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New Jersey Department of Environmental Protection

DEC 30 2004

By: Lauren Caruso Garofalo
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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - OCEAN COUNTY
DOCKET NO. L-3027-04

TR5 ASSOCIATES, LLC,

Plaintiffs,

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION FARMERS MUTUAL OF SALEM INSURANCE COMPANY; HARLEYSVILLE MUTUAL INSURANCE COMPANY; DANIEL HELLER; SALLY HELLER; NAFTALI HELLER; GRETA HELLER; JOHN DOES 1 THROUGH 25; ABC CORPORATION; XYZ CORPORATION; DEF INSURANCE COMPANY; XYZ INSURANCE COMPANY; JOHN DOES 25 THROUGH 50; and Z-2 DRY CLEANERS,

Defendants.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE ADMINISTRATOR OF THE NEW JERSEY SPILL COMPENSATION FUND,

Third-Party Plaintiffs,

v.

ELITE CLEANERS; ESTATE OF ANDREW SPOTO; IRWIN DAYON;

Civil Action

ANSWER, COUNTERCLAIM,
CROSS CLAIM
THIRD-PARTY COMPLAINT, AND
SEPARATE DEFENSES

STEVEN DAYON;
DAVID A. KAPLAN; :
NAT MATUT; :
FRANCINE LYNN SHAMASH; and :
TR5 ASSOCIATES, (A NEW JERSEY :
PARTNERSHIP); :

Third-Party Defendants. :

Defendant, New Jersey Department of Environmental Protection ("DEP"), and the Administrator of the New Jersey Spill Compensation Fund ("Administrator") (collectively, "the Defendant DEP"), having its principal offices at 401 East State Street in the City of Trenton, County of Mercer, State of New Jersey, by way of Answer to the Complaint hereby states:

FIRST COUNT

1. The Defendant DEP makes no answer to the First Count since no relief is sought therein against the Defendant DEP.

SECOND COUNT

2. Paragraph 1 of Defendant DEP's Answer is incorporated herein as if set forth in its entirety.

3. The Defendant DEP makes no answer to the Second Count since no relief is sought therein against the Defendant DEP.

THIRD COUNT

4. Paragraphs 1 through 3 of Defendant DEP's Answer are incorporated herein as if set forth in their entirety.

5. The Defendant DEP makes no answer to the Third Count since no relief is sought therein against the Defendant DEP.

FOURTH COUNT

6. Paragraphs 1 through 5 of Defendant DEP's Answer are incorporated herein as if set forth in their entirety.

7. The Defendant DEP makes no answer to the Fourth Count since no relief is sought therein against the Defendant DEP.

FIFTH COUNT

8. Paragraphs 1 through 8 of Defendant DEP's Answer are incorporated herein as if set forth in their entirety.

9. The Defendant DEP makes no answer to the Fifth Count since no relief is sought therein against the Defendant DEP.

SIXTH COUNT

10. Paragraphs 1 through 9 of Defendant DEP's Answer are incorporated herein as if set forth in their entirety.

11. The Defendant DEP makes no answer to the Sixth Count since no relief is sought therein against the Defendant DEP.

SEVENTH COUNT

12. Paragraphs 1 through 11 of Defendant DEP's Answer are incorporated herein as if set forth in their entirety.

13. DEP admits the allegations of paragraph no. 56 of the Complaint.

14. DEP admits the allegations of paragraph no. 57 of the Complaint.

15. DEP admits the allegations of paragraph no. 58 of the Complaint, but clarifies that the remediation may not currently be

concluded or in compliance with DEP's rules and regulations, based on the status of this lawsuit.

16. DEP admits the allegations of paragraph no. 59 of the Complaint.

17. DEP denies the allegations in paragraph no. 60 of the Complaint.

SEPARATE DEFENSES

FIRST DEFENSE

Plaintiff's cause of action as against Defendant DEP, fails to state a claim upon which relief can be granted against Defendant DEP.

SECOND DEFENSE

Plaintiff's claims are barred as against Defendant DEP, in whole or in part, by the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq.

