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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

DENISE M. SHEEHAN, Commissioner of the New York State Department of Environmental Conservation, the NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and the STATE OF NEW YORK,	Index No. 03-10241
Plaintiffs,	
-against-	
LAWRENCE AVIATION INDUSTRIES, INC. and GERALD COHEN,	
Defendants.	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO HOLD DEFENDANTS IN CIVIL AND CRIMINAL CONTEMPT FOR FAILING TO REMEDIATE PETROLEUM SPILLS AS ORDERED IN THIS COURT'S 2007 CONSENT JUDGMENT

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MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO HOLD DEFENDANTS IN CIVIL AND CRIMINAL CONTEMPT FOR FAILING TO REMEDIATE PETROLEUM SPILLS AS ORDERED IN THIS COURT'S 2007 CONSENT JUDGMENT

Plaintiffs Commissioner of the New York State Department of Environmental Conservation ("Commissioner"), New York State Department of Environmental Conservation and State of New York (collectively the "State"), submit this memorandum of law in support of their motion to hold defendants Lawrence Aviation Industries, Inc. ("LAI") and its owner Gerald Cohen (collectively "Defendants") in contempt of this Court's January 10, 2007 consent judgment (the "Consent Judgment").

PRELIMINARY STATEMENT

In 2003 the State sued Defendants for hundreds of violations of New York State environmental laws and regulations at the LAI facility located off Sheep Pasture Lane in Port Jefferson Station (the "Site"), then in its last throes as an active manufacturer of titanium products, primarily for the aeronautical industry. The violations included illegal storage of hazardous wastes, spilling and failing to clean up petroleum, and violations of the air pollution control laws.

Concurrent with filing its verified complaint on May 12, 2003 (the "Complaint"), the State moved for a preliminary injunction prohibiting LAI from operating its facility unless and 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 motion and preliminarily enjoined Defendants from operating until the facility came into compliance.[1]

[1] Judge Emerson's order is attached as Exhibit C to the accompanying affirmation of Assistant Attorney General Andrew J. Gershon, dated March 20, 2014 (the "Gershon Aff.").

By the time the State sued, the LAI Site was the subject of a cleanup overseen by the United States Environmental Protection Agency ("EPA"). EPA had added the LAI Site to the National Priorities List of hazardous waste sites to be investigated and remediated under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA," also known as "Superfund"), 42 U.S.C. §§ 9601, *et. seq*. EPA's long term CERCLA cleanup focused on investigating and remediating historic contamination caused by the dumping of chemicals on the ground by LAI, which had created a contaminant plume starting at the Site and flowing in groundwater toward Port Jefferson Harbor. However, in 2004 EPA, acting under its "removal" power to address immediate threats to public health and the environment, hauled away and legally disposed of over 100 tons of hazardous substances accumulated in drums and other containers at the LAI facility.

EPA thus effectively provided much of the injunctive relief sought in the State's Complaint, by correcting the numerous violations involving the illegal storage of hazardous waste. Even though EPA's work mooted the State's demand for this injunctive relief, its demand for a finding of liability and penalties on these hazardous waste violations remained. A number of other violations alleged by the State, which EPA had not corrected, remained the subject of State demands for injunctive relief, as well as penalties.

In 2006 the State moved for summary judgment, seeking a determination of liability on all claims, and injunctive relief compelling Defendants to remediate all remaining outstanding, ongoing violations. Rather than oppose the motion, Defendants agreed to the Consent Judgment, which included an agreed upon penalty of $500,000 (entered as a money judgment, but never paid in any part), and required Defendants to complete a number of "Remedial Action Items" to

correct the ongoing violations within six months. Justice Elizabeth Emerson approved the Consent Judgment on December 20, 2006, and it was entered on January 10, 2007.

