

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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ERIN M. CROTTY, Commissioner of the New York
State Department of Environmental Conservation,
NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION and
STATE OF NEW YORK,

Index No. 03-10241

Plaintiffs,

-against-

LAWRENCE AVIATION INDUSTRIES, INC.
and GERALD COHEN,

Defendants.

-----X

**AFFIRMATION OF
ASSISTANT ATTORNEY
GENERAL RACHEL
ZAFFRANN IN FURTHER
SUPPORT OF
PLAINTIFFS' ORDER TO
SHOW CAUSE AND IN
OPPOSITION TO THE
AFFIDAVIT OF
DEFENDANT GERALD
COHEN**

RACHEL ZAFFRANN, an attorney duly admitted to practice law in the courts of the
State of New York, affirm the following under the penalty of perjury:

1. I am an Assistant Attorney General with the New York State Attorney General's
Office, attorneys for plaintiffs Erin M. Crotty, Commissioner of the New York State Department
of Environmental Conservation (DEC), DEC and the State of New York. (collectively the State,
plaintiffs or DEC). I base this affirmation on my own personal knowledge and on information
provided by the New York State Department of Environmental Conservation.

History of the Site

2. In the Affidavit of Gerald Cohen, dated June 12, 2003, (herein Cohen Aff.),
affiant makes numerous representations about the past regulatory history of the Lawrence
Aviation plant (the plant). *See* Cohen Aff. p. 3 - 5. Much of the information provided in this
section is inaccurate or incomplete.

3. Cohen asserts that the United States Environmental Protection Agency (EPA) is the “lead agency” for the site. Cohen Aff. p. 4. Cohen fails to explain, however, that EPA is the lead agency for only a single aspect of the environmental problems at the site - namely, past contamination at the site caused by defendants’ past release of hazardous waste. Specifically, as a result of the past releases of hazardous wastes the site was list on the State’s Inactive Hazardous Waste Sites list (Exhibit ____), and on the National Priorities List under the federal Comprehensive Environmental Remediation and Closure Law (CERCLA). *Final Rule: National Priorities List for Uncontrolled Hazardous Waste Site*, 65 FR 5435 (February 4, 2000) (Exhibit ____). EPA is the lead agency solely for purposes of the Superfund clean-up. Importantly, CERCLA was enacted to deal with the limited, albeit significant, problem of abating and controlling problems associated with *abandoned and inactive* hazardous waste disposal sites. *United States of America v. State of Colorado*, 990 F.2d 1565, 1570 (10th Cir. 1993). CERCLA does not, however, pre-empt or otherwise supercede State law governing *current* operations at an industrial site, as reflected in the Act itself which expressly provides that “[n]othing in this Act shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants.” 42 U.S.C. § 9652(d); *see also United States of America v. State of Colorado*, 990 F.2d 1565 (10th Cir. 1993)(site was subject to both CERCLA requirements and requirements of the state’s hazardous waste disposal regulations, and CERCLA did not pre--empt state requirements).

4.. The State’s current complaint does not involve, or stem from, defendants’ past contamination of the site. Rather, the State’s complaint stems from defendants’ *current*

operations and how those operations violate applicable State environmental laws, including the State's 1) Industrial Hazardous Waste Management Law, Environmental Conservation Law (ECL) Article 27, Title 9; (2) Hazardous Substances Bulk Storage Law, ECL Article 40; (3) Air Pollution Control Law, ECL Article 19; and (4) the Navigation Law (regarding petroleum spills). Because the State's complaint involves current operations at the site, nothing in CERCLA supercedes the State's action in this case, and, therefore, EPA's designation as "lead agency" for CERCLA purposes is irrelevant.

5. Cohen also describes a decision by the Suffolk County Supreme Court, Judge Gerard, regarding the proposed remediation on the site by the State. Cohen Aff. p. 4. The Second Department, however, reversed the trial court's judgment in that case, finding that "[t]he Supreme Court improperly denied the DEC access to the respondents' property on the basis that the respondents could allegedly conduct the investigation at a lower cost." *In the Matter of State of New York v. Lawrence Aviation Industries, Inc.*, 263 A.D.2d 511, 512 (2nd Dep't 1999). Because the decision that defendants rely upon was reversed, their argument based on the invalid decision is completely irrelevant.

