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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BOOTH OIL SITE ADMINISTRATIVE GROUP,

Plaintiff

-vs-

GEORGE T. BOOTH, JR., GEORGE T. BOOTH, III, LONSDALE SLATER SCHOFIELD, JOSEPH CHALHOUB, AHSEN YELKIN, BOOTH OIL COMPANY, INC., SCHOFIELD OIL LIMITED, 118958 CANADA LIMITED, SPEEDY OIL SERVICES, INC., BRESLUBE INDUSTRIES LIMITED, EC HOLDINGS CORP., KATHERINE ST. PROPERTIES, INC. now known as Eventures Ltd., SAFETY-KLEEN CORP.

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Case No. 98-CV-0696A(Sr)

I. PRELIMINARY STATEMENT

BOSAG submits this memorandum of law in support of its motion for summary judgment against defendant Booth Oil Company, Inc. (BOCI) (1) for contribution under section 113 of CERCLA, (2) for indemnification of cleanup and removal costs as well as direct and indirect damages under Article 12 of the New York Navigation Law in connection with releases of petroleum at the Booth Oil Robinson Street site, (3) for contribution under section 176(8) of the Navigation Law, (4) for an order declaring that the liability of BOCI to BOSAG for indemnification and contribution is not less than $1,475,000, (5) for an order that BOCI transfers of $450,000 to EC Holdings in late 1992 and early 1993 of $300,000 to Katherine Street Properties, Inc. on August 15, 1994, as well as the transfer of $275,000 to George T. Booth, III

on or about October 7, 1994, violated the terms of the Liquidating Plan of Reorganization confirmed by the United States Bankruptcy Court, (6) directing BOCI to comply with the terms of the Liquidating Plan of Reorganization by placing all BOCI assets in a Contingency Fund as required by the Plan, and in turn paying over those funds to BOSAG, consistent with the liability determination requested herein, and (7) for an order requiring BOCI to provide an accounting in order to allow the Court to determine the extent to which additional amounts were diverted from BOCI in violation of the Liquidating Plan, and any other relief which the Court deems just and proper.

II. FACTUAL BACKGROUND

Factual information supporting this motion is set forth in the Affirmation of R. William Stephens, Esq., the exhibits attached thereto, and the Local Rule 56 Statement of Undisputed Facts, each submitted herewith. These facts will not be repeated herein. References throughout this memorandum are to the Stephens Affidavit ("Stephens Aff.").

III. BOSAG IS ENTITLED TO CONTRIBUTION UNDER SECTION 113 OF CERCLA

Booth Oil Site Administrative Group ("BOSAG") is seeking summary judgment on the issue of Booth Oil Company Inc.'s (BOCI) liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Section 113(f)(1) of CERCLA authorizes a private cause of action whereby "[a]ny person may seek contribution from any other person who is liable or potentially liable under [CERCLA] § 107(a)." 42 U.S.C.S. § 9613(f)(1) (2004). A plaintiff establishes its *prima facie* case for contribution under § 113 by proving the five § 107(a) elements: i.e., (1) the defendant is within one of the four categories of responsible parties enumerated in § 107(a); (2) the site at issue is a "facility" as defined in CERCLA §

101(9); (3) there is a release or threatened release of hazardous substances at the facility; (4) the plaintiff incurred necessary costs responding to the release or threatened release; and (5) the costs and response actions conform to the National Contingency Plan ("NCP"). Bedford Affiliates v. Sills, 156 F.3d 416, 427 (2d Cir. 1998); B.F. Goodrich Co. v. Betkoski, 99 F.3d 505, 514 (2d Cir. 1996), *cert. denied*, Zollo Drum Co., Inc. v. B.F. Goodrich Co., 524 U.S. 926 (1998), *overruled on other grounds*, *see* State v. Nat'l Servs. Indus., Inc., 352 F.3d 682, 687 (2d Cir. 2003). If a plaintiff establishes each of the elements of a *prima facie* case and the defendant is unable to establish one of the defenses to liability listed in § 107(b), the plaintiff is entitled to summary judgment on the liability issue, even when genuine issues of material fact remain as to appropriate damages. United States v. Alcan Aluminum Corp., 990 F.2d 711, 720 (2d Cir. 1993). As demonstrated below, BOSAG can conclusively establish each of the elements of its *prima facie* case, and therefore BOCI must be held liable to BOSAG for contribution under CERCLA.

a. BOCI is a "Responsible Party" Within the Meaning of CERCLA

Section 107(a) of CERCLA assigns liability for costs associated with the cleanup of hazardous substances at a site to four classes of persons who are typically referred to as "responsible parties." *See, e.g.*, Bedford Affiliates, 156 F.3d at 427. Among the classes of responsible parties are "(1) the owner and operator of a vessel or a facility, [and] (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C.S. § 9607(a)(1)-(2) (2004). As shown below, BOCI is liable for contribution to BOSAG under § 107(a)(1) and (2) as the owner and operator of the Robinson Street facility.

It is beyond dispute that BOCI owns the facility located on Robinson Street. BOCI is the current owner of the Booth Oil Robinson Street Site and has owned the facility since its incorporation in approximately 1960. Stephens Aff., ¶ 12-14. BOCI's current ownership of the facility creates CERCLA liability as a matter of law. State v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985) (holding that "[s]ection 9607(a)(1) unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation").

