UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

VIRGINIA STREET FIDELCO, L.L.C.,
and CITY OF NEWARK, NEW JERSEY,

Plaintiffs,

v.

CASE NO: 8:14-cv-130-T-26EAJ

ESTATE OF VERNON G. BROWNE,

Defendant.

_____/

ORDER

THIS CAUSE came before the Court for a nonjury trial held on April 25, 2016. The Court now has before it Plaintiffs' Amended Final Closing Trial Brief (Dkt. 99) and Defendant's Post-Trial Brief (Dkt. 95) and Amended Proposed Findings of Fact and Conclusions of Law (Dkt. 96), as well as notices filed by the parties (Dkts. 100, 101, and 102). Having carefully considered the arguments and evidence at trial, as well as the parties' post-trial submissions, the Court now must find that Defendant is entitled to the entry of final judgment in its favor and against Plaintiffs.

Plaintiffs' Claims

Plaintiffs Virginia Street Fidelco, L.L.C. ("Fidelco") and the City of Newark, New Jersey, (the "City") sought to hold Defendant Estate of Vernon G. Browne ("Defendant"), as legal successor to Vernon G. Browne ("Browne"), personally liable for the cost of remediating environmental contamination at the property known as 55 Virginia Street, Newark, New Jersey (the "Property"). In their Amended Complaint, they allege claims under the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended by the Superfund Amendment and Reauthorization Act of 1986, 42 U.S.C. § 9601, *et seq.* ("CERCLA") (Counts I through III), the New Jersey Spill Compensation and Control Act, N.J.S.A., 58:10-23.11, *et seq.*, ("the Spill Act") (Counts IV and V), the New Jersey Tortfeasor Contribution Act, N.J.S.A. 2A:15-5.1, *et seq.*, the New Jersey Comparative Negligence Act, N.J.S.A. 2A:15-5.1, *et seq.*, and the New Jersey Declaratory Judgments Act, N.J.S.A. 2A:16-50, *et seq.* (Count VI), as well as claims for common law indemnification and restitution (Counts XI and XII). The claims were brought against Defendant for Browne's participation as a controlling officer and/or director of a corporation whose primary business was the manufacture of essential oils, flavors and aromatic chemicals, and pharmaceutical products, and which operated major facilities in New Jersey, including the Property that is the subject of this case.

Findings of Fact

Orbis Products Corporation ("Orbis") operated its manufacturing facility for the production of essential oils, flavors and aromatic chemicals, and pharmaceutical products in Newark, New Jersey on the Property at issue in this case for a number of years, but ceased in the late 1980s. By the time it ceased operations, environmental regulators had already advised the owners that the Property had a number of environmental contamination problems and that clean up would become a necessity. During the 1970s and 1980s, Orbis was the wholly owned subsidiary of Norda, Inc. ("Norda"). In 1985, Norda changed its name to Adron, Inc. ("Adron"). Browne worked in the Finance Department at Norda from approximately 1970 until approximately 1976. In 1976, he was named Vice-President of Administration and a Director of Norda. He remained Vice-President of Administration of Norda until 1981, when he left the employment of Norda. Browne's duties in his roles at Norda were purely administrative and financial in nature, and did not relate in any way to physical conditions or operations at the Orbis Newark plant and he had no personal knowledge of the same.[1] There is no evidence that Browne had any personal knowledge of physical conditions or operations at the Orbis Newark plant; that he actually participated in operating that plant or in activities resulting in the disposal of hazardous substances at the Property; or that he actually exercised control over or was otherwise intimately involved in the operations of Orbis, the

[1] Dkt. 91, Defendant's Trial Exhibit D-2, ¶ 7.

corporation immediately responsible for the operation of the Orbis Newark plant on the Property.[2]

Corporate filings for the New Jersey Division of Taxation reveal that Browne was the Secretary of Norda in 1982, 1983 and/or 1984, was not an officer in 1985, but was a "VP/Secretary" in 1988.[3] Minutes of Meetings of the Board of Directors of Norda show that Browne was a Director of Norda from 1982-1985 and that he was the Vice President and Secretary of Norda in 1983.[4] Additionally, Minutes of Meetings of the Board of Directors of Adron show that Browne was a Director of Adron in 1985-1987 and 1990.[5] Browne was never a shareholder, officer or employee of Orbis and was never a shareholder of Adron. None of the corporate board minutes relied upon by Plaintiffs contains any discussion of environmental contamination at the Property. The only references in the corporate board minutes to the Property relate to its sale,[6] a joint venture relating to the Property,[7] and the Property's possible utilization as a solid waste transfer facility.[8] Browne certified, in 2012, that he only visited the Property on one occasion, as

---

[2] Dkt. 91, Defendant's Trial Exhibit D-2, ¶¶ 5-7.

