

69568-1

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Case No. 69568-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

AUBURN VALLEY INDUSTRIAL CAPITAL, L.L.C.,
a Washington limited liability company,
Plaintiff/Respondent,

v.

ROSS B. HANSEN, a single person, and NORTHWEST TERRITORIAL MINT, L.L.C., a
Washington limited liability company,

Defendants/Appellants.

BRIEF OF DEFENDANTS/APPELLANTS

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ASSIGNMENTS OF ERROR..... 2

III. STATEMENT OF THE CASE..... 4

A. NW Mint’s 2002 Lease for the Property..... 4

B. Termination of the Lease on April 30, 2010. 5

C. Auburn’s Actions After NW Mint Vacated the Premises..... 6

D. Clean Harbor’s Demolition and Cleaning of the Premises. 9

E. Auburn’s After-the-Fact MTCA Justification..... 10

F. Ecology Determines that MTCA does not Apply to the
Premises..... 13

IV. ARGUMENT..... 15

A. Standard of Review..... 15

B. The Trial Court Erroneously Applied MTCA..... 16

1. The trial court misconstrued MTCA and
ignored Ecology’s testimony and evidence. 17

2. Ecology determined that MTCA did not
apply to the Premises. The trial court
failed to give any weight to Ecology’s
determination. 18

3. The Statute, analogous CERCLA case law,
and expert testimony all support Ecology’s
determination that MTCA does not apply
to this case because “dust” is not “soil.” 20

a.	Because the lower court failed to make express material findings, the “soil” issue is deemed to have been found against Auburn.....	21
b.	Dust is not “soil” under MTCA or basic science....	21
4.	Auburn did not establish a <i>prima facie</i> MTCA claim.	23
a.	No threat to human health or the environment existed.....	24
b.	No release to the environment occurred or threatened to occur.....	27
c.	Auburn did not establish that NW Mint created the dust.....	32
d.	Because no threat existed before EBI initiated cleanup, Auburn’s costs were not “necessary” and are not recoverable.....	34
e.	Because Auburn also cannot establish “substantial equivalence,” none of its costs are recoverable.	37
f.	Auburn cannot recover costs incurred without regard to economic efficiency or ecological necessity.....	38
C.	The Trial Court Erroneously Determined that NW Mint Breached Sections 11 and 13 of the Lease.....	40
1.	NW Mint did not breach Section 11 of the Lease because the mere presence of metals in the Premises did not present a risk to human health or the environment.	40
2.	Because NW Mint did not violate any statute or order, Section 11 did not require it to pay for cleaning the Premises.	45

3.	The Lease only required NW Mint to leave the Premises in a “broom clean” condition. NW Mint did not have a contractual obligation to clean the Premises to EBI’s Limits.	46
D.	NW Mint is Entitled to Recover its Attorneys’ Fees and Expenses on Appeal.	49
V.	CONCLUSION	49

TABLE OF AUTHORITIES

Cases

<i>224 Westlake, LLC v. Engstrom Props., LLC</i> , 169 Wn. App. 700, 281 P.3d 693 (2012)	46
<i>3550 Stevens Creek Assoc. v. Barclays Bank of Cal.</i> , 915 F. 2d 1355 (9th Cir. 1990).....	18, 27, 28
<i>BCW Associates, Ltd. v. Occidental Chemical Corp.</i> , No. 86-5947, 1988 WL 102641 (E.D. Pa. Sept. 29, 1988).....	29, 31
<i>Bird-Johnson Corp. v. Dana Corp.</i> , 119 Wn.2d 423, 833 P.2d 375 (1992).....	18
<i>Carson Harbor Village, Ltd. v. Unocal Corp.</i> , 270 F.3d 863 (9th Cir. 2001).....	34, 35
<i>City of Detroit v. Simon</i> , 247 F.3d 619 (6th Cir. 2001).....	36
<i>City of Seattle (Seattle City Light) v. Wash. State Dep't of Transp.</i> , 98 Wn. App. 165, 989 P.2d 1164 (1999)	24, 25, 38, 39
<i>Condon v. Condon</i> , 2013 Wn. LEXIS 238 (2013)	46
<i>Covalt v. Carey Canada Inc.</i> , 860 F.2d 1434 (7th Cir. 1988).....	31
<i>Crites v. Koch</i> , 49 Wn. App. 171, 741 P.2d 1005 (1987)	21
<i>Cyker v. Four Seasons Hotels Ltd.</i> , No. 90-11929-Z, 1991 WL 1401 (D. Mass. Jan. 3, 1991)	18, 27
<i>Dash Point Vill. Assocs. v. Exxon Corp.</i> , 86 Wn. App. 596, 937 P.2d 1148 (1997)	38
<i>Dep't of Ecology v. Theodoratus</i> , 135 Wn.2d 582, 957 P.2d 1241 (1998)	19
<i>Diverse Real Estate Holdings Ltd. Partnership v. International Mineral & Chemical Corp.</i> , No. 91-8090, 1995 WL 110138, (N.D. Ill. Mar. 13, 1995).....	28, 34

<i>Elec. Power Bd. of Chattanooga v. Monsanto Co.</i> , 879 F.2d 1368 (6th Cir. 1989).....	30
<i>Elec. Power Bd. of Chattanooga v. Westinghouse Elec. Corp.</i> , 716 F. Supp. 1069 (E.D. Tenn. 1988)	30, 31
<i>Emhart Industries, Inc. v. Duracell Intern. Inc.</i> , 665 F. Supp. 549 (M.D. Tenn. 1987).....	29
<i>Fertilizer Inst. v. U.S. E.P.A.</i> , 935 F.2d 1303 (D.C. Cir. 1991).....	27
<i>Forfeiture of One 1970 Chevrolet Chevelle</i> , 140 Wn. App. 802, 167 P.3d 599 (Wn. App. 2007)	19
<i>G.J. Leasing Co. v. Union Elec. Co.(G.J. Leasing II)</i> , 54 F.3d 379 (7th Cir. 1995).....	34, 35, 39
<i>G.J. Leasing Co. v. Union Electric (G.J. Leasing I)</i> , 854 F.Supp. 539 (S.D. Illinois 1994).....	24, 30, 35
<i>Greco v. United Tech. Corp.</i> , 277 Conn. 337, 890 A.2d 1269 (2006).....	27, 31
<i>Grey v. Leach</i> , 158 Wn.App. 837, 244 P.3d 970 (2010)	33
<i>Hearst Commc'ns, Inc. v. Seattle Times Co.</i> , 154 Wn.2d 493, 115 P.3d 262 (2005).....	46, 48
<i>Iron Partners v. Maritime Admin.</i> , No. 08-05217, 2011 WL 4502139 (W.D. Wn. Sept. 28, 2011).....	34, 38, 39
<i>Kittitas County v. E. Wash. Growth Mgmt. Hearings Bd.</i> , 172 Wn.2d 144, 256 P.3d 1193 (2011)	19
<i>KN Energy, Inc. v. Rockwell Int'l Corp.</i> , 840 F. Supp. 95 (D. Colo. 1993)	27
<i>Lobdell v. Sugar 'N Spice, Inc.</i> , 33 Wn. App. 881, 658 P.2d 1267 (1983)	16
<i>McCutcheon v. Brownfield</i> , 2 Wn. App. 348, 467 P.2d 868 (1970)	16, 21
<i>Michaels v. CH2M Hill, Inc.</i> , 171 Wn.2d 587, 257 P.3d 532 (2011).....	33

<i>Miller v. Mandarin Homes, Ltd.</i> , 305 Fed.Appx. 976 (4th Cir. 2009)	29
<i>New York State Elec. & Gas Corp. v. FirstEnergy Corp.</i> , 808 F. Supp. 2d 417 (N.D.N.Y. 2011)	35
<i>Otay Land Co. v. United Ents. Ltd.</i> , 338 F. App'x 689 (9th Cir. 2009).....	39
<i>PacifiCorp Envtl. Remediation Co. v. Wash. State Dep't of Transp.</i> , 162 Wn. App. 627, 259 P.3d 1115 (2011)	15
<i>Port of Seattle v. Pollution Control Hearings Bd.</i> , 151 Wn.2d 568, 90 P.3d 659 (2004)	19
<i>Powell Duffryn Terminals, Inc. v. CJR Proc., Inc.</i> , 808 F. Supp. 652 (N.D. Ill. 1992).....	28
<i>Regional Airport Auth. of Louisville v. LFG, LLC</i> , 460 F.3d 697 (6th Cir. 2006).....	34, 39
<i>Rivas v. Safety- Kleen</i> , 98 Cal. App. 4th 218, 119 Cal. Rptr. 2d 503 (2002).....	30, 31
<i>Santa Clara Valley Water Dist. v. Olin Corp.</i> , 655 F. Supp. 2d 1048 (N.D. Cal. 2009).....	33
<i>Schooley v. Pinch's Deli Mkt., Inc.</i> , 134 Wn.2d 468, 951 P.2d 749 (1998).....	33
<i>Southfund Partners III v. Sears</i> , 57 F. Supp.2d 1369 (N.D. Ga. 1999).....	35, 36
<i>State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n</i> , 111 Wn. App. 586, 49 P.3d 894 (2002)	16
<i>State, Dep't of Ecology v. Pub. Utility Dist. No. 1 of Jefferson County</i> , 121 Wn.2d 179, 849 P.2d 646 (1993).....	19
<i>State, Dep't of Ecology v. Tiger Oil Corp.</i> , 166 Wn. App. 720, 271 P.3d 331 (2012)	19
<i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wn.2d 873, 73 P.3d 369 (2003).....	15, 16
<i>Sycamore Indus. Park Assocs. v. Ericsson, Inc.</i> , 546 F.3d 847 (7th Cir. 2008).....	27

<i>Taliesen Corp. v. Razore</i> , 135 Wn. App. 106, 144 P.3d 1185 (2006)	38, 39
<i>United States v. Hardage</i> , 982 F.2d 1436 (10th Cir. 1992).....	35
<i>United States v. Hoffman</i> , 154 Wn.2d 730, 116 P.3d 999 (2005).....	19

Statutes

29 U.S.C. §§ 651-678.....	20
Ch. 49.17 RCW <i>et seq.</i>	20
Chapter 90.44 RCW.....	19
RCW 70.105D.010(1)-(2).....	17
RCW 70.105D.020.....	18, 25
RCW 70.105D.020(21).....	38
RCW 70.105D.020(25).....	18
RCW 70.105D.030.....	13
RCW 70.105D.040.....	18, 23, 37
RCW 70.105D.080.....	passim
RCW 70.105D.200.....	24

Regulations

29 C.F.R., Subtitle B.....	20
Title 296 WAC <i>et seq.</i>	20
WAC 173-340-200.....	18, 21, 22, 28
WAC 173-340-360(3)(e)(i).....	38
WAC 173-340-545.....	38
WAC 173-340-700 through -760.....	18
WAC 173-340-700(2).....	18
WAC 173-340-702(6).....	38
WAC 173-340-708(3)(b).....	18

WAC 173-340-740(1)(c) 22, 23

I. INTRODUCTION

“Hazardous substances” are ubiquitous in our environment. Their presence alone does not automatically result in liability under the Model Toxic Control Act (“MTCA”). A plaintiff must prove all statutory elements to prevail on a MTCA claim. Under the trial court’s reasoning, however, every business using “hazardous substances” will be subject to MTCA liability—even when no release of hazardous substances to the environment occurs or threatens human health or the environment.

This appeal presents three legal questions of first impression: (1) whether MTCA regulates dust inside of buildings; (2) whether dust is “soil” under MTCA; and (3) whether roofs and concrete loading docks are “land surfaces” under MTCA. The answer to each question is no.

If the Court resolves these questions in favor of the Appellants Ross Hansen and Northwest Territorial Mint, L.L.C. (collectively, “NW Mint”), it will continue Washington courts’ consistent and logical interpretation of MTCA by applying the statute’s plain language and following well-settled precedent. If the Court resolves these questions in favor of the Respondent Auburn Valley Industrial Capital, L.L.C. (“Auburn”), it will be rejecting the interpretation of the Washington De-

partment of Ecology (“Ecology”)—the agency responsible for MTCA implementation—and will expand MTCA to an unprecedented scope.

Even if MTCA applied to the Property in question, Auburn did not meet its burden at trial to establish MTCA liability on the part of NW Mint. Additionally, the trial court erred in ruling that NW Mint was liable under the Lease between the parties because: (1) the residual metals NW Mint left at the Premises did not present a risk of actual harm to human health or the environment; (2) NW Mint complied with all statutes, regulations and orders concerning hazardous wastes; and (3) NW Mint left the Premises in a “broom clean” condition, which is the Lease’s only cleanup standard.

II. ASSIGNMENTS OF ERROR

NW Mint assigns error to the following trial court determinations:

1. The Auburn Property is a MTCA site.¹
2. NW Mint is liable under MTCA.²
3. NW Mint is liable under Sections 11 and 13 of the Lease.³

¹ Conclusion of Law (“COL”) # 2. The trial court’s October 15, 2012 Findings of Fact and Conclusions of Law is found at Clerk’s Papers (“CP”) 1703-1734. The trial court’s November 14, 2012 Order Granting in Part and Denying in Part Plaintiff’s Motion to Amend the Findings of Fact and Conclusions of Law is found at CP 1735-1737.

² COL #’s 1, 3-9.

NW Mint contends that the trial court improperly made the following Conclusions of Law: COL #'s 1-13, 15-19, and 21-22.

The following are the issues pertaining to the Assignments of Error:

1. Whether the trial court properly ignored Ecology's interpretation of MTCA—a statute that Ecology has sole authority to administer.
2. Whether MTCA's definition of "soil" included dust on interior and exterior building surfaces that was created solely by interior activities.
3. Whether MTCA applied to the interior surfaces of Suite 101 (the "Premises") in an industrial building located in Auburn, Washington ("Property" or "Building") when no potential for vapor intrusion existed.
4. Whether the mere presence of "hazardous substances" in the Premises—without proof of a "release," "threatened release," "threat to human health or environment," or incurrence of "remedial action costs" for a response "substantially equivalent" to an Ecology cleanup—automatically resulted in MTCA liability.
5. Whether the Property's metal roof and interior loading dock qualified as "land surfaces" (and, therefore, the "environment") under MTCA.
6. Whether Auburn's "cleanup" of the Premises was "substantially equivalent to an Ecology-conducted or -supervised cleanup," given Ecology's express determination that the Premises did not require cleanup under MTCA.
7. Whether NW Mint breached Sections 11 and 13 of the Lease, when Auburn did not: (1) present any evidence that metallic dust

³ COL #'s 10-13, 15-19, 21-22. NW Mint does not challenge the trial court's determination that it is liable in the amount of \$9,995.77 for damages related to the Property's telecommunications room. FOF # 73.

presented an actual risk of harm to human health or the environment; and (2) Auburn's cleanup of the Premises was not necessary to comply with any statute, regulation or order.

8. Whether NW Mint is liable for the cost of cleaning the Premises to a "cleanliness standard" not contained in the Lease.

NW Mint contends the trial court improperly made the following Findings of Fact ("FOF"): FOF #'s 14, 18, 90, 93-112, 123-129 and 132-136.

III. STATEMENT OF THE CASE

A. NW Mint's 2002 Lease for the Property.

Defendant Ross Hansen ("Hansen") did business as Northwest Territorial Mint, a full-service mint that fabricates coins and other metallic items. In May 2002, Hansen entered into a lease ("Lease") with MegaWest, LLC ("MegaWest") to occupy the Premises.⁴ FOF # 4.

Immediately before Hansen moved his mint operation into the Premises, MegaWest was still constructing the Property and using the Premises as a staging area for a large amount of construction activity. These activities included the cutting of metal beams and copper piping, welding and soldering.⁵ 8/14, RP 200-202. Additionally, MegaWest's construction

⁴ The Lease was Exhibit 1 at trial and is included in the Appendix. See CP 1684-1703 for the Trial List of Exhibits. In December 2002, Hansen formed Northwest Territorial Mint, L.L.C. to take over the mint's operations. FOF #7. NW Mint was not a party to the Lease. 8/14, RP 207-208.

⁵ Citations to the Report of Proceedings ("RP") are first to the date of the transcript and then to the page numbers. For example, support for the referenced statement—which

of the improvements in the Premises required a large amount of concrete sawing, sanding and polishing, plus the extensive cutting of gypsum dry-wall. This construction generated a significant amount of dust in the Premises. *Id.*, RP 206-207; 8/15/12, RP 93-94, 100-101. Hansen cleaned the Premises in 2002 when he moved in, but never cleaned the warehouse's beams or ceiling. 8/15/12, RP 104.

B. Termination of the Lease on April 30, 2010.

Auburn purchased the Property in 2007. FOF #35. There was no difference in NW Mint's processes and operations before and after Auburn purchased the Property. 8/02, RP 206; 8/15, RP 22. NW Mint's processes and operations did not change in any material respect between 2002 and 2010. 8/15, RP 22.

The Lease terminated on April 30, 2010 and NW Mint vacated the Premises on that date. FOF #8. NW Mint left the Premises in a "broom clean" condition as required by Section 13 of the Lease. 8/02, RP 19; 8/15, RP 74-76. This was the Lease's only "cleanliness standard." 8/14, RP 215-216; 8/15, RP 76, 130-131. *See* Lease, § 13 (Exhibit 1).

Before the Lease terminated, Auburn never objected to NW Mint's

is found at pages 200-202 of the transcript for August 14, 2012—is cited as "8/14, RP 200-202."

use of metals such as silver, copper and nickel in its manufacturing processes. 8/15, RP 86. Auburn never claimed that NW Mint's operations breached Section 11 of the Lease. 8/02, RP 117-118, 135-136.

C. Auburn's Actions After NW Mint Vacated the Premises.

Immediately after the Lease ended, NW Mint Auburn hired Enviro-business, Inc. ("EBI") to investigate the Premises for "hazardous substances." FOF #91. There are no regulatory limits addressing surface contamination for industrial type settings. 8/01, RP 67-68, 128-129; 8/06, RP 127-28. EBI did not establish site-specific or health-based cleanup standards for the Premises; instead, EBI applied its own "Surface Contamination Limits" ("Limits") developed by its consultant Dr. Michael Walters ("Walters"). 8/01, RP 67, 128; 8/06, RP 127-128.

Walters based the Limits solely upon his professional judgment; he did not base them on a risk assessment. 8/06, RP 128, 182-83, 186-87, 212, 220. Walters' Limits are not used by anyone else, have never been peer-reviewed, are not accepted in the relevant scientific community and have never been presented to or accepted by any regulatory agency.⁶

⁶ 8/01, RP 160-161; 8/06, RP 178-180, 188-190, 193-196, 211; 8/07, RP 7-11, 57; 8/20, RP 72-73. Pursuant to ER 104(a), NW Mint requested a *Frye* hearing to determine whether to exclude the Limits and Walters' expert opinions regarding the Limits. CP 904-916. The trial court denied the motion and refused to hold a *Frye* hearing. CP 1182-

The sole purpose of the Limits was to provide EBI with a basis to issue a “certificate of cleanliness” for the Premises. If the levels of metals present in the Premises were below the Limits, EBI would “certify” the Premises as being “clean.” 8/06, RP 131-133, 175, 191, 240; 8/07, RP 3, 30-21. EBI was only interested in whether metals were present; it did not perform a risk or toxicological assessment of the Premises. 8/06, RP 182-183. The Limits were not based on and were unrelated to any regulatory standard, and were far lower than any potentially related standard. 8/06, RP 211-213; 8/07, RP 14-15, 53-54, 56, 71-72.

Applying the Limits, EBI reported to Auburn that the Premises were “grossly contaminated” with “highly toxic metals” that presented a significant risk to human health and safety. 8/02, RP 115. See EBI’s May 7, 2010 report (Exhibit 58). EBI intentionally used this highly charged language to persuade Auburn to have the metals removed from the Premises. 8/06, RP 127, 183. EBI’s sole basis for claiming the Premises were “contaminated” is that metals were present at levels greater than those stated in the Limits. *Id.*, RP 131-132, 175, 191; 8/07, RP 3, 22-23. EBI advised Auburn in writing not to lease or occupy the Premises until they

1183. NW Mint orally renewed its *Frye* motion at trial. The trial court denied the motion, stating that “we are way beyond *Frye* at this point in the middle of the trial.” 8/7, RP 57.

were cleaned and “decontaminated.” 8/01, RP 71; 8/02, RP 116.

EBI did not assess the potential risk of human exposure to residual metals that might be in the Premises and did not know whether the metals present in the Premises were an actual or potential risk of harm to human health or the environment. 8/06, RP 128, 145; 8/07, RP 2-5. EBI did not speciate any of the metals detected or otherwise determine whether they were present in the Premises in benign or potentially hazardous forms. 8/20, RP 45-46.⁷ EBI did not conduct any analysis to determine the source of the metals detected in the Premises. *Id.*, RP 49-50.

Auburn forwarded EBI’s Report to NW Mint. Auburn demanded that NW Mint clean the Premises, reduce the presence of metals to below EBI’s Limits and provide a “certificate of cleanliness.” 8/02, RP 130-134, 148-149. Auburn threatened NW Mint with litigation if it did not agree to these demands. 8/02, RP 148-149; 8/09, RP 141-142. NW Mint rejected Auburn’s demands. 8/02, RP 147-148; 8/20, RP 9-10.

Auburn believed it was “very important” to obtain an unqualified certification from EBI that the Premises were “clean” and safe to lease to new tenants. 8/02, RP 120, 187-188. EBI told Auburn that it would not

⁷ EBI based its recommendations for cleanup on wipe samples, which only show whether metal is present and do not provide any information about the type, amount, source, or concentration of the metals. 8/20, RP 9, 48-51.

issue a certificate of cleanliness unless the trace levels of metals in the Premises were reduced to below the Limits. *Id.*, RP 119, 175, 187, 189.

Auburn voluntarily decided to clean the Premises. No government agency directed or required Auburn to clean the Premises. No government agency told Auburn that it could not re-lease the Premises until they were cleaned. 8/02, RP 173-174.

Auburn hired Clean Harbors Environmental Services, Inc. (“Clean Harbors”) to clean the Premises. FOF #113. Auburn hired EBI to supervise Clean Harbors and verify that it properly performed the work. 8/01, RP 145; 8/02, RP 116-117, 175.

D. Clean Harbor’s Demolition and Cleaning of the Premises.

Clean Harbors started work in January 2011—eight months after NW Mint vacated the Premises. FOF #113. Clean Harbors spent all of January 2011 demolishing existing tenant improvements and removed 86 tons of debris from the Premises.⁸ FOF #115. In waste manifests (Exhibit 258) submitted to the U.S. Environmental Protection Agency (“EPA”), both Clean Harbors and Auburn certified that these 86 tons of debris did not contain any hazardous substances. 8/07, RP 133, 144-46, 160-162.

⁸ Auburn claimed that NW Mint was responsible for the cost of removing the tenant improvements. The trial court rejected this claim. FOF # 88.

Clean Harbors did not actually start cleaning the Premises until February 2011. Although EBI testified that cleaning to its Limits was not “rocket science,” it took Clean Harbors until September 2011—more than seven months—to clean the Premises to EBI’s satisfaction. 8/1, RP 146-147; 8/02, RP 193-194. *See* FOF #’s 117-120.

Auburn did not report a release of any hazardous substances to Ecology or any other regulatory agency before, during or after the investigation and cleanup activities at the Premises. 8/13, RP 24, 36. Auburn never sought Ecology’s opinion regarding MTCA’s applicability to the Premises. *Id.*; RP 35-36. Auburn did not prepare a Sampling and Analysis Plan, Cleanup Action Plan or Compliance Monitoring Plan typically required for remedial work in Washington State. 8/14, RP 71-74. Auburn did not provide Ecology or the public with notice of its activities regarding the investigation or cleanup of the Premises. *Id.*

E. Auburn’s After-the-Fact MTCA Justification.

In March 2012—six months after Clean Harbors completed its work at the Premises—Auburn hired Dr. John Schell (“Schell”) as an expert to testify in support of its MTCA claim. Schell is employed as a toxicologist in Exponent Consulting’s Houston, Texas office. 8/08, RP 160-161. Schell first learned of MTCA’s existence when Auburn contacted him regarding

the case. Schell has never conducted a MTCA investigation or cleanup, nor has he ever talked with Ecology. Schell based his knowledge of MTCA entirely upon his recent review of the Washington statutes and regulations. 8/09, RP 46-48, 52-53.

Schell testified that a risk assessment, “a quantitative evaluation of risk,” is required to calculate a MTCA cleanup level. *Id.*, RP 9-10, 45. He further testified that whether hazardous substances pose a risk cannot be determined without knowing a dose: “One of the things that toxicologists live by is that exposure doesn’t equal a dose, and risk is a function of both the toxicity of the material and the dose that is received . . . [R]isk is a function of those two elements.” *Id.*, RP 9-10, 43-44; *see also id.* at 59.

