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At a Special Term of the Supreme Court of the State of New York, ~~Part~~ ___, held in and for the County of Suffolk at the Courthouse located at One Court Street/~~120 Center Drive~~, Riverhead, New York on the 21st day of March, 2014.

PRESENT:

HON. **HON. PETER H. MAYER**
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

---X

JOSEPH MARTENS, Commissioner of the New York State Department of Environmental Conservation, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and STATE OF NEW YORK,

Plaintiffs,

-against-

LAWRENCE AVIATION INDUSTRIES, INC. and GERALD COHEN,

Defendants.

---X

Index No. 03-10241
(Emerson, J.)

ORDER TO SHOW CAUSE FOR CIVIL AND CRIMINAL CONTEMPT

WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT.

NOTICE: THE PURPOSE OF THIS HEARING IS TO PUNISH YOU FOR A CONTEMPT OF COURT. SUCH PUNISHMENT MAY CONSIST OF A FINE OR IMPRISONMENT, OR BOTH, ACCORDING TO LAW.

Upon the attached affirmation of Assistant Attorney General Andrew J. Gershon, dated March 20, 2014; the attached affidavit of Nicholas Acampora, Environmental Program Specialist II for Region 1 of the New York State Department of Environmental Conservation ("DEC"), sworn to March 19, 2014; the attached affidavit of Steven F. Scharf, P.E., Project Engineer in the

Division of Environmental Remediation of the DEC, sworn to March 18, 2014; the accompanying memorandum of law; and all of the prior proceedings in this action, let defendants Gerald Cohen and Lawrence Aviation Industries Inc. ("Defendants") show cause at an IAS Term, Part __, of this Court to be held at the Supreme Court, ____, Riverhead, New York, on the 10th day of ~~March~~/April, 2014 at 9:30 A.M., or as soon thereafter as counsel can be heard, why an order should not be made and entered: (a) finding Defendants guilty of and punishable for civil and criminal contempt for their refusal to comply with the consent judgment signed by the Honorable Elizabeth Emerson on December 20, 2006, and duly entered by the Court on January 10, 2007 (the "Consent Judgment"); (b) ordering Defendants to purge their contempt by implementing all of the outstanding "Petroleum Remedial Action Items" as set forth in paragraphs 5-7 of the Consent Judgment or, alternatively, agreeing to allow a contractor employed by DEC to complete the outstanding requirements, without interference by Defendants; in either case this work shall include reporting any ongoing petroleum spill or leak to DEC, and implementing immediate steps to stop the spill or leak, including, if necessary, draining any petroleum from the source of the leak or spill; and (c) imposing on Defendants punishment for their contempt, including fines and imprisonment until they purge their contempt; and it is further

~~**ORDERED**, that notice of the above hearing shall be deemed good and sufficient if a copy of this Order to Show Cause, together with the supporting affidavits and papers, is served on Defendants by personal delivery no later than March ___, 2014; and it is further~~ J.S.C

ORDERED, that personal service of a copy of this Order to Show Cause, together with the papers upon which it was granted, on Defendants, on or before ~~March~~ April 2, 2014, shall be deemed good and sufficient service; and it is further

~~**ORDERED**, that answering papers, if any, shall be served upon plaintiffs' counsel at least seven days prior to the return date of this motion.~~

ENTER,

Honorable **HON. PETER H. MAYER**
Justice of the Supreme Court

GRANTED
MAR 21 2014
JUDITH A. PASCALE
Clerk of Suffolk County

GERSHON AFFIRMATION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

---X

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

Plaintiffs,

-against-

LAWRENCE AVIATION INDUSTRIES, INC. and GERALD COHEN,

Defendants.

---X

Index No. 03-10241
(Emerson, J.)

AFFIRMATION OF ASSISTANT ATTORNEY GENERAL ANDREW J. GERSHON IN SUPPORT OF ORDER TO SHOW CAUSE FOR CONTEMPT

ANDREW J. GERSHON, an attorney licensed to practice law before the courts of the state of New York affirms, under penalty of perjury, that:

1. I am an Assistant Attorney General and Section Chief in the Environmental Protection Bureau of the New York State Office of the Attorney General. I have represented plaintiffs Department of Environmental Conservation ("DEC"), Commissioner of the DEC, and State of New York (collectively the "State") in this action since 2003. The case was settled as an active matter by a consent judgment (the "Consent Judgment;" Exhibit A hereto) that I negotiated on behalf of the State with defendants Lawrence Aviation Industries, Inc. ("LAI") and its owner and president, Gerald Cohen ("Cohen") (collectively "Defendants"). Judge Elizabeth Emerson signed the Consent Judgment on December 20, 2006, and the clerk entered on January 10, 2007.

2. The subject of this motion is Defendants' contempt for failing to implement certain "Remedial Action Items" as agreed to and ordered in the Consent Judgment. Defendants were

required to complete this overdue work by the end of June, 2007, and almost seven year later have still not performed this work. The State recently offered to have a DEC contractor complete the work, in order to arrest the growing threat the rapidly deteriorating, contaminated LAI industrial facilities pose to public health and safety and the environment. Defendants have even refused to cooperate with this offer. I make this affirmation based on personal knowledge, discussions with DEC personnel, public records, and the accompanying papers filed in support of the State's motion for contempt.

Background to this Action and Overview of This Motion

3. As more fully discussed below and in the accompanying memorandum of law, in 2003 the State sued Defendant for hundreds of violations of New York State environmental laws and regulations at the now defunct LAI titanium manufacturing facility located on an approximately 126 acre site off Sheep Pasture Road in Port Jefferson Station (the "Site"). The violations included illegal storage of hazardous wastes, spilling and failing to clean up petroleum, and the illegal release and failure to remediate air contaminants. The State's verified complaint also included a claim for public nuisance. The complaint sought a permanent injunction requiring Defendants to remedy all of the violations, statutory penalties and damages for and abatement of the nuisance.

4. In 2000 the United States Environmental Protection Agency ("EPA") added the LAI Site on its National Priorities List for hazardous substance contamination cleanup pursuant to the federal Comprehensive Response, Compensation and Liability Act, 42 U.S.C. §§ 9601, *et. seq.* ("CERCLA"). In 2004 EPA did much of the remedial work being sought by the State under its state law claims when EPA hauled away and legally disposed of over 100 tons of hazardous

substances accumulated in drums and other containers at the facility. This mooted a substantial part of the injunctive relief being sought by the State, although some of the injunctive relief sought by the State remained to be done, and all of the State's original claims for liability and penalties continued.

5. In 2006 the State filed a motion for summary judgment, which Defendants did not oppose. Defendants instead agreed to the Consent Judgment. It provided for an agreed upon penalty of $500,000 (subsequently entered as a money judgment, but to this day unpaid in any amount), as well as injunctive relief, including the requirement that Defendants complete a number of "Remedial Action Items" within six months. Justice Elizabeth Emerson approved the Consent Judgment on December 20, 2006, and it was entered on January 10, 2007.

6. A number of Remedial Action Items required Defendants to clean up spilled petroleum or complete other petroleum-related remediation work. Ex. A, ¶¶ 5-7. However, as more fully described in the accompanying affidavit of DEC's Nicholas Acampora, sworn to March 19, 2014 (the "Acampora Aff."), to this day Defendants have failed to complete these Remedial Action Items, almost seven years after this Court had ordered this work to be completed.

7. For practical reasons the State has to some extent held back on enforcing against these outstanding violations of the Consent Judgment. Defendants, as well as their time and financial resources, have been embroiled in a federal criminal environmental case against them. *See* ¶ 16 below. Both plead guilty and Cohen served time in prison from late 2010 until early 2012. It also appeared possible that EPA would perform some of the overdue petroleum cleanup work as part of its CERCLA cleanup. However, last year EPA clarified that it would

not be doing this work. Acampora Aff., ¶ 20. And, since entry of the Consent Judgment the LAI plant has increasingly fallen apart, due to lack of maintenance, vandalism and haphazard scavenging for metals. As a result the contamination within the facility poses a growing threat to public health and safety and the environment.

8. In 2013 DEC approached Cohen, now out of federal prison, to seek his voluntary cooperation in completing the outstanding Remedial Action Items without the need for Court intervention. DEC even offered to have one of its contractors perform the work. Defendants refused to either commit to a schedule to implement the overdue work, or allow DEC's contractor do it without their interfering or resistance.

9. The State is therefore moving to hold Defendants in civil and criminal contempt of the Consent Judgment. As more fully discussed below, the Court should hold Defendants in contempt, fine them, and order that to purge their contempt they must either: (a) within 10 business days complete all outstanding Remedial Action Items, or (b) within five business days confirm in writing that DEC and any contractor it retains will have ready access to perform the work, on a day or days of DEC's choosing. The order should further direct that if Defendants do not comply with either of those conditions, Cohen should be imprisoned until Defendants comply.

The Consent Judgment

10. This action arose out of a comprehensive, multi-program inspection of the LAI plant by DEC from April 8 through April 14, 2003. The inspection revealed numerous current and ongoing environmental violations. These included hundreds of hazardous waste storage and disposal violations arising out of Defendants' warehousing of chemicals in dilapidated, leaking, and unmarked drums; petroleum spills; improper use and maintenance of chemical bulk storage

tanks; and air permit violations. Shortly thereafter, the Town of Brookhaven's Assistant Chief Fire Marshall inspected the Plant and immediately ordered the premises vacated as unsafe.

11. The State commenced this action by filing its verified complaint (the "Complaint;" Exhibit B hereto) on May 12, 2003. Concurrent with filing its Complaint the State moved for a preliminary injunction prohibiting LAI from operating its facility until it came into compliance with applicable environmental laws and regulations. After finding that the State had shown a likelihood of success on the merits, Judge Emerson granted the preliminary injunction by order dated July 16, 2003, a copy of which is attached as Exhibit C.

12. As noted above and in the Consent Judgment, the State eventually moved, on November 18, 2005, for summary judgment seeking a determination of liability on all of its statutory and regulatory violation claims. The motion sought an award of penalties on all claims, and an injunction ordering Defendants to correct any still extant violations; *i.e.*, those that EPA had not remediated as part of its CERCLA work at the site. Ex. A, p. 4.

13. In lieu of opposing the State's motion, and after an extended period of negotiation, Defendants agreed to the Consent Judgment. Defendants were at the time represented by their long time attorney John Hart and environmental counsel Frederick Eisenbud. Eisenbud signed the Consent Judgment on behalf of Defendants, as did Cohen, both in his individual capacity and as president of LAI. Judge Emerson signed the Consent Judgment on December 20, 2006, and the clerk entered it on January 10, 2007. Ex. A, p. 25.

14. In the Consent Judgment Defendants agreed to a penalty of $500,000 to settle the State's penalty claims in the Complaint. In addition, although the costs incurred by DEC while it was lead agency in addressing the historic hazardous substance contamination at the Site before

EPA took over were not the subject of this action, Defendants agreed to add $524,624 to the total judgment to settle DEC's cost recovery claims. This brought the total money judgment to be entered on the Consent Judgment to $1,024,624. Ex. A, pp. 3-5. The State filed a money judgment for that amount on January 12, 2007. To date Defendants have not paid any of that judgment.

15. The pertinent provisions of the Consent Judgment are described in the accompanying memorandum of law at pp. 13-15 and the Acampora Aff.

The Federal Criminal Case Against Defendants

16. The United States Attorney for the Eastern District of New York indicted both Defendants on September 6, 2006 for federal environmental crimes: (a) two counts of violating the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.*, by failing to legally dispose of over 12 tons of hazardous waste; and (b) one count of violating the Clean Air Act, 42 U.S.C. § 7401, *et seq.*, for allowing two diesel powered generators to discharge into the air up to 440 tons of smog producing nitrogen oxides between 2001 and 2003. Indictment, September 6, 2006, 2:06-cr-00596-DRH-AKT. Cohen and LAI ultimately plead guilty, on July 10, 2008, to the second RCRA count, with the remaining two counts dismissed. Criminal Cause for Change of Plea, July 10, 2008, 2:06-cr-00596-DRH-AK. Cohen was sentenced on December 10, 2010 to 366 days in federal prison, to be followed by 36 months of supervised release, and $105,816 in restitution, to be paid within nine months of his release from prison. LAI was held jointly and severally liable for payment of the restitution. After examining Defendants' poor financial condition, and assessing their ability to pay, the Court waived any fine. December 10, 2010 proceedings, and Criminal Cause for Sentence, 2:06-cr-00596-DRH-AKT. Cohen served until

January 6, 2012. January 14, 2013, Report on Offender Under Supervision, 2:06-cr-00596-DRH-AKT.

The State's Unsuccessful Attempts to Obtain Defendants' Cooperation in Resolving Their Consent Judgment Violations

17. Conditions at the LAI facilities continued to deteriorate during Cohen's incarceration and after his release. *See* Acampora Aff., ¶¶ 15-19, 27-29. Defendants never completed the petroleum-related Remedial Action Items, exposing the unremediated spills to the elements as LAI buildings have increasingly fallen apart. *Id.*

18. By the end of 2013 EPA had clarified that it would not be addressing waste oils in the LAI facilities as part of its ongoing hazardous substance remediation under CERCLA. *Id.*, ¶ 20.

19. DEC determined that in order to arrest a growing threat to public health and safety and the environment it would exercise its statutory authority under the State Navigation Law to hire a contractor to complete the outstanding Remedial Action Items. (Under the Navigation Law Defendants would then be liable to pay the State for the costs of the cleanup. However, given Defendants' poor financial status and millions of dollars they now owe or will likely owe, chances of the State ever receiving compensation are minimal.)

20. DEC's Acampora met with Cohen at LAI on December 20, 2013. Acampora raised not only Defendants' ongoing failure to clean up spilled petroleum as required under the Consent Judgment, but more generally the general poor condition of the buildings, uncontrolled access to the Site, and the presence of long dormant oil-containing machinery in the deteriorating buildings, all of which are contributing to, and making inevitable additional petroleum spills. Acampora offered to have one of its contractors address not only the outstanding Remedial

Action Items, but current and likely future environmental violations that are not specifically covered under the Consent Judgment while on site. *Id.*, ¶ 21.

21. DEC informed Cohen that it needed to know whether Defendants would agree to either correct these violations of both the Consent Judgment and State environmental law by January 5, 2014, or cooperate and allow DEC and its contractor to clean up the spills and drain and dispose of oil accumulated in various defunct transformers. *Id.*

22. Since violations of the Consent Judgment were at issue, I followed by writing to Cohen on December 26, 2013. My letter reminded Cohen of Defendants' outstanding obligations under the Consent Judgment, and told him that the State would take action to enforce its terms if Defendants did not either complete the outstanding Remedial Action Items, or agree to allowing the State to do the work without interference.

23. The Consent Judgment also requires the State to provide notice of any violation of its terms to Frederick Eisenbud, the attorney who signed on behalf of Defendants. However, Eisenbud long ago informed me that he no longer represents them. My December 26, 2013 letter therefore asked Cohen to provide it to any attorney who might be representing Defendants, and to provide me with contact information for any such attorney. To date Cohen has identified no attorney who is representing Defendants.

24. Acampora contacted Cohen on January 6, 2014 to follow up, but Cohen refused to indicate whether Defendants had taken any steps to address their violation, and asserted that DEC had no right to be on Site to conduct the work described by Acampora. Acampora Aff., ¶ 24.

25. DEC inspected the Site again on January 31, 2014, in order to obtain a comprehensive and up-to-date assessment of Site conditions to assist the State in determining

appropriate next steps. DEC's inspection confirmed that Defendants had done nothing to correct any ongoing Consent Judgment violations. The inspection confirmed the increasingly deteriorated state of the plant and its machinery, exposure of existing petroleum spills to the elements, and inevitability of new petroleum spills unless the aging machinery is properly drained. Photographs taken by DEC during the inspection, which show the decrepit and contaminated conditions of the LAI facilities, are included in the Acampora Aff., ¶¶ 25-33.

26. During the course of the January 31 inspection Cohen admitted to Acampora that there are open and ongoing violations of the Consent Judgment. Cohen stated that he would consider allowing a DEC contractor to remedy those violations if DEC provided a specific list of the work to be done. In response I drafted the letter attached as Exhibit D, which Acampora hand delivered to Cohen on February 11, 2014. My letter described in detail the work that is required to complete the outstanding Remedial Action Items, whether by Defendants or a DEC contractor. I made clear that absent performance of this work by Defendants, or their acquiescence in a DEC contractor doing the work, the State would seek to hold Defendants in contempt. My letter described the work to be done:

> The contractor [of either DEC or Defendants] would enter the site with the appropriate manpower and equipment, evaluate each machine pit and remove any petroleum or incidental water. All machine pits and vaults (including those which were inaccessible during DEC's January 31, 2014 inspection) would be evaluated and addressed where needed and as practical. Should petroleum be found, the contractor would use appropriate equipment to remove the petroleum and incidental water. After all liquids are removed, DEC and the contractor would re-evaluate the condition of all pits and determine if solids removal is warranted. If so, the solids would be removed. If a pit is empty or contains only water, it would be left as is for now. DEC would mark each pit upon completion of its remediation. At the conclusion of this work DEC would advise you which pits had been cleaned out, and which had been left as is.
>
> With respect to the underground tank that was removed from the ground at "Building M" in June, 2012, DEC and the contractor would inspect it to determine if any

liquids or sludge remain inside. If so the contractor will clean it out and dispose of the waste.