[3] Id. at Exhibits D-3-5.

[4] Id. at D-7-11.

[5] Id. at D-12-15.

[6] Id. at D-7, p. 4; D-11, p. 2.

[7] Id. at D-12, p. 2.

[8] Id. at D-14, p. 2.

part of an introductory tour when he joined Norda in 1970.[9] Browne died January 17, 2014 in Hillsborough County, Florida, and Defendant is his legal successor.

The Property is owned by the City, with Fidelco (a New Jersey real estate developer) holding a master lease from the City. A Redevelopment Agreement which gave rise to the City-Fidelco relationship[10] is no longer in effect, according to the testimony of Marc Berson ("Berson"), a Fidelco representative.[11] Although, Berson testified that the Redevelopment Agreement was "revised,"[12] Plaintiffs did not introduce any revised Redevelopment Agreement, nor did they introduce any Lease Agreement between the City and Fidelco so that it is not clear to this Court whether Fidelco has any contractual rights or obligations regarding the Property. What is clear, however, is that Fidelco can terminate the Redevelopment Agreement at any time.[13]

With respect to clean up, the only costs that Fidelco alleges that it has incurred relating to conditions at the Property are approximately $52,000, which it stated were incurred for asbestos abatement, but not for the investigation or remediation of

---

[9] Dkt. 91, Defendant's Trial Exhibit D-2, ¶ 7.

[10] Dkt. 90, Plaintiffs' Trial Exhibit P-20.

[11] Dkt. 93, Trial Transcript, T57:16-21.

[12] Id. at T57:18.

[13] Id. at T67:17-69:16.

environmental contamination.[14] Fidelco did not incur demolition costs to the Property and the work included in a proposal introduced as P-29A was not performed.[15] The City also alleged that it incurred costs relating to conditions at the Property, but they were limited to building demolition and asbestos abatement.[16] It received approximately $300,000 for an environmental investigation of the Property from the State of New Jersey.[17] It sought recovery of approximately $27,075.50 in attorneys' fees for services performed by the firm of Golub, Isabel & Cervino, P.C., rendered primarily in litigating the lawsuit Virginia Street Fidelco L.L.C. et al. v. Orbis Products Corporation, et al., Case No. 2:11-cv-02057-SRC-CLW (the "New Jersey Action"), in the District of New Jersey.[18]

Fidelco sought to recover approximately $40,000 in attorneys' fees that it paid for services performed by the firm of Keane, Reese, Vesely, and Gerdes, P.A., in the instant action.[19] Fidelco also sought recovery of approximately $376,000 in attorneys' fees for services rendered primarily in the New Jersey Action by the firm of Nagel and Rice.[20]

---

[14] Dkt. 85, Plaintiffs' Itemization of Damages Supplement to Joint Pretrial Statement, ¶ 1 B, Dkt. 93, Trial Transcript, T56:2-21; T58:17-59:10.

[15] Dkt. 93, Trial Transcript, T60:13-22.

[16] Id. at T53:9-54:3; T60:13-22.

[17] Id. at T50:5-51:4; Dkt. 91, Defendant's Exhibit D-23.

[18] Dkt. 90, Plaintiffs' Exhibit P-29B.

[19] Id. at P-29D.

[20] Id. at P-29C.

However, Berson testified for Fidelco that Nagel and Rice was retained on a "partial contingency basis," which he defined to mean that "because they know me, they know that in the end, if for some reason we're not successful, I'm going to compensate them anyway."[21] The evidence in this case plainly demonstrates that Defendant is not personally liable to Plaintiffs under any of their claims. Accordingly, the Court need not make any findings related to the damages issues addressed by the parties' experts, Richard S. Greenberg ("Greenberg") and Michael W. McLaughlin ("McLaughlin"), or any of the exhibits exclusively related to the experts' testimony.[22]

Notwithstanding, even if the Court could reach the matter of damages, Plaintiffs only presented the expert testimony of Richard S. Greenberg, Ph.D ("Greenberg"), which related entirely to his estimate of environmental costs that may be incurred in the future at the Property. Greenberg estimated that the remediation of the Property would cost between $6,100,000 and $8,700,000.[23] He acknowledged that he did not conduct any independent analysis or work at the Property, but rather he relied upon reports and sampling information provided by other parties.[24] He did not speak with the New Jersey Department of Environmental Protection ("NJDEP") or other environmental agencies

---

[21] Dkt. 93, Trial Transcript T67:2-11.

