

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Alleged Violations of Title 10 of Article
17 of the Environmental Conservation Law
("ECL") and Part 613 of Title 6 of the
Official Compilation of Codes, Rules and
Regulations of the State of New York ("6
NYCRR"),

- by -

**125 BROADWAY, LLC, and
MICHAEL O'BRIEN,**

Respondents.

DEC Case No. R4-2005-0214-18

DECISION AND ORDER OF THE COMMISSIONER

December 15, 2006

DECISION AND ORDER OF THE COMMISSIONER

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondents 125 Broadway, LLC and Michael O'Brien by service of a notice of hearing and complaint dated January 3, 2006. In accordance with 6 NYCRR 622.3(a)(3), respondents were served with a copy of the notice of hearing and complaint on January 11, 2006 by personal delivery to Michael O'Brien at 4 Central Avenue, Albany, New York.

The complaint alleged that respondent 125 Broadway, LLC, a limited liability company, is the owner of a building located at 125 Broadway, Menands, New York (the "site") at which various environmental violations relating to petroleum and chemical bulk storage tanks and potentially hazardous liquids occurred. The complaint further alleged that respondent Michael O'Brien is the president and member of 125 Broadway, LLC.

Pursuant to 6 NYCRR 622.4(a), respondents' time to serve an answer to the complaint expired on January 31, 2006, and has not been extended by Department staff. Department staff filed a motion for default judgment, dated May 4, 2006 with the Department's Office of Hearings and Mediation Services. The matter was assigned to Administrative Law Judge ("ALJ") Susan J.

DuBois, who prepared the attached default summary report. I adopt the ALJ's default summary report as my decision in this matter, subject to the following comments.

Prior Consent Orders

Previously, respondent 125 Broadway, LLC had executed an order on consent (R4-2005-0214-18) ("Order on Consent"), effective July 7, 2005. The Order on Consent noted the failure of respondent to register petroleum and chemical bulk storage tanks at the site (thereby violating, respectively, 6 NYCRR 612.2[c] and 6 NYCRR 596.2), and the failure to determine if liquid waste on-site constituted hazardous waste (thereby violating 6 NYCRR 372.2[a][2]).

Pursuant to the Order on Consent, respondent 125 Broadway, LLC was assessed a civil penalty of twenty-five thousand dollars (\$25,000), of which twenty thousand dollars (\$20,000) was suspended, conditioned upon its compliance with the terms and conditions of the Order on Consent. Attached to and incorporated as part of the Order on Consent was a schedule of compliance whereby 125 Broadway, LLC agreed to register and permanently close all petroleum and chemical bulk storage tanks at the site, make a hazardous waste determination of the liquids identified in the order and properly dispose of such liquids in

accordance with specified timeframes.

Respondent 125 Broadway, LLC failed to comply with the Order on Consent and subsequently signed a modification of the order on consent, effective September 26, 2005 ("Modified Order"). The Modified Order imposed a civil penalty of fifty thousand dollars (\$50,000) on 125 Broadway, LLC for violation of the Order on Consent. Of this amount, forty-five thousand dollars (\$45,000) was suspended conditioned upon 125 Broadway, LLC's compliance with the Order on Consent and Modified Order. The Modified Order established a schedule for the payment of the unsuspended portion of five thousand dollars (\$5,000), together with new schedule of compliance dates for undertaking the remedial measures that had been required by the Order on Consent.

Michael O'Brien, the President of 125 Broadway, LLC, signed both the Order on Consent and the Modified Order on behalf of the company but was not named as a respondent on either order.

Proposed Penalty

Department staff, in its complaint, alleges that respondents 125 Broadway, LLC and Michael O'Brien violated the Modified Order by failing to pay the assessed penalty and by failing to comply with the schedule of compliance relative to the

registration and permanent closure of all petroleum bulk storage tanks and chemical bulk storage tanks at the site, the determination of whether various liquids on-site constituted hazardous waste, and the proper disposal of those liquids.

In light of the foregoing, Department staff proposes that 125 Broadway, LLC and Michael O'Brien be jointly and severally assessed a civil penalty of sixty thousand dollars (\$60,000) for the failure to comply with the Modified Order. Of this penalty, thirty thousand dollars (\$30,000) would be suspended contingent upon respondents' payment of the unsuspended portion of the penalty and compliance with a schedule of compliance to address the tanks and the potentially hazardous liquids on site. Department staff also proposes that respondents be held jointly and severally liable for the forty-five thousand dollar (\$45,000) suspended penalty in the Modified Order.

