IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

HOGE LUMBER COMPANY,

Defendant.

Case No. 3:95 CV 7044

JUDGMENT ENTRY
(Resolves Docs. 124 & 125)

KATZ, J.

For the reasons stated in the Memorandum Opinion filed contemporaneously with this entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Defendant's motion to alter or amend (Doc. No. 125) is granted in part and denied in part.

FURTHER ORDERED that the judgment entered November 5, 1997 is modified as to the payment of the civil penalty as follows: that the civil penalty previously assessed shall be paid over a period of six (6) years commencing in April 1998 and each April thereafter until paid in full, in equal annual installments of $50,000 for the first two years, installments of $100,000 for the third, fourth, and fifth years, and a final installment of $250,000. Defendant shall pay with each said payment an amount equal to accrued interest on the unpaid balance at the statutory rate

for judgments in federal court.

FURTHER ORDERED that Defendant's motion for relief from judgment (Doc. No. 124) is denied as moot.

DAVID A. KATZ
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,

Case No. 3:95 CV 7044

Plaintiff,

-vs-

MEMORANDUM OPINION

HOGE LUMBER COMPANY,

Defendant.

KATZ, J.

This matter is before the Court on Defendant's motion for relief from judgment and motion for a new trial and/or to alter or amend the judgment. Plaintiffs submit their opposition and Defendant replies thereto. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

Following a bench trial, this Court ordered Defendant Hoge Lumber Company ("Hoge") to pay a civil penalty of $650,000 over a four year period, commencing in March 1998 for violations of the Clean Air Act, 42 U.S.C. § 7413. (Doc. No 123). Defendant filed a timely motion for relief from judgment under Fed. R. Civ. P. 60(b)(6) and a motion for a new trial and/or to alter or amend under Rules 59(a) and (e) and 52(b).

A. Fed. R. Civ. P. 60(b)(6).

Under Fed. R. Civ. 60(b)(6), a court may order relief from judgment for "any other reason justifying relief from the operation of the judgment." Rule 60(b)(6) has been described as a catch all provision which provides for a "grand reservoir of equitable power to do justice in a particular case." 12 James Wm. Moore, Moore's Federal Practice, § 60.48[1] (3d ed. 1997). However, in order to qualify for relief under 60(b)(6), the provision applies only where there are reasons for relief other than those set out in the more specific clauses of rule 60(b) and a valid reason deserving relief from judgment exists. *Id.* "Relief from judgment is reserved for a confined set of circumstances when the trial court is convinced that the imposition of judgment would work an extreme hardship or injustice." *Epling v. United States*, 172 F.R.D. 220, 222 (W.D. Ky. 1997). Furthermore, such relief is unavailable when the movant's arguments could have been presented before judgment issued.

B. Fed. R. Civ. P. 52(b) and 59(e).

The purpose of a motion to alter or amend judgment under Fed. R. Civ. P. 59(e) is to have the court reconsider matters "properly encompassed in a decision on the merits." *Osterneck v. Ernst and Whinney*, 489 U.S. 169, 174 (1988). This rule gives the district court the "power to rectify its own mistakes in the period immediately following the entry of judgment." *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 450 (1982). Generally, there are three major situations which justify a district court altering or amending its judgment: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or to prevent a manifest injustice." *In re Continental Holdings, Inc.*, 170 B.R. 919, 933 (Bankr. N.D. Ohio 1994); *Braun v. Champion Credit Union*, 141 B.R. 144, 146 (Bankr. N.D. Ohio 1992), *aff'd*, 152 B.R. 466 (N.D. Ohio 1993);

In re Oak Brook Apartments of Henrico County, Ltd., 126 B.R. 535, 536 (Bankr. S.D. Ohio 1991). It is not designed to give an unhappy litigant an opportunity to relitigate matters already decided; nor is it a substitute for appeal. *Dana Corp. v. United States*, 764 F. Supp. 482, 488-89 (N.D. Ohio 1991); *Erickson Tool Co. v. Ballas Collet Co.*, 277 F. Supp. 226 (N.D. Ohio 1967), *aff'd*, 404 F.2d 35 (6th Cir. 1968).