[22] Dkt. 90, Plaintiffs' Exhibits P-22, P23; Dkt. 91, Defendant's Exhibits D-19, D-22, D-23, D-24.

[23] Dkt. 93, Trial Transcript, T124:9-13.

[24] Id. at T128:15-21.

regarding the current status of the Property, but chose instead to rely upon information he obtained from NJDEP's website.[25] He acknowledged that he made mistakes in his expert report regarding conditions on the Property, such as the location of buildings and whether they were still standing.[26] He did not reduce his estimate of future environmental costs at the Property to account for the fact that some contamination might be coming from off-site sources.[27] He did not know the locations on the Property where the prior consultant, Envirotactics, collected soil samples, and was, therefore, unable to confirm where on the Property Envirotactics found environmental contamination which needed to be remediated.[28] He concluded that environmental remediation needed to be conducted in areas on the Property where Envirotactics concluded that no further remedial work was required.[29] He did not prepare a listing of each environmental area of concern on the Property with any detailed back-up to justify his estimated costs to remediate the area of concern.[30] He did not verify that piping, catch basins, and other structures identified on

---

[25] Dkt. 93, Trial Transcript, T134:24-135:5.

[26] Id. at T133:9-134:23.

[27] Id. at T135:21-136:21.

[28] Id. at T138:21-139:15.

[29] Id. at T141:19-144:23.

[30] Id. at T149:20-25.

the Property were still present at the time of his expert report and needed to be removed.[31]

Greenberg's cost estimate for site-wide soil remediation at the Property was based upon his assumption that all of the soil on the property is contaminated and must be removed or treated, without any volumetric determination of contaminated soil or specific sampling results at particular locations to support that conclusion.[32] On direct examination, he testified that 5 acres of the 6.1 acre Property are probably contaminated, but he still assumed that the entire Property would need to be capped with two feet of fill, at a cost of approximately $1,200,000.[33] On cross-examination, he was directed to look at page 14 of his expert report,[34] which estimated this capping cost at $2 million to $3 million,[35] but he was unable to explain this discrepancy in costs. Although he acknowledged that the buildings and parking areas on a redevelopment property can serve as an environmental cap, he did not take this into account when he concluded that all of the Property would need 2 feet of fill as a cap, and he further admitted that he had no information on the footprint of the building and parking which was proposed to be

---

[31] Dkt. 93, Trial Transcript, T151:11-155:18.

[32] Id. at T155:19-156:19.

[33] Id. at T92:10-93:4.

[34] Dkt. 90, Plaintiffs' Trial Exhibit P-23.

[35] Dkt. 93, Trial Transcript, T161:25-162:9.

constructed on the Property.[36] Greenberg's expert report did not provide a factual basis for his future environmental remediation cost estimates set forth in Table 2 of his report.[37] On direct examination, he was shown an exhibit from his deposition and he used it to testify about additional information related to a scope of work, but the exhibit was not admitted into evidence, and, therefore, all testimony offered in connection with that exhibit must be disregarded.[38]

Michael McLaughlin ("McLaughlin"), Defendant's expert witness, testified that Greenberg's opinion did not present a reliable estimate of the cost of future response actions at the Property.[39] He concluded that Greenberg's cost estimate in his report lacked foundation for the purported $6 million to $8 million in future remediation costs, and that there was no clear expression of what would be done for that amount of money, that there was no systematic evaluation of the available data, that there was no attempt to take into account how the redevelopment plans for the Property would impact the cost of remediation, and that because no scope of work was provided in the expert report, the basis for Greenberg's cost estimates could not be independently reviewed or properly

---

[36] Dkt. 93, Trial Transcript, T162:10-163:13.

[37] Dkt. 90, Plaintiffs' Trial Exhibit P-23.

