UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

STATE OF NEW YORK, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and UNITED STATES OF AMERICA,

Plaintiffs,

-against-

OPINION & ORDER
CV-07-0541 (SJF)(ETB)

SANDERINA KASPER, individually and as Trustee of the Kasper (1977) Irrevocable Trust(s) for the benefit of Charles B. Kasper and Richard J. Kasper, MARTIN STALLER, AMERICAN DRIVE-IN CLEANERS OF BETHPAGE, INC., LAWRENCE COHEN, JERRY COGAN, PARVIZ NEZAMI, a/k/a Paruiz Nezami, a/k/a Parvis Nezami, and THE KASPER (1977) IRREVOCABLE TRUSTS FOR THE BENEFIT OF CHARLES B. KASPER AND RICHARD J. KASPER or THE KASPER (1977) IRREVOCABLE TRUST FOR THE BENEFIT OF CHARLES B. KASPER AND RICHARD J. KASPER,

Defendants.

FEUERSTEIN, J.

On February 8, 2007, plaintiffs State of New York and Commissioner of the New York State Department of Environmental Conservation ("the DEC") (collectively, "the State") commenced this action against Sanderina Kasper ("Sanderina"), individually and as trustee of The Kasper (1977) Irrevocable Trusts for the Benefit of Charles B. Kasper and Richard J. Kasper, and The Kasper (1977) Irrevocable Trusts For the Benefit of Charles B. Kasper and Richard J. Kasper ("the Kasper Trust") (collectively "the Kasper defendants"); Martin Staller ("Staller"); American Drive-in Cleaners of Bethpage, Inc. ("American Drive-In Cleaners");

Lawrence Cohen ("Cohen"); Jerome Cogan, i/s/h Jerry Cogan ("Cogan"); and Parviz Nezami, a/k/a Paruiz Nezami, a/k/a Parvis Nezami ("Nezami"), pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, to recover costs incurred by the State in responding to the release and threatened release of hazardous substances at a site known as the American Drive-In Cleaners Site ("the Site"), located in Levittown, New York, and to redress harm to the public health and environment of the State. The State also asserts state law claims for public nuisance, restitution and indemnification.

On November 25, 2008, the United States of America ("the United States") commenced a separate action against the Kasper defendants, Staller and Nezami pursuant to CERCLA to recover costs incurred, and to be incurred, by the United States in responding to the release and threatened release of hazardous substances at the Site, as well as civil penalties and punitive damages from the Kasper defendants. The cases were consolidated, on consent, on January 27, 2009.

The Kasper defendants now move, pursuant to Rule 56 of the Federal Rules of Civil Procedure ("Rule 56"), for summary judgment dismissing the United States's complaint as against them. Staller joins in the motion. Nezami separately moves, pursuant to Rule 56, for summary judgment dismissing the United States's complaint in its entirety as against him. The United States cross-moves to limit the scope of judicial review to the administrative record and to strike certain evidence submitted by the Kasper defendants on its motion for summary judgment. The Kasper defendants cross-move to strike the declaration submitting the administrative record and the related certification, or, in the alternative, to supplement the administrative record. For the reasons set forth herein, the United States's cross motion is

denied, the Kasper defendants' motion and cross motion are granted in part and denied in part and Nezami's motion is granted.

I. BACKGROUND

A. Factual Background[1]

1. Contamination of Site

The Site is approximately three-tenths (0.37) of an acre, located at 3801 Hempstead Turnpike, Levittown, New York, on which is located a four thousand eight hundred (4,800) square-foot masonry block building. (State's Complaint [NY Compl.], ¶¶ 2, 33-35; Answer to the NY Compl. by the Kasper defendants [Kasper NY Ans.], ¶¶ 2, 33-35; United States of America's Complaint [USA Compl.], ¶¶ 19, 21; Answer to the USA Compl. by the Kasper defendants [Kasper USA Ans.], ¶¶ 19-21). In the mid-1950's, when the building was erected on the Site, Levittown did not have a public sewer system. (Statement of Material Facts on Defendant's Motion for Summary Judgment Pursuant to Local Rule 56.1 [Def. 56.1 Stat.], ¶ 4; Plaintiff's Local Civil Rule 56.1 Statement in Opposition to Trust Defendants' Motion for Summary Judgment [Plf. 56.1 Stat.], ¶ 4). According to the DEC, "[p]rior to 1981, wastewater from the building drained into one of several cesspools located north and east of the building. * * *. The building was connected to the public sewer system in 1981." (Affidavit of William F.

[1] The facts are derived from the pleadings, the parties' Local 56.1 statements and the affidavits and declarations, with exhibits, submitted by the parties in their respective motion papers. The facts are undisputed, unless otherwise indicated.

Ryan, Jr. [Ryan Aff.], Ex. 3;[2] Affidavit of Stephanie O. Davis ["Davis Aff."], Exs. 1 and 3;[3] Def. 56.1 Stat., ¶ 2; Plf. 56.1 Stat., ¶ 2).

From the mid-1950's until 2000, one of the commercial tenants which occupied the building on the Site was a dry-cleaning business operated first by a now-dissolved corporation, American Drive-In Cleaners of Levittown, Inc. ("ADC Levittown"), then by defendant American Drive-In Cleaners of Bethpage, Inc[4]. (Def. 56.1 Stat., ¶ 3; Plf. 56.1 Stat., ¶¶ 3, 173; Davis Aff., Ex. 3). American Drive-In Cleaners of Bethpage, Inc. leased the building on the Site from October 1, 1977 through approximately February 28, 1983. (Plf. 56.1 Stat., ¶¶ 177, 180).

From March 1, 1983 until 2001, the building on the Site was leased to Interior Construction Management Inc. ("ICM")[5], d/b/a American Drive-In Cleaners[6]. (Def. 56.1 Stat., ¶¶

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[2] Mr. Ryan is an attorney who has represented the Kasper defendants since the Spring of 2002. (Ryan Aff., ¶ 3). Exhibit 3 to the Ryan Affidavit is a Record of Decision dated August 2002 issued by the DEC.

[3] Ms. Davis is a registered geologist and a certified professional geologist and hydrogeologist employed by FPM Group, an environmental and engineering consulting firm. (Davis Aff., ¶¶ 1-2). FPM was retained by the Kasper Trust in 2001 to provide environmental consulting services with respect to the Site. (Davis Aff., ¶ 4). Exhibit 1 to the Davis Affidavit is a Record of Decision dated March 2001 issued by the DEC. Exhibit 3 to the Davis Affidavit is an Action Memorandum by the EPA dated September 5, 2001.

[4] American Drive-In Cleaners is a New York corporation, of which Cohen was the president, director and a shareholder and Cogan was an officer, director and shareholder from 1977 until 1983. (Def. 56.1 Stat., ¶ 21; Plf. 56.1 Stat., ¶ 21). American Drive-In Cleaners and Cohen have not appeared in this action.

[5] Nezami was a forty percent (40%) owner of ICM. (Plf. 56.1 Stat., ¶ 182; USA Compl., ¶ 26; Answer of Parviz Nezami [Nezami Ans.], ¶ 26).

[6] Nezami, in his capacity as president and owner of ICM, (Ryan Aff., Ex. 1), negotiated and purchased the dry cleaning business on the Site from American Drive-In Cleaners of Bethpage, Inc. (Def. 56.1 Stat., ¶¶ 17, 21; Plf. 56.1 Stat., ¶¶ 17, 21).

16, 20; Plf. 56.1 Stat., ¶¶ 16, 20, 181, 188; Ryan Aff., Ex. 1;[7] Declaration of Sharon E. Kivowitz [Kivowitz Decl.]., Ex. 5[8]). From 1983 through December 2000, ICM operated a dry-cleaning business in a portion of the building on the Site and sublet the remaining portions of the building to various other businesses. (Def. 56.1 Stat., ¶ 18; Plf. 56.1 Stat., ¶¶ 18, 187). During that time period, Nezami "was solely responsible for the operations of the dry cleaning store" on the Site, including, *inter alia*, how to dispose of hazardous substances and compliance with environmental laws and regulations at the Site. (Def. 56.1 Stat., ¶ 19; Plf. 56.1 Stat., ¶ 19; Ryan Aff., Ex. 1).

One of the chemicals used by ADC Levittown and American Drive-In Cleaners in their dry-cleaning operations was the solvent tetrachloroethene, a/k/a perchloroethene ("PCE" or "perc")[9]. (Plf. 56.1 Stat., ¶¶ 174, 189; Nezami Ans. ¶¶ 32-33). "At some time before 1981," PCE, or wastewater containing PCE, was disposed of in drains leading into the two underground cesspools on the east side of the building on the Site during the dry cleaning operations. (Davis Aff., Ex. 1; see Def. 56.1 Stat., ¶ 5; Plf. 56.1 Stat., ¶¶ 5, 175). An August 2002 Record of Decision ("ROD") issued by the DEC indicates that "[t]he releases to the on-site cesspools ended in 1981 when the building was connected to public sewers. The presence of the contamination was not known until 1990, long after the releases had ended." (Def. 56.1 Stat., ¶ 23; Plf. 56.1

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[7] Exhibit 1 to the Ryan affidavit is Nezami's answer to interrogatories.

[8] Ms. Kivowitz is an assistant regional counsel in the Office of Regional Counsel for the EPA, Region 2, and is the site attorney assigned to the Site. (Kivowitz Decl., ¶ 1). Exhibit 5 to the Kivowitz declaration is the lease between Benjamin Kasper and ICM dated March 1983, and the subsequent amendments thereto.

[9] PCE, a solvent commonly used in dry-cleaning operations, is a hazardous substance pursuant to Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), and 40 C.F.R. § 302.4. (See USA Compl., ¶ 48; Kasper USA Ans., ¶ 48).

Stat., ¶ 23).

In addition, "a small area of soil contaminated by PCE" was discovered near the northwest corner of the building on the Site, which the DEC attributed "to a small PCE spill or improper disposal of PCE contaminated waste at an unknown time." (Davis Aff., Ex. 1).

2. Ownership of the Site

Staller owned the Site from December 1976 until April 1978. (Def. 56.1 Stat., ¶ 8; Plf. 56.1 Stat., ¶¶ 8, 176). The State and United States allege that hazardous substances were disposed of at the Site during part of that period. (NY Compl., ¶ 8; USA Compl., ¶ 38).

On or about April 7, 1978, Staller transferred title to the Site to Kastal Properties, which was an unincorporated partnership between Benjamin P. Kasper ("Benjamin") and Staller. (USA Compl., ¶ 39; Answer to USA Compl. by Staller [Staller USA Ans.], ¶ 39 (admitting to the transfer of title to the Site); Plf. 56.1 Stat., ¶ 178). On or about October 11, 1979, Kastal Properties transferred title to the Site to Benjamin.[10] (Def. 56.1 Stat., ¶ 7; Plf. 56.1 Stat., ¶¶ 7, 179; Kivowitz Decl., Ex. 4[11]). According to the United States, disposal of hazardous substances occurred at the Site during the periods that Kastal Properties and Benjamin owned it. (USA Compl., ¶¶ 41, 43; see also NY Compl., ¶ 13).

