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IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

State of Ohio, ex rel. Marc Dann,	**Case No. 2007CV02973**
Plaintiff,	**Judge Lee Sinclair**
	Magistrate Kristin G. Farmer
vs.	
Donald C. Coen, et al.,	**MAGISTRATE'S DECISION**
Defendants.	

This matter came before this Magistrate for an evidentiary hearing on the complaint on December 7, 2007.[1] On December 6, 2007, the Court granted the motion of the plaintiff, the State of Ohio ("State"), for default judgment against the defendants, The Coen Company ("Coen Company"), Carlton B. Coen Land Co. ("Carlton"), and Rocket Oil Company ("Rocket"). Via a judgment entry filed same date, injunctive relief was afforded to the State against these defendants. Additionally, prior to the commencement of the December 7, 2007, hearing, the Court granted the State's request for a declarative ruling that said defendants were "owners or operators" for the purposes of applicable Ohio Administrative Code and Ohio Revised Code provisions. Therefore, the only issue remaining as to the aforementioned defendants to be determined by this Magistrate is the appropriate civil penalty, if any, to be levied against each defendant.

As to the remaining defendant,[2] Donald C. Coen ("Donald Coen"), the State not only seeks to hold him liable for environmental violations as an "owner

[1] The hearing was, in essence, a trial on the merits of the State's complaint.

[2] Robert Coen was also named as a defendant in this matter. However, prior to the hearing, the State and Robert Coen entered into a consent entry.

or operator," but, further, seeks to hold him personally liable (i.e., "pierce the corporate veil") for the violations of Coen Company, Carlton, and Rocket. With respect to Donald Coen, this Magistrate must determine: (1) whether he was an "owner or operator" of any of the sites at issue; (2) whether a violation has occurred at any site in which he is found to be an "owner or operator"; (3) if a violation or violations have occurred, the appropriate injunctive relief and/or civil penalty that may be awarded to the State; and, (4) whether Donald Coen can be held personally liable for the violations by Coen Company, Carlton, and Rocket.

Upon review of the evidence submitted at the hearing, as well as the written closing arguments submitted by both parties, this Magistrate finds as follows:

I. Coen Company, Carlton, and Rocket

A. Findings of Fact

1. As previously stated, default judgment and injunctive relief have been granted against Coen Company, Carlton, and Rocket.

2. Therefore, for this Magistrate's "Findings of Fact" as it relates to these defendants, this Magistrate incorporates the allegations of the complaint against same as it fully rewritten herein.

B. Conclusions of Law

3. R.C. 3737.882 (C)(2) provides for a civil penalty of not more than $10,000.00 a day for each day that a person violates or fails to comply with a rule adopted under R.C. 3737.88(A) or (B), or any order issued by the Fire Marshall pursuant to R.C. 3737.88 (A) or R.C. 3737.882 (A)(1).

4. "Civil penalties can be used as a tool to implement a regulatory program." *State v. Howard* (2006), 3 Ohio App.3d 189, citing *United States ex rel. Marcus v. Hess* (1943), 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443; *Oceanic Steam Navigation Co. v. Stranahan* (1909), 214 U.S. 320, 29 S.Ct. 671, 53 L.Ed. 1013.

5. The purpose of a civil penalty is deterrence of future violations, not punishment. *Dayton Malleable*, infra.

6. When determining the amount of a civil penalty, the following factors are to be considered: 1) the harm or threat of harm posed to the environment by the person violating committing the violation; 2) the level of recalcitrance, defiance, or indifference demonstrated by the violator of the law (i.e., the defendant's good or bad faith); 3) the economic benefit gained by the violation; and, 4) the extraordinary costs incurred in enforcement of the regulations at issue. *State v. Tri-State Group, Inc.*, 7th Dist. No. 03 BE-61, 2004-Ohio-4441, citing *Howard*, supra, *State ex rel. Brown v. Dayton Malleable* (1982), 1 Ohio St.3d 151, 157, 438 N.E.2d 120, and *Mentor v. Nozik* (1993), 85 Ohio App.3d 490.

7. In order to calculate the amount of a civil penalty, a court is to assess a dollar value to each factor that the court finds appropriate to address to concerns presented by the factor. The court must then add such values and reduce that amount by any "mitigating factors," such as any amount that may be attributable to action/inaction by the government or any other factors beyond the violator's control. *Dayton Malleable*, supra.

