EPA Region 5 Records Ctr.
275667

U.S. Department of Justice

Environment and Natural Resources Division

Environmental Enforcement Section
P.O. Box 7611
Washington, D.C. 20044-7611
Telephone: (202) 514-4213
Facsimile: (202) 616-6584

BSG:AML
DJ No. 90-11-3-1620/2

August 10, 2001

VIA FEDERAL EXPRESS

Clerk's Office
United States District Court for the Southern District of Ohio
Rm. 324
Potter Stewart Courthouse
100 E. 5th St.
Cincinnati, OH 45202

Re: United States v. Aeronca, Inc. et al., C-1-01-439
Motion to Consolidate

Dear Clerk:

Enclosed please find:

(1) The original and two copies of a Motion to Consolidate where the caption is headed by the case of United States v. Aeronca, Inc., et al., and is followed by the case that the United States seeks to be consolidated with; and

(2) The original and two copies of an identical Motion to Consolidate where the caption is headed by the case of Dow Chemical et al. v. Acme Wrecking et al., and is followed by the United States' case.

After speaking with Darlene Maury of Judge Weber's chambers – where the Dow Chemical cases currently are pending – it was my understanding that I should file the Motion with these two different captions so that one could be directed to Judge Beckwith's chambers and the other could be directed to Judge Weber's chambers. If I am mistaken in my understanding, then just utilize the caption that has the appropriate "order" of the civil actions.

Thank you for your kind attention to this matter.

Sincerely,

Annette M. Lang

Annette M. Lang
Trial Attorney

cc: David Northrop
Jonathan Conte
Kevin Hopper
Craig Melodia
Karl Bourdeau
Mike O'Callaghan

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

UNITED STATES OF AMERICA, Plaintiff, v. AERONCA, INC. (f/k/a Aeronca Manufacturing Corp. f/k/a/ Aeronca Aircraft), CLARKE CONTAINER, INC., CLARKE'S INCINERATORS, INC., JOHN J. WHITTON TRUCKING, INC., Defendants.	Civil Action No. C-1-01-439 Judge Beckwith
THE DOW CHEMICAL CO., et al., Plaintiffs, v. ACME WRECKING CO., INC., et al., Defendants.	Civil Action Nos. C-1-97-0307 and C-1-97-0308 (Consolidated Actions) Judge Weber
THE DOW CHEMICAL CO., et al. Plaintiffs, v. SUN OIL COMPANY, d/b/a SUNOCO OIL CORP., et al., Defendants.	

MOTION AND MEMORANDUM OF THE UNITED STATES TO CONSOLIDATE

Plaintiff United States of America hereby files this Motion to Consolidate. As demonstrated herein, this action, which was filed by the United States on July 29, 2001, should be consolidated with the closely-related cases of Dow Chemical Co. et al. v. Acme Wrecking Co., Inc., et al., Civil Action No. C-1-07-0307 and Dow Chemical Co. et al v. Sun Oil Co. et al., C-1-97-0308 (hereinafter "Dow Chemical cases"). The plaintiffs in the Dow Chemical cases support this consolidation. See Status Report of Plaintiffs, filed July 3, 2001, in the Dow Chemical cases.

Rule 42(a) of the Federal Rules of Civil Procedure governs motions to consolidate. That Rule states: "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning the proceedings therein as may tend to avoid unnecessary costs or delay." The threshold issue, therefore, is whether the actions involve common facts or legal issues. See Cantrell v. GAF Corp., 999 F.2d 1007, 1011 (6th Cir. 1993). The decision whether to consolidate is reserved to the discretion of the district judge. Id., *citing* Stemler v. Burke, 344 F.2d 393, 396 (6th Cir. 1965).

This case has a substantial factual and legal overlap with the pending Dow Chemical cases. All cases were brought under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 et seq., to recover costs incurred as a result of releases or threatened releases of hazardous substances at or from the Skinner Landfill Superfund Site in Westchester, Ohio (the "Site"). The three defendants in the

United States' action are defendants in the Dow Chemical actions.[1] These defendants are companies that the United States could not settle with in its recently-entered Consent Decree involving the Skinner Landfill (Civil Action No. C-1-00-424). These defendants are companies that the plaintiffs in the Dow Chemical cases have not yet been able to settle with. The question of whether these defendants were generators or transporters of hazardous substances to the Skinner Landfill is identical in all of the cases. Additional questions regarding liability -- for example, whether the Skinner Landfill is a "facility" as that term is used in CERCLA, whether there was a release or threatened release of "hazardous substances" at the Site – are similarly parallel. The defendants can be anticipated to assert the same or similar defenses to all of the actions. Moreover, should relief be granted in all of the cases, it does not make sense for the defendants to be subject to inconsistent orders. On the other hand, if these cases ultimately are resolved by settlement, the United States and the plaintiffs in the Dow Chemical cases agree that one Consent Decree can be fashioned that would address the claims in all the cases.

