

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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| STATE OF NEW YORK and BASIL SEGGOS, as : | : | |
| Commissioner of the New York State Department : | : | |
| of Environmental Conservation, | : | |
| | : | |
| Plaintiffs, | : | |
| | : | Case No. 2:20-CV-244-PKC-ST |
| - against - | : | |
| | : | CONSENT DECREE |
| K. B. K. HUNTINGTON CORP. and DENISE : | : | |
| KILMER, as the Executor of the ESTATE OF : | : | |
| STEPHEN BIRCHELL, | : | |
| | : | |
| Defendants. | : | |
| | : | |
| | : | |
| _____ | X | |

Plaintiffs the State of New York and Basil Seggos, as Commissioner of the New York State Department of Environmental Conservation (“DEC”) (the State of New York and Commissioner Seggos together, the “State”), agree as follows with defendants K. B. K. Huntington Corp. (“KBK”) and Denise Kilmer, as the executor of the Estate of Stephen Birchell (the “Birchell Estate”) (KBK and the Birchell Estate together, “Defendants”):

WHEREAS, on January 14, 2020, the State commenced this action pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) seeking to recover response costs that have been and will be incurred by the State in responding to the release or threatened release of hazardous substances at and emanating from the site the property located at 410 West Main Street in Huntington, Suffolk County, New York (the “Site”), identified on the

Suffolk County tax map as District 400, Section 69, Block 3, Lot 1, and identified as Site No. 152187 in the Registry of Inactive Hazardous Waste Disposal Sites in New York State (the “Registry”), and referred to in the Registry as the Country Cleaners Site;

WHEREAS, the Site has been used for dry cleaning since approximately 1965;

WHEREAS, the State alleged in its Complaint dated January 14, 2020 (the “Complaint”) that between approximately 1965 and 2004, the dry cleaning solvent tetrachloroethylene (“PCE”) was disposed of and released at the Site, and that PCE and its degradation products, trichloroethene (“TCE”) and dichloroethylene (“DCE”), leached into groundwater at the Site and migrated into groundwater off-Site;

WHEREAS, PCE, TCE, and DCE have been designated as hazardous by the U.S. Environmental Protection Agency, *see* 40 C.F.R. § 302.4, and are thus hazardous substances within the meaning of CERCLA, 42 U.S.C. § 9601(14);

WHEREAS, the State alleged in its Complaint that it had incurred costs in excess of \$1,000,000 in responding to the release of hazardous substances at the Site as of filing the Complaint, and estimated that it would incur future costs in excess of \$1,000,000 including for ongoing monitoring and other controls, and that the response actions that the State has taken and will take to respond to the release of hazardous substances at the Site are not inconsistent with the “National Oil and Hazardous Substances Pollution Contingency Plan,” *see* 40 C.F.R. Part 300;

WHEREAS, since filing the Complaint, the State has incurred additional response costs and revised its future cost estimate, and accordingly has calculated an updated estimate of its total response costs at the Site (including past and future costs) to be in excess of \$2,500,000;

WHEREAS, the State alleged in its Complaint that KBK was the “owner” of the Site at the time of disposal of hazardous substances within the meaning of CERCLA, 42 U.S.C. § 9607(a)(2), and is the current “owner” of the Site within the meaning of CERCLA, 42 U.S.C. § 9607(a)(1), and that KBK is therefore liable for all costs incurred, and to be incurred, by the State in responding to releases of hazardous substances at and from the Site;

WHEREAS, the State alleged in its Complaint that the late Stephen Birchell—who was principal of KBK—was an “operator” at the Site at the time of disposal of hazardous substances within the meaning of CERCLA, 42 U.S.C. § 9607(a)(2), and that the Birchell Estate is therefore liable for all costs incurred, and to be incurred, by the State in responding to releases of hazardous substances at and from the Site;

WHEREAS, during the pendency of this case, and without any admission of liability, the State has engaged in settlement discussions with Defendants regarding reimbursement of the State for its response costs;

WHEREAS, the State, KBK, and the Birchell Estate (each a “party” and together, the “parties”) desire to enter into this Consent Decree (“Decree”) in order to fully and finally resolve all claims that have been and could now or hereafter be

asserted by the parties with respect to the Matters Addressed, as defined below, without the necessity or further expense of prolonged and complex litigation, and without admission of liability, adjudication, or determination of any issue of fact or law;