8. Further, in order to deter future violations, a civil penalty must be large enough to hurt the offender, but not so large as to result in the violator's

bankruptcy. *State ex. rel. Petro v. Maurer Mobile Home Court, Inc.*, 6th Dist. No. WD-06-053, 2007-Ohio-2262, citations omitted.

9. To this end, a court may consider the financial status of an offender in order to insure that the penalty is large enough to make an impact, but not so large as to bankrupt the offender. Id.

10. All of the violations found to have been committed by Coen Company, Carlton, and Rocket are subject to the penalty set forth in R.C. 3737.882 (C)(2).

11. This Magistrate finds that Coen Company was liquidated by Key Bank in 1995. Although there was evidence presented that Coen Company never entered bankruptcy or was properly dissolved, this Magistrate finds that the Coen Company has ceased to exist since the 1995 liquidation and has been cancelled by the Secretary of State. In light of purpose behind civil penalties (i.e., deterrence of future violations), this Magistrate finds that a civil penalty against Coen Company is not warranted because it no longer exists and, therefore, the penalty would not be a deterrent. Rather, it would serve as a punishment.[3] As such, since Coen Company is the only "Owner or Operator" of the premises located at 604 Lincoln Way, Minerva, Ohio ("Dave's Lincoln Way Amoco"), this Magistrate will not assess a civil penalty relative thereto.

12. However, as to Rocket and Carlton, this Magistrate finds that both corporations are currently operating, despite the fact that Rocket was cancelled by the Secretary of State. As such, this Magistrate, hereby, assesses the following civil penalties against the aforementioned:

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[3] This Magistrate recognizes that R.C. 3737.82 (C)(2) is mandatory in nature. However, this Magistrate finds that the notion that the violator is still operational is implicit in the language of the statute.

a). Civil Penalties against Carlton:

1). 1900 19th St. Canton, Ohio ("Pep Oil"): This Magistrate find that Carlton, as the owner of the real property upon which the underground storage tanks at this site are located, has violated OAC 1301:7-9-04 (registration of underground storage tanks) and OAC 1301: 7-9-12 (failure to maintain out-of-service underground storage tanks). With respect to Carlton's failure to register underground storage tanks at this location, this Magistrate assesses a civil penalty in the amount of $10.00/day for the failure to register the underground storage tanks. The amount of this penalty is based upon the following factors: there is a minor threat to the environment for such violation ($1.00)[4]; there is a moderate level of defiance shown as the registration form was mailed by the Fire Marshal and Carlton simply had to fill out the form and return it ($2.00); there is a moderate economic benefit to Carlton by not paying the yearly registration fee ($2.00); and there an enormous burden in enforcement of this regulation because there are approximately 23,000 underground storage tanks in Ohio that must be accounted for on a yearly basis ($5.00). There was no evidence presented that would mitigate this penalty. This Magistrate finds that this violation has occurred on 4,908 days (June 30, 2004-December 7, 2007). Therefore, the total civil penalty against Carlton for the failure to register underground storage tanks at the Pep Oil Site is: **$49,080.00**

As to Carlton's failure to properly maintain out-of-service underground storage tanks at this location, this Magistrate assesses a civil penalty in the

[4] From this point in the decision forward, the dollar number in parenthesis is the amount determined by this Magistrate to be appropriate to address the concern presented by each factor.

amount of $20.00/day for such violation. The amount of this penalty is based on the following factors: there is a great threat to the environment for such violation due to the possibility of leaks from the tanks ($10.00); there is a minor level of defiance shown due to the expense of compliance ($2.00); there is a moderate economic benefit to Carlton by not incurring the expense of compliance ($4.00); and there a moderate burden of enforcement of this regulation as testified to by Steve Parsons ($4.00). There was no evidence presented that would mitigate this penalty. This Magistrate finds that this violation, to date, has occurred on 1,323 days (April 21, 2004-December 7, 2007). Therefore, the total civil penalty against Carlton for the failure to properly maintain out-of-service underground storage tanks at the Pep Oil Site is: **$26,460.00.**