Ex. D. My letter concluded by informing Defendants that if they did not commit to one of the two options by February 18, the State would assume that they are continuing their refusal to comply, and would take appropriate legal action.

27. Defendants did not respond to my letter by February 18, 2014, or since.

The Relief Sought By the State

28. To address, in part, the growing threat to public health, safety and the environment, DEC is prepared to exercise its statutory authority and bring a contractor onto the Site to remedy defendants' violations of the Consent Judgment. However, Cohen has refused to cooperate and allow this to occur without resistance. Even assuming that Defendants are financially unable to perform the outstanding remedial work, they have no excuse for standing in the way of DEC coming on-site with a contractor to get it done. The State is therefore moving to hold Defendants in contempt for their ongoing failure to implement the outstanding Remedial Action Items.

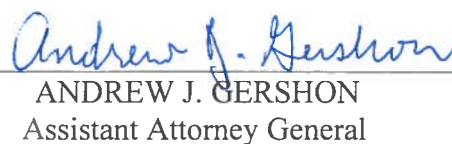
29. As more fully set forth in the accompanying memorandum of law, the Court should hold defendants in civil and criminal contempt of the Consent Judgment and fine them. The Court should order that to purge their civil contempt, Defendants must: (a) within 10 business days of service, complete all outstanding Remedial Action Items as outlined in my letter of February 11, 2014; or (b) within five business days of service confirm in writing that DEC and any contractor it retains may perform the work, on a day or days of DEC's choosing. In either case the Court's order should specify that if any petroleum spill or leak in any amount is found, the person or entity doing the remediation must report the spill or leak to the State and take immediate steps to

stop the spill or leak, including, if necessary, draining any petroleum from the source of the leak or spill.

30. The order should further direct that if Defendants do not comply with either of those conditions, Defendant Cohen should be imprisoned until Defendants comply.

WHEREFORE, for the reasons set forth above and in the accompanying memorandum of law, the State respectfully requests that the Court grant its motion for civil and criminal contempt against Defendants.

Dated: New York, New York
March 20, 2014



ANDREW J. GERSHON
Assistant Attorney General

No prior application for the relief sought in this motion has been made.

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

---X

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

Plaintiffs,

-against-

LAWRENCE AVIATION INDUSTRIES, INC. and GERALD COHEN,

Defendants.

---X

Index No. 03-10241
(Emerson, J.)

CONSENT JUDGMENT

WHEREAS, plaintiffs State of New York, Erin M. Crotty, Commissioner of the New York State Department of Environmental Conservation (DEC) and the DEC (collectively the State or Plaintiffs), commenced this action by filing a Verified Complaint on May 12, 2003, alleging violations of New York State Navigation Law (Navigation Law) §§ 172,173, 175, and 192 and various New York State Environmental Conservation Laws (ECL) and regulations promulgated thereunder, including the State Industrial Hazardous Waste Management Law and regulations (ECL Article 27, Title 9 and 6 NYCRR Parts 372 and 373), the State Hazardous Substances Bulk Storage Law and regulations (ECL Article 27, Title 9 and 6 NCYRR Parts 598 and 599), the State Air Pollution Control Law and regulations (ECL Article 19 and 6 NYCRR Parts 201, 212 and 227), and the common law of public nuisance by defendants Lawrence Aviation Industries, Inc., Sheep Pasture Road, Port Jefferson, New York 11776 and Gerald Cohen, 38 Bridle Path, St. James, New York 11780 (collectively LAI or Defendants) in connection with the operation of the LAI titanium processing plant on Sheep Pasture Road, Port Jefferson Station, New York (the Plant), and seeking a judgment, among other things, (i)

assessing civil penalties for Defendants' violations, (ii) enjoining Defendants from further violation of the specified laws and from maintaining a public nuisance, and (iii) enjoining Defendants to remediate the environmental violations at and around the Plant identified in the Complaint;

WHEREAS, Plaintiffs moved by Order to Show Cause dated May 12, 2003, with a temporary restraining order, for a preliminary injunction pursuant to CPLR Article 63(i) enjoining Defendants from operating the Plant until Defendants come into full compliance with the applicable requirements of the State Industrial Hazardous Waste Management Law and regulations, including 6 NYCRR Parts 372 and 373; the State Hazardous Substances Bulk Storage Law and regulations, including 6 NCYRR Parts 598 and 599; the State Air Pollution Control Law and regulations, including 6 NYCRR Parts 201, 212 and 227; and the State Navigation Law, Article 12, (ii) enjoining Defendants from selling, transferring or otherwise alienating the Plant or the Plant site property without approval of the Court, and (iii) requiring Defendants to post a bond or other financial guarantee, in an amount to be determined by the Court, to ensure the performance of the interim remedial measures necessary to eliminate the threats to human health and the environment posed by the Defendants' violations of law concerning the proper storage, handling and disposal of hazardous wastes and hazardous substances in and around the Plant, (iv) enjoining Defendants from denying DEC personnel access to the Plant and the Plant site without the need for a search warrant to ensure compliance with the foregoing injunctive relief, and the Court having granted the preliminary injunction by decision and order dated July 16, 2003 (the Preliminary Injunction);

WHEREAS, Plaintiffs moved, on November 18, 2005, for: (a) summary judgment on liability; (b) contempt predicated on Defendants' alleged violations of the Preliminary Injunction and a subsequently-issued temporary restraining order; and (c) for modification of the Preliminary Injunction to (i) preliminarily enjoin Defendants to correct all outstanding violations within six months, (ii) prohibit the operation of the Plant until all outstanding violations have been corrected, and (iii) prohibit the sale of the Plant until all outstanding violations have been corrected (the November 18, 2005 Summary Judgment Motion), which motion has not been resolved;

WHEREAS, Defendants do not contest liability for the ECL violations upon which Plaintiffs have moved for summary judgment as to liability;

WHEREAS, starting in August 1997 and continuing through April 2000, the DEC, as lead agency, pursuant to ECL Article 27, Title 13, conducted a remedial investigation of the LAI Plant site and surrounding areas and took other actions to address hazardous substance contamination that DEC attributed to Defendants' historic activities, including, but not limited to, installing groundwater monitoring wells, taking soil samples, extending water lines and connecting homes to these lines, and incurred total costs of $524,624, which Plaintiffs seek to recover from Defendants (the LAI Cost Recovery Claims), and DEC continued thereafter to monitor and comment on the remedial investigation, which was taken over by the United States Environmental Protection Agency (EPA) as lead agency;

WHEREAS, beginning in or around February 2004, EPA implemented a "removal action" to characterize, stabilize and lawfully dispose of hazardous substances stored at the Site, which removal action was substantially completed by April 2005, resulting in the removal from

the Site of much of the hazardous wastes that were the subject of the hazardous waste violations alleged by the State in this action, and remediating some of the conditions leading to Plaintiffs' claims for injunctive relief; and

WHEREAS, Defendants waive all jurisdictional defenses and consent to the jurisdiction of this Court for purposes of entering and enforcing this Consent Judgment;

IT IS HEREBY STIPULATED, ORDERED AND DECREED that:

1. Defendants admit that on at least one occasion each of them committed a violation of each of: (1) Navigation Law §173, by discharging petroleum, failing to report a petroleum discharge to DEC, and/or failing to immediately contain a petroleum discharge; (2) ECL Article 27, Title 9, by violating regulations concerning the storage, handling, disposal and containment of hazardous waste; and (3) ECL Article 19, by failing to have air emission sources duly permitted, failing to comply with air emissions permit requirements and/or failing to maintain air pollution control equipment.

2. It is the express understanding and agreement of the parties that, upon execution of this Consent Judgment by their respective authorized counsel, and when "So Ordered" by the Court, this Consent Judgment shall be and have the force of an order of the Court, and may be enforced as such by all parties.

PENALTY AND COST RECOVERY PAYMENTS

3. Defendants agree to entry of judgment against them in the amount of $1,024,624. That amount is comprised of $500,000 in penalties in full settlement of Plaintiffs' penalty claims in this action, and $524,624, in full satisfaction of DEC's LAI Cost Recovery Claims for remedial and investigation costs incurred by the State as of the date of this Consent Judgment.

REMEDIAL REQUIREMENTS

4. Unless already completed prior to the Effective Date of this Consent Judgment, Defendants shall undertake and complete the following remedial actions (Remedial Action Items or Items) to correct the violations of the ECL, Navigation Law and environmental regulations set forth in the Complaint that remain uncorrected. Defendants shall complete each Remedial Action Item within six months of the Effective Date of this Consent Judgment (the Completion Date), except that the Completion Date for a particular Remedial Action Item shall, upon the written request of Defendants, be extended for the number of days it takes Plaintiffs to review, comment on, or approve the work required to plan or complete the Item, and by any delay caused by the unavailability of any DEC personnel whose presence during the required work Plaintiffs deem necessary, provided Defendants provide Plaintiffs with 48 hours of advance notice of when the work will occur. The parties may agree, in writing, to extend the Completion Date for particular Remedial Action Items for good cause shown by Defendants. Plaintiffs' approval of any such extension request will not be unreasonably withheld, so long as Defendants or their consultant(s) have been and are working diligently and in good faith to complete the various Remedial Action Items

A. Petroleum Cleanup Remedial Action Items

1. Petroleum-Contaminated Soils

5. Defendants must excavate and lawfully dispose of all petroleum and petroleum-contaminated soils, with complete removal to be verified through testing, from the following areas: (1) soil beneath and around the diesel generator area; (2) soil adjacent to the large aboveground diesel storage tank; and (3) soil located on the opposite side of the access road from

the diesel generator. Completeness of contaminated soil removal shall be determined by application of DEC TAGM 4046 criteria. Additionally: (1) the various machine pits and containment areas/systems throughout the complex and the containment area for the large diesel tank must be emptied and cleaned and then properly maintained; (2) any open containers of petroleum must be properly staged and properly disposed of; and (3) any areas throughout the complex that have any petroleum staining must be cleaned up, including inside the electric substations where previous inspections identified the presence of transformer oil staining.

6. LAI must provide to DEC copies of the completed waste manifests to prove proper disposal. DEC will conduct follow-up inspections to verify compliance. DEC will require end-point sampling by a qualified professional, with the samples analyzed by a New York State Certified Laboratory, where soil has been excavated or where it is apparent that contamination has penetrated impervious surfaces (*i.e.*, concrete). Samples must be run utilizing EPA Methods 8021 and 8270, including MTBE testing. Based on the contaminated or potentially contaminated material stored and/or generated during the cleanup process, additional sampling criteria such as PCB or TAL Metal analysis may be required. Existing State Petroleum spill numbers 03-25255, 03-25024, and 03-25019 will remain "open" until all petroleum cleanup requirements are fulfilled.

2. Petroleum Storage Tanks

7. A. LAI must remove the underground tank in the vicinity of Buildings 10X and G that has been partially exposed, and excavate and lawfully expose of any petroleum-contaminated soil below, adjacent to or otherwise traceable to the tank, and seal all outlets from this tank.

B. The 2000-gallon underground tank located at Building M (Electro-Melt Facility) that remains in service must be removed, in the presence of a DEC representative, or tightness tested with an accepted testing method by a qualified contractor in accordance with 6 NYCRR Part 613.5. The test results must be submitted to DEC for review. DEC will determine additional appropriate actions based on the test results. If the tank meets applicable standards for tightness and LAI proposes to keep it in service, the tank must meet the requirements of 6 NYCRR Parts 612 through 613 and must comply with Article 12 of the Suffolk County Health Department Sanitary Code.

C. LAI must remove the fluids from, and then clean the residue from, the secondary containment for Tank 18, the 5,000-gallon oil tank near the diesel generators near Building 10X.

D. LAI must clean out, and then clean the residue from, the secondary containment around the 275-gallon tank in the propane building, which contains oil and water, and lawfully dispose of the fluids that are removed. LAI must provide copies of the completed waste manifests to DEC to prove proper disposal.

B. <u>Air Emission Clean Up Remedial Action Items</u>

8. LAI must remove and lawfully dispose of the air contaminant residue from the fabric filter baghouses of the Rotoblast operation in the Drop Hammer area (identified in a previously-issued DEC air permit as Emission Point No. 00051).

9. LAI must clean up the cyclone type dust collector for the Pangborn Rotoblast located in Building F, including the contaminants on the ground, where the baghouse from the Rotoblast was disconnected (identified in the previously issued DEC permit as Emission Point No. 00975).

10. LAI shall drain and lawfully dispose of any diesel fuel, oil or other petroleum product contained in the remaining Caterpillar diesel generator located outside of Building 10X. After DEC confirms that the generator has been fully drained, it shall have the option of placing seals or evidence tape anywhere on the unit. If DEC does so, it shall be a violation of this Consent Judgment to break any seal or tape without prior written approval by DEC. Defendants shall not engage in repair of, or operate, the generator without prior written approval by DEC.

C. Swarf Disposal

11. All titanium scrap, or "swarf," shall be removed from the Site and lawfully disposed of by Defendants or EPA, in accordance with EPA's letter to Defendants dated May 24, 2006, or as otherwise agreed to in writing by EPA.

D. Procedures For Determining When Remedial Action Items Are Complete

12. Defendants shall notify DEC, in writing, when they believe a Remedial Action Item has been completed. DEC shall thereafter inspect the Plant site to determine whether the Remedial Action Item has been completed, with reasonable promptness, and issue a written determination (Determination of Completeness) either concurring that the Item has been completed, or, if DEC determines that a Remedial Action Item has not been satisfactorily completed, specifying what needs to be done to complete the Item, and giving Defendants 30 days to cure. DEC's Determination of Completeness shall be binding unless Defendants challenge the Determination pursuant to Paragraphs 43 - 47 below and meet their burden of demonstrating that the determination was arbitrary and capricious. If DEC determines that the Remedial Action Item has in fact been completed, or if DEC determines that the Item has not been completed, but its determination is subsequently reversed in accordance with Paragraphs 43

- 47 below, then the date on which Defendants notify DEC shall be considered the date on which the Remedial Action Item has been completed. If DEC determines that the Remedial Action Item has not been completed, and DEC's determination is not reversed, then Defendants' notification of DEC that the action has been completed shall not extend Defendants' time to complete the Remedial Action Item, except to the extent any decision issued pursuant to Paragraphs 44 or 46 below allows.

13. Defendants shall notify DEC, in writing, when they believe all Remedial Action Items have been completed. Within 20 days of receiving such notification, DEC shall provide a Determination of Completeness either verifying completion of all Remedial Action Items, or, alternatively, specifying why all Remedial Action Items have not been completed (and giving the requisite 30 days to cure, to the extent that there are fewer than 30 days left before the deadline to complete all Remedial Action Items).

14. If Plaintiffs seek to establish that Defendants have violated this Consent Judgment by failing to complete any Remedial Action Item by the Completion Date, then Plaintiffs shall serve a written notice of violation on Defendants.

15. Defendants shall notify Plaintiffs in writing within one week of any decision to permanently cease operating the LAI Plant as a titanium processing facility or otherwise significantly change operations at the Plant.

REQUIREMENTS FOR FUTURE OPERATION OF THE PLANT

16. Subject to the definitions and exceptions in Paragraphs 38 - 40 below, in addition to compliance with all applicable laws or regulations not specifically addressed herein, any future

operation of the Plant must adhere to the following operational requirements (Operational Requirements):

A. **Chemical Bulk Storage Tanks**

17. Before any chemical bulk storage tank can be placed back in service or the tanks can be filled with product, all requirements set forth in the applicable portions of 6 NYCRR Parts 595 through the 599 governing the bulk storage of hazardous substances must be complied with, and compliance verified by DEC. These requirements include, but are not limited to, repair and/or replacement of the tank secondary containment systems; installation of a transfer station containment system; replacement and/or repairs to the existing storage tank(s) and related product piping; 5-year reinspections; repair of overfill alarms; installation of tank gauges; and the development and approval of a Spill Prevention Report.

18. If any chemical bulk storage tank is not going to be placed back in service, Defendants must properly remove it from service in accordance with 6 NYCRR Part 598.10, "Closure and Change of Service," within 90 days of the determination to remove it from service.

B. **Air Emission Sources**

1. **Equipment Repair and Maintenance**

19. Defendants shall maintain all equipment in accordance with 6 NYCRR Part 200.7, "Maintenance of equipment," including, but not limited to, repairing holes in the walls and sparking electrical wires.