Consolidating the United States' action with the Dow Chemical action will not slow the progress of that previously-filed litigation. As Judge Weber is aware, the Dow Chemical cases have been stayed pending an Alternative Dispute Resolution ("ADR") process which ultimately resulted in settling out many parties. Settlement discussions based on the ADR process continue with the remaining non-settling parties. No discovery in the context of civil litigation has

---

[1] The United States actually named four companies as defendants. However, two of the named defendants – Clarke Incinerators, Inc. and Clarke Container, Inc. – were and are owned by the same individual, Marty Clarke. In the status reports in the Dow Chemical cases, the plaintiffs generally refer to these two defendants as "Marty Clarke and related entities." For that reason, the United States has indicated in the text of this Motion that it sued three defendants.

occurred. To the extent that settlements are not reached, parallel discovery and case management in the Dow Chemical action and in the United States' action should be undertaken to conserve resources and save costs.

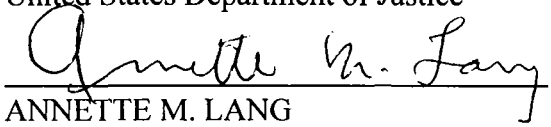
The defendants will not be prejudiced by the consolidation. Indeed, to the extent that settlement cannot be reached, consolidating the actions will prevent the defendants from being subject to conflicting case management orders an discovery tracks. To the extent that settlement can be reached, it will be among all parties.

For more than two weeks, the United States has attempted to seek the concurrence of the defendants to this Motion. Two defendants have not responded to the request. The other defendant could "neither agree nor disagree."

For the reasons stated herein, this Court should grant the Motion to Consolidate the present case with the Dow Chemical cases.

Respectfully submitted,

JOHN C. CRUDEN
Acting Assistant Attorney General
Environment and Natural Resources
Division
United States Department of Justice



ANNETTE M. LANG
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources
Division
United States Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044
(202) 514-4213

SALVADOR DOMINGUEZ
United States Attorney
Southern District of Ohio

GERALD F. KAMINSKI
(Ohio Bar No. 0012532)
Assistant United States Attorney
Southern District of Ohio
220 U.S.P.O. & Courthouse
100 E. 5th Street
Cincinnati, Ohio 45202
(513) 684-3711

OF COUNSEL:

CRAIG MELODIA
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August 2001, I caused a true copy of the foregoing Motion and Memorandum of the United States to Consolidate to be served by first-class mail, postage pre-paid on the following counsel:

David E. Northrop, Esq.
Porter Wright Morris & Arthur
41 S. High St.
Columbus, OH 43215-6194
(Attorney for Aeronca)

Kevin J. Hopper, Esq.
Southampton Square
7434 Jager Ct.
Cincinnati, OH 45230
(Attorney for John J. WhittonTrucking)

Jonathon Conte, Esq.
Blank Rome Comisky & McCauley LLP
PNC Center
201 E. Fifth St., Suite 1700
Cincinnati, OH 45202
(Attorney for Clarke Container and Clarke Incinerators)

I also sent a courtesy copy to two counsel in the Dow Chemical cases:

Karl S. Bourdeau
Beveridge & Diamond
1350 I Street, N.W., Suite 700
Washington, D.C. 20005-3311

Michael J. O'Callaghan
Shumaker, Loop & Kendrick
41 S. High Street, Suite 2210
Columbus, OH 43215

Annette M. Lang

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

THE DOW CHEMICAL CO., et al., Plaintiffs, v. ACME WRECKING CO., INC., et al., Defendants.	Civil Action Nos. C-1-97-0307 and C-1-97-0308 (Consolidated Actions) Judge Weber
THE DOW CHEMICAL CO., et al. Plaintiffs, v. SUN OIL COMPANY, d/b/a SUNOCO OIL CORP., et al., Defendants.	
UNITED STATES OF AMERICA, Plaintiff, v. AERONCA, INC. (f/k/a Aeronca Manufacturing Corp. f/k/a/ Aeronca Aircraft), CLARKE CONTAINER, INC., CLARKE'S INCINERATORS, INC., JOHN J. WHITTON TRUCKING, INC., Defendants.	Civil Action No. C-1-01-439 Judge Beckwith

MOTION AND MEMORANDUM OF THE UNITED STATES TO CONSOLIDATE

Plaintiff United States of America hereby files this Motion to Consolidate. As demonstrated herein, this action, which was filed by the United States on July 29, 2001, should be consolidated with the closely-related cases of Dow Chemical Co. et al. v. Acme Wrecking Co., Inc., et al., Civil Action No. C-1-07-0307 and Dow Chemical Co. et al v. Sun Oil Co. et al., C-1-97-0308 (hereinafter "Dow Chemical cases"). The plaintiffs in the Dow Chemical cases support this consolidation. See Status Report of Plaintiffs, filed July 3, 2001, in the Dow Chemical cases.

Rule 42(a) of the Federal Rules of Civil Procedure governs motions to consolidate. That Rule states: "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning the proceedings therein as may tend to avoid unnecessary costs or delay." The threshold issue, therefore, is whether the actions involve common facts or legal issues. See Cantrell v. GAF Corp., 999 F.2d 1007, 1011 (6th Cir. 1993). The decision whether to consolidate is reserved to the discretion of the district judge. Id., *citing* Stemler v. Burke, 344 F.2d 393, 396 (6th Cir. 1965).