With respect to the liability of member and President Michael O'Brien, the ALJ in her default summary report addresses whether a member of a limited liability company may be held liable for environmental violations. Her report reviews the well-settled law that officers of corporations may be held liable, without piercing the corporate veil, for environmental violations where their acts or omissions result in or otherwise

contribute to those violations. The ALJ recommends that this theory of corporate officer liability also be applied to a member of a limited liability company and, accordingly, that respondent Michael O'Brien, in addition to 125 Broadway, LLC, be held liable.

I concur. The legal theories in New York law that authorize imposition of individual liability for environmental violations upon corporate officers arising from their individual acts or omissions are equally applicable to a member or officer of a limited liability company. Nothing in New York law suggests a contrary conclusion. By defaulting, respondent Michael O'Brien has not disputed Department staff's allegation that he exercised total control over the site and had the sole power to cause compliance with the Order on Consent and the Modified Order. He has been directly and knowingly involved with respect to the environmental conditions at the site, and has failed to correct the identified violations (see Complaint dated January 3, 2006, ¶¶ 7-20; see also Affirmation of Richard Ostrov, Esq., dated May 4, 2006, ¶¶ 9-22). His failure to undertake the compliance activities required by the Modified Order resulted in the violation of the order. Accordingly, in addition to 125 Broadway, LLC being held liable, respondent O'Brien shall be held individually liable.

However, for the reasons set forth by the ALJ (see Default Summary Report, at 11-12), I conclude that respondent Michael O'Brien should not be found liable for payment of the suspended portion of the penalty contained in the Modified Order. Mr. O'Brien was not a named respondent under that order and he did not, by the language of that order, assume personal liability for the payment of the penalty by his signing it, as president, on behalf of 125 Broadway, LLC.

With respect to the amount of the proposed penalty, based upon the record, including but not limited to the nature of the violations at the site and the ongoing failure of respondents to address those violations, a civil penalty of sixty thousand dollars (\$60,000) is justified.

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

I. Pursuant to 6 NYCRR 622.15, Department staff's motion for a default judgment is granted.

II. Respondents 125 Broadway, LLC and Michael O'Brien are adjudged to be in default and to have waived the right to a hearing in this enforcement proceeding. Accordingly, the allegations against respondents, as contained in the complaint, are deemed to have been admitted by respondents.

III. Respondent 125 Broadway, LLC is adjudged to have violated the requirements established by the Modified Order by failing to carry out the remedial measures directed in the schedule of compliance set forth in the Modified Order and by failing to pay the suspended penalty of \$45,000 that became due for its violation of the Modified Order.

IV. Respondent Michael O'Brien is adjudged to have caused the violation of the Modified Order by failing to (1) cause payment of the penalty (including but not limited to his submitting a check in partial payment of the penalty that he signed but which was returned for insufficient funds) and (2) comply with the requirements set forth in the schedule of compliance, thereby allowing continued violation of applicable petroleum and chemical bulk storage and hazardous waste regulations.

V. Respondents 125 Broadway, LLC and Michael O'Brien are hereby jointly and severally assessed a civil penalty in the amount of sixty thousand dollars (\$60,000), of which thirty thousand dollars (\$30,000) shall be due and payable within thirty (30) days after service of this decision and order upon respondents. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address: Region 4 Office, Division of Legal Affairs, 1150 North Westcott Road, Schenectady, New York 12306-2014, ATTN: Blaise Constantakes, Esq., Regional Attorney. The remaining portion of thirty thousand dollars (\$30,000) shall be suspended contingent upon respondents' compliance with the requirements of this decision and order. If respondents fail to comply with this decision and order, the suspended portion of the penalty shall become immediately due and payable upon demand by Department staff and is to be submitted to the Department in the same form and manner as the unsuspended portion of the penalty.

VI. In addition to the penalty assessed in paragraph V of this decision and order, respondent 125 Broadway, LLC is also liable for payment of the suspended penalty of forty-five thousand dollars (\$45,000) imposed by the Modified Order, which is due and payable no later than thirty (30) days after service of this decision and order upon respondent 125 Broadway, LLC. Payment of the \$45,000 suspended penalty shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address: Region 4, Division of Legal Affairs, 1150 North Westcott Road, Schenectady, New York 12306-2014, ATTN: Blaise Constantakes, Esq., Regional Attorney.