[38] Dkt. 93, Trial Transcript, T195:16-21.

[39] Id. at T195:16-21.

evaluated.[40] McLaughlin stated that Greenberg did not give proper credit to the environmental work already performed at the Property and did not use a systematic approach to estimate the work that was still necessary to perform.[41] He testified that Greenberg was selective in what technical information he included in his expert report that he did not pay enough attention to data which demonstrated that certain areas on the Property had been cleaned up, and that other areas on the property were contaminated by off-site sources, and that the City, the current property owner, would not be obligated to remediate those areas.[42] He testified that Greenberg had dismissed the conclusions of the prior consultant, Envirotactics, that a number of areas of concern at the Property did not need to be remediated, which was approved by NJDEP.[43] He rejected Greenberg's opinion that two feet of a soil cap needed to be placed on the entire Property, at a cost of $2 million to $3 million, even when a typical redevelopment plan would be to cap most of a contaminated property with buildings and paving.[44]

Greenberg's former firm, Environmental Waste Management Associates ("EWMA"), advised Fidelco in 2015 that further site investigation at the Property was

---

[40] Dkt. 91, Defendant's Trial Exhibit D-19; Dkt. 93, Dkt. 93, Trial Transcript, T195:22-196:11.

[41] Dkt. 93, Trial Transcript, T197:9-198:14.

[42] Id. at T199:20-200:21.

[43] Id. at T200:22-202:17; Dkt. 90, Plaintiffs' Trial Exhibits P-22, D-22, 23.

[44] Dkt. 93, Trial Transcript, T204:8-205:5.

necessary to develop future costs to achieve case closure.[45] McLaughlin's main criticism of Greenberg's expert report and opinion was that it did not contain a volumetric, arithmetic analysis of future environmental costs based upon data from the Property.[46] He testified that there was no information currently available regarding the nature of the groundwater contamination at the Property and there is no basis for any kind of estimate about what it might cost to address groundwater at the Property.[47] Greenberg's future environmental remediation cost estimates, without a complete and finalized environmental delineation investigation, amount to mere speculation.[48] Therefore, the Court feels compelled to adopt McLaughlin's conclusion that Greenberg's expert report does not present a reliable estimate of the costs for future environmental remediation at the Property. Greenberg's remediation cost estimates were not based upon reliable analytical data, and there was no scope of work presented to permit his cost estimates to be independently reviewed or properly evaluated.

Conclusions of Law

Congress enacted CERCLA "to promote timely cleanup of hazardous waste sites and to ensure that costs of such cleanup efforts were borne by those responsible for the

---

[45] Dkt. 93, Trial Transcript, T175:18-177:20; Dkt. 91, Defendant's Trial Exhibit D-24.

[46] Id. at T214:4-8.

[47] Id. at T198:15-25; T214:4-216:1.

[48] Id. at T217:17-218:4.

contamination. Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599, 602 (2009). In order to recover under CERCLA Section 107 for Count I of the Amended Complaint, Plaintiffs must prove: (i) that Defendant falls within one of the four categories of liable entities under the statute; (ii) that hazardous substances were disposed at a "facility;" (iii) that there has been a "release" or "threatened release" of hazardous substances from the facility to the environment and (iv) that the "release" or "threatened release" has required or will require the Plaintiffs to incur response costs. 42 U.S.C. 9607(a); see also Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1496-97 (11th Cir. 1996). The four categories of potentially responsible parties under CERCLA Section 107 are as follows:

a. The owner and operator of a vessel or a facility;

b. Any person who at the time of the disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;

c. Any person who by contract, agreement or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances; and

d. Any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.

42 U.S.C. 9607(a)(1)-(4). CERCLA Section 107(a)(2) operator liability is based upon evidence that the individual concerned was actively supervising operations at the facility where discharges to the environment took place. Jacksonville Elec. Auth. v. Bernuth Corp., 996 F.2d 1107, 1110 (11th Cir. 1993); see also, United States v. BestFoods, 534 U.S. 51, 66-7 (1998) (holding that an "operator is "someone who directs the workings of, manages, or conducts the affairs of the facility" and that liability attaches when an operator "manage[s], direct[s], or conduct[s] operations specifically related to pollution, that is operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.").