Sanderina is the trustee of the Kasper Trust. (Affidavit of Richard J. Kasper [R. Kasper

[10] Benjamin executed the deed on behalf of Kastal Properties and averred therein that he was a member of the firm of Kastal Properties, a co-partnership; that he executed the deed in the firm name of Kastal Properties; that he had authority to sign the deed; and that he executed the deed "the same as the act and deed of [Kastal Properties] * * *." (Kivowitz Aff., Ex. 4).

[11] Exhibit 4 to the Kivowitz declaration is the deed between Kastal Properties and Benjamin.

Aff.], ¶ 2). On or about April 1, 1991, Benjamin, as settlor of the Kasper Trust, transferred title to the Site to the Kasper Trust. (R. Kasper Aff., ¶ 13; Def. 56.1 Stat., ¶ 6; Plf. 56.1 Stat., ¶¶ 6, 183; Kivowitz Decl., Ex. 3[12]). At the time of the transfer to the Kasper Trust, the land and building on the Site were leased to ICM. (R. Kasper Aff., ¶ 17; Def. 56.1 Stat., ¶ 15; Plf. 56.1 Stat., ¶ 15). A "Second Amendment to Lease" dated October 16, 1991 designates the Kasper Trust as "the successor in interest to Benjamin Kasper" and the landlord under the lease. (Kivowitz Decl., Ex. 5; Plf. 56.1 Stat., ¶¶ 185-186).

The Kasper Trust is the current record owner of the Site. (NY Compl., ¶ 12; Kasper NY Ans., ¶ 2; USA Compl., ¶ 44; Plf. 56.1 Stat., ¶ 191). The United States alleges that hazardous substances were disposed of at the Site during the period that the Kasper Trust owned it. (USA Compl., ¶ 45). The United States, as well as the State, also allege that the Kasper Trust is the successor in interest to Benjamin, who owned the Site at the time of the disposal of hazardous substances. (USA Compl., ¶ 46; NY Compl., ¶ 13). However, the Kasper defendants deny owning or operating the Site, or being a successor to any of the entities that owned or operated the Site, at the time of the disposal of the hazardous substances. (Kasper NY Ans., ¶¶ 2, 13).

3. Response Action

In September 1990, the Nassau County Department of Public Works ("NCDPW") installed five (5) monitoring wells on a then-vacant parcel of property directly across and "hydraulically downgradient" from the Site. (Def. 56.1 Stat., ¶ 24; Plf. 56.1 Stat., ¶ 24; Ryan

[12] Exhibit 3 to the Kivowitz declaration is the deed between Benjamin and the Kasper Trust.

Aff., Exs. 2 and 3; Davis Aff., Exs. 1 and 3). Groundwater from some of the monitoring wells was found to be contaminated with PCE. (Def. 56.1 Stat., ¶¶ 24-25; Plf. 56.1 Stat., ¶¶ 24-25; Ryan Aff., Exs. 2[13] and 3; Davis Aff., Exs. 1 and 3). The NCDPW requested that the Nassau County Department of Health ("NCDOH") investigate American Drive-In Cleaners as a possible source of the contamination. (Def. 56.1 Stat., ¶ 26; Plf. 56.1 Stat., ¶ 26; Ryan Aff., Exs. 2 and 3; Davis Aff., Exs. 1 and 3).

In December 1990, the NCDOH conducted a soil vapor survey and collected a surface soil sample near the northwest corner of the building on the Site, which revealed PCE contamination in soils and soil-gas at the Site. (Def. 56.1 Stat., ¶ 27; Plf. 56.1 Stat., ¶¶ 27, 122; Ryan Aff., Exs. 2 and 3; Davis Aff., Exs. 1 and 3; Declaration of Louis DiGuardia ["DiGuardia Decl.], Ex. 1[14]).

The Site was referred to the DEC. (Def. 56.1 Stat., ¶ 28; Plf. 56.1 Stat., ¶ 28; Ryan Aff., Exs. 2 and 3; Davis Aff., Exs. 1 and 3). In December 1991, the Site was designated as "a Class 2 inactive hazardous waste disposal site,"[15] as defined in New York Environmental Conservation Law ("N.Y.E.C.L.") § 27-1301.2. (Def. 56.1 Stat., ¶ 28; Plf. 56.1 Stat., ¶¶ 28, 123; Davis Affs., Exs. 1 and 3; Ryan Aff., Ex. 2; DiGuardia Decl., Ex. 1). The DEC determined that the Site

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[13] Exhibit 2 to the Ryan affidavit is a letter from the EPA to the Kasper defendants dated October 2, 2002 and the unilateral administrative order ("UAO") issued by the EPA on September 30, 2002.

[14] Mr. DiGuardia is employed by the EPA, Region II Office, and was the on-scene coordinator assigned to the Site. (DiGuardia Decl., ¶¶ 1, 11). Exhibit 1 to the DiGuardia declaration is the EPA's September 5, 2001 Action Memorandum, which is the same as Exhibit 3 to the Davis affidavit.

[15] A "Class 2" site is one that presents a significant threat to the public health and/or the environment, thereby requiring action. (Ryan Aff., Ex. 3; Davis Aff., Exs. 1 and 3).

represented "a significant threat to the environment associated with the environmental damage to a groundwater resource. PCE contamination from the site affects groundwater beneath and hydraulically down gradient of the site, impacting its value as a sole source aquifer." (Ryan Aff., Ex. 3). However, the DEC further indicated, in response to a public inquiry regarding the delay in responding to the contamination at the Site, that there were "hundreds of sites across the state just like this [Site]" and the Site was not one of its highest priorities because "there were no public drinking water supplies being impacted, or any other immediate threats to human health or the environment." (Ryan Aff., Ex. 3).

The DEC identified the Kasper defendants and Nezami as the Potential Responsible Parties ("PRPs") for the Site. (Ryan Aff., Ex. 3; Davis Aff., Ex. 1). According to the Kasper defendants, upon learning of the contamination, the Kasper Trust hired Nova Environmental Services, Inc. ("Nova") to conduct an environmental assessment of the Site. (Def. 56.1 Stat., ¶ 29). Nova prepared two (2) written proposals, dated December 9, 1996 and April 9, 1997, respectively, to remediate the soil at the Site through the abandonment and removal of the suspected cesspool at the Site, then the installation of an in-situ soil vapor extraction ("SVE") system at two (2) areas on the Site, at estimated costs of sixty-seven thousand eight hundred fifty dollars ($67,850.00) and fifty-nine thousand three hundred fifty dollars ($59,350.00), respectively. (Id.; Affidavit of John W. Wolf [Wolf Aff.], Exs. 7 and 8[16]). The Kasper defendants further allege that the two (2) Nova proposals were submitted to the DEC by their former attorney, who is now deceased. (Def. 56.1 Stat., ¶ 30).

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[16] Mr. Wolf is an attorney who has represented the Kasper defendants since March 2001. (Wolf Aff., ¶¶ 2-3). Exhibits 7 and 8 to the Wolf affidavit are Nova's December 9, 1996 and April 9, 1997 proposals, respectively.

Between September 1997 and January 2002, the DEC conducted a remedial investigation and feasibility study ("RI/FS") at the Site, which revealed PCE contamination in soils at the Site and in groundwater at, and downgradient of, the Site. (Def. 56.1 Stat., ¶¶ 22, 33; Plf. 56.1 Stat., ¶¶ 22, 33; Ryan Aff., Exs. 2 and 3; Davis Aff. Exs. 1 and 3; DiGuardia Decl., Exs. 1 and 3[17]). According to the DEC, since the Kasper Trust and Nezami declined to implement the RI/FS at the site[18], the DEC completed the investigation under the State Superfund program. (Ryan Aff., Ex. 3).

During the RI/FS, white fiber material with "very high concentrations" of PCE were discovered at the bottom of a cesspool located on the east side of the building on the Site. (Davis Aff., Ex. 1). In August 1999, the DEC used a vacuum truck and excavator to remove approximately two (2) cubic yards of that material, but work was halted once the excavation presented a danger of undermining the cesspool and, potentially, the adjacent building. (Def. 56.1 Stat., ¶ 34; Plf. 56.1 Stat., ¶ 34; Davis Aff., Ex. 1). The PCE-impacted soil still remains in and below the cesspool structure. (Davis Aff., Ex. 1).

Moreover, the DEC noted "a small area of soil contaminated by PCE * * * near the northwest corner of the building at the surface * * * [that was] likely due to a small PCE spill or improper disposal of PCE contaminated waste at an unknown time." (Ryan Aff., Ex. 3). In addition, groundwater sampling and analysis at the Site indicated "a plume of contamination

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[17] Exhibit 3 to the DiGuardia declaration is the EPA's May 22, 2008 Action Memorandum.

[18] According to the United States, Nezami was required to install a vapor barrier and general exhaust and ventilation system in his dry cleaning facility by November 15, 1998, which he failed to do as of January 2001. (Declaration of Joseph DeFranco, Ex. 2).

from the site heading just east of due south," consisting primarily of PCE. (Ryan Aff., Ex. 3). Specifically, between March 1998 and January 2000, the DEC took four (4) rounds of groundwater samples from sixteen (16) monitoring wells and an irrigation well located on adjacent property, which indicated a plume of PCE contamination from the Site heading south to southeast. (Davis Aff., Ex. 3; Plf. 56.1 Stat., ¶ 136; DiGuardia Decl.., Ex. 1). One of the samples taken from a monitoring well up-gradient of the building contained elevated levels of PCE concentrations. (Def. 56.1 Stat., ¶ 33; Plf. 56.1 Stat., ¶ 33; Davis Aff., Ex. 1). Since this well was up-gradient of the Site, the DEC determinated that it was unlikely that the PCE contamination in that well were due to contamination from the Site. (Def. 56.1 Stat., ¶ 33; Plf. 56.1 Stat., ¶ 33; Davis Aff., Ex. 1). However, the DEC further determined that the relatively low concentrations of PCE found in that up-gradient well "would not have significantly contributed to the Site related groundwater plume which is at much greater concentrations." (Plf. 56.1 Stat., ¶ 33; Davis Aff., Ex. 1).

Between September 2000 and February 2001, the DEC and the New York State Department of Health ("DOH") conducted air sampling from four (4) of the five (5) businesses on the Site[19]. (Def. 56.1 Stat., ¶ 36; Plf. 56.1 Stat., ¶¶ 36, 125, 137, 140-141; Davis Aff., Ex. 3; Ryan Aff., Ex. 2; DiGuardia Decl., Ex. 1). The air monitoring samples showed that the sub-tenants's businesses were impacted by PCE vapors. (Def. 56.1 Stat., ¶ 36; Plf. 56.1 Stat. ¶¶ 36, 125; Davis Aff., Ex. 3). In addition, an investigator from the NCDOH reported that during one of his visits to the dry cleaning business on the Site, "strong odors of [PCE] were apparent."

[19] Nezami declined to have air monitoring performed in his portion of the building. (Def. 56.1 Stat., ¶ 36; Plf. 56.1 Stat., ¶¶ 36, 125, 137, 140-141; Davis Aff., Ex. 3; Ryan Aff., Ex. 2; DiGuardia Decl., Ex. 1).

