

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

CIVIL ACTION NO. C-3-91-309

THE ATLAS LEDERER COMPANY;)

GENERAL MOTORS CORPORATION;)

SENER METAL, CO., INC.;)

SIMS BROS. INC.;)

HERMAN STRAUSS INC.;)

THE DAVID J. JOSEPH)

COMPANY;)

LIVINGSTON & CO., INC.;)

CONSOLIDATED RAILROAD)

CORPORATION;)

NAVISTAR INTERNATIONAL)

CORPORATION; AND)

BAILEN BROTHERS, INC.,)

LARRY KATZ, ALAN LEVINE,)

and SAUL SENSER,)

Defendants.)

JUDGE WALTER H. RICE

AMENDED COMPLAINT

The United States of America, by and through the undersigned attorney, by authority of the Attorney General of the United States and acting at the request of and on-behalf of the Administrator of the United States Environmental Protection Agency ("U.S. EPA") files this Amended Complaint and alleges as follows:

NATURE OF ACTION

1. This is a civil action brought pursuant to Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. Section 9601, et seq., (“CERCLA”) as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat., 1613 (1986) (“CERCLA”). This action seeks to recover costs incurred by plaintiff in the implementation of certain response measures, at a site known as the United Scrap Lead (“Site”) located in Troy, Ohio.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. Sections 1331 and 1345, and 42 U.S.C. Section 9607(a) and (c), and Section 9613(b).

3. Venue is proper in this district pursuant to 42 U.S.C. Section 9613(b) and 28 U.S.C. Section 1391(b), as the actual and threatened releases of hazardous substances that gave rise to this claim occurred in this district.

DESCRIPTION OF DEFENDANTS

4. The Atlas-Lederer Company (“Atlas”) is incorporated in the State of Ohio, and is a “person” within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21). Atlas owned or possessed hazardous substances and by contract, agreement or otherwise, arranged for disposal or treatment, or arranged with a transporter for disposal or treatment, of such hazardous substances at the Site, within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607 (b)(3).

5. General Motors Corporation (“GM”) is incorporated in the State of Delaware, and is a “person” within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21). GM owned

or possessed hazardous substances and by contract, agreement or otherwise, arranged for disposal or treatment, or arranged with a transporter for disposal or treatment, of such hazardous substances at the Site, within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

6. Senser Metal, Co., Inc., (“Senser”) is incorporated in the State of Ohio, and is a “person” within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21). Senser owned or possessed hazardous substances and, by contract, agreement or otherwise, arranged for disposal or treatment, of such hazardous substances at the Site, within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

7. Livingston & Co., Inc., (“Livingston”) is incorporated in the State of Ohio, and is a “person” within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21). Livingston owned or possessed hazardous substances and by contract, agreement or otherwise, arranged for disposal or treatment, of such hazardous substances at the Site, within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

8. Herman Strauss Inc., (“Strauss”) is incorporated in the State of West Virginia, and is a “person” within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21). Strauss owned or possessed hazardous substances and by contract, agreement or otherwise, arranged for disposal or treatment, of such hazardous substances at the Site, within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

9. Sims Bros. Inc., (“Sims”), is incorporated in the State of Ohio, and is a “person” within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21). Sims owned or possessed hazardous substances and by contract, agreement or otherwise, arranged for disposal or

treatment, of such hazardous substances at the Site, within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

10. The David J. Joseph Company (“Joseph”) is incorporated in the State of Ohio, and is a “person” within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21). Joseph owned or possessed hazardous substances and by contract, agreement or otherwise, arranged for disposal or treatment, of such hazardous substances at the Site, within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

11. Navistar International Corporation (“Navistar”) is incorporated in the State of Delaware, and is a “person” within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21). Navistar owned or possessed hazardous substances and by contract, agreement or otherwise, arranged for disposal or treatment, of such hazardous substances at the Site, within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

12. Consolidated Rail Corporation (“ConRail”) is incorporated in the State of Pennsylvania, and is a “person” within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21). ConRail owned or possessed hazardous substances and by contract, agreement or otherwise, arranged for disposal or treatment, of such hazardous substances at the Site, within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

13. Bailen Brothers, Inc., (“Bailen”) is incorporated in the State of Ohio, and is a “person” within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21). Bailen is the owner of the USL “facility” as that term is defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

