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COURT OF COMMON PLEAS

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GREGORY A. DRUSH  
IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO  
CIVIL DIVISION

STATE OF OHIO, Ex Rel.  
NANCY ROGERS, ATTORNEY  
GENERAL OF OHIO,

CASE NO. 1998 CV 03449

(Judge Mary Wiseman)

Plaintiff,

-vs-

DECISION, ORDER AND ENTRY  
GRANTING JUDGMENT TO PLAINTIFF  
FOR STIPULATED PENALTIES

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

FINAL APPEALABLE ORDER

Defendants.

On June 5, 2009, the Court held an evidentiary hearing for the purpose of establishing the appropriate monetary sums to impose upon Defendants under the Court's February 13, 2009 Order holding Defendants jointly and severally liable in contempt.

Mr. Brian Getzinger of OEPA testified that on May 28, 2009, the McCabe Defendants submitted a document entitled "May 2009 Amended Closure Plan." Mr. Getzinger testified that this document does not constitute a closure plan due to the failure to comply with certain statutory and administrative requirements. This document was received by OEPA on the Monday immediately preceding the evidentiary hearing, substantially impairing OEPA's ability to fully evaluate the submission and opine about it at the June 5, 2009 hearing. At the hearing, it was disputed as to whether the McCabe Defendants' "May 2009 Amended Closure Plan" met clear OEPA requirements and guidance for closure plans addressing sites of this nature. Given the uncertainty surrounding that point, the Court will (at least temporarily, for present purposes only at this time) treat the McCabe submission as an adequate amended closure plan, for purposes of calculating

Montgomery County Common Pleas Court  
General Division

...the McCabe Defendants that the

submission is rejected as an amended closure plan; OEPA must communicate to the McCabe Defendants its definitive position regarding the May 2009 Amended Closure Plan within sixty (60) days from the date of this order. The interim period of regulatory review by OEPA (from submission until formal acceptance or rejection) shall not accrue stipulated penalties, as otherwise substantial and undue unfairness would result to the McCabe Defendants. If the McCabe Defendants' submission of May 2009 is accepted by OEPA as an adequate and acceptable amended closure plan, then the applicable stipulated penalties for this specific contempt charge will be deemed to have ceased accruing as of the date of submission. However, if OEPA issues a rejection of the McCabe Defendants' May 2009 amended closure plan, determining that it is not an adequate and acceptable amended closure plan under Ohio law and regulations, then the McCabe Defendants shall have sixty (60) days in which to re-submit an amended closure plan for OEPA's review and evaluation following that rejection. In the event that OEPA would reject that re-submittal, then at that time stipulated penalties will re-commence accruing on this violation, if sought by OEPA.

Accordingly, using Plaintiff's (Penalty Phase Hearing) Exhibit 6, the Court imposes upon Defendants, jointly and severally, for failure to amend the closure plan, the sum of \$20,600.00 (failure to submit closure plan before submittal of Amended Plan) and \$1,642,800.00 (failure to amend closure plan after two (2) extensions of 180 and 90 days). Hence, the total sum imposed for this violation, under application of the stipulated penalty, is \$1,663,400.00.

Under Charge II, Failure to Close the Facility, the stipulated total penalty imposed by the Court is \$2,212,200.00. With regard to Charge III, Groundwater Monitoring, the groundwater monitoring plan was approved by OEPA on September 16, 1998, according to paragraph 22(a) of the Consent Decree. Therefore, stipulated penalties for a failure to comply with that plan could begin, at the earliest, on October 1, 1998. A failure to comply with the groundwater monitoring plan for the Fourth Quarter of 1998 would yield a stipulated penalty of \$21,000.00. Adding this

amount to the other sums listed on Plaintiff's Exhibit 6 yields a total of \$777,600.00. This amount does not include any stipulated penalty for 1998 except for the Fourth Quarter of 1998. The stipulated penalty amount imposed for Charge III (Groundwater Monitoring 36 quarters incomplete or missing) is \$1,642,200. The stipulated penalty amount for Charge IV (Groundwater Remediation/Since Power Shut Off) is \$1,615,800, again in reliance upon Plaintiff's Exhibit 6.

