

IN THE COURT OF COMMON PLEAS, ALLEN COUNTY, OHIO

STATE OF OHIO, ex rel  
ANTHONY J. CELEBREZZE, JR.  
ATTORNEY GENERAL OF OHIO

CASE NO. 83 CIV 037

Plaintiff

-vs-

TRANSVAC, DIVISION OF  
INTERDYNE CORPORATION, et al

JUDGMENT ENTRY

Defendants

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A complaint having been filed seeking injunctive relief and civil penalties for alleged violations of Ohio Hazardous Waste laws, which allegations Defendants have expressly denied, and the parties having consented to the entry of this order, which consent by the defendants shall not be construed as an admission or inference that defendants have violated any of the Ohio hazardous waste laws, and do expressly deny having done any of the acts to be enjoined hereby, now therefore the parties agree,

And it is therefore ORDERED, ADJUDGED, and DECREED that:

1. The court has jurisdiction over the subject matter of the above-captioned suit and the parties herein.
2. This consent entry is binding upon all parties to this action, their heirs, assigns, successors in interest and all parties acting in privity with the Defendants.
3. The Defendants are hereafter forever enjoined to comply with the hazardous waste laws of the State of Ohio as codified in Chapter 3743 of Ohio Revised Code and the Regulations promulgated pursuant thereto.
4. Defendants are ordered to pay civil penalty of One Hundred Fifty Thousand Dollars (\$150,000.00). Pursuant to the stated agreement of the parties on May 28, 1985 said civil penalty shall be assessed as follows:

(A). Fifty Thousand Dollars(\$50,000.00) of the civil penalty shall be suspended provided the Defendants comply with, in the future, the hazardous waste laws of the State of Ohio.

(B). Fifty Thousand Dollars (\$50,000.00) shall be paid by Transvac, Division of Interdyne Corporation into the State Treasury, to the credit of the Hazardous Waste Special Account, in five (5) annual installments of Ten Thousand Dollars (\$10,000.00) each, the first payment to be made on or before December 31, 1985, and the remaining four (4) installments shall be made on or before December 31 of each subsequent year unless otherwise ordered by the Court upon application of Transvac, notice to the State, and a hearing. Interest shall accrue at the statutory rate of ten percent (10%) on the judgment pursuant to R.C. 1343.03.

(C). Defendants shall be credited for the cleanups heretofore accomplished and soil analysis and survey as described in paragraph eight (8), *infra*, to be applied against the remaining Fifty Thousand Dollars (\$50,000.00). Any part of this remaining Fifty Thousand Dollars (\$50,000.00) which is not subsumed by this credit shall be paid by the Defendants, concurrent with and in addition to the final installment paid pursuant to paragraph 4(B) *supra*, unless otherwise ordered by the Court upon application of the Defendants, notice, and a hearing. There shall be no interest chargeable to the unpaid balance, if any, due to the State at the end of said term.

5. All payments made pursuant to this order shall be made in the medium required by the Treasurer of the State of Ohio to the "State of Ohio, Hazardous Waste Special Account" in the appropriate amount tendered to Plaintiff's counsel or his successor.

6. The Defendants shall undertake a soil sampling and analysis plan in accordance with an agreed plan to be submitted by the parties within thirty (30) days following the filing of this Entry, or, if they do not agree, as ordered by the Court. The Defendants shall begin implementation of the agreed plan or plan as ordered within one (1) year after adoption of the plan by the Court. The Defendants shall complete the sampling and analysis plan within two (2) years thereafter. Sampling shall be done in accordance with the plan. The Defendants shall give twenty-four (24) hours notice to the Ohio EPA of any impending work to implement the plan. An employee of Ohio EPA shall have the right to attend the premises of Interdyne Corporation at anytime Defendants or their consultant contractors are implementing the soil analysis plan.

PAGE 3  
JUDGMENT ENTRY  
CASE NO. 83 CIV 073

7. Ohio EPA shall have the right to split samples taken pursuant to the plan, both soil and water. The Defendants have the right to a split of any sample which Ohio EPA may choose to take during implementation of the plan.