2. **Air Permitting**

20. Before lawful operation of the Plant may be resumed, Defendants must apply for and obtain from DEC an Air Pollution Title V Permit, or such other air emission permit(s),

registration(s) or approval(s) as DEC deems necessary, in accordance with 6 NYCRR Part 201, or decommission the Plant in accordance with Paragraph 23 below. The permit application shall include a NOx Reasonably Available Control Technology Plan in accordance with 6 NYCRR Part 227-2 and must identify all active and inactive air emission points for inclusion in the air permit, including, but not limited to: (1) five emission points on the north face of Building G (also known as the 4-High Building) near the titanium rolling mill; (2) two emission points located on the roof of Building 10X, where LAI has a second titanium rolling mill; (3) two emission points in the roof above the Drop Hammer area of the Plant, where there are two oil or gas fired boilers, manufactured by Cleaver Brook and York-Shipley respectively; (4) the industrial heat processing heat unit (drying oven) in the Drop Hammer building it uses fuel, as opposed to electricity; (5) the acid scrubber in Building (Emission Point 00043 - Acid Scrubber); (6) the stack connected to a common lateral exhaust system covering the tanks in Building 30, where the three titanium processing tanks are located (Emission Point 00022); (7) the baghouse from the Pangborn Rotoblast located in Building F (Emission Point No. 00975); (9) the gas or oil-fired boiler manufactured by Superior Combustion Industries located in Building F; (10) the oil-fired boiler manufactured by York-Shipley located in Building M; and (11) the Submerged Combustion Evaporator (Emission Point 00050).

3. Air Pollution Control Devices

21. Before lawful operation of the Plant may be resumed, Defendants must reinstall all air pollution control devices such as acid gas scrubbers, baghouses and NOx controls, in accordance with the permit, or as required by applicable regulations, or decommission the Plant in accordance with Paragraph 23 below. Necessary repairs required before lawful operation of

the Plant may resume include, but are not limited to: (1) the acid scrubber installed on two exhaust stacks in Building 30 (Emission Point 00043 - Acid Scrubber) must be reconnected; (2) the stack connected to a common lateral exhaust system covering the three titanium processing tanks in Building 30 (Emission Point 00022) must be reconnected; (3) the baghouse from the Pangborn Rotoblast located in Building F (Emission Point No. 00975) must be reconnected and made operable; (4) the Submerged Combustion Evaporator (Emission Point 00050), with the discharge pipes of the Evaporator Vessels in open-ended position, must be repaired.

4. Record-keeping

22. Unless all air emission sources are decommissioned in accordance with Paragraph 23 below, Defendants shall maintain all required records in conformance with 6 NYCRR Part 201, 6NYCRR Part 227, 6 NYCRR Part 231-2 and any other applicable federal and State regulations, including, for each source of air pollution, records of hours of operation and total fuel usage. For any source permitted as a major source, Defendants shall prepare an annual emission statement in accordance with 6 NYCRR Part 202-2 to demonstrate continuous compliance with all applicable regulations and air permit conditions.

5. Decommissioning

23. Alternatively to bringing any source of air emissions into compliance with permit, maintenance and other applicable requirements, Defendants may either: (a) permanently discontinue the air emission source by dismantling and removing it from the Site, and cleaning up any residual contaminants remaining after removal; or (b) notify DEC in writing that the particular air emission source will not be activated, will be disconnected from its power source, and, unless written notice is given by Defendants to DEC, not reconnected to a power source or

reactivated. If Defendants choose the second option, then Defendants shall take such steps as DEC shall direct to prevent any further release of contaminants from the decommissioned source, including, but not limited to, cleaning up any dust or other contaminants and removing any petroleum or other fuel.

C. Hazardous Wastes

24. LAI must maintain the integrity of containers and tanks holding hazardous wastes, in accordance with applicable DEC regulations. Materials in containers showing signs of compromised integrity, such as rust or other corrosion, or denting preventing the sealing of lids, shall be repackaged.

25. Containers holding hazardous wastes must be labeled with their contents, the words "Hazardous Waste," and accumulation start dates, in accordance with applicable DEC regulations.

26. Containers holding hazardous waste must be closed when not in use, in accordance with applicable DEC regulations.

27. The secondary containment systems for hazardous waste containers and tanks must be maintained in a dry state, in accordance with applicable DEC regulations. Hazardous waste determinations must be made for any liquids removed from secondary containment systems in accordance with 6 NYCRR § 372.2(a)(2), and the liquids disposed of legally and in accordance with 6 NYCRR Parts 372 and 373, and documentation of such disposal provided to DEC.

28. Subject to the definitions in Paragraphs 38 - 40, before lawful operation of the Plant may be resumed, Defendants must update the Plant's facility closure plan to address all storage areas where wastes have been held for more than 90-days, all tanks used to store hazardous

wastes, and all locations where hazardous waste releases have been identified, through sampling or otherwise.

29. Defendants shall submit an approvable closure plan to DEC, which will be subject to public notice and must be approved by DEC before lawful operation of the Plant can commence.

30. Any areas identified in the closure plan that will not be used for hazardous waste storage must be closed according to the terms of the approved closure plan.

31. All titanium scrap, or swarf, shall be stored in its current containers as directed by EPA, provided such containers are sealed and impervious and the swarf shall be stored wet. If the scrap or swarf is transferred to other containers, the new containers must be sealed and impervious, and the materials inside must be stored wet.

32. Before lawful operation of the Plant may be resumed, Defendants shall develop and implement a training program, as described in 6 NYCRR Part 373-3, to educate their employees about the hazardous waste generated and stored on-site and all related operations. The written training program shall include waste management procedures, including information on the contingency plan, relevant to the positions in which personnel are employed. A copy of the written plan shall be submitted to DEC.

33. The Plant shall update its contingency plan and submit it to the appropriate agencies as required by 6 NYCRR Part 373. A copy of the plan shall be submitted to DEC.

34. All documentation related to the generation, storage, and disposal of hazardous waste must be maintained on-site in an easily accessible location.

35. Hazardous materials shall only be stored in tanks that have secondary containment systems, leak detection systems, and written assessments in accordance with 6 NYCRR Part 373-3.10(c)(1).

36. Tanks containing hazardous materials shall be inspected, once each operating day, to detect corrosion or the release of waste. These inspections shall be documented.

D. <u>Brookhaven Fire Marshal's Requirements</u>

37. Before lawful operation of the Plant may be resumed, Defendants shall bring it into compliance with all requirements set forth in the stipulation and order dated June 19, 2003 between LAI and Gerald Cohen and the Town of Brookhaven. Defendants shall obtain and provide to DEC written certification by the Brookhaven Fire Marshal or his or her representative that the requirements have been met, or, for purposes of the specific task or tasks that Defendants propose to undertake, the Fire Marshal does not object to Defendants or such other person or persons as Defendants may authorize undertaking the specified task of tasks.

<u>OPERATION OF THE PLANT DEFINED</u>

38. For purposes of this Consent Judgment, "operate the Plant," "operation of the Plant," "operations at the Plant" or similar phrases shall refer to: operating any diesel generator; utilizing any electrically-powered device for cutting, sheering, bending, grinding, rolling, pressing, molding, shaping, chemically bathing, heating or otherwise processing titanium or any other metal; chemically treating titanium or any other metal; operating any gas-fired kiln; and engaging in any other manufacturing or fabrication process utilizing hazardous substances, as that term is defined at 42 U.S.C. § 9601(14).

39. For purposes of this Consent Judgment, if Defendants need to operate any component of the titanium manufacturing process as part of the permitting process or to otherwise comply with the requirements hereof, prior to complying with all prerequisites for lawful operation set forth in this Consent Judgment, then Defendants shall make a written request to DEC explaining why such operation is necessary. DEC shall determine whether it concurs, and if it does, specify such conditions as it deems necessary to properly oversee activation of the component, including, but not limited to, time and duration of permissible activation and DEC presence.

40. For purposes of this Consent Judgment, the use of the Plant, or any part of the Plant, for storage, the processing of solid waste that is not hazardous waste, or such other uses as do not involve operating any diesel generator; utilizing any electrically-powered device for cutting, sheering, bending, grinding, rolling, pressing, molding, shaping, chemically bathing, heating or otherwise processing titanium or any other metal; chemically treating titanium or any other metal; operating any gas-fired kiln; and engaging in any other manufacturing or fabrication process utilizing hazardous substances, as that term is defined at 42 U.S.C. § 9601(14), shall not be considered "operating" the Plant for purposes of this Consent Judgment. Nothing herein shall preclude the use of the Plant, or any part of the Plant, from being used for storage, the processing of solid waste that is not hazardous waste, or such other uses as do not constitute "operating" the Plant, provided that Defendants or such other party as may seek to engage in such activity obtains all legally required permits or approvals, and obtains written confirmation from the Town of Brookhaven Fire Marshal that the proposed use is allowed under the Town Fire Code.

STIPULATED MINIMUM PENALTIES

41. In addition to all other available remedies, including contempt and injunctive relief, Defendants shall be liable to Plaintiffs for stipulated penalties for violation of this Consent Judgment, as follows:

A. If Defendants fail to complete the Remedial Action Items by the Completion Date for each item, then Defendants shall be jointly and severally liable for a stipulated penalty in the amount of $500 per day.

B. If Defendants commence operations at the Plant before each of the requirements enumerated in Paragraphs 16 - 37 have been complied with, then Defendants shall be jointly and severally liable for a stipulated penalty in the amount of $1,000 per day of operation.

C. If Defendants violate any Operational Requirement, then they shall be jointly and severally liable for a stipulated penalty in the amount of $500 per violation.

D. Any other violation of this Consent Judgment shall subject Defendants to a penalty of $500 per violation.

42. To obtain stipulated penalties for any violation of the terms of this Consent Judgment, Plaintiffs shall give Defendants notice of any such violation by issuing them a notice of violation (NOV), which shall include a period of 30 days to cure the violation. Any stipulated penalty assessed by Plaintiffs shall be due and payable after Defendants' time to invoke dispute resolution under Paragraph 43 expires. Any NOV of this Consent Judgment issued by Plaintiffs shall specify the date by which Defendants must challenge the violation or waive the right to challenge it, which shall factor in the 30-day cure period and the time period within which

Defendants must bring such a challenge in accordance with Paragraph 43 below. Interest shall accrue on any stipulated penalty not paid when due, in accordance with New York State Finance Law and other laws applicable to debts to the State. Commencement of a timely challenge by LAI shall preclude Plaintiffs from entering judgment on the subject violation pending a resolution of that challenge in accordance with the dispute resolution provisions in Paragraphs 43 - 47 below, including exhaustion or waiver of appeals. If Defendants do not timely challenge an NOV hereunder, Defendants consent to Plaintiffs' entering a judgment in the amount specified in the NOV, with interest, without further notice.

DISPUTE RESOLUTION

43. Defendants shall have the right to challenge any NOV or Determination of Completeness issued by Plaintiffs under this Consent Judgment, including the amount of any penalty assessed. In any such challenge, the burden shall be on Defendants to demonstrate that the NOV or determination was arbitrary and capricious. To commence such a challenge, Defendants shall, within 20 days of receipt of the NOV or determination, serve a written statement with supporting affidavits setting forth Defendants' position (Challenge Statement). If Defendants fail to commence a challenge within 20 days of receipt, they shall waive the right to challenge the determination or NOV and the assessment of any penalties associated therewith. Upon receipt of a Challenge, DEC staff shall send a copy of it to the Chief DEC Administrative Law Judge (ALJ). Plaintiffs shall have 20 working days from receipt of the Challenge to serve a written response, with supporting affidavits (Response Statement). Simultaneously with serving its Response Statement, Plaintiffs shall send a copy to the Chief ALJ, together with proof of service on the Defendants.

44. The ALJ to whom the matter is assigned shall decide whether Defendants have demonstrated that the NOV or determination was arbitrary and capricious, based on the Challenge and Response Statements. There shall be no hearing. The ALJ may, in his or her discretion, request no more than one supplemental submission from each of the parties to assist him or her in deciding the challenge. Upon determining the merits of the challenge, the ALJ will prepare a written decision, which shall explain the basis for the decision. This decision shall be considered final as if issued by the DEC Commissioner, and subject to challenge in an Article 78 proceeding. Defendants must commence any such Article 78 proceeding within 30 days of service upon them of the decision.

45. The parties may agree, in writing, to extend the date for serving a Challenge Statement or serving a Response Statement. The parties may stipulate at any time prior to the ALJ's decision on any matter relevant to the challenge, including its withdrawal.

46. If a challenged DEC Determination of Completeness is upheld by the ALJ, then Defendants' time to complete the subject Remedial Action Item shall not be extended, except to the extent the ALJ, or in any Article 78 proceeding, the court, directs, based on whether the challenge was brought in good faith, Defendants' overall progress at the site, and such other equitable factors as the ALJ or court shall deem relevant.

47. In any administrative or court proceeding brought pursuant to the dispute resolution provisions of this Consent Judgment, personal service of the petition or other papers (or, if the Court deems an informal conference appropriate, such letter or oral communication as the Court shall deem appropriate) commencing the proceeding on:

Craig Elgut
Acting Regional Attorney
New York State Department of Environmental Conservation, Region 1
SUNY Building 40
Stony Brook, New York 11790

and on

AAG Andrew J. Gershon
Office of the New York State Attorney General, Environmental Protection Bureau
120 Broadway
New York, NY 10271

shall be deemed valid service.

DURATION OF THIS CONSENT JUDGMENT

48. Except for the provisions set forth in Paragraph 3 above regarding a money judgment in the amount of $1,024,624, the terms of this Consent Judgment shall remain in force and effect for 18 months from the date Plaintiffs certify in writing that all of the Remedial Action Items have been completed, or, absent such a certification, 18 months from the date all Remedial Action Items are determined to have been completed pursuant to Paragraph 44 above. The money judgment provisions set forth in Paragraph 3 shall remain in force and effect until the judgment, and any interest due thereon, is fully satisfied in accordance with the CPLR and other applicable law. Defendants' obligation to pay any stipulated penalties assessed hereunder, or judgments entered thereon, including interest, shall continue until fully satisfied.

49. Defendants agree to remain subject to the jurisdiction of this Court for the sole purpose of enforcement of, and disputes concerning, the requirements of this Consent Judgment.

SALES OF REAL PROPERTY, CAPITAL ASSETS OR THE PLANT

50. Defendants are enjoined from selling, transferring or otherwise alienating the Plant, any capital asset thereof, or the real property on which the Plant is located without approval of the Court, excluding any existing lease.

51. Defendants shall inform Plaintiffs, in writing, at least 30 days prior to selling or leasing any part of the Plant, the real property on which the Plant is located, or any capital asset component of the Plant. Upon request, Defendants shall provide Plaintiffs with copies of all finalized sale or lease documents. "Finalized sale or lease documents" shall mean the documents effectuating the sale or lease transaction, such as a lease, contract of sale, title documents, that are in final form ready for execution as agreed by the parties. Plaintiffs agree to keep confidential any financial information contained in the finalized sale or lease documents, such as the amount of money to be paid, the timing of payment, or terms of guaranty, provided pursuant to this paragraph that Defendants request be kept confidential (Information Designated Confidential), so long as Defendants themselves do not disclose it to any third parties other than those directly involved in the sale, transfer or alienation, including, but not limited to, brokers and title companies. Plaintiffs may include Information Designated Confidential in any court filing made under seal. If Plaintiffs are required by law to disclose any Information Designated Confidential, Plaintiffs shall provide notice to Defendants prior to making such disclosure, to the extent legally possible.

GENERAL PROVISIONS

52. In addition to all other rights of access provided by law, Plaintiffs, their employees and agents shall be granted immediate access to the Plant and site during normal business hours

and/or when any employee or agent of Defendants or of any entity owned or controlled by Defendants is there, for the purposes of inspecting and determining compliance with this Consent Judgment and with the ECL. Such access shall include the right to take photographs of such conditions and practices and to take samples of soil, groundwater, surface waters (including waters that have collected or pooled on-site), and any chemicals or compounds.

53. Nothing contained herein shall waive or bar of the rights of Plaintiffs to prosecute violations of the ECL, Navigation Law or other laws by Defendants, except that with respect to violations that were enumerated in the Complaint or November 18, 2005 Summary Judgment Motion herein, or any other violation that occurred prior to the Effective Date of this Consent Judgment, Plaintiffs shall not be entitled to seek financial penalties additional to those provided for herein. Plaintiffs reserve their rights to prosecute any additional violations not enumerated in the Complaint, November 18, 2005 Summary Judgment Motion and/or in this Consent Judgment.

54. The failure to enforce any alleged violation of any term of this Consent Judgment by any party shall not constitute or be deemed or construed to constitute any waiver of such violation or any other violation, except that the daily penalties enumerated herein shall not commence accruing until written notice is provided to Defendants and the 30-day cure period for the violation has expired. No amendment to, change of or suspension or waiver of this Consent Judgment shall be binding or of any force or effect unless and until signed by all parties or their authorized counsel and "So Ordered" by the Court.

55. Nothing herein shall be construed as an approval of any activity by any state, local

or federal agency not party to this Consent Judgment. Plaintiffs shall work with Defendants and EPA to obtain EPA's permission for Defendants to implement the Remedial Action Items, to the extent EPA requests that particular Remedial Action Items not proceed absent its approval.