THIRD DEFENSE

Any recovery to which Plaintiff may be entitled as against Defendant DEP is subject to the limitations and reductions set forth in N.J.S.A. 59:9-2.

FOURTH DEFENSE

Damages, if any, sustained by Plaintiff were the result of the actions of persons and/or entities both public and private over whom Defendant DEP had no control.

FIFTH DEFENSE

Defendant DEP acted at all times relevant hereto with good faith and without any fraud or malice.

SIXTH DEFENSE

Plaintiff's claims are barred as against Defendant DEP as a matter of public policy.

PRAYER FOR RELIEF

WHEREFORE, DEP and Administrator pray that this Court:

- a. Dismiss Plaintiff's Complaint, as against Defendant DEP, with prejudice;
- b. Award Defendant DEP its attorney's fees together with interest and costs incurred in the defense of this action; and
- c. Award Defendant DEP such other relief as this Court deems appropriate.

COUNTERCLAIM, CROSS CLAIM AND THIRD-PARTY COMPLAINT

Defendant/Third-Party Plaintiff DEP ("DEP"), by way of Counterclaim against Plaintiff, TR5 Associates, LLC and by way of Cross Claim against Defendants, Daniel Heller, Sally Heller, Naftali Heller, Greta Heller, John Does 1 through 25, ABC Corporation, XYZ Corporation, John Does 25 through 50 and Z-2 Dry Cleaners, and by way of a third-party complaint against Elite Cleaners, the Estate of Andrew Spoto, TR5 Associates (A New Jersey Partnership), David A. Kaplan, Nat Matut, Steven Dayon, Irwin Dayon, and Francine Lynn Dayon says:

Compensation and Control Act, N.J.S.A. 58:10-23.11 to -23.24 ("the Spill Act"), and the common law, for reimbursement of the cleanup and removal costs it has incurred, and will incur, as a result of the discharge of hazardous substances at the Breton Harbors Ground Water Contamination ("Breton Harbor") site in Dover Township, Ocean County. The costs and damages the DEP seeks include the damages it has incurred, and will incur, for any natural resource of this State that has been, or may be, injured as a result of the discharge of hazardous substances at the Breton Harbor site, and to compel the Plaintiff, Defendants and Third-Party Defendants to perform, under DEP's oversight, or to fund DEP's performance of, any further assessment and restoration of any natural resource that has been, or may be, injured as a result of the discharge of hazardous substances at the Breton Harbor site.

THE PARTIES

2. DEP is a principal department within the Executive Branch of the State government vested with the authority to conserve natural resources, protect the environment, prevent pollution, and protect the public health and safety. N.J.S.A. 13:1D-9.

3. In addition, with the State being the trustee, for the benefit of its citizens, of all natural resources within its jurisdiction, DEP is vested with the authority to protect this public trust. N.J.S.A. 58:10-23.11a.

4. Third-Party Plaintiff Administrator is the chief

executive officer of the New Jersey Spill Compensation Fund ("the Spill Fund"). N.J.S.A. 58:10-23.11j. As chief executive officer of the Spill Fund, plaintiff Administrator is authorized to approve and pay cleanup and removal costs DEP incurs, N.J.S.A. 58:10-23.11f.c. and d., and to certify the amount of any claim to be paid from the Spill Fund, N.J.S.A. 58:10-23.11j.d.

5. Plaintiff TR5 Associates, LLC, is a Limited Liability Corporation, organized under the laws of the State New Jersey, with a principal place of business located at 1502 Route 37 East, Toms River, New Jersey.

6. Defendant Daniel Heller, is an individual whose dwelling or usual place of abode is 2302 Logan Court, Toms River, New Jersey.

7. Defendant Sally Heller, is an individual whose dwelling or usual place of abode is 2302 Logan Court, Toms River, New Jersey.

8. Defendant Naftali Heller, is an individual whose dwelling or usual place of abode is 2107 Beaudet Place, San Laurent, Quebec, Canada.

9. Defendant Greta Heller is an individual whose dwelling or usual place of abode is 2107 Beaudet Place, San Laurent, Quebec, Canada.

10. Defendant Elite Cleaners, upon information and belief, was a dry cleaning business that operated at 1512 Route 37 E, Toms

River, New Jersey.

