

**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

**DEFENDANT SOUTHDOWN'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S
MOTION TO JOIN A CLAIM UNDER
RULE 18 AND MOTION TO AMEND COMPLAINT UNDER RULE 15**

On March 2, 1998, counsel for Southdown, Inc. ("Southdown") was served with a copy of Plaintiffs 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 15.¹ Southdown does not oppose Plaintiffs Motion to Join Parties as Defendants under Rule 19 but does oppose Plaintiffs Motion to Join a Claim under Rule 18 and Plaintiffs Motion to Amend Complaint under Rule 15.

Despite the uncertainty of the exact nature of the proposed amendment, due to Plaintiffs failure to attach a copy of the proposed amended complaint to its motion, it is nonetheless clear that Plaintiff cannot, as a matter of law, state a claim for fraudulent conveyance against Southdown. In the alternative, in light of Plaintiffs failure to attach a copy of the proposed amended complaint to its motion, Plaintiffs motion should be denied or stayed until Plaintiff has submitted a proposed amended complaint.

¹ In conjunction with the filing of Plaintiffs motions, on March 3, 1998 Plaintiff held press conferences in Dayton, Ohio and Houston, Texas and issued an inflammatory press release titled "Texas Cement Company Charged with Fraud in Ohio - Company Faces Fifty Million Dollars in Fines" (see copy attached as Exhibit A).

I. LAW AND ARGUMENT

Rule 15(a) of the Federal Rules of Civil Procedure provides that a party may amend its pleading by leave of court, and “leave shall be freely given when justice so requires.” The decision whether to grant leave to amend is within the sound discretion of this Court. United States v. Wood, 877 F.2d 453,456 (6th Cir. 1989). In recognition of the objective of the Federal Rules of Civil Procedure to make pleadings a vehicle for the proper presentation of a case rather than an end in themselves, the standard for granting leave to amend is an exceedingly liberal one. 3 Moore’s Federal Practice, ¶ 15.02 (Matthew Bender 3d ed. 1997); see also Conley v. Gibson, 355 U.S. 41, 48 (1957); Fed. R. Civ. P. 1 (stating that the Rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action”). Thus, absent unusual circumstances such as “delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party . . ., [or] futility of amendment,” leave should be freely granted. Foman v. Davis, 371 U.S. 178, 182 (1962).

In analyzing the propriety of granting leave to amend a complaint, the Sixth Circuit employs several factors which should be considered by the district court. See Wood, 877 F.2d at 456-7; Roth Steel Products v. Sharon Steel Corp., 705 F.2d 134, 155 (6th Cir. 1983). These considerations include: 1) whether the opposing party will be unduly prejudiced if leave is granted; 2) whether the amended complaint can survive a motion under Fed. R. Civ. P. 12(b)(6); 3) whether the opposing party will be unduly surprised by any new theories asserted in the amended complaint; 4) whether the opposing party will have sufficient time to conform its pleadings to the amended complaint, and ultimately; 5) whether granting leave to amend

adversely affects the opposing party's posture in the litigation. Wood, 877 F.2d at 456-57; Roth Steel Products, 705 F.2d at 155. In the instant case, since the amended complaint cannot survive a motion to dismiss under Rule 12(b)(6), Plaintiffs motion to amend its complaint to add an additional claim should be denied.

A. Plaintiffs motion should be denied because Plaintiff cannot, as a matter of law, state a claim for fraudulent transfer under Ohio law because Plaintiff is not a “creditor” of Southdown.

While the extent and detail of Plaintiffs allegations are not entirely clear because Plaintiff failed to attach a copy of its proposed amended complaint, it is clear that under Ohio law Plaintiff can make no claim against Southdown for a fraudulent conveyance. Pursuant to Ohio Rev. Code Chapter 1336, a transfer by a “debtor” is fraudulent as to a “creditor” under certain circumstances which are not relevant to the case at bar. In order for the alleged transfers to be fraudulent under Ohio law, Plaintiff must be a “creditor” of Southdown. See Ohio Rev. Code §§ 1336.04 and 1336.05. To be a “creditor” of Southdown, Plaintiff must have a “claim” against Southdown. Ohio Rev. Code § 1336.01(D). A “claim” is a “right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, legal, equitable, secured, or unsecured.” (Emphasis added.) Ohio Rev. Code §1336.01(C)

Plaintiff cannot allege that it is a creditor of Southdown in the context of this lawsuit because no such right of payment exists. In the instant action, Plaintiffs sole allegation is that Southdown is discharging pollutants into the waters of the United States without a permit in violation of the Clean Water Act. Plaintiff seeks injunctive relief and the imposition of civil penalties. Even if Plaintiff were to prevail, which assumes all facts in favor of the Plaintiff, any civil penalties imposed cannot, as a matter of law, constitute a “claim” or “right to payment” from Southdown to Plaintiff because such civil penalties are paid to the United States

government. See 33 U.S.C. §1365. Therefore, within the context of this lawsuit, Plaintiff can make no claim that it is a “creditor” of Southdown with standing to prosecute a fraudulent conveyance action under Ohio Rev. Code Chapter 1336.