(Declaration of Joseph DeFranco [DeFranco Decl.], Ex. 1[20]). As a result, the dry cleaning machine was disconnected and its contents emptied. (Davis Aff., Ex. 3; Ryan Aff., Ex. 2; Plf. 56.1 Stat., ¶ 139; DiGuardia Decl., Ex. 1). According to the Kasper defendants, the Kasper Trust took action to have the drycleaner operator evicted and engaged a licensed contractor to remove the drycleaner's machinery and cleaning material, including PEC. (Def. 56.1 Stat., ¶ 16).

In January 2001, the DEC and DOH split the Site into two (2) operable units: Operable Unit ("OU")-1 represents the area north of Hempstead Turnpike and addresses the on-Site contamination at the Site and small portions of adjacent properties; OU-2 represents the area south of, and beneath, Hempstead Turnpike and addresses the off-Site groundwater PCE plume. (Ryan Aff., Ex. 3; Davis Aff., Ex. 1).

In February 2001, the DEC installed an emergency soil vapor extraction ("SVE") system, which included "five (5) extraction wells that were installed into borings drilled into the ground on the east, north and south sides of the [Site]; laying pipe from each SVE well to a central system location; purchase and installation of a blower to operate the system; and extension of electrical service to the system," and took measures to seal any openings where soil vapor could enter the building in an attempt to reduce PCE concentrations in the soil and indoor air. (Davis Aff., Ex. 3; Def. 56.1 Stat., ¶42; Plf. 56.1 Stat., ¶¶ 42, 125, 142; DiGuardia Decl., Ex. 1). In addition, the DEC notified Nezami that he was required "to take **immediate** steps to reduce levels of [PCE] inside [his] store and the adjacent stores," including removing his dry cleaning equipment and all PCE-solvent bearing materials from his facility and installing air purifying

[20] Mr. DeFranco is employed by the NCDOH and conducted inspections at the Site. (DeFranco Aff., ¶¶ 1, 4). Exhibit 1 to the DeFranco declaration are records regarding the inspections completed by Mr. DeFranco at the Site.

equipment in his store and adjacent stores and an SVE system. (DeFranco Decl., Ex. 2[21]) (emphasis in original).

Potential remedial alternatives for OU-1 were identified, screened and evaluated by the DEC in a Focused Feasability Study ("FFS") dated February 2001. (NY Compl., ¶ 50).

On March 8, 2001, the NCDPW performed a dye test on a floor drain in the boiler room behind the dry cleaner at the Site, which revealed "[n]o positive connection between the floor drain and the public sewer system." (DeFranco Decl., Ex. 3[22]).

In March 2001, the DEC, in consultation with the DOH, issued a Record of Decision ("ROD") based on the FFS that described the selected remedy for the Site as follows: "in-situ chemical oxidation, where a chemical oxidant [Fenton's Reagent] would be injected into subsurface soils and groundwater near the contaminated cesspools;" groundwater extraction and treatment; and soil vapor extraction ("SVE"). (Davis Aff., Exs. 1 and 4[23]; Def. 56.1 Stat., ¶ 37; Plf. 56.1 Stat., ¶¶ 37, 125; Ryan Aff., Ex. 2; DiGuardia Decl., Ex. 1). As determined by the DEC, the SVE system would be utilized "to collect any off gases from the chemical oxidation process and in other areas [to] remove PCE concentrations from subsurface soils." (Davis Aff., Ex. 1; Def. 56.1 Stat., ¶ 39; Plf. 56.1 Stat., ¶ 39). In addition, the ROD called for the institution of "a long term monitoring program" since the selected remedy would result in "untreated

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[21] Exhibit 2 to the DeFranco declaration is a letter from the DEC to Nezami dated January 16, 2001.

[22] Exhibit 3 to the DeFranco declaration is a letter from the NCDOH to the EPA dated April 6, 2001.

[23] Exhibit 4 to the Davis affidavit is the EPA's May 22, 2008 Action Memorandum, which is the same as Exhibit 3 to the DiGuardia declaration.

hazardous waste remaining at the site." (Davis Aff., Ex. 1). The estimated cost for the remedy selected by the DEC in its March 2001 ROD was two million seven hundred twenty-one thousand dollars ($2,721,000.00). (Def. 56.1 Stat., ¶ 37; Plf. 56.1 Stat., ¶ 37; Davis Aff., Ex. 1).

On May 8, 2001, the DEC requested that the United States Environmental Protection Agency ("EPA") conduct an emergency response action to reduce volatile organic compounds, including PCE, in the soils at the Site, which were impacting the indoor air quality in the building at the Site and adjacent discount beverage center. (Davis Aff., Ex. 3; Ryan Aff., Ex. 2; DiGuardia Decl., Ex. 1; Plf. 56.1 Stat., ¶¶ 126, 144). Although indoor air quality at the Site had improved with the DEC's installation of an SVE system, contaminant levels had not consistently dropped below the DOH's guideline for immediate action. (DiGuardia Decl., Exs. 1-3). The EPA determined, *inter alia*, that high concentrations of PCE were present in the surface and sub-surface soils and were acting as a continuing source of groundwater and air contamination both on- and off-Site. (Davis Aff., Ex. 3; DiGuardia Decl., Exs. 1 and 2[24]). The EPA further determined that the conditions at the Site met the requirements for a CERCLA "removal" action because: (1) there existed an "[a]ctual or potential exposure to nearby human populations or the food chain from [PCE contamination] * * *," insofar as each of the businesses on the Site were found to be impacted by PCE vapors; (2) "[h]igh levels of [PCE contamination] in soils largely at or near the surface, that may migrate * * *," were found on the Site, specifically air and soil samples taken at the Site indicated that high levels of PCE vapors had migrated from the subsurface soils into the indoor environments of the buildings on, and adjacent to, the Site; (3)

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[24] Exhibit 2 to the DiGuardia declaration is the EPA's May 10, 2002 Action Memorandum.

"[w]eather conditions [existing at the Site, i.e. rain and snow melt] may cause [PCE contamination] to migrate or be released * * *;" and (4) there did not exist any "other appropriate federal or State response mechanisms to respond to the release * * *," insofar as the DEC had informed the EPA that it lacked "sufficient funds to satisfactorily address the immediate risk posed by the air contamination at the Site." (DiGuardia Decl., Ex. 1; Plf. 56.1 Stat., ¶¶ 147-151).

From May 8, 2001 through July 31, 2007, the EPA carried out the following response action at the Site "[i]n an effort to mitigate the threats to public health, welfare and the environment posed by contamination from the Site": installation, maintenance and operation of an "upgraded, more powerful" SVE system[25], i.e., replacing a trailer-mounted blower system for a more permanent, skid-mounted blower system, to reduce volatile organic compounds ("VOCs") in soils at the Site; installation of four (4) sub-slab depressurization ("SSD") systems; the performance of numerous air, soil-gas and soil sampling events at or near the Site; and "interim mitigation measures, including reinspection and resealing of soil gas entry points into the impacted buildings to reduce convective and diffusive vapor movement between the soil and buildings." (Davis Aff., Exs. 3 and 4; Def. 56.1 Stat., ¶ 45; Plf. 56.1 Stat., ¶¶ 45, 128, 145, 170, 200-211; Ryan Aff., Ex. 2; DiGuardia Decl., Exs. 1 and 3). The EPA found that "[b]ased on air, soil and groundwater data collected to date, PCE is migrating from the subsurface soils into the indoor environments of the buildings at and adjacent to the [Site]." (Davis Aff., Ex. 3). According to the EPA, its proposed response action would "abate the immediate threat associated with indoor air contamination, *assist in the long-term remediation of VOCs in soil*, prevent

[25] "SVE is a process whereby soil gas is extracted from the pore spaces within the soil, effectively reducing the mass and mobility of contamination. The extracted soil gas is treated to remove contaminants prior to discharge to the atmosphere." (DiGuradia Decl., Ex. 1).

migration of contaminants and reduce contaminant concentrations in soil and groundwater to levels protective of public health and the environment." (DiGuardia Decl., Ex. 1)(emphasis added). The total estimated project ceiling for the EPA's response action was seven hundred thousand dollars. ($700,000.00). (Davis Aff., Ex. 3).

On September 5, 2001, the EPA issued an Action Memorandum seeking and receiving approval to commence a "removal" action to implement an SVE system at the Site to address PCE contamination in the indoor air at the buildings on, and adjacent to, the Site. (Plf. 56.1 Stat., ¶¶ 132-133; DiGuardia Decl., Ex. 1; Davis Aff., Ex. 3).

FPM Group, an environmental engineering firm retained by the Kasper Trust to review the March 2001 ROD issued by the DEC, evaluated the remedy selected by the DEC and, in November 2001, proposed an alternative remedy, which included excavation of the contaminated soil from the cesspools, instead of using in-situ chemical oxidation (Fenton's Reagent), and an air sparging system to treat contaminated groundwater, instead of groundwater extraction and treatment. (Wolf Aff., ¶ 14; Davis Aff., Ex. 5; Def. 56.1 Stat., ¶¶ 48-49, 52; Plf. 56.1 Stat., ¶¶ 48-49, 52). According to the Kasper defendants, they discussed FPM Group's proposed alternative remedy with the DEC in November 2001. (Def. 56.1 Stat., ¶ 52). At the DEC's request, FPM Group provided additional information regarding its proposed alternative remedy in December 2001. (Davis Aff., Ex. 5[26]).

By letter dated November 29, 2001, the EPA notified the Kasper defendants that it considered the Kasper Trust to be a "potentially responsible party ('PRP')" with respect to the

[26] Exhibit 5 to the Davis affidavit is a draft Removal Action Work Plan ("RAWP") prepared by FPM Group for the Kasper Trust.

Site and determined that a "removal action," as defined in Section 101(23) of CERCLA, 42 U.S.C. § 9601(23), was necessary "to address the release and threatened release of hazardous substances at the Site." (Wolf Aff., Ex. 10[27]; Def. 56.1 Stat., ¶ 53; Plf. 56.1 Stat., ¶ 53). The EPA attached to the letter a "Request for Information" ("RFI") demanding that the Kasper defendants provide it with certain information, including, *inter alia*, the nature and extent of a release or threatened release of a hazardous substance at the Site and the Kasper defendants' ability to pay for, or to perform, the cleanup at the Site. (Wolf Aff., Ex. 10).

By letter dated December 21, 2001, Mr. Wolf, *inter alia*, raised an "innocent landowner" defense and requested that the EPA provide him with a complete accounting of the costs incurred by the EPA, as well as anticipated future costs. (Wolf Aff., Ex. 12[28]). According to Richard Kasper, Benjamin was never aware of any environmental problems at the Site, and neither he, nor the Kasper Trust, ever conducted any business operations on the Site. (R. Kasper Aff., ¶¶ 8, 9, 14, 16; Def. 56.1 Stat., ¶¶ 11-12).