A number of the Remedial Action Items were related to, and required cleanup of spilled petroleum, including petroleum accumulated in all machine pits and containment areas at the LAI facility. A photo recently taken of one of the machine pits, which shows oil mixed with stormwater and oily dirt, pointedly demonstrates that Defendants have failed to meet this requirement:

Affidavit of Nicholas Acampora, Environmental Program Specialist II for DEC Region 1, sworn to March 19, 2014 ("Acampora Aff."), ¶ 30.

The State has held back on seeking to enforce the outstanding Remedial Action Items while Defendants have been embroiled in a federal criminal environmental case. That federal prosecution resulted in Defendants pleading guilty, and Cohen's imprisonment for a time. However, the State can hold off no longer, as the outstanding uncorrected Remedial Action Items

pose an increasing threat to public health and the environment. The LAI plant (the "Plant") is falling apart, with holes in the roofs and walls allowing infiltration of stormwater, and increasing the likelihood that contaminants will spread to the surrounding environment. EPA has sealed off part of the facility because metal scavenging activities resulted in a release of asbestos. Scavengers, vandals and trespassers have accelerated the Plant's deterioration. The following photograph of the interior of Buildings 10 and 10X is illustrative:

Acampora Aff., ¶ 28.

In 2013, subsequent to Cohen's release from federal prison, DEC determined that if Defendants would not, or could not complete the outstanding petroleum Remedial Action Items, it would exercise its statutory authority and remediate the petroleum contamination at the Site. DEC sought Defendants' cooperation and Site access to allow it to abate this growing threat to public health and safety and the environment without the need for further legal intervention. However, Defendants have refused to cooperate and agree to allow access to a DEC contractor without interference. To the extent that Defendants claim they lack the funds to do the work –

and they do owe millions of dollars in tax and environmental liens – the State's willingness to step in and pay for the outstanding Remedial Action Items negates that as a defense. There is no excuse for Defendants to stand in the way.

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 for failing to implement the outstanding Remedial Action Items, 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 may 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.[2]

STATEMENT OF FACTS

The relevant facts are set forth in greater detail in the accompanying Gershon Affirmation, the exhibits thereto, particularly the Consent Judgment, the Acampora Aff., and the affidavit of DEC's Steven M. Scharf, P.E., sworn to March 18, 2014 (the "Scharf Aff.").

A. LAI Site History

This action concerns an approximately 126 acre site off Sheep Pasture Road in the Village of Port Jefferson Station, Brookhaven, Suffolk County (the "Site"). The industrial portion of the Site, on which now dormant titanium milling and related buildings are located, is

[2] The outstanding Remedial Action Items are not the only violations in and around the LAI buildings that need to be corrected to halt the growing threat to public health and safety and the environment. While this contempt motion is necessarily limited in scope to matters already covered by the existing Consent Judgment, new and additional enforcement proceedings are likely to be necessary, given Defendants' refusal to work with DEC in voluntarily fixing their environmental violations.

owned by LAI. 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. *See* the Scharf Aff., ¶¶ 8-9.

LAI was founded at the Site in 1959. The company manufactured titanium sheeting for the aeronautics industry. 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 sludges containing acid, salt wastes, hydraulic oils and other industrial wastes from the Site. SCDOH conducted a second removal in 1997. *Id.*.

DEC added the LAI Site to its Registry of Inactive Hazardous Waste Disposal Sites, Class 2a in 1983. Scharf Aff., ¶ 5. In 1990 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**.** From August 1997 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 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. DEC incurred total costs of $524,624. Scharf Aff., ¶¶ 5-6.

In 2000 EPA, upon application by DEC, added the Site to the federal National Priorities List under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA"). EPA became lead agency on the investigation and cleanup of the historic contamination at the Site. EPA's investigation eventually traced a plume of hazardous

substances originating at the Site to Port Jefferson Harbor, over one mile away. *Id.*, ¶¶ 7 and 10.

By approximately 2003 LAI had ceased producing titanium or fabricated titanium parts. *Id.*, ¶ 9.