8. Further remedial action, if any, will be determined after implementation of this plan for soil analysis. If the parties are unable to agree concerning the additional remedial action necessary, if any, the Court retains jurisdiction to decide the issues.

9. Defendants shall provide to the Court and to the Plaintiff progress reports concerning the implementation of this plan. These reports shall describe the various tasks performed by the consultant/contractors and the amount expended by the Defendants therefore.

10. Defendants shall pay the costs of this action, taxed in the amount of Three Thousand Three Hundred and Ninety and 09/100 Dollard (\$3,390.09).

11. This Court shall retain jurisdiction for the purpose of making any order necessary to carry out the terms of this Consent Judgment.

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MICHAEL A. RUMER, JUDGE

IN THE COURT OF COMMON PLEAS, ALLEN COUNTY, OHIO

STATE OF OHIO, ex rel  
ANTHONY J. CELEBREZZE, JR.  
ATTORNEY GENERAL OF OHIO

CASE NO. 83 CIV 037

Plaintiff

-vs-

TRANSVAC, DIVISION OF  
INTERDYNE CORPORATION, et al

MEMORANDUM DECISION  
ON JUDGMENT ENTRY

Defendants

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On May 28, 1985, during jury trial of the captioned cause, counsel for each respective party reported to the Court resolution of the parties' differences upon terms then acceptable to all concerned. After recitation of the agreement on the record, the jury was discharged. The terms of agreement left certain items concerning final terms of a soil survey and analysis, and the imposition of costs to be discussed and agreed upon at a later date.

Thereafter, on August 7, 1985, counsel for the parties having been unable to resolve their differences as to the appropriate entry to be filed, a hearing was held to apprise the Court of the respective positions taken by the parties and counsel.

Six areas of disagreement were presented to the Court. The Court expressed its opinion on the disagreements discussed, and thereafter, counsel for the parties submitted proposed entries and briefs upon matters previously discussed and those considered by the Court at hearing. After review of the proposed entries and the written arguments of counsel, the Court finds there are two remaining areas of disagreement. These issues are:

- (1) Should the civil penalty be binding upon all Defendants; and
- (2) Should interest accrue on the civil penalty announced in the Judgment Entry?

PAGE 2  
MEMORANDUM DECISION  
CASE NO. 83 CIV 037

The record reflects the agreement stated May 28, 1985 is as follows:

THE COURT: All right. Mr. Vitale, would you outline, please, the proposed consent decree?

MR. VITALE: The consent decree would indicate that Transvac, Division of Interdyne, Mr. Lucke, and Mr. Stough would not admit any liability. However, they would agree to pay a civil penalty, as apportioned between the three of them, of \$150,000.00. Fifty thousand dollars of that would be suspended immediately under the provision that they would in the future not illegally store hazardous wastes at any location. Fifty thousand dollars of that would be paid as a penalty, in cash, over a period of five years - the terms to be worked out at a later date. And, that the three defendants would undertake a soil survey and analysis - final terms of which are to be worked out either amongst the parties or by the Court, based on proposals previously submitted. The three defendants would receive a credit against the penalty remaining, up to the fifty thousand dollars that is remaining.

That's an outline of the consent entry as we have it at this time, subject to Mr. Bryant's comments, of course.

THE COURT: Any amendments or corrections, Mr. Bryant that you believe are appropriate?

MR. BRYANT: Just substantially that the matter of fine payments and undertaking of the soil survey are to be apportioned as determined by the defendants; as I understand it.

MR. VITALE: I believe I stated that, and I would agree to that if I misstated it previously.

THE COURT: As agreed between the defendants, or, among the defendants. Mr. Vitale, you will be preparing and entry in conformity with this proposal?

MR. VITALE: I will prepare the first draft and sent it to Mr. Bryant as soon as possible.

THE COURT: All right.

