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BARBARA A. WIEDENBORN
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**IN THE COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

STATE OF OHIO, ex rel.	:	CASE NO. 2018 CVH 01272
DAVE YOST	:	
OHIO ATTORNEY GENERAL,	:	
	:	
Plaintiff,	:	
	:	JUDGE ANTHONY BROCK
v.	:	
	:	
DONALD COMBS, et al.,	:	
	:	
Defendants.	:	

ORDER AND ENTRY

Pursuant to the Entry Granting Plaintiff's Motion for Summary Judgment and Imposing Injunctive Relief of February 11, 2021, this matter came before this Court on February 25, 2021 at 1:00 pm for a hearing on civil penalty against Defendants Donald Combs, Donald Combs dba Ace Dumpsters, and Donald Combs dba Combs Trucking and Land Improvement (collectively "Defendants") and Defendant Anita Combs. Defendant Donald Combs was present, and he and Donald Combs dba Ace Dumpsters and Donald Combs dba Combs Trucking and Land Improvement were represented by Jesse Lipcius and Reuel Ash. The State was represented by Casey Chapman and Sarah Bloom Anderson. Upon consideration of the Court's Entry Granting Plaintiff's Motion for Summary Judgment and Imposing Injunctive Relief, the briefings on civil penalty, the evidence before the Court, and the arguments of counsel, the civil penalty is hereby ordered as follows:

IT IS HEREBY ORDERED that a civil penalty judgment of \$10,000.00 against Anita Combs, and a civil penalty judgment of \$1,490,000.00 against Defendant Donald Combs, Donald Combs dba Combs Trucking and Land Improvements, and Donald Combs dba Ace Dumpster is awarded to Plaintiff, the State of Ohio ex rel. Dave Yost. The Court hereby finds:

1. The Court found liability against Defendants and Defendant Anita Combs for all eight counts as alleged in the State's Complaint for their violations of Ohio solid waste and construction debris laws under R.C. Chapter 3734 (Counts One through Five), air pollution control laws under R.C. Chapter 3734 (Count Six), and for nuisance (Counts Seven and Eight).

2. Upon finding liability, violators of R.C. Chapters 3714 and 3734 are subject to a civil penalty of "not more than ten thousand dollars for each day of each violation." R.C. 3714.11(B); R.C. 3734.13(C).

3. Upon finding liability, violators of R.C. Chapter 3704 are subject to a civil penalty of not more than twenty-five thousand dollars for each day of each violation. R.C. 3704.06(C).

4. Because of the mandatory nature of civil penalties under R.C. Chapters 3704, 3714, and 3734, a trial court's discretion lies in determining *how much* civil penalty is imposed and not *whether* to impose a civil penalty. *See State of Ohio v. Tri-State Group, Inc.*, 7th Dist. Belmont No. 03-BE-61, 2004-Ohio-4441 ¶ 103.

5. Deterrence is the primary purpose of assessing a civil penalty against a violator of environmental laws. A strong civil penalty deters both the violator in the present case from violating those laws in the future and others who might violate the law. In order to deter, the probability that a significant penalty will be imposed must be high enough that an offender finds the costs of noncompliance subjects them to substantial monetary risks. *State ex rel. Celebrezze v. Thermal-Tron*, 71 Ohio App.3d 11, 592 N.E.2d 912 (1992). "In determining a penalty, the trial

court must remember that because a civil penalty is an economic sanction designed to deter violations, the penalty must be large enough to hurt the offender.” *State of Ohio v. Meadowlake Corp.*, 5th Dist. Stark No. 2006 CA 00252, 2007-Ohio-6798, ¶ 51.

6. The Court recognizes that it may use its informed discretion to impose a civil penalty that is appropriate to: 1) redress the harm or risk of harm posed to public health or the environment by the violations at issue; 2) remove the economic benefit gained by the violations; 3) penalize the level of recalcitrance, defiance or indifference demonstrated by the violator of the law; and 4) address the extraordinary costs incurred by the State of Ohio. *State ex rel. Brown v. Dayton Malleable, Inc.*, 2d Dist. No. 6722 (Apr. 21, 1981), at *8, partially reversed on other grounds, 1 Ohio St.3d 151, 158, 438 N.E.2d 120 (1982).

7. With regard to the first civil penalty factor, that of risk of harm, it is clear that “[t]here is no requirement of proof of actual harm.” *State ex rel. Celebrezze v. Thermal-Tron, Inc.* 71 Ohio App. 3d at 20. This makes sense, given that “oftentimes . . . the actual damage cannot be precisely ascertained or is incapable of measurement.” *Dayton Malleable* at 13-14.

