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**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

FILED

STATE OF OHIO, EX REL., DAVE YOST, ET AL
Plaintiff

Case No: CV-19-910310

Judge: KELLY ANN GALLAGHER

2020 JAN 24 P 2:20
CLERK OF COURTS
CUYAHOGA COUNTY

BAUMANN'S RECYCLING CENTER, LLC, ET AL
Defendant

JOURNAL ENTRY

DEFENDANTS AND NEW PARTY BILL BAUMANN ARE HELD IN CONTEMPT OF THE COURT'S ORDER.
DEFENDANTS' MOTION FOR ORDER COMPELLING PLAINTIFFS' COMPLIANCE WITH THE AGREED PROCESSING
PLAN FOR PILE 2 IS DENIED.
PLAINTIFF'S MOTION TO STRIKE DEFENDANTS MEMORANDUM IN SUPPORT IS GRANTED.
OSJ.

Kelly Gallagher

1/24/20

Judge Signature

Date

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY**

STATE OF OHIO ex rel.	:	CASE NO. CV 19 910310
DAVE YOST et al.,	:	
Plaintiffs,	:	
	:	JUDGE KELLY ANN GALLAGHER
v.	:	
	:	
BAUMANN'S RECYCLING	:	
CENTER, LLC, et al.	:	<u>ENTRY AND ORDER</u>
	:	
Defendants.	:	

On January 9-10, 2020, the Court held a hearing on Plaintiff's Written Charges in Contempt, Defendant's Motion for Order Compelling Plaintiffs' Compliance with Agree Processing Plan for Pile #2, and Plaintiffs' Motion to Strike Defendants' Memorandum in Support of that Motion.

After hearing all the evidence presented, the Court finds that the Defendants blatantly and flagrantly disregarded an Order of this Court, with no justifiable excuse. As such, the Defendants and New Party Bill Baumann are held in contempt of Court. Furthermore, the Defendants' Motion for Order Compelling Plaintiffs' Compliance with the Agreed Process Plan for Pile 2 is denied, and the Plaintiffs' Motion to Strike Defendants Memorandum in Support is granted.

Civil Contempt

Revised Code 2705.02(A) provides that a person guilty of "[d]isobediencê of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer" may be punished for contempt.

Civil contempt exists when a party fails to do something ordered by a court for the

benefit of an opposing party. *Pedone v. Pedone*, 11 Ohio App.3d 164, 165, 11 Ohio B. 247, 463 N.E.2d 656 (1983); *Beach v. Beach*, 99 Ohio App. 428, 431, 134 N.E.2d 162 (1955). Contempt can be defined as the disregard for judicial authority. *Ohio Bur. of Workers' Comp. v. Salkin*, 8th Dist. Cuyahoga No. 96173, 2011-Ohio-4260, ¶ 37. Contempt exists when a party's "conduct brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions." *Windham Bank v. Tomaszczyk* (1971), 27 Ohio St.2d 55, 271 N.E.2d 815, paragraph one of the syllabus; *Ohio Bur. of Workers' Comp. v. Salkin*, 8th Dist. Cuyahoga No. 96173, 2011-Ohio-4260, ¶ 37.

The standard for contempt is clear and convincing evidence, or that the evidence, "will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Burkett v. Hickman*, 5th Dist. Licking No. 15-CA-87, 2016-Ohio-2701, ¶ 20.

Once a movant meets their burden, 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. *State ex rel. Cordray v. Tri-State Group, Inc.*, 7th Dist. Belmont No. 07-BE-38, 2011-Ohio-2719, ¶ 58.

Defendants and New Party Bill Baumann are in Violation the Court's Order

Aerial surveys are prescribed as the method of confirming compliance with the Order.

Based on the Order, Defendants should have removed at least 50,000 cubic yards from Pile 2 between June 21, 2019 and December 5, 2019. Defendants only removed 12, 120 cubic yards, as evidenced by the January 10, 2019 and December 5, 2019 aerial surveys provided by Defendants.

New party Bill Baumann, as the sole shareholder, member, and President of

Defendants had knowledge of their obligations under the Order, and failed to comply with those obligations.

New party Bill Baumann, as the sole shareholder, member, and President of Defendants had knowledge of their obligations under the Plan, and failed to comply with the obligations.

Pursuant to Civ.R. 65(D), the Court Order is binding on new party Bill Baumann, because he is the sole shareholder, member, and President of Defendants, had knowledge of their failure to comply with the Order and the Plan, failed to ensure compliance with the Order and the Plan, and acted in active concert or participation with Defendants in violating the Order and the Plan.

Even as he sat in the witness chair in a show cause hearing in which he was potentially personally liable for contempt of the Order, Bill Baumann maintained his indignant and recalcitrant attitude such that when asked if he had even considered disposal to comply with the Order, his answer was, "I don't even know why I am here. I am not regulated."