Schell performed a backward-looking risk analysis utilizing a modified MTCA Method B approach. *Id.*, RP 40.⁹ Schell based his analysis upon the results of a bulk dust sample (“Sample”) taken from one of the beams in the warehouse of the Premises. FOF #98. The beam was approximately 25 feet above the warehouse floor. 8/14, RP 38. Schell and industrial hy-

⁹ Schell testified that he had to do a “risk assessment” of the Premises in order for Auburn to assert that dust levels in the Premises violated specific site cleanup levels that Schell developed. 8/09, RP 44-45. Schell testified that “there is [*sic*] some considerations that are made before you enter a cleanup, but the original determination that a remedy must be undertaken, and it states it explicitly in the MTCA regs, is an exceedance of these risk[-]based cleanup levels.” *Id.*, RP 50.

gienist Elisabeth Black (“Black”) testified at trial that there was little to no risk of human exposure to dust on the beam and that it did not represent a hazard to building occupants. 8/6, RP 41; 8/09, RP 56-57.

The Sample that Schell analyzed weighed approximately 0.2 grams. 8/14, RP 39-41. Under EPA Guidance on Environmental Data Verification and Data Validation EPA QA/G-8 and EPA Guidance SW846, the recommended minimum weight of a bulk dust sample is 200 grams; thus, the Sample was 1,000 times smaller than the EPA’s recommended minimum weight. *Id.*, RP 39. Schell testified that he didn’t know the EPA’s recommended minimum sample size. 8/08, RP 60.

In performing his risk analysis, Schell assumed that: (1) MTCA applied to contamination in the interior of a warehouse; (2) the dust he analyzed from the Sample was the same as soil under the MTCA statute; (3) MTCA Method B applied to indoor dust; (4) the Sample was representative of the conditions in the entire Premises; (5) the industrial warehouse would be used as a day care; and (6) any metals in the Sample resulted from NW Mint’s activities in the Premises. 8/09, RP 14-20, 22, 30-31, 34, 62-63, 74-75, 78; 8/14, RP 52-53, 100-102; 8/20, RP 219.

Based upon these assumptions, and without any assessment of potential inhalation risk, Schell concluded that selenium, arsenic, chrome

and copper were “above” his Modified Method B levels and, on that basis, MTCA required the Premises be cleaned. 8/09, RP 55, RP 88; 8/20, RP 74, 85. See FOF #98.¹⁰ Schell never discussed his calculations with Ecology. 8/09, RP 78-79, 82, 85. He also testified that, “as a private risk assessor,” he could “propose” a non-regulatory cleanup level, “but it would have to be approved by [the regulatory agency].” *Id.*, RP 93-95.

F. Ecology Determines that MTCA does not Apply to the Premises.

Ecology is the only Washington state agency with the responsibility and authority to administer MTCA.¹¹ In June 2012, NW Mint’s counsel submitted an application to Ecology’s Voluntary Cleanup Program (“VCP”) for the Property. 8/13, RP 35-36. Ecology’s VCP is used for independent remediation work performed under MTCA. *Id.*, RP 12-13; 8/14, RP 13.

Mr. Russ Olsen (“Olsen”) is the supervisor of Ecology’s Toxics Cleanup Program VCP Unit for the Northwest Region. In that capacity, Olsen is responsible for administering Ecology’s VCP in the northwest region of the state, as well as Ecology’s release reporting requirements. 8/13, RP 3-7.

Mr. Olsen reviewed the VCP application submitted by NW Mint’s counsel. In June 2012, Olsen—acting on Ecology’s behalf—rejected NW

¹⁰ Schell testified that these metals were the “cleanup drivers;” *i.e.*, that cleaning those metals would address the alleged risk for the entire facility. 8/20, RP 69.

¹¹ RCW 70.105D.030.

Mint's VCP application because Ecology determined that no release occurred at the Premises and that (1) the Auburn property "is not a hazardous waste site requiring remedial action under . . . MTCA"; (2) there has been **no release into the environment of a hazardous substance** at the Auburn Property (emphasis in original); and (3) "metal dust . . . present inside the building . . . did not enter the 'environment.'" *Id.*, RP 39-43. Ecology's June 2012 letter rejecting NW Mint's VCP application is Exhibit # 260 and is included in the Appendix.

NW Mint's counsel submitted a second VCP application to Ecology. 8/13, RP 43-44. In July 2012, Olsen—again acting on Ecology's behalf—rejected NW Mint's second VCP application for the Premises. Ecology explained that it rejected the application because "the data provided to Ecology is insufficient to show a release into the environment of a hazardous substance." *Id.*, RP 44-48. Ecology's July 2012 letter rejecting NW Mint's VCP application is Exhibit # 285 and is included in the appendix.

Ecology determined that (1) there had not been a release into the environment of a hazardous substance at the Premises; (2) MTCA did not apply to the alleged contamination of the Premises; and (3) Ecology did not consider the Premises to be a hazardous waste site that required cleanup under MTCA. Ecology has never treated a building as a "hazard-

ous waste site” under MTCA based solely on the presence of indoor dust.
Id., RP 3-6, 8, 11, 15, 17-28, 30-35, 39, 43-44, 47-50, 141, 143-145, 147,
151-153, 158, 160-161, 170-72, 174-75, 190, 196, 204, 210-211.

IV. ARGUMENT

A. Standard of Review

This appeal presents multiple questions of law, which this Court reviews *de novo*.¹² NW Mint challenges Conclusions of Law 1-13, 15-19, and 21-22. The issues of law underlying these conclusions include the proper application of MTCA, interpretation of certain terms of art within MTCA, and interpretation of the Lease between NW Mint and Auburn.

The lower court erroneously categorized numerous conclusions of law and mixed questions of law and fact as Findings of Fact.¹³ “The trial

¹² *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). “Whether a statute applies to a factual situation is a question of law,” so is also reviewed *de novo*. *PacifiCorp Env'tl. Remediation Co. v. Wash. State Dep't of Transp.*, 162 Wn. App. 627, 662, 259 P.3d 1115 (2011) (footnote, citations, and internal quotations omitted).

¹³ The following are actually conclusions of law or, in some instances, mixed questions of fact and law (all of which turn on statutory terms of art requiring legal interpretation and legal conclusions on applicable standards): FOF #'s 93-96, 98-104, 105, 107, 108, and 123-128. These Findings include terms defined under MTCA, such as “hazardous substance,” “threat,” “facility,” “potential threat,” “threat” of future “releases” to the “environment,” “release” generally, “remedial action costs” and “necessary,” and require: 1) legal interpretation of these terms; 2) a finding of legal compliance with “MTCA procedures;” 3) determinations of “consisten[cy] with MTCA regulations” and achievement of “overall effectiveness” (terms underlying the trial court’s legal “substantial equivalence” determination); and 4) by use of the undefined relative term “high levels,” a legal determination of the applicable levels to which the samples were compared. The trial court did not identify what standard or level, if any, by which it measured or com-

court's label of a finding as one of fact is not determinative."¹⁴ Findings that are actually legal conclusions must be reviewed *de novo*. To the extent that they are mixed, Washington appellate courts "review mixed questions of law and fact under the error of law standard, giving deference to the trial court's factual findings, but reviewing their application to the law *de novo*."¹⁵

The appeal also presents multiple questions of fact. "Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true."¹⁶ "[I]f there is no express finding upon a material fact, the fact is deemed to have been found against the party having the burden of proof."¹⁷

B. The Trial Court Erroneously Applied MTCA

The trial court's ruling that MTCA applies to this case contravenes the

pared the sampling results. Nor did the trial court explain what inferences it drew from the facts found for purposes of applying and interpreting statutory terms and phrases.

¹⁴ *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 111 Wn. App. 586, 597, 49 P.3d 894 (2002) (citation omitted).

¹⁵ *Id.* at 596 (citations omitted).

¹⁶ *Sunnyside*, 149 Wn.2d at 879 (citation omitted).

¹⁷ *McCutcheon v. Brownfield*, 2 Wn. App. 348, 356, 467 P.2d 868 (1970) (citations omitted); *see also Lobdell v. Sugar 'N Spice, Inc.*, 33 Wn. App. 881, 887, 658 P.2d 1267 (1983) (same).

statute's plain language and ignores Ecology's explicit interpretation of the statute's applicability. MTCA does not apply to indoor dust. Nor does it allow private parties to make up arbitrary standards that ignore basic science and mandatory MTCA rules and force others to pay for the costs of unnecessary cleanups.

To affirm the trial court's ruling, this Court will have to decide three legal questions—all issues of first impression in Washington—in Auburn's favor: (1) MTCA regulates dust inside of buildings; (2) dust is "soil" under MTCA; and (3) roofs and concrete loading docks are "land surfaces" under MTCA. The Court will also have to excuse Auburn from meeting its minimum burden of proof under MTCA.

1. The trial court misconstrued MTCA and ignored Ecology's testimony and evidence.

MTCA's primary purpose is the "beneficial stewardship of the *land, air, and waters* of the state[.]"¹⁸ No land, water, or ambient air is at issue in this case. *See* 08/14, RP 11, 13, 18-19, 33 (no MTCA media contaminated). It is undisputed that Auburn did not even sample land, water, or ambient air at the Property.

MTCA addresses "releases" of "hazardous substances" to the "envi-

¹⁸ RCW 70.105D.010(1)-(2) (emphasis added).

ronment.”¹⁹ MTCA defines a “release” as “any intentional or unintentional entry of any hazardous substance into the environment, including but not limited to the abandonment or disposal of containers of hazardous substances.”²⁰ Regulations implementing MTCA define “environment” as:

any plant, animal, natural resource, surface water (including underlying sediments), groundwater, drinking water supply, land surface (including tidelands and shorelands) or subsurface strata, or ambient air [in] Washington.²¹

By its terms and as implemented in regulations and practice, MTCA applies only to the listed environmental media – air, soil, sediment, and water.²²

2. Ecology determined that MTCA did not apply to the Premises. The trial court failed to give any weight to Ecology’s determination.

“Ecology is the agency designated by the legislature to regulate the

¹⁹ RCW 70.105D.020, 70.105D.040; WAC 173-340-200.

²⁰ RCW 70.105D.020(25); WAC 173-340-200.

²¹ WAC 173-340-200. “Ambient air” means outside air. See *Cyker v. Four Seasons Hotels Ltd.*, No. 90-11929-Z, 1991 WL 1401 (D. Mass. Jan. 3, 1991) (citing regulations and cases); see also *3550 Stevens Creek Assoc. v. Barclays Bank of Cal.*, 915 F. 2d 1355, 1359-60 (9th Cir. 1990) (indoor air is not the “environment”). MTCA was patterned after CERCLA, including its definition of “environment.” See generally *Bird-Johnson Corp. v. Dana Corp.*, 119 Wn.2d 423, 427, 833 P.2d 375 (1992) (“As such, federal cases interpreting similar language in CERCLA and SARA are persuasive, albeit not controlling, when interpreting . . . MTCA.”).

²² See, e.g., WAC 173-340-200, 173-340-700(2), 173-340-708(3)(b), 173-340-700 through -760, tbls. 720-1—747-5 (all specific to ground water, surface water, soil, sediment and air).

State's ... resources," including administration of MTCA.²³ The trial court was required to "give great weight to Ecology's interpretation of the laws that it administers."²⁴

The trial court completely ignored Ecology's testimony and determinations regarding MTCA's inapplicability to the Premises. The trial court did not even mention them in its Findings and Conclusions.

"[I]t is well settled that due deference must be given to the specialized knowledge and expertise of an administrative agency."²⁵ Ecology renders its decisions after evaluating complex, technical factual matters at "the heart of the agency's expertise" regarding the primary hazardous waste law that it administers.²⁶ The trial court did not explain its failure to give "due deference" to Ecology's decisions regarding the Premises.

²³ *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004) (citing *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 593, 957 P.2d 1241 (1998)); see generally Chapter 70.105D RCW.

²⁴ *Port of Seattle*, 151 Wn.2d at 594 (citing *Theodoratus*, 135 Wn.2d at 589). Accord *Kit-titas County v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d 144, 178, 256 P.3d 1193 (2011) ("[B]ecause Ecology is the primary administrator of chapter 90.44 RCW, the court gives great weight to its interpretation of that chapter."); *United States v. Hoffman*, 154 Wn.2d 730, 747-748, 116 P.3d 999 (2005) ("[W]e generally give great weight to Ecology's interpretation of laws it administers."). See also 08/13/12, RP at 175.

²⁵ *State, Dep't of Ecology v. Pub. Utility Dist. No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993), *aff'd*, 511 U.S. 700, 114 S.Ct. 1900 (1994), *superseded on other grounds by statute as stated in Forfeiture of One 1970 Chevrolet Chevelle*, 140 Wn. App. 802, 167 P.3d 599 (Wn. App. 2007); see also *State, Dep't of Ecology v. Tiger Oil Corp.*, 166 Wn. App. 720, 754, 271 P.3d 331 (2012).

²⁶ *Tiger Oil*, 166 Wn. App. at 754; see also Exs. 260, 280; 08/13, RP 175.

3. The Statute, analogous CERCLA case law, and expert testimony all support Ecology's determination that MTCA does not apply to this case because "dust" is not "soil."

Auburn attempted to expand MTCA's reach to include dust on interior and exterior building surfaces by asserting that dust generated indoors qualifies as "soil" under MTCA. However, no Washington court has held a party liable under MTCA for dust generated by an indoor source. Ecology's Olsen testified that neither he nor anyone in Ecology has ever regulated a building under MTCA due to the presence of dust indoors and on a roof and loading dock.²⁷ 8/13, RP 21-22. MTCA expert Peter Jewett ("Jewett")—who has worked under the MTCA statute since its enactment in 1988 and conducted and supervised thousands of MTCA cleanups across the state—testified that he has "never had any experience where dust generated by a manufacturing process that is only within a tenant space would be clean[ed] up under a soil cleanup level under MTCA, nor have any of my associates." 8/14, RP 11, 74, 112-13 and 133.

²⁷ The Washington Department of Labor & Industries Division of Occupational Safety and Health and federal Occupational Safety and Health Administration—not Ecology—primarily regulate workplace safety, including the use of chemicals and metals inside of buildings. See Ex. 257; 08/13, RP 39-40; see generally 29 U.S.C. §§ 651-678; 29 C.F.R., Subtitle B; Ch. 49.17 RCW *et seq.*; Title 296 WAC *et seq.*

a. Because the lower court failed to make express material findings, the “soil” issue is deemed to have been found against Auburn.

Auburn’s entire MTCA case and the trial court’s decision depend on the adoption of Auburn’s proposition that MTCA treats indoor dust the same as “soil.” See FOF 99; 8/9, RP 74, 77-78. Yet, the trial court failed to make any explicit determination about whether dust is “soil” for purposes of MTCA. “[I]f there is no express finding upon a material fact, the fact is deemed to have been found against the party having the burden of proof.”²⁸ Accordingly, dust does *not* equal “soil” for purposes of MTCA in this case, and MTCA soil cleanup levels do not apply within or on the exteriors of the Auburn building.

b. Dust is not “soil” under MTCA or basic science.

Even if the trial court had found that dust was “soil,” the plain language of MTCA’s regulations show otherwise. MTCA defines “soil” as “a mixture of organic and inorganic solids, air, water and biota that exists on the earth’s surface above bedrock, including materials of anthropogenic sources such as slag, sludge, etc.”²⁹

²⁸ *McCutcheon*, 2 Wn. App. at 356. *Accord Crites v. Koch*, 49 Wn. App. 171, 176, 741 P.2d 1005 (1987) (“Generally, the failure of the trial court to make an express finding on a material fact requires that the fact be deemed to have been found against the party having the burden of proof.”).

²⁹ WAC 173-340-200.

The MTCA statute does not mention dust. Its regulations mention the word in one subsection, providing examples of circumstances in which Ecology “may require more stringent soil cleanup standards than required by this section. . . .”³⁰ At trial, Auburn argued that this regulatory reference indicated that soil cleanup standards apply to indoor dust.

The regulation’s plain language establishes that dust and soil are two different things under MTCA; it addresses each medium separately and distinctly.³¹ The definition’s first clause makes clear that all soil must: (1) contain “a mixture of organic and inorganic solids, air, water and biota”; and (2) “exist on the earth’s surface above bedrock[.]”³² The second clause explains that material that meets those two threshold criteria can include “materials of anthropogenic sources.”³³ It does not provide that all materials of anthropogenic sources are necessarily soil. Indeed, Schell conceded that dust does not meet the threshold definitional require-

³⁰ WAC 173-340-740(1)(c).

³¹ In subsections (c)(i)-(v), WAC 173-340-740(1)(c) describes media that can be affected by contaminated soil: groundwater, surface waters, vapors, and dust. The regulation explicitly distinguishes between soil (described in section (c) and subsection (c)(ii)) and dust (described separately, in subsection (c)(iii)).

³² WAC 173-340-200. Merriam-Webster defines “bedrock” as “the solid rock underlying unconsolidated surface materials (as soil).” See <http://www.merriam-webster.com/dictionary/bedrock> (last visited May 16, 2013). Defining everything that exists anywhere above bedrock—not just the surface immediately above it, as soil—would read all limits out of MTCA and basic earth science definitions of “soil.”

³³ WAC 173-340-200.

ments to be “soil.” 08/09, RP 78.³⁴

NW Mint’s experts also established that MTCA’s definition of soil does not encompass interior dust, and that legitimate MTCA cleanup levels cannot be developed for dust by mischaracterizing it as “soil.” 08/13, RP 11-16; 08/14, RP 34-39, 42, 44, 51-53, 91, 137; 08/20, RP 236. The regulation that mentions dust covers circumstances where “dust [is] generated by contaminated soil.” 8/14, RP 46-48, 109-110.³⁵ It does not transform dust into “soil.”

4. Auburn did not establish a *prima facie* MTCA claim.

If this Court holds that MTCA does not apply in this case, it need not reach any specific MTCA issue. Even if MTCA does apply, the lower court must be reversed because Auburn failed to establish a *prima facie* MTCA claim for cost recovery. The mere presence of a substance categorized as hazardous under MTCA does not establish MTCA liability.³⁶ Under RCW

³⁴ “Q Is [the dust] a mixture of organic and inorganic solids such as air, water and biota? A (Schell) No. Q So it is anthropogenic, but it's not organic air, water and biota as it's mixed above the earth's surface, above bedrock? A It isn't inorganic solids. Q Is it organic solids? A No. Q Is there biota in it? A No.” 08/09, RP 78.

³⁵ Even if Ecology decided to treat dust as “soil,” the regulation provides Ecology—not private parties—with authority to address dust generated by contaminated soil. WAC 173-340-740(1)(c) (“The department may require . . .”); *see also* 8/13, RP at 17-18.

³⁶ While there is no minimum level of “hazardous substance” required to meet that element of a *prima facie* MTCA case, Auburn must establish *all* elements for a court to hold NW Mint liable (*i.e.*, that the substance was “released” to the “environment,” “threatened human health or the environment,” and caused Auburn to incur “remedial

70.105D.040(1)(b) and -.080, Auburn had the burden of proving that:

- 1) the metals at issue are “hazardous substances” that “threatened human health or the environment”;
- 2) the Building is a “facility” from which a “release” of “hazardous substances” to the “environment” occurred when NW Mint “operated” the facility, such that NW Mint is a potentially liable party (“PLP”);
- 3) in response to a “release or threatened release to the environment” by NW Mint, Auburn conducted a “remedial action” and incurred “remedial action costs”; and
- 4) if Auburn conducted a “remedial action,” that it did so in a manner “substantially equivalent to a[n Ecology]-conducted or supervised” remedial action.³⁷

Auburn cannot prevail on its MTCA claim because it failed to prove all of these elements.

a. No threat to human health or the environment existed.

The presence of hazardous substances, without more (*i.e.*, evidence of release and threat to human health or the environment) does not give rise to a valid inference that a risk existed. If a hazardous substance “d[oes] not pose a threat or potential threat to human health or the envi-

action costs”). *See id.*; *see generally City of Seattle (Seattle City Light) v. Wash. State Dep’t of Transp.*, 98 Wn. App. 165, 177, 989 P.2d 1164 (1999) (addressing elements of MTCA liability); *see also G.J. Leasing Co. v. Union Electric (G.J. Leasing I)*, 854 F.Supp. 539, 557 (S.D. Illinois 1994) (“[I]n a private CERCLA action, the plaintiff bears the burden of establishing that each of the *prima facie* elements exist.”) (citations omitted).

³⁷ *See* RCW 70.105D.200, 70.105D.040(1)(b), 70.105D.080.

ronment,” then a plaintiff has no MTCA claim for cost recovery.³⁸

Both Auburn’s and NW Mint’s experts testified that determining whether the metallic dust posed a risk to human health or the environment required a risk assessment of pre-cleanup conditions. *See, e.g.*, 8/16, RP 58; 8/9, RP 45. Auburn made no effort before its cleanup to assess whether a threat to human health or the environment actually existed on the Premises.³⁹ Auburn initiated its cleanup based solely on EBI’s unscientific Limits, which EBI admits were set arbitrarily and without regard to MTCA.⁴⁰ 8/01, RP 135-36, 160-62, 165-66; 8/06, RP 47-50, 54-55, 190-91; 8/20, RP 48-54, 56-59, 211-12.

Six months after Clean Harbors completed its work, Auburn hired Schell to prepare an after-the-fact rationalization of the cleanup. Schell’s

³⁸ *Seattle City Light*, 98 Wn. App. at 177; *see also id.* at 176 (“[B]efore a court may equitably allocate remedial action costs in a contribution action, the party seeking contribution under RCW 70.105D.080 must demonstrate that the defendant’s hazardous substance contributed to a threat or potential threat to human health or the environment.”) (citing RCW 70.105D.040, 70.105D.020).

³⁹ NW Mint’s experts, including toxicologist Dr. Chris Mackay (“Mackay”), industrial hygienist Tim Reinhardt, and geologist Jewett, testified that the Premises posed no threat to human health or the environment and did not require cleanup. 8/14, RP 27, 32, 76, 120; 8/20, RP 6-7, 31, 37, 62, 238. Auburn’s witness Steve Frost testified that there was no way to he could testify as to whether a health threat was even “probable,” as “probability would require information that I do not have.” 8/08, RP 159.

⁴⁰ Auburn’s consultant Walters testified that, in his “arbitrary professional judgment,” he “would drop all limits to zero” 8/06, RP 197, 226. In reality, it is not possible to meet such limits because hazardous substances are ubiquitous. 8/13, RP 19; 8/20, RP 40-42, 52-53, 71-72; 8/14, RP 120. “Some concentrations of metal . . . can be detected in every environment[.]” 8/06, RP 33; *see also* 08/20, RP 71-72.

post hoc analysis is invalid: it turns not just on dust being “soil,” but requires a host of additional interpretations, assumptions, and inferences that are unsupported by fact or law.

Schell’s entire exercise—the only support for Auburn’s MTCA claim—is based upon a 0.2 gram sample that Schell erroneously assumed was representative of the entire facility. 08/14, RP 34-39, 41-42, 95-96, 99-101, 133-35, 220. Further, NW Mint established at trial that the “cleanup drivers” Schell identified were incapable of biological uptake, were non-hazardous, and were not released or threatening release to the environment. While present at lawful, *de minimus* levels, they did not threaten human health or the environment. Auburn did not show a threat or any basis from which to infer a threat. This failure is fatal to its MTCA claim.

According to Schell, and as substantiated by Jewett and MacKay, toxicity and dose must be known to assess risk. 8/9, RP 9-11. The existence of a potential exposure pathway determines the “dose” or “potential dose.” Auburn’s witnesses testified that there was no plausible route of exposure to the dust from which Auburn took its sole bulk dust sample (the ceiling beam), or from many areas that Auburn elected to clean, including interstitial spaces and electrical conduit, lights and beams at the warehouse’s ceiling. These experts also testified that they would not

have recommended cleaning up any of those areas. *See, e.g.*, 8/6, RP 61-62. If any inference can be made from Auburn’s witnesses’ uncertain and inconsistent testimony, it is that no threat existed.

b. No release to the environment occurred or threatened to occur.

MTCA, like CERCLA, “was not meant to provide a civil remedy whenever hazardous substances are found within a building’s interior.”⁴¹ A hazardous substance is not released into the environment when it is deposited onto interior building surfaces or merely exposed to air, and the mere presence of a hazardous substance—without a release or threat of release—does not automatically give rise to MTCA liability.⁴² Auburn “is not entitled to damages to clean up its own internal facilities and property absent contamination of the external environment.”⁴³

⁴¹ *Cyker*, 1991 WL 1401, at *2 (release of chemicals from indoor pool is not a “release” under CERCLA).