VII. In addition to the payment of penalties, respondents shall:

A. submit to the Department, within thirty (30) days

of the service of this decision and order, a completed application to register all tanks at the site that are subject to the petroleum bulk storage regulations and permanently close those tanks in accordance with the requirements in 6 NYCRR 613.9. A certification of closure shall be provided to the Department by respondents within 10 days of the completion of the closure;

B. submit to the Department, within thirty (30) days of the service of this decision and order, a completed application to register all tanks at the site that are subject to the chemical bulk storage regulations and permanently close those tanks in accordance with the requirements in 6 NYCRR 598.10. A certification of closure shall be provided to the Department by respondents within 10 days of the completion of the closure; and

C. (1) properly make a hazardous waste determination of all the liquids described in paragraph 6 of the Order on Consent, (2) properly dispose of all liquids at the site in accordance with applicable state and federal laws and regulations, and (3) provide the Department with written proof of proper disposal of the liquids within forty-five (45) days of the service of this Decision and Order.

VIII. All communications from respondents to the Department concerning this decision and order shall be made to Richard Ostrov, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation, Region 4, 1150 North Westcott Road, Schenectady, New York 12306-2014.

IX. The provisions, terms and conditions of this decision and order shall bind respondents 125 Broadway, LLC and Michael O'Brien, and their heirs, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/
Denise M. Sheehan
Commissioner

Dated: December 15, 2006
Albany, New York

TO: 125 Broadway, LLC (By certified mail)
4 Central Avenue
Albany, New York 12210

Michael O'Brien (By certified mail)
4 Central Avenue
Albany, New York 12210

Richard Ostrov, Esq. (By first class mail)
New York State Department
of Environmental Conservation
Region 4
1150 North Westcott Road
Schenectady, New York 12306-2014

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged
Violations of title 10 of article
17 of the New York State Environmental
Conservation Law and part 613 of title
6 of the Official Compilation of
Codes, Rules and Regulations of the
State of New York

DEFAULT SUMMARY
REPORT

DEC File No.
R4-2005-0214-18
Spill # 04-85103

by

125 BROADWAY LLC and
MICHAEL O'BRIEN,

September 14, 2006

Respondents.

Staff of the Department of Environmental Conservation ("DEC Staff") commenced this administrative proceeding by serving a notice of hearing and complaint, and a notice of discovery, upon 125 Broadway LLC, 4 Central Avenue, Albany, New York 12210 ("125 Broadway") and Michael O'Brien, 4 Central Avenue, Albany New York 12210 ("Mr. O'Brien"), the Respondents in this matter. The notice of hearing and complaint were served upon both Respondents on January 11, 2006.

The complaint alleges that both Respondents are liable for failure to comply with a Modification of Order on Consent ("Modification") issued to 125 Broadway that became effective on September 26, 2005. The Modification arose out of 125 Broadway's violations of an Order on Consent ("Order") that became effective on July 7, 2005. The Order imposed penalties and a compliance schedule on 125 Broadway for violations of petroleum bulk storage, chemical bulk storage and hazardous waste requirements at a site in Menands, Albany County.

On May 4, 2006, DEC Staff transmitted to the DEC Office of Hearings and Mediation Services a motion for a default judgment and order against Respondents on the basis that Respondents failed to timely file an answer to the complaint that was served in January 2006. In support of its motion for a default judgment, DEC Staff submitted an affirmation of Richard Ostrov, Esq., Assistant Regional Attorney, DEC Region 4, accompanied by a proposed order and proof of service of the notice of hearing and complaint in this matter. The motion for a default judgment was made pursuant to section 622.15 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR 622.15").

In its motion, DEC Staff sought an order finding Mr. O'Brien personally liable for the violations of the Modification, and requiring both Respondents, individually and jointly, to pay within 30 days of the order a \$45,000 suspended penalty provided for in the Modification. The requested order would also assess both Respondents, individually and jointly, a civil penalty of \$60,000 for violation of the Modification, of which \$30,000 would be due and payable within 30 days after service of the order and \$30,000 would be suspended conditioned on Respondents' compliance with the proposed order. The requested order would also require Respondents to carry out the remedial actions specified in the schedules of compliance that were included in the Order and the Modification.