2). Routes 619 & 183, Alliance, Ohio ("Ray & Sons"): This Magistrate find that Carlton, as the owner of the real property upon which the underground storage tanks at this site are located, has violated OAC 1301:7-9-04 (registration of underground storage tanks) and OAC 1301: 7-9-12 (failure to maintain out-of-service underground storage tanks). With respect to Carlton's failure to register underground storage tanks at this location, this Magistrate assesses a civil penalty in the amount of $10.00/day for the failure to register the underground storage tanks. The amount of this penalty is based upon the following factors: there is a minor threat to the environment for such violation ($1.00); there is a moderate level of defiance shown as the registration form was mailed by the Fire Marshal and Carlton simply had to fill out the form and return it ($2.00); there is a moderate economic benefit to Carlton by not paying the yearly registration fee ($2.00); and there an enormous burden in enforcement of

this regulation because there are approximately 23,000 underground storage tanks in Ohio that must be accounted for on a yearly basis ($5.00). There was no evidence presented that would mitigate this penalty. This Magistrate finds that this violation, to date, has occurred on 4,723 days (January 1, 1995-December 7, 2007). Therefore, the total civil penalty against Carlton for the failure to register underground storage tanks at the Ray & Sons Site is: **$47,230.00**

As to Carlton's failure to properly maintain out-of-service underground storage tanks at this location, this Magistrate assesses a civil penalty in the amount of $20.00/day for such violation. The amount of this penalty is based on the following factors: there is a great threat to the environment for such violation due to the possibility of leaks from the tanks ($10.00)[5]; there is a minor level of defiance shown due to the expense of compliance ($2.00); there is a moderate economic benefit to Carlton by not incurring the expense of compliance ($4.00); and there a moderate burden of enforcement of this regulation as testified to by Steve Parsons ($4.00). There was no evidence presented that would mitigate this penalty. This Magistrate finds that this violation, to date, has occurred on 4,386 days (December 4, 1995-December 7, 2007). Therefore, the total civil penalty against Carlton for the failure to properly maintain out-of-service underground storage tanks at the Ray & Sons Site is: **$87,720.00.**

3). 3050 Lincoln Way East, Massillon, Ohio ("Crescent Amoco"): On June 1, 1989, a petroleum release occurred at Crescent Amoco. Carlton is the owner of the real property upon which the release occurred. On

[5] This Magistrate rejects Donald Coen's argument that the risk to the environment from underground abandoned underground storage tanks is minimal due to the fact that microbes in the soil consume fuel hydrocarbons released from tanks before such hydrocarbons can be a threat to the environment and human health.

January 15, 1991, a corrective action report was sent to the owners of the underground storage tanks (i.e., Coen Company) pursuant to OAC 1301:7-9-13. The corrective action plan was not completed and Coen Company was ordered to comply with and complete the corrective action plan on or before June 18, 1991. To date, the corrective action plan issued relative to this property has not been complied with. This Magistrate assesses a civil penalty in the amount of $100.00/day for failure to comply with the corrective action plan. The amount of this penalty is based on the following factors: there is a severe threat to the environment for such violation, especially in light of the fact that, at some point, there were hydrocarbons from the release in the sanitary sewer ($70.00); there is a minor level of defiance shown by Carlton in refusing to finish the corrective action ($5.00); there is a moderate economic benefit to Carlton by not incurring the expense of compliance ($20.00); and there is a mild burden to the State for the enforcement compliance because several inspections of the tanks were required ($5.00). There was no evidence presented that would mitigate this penalty. This Magistrate finds that this violation, to date, has occurred on 6,017 days (June 18, 1991-December 7, 2007). Therefore, the total civil penalty against Carlton for the failure to comply with the corrective action plan ordered relative to Crescent Amoco is: **$601,700.00.**

4). 110 Third St., Beach City, Ohio ("Beach City Dairy Mart"): On January 27, 1989, Coen Company reported a petroleum release at the Beach City Dairy Mart. Carlton is the owner of the real property upon which the release occurred. A corrective action plan regarding the release was issued pursuant to OAC 1301:7-9-13. Coen Company, as owner of the underground storage tanks,

was ordered to comply with the corrective action plan on or before March 23, 1993. To date, the corrective action plan issued relative to this property has not been complied with. This Magistrate assesses a civil penalty in the amount of $70.00/day for failure to comply with the corrective action plan. The amount of this penalty is based on the following factors: there is a great threat to the environment when there is a release of petroleum from an underground storage tank ($40.00); there is a minor level of defiance shown by Carlton in refusing to finish the corrective action ($5.00); there is a moderate economic benefit to Carlton by not incurring the expense of compliance ($20.00); and there is a mild burden to the State for the enforcement compliance because several inspections of the tanks were required ($5.00). There was no evidence presented that would mitigate this penalty. This Magistrate finds that this violation, to date, has occurred on 5,373 days (March 23, 1993-December 7, 2007). Therefore, the total civil penalty against Carlton for the failure to comply with the corrective action plan ordered relative to Beach City Dairy Mart is: **$376,110.00.**