WHEREAS, Defendants intend to fund settlement of the State's claims against them in part through the sale of real property, including the Site, and the parties agree that it is in their mutual interests to facilitate such sale; and

WHEREAS, the State has determined that settlement of its claims against Defendants in accordance with the terms set forth below is practicable and in the best interest of the public;

NOW THEREFORE, IT IS HEREBY STIPULATED AND AGREED BY AND BETWEEN THE UNDERSIGNED AS FOLLOWS:

PURPOSE AND SCOPE OF THIS DECREE

1. The purpose of this Decree is to resolve claims set forth in the State's Complaint and any other claims that could have been made by the State against Defendants with regard to the Matters Addressed, defined in paragraph 2 below, and subject to paragraph 17 below; to release Defendants from liability for the Matters Addressed; and to provide full and complete contribution protection to Defendants with regard to the Matters Addressed pursuant to CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2).

2. "Matters Addressed," as that term is used in this Decree, is defined to include claims that were, or could now or hereafter be, asserted by the State against Defendants arising out of or in connection with the disposal, release, and/or threat of

release of hazardous substances at and/or from the Site, as identified in DEC's Record of Decision dated March 2012, including but not limited to, any and all response costs, past or future, and all other claims or causes of action under CERCLA and any other federal, state, local, or common law arising out of or in connection with the disposal, release, and/or threat of release of hazardous substances at and/or from the Site, as identified in the State's Record of Decision dated March 2012.

JURISDICTION

3. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 9613(b). Defendants hereby waive all objections and defenses they may have to the jurisdiction of the Court or to venue in this District. The Court shall have continuing jurisdiction to enforce the terms of this Decree and to resolve any disputes that may arise hereunder.

PARTIES BOUND

4. This Decree shall apply to, and be binding upon, the State, including its departments, agencies, and instrumentalities, and shall apply to and be binding upon Defendants and their respective heirs, agents, successors, representatives, insurers, and assigns. Each signatory represents that he or she is fully and legally authorized to enter into the terms and conditions of this Decree and to bind the party on whose behalf he or she signs.

DEFINITIONS

5. Unless otherwise expressly defined herein, terms used in this Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations.

6. “Affected local government” and “environmental easement” shall have the meaning assigned in New York Environmental Conservation Law (“ECL”) § 71-3603.

DISCLAIMER OF ADMISSIONS AND DENIALS

7. Nothing in this Decree shall constitute, or be construed as an admission or adjudication of liability on any issue of law or fact.

8. Nothing in this Decree shall constitute evidence that costs are divisible or can be apportioned among any Defendants in this action.

9. Defendants are entering into this Decree as a compromise of disputed claims and in doing so do not admit or deny any liability, wrongdoing, or fault under any of the claims alleged against them in the Complaint.

PAYMENT OF STATE RESPONSE COSTS

10. Defendants shall pay \$2,175,000 to the State as follows, for which amount KBK and the Birchell Estate are jointly and severally liable:

- *First Payment.* Defendants shall make a First Payment of \$375,000 to the State within thirty (30) days of the effective date of this Decree.
- *Second Payment.* Defendants shall make a Second Payment of \$100,000 to the State within six (6) months of the effective date of this Decree.
- *Third Payment.* Defendants shall make a Third Payment of \$1,700,000 to the State within sixteen (16) months of the effective date of this Decree, or within thirty (30) days of the sale of the Site if such date is sooner.

11. Defendants shall notify the State at least thirty (30) days prior to any closing date for the sale of the Site to the addresses provided in paragraph 26, unless

Defendants have already made the Third Payment to the State pursuant to paragraph 10.

12. Within five (5) days of the effective date of this Decree, the State shall provide Defendants with wiring instructions for payments under this Decree. Defendants shall make all payment amounts set forth in paragraph 10 in accordance with the wiring instructions provided.