BOCI is also liable under CERCLA § 9607(a)(2) due to the fact that it has operated the Site since shortly after its incorporation in 1960. Stephens Aff., ¶¶ 13, 15, 28. Under CERCLA, "an operator is simply someone who directs the workings of, manages, or conducts the affairs of the facility." United States v. Bestfoods, 524 U.S. 51, 66 (1998). The NYSDEC has concluded that the Site is "saturated with oil from 50+ years of oil spills and sloppy operating procedures" and not from any dumping or burial of wastes at the Site. Stephens Aff., ¶ 24. BOCI's "sloppy operating procedures" are the direct cause of the contamination at the Site and render BOCI liable under CERCLA § 9607(a)(2). Stephens Aff. ¶¶ 24, 28.

b. The Site is a "Facility"

The Site is a "facility" under CERCLA. The statute defines a "facility" as:

> any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or ... any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C.S. § 9601(9) (2004). The Robinson Street Site was utilized as a waste oil reprocessing facility at which numerous hazardous substances have been handled and stored. Stephens Aff.,

¶¶ 24, 25, 28. The Site fits well within CERCLA's broad definition.

c. Hazardous Substances Have Been Released at the Site

CERCLA defines the term "release" as:

> any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)...

42 U.S.C.S. § 9601(22) (2004). There have been releases of, among other substances, "arsenic, chromium, lead, mercury, nickle, zinc, PCBs, benzo(a)pyrene, perchloroethylene, trichloroethylene, and vinyl chloride." Stephens Aff., ¶ 25 (quoting the Affidavit of Dr. Kirk W. Brown (submitted herewith)). "The presence of hazardous substances in the soil, surface water, or groundwater of a site demonstrates a release." United States v. Hardage, 761 F. Supp. 1501, 1510 (W.D. Okl. 1990); *see also* Northwestern Mut. Life Ins. Co. v. Atl. Research Corp., 847 F. Supp. 389, 396 (E.D. Va. 1994) ("The fact that hazardous substances exist in the soil and groundwater ... indicates that these substances have been spilled, leaked, emitted, discharged, leached, etc., into the environment."); HRW Sys., Inc. v. Wash. Gas Light Co., 823 F. Supp. 318, 341 (D. Md. 1993) ("Given the breadth of the definitional language of CERCLA, it seems virtually impossible to conceive of a situation where hazardous substances are found in the soil and not *ipso facto* 'released' into the environment.").

d. BOSAG Has Incurred Necessary Costs Responding to the Release of Hazardous Substances at the Site

Releases or threatened releases of hazardous substances at the Site have caused BOSAG to incur "necessary response costs" as defined by CERCLA § 101(25), as the term response includes "actions as may be necessary to monitor, assess, and evaluate . . . prevent, minimize, or

mitigate damage..." caused by such releases. *See* 42 U.S.C.S. § 9601(25) (2004) (referencing § 9601(23)). Courts have concluded that a response cost is necessary if the cost responded to a threat to public health or the environment and the threat is not a theoretical one; the cost must be necessary to address the threat. Prisco v. State, 902 F. Supp. 374 (S.D.N.Y. 1995); Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 871 (9th Cir. 2001); Southfield Partners III v. Sears, Roebuck and Co., 57 F. Supp. 2d 1369, 1378 (N.D. Ga. 1999). Here, BOSAG incurred costs responding to hazardous substance spills at the Robinson Street facility. To date, BOSAG has completed construction of the remedy at a cost of $5,606,907.45. Stephens Aff. ¶ 34. The total cost of the remediation, including all future expenditures, is estimated to be $6,204,138.41. Stephens Aff. ¶ 34.

e. BOSAG's Response Costs at the Site Have Been Consistent with the NCP

CERCLA provides that any responsible person is liable for any necessary response costs that are incurred consistent with the NCP. 42 U.S.C.S. § 9607(a)(4)(B) (2004). BOSAG's actions at the Site have been at the direction and under the oversight of the NYSDEC. Stephens Aff. ¶ 5. BOSAG has implemented the remedy required under the Consent Order with the NYSDEC and the Amended Record of Decision. Stephens Aff. ¶ 5-6. BOSAG has established this element of its *prima facie* case. Bedford Affiliates v. Sills, 156 F.3d 416, 428-29 (2d Cir. 1998) (holding that significant state agency involvement can demonstrate compliance with the NCP).

IV. BOCI MUST INDEMNIFY BOSAG PURSUANT TO SECTION 181(5) OF NEW YORK NAVIGATION LAW

BOSAG is seeking summary judgment on the issue of BOCI's liability under the New

York Navigation Law otherwise known as the Oil Spill Act. Section 181(1) states, "[a]ny person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained, as defined in this section." N.Y. Nav. Law § 181(1) (Consol. 2004). Navigation Law section 172(8) defines a "discharge" of petroleum as:

> [A]ny intentional or unintentional action or omission 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.