Similarly, a motion made under Rules 52(b) and 59(e) may be based upon errors of law or fact, or to present newly discovered evidence. *Wallace v. Brown,* 485 F. Supp. 77, 78 (S.D.N.Y. 1979). In addition, such a motion may seek to supplement or amplify the court's findings. 9 James Wm. Moore, Moore's Federal Practice, § 52.60[4][d] (3d ed. 1997). The decision to grant or deny such a motion is within the discretion of the trial court. The purpose behind an amendment is to facilitate review and not for relitigation of the issues previously presented. *Id.* at § 52.60[3].

C. Discussion.

Hoge's position is simple. It seeks relief from the judgment on the basis that the penalty assessed will force it into bankruptcy. In support of this position, Hoge submits the affidavit of its secretary/treasurer, John Hoge who avers substantial losses in the amount of 1.5 million dollars for 1997. Coupled with the reduction in officer compensation, drops in sales and production, as well as Hoge's available line of credit, Defendant contends that if it must pay the penalty previously assessed, it will be forced into bankruptcy. (Hoge Affid.)

This Court agrees that Defendant's arguments regarding its past efforts, derating, stack test conditions, etc., are not properly before the Court in this motion and only seek to relitigate matters previously considered. Similarly, the Court agrees that Hoge does not assert a change in the

controlling law. Therefore, to the extent that Hoge seeks reconsideration of those previous issues, the Court denies the motion. However, the Defendant's argument as to its present financial situation requires a closer inspection.

At trial, Hoge presented evidence of its financial position in the following forms: (1) federal income tax returns for the years 1988 through 1996; (2) annual financial reports from 1988 through 1996; (3) a copy of Hoge's unaudited quarterly report for the first quarter of 1997; methodology of determining officer compensation; (4) Hoge's actions with regard to its workforce related to declining sales and production orders; (5) Hoge's short-term and long-term debt; (6) Hoge's status regarding its loan obligations in light of its current financial problems; and Hoge's commitment, under the Partial Consent Decree, to install a dry ESP unit on Boiler B004, at a cost of approximately $350,000.

The Court considered all this information and assessed a penalty which encompassed an economic benefit and deterrence component. After taking all the relevant factors into consideration, the Court determined the penalty to be assessed "[i]n light of the Defendant's net worth and its relatively low earnings record." (Mem. Op. at p. 26.) This penalty was assessed with the knowledge that Hoge's earning records reflected a loss of $1,023,000 for fiscal year 1996 and $816,000 for the first quarter of 1997. Thus, the Court was well aware of Hoge's financial status at trial and nevertheless imposed an appropriate penalty.

The Court also structured Hoge's payment of the penalty over a four year period beginning in March 1998. Hoge contends that it cannot afford to pay the structured payments due to present financial status. Hoge does not seek to escape from payment of any penalty, it merely seeks a reduction. While this Court is of the opinion that the penalty assessed must stand, it is persuaded

that a restructuring of payment is warranted given Hoge's current status.

Accordingly, the civil penalty previously assessed shall be paid over a period of six (6) years commencing in April 1998 and each April thereafter until paid in full, in equal annual installments of $50,000 for the first two years, installments of $100,000 for the third, fourth, and fifth years, and a final installment of $250,000. In addition, Hoge shall pay with each said payment an amount equal to accrued interest on the unpaid balance at the statutory rate for judgments in federal court. 28 U.S.C. § 1961(a). Defendant's motion to alter or amend (Doc. No. 125) is therefore granted in part and denied in part. Defendant's motion for relief from judgment (Doc. No. 124) is denied as moot.

IT IS SO ORDERED.

DAVID A. KATZ
UNITED STATES DISTRICT JUDGE