DEFAULT PROCEDURES

Section 622.15 of 6 NYCRR (Default Procedures) provides, in part, that a motion for default judgment must contain: "(1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding; (2) proof of the respondent's failure to appear or failure to file a timely answer; and (3) a proposed order."

The following findings are based upon the papers submitted, as identified above.

FINDINGS OF FACT

1. An Order on Consent was signed by Michael O'Brien, as President of 125 Broadway LLC, on May 23, 2005 concerning violations of articles 17 and 27 of the Environmental Conservation Law ("ECL") committed by 125 Broadway at a site that it owns and that is located at 125 Broadway, Menands, New York. DEC Region 4 Director Steven G. Schassler signed the Order, on behalf of the Department, on July 7, 2005 and the Order became effective on that date.

2. Pursuant to the Order, 125 Broadway admitted violating 6 NYCRR 612.2(c) by failing to register two above-ground oil storage tanks with combined capacities of greater than 1,100 gallons. 125 Broadway also admitted violating 6 NYCRR 596.2 by failing to register a chemical bulk storage tank with a capacity of 185 gallons or greater. The Order states that the chemical tank was a 3,500 gallon tank that stored either acetone or alcohol. Pursuant to the Order, 125 Broadway also admitted

violating 6 NYCRR 372.2(a)(2) by failing to determine the composition of liquids held on site in numerous containers, with regard to whether the liquids were hazardous waste.

3. The Order directed that 125 Broadway pay a civil penalty of \$5,000 with the return of the signed Order, and be subject to a penalty of \$20,000 that was suspended conditioned on 125 Broadway's compliance with the Order. The Order also directed 125 Broadway to adhere to a compliance schedule. Under the schedule of compliance, 125 Broadway was to register and to permanently close the tanks within 30 days of the effective date of the Order (i.e., 30 days after July 7, 2005) and provide certifications of closure within 10 days of the closure. The Order's compliance schedule directed 125 Broadway to properly make a hazardous waste determination of all the liquids described in paragraph 6 of the Order, and to do this within 30 days of the effective date of the Order. The compliance schedule also required 125 Broadway to properly dispose of all liquids on site in accordance with applicable state and federal laws and regulations, within 30 days after the effective date of the Order, and to provide the DEC with written proof of such disposal within 45 days of the effective date of the Order.

4. Respondent 125 Broadway violated the Order by failing to satisfy all the requirements in the Order's schedule of compliance. A Modification of the Order was signed by Mr. O'Brien, as President of 125 Broadway, on September 22, 2005 and by Regional Director Schassler on September 26, 2005. The Modification became effective on September 26, 2005. The Modification noted the suspended penalty provision of the Order, and imposed a civil penalty in the amount of \$50,000 for violating the Order, \$45,000 of which was suspended conditioned on 125 Broadway's compliance with the Modification and \$5,000 of which was due according to a schedule set forth in the Modification. Under the payment schedule, \$1,000 was due with the return of the signed and notarized Modification. The Modification also included a revised schedule of compliance that required the same actions as those in the schedule of compliance included in the Order, except that the deadlines were based upon the effective date of the Modification rather than upon the effective date of the Order.

5. Mr. O'Brien sent the DEC a check in the amount of \$1,000 as partial payment of the civil penalty owed under the Modification. The check was signed by Mr. O'Brien without any pre-printed information on the check, and was drawn on an account number that was not that of 125 Broadway. The check was returned by the bank for insufficient funds.

6. By Notice of Violation, dated October 7, 2005, Mr. O'Brien's then attorney of record was notified that the \$1,000 check had been returned for insufficient funds. The notice demanded payment to the DEC of the entire \$5,000 civil penalty owed under the Modification by October 17, 2005.

7. On November 1, 2005, criminal charges were filed in Town of Rotterdam Town Court against Mr. O'Brien under New York State Penal Law section 190.05, a Class B misdemeanor, for paying the civil penalty with a bad check. On November 2, 2005, the law firm representing Mr. O'Brien hand delivered a \$5,000 payment drawn on the law firm's escrow account to cover the Modification's civil penalty. On November 28, 2005, Mr. O'Brien received a six month adjournment in contemplation of dismissal.