11. Defendant, the Estate of Andrew Spoto, is the the Estate of Andrew Spoto, who, upon information and belief, operated the Defendant Elite Cleaners. Andrew Spoto died intestate and his wife, Rosemary A. Spoto was the Administrator of her husband's estate, whose dwelling or usual place of abode is 768 Jeffery Street, Boca Raton, Florida.

12. Defendants "John Does 1-50", these names being fictitious, are individuals whose identities cannot be ascertained as of the filing of this Complaint, certain of whom are in some manner responsible for the occurrences and claims in this Complaint, and are liable for damages claimed in this action.

13. Defendants "ABC Corporation" and "XYZ Corporation", these names being fictitious, are entities whose identities cannot be ascertained as of the filing of this Complaint, certain of which are the corporate successors to, or are otherwise related to, one or more of the Breton Harbor Defendants or Third-Party defendants and in some manner are responsible for the occurrences and claims in this Complaint.

14. Third-Party Defendant, TR5 Associates, A New Jersey Partnership, was a partnership organized under the laws of the State New Jersey, with a principal place of business located at 1502 Route 37 East, Toms River, New Jersey.

15. Third-Party Defendant David A. Kaplan, is an individual

whose dwelling or usual place of abode is 406 Deal Road, Albury Park, New Jersey.

16. Third-Party Defendant Nat Matut, is an individual whose dwelling or usual place of abode is 448 Holly Terrace, Deal, New Jersey.

17. Third-Party Defendant Steven Dayon, is an individual whose dwelling or usual place of abode is 18 Saxony Drive, Oakhurst, New Jersey.

18. Third-Party Defendant Irwin Dayon, is an individual whose dwelling or usual place of abode is 11 Saxony Drive, Oakhurst, New Jersey.

19. Third-Party Defendant Francine Lynn Shamash, is an individual whose dwelling or usual place of abode is 5 Harvard Court, Oakhurst, New Jersey.

AFFECTED NATURAL RESOURCES

Ground Water

20. Ground water is an extremely important natural resource for the people of New Jersey, supplying more than 900 million gallons of water per day, which provides more than half of New Jersey's population with drinking water.

21. Not only does ground water serve as a source of potable water, it also serves as an integral part of the State's ecosystem.

22. Ground water provides base flow to streams, and influences surface water quality and wetland ecology and the health

of the aquatic ecosystem.

23. Ground water also provides cycling and nutrient movement, prevents salt water intrusion, provides ground stabilization, prevents sinkholes, and provides maintenance of critical water levels in freshwater wetlands.

24. Ground water and the other natural resources of the State are unique resources that support the State's tourism industry, which helps sustain the State's economy.

25. There are more than 6,000 contaminated sites in New Jersey that have confirmed groundwater contamination with hazardous substances.

GENERAL ALLEGATIONS

26. The Breton Harbors site consists of less than 1 acre of real property located at 1502 Highway 37 East, Dover Township, Ocean County, New Jersey, this property being also known and designated as Block 1085.02, Lot 5, on the Tax Map of Dover Township ("the Breton Harbor Property"), and all other areas where any hazardous substance discharged there has become located (collectively, "the Site"), which DEP has designated as Site Remediation Program Interest No. G000008870.

27. From 1966 through 1984, Defendants Daniel Heller, Sally Heller, Naftali Heller and Greta Heller ("Heller Defendants") owned the Breton Harbor Property.

28. In February 28, 1984 the Heller Defendants sold the

Breton Harbor Property to David A. Kaplan, Nat Matut, Steven Dayon, Irwin Dayon and Francine Lynn Shamash, as partners, trading as TR5 Associates, A New Jersey Partnership.

29. On November 6, 2001, TR5 Associates, A New Jersey Partnership sold the Breton Harbor Property to TR5 Associates, LLC, the current owner of record.

30. During the time the Heller Defendants owned the Breton Harbor Property, "hazardous substances," as defined in N.J.S.A. 58:10-23.11b., were "discharged" there within the meaning of N.J.S.A. 58:10-23.11b., which substances include, tetrachloroethylene (PCE) and trichloroethene (TCE).