Further, Bill Baumann's willful noncompliance is obvious from his testimony in that he was fully aware of the Plaintiffs' cease and desist letter withdrawing permission to accept C&DD, and yet made the intentional choice to ignore that mandate and continue accepting C&DD for the last eight weeks.

With regard to the requirement for monthly aerial surveys, even using only Defendants' admissions and conservative numbers, Defendants and new party Bill Baumann are in contempt of the Order requiring monthly aerial surveys to confirm adequate reduction of Pile 2 by failing to conduct 30% of their required monthly aerial surveys, at least two out of six months. State's Exhibits 1, 27-31; Testimony of Bill Baumann and DeAnna Carriero.

Based on the testimony and exhibits presented at the show cause hearing, Defendants and new party Bill Baumann are in contempt of the Order requiring the reduction of Pile 2 by an average of 500 cubic yards per day per week.

Based on the testimony and exhibits presented at the show cause hearing, Defendants and new party Bill Baumann are in contempt of the Order prohibiting Defendants from accepting new C&DD at the Site without permission from Ohio EPA.

Based on the testimony and exhibits presented at the show cause hearing, Defendants and new party Bill Bauman are in contempt of the Order by violating the Plan's explicit restriction on accepting more than 750 cubic yards of C&DD per day.

Based on the testimony and exhibits presented at the show cause hearing, Defendants and new party Bill Baumann are in contempt of the Order by violating the Plan's prohibition from accumulating new C&DD at the Site prior to the complete removal of Pile 2.

Defenses to Contempt

A. Defendants Are Not in Substantial Compliance with the Order

Substantial compliance does not exist when a record is replete with examples of noncompliance. *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 75, 573 N.E.2d 62.

Substantial compliance will not protect a disobedient defendant when they are able to comply with the terms of an order but choose not to comply. *Durst v. Durst*, 3d Dist. Seneca No. 13-02-38, 2003-Ohio-2029, ¶ 18.

Responsibility of compliance lies directly with the defendant and it is their duty to ensure compliance with terms set forth in the order and agreement. *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 75, 573 N.E.2d 62. When an agreement is reached between two parties and a party fully understands the terms of the agreement, they later cannot complain that

the agreement was ambiguous or misunderstanding. *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 75, 573 N.E.2d 62.

The Ohio Supreme Court has rejected that substantial compliance must always preclude contempt. *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 75, 573 N.E.2d 62.

Defendants repeatedly failed to properly manage RSM at the Site, including failure to immediately containerize newly-generated RSM and failure to remove newly-generated RSM on a weekly basis. Defendants repeatedly allowed newly-generated RSM to block access to the nearby fire hydrant and repeatedly failed to maintain proper fire lanes at the Site. Testimony of Lt. Warner and Josh Adams.

Defendants failed to meet the weekly removal requirement for 40% of the weeks since the issuance of the Order. Testimony of Aaron Shear.

Defendants had failed to complete at least 30% of the aerial surveys required by the Order. Testimony of Bill Baumann and DeAnna Carriero.

Bill Baumann admitted that he negotiated and agreed to the requirements imposed in the Plan as a means to allow Defendants to comply with the Order. Testimony of Bill Baumann.

Bill Baumann testified that although the Order required removal of Pile 2, he never intended on disposing of material in Pile 2. Testimony of Bill Baumann.

The Order does not allow for substantial compliance of its terms.

Defendants and New Party Bill Baumann did not demonstrate by a preponderance of the evidence that they are in substantial compliance with the terms of the Order.

B. Defendants Did Not Present Evidence of Impossibility

When evaluating a party's failure to comply with an order, a court must determine

whether the party “took all reasonable steps within [its] power to comply with the court’s order.” *Lahoud v. Tri-Monex, Inc.*, 8th Dist. Cuyahoga No. 96118, 2011-Ohio-4120, ¶ 53-54; *Regalbuto v. Regalbuto*, 8th Dist. Cuyahoga No. 99604, 2013-Ohio-5031, ¶ 30.

Impossibility occurs when an unforeseen event occurs and renders the obligation impossible to perform. *State ex rel. Dewine v. City of Washington Court House*, 2014-Ohio-3557, 18 N.E.3d 448, ¶ 29 (12th Dist.).

Defendants raising impossibility as their defense must show “categorically and in detail” why they cannot comply with the order. *FirstMerit Bank, N.A. v. Xyran Ltd.*, 8th Dist. Cuyahoga No. 102905, 2016-Ohio-699, ¶ 30.

While Defendants feel that strict compliance with the Order is impractical, Carmen Mucciarone testified that strict compliance with the Order is possible. Testimony of Carmen Mucciarone.