14. In August 1998, the Court granted the motion of several Defendants to join a number of new defendants in the United States' cost recovery action pursuant to Fed. R. Civ. P. 20. Pursuant to the Second Case Management Order entered by the Court on September 15, 1998, the Plaintiff's Complaint was deemed to be asserted against each new defendant for whom the United States consented to joinder. On November 27, 1998, the United States consented to joinder of thirty-five of these parties: Ace Iron & Metal Co.; Barker Junk Co.; Beckner Iron & Metal; Bedford Auto Wrecking; Broadway Iron & Metal; Buckeye Metals and Refining; Burns Iron & Metal; Caldwell Iron & Metal; Cohen Brothers Metals Co.; Crispin Auto Wrecking; Dayton Iron & Metal; Decatur Salvage, Inc.; Ebner Sons Co.; Edison Automotive Inc.; Galion Auto Wrecking; Glazer Scrap Co.; Hinton's Inc.; Home City Iron & Metal; Industrial Battery Supply; J.M. Cousins; Joseph H. Homan Metal Co.; Joyce Iron & Metal Co.; Kelly, Patrick E. dba Kelly's Battery Service; Mid-Ohio Battery, Inc.; Montgomery Iron & Metal; Montgomery Iron & Paper Co.; Moyers Auto Wrecking; Norman's Auto Wrecking; Ohio Department of Transportation; Piqua Battery; Polk Scrap Iron & Metal; Snider's Auto Wrecking aka Snider's of Belpre; U.S. Waste Material Co.; United Salvage Co.; and Xenia Iron & Metal. This Court approved the joinder of these parties on December 12, 1998.

15. On June 14, 1999, the United States moved to join two additional, individual defendants, Martin Gable and Donald Gable, as principals of Xenia Iron & Metal. The Court granted this motion on February 10, 2000.

16. Since the inception of this case, the United States has settled with the following named parties: the Atlas Lederer Company, General Motors Corporation, Sims Bros. Inc., Herman Strauss Inc., the David J. Joseph Company, Consolidated Railroad Corporation, Navistar

International Corporation, Bailen Brothers, Inc., Barker Junk Co.; Beckner Iron & Metal; Bedford Auto Wrecking; Broadway Iron & Metal; Buckeye Metals and Refining; Cohen Brothers Metals Co.; Crispin Auto Wrecking; Dayton Iron & Metal; Decatur Salvage, Inc.; Ebner Sons Co.; Galion Auto Wrecking; Glazer Scrap Co.; Hinton's Inc.; Home City Iron & Metal; Industrial Battery Supply; J.M. Cousins; Joseph H. Homan Metal Co.; Joyce Iron & Metal Co.; Kelly, Patrick E. dba Kelly's Battery Service; Mid-Ohio Battery, Inc.; Montgomery Iron & Metal; Montgomery Iron & Paper Co.; Moyers Auto Wrecking; Ohio Department of Transportation; Piqua Battery; Polk Scrap Iron & Metal; Snider's Auto Wrecking aka Snider's of Belpre; U.S. Waste Material Co.; United Salvage Co.; Xenia Iron & Metal and Martin and Donald Gable.

17. On July 13, 2005, this Court granted the United States' motion to join three additional individual defendants, Alan Levine, Larry Katz, and Saul Senser.

18. Alan Levine is an individual who resides within the State of Ohio and is a "person" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21). Mr. Levine, through his sole proprietorships Ace Iron & Metal Co. ("Ace") and Norman's Auto Wrecking ("Noorman's") owned or possessed hazardous substances and by contract, agreement or otherwise, arranged for disposal or treatment of such hazardous substances at the Site, within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

19. Larry Katz is an individual who resides in the State of Ohio and is a "person" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21). Mr. Katz, through his partnership Caldwell Iron & Metal ("Caldwell"), owned or possessed hazardous substances and by contract, agreement or otherwise, arranged for disposal or treatment of such hazardous

substances at the Site, within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

20. Saul Senser is an individual who resides in the State of Ohio and is a “person” within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21). At all times relevant to this complaint, Mr. Senser’s control over Senser Metal was so complete that the company had no separate mind, will or existence of its own. Mr. Senser personally controlled Senser Metal Company, Inc. during the time that it owned or possessed hazardous substances and, by contract, agreement or otherwise, personally arranged for disposal or treatment, of such hazardous substances at the Site, within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

SITE DESCRIPTION

21. The United Scrap Lead Site consists of approximately twenty-five acres of land located at 2117 South County Road 25A which is approximately one mile south of the city of Troy, Ohio, in Concord Township, Miami County.