N.Y. Nav. Law § 172(8) (Consol. 2004). Navigation Law section 181(5) provides for a private right of action against dischargers for indemnification:

> Any claim by any injured person for the costs of cleanup and removal and direct and indirect damages based on the strict liability imposed by this section may be brought directly against the person who has discharged the petroleum, provided, however, that damages recoverable by any injured person in such a direct claim based on the strict liability imposed by this section shall be limited to the damages authorized by this section.

N.Y. Nav. Law § 181(5) (Consol. 2004). Booth Oil Company is a discharger under section 181(1). Stephens Aff. ¶ 15, 16, 18, 19, 24, 25. As such, BOCI is liable to BOSAG for cleanup and removal costs and all direct and indirect damages pursuant to section 181(5).

a. <u>BOCI is Strictly Liable as the Owner / Operator of the Booth Oil Site</u>

Under section 181(1) of the Navigation Law, BOCI is strictly liable "as a person who discharged petroleum" based on its ownership and operation of the Booth Oil Site over a period of approximately fifty years, during which time numerous leaks and spills of oil and oil tank failures occurred. Stephens Aff., ¶¶ 24-25. The NYSDEC has

concluded that the Site is "saturated with oil from 50+ years of oil spills and sloppy operating procedures" and not from any dumping or burial of wastes at the Site. Stephens Aff., ¶ 24. BOCI has also admitted its liability for the contamination in its Liquidating Plan of Reorganization and its Amended Disclosure Statement. Stephens Aff. attached as Exhibit 4. Within the clear terms of the statute, an owner / operator, such as BOCI, who causes discharges of petroleum is a "person who has discharged petroleum" under section 181(1), to be held strictly liable to Plaintiff under section 181(5). Race Oil Corp. v. Eastman, 213 A.D.2d 915, 623 N.Y.S.2d 964, 965 (3d Dep't 1995) (It was uncontested that plaintiff, owner and operator of gas station where petroleum leaked from a damaged pump, was a discharger under Nav. Law section 181(1)).

The New York Court of Appeals has further held that even a "faultless" landowner is to be held strictly liable under section 181(5). State v. Green, 96 N.Y.2d 403, 405, 729 N.Y.S.2d 420, 422 (2001); White v. Long, 85 N.Y.2d 564, 569, 626 N.Y.S.2d 989, 991 (1995); *see also* White v. Regan, 171 A.D.2d 197, 199, 575 N.Y.S.2d 375, 376 (3d Dep't 1991) ("Even accepting the contention that all discharges of petroleum occurred prior to petitioners' ownership of their respective parcels of land and that petitioners were unaware of and did nothing to contribute to the contamination, it is nonetheless our view that petitioners are dischargers"). BOCI is clearly liable as the owner / operator of the Booth Oil Site under section 181(1) and 181(5)

b. BOSAG has Incurred Considerable Costs Responding to BOCI Contamination

BOSAG has expended significant sums responding to contamination resulting

from BOCI's mishandling of oil at the Booth Oil Robinson Street facility. See Simmons Aff. (attached herewith). To date, BOSAG has expended $5,606,907.45 in connection with its efforts at the Booth Oil Site. Stephens Aff. ¶ 34. The total of recoverable costs before interest and counsel fees is expected to reach $6,204,138.41 within three months and will continue to accrue as BOSAG performs operation, maintenance and monitoring. Stephens Aff. ¶ 34. These costs have been incurred under the oversight and with the approval of the NYSDEC, and are therefore in compliance with the National Contingency Plan. Stephens Aff., ¶ 5-6; Bedford Affiliates v. Sills, 156 F.3d 416, 428-29 (2d Cir. 1998).

c. None of the Members of BOSAG are "Responsible Dischargers"

Navigation Law section 181(5) claims may only be maintained by a person who is not responsible for the discharge. White v. Long, 85 N.Y.2d 564, 569, 626 N.Y.S.2d 989, 991 (1995); Hjerpe v. Globerman, 280 A.D.2d 646, 721 N.Y.S.2d 367 (N.Y. App. Div. 2d Dep't 2001). Oil discharges onto the Booth Site came about as the direct result of defendant's actions, including spilling oil on the ground and failing to properly contain such spillage. Stephens Aff., ¶¶ 24-25; see also affidavit of Dr. Kirk W. Brown at ¶¶ 11-13 (attached herewith). None of the members of BOSAG are responsible for the discharge under the Navigation Law.

In State v. Avery-Hall Corp., Defendant/Third-Party Plaintiff, the owner of land previously operated as a gas station, brought a third-party action against Third-Party Defendant Gulf Oil Corporation ("Gulf"). Gulf's predecessor in interest sold gas to the owners of the former gas station. 279 A.D.2d 199, 201-02, 719 N.Y.S.2d 735, 736-37

(3d Dep't 2001). The Third-Party Plaintiff sought recovery of the costs related to cleanup of the gas station site pursuant to Navigation Law section 181(5). Id. The Third Department affirmed an order granting Gulf's motion for summary judgment dismissing the third-party complaint, holding that Gulf was not a "discharger" and, therefore, could not be held strictly liable under section 181(5). The Court found that Gulf only contracted to sell and deliver gas to the former owners of the gas station, that it never owned, leased or operated the gas station, and that there was no evidence that the discharge occurred during any of the gas deliveries it arranged. Id. The Court concluded that "it cannot be said that the discharge at issue occurred during delivery or that Gulf was in a position to 'halt the discharge, to effect an immediate cleanup or to prevent the discharge in the first place.'" Id., 279 A.D.2d at 202, 719 N.Y.S.2d at 737 (citation omitted). The members of BOSAG, like Gulf, did not take any action which caused a discharge and were not in a position to "halt the discharge, to effect an immediate cleanup or to prevent the discharge in the first place." Id. BOCI's actions were the sole cause of the petroleum contamination at the Site. Stephens Aff. ¶ 28.

