires the owner or operator of a hazardous waste facility to maintain a written estimate of the cost of closing a facility and annually updating the estimate to account for inflation.

112. Since the entry of the Consent Order, Defendants have failed to update the written cost estimate for closing the Facility to account for inflation in violation of Ohio Adm. Code 3745-55-42 and Paragraph 8 of the Consent Order.

113. Ohio Adm. Code 3745-55-43 requires the owner or operator of a hazardous waste facility to maintain financial assurance for closure of a facility and to increase financial assurance as necessary to account for inflation and other increases in the cost estimate of closure.

114. Since the entry of the Consent Order, Defendants have failed to increase financial assurance as necessary to account for inflation and other increases in the cost estimate of closure in violation of Ohio Adm. Code 3745-55-43 and Paragraph 8 of the Consent Order.

115. While Defendants Republic Ohio, Republic, and BRAC maintained a trust fund as a form of financial assurance, Defendants failed to maintain sufficient funds in the trust in violation of Ohio Adm. Code 3745-55-40, *et seq.* and Paragraph 8 of the Consent Order.

Charge VI in Contempt

Illegal Transfer of a Hazardous Waste Facility

116. Ohio Adm. Code 3745-50-52 governs the transfer of ownership and operation of a permitted hazardous waste facility such as the subject Facility. Pursuant to Ohio Adm. Code 3745-50-52, transfer of ownership or operation of a facility is considered a permit modification and is not permissible unless approved by the Director of the Ohio EPA.

117. Pursuant to Ohio Adm. Code 3745-50-52, an application to modify a permit by transferring ownership or operation must be submitted to the Director at least 90 days in advance of a proposed transfer. In order to approve the transfer, the Director must determine if the prospective owner has the necessary expertise and competence to take responsibility for the facility.

118. Defendants twice failed to apply for a permit modification to transfer the operation and ownership of the Facility in violation of Ohio Adm. Code 3745-50-52 and Paragraph 8 of the Consent Order.

Charge VII in Contempt

Failure by McCabe to Submit Initial Background Disclosure

119. The State General Assembly established background investigation requirements for persons managing hazardous waste facilities in Ohio to assure their reliability, expertise and competence. The statutes regarding those requirements are contained in R.C 3734.41 through R.C. 3734.44.

120. The Facility, located at 636 N. Irwin Street, Dayton, Montgomery County, Ohio, is an "off-site facility" as that term is defined in R.C. 3734.41, meaning it is located off the premises where the hazardous waste was generated.

121. R.C. 3734.42(F) requires that a prospective owner of an off-site facility file a disclosure statement with the Attorney General and the Director 180 days prior to the change of ownership.

122. Defendants never filed a disclosure statement with the Attorney General or the Director of Ohio EPA regarding the two changes of ownership in violation of R.C. 3734.42(F) and Paragraph 9 of the Consent Order.

Charge VIII in Contempt

Failure to Submit Background Disclosure Updates to the Attorney General

123. R.C. 3734.42(D) requires permittees and prospective owners to annually update their background disclosure statements and, for certain types of events, such as changes in key employees or criminal convictions, to update the disclosure within 90 days of the event.

124. Defendants have never updated nor provided updated background disclosures to the Attorney General in violation of R.C. 3734.42(D) and paragraph 9 of the Consent Order.

Charge IX in Contempt

Failure to Secure Against Unauthorized Entry

125. Ohio Adm. Code 3745-352-30(C) requires the owner of a reporting facility must secure against unauthorized entry by maintaining entry barriers and warning signs pursuant to 3745-352-30(A) and (B).

126. Defendants' inability to secure the Facility against unauthorized entry between at least August 2006 through April 10, 2008 is a violation of Ohio Adm. Code 3745-352-30(C).

Therefore, the Court does hereby:

A. Order Defendants to immediately comply with all the provisions of the Consent Order, including, but not limited to, Defendants must submit within sixty (60) days of the date of this Order or such other timeframe as this Court may determine by further order, for approval by Ohio EPA, an amended closure plan and, if necessary, a post-closure plan meeting the performance standards set forth in Ohio Adm. Code 3745-55-11, et seq., as well as all other applicable requirements of those sections;

B. Order Defendants to include in the amended Closure Plan (due within 60 days of the date of this Order or such other timeframe as this Court may determine by further order) a GW Plan to be implemented in accordance with terms and timeframes

established in that plan and Ohio Adm. Code 3745-54-90, et seq.;

C. Order Defendants to implement the amended closure plan and post-closure plan, as approved, in accordance with the timeframes established in the plans and Ohio Adm. Code 3745-55-11, et seq.;

D. Order Defendants to submit an updated closure cost estimate to OEPA within sixty (60) days of the date of this Order or such other timeframe as this Court may determine by further order based on the amended closure plan and post-closure plan and to increase the financial assurance to reflect the updated closure cost estimate;

E. Order Defendants to obtain liability coverage within sixty (60) days of the date of this Order or such other timeframe as this Court may determine by further order in the amount and form required by Ohio Adm. Code 3745-55-47;

F. Order Defendants to submit within sixty (60) days of the date of this Order or such other time frame as this Court may determine by further order and maintain background disclosure statements as required by R.C. 3734.41 through R.C. 3734.44;

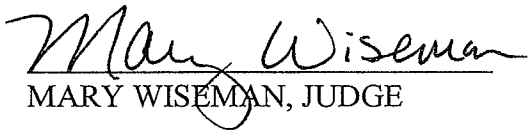
G. Order Defendants to pay an appropriate fine and be subject to other punishment and/or relief pursuant to R.C. 2705.05 and 2727.12 as shall be determined in further proceedings before this Court;

H. Order Defendants to pay all stipulated penalties in accordance with Paragraph 26 of the Consent Order the proper amount of which shall be determined in further proceeding before this Court; and

I. Order Defendants to comply with R.C. Chapter 3734 and rules promulgated thereunder as they pertain to the site at issue.

This Court shall hold a scheduling conference on March 19, 2009 at 8:30 a.m. by telephone for the purpose of setting a hearing date to determine the amount of the stipulated penalty and other monetary fines and penalties to be imposed. At that time, the Court also will discuss the scheduling needed for the claims asserted between the Republic Defendants and the McCabe Defendants, and the claims against the Third Party Defendants.

SO ORDERED:



MARY WISEMAN, JUDGE

Copies of the above were sent to all parties listed below by ordinary mail this date of filing.

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