

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED

MAY 22 2007

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY DM
DEPUTY CLERK

CITY OF AUSTIN,

Plaintiff,

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v.

NO. A-06-CA-0015 SS

REICHHOLD INC., DAINIPPON INK
AND CHEMICALS,
INCORPORATED, and DIC
INVESTMENTS JAPAN, INC.,

Defendants.

FIRST AMENDED ORIGINAL COMPLAINT OF PLAINTIFF CITY OF AUSTIN

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COMES NOW Plaintiff CITY OF AUSTIN, complaining of Defendants REICHHOLD INC., DAINIPPOIN INK AND CHEMICALS, INCORPORATED, and DIC INVESTMENTS JAPAN, INC., and in support of its First Amended Original Complaint, respectfully shows the Court as follows:

I. PARTIES

1. Plaintiff CITY OF AUSTIN ("CITY") is a home rule municipality located in Austin, Texas. Plaintiff CITY was created under Article XI, Section 5 of the Texas Constitution and is a political subdivision of the State of Texas.

2. Defendant REICHHOLD INC. ("REICHHOLD") is a corporation organized under the laws of Delaware. Defendant REICHHOLD can be served with this First Amended Complaint by serving its counsel, Taylor Hicks.

3. Defendant DAINIPPON INK AND CHEMICALS, INCORPORATED ("DAINIPPON") is a Japanese company with over 269 subsidiaries worldwide. Defendant

DAINIPPON can be served with this First Amended Complaint by serving its counsel, Frederick Addison.

4. Defendant DIC INVESTMENTS JAPAN, INC. ("DIC") is a Japanese company and wholly owned subsidiary of DAINIPPON established in May of 2004 as a holding company for the subsidiaries in the Industrial Materials segment (referred to as the "Reichhold Group") of DAINIPPON. Defendant DIC can be served with this First Amended Complaint by serving its counsel, Frederick Addison.

5. The CITY alleges that all Defendants are jointly and severally liable with REICHHOLD under the facts set forth under the doctrines of alter ego, successor corporate liability, single business enterprise and related corporate veil piercing principles that apply to disregard the corporate fiction when the corporate form is being used as an unfair device as a means to evade an existing legal obligation, to avoid a statute, to perpetrate a fraud and/or as a mere tool or business conduit for another corporation.

II. JURISDICTION AND VENUE

6. This case was properly removed to this Court based on diversity jurisdiction.

III. BACKGROUND FACTS

A. The Contaminated Real Property

7. This lawsuit concerns a 24.16 acre parcel of land located at 10414 McCalla Place, Austin, Texas 75758 (the "Property").

8. Defendant REICHHOLD acquired the Property in 1958 and operated a chemical manufacturing facility ("Chemical Facilities") on the Property from that time until 1985. The Property was also used by Defendant REICHHOLD to process, store and/or dispose of "solid waste" as that term is defined under Texas' Solid Waste Disposal Act, Tex. Health & Safety

Code Ann. §§ 361.001-.754 (Vernon 2001 & Supp. 2006) ("SWDA"). Accordingly, the Property is a "solid waste facility" under the SWDA.

9. One of the chemical products manufactured by Defendant REICHHOLD at the Chemical Facilities on the Property was benzoyl peroxide ("BPO") which is a dangerous, reactive, unstable, extremely flammable, extremely explosive chemical which is sensitive to shock, heat and friction. In addition, BPO is an allergen that causes irritation to skin, eyes and the respiratory tract. Besides BPO, Defendant REICHHOLD also used or manufactured numerous other dangerous and/or flammable chemicals, including methyl ethyl ketone, methyl ethyl ketone peroxide, dimethyl phthalate, tert-butyl perbenzoate, hydrogen peroxide, sodium benzoate, sodium sulfate, sodium chloride, sulfuric acid, sodium hydroxide, dipropylene glycol, propylene glycol and alpha methyl styrene.

10. Following an explosion and fire in February of 1985, Defendant REICHHOLD closed its Chemical Facilities on the Property.

