

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE:
SOUTHDOWN, INC., LITIGATION,

Case No. C-3-93-270

Judge Walter Herbert Rice

PLAINTIFF'S MOTION TO JOIN PARTIES AS DEFENDANTS
UNDER RULE 19; MOTION TO JOIN A CLAIM UNDER RULE 18; AND
MOTION TO AMEND COMPLAINT APPROPRIATELY UNDER RULE 15

Plaintiff hereby moves to join 444 Sandhill, Inc., an Ohio corporation whose address is 18 West First Street, Suite 200, Dayton, Ohio 45402, and Dirtvest, Ltd., an Ohio limited liability company whose address is 18 West First Street, Suite 200, Dayton, Ohio 45402, as defendants in the within action.

Plaintiff also moves for leave to amend its Complaint under Rule 15 of the Federal Rules of Civil Procedure to reflect the additional parties and claims.

Plaintiff further moves to join a claim against Southdown, 444 Sandhill, and Dirtvest for fraudulent conveyance to its Complaint.

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A Memorandum in Support of this Motion is attached.

Respectfully submitted:

Robert J. Shostak, Esq. Date
Sup. Ct. Regis. #00452 16
Attorney for Green Environmental Coalition

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Page 2

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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFF'S MOTION TO JOIN PARTIES
AS DEFENDANTS UNDER RULE 19; MOTION TO JOIN
A CLAIM UNDER RULE 18; AND MOTION TO AMEND
COMPLAINT APPROPRIATELY UNDER RULE 15

I. BACKGROUND OF THE CASE

On July 20, 1993, the Greene Environmental Coalition ("GEC") filed a Complaint against Southdown, Inc. ("Southdown") under the citizens suit provisions of the Clean Water Act ("Act"), 33 U.S.C. § 1365, seeking abatement of a pollution discharge and civil penalty damages. The pollution discharge emanates from a large landfill located on what was then Southdown's property and operated by Southdown and its predecessors. The landfill is believed to contain principally cement kiln dust, along with chrome bricks and other industrial waste products generated in the course of operation of the portland cement plant. The pollution discharge (known as leachate) enters waters of the United States, a stream known as Mud Run, causing a significant degradation of its water quality to the extent that the stream below the discharge point is devoid of aquatic life in stark contrast to

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Page 1

its upstream condition.

The Act provides **civil penalties** of up to \$25,000 per day per violation (33 U.S.C. 1319(d)) to be determined by the Court. Notice of intent to sue was provided to Southdown on **January 31**, 1992, thus if the maximum penalty is assessed by this Court, the penalty could amount to more than \$50,000,000. Indeed, under the recent facts of this case, Plaintiff will justifiably strongly urge **this Court to** assess a significant civil penalty against Southdown.

A short time after GEC filed its lawsuit against Southdown, Southdown sued the former owner of the property USX Corporation under the Federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601, et seq., seeking damages and indemnification for the discharge from Landfill No. 1. See Case No. C-3-93-354.

Because of common issues of fact, the cases were consolidated by Entry dated June 29, 1994.

On January 23, 1995, after discussions among the parties and in consultation with the Court, a stay of proceedings of nearly two years was entered to allow **sufficient** time to Southdown and USX to evaluate the landfill site and propose a settlement of the matter. It was in the contemplation of the parties that Southdown and USX would propose a plan to remedy the Icacate discharge to Mud Run.

On March 5, 1997, the stay was extended to May 12, 1997, to allow for the issuance of a report by the environmental consultant, Panterra Corporation of Texas, retained by Southdown and USX.

On April 4, 1997, Panterra issued its report entitled "Alternatives feasibility evaluation" to Southdown and USX. Plaintiffs counsel was informed of the report and provided a copy on April 18, 1997.

On July 1, 1997, all of the parties, their respective counsel, and environmental consultants met at the offices of Bricker & Eckler in Columbus and engaged in settlement discussions. An offer to settle was proposed by GEC which was taken into consideration by Southdown and USX. Discussions continued over the summer with status conferences with the Court from time to time. An impasse lead to the scheduling of a settlement conference with the Court on September 23, 1997. Due to a conflict in Plaintiff's counsel's schedule, the September 23rd conference was rescheduled for October 6, 1997, which was later rescheduled for October 16, 1997, as a telephone conference. On October 16, 1997, during the status conference, the Court set a settlement conference for November 13, 1997, with an exchange of settlement letter by November 11, 1997.