8. Defendant Anita Combs was not involved in the businesses operated by Donald Combs. Defendant Donald Combs, individually and doing business as other company Defendants, bears a grossly disproportionate responsibility for the violations in this case. However, as co-owner of the Sites, Mrs. Combs still bears responsibility for the environmental risk of harm.

9. Defendants’ violations caused a risk of harm to the public and to the environment that is both severe and imminent. Defendant Donald Combs dumped acres of solid waste at his own residence - the very home he raises his young children and next door to other families raising young children. This solid waste sat for years, began to decompose, and leachate seeped onto the ground, creating a risk of groundwater contamination. Defendant Donald Combs harbored scrap

tires at the properties risking disease in the community. He also created a significant risk of harm by open burning waste and debris and by creating a fire hazard due to the acres of solid waste piles at his Sites.

10. The second civil penalty factor, that of recalcitrance and indifference, reflects the principle that a “civil penalty is supposed to be a deterrent to violation, insofar as the violator is concerned, and an example to others, not just [. . . a] fee which might be considered nothing more than the cost of doing business.” *Dayton Malleable*, 1 Ohio St. 3d at 157; *State ex rel. Cordray v. Morrow Sanitary Co.*, 5th Dist. Morrow No. 10-CA-10, 2011-Ohio-2690, ¶ 15 (noting “significant recalcitrance by failing to discover and remedy violations before Ohio EPA sent any notice of violation, and by being relatively unresponsive even after Ohio EPA notified [violators] of their legal obligations * * *”).

11. The Court finds that Defendant Donald Combs has been extremely recalcitrant. He has repeatedly defied both Ohio EPA’s orders and notices of violation, court orders issued in prior proceedings concerning dumping on his property, as well as this Court’s orders. After more than two years of legal proceedings, a preliminary injunction order, two findings of contempt, and ten days in jail, the waste and debris remain on his residential site. Defendant even brought more material onsite, adding to the 20-foot piles of waste. Ohio EPA staff testified that Defendant Donald Combs is one of the most, if not the most, recalcitrant violator they have encountered. Despite efforts from multiple agencies over the last decade, Defendant Donald Combs continues to defy Ohio law and this Court’s orders.

12. A trial court may deduce an economic benefit, the third factor, based on the circumstances and presume economic benefit from environmental violations because oftentimes “it is impossible for either the trial court or [the appellate court] to calculate the precise amount of

economic benefit [defendants] gained by their non-compliance. . .” *Tri-State Group*, 2004-Ohio-4441, at ¶¶ 112-114.

13. The Court finds that Defendants gained an economic benefit from violating Ohio law. While the precise amount of economic benefit gained from their violations is not quantifiable, testimony showed that the cleanup costs of the sites is nearly \$1,300,000. Defendants gained an economic benefit by delaying these costs. They created an unlevel playing field in their industry, illegally creating an unfair business advantage by not paying a licensed disposal facility to take their accumulated solid waste, construction demolition and debris, and commingled waste that sat onsite for years. By avoiding this expense for years while their competitors were required to pay disposal fees, Defendants irrefutably obtained a substantial economic benefit.

14. Regarding the fourth factor, extraordinary enforcement costs protect and preserve the self-regulating nature of Ohio’s environmental laws “designed to avoid reaching litigation.” *State ex rel. DeWine v. Deer Lake Mobile Park*, 2015-Ohio-1060, 29 N.E.3d 35, ¶ 48 (11th Dist.). (“[The statutory scheme] depends on cooperation of the regulated industry through its self-monitoring, self-reporting, and self-correction.”).

15. The Court finds that the State incurred extraordinary costs in its attempts to bring Defendants into compliance. The State presented evidence of extraordinary enforcement costs. They spent substantial time and resources inspecting Defendants’ Sites for compliance with the Court’s orders and preparing to enforce against Defendants’ contempt of those orders. Ohio EPA staff have been to the Sites over a dozen times in the last several years due to Defendants’ noncompliance. They had to present evidence in contempt proceedings twice. These efforts also included substantial involvement from the Ohio Attorney General’s Office — filing the case, the preliminary injunction, summary judgment, the civil penalty hearing, in addition to time spent

preparing for and litigating the case. Altogether, the State's time and resources have been extraordinary, especially for a process that is supposed to be self-regulating. *State ex rel. DeWine v. Deer Lake Mobile Park, Inc.*, 2015-Ohio-1060, 29 N.E.3d 35, ¶ 48 (11th Dist.) (“[T]he statutory scheme governing enforcement of Ohio’s environmental laws is designed to be self-regulating. It depends on cooperation of the regulated industry through its self-monitoring, self-reporting, and self-correction. It is designed to avoid reaching litigation.”).