Alleged Irreparable Injury To Defendants By Issuance of the Injunction.

6. Apparently to show irreparable harm if the injunction is issued, defendants claim that the loss of business that would result from a preliminary injunction warrants denying the State's preliminary injunction request. Cohen's Aff. p. 1 - 2. However, monetary damages are insufficient to establish irreparable harm. *McCall v. State*, 215 A.D.2d 1 (2nd Dep't 1995).

7. Defendants also allege that Lawrence Aviation is the sole source supplier worldwide of 8% manganese alloy titanium (TI 8 MN). However, Manzi Metals, Inc. also sells these products, as indicated on its web-site, www.manzimetals.com.

8. Defendants further claim that they have a sub-contract with Lockheed Martin to provide materials for construction of the C-130J aircraft for the Air Force and Marines Corps. Cohen Aff p. 2. As described in the affidavit of Carlisle Tuggey, dated June 18, 2003, she contacted a Lockheed Martin employee familiar with the project and was told that Lawrence Aviation does not have a sub-contract for the project. Indeed, Exhibit B to the Cohen Affidavit reflects that On May 29, 2003, Lockheed Martin ordered Lawrence Aviation to ship the tools and planning data relating to the C-130J project to another company.

9. Defendant also criticizes the State for failing to timely and promptly pursue this enforcement case, going so far as to claim that laches applies. Cohen Aff. p. _____. However, the State filed its complaint within a month of completion of the inspection that gave rise to the egregious violations that are the basis of the State's complaint. It is difficult to understand how that month constitutes "excessive delay" sufficient to support a laches argument.

What are we seeking here?

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

.....X
ERIN M. CROTTY, Commissioner of the New York
State Department of Environmental Conservation,
NEW YORK STATE DEPARTMENT OF
STATE OF NEW YORK

Plaintiff,

-against-

LAWRENCE AVIATION INDUSTRIES, INC.,
and GERALD COHEN,

Defendants.
.....X

Index No. 3-10241

AFFIDAVIT IN OPPOSITION TO
MOTION OR AN ORDER
ENJOINING THE DEFENDANTS
FROM CONDUCTING
TITANIUM PROCESSES OR
OTHER INDUSTRIAL
PRODUCTION OR PROCESSES
AT THE LAWRENCE AVIATION
PLANT INCLUDING
OPERATION OF THE DIESEL
GENERATORS
(Assigned to Justice Emerson)

① GERALD COHEN, being duly sworn deposes and says that he is the chief operating officer of the defendant Lawrence Aviation Industries, Inc. and is personally familiar with all the facts and circumstances surrounding the matters alleged in the proceeding brought by the New York State Department of Environmental Conservation against Lawrence Aviation Industries, Inc. and your deponent individually.

② I am the sole shareholder of the company and its chief operating officer but I am not the entity which is the operator of the titanium processing plant Lawrence Aviation Industries, Inc. operates a plant for the production of Titanium sheet on 34 acres located on Upper Sheep Pasture Road, Port Jefferson Station, Town of Brookhaven, Suffolk County of New York. The plants history is all as contained in the brochure attached hereto and made a part hereof (Exhibit A). At the peak of the activity in the aircraft industry the plant operated 7 days a week 24 hours a day.

(3)

With the slow down in the aircraft industry and the shrinkage in the demand for titanium sheet the workforce has been reduced to 21 with a weekly payroll of \$15,000.00. Deponent as chief operating officer is paid the sum of \$900.00 per week. If the plant is forced to cease operation this payroll of \$15,000.00 will cease.

(4)

Lawrence Aviation Industries, Inc. however continues to be the sole source supplier worldwide of 2% manganese alloy titanium sheet which is essential in making repairs to existing aircraft which have used 2% manganese titanium sheet in their production; this primarily affects the F-4 Phantom Fighter with over 1,000 still in use.