11. On February 28, 1985, Defendant REICHHOLD submitted its Closure Plan to the Texas Department of Water Resources ("TDWR"). In the Closure Plan, Defendant REICHHOLD stated that its objective was to discontinue operation in a safe and orderly manner, including removal of hazardous materials, demolishing process buildings and clearing the overall site so as to eliminate any identified hazards to human health and the environment in accordance with local, state and federal requirements. The Closure Plan provided that all manufacturing materials on site governed by hazardous materials regulations would be removed to a properly authorized disposal location. The Closure Plan also stated that it was Defendant REICHHOLD's intent to "eliminate all hazards to human health and the environment thereby negating any continuing liabilities. However, in the event that a problem arises in the future that is determined to have been caused by [Defendant REICHHOLD], responsibility will be accepted

for participating in the resolution.” Despite these Closure Plan commitments and representations, Defendant REICHHOLD’s actual closure of the Property failed to eliminate hazards to human health and the environment, and these hazards were further exacerbated by Defendant REICHHOLD’s mischaracterization of both the condition of the Property and the actions that it was taking.

12. Although Defendant REICHHOLD’s Closure Report was accepted by the TWC in 1985, the Texas Natural Resource Conservation Commission (“TNRCC”) noted, in an August 15, 1994 letter to Defendant REICHHOLD, that it was possible that some residual contamination remained at the site and informed Defendant REICHHOLD that it had the continuing obligation to assure that wastes were managed in a manner which did not cause the discharge or imminent threat of discharge into or adjacent to waters in the state, a nuisance or an endangerment of the public health and welfare. Additionally, the TNRCC noted that if the actual closure by Defendant REICHHOLD had failed to comply with those requirements, the burden remained on Defendant REICHHOLD to take any necessary and authorized action to correct such conditions. The TNRCC was prescient in its statements.

13. For years, Defendant REICHHOLD actively marketed the Property for sale and even represented to the TDWR during the closure process that the Property was to be sold in the near future. At the same time, Defendant REICHHOLD internally discussed setting up reserves for future environmental expenses at the Property, suggested that some soil should be removed from the Property because of contamination, noted that the area around the closed earthen ponds would not support a foundation during construction, expressed that sludge and lime left in the earthen ponds would interfere with building in this area, questioned whether some remaining buildings contained asbestos, and noted that drums of chemicals still remained on the Property. None of these potential claims were ever disclosed to Plaintiff CITY.

14. On May 10, 1995, after months of negotiation of the terms, Plaintiff CITY and Defendant REICHHOLD entered into an Earnest Money Contract ("Contract") for Plaintiff CITY's purchase of the Property. During negotiations, Defendant REICHHOLD proposed to delete and/or limit its representations and warranties included in Article 7F relating to the representations at closing and Article 8 relating to claims. Plaintiff CITY refused to agree to Reichhold's proposed changes to these provisions, which are set forth in Paragraph 14 of this Complaint.

15. In the Contract, Defendant REICHHOLD made the following specific representations and warranties regarding the Property:

7. CLOSING.

F. Seller [REICHHOLD] hereby makes the following representations to Buyer [City]:

1. Seller, to the best of its knowledge and belief, has complied with all applicable laws, ordinances, regulations, statutes, rules and restrictions relating to the Property, or any part thereof. . . .In the event Seller learns of any such matters prior to closing, Seller shall promptly notify Buyer.

8. LEASES AND CLAIMS.

- B. Except as disclosed by Seller to Buyer and delivered to Buyer on or before the Seller's execution of this contract, a copy of which is attached as Exhibit "C", Seller further warrants that as of the date of this contract, it is not aware of any potential, pending or threatened claims, lawsuits or proceedings involving the Property, which affect the use or value of the Property, or which could result in monetary claims or liability being asserted against the Buyer, as the owner of the Property, subsequent to closing.

14. REPRESENTATIONS.

. . . All representations, warranties and disclaimers of warranties made in this contract shall survive closing.

The Contract further provided that the prevailing party in any legal proceeding brought under or with relation to the Contract was entitled to recover court costs and reasonable attorneys' fees.