While Defendants feel that strict compliance with the Plan is impractical, Carmen Mucciarone testified that strict compliance with the Plan is possible. Testimony of Carmen Mucciarone.

Further, Bill Baumann chose not to obtain the required aerals and chose to accept more than 750 cubic yards of C&DD per day. Testimony of DeAnna Carriero and Carmen Mucciarone.

Although Bill Baumann mentioned financial impossibility during testimony, Defendants and New Party Bill Baumann did not present any evidence to show impossibility to fund the complete removal of Pile 2.

Instead, Bill Baumann testified that he had numerous assets that are neither used

nor needed for the businesses, and he did not – and will not – consider liquidating these assets to fund removal. Such assets, which are held by Baumann Enterprises, Inc., include a Mercedes Benz G63 worth approximately \$140,000 and a Mercedes Benz GCL 300 worth approximately \$41,000.

Bill Baumann also testified that he purchased a new truck in September—well after the entry of the Order—worth approximately \$70,000 and gave his prior truck to Carmen Mucciarone, and both pick-up trucks are held in Defendant Baumann Enterprises' name. As for Defendant Baumann's Recycling Center, LLC, Bill Baumann testified that it possesses a new warrior machine worth approximately \$345,000 which remains unused and onsite. Testimony of Bill Baumann.

Sanctions

“In contempt proceedings, great reliance should be placed upon the discretion of the judge both in his findings of contempt and in the penalty imposed.” *Offenberg v. Offenberg*, 8th Dist. Cuyahoga Nos. 78885, 78886, 79425, 79426, 2003-Ohio-269, ¶ 77.

Civil contempt is a “sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance.” *Benjamin, Superintendent of Insurance v. Credit General Insurance Company, et al.* (10th Dist.), No. 04AP-459, 2004-Ohio-6354 ¶ 10 (quoting *McComb v. Jacksonville Paper Co.* (1949), 336 U.S. 187, 191). Punishment for civil contempt fall into two general categories: (1) remedial or compensatory in the form of a fine to compensate the complainant for the contemnor's past disobedience; or (2) coercive and prospective, and designed to aid a party by forcing the contemnor into compliance with the order. *State ex rel. Cordray v. Tri-State Group, Inc.*, 7th Dist. Belmont No. 07-BE-38, 2011-Ohio-2719, ¶ 41.

“Trial courts have inherent authority to enforce their orders and to punish for

contempt. ***[A] trial court may act within its sound discretion in fashioning an equitable remedy designed to facilitate compliance with its prior orders.” *Steinberg v. Steinberg*, 8th Dist. Cuyahoga No. 44125, 1982 Ohio App. LEXIS 12314, at *11 (June 24, 1982).

Revised Code 2705.10 provides a court the authority to fashion its own remedy. While R.C. 2705.05 provides potential fines a court can place on a defendant, the Ohio Supreme Court has held that Courts hold the inherent power to punish for contempt and that power is not subject to legislative control. *Cincinnati v. Cincinnati District Council 51* (1973), 35 Ohio St.2d 197, 299 N.E.2d 686 (upholding fines totaling \$37,000 imposed upon defendants found to have violated a permanent injunction); *Call v. G.M. Sader Excavating Paving, Inc.* (1980), 68 Ohio App.2d 41, 426 N.E.2d 798 [**9].(upholding a fine of \$10,000 despite defendants' claims that this fine exceeded R.C. 2705.05); *Olmsted Twp v. Riolo* (June 9, 1988), Cuyahoga App. No. 54004, 49 Ohio App. 3d 114, 550 N.E.2d 507, (upholding fines totaling \$26,500 for violating an injunction that prohibited the defendant from maintaining a junk yard on his property). See, generally, *State v. Kilbane* (1980), 61 Ohio St.2d 201, 400 N.E.2d 386 (dicta reaffirming court's holding in *Cincinnati v. Cincinnati Dist. Council 51*, supra); *State v. Local Union 5760* (1961), 172 Ohio St. 75, 173 N.E.2d 331 (holding that the inherent power of a court to punish for contempt generally may not be limited by legislative authority).

Purge

An individual charged with civil contempt must be permitted to appear before the court and purge himself of the contempt by demonstrating compliance with the court's order. *Ohio Bur. of Workers' Comp. v. Salkin*, 8th Dist. Cuyahoga No. 96173, 2011-Ohio-4260, ¶ 38.