31. From 1966 through approximately the late 1970s-early 1980s, Co-Defendants Elite Cleaners, the Estate of Andrew Spoto, ABC Corporation, XYZ Corporation and John Does 1-50, operated a dry cleaners at the Breton Harbor Property, the operation of which involved the generation of "hazardous substances," as defined in N.J.S.A. 58:10-23.11b., certain of which were "discharged" there within the meaning of N.J.S.A. 58:10-23.11b., which substances include PCE and TCE.

32. In 1987, a homeowner in the Breton Harbors site sampled his well in accordance with Ocean County private well regulations. As a result of this sampling, PCE and TCE were discovered in the well water.

33. In 1988, in an attempt to confirm the contamination, DEP

and the Ocean County Health Department (OCHD) conducted a site investigation to determine the nature and extent of the contamination at the Site.

34. In 1988, DEP and OCHD sampled the wells of 147 homes, of which 60 displayed levels of hazardous substances in excess of the maximum contaminant levels (MCLs) as prescribed by N.J.A.C. 7:10-1.1-16.12.

35. As a result of the sampling, a well restriction area (WRA) was established in 1988, which closed all the domestic potable wells in the area. Existing water lines were extended to the affected homes.

36. On June 21, 2001, monitoring wells were installed at the Breton Harbors site and were sampled by DEP, Bureau of Site Assessment on August 21, 2001.

37. The August 21, 2001 sampling results revealed the presence of various hazardous substances at concentrations exceeding the New Jersey Ground Water Quality Standards (NJGWQS).

38. Although DEP has initiated the remediation of the Site, the ground water contamination continues.

FIRST COUNT

Spill Act

39. DEP repeats each allegation of paragraph nos. 1 through 38 above as though fully set forth in its entirety herein.

40. Each defendant and third-party defendant is a "person"

within the meaning of N.J.S.A. 58:10-23.11b.

41. DEP has incurred, and will continue to incur, costs as a result of the discharge of hazardous substances at the Breton Harbor Property.

42. Third-Party Plaintiff Administrator has certified, and may continue to certify, for payment, valid claims made against the Spill Fund concerning the Site, and, further, has approved, and may continue to approve, other appropriations for the Site.

43. The DEP also has incurred, and will continue to incur, costs and damages, including lost use and reasonable assessment costs, for any natural resource of this State that has been, or may be, injured as a result of the discharge of hazardous substances at the Breton Harbor Property.

44. The costs and damages the DEP has incurred, and will incur, for the Site are "cleanup and removal costs" within the meaning of N.J.S.A. 58:10-23.11b.

45. Defendants Elite Cleaners, the Estate of Andrew Spoto, John Does 1-50, ABC Corporation and XYZ Corporation, are dischargers of hazardous substances at the Breton Harbor Property, and are liable, jointly and severally, without regard to fault, for all cleanup and removal costs and damages, including lost use and reasonable assessment costs, that the DEP has incurred, and will incur, to assess, mitigate, restore, or replace, any natural resource of this State that has been, or may be, injured as a

result of the discharge of hazardous substances at the Breton Harbor Property. N.J.S.A. 58:10-23.11g.c.(1).

46. The Heller Defendants, Plaintiff TR5 Associates, LLC, TR5 Associates, A New Jersey Partnership, David A. Kaplan, Nat Matut, Steven Dayon, Irwin Dayon, and Francine Dayon as the owners, or successors to the owners of the Breton Harbor Property, a property at which hazardous substances were discharged, also are persons otherwise responsible for the discharged hazardous substances, and are liable, jointly and severally, without regard to fault, for all cleanup and removal costs and damages, including lost use and reasonable assessment costs, that the DEP has incurred, and will incur, to assess, mitigate, restore, or replace, any natural resource of this State that has been, or may be, injured as a result of the discharge of hazardous substances at the Breton Harbor Property. N.J.S.A. 58:10-23.11g.c.(1).