⁴² *See supra* Part IV.B.4.a; *see also Fertilizer Inst. v. U.S. E.P.A.*, 935 F.2d 1303, 1309 (D.C. Cir. 1991) (“release” does not occur where hazardous substances are placed into open-air storage container”). The “environment” does not include “air within a building.” *See, e.g.*, *3550 Stevens Creek*, 915 F.2d at 1360 (citing cases); *Greco v. United Tech. Corp.*, 277 Conn. 337, 358-59, 890 A.2d 1269 (2006)) (same). Even if it did, the levels of metals in air samples taken inside and outside the Premises during NW Mint’s actual operations and during the cleanup were all below state and federal air standards. 8/07, RP 160-65, 169-70, 174; 08/13, RP 19, 76; 8/16, RP 69-180; *see also* 8/1, RP 157.

⁴³ *KN Energy, Inc. v. Rockwell Int'l Corp.*, 840 F. Supp. 95, 98 (D. Colo. 1993) (citing *Stevens Creek*, 915 F.2d at 1361) (CERCLA does not apply to the release of asbestos fibers within a building because, *inter alia*, there is no release into the environment); *see also Sycamore Indus. Park Assocs. v. Ericsson, Inc.*, 546 F.3d 847, 853 (7th Cir. 2008) (“[W]hen there is no emission into the outside environment, but rather any hazard resulting from

Even if dust did equal soil, MTCA still would not apply unless the Court makes a second determination in Auburn's favor: that roofs and concrete loading docks are "land surfaces" under MTCA. The MTCA term "environment" does not include indoor surfaces, indoor air, rooftops or partially enclosed concrete loading docks.⁴⁴ 08/14, RP 59-61.

Neither MTCA nor CERCLA define the phrase "threatened release," but CERCLA cases discuss the concept. A plaintiff basing a claim on an alleged threatened release must "show a concrete threat of a release" just to survive a motion to dismiss.⁴⁵ There is no concrete evidence of a threatened release in this case.⁴⁶

In *Diverse Real Estate Holdings Ltd. Partnership v. International Mineral & Chemical Corp.*, plaintiffs pursued a CERCLA claim based on an alleged threatened release from a pond to the environment.⁴⁷ Even then, when the alleged potential source was outdoors, the court refused to

emission of asbestos fibers would be confined inside a building, there is no release or threatened release, and thus there can be no liability under CERCLA.") (citing *Stevens Creek*, 915 F.2d at 1359-60).

⁴⁴ WAC 173-340-200; *see also* 08/14, RP 51-53, 55-58, 61-62, 64-65.

⁴⁵ *Powell Duffryn Terms, Inc. v. CIR Proc., Inc.*, 808 F. Supp. 652, 654-56 (N.D. Ill. 1992).

⁴⁶ For example, the materials detected on the roof "were solid[,] non-erodable and are non-soluble," and presented no risk or threat of release. 08/14, RP 51-53, 55-58, 61-62, 64-65; 08/20, RP 58.

⁴⁷ No. 91-8090, 1995 WL 110138, at *1 (N.D. Ill. Mar. 13, 1995).

find a threatened release and rejected plaintiff's claim. It held:

Based on the relatively low concentrations of hazardous substances in the Pond, their lack of mobility, and because there is no evidence of a release of hazardous substances into the surrounding groundwater... the Court concludes that the plaintiff has failed to prove by a preponderance of the evidence that there is a realistic, concrete threat of a release of hazardous substances into the environment.⁴⁸

Because no MTCA-regulated media was contaminated here, Auburn relied heavily on an unreported CERCLA opinion from the Eastern District of Pennsylvania, *BCW Associates, Ltd. v. Occidental Chemical Corp.*,⁴⁹ to argue that a "threatened release" existed.⁵⁰ This Court is not bound by *BCW* which, as explained below, has been rejected by many courts. Regardless, *BCW* does not support Auburn's case.

BCW met its burden of proof with respect to one defendant, Firestone, by: 1) conducting the necessary testing—speciation—to show that lead was in a toxic form and that it came from Firestone's operations; and 2) showing a threat of release of the Firestone-caused dust to the envi-

⁴⁸ *Id.* at *7; see also *Miller v. Mandarin Homes, Ltd.*, 305 Fed.Appx. 976, 980 (4th Cir. 2009) ([Plaintiffs] have suggested only possibility, rather than probability, on an element essential to their CERCLA claims. The district court properly granted summary judgment").

⁴⁹ No. 86-5947, 1988 WL 102641 (E.D. Pa. Sept. 29, 1988).

⁵⁰ Auburn will also rely on *Emhart Industries, Inc. v. Duracell Intern. Inc.*, 665 F. Supp. 549 (M.D. Tenn. 1987)—another non-controlling CERCLA case that is also distinguishable. Unlike this case, which involves dust confined to a building and metal on a small section of its metal roof, *Emhart* involved both spills of contamination within a building and extensive leaching of PCB and TCE into soil and groundwater.

ronment. Auburn presented no such evidence against NW Mint.

In *Rivas v. Safety- Kleen*,⁵¹ the court explained that interior dust is the province of OSHA (in Washington, WISHA), not EPA (in Washington, Ecology):

Nothing in either the 1986 Amendments or their legislative history hints that EPA (the agency empowered to investigate sites it believes are contaminated with hazardous waste and establish a Superfund for cleaning them up) is to muscle in on the territory of the Department of Labor, which administers programs dealing with workplace safety.⁵²

The *Rivas* court held that CERCLA does not govern interior dust—even if that dust could potentially be transported outside of a building.⁵³ Analyzing the scope of the term “release” into the “environment,” the *Rivas* court quoted the Seventh Circuit’s holding that

It is lexically possible to treat the ‘environment’ as everything pertaining to the planet Earth, so that the instant a container of asbestos is opened it is released ‘into [the local portion of] the environment.’ Such a global treatment erases ‘released into the environment’ as a limitation, however, by ensuring that it is always satisfied. . . . A reading of this sort trivializes statutory language. . . . [I]t is hard to believe that ‘released into the environment’ is an empty phrase. The focus and structure of CERCLA itself show that it has force. Asbestos encountered at work is not a toxic waste, and the Superfund Act is

⁵¹ 98 Cal. App. 4th 218, 119 Cal. Rptr. 2d 503 (2002).

⁵² *Id.* at 235; see also *G.J. Leasing I*, 854 F.Supp. at 562 (because all levels were “below OSHA action levels,” cleanup was not “necessary” and were not recoverable).

⁵³ 98 Cal. App. 4th. at 234; see also *Elec. Power Bd. of Chattanooga v. Westinghouse Elec. Corp.* (“*Chattanooga*”), 716 F. Supp. 1069, 1081 (E.D. Tenn. 1988), *aff’d sub nom. Elec. Power Bd. of Chattanooga v. Monsanto Co.*, 879 F.2d 1368 (6th Cir. 1989).

about inactive hazardous waste sites.⁵⁴

The *Rivas* court held “that such *de minimis* exposure [does not] transform these occupational exposure actions into CERCLA claims.”⁵⁵ Similarly, where the injury for which a plaintiff seeks recovery “results from expenses incurred in cleaning and testing inside the building, it cannot rely on any release of [hazardous substances] outside the building in order to come within the CERCLA. There is no causal link between [plaintiff]’s injury and any potential release outside the confines of the building.”⁵⁶

Further, under the practical scientific definition, a threatened release requires “a source [with] enough volume at certain concentrations of a hazardous substance” and a viable pathway for a release to a receptor. 8/14, RP 55-56. None of those elements existed on the Premises. *See, e.g.*, 08/13, RP 19, 76.

In its attempt to bootstrap an interior cleanup into a MTCA claim, Au-

⁵⁴ *Rivas*, 98 Cal. App. 4th at 234 (quoting *Covalt v. Carey Canada Inc.*, 860 F.2d 1434, 1436-37 (7th Cir. 1988)); *see also id.* at 236 (“laws have both directions and limits, and each must be scrupulously honored. Giving [a CERCLA section] its broadest possible meaning not only preempts wide sweeps of state law—something we do not lightly attribute to Congress—but also thrusts CERCLA into the domain of other federal rules expressly dealing with employees’ safety, another thing we do not lightly attribute to Congress.”) (internal quotations and ellipses omitted); *Greco*, 277 Conn. at 358-65 (rejecting reasoning similar to *BCW* and adopting *Rivas*).

⁵⁵ *Rivas*, 98 Cal. App. 4th at 234.

⁵⁶ *Chattanooga*, 716 F.Supp. at 1081.

burn argued that *de minimis* levels of metal on a metal roof and loading dock “threatened” a release. The Court should reject this argument: Auburn has no MTCA claim against NW Mint because it cannot establish all the elements of a *prima facie* case.

c. Auburn did not establish that NW Mint created the dust.

The trial court found that “[t]he contamination at the Auburn Property resulted from NW Mint’s operations[.]” FOF #100. However, the metals at issue are naturally occurring and common constituents of materials such as concrete, cement, steel and granitic bedrock. No evidence supports the trial court’s finding that NW Mint’s operations were the source of the metals found in the Sample.

Only one expert—Dr. Mackay—used the pre-cleanup data to assess the source of the dust at issue. Dr. Mackay concluded that the selenium and arsenic in the Sample did not come from NW Mint’s operations. 8/20, RP 96. Dr. Mackay testified that the concentration of selenium in the Sample was “too high for it to have come from the only selenium source that was in Northwest Mint’s operations.” *Id.* Dr. Mackay further testified “that there was no identifiable arsenic source with Northwest Mint’s operations; that it most likely came from some other operation.”

Id. Dr. Mackay concluded that NW Mint's operations were not the likely source of the selenium and arsenic found in the Sample. *Id.*, RP 97-98.

Dr. MacKay determined that calcium made up to one-third to one-half of the Sample. 8/20, RP 95-96. Since NW Mint did not use or generate calcium in its operations, the "calcium had to come from someplace else." *Id.*, RP 96. According to Dr. Mackay, "the major sources of calcium [at the Premises] are the concrete in the facility and the gypsum in the drywall." *Id.* Dr. Mackay concluded that most of the Sample is concrete and gypsum dust deposited on the beam during construction of the Premises and not due to NW Mint's operations. *Id.*, RP 42-43, 95-99.

Auburn had the burden of establishing that NW Mint's operations proximately caused the alleged contamination in the Premises.⁵⁷ None of Auburn's agents or experts attempted to determine the source of the

⁵⁷ Auburn must establish causation, according to the ordinary meaning of that term. See *Grey v. Leach*, 158 Wn.App. 837, 846-48, 244 P.3d 970 (2010) (MTCA does not define 'caused' or "contributed." We may resort to dictionary definitions to give undefined terms their plain and ordinary meaning, unless a contrary intent appears within the statute. *Webster's* . . . defines 'cause' as 'brings about an effect of that produces or calls forth a resultant action or state' or to 'bring into existence.'"); see also *Santa Clara Valley Water Dist. v. Olin Corp.*, 655 F. Supp. 2d 1048, 1057 (N.D. Cal. 2009) ("[CERCLA] plaintiff must establish a causal link between the release for which defendant is responsible and the response costs incurred.") (discussing cases) (citations omitted)).

"Cause in fact' refers to the actual, 'but for,' cause of the injury, i.e., 'but for' the defendant's actions the plaintiff would not be injured." *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 610, 257 P.3d 532 (2011) (citing *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998)).

substances detected in the Sample. 08/20, RP 96. The undisputed evidence is that the metals detected in the Sample were likely deposited on the beam during the Building's construction—before NW Mint began operating in the Premises. Auburn failed to establish that NW Mint's operations caused the alleged contamination.

d. Because no threat existed before EBI initiated cleanup, Auburn's costs were not "necessary" and are not recoverable.

Even if MTCA applied, "the remediation costs must still be 'necessary' to qualify as the substantial equivalent of an Ecology-conducted cleanup."⁵⁸ Response costs are "necessary" only when "an actual and real threat to human health or the environment exists[s] *before* initiating a response action."⁵⁹ "Conversely, costs incurred at a time when the plaintiff was unaware of any threat to human health or the environment are not 'necessary.'"⁶⁰

⁵⁸ *Iron Partners v. Maritime Admin.*, No. 08-05217, 2011 WL 4502139, at *6 (W.D. Wn. Sept. 28, 2011); *see also id.* ("[T]he notion that response costs must be 'necessary' in order to be recoverable is more precisely articulated under CERCLA, but no less applicable under MTCA.")

⁵⁹ *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 871 (9th Cir. 2001); *see also Diverse Real Estate*, 1995 WL 110138 at *8 (refusing to award plaintiff's response costs where it "made its determination to [conduct cleanup], and without assessing the risk, if any, posed by the hazardous substances in the Pond.")

⁶⁰ *Regional Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 703-04 (6th Cir. 2006) (quoting *G.J. Leasing Co. v. Union Elec. Co. (G.J. Leasing II)*, 54 F.3d 379, 386 (7th Cir. 1995)) (internal quotation marks omitted); *Carson Harbor*, 270 F.3d at 871 ("Remedia-

To be recoverable, costs must also be “necessary to the containment and cleanup of hazardous releases.”⁶¹ Costs incurred to achieve a higher level than the use of the property requires are not “necessary.” In *Southfund Partners III v. Sears*, Defendants argued that Southfund conducted its cleanup to a more stringent degree than necessary “to make the property more attractive to potential buyers.”⁶² The court agreed, finding that the “costs incurred to cleanse the groundwater and soil were [not] necessary to address threats to the public health or the environment.”⁶³

Auburn argued that the cleanup was necessary to make the industrial property suitable for use as a daycare. Even if MTCA applied (it doesn’t), Auburn cannot recover the costs it spent to improve the Property to make it suitable for a non-industrial use, particularly when it is undisput-

tion costs are recoverable under CERCLA only if ‘necessary.’ . . . this standard requires that an actual and real threat to human health or the environment exist before initiating a response action.” (citations omitted); *G.J. Leasing I*, 854 F.Supp. at 563 (no regulatory requirement for cleanup, so was “not justified or necessary”) (citation omitted).

⁶¹ *Carson Harbor*, 270 F.3d at 871; *United States v. Hardage*, 982 F.2d 1436, 1448 (10th Cir. 1992).

⁶² 57 F. Supp.2d 1369, 1378 (N.D. Ga. 1999) (quoting *G.J. Leasing II*, 54 F.3d at 386); see also *New York State Elec. & Gas Corp. v. FirstEnergy Corp.*, 808 F. Supp. 2d 417, 523 (N.D.N.Y. 2011) (“To recover CERCLA damages . . . , [plaintiff] must show that the threat to public health or the environment was the predicate for acting. Otherwise, businesses that happened to operate on contaminated property, yet took no additional measures in order to do so, would realize unearned fixed-cost advantages over their competitors.”) (quotations and citations omitted).

⁶³ *Southfund*, 57 F.Supp.2d at 1378-80.

ed that the Premises—a manufacturing warehouse—is designed and has always been used for industrial purposes. 08/06, RP 38, 53; 08/09, RP 41.

“[R]ecovery of environmental cleanup costs incurred to achieve a higher level than the use of the property necessitates would violate CERCLA's requirement that recoverable response costs be ‘necessary[.]’”⁶⁴ Where property has a long history of industrial use, “[t]o require former occupants to assume liability for cleanup costs going beyond the level necessary to make the property safe for industrial use would be to provide an unwarranted windfall to the beneficiary of the cleanup.”⁶⁵

Quoting the Seventh Circuit, the *Southfund* court explained:

Suppose a building that was being used to warehouse heavy industrial equipment were found to have very low levels of contamination by some hazardous substance and only a small expenditure would be necessary to remove enough of the substance to make the building safe for its current use. Thinking this is a perfect opportunity to upgrade that use, the owners decide to incur enormous costs to eliminate the contamination utterly, charge those costs to whoever was responsible for the current very low level of contamination, and then convert the building to a hospital, day care center, or dairy products plant. The limitation [to] ‘necessary’ response costs would deter them from carrying out this scheme. . . . The facts in the case sub judice fall squarely within this hypothetical, the only difference being that absolutely no costs were necessary to make the property at issue safe for its current use as an industrial site.⁶⁶

⁶⁴ *City of Detroit v. Simon*, 247 F.3d 619, 630 (6th Cir. 2001) (citing cases).

⁶⁵ *Id.*

⁶⁶ See also *Southfund*, 57 F.Supp. at 1378-80 (citations and internal quotations omitted).

The situation here is the same. The trial court ordered NW Mint to pay for Auburn's voluntary conversion of its industrial Property to property suitable for use as a day care. Auburn's cleanup was unnecessary in the first place and none of its costs are recoverable from NW Mint.

e. Because Auburn also cannot establish "substantial equivalence," none of its costs are recoverable.

Under MTCA, a party that incurs costs cleaning up a hazardous waste site may bring a "private right of action, including a claim for contribution . . . for recovery of remedial action costs" from liable parties.⁶⁷ However, the presence of metals in dust on interior surfaces does not automatically mean that a health or environmental hazard exists, and cleaning up property does not automatically entitle a party to recover its costs from another. Rather, if a party can establish liability (which Auburn cannot):

Recovery of remedial action costs shall be limited to those remedial actions that, when evaluated as a whole, are the substantial equivalent of a department-conducted or department-supervised remedial action. Substantial equivalence shall be determined by the court with reference to the rules adopted by the department under this chapter.⁶⁸

Auburn had the burden to both plead and prove substantial equiva-

⁶⁷ RCW 70.105D.080, 70.105D.040.

⁶⁸ RCW 70.105D.080.

lence—an element of a *prima facie* MTCA case—to recover its costs.⁶⁹ Because Ecology did not and would not have ordered Auburn or any other party to clean the Premises, it is impossible for Auburn’s work to be deemed “substantially equivalent” to an Ecology-conducted cleanup. Further, because the substances at issue did not pose a threat or potential threat, Auburn’s costs were not “remedial action cost[s] under RCW 70.105D.020(21).”⁷⁰

f. Auburn cannot recover costs incurred without regard to economic efficiency or ecological necessity.

MTCA regulations require that cost “be considered when selecting an appropriate cleanup action.”⁷¹ Auburn conducted an elaborate cleanup and renovation that its own witness acknowledged was “excessive.” 08/06, RP 64. MTCA does not permit recovery “without regard to the

⁶⁹ See *Dash Point Vill. Assocs. v. Exxon Corp.*, 86 Wn. App. 596, 605 n.15, 937 P.2d 1148 (1997) (plaintiff has burden to “demonstrate that its actions are the substantial equivalent to a[n Ecology]-supervised project”).

⁷⁰ *Seattle City Light*, 98 Wn. App. at 177-78. The parties agree that the “overall effectiveness” standard applies to the Court’s equivalence determination. See RCW 70.105D.080; WAC 173-340-545(1); *Iron Partners*, 2011 WL 4502139 at *5; *Taliesen Corp. v. Razore*, 135 Wn. App. 106, 120, 144 P.3d 1185 (2006). Auburn argued well beyond that standard, however, asserting that an unnecessary cleanup initiated and conducted without reference to MTCA can meet it. Auburn would have the Court read all requirements out of the statute, ignore its regulations and grossly exaggerate the flexibility afforded by *Taliesen*.

⁷¹ WAC 173-340-702(6); WAC 173-340-360(3)(e)(i).

economic efficiency or ecological necessity of the cleanup.”⁷²

Even if Auburn could establish MTCA liability against NW Mint, it still would not be entitled to recover unnecessary cleanup costs. In *Taliesen*:

[plaintiff] made a business decision to use a cleanup standard that was more stringent than the standard under MTCA and did testing of the contamination level of the soil at a frequency below the MTCA recommendations. . . . [Plaintiff], now, cannot ask the other liable parties to pay for its past business decisions.⁷³

Auburn voluntarily decided to clean the Premises to an arbitrary and unscientific standard. It did so based on business decisions that have nothing to do with protection of the environment or MTCA. The Court should reverse the trial court’s decision requiring NW Mint to pay for those unnecessary costs.⁷⁴

⁷² *Iron Partners*, 2011 WL 4502139, at *5.

⁷³ *Taliesen*, 135 Wn. App. at 133; see also *Louisville*, 460 F.3d at 705 (“To require former occupants to assume liability for cleanup costs going beyond the level necessary to make the property safe for industrial use would be to provide an unwarranted windfall to the beneficiary of the cleanup.”).

⁷⁴ See *G.J. Leasing II*, 54 F.3d at 386 (without the statutory limitation to “necessary” costs of cleanup, “there would be no check on the temptation to improve one’s property and charge the expense of improvement to someone else.”); see also *Seattle City Light*, 98 Wn. App. at 177 (costs associated with cleaning up hazardous substances that posed no threat to human health or environment are not recoverable “remedial action cost[s]” under MTCA); *Otay Land Co. v. United Ents. Ltd.*, 338 F. App’x 689, 691 (9th Cir. 2009) (“Because no public agency has indicated the need for remediation of the subject property and Otay has not demonstrated a reliable basis for its claimed remedial costs, this case is not ripe for judicial review.”).

C. The Trial Court Erroneously Determined that NW Mint Breached Sections 11 and 13 of the Lease.

The trial court erred in ruling that NW Mint was liable under the Lease between the parties because: (1) the metals NW Mint left at the Premises did not present a risk of actual harm to human health or the environment; (2) NW Mint complied with all statutes, regulations and orders concerning hazardous wastes; and (3) NW Mint left the Premises in a “broom clean” condition, which is the Lease’s only cleanup standard.

1. NW Mint did not breach Section 11 of the Lease because the mere presence of metals in the Premises did not present a risk to human health or the environment.

The trial court concluded that “NW Mint stored, generated, disposed, or otherwise released hazardous materials on the premises, in breach of Section 11 of the Lease.” COL # 11. Section 11 states that NW Mint “shall not store, generate, dispose of or otherwise allow the release of any hazardous waste or materials in, on or under the Premises.” The silver and other metals NW Mint used in its operations are “hazardous waste or materials” and are “subject to Section 11 of the Lease.” COL #12.

Since NW Mint manufactures its products out of silver and other metals, a strict reading of Section 11 would have prohibited the company

from even operating in the Premises.⁷⁵ Because of this concern, NW Mint discussed Section 11 with MegaWest before signing the Lease in 2002. MegaWest, which was familiar with and understood NW Mint's business, stated that NW Mint's operations would not violate Section 11. 8/14, RP 211-212. During the period it owned the Property, MegaWest never claimed that NW Mint breached Section 11. 7/30, RP 99; 8/14, RP 214.

Auburn assumed the Lease in 2007, by which time NW Mint had been operating in the Premises for almost five years. Before the Lease terminated in 2010, Auburn never objected to NW Mint's use of metals such as silver, copper and nickel in its manufacturing processes. Auburn never claimed that NW Mint's operations breached Section 11 of the Lease.

Auburn confirmed at trial that NW Mint did not breach Section 11 of the Lease by storing or using silver and other metals on the Premises. Auburn represented to the trial court that it "didn't bring the case because people had coins in their pockets, we brought the case because of the metallic dust in the premises." 7/30, RP 190-191. Auburn alleged that NW Mint breached Section 11 of the Lease by leaving metal dust in the Premises at levels that presented a risk of harm to human health and the

⁷⁵ For example, Section 11 prohibited NW Mint from storing "hazardous substances"—such as the silver, copper and nickel NW Mint used in its manufacturing operations—on the Premises.

environment. 8/9, RP 138.⁷⁶

Before Auburn purchased the Premises in 2007, EBI conducted a Phase I Environmental Site Assessment (“ESA”) and prepared a written report (“2007 ESA Report”). FOF #36. The 2007 ESA Report is Exhibit 11. The purpose of the 2007 ESA was to identify “recognized environmental conditions,” which EBI defined as “the presence or likely presence of any hazardous substances or petroleum products”. EBI stated that “recognized environmental conditions” did not include “*de minimis conditions* that generally do not present a threat to human health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate government agencies.” According to EBI, “[c]onditions determined to be *de minimis* are not recognized environmental conditions.” FOF #'s 37 and 38.

EBI stated in the 2007 ESA Report that there was “no evidence of recognized environmental conditions in connection with the Subject Property”, including the Premises, and that the Property (including the Premises) was not contaminated with hazardous substances. FOF #38; 8/2, RP 71. EBI concluded that no environmental cleanup of the Property or

⁷⁶ As discussed *supra*, there is no evidence that NW Mint’s operations presented an actual risk of harm to human health or the environment.

Premises was required. 2007 ESA, ¶ 9 (Exhibit 11). *See* 8/2, RP 71-72. EBI's 2007 investigation confirmed that after five years in the Premises, NW Mint's operations did not present an actual risk of harm to human health or the environment.