b). Civil Penalties against Rocket

1). 1240 Main Street, Navarre, Ohio ("Navarre Amoco"): This Magistrate find that Rocket, as the owner of the real property upon which the underground storage tanks at this site are located, has violated OAC 1301:7-9-04 (registration of underground storage tanks) and OAC 1301: 7-9-12 (failure to maintain out-of-service underground storage tanks). With respect to Rocket's failure to register underground storage tanks at this location, this Magistrate assesses a civil penalty in the amount of $10.00/day for the failure to register the underground storage tanks. The amount of this penalty is based upon the

following factors: there is a minor threat to the environment for such violation ($1.00); there is a moderate level of defiance shown as the registration form was mailed by the Fire Marshal and Rocket simply had to fill out the form and return it ($2.00); there is a moderate economic benefit to Rocket by not paying the yearly registration fee ($2.00); and there an enormous burden in enforcement of this regulation because there are approximately 23,000 underground storage tanks in Ohio that must be accounted for on a yearly basis ($5.00). There was no evidence presented that would mitigate this penalty. This Magistrate finds that this violation, to date, has occurred on 3,447 days (June 30, 1998-December 7, 2007). Therefore, the total civil penalty against Rocket for the failure to register underground storage tanks at the Navarre Amoco Site is: **$34,470.00**

As to Rocket's failure to properly maintain out-of-service underground storage tanks at this location, this Magistrate assesses a civil penalty in the amount of $20.00/day for such violation. The amount of this penalty is based on the following factors: there is a great threat to the environment for such violation due to the possibility of leaks from the tanks ($10.00); there is a minor level of defiance shown due to the expense of compliance ($2.00); there is a moderate economic benefit to Rocket by not incurring the expense of compliance ($4.00); and there a moderate burden of enforcement of this regulation as testified to by Steve Parsons ($4.00). There was no evidence presented that would mitigate this penalty. This Magistrate finds that this violation, to date, has occurred on 1,801days (June 18, 2003-December 7, 2007). Therefore, the total civil penalty against Rocket for the failure to properly maintain out-of-service underground storage tanks at the Navarre Amoco Site is: **$36,020.00.**

2. 3100 Lincoln St. East, Canton, Ohio ("Clearview Amoco"): This Magistrate find that Rocket, as the owner of the real property upon which the underground storage tanks are located, has violated OAC 1301:7-9-04 (registration of underground storage tanks) and OAC 1301: 7-9-12 (failure to maintain out-of-service underground storage tanks). With respect to Rocket's failure to register underground storage tanks at this location, this Magistrate assesses a civil penalty in the amount of $10.00/day for the failure to register the underground storage tanks. The amount of this penalty is based upon the following factors: there is a minor threat to the environment for such violation ($1.00); there is a moderate level of defiance shown as the registration form was mailed by the Fire Marshal and Rocket simply had to fill out the form and return it ($2.00); there is a moderate economic benefit to Rocket by not paying the yearly registration fee ($2.00); and there an enormous burden in enforcement of this regulation because there are approximately 23,000 underground storage tanks in Ohio that must be accounted for on a yearly basis ($5.00). There was no evidence presented that would mitigate this penalty. This Magistrate finds that this violation, to date, has occurred on 2,351 days (June 30, 2001-December 7, 2007). Therefore, the total civil penalty against Rocket for the failure to register underground storage tanks at the Clearview Amoco Site is: **$23,510.00**

As to Rocket's failure to properly maintain out-of-service underground storage tanks at this location, this Magistrate assesses a civil penalty in the amount of $20.00/day for such violation. The amount of this penalty is based on the following factors: there is a great threat to the environment for such violation due to the possibility of leaks from the tanks ($10.00); there is a minor level of

defiance shown due to the expense of compliance ($2.00); there is a moderate economic benefit to Rocket by not incurring the expense of compliance ($4.00); and there a moderate burden of enforcement of this regulation as testified to by Steve Parsons ($4.00). There was no evidence presented that would mitigate this penalty. This Magistrate finds that this violation, to date, has occurred on 1,927 days (August 28, 2002-December 7, 2007). Therefore, the total civil penalty against Rocket for the failure to properly maintain out-of-service underground storage tanks at the Navarre Amoco Site is: **$38,540.00.**