56. Plaintiffs shall serve any NOV or determination hereunder by certified United States mail, return receipt requested, or by recognized overnight mail service which provides proof of delivery, upon:

Gerald Cohen
Lawrence Aviation Industries, Inc.
Sheep Pasture Road
Port Jefferson, NY 11776

and

Gerald Cohen
38 Bridle Path
St. James, New York 11780

with a copies to:

Frederick Eisenbud, Esq.
Lamb & Barnosky, LLP
534 Broadhollow Road
P.O. Box 9034
Melville, New York 11747-9034

Either (a) a signed acknowledgment of receipt by or on behalf of any one of the recipients, or (b) proof of delivery by an overnight service to any one of the recipients, whether or not signed on behalf of the recipient, shall be conclusive proof of receipt by Defendants. Defendants reserve the right to designate, in writing, other individuals, addresses or counsel of record for purposes of valid service of NOVs or determinations, although service in the manner described above upon Mr. Cohen or any new designee at any one location shall remain conclusive proof of receipt.

57. For purposes of establishing the date by which certain actions or tasks must be completed based upon issuance of a NOV or determination, the date from which Defendants' time is calculated shall be the day following the date of actual receipt of the NOV, or determination by the means of service specified in the immediately preceding paragraph.

58. Any technical submission required to be made to Plaintiffs hereunder shall be made to:

Nicholas Acampora
Spill Response Section Supervisor
New York State Department of Environmental Conservation, Region 1
SUNY Building 40
Stony Brook, New York 11790

with a copy to:

AAG Andrew J. Gershon
Office of the New York State Attorney General, Environmental Protection Bureau
120 Broadway
New York, NY 10271

Plaintiffs reserve the right to designate alternative or additional persons to whom technical submissions should be submitted.

59. This Consent Judgment shall be binding upon the parties and their respective employees, principals, agents, heirs, successors, assigns, lessees, or the employees, principals, agents, heirs, successors, assigns, or lessees, of any company or entity owned or controlled by Defendants.

60. The "Effective Date" of this Consent Judgment is the date it is "So Ordered" by the Court.

61. The caption of this action is hereby amended by the substitution of Denise M. Sheehan for plaintiff Erin M. Crotty, as Commissioner of the New York State Department of

Environmental Conservation.

ELIOT SPITZER
Attorney General of the State of New York
Attorney for Plaintiffs

By: ______________________
Andrew J. Gershon
Assistant Attorney General

Date: 11/30/06
Environmental Protection Bureau
120 Broadway, 26th Floor
New York, New York 10271
(212) 416-8474

LAMB & BARNOSKY, LLP
Attorneys for the Defendants

By: ______________________
Frederick Eisenbud

Date: 11/29/06
535 Broadhollow Road
P.O. Box 9034
Melville, New York 11747-9034

Lawrence Aviation Industries, Inc.

By: ______________________
Gerald Cohen, President
Lawrence Aviation Industries, Inc.
Sheep Pasture Road
Port Jefferson, NY 11776

Date: 11/28/06

Gerald Cohen, Individually

____
38 Bridle Path
St. James, New York 11780

Date: 11/28/06

SO ORDERED: ELIZABETH H. EMERSON
Justice, Supreme Court

DATE: December 20, 2006

FILED
JAN 10 2007
Judith A. Pascale
CLERK OF SUFFOLK COUNTY

EXHIBIT B

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 ENVIRONMENTAL CONSERVATION and STATE OF NEW YORK,

Index No.

VERIFIED COMPLAINT

Plaintiffs,

-against-

LAWRENCE AVIATION INDUSTRIES, INC. and GERALD COHEN,

Defendants.

---X

Plaintiffs, Erin M. Crotty, Commissioner of the New York State Department of Environmental Conservation (DEC), DEC and the State of New York (together, the State), by their attorney, Eliot Spitzer, Attorney General of the State of New York, allege upon information and belief:

NATURE OF THE ACTION

1. Defendants own and operate a titanium processing plant (the Plant) located on Sheep Pasture Road in Port Jefferson Station, Long Island. The Plant site is more than 120 acres, with approximately 35 acres devoted to industrial processes. Opened in 1959, the Plant had approximately 500 employees during its most successful period, but today employs only 23 people sporadically. The Plant site is on the federal list of severely contaminated sites because of extensive ground water contamination caused by the Plant's operations in the 1970's and 1980's.

2. Unfortunately, defendants conduct their titanium processing operations in wholesale disregard of the State's environmental laws and regulations which are designed to protect human health and the environment from hazardous substances and hazardous wastes, and to prevent the creation of new environmental toxic waste sites. Because of the defendants' violations of law and the dilapidated condition of the facility, the Plant presents a clear and present threat to human health and the environment.

3. The Plant uses hazardous substances in its processes, including nitric acid and hydroflouric acid. Nitric acid is highly corrosive. Contact with nitric acid can cause serve skin irritation, resulting in second or third degree burns on short contact. If heated, nitric acid can produce a poisonous gas. Further, inhalation of vapors can burn the eyes, nose and throat. Nitric acid corrodes and cannot be contained by most metals. Hydrofluoric acid is a corrosive and a poison. Vapors are poisonous and can cause eye and lung injury. Inhalation of vapors cannot be tolerated even at low levels. If heated, hydroflouric acid produces toxic vapors. Skin contact causes severe skin irritation, and second or third degree burns on short contact. Hydrofluoric acid attacks glass, concrete and certain metals.

4. Additionally, titanium powder, if sufficiently fine, is spontaneously combustible. Thus, the material does not need an ignition source to begin combustion, or to burn; it can ignite simply with contact with air or oxygen.

5. DEC conducted a five-day inspection of the Plant between April 8, 2003 and April 14, 2003. During the inspection, DEC staff noted over fifty violations of the State's environmental regulations; the vast majority related to the mismanagement of hazardous waste and the Plant's complete lack of procedures to address emergency procedures. Indeed,

uncontained spills of unknown substances and petroleum products were observed at the Plant, along with large volumes of hazardous wastes are currently stored in the Plant in deficient and unsound containers.

6. The Plant structures containing the hazardous substances and hazardous wastes are also in a poor state of maintenance and repair, and present a high decree of risk of fire, flood or structural failure. The occurrence of any of these events could potentially trigger the release of hazardous substances and hazardous wastes into the environment.

7. Portions of the roof over areas where hazardous substances and wastes are stored within the Plant are unsound and leak. The plumbing also leaks. The electrical system is prone to shorts and sparking, presenting a risk of fire. Fire suppression equipment is inoperative, and contingency plans for emergencies are completely lacking or grossly deficient.

8. The State brings this action to compel the defendants to immediately correct and remediate the numerous threats to human health and the environmental posed by the Plant. Given the extensive and dangerous nature of the violations, the State also seeks an injunction compelling the defendants to cease all industrial production and other processes at the Plant, including operating the diesel generators, until the human health and environmental hazards are remedied, and the Plant operations are in compliance with applicable environmental laws.

9. As set forth below, the defendants have violated and are in violation of the State (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).

Additionally, the defendants have created and are maintaining a public nuisance. To redress these violations, the State seeks temporary and permanent injunctive relief, and civil penalties.

JURISDICTION AND VENUE

10. The Court has jurisdiction over this action pursuant to CPLR § 301, ECL §§ 71-2727, 71- 2705, 71- 2103, 71- 2107, 71- 4303 and 71- 4305, and Judiciary Law § 140-b.

11. Pursuant to CPLR § 503, venue is proper in Suffolk County because the defendants reside there and the plant at issue in the action is located in Suffolk County.

PARTIES

12. Plaintiff State of New York is a body politic and a sovereign entity, and brings this action on behalf of itself and as *parens patriae* on behalf of all citizens and residents of New York, particularly those who live or work in the vicinity of the plant at issue.

13. Plaintiff DEC is an executive department of the State of New York, and is charged with enforcing the ECL and its implementing regulations.

14. Plaintiff Erin M. Crotty is the Commissioner of DEC.

15. Defendant Lawrence Aviation Industries, Inc. (Lawrence Aviation Industries), is a corporation organized and existing under the laws of the State of New York, with its principal place of business at Sheep Pasture Road, Port Jefferson Station, New York. Lawrence Aviation Industries is the owner or operator of the Plant.

16. Defendant Gerald Cohen (Cohen) resides within Suffolk County, and is an officer and principal of defendant Lawrence Aviation Industries. Cohen is an owner or operator of the Plant, and exercises actual control over its operations, and over the operations of Lawrence

Aviation Industries, including the acts and omissions giving rise to the violations of law at issue in this action.

STATUTORY AND REGULATORY BACKGROUND

A. Industrial Hazardous Waste Management

17. In 1978, the State Legislature recognized that the increased industrial expansion in the State had resulted in the production of wastes that were flammable, explosive, reactive, toxic or infectious. Mismanagement of those kinds of waste had resulted in public health problems and contamination of the air, land and waters of the State. The Legislature, therefore, in ECL Article 27, Title 9 (the Industrial Hazardous Waste Law) empowered DEC to adopt regulations designed to reduce the generation of hazardous wastes and to ensure the proper storage, treatment and disposal of those wastes so as to minimize the present and future threat to human health and the environment.

18. DEC has promulgated regulations governing the management of hazardous wastes in New York. Parts 370 and 371 of 6 New York Code, Rules and Regulations (NYCRR) provide key definitions used in hazardous waste regulation, and identify and list materials deemed "hazardous waste" and therefore subject to regulation under the Industrial Hazardous Waste Law. Part 372 sets forth a system for tracking hazardous waste from generation through disposal, including the storage and treatment of such wastes. The system requires the preparation of hazardous waste manifests that identify each shipment of waste at each stage. Part 373 includes standards for the operation of hazardous waste management facilities and requires that such facilities obtain permits from DEC unless exempt from such requirement. Part 374

regulates the management of specific hazardous wastes. Part 376 regulates the disposal of hazardous wastes on land.

1. <u>**Hazardous Waste Identification and Information Requirements**</u>

19. Under 6 NYCRR Part 371, a waste is classified as a hazardous waste if the waste exhibits a defined "characteristic" of hazardous waste, such as ignitability, corrosivity, reactivity or toxicity, *see* 6 NYCRR § 371.3, or if the waste is a "listed" hazardous waste. *See* 6 NYCRR § 371.4. With respect to corrosivity, liquid wastes are classified as hazardous wastes if the liquid has a pH less than or equal to 2 or greater than or equal to 12.5. 6 NYCRR § 371.3(c)(1)(i).

20. Under 6 NYCRR § 372.2(a)(2), a person "who generates a solid waste" must determine whether that waste is a hazardous waste.[1] If it is, the waste must be managed in accordance with the hazardous waste management regulations.

21. One of the most basic requirement in the State's hazardous waste management program is that a hazardous waste generator must mark hazardous waste containers with the words "hazardous waste" or other words that identify the contents of the container. 6 NYCRR § § 372.2(a)(8)(i(a)(2)' 373-3.9(d)(3), 373-3.10(e)(4); 373-1.1(d)(1)(xii). Employees, emergency response personnel and the public are then alerted to the dangerous nature of the substance and can take the necessary precautions to protect against the dangerous posed by the waste if, or when, they come into contact with the waste. Such designations are particularly important in this case because the titanium processed at the Plant is highly flammable, and any fire at the facility

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[1] The term "solid waste" includes, among other things, liquids. *See* 6 NYCRR § 371.1(c).

would require special firefighting techniques, given the nature of the hazardous wastes stored in the Plant.

22. The owners or operators of hazardous waste facilities must provide training for facility personnel that includes: 1) procedures for using, inspecting, repairing and replacing facility emergency and monitoring equipment; 2) key parameters for any automatic waste feed cutoff systems; 3) information regarding the facility's communication and alarm systems; 4) information regarding responding to fires and explosions; 5) information regarding responding to groundwater contamination incidents; and 6) information regarding the shutdown of operations. 6 NYCRR § § 373-3.2(g)(1)(iii); 373-1.1(d)(1)(xii). The facility owner or operator must maintain records documenting employee training. 6 NYCRR § 373-3.2(g)(4).

23. The facility must also have a closure plan that identifies the steps necessary to perform partial and/or final closure of the facility at any point during its active life. 6 NYCRR §§ 373-1.1(d)(1)(iv)(d), 373-3.7(c)(2).

24. Further, a facility must have a contingency plan that: 1) contains descriptions of any agreed upon arrangements, in the event of emergency, with the local police department, fire department, hospital, or any emergency response team, 6 NYCRR § 373-3.4(c)(3); 2) identifies the locations and descriptions of emergency equipment at the facility and its capabilities, 6 NYCRR § 373-3.4(c)(5); 3) contains an evacuation plan for facility personnel, in the event of an emergency, § 373-3.4(c)(6); and 4) includes the correct, current contact numbers for the local police department, fire department and spill clean-up responders. 6 NYCRR § 373-3.4(e).

2. <u>Hazardous Waste Storage Requirements</u>

25. In order to insure that hazardous waste is not released, the owner or operator of the facility must transfer hazardous waste out of any container that is not in good condition to a container that is in good condition. 6 NYCRR § 373-3.9(b)

26. Further, a container holding hazardous waste must always be closed during storage, 6 NYCRR § 373-3.9(d)(1), and cannot be stored in a manner which may rupture the container or cause it to leak. 6 NYCRR § 373-3.9(d)(2).

27. Secondary containment, which holds hazardous waste in the event of a leak or spill from the primary container, must be sloped or otherwise designed or operated to drain and remove liquids resulting from leaks or spills or hazardous waste, or precipitation. 6 NYCRR § 373-3.10(d)(3)(iv).

28. Given the dangerous nature of hazardous waste, a facility storing hazardous waste must be operated or maintained in a manner to minimize the possibility of a fire or an explosion, or any unplanned release of hazardous waste to air, soil or surface waters which could threaten human health or the environment. 6 NYCRR § 373-3.3(b). Further, all fire protection equipment and spill control equipment must be maintained as necessary to assure their proper operation in time of emergency. 6 NYCRR § 373-3.3(d).

29. Last but not least, hazardous waste must be sent to an authorized hazardous waste disposal facility within ninety days of generation, 6 NYCRR § 372.2(a)(8), to insure that a generator does not simply store, or abandon, hazardous waste on its site, rather than providing for proper disposal of the waste. To enforce this time limit, hazardous waste containers must be

clearly marked with the date when accumulation of the waste began. 6 NYCRR § § 372.2(a)(8)(ii), 373-1.1(d)(1)(iv)(d); 373-1.1(d)(1)(xii).

3. Enforcement

30. Under ECL § 71-2705(1), any person who violates the Industrial Hazardous Waste Law, or any implementing rule or regulation, is liable for a civil penalty of up to $25,000 per day for each violation in the case of a first violation, and in the case of a second or any further violation, a civil penalty of up to $50,000 per day for each day during which the violation continues. Additionally, a violator may also be enjoined from continuing any such violation.

B. Hazardous Substances Bulk Storage Law and Regulations

31. The State Hazardous Substances Bulk Storage Act, ECL Article 40, was enacted to protect the lands, water and air of the State from releases of hazardous substances from active and abandoned storage facilities. *See* ECL § 40-0101. Pursuant to statutory directive, DEC promulgated rules and regulations to implement the Act, which are found at 6 NYCRR Parts 596 through 599.

32. Under the bulk storage regulations, facilities that store more than 185 gallons of a hazardous substance in above-ground storage tanks are subject to regulations designed to prevent, detect and minimize releases from such tanks. 6 NYCRR § 596.1(b)(1).

33. In order to prevent the release of hazardous substance, all storage tanks containing hazardous substances must be equipped with secondary containment that collects and contains leaks from the storage tank, thereby preventing spills from entering the land, or waters of the State. 6 NYCRR §§ 598.5(c), 599.9.

34. To prevent spills and overfilling of the tanks, the tanks must be equipped with an operating high level alarm system that is triggered when the liquid in the tank reaches a certain level in the tank. 6 NYCRR § 599.17(b)(1)(i). Tanks must also contain level gauges so that the amount of hazardous substance in the tank can be determined. 6 NYCRR § 599.19(b)(1)(iii). Further, a transfer station must be installed to contain spills during filling of the tanks. 6 NYCRR § 599.17(c)(2).

35. Tanks must also be protected from corrosion. 6 NYCRR §§ 598.9(e), 599.8(f).

36. In order to assess a tank's tightness against leaks, structural soundness, corrosion, wear, foundation weakness and operability, a tank must be inspected every 5 years, beginning in 1999. 6 NYCRR § 598.7(d). A visual inspection of the tank for any leaks, cracks, areas of wear or corrosion must be conducted annually. 6 NYCRR § 598.7(c). If any portion of a tank is not inspected pursuant to the provisions of the rule, the owner or operator must take the uninspected portion of the tank out-of-service. 6 NYCRR § 598.7(c).

37. Owners or operators of tanks must also prepare and maintain a spill prevention report for preventing and responding to spills, releases and accidents at the facility. 6 NYCRR § 598.1(k).