Three years later, EBI stated in its May 2010 Report that the Premises were "grossly contaminated" with "highly toxic metals" that presented a significant risk to human health and safety. Exhibit 58. EBI admitted at trial that it used this highly charged language to persuade Auburn to have the metals removed from the Premises. Not coincidentally, this language helped convince Auburn to hire EBI to supervise the "cleanup."

EBI's May 2010 Report conflicted with the conclusion in its 2007 ESA Report that the conditions in the Premises did not present a risk to human health or the environment and that the Premises did not require an environmental cleanup. However, EBI admitted at trial that its May 2010 investigation did not assess the potential risk of human exposure to residual metals that might be in the Premises. EBI further admitted that it did not know whether the metals in the Premises presented an actual or potential risk of harm to human health or the environment.

In December 2010—seven months after NW Mint vacated the Premises and before any cleanup began—EBI performed a second Phase I ESA

at the Property. 8/02, RP 218. When EBI performed the 2010 ESA, the Premises contained the same amount of metallic dust as when the Lease ended. 8/13, RP 232-234; 8/14, RP 7. EBI stated in its written report (“2010 ESA Report”) that the purpose of the 2010 ESA was “to assist a lender to be selected by Cohen Asset Management, Inc. [Auburn] in determining whether to make a loan evidenced by a note secured by the Subject Property.” 8/02, RP 213-214. The 2010 ESA Report is Exhibit 250.

EBI determined in the 2010 ESA (just as it did in the 2007 ESA) that there was “no evidence of recognized environmental conditions in connection with the Subject Property”—*i.e.*, that there were no conditions that presented a risk to human health or the environment. EBI did not recommend the performance of any environmental cleanup. 8/02, RP 215. *See* 2010 ESA, ¶¶’s 8 & 9 (Ex. 250).

Auburn did not introduce any evidence that the residual metallic dust, which was in the Premises at lawful, *de minimus* levels, presented a threat to human health or the environment. The trial court erred in concluding that the mere presence of metallic dust in the Premises constituted a breach of Section 11 of the Lease.

2. Because NW Mint did not violate any statute or order, Section 11 did not require it to pay for cleaning the Premises.

Section 11 of the Lease required NW Mint to “comply with all statutes, regulations and ordinances, and with all orders, decrees, judgments of governmental authorities or courts having jurisdiction, relating to the use, collection, treatment, disposal, storage, control, removal or cleanup of Hazardous Waste.” Section 11 further stated that if NW Mint failed to comply, Auburn had the right to “take such actions and incur such costs and expense **to effect such compliance** as it deems advisable to protect its interest in the Premises (emphasis added).”

Other than MTCA, Auburn did not allege that NW Mint failed to comply with any statute, regulation or order. As discussed *supra*, MTCA does not apply to the alleged contamination at the Premises. Even if it did, Ecology determined that no cleanup was required. There was no “non-compliance” for Auburn to remedy.

Section 11 of the Lease only required NW Mint to reimburse Auburn “for all costs and expenses incurred by Landlord **in connection with such compliance activities** (emphasis added).” Auburn admitted that it voluntarily cleaned the Premises. No government agency directed or required Auburn to clean the Premises. No government agency told Auburn that it

could not re-lease the Premises until they were cleaned.

Washington follows the objective manifestation theory of contracts, determining the parties' intent based on the objective manifestations of the agreement, rather than any unexpressed subjective intent.⁷⁷ Courts are to interpret what was written, not what was intended to be written.⁷⁸

Section 11 expressly provided that NW Mint was only liable if (1) it failed to comply with a statute, regulation or order related to hazardous wastes; and (2) Auburn incurred costs and expenses to "effect such compliance." These requirements were a condition precedent to Auburn's right to recover the costs it incurred "in connection with such compliance activities."⁷⁹ Since NW Mint fully complied with all statutes, regulations and orders, and since Auburn voluntarily cleaned the Premises, NW Mint is not liable under Section 11 of the Lease.

3. The Lease only required NW Mint to leave the Premises in a "broom clean" condition. NW Mint did not have a contractual obligation to clean the Premises to EBI's Limits.

NW Mint refused Auburn's demand that it clean the Premises, reduce the presence of metals to below EBI's Limits and provide a "certificate of

⁷⁷ *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005).

⁷⁸ *Id.* at 503-04 (2005). *Accord Condon v. Condon*, 2013 Wn. LEXIS 238, 15-16 (2013).

⁷⁹ A "condition precedent" is an event that "must exist or occur before there is a right to immediate performance." *224 Westlake, LLC v. Engstrom Props., LLC*, 169 Wn. App. 700, 726, 281 P.3d 693 (2012).

cleanliness.” The trial court concluded that NW Mint breached the Lease by refusing these demands. FOF #'s 107, 110; COL #'s 15-17.

As discussed *supra*, the mere presence of metals in the Premises did not present an actual risk of harm to human health or the environment. NW Mint did not breach MTCA or fail to comply with any other statute, regulation, rule or judgment. Auburn did not have a right under Section 11 to require NW Mint to pay for the unnecessary cleanup.⁸⁰

At Auburn's direction, Clean Harbors cleaned the Premises to meet EBI's Limits. EBI admitted the Limits are simply a "cleanliness standard" it uses as the basis for issuing a "certificate of cleanliness."⁸¹ EBI will "certify" a property as being "clean" if the levels of metals present are below the Limits. EBI decides whether a property is or isn't contaminated, and then certifies whether that property is or isn't clean, solely by reference to its own arbitrary and unscientific Limits. 8/1, RP 132.

The Lease did not reference or include EBI's Limits. 8/1, RP 137;

⁸⁰ The trial court found that "Section 13 of the Lease applies to the physical condition of Suite 101 [Premises], and the "broom clean" specification in Section 13 does not modify or supersede the requirements of Section 11 of the Lease regarding hazardous substances." FOF #18. However, since NW Mint is not liable under Section 11 of the Lease, Auburn's only basis for directing NW Mint to clean the Premises is under Section 13.

⁸¹ There is no "industry standard" for issuance of a "certificate of cleanliness." 8/2, RP 8-9. Further, the certificate is legally meaningless: EBI did not promise to indemnify Auburn if someone sued and claimed the Premises were contaminated. 8/2, RP 10.

08/14, RP 216-217. Auburn never sought to amend the Lease to incorporate EBI's Limits, nor would NW Mint have agreed to such an amendment.⁸² The Lease's only "cleanliness standard" required that NW Mint "quit and surrender the Premises . . . in a **neat and broom clean condition**" (emphasis added). See Exhibit 1, § 13. The Premises were in a "neat and broom clean condition" when the Lease terminated.

The Lease also did not require NW Mint to provide a "certificate of cleanliness," nor did Auburn ever seek to amend the Lease to require such a certificate. 08/02, RP 112-113; 08/15, RP 66-67; 08/09, RP 119-120. NW Mint had been operating in the Premises for almost five years when Auburn purchased the Property, yet Auburn never required Meg-aWest to provide a "certificate of cleanliness." 8/14, RP 216-217.

Courts are to enforce what is written in a contract, not what one of the parties wish the contract included.⁸³ Auburn never sought to amend the Lease to include EBI's Limits as a cleanup standard or to require NW Mint to provide a "certificate of cleanliness." NW Mint fully complied with the Lease's only "cleanliness" standard: it left the Premises in a

⁸² Auburn paid Clean Harbors more than \$228,000 to clean the Premises so that it met EBI's Limits. FOF # 125. NW Mint would not voluntarily have agreed to absorb this additional cost. 08/14, RP 216-217.

⁸³ See *Hearst*, 154 Wn. 2d at 503-04 (2005).

“neat and broom clean condition.” The trial court erred in holding that NW Mint breached the Lease by failing to clean the Premises to EBI’s Limits and by refusing to provide a certificate of cleanliness.

D. NW Mint is Entitled to Recover its Attorneys’ Fees and Expenses on Appeal.

Pursuant to RAP 18.1, NW Mint hereby requests an award of the attorneys’ fees and expenses it incurs in this appeal. NW Mint bases this request on RCW 70.105D.080, RCW 4.84.330 and the Lease.

V. CONCLUSION

The trial court erred in ruling that NW Mint was liable under MTCA. Ecology determined that MTCA did not apply to the Premises and that a cleanup was unnecessary. The residual metals in the Premises did not threaten human health or the environment and there was no “release or threatened release” to the environment. A cleanup that Ecology would not have conducted and did not order be conducted cannot be deemed “substantially equivalent” to an Ecology cleanup.

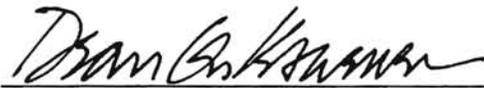
The trial court also erred in ruling that NW Mint was liable under the Lease because: (1) the metals NW Mint left at the Premises did not present a risk of actual harm to human health or the environment; (2) NW Mint complied with all statutes, regulations and orders concerning haz-

ardous wastes; and (3) NW Mint left the Premises in a “broom clean” condition, which is the only cleanup standard the Lease contained.

This Court should reverse the trial court’s rulings on MTCA liability and breach of Sections 11 and 13 of the Lease. The Court should also award NW Mint the attorneys’ fees and expenses it incurs on appeal.

Dated May 29, 2013.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on May 29, 2013, I caused the Appellants' Opening Brief in the above-captioned matter to be served upon the parties herein as indicated below:

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4821-7386-2164, v. 1

Case No. 69568-1

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

AUBURN VALLEY INDUSTRIAL CAPITAL, L.L.C.,
a Washington limited liability company,
Plaintiff/Respondent,

v.

ROSS B. HANSEN, a single person, and NORTHWEST TERRITORIAL MINT,
L.L.C., a Washington limited liability company,

Defendants/Appellants.

APPENDIX
TO BRIEF OF DEFENDANTS/APPELLANTS

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ORIGINAL

TABLE OF CONTENTS

	Tab
Statutory Excerpts	1
Lease Agreement (Trial Ex. No. 1).....	2
Dept. of Ecology Letter, dated June 12, 2012 (Trial Ex. No. 260)	3
Dept. of Ecology Letter, dated July 11, 2012 (Trial Ex. No. 285)	4

Unpublished Opinions Cited in Brief, GR 14.1(b)

<i>Cyker, et al. v. Four Seasons Hotel Limited, et al.,</i> Civ. A. No. 90-1192-Z, 1991 WL 1401 (D. Mass.)	5
<i>Diverse Real Estate Holdings LP v. Int'l Mineral & Chem. Corp.,</i> No. 91-C 8090, 1995 WL 110138 (N.D. Ill.)	6
<i>Iron Partners, LLC v. Maritime Admin., et al.,</i> No. 3:08-CV-05217-RBL, 2011 WL 4502139 (W.D. Wash.)	7
<i>BCW Assoc., Ltd., et al. v. Occidental Chem. Corp., et al.</i> Civ. A. No. 86-5947, 1988 WL 102641 (E.D. Pa.).....	8

Tab 1

Appendix

Statutory Excerpts

RCW 70.105D.010(1)-(2)

Declaration of policy.

(1) Each person has a fundamental and inalienable right to a healthful environment, and each person has a responsibility to preserve and enhance that right. The beneficial stewardship of the land, air, and waters of the state is a solemn obligation of the present generation for the benefit of future generations.

(2) A healthful environment is now threatened by the irresponsible use and disposal of hazardous substances. There are hundreds of hazardous waste sites in this state, and more will be created if current waste practices continue. Hazardous waste sites threaten the state's water resources, including those used for public drinking water. Many of our municipal landfills are current or potential hazardous waste sites and present serious threats to human health and environment. The costs of eliminating these threats in many cases are beyond the financial means of our local governments and ratepayers. The main purpose of chapter 2, Laws of 1989 is to raise sufficient funds to clean up all hazardous waste sites and to prevent the creation of future hazards due to improper disposal of toxic wastes into the state's land and waters.

RCW 70.105D.020(2), (10), (21), (25), (26)

Definitions.

(2) "Department" means the department of ecology.

...

(10) "Hazardous substance" means:

(a) Any dangerous or extremely hazardous waste as defined in *RCW 70.105.010 (5) and (6), or any dangerous or extremely dangerous waste designated by rule pursuant to chapter 70.105 RCW;

(b) Any hazardous substance as defined in *RCW 70.105.010(14) or any hazardous substance as defined by rule pursuant to chapter 70.105 RCW;

(c) Any substance that, on March 1, 1989, is a hazardous substance under section 101(14) of the federal cleanup law, 42 U.S.C. Sec. 9601(14);

(d) Petroleum or petroleum products; and

(e) Any substance or category of substances, including solid waste decomposition products, determined by the director by rule to present a threat to human health or the environment if released into the environment.

The term hazardous substance does not include any of the following when contained in an underground storage tank from which there is not a release: Crude oil or any fraction thereof or petroleum, if the tank is in compliance with all applicable federal, state, and local law.

...

(21) "Potentially liable person" means any person whom the department finds, based on credible evidence, to be liable under RCW 70.105D.040. The department shall give notice to any such person and allow an opportunity for comment before making the finding, unless an emergency requires otherwise.

...

(25) "Release" means any intentional or unintentional entry of any hazardous substance into the environment, including but not limited to the abandonment or disposal of containers of hazardous substances.

(26) "Remedy" or "remedial action" means any action or expenditure consistent with the purposes of this chapter to identify, eliminate, or minimize any threat or potential threat posed by hazardous substances to human health or the environment including any investigative and monitoring activities with respect to any release or threatened release of a hazardous substance and any health assessments or health effects studies conducted in order to determine the risk or potential risk to human health.

RCW 70.105D.040(1)-(2)

Standard of liability — Settlement.

(1) Except as provided in subsection (3) of this section, the following persons are liable with respect to a facility:

(a) The owner or operator of the facility;

(b) Any person who owned or operated the facility at the time of disposal or release of the hazardous substances;

(c) Any person who owned or possessed a hazardous substance and who by contract, agreement, or otherwise arranged for disposal or treatment of the hazardous substance at the facility, or arranged with a transporter for transport for disposal or treatment of the hazardous substances at the facility, or otherwise generated hazardous wastes disposed of or treated at the facility;

(d) Any person (i) who accepts or accepted any hazardous substance for transport to a disposal, treatment, or other facility selected by such person from which there is a release or a threatened release for which remedial action is required, unless such facility, at the time of disposal or treatment, could legally receive such substance; or (ii) who accepts a hazardous substance for transport to such a facility and has reasonable grounds to believe that such facility is not operated in accordance with chapter 70.105 RCW; and

(e) Any person who both sells a hazardous substance and is responsible for written instructions for its use if (i) the substance is used according to the instructions and (ii) the use constitutes a release for which remedial action is required at the facility.

(2) Each person who is liable under this section is strictly liable, jointly and severally, for all remedial action costs and for all natural resource damages resulting from the releases or threatened releases of hazardous substances. The attorney general, at the request of the department, is empowered to recover all costs and damages from persons liable therefor.

RCW 70.105D.050(1), (6)

Enforcement.

(1) With respect to any release, or threatened release, for which the department does not conduct or contract for conducting remedial action and for which the department believes remedial action is in the public interest, the director shall issue orders or agreed orders requiring potentially liable persons to provide the remedial action. Any liable person who refuses, without sufficient cause, to comply with an order or agreed order of the director is liable in an action brought by the attorney general . . .

...

(6) Any person who fails to provide notification of releases consistent with RCW 70.105D.110 or who submits false information is liable in an action brought by the attorney general for a civil penalty of up to five thousand dollars per day for each day the party refuses to comply.

RCW 70.105D.080

Private right of action — Remedial action costs.

Except as provided in RCW 70.105D.040(4) (d) and (f), a person may bring a private right of action, including a claim for contribution or for declaratory relief, against any other person liable under RCW 70.105D.040 for the recovery of remedial action costs. In the action, natural resource damages paid to the state under this chapter may also be recovered. Recovery shall be based on such equitable factors as the court determines are appropriate. Remedial action costs shall include reasonable attorneys' fees and expenses. Recovery of remedial action costs shall be limited to those remedial actions that, when evaluated as a whole, are the substantial equivalent of a department-conducted or department-supervised remedial action. Substantial equivalence shall be determined by the court with reference to the rules adopted by the department under this chapter. An action under this section may be brought after remedial action costs are incurred but must be brought within three years from the date remedial action confirms cleanup standards are met or within one year of May 12, 1993, whichever is later. The prevailing party in such an action shall recover its reasonable attorneys' fees and costs. This section applies to all causes of action regardless of when the cause of action may have arisen. To the extent a cause of action has arisen prior to May 12, 1993, this section applies retroactively, but in all other respects it applies prospectively.

Regulatory Excerpts

WAC 173-340-100

Purpose.

This chapter is promulgated under the Model Toxics Control Act. It establishes administrative processes and standards to identify, investigate, and clean up facilities where hazardous substances have come to be located. It defines the role of the department and encourages public involvement in decision making at these facilities.

The goal of this chapter is to implement chapter 70.105D RCW. This chapter provides a workable process to accomplish effective and expeditious cleanups in a manner that protects human health and the environment. This chapter is primarily intended to address releases of hazardous substances caused by past activities although its provisions may be applied to

potential and ongoing releases of hazardous substances from current activities.

WAC 173-340-110

Applicability.

(1) This chapter shall apply to all facilities where there has been a release or threatened release of a hazardous substance that may pose a threat to human health or the environment. Under this chapter, the department may require or take those actions necessary to investigate and remedy these releases.

(2) Nothing herein shall be construed to diminish the department's authority to address a release or threatened release under other applicable laws or regulations. The cleanup process and procedures under this chapter and under other laws may be combined. The department may initiate a remedial action under this chapter and may upon further analysis determine that another law is more appropriate, or vice versa.

(3) If a hazardous substance remains at a facility after actions have been completed under other applicable laws or regulations, the department may apply this chapter to protect human health or the environment.

WAC 173-340-120

Overview.

(1) Purpose. This section provides an overview of the cleanup process that typically will occur at a site where a release of a hazardous substance has been discovered with an emphasis on sites being cleaned up under order or consent decree. If there are any inconsistencies between this section and any specifically referenced sections, the referenced section shall govern.

(2) Site discovery. Site discovery includes:

(a) Release reporting. An owner or operator who knows of or discovers a release of a hazardous substance due to past activities must report the release to the department as described in WAC 173-340-300. Most current releases of hazardous substances must be reported to the department under the state's hazardous waste, underground storage tank, or water quality laws. The term "hazardous substance" includes a broad range of substances as defined by chapter 70.105D RCW.

...

WAC 173-340-200

For the purpose of this chapter, the following definitions apply:

...

"Area background" means the concentrations of hazardous substances that are consistently present in the environment in the vicinity of a site which are the result of human activities unrelated to releases from that site.

...

"Cleanup level" means the concentration of a hazardous substance in soil, water, air, or sediment that is determined to be protective of human health and the environment under specified exposure conditions.

"Cleanup standards" means the standards adopted under RCW 70.105D.030 (2)(d). Establishing cleanup standards requires specification of the following:

Hazardous substance concentrations that protect human health and the environment ("cleanup levels");

The location on the site where those cleanup levels must be attained ("points of compliance"); and

Additional regulatory requirements that apply to a cleanup action because of the type of action and/or the location of the site. These requirements are specified in applicable state and federal laws and are generally established in conjunction with the selection of a specific cleanup action.

...

"Department" means the department of ecology.

...

"Environment" means any plant, animal, natural resource, surface water (including underlying sediments), groundwater, drinking water supply, land surface (including tidelands and shorelands) or subsurface strata, or ambient air within the state of Washington or under the jurisdiction of the state of Washington.

...

"Exposure pathway" means the path a hazardous substance takes or could take from a source to an exposed organism. An exposure pathway describes the mechanism by which an individual or population is exposed or has the potential to be exposed to hazardous substances at or originating from a site. Each exposure pathway includes an actual or potential source or release from a source, an exposure point, and an exposure route. If the exposure point differs from the source of the hazardous substance, the exposure pathway also includes a transport/exposure medium.

...

"Groundwater" means water in a saturated zone or stratum beneath the surface of land or below a surface water.

...

"Hazardous substance" means any dangerous or extremely hazardous waste as defined in RCW 70.105.010 (5) and (6), or any dangerous or extremely dangerous waste as designated by rule under chapter 70.105 RCW; any hazardous substance as defined in RCW 70.105.010(14) or any hazardous substance as defined by rule under chapter 70.105 RCW; any substance that, on the effective date of this section, is a hazardous substance under section 101(14) of the federal cleanup law, 42 U.S.C., Sec. 9601(14); petroleum or petroleum products; and any substance or category of substances, including solid waste decomposition products, determined by the director by rule to present a threat to human health or the environment if released into the environment....

"Hazardous waste site" means any facility where there has been confirmation of a release or threatened release of a hazardous substance that requires remedial action.

...

"Initial investigation" means a remedial action that consists of an investigation under WAC 173-340-310.

...

"Release" means any intentional or unintentional entry of any hazardous substance into the environment, including but not limited to the abandonment or disposal of containers of hazardous substances.

...

"Remedy" or "remedial action" means any action or expenditure consistent with the purposes of chapter 70.105D RCW to identify, eliminate, or minimize any threat posed by hazardous substances to human health or the environment including any investigative and monitoring activities with respect to any release or threatened release of a hazardous substance and any health assessments or health effects studies conducted in order to determine the risk or potential risk to human health.

...

"Soil" means a mixture of organic and inorganic solids, air, water, and biota that exists on the earth's surface above bedrock, including materials of anthropogenic sources such as slag, sludge, etc.

"Soil biota" means invertebrate multicellular animals that live in the soil or in close contact with the soil.

...

"Surface water" means lakes, rivers, ponds, streams, inland waters, salt waters, and all other surface waters and water courses within the state of Washington or under the jurisdiction of the state of Washington.

WAC 173-340-300(1)-(2)(a)-(b)

Site discovery and reporting.

(1) Purpose. As part of a program to identify hazardous waste sites, this section sets forth the requirements for reporting a release of a hazardous substance due to past activities, whether discovered before or after the effective date of this regulation. It also sets forth the requirements for reporting independent remedial actions. The department may take any other actions it deems appropriate to identify potential hazardous waste sites consistent with chapter 70.105D RCW.

(2) Release report.

(a) Any owner or operator who has information that a hazardous substance has been released to the environment at the owner or operator's facility and may be a threat to human health or the environment shall report such information to the department within ninety days of discovery. Releases from underground storage tanks shall be reported by the owner or operator of the underground storage tank within twenty-four hours of release confirmation, in accordance with WAC 173-340-450. To the extent known, the report shall include:

(i) The identification and location of the hazardous substance;

(ii) Circumstances of the release and the discovery; and

(iii) Any remedial actions planned, completed, or underway. All other persons are encouraged to report such information to the department.

(b) Persons should use best professional judgment in deciding whether a release of a hazardous substance may be a threat or potential threat to human health or the environment. ...

WAC 173-340-357(1)-(3)(a)-(e), -(4)

Quantitative risk assessment of cleanup action alternatives.

(1) Purpose. A quantitative site-specific risk assessment may be conducted to help determine whether cleanup action alternatives, including those using a remediation level, engineered control and/or institutional control, are protective of human health and the environment. If a quantitative site-specific risk assessment is used, then other considerations may also be needed in evaluating the protectiveness of the overall cleanup action. Methods other than a quantitative site-specific risk assessment may also be used to determine if a cleanup action

alternative is protective of human health and the environment.

(2) Relationship to selection of cleanup actions. Selecting a cleanup action requires a determination that each of the requirements specified in WAC 173-340-360 is met, including the requirement that the cleanup action is protective of human health and the environment. A quantitative risk assessment conducted under this section may be used to help determine whether a particular cleanup action alternative meets this requirement. A determination that a cleanup action alternative evaluated is protective of human health and the environment does not mean that the other minimum requirements specified in WAC 173-340-360 have been met.

(3) Protection of human health. A quantitative site-specific human health risk assessment may be conducted to help determine whether cleanup action alternatives, including those using a remediation level, engineered control and/or institutional control, are protective of human health. For the purpose of this assessment, the default assumptions in the standard Method B and C equations in WAC 173-340-720 through 173-340-750 may be modified as provided for under modified Method B and C. In addition to those modifications, adjustments to the reasonable maximum exposure scenario or default exposure assumptions may also be made. See WAC 173-340-708 (3)(d) and (10)(b). References to Method C in this subsection apply to a medium only if the particular medium the remediation level is being established for qualifies for a Method C cleanup level under WAC 173-340-706.

(a) Reasonable maximum exposure. Standard reasonable maximum exposures and corresponding Method B and C equations in WAC 173-340-720 through 173-340-750 may be modified as provided under WAC 173-340-708 (3)(d). For example, land uses other than residential and industrial may be used as the basis for an alternative reasonable maximum exposure scenario for the purpose of assessing the protectiveness of a cleanup action alternative that uses a remediation level, engineered control, and/or institutional control.