On November 7, 1997, at 5:21 p.m., Frank Merrill, counsel for Southdown, faxed a letter to GEC's counsel informing that the tract of land containing the landfill had been sold to Dirtvest, Ltd., and 444 Sandhil!, Inc. A copy of that letter is attached as Exhibit A. The

Court was informed of the matter by letter dated November 11, 1997. At a telephone status conference with the Court on November 25, 1997, the Court allowed Plaintiff time to consider, evaluate, and present appropriate motions addressing the legal issues presented by the transfer of **ownership. Hence** the instant motion.

II. UNDERLYING FACTS RELEVANT TO THE TRANSFER OF OWNERSHIP

Southdown owns hundreds of acres near the city of Fairbom upon which it conducts its **portland** cement production plant and several limestone quarries from which it gets the raw materials to produce **portland** cement. In addition, Southdown and the predecessor owner of the property, USX, operated several landfills in which they disposed of the industrial wastes of the operation. Indeed, as noted above, after Southdown received GEC's notice of intent to sue, Southdown determined to bring its own claims against the prior owner, Atlas Cement Company, and its parent, USX Corporation. The Court and parties have been informed that Southdown and USX have reached a settlement of their litigation and the *Southdown v. USX* litigation has been dismissed.

On November 7, 1997, Plaintiff was informed by Frank Merrill, counsel for Southdown, that the properties at issue in the GEC case, the landfill and discharge point, had been sold. See letter attached hereto as Exhibit A. Upon its own investigation, Plaintiff has learned that Southdown has sold parts of its property to two separate entities, namely 444 Sandhill, Inc. ("444") and Dirtvest, Ltd. ("Dirtvest"). These transfers occurred on

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Page 4

September 30, 1997. A copy of the deed to 444 is attached hereto as Exhibit B and the deed to Dirtvest is attached as Exhibit C.

Plaintiffs investigation has revealed that Dirtvest, Ltd., is an Ohio limited liability company registered with the Ohio Secretary of State's office on August 8, 1997, I.D. #988373. Its office address is listed as 18 West First Street, Suite 200, Dayton, Ohio 45402. Its agent for service of process is Jacob Myers. See Affidavit of Susan Lanning attached hereto as Exhibit D.

444 Sandhill, Inc., is an Ohio corporation incorporated with the Ohio Secretary of State's office on September 26, 1997. The agent for service of process is Adam J. Biehl, 18 West First Street, Suite 200, Dayton, Ohio 45402. See Affidavit of Susan Lanning attached hereto as Exhibit D.

The records of the County Auditor's office reveal that Kohner Assoc., c/o Robert L. Kohner, P.O. Box 250, Dayton, Ohio 45449, are to receive the tax billings for 444 Sandhill, Inc. See Exhibit E.

In its 1997 Regulation Q filing with the Federal Securities and Exchange Commission (see Exhibit F). at Part II, pp. 17-18, Southdown states:

On September 30, 1997, the Company sold the property that is the subject of these lawsuits to independent third parties. The property was sold "as is, where is" and the Company assumed no obligations to remediate the property. Because of the transaction, the Company is negotiating a stipulated dismissal of this lawsuit with USX Corporation. Also, since the

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Page 5

Company no longer owns this property, the Company believes it should have no ongoing obligation under the Clean Water Act to obtain a permit for the alleged discharge from **the** property, which is the sole allegation in the GEC Case. The Court has ordered the parties to attend a settlement conference with the Court. A date for this conference has not been established as of this writing. **The** Company intends to move the Court for a dismissal of the GEC Case based on the recent transaction.

To the best of **Plaintiff's** ability, it appears that the part of the landfill from which the pollution discharge emanates was sold to Dirtvest. However, 444 owns part of the landfill which contributes to the discharge. Thus, both parties have an interest in the outcome of the pending litigation.

III. DISCUSSION

A. Joinder of Partics

Rule 19(A) reads in relevant **part**:

Persons to be joined if feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the **subject** of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties **subject** to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Rule 19 requires a two-step analysis to determine when persons should be joined to pending litigation. The first step requires a determination of whether an absent

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Page 6