Plaintiffs argued that Browne was an "operator" under Section 107(a)(2) because the "exercised control" over the Property at the time of the disposal of hazardous substances there and they further argue that he was an "arranger" and "transporter" under CERCLA Sections 107(a)(3) and (4). They fail, however, to offer any evidence to support those arguments. The evidence is abundantly clear that Browne was involved with only administrative and financial duties as an employee, officer, and director of Norda, that he had no personal knowledge of conditions or operations at the Orbis Newark facility on the Property, and that he visited it only once, as part of an introductory tour when he was hired by Norda. His status as an employee, officer, or director of Norda at various times is simply not enough to subject him to personal individual liability as a CERCLA operator under CERCLA Section 107(a)(2). Therefore, the Court must find

that Defendant is in no way liable to Plaintiffs under CERCLA Section 107(a)(2) because Browne was never an "operator" of the Orbis Newark facility on the Property at the time of disposal of hazardous waste there.

Although Plaintiffs introduced a number of documents relating to the management and operations of Norda and Adron, none of them demonstrated that Browne engaged in any conduct which gives rise to personal liability under any of the claims alleged by Plaintiffs. The documents actually related to the conduct of individuals other than Browne and only a few of them even mentioned Browne's name. Where Browne was mentioned, the references to him were only that he was a Norda officer and/or director, Adron director, attended a meeting, or notarized a document.[49] The minutes of the Norda and Adron Board meetings which were introduced contain no discussion of environmental contamination at the Property, despite Plaintiffs' representations to the contrary.[50] Without any evidence of any act or omission by Browne that caused a discharge to the environment at the Property, Plaintiffs' arguments are essentially that Browne was personally liable for the environmental contamination at the Property because he was an officer/director/employee of Norda, Orbis' parent company, or a director of Adron. That claim must fail. As set out above, personal liability as an

---

[49] Dkt. 91, Defendant's Trial Exhibits D-3-5, D7-16.

[50] Dkt. 90, Plaintiffs' Trial Exhibit P-17; Dkt. 91, Defendant's Trial Exhibits D-3, D-4, D-5, D7-16.

"operator" under CERCLA requires proof of that individual's active supervision at the facility where discharges to the environment took place.

Furthermore, in order for the Court to impose arranger liability under CERCLA Section 107(a)(3), proof of an affirmative act by Defendant to dispose of hazardous substances or a failure to act that resulted in that disposal is required. Redwing Carriers, 94 F.3d at 1506; see also Concrete Sales and Serv., Inc. v. Blue Bird Body Co., 211 F.3d 1333 (11th Cir. 2000); South Fla. Water Mgmt. Dist. v. Montalvo, 84 F.3d 402 (11th Cir. 1996). And, "transporter" liability under CERCLA Section 107(a)(4) arises where a party "accepted any hazardous substances for transport to disposal or treatment facilities." 42 U.S.C. 9607(a)(4); see also, United States v. USX, 68 F.3d 811, 824-25 (3d Cir. 1995). Plaintiffs failed to present any evidence in this case whatsoever to show that Browne, individually or in his capacity as an employee, director, or officer of Norda, engaged in any conduct which would give rise to arranger or transporter liability under CERCLA and his status as a corporate officer/director/employee of Adron or Norda at various times does not give rise to CERCLA arranger or transporter liability.

Even if the Court could find any personal liability on the part of Defendant, as successor to Browne, Plaintiffs failed to produce any credible evidence that they have incurred any necessary response costs under CERCLA Section 107(a)(4)(B,) relating to releases of hazardous substances to the environment, as is required for the imposition of

CERCLA Section 107 liability. "Response" is defined as "remove, removal, remedy and remedial action." 42 U.S.C. 9601(25). "Remove" or "removal" means:

> The cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of 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 a threat of release…

42 U.S.C. 9601(23).

"Remedy" or "remedial action" means:

> removal actions in the event of a release of 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 to the environment. The term includes, but is not limited to, such actions … as storage, confinement, … clay cover, … and any monitoring reasonably required to assure that such actions protect the health and welfare and the environment …

42 U.S.C. 9601(24). Plaintiffs must, therefore, establish that there is a nexus between the alleged response cost and an actual effort to clean up environmental contamination in response to a threat to human health or the environment. Ford Motor Co. v. Michigan Consol. Gas Company,2010 WL 3419502, at *4 (E.D. Mich. Aug. 27, 2010) (citing Young v. United States, 394 F.3d 858, 863 (10th Cir. 2003)).