3. 1823 West Main Street, Louisville, Ohio ("Louisville Dairy Mart"): On July 9, 1998, Dairy Mart reported a petroleum release at the Louisville Dairy Mart Site. Rocket is the owner or operator of the underground storage tank(s) that experienced the release. A corrective action plan regarding the release was issued pursuant to OAC 1301:7-9-13. Rocket was ordered to comply with the corrective action within 180 days from the release. Rocket requested and received a ninety (90) day extension to so comply. To date, the corrective action plan issued relative to this property has not been complied with. This Magistrate assesses a civil penalty in the amount of $70.00/day for failure to comply with the corrective action plan. The amount of this penalty is based on the following factors: there is a great threat to the environment when there is a release of petroleum from an underground storage tank ($40.00); there is a minor level of defiance shown by Rocket in refusing to finish the corrective action ($5.00); there is a moderate economic benefit to Rocket by not incurring the expense of compliance ($20.00); and there is a mild burden to the State for the enforcement compliance ($5.00). There was no evidence presented that would

mitigate this penalty. This Magistrate finds that this violation, to date, has occurred on 3,165 days (April 9, 1999). Therefore, the total civil penalty against Rocket for the failure to comply with the corrective action plan ordered relative to Louisville Dairy Mart is: **$221,550.00.**

13. The above civil penalties are to be applied for each day subsequent to December 7, 2007, that the violations continue.

14. This Magistrate takes the protection of the environment very seriously and realizes that the civil penalties awarded may seem minimal to those requested by the State. However, this Magistrate has considered the testimony regarding the financial status of Carlton and Rocket when assessing civil penalties and finds that the civil penalties imposed are sufficient to deter future violations, but are not so large as to render the corporations bankrupt.

II. Donald Coen-Liability as "Owner or Operator"

A. Findings of Fact

15. Donald Coen owns the real property located at 3100 Lincoln St. East, Canton, Ohio ("Clearview Amoco").

16. At the Clearview Amoco site, there are underground storage tanks that have not been properly registered with the Fire Marshal since June 30, 2001.

17. Additionally, the underground storage tanks at the Clearview Amoco site have been out-of-service since at least August 28, 2002.

18. The out-of-service tanks at the Clearview Amoco site have not been properly maintained pursuant to OAC 1301:7-9.

19. Donald Coen owns the real property located at 1823 West Main Street, Louisville, Ohio ("Louisville Dairy Mart").

20. On July 9, 1998, Dairy Mart Corporation, through one of its employees, reported a suspected petroleum release from one or more of the underground storage tanks located at Louisville Dairy Mart.

21. The Bureau of Underground Storage Tank Regulations informed Rocket, the registered owner of the underground storage tanks located at Louisville Dairy Mart, that a site assessment of the tanks was needed to complete the corrective action plan relating to the release.

22. The site assessment for Louisville Dairy Mart was due within 180 days from the suspected release.

23. Rocket received a ninety (90) day extension for the submission of the site assessment.

24. To date, a site assessment for Louisville Dairy Mart has not been completed.

B. Conclusions of Law

25. OAC 1301: 7-9-04 (B)(1) provides that "on or before August 1, 1991, and not later than the first day of July of each subsequent year, owners of the following UST [underground storage tanks] systems shall submit an annual registration application to the fire marshal.

26. OAC 1301: 7-9-04 applies to underground storage tank systems currently in use or those that were taken out of service in a manner not proscribed by the Ohio Administrative Code.

27. OAC 1301: 7-9-02 defines "owner" for the purposes of Chapter 13 of the Ohio Administrative Code to include:

> any person who holds, or, in the instance of an underground storage tank in use before November 8, 1984, but no longer in use on that date, any person who held immediately before the discontinuation of its use, a legal, equitable, or possessory interest of any kind in an underground storage tank system or in the property on which the underground storage tank system is located, including, without limitation, a trust, vendor, vendee, lessor, or lessee.

This same definition is set forth in R.C. 3737.87.