By letter dated January 17, 2002, Mr. Wolf provided certain information requested in the EPA's RFI and advised that he would provide more information as it was organized. (Wolf Aff., Ex. 13[29]). In addition, Mr. Wolf requested that the EPA provide 'a breakdown of all past costs and the anticipated costs of maintaining the equipment that [it] wishe[d] the [Kasper] Trust to

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[27] Exhibit 10 to the Wolf affidavit is the letter from the EPA to Sanderina, c/o Mr. Wolf, dated November 29, 2001.

[28] Exhibit 12 to the Wolf affidavit is the letter from Mr. Wolf to the EPA dated December 21, 2001.

[29] Exhibit 13 to the Wolf affidavit is the letter from Mr. Wolf to the EPA dated January 17, 2002.

maintain," as well as "all bid proposals, contracts, administration costs, etc. * * * and all recommendations and reports of the Federal Underground Injection Control Director." (Wolf Aff., Ex. 13). Moreover, Mr. Wolf indicated the Kasper Trust's position that the EPA's removal costs did not comply with the NCP, insofar as the EPA's removal expenses were "over twice" the amount proposed by the Kasper Trust's engineers and the cesspools had still not been removed from the Site. (Wolf Aff., Ex. 13).

By letter dated January 25, 2002, the DEC proposed some additions to FMP Group's proposed alternative remedy and indicated that if those additions was acceptable, the parties could proceed negotiating a consent order for the design and implementation of the site remediation. (Wolf Aff., ¶17; Davis Aff., Exs. 2 and 5[30]).

The DEC identified potential remedial alternatives for OU-2 in an FFS dated February 2002. (Ryan Aff., Ex. 3).

By letter to the EPA dated April 29, 2002, William F. Ryan, Jr., counsel for the Kasper defendants, *inter alia*, indicated that the Kasper Trust was willing to assume responsibility for operating the SVE system, subject to a consent order, and to immediately undertake to remove the cesspools on the Site. (Ryan Aff., Ex. 4[31]). Mr. Ryan also requested that the EPA provide him with all information regarding the SVE system operation, air sampling and monitoring and an itemization of the EPA's claimed recovery costs. (Id.).

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[30] Exhibits 2 and 5 to the Davis affidavit are the letter from the DEC to Ms. Davis dated January 25, 2002 and the draft RAWP dated August 2002 prepared by FPM Group for the Kasper Trust, respectively.

[31] Exhibit 4 to the Ryan affidavit is the letter from Mr. Ryan to the EPA dated April 29, 2002.

Mr. Wolf provided supplemental information to the EPA by letter dated April 30, 2002, following up his prior letters dated December 21, 2001 and January 17, 2002. (Wolf Aff., Ex. 6[32]; Def. 56.1 Stat., ¶ 62; Plf. 56.1 Stat., ¶ 62). Mr. Wolf submitted with his letter, *inter alia*, copies of the two (2) proposals the Kasper defendants had received from Nova in December 1996 and April 1997, the Kasper Trust Agreement, and the Kasper Trust's income tax returns for five (5) years. (Wolf Aff., ¶ 9; Def. 56.1 Stat., ¶ 62).

On May 10, 2002, the EPA approved an Action Memorandum for an exemption to the twelve-month limitation on removal operations at the Site to allow operation of the SVE system to continue beyond the twelve-month period, based upon findings that if the SVE system were shut down, "PCE levels in the indoor air [would] immediately rebound to concentrations above the NYSDOH immediate action levels * * *," and that "the subsurface contaminants pose[d] a continuing risk to the underlying soils and the aquifier." (Ryan Aff., Ex. 2; DiGuardia Decl., Ex. 2; Plf. 56.1 Stat., ¶ 154). The EPA found that the following criteria for an exemption from the twelve-month limit of a CERCLA removal action were met: (1) there was an "immediate risk to the public health" as a result of the rebound levels of PCE in the indoor air within the buildings on the Site; (2) the conditions at the Site continued "to represent an emergency due to elevated PCE rebound level concentrations within the indoor environments of the businesses at the Site * * * [and] in the vicinity of the Site;" and (3) there was no state or local governmental agency that had the resources available to complete the removal action in a timely manner, although the Kasper Trust had indicated a willingness to assume responsibility for the removal action pursuant

[32] Exhibit 6 to the Wolf affidavit is the letter from Mr. Wolf to the EPA dated April 30, 2002.

to an Administrative Order on Consent, for which the EPA and Kasper defendants were negotiating. (DiGuardia Decl., Ex. 2; Plf. 56.1 Stat., ¶¶ 158-163).

In August 2002, the DEC, in consultation with the NYSDOH, issued a ROD selecting the following remedy for the Site: "an in-situ sparging system to treat contaminated groundwater" and a "soil vapor extraction (SVE) system." (Ryan Aff., Ex. 3). In addition, the ROD called for the institution of "a long term monitoring program for a time period of up to 30 years." (Id.). The DEC estimated the cost to implement that remedy at two million two hundred seventy-nine thousand dollars ($2,279,000.00). (Id.).

By letter dated September 23, 2002, the Kasper Trust submitted to the EPA a draft removal action work plan ("RAWP") for OU-1 dated August 2002, which had been prepared by FPM Group. (Davis Aff., Exs. 5 and 8[33]; Def. 56.1 Stat., ¶ 64). The proposed actions in the RAWP included "cleanout of the leaching pools on the east side of the Site, investigation of other potential PCE source areas in association with the Site building, and the operation and monitoring of the existing SVE system around the Site building." (Davis Aff., Ex. 5; Def. 56.1 Stat., ¶ 65). In the September 23, 2002 letter, Ms. Davis indicated that the draft RAWP referenced an indoor quality guideline level of 100 micrograms per cubic meter (100 $\mu g/m^3$), but would be updated to conform to the EPA's reduced guideline level of 1.2 $\mu g/m^3$. (Davis Aff., Ex. 8). Ms. Davis also inquired as to where she could find the EPA's lower guideline in its regulations. (Id.). According to the Kasper defendants, the EPA subsequently changed the guideline level to 6 $\mu g/m^3$. (Def. 56.1 Stat., ¶ 76).

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[33] Exhibit 8 to the Davis affidavit is a letter from FPM Group to the EPA dated September 23, 2002.

By letter dated September 25, 2002, the EPA forwarded to Mr. Ryan a "signature-ready version of the Administrative Order on Consent ["AOC"]" and demanded that it receive the signed AOC by September 27, 2002. (Ryan Aff., Ex. 5[34]). The EPA advised Mr. Ryan that if it did not receive the signed AOC by September 27, 2002, it would "take such other action as [it] deem[ed] appropriate," including issuing "a unilateral administrative order to [the Kasper defendants] for the cleanup of the [Site]." (Id.). Mr. Ryan responded to the AOC by letter dated September 30, 2002, in which he, *inter alia*, indicated that he was out of town; "reconfirmed" the Kasper Trust's willingness to enter into a global consent order including resolution of the EPA's claim for cost recovery and a work plan for the takeover and operation of the SVE systems and removal of the cesspools; expressed surprise over the AOC and short deadline, particularly since, *inter alia*, the EPA had subsequently suggested changes to that document; and delineated several issues raised by the AOC which he believed needed to be addressed. (Ryan Aff., Ex. 19[35]).

By letter dated October 2, 2002, the EPA sent a unilateral administrative order ("UAO") dated September 30, 2002 to Sanderina, as trustee of the Kasper Trust, which directed her to: (1) operate the SVE system until the PCE level in the indoor air was reduced to a level of 6 $\mu g/m^3$;[36] (2) operate the SVE system for six (6) months after the PCE level of the indoor air was achieved

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[34] Exhibit 5 to the Ryan affidavit is the letter from the EPA to Mr. Ryan dated September 25, 2002.

[35] Exhibit 19 to the Ryan affidavit is the letter from Mr. Ryan to the EPA dated September 30, 200.

[36] In an "Action Memorandum" dated May 22, 2008, the EPA indicated that the 6 $\mu g/m^3$ level was chosen because "it was believed that the risk-based level of 1.2 $\mu g/m^3$ identified by EPA for the Site was below what was considered to be background in such an environment setting and therefore unachievable." (Davis Aff., Ex. 4).

at that level; (3) monitor the indoor air at the Site for three (3) years after the SVE system was turned off; and (4) remove two (2) dry wells and associated contaminated soils on the Site to the extent "technically feasible." (Ryan Aff., Ex. 2). Since the Kasper defendants had requested a conference to discuss the UAO, (see Ryan Aff., Ex. 6[37]), which was held on December 12, 2002, the original UAO was never effective. (Ryan Aff., Exs. 6, 9 and 11-12[38]).

By letter dated November 14, 2002, prior to the December 12, 2002 conference, the Kasper Trust sent a Freedom of Information Act ("FOIA") request to the EPA requesting, *inter alia*, information supporting the EPA's indoor air guideline level of 6 $\mu g/m^3$ set forth in the UAO. (Ryan Aff., Ex. 7[39]; Def. 56.1 Stat., ¶ 91; Plf. 56.1 Stat., ¶ 90). By letter dated November 21, 2000, the EPA acknowledged receipt of the FOIA request, but did not otherwise respond thereto. (Ryan Aff., Ex. 8[40]; Def. 56.1 Stat., ¶ 92).

By letter dated June 26, 2003, the EPA, *inter alia*, advised that it had amended the UAO based upon the Kasper Trust's failure to undertake remedial action in accordance with a consent order with the DEC, its discussions with the DEC, and issues raised by the Kasper Trust. (Wolf

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[37] Exhibit 6 to the Ryan affidavit is the letter from Mr. Ryan to the EPA dated November 20, 2002.

[38] Exhibits 6 and 9 to the Ryan affidavit are letters from Mr. Ryan to the EPA dated November 20, 2002 and December 4, 2002, respectively. Exhibits 11 and 12 to the Ryan affidavit are letters from the EPA to Mr. Ryan dated December 20, 2002 and March 20, 2000, respectively.

[39] Exhibit 7 to the Ryan affidavit is the letter from Mr. Ryan to the EPA dated November 14, 2002.

[40] Exhibit 8 to the Ryan affidavit is the letter from the EPA to Mr. Ryan dated November 21, 2002.

Aff., Ex. 9; Davis Aff., Ex. 9; Ryan Aff., Ex. 13[41]). The amended UAO, *inter alia*, not only directed the Kasper defendants to continue to operate the SVE system until a 6 $\mu g/m^3$ level was achieved in indoor air, but also directed that they operate the SVE system and SSD systems until PCE levels in soil-gas at the intake to those systems were reduced to 81 $\mu g/m^3$ and 810 $\mu g/m^3$, respectively[42]. (Wolf Aff., Ex. 9; Davis Aff., Exs. 4 and 9; Ryan Aff., Exs. 13 and 14[43]). In the June 26, 2003 letter, the EPA advised the Kasper defendants that the UAO, as amended, would become effective on July 11, 2003, unless the Kasper defendants requested a conference by July 4, 2003. (Wolf Aff., Ex. 9; Davis Aff., Ex. 9; Ryan Aff., Ex. 13; Def. 56.1 Stat., ¶ 106; Plf. 56.1 Stat., ¶ 105). Although the EPA referred to the FMP Group's draft RAWP in the June 26, 2003 letter, it did not otherwise comment on the RAWP at that time. (Wolf Aff., Ex. 9; Ryan Aff., Ex. 13).