47. Pursuant to N.J.S.A. 58:10-23.11u.a.(1)(a) and N.J.S.A. 58:10-23.11u.b., DEP may bring an action in the Superior Court for injunctive relief, N.J.S.A. 58:10-23.11u.b.(1); for its unreimbursed investigation, cleanup and removal costs, including the reasonable costs of preparing and successfully litigating the action, N.J.S.A. 58:10-23.11u.b.(2); natural resource restoration and replacement costs, N.J.S.A. 58:10-23.11u.b.(4); and for any other unreimbursed costs or damages DEP incurs under the Spill Act, N.J.S.A. 58:10-23.11u.b.(5).

48. Pursuant to N.J.S.A. 58:10-23.11q., Defendant Administrator is authorized to bring an action in the Superior Court for any unreimbursed costs or damages paid from the Spill Fund.

PRAYER FOR RELIEF

WHEREFORE, DEP and Administrator pray that this Court:

- a. Order the Plaintiff, Co-Defendants and Third-Party Defendants to reimburse the DEP, jointly and severally, without regard to fault, for all cleanup and removal costs and damages, including lost use and reasonable assessment costs, that the DEP has incurred for any natural resource of this State injured as a result of the discharge of hazardous substances at the Breton Harbor Property, with applicable interest;
- b. Enter declaratory judgment against the Plaintiff, Defendants and Third-Party Defendants, jointly and severally, without regard to fault, for all cleanup and removal costs and damages, including lost use and reasonable assessment costs, that the DEP will incur for any natural resource of this State injured as a result of the discharge of hazardous substances at the Breton Harbor Property;
- c. Enter judgment against the Plaintiff, Defendants and Third-Party Defendants, jointly and severally, without

regard to fault, compelling the Plaintiff, Defendants and Third-Party Defendants to compensate the citizens of New Jersey for the injury to their natural resources as a result of the discharge of hazardous substances at the Breton Harbor Property, by performing, under DEP's oversight, or funding DEP's performance of, any further assessment and compensatory restoration of any natural resource injured as a result of the discharge of hazardous substances at the Breton Harbor Property;

- d. Award the DEP their costs and fees in this action; and
- e. Award the DEP such other relief as this Court deems appropriate.

SECOND COUNT

Public Nuisance

49. DEP repeats each allegation of Paragraphs 1 through 48 above as though fully set forth in its entirety herein.

50. Ground water is a natural resource of the State held in trust by the State.

51. The use, enjoyment and existence of uncontaminated natural resources is a right common to the general public.

52. The ground water contamination at the Site constitutes a physical invasion of public property and an unreasonable and substantial interference, both actual and potential, with the exercise of the public's common right to this natural resource.

53. As long as the ground water remains contaminated due to the Plaintiff, Co-Defendants and Third-Party Defendants' conduct, the public nuisance continues.

54. Until the ground water is restored to its pre-injury quality, the Plaintiff, Defendants and Third-Party Defendants are liable for the creation, and continued maintenance, of a public nuisance in contravention of the public's common right to clean ground water.

PRAYER FOR RELIEF

WHEREFORE, DEP and Administrator pray that this Court:

- a. Order the Plaintiff, Defendants and Third-Party Defendants to reimburse the DEP for all cleanup and removal costs and damages, including restitution for unjust enrichment, lost use and reasonable assessment costs, that the DEP has incurred for any natural resource of this State injured as a result of the discharge of hazardous substances at the Breton Harbor Property, with applicable interest;
- b. Enter declaratory judgment against the Plaintiff, Defendants and Third-Party Defendants for all cleanup and removal costs and damages, including restitution for unjust enrichment, lost use and reasonable assessment costs, that the DEP will incur for any natural resource of this State injured as a result of the

discharge of hazardous substances at the Breton Harbor Property;

- c. Enter judgment against the Plaintiff, Defendants and Third-Party Defendants, compelling the Plaintiff, Defendants and Third-Party Defendants to compensate the citizens of New Jersey for the injury to their natural resources as a result of the discharge of hazardous substances at the Breton Harbor Property, by performing, under DEP's oversight, or funding Defendant DEP's performance of, any further assessment and compensatory restoration of any natural resource injured as a result of the discharge of hazardous substances at the Breton Harbor Property;
- d. Award the DEP its costs and fees in this action; and
- e. Award the DEP such other relief as this Court deems appropriate.