Between September 2004 and April 2005, EPA work – at taxpayer expense – conducted a cleanup "removal" action at the industrial portion of the Site. Under CERCLA, EPA is empowered to perform a removal action at any time to remove contamination that poses an immediate threat to human health and the environment. 42 U.S.C. § 9604(a)(1). The 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. *Id.*, ¶ 11.

EPA's longer term remedy to address the contaminant plume consists of an extraction and treatment system and the in-situ chemical oxidation process. These actions, aimed at source control, are designed to prevent the further migration of groundwater contaminants beyond the LAI Plant 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 treatment systems will have to be operated until 2030 to complete the groundwater portion of the remedial process. *Id.*, ¶ 10.

A State-owned strip of land on which a public bike path is located crosses the Site. The bike path is separated from the rest of the Site by a six foot high chain link fence. *Id.*, ¶ 12.

B. <u>The State Sues Over Current Violations, Resulting in the Consent Judgment</u>

A comprehensive, multi-program inspection of the LAI Plant by DEC from April 8 through April 14, 2003 found 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. Gershon Aff., ¶ 10.

To address the environmental violations, the State commenced this action on May 12, 2003. The State's Complaint alleged violations of New York State Navigation Law (Navigation Law) §§ 172, 173, 175, and 192, which prohibit and require the immediate reporting and cleanup of petroleum spills, violations of 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 violation of the common law of public nuisance by Defendants. The Complaint sought 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. *Id.*, ¶ 11 and Ex. B.

Concurrent with filing the Complaint, the State moved by order to show cause for a preliminary injunction that would, among other things, prohibit operation of the LAI Plant until it was brought into compliance. On July 16, 2003, the Court, having found a substantial likelihood of success on the merits, issued the requested preliminary injunction. *Id.*, ¶ 11 and Ex. C.

As noted above, many of the violations alleged in the Complaint arose out of Defendant's storage and illegal disposal of hazardous substances in drums and other containers at the LAI Plant. EPA's removal action at the Site in 2004 lawfully disposed of over 10,000 cubic yards of illegally stored hazardous waste. This work effectively remedied those violations and therefore mooted the State's request for an injunction ordering Defendants to remove and lawfully dispose of those wastes. (The State's claims for penalties on those violations remained to be resolved.) EPA's work therefore significantly reduced the scope of injunctive relief being sought by the State. Gershon Aff., Ex. A, pp. 3-4; Scharf Aff., ¶ 11; Acampora Aff., ¶ 14.

On November 18, 2005, the State moved for summary judgment on liability on hundreds of individual violations. Gershon Aff., ¶ 12. In terms of remedy, the motion sought an injunction requiring Defendants to correct all outstanding and ongoing environmental violations alleged in the Complaint within six months, and a hearing to determine appropriate statutory penalties for all violations, whether ongoing or remedied by EPA. Defendants did not oppose the motion or contest their liability for the environmental violations that were the subject of the motion. Defendants instead agreed to the Consent Judgment in resolution of those claims and this action. *Id.*, ¶¶ 12-13.

C. <u>The Consent Judgment</u>

Cohen signed the Consent Judgment individually and as president of LAI on November 28, 2006, as did Defendants' attorney. Justice Elizabeth Emerson reviewed and approved it, and "so ordered" it on December 20, 2006. The clerk entered the Consent Judgment on January 10, 2007. *Id.*, Ex. A, p. 25.

Under the Consent Judgment Defendants admitted to violating: (1) the Navigation Law 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. *Id.*, Ex. A., ¶ 1.

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 for DEC's cost recovery claims. This brought the total money judgment to be entered on the Consent Judgment to $1,024,624. *Id.*, ¶ 3. The State filed a money judgment for that amount on January 12, 2007. To date Defendants have not paid any of that judgment. Gershon Aff., ¶ 14.