13. At the time such payments are remitted, Defendants shall provide written or electronic notice of the remittance to the State to the addresses provided in paragraph 26 below. Any failure to make a payment required in paragraph 10 in the manner and time period specified therein shall constitute a default under this Decree by Defendants. In the event of such default, the State shall send written notice of the default to Defendants. Such notice shall be sent via certified mail to Defendants at the addresses noted below in Paragraph 26. Defendants shall have thirty (30) days from the date of mailing of such notice to cure the default by payment of the amount originally due. If Defendants fail to cure the default within that thirty (30) day period, the State shall be entitled to (but not required to demand) the following: (1) interest of 12% per annum on the amount in default running from the original date of default; (2) civil penalties in the amount of \$100/day running from the original date of default; and (3) attorneys' fees and costs incurred by the State to enforce these provisions.

14. The payment terms under this Decree represent a fair and reasonable contribution by Defendants toward the total response costs that have been incurred

with respect to releases of hazardous substances at and/or from the Site. The parties agree, and this Court by entering this Decree finds, that this Decree has been negotiated in good faith, that settlement of this matter will avoid prolonged and complicated litigation, and that this Decree is fair, reasonable, and in the public interest.

ENVIRONMENTAL EASEMENT

15. KBK, as current owner of the Site, shall take all measures that may be required to give effect to an environmental easement at the Site consistent with DEC's Record of Decision dated March 2012, including but not limited to executing and recording such easement with all appropriate governmental bodies. Defendants shall bear all costs associated with the same.

16. Within sixty (60) days of the effective date of this Decree, KBK shall submit to DEC a complete environmental easement package for the Site consisting of DEC's environmental easement certification and checklist available at <https://www.dec.ny.gov/chemical/65118.html> together with all requirements and documents listed therein, and timely correct any deficiencies that the DEC notes in the submitted package. Thereafter, DEC will prepare and transmit a copy of the environmental easement for the Site for signature. Thereafter, within thirty (30) days of the DEC's transmission of the environmental easement for the Site as approved, KBK shall: (1) record the environmental easement in the real property records for Suffolk County; (2) provide DEC proof of such recording, complete with book and page number or other similar instrument; and (c) mail notice with a copy of

the recorded environmental easement for the Site to each Affected Local Government and provide proof of same to DEC.

COVENANTS NOT TO SUE

17. **Covenant Not to Sue Defendants.** For so long as Defendants comply with all terms of this Decree, the State releases and covenants not to sue, execute judgment, or take any civil, judicial, or administrative action under any federal, state, local, or common law (other than enforcement of this Decree) against Defendants or their heirs, agents, successors (except a successor in title, which is addressed in paragraph 18 of this Decree), representatives, insurers, and assigns for any matter arising out of or relating to the Matters Addressed defined in paragraph 2 in this Decree including, without limitation, any claims or causes of action for costs, damages, enforcement costs, interest, indemnification, contribution, or attorneys' fees.

18. **Covenant Not to Sue Future Site Owner.** Once Defendants make all payments required by paragraph 10 in this Decree, the State releases and covenants not to sue, execute judgment, or take any civil, judicial, or administrative action under any federal, state, local, or common law against KBK's successor in title to the Site for any matter arising out of or relating to the Matters Addressed in paragraph 2 in this Decree including, without limitation, any claims or causes of action for costs, damages, enforcement costs, interest, indemnification, contribution, or attorneys' fees, provided that such successor in title qualifies for the limitation on

liability available to a bona fide prospective purchaser under CERCLA, 42 U.S.C. §§ 9601(40) and 9607(r)(1).

19. **Covenant Not to Sue by Defendants.** Defendants release and covenant not to sue, execute judgment, or take any civil, judicial, or administrative action under any federal, state, local, or common law against the State, or its employees, departments, agencies, or instrumentalities, or to seek against the State any costs, damages, contribution, or attorneys' fees arising out of or relating to any of the Matters Addressed defined in Paragraph 2 in this Decree. Notwithstanding the foregoing, Defendants may assert any claims or causes of action against any person other than the State, to the extent permitted by law, for any costs, damages, contribution, or attorneys' fees arising out of any of the Matters Addressed as defined in Paragraph 2 in this Decree.