(b) Exposure parameters. Exposure parameters for the standard Method B and C equations in WAC 173-340-720 through 173-340-750 may be modified as provided in WAC 173-340-708(10).

(c) Acceptable risk level. The acceptable risk level for remediation levels shall be the same as that used for the cleanup level.

(d) Soil to groundwater pathway. The methods specified in WAC 173-340-747 to develop soil concentrations that are protective of groundwater beneficial uses may also be used during remedy selection to help assess the protectiveness to human health of a cleanup action alternative that uses a remediation level, engineered control, and/or institutional control.

(e) Burden of proof, new science, and quality of information. Any modification of the default assumptions in the standard Method B and C equations, including modification of the standard reasonable maximum exposures and exposure parameters, or any modification of default assumptions or methods specified in WAC 173-340-747 requires compliance with WAC 173-340-702 (14), (15) and (16).

...

(4) Protection of the environment. A quantitative site-specific ecological risk assessment may be conducted to help determine whether cleanup action alternatives, including those using a remediation level, engineered control and/or institutional control, are protective of the environment.

Tab 2

COPY

LEASE AGREEMENT

ROSS B. HANSEN DBA NORTHWEST TERRITORIAL MINT

**MEGAWEST CORPORATE PARK
AUBURN, WASHINGTON**

TABLE OF CONTENTS

1.	PREMISES	1
2.	TERM	1
3.	OPTIONS TO RENEW	1
4.	CONSTRUCTION; ACCEPTANCE OF PREMISES	2
	(a) Landlord's Work.....	2
	(b) Delay in Completion.....	2
	(c) Early Occupancy.....	2
5.	RENT COMMENCEMENT DATE	2
6.	RENT	2
	(a) Covenant to Pay Rent	2
	(b) Basic Rent.....	2
	(c) Annual Basic Rent Adjustments.....	2
	(d) Additional Rent.....	2
	(e) Initial Payment.....	3
7.	ADDITIONAL RENT	3
	(a) Tenant's Share.....	3
	(b) Operating Expenses	3
	(c) Payment; Adjustments.....	3
8.	LATE CHARGE.....	4
9.	SECURITY DEPOSIT	4
10.	USE OF PREMISES.....	4
11.	HAZARDOUS WASTE	4
12.	COMMON AREAS; RULES & REGULATIONS; PARKING	4
13.	MAINTENANCE AND REPAIRS; REDELIVERY	5
	(a) Maintenance.....	5
	(b) Redelivery.....	5
14.	ALTERATIONS.....	5
15.	SIGNS.....	5
16.	LIENS.....	6
17.	INDEMNIFICATION; INSURANCE.....	6
	(a) Indemnification.....	6
	(b) Tenant's Insurance	6
	(c) Landlord's Insurance.....	7

(d)	Certificate	7
(e)	Disclaimer.....	7
(f)	Waiver of Subrogation.....	7
(g)	Payment of Premium Increase.....	7
(h)	Exemption of Landlord from Liability.....	7
18.	DAMAGE TO PREMISES.....	8
19.	CONDEMNATION.....	8
(a)	Entire Taking.....	8
(b)	Partial Taking; Right to Terminate.....	8
(c)	Continuation.....	8
(d)	Compensation.....	8
20.	ASSIGNMENT.....	8
21.	ENTRY BY LANDLORD.....	9
22.	TENANT'S DEFAULT.....	9
23.	REMEDIES UPON DEFAULT.....	9
(a)	Remedies.....	9
(b)	Remedies Cumulative.....	10
(c)	Interest upon Default.....	10
24.	COSTS, ATTORNEYS' FEES AND INTEREST.....	10
25.	NON-WAIVER OF BREACH.....	10
26.	REMOVAL OF PROPERTY.....	10
27.	LANDLORD'S LIABILITY.....	10
(a)	Limitations.....	10
(b)	Transfer of Landlord's Interest.....	11
28.	HEIRS AND SUCCESSORS.....	11
29.	HOLD OVER.....	11
30.	NOTICES.....	11
31.	SUBORDINATION OF TENANT'S INTEREST.....	11
32.	ESTOPPEL CERTIFICATES.....	11
33.	TENANT'S FINANCIAL CONDITION.....	12
34.	PERSONAL PROPERTY TAXES.....	12
35.	FOR LEASE SIGNS.....	12
36.	QUIET ENJOYMENT.....	12
37.	MISCELLANEOUS.....	12
(a)	Integration; Amendments.....	12

(b)	Memorandum of Lease	12
(c)	Force Majeure.....	12
(d)	Captions and Construction.	12
(e)	Interpretation.	12
(f)	Partial Invalidity.....	12
(g)	Number; Gender; Permissive Versus Mandatory Usage.....	13
(h)	Tenant's Liability.	13
(i)	Time.....	13
(j)	Governing Law.....	13
(k)	Authority to Sign.....	13

LEASE

THIS LEASE ("Lease") is entered into between MEGAWEST, LLC, a Washington limited liability company ("Landlord") and Ross B. Hansen dba Northwest Territorial Mint ("Tenant").

BASIC LEASE TERMS

Lease Date: May 1, 2002 (dated for reference purposes only)

Premises Area: 20,483 Square Feet

Premises Address: 1307 West Valley Highway N., Suite 101, Auburn, WA

Estimated Commencement Date: August 1, 2002

Term: Six (6) Years

Renewal Options: None

Initial Basic Rent: \$13,837 per month

Established Initial Operating Expense Share: \$2,253 per month

Security Deposit: \$10,000

Improvement Allowance: \$45.00 per square foot of the office space.
\$0 per square foot of the warehouse space.

1. **PREMISES.** Landlord hereby leases to Tenant, and Tenant leases from Landlord upon the terms and conditions of this Lease, a portion of the real property situated in the City of Auburn, King County, Washington, commonly known as MegaWest Corporate Park, 1307 West Valley Highway N., Suite 101, Auburn, WA 98001 (the "Building") and legally described on the attached Exhibit A (including land, building, and improvements, (the "Property")). The portion of the Property leased to Tenant (the "Premises") contains an agreed area of Twenty Thousand Four Hundred Eighty- Three (20,483) rentable square feet and is outlined on the sketch attached hereto as Exhibit B. The Building contains an agreed area of 91,607 square feet. The Property is described in a site plan on Exhibit C hereto.

2. **TERM.** The term of this Lease is Six (6) Years (the "Term"). The term shall begin on the Rent Commencement Date defined below. If the Lease Commencement Date is a day other than the first day of a calendar month, then the Term shall expire on the date which is the Term period from the first day of the month after the Rent Commencement Date, and Tenant shall be deemed to have been given early occupancy as of the Rent Commencement Date under all terms of this Lease, including Rent, and other amounts due to Landlord, applicable to the period of early occupancy. The parties acknowledge that all obligations under this Lease, other than Rent and Additional Rent, shall apply if Tenant or its employees, agents or contractors are present on the Property prior to the Rent Commencement Date. As used in this Lease, "Lease Year" means each successive period of twelve months, the first Lease Year beginning on the Rent Commencement Date and ending on the first anniversary of such Date if it falls on the first day of a month, or the first day of the following month if it does not.

3. **OPTIONS TO RENEW.**

Landlord hereby grants to Tenant the exclusive and irrevocable option to renew this Lease for One (1) additional term of Five (5) years each (the "Renewal Terms"). To exercise an option Tenant must give Landlord written notice thereof no less than two hundred forty (240) days, nor more than three hundred sixty (360) days prior to the expiration of the Term, base or renewal, then in effect. Tenant may not exercise this option if it is then in default hereunder or has previously been in default beyond the applicable cure period.

If Tenant exercises a renewal option, Basic Rent for that Renewal Term shall be equal to the preceding fair market rate(s) for a Five (5) year term for comparable space in a compatible building in the greater Auburn area on terms and conditions comparable to those contained in this Lease (collectively "Fair Market Rent"), but in no event less than the Basic Rent payable during the last month of the Term, base or renewal, then in effect. Landlord shall advise Tenant in writing of Landlord's calculation of Fair Market Rent not less than seven (7) months prior to the end of the Term of this Lease then in effect. If Tenant disagrees with such calculation, it shall advise Landlord in writing thereof within twenty (20) days thereafter. If there is a disagreement on such calculation, the parties shall promptly meet to attempt to resolve their differences. If these differences as to Fair Market Rent are not resolved with an executed and binding Renewal Agreement by both parties within a

two (2) month period, then either party may terminate the "Renewal Option" with 10 days written notice to the other party.

4. **CONSTRUCTION; ACCEPTANCE OF PREMISES.**

(a) **Landlord's Work.** Landlord agrees that it will, at its cost, pursue to completion the Premises to the extent specified in Exhibit D as "Landlord's Work". Landlord shall use diligent efforts to complete Landlord's Work on or before August 1, 2002 (the "Estimated Completion Date"). The taking of possession of the Premises by Tenant shall constitute its acknowledgment that the Landlord's Work has been fully performed as agreed, that the Premises are then in good and tenable condition and as represented by Landlord, and that Landlord has fully complied with all of Landlord's obligations regarding the condition of the Premises.

(b) **Delay in Completion.** If Landlord cannot deliver possession of the Premises to Tenant by the Estimated Completion Date for any reason, Landlord shall not be subject to any liability therefore, nor shall such failure affect the validity of this Lease or the obligations of Tenant hereunder. In such case, the Completion Date (and the Rent Commencement Date) shall be extended a period of time equal to the period of any delay in delivery of possession of the Premises. Tenant shall not be obligated to pay Rent until possession of the Premises is tendered to Tenant; provided, however, if Landlord has not completed the Landlord's Work within One Hundred Twenty (120) days from the Estimated Completion Date, and such delay is not attributable to Tenant or a force majeure event, then Tenant may cancel this Lease upon ten (10) days prior written notice by giving Landlord notice of the cancellation within ten (10) days from the expiration of such 120 day period. If Landlord's Work is not completed by the end of the ten (10) day period, then the cancellation shall be effective and the parties shall be discharged from all obligations under this Lease, other than their indemnification obligations as to matters accruing prior to the cancellation date.

(c) **Early Occupancy.** If Tenant occupies the Premises before the Estimated Completion Date, such occupancy shall constitute the Rent Commencement Date and shall be subject to all the terms of this Lease but shall not advance the expiration date of the Lease Term, and Tenant shall pay Rent for such period at the initial monthly rates prorated for partial months.

5. **RENT COMMENCEMENT DATE.** The Rent Commencement Date" shall be the date on which the Premises are occupied or when the Premises are ready for occupancy, whichever comes first. Upon Tenant's occupancy of the Premises, the parties shall complete and execute a Commencement and Termination Date Agreement in the form attached to this Lease as Exhibit E.

6. **RENT.**

(a) **Covenant to Pay Rent.** Tenant covenants and agrees to pay Rent to Landlord on or before the first (1st) day of each calendar month during the Term. "Rent" consists of all amounts due from Tenant under this Lease, including Basic Rent and Additional Rent, as defined below. Payment shall be made to Landlord or to such other party as Landlord may designate. Tenant's obligations to pay Basic Rent and Additional Rent are absolute and unconditional, and shall not at any time be subject to offset, discount, or reduction of any kind whatsoever. The duty to pay Basic Rent and Additional Rent is a covenant of the Tenant which is independent of any and all undertakings, covenants or warranties of Landlord, and no claimed breach or default on the part of the Landlord will justify or excuse the failure to make such payments on the dates specified.

(b) **Basic Rent.** Beginning ninety days after the Rent Commencement Date and continuing on the first day of each month thereafter until the expiration date of the Term, Tenant covenants and agrees to pay monthly Basic Rent, in advance, to Landlord as basic minimum rental for the Premises. The initial Basic Rent is **Thirteen Thousand Eight Hundred Thirty Seven Dollars (\$13,837)** per month and is subject to adjustments as provided below. If the office portion of the Premises is greater or less than six thousand (6,600) square feet, then the Basic Rent shall be determined by multiplying the office area by Seventy Cents (\$0.70) per square foot, and the Premises by Forty Five Cents (\$.45) per square foot, and the Basic Rent adjustment in paragraph 6(c) shall be determined by multiplying the revised monthly Basic Rent by one hundred and twelve percent (112%) at the beginning of month 37 and then again by multiplying the then current monthly Basic Rent by one hundred and three percent (103%) at the beginning of month 61. Office Area shall be calculated by measuring the outside edge of the exterior framed walls.

(c) **Annual Basic Rent Adjustments.** The monthly Basic Rent shall be increased on the first day of the thirty-seventh (37th) month of the Term to Fifteen Thousand Four Hundred Ninety Eight Dollars (\$15,498). The monthly Basic Rent shall be increased on the first day of the Sixty-First (61st) month of the Term to Fifteen Thousand Nine Hundred Sixty Three Dollars (\$15,963).

(d) **Additional Rent.** This is a "triple-net" lease which requires that Tenant is to pay its Percentage Share of all costs of ownership, management, repair, replacement, administration, operation and maintenance of the Property throughout the Term. Therefore, in addition to the Basic Rent, Tenant agrees to

pay Landlord Tenant's Share of the Operating Expenses (defined below) incurred by Landlord in connection with the Property for each Accounting Period. An "Accounting Period" is a calendar year except that the first Accounting Period shall commence on the Rent Commencement Date and the last Accounting Period shall end on the date the Lease Term expires or terminates. Tenant's Share for the initial Accounting Period is estimated at ~~Two Thousand Two Hundred Fifty-Three Dollars (\$2,253)~~ ^{four} ~~per~~ ^{thousand} ~~per~~ ^{three} ~~month,~~ payable in advance on the first day of each month. As used in this Lease the term "Additional Rent" shall mean all sums, other than Basic Rent, payable by Tenant under terms of this Lease.

^{four} ~~Three~~ ^{thousand} ~~Four~~ ^{hundred} ~~Six~~ ^{thousand} ~~Dollars (\$34,306)~~ ^{thousand} ~~to be applied to the Basic Rent and estimated Tenant's Share of Operating Expenses due for the first and last months of the Term if Tenant is not then in default and Ten Thousand Dollars (\$10,000) to be applied to tenants Security Deposit.~~

7. ADDITIONAL RENT.

(a) Tenant's Share. "Tenant's Share" of Operating Expenses is twenty-two and four tenths percent (22.4%) of the Operating Expenses for the Property.

(b) Operating Expenses. In this Lease, "Operating Expenses" means all costs of ownership, management, operation, maintenance, repair, replacement, administration and security of the Property and those Project costs described below including without limitation, the following Property costs: janitorial, cleaning, landscaping, security and other services; costs incurred in connection with any efforts to control trespassing, picketing, demonstrations, gatherings or assemblies, vandalism, thefts and interference with the use of Common Areas; gas, electricity, water, sewer, waste disposal, and other utilities; heating, ventilation and air-conditioning; window-washing; materials and supplies; painting, repairs, and other maintenance; parking lot resurfacing and re-striping, as well as cleaning, sweeping, and ice and snow removal; maintenance, repair, replacement, permanent change and service of equipment and improvements, including without limitation the HVAC system, alarm systems, ~~elevator equipment~~, and other equipment; reserves for any common area improvements; costs of independent contractors; Landlord's management and administrative fees and expenses; audit expenses; insurance and bond premiums and expenses and insurance deductibles of every kind; taxes, assessments (special and general) and other governmental and utility fees and charges of every kind and nature and all costs incurred in connection with efforts to reduce taxes or assessments; the cost of any repair, renovation, alteration, and improvement required to be made by Landlord under any governmental law, rule or regulation or designed for the reduction of Operating Expenses; depreciation on personal property; the cost of directional signs, other markers, and car stops; an administrative charge to Landlord for Landlord's supervision of maintenance and operation of the Common Areas; salaries, wages and bonuses paid to, and the cost of any hospitalization, medical, surgical, union and general welfare benefits (including group life insurance), any pension, retirement or life insurance plan and other benefits or similar expenses relating to, employees of Landlord engaged in the operation, cleaning, repair, safety, management, security or maintenance of the Property, to the extent so engaged; social security, unemployment and other payroll taxes, the cost of providing disability and worker's compensation coverage imposed by any law or regulation, union contract or otherwise in respect of said employees; reserves for roof repairs (based on Landlord's reasonable estimate thereof); association fees and dues; surcharges levied upon or assessed against the Property or the parking spaces or other Common Areas; payments to or for public transit or carpooling facilities or other facilities or purposes as required by any governmental agency having jurisdiction over the Building and Property; all costs incurred by Landlord in connection with complying with applicable federal, state or local legal requirements and any other expense or charge which in accordance with generally accepted accounting and management principles would be considered a cost of ownership, management, operation, maintenance, repair, replacement or administration of the Property. Project Operating Expenses include only those costs relative to the Storm Detention System and other systems provided for the benefit of all tenants of the Project. Landlord shall determine Operating Expenses and their allocation to tenants.

(c) Payment; Adjustments. Commencing upon the Rent Commencement Date, Tenant shall pay to Landlord the estimated Tenant's Share of Operating Expenses for the Initial Accounting Period on a monthly basis concurrently with the payment of the Basic Rent. Tenant shall continue to make said monthly payments until notified by Landlord of a change in the amount thereof. By March 1st of each year, Landlord shall endeavor to give Tenant a statement showing the total Operating Expenses for the Property for the prior calendar year and Tenant's Share thereof, prorated from the commencement of Lease Term. If the total of the Operating Expense payments which Tenant made for the prior calendar year is less than the Tenant's Share of the actual Operating Expenses, then within ten (10) days after receipt of such statement from Landlord, Tenant shall pay Landlord the difference in a lump sum. Any overpayment by Tenant shall be credited towards Additional Rent next coming due, unless Tenant is then in default under this Lease. Landlord shall determine and adjust Tenant's Operating Expense payments each calendar year based on Landlord's estimate thereof and more frequently if it determines that its estimate thereof is inaccurate. Even though the Term has expired and Tenant has vacated the Premises, Tenant shall immediately pay any increase due over the estimated Operating Expenses previously paid and, conversely, any overpayment made shall be rebated by Landlord to Tenant when the final determination of Tenant's actual Additional Rent is made, if Tenant is not in default under this Lease. Failure of Landlord to submit statements as called for herein shall not be deemed a waiver of Tenant's

including parking areas (the "Common Areas") as limited or otherwise restricted by Landlord in accordance with such reasonable rules and regulations not inconsistent with this Lease as may from time to time be established made by Landlord for the general safety, comfort, and convenience of Landlord and the Property tenants. Tenant shall cause its employees, agents, invitees, and licensees to abide by such rules and regulations. Tenant shall have the right to use the parking portion of the Common Areas subject to the rules and regulations and any charges imposed by Landlord for such parking areas, which may be established or altered by Landlord at any time or from time to time during the term hereof. Tenant and Tenant's employees shall park only in areas designated by Landlord and as limited or otherwise restricted by Landlord. Landlord shall have the right to make changes to the Common Areas including, without limitation, changes in the location of driveways, entrances, exits, vehicular parking spaces, parking area, and the direction of the flow of traffic. Tenant shall have the right to use up to Twenty (20) unreserved parking space in the Common Areas. Landlord shall not be responsible to Tenant for the non-performance of any rules or regulations by any other tenants, occupants, or users of the Property.

13. **MAINTENANCE AND REPAIRS; REDELIVERY.**

(a) **Maintenance.** The Premises have been inspected, or if construction or alteration thereof is contemplated, then the Premises will be inspected when Tenant assumes possession thereof. Upon acceptance of possession the Tenant waives any claim that the Premises are deficient in any respect, except only for any exceptions noted in writing by Tenant within Thirty (30) days of delivery and consented to in writing by Landlord. Tenant will at all times during the Term keep the Premises and all systems therein and the doors and windows thereof neat, clean and in good order, repair and in a sanitary condition. Tenant will replace all cracked or broken glass in all windows or doors. Except for reasonable wear and tear and damage by fire or unavoidable casualty, Tenant will at all times preserve the Premises in as good repair as they are now or may hereafter be put to. All repairs shall be at Tenant's sole cost and expense, except for repairs required for the outside roof, exterior walls and foundation which shall be Landlord's responsibility. Tenant will, at all times, cause the Premises to comply with all ordinances, regulations, rules or orders of every governmental entity undertaking jurisdiction over the Premises.

(b) **Redelivery.** Tenant agrees that at the expiration or sooner termination of this Lease, Tenant will quit and surrender the Premises without notice, and in a neat and broom clean condition, and will deliver up all keys belonging to said Premises to the Landlord or Landlord's agents. Prior to such redelivery, Tenant will remove all of its personal property therefrom and otherwise comply with the terms of paragraph 14 hereof.

14. **ALTERATIONS.** Tenant shall not make any alterations, additions or improvements in or to the Premises without first submitting to Landlord professionally prepared plans and specifications for such work and obtaining Landlord's prior written approval thereof which shall not be unreasonably withheld for interior work which does not affect the Building structure or systems. Tenant covenants that it will cause all such alterations, additions and improvements to be performed at Tenant's sole cost and expense by a contractor approved by Landlord and in a manner which: (a) is consistent with the Landlord approved plans and specifications and any conditions imposed by Landlord in connection therewith; (b) is in conformity with commercial standards; (c) includes acceptable insurance coverage for Landlord's benefit; (d) does not affect the structural integrity of the Building; (e) does not disrupt the business or operations of adjoining tenants; and (f) does not invalidate or otherwise affect the construction and systems warranties then in effect with respect to the Building. Tenant shall secure all governmental permits and approvals, as well as comply with all other applicable governmental requirements and restrictions. Any and all alterations, additions and improvements shall be made at Tenant's sole expense and, with the exception of trade fixtures, shall become the property of the Landlord, and shall remain in and be surrendered with the Premises as a part thereof at the termination of this Lease, without disturbance, molestation or injury, unless Landlord otherwise indicates that Tenant must remove such alterations at Tenant's sole cost and expense. Tenant shall indemnify, protect, defend and hold Landlord and its employees and agents harmless from damages, claims, suits, losses or expenses arising out of any alteration, addition or improvement requested or made by Tenant, including all attorney's fees, court costs and other litigation expenses. Tenant agrees that Landlord has the right to make alterations to the Premises, to the building in which the Premises are situated, to the Property and to the Project, and Landlord shall not be liable for any damage which Tenant might suffer by reason of such undertakings.

15. **SIGNS.** All signs or symbols placed by Tenant in the windows, doors or roof of the Premises, or upon any part of the Property, shall be subject to the prior approval of Landlord. Any signs placed on the Premises shall be so placed upon the understanding and agreement that Tenant will remove them at the termination of the tenancy and repair any damage or injury to the Premises caused thereby, and if not so removed by Tenant then Landlord may have same removed at Tenant's expense. Landlord may require that all signs on or about the Property be of a uniform size, shape and appearance. Upon notice from Landlord reasonably specifying such size, shape and appearance, the Tenant will cause his signs to comply with such notice. Tenant must have all signs manufactured and installed by a firm approved in writing, in advance, by Landlord.

16. **LIENS.** Tenant shall not suffer or permit any lien to be filed against the Premises, Property or Project. Tenant shall not suffer or permit any lien to be filed against the Premises, Property or Project or any part thereof or Tenant's leasehold interest, by reason of work, labor, services, or materials performed or supplied to or at the request of Tenant or due to the acts or omissions of Tenant or its employees, agents or contractors, Tenant shall cause any such lien to be promptly discharged and shall indemnify, defend, protect and hold harmless the Landlord and any lender with a lien on the Property against liability, loss, damage, costs or expenses (including reasonable attorneys' fees, statutory costs, and all litigation expenses) on account of such claim of lien. Within ten (10) days after Landlord's request therefor, Tenant shall cause any such lien to be released and discharged of record, either by paying the indebtedness which gave rise to such lien or by posting bond or other security as shall be required by law to obtain such release and discharge.

17. **INDEMNIFICATION; INSURANCE.**

Indemnification. Tenant shall indemnify, defend and hold harmless Landlord, its successors, assigns, subsidiaries, directors, officers, agents and employees from and against any and all damage, loss, liability or expense including, but not limited to, attorney's fees and legal costs suffered by same directly or by reason of any claim, suit or judgment brought by or in favor of any person or persons for damage, loss or expense due to, but not limited to, bodily injury, including death resulting anytime therefrom, and property damage sustained by such person or persons which arises out of, is occasioned by or in any way attributable to the use or occupancy of the Premises or Property by the Tenant, the acts or omission of the Tenant, its agents, employees or any other contractors or invitees brought onto the Premises or Property by the Tenant, or any breach or default in the performance of any obligation on Tenant's part to be performed under terms of this Lease, except to the extent caused by the sole gross negligence or willful misconduct of Landlord or its employees, and agents. If any action or proceeding is brought against Landlord by reason of any such claim, Tenant, upon notice from Landlord, shall defend same at Tenant's expense by counsel satisfactory to Landlord. Such loss or damage shall include, but not be limited to, any injury or damage to Landlord's personnel (including death resulting anytime therefrom) on the Premises. Landlord shall not be liable for any damages arising from any act or neglect of any other tenant, if any, of the Building in which the Premises are located. Tenant agrees that its obligations under this paragraph 17(a) shall survive the termination of this Lease. Landlord shall indemnify, defend and hold Tenant harmless from claims for personal injury and death attributable to the negligent or willful misconduct of Landlord or its employees or agents, to the extent so attributable to such negligence or willful misconduct.