MR. VITALE: The only remaining question would be costs.

PAGE 3  
MEMORANDUM DECISION  
CASE NO. 83 CIV 037

THE COURT: I was just going to say that's the one bottom line here that I do not have written down yet. What is the agreement; if any?

MR. BRYANT: The matter was not discussed.

MR. VITALE: We have no agreement, your Honor. I guess that will have to be a term to be worked out.

MR. BRYANT: A matter to be determined as part of the entry, your Honor.

THE COURT: All right, fine.

As can be readily seen from this dialogue, no mention was made of interest on the judgment; and each counsel acknowledged the term "apportioned" as significant to the agreement.

The Court's understanding of the agreement on the record is that Transvac and the two individual defendants were to have the right to decide among themselves which should suffer imposition of the penalty to be paid, while all are to be subject to the terms of the injunctive relief granted. The \$150,000.00 penalty agreed upon has been "apportioned" by the Defendants as permitted under the negotiated terms. The Court views the suspension of the first \$50,000.00 as a condition upon all Defendants that injunctive relief be adhered to. A violation of this injunctive relief could result in imposition of the suspended penalty. The second \$50,000.00, apportionment has been assessed to Transvac in full. This penalty is unconditional, save and accept later modification by the Court. The third \$50,000.00 apportionment, as presented by Defendants, is applicable to all Defendants by the terms outlined in the proposed entry.

R.C. 1343.03 provides in pertinent part:

- (A) In cases other than those provided for in Sections 1343.01 and 1343.02 of the Revised Code, when money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account, upon any settlement between parties . . . The creditor is entitled to interest at a rate of ten percent per annum, . . . (Emphasis Added)

PAGE 4  
MEMORANDUM DECISION  
CASE NO. 83 CIV 037

A Consent Judgment is clearly a "settlement between parties" under the terms of which money becomes due at certain intervals. R.C. 1343.03 authorizes the creditor under the terms of the agreement to ten percent interest on the unpaid balance. The interest attaches by operation of law, and not as a result of the agreement of the parties.

This Court had intimated that it believed the statutory rate of interest may not attach to a "fine" or "criminal penalty." However, a review of the statutory scheme under which the instant action has been brought, leads the Court to conclude that the civil penalty authorized by R.C. 3434.13 is not a fine, criminal penalty or even quasi-criminal penalty, but civil remedial relief. Both case law and statutory construction support such a conclusion.

R.C. 3434.13(C) provides as follows:

If the Director determines that any person is violating or has violated this chapter, a rule adopted thereunder, or term or condition of a permit issued thereunder, the Director may, without prior issuance of an order, request in writing that the Attorney General bring a civil action for appropriate relief, including a temporary restraining order, preliminary or permanent injunction, and civil penalties in any Court of competent jurisdiction. Such an action shall have the precedence over all other cases. The Court may impose upon the person a civil penalty of not more than ten thousand dollars for each day of violation of this Chapter, a rule adopted thereunder, or a term or condition of a permit issued thereunder, which money shall be paid into the hazardous waste clean-up special account created in Section 3734.28 of the Revised Code.

Any action under this Section is a civil action, governed by the rules of civil procedure and other rules of practice and procedure applicable to civil actions. (Emphasis Added).

While R.C. 3743.13(C) specifically labels any action brought pursuant to that section a "civil action" the case law outlining the factors to be considered in assessing the penalty describe the purposes of the penalty assessment as remedial rather than penal. The proceeds are deposited into the Hazardous Waste Clean-Up Special Account for clean-up and investigation of future sites.

PAGE 5  
MEMORANDUM DECISION  
CASE NO. 83 CIV 037

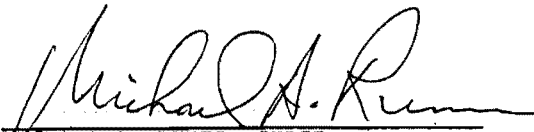
A review of R.C. 3734.99, further emphasizes the legislative intent to distinguish between civil and criminal enforcement of the hazardous waste laws. This section makes any reckless violation of R.C. Chapter 3734 a felony subject to a fine and/or imprisonment. This criminal process was not pursued here.