Similarly, in State v. Cronin, the court found that a supplier of gasoline to an automotive/gasoline service station which had at one time operated as a Sunoco station, was not a "discharger" which could be held strictly liable to plaintiff under Sec. 181(5). 186 Misc. 2d 809, 717 N.Y.S.2d 828 (Sup. Ct., Albany County 2000) The court stated:

> In the court's view, it would be unduly burdensome to extend liability for petroleum discharges to petroleum suppliers in the absence of some evidence that the supplier either caused or contributed to the discharge or that it possessed the ability to anticipate and/or prevent the discharge. The court finds that the mere delivery of gasoline to an underground storage tank, of itself -- absent other factors -- is not sufficient to render a gasoline

supplier a discharger.

Cronin, 186 Misc. 2d at 812-13, 717 N.Y.S.2d at 831. The members of BOSAG did not even deliver oil to the Site as BOCI's drivers picked the oil up from its customers. As a result, the members of BOSAG are not responsible for the discharge which occurred at the Site, and are therefore able to bring a claim under section 181(5) of the New York Navigation Law.

V. BOSAG IS ENTITLED TO CONTRIBUTION UNDER SECTION 176(8) OF THE NAVIGATION LAW

Although we believe that BOSAG is entitled to indemnification under section 181(1) and 181(5), an alternative basis of liability exists under section 176(8) of the Navigation Law which provides for a private right of action against a "responsible party". Volunteers of Am. v. Heinrich, 90 F. Supp. 2d 252, 259 (W.D.N.Y. 2000) (holding that a "plaintiff does have the right to seek contribution from any other responsible party for costs incurred in providing cleanup or removal of a discharge of petroleum pursuant to Navigation Law § 176(8)**"**). Section 176(8) states:

> Notwithstanding any other provision of law to the contrary, including but not limited to section 15-108 of the general obligations law, every person providing cleanup, removal of discharge of petroleum or relocation of persons pursuant to this section shall be entitled to contribution from any other responsible party.

N.Y. Nav. Law § 176(8) (Consol. 2004).

In order to maintain a claim under section 176(8), a plaintiff must demonstrate that the defendant is a "responsible party" with respect to the petroleum discharge and that the plaintiff incurred cleanup and removal costs responding to the discharge. New York Navigation Law § 176(8); Volunteers of Am. v. Heinrich, 90 F. Supp. 2d 252, 259

(W.D.N.Y. 2000); Niagara Mohawk Power Corp. v. Conrail, 291 F. Supp. 2d 105, 137 (N.D.N.Y. 2003).

BOCI is a "responsible party" within the purview of section 176(8). Though the Navigation Law does not explicitly define the term "responsible party," BOCI's ownership, operation, and control of the Site renders the company liable as a "discharger" under section 181(1). Stephens Aff. ¶¶ 12-15, 24-25. The NYSDEC has concluded that for over fifty years, sloppy BOCI procedures have led to the contamination of the soil and groundwater at the Site. Stephens Aff. ¶¶ 24-25. BOCI's operation of the Site renders the company "responsible" for the contamination at the Robinson Street facility. Therefore, the company is a "responsible party" for the purposes of section 176(8).

BOSAG has incurred cleanup and removal costs responding to the contamination caused by faulty BOCI operating procedures. To date, BOSAG has completed construction of the remedy at a cost of approximately $5,606,907.45. Stephens Aff. ¶ 34. The total cost of remediation is expected to reach more than $6,204,138.41. Stephens Aff. ¶ 34. As a result, BOCI is liable to BOSAG for contribution pursuant to section 176(8) of the Navigation Law.

VI. BOCI'S LIABILITY TO BOSAG UNDER THE NAVIGATION LAW AND CERCLA SIGNIFICANTLY EXCEEDS $1,475,000.00 [1]

a. Introduction

[1]This number represents BOCI's current assets of $450,000 plus the total of conveyances the Company initiated in violation of its Liquidating Plan totaling $1,025,000. See Stephens Aff. Exhibits 22, 27, 28, 29, 30, 32. These amounts will be discussed in greater detail in section VII.

BOCI, as a current and former owner and operator of the Booth Oil Robinson Street Site, is liable as a matter of law for contribution of its equitable share of the costs incurred by BOSAG for the remediation of the Site under section 113 of CERCLA. As the current owner and operator of the Site since its incorporation in approximately 1960 and as successor in interest to George T. Booth & Son, the copartnership, and George T. Booth Company, the sole proprietorship, BOCI's equitable share is the equitable share of the sole owner / operator since operations began in 1939. Stephens Aff. ¶¶ 12-15. No other party conducted any activities on the Site that resulted in the contamination of the Site. Stephens Aff. ¶ 24. Under these circumstances, the equitable share of BOCI for its status and activities at this Site is a large one. BOCI has refused to cooperate with DEC and has made no significant contribution to the remediation of the Site. Stephens Aff. ¶ 31.