By letter dated July 2, 2003, Mr. Ryan requested a conference to discuss the UAO, as amended. (See Ryan Aff., Ex. 15[44]; Def. 56.1 Stat., ¶ 106; Plf. 56.1 Stat., ¶ 105). By letter dated July 10, 2003, the EPA extended the deadline within which to hold the conference until August

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[41] Exhibit 9 to both the Wolf and Davis affidavits, and Exhibit 13 to the Ryan affidavit, are all the same letter from the EPA to Mr. Ryan dated June 26, 2003.

[42] According to the EPA's "Action Memorandum", those levels were derived utilizing a November 2002 draft guidance issued by EPA headquarters, entitled "Draft Guidance for Evaluating the Vapor Intrusion to Indoor Air Pathway from Groundwater and Soils," which "provides recommended target concentrations for indoor air, soil gas, and groundwater for", *inter alia*, PCE. (Davis Aff., Ex. 4).

[43] Exhibit 14 to the Ryan affidavit is the Amendment to Administrative Order issued by the EPA on June 20, 2003.

[44] Exhibit 15 to the Ryan affidavit is the letter from Mr. Ryan to the EPA dated July 2, 2003.

1, 2003, "but no longer." (Ryan Aff., Ex. 16[45]; Def. 56.1 Stat., ¶ 106; Plf. 56.1 Stat., ¶ 105).

By letter dated July 24, 2003, the EPA advised Mr. Ryan that the UAO, as amended, would become effective on August 2, 2003 and reminded Mr. Ryan to schedule a conference prior to that date. (Kivowitz Decl., Ex. 2[46]; Plf. 56.1 Stat., ¶ 214). In addition, the EPA directed the Kasper Trust to amend the RAWP it had previously submitted to include the requirements of the UAO, as amended. (Id.).

By letter dated July 28, 2003 to the EPA, Mr. Ryan, *inter alia*, indicated that the Kasper Trust remained committed to removing the cesspools on the Site and to abide by an administrative order that fairly resolved the EPA's claim for recovery costs, but would not agree to maintain and operate an SVE system and SSD system to a guideline level of 6 $\mu g/m^3$. (Ryan Aff., Ex. 17[47]; Def. 56.1 Stat., ¶ 106; Plf. 56.1 Stat., ¶ 105). Mr. Ryan further indicated that he was unable to discuss the issues raised by the UAO, as amended, until the following week, although he did not otherwise raise the issue of a conference. (Ryan Aff., Ex. 17; Def. 56.1 Stat., ¶ 106; Plf. 56.1 Stat., ¶ 105). The United States alleges that the UAO, as amended, thus became effective on August 2, 2003.

By letter dated January 23, 2004, the EPA demanded that the Kasper defendants reimburse it for its response costs and to pay civil penalties for their failure to comply with the

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[45] Exhibit 16 to the Ryan affidavit is the letter from the EPA to Mr. Ryan dated July 10, 2003.

[46] Exhibit 2 to the Kivowitz declaration is the letter from the EPA to Mr. Ryan dated July 24, 2003.

[47] Exhibit 17 to the Ryan affidavit is the letter from Mr. Ryan to the EPA dated July 28, 2003.

UAO, as amended. (Wolf Aff., Ex. 11[48]). Attached to the letter was a supplemental RFI, in which the EPA admitted receiving the Kasper defendants' supplemental response to the prior RFI on April 30, 2002, but requested "certain additional information and documents." (Wolf Aff., Ex. 11).

By letter dated March 25, 2002[49], the Kasper defendants provided more of the information that the EPA requested, albeit over objection to the RFI as "tantamount to an inquisition." (Wolf Aff., Ex. 14[50]; Def. 56.1 Stat., ¶ 62). In addition, Mr. Wolf demanded permission to proceed with a private party cleanup. (Wolf Aff., Ex. 14).

By letter dated May 13, 2004, the EPA advised Mr. Wolf that it did not believe that the Kasper defendants provided all of the information it had previously requested, demanded that the information be provided "immediately," and advised that a failure to fully respond to the information requests could subject the Kasper defendants to penalties. (Wolf Aff., Ex. 15[51]). Mr. Wolf responded by letter dated May 25, 2004. (Wolf Aff., Ex. 16[52]).

By letter dated May 18, 2004, the EPA commented on the draft RAWP dated August

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[48] Exhibit 11 to the Wolf affidavit is the letter from the EPA to Mr. Wolf dated January 23, 2004.

[49] This is a typographical error, which should read March 25, 2004. (Wolf Aff., ¶ 25).

[50] Exhibit 14 to the Wolf affidavit is the letter from Mr. Wolf to the EPA dated March 25, 2002 [sic].

[51] Exhibit 15 to the Wolf affidavit is the letter from the EPA to Mr. Wolf dated May 13, 2004.

[52] Exhibit 16 to the Wolf affidavit is the letter from Mr. Wolf to the EPA dated May 25, 2004.

2002 prepared by the FPM Group. (Davis Aff., Ex. 6[53]; Def. 56.1 Stat., ¶ 109). Specifically, the EPA demanded, *inter alia*, that the response action objectives be modified to be consistent with the requirements of the UAO, as amended. (Davis Aff., Ex. 6).

In or about March 2005, the Kasper Trust submitted to the EPA a revised RAWP for select portions of OU-1 of the Site consistent with the requirements of the UAO, as amended. (Davis Aff., Ex. 7[54]; Def. 56.1 Stat., ¶ 111). The response actions set forth in the RAWP include: "the cleanout of the leaching pools on the east side of the Site and the operation and monitoring of the existing SVE system around the Site building [and] placement of a vapor barrier and pouring of a new floor slab." (Id.).

By letter dated September 30, 2005, Mr. Wolf sent a FOIA request to the EPA requesting certain information pertaining, *inter alia*, to remediation work at the Site and other commercial establishments for which the EPA had required a 6 $\mu g/m^3$ level as the clean-up standard for PCE indoor air concentrations at sites within Region 2 since September 2001. (Wolf Aff., Ex. 1[55]; Def. 56.1 Stat., ¶ 113; Plf. 56.1 Stat., ¶ 112). Upon receiving no response to that FOIA request, Mr. Wolf sent a follow-up letter dated June 30, 2006. (Wolf Aff., Ex. 2[56]).

By letter dated July 18, 2006, the EPA provided "a partial response" to Mr. Wolf's FOIA

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[53] Exhibit 6 to the Davis affidavit is the letter from the EPA to the Kasper defendants dated May 18, 2004.

[54] Exhibit 7 to the Davis affidavit is the revised RAWP dated March 2005 prepared by FPM Group for the Kasper Trust.

[55] Exhibit 1 to the Wolf affidavit is the letter from Mr. Wolf to the EPA dated September 30, 2005.

[56] Exhibit 2 to the Wolf affidavit is the letter from Mr. Wolf to the EPA dated June 30, 2006.

request, indicating, *inter alia*, that it had no documents responsive to the request that it identify all other commercial establishments for which the EPA required a 6 μg/m³ level within Region 2. (Wolf Aff., Ex. 3[57]; Def. 56.1 Stat., ¶¶ 113-114; Plf. 56.1 Stat., ¶¶ 112-113).

By letter dated September 25, 2006, Mr. Wolf sent the EPA another FOIA request requesting information "concerning state, federal, or other guidance used to evaluate indoor air quality data and * * * target or cleanup objectives for indoor air for [the Stanton Cleaners Area Groundwater Contamination] Site * * * located in Great Neck, New York." (Wolf Aff., Ex. 4[58]; Def. 56.1 Stat., ¶ 115; Plf. 56.1 Stat., ¶ 114). The EPA responded to that request on October 25, 2006, indicating, *inter alia*, that it "used the NYSDOH value of 100 μg/m³ for PCE as its screening guideline for indoor air, *i.e.*, the level above which [the EPA] would pursue a clean up action." (Wolf Aff., Ex. 5[59]; Def. 56.1 Stat., ¶ 116; Plf. 56.1 Stat., ¶ 115).

The EPA took its last indoor air samples from the Site on April 26-27, 2007, which revealed PCE levels in indoor air at levels up to 3.54 μg/m³. (Davis Aff., Ex. 4; DiGuardia Decl., Ex. 3). The EPA indicated that although there had been "substantial decreases in indoor air PCE concentrations since EPA first started the removal action, * * * there is a continuing release of PCE, a hazardous substance, into the environment." (Id.). During its operation of the SVE system on the Site, the EPA removed approximately four thousand three (4,003) pounds of

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[57] Exhibit 3 to the Wolf affidavit is the letter from the EPA to Mr. Wolf dated July 18, 2006.

[58] Exhibit 4 to the Wolf affidavit is the letter from Mr. Wolf to the EPA dated September 25, 2006.

[59] Exhibit 5 to the Wolf affidavit is the letter from the EPA to Mr. Wolf dated October 25, 2006.

PCE from the Site. (Def. 56.1 Stat., ¶ 118; Plf. 56.1 Stat., ¶¶ 117, 171; Davis Aff., Ex. 4; DiGuardia Decl., Ex. 3). EPA never placed the Site on the National Priorities List ("NPL"). (Pl. 56.1 Stat., ¶ 131; DiGuardia Decl., Exs. 1-3).

On August 9, 2007, pursuant to a Property Transfer Agreement ("PTA"), the EPA transferred responsibility for the operation and maintenance of the SVE system and SSD systems at the site back to the DEC. (Davis Aff., Ex. 4; DiGuardia Decl., Ex. 3; Plf. 56.1 Stat., ¶¶ 130, 172). Under the PTA, the DEC agreed to operate the SVE and SSD systems until PCE levels were achieved at the following levels: 6 $\mu g/m^3$ in indoor air; 81 $\mu g/m^3$ at the intake to the SSD systems; and 810 $\mu g/m^3$ at the intake to the SVE system. (Davis Ex. 4; DiGuardia Decl., Ex. 3; Plf. 56.1 Stat., ¶ 172).

On May 22, 2008[60], the EPA issued an Action Memorandum requesting approval for a ceiling increase to continue removal operations at the Site. (Plf. 56.1 Stat., ¶ 164; DiGuardia Decl., Ex. 3; Davis Aff., Ex. 4). The May 22, 2008 Action Memorandum authorized a ceiling increase of one hundred ten thousand dollars ($110,000.00) to continue and complete "removal" activities at the Site. (DiGuardia Decl., Ex. 3; Plf. 56.1 Stat., ¶ 169; Davis Aff., Ex. 4).

B. Procedural History

On February 8, 2007, the State commenced this action against the Kasper defendants, Staller, American Drive-in Cleaners, Cohen, Cogan and Nezami pursuant to CERCLA, 42 U.S.C. §§ 9601-9675, seeking to recover its costs in responding to the release and threatened

[60] The EPA does not adequately explain the delay in issuing this Action Memorandum almost ten (10) months after it had transferred the response action back to the DEC.

release of hazardous substances at the Site and to redress harm to the public health and environment of the State. The State also asserts state law claims for public nuisance, restitution and indemnification. The State seeks judgment: (1) requiring defendants to complete the abatement and remediation of air, soil and groundwater contamination both on and off of the Site; (2) reimbursing it for its past, present and future costs in responding to the contamination; (3) compensating it for damages to its natural resources, including costs of assessing such damages; and (4) awarding enforcement costs and interest.