The Court finds that OEPA has failed to carry its burden of proof on the issue of Financial Assurance insofar as the McCabe Defendants apparently submitted over the years evidence of potential environmental liability insurance coverage which may not have fully complied with certain OEPA regulations in terms of the required form or language of the submission, yet the underlying insurance coverage itself may well have been adequate and appropriate. Hence, no amount of stipulated penalty will be imposed for this charge.

As Charges VI, VII, and VIII (transfer of permitted facility, initial background disclosure, and background disclosure updates, respectively), Plaintiff's Exhibit 6 shows that the stipulated penalty amounts are \$2,508,000.00, \$2,562,000.00 and \$2,235,000.00, for each category. The Court is concerned that these aggregate amounts are disproportionate to the nature and environmental impact of the violations. However, no Defendant presented the Court with any case law authority for the proposition that the Court has authority to modify the amount of stipulated penalties contained in a consent decree negotiated with OEPA.

Courts have found that a consent order is a contract based on the agreement of the parties. *SGN Int'l. Oil Co. et al., v. Ohio Liquor Control Comm'n.*, 2008-Ohio-6816, ¶20, Franklin App. No. 08AP-20 (citing *State v. Mann*, 2007-Ohio-6937, ¶24, Trimbill App. No. 2007-T-0067). "Under certain circumstances, 'a consent decree may be modified or vacated by the court, absent the consent of all the parties', including instances in which further prospective application of the agreement is no longer equitable in light of subsequent developments between the parties." *Id*

(citing *Bodem v. Beals*, 1984 Ohio App. LEXIS 9217, Ottawa App. No. OT-83-32). The United States Supreme Court has held that “modification of a consent decree may be warranted when changed factual conditions make compliance with the decree substantially more onerous, or when a decree proves to be unworkable because of unforeseen obstacles.” *Id.* (citing *Rufo v. Inmates of Suffolk Cty. Jail* (1992), 502 U.S. 367, 112 S. Ct. 748, 116 L.Ed. 2d 867). However, ordinarily, modification should not be granted as it is tantamount to the Court re-writing a private contract. *Id.*

The court in *In Re: Suitability of Matthew H. Tucker* held that as long as long as the court found there was reliable, probative, and substantial evidence in the record to support a consent decree, the court was required to affirm the order. *In Re: Suitability of Matthew H. Tucker v. Womer Benjamin* 2005-Ohio-1042, ¶14, Stark App. No. 2004CA00240. Tucker was a licensed insurance agent who entered into a consent decree where he admitted to selling securities without a license. *Id.* At ¶2. The Ohio Department of Insurance held a hearing and recommended the revocation of Tucker’s insurance license with reapplication in four years. *Id.* Tucker appealed to the court of common pleas and the court affirmed the license suspension but modified the sanction to a one year suspension. *Id.* At ¶3. Tucker involved a R.C. § 119.12 appeal (which applies to appeals by parties adversely affected by orders of an agency), and pursuant to the statute, the trial court’s review was limited: the court was required to affirm the order of the agency upon finding that the order was supported by reliable, probative, and substantial evidence or, in the absence of such finding, could reverse, vacate, or modify the order. *Id.* at ¶8.

The appellate court held that that court of common pleas had no authority to modify a penalty that the agency was authorized to and did impose on the ground that the agency abused its discretion. *Id.* at ¶13 (citations omitted). The appellate court further held that the trial court was not authorized to modify the penalty ordered by the board on the basis that the board abused its discretion or *because the court felt that lesser disciplinary action would be more appropriate under*

all of the circumstances. *Id.* at ¶14. As long as the court found there was reliable, probative, and substantial evidence in the record, then the trial court was required to affirm the consent decree. *Id.*

Hence, the greater weight of Ohio case law directly applicable or applicable by analogy appears to hold that the Court cannot reduce the amount of stipulated penalty for a violation even where the Court believes the penalty amount disproportionate to the seriousness of the violation or the environmental impact of the violation.