While BOSAG negotiated the terms of a consent order and an Amended Record of Decision (AROD), BOCI claimed that it was unable to contribute to the cleanup efforts because of its poor financial condition and its bankruptcy. Stephens Aff. ¶¶ 32, 50. At the same time, BOCI was earning significant profits which were required by its Liquidating Plan of Reorganization to be placed in a contingency fund for future liabilities. Stephens Aff. ¶¶ 46-50. The most significant of those liabilities was the liability associated with the costs of remediating the Site of its former operations on Robinson Street.

These circumstances support an allocation of a very significant equitable share of Site costs.

b. A Partial Determination of Damages is Appropriate

Pursuant to Rule 56(d) of the Federal Rules of Civil Procedure, the Court has the power to grant partial judgments on issues not in controversy without disposing of the case in its entirety. Rule 56(d) states:

> If on motion under this rule judgment is not rendered upon the whole case or for all therelief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just.

Fed. R. Civ. P. 56(d). The Rule encourages the court to make partial determinations concerning damages. *See also* United States v. Tyson, 1989 U.S. Dist. LEXIS 15761 (E.D. Pa. 1989) (granting summary judgment against an owner / operator and holding it liable for 50 percent of the remediation costs).

Similarly, in litigation involving CERCLA contribution claims, courts have wide discretion to determine the chronological order in which issues such as liability and apportionment of damages will be decided. In Acushnet Co. v. Mohasco Corp., the First Circuit stated,

> [d]istrict courts have considerable latitude to deal with issues of liability and apportionment in the order they see fit to bring the proceedings to a just and speedy conclusion. [Citation omitted]. CERCLA does not demand a bifurcated trial on this score, nor have we insisted that the many knotty issues that arise in the typical CERCLA action be resolved in any particular chronological order.

191 F.3d 69, 82 (1st Cir. 1999). *See also* United States v. Alcan Aluminum Corp., 990 F.2d 711, 723 (2d Cir. 1993) (holding that "the choice as to when to address divisibility

and apportionment are questions best left to the sound discretion of the trial court in the handling of an individual case"). It is well within this Court's discretion to make a partial finding on damages.

In the present litigation, no reasonable factfinder could conclude that BOCI is liable to BOSAG for less than $1,475,000.00. BOCI is liable to BOSAG for contribution pursuant to section 113 of CERCLA. BOCI is a "discharger" under section 181(1) of New York Navigation Law. A "discharger" is strictly liable for indemnification under section 181(5) and contribution under section 176(8). BOCI's faulty operation of the facility is the sole cause of environmental contamination at the Robinson Street Site. Stephens Aff. ¶¶ 24-25.

BOSAG has already incurred cleanup costs responding to contamination at the Site totaling $5,606,907.45. Stephens Aff. ¶ 34**.** The total cost of remediation, including estimated future expenses, will reach more than $6,204,138.41. Stephens Aff. ¶ 34. These costs have been incurred at the direction and under the oversight of the NYSDEC and, therefore, are presumed to be consistent with the NCP. Stephens Aff. ¶ 5-7.

Under CERCLA, the Court's discretion to allocate liability among responsible parties at hazardous waste sites is extremely broad. Section 113 of CERCLA states, "the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C.S. § 9613(f)(1) (2004). This language "affords a district court broad discretion to balance the equities in the interests of justice." Bedford Affiliates v. Sills, 156 F.3d 416, 429 (2d Cir. 1998). Many courts have considered a list of six potentially-relevant equitable considerations known as the "Gore

factors." *See* Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 354 (6th Cir. 1998); United States v. Colo. E. R.R., 50 F.3d 1530, 1536 n.5 (10th Cir. 1995). Three of these factors are relevant to the case at bar: (1) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (2) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (3) the degree of cooperation by the parties with the Federal, State or local officials to prevent any harm to the public health or the environment.

The members of BOSAG are liable under CERCLA because they delivered contaminated oil to the Robinson Street facility for reprocessing. None of the Plaintiffs engaged in any actions that resulted in the release of hazardous waste into the environment. There are no allegations against the members of BOSAG for improperly handling the waste material. CERCLA imposes strict liability without regard to causation. Bedford Affiliates v. Sills, 156 F.3d 416, 425 (2d Cir. 1998). In Rumpke of Indiana, Inc. v. Cummins Engine Co., the Seventh Circuit held that a contribution claim under section "113(f) exists for the express purpose of allocating fault among PRPs." 107 F.3d 1235, 1240 (7th Cir. 1997). The NYSDEC found that "the contamination present at the Booth Oil Site is directly attributable to the operations and maintenance of the site." Stephens Aff. ¶ 25. BOSAG exerted no control over the operation of the facility. As a result, BOSAG is comparatively faultless. Despite this lack of fault, the Group has paid for the majority of the remediation. Simmons Aff. (submitted herewith). BOSAG has also worked closely and in good faith with the NYSDEC to clean up the hazardous

material. Stephens Aff. ¶¶ 5-7. BOCI, on the other hand, has refused to participate in all remediation activities. Stephens Aff. ¶ 31. These factors support the finding that BOCI is liable for not less than $1,475,000.00, less than one quarter of the total estimated cost of remediation.