8. In December, 2005, DEC Staff attempted to serve a Notice of Hearing and Complaint, and a notice of discovery, by mailing them to Andrew Gilchrist, Esq., an attorney who had represented Mr. O'Brien and 125 Broadway. Mr. Gilchrist returned the Notice of Hearing and Complaint to Mr. Ostrov on December 23, 2005 with a letter stating that Mr. Gilchrist was not authorized to accept service on behalf of Mr. O'Brien or 125 Broadway.

9. DEC Staff then issued a Notice of Hearing and Complaint, and a Notice of Discovery, dated January 3, 2006. This Notice of Hearing and Complaint named both 125 Broadway and Mr. O'Brien as Respondents and alleged that they had violated the Modification, ECL article 17 and 6 NYCRR part 613. Investigator Norman Channing, of DEC Region 4, personally delivered a copy of the Notice of Hearing and Complaint to Michael O'Brien at 4 Central Avenue, Albany, New York on January 11, 2006.

10. The January 3, 2006 Complaint alleges that Respondents failed to comply with any of the deadlines in the Modification's compliance schedule. The January 3, 2006 Complaint further alleges that Respondents received a notice of violation from the DEC, via their then attorney, on December 6, 2005. Pursuant to the Modification, 125 Broadway was required to pay the \$45,000 suspended penalty within 15 days of receipt by 125 Broadway of a notice of violation. The Complaint alleges that Respondents violated the Modification by failing to pay the suspended penalty by December 21, 2005.

11. The January 3, 2006 Notice of Hearing notified Respondents that they must file a written answer within 20 days of receipt of the Complaint and that failure to serve a timely written answer, or failure to appear at the adjudicatory hearing, would result in a default and waiver of their right to a hearing.

12. The time for serving an answer expired on January 31, 2006, 20 days after the January 11, 2006 service of the Notice of Hearing and Complaint. As of May 4, 2006, the date of Mr. Ostrov's affirmation, Respondents had not served an answer to the January 3, 2006 Complaint.

13. Mr. O'Brien is the only member of 125 Broadway who has had contact with DEC Staff regarding the Site, the Order and the Modification. Mr. O'Brien signed both the Order and the Modification, as President of 125 Broadway. Mr. O'Brien also sent the \$1,000 check (later returned for insufficient funds) to the DEC.

14. Attached with the motion for a default judgment were an affidavit by Investigator Channing concerning service of the Notice of Hearing and Complaint, a proposed order, and an affirmation by Mr. Ostrov that includes proof of Respondents' failure to file a timely answer.

DISCUSSION

Service of process and default

Section 622.3(a)(3) of 6 NYCRR governs service of the notice of hearing and complaint in DEC administrative enforcement hearings, and provides that service must be made consistent with the Civil Practice Law and Rules ("CPLR") or by certified mail. CPLR section 308 governs personal service upon a natural person. Section 308(1) provides that service may be made by delivering the summons within the state to the person to be served. The January 3, 2006 Notice of Hearing and Complaint were delivered personally to Mr. O'Brien on January 11, 2006 in Albany, New York. DEC Staff demonstrated that Mr. O'Brien was served with the notice of hearing and complaint in this manner.

The affidavit of service states that the Notice of Hearing and Complaint were delivered to "Michael O'Brien, as individual, and as the Member of 125 Broadway LLC."

DEC Staff cited 6 NYCRR 622.3(a)(3), Business Corporation Law 306(b) and CPLR section 311(a)(1) with regard to service on 125 Broadway. The latter two sections, however, pertain to service upon corporations. Respondent 125 Broadway is a limited liability company.

CPLR section 311-a governs service upon limited liability companies and provides, in part, that "[s]ervice of process on

any domestic or foreign limited liability company shall be made by delivering a copy personally to (i) any member of the limited liability company in this state, if the management of the limited liability company is vested in its members, (ii) any manager of the limited liability company in this state, if the management of the limited liability company is vested in one or more managers..."

The record in this matter does not indicate whether the articles of organization of 125 Broadway provide that management is vested in its members or in one or more managers. Mr. O'Brien, however, identified himself as "President" of 125 Broadway, and signed both the Order and the Modification on behalf of 125 Broadway. Mr. O'Brien also signed the \$1,000 check submitted to DEC on behalf of 125 Broadway. Mr. Ostrov's affirmation states that Mr. O'Brien is the only member of 125 Broadway who has had contact with DEC Staff regarding the site, the Order, and the Modification.