THIRD COUNT

Trespass

55. DEP repeats each allegation of Paragraphs 1 through 54 above as though fully set forth in its entirety herein.

56. Ground water is a natural resource of the State held in trust by the State for the benefit of the public.

57. The Plaintiff, Defendants and Third-Party Defendants are liable for trespass, and continued trespass, since hazardous

substances were discharged at the Breton Harbor Property.

58. As long as the ground water remains contaminated, the Plaintiff, Defendants and Third-Party Defendants' trespass continues.

PRAYER FOR RELIEF

WHEREFORE, DEP and Administrator pray that this Court:

- a. Order the Plaintiff, Defendants and Third-Party Defendants to reimburse the DEP for all cleanup and removal costs and damages, including restitution for unjust enrichment, lost use and reasonable assessment costs, that the DEP has incurred for any natural resource of this State injured as a result of the discharge of hazardous substances at the Breton Harbor Property, with applicable interest;
- b. Enter declaratory judgment against the Plaintiff, Defendants and Third-Party Defendants for all cleanup and removal costs and damages, including restitution for unjust enrichment, lost use and reasonable assessment costs, that the DEP will incur for any natural resource of this State injured as a result of the discharge of hazardous substances at the Breton Harbor Property;
- c. Enter judgment against the Plaintiff, Defendants and Third-Party Defendants, compelling the Plaintiff, Defendants and Third-Party Defendants to compensate

the citizens of New Jersey for the injury to their natural resources as a result of the discharge of hazardous substances at the Breton Harbor Property, by performing, under DEP's oversight, or funding DEP's performance of, any further assessment and compensatory restoration of any natural resource injured as a result of the discharge of hazardous substances at the Breton Harbor Property;

- d. Award the DEP its costs and fees in this action; and
- e. Award the DEP such other relief as this Court deems appropriate.

REQUEST FOR STATEMENT OF DAMAGES

A written statement of the amount of damages claimed is hereby requested pursuant to R. 4:5-2 within five days of service.


RESERVATION OF RIGHTS

DEP reserves the right, at or before trial, to assert additional defenses if it is later determined that they would be appropriate. DEP also reserves the right, at or before trial, to move to dismiss the complaint and/or for summary judgment, on the ground that the complaint fails to state a claim upon which relief can be granted and/or the DEP is entitled to judgment as a matter of law, based on any or all of the above defenses.

WHEREFORE, DEP New Jersey Department of Environmental Protection demands judgment dismissing Plaintiff's Complaint,

awarding attorneys' fees, costs of suit, and such other and further relief as the Court deems appropriate.

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY

By: 
Lauren Caruso Garofalo
Deputy Attorney General

Dated: December 30, 2004

DESIGNATION OF TRIAL COUNSEL


Pursuant to R. 4:25-4, the Court is advised that Lauren Caruso Garofalo, Deputy Attorney General, is hereby designated as trial counsel.

CERTIFICATION REGARDING OTHER PROCEEDINGS AND PARTIES

Undersigned counsel hereby certifies, in accordance with R. 4:5-1(b) (2), that the matters in controversy in this action may be considered to be the subject of another pending action: New Jersey Society for Environmental, Economic Development, et al. v. Bradley M. Campbell, et al., Docket No. A-6537-03 T3. Otherwise, the matters in controversy in this action are not the subject of any other pending or contemplated action in any court or arbitration proceeding known to the Plaintiffs at this time, nor is any non-party known to the Plaintiffs at this time who should be joined in this action pursuant to R. 4:28, or who is subject to joinder pursuant to R. 4:29-1. If, however, any such non-party later

this action pursuant to R. 4:28, or who is subject to joinder pursuant to R. 4:29-1. If, however, any such non-party later becomes known to the Plaintiffs, an amended certification shall be filed and served on all other parties and with this Court in accordance with R. 4:5-1(b) (2).

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY

By: 
Lauren Caruso Garofalo
Deputy Attorney General

Dated: December 30, 2004