Several courts have held an owner / operator liable for over 50 percent of the cost of remediation. Amoco Oil Co. v. Dingwell, 690 F. Supp. 78 (D. Me. 1998) (holding that the defendant's "comparative lack of care with respect to the hazardous waste, and [defendant's] comparative lack of cooperation with governmental agencies to prevent harm to the public health or the environment," supports a 65 percent liability share); Am. Cyanamid Co. v. Nascolite Corp., 1995 U.S. Dist. LEXIS 22159 (D.N.J. 1995) (holding the owner / operator of a scrap acrylic reclamation facility liable for 85 percent of the remediation costs); United States v. Tyson, 1989 U.S. Dist. LEXIS 15761 (E.D. Pa. 1989) (granting summary judgment against an owner / operator and holding it liable for 50 percent of the remediation costs). Like the defendants in Amoco, Nascolite and Tyson, BOCI's faulty operation directly caused the release of hazardous material into the environment. Holding BOCI liable for less than 50 percent of the remediation costs would violate the principles of equity and justice. With the aforementioned equitable factors in mind, no reasonable factfinder could conclude that BOCI is liable for less than $1,475,000, or less than one quarter of the total estimated cost of remediation.

VII. BOCI SHOULD PLACE ITS CURRENT ASSETS TOTALING $450,000 IN THE CONTINGENCY FUND FOR THE BENEFIT OF ITS ENVIRONMENTAL CREDITORS

BOCI's Disclosure Statement and Liquidating Plan of Reorganization describe

how the assets of Booth Oil Company, Inc. were to be liquidated. See Stephens Aff. (Exhibit 4). The majority of the operating assets were to be purchased by Speedy Oil Services, Inc. for $1,000,000 ($200,000 cash and an $800,000 note to be held by the SBA) and any surplus was to be preserved for the benefit of the environmental creditors. Stephens Aff. ¶¶ 46-49. Section 3.3 of the Plan provides:

> Class 3 claims are environmental-related claims. These will be impaired.
>
> > A reserve must be established for expenses to be incurred by Booth during the consummation of the Plan and the final dissolution of the Company. Expenditures will be required for an orderly transfer of the Company's business and Operating Assets to Speedy and dissolution of the Company. There are other matters such as proceedings under the federal "Superfund" law and other environmental issues, disputes over fees, property taxes, and questions relating to pension plan contributions. These will require that a contingency be set up in an amount to allow for settlement of these matters and legal representation, if necessary. These matters are discussed in the Disclosure Statement.

Amended Disclosure Statement and Liquidating Plan of Reorganization at 28-29 (attached as Exhibit 4 to the Stephens Affidavit). Article II(B) of the Plan provides:

> Cash/Accounts Receivable: Booth will collect in the normal course of business and apply the funds collected to liabilities such as administrative expenses, post-petition accounts payable, taxes, payroll, etc. Surplus, if any, will be maintained as a contingency for certain other liabilities which will be explained in the Disclosure Statement.

Amended Disclosure Statement and Liquidating Plan of Reorganization at 25 (attached as Exhibit 4 to the Stephens Affidavit). The equity shares of BOCI were to be cancelled and the corporation was to be dissolved. Amended Disclosure Statement and Liquidating Plan of Reorganization at 31 (attached as Exhibit 4 to the Stephens Affidavit) (providing "Section 3.10. Class 10: Holders of Equity Interests The holders of issued and outstanding equity shares of Booth will receive no distribution under the Plan. The

equity shares of Booth will be cancelled under the Plan and the Company dissolved").

a. Confirmation of the Liquidating Plan

On December 29, 1989 Booth Oil Company, Inc.'s Liquidating Plan of Reorganization was confirmed by the bankruptcy court. Stephens Aff. ¶ 45. Section 1141 of the Bankruptcy Code articulates the effect of the confirmation of a Chapter 11 Reorganization Plan. Subsection (a) lists those bound by the confirmed plan as (1) the debtor, (2) any entity issuing securities under the plan, (3) any creditor, (4) any equity security holder or general partner in the debtor. 11 U.S.C.A. § 1141(a) (West 1993). This is true "whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan." Id. Subsection (b) states: "Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." 11 U.S.C.A. § 1141(b) (West 1993). Subsection (c) provides that "[e]xcept as provided in [subsection] . . . (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor." 11 U.S.C.A. § 1141(c)(2004).

Section (d)(3) relates to liquidating plans. It provides that, "confirmation of a plan does not discharge a debtor if (A) the plan provides for the liquidation of all or substantially all of the property of the estate; (B) the debtor does not engage in business after consummation of the plan; and (C) the debtor would be denied a discharge under

Section 727(a) of this title if the case were a case under Chapter 7 of this title." 11 U.S.C.A. § 1141(d)(2)(West 1993). Section 727 relates to the discharge afforded a debtor under Chapter Seven of the Code and to the circumstances that prevent a discharge. The first circumstance listed is "the debtor is not an individual." 11 U.S.C.A. § 727(a)(1) (West 1993).