28. OAC 1301: 7-9-12 sets forth the proper maintenance of underground storage tank systems that are out of service for more than twelve months.

29. OAC 1301: 7-9-12 (A)-(H) applies to "any person who holds a legal, possessory, or equitable interest in a parcel of real property on which an underground storage tank system is located, regardless of that person's status as an "owner" or "operator" as those terms are defined in section 3737.87 of the revised code."

30. OAC 1301: 7-9-13 sets forth the correction action to be taken when a petroleum release from an underground storage tank system is reported.

31. OAC 1301: 7-9-13 (B) states that "for releases reported on or after the effective date of this rule [i.e., September 1, 1992], owners and operators shall conduct corrective action in accordance with this rule."

32. If any person violates the above OAC provision, that person shall pay a civil penalty of not more than ten thousand dollars for each day that the violation continues. Additionally, if a civil action is brought before a court concerning such violations, the court may grant injunctive relief.

33. As the owner of the real property at Clearview Amoco, Donald Coen is an "owner" for the purposes of OAC 1301: 7-9-04 (B)(1) and OAC 1301: 7-9-12.

34. Therefore, Donald Coen is liable for the violations of OAC 1301: 7-9-04 (B)(1) and OAC 1301: 7-9-12 that occurred at Clearview Amoco.

35. As the owner of the real property at Louisville Dairy Mart, Donald Coen is an "owner" for the purposes of OAC 1301: 7-9-13.

36. Therefore, DC is liable for the violation of OAC 1301:7-9-13 that has occurred at Louisville Dairy Mart.

37. As such, the State is entitled to the following injunctive relief and Donald Coen is, hereby, **ORDERED** to do the following regarding Clearview Amoco site:

a). Comply with the registration application, registration certificate, and registration fee requirements of OAC 1301: 7-9-04 (B)(1-3) for the unregistered underground storage tank system at Clearview Amoco; and,

b). Permanently remove, close-in-place, perform a change in service, or immediately place back into service the underground storage tank system at Clearview Amoco pursuant to OAC 1301: 7-9-12 (E)(4).

38. Additionally, the State is entitled to the following injunctive relief and Donald Coen is, hereby, **ORDERED** to do the following regarding Louisville Dairy Mart site:

a). Conduct a "Tier 1 Source Investigation" for the Louisville Dairy Mart site and submit it to the Bureau of Underground Storage Tank Regulations ("BUSTR") either a "Tier 1 Evaluation Report" or a "Tier 1 Delineation Notification" in accordance with OAC 1301: 7-9-13 (H); and,

b). Take the required response action if any free product is discovered in the course of corrective action activities at Louisville Dairy Mart in accordance with OAC 1301: 7-9-13 (G)(3).

39. Donald Coen is jointly and severally liable with Rocket for the completion of the relief ordered in Paragraphs 36 and 37 of this decision.

40. Also, as an owner of Clearview Amoco, Donald Coen is jointly and severally liable for the civil penalty assessed against Rocket in Paragraph 12 (b)(2) of this decision.

41. Further, as an owner of Louisville Dairy Mart, Donald Coen is jointly and severally liable for the civil penalty assessed against Rocket in Paragraph 12 (b)(3) of this decision.

III. Donald Coen-Liability for the Acts of Coen Company, Carlton, and Rocket

A. Findings of Fact

42. Donald Coen began working with Coen Oil Company as a salesman in October 1963.

43. Sometime thereafter, Donald Coen became a Vice President of the Coen Oil Company.

44. In 1989, the Coen Oil Company split into the Coen Oil Company and Coen Company as a result of a disagreement between Coen Oil operations in Pennsylvania and Ohio.

45. The Coen Oil operation in Ohio became Coen Company.

46. Donald Coen was the Chairman of the Board of Coen Company from its inception in 1989 until just prior to its liquidation by Key Bank in 1995. The Board of Directors of Coen Company was made of all Coen relatives under the age of eighteen.

47. Coen Company had an outside Board of Advisors that suggested to Donald Coen that he hire professional managers to run the company.

48. Donald Coen hired Joseph Laskowski who, with a team of managers, ran the daily operations of Coen Company, including maintenance of underground storage tanks.

49. Coen Company would borrow money from other entities, including Key Bank and Rocket. The transfers of money between Rocket and Coen Company were secured by cognovit notes; however, there was never a formal written agreement that the money would be paid back.