16. Under the terms of the Contract, Plaintiff CITY purchased the Property from Defendant REICHHOLD in October of 1995 for \$1,422,630. The purchase was documented by a Special Warranty Deed executed on October 23, 1995 and filed in the real property records of Travis County, Texas.

17. At closing, the Property was not as represented and warranted by Defendant REICHHOLD. The lined earthen waste water ponds were not properly closed; dangerous and hazardous substances were buried throughout the Property; groundwater was contaminated; soil had been exposed to contaminated waste water for more than 25 years; the Property contained explosive BPO waste buried underground; the pond liners were buried instead of being removed; misrepresentations and material omissions were made to regulatory authorities; internal assessments of problems that could lead to future claims were never disclosed to third parties; and the areas around the waste water ponds would not support a foundation during construction.

18. In May of 2003, Plaintiff CITY began construction of its North Service Center on the Property. On November 3, 2003, an explosion occurred during trench excavation at the Property, and workers were severely injured. Plaintiff CITY determined that the explosion was caused by BPO that existed on the Property because of the actions of Defendant REICHHOLD. Plaintiff CITY discovered approximately 500 pounds of bulk BPO on the Property. Tests on the bulk BPO showed concentrations of BPO as high as 98%. Defendant REICHHOLD's own analysis of samples taken from the Property in 2005 confirmed BPO in similar concentrations. Defendant REICHHOLD knowingly buried this BPO on the Property. Defendant REICHHOLD did not disclose to Plaintiff CITY the existence of the BPO on the Property.

B. Plaintiff City's Clean-Up of the Property

19. By letter dated November 17, 2003, Plaintiff CITY notified Defendant REICHHOLD that an explosion occurred on the Property and that Plaintiff CITY intended to seek cost recovery from Defendant REICHHOLD related to a release or threatened release of solid waste from its chemical production activities. Defendant REICHHOLD failed to respond to that notification.

20. Plaintiff CITY stopped its ongoing construction of the North Service Center and engaged experts to assist it with the required clean-up of the Property.

21. Plaintiff CITY has investigated and removed the hazards related to BPO and other solid waste left on the Property in coordination with the Texas Commission on Environmental Quality ("TCEQ") and with TCEQ's approval.

22. To date, Plaintiff CITY has expended substantial sums in investigation, removal and remedial costs. In addition, Plaintiff CITY has suffered millions of dollars of other consequential losses resulting from the explosion and from the presence of BPO and other solid waste on the Property including delay costs, contract cancellation costs and construction costs incurred prior to the time of the explosion.

V. CAUSES OF ACTION

A. Cost Recovery under the Texas Solid Waste Disposal Act

23. Plaintiff CITY incorporates the allegations contained in Paragraphs 7 through 22 of this First Amended Original Complaint.

24. This is a private cost recovery claim under the SWDA. Defendant REICHHOLD used the Property for the processing, storage, and/or disposal of "solid waste" as that term is defined by the SWDA. Accordingly, the Property is a "solid waste facility" under the SWDA.

25. Because Defendant REICHHOLD owned and operated the Property during the time of processing, storage, and/or disposal of solid waste on the Property, it is a person "responsible for solid waste" under the SWDA.

26. The removal and remedial actions taken by Plaintiff CITY have been approved by TCEQ and are necessary to address a release or threatened release of solid waste. Plaintiff CITY has expended reasonable and necessary costs to address the release or threatened release of BPO and other solid wastes on the Property.

27. Plaintiff CITY made reasonable attempts to notify Defendant REICHHOLD of the existence of the release or threatened release referred to above and that Plaintiff CITY intended to take steps to eliminate the release or threatened release.

28. Plaintiff CITY requests that the Court find that Defendant REICHHOLD is a person responsible for solid waste at the Property and render a judgment against Defendant REICHHOLD, awarding to Plaintiff CITY an amount equal to the reasonable and necessary costs that it has incurred to address the release or threatened release of BPO and other solid wastes at the Property.

B. Breach of Express Warranty

29. Plaintiff CITY incorporates the allegations contained in Paragraphs 7 through 28 of this First Amended Original Complaint.