The conditions of section (d)(3) are satisfied and Booth Oil Company, Inc. is not entitled to a discharge pursuant to the terms of the Liquidating Plan of Reorganization: (1) The plan provides for the liquidation of all or substantially all of the property of the estate (11 U.S.C.A. § 1141(d)(3)(a) (West 1993)); (2) the plan does not contemplate the debtor engaging in business after consummation of the plan (11 U.S.C.A. § 1141(d)(3)(B)(West 1993)); and (3) the debtor would be denied a discharge under section 727 because it is a corporation not an individual. 11 U.S.C.A. § 1141(d)(3)(C)(West 1993). A corporation operating under a liquidating plan of reorganization does not receive a discharge. In re Mcorp Fin., Inc., 137 B.R. 219, appeal dismissed on other grounds, 139 B.R. 820 (Bankr. S.D. Tex. 1992). Booth Oil Company, Inc. was not free to make a profit which would then be paid to the shareholders. The plan specifically prohibited a distribution to the shareholders. Any profit or surplus was required to be preserved for the benefit of the environmental creditors. The shares of the corporation were to be canceled and the corporation dissolved. The shareholders were not free to make loans of Booth Oil Company, Inc. funds to entities they controlled and to donate valuable assets of Booth Oil Company, Inc. to an entity by whom they were employed. They were required to preserve any profit or surplus of any kind for the environmental

creditors. Stephens Aff. ¶¶ 46-48.

b. Bankruptcy Final Decree

On May 21, 1993, a Final Decree was entered closing the Chapter 11 case of Booth Oil Co., Inc. Final Decree and Status Report (attached as Exhibit 26 to the Stephen Aff.). Attached to the Decree was the Status Report and Account of Booth Oil Co., Inc. Id. The status report was signed by George T. Booth, III as President of Booth Oil Company, Inc. Id. Attached to the status report were certain explanations. One is an explanation of Item III, C. It states, "[t]here is one class of equity holders. They have received nothing under the plan as stockholders." Id. Item VII provides the following explanation related to Speedy's purchase of the assets:

> As noted, the Plan called for the Operating Assets, as defined in the plan, to be purchased by Speedy for $1,000,000. Speedy conditioned the purchase upon the satisfaction of several conditions set forth in pages 9 and 10 of the Disclosure Statement. All of these conditions have been satisfied, except for approval by the New York State Department of Environmental Conservation of a transfer of Part 373 Permit of Booth to Speedy. Notwithstanding the foregoing condition, on October 28, 1992, Speedy purchased the Operating Assets for the consideration described in the Plan. As described in the Amended Disclosure Statement, significant capital expenditures were made and paid for by Speedy necessary to satisfy New York State Department of Environmental Conservation mandates (Speedy Improvements). If the Speedy Improvements were not made, Booth would not have been permitted to operate. Booth was obligated to make payments to Speedy for use of the Speedy Improvements prior to October, 1992. After October, 1992, Booth may continue in operation until regulatory approval of the permit transfer, a date for which has not been established by the regulatory bodies. Pending approval of the permit transfer, Booth will be required to make payments to Speedy for the lease of the Katherine Street premises. Upon permit transfer and payment of the pension liabilities described in Item VI, a Final Report will be submitted and a motion for final decree closing the case will be made by Booth.

Id. Speedy was unable to obtain the permit but was willing to take the operating assets

for the agreed upon consideration, Booth Oil Company, Inc. continued to operate with its only remaining asset, its permit. Stephens Aff. ¶¶ 49-50. The permit was not transferred to Speedy, but was instead transferred to Safety Kleen Corp. on June 30, 1996 with no consideration to Booth Oil Company, Inc. Booth Oil Company, Inc. was under no obligation pursuant to the Liquidating Plan to transfer the permit to Safety Kleen Corp.

c. Improper Loans

During the period between the confirmation of the liquidating plan and the Final Decree, Booth Oil Company, Inc. transferred to EC Holdings $450,000, to Katherine Street Properties, Inc. (now known as Eventures, Ltd.) $300,000 and to George T. Booth, III $275,000. See Stephens Aff. ¶¶ 51-52, 55. At this time, Booth Oil Company, Inc. remained insolvent. These transfers were made outside the ordinary course of business without notice to the bankruptcy court, to the U.S. Trustee or to the environmental creditors. The transfers were made from profits Booth Oil Company, Inc. was able to earn because Speedy Oil Services, Inc. was unable to obtain the right to operate the Katherine St. facility. Stephens Aff. ¶¶ 50-52. As a result, Booth Oil Company, Inc. retained a valuable asset, a circumstance not contemplated by the Liquidating Plan of Reorganization. If Booth Oil Company, Inc. had filed a traditional plan of reorganization instead of a liquidating plan of reorganization, it might have received a discharge under section 1141 of the Bankruptcy Code. Since it filed a liquidating plan of reorganization, its profits were not its own. Those profits were required to be preserved for the benefit of the environmental creditors under the terms of the liquidating plan of reorganization.