(5)

The company is presently the sole source provider of KAI Hot Formed Details for C-130J aircraft produced by Lockheed Martin. Attached hereto and made a part hereof is a release from Lockheed Martin Aeronautics Company dated March 14, 2003 indicating that Lockheed Martin was awarded a \$4,000,000,000.00 contract for the multi year acquisition of C-130J aircraft for the Air Force and Marine Corps. (Exhibit B) Lockheed Martin cannot fulfill their contract without the material furnished to it by the Defendant, Lawrence Aviation Industries, Inc. In addition to the contract with Lockheed Martin there is a contract with Tri Industries, Inc. of Terre Haute, Indiana for \$160,929.31 for titanium alloy sheet which will be used for National defense, attached hereto and made a part hereof is the purchase order dated March 11, 2003 indicating that the titanium sheet order is a rated order certified for National Defense use. (Exhibit C) If the Plaintiff is successful in its application and prevents the Defendant from processing Titanium sheet for National Defense of this country will be greatly impacted negatively.

(6)

I have been advised by my attorney that there are three basic principles which govern the issue of preliminary injunctions:

1. The propriety of granting or refusing such relief is discretionary.
2. The burden of establishing the undisputed right to so drastic a remedy rests upon the parties seeking it.
3. Such relief should not be granted where the right to the ultimate relief sought in the action is in doubt.

⑦ In this particular case the allegations made by the Plaintiff have never been subject to a hearing nor are they undisputed. There has never been a determination by any administrator or judge after a due process hearing. This has been a long ongoing saga which begins when Plaintiff in January of 1986 (over 17 years ago) did a phase I investigation of the Lawrence Aviation Industries site at Port Jefferson Station, New York. A copy of that investigation is attached hereto. Exhibit D. You will note that the data contained in the report is based upon an unsigned affidavit dated November 20, 1980 bearing the name, Robert-Carl Olsen but unsigned and unsworn to. A copy of the registry site classification decision is also attached hereto. Exhibit E. The preparer of the document was one John Conover you will also note Mr. John Conover did not sign the document although it apparently was approved.

numerous samples taken by SEDITS. - Prelim RI from DEC substantiated site as a source.

⑧ The hazardous wastes referred to were disposed of in accordance with New York State DEC regulation and were properly documented. Again your deponent would emphasize that there has never been a hearing of any kind or nature with a determination by a properly authorized administrative agency or officer or a court of law that defendants have violated any law.

Documented disposal of drums in rear areas and samples from discharge to lagoons.

⑨ In November of 1993 Lawrence Aviation Industries site was expanded from 44 acres to 125.8 acres based solely upon it being adjacent to the Lawrence Aviation Industries property and being owned by your Deponent, Gerald Cohen. You will note again in the letter dated November 22,

Aerial photos identified

1993 that the person cited as reference is John Conover. (Exhibit F) The final work plan remedial investigation/feasibility study was completed for the New York State Department of Environmental Conservation by CDM Camp Dresser and McKee, in July 1997 copy enclosed. (Exhibit G)

10 When deponent was advised by Plaintiff that the cost of the proposed remedial investigation feasibility study was to be \$684,000.00 he applied to the Supreme Court of the State of New York in the County of Suffolk for relief alleging that he could have the same work done at a cost of approximately \$100,000.00. This is the estimated cost as contained in the Feasibility study phase 1 investigation in table 3 of exhibit 1 attached to this affidavit being the study done by the New York State Department of Environmental Conservation up until the present time. If there was a real threat why wasn't an injunction sought at that time?

11 Judge Gerard granted the relief sought by your deponent allowing deponent to do the work. His decision was appealed to the Appellate Division. By decision dated July 19, 1999 Plaintiff was granted the right to enter upon the property and conduct the investigation. It has done nothing for 4 years.

12 I have been advised by my attorney that this lapse of time in pursuing what Plaintiff now insists is a time imperative need for an injunction is another reason for the court to deny the application. The plaintiff is guilty of laches.