(b) **Tenant's Insurance.** Tenant hereby agrees to maintain in full force and effect at all times during the Term, at Tenant's own expense, for the protection of Tenant, Landlord and Landlord's property manager, as their interest may appear, policies of insurance issued by a responsible carrier or carriers which afford the following coverages:

(i) Workers' Compensation with statutory limits.

(ii) Employers' Liability insurance with the following minimum limits:

Bodily injury by disease per person	\$1,000,000
Bodily injury by accident policy limit	\$1,000,000
Bodily injury by disease policy limit	\$1,000,000

(iii) Property insurance on a special causes of loss insurance form covering any and all personal property of Tenant including but not limited to improvements, betterment's, furniture, fixtures, utility installations, and equipment in an amount not less than their full replacement cost, with a deductible not to exceed \$10,000. This policy should contain a waiver of subrogation.

(iv) Commercial General Liability Insurance including Broad Form Property Damage and Contractual Liability with the following minimum limits:

General Aggregate	\$2,000,000
Products/Completed Operations Aggregate	\$2,000,000
Each Occurrence	\$1,000,000
Personal & Advertising Injury	\$1,000,000
Medical Payments	\$5,000 per person

(v) Umbrella/Excess Liability on a following form basis with the following minimum limits:

General Aggregate	\$3,000,000
Each Occurrence	\$3,000,000

The limits of the insurance required in this paragraph 17(b) shall not limit the liability of Tenant hereunder.

(c) **Landlord's Insurance.** Landlord shall, at all times during the term of this Lease, maintain the following insurance in such limits as Landlord deems appropriate:

(i) A policy or policies of all-risk property insurance. Landlord shall not be obligated to insure, and shall not assume any liability or risk of loss for, any of Tenant's furniture, equipment, machinery, goods, supplies, utility installations, improvements, or alterations upon the Premises. Landlord may, but shall not be obligated to, obtain earthquake and flood insurance.

(ii) Rent insurance.

(iii) Commercial general liability insurance.

(iv) Landlord may secure and maintain increased amounts of insurance and other insurance coverage in such limits, as Landlord may require in its sole judgment to afford Landlord adequate protection.

(d) **Certificate.** Tenant shall deliver to Landlord prior to taking possession of the Premises, and thereafter at least thirty (30) days prior to expiration of such policy, certificates of insurance evidencing the above coverage with limits not less than those specified above. Insurance required hereunder shall be in companies holding a "General Policyholders Rating" of at least A-VIII as set forth in the most current issue of "Best's Insurance Guide". Such Certificates with the exception of Worker's Compensation, shall name Landlord, its subsidiaries, directors, agents and employees, and its property manager as additional insured's and shall expressly provide that the interest of same herein shall not be affected by a breach by Tenant of any insurance policy provision for which such Certificates evidence coverage. Further, all Certificates shall expressly provide that no less than thirty (30) days prior written notice shall be given to Landlord in the event of material alteration to or cancellation of the coverage evidenced by such Certificates.

(e) **Disclaimer.** Landlord makes no representation that the limits of liability specified to be carried by Tenant under this Lease are adequate to protect Tenant against Tenant's undertaking under this Lease and if Tenant believes that any such insurance coverage called for under this Lease is insufficient, Tenant shall provide, at its own expense, such additional insurance as Tenant deems adequate.

(f) **Waiver of Subrogation.** Anything in this Lease to the contrary notwithstanding, Landlord and Tenant hereby waive and release each other of and from any and all rights of recovery, claims, action or cause of action, against each other, their agents, officers and employees, for any loss or damage that may occur to the Premises, improvements to the building of which the Premises are a part, personal property (building contents) within the building on the Premises, any furniture, equipment, machinery, goods or supplies not covered by this Lease which Tenant may bring or obtain upon the Premises or any additional improvements which Tenant may construct on the Premises, by reason of fire, the elements or any other cause which could be insured against under the terms of all risk property insurance policies, regardless of cause or origin, including negligence of Landlord or Tenant and their agents, officers and employees. Because this Paragraph will preclude the assignment of any claim mentioned in it by way of subrogation (or otherwise) to an insurance company (or any other person) each party to this Lease agrees immediately to give to each insurance company, written notice of the terms of the mutual waivers contained in this Paragraph, and to have the insurance policies properly endorsed if necessary to prevent the invalidation of the insurance coverage's by reason of the mutual waivers contained in this Paragraph. Tenant also waives and releases Landlord, its agents, officers and employees of and from any and all rights of recovery, claim, action or cause of action for any loss or damage insured against under any other policies of insurance carried by Tenant.

(g) **Payment of Premium Increase.** Tenant shall pay the entirety of any increase in the property insurance premium for the Property over what is was immediately prior to the commencement of the Term if the increase is specified by Landlord's insurance carrier as being caused by the nature of Tenant's occupancy or any act or omission of Tenant.

(h) **Exemption of Landlord from Liability.** Tenant hereby agrees that Landlord shall not be liable for injury to Tenant's business or any loss of income or profit therefrom or for damage to the goods, wares, merchandise or other property of Tenant, Tenant's employees, invitees, customers, or any other person in or about the Premises, Property, nor shall Landlord be liable for injury to the person of Tenant, Tenant's employees, agents or contractors, whether such damage or injury is caused by or results from fire, steam, electricity, gas, water or rain, or from the breakage, leakage, obstruction or other defects of pipes, sprinklers, wires, appliances, plumbing, air conditioning, or lighting fixtures, or from any other cause, whether said damage or injury results from conditions arising upon the Premises or upon other portions of the Property, or from other sources or places and regardless of whether the cause of such damage or injury or the means of repairing the same is inaccessible to Tenant, Landlord shall not be liable for any damages arising from any act or neglect of any other lessee, occupant or user of the Property, nor from the failure of Landlord to enforce the provisions of any other lease of the Property.

18. **DAMAGE TO PREMISES.** If the Premises are damaged by fire or other casualty to an extent which makes the Premises or a significant part of the Property untenable, then the Tenant shall give notice of such event to Landlord. Within thirty (30) days after receipt of such notice, Landlord shall give Tenant notice whether Landlord elects to repair or replace the Premises or elects to terminate this Lease. If the Landlord fails to give notice of its intention within such time period, Tenant shall give Landlord notice that the election by the Landlord is required and if Landlord does not elect to repair or replace within five (5) days after the second notice, this Lease shall terminate. If the Landlord elects to repair or rebuild, the Landlord will proceed to do so with reasonable diligence commencing upon settlement of any insurance claim or, if there is no such claim, as soon as practicable. If this Lease is not terminated under this Paragraph then Rent shall be abated to the extent the Premises are untenable during the repair or reconstruction. The Term shall not be extended by virtue of the Premises being untenable for any period of time.

19. **CONDEMNATION.**

(a) **Entire Taking.** If all of the Premises is taken by any public authority under the power of eminent domain or transferred under threat thereof (collectively a "Taking"), this Lease shall terminate as of the date possession is transferred to the public authority.

(b) **Partial Taking; Right to Terminate.** If twenty-five percent (25%) or more of the Premises area is Taken and, in the opinion of either Landlord or Tenant, it is not economically feasible to continue this Lease in effect, either party may terminate this Lease. If any part of the Premises or Property is so taken and, in the opinion of Landlord, it is not economically feasible to continue this Lease in effect, Landlord may terminate this Lease. Termination by either party shall be made by notice to the other given not later than thirty days after notice of the Taking is given, the termination to be effective as of the later of thirty days after said notice or the date possession is so taken.

(c) **Continuation.** If part of the Property or Premises is so taken, and neither Landlord nor Tenant elects to terminate this Lease, or until termination is effective, as the case may be, the Rent shall be abated in the same proportion as the portion of the Property so taken bears to the whole of the Property, and Landlord shall make such repairs or alterations, if any, as are required to render the remainder of the Property tenable.

(d) **Compensation.** Landlord reserves all right to the entire damage award or payment for any Taking, and Tenant waives all claim whatsoever against Landlord for damages for termination of its leasehold interest in the Premises or for interference with its business. Tenant hereby grants and assigns to Landlord any right Tenant may now have or hereafter acquire to such damages and agrees to execute and deliver such further instruments of assignment as Landlord may from time to time request. Tenant shall, however, have the right to claim from the condemning authority all compensation that may be recoverable by Tenant on account of any loss incurred by Tenant for moving costs or in removing Tenant's merchandise, furniture, trade fixtures, equipment and other personal property or for such personal property which has been taken, provided, however, that Tenant may claim such damages only if they are awarded separately in the eminent domain proceeding and not as part of Landlord's damages.

20. **ASSIGNMENT.** Tenant may, with the prior written consent of the Landlord, assign this Lease or sublet the whole or any part of the Premises. Landlord shall use reasonable efforts to respond to Tenant within ten (10) business days after its receipt of the request, if it is provided, together with the identity of the proposed transferee and financial and operating history for the proposed transferee and a copy of the transfer document. It shall be reasonable, among other reasons; for Landlord to withhold its consent if (i) Tenant is in default under this Lease; (ii) the assignee will not assume all of the obligations of this Lease, or the sublessee does not agree to be subject to all the terms and conditions of, this Lease; (iii) the proposed transferee will use the Premises other than wholly for uses specifically permitted hereunder; (iv) Tenant has failed to furnish Landlord with the information specified above; (v) the proposed transferee will cause Landlord to be in violation of any agreement with respect to the Property; and (vi) the transferee's financial condition and operating history are not reasonably acceptable to Landlord. No assignment or sublease shall release Tenant from primary liability on this Lease. In lieu of giving its consent to an assignment or a sublease, Landlord may elect to terminate this Lease. The consent of the Landlord need not be obtained if the sublease is to any entity which controls, is controlled by, or is under common control with Tenant; provided that the assignee or sublessee has the financial strength to enable it to perform Tenant's obligations hereunder and Landlord is given prior written notice thereof and provided with evidence that all insurance required hereunder is in place. Failure to first obtain in writing Landlord's written consent or to comply with the provisions of this paragraph 20 shall operate to prevent any such assignment, sublease or transfer from becoming effective. If Tenant assigns this Lease or sublets the Premises, then all consideration received by Tenant in whatever form and at whatever time for such assignment or sublease (in excess of amounts payable by Tenant as minimum rent, in the case of a sublease) shall belong to and be paid over to Landlord, as and when received by Tenant, to the extent such exceed the normal and reasonable out-of-pocket costs incurred in connection with such assignment or sublease. Tenant shall also pay all reasonable legal fees and other costs incurred by Landlord in connection with Landlord's consideration of Tenant's request for approval of assignments or subleases.

of the Premises, including reasonable attorneys' fees therefor, (b) maintaining or preserving the Premises after such default, (c) restoring the Premises to the condition in which they were to be returned by Tenant hereunder, (d) leasing commissions, and (e) any other costs reasonably necessary to relet the Premises.

As used in items (i) and (ii) above, the "worth at the time of award" is computed by allowing interest at the Default Interest rate specified in paragraph 23(c) hereof. As used in item (iii) above, the "worth at the time of award" is computed by using a discount rate of four percent (4%).

For all purposes of paragraph 23(a), all Rent shall, for the purpose of calculating any amount due under the provisions of subparagraph (iii) above, be computed on the basis of the average monthly amount thereof accruing during the immediately preceding twelve (12) month period, except that if it becomes necessary to compute such rental before such a twelve (12) month period has occurred then such Rent shall be computed on the basis of the average monthly amount hereof accruing during such shorter period.

(b) Remedies Cumulative. Landlord's remedies hereunder are cumulative, and Landlord's exercise of any right or remedy due to a default or breach by Tenant shall not be deemed a waiver of, or alter, affect or prejudice any other right or remedy which Landlord may have under this Lease or by law. Neither the acceptance of rent nor any other acts or omissions of Landlord at any time or times after the happening of any event authorizing the cancellation or forfeiture of this Lease shall operate as a waiver of any past or future violation, breach or failure to keep or perform any covenant, agreement, term or condition hereof or to deprive Landlord of its right to cancel or forfeit this Lease, upon the written notice provided for herein, at any time that cause for cancellation or forfeiture may exist, or be construed so as at any future time to estop Landlord from promptly exercising any other option, right or remedy that it may have under any term or provision of this Lease.

(c) Interest upon Default. If there is any Default, all unpaid Rent and other amounts past due under this Lease shall bear interest ("Default Interest") from the due date at the rate of five percent (5%) above the prime rate as set from time to time and in no event shall this rate be less than twelve percent (12%).

24. COSTS, ATTORNEYS' FEES AND INTEREST. If Landlord employs an attorney or if Landlord brings suit to recover any rent due hereunder, or for breach of any other provision of this Lease or to recover possession of the Premises or to enforce or defend any rights under federal bankruptcy law, Landlord shall be awarded its attorney's fees, statutory court costs, and all other litigation costs and expenses expended or incurred in connection with such action and in any appellate or collection proceedings. All sums due from Tenant to Landlord shall bear interest at the Default Interest rate.

25. NON-WAIVER OF BREACH. Landlord's failure to insist upon strict performance of any of the covenants or agreements of this Lease, or to exercise any option herein conferred in any one or more instance shall not be a waiver or relinquishment of any Default nor shall any such approval constitute a waiver of the right to disapprove of any act in the future. The approval of any assignment of this Lease or of the subletting of the Premises or the approval of any variation from the strict requirements of this Lease shall not constitute a waiver of the right to refuse consent to any future assignment, subletting or variation. Tenant agrees that it will not rely upon nor ever assert the existence of any purported past or future approval, consent, or waiver from the Landlord not in writing and signed by the Landlord's president, or by a person previously designated in writing to have the authority to bind the Landlord to contracts.

26. REMOVAL OF PROPERTY. In the event of any entry in, or taking possession of the Premises, Landlord shall have the right, but not the obligation, to remove from the Premises all personal property located therein, and to store the same in any place selected by Landlord, including but not limited to a public warehouse, at the expense and right of the owners thereof with the right to sell such stored property, without notice to Tenant, after it has been stored for a period of thirty (30) days or more. The proceeds of such sale shall be applied first to the cost of such sale; second to the payment of the charges for storage, if any; third to the payment of any sums of money which may then be due from Tenant to Landlord under any of the terms hereof; and the balance, if any, shall be paid to Tenant.

27. LANDLORD'S LIABILITY.

(a) Limitations. Anything in this Lease to the contrary notwithstanding, covenants, undertakings and agreements herein made on the part of Landlord are made and intended not as personal covenants, undertakings or agreements for the purpose of binding Landlord personally or the assets of Landlord except Landlord's interest in the Property, but are made and intended for the purpose of binding only the Landlord's interest in the Property, as the same may from time to time be encumbered. While Tenant may bring a legal action against Landlord, judgments may be enforced only against Landlord's interest in the Property. No personal liability or personal responsibility is assumed by, nor shall at any time be asserted or enforceable against, Landlord or its partners or agents or their respective heirs, legal representatives, successors, and assigns on account of this Lease or on account of any covenant, undertaking or agreement of Landlord in this Lease contained. Nothing in this paragraph shall impose any liability on Landlord that has been waived or released elsewhere in this Lease.

(b) **Transfer of Landlord's Interest.** In the event of any transfer or transfers of Landlord's interest in the Property, other than a transfer for security purposes only, the transferor shall be automatically released of any and all obligations and liabilities on the part of Landlord accruing from and after the date of such transfer, and Tenant agrees to attorn to the transferee. Any such transfer shall be made expressly subject to this Lease, and the transferee shall assume Landlord's obligations hereunder arising thereafter.

28. **HEIRS AND SUCCESSORS.** Subject to the provisions hereof pertaining to assignment and subletting, the covenants and agreements of this Lease shall be binding upon the heirs, legal representatives, successors and assigns of any or all of the parties hereto.

29. **HOLD OVER.** Any holding over by Tenant after the expiration of the Term hereof, with Landlord's prior written consent, shall be construed as a tenancy from month-to-month on the terms and conditions set forth herein, except for Rent which shall be increased to one and one-quarter (1 1/4) times that in effect during the last month hereof, which tenancy may be terminated by either party upon thirty (30) days written notice to the other party, effective as of the last day of a calendar month. If Tenant holds over without Landlord's consent, it shall be a tenancy at will, terminable at any time immediately upon notice from Landlord at two (2) ~~three (3)~~ times the prior Rent level thereafter. If Tenant fails to vacate the Premises after Landlord's written demand in the case of a tenancy at will, it shall be liable for damages suffered by Landlord as a consequence of such holding over thereafter.

30. **NOTICES.** Any notice, approval, consent or request required or permitted under this Lease shall be in writing and shall be personally delivered, sent by courier or mailed to the person or entity entitled to receive the same at the address stated below or such other address as may be substituted by notice, or, if no address is specified then notice to the Tenant shall be given at the Premises. Such notices shall be deemed given on the day delivered or on the third business day after deposit in the U.S. mail, registered or certified, return receipt requested, postage prepaid.

Notices to the Landlord shall be given to:

MegaWest, LLC
3402 West Valley Highway N., Suite 101
Auburn, WA 98001

Notices to the Tenant shall be given to:

Ross Hansen
Northwest Territorial Mint
1307 West Valley Highway N., Suite 101
Auburn, WA 98001

31. **SUBORDINATION OF TENANT'S INTEREST.** This Lease is and shall be subordinate to any encumbrance now of record or any encumbrance hereafter recorded affecting the Property. Tenant shall attorn to any purchaser at any foreclosure sale, or to any grantee or transferee designated in any deed in lieu of foreclosure. Tenant shall execute any documents required by any such holder to accomplish the purposes of this section, including subordination, non-disturbance and attornment agreements and estoppel certificates, and in such form as the lender may require and is consistent with commercial lending practices. Tenant's failure to promptly execute such documents shall be a Default under this Lease.

32. **ESTOPPEL CERTIFICATES.** Upon Landlord's written request, Tenant shall execute, acknowledge and deliver to Landlord a written statement certifying: (a) that none of the terms or provisions of this Lease have been changed (or if they have been changed, stating how they have been changed); (b) that this Lease has not been canceled or terminated; (c) the last date of payment of the rent and other charges and the time period covered by such payment; (d) that Landlord is not in default under the Lease (or, if Landlord is claimed to be in default, stating why); and, (e) such other representations or information with respect to Tenant of the Lease as Landlord may reasonably request or which any prospective purchaser or encumbrancer of the Property may require. Tenant shall deliver such statement to Landlord within ten (10) days after Landlord's request. Landlord may give any such statement by Tenant to any prospective purchaser or encumbrancer of the Property. Such purchaser or encumbrancer may rely conclusively upon such statement as true and correct. If Tenant does not deliver such statement to Landlord within said ten (10) day period, Landlord, and any prospective purchaser or encumbrancer may conclusively presume and rely upon the following as facts: (i) That the terms and provisions of this Lease have not been changed except as otherwise represented by Landlord; (ii) that this Lease has not been canceled or terminated except as otherwise requested by Landlord; (iii) that not more than one (1) month's rent or other charges have been paid in advance; and (iv) that Landlord is not in default under the Lease.

33. **TENANT'S FINANCIAL CONDITION.** Within ten (10) days after written request from Landlord, Tenant shall permit Landlord or Landlord's designee to review Tenant's balance sheet and income statement to verify the net worth of Tenant or any assignee, subtenant, or guarantor of Tenant. Tenant shall permit Landlord's designee to review Tenant's balance sheet and income statement only for the purpose of facilitating the potential sale of the Building that Tenant occupies or in order for Landlord to secure financing. The "potential sale" will be defined by a valid, fully executed purchase and sale agreement between Landlord and Buyer as it pertains to the Building. Tenant represents and warrants to Landlord that each such financial statement is a true and accurate statement as of the date of such statement. All financial information revealed to Landlord, or his designees shall be kept strictly confidential. If a lender or potential lender to Landlord requires a copy of Tenant's financial statement in order to secure permanent financing, then the Tenant will provide financial statements to the lender or potential lender and all information provided shall be kept strictly confidential.

34. **PERSONAL PROPERTY TAXES.** Tenant shall pay or cause to be paid before delinquency any and all taxes levied or assessed and which become payable during the term hereof upon all Tenant's leasehold improvements, equipment, furniture, fixtures and any other personal property located in the Premises or upon Tenant's business upon the Premises. In the event any or all of the Tenant's leasehold improvements, equipment, furniture, fixtures, and other personal property shall be assessed and taxed with the real property, Tenant shall pay to Landlord its share of such taxes within ten (10) days after delivery to Tenant by Landlord of a statement in writing setting forth the amount of such taxes applicable to Tenant's property.

35. **FOR LEASE SIGNS.** Landlord may place "For Lease" signs upon the Premises in prominent locations selected by Landlord for the ninety (90) days preceding termination of this Lease.

36. **QUIET ENJOYMENT.** Landlord covenants and agrees that so long as Tenant remains in full compliance with all of Tenant's obligations under this Lease, Tenant shall lawfully and quietly hold, occupy, and enjoy the Property during the term of this Lease, subject to the other terms and provisions of this Lease and subject to all mortgages, underlying leases, and other underlying matters of record to which this Lease is or may become subject and subordinate. Landlord shall not be liable for changes in light, air, or view of the Premises.

37. **MISCELLANEOUS.**

(a) **Integration; Amendments.** This Lease contains the entire agreement between Landlord and Tenant concerning the leasing of the Premises and supercedes all prior correspondence and communications. There are no oral or written agreements relative to the Premises beyond those set forth in this Lease. This Lease may only be altered by written consent of both Landlord and Tenant.

(b) **Memorandum of Lease.** Unless approved by Landlord in writing, if Tenant causes this Lease or a notice or memorandum thereof to be placed of record, such recording shall constitute a Default by Tenant under this Lease. If Landlord so requests, Tenant agree to execute and place of record an instrument, in recordable form, evidencing the commencement date and expiration date of this Lease, which instrument Landlord may record.

(c) **Force Majeure.** Landlord shall have no liability whatsoever to Tenant on account of the following acts of "force majeure," which shall include (a) the inability of Landlord to fulfill, or delay in fulfilling, any of Landlord's obligations under this Lease by reason of strike, lockout, other labor trouble, dispute or disturbance; (b) governmental regulation, moratorium, action, preemption or priorities or other controls; (c) shortages of fuel, supplies or labor; (d) any failure or defect in the supply, quantity or character of electricity or water furnished to the Property by reason of any requirement, act or omission of the public utility or others furnishing the Building with electricity or water; and (e) for any other reason, whether similar or dissimilar to the above, or for Act of God, beyond Landlord's reasonable control. If this Lease specifies a time period for performance of an obligation of Landlord, that time period shall be extended by the period of any delay in Landlord's performance caused by any of the events of force majeure described herein.

(d) **Captions and Construction.** The captions in this Lease are for the convenience of the reader and are not to be considered in the interpretation of its terms.

(e) **Interpretation.** This Lease has been submitted to the scrutiny of all parties hereto and their counsel if desired, and shall be given a fair and reasonable interpretation in accordance with the words hereof, without consideration or weight being given to its having been drafted by any party hereto or its counsel.

(f) **Partial Invalidity.** If any term or provision of this Lease or the application thereof to any person or circumstance shall to any extent be invalid or unenforceable, the remainder of this Lease, or the application of such term or provision to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each term and provision of this Lease shall be valid and be enforced as written to the fullest extent permitted by law.

(g) **Number; Gender; Permissive Versus Mandatory Usage.** Where the context permits, references to the singular shall include the plural and vice versa, and to the neuter gender shall include the feminine and masculine. Use of the word "may" shall denote an option or privilege and shall impose no obligation upon the party which may exercise such option or privilege; use of the word "shall" shall denote a duty or an obligation.

(h) **Tenant's Liability.** Each Tenant, and all general partners of any partnership which is a Tenant, shall be jointly and severally liable under this Lease.

(i) **Time.** Time is of the essence to all of Tenant's obligations under this Lease.

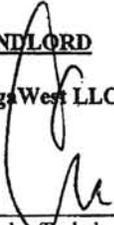
(j) **Governing Law.** This Lease shall be governed by the laws of the State of Washington.