Fidelco acknowledged at trial that the only funds it has expended on the Property with regard to environmental conditions were for asbestos abatement, not investigation or

remediation of environmental contamination.[51] The City's expenditures on the Property were limited to demolition and asbestos abatement, and the City received approximately $300,000 for environmental investigation of the Property from the State of New Jersey.[52] Although Plaintiffs seek recovery of attorneys' fees, fees are not recoverable under CERCLA or under the other causes of section pled by Plaintiffs. Key Tronic Corp. v. United States, 511 U.S. 809, 814 (1999); Jacksonville Elec. Auth.v. Eppinger and Russell Co. 2005 WL 3533163, at *9 (M.D. Fla 2005) (citing Key Tronic, 511 U.S. at 814). Therefore, Plaintiffs' claims under Section 107 of CERCLA in Count I of the Amended Complaint must be denied because Plaintiffs did not incur the necessary response costs. In addition, Plaintiffs' claim in Count II of the Amended Complaint for "contribution" under CERCLA Section 107(a), must be denied inasmuch as CERCLA Section 107(a) does not provide for a "contribution" claim. A claim for contribution would only arise under CERCLA Section 113.

In Count III, Plaintiffs brought a claim against Defendant under Section 113(f)(1) of CERCLA, which provides the following:

> Any person may seek contribution from any other person who is liable or potentially liable under Section 9607(a) of this Title, during or following any civil action under Section 9606 of this Title or under Section 9607(a) of this Title. Such claim shall be brought in accordance with this Section and the Federal Rules of Civil Procedure, and shall be governed by Federal law.

---

[51] Dkt. 93, Trial Transcript, T:56:2-21; T58:17-59:10; T60:13-22.

[52] Id. at T53:9-54:3; T60:13-22; T50:5-51:4.

42 SC § 9613(f)(1). To recover under CERCLA Section 113, Plaintiffs must establish that they are the subject of legal action brought by the government or a private party under either CERCLA Section 106 or 107 or comparable State law, and did not incur voluntarily the remediation costs that are the subject of the claim. Cooper Indus., Inc. v. Aviall Serv. Inc., 543 U.S. 157, 162-63 (2004); United States v. Atl. Research Corp, 551 U.S. 128, 138-39 (2007). Plaintiffs failed to produce any evidence that they have been the subject of any legal action by the federal or state government or a private party under CERCLA or other environmental statutes. Therefore, Plaintiffs' claims for contribution in Count III must be denied.

In Counts IV and V, Plaintiffs alleged claims under the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11, *et seq.* N.J.S.A. 58:10-23.11g(c)(1) provides that:

> Any person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance, shall be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs no matter by whom incurred. Such person shall also be strictly liable, jointly and severally, without regard to fault, for all cleanup and removal costs incurred by the department or a local unit …

In 1992, the New Jersey Legislature amended the Spill Act to create a private right of contribution:

> Whenever one or more dischargers or persons cleans up and removes a discharge of a hazardous substance, those dischargers and persons shall have a right of contribution against all other dischargers and persons in any way responsible for a discharged hazardous substance or other persons who

> are liable for the cost of the cleanup and removal of that discharge of a hazardous substance ...

N.J.S.A. 58:10-23.11f(a)(2).

Under the Spill Act, a party who "cleans up and removes the discharge of a hazardous substance" may bring an action for contribution against all dischargers. N.J.S.A. 58:10-23.11(f)(2)(a). In that action, the court must first determine if the contribution defendants are responsible for a discharge to the environment. If the court makes that finding, then the court "may allocate the costs of cleanup and removal among liable parties using such equitable factors as the court determines are appropriate." N.J.S.A. 58:10-23.11f(a)(3). Other than this right of contribution, there is no 'cost recovery' cause of action available to a private party under the Spill Act. Magic Petroleum Corp. v. Exxon Mobil Corp., 218 N.J. 390, 403-405 (2014). There first must be proof that the defendant caused a discharge in order for liability to attach under the Spill Act. Dept. of Envtl. Prot. v. Dimant, 212 N.J. 153, 177-178 (2012). Then the plaintiff must establish a direct nexus between the discharge and the contamination for which cleanup costs have been or will be incurred. Id. There must be "a connection between the discharge complained of and the resultant Spill Act response." Id. at 178. More specifically, "... [a] party ... must be shown to have committed a discharge that was connected to the specifically charged environmental damage of natural resources ... in some real, not hypothetical way. A reasonable nexus or connection must be demonstrated by a preponderance of the evidence." Id. at 182.