38. Pursuant to ECL § 71-4303, any person who violates the Hazardous Substances Bulk Storage Act, or any implementing rule or regulation, is liable for a civil penalty of up to $25,000 per day for each violation in the case of a first violation, and in the case of a second violation, a civil penalty of up to $50,000 per day for each day during which the violation continues. Additionally, a violator may also be enjoined from continuing any such violation.

C. Air Pollution Control Law and Regulations

39. The State Air Pollution Control Law, ECL Article 19, is designed to "maintain a reasonable degree of purity of the air resources of the state." ECL § 19-0103.

40. To protect air quality in the State consistent with its ECL Article 19 mandate, DEC has promulgated numerous regulations limiting the quantity of air pollution that legally may be emitted by industrial and other facilities. Of particular concern on Long Island is ozone, created in a chemical reaction between nitrogen oxides (NO_x) and volatile organic compounds (VOCs), because air quality on Long Island does not meet the minimum federal standards for ozone necessary to protect public health.

41. Foremost, major sources of air pollution are required to obtain an operating permit. 6 NYCRR § 201. A major source is one that has the potential to emit pollution above a threshold level. For NO_x, a major source is one that has the potential to emit 25 tons annually of NO_x.

42. Because Long Island violates the federal ozone standard, major sources of air pollution on Long Island are required to utilize Reasonably Available Control Technology (RACT) to reduce emissions of NO_x. 6 NYCRR § 227.

43. To control emissions of particulate matter (PM), sources that combust any type of fuel must not emit smoke that is overly dark or opaque, as measured by compliance with an opacity limit of 20%. 6 NYCRR § 227-11.3.

44. Where emissions are released from a process unit – but combustion is not involved – emission limits for the unit are established though a source-specific analysis. 6 NYCRR § 212.

45. Source owners and operators are also required to maintain and keep in satisfactory condition any air pollution control device that reduces emissions from the source. 6 NYCRR § 200.7

46. Under ECL § 71-2103(1), any person who violates the Air Pollution Control Law, or any implementing rule or regulation, is liable for a civil penalty of up to $10,000 per day for each violation in the case of a first violation, and in the case of a second or further violation, a civil penalty of up to $15,000 per day for each day during which the violation continues. Additionally, a violator may also be enjoined from continuing any such violation.

D. State Navigation Law

47. Article 12 of the New York State Navigation Law was enacted "to ensure a clean environment and healthy economy for the state by preventing the unregulated discharge of petroleum which may result in damage to lands, waters, or natural resources of the state." Navigation Law § 171. The law strictly prohibits the "discharge" of petroleum, broadly defined as "any intentional or unintentional action resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto lands from which it might flow or drain into said waters ...." Navigation Law §§ 172(8) and 173. The law further requires any person responsible for causing a petroleum discharge to notify DEC within two hours of its occurrence and to immediately undertake to contain the discharge. Navigation Law §§ 173, 175 and 176. Each discharge, and each failure to notify DEC of such discharge, independently subjects the violator to a civil penalty of $25,000 per violation. Navigation Law § 192.

48. Long Island is particularly vulnerable to petroleum discharges because of its unusual topography. Long Island is designated as a sole source aquifer, meaning that drinking water for the population is derived from a single inter-connected aquifer that extends the length of Long Island. Thus, contamination of one part of the aquifer could poison the entire aquifer. Given the sandy soils that predominate on Long Island, spills onto the ground can easily travel through the soil and into the ground water.

49. Pursuant to Navigation Law §§ 173, 192 and 193 and common law, the Court can provide injunctive relief to remedy violations of the State's Navigation Law.

FACTS

50. Between April 8, 2003 and April 14, 2003, DEC personnel inspected the Plant pursuant to an administrative search warrant. During the course of the inspection, the inspectors discovered wholesale violations of State environmental regulations.

51. On or about May 2, 2003, the Assistant Chief Fire Marshall for the Town of Brookhaven inspected the Plant. Based on his inspection, the Assistant Chief issued an order to vacate the Plant due to its unsafe condition.

A. Industrial Hazardous Waste Violations

52. Defendants are owners or operators of a hazardous waste facility, as that term is defined under 6 NYCRR § 370.2(83).

53. As generators of hazardous wastes, the defendants are subject to the requirements of 6 NYCRR § § 372 and 373.

54. On or about April 8, 2003,through April 14, 2003, two DEC hazardous waste inspectors conducted an inspection to determine the Plant's compliance with the State's

hazardous waste regulations. During the course of the inspection, the inspectors discovered scores of hazardous waste management violations.

55. In Building 30, the Chemical Mill, an inspector discovered a tank containing liquid and sludge (Tank 51). The liquid came within one inch of the top of the tank, which could hold approximately 1,500 gallons. The pH of the liquid in Tank 51 was above 12.5, and, therefore, the liquid constitutes hazardous waste. Cohen stated that the contents of the tank had been stored at the Plant for approximately two to three years. Tank 51 was not marked with the date that accumulation of the waste had begun, was not marked as hazardous waste, and lacked secondary containment. In addition, the defendants failed to produce documents requested by DEC to establish that the tank had undergone the required annual testing.

56. In Building 30, the Chemical Mill, an inspector discovered a second tank, covered by a green tarp, containing a liquid with a pH above 12.5; that liquid also constitutes hazardous waste. Cohen stated that the contents of that tank had also been stored at the Plant for approximately two to three years. The tank was not marked with the date that accumulation of the waste had begun and was not labeled as hazardous waste. Further, the secondary containment for the tank contained more than a foot of liquid with sludge on the bottom of the containment vessel.

57. In the "Drop Hammer Area" an inspector observed eight 55-gallon drums identified as caustic potash flake. Six of the drums were open and did not contain virgin potash flake. Potash flake should be a white solid, but the contents of the open drums were white and rust colored solids. One drum had a deformed, creased rim, and had visible liquid inside the drum which was almost spilling out of the drum. Other open drums had staining indicating

contact with liquid. The manufacturer's Material Data Safety Sheet (MSDS) indicated that if a very small amount (approximately one-half a gram) of the caustic potash flake is dissolved in a liter of water, the solution has a pH of at least 12, indicating that any liquid in or released from the potash flake drums would likely be hazardous waste.

58. In the "Waste Storage Facility" an inspector found an open drum labeled "Spent Corrosive Solid" that contained free liquid with a pH of above 12.5; accordingly, the liquid constitutes hazardous waste. The liquid appeared in danger of spilling out of the drum. Further, the drum was not labeled with the date that accumulation of the waste had begun; nor was it labeled as "hazardous waste."

59. In the "Waste Storage Facility," an inspector observed that a drum labeled "Ink" was being stored in a secondary containment tray that was flooded with a liquid. The MSDS for the ink indicated that when discarded, the ink is a hazardous waste. The drum had excessive surface corrosion above the level of the liquid in the container. The drum was not labeled as "hazardous waste;" nor was it labeled with the date that accumulation of the waste had begun.

60. An inspector also observed that solid caustic waste stored in the "Waste Storage Facility" was not protected from precipitation. The bases of the two visible drums showed evidence of structural deterioration and the pooled fluid under the pallets of the caustic solid had a pH of 9 - indicating the fluid was not simply water.

61. In the "Waste Storage Facility," an inspector discovered a small white container that was labeled "Thinner." At least two drums of methyl ethyl ketone, a thinner and a hazardous waste, were adjacent to the small white container. The white container appeared to have the

same contents as the drums. The white container was not labeled as "hazardous waste" and did not have a label indicating the accumulation start date. The white container was also open.

62. In a storage building, an inspector discovered approximately 40 capacitors. Based on the size of the capacitors, they are hazardous waste because of PCB content. However, there was no determination by the defendants that the capacitors are hazardous waste.

63. An inspector also found titanium dust stored in open fifty-five gallon drums in the Main Building. According to the MSDS, titanium dust is spontaneously combustible and should not be stored in large quantities because it is a fire hazard.

64. On the loading dock, an inspector observed a broken lead acid battery – a hazardous waste. The plastic casing of the battery was incapable of preventing the battery's lead acid from leaking out. Further, there was no label indicating the accumulation start date or that the battery was hazardous waste.

65. No fire extinguishers observed had inspection tags that dated more recent than 1999.

66. During the inspection, the inspectors requested various records from Cohen, including records relating to employee training, the Plant's contingency plan, and the Plant's closure plan.

67. The contingency plan contained no descriptions of any agreed upon arrangements with the local police department, fire department, hospital, or any emergency response teams; lacked information about the locations, descriptions, or capabilities of emergency equipment, did not have an evacuation plan for personnel and lacked current information about emergency contact numbers.

68. The personnel training records did not contain; the job titles of the positions at the facility and the names of employees filling them, written job descriptions, written descriptions of training that each person receive related to hazardous waste management, records of completed training and given training by personnel, and did not provide: 1) procedures for inspecting, repairing, and replacing facility emergency and monitoring equipment; 2) key parameters for any automated waste feed cutoff system; 3) facility communication and alarm systems; 4) response to fire and explosives; 5) response to groundwater contamination incidents; and shutdown of operations.

69. The closure plan for the Plant did not include a tank in the "Acid Neutralization and Evaporation" facility.

B. <u>Hazardous Substances Bulk Storage Violations</u>

70. On or about April 8, 2003 through April 14, 2003, two DEC inspectors inspected the Plant for violations of the State's hazardous substances bulk storage regulations. During the inspection, the inspectors discovered serious violations of those regulations.

71. During the inspection, the inspectors observed two 6,000 gallon tanks (Tanks 3 and 4) which were labeled as containing hazardous substances. One tank was labeled nitric acid and the other tank was labeled hydroflouric acid.

72. The tanks were surrounded by a single concrete secondary containment. The containment was approximately 3 feet high and 8 inches thick. The containment had a crack, approximately 1/8 of an inch that extended from the top of the containment wall to the bottom of the containment wall and went completely through the eight inch containment wall. The crack was large enough to allow daylight to show through.

73. Neither of the tanks had operable high-level alarms nor level gauges. No annual or five-year inspection had been performed for either tank or the piping associated with the respective tank.

74. Tank 3 is rusting, and lacks adequate corrosion protection.

75. Both tanks lack a transfer station, required to prevent releases of hazardous substances during tank filling.

76. The inspectors requested a spill prevention report but Defendants failed to produce it.

C. **Air Pollution Control Violations**

77. On or about April 8, 2003 and April 10, 2003, a DEC air inspector conducted an inspection of the Plant to determine the facility's compliance with the State air pollution control regulations.

78. During the inspection, the inspector found two diesel generators north of Building 10X. The annual potential to emit NO_x from those two generators is approximately 444 tons. Despite the large potential emissions of NO_x, the Plant does not have the operating permit required under the State Air Pollution Control Law. Further, the inspector found no evidence that these generators were complying with the State's NO_x RACT requirements or the State's opacity requirements.

79. The inspector also discovered a Rotoblast operation in the Drop Hammer area. Although the operation was required to have a fabric filter baghouse to reduce PM emissions, the dust collection hopper of the baghouse was not connected to any collection system and air contaminants were piled on the ground. Similarly, the fabric filter baghouse attached to the

Rotoblast operation in Building F was disconnected. Thus PM emissions from these operations are completely uncontrolled.

80. The air inspector also discovered that the two exhaust stacks located in Building 30 lacked the requisite acid scrubber. The acid scrubber is required on the exhaust stacks to control acid emissions from the facility. The absence of the acid scrubber allows acid emissions from this operations to go directly into the ambient air.

81. The inspector further observed numerous emission units on the site that lacked air permits, including a rolling mill in Building G, a rolling mill in Building 10X, two gas fired boilers in the Drop Hammer Area, a gas fired boiler in Building F and an oil fired boiler in Building M. All of these units are subject to the State's NO_x RACT requirements and opacity requirements. No records were produced or submitted to DEC establishing that these units were complying with the NO_x RACT requirements or opacity requirements.

D. State Navigation Law Violations

82. On or about April 11, 2003, two DEC inspectors inspected the Plant for compliance with the State Navigation Law. While on the Plant site, the inspectors discovered numerous spills of petroleum products on the open ground.

83. An inspector observed two diesel generators that appear to power the facility. The generators are housed in tractor-trailer trucks adjacent to the main Plant building. The inspector saw a petroleum spill on the ground under and around the generators, extending over an area of approximately 40 feet by 100 feet. Based on the dark staining of the soil, the inspector concluded that the spill was very recent.

84. An inspector also observed an above-ground storage tank that had oil floating in the secondary containment, indicating a rupture in the tank. A large petroleum spill was on the ground in the vicinity of the above-ground storage tank. The spill measured approximately 200 feet long and was 50 - 60 feet wide. Based on the size of the stain, the inspector estimated that at least 50 - 60 gallons of petroleum had been spilled on the ground.

85. An inspector further discovered an underground storage tank on the site. The inspector lowered a measuring tape into the tank. Approximately five feet of the measuring tape was covered in petroleum product, indicating at least five feet of petroleum product in the tank. The soil adjacent to the tank was saturated with oil. The inspector discovered a second 2,000 gallon underground storage tank. Adjacent to this tank was a petroleum spill that measured a few feet in diameter and extended a few inches into the soil.

86. DEC had not previously been notified of any of the petroleum discharges discovered at the Plant site during the inspection.

FIRST CAUSE OF ACTION
(Failure to make a hazardous waste determination)

87. Defendants have failed and continue to fail to make hazardous waste determinations for various wastes at the Plant, as required by 6 NYCRR § 372.2(a)(2).

SECOND CAUSE OF ACTION
(Accumulation of hazardous wastes on site beyond the 90 day limit)

88. Defendants have allowed and continue to allow hazardous wastes to accumulate on site beyond the 90 day limit for such storage, in violation of 6 NYCRR § 372.2(a)(8).

THIRD CAUSE OF ACTION
(Hazardous waste container violations)

89. Defendants have failed and continue to fail to transfer hazardous wastes that are stored in dilapidated containers into containers in good condition, as required by 6 NYCRR § 373-3.6(b).

90. Defendants have stored and continue to store hazardous wastes in containers that are open, in violation of 6 NYCRR § 373-3.9(d)(1).

91. Defendants have stored and continue to store hazardous wastes in a manner that may rupture the container or cause it to leak, in violation of 6 NYCRR § 373-3.9(d)(2).

FOURTH CAUSE OF ACTION
(Facility not operated in a manner that minimizes fire risk)

92. Defendants have failed and continue to fail to operate or maintain the Plant in a manner designed to minimize the risks of a fire or an explosion or the unplanned release of hazardous waste into the environment, in violation of 6 NYCRR § 373-3.3(b).

FIFTH CAUSE OF ACTION
(Secondary containment violations)

93. Defendants have failed and continue to fail to maintain the secondary containment systems in a manner that drains or removes liquids from the containers and the containment systems are not elevated or otherwise protected from contact with accumulated liquids, in violation of 6 NYCRR § 373-2.9(f)(ii).

SIXTH CAUSE OF ACTION
(Labeling violations)

94. Defendants have failed and continue to fail to label containers as "hazardous waste," and failed and continue to fail to identify the contents of the container on the label, in violation of 6 NYCRR § § 372.2(8)(i)(a)(2);373-3.9(d)(3).

95. Defendants have failed and continue to fail to mark on the containers the date when accumulation of the hazardous material began, in violation of 6 NYCRR § § 372.2(a)(8)(ii); 373-1.1(d)(1)(iii)(c)(2).

SEVENTH CAUSE OF ACTION
(Failure to maintain fire protection equipment)

96. Defendants have failed and continue to fail to maintain fire protection equipment as necessary to assure its proper operation in time of emergency, as required by 6 NYCRR § 373-3.3(d).

EIGHTH CAUSE OF ACTION
(Deficient contingency plan)

97. Defendants' contingency plan was and is deficient in that it: (1) does not contain descriptions of any agreed upon arrangements, in the event of emergency, with the local police department, fire department, hospital, or any emergency response team, as required by 6 NYCRR § 373-3.4(c)(3); (2) fails to identify the locations and descriptions of emergency equipment at the Plant and its capabilities, as required by 6 NYCRR § 373-3.4(c)(5); (3) contains no evacuation plan for Plant personnel, in the event of an emergency, as required by 6 NYCRR § 373-3.4(c)(6); and (4) does not include the correct, current contact numbers for the Suffolk County Police

Department, the Terryville Fire Department, the Brookhaven Town Division of Fire Prevention and County Control or the spill clean-up contractor, as required by 6 NYCRR § 373-3.4(e).

NINTH CAUSE OF ACTION
(Lack of personnel training)

98. Defendants personnel training plan lacks key safety information for employees, including :1) procedures for using, inspecting repairing and replacing Plant emergency and monitoring equipment; 2) key parameters for any automated waste feed cutoff systems; 3) information regarding the Plant's communication and alarm systems; 4) information regarding responding to fires and explosions; 5) information about responding to ground water contamination incidents, and 6) information about shutting-down operations, as required by 6 NYCRR § 373-3.2(g)(1)(iii)

TENTH CAUSE OF ACTION
(Inadequate closure plan)

99. The closure plan for the Plant does not identify the steps necessary to perform partial and/or final closure of the facility, as required by 6 NYCRR § § 373-1.1(d)(1)(iv)(d), 373-3.7(c)(2).