50. Interest on the loans from Rocket was made on an annual basis.

51. In 1995, Coen Company was liquidated by Key Bank.

52. Donald Coen was president of Rocket, which was a private label motor fuel sold at Amoco stations, until his son became president.

53. As a result of personal issues, Donald Coen's son was demoted from his position as president at Rocket in 2002.

54. Thereafter, Donald Coen resumed the position as president until Rocket was cancelled by the Secretary of State in 2002.

55. Despite being cancelled by the Secretary of State, Rocket continues to collect rents from properties that it owns.

56. Until 2002, Rocket held regular meetings, mostly in written form. However, Rocket is currently not up to date on its meetings.

57. As president of Rocket, Donald Coen could sell property, borrow money, and obligate the company.

58. There were no limitations on the amount of checks Donald Coen could write at the president of Rocket.

59. Donald Coen handled the environmental compliance issues for Rocket.

60. As with Coen, Rocket would borrow money from other entities, including Donald Coen, and secured the debt with a cognovit note, although no formal written agreement for repayment was made.

61. Despite being aware of environmental compliance issues, Donald Coen has written at least one check to himself as repayment on the principal of a loan made to Rocket.

62. Rocket collects its mail at the same post office box as Coen Oil Company, Coen Company, and Carlton.

63. Carlton is a land company started by Donald Coen's father.

64. Donald Coen's father would purchase parcels of real property and place it into Carlton.

65. Carlton would then lease the land to operating companies, such as Coen Company and Rocket.

66. Carlton is currently operational (i.e., continues to own property and collect rents) and Donald Coen is its president.

67. Donald Coen makes most of the decisions for Cartlton.

68. He can sign checks on behalf of Carlton in any amount without permission.

69. Although Carlton does not have any employees (other than Donald Coen's wife as a bookkeeper), Donald Coen would deal with all hiring and firing matters if it had employees.

70. Donald Coen deals with all environmental compliance issues for Carlton.

71. Despite being aware of environmental compliance issues, Donald Coen, on behalf of Carlton, pays his wife a monthly salary for bookkeeping, although she has not done so for a while.

72. As with Coen and Rocket, Carlton would borrow money from other entities and secured the debt with a cognovit note, although no formal written agreement for repayment was made.

73. Carlton collects its mail at the same post office box as Coen Oil Company, Coen Company, and Rocket.

B. Conclusions of Law

74. Generally, "shareholders, officers, and directors are not liable for the debts of the corporation." *Belvedere Condominium Unit Owner's Assn. v. R.E. Roark Companies, Inc.* (1993), 67 Ohio St.3d 274.

75. An exception to this general rule exists when shareholders, officers, or directors use the corporation for fraudulent or criminal acts, they be held personally liable. Id.

76. "Under this exception, the "veil" of the corporation can be "pierced" and individual shareholders held liable for corporate misdeeds when it would be unjust to allow the shareholders to hide behind the fiction of the corporate entity. Courts will permit individual shareholder liability only if the shareholder is

indistinguishable from or the "alter ego" of the corporation itself." Id, citation omitted.

77. The "corporate veil" may be pierced when all of the following are met:

> (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own,
> (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and,
>
> (3) injury or unjust loss resulted to the plaintiff from such control and wrong.

Id.

78. As noted by the Seventh District Court of Appeals:

> Ohio courts have looked at various factors when determining whether a shareholder's control over a corporation is "so complete that the corporation has no separate mind, will, or existence of its own". These factors include 1) the failure to observe corporate formalities, 2) shareholders holding themselves out as personally liable for certain corporate obligations, 3) diversion of funds or other property of the company property for personal use, 4) absence of corporate records, and 5) the fact that the corporation was a mere facade for the operations of the dominant shareholder(s).

State of Ohio v. Tri-State Group, Inc., 7th Dist. No. 03 BE 61, 2004-Ohio-4441, citing *LeRoux's Billyle Supper Club v. Ma* (1991), 77 Ohio App.3d 417, 422-423, 602 N.E.2d 685 and *Link v. Leadworks Corp.* (1992), 79 Ohio App.3d 735, 744, 607 N.E.2d 1140.