As noted above, the Consent Judgment ordered Defendants to complete various Remedial Action Items to correct ongoing violations of the ECL, Navigation Law and environmental regulations within six months. As more fully described in the Consent Judgment itself, and the Acampora Aff., these included: (a) petroleum cleanup Remedial Action Items; (b) air contaminant cleanup Remedial Action Items; and (c) removal of all titanium scrap, or "swarf," from the Site for lawful disposal (as with hazardous waste removal, EPA performed this work). The Consent Judgment established specific procedures for determining when remedial action items have been completed, with the last step being DEC's issuance of a formal determination of completeness after Defendants completed all Remedial Action Items. *Id.*, Ex. A., ¶¶ 4-15.

Although the LAI Plant has not produced titanium products in over a decade, and it continues to deteriorate, the Consent Judgment nevertheless established various requirements that Defendants had to follow if they were to operate the Plant in the future. The Consent Judgment also required Defendants to provide DEC with a written certification by the Brookhaven Fire Marshal that all of the Marshal's requirements for lawful operation had been met before resuming lawful operation. *Id.*, Ex. A, ¶¶ 16-37.

The Consent Judgment established stipulated penalties for violation of the Consent Judgment, as well as the procedures for the State to assess, and Defendants to challenge them. *Id.* ¶¶ 41-47.

The Consent Judgment was to remain in effect for 18 months from the date Plaintiffs certify in writing that all Remedial Action Items had been completed. . The Court retained jurisdiction for the purpose of enforcement of, and disputes concerning, the requirements of this Consent Judgment for so long as it remains in effect. *Id.*, ¶¶ 48-49.

The Consent Judgment enjoined Defendants 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. *Id.*, ¶¶ 50-51.

The Consent Judgment specifically provided the State and its employees and agents with immediate access to the Plant and Site during normal business hours, 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 the ECL. This access includes 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. *Id.*, ¶ 52.

The Consent Judgment specifically reserved the State's right to prosecute any new or ongoing violations of the ECL, Navigation Law or other laws by Defendants. The Consent Judgment provides that the State's non-enforcement of any violation of the Consent Judgment by Defendants cannot constitute or be deemed to constitute a waiver of such violation. *Id.*, ¶ 53.

D. **Defendants' Federal Indictment, Sentencing and Imprisonment for Environmental Crimes Places Obstacles in Front of State Enforcement of the Consent Judgment**

As described below and in the Acampora Aff., Defendants failed to complete a number of Remedial Action Items within the required six months (and have yet to complete those Items). Practical considerations have caused the State to hold back somewhat on enforcing against these violations. Most significantly, Defendants – and their time and financial resources – were caught up in a federal prosecution for environmental crimes against them.

On September 6, 2006 the U.S. Attorney's Office for the Eastern District of New York indicted Cohen and LAI for two counts of violating the federal Resource Conservation and Recovery Act by failing to legally dispose of over 12 tons of hazardous waste, and one count of violating the Clean Air Act for allowing two diesel powered generators to discharge into the air up to 440 tons of smog producing nitrogen oxides between 2001 and 2003. Cohen was arrested on September 7, 2006. Cohen and LAI plead guilty to all counts on July 10, 2008. On December 10, 2010, U.S. District Court in Islip sentenced Cohen to 366 days in jail, followed by 36 months of supervised release, and $105,816 in restitution, for which Cohen and LAI are jointly and severally liable. Based on Defendants' poor financial conditions the Court waived any fine. Cohen served his sentence in federal prison and was released on January 6, 2012. Gershon Aff., ¶ 16.

In addition to the practical barriers to effectively enforcing the Consent Judgment against Defendants, EPA and its contractor were on-site and active during this time. The possibility existed that EPA would address certain of issues that remained unresolved under the Consent Judgment under overlapping CERCLA jurisdiction. However, by the end of 2013 EPA had clarified that it would not be addressing non-PCB-laden waste, the hydraulic press pit reservoir or the abandoned machine oils. Acampora Aff., ¶ 20.