(k) **Authority to Sign.** If Tenant is a corporation, a limited liability company, or a limited partnership, each person signing this Lease on behalf of the corporation, company or partnership warrants that he or she has full authority from such corporation, company or partnership to enter into and execute this Lease on behalf of such entity.

(i) **Brokers.** Mike Newton Represented Tenant. Fee shall be 5% of the gross base rent for the first 5 years and 2.5% of the gross base rent thereafter. ½ due upon a both parties signing the lease and ½ due upon occupancy by tenant. No commissions are payable or due for renewal periods.

LANDLORD

MegaWest LLC, a Washington limited liability company


Charles Jurbak, Managing Member

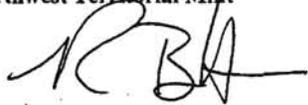
5-3-02
Date


Wayne Williams, Managing Member

5/3/02
Date

TENANT

Northwest Territorial Mint


Ross B. Hansen, Owner

5-3-2002
Date

REPRESENTATIVE CAPACITY Acknowledgment

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I certify that I know or have satisfactory evidence that **Charles Turbak and Wayne Williams** are the persons who appeared before me, and said persons acknowledged that he/she signed this instrument, on oath stated that he/she was authorized to execute the instrument and acknowledged it as a **Managing Member of MegaWest, LLC**, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED this 3 day of May, 2002.

Suzanne M Welfringer
Notary Public in and for the State of Washington,
residing at: Puyallup
Name (printed or typed):
SUZANNE M WELFRINGER
My appointment expires: 4/4/2004

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

On this 3 day of May, 2002, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn personally appeared **Ross B. Hansen** known to me to be the **individual** that executed the foregoing instrument, and acknowledged the said instrument to be her free and voluntary act and deed, for the purposes therein mentioned.

I certify that I know or have satisfactory evidence that the person appearing before me and making this acknowledgment is the person whose true signature appears on this document.

WITNESS my hand and official seal hereto affixed the day and year in the certificate above written.

Jacquelyn M. Equall
Signature
Jacquelyn M. Equall
Print Name

NOTARY PUBLIC in and for the State of Washington, residing at Lander
My commission expires 4/1/04



LANDLORD [Signature] TENANT [Signature]

**EXHIBIT A
TO
LEASE AGREEMENT**

LEGAL DESCRIPTION OF PROPERTY

The Property referred to in this Lease Agreement is located in King County, Washington, and is legally described as follows: *

PARCEL A:

COMMENCING AT THE EAST QUARTER CORNER OF SECTION 11, TOWNSHIP 21 NORTH, RANGE 4 EAST, WILLAMETTE MERIDIAN, IN KING COUNTY, WASHINGTON, AND PROCEEDING;

THENCE SOUTH 01°10'00" WEST 881.31 FEET ALONG THE EAST LINE OF SAID SECTION 11;

THENCE NORTH 88°50'00" WEST 30.00 FEET TO THE TRUE POINT OF BEGINNING;

THENCE SOUTH 89°52'16" WEST 312.08 FEET;

THENCE SOUTH 01°10'00" WEST 15.00 FEET;

THENCE SOUTH 89°52'16" WEST 958.35 FEET TO THE WEST LINE OF THE NORTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SAID SECTION 11;

THENCE SOUTH 01°09'52" EAST 263.82 FEET TO THE NORTH LINE OF THE SOUTH 153.75 FEET OF THE NORTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SAID SECTION 11;

THENCE NORTH 89°52'16" EAST 958.34 FEET;

THENCE NORTH 01°10'00" EAST 151.22 FEET;

THENCE NORTH 89°52'16" EAST 312.08 FEET TO THE WESTERLY RIGHT OF WAY LINE OF WEST VALLEY HIGHWAY NORTH;

THENCE NORTH 01°10'00" EAST 127.61 FEET TO THE TRUE POINT OF BEGINNING;

(ALSO KNOWN AS LOT 1 OF CITY OF AUBURN LOT LINE ADJUSTMENT NUMBER LLA-0020-92, RECORDED UNDER RECORDING NUMBER 9302161187).

PARCEL B:

COMMENCING AT THE EAST QUARTER CORNER OF SECTION 11, TOWNSHIP 21 NORTH, RANGE 4 EAST, WILLAMETTE MERIDIAN, IN KING COUNTY, WASHINGTON, AND PROCEEDING;

THENCE SOUTH 01°10'00" WEST 1008.92 FEET ALONG THE EAST LINE OF SAID SECTION 11;

THENCE NORTH 89°50'00" WEST 30.00 FEET TO THE TRUE POINT OF BEGINNING;

THENCE SOUTH 89°52'16" WEST 312.08 FEET;

THENCE SOUTH 01°10'00" WEST 151.22 FEET TO THE NORTH LINE OF THE SOUTH 153.75 FEET OF THE NORTHEAST QUARTER OF THE SOUTHEAST QUARTER OF SAID SECTION 11;

THENCE NORTH 89°52'16" EAST 312.08 FEET TO THE WESTERLY RIGHT OF WAY LINE OF WEST VALLEY HIGHWAY NORTH;

THENCE NORTH 01°10'00" EAST 151.23 FEET TO THE TRUE POINT OF BEGINNING, BEING CONTAINED ENTIRELY WITHIN THE SOUTHEAST QUARTER OF SECTION 11, TOWNSHIP 21 NORTH, RANGE 4 EAST, WILLAMETTE MERIDIAN, IN KING COUNTY, WASHINGTON;

(ALSO KNOWN AS LOT 2 OF CITY OF AUBURN LOT LINE ADJUSTMENT NUMBER LLA-0020-92, RECORDED UNDER RECORDING NUMBER 9302161187).

PARCELS A AND B TOGETHER NOW KNOWN AS PARCEL 1 OF CITY OF AUBURN LOT LINE ADJUSTMENT NO. LLA-01-0016, RECORDED UNDER RECORDING NUMBER 20010802001613.

Also known as:

**MegaWest Corporate Park
1307 West Valley Highway North
Auburn, Washington**

*The parties to this agreement agree that the Legal description may be corrected and inserted at a later date.

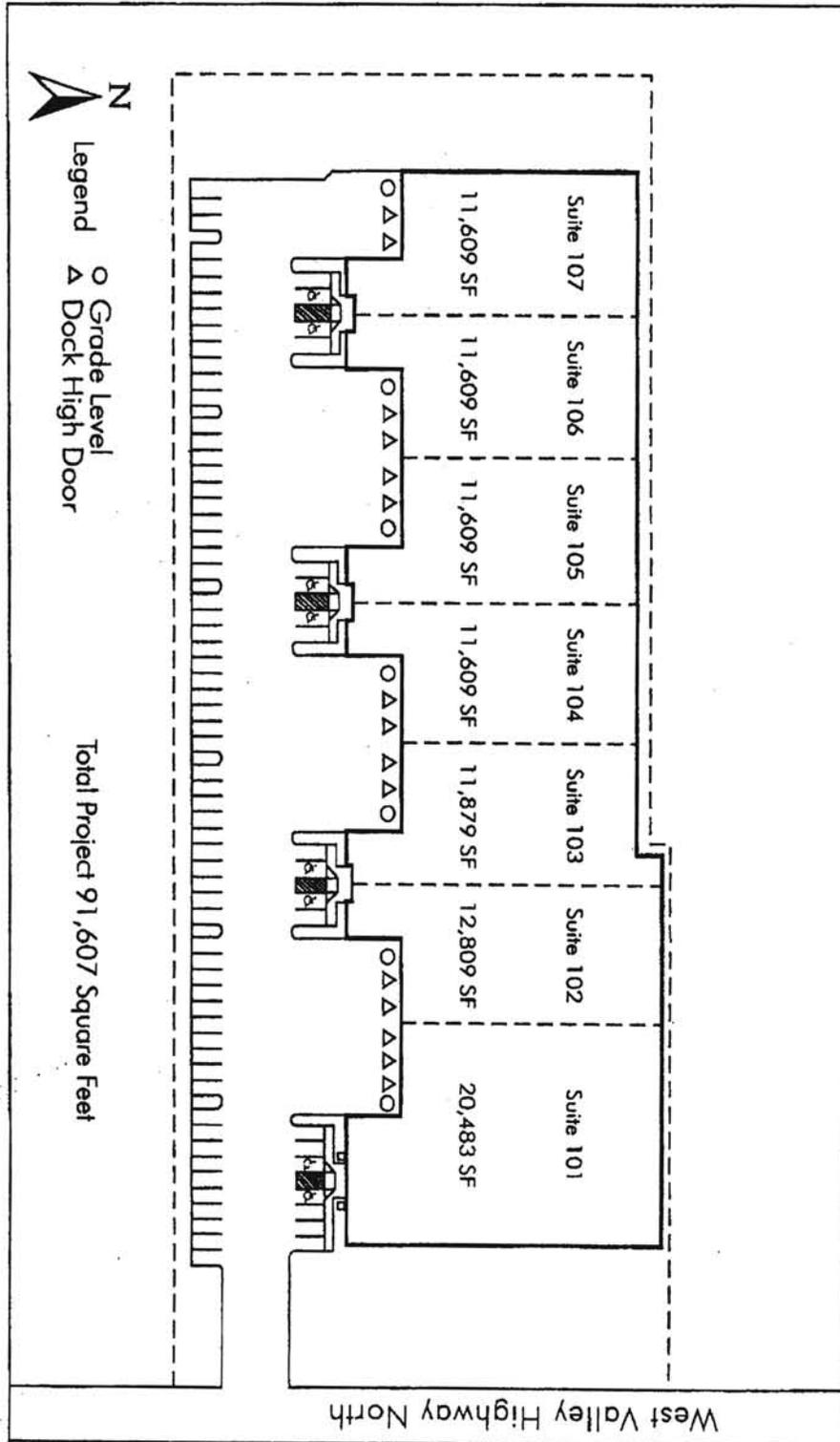
**EXHIBIT B
TO
LEASE AGREEMENT**

**Description of Premises
(Floor Plan)**
(to be inserted upon completion of drawings)



EXHIBIT C
TO
LEASE AGREEMENT

Description of Property
(Site Plan)



**EXHIBIT D
TO
LEASE AGREEMENT**

OFFICE IMPROVEMENT SPECIFICATIONS:

Office Construction shall be performed as per Exhibit F. Below is a list of Office Improvement Specifications.

INTERIOR WOOD DOORS & FRAMES:

Includes pre-finished 3'0" x 7'0" solid core oak doors with hemlock jambs and oak or birch 2 1/4" beveled casing.

FINISH HARDWARE:

Includes door hardware by Arrow or equal in brushed chrome finish.

MILLWORK & CABINETS:

Includes 6' long upper and lower cabinets with plastic laminate countertop at lunchroom, two 3' plastic laminate bathroom vanity counters (per code/no base cabinets).

TOILET PARTITIONS & ACCESSORIES:

Included as follows: (1) each restroom surface mount toilet paper dispenser and grab bars in handicap restrooms as required by code in brushed chrome. (We do not normally include such items as paper towel or soap dispensers and waste receptacles because it is much more cost effective for tenant/owner to supply their own.)

DRYWALL:

Included per plans. Smooth finish at interior office areas. Fire tape only in warehouse areas (no paint).

ACOUSTICAL:

Included per plans. Armstrong Cortega or equal 2 x 4 ceiling tiles, non-rated grid and seismic bracing per code.

FLOORCOVERING:

Armstrong Standard sheet vinyl self-coved at restrooms, Armstrong vinyl tile at lunchroom (standard colors/patterns) with 4" rubber base. Plastic laminate wainscot to 4' high on wet walls with returns. Philadelphia Volunteer 26 oz. at remaining office areas with 4" rubber base throughout. One color only per each color selected.

PAINTING:

Interior Walls – one coat primer and two coats latex eggshell enamel. Excludes painting of warehouse areas.

PLUMBING: Included per plans and as follows:

Crane 3-152 handicap water closets/Bemis 1500D.

Briggs 19" round steel lavatories/Moen L4621

Dayton 33" x 22" stainless steel sink/Moen 67531.

50 gallon electric hot water heater/expansion tank.

Industry standard fixtures per code. All fixtures to be white, faucets chrome. Drain, waste and vents below slab shall be saxt iron no hub pipe and fittings. Drain, waste and vents above slab shall be A.B.S. pipe fittings.

Domestic water piping to be type M copper, type L under slab.

H.V.A.C.: Included per plans and as follows:

One gas heat/electric cool packaged roof top unit for the office space complete with factory roof curb and 100% economizer for the large office.

Two restroom exhaust fans vented to outside.

Trim diffusers, grilles and registers.

Natural gas piping from one meter location.

Low voltage wiring and permit.

H.V.A.C. permit, design drawings and engineering fees.

Full one year warranty plus factory warranties.

FIRE PROTECTION:

Includes a wet fire sprinkler system at roof and office per City of Auburn and NFPA #13 (1994 Edition). Fire alarm system per code and City of Auburn requirements. Excludes fire alarm monitoring.

ELECTRICAL:

Receptacles per code

G.F.I. (1 per restroom)

Dedicated per code
 Switches per code
 Phone (mud ring, pull string)
 2 x 4 troffers for office space to obtain 60 foot candles.
 Equipment connections for unit heaters, HVAC, exhaust fans and hot water tank.
 Excludes: connections for Owner's equipment.

ARCHITECTURAL FEES:

Landlord's architectural fees for designing Tenants office and warehouse space, which shall not to exceed \$10,000.

GENERAL EXCLUSIONS:

Telephone equipment, telephone wiring/service, signage, fire alarm and security systems, window coverings, furniture.

Landlord's Work

WAREHOUSE IMPROVEMENTS:

Power:

- 600 amp, 480 volt, 3-phase se
- 400 amp, 208 volt, 3-phase s space.
- Hookup of equipment shall be
- All wiring beyond the panel sl

1 11/1/02 - 10/31/03
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 11/1/07 - 10/31/08

①
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wer panel within the

Warehouse Lighting:

- Warehouse lighting to be 400.
- Lighting fixtures shall provide

Warehouse Heat:

- Gas heaters providing freeze p

Warehouse Fire Protection:

- ESFR
- Fire alarm system per code and City of Auburn requirements.
- Excludes fire alarm monitoring.

Insulation:

- R-19 rigid above roof structure per code requirements.

Floor Slab:

- 6" thick reinforced concrete floor slab, reinforced with #4 rebar @ 18" o.c. each way, concrete =

Demising Walls:

- Landlord shall provide a demising wall on the center column line of Tenants premises and all demising walls dividing Tenants space from adjacent tenant.

Dock Leveler:

- Kelley FX Edge-of-dock 30,000 lb capacity

[Handwritten signatures]

**EXHIBIT E
TO
LEASE AGREEMENT**

Commencement and Termination Date Agreement

This Agreement is made with respect to the Lease Agreement dated May 1, 2002, (the "Lease") between MegaWest, LLC, a Washington limited liability company, as "Landlord" and Ross B. Hansen dba Northwest Territorial Mint, as "Tenant" for the lease of "Premises" located at MegaWest Corporate Park, 1307 West Valley Highway N., Suite 101, Auburn, WA. Any capitalized term not defined in this Agreement has the meaning given it the Lease.

The Lease provides that when certain obligations completed, Landlord and Tenant shall enter into a supplemental agreement confirming the Rent Commencement Date and the Lease Term. Accordingly, the parties agree as follows:

The Rent Commencement Date of the Lease is November 1, 2002.

The Lease Term shall expire on October 31, 2008, subject to any provision in the Lease for extending the Lease Term.

Tenant's obligation to pay Rent shall commence on the Rent Commencement Date.

The Office Square Feet at the Rent Commencement Date of the Lease is 6,750.

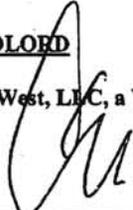
The Base Rent at the Rent Commencement Date of the Lease is \$13,942.

The monthly Basic Rent shall be increased on the first day of the thirty-seventh (37th) month of the Term to Fifteen Thousand Six Hundred Fifteen Dollars (\$15,615). The monthly Basic Rent shall be increased on the first day of the Sixty-First (61st) month of the Term to Sixteen Thousand Eighty Four Dollars (\$16,084).

DATED this 16 day of January 2003.

LANDLORD

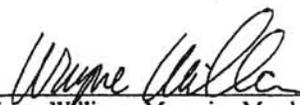
MegaWest, LLC, a Washington limited liability company



Charles Turbak, Managing Member

1-16-03

Date



Wayne Williams, Managing Member

1/16/03

Date

TENANT

Ross B. Hansen dba Northwest Territorial Mint



Ross B. Hansen, Owner

1-16-2003

Date

**EXHIBIT F
TO
LEASE AGREEMENT
CONSTRUCTION PROVISIONS**

Initial Improvements.

1.1.1 Landlord's Improvements.

Landlord will provide, at no cost to Tenant, the Landlord's Work described in Exhibit D.

1.1.2 Tenant's Improvements.

All improvements to the Premises to be performed by Landlord under this Exhibit F, other than those improvements described in Section 1.1.1 above, are referred to in this Exhibit F collectively as "Tenant's Improvements". Landlord will competitively bid the Tenant's Improvements to Johnson TI and Poe Construction. Tenant shall have the right to select the General Contractor for the Tenant's Improvements from these competitive bids. Landlord will then cause the selected General Contractor to construct the Tenant's Improvements under a contract which may also include Landlord's Improvements. Landlord reserves the right to approve the selected Contractors construction schedule. Tenant's Improvements will be designed as described in this **Exhibit Section 1.1**. Tenant will pay all of General Contractor's direct and indirect costs of causing the design and installation of Tenant's Improvements, plus all sales and excise taxes, and all Landlord's other out-of-pocket costs related thereto, including space planning costs, construction document preparation costs, design and engineering costs, construction drawing costs, construction costs, risk insurance costs directly related to the Tenant's Improvements and all costs incurred in obtaining permits (including all consultants' fees and charges incurred in connection with any permits) for the Tenant's Improvements. Tenant's Improvements become the property of Landlord and a part of the Building immediately upon installation.

1.1.3 Improvement Allowance.

Landlord will credit an amount, not to exceed the Improvement Allowance (as stated in Basic Lease Terms), against Tenant's obligation to pay for the design and installation of the Tenant's Improvements. Landlord is not obligated to pay or incur any amounts that exceed the Improvement Allowance. If the cost of Tenant's Improvements exceeds the Improvement Allowance, Tenant will pay the excess to Landlord in cash upon Substantial Completion of the Tenant's Improvements. Within 10 days after Landlord's demand therefor accompanied by reasonable documentation of such costs, Tenant will also pay, as Additional Rent, all of Landlord's costs (including lost Rent) resulting from Tenant Delays. If Landlord reasonably estimates that the cost of the Tenant's Improvements will exceed the Improvement Allowance, Landlord may require Tenant to deposit with Landlord, before Landlord commences construction of Tenant's Improvements, an amount equal to the amount by which the cost of the Tenant's Improvements is expected to exceed the Improvement Allowance.

1.1.4 Project Manager/Site Superintendent.

Landlord is the general contractor for all Tenant's Improvements. In connection with installing Tenant's Improvements, Landlord will utilize a project manager and site superintendent, the fees of which are payable by Tenant on an hourly basis as a direct cost of the Tenant's Improvements.

1.1.5 Space Plan.

Landlord will provide Tenant with a space plan for the Tenant's Improvements (a) adequate for Landlord to prepare working drawings for the Tenant's Improvements; (b) showing, in reasonable detail, the design and appearance of the finishing material Landlord will use in connection with installing Tenant's Improvements without additional requests for information; and (c) containing such other detail or description as may be necessary for Landlord to adequately define the scope of Tenant's Improvements. Tenant will have 5 Business Days to review and approve or make recommendations for change in the space plan. Any disapproval or recommendation for change will specify both the requested change and the reason for the change with particularity. Landlord will promptly make revisions to the proposed space plan necessary to obtain Tenant's approval. Landlord and Tenant will indicate their agreement to the space plan by initialing 2 sets thereof.

1.1.6 Working Drawings and Specifications.

After the space plan has been established, Landlord will provide Tenant with the proposed Final Plans. When Landlord requests Tenant to specify details or layouts, Tenant will specify the same, subject

to the **Exhibit C** attached hereto, within 2 Business Days after Landlord's request, so as not to delay completion of the Final Plans. Tenant will approve or disapprove the proposed Final Plans in writing within 5 Business Days after receiving the same. If Tenant disapproves the proposed Final Plans within the 5 Business Day period described in this section, Landlord will revise the proposed Final Plans and submit the same to Tenant for approval. Tenant will have the same approval rights and approval time period with respect to the revised proposed Final Plans as Tenant had with respect to the initial proposed Final Plans as described in this section. Landlord will seal the proposed Final Plans after Tenant approves the same and will submit the same for permits and construction bids. Landlord will promptly notify Tenant of any changes to the proposed Final Plans that are required by City. Tenant will approve or disapprove the required changes in writing within 2 Business Days after receiving notice of the same. Tenant will not withhold its approval except for reasonable cause and will not act in an arbitrary or capricious manner in connection with approving the Final Plans or any changes thereto required by City. If Tenant fails to notify Landlord of Tenant's approval or disapproval of the proposed Final Plans or City's required changes thereto within the 5 or 2 Business Day periods described in this section, or fails to specify any details or layouts within the 2 Business Day period described in this section, such failure is deemed to be a Tenant Delay and the Delivery Date is automatically extended day for day for each day of delay after the date by which Tenant was obligated to approve the Final Plans or specify the details or layouts. Tenant will approve the Final Plans in writing within 5 Business Days after receiving the same. Tenant will not order long lead-time items that will delay Substantial Completion of Tenant's Improvements. Landlord will exercise commercially reasonable efforts to notify Tenant if Tenant orders long lead time items that will delay Substantial Completion of Tenant's Improvements.

1.1.7 Changes to Final Plans.

Tenant will notify Landlord of any desired revisions to the Final Plans Tenant approved under Section 1.1.6. If Landlord approves the revisions, Landlord will revise the Final Plans accordingly and will notify Tenant of the additional cost of Tenant's Improvements and the anticipated delay in completing the Tenant's Improvements caused by such revisions. Tenant will approve or disapprove the increased cost and delay within 5 Business Days after Landlord notifies Tenant of the additional cost and delay. If Tenant fails to notify Landlord of its approval or disapproval of the additional cost and delay within the 5 Business Day period, Tenant is deemed to have disapproved the additional cost or delay. If Tenant disapproves the additional cost or delay, Tenant is deemed to have withdrawn its proposed revisions to the Final Plans. If incident to a requested revision to the Final Plans, Landlord stops work pending resolution of whether Tenant finally approves or disapproves a proposed revision, then whether or not Tenant ultimately approves or disapproves the proposed revision and its attendant additional cost or delay, any delay resulting from the work stoppage will constitute a Tenant Delay.

1.1.8 Substantial Completion.

Landlord will use commercially reasonable efforts to achieve Substantial Completion of Tenant's Improvements on or before the Delivery Date, subject to Tenant Delays and delays caused by Force Majeure.

1.1.9 Punch List.

Within 5 days after Substantial Completion, Landlord and Tenant will inspect the Premises and develop a Punch List. Landlord will complete (or repair, as the case may be) the items described on the Punch List with commercially reasonable diligence and speed, subject to delays caused by Tenant Delays and Force Majeure. If Tenant refuses to inspect the Premises with Landlord within the 5-day period, Tenant is deemed to have accepted the Premises as delivered, subject to Section 1.1.10.

1.1.10 Construction Warranty.

Landlord warrants Tenant's Improvements against defective workmanship and materials for a period of one year after Substantial Completion. Landlord's sole obligation under this warranty is to repair or replace, as necessary, any defective item caused by poor workmanship or materials if Tenant notifies Landlord of the defective item within such one-year period. Landlord has no obligation to repair or replace any item after such one-year period expires. Tenant must strictly comply with the Warranty Terms. THE WARRANTY TERMS PROVIDE TENANT WITH ITS SOLE AND EXCLUSIVE REMEDIES FOR INCOMPLETE OR DEFECTIVE WORKMANSHIP OR MATERIALS OR OTHER DEFECTS IN THE PREMISES IN LIEU OF ANY CONTRACT, WARRANTY OR OTHER RIGHTS, WHETHER EXPRESSED OR IMPLIED, THAT MIGHT OTHERWISE BE AVAILABLE TO TENANT UNDER APPLICABLE LAW. ALL OTHER WARRANTIES ARE EXPRESSLY DISCLAIMED.