79. In addition to "piercing the corporate veil," individual shareholders, officers, or directors may be held personally liable for corporate acts under the "participation theory," which provides as follows:

> Officers of a corporation 'are not held liable for the negligence of the corporation merely because of their official relation to it, but because of some wrongful or negligent act by such officer

> amounting to a breach of duty which resulted in an injury * * *. To make an officer of a corporation liable for the negligence of the corporation there must have been upon his part such a breach of duty as contributed to, or helped to bring about, the injury; that is to say, he must be a participant in the wrongful act.

Young v. Featherstone Motors (1954), 97 Ohio App. 158, citation omitted.

80. Upon review of the evidence presented, this Magistrate finds that the State has failed to demonstrate by a preponderance of the evidence that, with respect to Coen Company, Rocket Oil, and Carlton, Donald Coen's control over same was "so complete that the corporation has no separate mind, will, or existence of its own" or that such control was "exercised in such a manner as to commit fraud or an illegal act."

81. This Magistrate finds that Donald Coen, as a corporate officer of the aforementioned, may not have strictly observed corporate formalities. However, there was no evidence presented that he held himself out as being personally liable for corporate obligations, that he used any corporate money for personal use, or that any of the corporations were used as facades.

82. This Magistrate notes that, while Donald Coen may have made personal loans to the corporations, these loans were made purely to keep the corporations operational and that Donald Coen has only collected the principal, not interest, on theses loans.

83. However, this Magistrate finds that Donald Coen is personally liable for the obligations incurred through this action by Rocket and Carlton under the "participation" theory.

84. This Magistrate finds that Donald Coen was responsible for the environmental compliance of the real property and assets (including underground storage tank systems) of Rocket and Carlton.

85. Despite such responsibility, Donald Coen has actively chosen not to comply with the applicable Ohio Administrative Code provisions applicable to the aforementioned, despite numerous attempts by BUSTR and the Fire Marshal to obtain such compliance.

86. This Magistrate finds that Donald Coen's reasons for refusing to comply with orders issued by BUSTR and the Fire Marshal (i.e., he believed that the abandoned underground storage tanks were "orphans of the state," he believed that no environmental harm could come from a release of petroleum, and he believed that future legislation would not require him to comply) do not constitute defenses to such violations.

87. Additionally, this Magistrate finds that BUSTR and the Fire Marshal have attempted to work with Donald Coen; however, Donald Coen, on behalf of Rocket and Carlton, has continued to refuse to comply with their orders and has personally brought about the noncompliance issues at bar.

88. This Magistrate does not find that the State of Ohio has proven by a preponderance of the evidence that the "participation" theory applies to Donald Coen in his capacity with Coen Company. As previously indicated, Donald Coen hired professional mangers to handle the environmental issues for the assets owned by Coen Company. This Magistrate further finds that the State has not shown by a preponderance of the evidence that Donald Coen was a participant in the wrongful acts of Coen Company.

89. Accordingly, this Magistrate finds that, in addition to the above findings regarding personal liability on the part of Donald Coen, Donald Coen is personally liable for the violations against Rocket and Carlton and is personally liable for the civil penalties assessed thereto. This liability is joint and several with the liabilities of Rocket and Carlton.

90. In addition to the orders set forth in-Paragraphs 36 and 37 of this decision, Donald Coen is, hereby, **ORDERED** to comply with the injunctive relief afforded to the State against Rocket and Carlton as set for in the Court's December 6, 2007, entry.

91. COSTS TO THE DEFENDANTS

Pursuant to Civ. R. 53, any party may file written objections to this decision within FOURTEEN (14) days from the date on which it is filed. No party shall assign as error on appeal the Court's adoption of any finding of fact or conclusion of law in this decision unless the party timely and specifically objects to such finding or conclusion pursuant to Civ. R. 53.

IT IS SO ORDERED.

MAGISTRATE KRISTIN G. FARMER

ADOPTED AND APPROVED:

HON. LEE SINCLAIR

NOTICE TO THE CLERK:
FINAL APPEALABLE ORDER
Case No. 2007CV02973

IT IS HEREBY ORDERED that notice and a copy of the foregoing Judgment Entry shall be served on all parties of record within three (3) days after docketing of this Entry and the service shall be noted on the docket.

HON. LEE SINCLAIR

c: Nicholas J. Bryan/Jessica B. Alteson/George Horvath
Donald C. Coen, pro se - CERT. & REG. MAIL BY CLERK
The Coen Company
Coen Oil Company
Carlton B. Coen Land Co.
Rex W. Miller (Lesh, Casner)