E. <u>Defendants' Ongoing Violations of the Consent Judgment</u>

Defendants or EPA have completed some of the Remedial Action Items. However, more than six years after all Remedial Action Items were required to be done, Defendants have failed to complete the Petroleum Cleanup Remedial Action Items, as set forth in Paragraphs 5-7 of the Consent Judgment.

Paragraph 5 of the Consent Judgment required, by July 7, 2007, that:

> (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.

Today numerous machinery pits within the Site's deteriorated buildings contain lubrication oils leaking from machinery or spilled during unauthorized removal of machinery by vandals or companies retained by Cohen, as well as standing, now contaminated stormwater due to the deteriorating conditions of the buildings. Petroleum stains appear inside and outside the buildings, including within the electric substations where contamination by toxic polychlorinated biphenyls ("PCBs") – toxic compounds whose manufacture has been banned – has been

documented. Acts of vandalism or scrap salvage at Defendants' behest have vandalized four transformers, which hold up to 200 gallons of oil, causing further spillage. None of the approximately 35 machinery pits to date have been properly cleaned for DEC's inspection, or maintained. Despite being reminded of his legal obligation to report any petroleum spills to the NYS DEC Hotline, Cohen has failed to call in any of the spills that have occurred since he signed the Consent Judgment. Acampora Aff., ¶¶ 8-12, 30-32.

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 . . .

Gershon Aff, Ex. A, ¶ 6.

To date, DEC has received no waste disposal documentation relative to the actions described above. In addition, 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. Acampora Aff., ¶¶ 10-12, 33.

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.

Gershon Aff., ¶ 6.

Defendants have at the very least violated this requirement by failing to provide DEC with any documentation that this work was performed. In all likelihood, no such documentation could exist, as there is nothing to indicate that Defendants have cleaned out the secondary containment around the 275-gallon tank or lawfully disposed of any contaminant wastes generated by that process. Acampora Aff., ¶¶ 11-12.

F. Deterioration of the Site Increases Risks to Public Health and the Environment

The condition of the buildings at the Site, already poor at the time Cohen signed the Consent Judgment, have gotten progressively worse. The facilities have not been repaired or maintained and have continued to deteriorate. The roofs have holes and leak, and walls are also breaking down. Rain and snow can therefore infiltrate, accelerating deterioration of the facility and equipment corrosion, and spread exposed pollutants. 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. Acampora Aff., ¶¶ 15-19, 27-29.

Defendants have failed to properly secure the Site, and the site security fencing has been breached, allowing access to trespassers, scavengers and vandals. Since entry of the Consent Judgment at least three fires have occurred on the grounds. One destroyed the main office building, one destroyed a residential building and the other heavily damaged the main manufacturing building. *Id.*, ¶ 16.

Defendants have hired a scrap metal dealer to remove machinery for sale as scrap. 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, and a large portion of the main building has been isolated until proper asbestos abatement has been performed. *Id.*, ¶ 18.

Given the ongoing deterioration and accessibility of the LAI Site, the longer the outstanding Remedial Action Items remain uncompleted, the greater the threat that those violations will result in pollution of surrounding areas, and exposure of the public to contaminants.

G. Defendants Refuse Either to Correct their Admitted Violations of the Consent Judgment, or Alternatively Allow DEC to Remediate those Violations

In 2013 EPA's project manager clarified to DEC that it would not be addressing the waste oils in the abandoned machine pits, derelict machinery and equipment operations as part of its Superfund cleanup. DEC therefore sought to determine whether Defendants would cooperate in completing their outstanding obligations under the Consent Judgment. *Id.*, ¶ 20.

In December, 2013 DEC arranged to meet with Cohen at the Site 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 petroleum spills on the site. Acampora informed Cohen that unless Defendants agreed to correct these violations of both the Consent Judgment and State environmental law by January 5, 2014, DEC would act under its Navigation Law authority and bring a DEC Contractor to clean up the spills and drain and dispose of the defunct transformers. Cohen was non-committal as to whether he would cooperate with this approach. *Id.*, ¶¶ 20-21.