On November 25, 2008, the United States commenced a separate action against the Kasper defendants, Staller and Nezami pursuant to CERCLA to recover its costs in responding to the release and threatened release of hazardous substances at the Site, as well as civil penalties and punitive damages for the Kasper defendants' alleged failure to comply with the UAO, as amended, and to provide all of the information requested by the EPA. The United States contends that the EPA has incurred "at least" one million seven hundred fifty thousand four hundred seventy-three dollars ($1,750,473.00) in response costs with respect to the Site, for which it has not been reimbursed. (USA Compl., ¶¶ 68, 70, 72, 74).

The cases were consolidated, on consent, on January 27, 2009.

The Kasper defendants and Nezami now separately move pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment dismissing the United States's claims against them. Staller joins in the Kasper defendants' motion. The United States cross-moves to limit judicial review to the certified administrative record. The Kasper defendants cross-move to strike, or, in the alternative to supplement, the certified administrative record.

II. DISCUSSION

A. The United States's Cross Motion to Limit Review to Administrative Record[61]

The United States alleges that this Court's review of the EPA's response action in this case is limited to a determination on the administrative record that the decision to issue the UAO, as amended, was arbitrary and capricious. Accordingly, the United States cross-moves to strike all material submitted by the Kasper defendants on their motion which are not included in the certified administrative record[62] and to limit this Court's review to the administrative record.

Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides, in relevant part:

> "Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section– (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, * * * , shall be liable for-- (A) all costs of removal or remedial action incurred by the United States Government or a State * * * not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title. * * *"

42 U.S.C. § 9607(a). Section 107(a) authorizes cost recovery actions by the government against potentially responsible parties ("PRPs") "to recoup money spent to clean up and prevent future pollution at contaminated sites or to reimburse others for cleanup and prevention at contaminated sites." Schaefer v. Town of Victor, 457 F.3d 188, 194 (2d Cir. 2006) (quoting Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc., 423 F.3d 90, 94 (2d Cir. 2005)).

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[61] The Kasper defendants' application to strike the EPA's cross motion as "an improper attempt to avoid the court's limitations on the size of a brief," is disingenuous and is denied.

[62] The certified administrative record was filed with the Court on June 24, 2009.

Judicial review of a response action undertaken by the EPA is guided by Section 113(j) of CERCLA, which provides:

> "(1) Limitation. In any judicial action under this chapter, judicial review *of any issues concerning the adequacy of any response action taken or ordered by the President* shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.
>
> (2) Standard. In considering objections raised in any judicial action under this chapter, the court shall uphold the President's decision *in selecting the response action* unless the objecting party can demonstrate, *on the administrative record*, that the decision was arbitrary and capricious or otherwise not in accordance with law."

42 U.S.C. § 9613(j) (emphasis added).

In addition, general principles of review of administrative agency decisions are set forth in the Administrative Procedures Act ("APA"), 5 U.S.C. §§701-706, which limits judicial authority to set aside an administrative agency decision or action to decisions or actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

The district court's role in a CERCLA action challenging a response action undertaken by the EPA "is one of review on the administrative record, searching for error of procedure and for glaring omissions or mistakes which indicate that EPA has acted arbitrarily and capriciously." United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1424 (6th Cir. 1991). Actions by the EPA may only be set aside if:

> "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the

product of agency expertise."

United States v. Burlington Northern Railroad Co., 200 F.3d 679, 689 (10th Cir. 1999) (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983); see also Akzo Coatings, 949 F.2d at 1425 (holding that the district court's task on review of a response action is to search for errors of procedure and serious omissions of substantive evidence).

Accordingly, in order to successfully challenge a particular response action, a PRP, like the Kasper defendants, must establish "that the costs incurred were inconsistent with the NCP, an issue that is judicially reviewed under the arbitrary and capricious standard of review for agency action." United States v. Alcan Aluminum Corp., 97 F.Supp.2d 248, 272 (N.D.N.Y. 2000), aff'd, 315 F.3d 179 (2d Cir. 2003) (quoting State of Minnesota v. Kalman W. Abrams Metals, Inc., 155 F.3d 1019, 1023 (8th Cir. 1998)).

However, the intent behind the limitation on judicial review of agency action is the avoidance of "engaging in a de novo review of the scientific evidence pro and con on each proposed remedy in the hazardous substance arena." Akzo Coatings, 949 F.2d at 1424. As the Sixth Circuit explained:

> "The federal courts have neither the time nor the expertise to [engage in a de novo review of the scientific evidence], and CERCLA has properly left the scientific decisions regarding toxic substance cleanup to the President's delegatee, the EPA administrator and his staff. 'When examining this kind of scientific determination . . . a reviewing court must generally by at its most deferential.' Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 103, 103 S.Ct. 2246, 2255, 76 L.Ed.2d 437 (1983). * * * '[L]imiting judicial review of response actions to the administrative record expedites the process of review, avoids the need for time-consuming and burdensome discovery, reduces litigation costs, and ensures that the reviewing court's attention is focused on the criteria

> used in selecting the response.' H.R.Rep. No. 253, Pt. 1, 99th Cong., 1st Sess. 81 (1985), reprinted in 1986 U.S. Code Cong. & Admin. News 2835, 2863."

Id. "[I]n evaluating the efforts of an agency charged with making technical judgments and weighing complex data, [the district court] must give a proper degree of deference to the agency's expertise, * * *, yet also ensure that the agency has considered all of the relevant evidence in the record and has acted in the public interest." Id. at 1426 (citation omitted).

"[A] reviewing court may consider materials supplementary to the administrative record in order to determine the adequacy of the government agency's decision, even when the court's scope of review is limited to the administrative record." Akzo, 949 F.2d at 1427. In addition, the court may consider supplemental evidence "as either background information to aid the court's understanding, or to determine if the agency examined all relevant factors or adequately explained its decision." Id. at 1428; see also Rochester-Genesee Regional Transportation Authority v. Hynes-Cherin, 531 F.Supp.2d 494, 517 (W.D.N.Y. 2008) (recognizing exception to the rule limiting judicial review of administrative agency actions to the administrative record where the supplemental material is necessary to determine whether the agency has considered all relevant factors and has explained its decision or provides background information to aid in the court's understanding). Thus, supplemental material may be admitted to determine the adequacy of the EPA's decision, so long as it is not used to determine whether the EPA's response action was the best one available. Id.

In light of the above principles, the United States's cross motion is denied. Any supplemental material submitted by the Kasper defendants on this motion for summary judgment will be reviewed to determine the adequacy of the EPA's decision, i.e., whether it considered all

of the relevant factors and acted in the public interest, and as background information, but will not be used to determine whether the UAO, as amended, was the best response action available to the EPA, as such scientific and technical decisions are best left to the EPA.

Moreover, the United States's cross motion is based entirely on its claims for cost recovery pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a). However, the United States also asserts claims to recover civil penalties from the Kasper defendants pursuant to Section 106(b)(1) of CERCLA, 42 U.S.C. § 9606(b)(1), (USA Compl., ¶¶ 98-102), and 104(e)(5)(B) of CERCLA, 42 U.S.C. § 9604(e)(5)(B), (USA Compl., ¶¶ 103-105[63]). Section 106(b)(1) provides:

> "Any person who, *without sufficient cause, willfully* violates, or fails or refuses to comply with, any order of the President under subsection (a) of this section[64] may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than $25,000 for each day in which such violation occurs or such failure to comply continues."

42 U.S.C. § 9606(b)(1) (emphasis added). The Second Circuit has read a good faith defense into

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[63] The United States's complaint erroneously designates two paragraphs as "104." Accordingly, the last numbered paragraph of the United States's complaint will be designated herein as "105."

[64] 42 U.S.C. § 9606(a) provides: "In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment."

Section 106(b)(1). Wagner Seed Co. v. Daggett, 800 F.2d 310, 316 (2d Cir. 1986).[65]

Section 104(e)(5)(B) provides, in relevant part:

> "The President may ask the Attorney General to commence a civil action to compel compliance with a request or order [to comply with a request for information or documents]. Where there is a reasonable basis to believe there may be a release or threat of a release of a hazardous substance or pollutant or contaminant, the court shall take the following actions: * * * (ii) In the case of information or document requests or orders, the court shall enjoin interference with such information or document requests or orders or direct compliance with the requests or orders to provide such information or documents unless under the circumstances of the case the demand for information or documents is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.
>
> The court may assess a civil penalty not to exceed $25,000 for each day of noncompliance against any person who *unreasonably* fails to comply with the provisions of paragraph (2), (3), or (4) or an order issued pursuant to subparagraph (A) of this paragraph.

42 U.S.C. § 9604(e)(5)(B) (emphasis added).

In addition, the United States seeks punitive damages against the Kasper defendants pursuant to Section 107(c)(3) of CERCLA. (USA Compl., ¶¶ 1(c), 102, "Wherefore" clause, subparagraph [C]). Section 107(c)(3) provides, in relevant part:

> "If any person who is liable for a release or threat of release of a hazardous

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[65] The United States asserts, without any support, that the Wagner Seed holding is no longer applicable to claims for civil penalties under Section 106(b)(1) because that case predated the 1986 Superfund Amendments and Reauthorization Act ("SARA"), which, *inter alia*, amended Section 106(b)(1) of CERCLA to add the "without sufficient cause" language. (Memorandum of Law in Further Support of Cross Motion to Strike [Reply Mem.], p. 11 n. 5). However, as set forth below, similar "without sufficient cause" language in Section 107(c)(3) has also been interpreted, post-SARA, to constitute a good faith defense, and at least one other court has read a good faith defense into Section 106(b)(1) subsequent to SARA. See Employers Ins. of Wausau v. Browner, 848 F.Supp. 1369, 1375 (N.D.Ill. 1994), aff'd, 52 F.3d 656 (7th Cir. 1995) (holding that a good faith defense to the EPA's administrative order precludes the application of the penalty provision under Section 106(b)(1)). Accordingly, I reject the United States's conclusory and unsupported contention.

> substance fails *without sufficient cause* to properly provide removal or remedial action upon order of the President pursuant to section * * * 9606 of this title, such person may be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of any costs incurred by the Fund as a result of such failure to take proper action. * * *."

42 U.S.C. § 9607(c)(3) (emphasis added). The "without sufficient cause" language has also been interpreted to operate as a good faith defense. See General Electric Co. v. Jackson, 595 F.Supp.2d 8, 17 (D.D.C. 2009) (citing cases); U.S. v. Parsons, 723 F.Supp. 757, 763 (N.D.Ga. 1989); see also Solid State Circuits, Inc. v. U.S.E.P.A., 812 F.2d 383, 391 (8th Cir. 1987) (interpreting the "without sufficient cause" language to mean that punitive damages may not be assessed if the PRP has an objectively reasonable basis for believing that the EPA's order was invalid or inapplicable to it).