30. In the Contract, Defendant REICHHOLD made the following specific representations and warranties regarding the Property:

7. CLOSING.

F. Seller [REICHHOLD] hereby makes the following representations to Buyer [City]:

1. Seller, to the best of its knowledge and belief, has complied with all applicable laws, ordinances, regulations, statutes, rules and restrictions relating to the Property, or any part thereof. . . .In the event Seller learns of any such matters prior to closing, Seller shall promptly notify Buyer.

8. LEASES AND CLAIMS.

- B. Except as disclosed by Seller to Buyer and delivered to Buyer on or before the Seller's execution of this contract, a copy of which is attached as Exhibit "C", Seller further warrants that as of the date of this contract, it is not aware of any potential, pending or threatened claims, lawsuits or proceedings involving the Property, which affect the use or value of the Property, or which could result in monetary claims or liability being asserted against the Buyer, as the owner of the Property, subsequent to closing.

14. REPRESENTATIONS.

. . . .All representations, warranties and disclaimers of warranties made in this contract shall survive closing.

The Contract further provided that the prevailing party in any legal proceeding brought under or with relation to the Contract was entitled to recover court costs and reasonable attorneys' fees.

31. Defendant REICHHOLD made the representations and warranties in the Contract in order to induce Plaintiff CITY into purchasing the Property. These representations and warranties were a part of the basis of the bargain between Defendant REICHHOLD and Plaintiff CITY, and Plaintiff CITY relied on the truth of these representations and warranties in purchasing the Property.

32. Defendant REICHHOLD breached its express warranties by failing to comply with numerous statutes, regulations and restrictions, in effect in or prior to 1995, relating to the handling, storage, treatment, processing and disposal of solid waste and/or hazardous waste. The statutes, regulations, and restrictions with which Defendant REICHHOLD did not comply include the following or their predecessors:

- a. Restrictions set forth in Defendant REICHHOLD's 1985 Closure Plan that was approved by the TWC;
- b. 30 TEX. ADMIN. CODE § 335.4;
- c. TEX. HEALTH & SAFETY CODE ANN. § 361.082(a);
- d. 30 TEX. ADMIN. CODE § 335.43(a);
- e. 42 U.S.C. § 6928(d)(3);
- f. 42 U.S.C. § 6928(d)(4);
- g. 42 U.S.C. § 6972(a)(1)(B);
- h. 42 U.S.C. § 6973(a);
- i. 42 U.S.C. § 9603(c); and
- j. 30 TEX. ADMIN. CODE § 335.5(a).

33. Defendant REICHHOLD was aware when it entered into the Contract that claims could be made involving the Property, and that those claims could affect the use or the value of the Property. In addition, Defendant REICHHOLD was also aware claims could be made involving the Property which could result in monetary claims or liability being asserted against Plaintiff CITY as the owner of the Property after closing. Those claims are:

Potential Claims against the City subsequent to Closing of which Reichhold was aware at or before Closing.

- a. Potential claims for injury or property damage as a result of a future release, exposure to, or an explosion of the BPO buried on the Property;
- b. Potential claim of nuisance related to a possible future release of the buried BPO;
- c. Potential statutory and regulatory claims under environmental laws that could result in an order requiring the City to spend substantial funds to remove or remediate the BPO or other solid or hazardous waste on the Property, civil

penalties, or cost recovery. Such laws include:

- TEX. HEALTH & SAFETY CODE ANN. § 361.271;
- TEX. HEALTH & SAFETY CODE ANN. § 361.272;
- TEX. HEALTH & SAFETY CODE ANN. § 361.188;
- TEX. HEALTH & SAFETY CODE ANN. § 361.273;
- TEX. HEALTH & SAFETY CODE ANN. § 361.252;
- TEX. HEALTH & SAFETY CODE ANN. § 361.301;
- TEX. HEALTH & SAFETY CODE ANN. § 361.197;
- TEX. HEALTH & SAFETY CODE ANN. § 361.341;
- TEX. HEALTH & SAFETY CODE ANN. § 361.344;
- 42 U.S.C. § 6972(a)(1)(B); and
- 42 U.S.C. § 6973(a).

Potential claims involving the use or value of the Property to which Reichhold was aware at or before Closing.

