

6. ORDER on Consent  
between Theodore Dzus  
SR. DZUS FASTENER CO.  
WI Holdings Limited  
\* DZUS IN. Lim. Respondents  
\* the State of N.Y. 6-4-96

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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THE STATE OF NEW YORK and LANDGDON	:	
MARSH as Trustee of the Natural	:	
Resources,	:	
	:	
Plaintiffs,	:	
	:	
-against-	:	
	:	
THEODORE DZUS, SR.,	:	CIV. 94-5334 (LDW)
	:	
Defendant and	:	
Third Party Plaintiff,	:	
	:	
-against-	:	
	:	
DZUS FASTENER CO., INC., W.I. HOLDINGS	:	
LTD. and DZUS INTERNATIONAL LTD.,	:	
	:	
Third-Party Defendants.	:	

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ORDER ON CONSENT

WHEREAS, the State of New York and Langdon Marsh, as Trustee of the Natural Resources ("Plaintiffs"), filed a complaint in this matter in November 1994 pursuant to Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9607, as amended ("CERCLA"), and pursuant to the common law of public nuisance, unjust enrichment and restitution;

WHEREAS, the Plaintiffs are seeking to recover costs to date and future costs for response actions in connection with the release or threatened release of hazardous substances at the Deus Fastener Company Inactive Hazardous Waste Disposal Site # 1-52-033 in West Islip, Suffolk County, New York (the "Site");



WHEREAS, Dzus Fastener Co., Inc. (the "Company"), is a corporation organized and existing under the laws of the State of New York, and the Company owns real property located at 425 Union Boulevard, West Islip, County of Suffolk;

WHEREAS, in 1989 the Company undertook a Phase II Investigation which included the installation of monitoring wells and the analysis of soil and groundwater quality beneath the site. Soil and groundwater quality data exhibited cadmium concentrations exceeding New York State standards;

WHEREAS, on April 2, 1991, and based upon the Phase II investigation, the Company began an Interim Remedial Measure ("IRM"), under Department supervision, to remove grossly contaminated soil from three areas on the Site; a report on the IRM activities was issued by the Company consultants in June 1992;

WHEREAS, between May 1992 and October 1994, a State-funded Remedial Investigation/Feasibility Study ("RI/FS") was conducted to determine the nature and extent of the contamination attributable to the Site, and to develop remedies for addressing said contamination. The RI/FS Report was issued in October 1994;

WHEREAS, the RI/FS identified contamination attributable to the operation of the Company's facilities in soil and groundwater on-Site and in sediments in Willetts Creek and in nearby Lake Capri;

WHEREAS, in March 1995, the Department issued a Record of Decision ("ROD") in which, inter alia, a remedial action was

selected to treat the contaminated soils on the Site and to remove hazardous wastes on the Site. The remediation of the on-Site contamination is identified hereinafter as Operable Unit # 1 for the Site, as discussed in the Record of Decision of March 1995;

WHEREAS, the Department is assessing what, if any, remedial action may be undertaken in the future to address contamination of the sediments in Willetts Creek and Lake Capri ("Operable Unit ("OU") #2);

WHEREAS, the Department has incurred response costs for the continuation of the IRM, for the RI/FS and for the implementation of OU #1, and will continue to incur response costs for the completion of OU #1 at the Site;

WHEREAS, Plaintiffs and Defendant Theodore Dzus, Sr. (referred to as "Settling Defendant Dzus") have agreed on the terms set forth below to settle certain of the State's claims raised in this action, in exchange for payment by Settling Defendant Theodore Dzus in the amount of \$400,000.00;

NOW THEREFORE, upon the consent of the parties to this action as evidenced by their signatures, it is hereby ORDERED, ADJUDGED, AND DECREED:

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9607 and 9613(b). This Court also has personal jurisdiction over the Settling Defendant Dzus.



2. For the purposes of this Order, all terms, other than those terms expressly and particularly defined herein, shall be defined in accordance with CERCLA, the New York State Environmental Conservation law (the "ECL"), the New York State Finance Law (the "SFL"), and the regulations promulgated pursuant to these laws; or, in the absence of a statutory or regulatory definition, such terms will be construed in accordance with their commonly attributed meaning.

3. This Stipulation and Order on Consent and any statement of fact contained herein shall not in any event be construed to be evidence of, an admission of or a concession by Settling Defendant Dzus that he is liable for any of the claims or assertions raised in this action or that such claims or assertions have any validity.

4. Settling Defendant Dzus shall pay to the State, by certified check, \$310,000 within sixty days (60) days of the entry of this Order, and Settling Defendant Dzus shall pay an additional \$90,000, by certified checks, as follows: \$22,500 on a date one year after the entry of this Order; \$22,500 on a date two years after entry of this Order; \$22,500 on a date three years after entry of this Order; and, \$22,500 on a date four years after entry of this Order.

The amounts due and payable shall be sent to:

Robert Emmet Hernan, Esq.  
Assistant Attorney General  
Environmental Protection Bureau  
New York State Department of Law  
120 Broadway - 26th Floor  
New York, New York 10271;

The checks shall be made payable to "New York State Department of Environmental Conservation."