This case has a substantial factual and legal overlap with the pending Dow Chemical cases. All cases were brought under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 et seq., to recover costs incurred as a result of releases or threatened releases of hazardous substances at or from the Skinner Landfill Superfund Site in Westchester, Ohio (the "Site"). The three defendants in the

United States' action are defendants in the Dow Chemical actions.[1] These defendants are companies that the United States could not settle with in its recently-entered Consent Decree involving the Skinner Landfill (Civil Action No. C-1-00-424). These defendants are companies that the plaintiffs in the Dow Chemical cases have not yet been able to settle with. The question of whether these defendants were generators or transporters of hazardous substances to the Skinner Landfill is identical in all of the cases. Additional questions regarding liability -- for example, whether the Skinner Landfill is a "facility" as that term is used in CERCLA, whether there was a release or threatened release of "hazardous substances" at the Site – are similarly parallel. The defendants can be anticipated to assert the same or similar defenses to all of the actions. Moreover, should relief be granted in all of the cases, it does not make sense for the defendants to be subject to inconsistent orders. On the other hand, if these cases ultimately are resolved by settlement, the United States and the plaintiffs in the Dow Chemical cases agree that one Consent Decree can be fashioned that would address the claims in all the cases.

Consolidating the United States' action with the Dow Chemical action will not slow the progress of that previously-filed litigation. As Judge Weber is aware, the Dow Chemical cases have been stayed pending an Alternative Dispute Resolution ("ADR") process which ultimately resulted in settling out many parties. Settlement discussions based on the ADR process continue with the remaining non-settling parties. No discovery in the context of civil litigation has

---

[1] The United States actually named four companies as defendants. However, two of the named defendants – Clarke Incinerators, Inc. and Clarke Container, Inc. – were and are owned by the same individual, Marty Clarke. In the status reports in the Dow Chemical cases, the plaintiffs generally refer to these two defendants as "Marty Clarke and related entities." For that reason, the United States has indicated in the text of this Motion that it sued three defendants.

occurred. To the extent that settlements are not reached, parallel discovery and case management in the Dow Chemical action and in the United States' action should be undertaken to conserve resources and save costs.

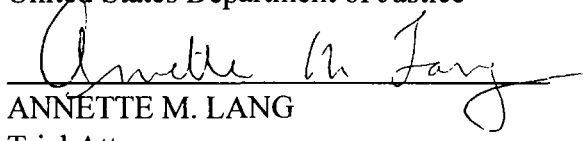
The defendants will not be prejudiced by the consolidation. Indeed, to the extent that settlement cannot be reached, consolidating the actions will prevent the defendants from being subject to conflicting case management orders an discovery tracks. To the extent that settlement can be reached, it will be among all parties.

For more than two weeks, the United States has attempted to seek the concurrence of the defendants to this Motion. Two defendants have not responded to the request. The other defendant could "neither agree nor disagree."

For the reasons stated herein, this Court should grant the Motion to Consolidate the present case with the Dow Chemical cases.

Respectfully submitted,

JOHN C. CRUDEN
Acting Assistant Attorney General
Environment and Natural Resources
Division
United States Department of Justice



ANNETTE M. LANG
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources
Division
United States Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044
(202) 514-4213

SALVADOR DOMINGUEZ
United States Attorney
Southern District of Ohio

GERALD F. KAMINSKI
(Ohio Bar No. 0012532)
Assistant United States Attorney
Southern District of Ohio
220 U.S.P.O. & Courthouse
100 E. 5th Street
Cincinnati, Ohio 45202
(513) 684-3711

OF COUNSEL:

CRAIG MELODIA
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August 2001, I caused a true copy of the foregoing Motion and Memorandum of the United States to Consolidate to be served by first-class mail, postage pre-paid on the following counsel:

David E. Northrop, Esq.
Porter Wright Morris & Arthur
41 S. High St.
Columbus, OH 43215-6194
(Attorney for Aeronca)

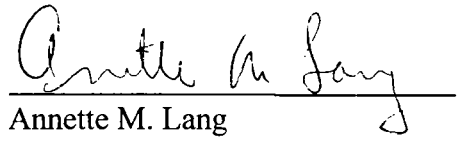
Kevin J. Hopper, Esq.
Southampton Square
7434 Jager Ct.
Cincinnati, OH 45230
(Attorney for John J. WhittonTrucking)

Jonathon Conte, Esq.
Blank Rome Comisky & McCauley LLP
PNC Center
201 E. Fifth St., Suite 1700
Cincinnati, OH 45202
(Attorney for Clarke Container and Clarke Incinerators)

I also sent a courtesy copy to two counsel in the Dow Chemical cases:

Karl S. Bourdeau
Beveridge & Diamond
1350 I Street, N.W., Suite 700
Washington, D.C. 20005-3311

Michael J. O'Callaghan
Shumaker, Loop & Kendrick
41 S. High Street, Suite 2210
Columbus, OH 43215



Annette M. Lang