An analogy can be drawn to the Chapter 13 individual creditor who obtains a

large personal injury settlement. After a minimal exempt amount, such a debtor is typically required to pay all of his creditors before he is free to enjoy the remaining settlement proceeds. The corporation acts in effect as a liquidating trustee, the plan determines how the assets of the corporation are to be liquidated, the liquidation is completed, and the company is dissolved. There is no need for a discharge. If a company is expected to operate after consummation of the plan, a discharge is necessary. That situation is the subject of a traditional reorganization plan, not a liquidating plan of reorganization.

d. The Contingency Fund

BOCI currently has $450,000 in assets. Stephens Aff. ¶ 42. Pursuant to the Liquidating Plan, this money should be placed in the Contingency Fund for the benefit of the Company's environmental creditors. Stephens Aff. ¶¶ 46-48. BOSAG has paid $5,606,907.45 remediating the Site. Stephens Aff.¶ 34. BOCI has not participated in the cleanup and has not contributed in any way to the costs incurred during the remediation. Stephens Aff. ¶ 31-32. Considering BOCI's liability under CERCLA and New York Navigation Law, as well as the amounts the Company transferred in violation of its Liquidating Plan, BOCI should be required to place its $450,000 in assets into the Contingency Fund. This money should then be paid to BOSAG consistent with the terms of the Liquidating Plan of Reorganization and the liability and damage determinations requested in this motion.

VIII. JUDICIAL ACCOUNTING

An action for a judicial accounting is based on the following four conditions:

> (1) relations of a mutual and confidential nature; (2) money or property entrusted to the defendant imposing upon him a burden of accounting; (3) that there is no adequate legal remedy; and (4) in some cases, a demand for an accounting and a refusal.

Pressman v. Estate of Steinvorth, 860 F. Supp. 171, 179 (S.D.N.Y. 1994). "In order to establish a right to an accounting, which is an action in equity, plaintiff must demonstrate the existence of a fiduciary relationship between himself and defendant, or the existence of a joint venture or other special circumstances warranting equitable relief." Rodgers v. Roulette Records, Inc., 677 F. Supp 731, 738 (S.D.N.Y. 1988). In In re Fugazy Express, the court held that "[u]nder New York law, an accounting may be available where special circumstances warrant equitable relief in the interests of justice" and "that [a]n accounting may be available once the under lying right has been established." In re Fugazy Express, 124 B.R. 426, 431 (S.D.N.Y. 1991), *appeal dismissed*, 982 F.2d 769 (2d Cir. 1992). The Fugazy case involved a debtor-in-possession who transferred its rights under an FCC license to his son after filing a chapter 11 bankruptcy petition. The court held:

> In this case, it is established that the License is property of the Debtor's estate, the serious nature of the misconduct is evident, and the ineffectiveness of a legal remedy is clear. It is therefore appropriate to order an accounting.

Id.

Directors and officers of an insolvent corporation are fiduciaries with respect to the corporation's creditors. *See* In re Hayes, 183 F.3d 162 (2d Cir. 1999) (collecting cases); Clarkson Co. Ltd. v. Shaheen, 660 F.2d 506 (2d Cir. 1981); In re Frankel, 77 B.R. 401, 404 (Bankr. W.D.N.Y. 1987). BOCI had a duty to preserve the assets of the

Corporation for its creditors. Clarkson, 660 F.2d at 512. According to BOCI's Liquidating Plan of Reorganization, all surplus was to be placed in a Contingency Fund for the purpose of settling the company's liability to its environmental creditors. Amended Disclosure Statement and Liquidating Plan of Reorganization at 25, 28-29 (attached as Exhibit 4 to the Stephens Affidavit). In violation of the Liquidating Plan, BOCI made several transfers which, directly or indirectly, compensated the company's equity shareholders. Stephens Aff. ¶¶ 51-52; *see also* Amended Disclosure Statement and Liquidating Plan of Reorganization at 25 (attached as Exhibit 2 to the Stephens Affidavit). In order to definitively determine the amount of money diverted from the Contingency Fund in violation of the Liquidating Plan, the Court should order an accounting.

IX. CONCLUSION

WHEREFORE, this court should grant plaintiff's motion for summary judgment against defendant Booth Oil Company, Inc. (BOCI) (1) for contribution under section 113 of CERCLA, (2) for indemnification of cleanup and removal costs as well as direct and indirect damages under Article 12 of the New York Navigation Law in connection with releases of petroleum at the Booth Oil Robinson Street site, (3) for contribution under section 176(8) of the Navigation Law, (4) for an order declaring that the liability of BOCI to BOSAG under CERCLA and the Navigation Law is not less than $1,475,000, (5) holding that BOCI transfers totaling $450,000 to EC Holdings between 1991 and 1993, $300,000 to Katherine Street Properties, Inc. in 1994 as well as the payment to George T. Booth III, in the amount of $275,000 on or after October 7, 1994, violated the

terms of the Liquidating Plan, (6) directing BOCI to comply with the terms of the Liquidating Plan of Reorganization by placing all BOCI assets in a Contingency Fund as required by the Plan and in turn paying over those funds to BOSAG consistent with the liability determination requested herein and (7) for an order requiring BOCI to provide an accounting in order to allow the Court to determine the extent to which additional amounts were diverted from BOCI in violation of the Liquidating Plan and any other relief the Court deems just and proper.

Dated: July, 30, 2004
Buffalo, New York

s/_____
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