Assistant Attorney General Gershon followed with a letter on December 26, 2013.[3] Gershon reminded Cohen of Defendants' outstanding obligations under the Consent Judgment, and that the State would take enforcement action if Defendants did not either complete the outstanding Remedial Action Items, or allow the State to do so in order to address the growing threat to public health and safety and the environment. Gershon Aff., ¶ 22.

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

DEC inspected the Site again on January 31, 2014, in order to obtain a comprehensive assessment of Site conditions before seeking court intervention, if necessary. Cohen did not interfere and accompanied the inspectors**.** The inspection confirmed not only that Defendants had done nothing to correct any ongoing Consent Judgment violations, but also 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. *Id.*, ¶¶ 25-33.

During the course of the January 31 inspection Cohen admitted to Acampora that there were open and ongoing violations of the Consent Judgment, and that he would consider allowing a DEC contractor to remedy those violation if DEC provided a specific list of the work to be done. In response AAG Gershon drafted a letter, which Acampora hand delivered on February 11, 2014 (the "Gershon Letter," Exhibit D to the Gershon Aff.). The Gershon Letter described in detail the work that either Defendants must do, or must allow a DEC contractor to do, to

[3] The letter asked Cohen to provide it to any attorney who might be representing Defendants, and to provide the attorney's contact information to the State. To date Cohen has identified no attorney who is representing Defendants. Gershon Aff., ¶ 23.

complete the Remedial Action Items required under the Consent Judgment. Absent performance of this work by Defendants, or allowing a DEC contractor to do the work, the State would seek to hold Defendants in contempt:

> 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.

Gershon Aff, Ex. D.

The Gershon 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. Defendants did not respond to the Gershon Letter by February 18, 2014, or since. Gershon Aff., ¶ 27.

ARGUMENT

I

THIS COURT SHOULD HOLD THE DEFENDANTS IN CIVIL CONTEMPT FOR FAILING TO IMPLEMENT PETROLEUM REMEDIATION REQUIREMENTS OF THE CONSENT JUDGMENT

A. Standards for Civil Contempt

Judiciary Law § 753, Civil Contempt, provides, in relevant part, that:

> A. A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in any of the following cases: . . .
>
> 3. A party to the action or special proceeding, an attorney, counsellor, or other person, . . . for any . . . disobedience to a lawful mandate of the court.

To obtain a finding of civil contempt, the movant must demonstrate: (1) "a lawful order of the court clearly expressing an unequivocal mandate was in effect"; (2) a "reasonable certainty that the order has been disobeyed"; and (3) "the party charged must have had knowledge of the Court's Order." *New York City Dep't of Envtl. Prot. v. Dep't of Envtl. Conserv.*, 70 N.Y.2d 233, 240 (1987).

Punishment for civil contempt is not punitive in nature; it seeks to compensate an injured party or to compel compliance with a court order, or both. *See Town Bd. of Town of*

Southampton v. R.K.B. Realty, LLC, 91 A.D.3d 628 (2d Dep't 2012); *New York City Dep't of Envtl. Prot. v. Dep't of Envtl. Conserv.*, 70 N.Y.2d at 239. Therefore, the moving party must also establish that its rights have been prejudiced. *New York City Dep't of Envtl. Prot. v. Dep't of Envtl. Conserv.*, 70 N.Y.2d at 239; *Town Bd. of Town of Southampton v. R.K.B. Realty*, LLC, 91 A.D.3d at 629. A finding of civil contempt does not require the disobedience to have been deliberate or willful; the movant need only show that its rights were impaired, impeded or prejudiced. *Doors v. Greenburg*, 151 A.D.2d 550, 551 (2d Dep't 1989).