CONTRIBUTION PROTECTION AND RIGHTS

20. In consideration of Defendants' compliance with this Decree, the parties agree that Defendants are entitled, as of the effective date of this Decree, to the full extent of protection from contribution actions or claims as provided by CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2), the Uniform Comparative Fault Act, and any other applicable provision of federal or state law, whether by statute or common law, extinguishing the potential liability of Defendants to persons not party to this Decree for the Matters Addressed. As provided under CERCLA § 113(f), 42 U.S.C. § 9613(f), and New York General Obligations Law § 15-108, and to the extent authorized under any other applicable law, Defendants shall be deemed to have resolved their liability

to the State under applicable law including, without limitation, CERCLA, the New York State Environmental Conservation Law, and common law, for purposes of contribution protection and with respect to the Matters Addressed pursuant to and in accordance with this Decree.

21. Any rights Defendants may have to obtain contribution or otherwise recover costs or damages from persons not a party to this Decree are preserved. In addition, all claims and defenses of Defendants with respect to all persons other than the State are expressly reserved.

**DISMISSAL OF THE STATE'S CLAIMS
AND RETENTION OF JURISDICTION**

22. All claims asserted by the State in its Complaint against Defendants are hereby dismissed with prejudice.

23. For purposes of entry and enforcement of this Decree, the parties to this Decree agree that the Court has jurisdiction in this matter and shall retain jurisdiction until Defendants have fulfilled their obligations hereunder.

EFFECT ON LIABILITY OF OTHER PARTIES

24. Except as provided in paragraph 18 with respect to a bona fide prospective purchaser of the Site, nothing in this Decree is intended as a release of, or covenant not to sue with respect to, any person or entity other than Defendants or their respective heirs, agents, successors, representatives, insurers, and assigns, and the State expressly reserves its rights to assert in a judicial or administrative forum any claim or cause of action, past or future, in law or in equity, that the State may have against any other person, firm, corporation, or other entity.

REOPENER

25. Notwithstanding any other provision of this Decree, and any release, discharge, or covenant not to sue that Defendants may receive from the State, the State reserves, and this Decree is without prejudice to, the right of the State to institute proceedings seeking to compel Defendants: (a) to perform further response actions relating to the Site; or (b) to reimburse the State for additional costs of response actions relating to the Site, but in either case only if:

- (i) conditions at the Site previously unknown to the State are discovered after the effective date of this Decree that relate to contaminants other than the contaminants of concern and/or their degradation products identified in the State's March 2012 Record of Decision; or
- (ii) material information previously unknown to the State is received after the effective date of this Decree that relates to contaminants other than the contaminants of concern and/or their degradation products identified in the State's March 2012 Record of Decision;

and these previously unknown conditions or information, together with any other relevant information, demonstrate that the response actions selected for the Site in the State's March 2012 Record of Decision are not protective of human health or the environment.

NOTIFICATIONS

26. Any notification to the parties shall be in writing or electronic mail and shall be deemed properly given if sent to the following (or to such other addresses as the parties may specify):

As to Defendants:

Joseph R. Harbeson, Esq.
Ruskin Moscou Faltischek, P.C.
1425 RXR Plaza
East Tower, 15th Floor
Uniondale, NY 11556
jharbeson@rmfpc.com

and

E. Christopher Murray, Esq.
Ruskin Moscou Faltischek, P.C.
1425 RXR Plaza
East Tower, 15th Floor
Uniondale, NY 11556
emurray@rmfpc.com

As to the State:

Channing Wistar-Jones, Esq.
Assistant Attorney General
New York State Department of Law
Environmental Protection Bureau
28 Liberty Street, 19th Floor
New York, New York, 10005
channing.jones@ag.ny.gov

and

Alali Tamuno, Esq.
Office of General Counsel
New York State Department of Environmental Conservation
100 Hillside Avenue, Suite 1W
White Plains, New York 10603
alali.tamuno@dec.ny.gov

and

Karen Diligent
Resource Management and Recovery Section
Bureau of Program Management
Division of Environmental Remediation
New York State Department of Environmental Conservation
625 Broadway, 12th Floor
Albany, New York 12233
Karen.Diligent@dec.ny.gov

COMPLETE AGREEMENT/SIGNATURES

27. This Decree constitutes the complete agreement of the parties. This Decree may not be amended, modified, supplemented, or otherwise changed without approval of the Court and the written consent of both the State and Defendants. This Decree may be signed in counterparts.

EFFECTIVE DATE

28. This Decree shall become effective when it is entered by the Court. All times for performance of activities under this Decree shall be calculated from that date.