Limited Liability Company Law ("LLCL") section 401 provides, in part, that "[u]nless the articles of organization provides [sic] for management of the limited liability company by a manager or managers or a class or classes of managers, management of the limited liability company shall be vested in its members...." LLCL section 412(a) provides, in part, that "[u]nless the articles of organization of a limited liability company provide that management shall be vested in a manager or managers, every member is an agent of the limited liability company for the purpose of its business, and the act of every member, including the execution in the name of the limited liability company of any instrument, for apparently carrying on in the usual way the business of the limited liability company, binds the limited liability company, unless (i) the member so acting has in fact no authority to act for the limited liability company in the particular matter and (ii) the person with whom he or she is dealing has knowledge of the fact that the member has no such authority."

The documents attached with the motion for a default order demonstrate that Mr. O'Brien was a member of 125 Broadway and was managing the company's business at least with regard to its interactions with DEC. Consequently, Investigator Channing's delivery of the Notice of Hearing and Complaint to Mr. O'Brien also effected service upon 125 Broadway.

Based upon the motion and supporting papers, it is clear that both Mr. O'Brien and 125 Broadway failed to file timely answers to the January 3, 2006 Complaint.

Liability

In the context of a motion for a default judgment, the issue is whether the complaint states a claim for liability against the respondents. This is clearly so with respect to 125 Broadway, which is the owner of the site and the respondent in both the Order and the Modification.

The January 3, 2006 Notice of Hearing and Complaint were issued to both 125 Broadway and Mr. O'Brien, while the Order and the Modification were issued to 125 Broadway only. The Complaint alleged, and Respondents did not refute, that Mr. O'Brien exercised total control over the site and has had the sole power to cause compliance with the Order and the Modification (Complaint, at paragraph 19). The Complaint stated that an officer of a corporation who has the authority and responsibility to effect changes that will bring a facility into compliance will be held personally liable for violations, citing the Commissioner's May 5, 1993 Order in Matter of Sheldon Galfunt and Hudson Chromium Company, Inc., which in turn cites United States v Park (421 US 658, 95 S Ct 1903 [1975]) (Complaint, at paragraph 7). Mr. O'Brien did not refute this assertion, or its application to him in this case.

Corporate officers have been held liable for violations under this concept in other orders issued by the Commissioner of Environmental Conservation (see, for example, Matter of Oil Co., Inc., et al., Order of the Commissioner [July 9, 1998] at 41-44, and decisions cited at 42).¹ These prior DEC administrative

¹ Matter of Ronald Edgar, Productive Recycling, Inc., and Productive Recycling Corporation (Order of the Commissioner [June 18, 1993]); Matter of Jackson's Marina, Inc., Gordon Jackson, James H. Rambo, Inc. and Thomas Samuels (Order of the Commissioner [Nov. 6, 1991]); Matter of Lillian Costanzo, Frederick DeCaprio and Nationwide Exterminating and Deodorizing, Inc. (Order of the Commissioner [Feb. 4, 1988]). Also compare, Matter of Mattiace Industries, Inc., Mattiace Petrochemicals Company, William Mattiace and Louis J. Mattiace (Order of the Commissioner [May 23, 1988]) (record did not prove that either officer committed any act of omission or commission that resulted in or contributed to the violations); Matter of RGLL, Inc. et al. (Order of the Commissioner [Jan 21, 2005]) (no authority to impose individual liability upon corporate officer solely because the corporation's authorization to do business in New York is annulled).

decisions involved liability of officers of corporations, but, as noted above, 125 Broadway is a limited liability company.

New York State began allowing business entities to form and operate in New York as limited liability companies in 1994 (Rich, Practice Commentaries, McKinney's Cons Laws of NY, Book 32A, Limited Liability Company Law, 2006 Pamphlet, at 4; L 1994, ch 576, § 76). No orders of the DEC Commissioner issued to date have considered whether or not the above concept of corporate officers' individual liability also applies to members and/or managers of limited liability companies. The motion for a default judgment and order does not discuss this question, but in order for the Commissioner to determine whether or not Mr. O'Brien is liable for the violations, the Commissioner will need to consider this question. The following is the basis for my recommendation on this subject.