Judiciary Law §§ 753, 773 and 774 collectively authorize a court to punish a defendant for civil contempt by fine and imprisonment. If the moving party has experienced actual loss or injury from the contemptuous misconduct, the fine must sufficiently indemnify the injured party. Judiciary Law § 773. Where the movant does not show actual loss or injury, the fine may include the costs and expenses incurred by the movant, plus an additional fine amount of up to $250. *Id.*

Section 774 defines the length of imprisonment authorized for the purpose of inducing defendant's compliance with his unperformed legal obligation. It states, in part:

> Where the misconduct proved consists of an omission to perform an act or duty, which is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it, and paid the fine imposed, but if he shall perform the act or duty required to be performed, he shall not be imprisoned for the fine imposed more than three months if the fine is less than five hundred dollars, or more than six months if the fine is five hundred dollars or more. In such case, the order, and the warrant of commitment, if one is issued, must specify the act or duty to be performed, and the sum to be paid.

Judiciary Law § 774.

B. <u>Defendants Should be Held in Civil Contempt of the Consent Judgment</u>

<u>Lawful Court Order Expressing Unequivocal Mandate</u>. There is no question that the

Consent Judgment is a lawful court order expressing an unequivocal mandate to implement the outstanding Remedial Action Items. Defendants, represented by counsel, negotiated and agreed to its terms. Cohen signed on behalf of both Defendants. Judge Emerson reviewed the Consent Judgment and approved it. The specific provisions in question, which required Defendants to complete the described Remedial Action Items within six months, are straightforward and direct.

Clear Disobedience of the Mandate. Defendants have clearly disobeyed the Consent Judgment's mandate to implement the outstanding Remedial Action Items. As described in more detail in the accompanying Acampora Aff. and above, Defendants have to date failed to empty and clean out numerous 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. Even if Defendants had done any of this work – which they have not – they never submitted the documentation evidencing proper and legal disposal of the wastes from the remediation, as required under Paragraph 6 of the Consent Judgment.

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. See p. 14 above.

Similarly, Defendants have provided no completed waste manifests evidencing that they have complied with Paragraph 7(D) by "clean[ing] out, and then clean[ing] the residue from, the secondary containment around the 275-gallon tank in the propane building, which contains oil and water, and lawfully dispose[ing] of the fluids that are removed."

Knowledge of the Court's Order. Nor can there be any question that Defendants have knowledge of the Consent Judgment. The order in question was entered on consent. Defendants, advised by counsel, negotiated and agreed to its terms, and Cohen signed it. Prior to

making this motion the State specifically reminded Cohen that Defendants have failed to comply with the outstanding Remedial Action Items, which he acknowledged, and further advised him that the State would be pursuing an order of contempt unless Defendants cured these failures.

By failing to complete the outstanding Remedial Action Items, Defendants have defeated, impaired, impeded and prejudiced the State's and DEC's rights and ability to protect the State's environment, as well as public health and safety, in accordance with legislative mandate.

Because the destruction of the environment and its benefits will nearly always result in irreparable injury, an injunction serves to remedy environmental harm where money damages would be futile. The United States Supreme Court has stated that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.* irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). Reflecting this principle, New York courts have consistently held that non-compliance with judicial orders prejudices agencies and municipalities charged with enforcing the applicable public welfare laws. *See, e.g., Inc. Vill. of Plandome Manor v. Ioannou*, 54 A.D.3d 364 (2dDep't 2008)(defendants' unpermitted construction violating previous temporary restraining order prejudiced the rights of the village); *Town of Copake v. 13 Lackawanna Props*., LLC, 73 A.D.3d 1308, 1310 (3d Dep't 2010)(non-compliance with a temporary retraining order prohibiting construction and the filling of wetlands "caused prejudice" to the town by "frustrating [the] plaintiff's ability to enforce its public health and safety laws").