FACTUAL BACKGROUND

22. From 1946 to 1980, the Site was utilized as a waste disposal facility. During this time large amounts of hazardous substances, particularly lead, were disposed of at the USL Site.

23. In September 1983, the USL Site was placed on the National Priorities List (“NPL”), 40 C.F.R. §300 *et seq.*, Appendix B, which is a national list of hazardous waste sites posing the greatest threat to the public health, welfare and the environment. The NPL is established pursuant to Section 105(a) of CERCLA, 42 U.S.C. § 9605(a).

24. In November 1985, pursuant to CERCLA Section 104, 42 U.S.C. §9604, U.S. EPA undertook various response actions to address the release of hazardous substances at and around the removal Site. The actions included sampling and analyzes of soils and materials at the Site; removal of the contaminated soils and waste materials from the immediate vicinity of the surrounding residences and roadways; and air sampling.

25. An investigation of the nature and extent of contamination known as a remedial investigation (“RI”) was conducted at the Site and completed in February 1988. The RI concluded that the soils and waste materials at the USL Site are contaminated with high levels of lead.

26. In August 1988, U.S. EPA completed a feasibility study at the Site which was followed in September 1988, by a record of decision which explored remedial alternatives for the Site. In September 1988, U.S. EPA issued a record of decision which selected a remedial action for the Site. In September, 1997, U.S. EPA amended the Record of Decision to select an alternative remedial action for the Site. In summary, the selected remedial action calls for: 1) excavation and treatment of batter casings; 2) excavation and treatment of surface and subsurface soils; 3) surface water, groundwater and air monitoring; 4) demolition of buildings and structures on the Site; and 5) construction of a new well for a nearby residence. The remedial action for the Site is largely complete.

27. Senser Metal began operation in 1953, although it did not incorporate until 1973.

28. Prior to its closure in 1996, Senser engaged in the business of purchasing and selling of non-ferrous metal, commonly known as the “scrap metal” business.

29. In carrying out this business, Mr. Senser exercised complete control over the corporation, negotiating and executing all agreements with suppliers, customers and employees.

30. Mr. Senser also served as the sole director, shareholder, president, treasurer and secretary of Senser Metal.

31. Starting in the 1970s, Senser began to sell used batteries to United Scrap Lead Company. United Scrap Lead purchased nearly 5,200 tons of scrap lead from Senser in the 1970s.

32. Senser Metal is presently liable to the United States for more than \$9 million in response costs incurred at the USL Site.

FIRST CLAIM FOR RELIEF
(CERCLA Section 107 Cost Recovery)

33. Plaintiff realleges paragraphs 1 through 32 as if fully set forth herein.

34. Section 107(a) of CERCLA, 42 U.S.C. Section 9607(a), provides in relevant part:

(a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section-

(1) the owner and operator of a vessel or a facility,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances . . .

shall be liable for-

(A) all costs for removal or remedial action incurred by the United States Government or

a State . . . not inconsistent with the national contingency plan; . . .

35. Each of the named defendants and the other Defendants joined in this matter in 1998, 2000 and 2005, as set forth in Paragraphs 14, 15, and 17 is a “person” within the meaning of Section 101(21) of CERCLA, 42 U.S.C. Section 9601(21).

36. The USL Site is a “facility” within the meaning of Section 101(2) of CERCLA, 42 U.S.C. Section 9601(2).

37. There have been “releases” or “threatened releases” of “hazardous substances” at the Site as those terms are defined in Section 101(14) and (22) of CERCLA, 42 U.S.C. Section 9601(14) and (22).

38. The term “disposal”, is defined, pursuant to Section 101(29) of CERCLA, 42 U.S.C. § 9601(29), and 42 U.S.C. § 6903, as follows:

The term “disposal means the discharge deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.”

39. The materials disposed of at the USL Site by the named Defendants and the other Defendants joined in this matter in 1998, 2000 and 2005, as set forth in Paragraphs 14, 15, and 17, contained hazardous substances, including lead.

40. The term “owner” or “operator” is defined in Section 101(20)(a)(ii) of CERCLA, 42 U.S.C. § 9601(20)(a)(ii), to mean:

in the case of an onshore facility or an offshore facility, any person owning or operating such facility...