In conclusion, Plaintiffs motion to join a claim for fraudulent conveyance must be denied because Plaintiff cannot allege that Plaintiff is a “creditor” of Southdown. Since Plaintiff has not alleged, nor can it in the context of this lawsuit, that it is a “creditor” of Southdown, Plaintiff cannot, as a matter of law, bring a claim for fraudulent conveyance under Ohio law.

Accordingly, this court must deny Plaintiff's motion to join an additional claim.

B. In the alternative, in light of Plaintiffs failure to attach a copy of the amended complaint to its motion, Plaintiffs motion should be denied or stayed until a copy of the proposed amended complaint is submitted.

This Court has held that “there is substantial authority for the proposition that Civil Rules 7(b)(1) and 15(a) impliedly require submission of the proposed amended pleading with the motion to amend.” Nation v. U.S. Government, 512 F.Supp. 121, 124 (S.D. Oh. 1981). In this case, Plaintiff has failed to attach a proposed amended complaint to its motion for leave to amend. Plaintiffs memorandum in support merely alleges that a fraudulent transfer occurred when Southdown conveyed property to 444 Sandhill, Inc. and Dirtvest, Ltd. Such conclusory allegations shed little light on what specific factual allegations Plaintiff believes establish a fraudulent transfer. In addition, this is an entirely new claim requiring that new facts be alleged. As such, Plaintiffs motion should either be denied or stayed pending submission by Plaintiff of an amended complaint. Nation, 512 F.Supp. at 124-5 (disposition of motion for leave to amend pleading should be held in abeyance until movant has submitted a proposed amendment); see also Williams v. Wilkerson, 90 F.R.D. 168, 170 (E.D.Va. 1981) (motion for leave to file

amended complaint denied without prejudice because plaintiff failed to attach a copy of the proposed amended pleading to the motion).

II. CONCLUSION

For the foregoing reasons, Defendant Southdown respectfully requests that the Court deny Plaintiffs motion to join an additional claim and deny Plaintiffs motion for leave to file an amended complaint because Plaintiff cannot state a claim for fraudulent transfer under Ohio law. In the alternative, Defendant Southdown respectfully requests that the Court deny Plaintiffs motions due to Plaintiffs failure to attach a copy of the proposed amended pleading to the motion or stay disposition of these motions until Plaintiff submits a copy of said pleading.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Defendant Southdown's Memorandum In Opposition To Plaintiffs Motion To Join A Claim Under Rule 18 And Motion To Amend Complaint Under Rule 15 was served on Robert J. Shostak, Esq., Shostak Law Office, 41 North Court Street, Suite 301, Athens, Ohio 45701-2429, Attorney for Plaintiff, C. Craig Woods, Esq., Squire, Sanders & Dempsey, 1300 Huntington Center, 4 1 South High Street, Columbus, Ohio 43215 and Jacob A. Myers, Esq., Myers & Frayne Co., LPA, 18 West First Street, Suite 200, Dayton, Ohio 45402 by regular U.S. mail, postage prepaid, this 20th day of March, 1998.



Quintin F. Lindsmith (0018327)

EXHIBIT A

MEDIA ADVISORY

Greene Environmental Coalition
Embargo until 11:00 AM EST, Tuesday, March 3, 1998

Date: Tuesday March 3, 1998 - 2:00 PM
**Place: U.S. Federal Court, 200 West
Second Street, Dayton**

Contact: Bruce Cornett at (937) 767.2109 or (937) 767.5000
bcornett@greenlink.org
Michael Jones at (937) 767.1004

TEXAS CEMENT COMPANY CHARGED WITH FRAUD IN OHIO - COMPANY FACES FIFTY MILLION DOLLARS IN FINES.

Tuesday, March 3 in an ongoing civil enforcement case that began in Federal Court in 1993 in Dayton, OH, the Greene Environmental Coalition will add new charges that Southdown Corporation committed a Fraudulent Conveyance of 500 acres of contaminated land.

A landfill owned by the company has been leaching heavy metals for at least 5 years into a tributary of the Mad River near the well fields of Fairborn Ohio.

The media will be presented with:

- extensive photographs
- video tapes
- detailed documentation of this environmental travesty.
- copies of the suit

1) A concurrent press conference is being held in Houston, Texas today at 1:00 PM . Tracy Slayton, the Coalition's president and Mike Nixon, one of the Coalition's attorneys will be present in Houston.

The Houston event is being coordinated by Texan's United. Contact Jim Baldauf via cellular phone (512) 517.2663 or Rick Abraham at (713) 869.0774