Accordingly, the supplemental material submitted by the Kasper defendants on its motion for summary judgment is admissible, to the extent relevant, on the United States's claims against the Kasper defendants for civil penalties and punitive damages. Indeed, the intent behind Congress's limitation of judicial review to the administrative record would not be served by disallowing evidence of the Kasper's defendants reasons for failing to comply with the UAO, as amended, or the EPA's January RFI, particularly since those claims do not involve matters of scientific or technical expertise requiring deference to the agency's decisions. Accordingly, the United States's cross motion is denied.[66]

B. Motions for Summary Judgment

[66] For essentially the same reasons, the branch of the Kasper defendants' cross-motion to supplement the administrative record is granted, but their cross motion is otherwise denied.

1. Standard of Review

Summary judgment should not be granted unless "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c), as amended by 2009 U.S. Order 17 (C.O. 17), effective December 1, 2009. In ruling on a summary judgment motion, the district court must first "determine whether there is a genuine dispute as to a material fact, raising an issue for trial." McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 202 (2d Cir. 2007) (internal quotations and citations omitted); see Ricci v. DeStefano, 129 S.Ct. 2658, 2677, 174 L.Ed.2d 490 (2009) (holding that "[o]n a motion for summary judgment, facts must be viewed in the light most favorable to the nonmoving party *only* if there is a 'genuine' dispute as to those facts." (Emphasis added) (internal quotations and citation omitted)). "A fact is material if it 'might affect the outcome of the suit under governing law.'" Spinelli v. City of New York, 579 F.3d 160, 166 (2d Cir. 2009) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." Ricci, 129 S.Ct. at 2677 (quoting Matsushita Elec. Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

If the district court determines that there is a dispute as to a material fact, the court must then "resolve all ambiguities, and credit all factual inferences that could rationally be drawn, in favor of the party opposing summary judgment," Spinelli, 579 F.3d at 166 (internal quotations and citation omitted), to determine whether there is a genuine issue for trial. See Ricci, 129 S.Ct. at 2677. The moving party bears the initial burden of establishing the absence of any genuine

issue of material fact, after which the burden shifts to the nonmoving party to "come forth with evidence sufficient to allow a reasonable jury to find in [its] favor." Spinelli, 579 F.3d at 166 (internal quotations and citation omitted). Thus, the nonmoving party can only defeat summary judgment "by coming forward with evidence that would be sufficient, if all reasonable inferences were drawn in [its] favor, to establish the existence of" a factual question that must be resolved at trial. Id. (internal quotations and citations omitted); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

2. Cost Recovery Claims

The Kasper defendants contend that the cost recovery claims asserted against them by the United States are precluded by the statute of limitations, and by the fact that the contamination was caused by third parties. Nezami contends, *inter alia*, that the United States's cost recovery claims are precluded by the statute of limitations.

The United States contends, *inter alia*, that the Kasper defendants mischaracterize this action as a "remedial action" subject to a six (6) year limitations period which runs from the initiation of physical on-site construction, when it is, in fact, a "removal" action subject to a three (3) year limitations period which runs from the completion of the removal. According to the United States, since its removal action was completed in July 2007, its action was timely commenced in November 2008.

a. Statute of Limitations

Section 113 (g)(2) of CERCLA provides the following limitations period for actions

under Section 107:

> " (A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and (B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.
>
> In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred."

42 U.S.C. § 9613(g)(2).

"For cost recovery actions under § 107, CERCLA 'distinguishes between two kinds of response: remedial actions–generally long-term or permanent containment or disposal programs– and removal efforts– typically short-term cleanup arrangements.'" Schaefer, 457 F.3d at 195 (quoting State of New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985)). Since the limitations period for cost recovery claims relating to "removal" actions is three (3) years after the completion of the removal action, Section 9613(g)(2)(A), while the limitations period for cost recovery claims relating to "remedial actions" is six (6) years after the initiation of physical on-site construction of the remediation, Section 9613(g)(2)(B), "whether an activity is a 'removal action' or a 'remedial action' under § 107(a) can be determinative of the timeliness of a

claim." Id. at 195-196.

The Kasper defendants contend that the United States's cost recovery claims relate to a "remedial action" and, thus, are barred by the six (6) year limitations period. To the contrary, the United States contends that its cost recovery claims relate to an ongoing "removal" action and, thus, are not time-barred. Since the statute of limitations is an affirmative defense, the Kasper defendants have the burden of establishing that the United States's cost recovery claims are time-barred. See, e.g. Chimblo v. C.I.R., 177 F.3d 119, 125 (2d Cir. 1999).

Section 101(23) of CERCLA defines a "removal" as follows:

> "the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C.A. § 5121 et seq.]."

42 U.S.C. § 9601(23). The National Contingency Plan sets forth a non-exhaustive list of appropriate "removal" actions, which include, *inter alia*,: fences, warning signs, or other security or site control precautions; drainage controls; "[s]tabilizations of berms, dikes, or impoundments or drainage or closing of lagoons * * *;" capping of contaminated soils or sludges; "[u]sing chemicals and other materials to retard the spread of the release or to mitigate its effects * * *;" excavation and removal of "highly contaminated soils;" removals of bulk containers containing

hazardous substances; "[c]ontainment, treatment, disposal or incineration of hazardous materials * * *;" and provisions of alternative water supply. 40 C.F.R. § 300.415(e).

Section 101(24) of CERCLA defines a "remedial action" as follows:

> "those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. The term includes the costs of permanent relocation of residents and businesses and community facilities where the President determines that, alone or in combination with other measures, such relocation is more cost-effective than and environmentally preferable to the transportation, storage, treatment, destruction, or secure disposition offsite of hazardous substances, or may otherwise be necessary to protect the public health or welfare; the term includes offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials."

42 U.S.C. § 9601(24). Generally, remedial actions involve "long-term, permanent containment effort[s] * * * intended to 'prevent or minimize the release of hazardous substances,' CERCLA § 101(24), Schaefer, 457 F.3d at 203, whereas removal actions are "typically short-term cleanup arrangements." Yankee Gas Services Co. v. UGI Utilities, Inc., 616 F.Supp.2d 228, 270 (D.Conn. 2009); see also Syms v. Olin Corp., 408 F.3d 95, 101 (2d Cir. 2005) ("Broadly speaking, removal includes efforts to clean up a site, prevent the threatened release of hazardous substances, and dispose of removed material. * * * Remedial action includes more permanent

efforts to store, confine, recycle, or destroy hazardous substances." [citations omitted]). "[A] removal action costs less [than a remedial action], takes less time, and is geared to address an immediate release or threat of release." Yankee Gas, 616 F.Supp.2d at 270 (quoting Colorado v. Sunoco, Inc., 337 F.3d 1233, 1240 (10th Cir. 2003)); see also Geraghty and Miller, Inc. v. Conoco Inc., 234 F.3d 917, 926 (5th Cir. 2000) (holding that "removal actions generally are immediate or interim responses, and remedial actions generally are permanent responses.")

Whether response actions are properly characterized as "remedial" or "removal" is a question of law. See United States v. W.R. Grace & Co., 429 F.3d 1224, 1234 (9th Cir. 2005); OBG Technical Services, Inc. v. Northrop Grumman Space & Mission Systems Corp., 503 F.Supp.2d 490, 524 (D.Conn. 2007). Although the EPA's characterization of its response action as "removal" or "remedial" is entitled to some deference, the Court must ultimately determine as a matter of law whether that characterization accords with CERCLA. W.R. Grace, 429 F.3d at 1247.

Although the United States characterizes its response action as a "removal" action commenced as an emergency response to address the release or threatened release of a hazardous substance, i.e., PCE, into the environment, it is clear from the administrative record that the EPA's actions, including installation, operation and maintenance of the SVE and SSD systems on the Site, were intended to constitute a long-term, if not permanent, remedy to the PCE contamination, as opposed to a short-term removal effort. The EPA specifically indicated that its response action was undertaken, *inter alia*, to "assist in the long-term remediation of VOCs in soil." (DiGuardia Decl., Ex. 1). Morever, in the Property Transfer Agreement prepared by the EPA, the EPA indicates that as part of its response activities, it, *inter alia*, "replaced the

temporary SVE system with a *permanent* system." (DiGuardia Decl., Ex. 3) (emphasis added). Moreover, although the statutory descriptions of "remedial actions" and "removal" are vague and often overlapping, the EPA's own description of the SVE process as the treatment of soil gas extracted from the pore spaces within the soil to remove contaminants prior to discharge to the atmosphere, (DiGuardia Decl., Ex. 1), falls squarely within CERCLA's definition of a "remedial action" as including "onsite treatment."[67] Furthermore, the EPA conducted response activities at the Site from May 2001 until August 2007, over six (6) years, and anticipates continued operation of the SVE and SSD systems by the DEC or PRPs until the PCE contamination has been remedied. Such a long-term solution "is properly characterized as a remedial, as opposed to removal, action." OBG, 503 F.Supp.2d at 525; see also Sherwin-Williams Co. v. City of Hamtramck, 840 F.Supp. 470, 475-476 (E.D.Mich. 1993) (holding that "the extended and protracted nature of the cleanup indicate[d] that the City ha[d] engaged in a remedial action.") The EPA's activities were undertaken to minimize the migration of the hazardous substance, i.e., PCE, that was already in the ground at the Site, which "is one of the key objectives of a remedial action." Yankee Gas, 616 F.Supp.2d at 274. Like the plaintiff in OBG, the EPA has not identified "a permanent remedial solution that followed its removal actions because the actions it

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[67] The EPA's response action can also be generally designated as "cleanup of released hazardous substances" and, therefore, fall within either statutory definition as a "remedial action" or "removal." Moreover, the EPA's removal of approximately four thousand three pounds (4,003) of PCE from the Site can constitute either a removal action, see 40 C.F.R. § 300.415(e)(6), or a remedial action. See, e.g. Yankee Gas, 616 F.Supp.2d at 274 (finding that the removal of nine thousand tons of contaminated soil from the Site was consistent with a permanent remedy because the plaintiffs surely did not intent to return the contaminated soil to the Site and that the removal of 20,000 cubic yards of contaminated soil also constituted a remedial activity). However, only the definition of "remedial action" specifically includes onsite treatment of contamination.

considers to be removal actions were, in fact, the permanent remedial solution envisioned under CERCLA." OBG, 503 F.Supp.2d at 525. Indeed, the DEC's March 2001 ROD selected SVE as part of its permanent remedy at the Site prior to the EPA's involvement at the Site, and the Property Transfer Agreement drafted by the EPA contemplates the continued operation and maintenance of the SVE and SSD systems installed by the EPA until PCE levels were achieved at certain levels to remedy the Site and the dismantling and removal of the system(s) only when cleanup is complete. Therefore, the EPA's installation, operation and maintenance of the SVE and SSD systems at the Site were "consistent with [the] permanent remedy" selected for the Site, 42 U.S.C. ¶ 9601(24), and, thus, its response constituted a "remedial action."