16. When imposing a civil penalty for environmental violations, the proper starting point is the statutory maximum, and any downward adjustments made only based upon the evidence introduced at trial. *State of Ohio v. Midwest Paving and Materials Co.* (Cuyahoga Cty. 2012), No. CV 10 723796, Findings of Fact and Conclusions of Law of May 25, 2012, (citing *United States v. Midwest Suspension and Brake*, 824 Supp. 713, 735 (E.D. Mich. 1993), affirmed 49 F.3d 1197 (C.A. 6, 1995).

17. Based on this Court’s findings of liability on all eight counts of the State’s Complaint, Defendants amassed 1,371 days of violation from the effective date of the Director’s Orders for Count One at a statutory maximum of \$10,000.00 per day; 2,341 days of violation from September 3, 2014 for Counts Two through Five at a statutory maximum of \$10,000.00 per day; and 1 day of violation for Count Six at a statutory maximum of \$25,000.00 per day; making the statutory maximum civil penalty \$107,375,000.00.

18. The State did not seek civil penalty or damages for the nuisance violations in Counts Seven and Eight.

19. Ohio appellate courts have reversed civil penalties in part because the penalties were less than one percent of the statutory maximum. *State ex rel. Rogers v. Elbert*, 180 Ohio App.3d 284, 2008-Ohio-6746, 905 N.E.2d 235, ¶ 62 (9th Dist.).

20. Other Ohio courts have also considered this one percent guideline. *State v. Pure Tech Systems*, Cuyahoga C.P. No. CV-06-597766 (May 13, 2014), 12 ¶ 20 (holding defendants liable for \$6,075,800, “or one percent of statutory maximum”); *State v. Ashworth*, Lawrence C.P. No. 06-OC-853 (June 8, 2011), 9-10 (“Defendants are ORDERED to pay a civil penalty for the violations at [each site], that is a deterrent, large enough to punish the offender, and more than one percent (1%) of the statutory maximum...”), affirmed at *State v. Ashworth*, 4th Dist. Lawrence No. 11CA16, 2012-Ohio-5632, ¶ 10 (explaining that the trial court’s “decision to impose approximately one percent of the penalty it could have” indicates “that the court did not act unreasonably, arbitrarily, or unconscionably in fixing the amount of the penalties”).

21. A civil penalty of \$1,500,000.00 is more than one percent of the statutory maximum and reflects the seriousness of the risk of harm to public health and the environment, the unparalleled level of recalcitrance, the economic benefit derived by Defendants for the violations, and the extraordinary enforcement costs incurred by the State. Further, this amount exceeds the \$1,300,000.00 estimate the State provided to remove and dispose of the solid waste, construction demolition and debris, and commingled waste.

22. A party who has violated environmental laws bears the burden of showing a civil penalty would be ruinous or otherwise disabling. *State ex rel. Dann v. Meadowlake Corp.*, 5th Dist. Stark No. 2006 CA 00252, 2007-Ohio-6798, ¶ 66.

23. Defendants offered no evidence that a civil penalty of \$1,500,000.00 will be ruinous.

24. Defendant Anita Combs has never appeared before this Court, and therefore has not offered any evidence that a civil penalty of \$10,000.00 will be ruinous.

25. Having considered the four factors articulated in *Dayton Malleable* and the evidence submitted by Plaintiff, the State of Ohio, this Court finds that a \$10,000 penalty for Defendant Anita Combs and a \$1,490,000 civil penalty for Defendants Donald Combs, Donald Combs dba Ace Dumpsters, and Donald Combs dba Combs Trucking and Land Improvement for their violations of Ohio's solid waste and air pollution control laws is warranted.

Therefore, it is ORDERED, ADJUDGED AND DECREED that Defendant Anita Combs shall pay to the State of Ohio a civil penalty of ten thousand dollars (\$10,000.00), and Defendants Donald Combs, Donald Combs dba Ace Dumpsters, and Donald Combs dba Combs Trucking and Land Improvement shall pay to the State of Ohio, jointly and severally, a civil penalty of one million, four hundred and ninety thousand dollars (\$1,490,000.00) pursuant to R.C. Chapters 3704, 3714, and 3734.

This Court will retain jurisdiction of this suit for the purpose of making any order or decree which it may deem necessary at any time to carry out its judgment. There is no just cause for delay with respect to the matters set forth herein. This is a final appealable order.

IT IS SO ORDERED.

3-3-21
DATE


JUDGE ANTHONY W. BROCK