41. Defendant Bailen Brothers, Inc., is within the class of persons described in Section 107(a) of CERCLA, 42 U.S.C. § 9607(a) since it is the owner of the USL Site.

42. Defendants, The Atlas-Lederer Company, Senser Metal Co., Inc., Livingston & Co., Inc., Herman Strauss Inc., Sims Bros. Inc., The David J. Joseph Company, Navistar International Corporation, Consolidated Rail Corporation, General Motors Corporation, and the other Defendants joined in this matter in 1998, 2000, and 2005, as set forth in Paragraphs 14, 15 and 17, are within the class of persons described in Section 107(a) of CERCLA, 42 U.S.C. § 9607 because they contracted, agreed, or otherwise arranged with a transporter to transport for disposal or treatment to the USL Site hazardous substances which they owned or possessed. Defendants Larry Katz, Alan Levine, Saul Senser are individually liable because of their personal actions on behalf of their companies, Larry Katz as the general partner of Caldwell; Alan Levine as the sole proprietor of Ace and Norman's, and Saul Senser because he personally arranged for the disposal of Senser Metals' wastes at the USL Site.

43. As a result of the release or threatened release of hazardous substances at the Site, U.S. EPA has incurred "response costs," within the meaning of Section 101(25) of CERCLA, 42 U.S.C. Section 9601(25), including related administrative, investigative and enforcement costs.

44. The amount of the United States' response costs for which the Defendants are liable has not yet been fixed by the Court, but the United States' unreimbursed response costs in connection with the Site currently exceed \$9,000,000.00.

45. The costs incurred by the United States at the Site were incurred for response actions not inconsistent with the National Contingency Plan, 40 C.F.R. Part 300, et seq.

46. The United States has satisfied any condition precedent to the undertaking of the response costs and for the recovery of those costs under Section 107 of CERCLA, U.S.C. Section 9607.

47. Pursuant to Section 107(a) of CERCLA, 42 U.S.C. Section 9607(a), the named Defendants and the other Defendants joined in this matter in 1998 and 2000 as set forth in Paragraph 14 are jointly and severally liable for all response costs incurred by the United States for response activities conducted at the Site, including related administrative, investigative and enforcement costs.

48. Pursuant to Section 107(a) of CERCLA, 42 U.S.C. Section 9607(a), the United States is entitled to recover interest on the response costs which it has incurred.

49. Pursuant to Section 113(g)(2) of CERCLA, U.S.C. Section 9613(g)(2), the court should enter a declaratory judgment that the defendants will be jointly and severally liable for all future response costs incurred by the United States at the Site.

SECOND CLAIM FOR RELIEF
(Piercing Senser Metal's Corporate Veil)

50. The allegations or paragraphs 1 through 49 are re-alleged and incorporated herein by reference.

51. At all times relevant to this complaint, Mr. Senser's control over Senser Metal was so complete that the company had no separate mind, will or existence of its own.

52. In particular, Mr. Senser controlled Senser Metal Company, Inc. during the time that it owned or possessed hazardous substances and, by contract, agreement or otherwise, arranged

for disposal or treatment, of such hazardous substances at the Site, within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

53. As result of his actions, Mr. Senser is personally liable for response costs incurred by EPA at the USL Site under Section 107 of CERCLA, 42 U.S.C. § 9607.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, the United States of America respectfully prays that this Court:

(A) Enter judgment against the defendants, jointly and severally, for the response costs, including administrative, investigative and enforcement costs, and including interest on all response costs, incurred by the United States under CERCLA, 42 U.S.C. Section 9601 et seq., in connection with the Site;

(B) Enter a declaratory judgment that defendants will be jointly and severally liable for future response costs incurred by the United States at the Site;

(C) Award such other relief as this Court deems necessary and appropriate.

Respectfully submitted,

KELLY A. JOHNSON
Acting Assistant Attorney General
Environment and Natural
Resources Division

By: /
DEBORAH M. REYHER /
Senior Attorney
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 514-4113/616-6584 (FAX)

GREGORY G. LOCKHART
United States Attorney
Southern District of Ohio

PATRICK D. QUINN
Assistant U.S. Attorney
Southern District of Ohio
Federal Building, 602
200 W. Second Street
Dayton, OH 45400
(937) 225-2910/2564 (FAX)

OF COUNSEL:
SHERRY L. ESTES
Associate Regional Counsel
U.S. EPA — Region V
77 West Jackson Boulevard
Chicago, IL 60604