- d. Potential claims based on the release or presence of BPO or other solid or hazardous waste on the Property, that would involve and affect the use or value of the Property
- e. A potential claim based on the assertion that the pond areas of the Property could not support the construction of foundations thus affecting the use or value of the Property; and
- f. Potential claims that would require the City to spend substantial funds to clean up the buried BPO on the Property in order to use or increase the possible uses of the Property.

34. When it sold the Property to Plaintiff CITY, Defendant REICHHOLD was aware of the potential claims regarding the hazardous and dangerous BPO waste and other substances on the Property and was aware that the Property was not in compliance with all applicable laws, ordinances, regulations, statutes, rules and restrictions relating to the Property. Despite this knowledge, Defendant REICHHOLD remained silent and failed to disclose any of this information to Plaintiff CITY.

35. When it sold the Property to Plaintiff CITY, Defendant REICHHOLD was also

aware of potential claims affecting the use or value of the Property including its knowledge that some soil should be removed from the Property because of contamination, that the area around the closed earthen ponds would not support a foundation during construction, that sludge and lime left in the earthen ponds would interfere with building in this area, that some remaining buildings contained asbestos, and that drums of chemicals still remained on the Property. Despite this knowledge, Defendant REICHHOLD remained silent and failed to disclose any of this information to Plaintiff CITY.

36. Defendant REICHHOLD is in breach of the express warranties and representations it made in the Contract as described above. As a result, Plaintiff CITY has suffered actual and consequential damages including, but not limited to, the costs it has expended in order to investigate and remove the BPO waste and other dangerous and hazardous substances on the Property as well as delay costs, contract cancellation costs, and the costs actually paid for construction prior to the time of the explosion in an amount in excess of the jurisdictional limits of the Court.

37. All conditions precedent to Plaintiff CITY's right of recovery against Defendant REICHHOLD have been performed or have occurred.

38. It was necessary for Plaintiff CITY to secure the services of the law firm of Kemp Smith LLP, licensed attorneys, to prepare and prosecute these claims. Pursuant to Section 12 of the Contract, Plaintiff CITY seeks to recover its reasonable attorney's fees and court costs. Judgment for attorneys' fees through trial and appeal should be granted against Defendant REICHHOLD and in favor of Plaintiff CITY for the use and benefit of Plaintiff CITY's attorneys; or, in the alternative, Plaintiff CITY requests that reasonable attorneys' fees and expenses through trial and appeal be taxed as costs and ordered paid directly to Plaintiff CITY's attorneys, who may enforce the order for fees in the attorneys' own names.

C. Section 27.01 Fraud in a Real Estate Transaction

39. Plaintiff CITY incorporates the allegations contained in Paragraphs 7 through 38 of this First Amended Original Complaint into this cause of action asserted under section 27.01 of the Texas Business and Commerce Code.

40. In the Contract, Defendant REICHHOLD made the following untrue statements of material fact regarding the Property:

7. CLOSING.

F. Seller [REICHHOLD] hereby makes the following representations to Buyer [City]:

1. Seller, to the best of its knowledge and belief, has complied with all applicable laws, ordinances, regulations, statutes, rules and restrictions relating to the Property, or any part thereof. . . .In the event Seller learns of any such matters prior to closing, Seller shall promptly notify Buyer.

8. LEASES AND CLAIMS.

- B. Except as disclosed by Seller to Buyer and delivered to Buyer on or before the Seller's execution of this contract, a copy of which is attached as Exhibit "C", Seller further warrants that as of the date of this contract, it is not aware of any potential, pending or threatened claims, lawsuits or proceedings involving the Property, which affect the use or value of the Property, or which could result in monetary claims or liability being asserted against the Buyer, as the owner of the Property, subsequent to closing.