As Defendant points out, courts have been reluctant to impose liability under the Spill Act on employees or officers of companies responsible for a discharge unless the evidence justified piercing the corporate veil. Analytical Measurements, Inc. v. Keuffel & Esser Co., 816 F. Supp. 291, 299 (D.N.J. 1993); see also, State Dept. of Envtl. Prot. v. Ventron, 94 N.J. 473, 500 (1983); Canter v. Lakewood of Voorhees, 420 N.J. Super. 508, 519 (App. Div. 2011) (to pierce the veil, the 'domination' prong and the 'improper purpose' prong must be established by clear and convincing evidence). Plaintiffs simply do not present the Court with any facts or evidence that justify piercing the veil of any of the companies allegedly relevant to the claims against Defendant. There is no evidence that Browne discharged a hazardous substance, or was "in any way responsible for any hazardous substance" at the Property, so that his Estate is not liable under the Spill Act as alleged in Count V of the Amended Complaint.

Plaintiffs also raised a nuisance claim, but such a claim is only valid under New Jersey law when filed by a property owner who alleges harm caused by another's use of adjacent or nearby property. New Jersey Tpk. Auth. v. PPG Indus., Inc., 16 F. Supp. 2d 460, 478 (D.N.J. 1998). Likewise, a trespass claim requires entry onto another's land, causing injury. Restatement (Second) of Torts, (1979), § 158; see also, New Jersey Tpk., 16 F. Supp. at 478. Because Plaintiffs seek to obtain recovery in nuisance and trespass against a predecessor in title to the same property, those claims, found in Counts VII and VIII, have no legal foundation and must be denied.

Under New Jersey law, a strict liability claim requires a plaintiff to demonstrate (i) that the defendants' conduct constituted an abnormally dangerous activity; and (ii) that such activity has harmed the plaintiff. Bonnieview Homeowners Assoc. v. Woodmont Builders, 655 F. Supp. 2d. 473, 519 (D.N.J. 2009) (citing Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 263 F. Supp. 2d. 796, 850 (D.N.J. 2003)). In evaluating whether a Defendant's conduct was abnormally dangerous, "the essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it." Id. (citing Restatement (Second) of Torts, § 520 cmt. f).

New Jersey law directs the court to consider six factors when determining if an activity is abnormally dangerous:

> a. existence of a high degree of risk of some harm to the person, land, or chattels of others;
>
> b. likelihood that the harm that results from it will be great;
>
> c. inability to eliminate the risk by the exercise of reasonable care;
>
> d. extent to which the activity is not a matter of common usage;
>
> e. inappropriateness of the activity to the place where it is carried on; and
>
> f. extent to which its value to the community is outweighed by its dangerous attributes.

Id. It is not necessary that each factor be present if the other factors weigh heavily for or against a finding that the activity is or is not abnormally dangerous. Ordinarily, a court

must find that several factors apply in order to impose strict liability. Id. (citing T & E Indus. v. Safety Light Corp., 123 N.J. 371, 390 (1991)). As previously discussed, Browne did not personally engage in abnormally dangerous activities at the Property and, thus, Plaintiffs' claim in Count IX for the imposition of strict liability against Defendant, as his legal successor must be denied.

Plaintiffs' claim in Count X for "Tortious Contamination" must also be denied because New Jersey law does not recognize any such cause of action. Furthermore, Count X is duplicative and superfluous of Plaintiffs' claims for nuisance, trespass, and strict liability.

Plaintiffs presented a claim for common law indemnification, however, such an obligation only arises when two or more persons become liable in tort to the same person for the same harm. United States v. Manzo, 182 F. Supp. 2d 385, 411 (D.N.J. 2000); United States v. Alcan Alum. Corp., 964 F. 2d 252, 268-69 (3rd Cir. 1992) (citing Restatement (Second) of Torts, (1979), sec. 433A). Inasmuch as the Court has already determined that Defendant has no personal liability, as Browne's legal successor, for the environmental contamination of the Property, Plaintiffs' claim in Count XI for common law indemnification must be denied.