ELEVENTH CAUSE OF ACTION
(Failure to maintain secondary containment on chemical storage tank)

100. Defendants have failed and continue to fail to equip one of the two tanks storing hazardous substances with secondary containment that is capable of collecting and containing leaks from the storage tanks, as required by 6 NYCRR §§ 598.5(c) and 599.9.

TWELFTH CAUSE OF ACTION
(Failure to have gauges and alarms on the tanks)

101. Defendants have failed and continue to fail to equip the tanks storing hazardous substances with operating high level alarms, as required by 6 NYCRR § 599.17(b)(1)(i)

102. Defendants have failed and continue to fail to equip the tanks storing hazardous substances with level gauges, as required by 6 NYCRR § 599.17(b)(1)(iii).

THIRTEENTH CAUSE OF ACTION
(Lack of transfer station)

103. Defendants have failed and continue to fail to install a transfer station for the tanks containing hazardous substances, as required by 6 NYCRR § 599.17(c)(2).

FOURTEENTH CAUSE OF ACTION
(Failure to provide corrosion protection)

104. Defendants have failed and continue to fail to provide corrosion protection for Tank 3, as required by 6 NYCRR §§ 598.9(e) and 598.8(f).

FIFTEENTH CAUSE OF ACTION
(Failure to have a spills prevention report)

105. Defendants failed and continue to fail to have a spills prevention report, as required by 6 NYCRR § 598.1(k)(1).

SIXTEENTH CAUSE OF ACTION
(Failure to perform inspections)

106. Defendants have failed to perform annual and five-year inspections as required by 6 NYCRR §§ 598.7(c)(2); 598.7(d).

SEVENTEENTH CAUSE OF ACTION
(Failure to obtain major source permit)

107. Defendants have failed to obtain a major source air operating permit (Title V permit) as required by 6 NYCRR § 201.

EIGHTEENTH CAUSE OF ACTION
(Failure to comply with NO_x emission requirements)

108. Defendants have failed and continue to fail to comply with NO_x RACT provisions, as required by 6 NYCRR § 227-2.

NINETEENTH CAUSE OF ACTION
(Failure to comply with PM emission requirements)

109. Defendants have failed and continue to fail to comply with the PM emission limits, as required by 6 NYCRR § 227-11.3.

TWENTIETH CAUSE OF ACTION
(Failure to comply with unit-specific emission limits)

110. Defendants have failed and continue to fail to comply with the unit-specific emission limits required by 6 NYCRR § 212.

TWENTY-FIRST CAUSE OF ACTION
(Failure to maintain air pollution control equipment)

111. Defendants have failed and continue to fail to maintain and keep in satisfactory condition air pollution control equipment at the Plant, as required by 6 NYCRR § 200.7.

TWENTY-SECOND CAUSE OF ACTION
(Discharge of petroleum)

112. Defendants have discharged petroleum onto the ground, in violation of Navigation Law § 173(1).

113. Defendants failed to notify DEC within two hours of a petroleum discharge, as required by Navigation Law §§ 173, 175 and 176.

114. Defendants have failed and continue to fail to contain discharges of petroleum that occurred on the Plant site, as required by Navigation Law § 176(1).

TWENTY-THIRD CAUSE OF ACTION
(Public Nuisance)

115. Defendants' unlawful conduct has created a public nuisance.

116. Although on notice of the public nuisance that they have created and are maintaining at and around the Plant, defendants have failed to abate the nuisance.

117. Under the common law of public nuisance, the State is entitled to an injunction prohibiting defendants from storing hazardous substances and hazardous wastes in an unsafe manner, prohibiting further illegal discharges of air pollutants and petroleum, and further requiring defendants to abate and cease maintaining the public nuisance by properly managing the hazardous substances and the hazardous wastes at the Plant site, cleaning up the petroleum that has been discharged at the Plant site, and by ceasing to conduct all industrial production and other processes at the Plant until defendants are in full compliance with the environmental laws and regulations described above.

WHEREFORE, the State respectfully requests that this Court enter judgment against the defendants as follows:

A. Declaring that the defendants have been and are in violation of the (1) Industrial Hazardous Waste Law, ECL Article 27, Title 9, and its implementing regulations; (2) Hazardous Substances Bulk Storage Law, ECL Article 40, and its implementing regulations; (3) Air

Pollution Control Law, ECL Article 19, and its implementing regulations; and (4) the State Navigation Law;

B. Declaring that the defendants have created and are maintaining a public nuisance;

C. Ordering the defendants to cease all industrial production and other processes at the Plant, including operating the diesel generators, until defendants have corrected all of the environmental violations at the Plant site and have abated the public nuisance;

D. Ordering the defendants to comply with all applicable environmental laws and regulations and to abate the public nuisance at the Plant site;

E. Allowing DEC personnel access to the Plant and the Plant site without the need for a search warrant to ensure compliance with the foregoing injunctive relief;

F. Pursuant to ECL § 71-2705(1), assessing a civil penalty against the defendants of up to $25,000 per day per violation for a first violation and $50,000 per day for second and later violations for the violations of law alleged in the First through Tenth causes of action;

G. Pursuant to ECL § 71-4303(a), assessing a civil penalty against the defendants of up to $25,000 per day per violation for a first violation and $50,000 per day for second and later violations for the violations of law alleged in the State's Eleventh through Sixteenth causes of action;

H. Pursuant to ECL § 71-2103(1), assessing a civil penalty against the defendants of up to $10,000 per day of violation for the violations of law alleged in the State's Seventeenth through Twenty-First causes of action;

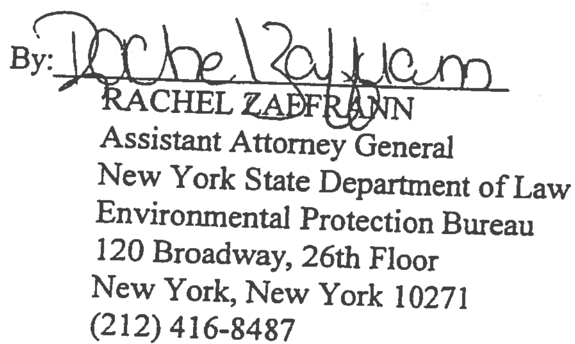
I. Pursuant to Navigation Law § 192, assessing a civil penalty of $25,000 per violation for the violations of law alleged in the State's Twenty-Second cause of action;

J. Order Defendants to post a bond to cover the costs of remediating the site; and

K. Granting other and further relief as just and appropriate.

Dated: New York, New York
May 12, 2003

ELIOT SPITZER
Attorney General of the
State of New York
Attorney for Plaintiffs



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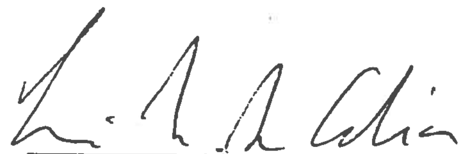
VERIFICATION

Louise M. DeCandia an attorney admitted to practice in the State of New York, affirms under penalties of perjury and says:

I am an Assistant Regional Attorney with the New York State Department of Environmental Conservation ("DEC"). I have read the foregoing Complaint and assert upon information and belief that the contents thereof are true. The sources of my information and belief are my review of DEC files, discussions with DEC staff and my personal knowledge.

Dated: May 12, 2003
Stony Brook, New York



Louise M. DeCandia

EXHIBIT C

SHORT FORM ORDER

INDEX
NO.: 10241-03

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 5-22-03
SUBMITTED: 6-12-03
MOTION NO.: 002 - MG

F/7-18-03

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,

Plaintiffs,

-against-

LAWRENCE AVIATION INDUSTRIES, INC. and GERALD COHEN,

Defendants.

ELIOT SPITZER
Attorney General of the
State of New York
Attorney for Plaintiffs
Department of Law
Environmental Protection Bureau
120 Broadway
New York, N. Y. 10271

PELLETREAU & PELLETREAU, LLP
Attorneys for Defendants
475 East Main Street
Suite 114
Patchogue, N. Y. 11772

Upon the following papers numbered 1 to 36 read on this motion for a preliminary injunction ; Notice of Motion/Order to Show Cause and supporting papers 1 - 19 ; Notice of Cross Motion and supporting papers —; Answering Affidavits and supporting papers 20 - 34 ; Replying Affidavits and supporting Papers 35 - 36 ; it is,

ORDERED that the motion by plaintiffs for a preliminary injunction is determined as follows.

The defendants operate a titanium processing plant located in Port Jefferson Station. In April 2003, the plaintiff New York State Department of Environmental Conservation (DEC) conducted an inspection of the facility. The plaintiffs allege that the defendants are in violation of numerous environmental statutes and regulations. The plaintiffs commenced this action and move for a preliminary injunction enjoining the defendants from operating the plant until they come into full compliance with the applicable regulations.

It is well settled that in order to obtain a preliminary injunction the movant must demonstrate a likelihood of ultimate success on the merits, irreparable harm unless the injunction is granted and that the equities are balanced in its favor (*see,* **Aetna Ins. Co. v Capasso**, 75 NY2d 860; **Grant Co. v Srogi**, 52 NY2d 496, 517; **State of New York v Sour Mountain Realty**, 276

PLAINTIFF'S EXHIBIT
F (2pgs)
KD 5/19/04

AD2d 8, 15 [2d Dept 20001). Here, the plaintiffs submit affidavits and photographs from DEC inspectors who examined the plant. The affidavits contend that, inter alia, the defendants have improperly stored hazardous substances in violation of regulations promulgated under the Environmental Conservation Law *(see,* 6 NYCRR §§ 372, 373). In addition, an inspector asserts that he personally observed petroleum spills on the ground under and around diesel generators and storage tanks in violation of Navigation Law § 173. Thus, the plaintiffs have made a prima facie showing that the defendants are in violation of statutory provisions and regulations *(see,* **State of New York v Izzo,** 216 AD2d 456 [2d Dept 1995]; **State of New York v Merion Blue Grass,** 122 AD2d 789 [2d Dept 19861). In opposition, the defendants deny the allegations in conclusory fashion. The defendants have submitted no evidence demonstrating that they are in compliance with the subject regulations. In fact, the defendants concede that they have entered into a contract with a third party for the disposal of diesel contaminated soil. Under these circumstances, the plaintiffs have demonstrated a likelihood of success on the merits. In addition, the violation of statutory provisions is sufficient to show irreparable harm *(see,* **State of New York v Sour Mountain Realty,** ***supra;*** **State of New York v Brookhaven Aggregates,** 121 AD2d 440 [2d Dept 19861). While the defendants assert that the injunction will negatively impact its employees and the defense industry, the injunction seeks only to enjoin the defendants' operation until they are in compliance with appropriate regulations. Accordingly, the plaintiffs' motion for a preliminary injunction is granted.

DATED: July 16,2003

HON. ELIZABETH HAZLITT EMERSON
J. S.C.

EXHIBIT D

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

February 11, 2014

By Hand and Email
Lawrence Aviation Industries, Inc.
Sheep Pasture Road
Port Jefferson, NY 11776
Attn.: Gerald Cohen, President

Re: *Crotty, et al v. Lawrence Aviation Industries, Inc. and Gerald Cohen*, Index No. 03-10241 (Emerson, J.)

Dear Mr. Cohen:

We write in an attempt to resolve numerous long-outstanding violations of the consent judgment which was entered by the Court in January, 2007 (the "Consent Judgment") between plaintiffs New York State DEC and the State of New York (the "State") and defendants Gerald Cohen and Lawrence Aviation Industries, Inc. ("Defendants"), without the need for court intervention. Absent a prompt completion of these outstanding Consent Judgment requirements, the State will seek an order of contempt from the Court compelling compliance, and providing for appropriate sanctions.

Among other things, the Consent Judgment required Defendants to perform the following petroleum-related "Remedial Action Items" within six months:

> (1) The various machine pits and containment areas/systems throughout the complex and the containment area for the large diesel tank must be emptied and cleaned and then properly maintained; (2) any open containers of petroleum must be properly staged and properly disposed of; and (3) any areas throughout the complex that have any petroleum staining must be cleaned up, including inside the electric substations where previous inspections identified the presence of transformer oil staining . . .

We note that, in addition to the specific court-ordered injunction in the Consent Judgment, the New York State Navigation Law requires that all petroleum spills be promptly reported to DEC and then cleaned up.

120 BROADWAY, NEW YORK, NY 10271 ● PHONE (212) 416-8446 ● FAX (212) 416-6007 ● WWW.AG.NY.GOV
Writer's Direct Phone: (212) 416-8474 ● Email Address: andrew.gershon@ag.ny.gov

Defendants have not complied with these requirements. Numerous machinery pits within the facility contain standing stormwater and/or lubrication oils leaking from machinery or otherwise spilled. Further, petroleum staining has been observed both inside and outside the buildings, including within the "electric substations" (transformer enclosures) where contamination by polychlorinated biphenyls ("PCBs") has been previously documented. Recently, as many as four of the approximately 28 transformers (several of which contains PCB oil) were vandalized, causing further spillage. Each of the transformers has a capacity of approximately 200 gallons. In at least one location, when a company retained by Defendants removed a large machine, the machine pit was backfilled with an aggregate mix, preventing DEC from inspecting the integrity of the pit walls and floor. None of the machinery pits to date have been properly cleaned for DEC's inspection, or maintained.

Consent Judgment Paragraph 6 required that Defendants:

> [P]rovide to DEC copies of the completed waste manifests to prove proper disposal. DEC will conduct follow-up inspections to verify compliance. DEC will require endpoint sampling by a qualified professional, with the samples analyzed by a New York State Certified Laboratory, where soil has been excavated or where it is apparent that contamination has penetrated impervious surfaces (*i.e.*, concrete). Samples must be run utilizing EPA Methods 8021 and 8270, including MTBE testing. Based on the contaminated or potentially contaminated material stored and/or generated during the cleanup process, additional sampling criteria such as PCB or TAL Metal analysis may be required . . .

To date, DEC has received no waste disposal documentation relative to the actions described above. Further, to date, and despite repeated requests by DEC, Defendants have failed to properly clean and dispose of an underground tank and its contents removed from the ground at "Building M" in June, 2012. The tank remains on Site.

Consent Judgment Paragraph 7(D) provides that:

> LAI must clean out, and then clean the residue from, the secondary containment around the 275-gallon tank in the propane building, which contains oil and water, and lawfully dispose of the fluids that are removed. LAI must provide copies of the completed waste manifests to DEC to prove proper disposal.

Defendants have violated this requirement by failing to provide DEC with any documentation that the work was performed. Based on Defendants' failure to provide this documentation with respect to remediation of the secondary containment for the 275-gallon tank, as well as their numerous other failures to comply with the Consent Judgment's requirements, as well as the overall deteriorating conditions at the Site, DEC strongly believes that Defendants have failed to clean out the secondary containment around the 275-gallon tank or lawfully dispose of any contaminant wastes generated by that process.

If Defendants wish to avoid a contempt motion, you can follow one of two paths. First, you can arrange for completion of all of the remedial work described below by March 13, 2014. If you choose this option Defendants would have to provide the State with the identity of the

contractor or contractors who will do the work by the close of business on February 18, 2014, describing what each contractor will be doing and when. DEC would be on-site during the work to make sure that the work is done in accordance with the parameters described below, and to ensure compliance with the requirements of the Consent Judgment. This remedial work would have to include, with respect to the underground tank that was removed from the ground at "Building M" in June, 2012, inspection to determine if any liquids or sludge remain inside. If so your contractor would have to clean it out and lawfully dispose of the waste.

The second path would be for Defendants to allow full access to the entire site, including all buildings, to the DEC and a State contractor to supervise and perform the remedial work. Defendants would be responsible for the costs to the State. To choose this path you must confirm in writing, by the close of business on February 18, 2014, that Defendants agree to allow the State to implement the work described below.

Remedial Work Required For Compliance with the Consent Judgment

The contractor would enter the site with the appropriate manpower and equipment, evaluate each machine pit and remove any petroleum or incidental water. All machine pits and vaults (including those which were inaccessible during DEC's January 31, 2014 inspection) would be evaluated and addressed where needed and as practical. Should petroleum be found, the contractor would use appropriate equipment to remove the petroleum and incidental water. After all liquids are removed, DEC and the contractor would re-evaluate the condition of all pits and determine if solids removal is warranted. If so, the solids would be removed. If a pit is empty or contains only water, it would be left as is for now. DEC would mark each pit upon completion of its remediation. At the conclusion of this work DEC would advise you which pits had been cleaned out, and which had been left as is.

With respect to the underground tank that was removed from the ground at "Building M" in June, 2012, DEC and the contractor would inspect it to determine if any liquids or sludge remain inside. If so the contractor will clean it out and dispose of the waste.

DEC would place one of its locks on the front gate for the period when the contractor is performing this work, to facilitate access to the site.