5. In consideration of the payments to be made by Settling Defendant Dzus under the terms of this Consent Decree, and except as specifically provided in Paragraphs 6-8, infra, the Plaintiffs release and covenant not to sue or take administrative action against Settling Defendant Dzus pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), or under any other statute or common law claim, relating to response and any and all other costs incurred: in investigating the Site to the date of entry of this Order, including the RI/FS; in implementing the IRM; and in implementing the remedial action selected for Operable Unit #1. The Plaintiffs' release of and covenant not to sue Settling Defendant Dzus remains in effect as long as Settling Defendant Dzus complies with the payment provisions as set forth in Paragraphs 4 and 5 of this Order. In the event that Settling Defendant Dzus fails to make the payments to Plaintiffs within the time periods set forth in Paragraph 4, and Settling Defendant Dzus does not cure such failure within fifteen (15) days following written notice of same, then such failure shall constitute a failure to comply with the terms of this Order. Written notice shall be effective upon mailing by registered mail to:

Theodore Dzus, Sr.  
46 Cooper Ave.  
Amityville, N.Y. 11701

- and -



Tenzer Greenblatt LLP  
405 Lexington Avenue  
New York, N.Y. 10174  
(Attn: Lawrence M. Rosenstock, Esq.)

This release and covenant not to sue extends only to Settling Defendant Dzus and does not extend to any other person.

6. The State is settling its claims against Settling Defendant Dzus with regard to response costs of investigating OU #1 and the costs of implementing the IRM and the remedy for OU #1. However, and notwithstanding any other provision of this Consent Decree, the Plaintiffs reserve, and this Consent Decree is without prejudice to, the right to institute proceedings in ~~this action or in~~ <sup>9</sup> a new action, or to issue an administrative order seeking to compel Settling Defendant Dzus (a) to perform further response actions relating to the Site or (b) reimburse the Plaintiffs for additional costs of response if:

- (i) conditions at the Site, previously unknown to Plaintiffs, are discovered, or
- (ii) information, in whole or in part previously unknown to Plaintiffs, is received,

and these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action selected for Operable Unit #1 is not protective of human health or the environment.

7. The State is not settling its claims for any costs of investigation regarding OU #2 incurred after the date of entry of this Order or for any remedial actions to be taken with regard to OU #2. Therefore, and notwithstanding any other provision of

this Consent Decree, the covenant not to sue, set forth in Paragraph 5, does not apply to the following:

- (a) costs of further studies for or implementation of any remedy regarding or related to off-site contamination, including contamination of Willetts Creek and/or of Lake Capri;
- (b) damages to natural resources resulting from any release or threat of release from the Site;
- (c) criminal liability.

8. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a party to this Consent Decree. Each of the parties expressly reserves any and all rights (including, but not limited to, any right of contribution), defenses, claims, demands, and causes of action which each party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a party hereto.

9. With respect to claims for which the State has covenanted not to sue Settling Defendant Dzus, as set forth above, the Parties hereto agree that Settling Defendant Dzus is entitled to such protection from contribution actions or claims as is provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2).

10. Settling Defendant Dzus agrees that with respect to any suit or claim for contribution brought by him for matters related to this Consent Decree, he will notify the Plaintiffs in writing



no later than 30 days prior to the initiation of such suit or claim. Settling Defendant Dzus also agrees that with respect to any suit or claim for contribution brought against him for matters related to this Consent Decree, he will notify Plaintiffs in writing within 10 days of service of the complaint on him. In addition, Settling Defendant Dzus shall notify the Plaintiffs within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial for matters related to this Consent Decree.

11. Plaintiffs agree not to institute for one year, from the date of entry of this Order, any judicial proceeding for injunctive relief, recovery of response costs or other relief relating to OU #2, and Settling Defendant Dzus agrees not to assert and not to maintain any defense based upon any statute of limitations in any subsequent proceeding for a period of two years from the date of entry of the Order. In any subsequent administrative or judicial proceeding initiated by the Plaintiffs for injunctive relief, recovery of response costs, claims for natural resource damages, or other appropriate relief relating to OU #1 and/or OU #2, Settling Defendant Dzus shall not assert, and may not maintain, any defenses or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the Plaintiffs in the subsequent proceeding were or should have been brought in the instant case, provided,

however, that nothing in this paragraph affects the enforceability of the covenant not to sue. In addition, the parties agree that if there is any subsequent proceeding, the discovery undertaken in this action, including but not limited to depositions, shall be admissible in that subsequent proceeding to the same extent as it would have been in this action.

3. This Decree shall apply to, and be binding upon the parties, their officers, agents, servants, employees, successors and assigns, and upon all persons, firms and corporations acting under, through or for any of them.

4. This Consent Decree shall become effective upon the date of its entry by the Court.

5. This Agreement and Order constitutes the entire agreement of the parties herein and shall only be modified in writing on consent of all parties.

FOR THE PLAINTIFFS:

DENNIS C. VACCO  
Attorney General of the state  
of New York

Dated: *June 4, 1996*

BY: *Robert Emmet Hernan*  
Robert Emmet Hernan  
Assistant Attorney General  
State of New York  
120 Broadway  
New York, NY 10271



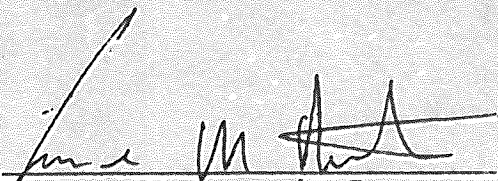
FOR THE DEFENDANT THEODORE  
DZUS, SR.

Sworn to before me this  
1st day of June 1996.

  
NOTARY PUBLIC

ELIZABETH F. DI MICHELE  
Notary Public, State of New York  
No. 4959239  
Qualified in Nassau County  
Commission Expires Nov. 27, 1997

  
Theodore Dzus, Sr.

  
Lawrence Rosenstock, Esq.  
TENZER GREENPLATT LLP  
405 Lexington Avenue  
New York, New York 10174

SO ORDERED THIS 12<sup>th</sup> DAY OF June, 1996

  
United States District Judge

HAUPPAUGE, NY