Defendant's failure to comply with the outstanding Consent Judgment requirements is particularly egregious here. Not only are they almost seven years late in completing the outstanding Remedial Action Items, they have refused the State's offer to have a DEC contractor complete this work. Defendants have no excuse based on any purported inability to pay for the

remedial work.

The Defendants should therefore be held in civil contempt, and deemed in contempt until they purge their contempt by implementing all the Remedial Action Items, or allow DEC and a State contractor to complete this work as specified in the Gershon Letter.

This Court may exercise its discretion to determine conditions under which Defendants may purge their contempt. *Midlarsky v. D'Urso*, 133 A.D.2d 616, 617 (2d Dep't 1987); *Dep't of Hous. Pres. and Dev. of the City of New York v. Park Props. Dev. Assocs.*, 154 Misc. 2d 315, 318 (N.Y. Civ. Ct. 1992). The Court's contempt order should give Defendants 10 business days from service to either complete all outstanding remedial action items, or five business days from service to confirm in writing that DEC and any contractor it retains may perform the work, on a day or days of DEC's choosing. 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.

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

Finally, each Defendant should be fined $250 for civil contempt, and the State awarded costs and expenses incurred in making this motion.

II

THIS COURT SHOULD HOLD THE DEFENDANTS IN CRIMINAL CONTEMPT FOR FAILING TO IMPLEMENT PETROLEUM REMEDIATION REQUIREMENTS OF THE CONSENT JUDGMENT

A. Standards for Criminal Contempt

Judiciary Law § 750, Criminal Contempt, provides, in relevant part: "A court of record has power to punish for a criminal contempt, a person guilty of ... [3.] Willful disobedience to its lawful mandate [or]. . . [4.] Resistance willfully offered to its lawful mandate." *See also* New York City Civil Court Act § 210; *New York City Dep't of Envtl. Prot. v. Dep't of Envtl. Conserv.*, 70 N.Y.2d at 240.

As with civil contempt, the party moving for criminal contempt must demonstrate that: (1) "a lawful order of the court clearly expressing an unequivocal mandate was in effect;" (2) a "reasonable certainty that the order has been disobeyed;" and (3) "the party charged must have had knowledge of the Court's Order." *New York City Dep't of Envtl. Prot. v. Dep't of Envtl. Conserv.*, 70 N.Y.2d at 240. Criminal contempt is intended to punish disobedience to the court and the judicial process. Criminal contempt "involves an offense against judicial authority and is utilized to protect the integrity of the judicial process and to compel respect for its mandates." *Id*. at 239. Thus, no showing of injury or prejudice to a litigant is required in a criminal contempt proceeding, because respect for the integrity the court and its mandates, not the rights of the parties, is the injury to be redressed. *Id*. at 240. The movant need only demonstrate, in addition to the above listed three factors, that the contemnor willfully violated a court order. *Id*.; *Sheridan v. Kennedy*, 12 A.D.2d 332, 333 (1st Dep't 1961).

Criminal contempt is punishable by fine, not exceeding $1,000, or by imprisonment, not

exceeding 30 days, or both. Judiciary Law § 751(1).

B. An Order Of Criminal Contempt Should Be Entered Against Defendants

The Court should additionally hold Defendants in criminal contempt of the Consent Judgment. As demonstrated above, they have completely ignored and flouted their obligations to complete the outstanding Remedial Action Items – even when the State offered to do the work, thus negating any claim of inability to pay. The Court should therefore hold each Defendant in criminal contempt and fine each an appropriate amount of up to $1,000. The Court should order Cohen jailed for 30 days as punishment if he fails to purge the contempt in accordance with the terms described in the State's request for an order of civil contempt.

CONCLUSION

For the reasons set forth above and in the accompanying papers, this Court should grant the State's motion to hold the Defendants in civil and criminal contempt of this Court for refusing to complete the long overdue Remedial Action Items.

Dated: New York, New York
March 20, 2014

Respectfully submitted,

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