THEREFORE, the Court ORDERS as follows regarding Plaintiffs' Charges

in Contempt and show cause hearing:

- A. Defendants and new party Bill Baumann shall complete the total removal of Pile 2 by removing and lawfully disposing the C&DD and solid waste that makes up Pile 2 by March 20, 2020. Defendants and new party Bill Baumann shall obtain disposal receipts from the licensed disposal facility indicating the weight or volume received of the material. Defendants shall provide a copy of each receipt to Ohio EPA Northeast District Office no later than seven days after receiving it;
- B. Defendants and new party Bill Baumann shall fly an aerial survey no later than the 15th day of each month and provide results to Plaintiffs' counsel within one week of flying each aerial until Pile 2 is completely removed;
- C. Defendants and new party Bill Baumann shall reduce Pile 2 by at least 15,000 cubic yards each month which shall be confirmed with a monthly aerial survey with the total removal of Pile 2 occurring no later than March 20, 2020. Aerial surveys and site inspections shall be the sole means of determining compliance with removal requirements with this Order. Aerial surveys shall maintain the same format (graphic images and pile volumes of the entire Site) as the December 5, 2019 aerial survey conducted by Civil & Environmental Consultants, Inc.;
- D. Upon the completion of the complete removal of Pile 2, Defendants and new party Bill Baumann shall notify Plaintiffs in writing of the complete removal of Pile 2;
- E. Within one week of Defendants and new party Bill Baumann providing notice of the complete removal of Pile 2, Defendants shall fly an aerial survey to confirm the complete removal of Pile 2 and provide results to Plaintiffs' counsel within one week of flying the final aerial survey;

- F. Within one week of Defendants and new party Bill Baumann providing notice of the complete removal of Pile 2 and intention to fly the final aerial survey, Plaintiffs shall conduct a visual inspection of the Site to confirm the complete removal of Pile 2 in conjunction with the flying of the aerial survey;
- G. Defendants and new party Bill Baumann shall not accept any new C&DD until the complete removal of Pile 2 has been confirmed by aerial survey and Plaintiffs' visual inspection;
- H. Defendants shall provide Plaintiffs at all reasonable times, including during business hours, access to the Site and any other property to which access is required for the implementation of this Entry and Order, to the extent access to the property is owned or controlled by Defendants. Access shall be for purposes including but not limited to the following:
 - a. Monitoring the activities required by this Entry and Order;
 - b. Determining compliance with this Entry and Order, including inspecting and photographing the Site;
 - c. Determining compliance with R.C. Chapters 3704, 3714, 3734, 3737, and 6111 and any rules promulgated thereunder, including inspecting and photographing the Site;
 - d. Inspecting and copying records, operating logs, contracts, and/or other documents related to the implementation of this Entry and Order;
 - e. Conducting investigations and tests related to the implementation of this Entry and Order;
 - f. Verifying any data and/or other information submitted to Plaintiffs; and,

- g. Conduct any sampling, monitoring, removal, remediation, or corrective action activities undertaken or funded by Plaintiffs, including any activities commenced pursuant to Paragraph K of this Entry and Order; and,
- I. Defendants and new party Bill Baumann are jointly and severally ordered to pay \$5,000 per day until the complete removal of Pile 2, which will be due and owing on March 20, 2020, and weekly thereafter, until the complete removal of Pile 2.

THEREFORE, the Court ORDERS the following purge requirements:

- J. Defendants and new party Bill Baumann may purge contempt by completely removing Pile 2 by March 20, 2020.
- K. If Defendants and new party Bill Baumann fail to completely remove Pile 2 by March 20, 2020, Defendants and new party Bill Baumann shall post a bond guaranteeing performance of the activities required by this Entry and Order in the amount not less than \$897,000 [calculated by multiplying 30,000 cubic yards of material left in Pile 2 by 1.3 fluff factor, and multiplying that by \$23.00 a cubic yard which is based on the ARCO site clean-up as the actual amount bid by Kurtz Bros for the loading, transport, and disposal of C&DD].
- L. If Defendants and new party Bill Baumann fail to completely remove Pile 2 by March 20, 2020, Defendants and new party Bill Baumann shall pay Plaintiffs' attorney fees for the litigation and compliance monitoring resulting from Defendant's contempt.
- M. If Defendants and New Party Bill Baumann purge themselves of contempt by March 20, 2020, they will not be subject to the payment of \$5,000 per day imposed by Paragraph I of this Entry and Order.

THEREFORE, the Court ORDERS the following regarding Defendants' Motion for Order Compelling Plaintiffs' Compliance with the Agreed Processing Plan for Pile 2 and Plaintiffs' Motion to Strike Defendants Memorandum in Support:

Defendants' Motion for Order Compelling Plaintiffs' Compliance with the Agreed Processing Plan for Pile 2 is DENIED.

Plaintiffs' Motion to Strike Defendants Memorandum in Support is GRANTED.

IT IS SO ORDERED.



JUDGE KELLY ANN GALLAGHER

1/24/20

DATE