The LLCL Practice Commentaries state, "[a]n LLC can be considered a successful cross-breeding of the corporate form and the partnership form. The LLC combines the corporate limitation on personal liability of the owners (who are called 'members') with the partnership's operating and management flexibility by its members (which would be 'member-managed') or by persons selected by its members (which would be 'manager-managed'), as well as the opportunity for versatile capital formation, allocation and distribution structures, and 'pass through' tax treatment" (Id., at 4.)

With regard to corporate officers, the Commissioner's order in Galfunt states, at paragraph 7:

"It is well established that a corporate officer may be held criminally liable for violations of statutes enacted to protect the public health, safety and welfare, where that officer had the authority and responsibility to prevent the violation (United States v. Park, 95 S.Ct. 1903 (1975); United States v. Dotterweich 64 S.Ct. 134 (1943)). The rationale for holding corporate officers criminally responsible is even more persuasive where only civil liability is involved (United States v. Hodges X-Ray, Inc., 759 F.2d 557 (CA 6th Cir, 1985))."

The hearing report in Matter of Oil Co., Inc. et al., at 42, identifies additional court and administrative decisions on this subject, and states, "In cases where the statutory violation does not require any showing of wrong doing, liability attaches to managerial officers of a corporation where it is shown that, by

virtue of the relationship the officer bore to the corporation, he or she had the power to prevent the violation."

This concept of officer liability differs from "piercing the corporate veil." The Court of Appeals described the concept of piercing the corporate veil as "a limitation on the accepted principles that a corporation exists independently of its owners, as a separate legal entity, that the owners are normally not liable for the debts of the corporation, and that it is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners" (Matter of Morris v New York State Dept. of Taxation and Fin., 82 NY2d 135, 140, 603 NYS2d 807, 810 [1993]). The Morris decision cautioned that a decision to pierce the corporate veil depends on the facts and equities and that the New York cases may not be reduced to definitive rules. Despite this, the Morris decision stated that generally, piercing the corporate veil "requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (82 NY2d at 141).

The concept of corporate officer liability that was applied in the Galfunt and Oil Co. orders may be thought of as a third situation, that lies between piercing the corporate veil and shielding corporate officers from any liability for violations committed by the corporation. Corporate officers have been held liable in both state and federal cases in which the corporate veil was not pierced. This liability is not based solely upon the individual's status as a corporate officer, but requires proof of the individual's actions or inactions related to the violation. The standard for such liability, in terms of the officer's role or actions, can differ depending upon what law is violated (State v Markowitz, 273 AD2d 637, 642 n 4, 710 NYS2d 407, 412 n 4 [3d Dept 2000], lv denied 95 NY2d 770, 722 NYS2d 473 [2000]).

Examples of federal court decisions that found individual liability of corporate officers without piercing the corporate veil include: State of New York v Shore Realty Corp. (759 F2d 1032, 1052 [2d Cir 1985]) (corporate officer who "controls corporate conduct and thus is an active individual participant in that conduct is liable for the torts of the corporation"); United States v Pollution Abatement Services of Oswego, Inc. (763 F2d 133, 135 [2d Cir 1985]); United States v Northeastern Pharmaceutical Chemical Co., Inc. (810 F2d 726, 744 [8th Cir 1986], cert denied 484 US 848 [1987]) (officer actually and personally participated in CERCLA violation); and Citronelle-

Mobile Gathering, Inc. v Herrington (826 F2d 16, 23 [Temporary Emergency Court of Appeals 1987], cert denied sub nom. Chamberlain v United States, 484 US 943 [1987]) (officer as a "central figure" in violation of oil pricing law).

Two New York State court decisions that have considered this issue are Matter of Jackson's Marina, Inc. v Jorling (193 AD2d 863, 597 NYS2d 749 [3d Dept 1993]) and State v Markowitz (supra). Jackson's Marina was an article 78 proceeding challenging the DEC Commissioner's order in a tidal wetlands case (Matter of Jackson's Marina, Inc. [Nov. 6, 1991]), in which Mr. Jackson was found to be liable because of his role in supervising construction of a bulkhead. The court stated, "Thus, without piercing the corporate veil, Jackson could properly be held liable individually on the basis of his act in measuring the bulkhead (see, [Shore Realty])" (193 AD2d at 866). State v Markowitz also cites Shore Realty, and states:

"Consistent with the relevant Federal and State statutes and developing case law, we hold that in order to hold a corporate stockholder, officer or employee personally liable under the Navigation Law for a discharge occurring at a site owned or operated by the corporation, that individual must, at a minimum, have been directly, actively and knowingly involved in the culpable activities or inaction which led to a spill or which allowed a spill to continue unabated [citations omitted]" (273 AD2d at 642).