Consequently, the Court will impose the stipulated penalty amounts as stated in Plaintiff's (Penalty Phase Hearing) Exhibit 6, as testified to by Plaintiff's witness, Mr. Isaac Wilder as appropriately modified in light of Mr. Wilder's testimony.<sup>1</sup>

In summary, the total judgment against Defendants for the stipulated penalties is:

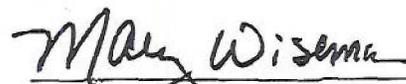
Charge I	(Failure to Amend Closure Plan)	\$1,666,400.00
Charge II	(Failure to Close Facility)	\$2,212,200.00
Charge III	(Groundwater Monitoring)	\$1,642,200.00
Charge IV	(Groundwater Remediation)	\$1,615,800.00
Charge V	(Financial Assurance)	\$0
Charge VI	(Transfer of Permitted Facility)	\$2,458,800.00
Charge VII	(Initial Background Disclosure)	\$2,458,800.00
Charge VIII	(Background Disclosure Updates)	\$2,235,000.00
Charge XI	(Security Against Unauthorized Entry)	<u>\$417,600.00</u>
Total		\$14,706,800.00

<sup>1</sup> Mr. Wilder used a start date of October 31, 1997 for Charge VI, Transfer of Permitted Facility and August 2, 1997 for Charge VII, Initial Background Disclosure. However, the real estate purchase agreement (State's Exhibit 7) between Republic and Mr. McCabe is dated December 17, 1997. Hence, Defendants' stipulated penalty amount for Charge VI (Transfer of Permitted Facility) and Charge VII (Initial Background Disclosure) should be reduced by those forty-seven (47) and one hundred thirty-seven (137) days, respectively. The corrected amounts for these Charges are thus \$2,458,800.00 and \$2,458,800.00 (through June 5, 2009).

The Court finds that the Republic entities did not establish indigency, such that their contempt is excused. The testimony of Mr. Michael Boyas, President of BRAC, established that he, as the former president of BRAC, knew virtually nothing about BRAC, RESI or the related entities. He had no knowledge about disposition of the trust funds that had been released by OEPA. While the indigency or insolvency of the Republic Defendants may bar collection of the judgment for stipulated penalties, the evidence of record does not support holding that the Republic entities were barred from compliance with the consent decree obligations because they did not have the financial resources to comply. Mr. Boyas knew so little about the Republic entities that his testimony is of only slight assistance, if any, on the key issue of the Republic entities' financial ability to comply with the consent decree obligations.

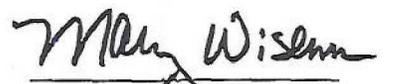
Accordingly, the Court enters Judgment of stipulated penalties in the aforementioned amount against all Defendants, jointly and severally, consistent with the Court's prior Order finding contempt

SO ORDERED:

  
MARY WISEMAN, JUDGE

**THIS IS A FINAL APPEALABLE ORDER, AND THERE IS NOT JUST REASON FOR DELAY FOR PURPOSES OF CIV. R. 54(B). PURSUANT TO APP. R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.**

SO ORDERED:

  
MARY WISEMAN, JUDGE

TO THE CLERK OF COURTS:

PURSUANT TO CIV. R. 58(B), PLEASE SERVE THE ATTORNEY FOR EACH PARTY AND EACH PARTY NOT REPRESENTED BY COUNSEL WITH NOTICE OF JUDGMENT AND ITS DATE OF ENTRY UPON THE JOURNAL.

*Mary Wiseman*  
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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