13 By letter dated April 12, 2000, the United States Environmental Protection Agency advised your deponent that the EPA was the lead agency for the site. (Exhibit I) It had become the lead agency in February 2000 and it is so stated in the study which was done for the Plaintiff in May of 2000.

Lawrence
w/ w/ was
incomplete
- Preliminary R.I.
After Agency was
denied found G.W.
contamination from
- delays by Lawrence
as negotiation for
an acceptable R.I. w/ p
stretched for years.

For R.I./FS
Not R.I./FS

(14)

Another preliminary remedial investigation report was done by the Plaintiff in May of 2000, over 3 years ago (Exhibit I). The plaintiff did not seek an injunction then nor did it follow through in any manner. Prior to this report being issued all users of water down gradient from the Lawrence Aviation site were hooked up to public water eliminating any possibility of contamination. Again there has never been proof that there is in fact any contamination emanating from the Lawrence site. During the period from the decision by the Appellate Division up until the present time there has been no action taken by the DEC against the defendant and its operation of the titanium processing plant except that by letter dated April 15, 2002 (sic) referring to an inspection made on April 9 and 10th of 2003 the DEC informed your deponent that there were various petroleum spills found throughout the facility. (Exhibit J)

NOT TRUE

(15)

Upon receipt of this letter your deponent entered into an agreement with AB Environmental to transport and dispose of the diesel contaminated soil. This contract is ongoing (Exhibit K)

(16)

For some years now Lawrence Aviation has been the subject of allegations regarding contamination by Lawrence Aviation of properties surrounding the pond and creek located in the Incorporated Village of Port Jefferson down gradient of the site see (Exhibit L) dated January 8, 1992. As a matter of fact as is indicated in the June 3, 1998 issue of the Three Village Herald News the contamination at the pond and at the creek was caused by an adjacent service station and other operations involving petroleum storage which had been abandoned. (Exhibit M)

Down gradient from pond.

(17)

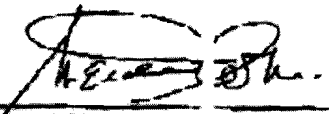
As you will note from the report in the Three Village Herald News the regional director of the DEC is quoted as saying, "We don't have any record of that site being inspected." There have been many inspections at the Lawrence Aviation Industries site but there never has been

a determination and finding after a due process hearing that Lawrence Aviation Industries has violated the law as is alleged by the Plaintiff. (Exhibit N)

(18) Deponent asks for and welcomes a hearing on the issues raised belatedly by the Plaintiff.

(19) Deponent reaffirms its contention that granting the relief sought by the Plaintiff would first directly negatively impact the recipients of the \$15,000.00 payroll made every week by the Lawrence Aviation Industries, Inc.; that it would adversely impact the defense industry and the National Defense of this country and that it would do irreputable damage and harm to the Defendant at no cost to the Plaintiff.

(20) There is a remedy available to the Plaintiff. The Defendant welcomes the Plaintiff's participation in a due process hearing to determine whether or not the allegations made by the Plaintiff in its underlying complaint are accurate and can be substantiated. It is the Defendant's contention that after such a due process hearing is held that Defendant will be exonerated and that it will be found that it is guilty of no violation of the law.


GERALD COHEN

STATE OF NEW YORK)

ss.:

COUNTY OF SUFFOLK)

GERALD COHEN, being duly sworn, deposes and says:

Deponent is the President of LAWRENCE AVIATION INDUSTRIES, INC., a domestic corporation, defendant in the within action; that deponent has read the foregoing Answer and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters, deponent believes it to be true. This verification is made by deponent because defendant is a corporation and deponent is an officer thereof, and he makes this affidavit individually and as a corporate officer of Lawrence Aviation Industries, Inc.


GERALD COHEN

Sworn to before me this
12th day of June, 2003.


Notary Public

MARIA C. ALMEIDA
NOTARY PUBLIC, STATE OF NEW YORK
NO. 014000141
QUALIFIED IN SUFFOLK COUNTY
COMMISSION EXPIRES FEB 24, 2004