Remedial Work Necessary to Prevent Future Spills

DEC has identified various pieces of dormant machinery that contain lubrication oils. This machinery is deteriorating due to lack of maintenance, vandalism, scavenging and deterioration of the buildings in which the machinery is located. If any equipment has already leaked, violations of the petroleum spill provisions of the Navigation Law have occurred. Other pieces may not have leaked yet, but it appears inevitable that they will in the not distant future. Such current and future leaks would likely re-contaminate areas that should have been, and now must be cleaned up under the Consent Judgment. To the extent remediation of these conditions is not required under the Consent Judgment, the State will take appropriate new enforcement action to address the violations and protect public health and safety and the environment.

You have told DEC that you will not agree to a DEC contractor draining and lawfully disposing of the fluids from the transformers and other machinery. You can maintain this position and face new enforcement. Or, you can consent to the DEC contractor emptying and properly disposing of and/or securing all transformers, and empty and secure all machinery. These pieces of equipment will continue to present an ever-worsening hazard in their current condition, and must be addressed. Addressing the problem before it becomes worse, while a State contractor is mobilized at the Site, would be far more efficient than through a separate enforcement proceeding. Should such a new proceeding prove necessary, the State would present Defendants' lack of cooperation as a factor to be considered in determining appropriate sanctions.

<u>Summary</u>

With respect to the outstanding Remedial Action Items under the Consent Judgment, as described above, please let me know by the close of business on February 18, 2014 whether Defendants will be arranging for completion of those items by March 13, 2014. If so, provide the identity of the contract or contractors who will be doing, the work, and what work each will be doing.

Alternatively, please confirm by the close of business on February 18, 2014, that Defendants will provide access to the site to a DEC contractor to complete all of the outstanding Remedial Action Items.

If you do not choose one of the two paths, then the State will assume that Defendants are continuing their refusal to complete the work required under the Consent Judgment, and will move to have them held in contempt by the Court.

Please also let me know by the close of business on February 18, 2014 whether Defendants will arrange for proper draining of the transformers and other equipment containing lubrication oils by no later than March 13, 2014. If not, let me know whether Defendants will allow a DEC contractor to address these nascent but growing violations.

* * *

Please feel free to contact me if you have any questions or concerns. Under the Consent Judgment, copies of notices of violation are to be provided to Defendants' now former lawyer, Frederick Eisenbud, but Mr. Eisenbud informed the State some time ago that he no longer represents you. More recently you provided the State with the name Donald Creadore, Esq., but he did not return my call concerning this matter. We are, accordingly, not copying any attorney for Defendants on this letter. However, I ask that you provide a copy to any attorney who is

currently representing Defendants, and provide me with his or her contact information.

Sincerely,

ANDREW J. GERSHON
Assistant Attorney General

cc: Benjamin Conlon, Esq., DEC
John Conover, DEC
Nick Acampora, DEC

ACAMPORA AFFIDAVIT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

--X

JOSEPH MARTENS, Commissioner of the New York State Department of Environmental Conservation, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and STATE OF NEW YORK,

Plaintiffs,

-against-

LAWRENCE AVIATION INDUSTRIES, INC. and GERALD COHEN,

Defendants.

--X

Index No. 03-10241
(Emerson, J.)

AFFIDAVIT OF NICHOLAS ACAMPORA IN SUPPORT OF ORDER TO SHOW CAUSE FOR CONTEMPT

STATE OF NEW YORK)
) ss:
COUNTY OF SUFFOLK)

NICHOLAS ACAMPORA, being duly sworn, deposes and says:

1. I am employed with the New York State Department of Environmental Conservation, Region 1 ("DEC"), as an Environmental Program Specialist II for DEC Region 1, which covers Nassau and Suffolk County. Since in or around 2003 I have had regulatory responsibilities with respect to the Lawrence Aviation Industries Inc. ("LAI") plant and approximately 126 acre site located on Sheep Pasture Road in Port Jefferson, Suffolk County (the "Site"), where the company once milled titanium and manufactured titanium parts. Since 2003 I have assisted attorneys with the DEC and New York State Office of the Attorney General with this action against Defendants LAI and its owner, Gerald Cohen (collectively "Defendants"), to address various violations of New York State Environmental Law and regulation at the Site.

2. The Site is on the federal Superfund list, and the United States Environmental Protection Agency ("EPA") has been undertaking long-term remediation of historic contamination that entered the ground at the Site, and has migrated in groundwater as far as Port Jefferson Harbor, both directly and through its contractors. EPA has been undertaking this cleanup, and accruing claims against Defendants for its expenses under federal law, pursuant to the Comprehensive Response, Compensation and Liability Act, 42 U.S.C. §§ 9601, *et. seq.* In this action the State has prosecuted ongoing violations of New York environmental laws and regulations.

3. To resolve the state environmental law violations by Cohen and LAI alleged in this action, plaintiffs DEC, DEC Commissioner and State of New York (collectively the "State") entered into a consent judgment with Cohen and LAI, which Judge Elizabeth Emerson signed on December 20, 2006, and was entered on January 10, 2007 (the "Consent Judgment"). Among other things, the Consent Judgment required the Defendants to complete certain "Remedial Action Items" within six months of its entry.

4. The State has held back to some extent on enforcing these requirements, due to the fact that after entry of the Consent Judgment Defendants had to devote their time and financial resources to defending the federal environmental crimes for which they were indicted. These resulted in Cohen's incarceration for a period and other sanctions. In addition, EPA cleanup actions at the Site have addressed some aspects of the work required under the Consent Judgment. However, it is now seven years since the effective date of the Consent Judgment, Defendants have failed to complete certain Remedial Action Items, and EPA has clarified that it will not be addressing them. Moreover, conditions at the LAI facilities have increasingly

deteriorated due to fires, the passage of time, maintenance failure, sloppy scrap metal recovery efforts undertaken at Cohen's request, and apparent vandalism. (Photographs showing current conditions at the Site are included below at paragraphs 26-33.) The result has been a growing threat to public health and the environment. The State can't wait any longer to act.

5. To address this growing threat to public health, safety and the environment, DEC is prepared to use State Spill Fund money pursuant to its authority under the Navigation Law to bring a contractor onto the Site to remedy Defendants' violations of the Consent Judgment. However, Cohen has refused to allow DEC and its contractor access to the Site to perform the work, without interference.

6. Under the Navigation Law DEC is authorized to enter onto private property to clean up petroleum spills using public money. Since Defendants are here already under order to complete the Remedial Action Items the State is therefore seeking to hold Defendants in contempt to compel them to act, or at least desist from threatened interference. I am therefore submitting this affidavit, based on personal knowledge and direct observation, unless otherwise stated, in support of the State's motion to hold Defendants in contempt, and order them to either immediately perform the long-overdue remedial actions, or specifically authorize DEC to complete that work, without interference.

My Background and Responsibilities

7. I am employed with the New York State Department of Environmental Conservation, Region 1 (DEC), as an Environmental Program Specialist 2. I am currently the Response Section Supervisor in the Division of Environmental Remediation, Office of Spill Prevention and Response for DEC Region 1. I have worked at DEC for approximately 30 years. As part of

my job responsibilities I inspect facilities on Long Island including Major Oil Storage Facilities which store over 400,000 gallons of petroleum to evaluate compliance with the State's Bulk Storage Regulations, and the Oil Spill Prevention, Control and Compensation article of the State Navigation Law. I also respond to emergency spill situations, oversee remediation of petroleum spills and am the Regional Emergency Response Coordinator. Among other training, I have taken hazardous materials training course and subsequent refresher courses, a groundwater course involving groundwater contamination and required training regarding the State's Hazardous Substance and Petroleum Bulk Storage Regulations and the State's Navigation Law.

The Consent Judgment and Defendant's Violations of its Requirements

8. Defendants' violations of New York State environmental laws, the legal proceedings by the State to address those violations, and the Consent Judgment that resolved the State's claims are described in the accompanying affirmation by Assistant Attorney General Andrew Gershon (the "Gershon Aff."), as well as in the Consent Judgment itself (Exhibit A to the Gershon Aff.) The provisions of the Consent Judgment of most relevance to this motion are found in the "Remedial Requirements" section, in particular the provisions covering the Petroleum Remedial Action Items, ¶¶ 5-7. The Consent Judgment required Defendants to complete each listed Remedial Action Item within six months of the Effective Date, *i.e.*, by June 20, 2007.

9. Paragraph 5 included the following petroleum-related Remedial Action Items:

> (1) The various machine pits and containment areas/systems throughout the complex and the containment area for the large diesel tank must be emptied and cleaned and then properly maintained; (2) any open containers of petroleum must be properly staged and properly disposed of; and (3) any areas throughout the complex that have any petroleum staining must be cleaned up, including inside the electric substations where previous inspections identified the presence of transformer oil staining . . .

Gershon Aff., Ex. A, ¶ 5.

8. Defendants have not complied with these requirements. Numerous machinery pits within the facility contain standing, contaminated stormwater due to deteriorating conditions of the buildings and/or lubrication oils leaking from machinery or spilled during unauthorized removal of machinery by vandals or companies retained by Cohen, without prior notification to DEC and/or without proper oversight. Further, petroleum staining has been observed both inside and outside the buildings, including within the "electric substations" (transformer enclosures) where contamination by polychlorinated biphenyls ("PCBs") – toxic compounds whose manufacture has been banned – has been previously documented. Recently, as many as four of the approximately 30 transformers (several of which contains PCB oil) were vandalized, causing further spillage. Each of the transformers has a capacity of approximately 200 gallons. In at least one location, when a large machine was removed by a company retained by Cohen, the machine pit was backfilled with an aggregate mix, preventing DEC from inspecting the integrity of the pit walls and floor. None of the approximately 35 machinery pits to date have been properly cleaned for DEC's inspection, or maintained. Cohen was also advised that he must report any new spills to the NYS DEC Hotline that occur at the Site, which is a legal requirement that applies to all persons under the law. To date, he has failed to do so.

9. Paragraph 6 required that LAI:

> [P]rovide to DEC copies of the completed waste manifests to prove proper disposal. DEC will conduct follow-up inspections to verify compliance. DEC will require endpoint sampling by a qualified professional, with the samples analyzed by a New York State Certified Laboratory, where soil has been excavated or where it is apparent that contamination has penetrated impervious surfaces (*i.e.*, concrete). Samples must be run utilizing EPA Methods 8021 and 8270, including MTBE testing. Based on the contaminated or potentially contaminated material stored and/or generated during the

cleanup process, additional sampling criteria such as PCB or TAL Metal analysis may be required . . .

Id., ¶ 6.

10. Defendants have failed to comply with these requirements. To date, DEC has received no waste disposal documentation relative to the actions described above. Further, to date, and despite repeated requests by DEC, Defendants have failed to properly clean and dispose of an underground tank and its contents removed from the ground at "Building M" in June, 2012. As shown below in the photograph in Paragraph 33, the tank remains on Site, rusting.

11. Paragraph 7(D) provides that:

> LAI must clean out, and then clean the residue from, the secondary containment around the 275-gallon tank in the propane building, which contains oil and water, and lawfully dispose of the fluids that are removed. LAI must provide copies of the completed waste manifests to DEC to prove proper disposal.

Id., ¶ 6.

12. Defendants have violated this requirement by not providing DEC with any documentation that the work was performed. Based on Defendants' failure to provide this documentation with respect to remediation of the secondary containment for the 275-gallon tank, as well as their numerous other failures to comply with the Consent Judgment's requirements, as well as the overall deteriorating conditions at the Site, DEC strongly believes that Defendants have failed to clean out the secondary containment around the 275-gallon tank or lawfully dispose of any contaminant wastes generated by that process.

Defendants' Unremediated Violations and Deteriorating Site Conditions
Increasingly Threaten Public Health and Safety and the Environment

13. The LAI plant has not produced titanium or fabricated titanium parts for more than 10 years. The Site on which it is located has been on the EPA Superfund list since 2000, and on the New York State Registry of Inactive Hazardous Waste Disposal Sites, Class 2, since 1993. The LAI facilities are defunct and deteriorating.

14. Much of the cleanup work that the State sought in this action, consisting of removal and lawful disposal of thousands of cubic yards of hazardous wastes from the plant at the Site, has been completed. However, that cleanup work was done not by Defendants, but by EPA, under its CERCLA authority, and at taxpayer expense. As noted in the Consent Judgment, EPA, acting under its "removal" power, which allows it to remove contamination at any time that poses an immediate threat to human health and the environment, removed over 10,000 cubic yards of hazardous waste from the Site.

15. The remainder of the remedial work sought in the State's complaint was covered by the Remedial Action Items in the Consent Judgment. Defendants have completed some of the Remedial Action Items as required, but, as noted above, have failed to complete others. Meanwhile, violations that should have been corrected have gotten worse as the LAI facilities have continued to deteriorate. In addition, Cohen has brought scrappers on Site to pull out and sell metal in haphazard fashion, further exacerbating existing violations, and creating additional ones. The Site has become an increasing threat to public health and safety and the environment.

16. Defendants' failure to properly secure the Site has resulted in uncontrolled access to the facility grounds and main structures. Damage to the buildings, equipment and machinery indicates frequent visits to the Site by vandals and metal scavengers, causing unreported spills.

At least three fires have occurred on the grounds. One destroyed the main office building, another a residential building and the third heavily damaged the main manufacturing building. Stormwater enters the remaining portion of the main buildings and machine pits due to deteriorated, leaking roofs and missing walls. This water intrusion has contributed to and exacerbated the spillage of petroleum, washing the latter out of pits and machinery and onto adjacent floor space.

17. A State-owned strip of land on which a public bike path is located crosses the Site. While the bike path is separated from the rest of the Site by a six foot high chain link fence, this provides would-be trespassers and vandals with an easy means of access to the buildings on the Site.

18. Cohen has retained the services of a metal scavenger to remove machinery without notification to, and oversight by DEC, or, apparently, EPA. This scavenging resulted in at least two incidents involving the release of hazardous materials into the environment, including the release of mercury and asbestos. EPA had to take emergency corrective actions to address each situation. EPA has directed that a large portion of the main building be isolated until proper asbestos abatement has been performed. However, the cordoned off area is still accessible to trespassers, vandals, and whomever else Cohen allows on Site.

19. Approximately 30 transformers, some containing PCB oils, remain de-energized and unsecured at the site. DEC has directly observed or has been advised by EPA of at least four that have been vandalized to date, causing spills of transformer oil to the ground. In one of these cases PCB oil was released. The transformers have capacities of approximately 200 gallons of oil

on average, significantly increasing potential negative environmental and public health impacts if there is further vandalism.

Defendants Refuse to Allow the State to Eliminate their Ongoing Violations

20. Last year EPA's project manager clarified that the federal agency would not be addressing the waste oils in the abandoned machine pits, derelict machinery and equipment operations as part of its Superfund cleanup. DEC thereafter sought Cohen's cooperation in an attempt to end Defendants' ongoing violations of the Consent Judgment, and mitigate the escalating threats to public health and safety and the environment posed by the Site. DEC has the authority under Article 12 of the Navigation Law, the "Oil Spill Act," to retain a contractor to remediate oil spills where the responsible parties fail to do so as the law requires, and to subsequently seek reimbursement from the responsible party or parties. Navigation Law § 176.2(a). In this case DEC has concluded, due to the growing problems the unremediated petroleum spills at the Site pose, that the use of State money is warranted, even though the chance of obtaining reimbursement from Defendants, who owe millions in judgments, is extremely remote.

21. On December 20, 2013 I and other personnel from DEC met with Cohen to discuss the ongoing releases of petroleum from the machinery, petroleum in the machine pits and in the numerous transformers, the general poor condition of the buildings, uncontrolled access to the Site, and Defendants' failure to comply with the Consent Judgment, all of which are contributing to additional spills, or pose a threat of likely future spills at the Site. I told Cohen that unless Defendants agreed to correct these violations by January 5, 2014, a State Contractor would enter the Site to remove all lubrication oils

22. DEC offered several options with regard to the transformers, to be accomplished either by Defendants or a DEC contractor: (1) drain and dispose of transformer oil from all or certain transformers; (2) drain and dispose of transformer oil, clean and properly "mothball" all or certain transformers; or (3) relocate unsecured transformers to a secure location on the property (Building F) to prevent unauthorized tampering. He was initially combative and resistant, but later appeared cooperative. At the conclusion of the December meeting Cohen was non-committal as to whether he would refuse to allow the contractor entry to perform such work, which is at least in part outside the Consent Judgment

23. Assistant Attorney General Gershon followed with a letter on December 26, 2013, reminding Cohen of Defendants' outstanding obligations under the Consent Judgment, and that the State would take enforcement action if Defendants did not either do the work as required, or allow a State contractor to do the work and address the threats to public health and safety and the environment caused by Defendants' violations of the Consent Judgment and other environmentally deleterious conduct.