The New Jersey Tortfeasor Contribution Act, N.J.S.A. 2A:53A-1, *et seq.*, provides for the allocation of liability among multiple parties found to be liable in tort for injuries to a third party. The purpose of the Act is to accomplish "a sharing of the common

responsibility [among tortfeasors] according to equity and natural justice." Magic Petroleum, 218 N.J. at 403. Accordingly, the New Jersey Comparative Negligence Act, N.J.S.A. 2A:15-5.1 et seq., is implicated only if there is a finding of tort liability.

In light of the Court's determination that Defendant is not liable in nuisance, trespass, common law strict liability, or "tortious contamination," Plaintiffs' claims under the New Jersey Tortfeasor Contribution Act, (Count VI), the New Jersey Comparative Negligence Act, (Count VI), the New Jersey Declaratory Judgments Act, N.J.S.A. 2A:16-50 et. seq. (Count VI) and the claim for common law indemnification (Count XI) must be denied as a matter of course because liability under those claims requires a finding of tort liability. Because Browne was not personally liable for the contamination on the Property, the Court must necessarily conclude that Defendant has not been unjustly enriched at Plaintiffs' expense and, therefore, Plaintiffs claim for restitution in Count XII must be denied.

As Defendant correctly asserts, even if the Court were able to find Defendant liable under either CERCLA or the Spill Act, it would still have to determine the share of liability for the remediation costs at the Property to be allocated to this Defendant "using such equitable factors as the court determines are appropriate." 42 U.S.C. 9613(f); N.J.S.A. 58:10-23.11(f)(a)(3). That share may be zero. Halliburton Energy Serv, Inc. v. NL Indus., 648 F. Supp. 2d 840, 865 (S.D. Tex. 2009); Kalamazoo River Study Grp. v. Rockwell Int'l Corp., 274 F.3d 1043, 1047 (6th Cir. 2001) ("a holding of potential liability

does not preclude a zero allocation of response costs"); PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610, 616 (7th Cir. 1998) (holding that a Potentially Responsible Party's ("PRPs") "spills may have been too inconsequential to affect the cost of cleaning up significantly, and in that event a zero allocation would be appropriate"); Acushnet Co. v. Mohasco Corp., 191 F.3d 69, 78 (1st Cir. 1999) ("in an appropriate set of circumstances, a tortfeasor's share of the response costs may even be zero"). A PRP need not be totally blameless to receive an allocation of zero liability, so long as the court reaches its conclusion by acting within its broad discretion and using equitable factors to make that determination based on the evidence presented. Kalamazoo, 274 F.3d at 1049. The Spill Act authorizes the court to "allocate the costs of cleanup and removal among liable parties using such equitable factors as the court determines are appropriate." N.J.S.A. 58:10-23.11f(a)(3). Therefore, even if the Court found Browne potentially responsible, his previously discussed lack of any connection or involvement with the Property and Orbis' operations there supports an allocation of a 'zero' share of liability to Defendant. Plaintiffs utterly failed to prove that they are entitled to reimbursement for any costs incurred to date.

An award of no damages is further supported by the fact that Greenberg's expert report and testimony regarding estimated future remediation expense at the Property was too speculative and lacking in foundation. The Court has already determined that the more credible testimony was offered by McLaughlin, who testified that Greenberg's did

not present a reliable estimate of the cost of future response action at the Property. McLaughlin concluded that Greenberg's cost estimate lacked foundation for the purported $6 million to $ 8 million in future remediation costs with no clear explanation of what was going to be done for that amount of money. McLaughlin found that Greenberg made no systematic evaluation of the available data and no attempt to take into account how the redevelopment plan for the Property would impact the cost of remediation, and because no scope of work was provided in the expert report, the basis for Greenberg's estimates and costs could not be independently reviewed or properly evaluated. The Court agrees with McLaughlin's conclusions.

In light of all the reasons announced above, Plaintiffs are not entitled to relief under any of the claims in their Amended Complaint.

ACCORDINGLY, it is **ORDERED AND ADJUDGED**:

The Clerk is directed to enter final judgment in favor of Defendant and against Plaintiffs and to close this case.

DONE AND ORDERED at Tampa, Florida, on June 29, 2016.

s/*Richard A. Lazzara*
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:
Counsel of Record