41. At the time of the Contract, Defendant REICHHOLD knew it had not "complied with all applicable laws, ordinances, regulations, statutes, rules and restrictions relating to the Property, or any part thereof." Specifically, Defendant REICHHOLD knew that it had not complied with the following:

- a. Restrictions set forth in Defendant REICHHOLD's 1985 Closure Plan that was approved by the TWC;

- b. 30 TEX. ADMIN. CODE § 335.4;
- c. TEX. HEALTH & SAFETY CODE ANN. § 361.082(a);
- d. 30 TEX. ADMIN. CODE § 335.43(a);
- e. 42 U.S.C. § 6928(d)(3);
- f. 42 U.S.C. § 6928(d)(4);
- g. 42 U.S.C. § 6972(a)(1)(B);
- h. 42 U.S.C. § 6973(a);
- i. 42 U.S.C. § 9603(c); and
- j. 30 TEX. ADMIN. CODE § 335.5(a).

42. When it sold the Property to Plaintiff CITY, Defendant REICHHOLD knew it had not disclosed the “potential ... claims...involving the Property, which affect the use or value of the Property, or which could result in monetary claims or liability being asserted against the Buyer, as the owner of the Property, subsequent to closing.” Specifically, Defendant REICHHOLD admittedly knew it had buried dangerous and hazardous substances on the Property that could cause injury and damages and potentially result in monetary claims against Plaintiff CITY and that could potentially affect the use or value of the Property. Defendant REICHHOLD also knew that some soil should be removed from the Property because of contamination, that the area around the closed earthen ponds would not support a foundation during construction, that sludge and lime left in the earthen ponds would interfere with building in this area, that some remaining buildings contained asbestos, and that drums of chemicals still remained on the Property. Despite this knowledge, Defendant REICHHOLD remained silent and failed to disclose any of this information to Plaintiff CITY.

43. Defendant REICHHOLD also falsely made the material representations to Plaintiff CITY that, when it closed its Chemical Facilities on the Property, it removed all BPO and liner from the ponds when they were closed.

44. Defendant REICHHOLD knowingly made the false representations and material omissions outlined herein with the intent of inducing Plaintiff CITY to enter the Contract and purchase the Property. Relying on the false representations outlined and material omissions outlined herein, Plaintiff CITY entered into the Contract with Defendant REICHHOLD. Plaintiff CITY would not have entered the transaction but for these false representations and material omissions by Defendant REICHHOLD.

45. As a result, Plaintiff CITY has suffered actual and consequential damages including, but not limited to, the costs it has expended in order to investigate and remove the BPO waste and other dangerous and hazardous substances on the Property as well as delay costs, contract cancellation costs, and the costs actually paid for construction prior to the time of the explosion in an amount in excess of the minimum jurisdictional limits of the Court.

46. Pursuant to section 27.01(e) of the Texas Business and Commerce Code, Plaintiff CITY seeks to recover its reasonable and necessary attorneys' fees, expert witness fees, costs for depositions and copies of depositions and costs of court.

47. Pursuant to section 27.01(c) of the Texas Business and Commerce Code, because Defendant REICHHOLD had actual awareness of the falsity of its representations and material omissions outlined herein, Defendant REICHHOLD is also liable to Plaintiff CITY for exemplary damages in excess of the minimum jurisdiction of this Court.

VI. JURY DEMAND

48. Plaintiff CITY hereby demands trial by jury.

WHEREFORE, PREMISES CONSIDERED, Plaintiff CITY requests that Defendants be cited to appear and answer herein and that upon trial of this cause the Court:

1. Render judgment against Defendants for all costs expended by Plaintiff CITY that are reasonable and necessary to address the release or threatened release of solid waste in an amount in excess of the minimum jurisdictional limits of the Court;
2. Render judgment against Defendants for actual and consequential damages under the breach of warranty and statutory fraud claim under Section 27.01 of the Texas Business and Commerce Code in an amount in excess of the minimum jurisdictional limits of the Court;
3. Render judgment against Defendants for exemplary damages incurred for violation of Section 27.01 of the Texas Business and Commerce Code;
4. Render judgment against Defendants for all costs of suit, deposition costs, expert witness expenses and reasonable attorneys' fees; and
5. Such other and further relief to which Plaintiff CITY may be justly entitled.

Respectfully submitted,

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By: 

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ATTORNEYS FOR PLAINTIFF CITY
OF AUSTIN

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was filed electronically and that notice of this filing will be sent to the following person by operation of the Court's electronic filing system on May 8, 2007:

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