24. I contacted Cohen on January 6, 2014 to determine if the required corrective actions had been taken, and to ask what he had decided regarding allowing the DEC contractor to drain the transformers. He told me that "his attorney is reviewing the letter" and would respond later. He would not provide any information as to whether any of the required actions had been taken. I told him that the State contractor was prepared to initiate work on or about January 8, 2014. However, at the end of our conversation, Cohen asserted that DEC had no right to be on Site and made clear he would resist access to conduct the aforementioned work.

25. In order to determine whether Cohen had done anything to correct the ongoing Consent Judgment violations, to determine whether he would comply with the inspection access

provision of the Consent Judgment, and to obtain a comprehensive assessment of Site conditions before seeking court intervention, on January 31, 2014, I and other DEC personnel performed a comprehensive inspection of the Site facilities. Cohen did not interfere and accompanied the inspectors. The inspection confirmed not only that Defendants had done nothing to correct any ongoing violations, but the increasingly deteriorated state of the plant and its machinery, exposure of existing petroleum spills to the elements, and inevitability of new petroleum spills unless the machinery is properly drained. Each of the photographs below was taken by my DEC colleague John Conover during our January 31 inspection, and fairly and accurately depicts the conditions shown at the LAI facility on that day.

26. The following photograph fairly and accurately depicts a fabrication machine leaking lubrication oil in Building G. The puddled liquid on the floor is a mixture of water and oil.

27. The following photograph fairly and accurately depicts a partially dismantled machine in Building 10. Lubrication oil was observed in and around the machine pit. Water was also observed in sections of the machine pit, forcing oil to the surrounding concrete.

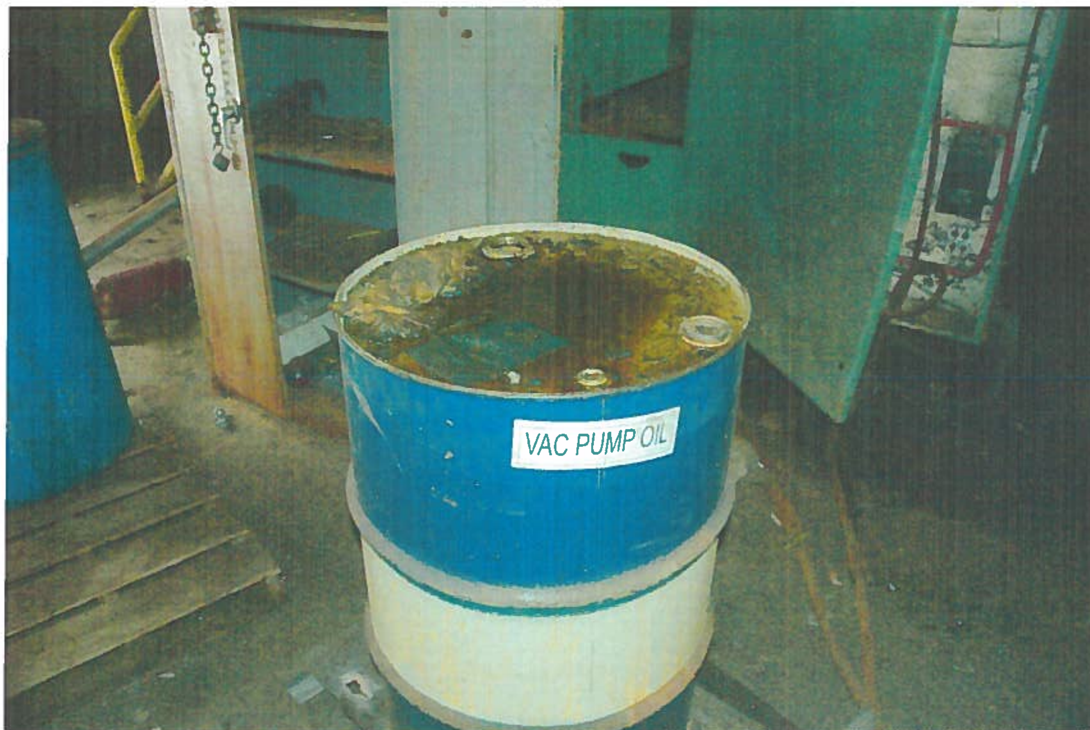
28. The following photograph fairly and accurately depicts a typical example of the dormant machinery left in a deteriorating building at the Site.

29. The following photograph fairly and accurately depicts typical conditions in Buildings 10 and 10X. Note the snow and ice inside the buildings, due to openings in the roof and walls, which create a pathway for release of oil and other contaminants into the environment.

30. The following photograph fairly and accurately depicts a partially dismantled machine in Building 10, with a mixture of oil and water in the machine pit below.

31. The following photograph fairly and accurately depicts waste oils on the ground below a machine in Building G.

32. The following photograph fairly and accurately depicts an open drum containing oil in Building F. There were other open containers containing oil.



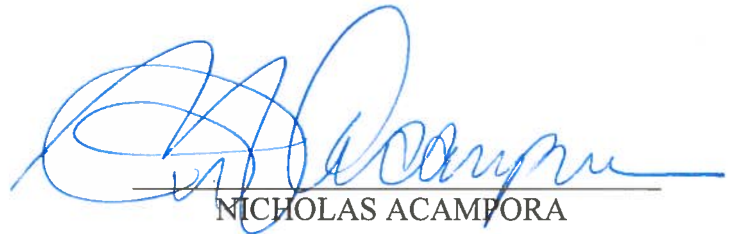
33. The following photograph fairly and accurately depicts an underground oil tank that Defendants had removed from the ground in accordance with the Consent Judgment, but failed to properly dispose of as required.

34. During the course of the inspection Cohen told me that he might be open to a DEC contractor fixing what he admitted were continuing violations of the Consent Judgment, if we provided a specific list of the work to be done. In a final effort to see if the violations could be resolved in a cooperative way, without the need for the Court to become involved, on February 11, 2014 I hand delivered Cohen the letter by AAG Gershon attached to his affirmation (the "Gershon February 11 Letter"). The Gershon February 11 Letter described in detail the work that either Defendants must do, or must allow a DEC contractor to do, to complete the Remedial Action Items required under the Consent Judgment. The letter told Defendants that if they did not commit to one of the two options by February 18, the State would assume that they are continuing their refusal to comply, and would take appropriate legal action.

35. Cohen did not respond to the Gershon Letter by February 18, 2014, or since.

The Relief Sought by the State

36. Since it is clear that Defendants are unwilling to and/or incapable of performing the outstanding Remedial Action Items, the Court should hold Defendants in contempt, and order that to purge their contempt they must allow DEC and a DEC contractor access to the Site to implement all outstanding Remedial Action Items as specified in the Gershon February 11 Letter. The order should make clear that that if any petroleum spill or leak in any amount is found, the contractor, whether working for Defendants or the State, must report the spill or leak to the State and take immediate steps to stop the spill or leak, including, if necessary, draining any petroleum from the source of the leak or spill.



NICHOLAS ACAMPORA

Sworn to before me
this 19th day of March, 2014

Carole A. Gajewski
Notary Public

CAROLE A. GAJEWSKI
NOTARY PUBLIC - STATE OF NEW YORK
NO. 01-GA6192849
QUALIFIED IN SUFFOLK COUNTY
COMMISSION EXPIRES SEPT 02, 2016

SCHARF AFFIDAVIT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

---X

JOSEPH MARTENS, Commissioner of the New York State Department of Environmental Conservation, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and STATE OF NEW YORK, Plaintiffs, -against- LAWRENCE AVIATION INDUSTRIES, INC. and GERALD COHEN, Defendants.	Index No. 03-10241 (Emerson, J.) **AFFIDAVIT OF STEVEN M. SCHARF, P.E. IN SUPPORT OF ORDER TO SHOW CAUSE FOR <u>CONTEMPT</u>**

---X

STATE OF NEW YORK)
) ss:
COUNTY OF ALBANY)

STEVEN M. SCHARF, P.E., being duly sworn, deposes and says:

1. I am employed with the New York State Department of Environmental Conservation, Region 1 ("DEC"), as a Project Engineer in the Division of Environmental Remediation, based in Albany. Among other things, the Division of Environmental Remediation administers the State Superfund Program (Inactive Hazardous Waste Disposal Site Remedial Program), which oversees the identification, investigation and cleanup of sites where consequential amounts of hazardous waste exist. I have worked on the Lawrence Aviation Industries Inc. ("LAI") site, which covers approximately 126 acre off Sheep Pasture Road in Port Jefferson, Suffolk County (the "LAI Site"), since approximately 1997. I make this affidavit, based on personal knowledge, DEC's files, discussions with former and current employees of the Suffolk County Department of Health

Services and review of that agency's records, and discussions with and review of records maintained by the United States Environmental Protection Agency ("EPA").

2. I submit this affidavit to provide background information concerning the LAI Site for the State's motion to hold defendants LAI and its owner, Gerald Cohen (collectively "Defendants") in contempt for failing to complete certain Remedial Action items as ordered in the consent judgment signed by Justice Elizabeth Emerson on December 20, 2006 (the "Consent Judgment"), between plaintiffs DEC, DEC Commissioner and State of New York (collectively the "State") and Defendants..

My Personal Background and Involvement with the LAI Site

3. My educational background includes two Bachelor of Science degrees. The first is a Bachelor of Science in Biology from the State University of New York Stony Brook, May 1979. The second is Bachelor of Science in Chemical Engineering from the University of Colorado Boulder, May 1983. Additionally, I am certified as a Professional Engineer by the New York State Department of Education.

4. I joined DEC in July, 1985 in the Division of Air Resources, and moved to the Inactive Hazardous Waste Site Remediation Program in the Division of Hazardous Waste Remediation in October, 1985. Shortly thereafter, the Division was reorganized into the Division of Environmental Remediation ("DER"). I became a Project Manager in the DER in October 1985. As Project Manager, my responsibilities include the oversight of remedial investigations (RIs), feasibility studies (FSs), remedial designs (RDs) and interim remedial measures (IRMs) related to sites listed as Class "2" in the New York State Registry of Inactive Hazardous Waste Sites (the "Registry"). My technical responsibilities with respect to the remedial projects that I

manage include ensuring the technical adequacy and consistency with current DEC, state and federal requirements, policies and regulations of the methodologies selected.

5. DEC added the LAI Site to its Registry of Inactive Hazardous Waste Disposal Sites, Class 2a in 1983. In 1992 DEC changed the Site's classification to 2, "significant threat to the public health or environment - action required." ECL § 1305; 6 NYCRR § 375-2.7. I began to work on the LAI Site for DEC in 1997.

6. From August 1997 through April 2000, DEC, as lead agency, pursuant to ECL Article 27, Title 13, conducted a remedial investigation of the LAI Site under the New York State Superfund program, as well as the surrounding areas. DEC also took other actions to address hazardous substance contamination attributable to Defendants' historic activities, including, but not limited to, installing groundwater monitoring wells, taking soil samples, extending water lines and connecting homes to these lines, and investigating the historic hazardous waste contamination at and emanating from the LAI Site, for purpose of planning an effective long-term remedial plan for the Site. DEC incurred total costs of $524,624 while acting as lead agency.

7. In 2000 the United States Environmental Protection Agency ("EPA") Region 2 office, responding to a New York State application, added the LAI Site to the federal National Priorities List under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), also known as Superfund. EPA took over from DEC as lead agency on the investigation and cleanup of the hazardous substance contamination at the Site. EPA remains lead agency for this work today. Although EPA took over as lead agency from DEC, I have continued to review and monitor the actions of the EPA and interface with other DEC programs

with oversight responsibilities for the LAI Site under other, sometimes overlapping environmental regulatory programs.

The LAI Site History

8. LAI was founded at the Site in 1959. The company manufactured titanium sheeting for the aeronautics industry and other uses. By 1980 both the Suffolk County Department of Health Services ("SCDOH") and DEC had cited LAI for poor waste disposal practices and leaking drums. In 1980 and 1981, SCDOH required LAI to remove a number of drums of waste materials from the Site. The drums contained the chemicals trichloroethylene and tetrachloroethylene, as well as hydroflouric and nitric acid, waste sludge containing acid, salt wastes, hydraulic oils and other plant wastes. SCDOH conducted a second removal in 1997 (*See* EPA Region 2 Superfund Fact Sheet http://www.epa.gov/superfund/eparecovery/lawrence_aviation.html).

9. The approximately 35 acre industrial portion of the Site, on which now dormant titanium milling and related buildings are located, is owned by LAI. Gerald Cohen owns LAI. Cohen individually owns several undeveloped adjoining parcels that are included in the EPA-designated Superfund site area. The Site is surrounded by residential areas and a few commercial properties. By approximately 2003 the LAI had ceased producing titanium or fabricated titanium parts.

10. As noted above, in 2000 EPA became lead agency on the investigation and cleanup of the historic contamination at the Site. EPA's remedial investigation eventually traced a plume of hazardous substances originating at the Site to Port Jefferson Harbor, over one mile away (*See* EPA LAI RI Report 03-2006 www.epa.gov/superfund/eparecovery/lawrence_aviation.html). EPA's longer term remedy to address the contaminant plume consists of two extraction and

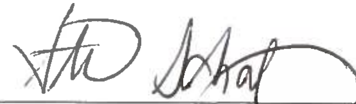
treatment systems, the in-situ chemical oxidation process and off-site disposal. These actions, aimed at source control and aquifer restoration, are designed to prevent the further migration of groundwater contaminants beyond the LAI Site boundary. The treatment system operation at the LAI facility began in September, 2010. Construction of the second treatment system down gradient at the Old Mill Pond near Port Jefferson Harbor began in November 2010 and was completed in August 2011. EPA projects that the groundwater treatment systems will have to be operated until 2030 to complete the groundwater portion of the remedial process. (*See* EPA Community Update, April 2011 <http://www.epa.gov/recovery/plans.html>). The soil removal program was completed in 2013 and the EPA will be releasing a factsheet on this in the near future.

11. Between September 2004 and April 2005, EPA work, at taxpayer expense, conducted a cleanup "removal" action at the industrial portion of the Site (*See* EPA Factsheets, <http://www.epa.gov/recovery/plans.html>). Under CERCLA, EPA is empowered to perform a removal action to address immediate risks to public health and the environment posed by hazardous substances. EPA undertakes such near-term removal measures to address hazardous substance releases or threatened releases that pose an immediate threat to public health and safety. The Lawrence Aviation removal action included the disposal of hundreds of drums of hazardous materials, the emptying and disposal of the contents of chemical storage vats, and the stabilization of other waste materials. EPA re-staged approximately 1,300 drums, containers and cylinders containing various flammable solids, acids, bases and unknown compounds. EPA disposed of most of the drums and containers off-site. In 2005, in a third removal action, EPA transported a 13.5-ton shipment of transformers and capacitors filled with suspected polychlorinated biphenyls

(PCBs) liquids off-site for disposal (*See* EPA Factsheet,

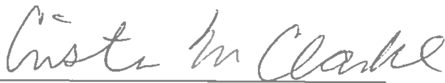
<http://www.epa.gov/superfund/eparecovery/lawrence_aviation.html>).

12. A State-owned strip of land that crosses the southeast portion of the Site, or right of way, was once slated to be a Port Jefferson highway bypass, on which a public bike path on these lands is now located and was opened in 2012. The contaminant impacts to the bike path were remediated by the EPA. The bike path is separated from the rest of the Site by a six foot high chain link fence.



STEVEN M. SCHARF, P.E.

Sworn to before me
this 18th day of March, 2014



Notary Public

CRISTIN M. CLARKE, ESQ.
NOTARY PUBLIC - STATE OF NEW YORK
NO. 02CL6056390
QUALIFIED IN SARATOGA COUNTY
COMMISSION EXPIRES MARCH 19, 2015

Sir:
Please take notice that the within are true copies of **Index No. 03-10241** duly filed and entered in the office of the Clerk of County, on the day of , 2013

Yours, etc.,
ERIC T. SCHNEIDERMAN,
Attorney General,

Attorney For

Office and P.O. Address
120 Broadway, New York, NY 10271

To , Esq.

Attorney for

Sir:
Please take notice that the within will be presented for settlement and signature herein to the **Hon. J. Emerson** one of the judges of the within named Court, at in the Borough of City of New York, on the day of 2013 , at M.

Dated, N.Y. , 2013
Yours, etc.,
ERIC T. SCHNEIDERMAN,
Attorney General,

Attorney For
Office and P.O. Address
120 Broadway, New York, NY 10271

To , Esq.

Attorney for

RECEIVED
MAR 2 1 2014
SUFFOLK COUNTY SUPREME COURT
RIVERHEAD, NEW YORK

SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

JOSEPH MARTENS,
Commissioner of the New York State
Department of Environmental Conservation,
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
and
STATE OF NEW YORK

Plaintiffs,

- against -

LAWRENCE AVIATION INDUSTRIES, INC.
and
GERALD COHEN

Defendants.

ORDER TO SHOW CAUSE FOR CIVIL AND CRIMINAL CONTEMPT

ERIC T. SCHNEIDERMAN,
Attorney General
Attorney for Respondents

Office and P.O. Address
120 Broadway, New York, NY 10271
Tel.(212) 416-8474

Personal service of a copy of within..
is admitted this..day of
2013