Although the United States maintains that a removal action is not converted into a remedial action just because the response actions are permanent in nature, it relies on response actions involving the physical removal or disposal of hazardous substances; the excavation and physical removal of highly contaminated soils; and the physical removal of bulk containers, as do the cases it cites. See W.R. Grace, 429 F.3d at 1247 (physically removing exposed piles of vermiculite); General Electric Co. v. Litton Indus. Automation Sys., 920 F.2d 1415, 1419 n. 4 (8th Cir. 1990) (excavation of soil and buried drums); E.P.A. by and through U.S. v. TMG Enterprises, Inc., 979 F.Supp. 1110, 1130 (W.D. Ky. 1997) (excavation and offsite transport of soil); Hatco Corp. v. W.R. Grace & Co.–Conn., 849 F.Supp. 931, 962 (D. N.J. 1994) (excavation and offsite transport of hazardous substance). Clearly, those actions will always be permanent in nature, as it defies logic to think that the hazardous substances or contaminated soils or containers would be replaced on the site at the conclusion of the removal action. In contrast, the response action at issue here is the continued operation and maintenance of a system(s) for the

treatment of PCE contamination on the Site. Such a system(s) could be removed upon completion of the removal action once the cleanup has been concluded. However, it was not. Instead, the system(s) were kept in place to prevent or minimize PCE contamination in indoor air at the Site until certain levels were attained and contamination at the Site remedied. Accordingly, the EPA's response action constitutes a "remedial action," notwithstanding the EPA's contrary characterization.

Since the EPA's activities were part of a remedial action, the United States's cost recovery claims are foreclosed by the relevant statute of limitations. The latest period on which the limitations period commenced for the EPA's cost recovery claims is May 2001, when the EPA took over the maintenance and operation of the SVE system installed by the State.[68] The United States did not commence its action until November 2008, over seven (7) years later. Accordingly, the branches of the Kasper defendants' and Nezami's motions seeking dismissal of the EPA's cost recovery claims as time-barred is granted, and those claims (the first, second and third causes of action) are dismissed in their entirety with prejudice.[69]

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[68] Even assuming that the physical on-site construction must have been undertaken by the United States, as opposed to the State, the EPA installed its own SVE system in June 2001, as well as a SSD system in the summer of 2002, both more than six (6) years prior to its commencement of this action.

[69] In light of this determination, it is unnecessary to consider the Kasper defendants' alternative arguments for dismissal of the United States's cost recovery claims. Moreover, although the United States conclusorily contends that there is a genuine issue of material fact with respect to whether the response action was a "removal" action or a "remedial action," it fails to identify any such issues. Moreover, the United States even recognizes that this issue is a question of law to be determined by the Court. (Memorandum of Law in Opposition to Motion for Summary Judgment [Mem. Opp.], p. 3). Further, since the United States's remaining causes of action (fourth and fifth causes of action) are asserted against only the Kasper defendants, its complaint is dismissed in its entirety as against Staller and Nezami.

3. Claims for Civil Penalties and Punitive Damages

The Kasper defendants contend that the United States's claims seeking civil penalties and punitive damages against them are precluded by the statute of limitations, and by the fact that they acted with sufficient cause and without bad faith.

The United States contends that each day of the Kasper defendants' non-compliance with the UAO, as amended, constitutes an independent claim for penalties and is in the nature of a continuing violation.

a. Statute of Limitations

i. Punitive Damages

Although both parties proceed on the assumption that CERCLA does not provide a statute of limitations governing the United States's claim for punitive damages, their assumption is belied by the language of Section 113(g)(2), which provides that: "An initial action for recovery of the costs *referred to in section 9607* of this title must be commenced * * *." (Emphasis added). The United States's claim for punitive damages is one of the "costs" referred to in Section 9607, specifically Section 9607(c)(3). Indeed, subparagraph (c) of Section 9607, which includes claims for punitive damages, expressly pertains to the determination of the amount of costs recoverable under Section 9607. Had Congress intended to limit the limitations period in Section 113(g)(2) to the recovery of costs referred to in Section 9607(a), it would have

expressly done so. See, e.g. 42 U.S.C. §§ 9612(d)(1) and (2).[70]

Accordingly, for the reasons set forth in Section B(2)(a), the United States's claim for punitive damages pursuant to Section 107(c)(3) of CERCLA is dismissed as time-barred.

ii. Enforcement Claims

Unlike Section 107(c)(3), CERCLA does not specifically contain a statute of limitations for the commencement of an action seeking the imposition of civil penalties under Section 106(b). Accordingly, the general five (5) year statute of limitations for an action by the government for recovery of fines or penalties, as set forth in 28 U.S.C. § 2462, applies. See General Electric Co. v. Jackson, 595 F.Supp.2d 8, 31 (D.D.C. 2009) (holding that an enforcement action commenced against a PRP for its failure to comply with a UAO must be brought within five years of a "violation" pursuant to 28 U.S.C. § 2462). Section 2462 provides, in relevant part:

> "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim *first accrued*, * * *." (Emphasis added).

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[70] Moreover, the general statute of limitations set forth in 28 U.S.C. § 2462, which the parties contend apply to the United States's claim for punitive damages, only applies to claims "for the enforcement of any civil fine, penalty or forfeiture * * *." Section 106(b) expressly authorizes claims to enforce a UAO and recover a fine for a failure to comply with a UAO and, thus, is clearly the type of claim contemplated by Section 2462. To the contrary, Section 107(c)(3) authorizes an action "to recover punitive damages," which is not the same as an action to enforce a civil fine, penalty or forfeiture. Accordingly, the statute of limitations set forth in Section 2462 would be inapplicable to the United States's claims under Section 107(c)(3) in any event.

"A claim first accrues on the date that a violation first occurs." National Parks and Conservation Ass'n, Inc. v. Tennessee Valley Authority, 502 F.3d 1316, 1322 (11th Cir. 2007).

According to the United States, the UAO, as amended, was effective as of August 4, 2003. The United States further alleges that the Kasper defendants never complied with the UAO, as amended. Thus, the United States's enforcement claim against the Kasper defendants for their failure to comply with the UAO first accrued on August 4, 2003. (See USA Compl., ¶ 101 [seeking penalties for the Kasper defendants' failure to comply with the UAO, as amended, from August 4, 2003]).

However, the continuing violation doctrine tolls the statute of limitations for a time-barred claim where the violation giving rise to that claim continues to occur within the limitations period. Havens Realty Corp. v. Coleman, 455 U.S. 363, 380-381, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982). Neither party has identified any case addressing the applicability of the continuing violation doctrine to enforcement actions under Section 106(b) of CERCLA. However, the continuing violation doctrine has been applied to other environmental law cases applying the five-year general statute of limitations to civil penalties. See, e.g. Scarlett & Associates, Inc. v. Briarcliff Center Partners, LLC, No. 1:05-cv-0145-CC, 2009 WL 3151089, at * 10 (N.D. Ga. Sept. 30, 2009) (holding that federal environmental statutes, such as the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901, *et seq.*, that do not contain their own statute of limitations are subject to Section 2462, but that the statute of limitations is tolled for an otherwise time-barred claim if the violation continues within the limitations period); United States v. Illinois Power Co., 245 F.Supp.2d 951, 955 (S.D. Ill. 2003) (applying Section 2642 to Clean Air Act claims and recognizing that where a violation of that Act is ongoing, the

statute of limitations is tolled for as long as the violation continues); Cornerstone Realty, Inc. v. Dresser Rand Co., 993 F.Supp. 107, 115 (D.Conn. 1998) (holding that the "first accrues" language of Section 2462 does not prohibit application of the continuing violation doctrine in an RCRA action).[71]

Although the United States's cause of action seeking to recover civil penalties under Section 106(b) of CERCLA first accrued on August 4, 2003, the limitations period was tolled until the offense was completed, i.e., until the Kasper defendants complied with the UAO, pursuant to the continuing violation doctrine. Since the Kasper defendants never complied with the UAO, as amended, prior to the commencement of this action, their violation of the UAO, as amended, was continuing and, thus, the statute of limitations was tolled. See, e.g. U.S. v. Reaves, 923 F.Supp. 1530, 1534 n. 1 (M.D. Fla. 1996). Therefore, the United States's claim for civil penalties under Section 106(b) is timely. Accordingly, the branch of the Kasper defendants' motion seeking dismissal of the United States's enforcement claim seeking civil penalties based upon their failure to comply with the UAO, as amended, is denied.

b. Merits of Section 106(b) Claim

The branch of the Kasper defendants' motion seeking dismissal of the United States's

[71] The case cited by the Kasper defendants, 3M Co. (Minnesota Min. and Mfg.) v. Browner, 17 F.3d 1453, 1460 (D.C. Cir. 1994), does not compel a different result, since the holding in that case concerned the meaning of the phrase "first accrued" and the application of the discovery rule, and did not address application of the continuing violation rule. See, e.g. American Canoe Association, Inc. v. District of Columbia Water and Sewer Authority, 306 F.Supp.2d 30, 41 (D.D.C. 2004) (holding that 3M does not bar as untimely actions to stop an alleged ongoing violation of an environmental statute).

Section 106(b) claim on the merits is denied, as genuine issues of material fact exist regarding, *inter alia*, whether the UAO, as amended, ever became effective; if so, whether the Kasper defendants had sufficient cause for failing to comply with the UAO, as amended; and whether equitable considerations weigh against the imposition of such fines.[72]

4. Section 104(e)(5)(B) Claim (Fifth Cause of Action)

The Kasper defendants contend that the claims asserted against them by the United States seeking penalties and injunctive relief for their alleged failure to provide information are inappropriate because they provided adequate information at the advice of legal counsel, and because the United States delayed for over four (4) years in seeking any relief for their alleged failure to provide the information.

This branch of the Kasper defendants' motion is also denied on the basis that genuine issues of material fact exist regarding, *inter alia*, whether the EPA's January 2004 RFI was arbitrary and capricious; whether the Kasper defendants failed to fully respond to the January 2004 RFI; and, if so, whether the Kasper defendants' alleged failure to fully comply with the January 2004 RFI was unreasonable.[73]

III. CONCLUSION

[72] This branch of the Kasper defendants' motion is also denied as premature, as discovery in the United States's action had not yet commenced when the motion was filed.

[73] This branch of the Kasper defendants' motion is also denied as premature.

For the reasons set forth herein: (1) the United States's cross motion is denied; (2) the branch of the Kasper defendants' cross motion to supplement the administrative record is granted, and the cross motion is otherwise denied; (3) the branches of the Kasper defendants' motion for summary judgment dismissing the United States's cost recovery and punitive damages claims are granted and those claims are dismissed with prejudice[74], and the motion is otherwise denied; and (4) Nezami's motion for summary judgment is granted and the United States's complaint against Nezami is dismissed in its entirety. The Clerk of the Court is directed to serve notice of entry of this Order in accordance with Rule 77(d)(1) of the Federal Rules of Civil Procedure, including mailing a copy of the Order to the *pro se* defendant, Nezami, at his last known address, see Fed. R. Civ. P. 5(b)(2)(C).

SO ORDERED.

SANDRA J. FEUERSTEIN
United States District Judge

Dated: December 2, 2009
Central Islip, New York

[74] Accordingly, the United States's complaint is dismissed in its entirety as against Staller.