It must assumed by the Court that the parties, through counsel, were aware of the operation of R.C. 1343.03 as to the installment apportionment of the penalty.

However, this Court's of the opinion that no interest should accrue as to the last \$50,000.00 apportionment which is to be credited by the amounts spent for analysis and clean up. Two reasons are foremost in the Court's approach to this segment of the judgment. First, the amount, if any is unliquidated and can only be determined at the end of the project. To charge the Defendants interest over the five (5) year period on the unexpended balance would become a bookkeeping nightmare, as well as encourage the Defendants to spend funds early to cut off accrual while jeopardizing the quality of the analysis and implementation. It would be self-defeating, from the public's standpoint, to have shoddy work by the Defendants' contractor to avoid interest accual.

Secondly, the State has agreed to allow Defendants to take their own remedial steps to correct an alleged but unidentified problem. Should the soil analysis prove non-injurious and therefore not in need of further remedial action the Defendants should not be further penalized by interest charges. Interest, by definition, is the charge made for the use of some other persons funds. In this case the State and Defendants have agreed to use Defendants funds directly rather than pay them into the State and then have the State remedy the situation. By acceptance of this approach the State has waived its claim to interest.

cc: Thomas F. Bryant  
Dale T. Vitale

  
MICHAEL A. ROMER, JUDGE



IN THE ALLEN COUNTY COURT OF COMMON PLEAS, LIMA, OHIO

STATE OF OHIO, ex rel.  
ANTHONY J. CELEBREZZE, JR.  
ATTORNEY GENERAL OF OHIO  
Plaintiff

CASE NO. 83 CIV 037

-vs-

JUDGMENT ENTRY

TRANSVAC, DIVISION OF  
INTERDYNE CORPORATION, et. al.  
Defendants

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This matter came on for hearing upon plaintiff's motions for contempt filed January 2, 1986 and January 9, 1986 respectively. Mr. Vitale appeared on behalf of the plaintiff, and Mr. Bryant on behalf of defendant with all defendants present in open Court. Evidence was adduced and arguments of counsel made.

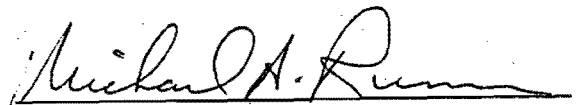
Upon consideration of the matter, the Court finds that defendant Transvac, Division of Interdyne Corporation is in contempt of this Court's Order of September 27, 1985, paragraph 4(B) in that, beyond a reasonable doubt, it failed to pay the plaintiff a fine installment of \$10,000.00 on or before December 31, 1985 or obtain an extension of said deadline.

The Court further finds as to the charges against all three defendants for the failure to submit a plan for soil sampling and analysis of the subject premises on Jefferson Street, Lima, Ohio are not well taken in that paragraph 6 of the Court's Order does not place this burden solely upon defendants, but places the responsibility on all parties relative to a plan.

Case No. 83 CIV 037  
State of Ohio -vs- Transvac  
Judgment Entry  
Page 2

Pursuant to the above findings the Court ORDERS:

- (1) That defendant Transvac, Division of Interdyne Corporation be found in contempt;
- (2) That defendant corporation may purge itself of that contempt by the payment of the fine by February 28, 1986;
- (3) That unless the ten thousand dollar fine is paid prior to February 28, 1986 the Court shall appoint a receiver for the operation of Interdyne Corporation pursuant to R.C. 2735.01 and the ancillary sections to carry into effect the judgment of September 27, 1985;
- (4) That each party submit a plan within fifteen days of the filing of this entry; and
- (5) All costs assessed to defendant Transvac, Division of Interdyne Corporation.

  
MICHAEL A. RUMER, JUDGE

cc: Dale T. Vitale  
Thomas F. Bryant