In several recent decisions, courts have held that the doctrine of piercing the corporate veil applies to limited liability companies (see Williams Oil Company, Inc. v Randy Luce E-Z Mart One, LLC, 302 AD2d 736, 757 NYS2d 341 [3d Dept 2003]; Retropolis, Inc. v 14th Street Development LLC, 17 AD3d 209, 797 NYS2d 1 [1st Dept 2005]) or that "members of limited liability companies, such (sic) as corporate officers, may be held personally liable if they participate in the commission of a tort in furtherance of company business" (Rothstein v Equity Ventures, LLC, 299 AD2d 472, 474, 750 NYS2d 625, 627 [2d Dept 2002]).

In view of these cases, it appears likely that the concept of holding corporate officers liable for acts or omissions that caused violations of the ECL applies as well to members of limited liability companies.

Section 609(a) of the LLCL provides that:

"Neither a member of a limited liability company, a manager of a limited liability company managed by a manager

or managers nor an agent of a limited liability company (including a person having more than one such capacity) is liable for any debts, obligations or liabilities of the limited liability company or each other, whether arising in tort, contract or otherwise, solely by reason of being such member, manager or agent or acting (or omitting to act) in such capacities or participating (as an employee, consultant, contractor or otherwise) in the conduct of the business of the limited liability company" (emphasis added).

This section would not appear to shield members of an LLC from liability where their liability was based not only on their membership in the company but also on their specific acts or omissions that caused a violation. This is similar to how liability of corporate officers was evaluated in United States v Northeastern Pharmaceutical Chemical Co., Inc. ("Liability was not premised solely upon Lee's status as a corporate officer or employee. Rather, Lee is individually liable under CERCLA ... because he personally arranged for the transportation and disposal of hazardous substances on behalf of NEPACCO and thus actually participated in NEPACCO's CERCLA violations")(810 F2d at 744). In United States v Pollution Abatement Services of Oswego, Inc., in which the defendants were charged with violating the Rivers and Harbors Appropriation Act, the court stated that "the liability imposed upon [corporate officers] was not premised solely on their corporate offices or ownership, but was bottomed on their personal involvement in the firm's activities... [The officers] were responsible for PAS's day-to-day operations, and for its illegal dumping and storage activities." (763 F2d at 135).

In the present case, Mr. O'Brien did not dispute DEC Staff's allegation that he exercised total control over the site and has had the sole power to cause compliance with the Order and the Modification. The record demonstrates that he took the actions described in Finding 13 of this report. Thus, the complaint states a valid claim of individual responsibility against Mr. O'Brien. Accordingly, I recommend that the Commissioner find that both Mr. O'Brien and 125 Broadway violated the Modification. I also recommend that the Commissioner grant DEC Staff's request that Mr. O'Brien and 125 Broadway be individually and jointly liable for a \$60,000 penalty (\$30,000 payable, \$30,000 suspended) for violating the Modification.

DEC Staff also requested that the Commissioner find Mr. O'Brien and 125 Broadway to be individually and jointly liable for payment of a suspended penalty of \$45,000 that was imposed by the Modification. Mr. O'Brien was not a party to the September

26, 2005 Modification, and the \$45,000 suspended penalty in the Modification was for violating the July 7, 2005 Order, to which Mr. O'Brien also was not a party. The only Respondent named in the Modification was 125 Broadway. When it agreed to the Modification, DEC Staff did not make Mr. O'Brien liable for the \$45,000 suspended penalty. I recommend that 125 Broadway, but not Mr. O'Brien, be ordered to pay the \$45,000 suspended penalty that was imposed by the Modification.

Both Mr. O'Brien and 125 Broadway should be ordered to carry out the compliance schedule that was included in the Order, the Modification and DEC Staff's proposed order, with compliance dates based upon the effective date of the Commissioner's order.

CONCLUSIONS

Pursuant to 6 NYCRR 622.15(a), "A respondent's failure to file a timely answer...constitutes a default and a waiver of respondent's right to a hearing." The motion for a default judgment should be granted, and an order issued as described above.

September 14, 2006
Albany, New York

_____/s/_____
Susan J. DuBois
Administrative Law Judge