1.1.11 Representatives.

"Designated Representative" means any person authorized to speak and act on behalf of Landlord or Tenant and upon whom the other will fully and unconditionally be entitled to rely for any and all purposes of this Section 1.1 until such designation is revoked or altered as hereinafter provided. Landlord hereby appoints Charles Turbak and Wayne Williams as its Designated Representatives. Tenant hereby appoints and _____ and _____ as its Designated Representatives. Either party may change its Designated Representatives by notice to the other, but no such change or revocation of the power of a Designated Representative will affect any approval or consent given by a party's Designated Representative prior to the other party receiving notice of revocation of such Designated Representative's appointment. Landlord or Tenant's approval or consent to any matter arising under this Section 1.1 will conclusively be evidenced by the signature of one of its Designated Representatives.



**EXHIBIT G
TO
LEASE AGREEMENT**

TENANT'S SPECIAL IMPROVEMENTS PROVISIONS

1.1 Tenant's Special Improvements

1.1.1 Tenant's Special Improvement Allowance.

Tenants Special Improvement Allowance is \$90,000.00

1.1.2 Tenant's Special Improvements.

All improvements to the Premises to be performed by Landlord under this Exhibit H, other than those improvements described in Section 1.1.1 above, are referred to in this Exhibit H collectively as "Tenant's Special Improvements". Landlord will competitively bid the Tenant's Special Improvements to Johnson TI and Poe Construction. Tenant shall have the right to select the General Contractor for the Tenant's Special Improvements from these competitive bids. Landlord will then cause the selected General Contractor to construct the Tenant's Special Improvements under a contract which may also include Landlord's Improvements. Landlord reserves the right to approve the selected Contractors construction schedule. Tenant's Improvements will be designed as described in this Exhibit Section 1.1. Tenant will pay all of General Contractor's direct and indirect costs of causing the design and installation of Tenant's Improvements, plus all sales and excise taxes.

Landlord will cause to be constructed, at Tenant's sole cost and expense, all Tenant's Special Improvements. Tenant's Special Improvements will be designed as described in this **Exhibit Section 1.1**. Tenant will pay all of Landlord's direct and indirect costs of causing the design and installation of Tenant's Special Improvements, plus ~~(a) 15% of the sum of all such direct and indirect costs for Landlord's overhead and profit, and (b)~~ all sales and excise taxes. Such costs of Landlord may include space planning costs, general conditions, construction document preparation costs, design and engineering costs, construction drawing costs, construction costs, builders risk and liability insurance costs directly related to the Tenant's Special Improvements and all costs Landlord incurs obtaining permits (including all consultants' fees and charges incurred in connection with any permits) for the Tenant's Special Improvements. Tenant's Special Improvements become the property of Landlord and a part of the Building immediately upon installation. Landlord may require Tenant to remove Tenant's Special Improvements at the expiration of the lease term at Tenants sole cost and expense.

1.1.3 Special Improvement Allowance.

Landlord will credit an amount, not to exceed the Special Improvement Allowance, against Tenant's obligation to pay for the design and installation of the Tenant's Special Improvements. Landlord is not obligated to pay or incur any amounts that exceed the Special Improvement Allowance. If the cost of Tenant's Special Improvements exceeds the Special Improvement Allowance, Tenant will pay the excess to Landlord in cash upon Substantial Completion of the Tenant's Special Improvements. Within 10 days after Landlord's demand therefor accompanied by reasonable documentation of such costs, Tenant will also pay, as Additional Rent, all of Landlord's costs (including lost Rent) resulting from Tenant Delays. If Landlord reasonably estimates that the cost of the Tenant's Special Improvements will exceed the Special Improvement Allowance, Landlord may require Tenant to deposit with Landlord, before Landlord commences construction of Tenant's Special Improvements, an amount equal to the amount by which the cost of the Tenant's Special Improvements is expected to exceed the Special Improvement Allowance.

1.1.4 Project Manager/Site Superintendent.

Landlord is the general contractor for all Tenant's Special Improvements. In connection with installing Tenant's Special Improvements, Landlord will utilize a project manager and site superintendent, the fees of which are payable by Tenant on an hourly basis as a direct cost of the Tenant's Special Improvements.

1.1.5 Space Plan.

Landlord will provide Tenant with a space plan for the Tenant's Special Improvements (a) adequate for Landlord to prepare working drawings for the Tenant's Special Improvements; (b) showing, in reasonable detail, the design and appearance of the finishing material Landlord will use in connection with installing Tenant's Special Improvements without additional requests for information; and (c) containing such other detail or description as may be necessary for Landlord to adequately define the scope of Tenant's Special

Improvements. Tenant will have 5 Business Days to review and approve or make recommendations for change in the space plan. Any disapproval or recommendation for change will specify both the requested change and the reason for the change with particularity. Landlord will promptly make revisions to the proposed space plan necessary to obtain Tenant's approval. Landlord and Tenant will indicate their agreement to the space plan by initialing 2 sets thereof.

1.1.6 Working Drawings and Specifications.

After the space plan has been established, Landlord will provide Tenant with the proposed Final Plans. When Landlord requests Tenant to specify details or layouts, Tenant will specify the same, within 2 Business Days after Landlord's request, so as not to delay completion of the Final Plans. Tenant will approve or disapprove the proposed Final Plans in writing within 5 Business Days after receiving the same. If Tenant disapproves the proposed Final Plans within the 5 Business Day period described in this section, Landlord will revise the proposed Final Plans and submit the same to Tenant for approval. Tenant will have the same approval rights and approval time period with respect to the revised proposed Final Plans as Tenant had with respect to the initial proposed Final Plans as described in this section. Landlord will seal the proposed Final Plans after Tenant approves the same and will submit the same for permits and construction bids. Landlord will promptly notify Tenant of any changes to the proposed Final Plans that are required by City. Tenant will approve or disapprove the required changes in writing within 2 Business Days after receiving notice of the same. Tenant will not withhold its approval except for reasonable cause and will not act in an arbitrary or capricious manner in connection with approving the Final Plans or any changes thereto required by City. If Tenant fails to notify Landlord of Tenant's approval or disapproval of the proposed Final Plans or City's required changes thereto within the 5 or 2 Business Day periods described in this section, or fails to specify any details or layouts within the 2 Business Day period described in this section, such failure is deemed to be a Tenant Delay and the Delivery Date is automatically extended day for day for each day of delay after the date by which Tenant was obligated to approve the Final Plans or specify the details or layouts. Tenant will approve the Final Plans in writing within 5 Business Days after receiving the same. Tenant will not order long lead-time items that will delay Substantial Completion of Tenant's Special Improvements. Landlord will exercise commercially reasonable efforts to notify Tenant if Tenant orders long lead time items that will delay Substantial Completion of Tenant's Special Improvements.

1.1.7 Changes to Final Plans.

Tenant will notify Landlord of any desired revisions to the Final Plans Tenant approved under Section 1.1.6. If Landlord approves the revisions, Landlord will revise the Final Plans accordingly and will notify Tenant of the additional cost of Tenant's Special Improvements and the anticipated delay in completing the Tenant's Special Improvements caused by such revisions. Tenant will approve or disapprove the increased cost and delay within 5 Business Days after Landlord notifies Tenant of the additional cost and delay. If Tenant fails to notify Landlord of its approval or disapproval of the additional cost and delay within the 5 Business Day period, Tenant is deemed to have disapproved the additional cost or delay. If Tenant disapproves the additional cost or delay, Tenant is deemed to have withdrawn its proposed revisions to the Final Plans. If incident to a requested revision to the Final Plans, Landlord stops work pending resolution of whether Tenant finally approves or disapproves a proposed revision, then whether or not Tenant ultimately approves or disapproves the proposed revision and its attendant additional cost or delay, any delay resulting from the work stoppage will constitute a Tenant Delay.

1.1.8 Substantial Completion.

Landlord will use commercially reasonable efforts to achieve Substantial Completion of Tenant's Special Improvements on or before the Delivery Date, subject to Tenant Delays and delays caused by Force Majeure.

1.1.9 Punch List.

Within 5 days after Substantial Completion, Landlord and Tenant will inspect the Premises and develop a Punch List. Landlord will complete (or repair, as the case may be) the items described on the Punch List with commercially reasonable diligence and speed, subject to delays caused by Tenant Delays and Force Majeure. If Tenant refuses to inspect the Premises with Landlord within the 5-day period, Tenant is deemed to have accepted the Premises as delivered, subject to Section 1.1.10.

1.1.10 Construction Warranty.

Landlord warrants Tenant's Special Improvements against defective workmanship and materials for a period of one year after Substantial Completion. Landlord's sole obligation under this warranty is to repair or replace, as necessary, any defective item caused by poor workmanship or materials if Tenant notifies Landlord of the defective item within such one-year period. Landlord has no obligation to repair or replace any item after such one-year period expires. Tenant must strictly comply with the Warranty Terms. THE WARRANTY TERMS PROVIDE TENANT WITH ITS SOLE AND EXCLUSIVE REMEDIES FOR INCOMPLETE OR DEFECTIVE WORKMANSHIP OR MATERIALS OR OTHER DEFECTS IN THE PREMISES IN LIEU OF ANY CONTRACT, WARRANTY OR OTHER RIGHTS, WHETHER EXPRESSED OR IMPLIED, THAT MIGHT OTHERWISE BE AVAILABLE TO TENANT UNDER APPLICABLE LAW. ALL OTHER WARRANTIES ARE EXPRESSLY DISCLAIMED.

1.1.11 Representatives.

"Designated Representative" means any person authorized to speak and act on behalf of Landlord or Tenant and upon whom the other will fully and unconditionally be entitled to rely for any and all purposes of this Section 1.1 until such designation is revoked or altered as hereinafter provided. Landlord hereby appoints Charles Turbak and Wayne Williams as its Designated Representatives. Tenant hereby appoints and _____ and _____ as its Designated Representatives. Either party may change its Designated Representatives by notice to the other, but no such change or revocation of the power of a Designated Representative will affect any approval or consent given by a party's Designated Representative prior to the other party receiving notice of revocation of such Designated Representative's appointment. Landlord or Tenant's approval or consent to any matter arising under this Section 1.1 will conclusively be evidenced by the signature of one of its Designated Representatives.

EXHIBIT H
TO
LEASE AGREEMENT

The following expenses shall be excluded from Operating Expenses for purposes of Section 7(b) of the Lease:

- 1) Costs incurred by Landlord for alterations or improvements which are considered capital improvements or replacements under generally accepted accounting principles, other than those required by applicable law or for health or safety reasons or in an effort to reduce Operating Expenses, in which latter events Operating Costs shall only include the annual amortized portions thereof;
- 2) Depreciation and amortization, except as noted in item 1 above;
- 3) Capital taxes, income taxes, corporate taxes, corporation capital taxes, profits taxes or other taxes personal to the Landlord, as opposed to attributable to the Property or Project;
- 4) Management fees in excess of five percent of gross rents;

**EXHIBIT I
TO
LEASE AGREEMENT
RULES AND REGULATIONS
MEGAWEST CORPORATE PARK**

Landlord is committed to keeping its facilities in a first class condition for the benefit of its tenants and ownership. To meet this objective, the following rules and regulations are established.

1. **Signage:** Tenant shall not place signage on the Premises or in the Common Areas that does not conform to the signage criteria specified in the Lease, City ordinance or rules reasonably established by Landlord. Tenant must submit all signage and signage modification requests in writing to Landlord and Landlord must approve such requests before installation. The following signage is prohibited outright: illuminated neon tube, "sandwich" type board signs and any non-standard window signage such as banners, cardboard, or handwritten.
2. **Outside Storage:** Tenant shall not keep or store any equipment, vehicle (personal or for business use), or inventory outside of the Leased Premises. This includes the Common Area directly adjacent to Tenant's space. Such items shall be stored within the Leased Premises, or at an off-site location. In limited circumstances and duration, Landlord may allow equipment or vehicles used in Tenant's day-to-day business to be stored in a Common Area location, which is designated by and approved in writing by Landlord.
3. **Parking:** The Following Rules govern the use of the Parking Facilities which serve the building and Project. Tenant will be bound by such rules and regulations and agree to cause its employees, subtenants assignees, contractors and suppliers to observe the same:
 - (a) Tenant will not permit or allow any vehicle that belong to or controlled by Tenant or Tenants employees, subtenants, customers, or invitees to be loaded unloaded or parked in areas other than those designated by Landlord for such activities. No vehicles are to be parked in the parking areas other than normally sized p[passenger automobiles, motorcycles, and pick-up trucks. No Extended term storage of vehicles with cabs is permitted.
 - (b) Vehicles must be parked entirely within painted lines of a single parking stall.
 - (c) All directional signs and arrow's must be observed.
 - (d) Parking is prohibited:
 - (i) In areas not striped for parking (except in tenants loading dock area);
 - (ii) In isles or on ramps;
 - (iii) Where no parking signs are posted;
 - (iv) In cross hatched areas
 - (e) Landlord reserves the right without cost or liability to Landlord, to tow any vehicle if such vehicle's auto theft alarm system remains engaged for an unreasonable period of time or frequency.
 - (f) Washing, waxing, cleaning or servicing of any vehicle in any area not specifically for such purpose is prohibited.
 - (g) Landlord may refuse to permit any person to park in the parking facilities who violates these rules and regulations with unreasonable frequency, and any violation of these rules shall subject the violators car to removal, at such car owners expense. Tenant agrees to use its best efforts to acquaint its employees, subtenants, assignees, contractors, suppliers, customers and invitees with these parking provisions, rules and regulations.
 - (h) Landlord reserves the right, without cost or liability to Landlord, to tow upon prior notice to responsible parties, any vehicle which are parked in violation of these rules and regulations.
4. **Pallets/Moving Materials:** Landlord shall monitor pallet accumulation outside the Leased Premises and shall require removal of such, as well as materials used in the distribution and transportation of product and materials related to Tenant's business. These materials may be present in and around the Leased Premises but will not be allowed to accumulate or be stored in the Common Areas outside the Leased Premises.

5. **Trash/Debris:** Tenant and its employees shall contain trash, debris or recyclable materials generated by Tenant, its employees and invitees in a Landlord approved type of receptacle. If Tenant consistently overloads such receptacles, Landlord has the right to remove any excess and dispose of the material at Tenant's cost, including dump fees. Tenant also agrees to purchase or provide any required locking device, acceptable to such vendor, to reduce the possibility of unauthorized dumping in Tenant's dumpster/trash receptacle. Tenant shall make every effort to keep such receptacle in the dumpster enclosure outside Tenant's space, or if such space does not have such an enclosure, then out of the way of common drives or other traffic areas.
6. **Outside Contractors:** As stated in the Lease, Tenant will not make any alterations to the Leased Premises without the prior written approval of Landlord, and will not employ the services of any contractor without the prior written approval of Landlord. Such services include modification that may affect building systems (fire sprinkler, electrical, plumbing etc.), and signage installation. Landlord may require Tenant to employ the services of one of Landlord's "preferred" contractors, a list of which can be provided. If Tenant wishes to qualify its contractor, Tenant must provide the following information:
 - (a) Contractor business license number, authorizing contractor to perform services in the State of Washington.
 - (b) Evidence of good financial standing in the industry.
 - (c) Insurance certificate meeting the current requirements of "Landlords Insurance Requirements for Contractors," which is provided to Tenant upon occupancy in the Premises (and by request).
7. **Domestic Water Supply/Use of Building Hose Bibbs:** Tenant shall not unreasonably consume building domestic water as would be considered excessive for normal day to day operations of a typical business, unless such use is expressly permitted in the Lease, or authorized by Landlord. This includes washing equipment or business and/or personal vehicles in the Common Areas, or any other activity that would increase water usage and affect Common Area costs of the Project. If Landlord determines that Tenant is using water in excess of normal consumption, Landlord reserves the right to impose a surcharge for such water usage, or require separate metering of the Leased Premises.
8. **Key System/Exterior Door:** Tenant shall not make any modifications to exterior door keyway. If new keying is required, Tenant shall make such request through Landlord and employ the services of Landlord's key hardware vendor. On request, Tenant shall provide Landlord with its Premises security alarm information. Landlord shall not be liable for costs associated with entering the Premises on an emergency basis or any charge for such for false alarm (from either the security monitoring company or any law enforcement entity).
9. **Emergency Information:** Tenant shall keep Landlord advised of current telephone number of Tenant's employees who should be contacted in an emergency (for example: fire, break-in, or vandalism). If Landlord determines it is necessary to respond to such emergency on Tenant's behalf, Tenant shall pay all costs incurred for services ordered by Landlord to secure or otherwise protect the Leased Premises and the contents thereof, including any premium charges for time spent by Landlord's employees in responding to such emergency.
10. **Rooftop Access:** Tenant, Tenant's employees, vendors, and invitees are prohibited from accessing the Project's rooftops. Any requests related to such access shall be directed to Landlord.
11. **Antennas, Satellite Dishes, Etc:** No such equipment shall be installed on the buildings without the prior written consent of Landlord.
12. **Electrical and Telephone Installation:** Landlord shall have sole power to direct electricians as to where and how telephone and other wires are to be introduced. No boring or cutting for wires or conduits is allowed without the consent of the Landlord. The location of telephones, call boxes and other office equipment affixed to the Premises shall be subject to the approval of the Landlord. Tenant may not make any changes to the existing wiring without the prior written approval of the Landlord. Telecommunications vendors must follow Landlord's Cabling Rules regarding insurance and permits.
13. **Size and Weight restrictions:** No items of unusual size or weight shall be used or placed in the Premises without Landlord's written permission. In no event shall any floor be overloaded as determined by Landlord's Structural Engineer.

In the event of any conflict between these Rules and Regulations and the Lease, the provisions of the Lease shall control.

Tab 3

Trial Exhibit # 260



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

Northwest Regional Office • 3199 160th Ave SE • Bellevue, WA 98008-5954 • 425-699-7000
711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341

June 12, 2012

Ms. Jessica K. Ferrell
Marten Law
1191 Second Avenue, Suite 2200
Seattle, Washington 98101

Re: VCP Application for the Following Facility:

- **Name:** Auburn Valley Industrial Capital Building
- **Address:** 1307 West Valley Highway North, Auburn, WA

Dear Ms. Ferrell:

The Department of Ecology (Ecology) received your Voluntary Cleanup Program (VCP) application for the facility located at 1307 West Valley Highway North in Auburn, WA. We applaud your initiative and appreciate your interest in the VCP. However, we have decided not to accept your application.

Reason

We did not accept your application because the release you reported does not constitute a hazardous waste site requiring remedial action under the Model Toxics Control Act (MTCA), Chapter 70.105D RCW. This opinion is based on an analysis of whether there has been a "release" into the "environment" of a "hazardous substance" as defined by MTCA, Chapter 70.105D RCW, and its implementing regulations, Chapter 173-340 WAC. The analysis is provided below.

This opinion is based on the information contained in the following documents:

1. Voluntary Cleanup Program Application (six attachments (A-F), Ecology received June 6, 2012
2. Voluntary Cleanup Agreement, Ecology received June 6, 2012

This opinion is void if any of the information contained in those documents is materially false or misleading.

Ms. Jessica K. Ferrell
June 12, 2012
Page 2

Ecology has determined that there has been no release into the environment of a hazardous substance at this facility.

Ecology requires any owner or operator of a facility to notify the agency if there has been a release of a hazardous substance to the environment which may be a threat to human health or the environment. Under the terms of MTCA, "release" means any intentional or unintentional entry of any hazardous substance into the environment. "Hazardous substance" means any dangerous or extremely hazardous waste as defined in RCW 70.105.010 (5) and (6), or any dangerous or extremely dangerous waste as designated by rule under chapter 70.105 RCW; any hazardous substance as defined in RCW 70.105.010(14) or any hazardous substance as defined by rule under chapter 70.105 RCW; any substance that is a hazardous substance under section 101(14) of the federal cleanup law, 42 U.S.C., Sec. 9601(14); petroleum or petroleum products; and any substance or category of substances, including solid waste decomposition products, determined by the director by rule to present a threat to human health or the environment if released into the environment. "Environment" means any plant, animal, natural resource, surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the state of Washington or under the jurisdiction of the state of Washington. See WAC 173-340-200.

In this case, metal dust was present inside the building but did not enter the "environment".

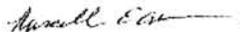
Documents provided to Ecology state that areas within the building contain dust composed of silver, selenium, copper, arsenic, cadmium, chromium, lead, cobalt, manganese, nickel and zinc.

From the documents provided, metal dust did not enter the "environment". Rather, the dust was contained within the building.

This opinion is regarding the administrative and technical requirements of MTCA, and is not an opinion regarding whether other local, state or federal requirements may apply to the facility. The state, Ecology, and its officers and employees are immune from all liability, and no cause of action of any nature may arise from any act or omission in providing this opinion. See RCW 70.105D.030(1)(i).

If you have any questions about our decision, please contact me at (425) 649-7038.

Sincerely,



Russell E. Olsen, MPA
VCP Unit Supervisor
Toxics Cleanup Program

Tab 4

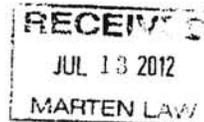
Trial Exhibit #285



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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July 11, 2012



Ms. Jessica K. Ferrell
Marten Law
1191 Second Avenue, Suite 2200
Seattle, WA 98101

Re: VCP Application for the following facility:

- **Name:** Auburn Valley Industrial Capital Building
- **Address:** 1307 W. Valley Highway N., Auburn, WA

Dear Ms. Ferrell:

The Department of Ecology (Ecology) received your Voluntary Cleanup Program (VCP) application for the facility located at 1307 W. Valley Highway N. in Auburn, WA. We applaud your initiative and appreciate your interest in the VCP. However, we have decided not to accept your application.

Reason

We did not accept your application because the data provided to Ecology is insufficient to show a release into the environment of a hazardous substance. This decision is based on an analysis of whether there has been a "release" into the "environment" of a "hazardous substance" as defined by MTCA, Chapter 70.105D RCW, and its implementing regulations, Chapter 173-340 WAC. The analysis is provided below. Ecology makes no determination as to whether there is a threatened release of a hazardous substance. The VCP is not designed for review of remedial actions related solely to a threatened release.

This decision is based on the information contained in the following documents:

1. Voluntary Cleanup Program Application Attachment G (a March 2012 report, including all appendices Ecology received June 27, 2012); and
2. Voluntary Cleanup Agreement, Ecology received June 27, 2012

Ecology requires any owner or operator of a facility to notify the agency if there has been a release of a hazardous substance to the environment which may be a threat to human health or the environment. Under the terms of MTCA, "release" means any intentional or unintentional entry of any hazardous substance into the environment. "Hazardous substance" means any

Ms. Jessica K. Ferrell
July 11, 2012
Page 2

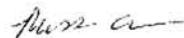
dangerous or extremely hazardous waste as defined in RCW 70.105.010 (5) and (6), or any dangerous or extremely dangerous waste as designated by rule under chapter 70.105 RCW; any hazardous substance as defined in RCW 70.105.010(14) or any hazardous substance as defined by rule under chapter 70.105 RCW; any substance that is a hazardous substance under section 101(14) of the federal cleanup law, 42 U.S.C., Sec. 9601(14); petroleum or petroleum products; and any substance or category of substances, including solid waste decomposition products, determined by the director by rule to present a threat to human health or the environment if released into the environment. "Environment" means any plant, animal, natural resource, surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the state of Washington or under the jurisdiction of the state of Washington. See WAC 173-340-200.

Documents provided to Ecology state that areas within the building contain dust composed of silver, selenium, copper, arsenic, cadmium, chromium, lead, cobalt, manganese, nickel and zinc (collectively "metals dust"). Ecology received no sampling data of surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air. If such data is provided, you may reapply to enter the VCP.

This decision is regarding whether Ecology will accept your application to enter the VCP. This decision is not an opinion regarding whether other local, state or federal requirements may apply to the facility. This decision does not determine whether any independent remedial action performed at the facility is the substantial equivalent of an Ecology-conducted or Ecology-supervised remedial action. Such determinations are made by a court. See RCW 70.105D.080. The state, Ecology, and its officers and employees are immune from all liability, and no cause of action of any nature may arise from any act or omission in providing this informal advice and assistance. See RCW 70.105D.030(1)(i).

If you have any questions about our decision, please contact me at 425-649-7038 or by email at rols461@ecy.wa.gov.

Sincerely,



Russell E. Olsen, MPA
VCP Unit Supervisor
Toxics Cleanup Program

cc: Ivy Anderson, Assistant Attorney General, Ecology Division

Unpublished Opinions Cited in Brief, GR 14.1(b)

Tab 5

United States District Court, D. Massachusetts.

Marvin M. CYKER and Jenny Cyker

v.

FOUR SEASONS HOTELS LIMITED; Gardens Plaza Associates; George B.H. Macomber Company; Boston Plaza Hotel Associates; Galbreath–Ruffin Corporation; Macomber–Boston Plaza Associates; George Macomber; Byron Gilchrest; Anthony Pangaro; Peter Freeman; Edward Flanagan; Isadore Sharp; Lizanne Galbreath; E/M Boston Associates; the Equitable Life Assurance Society of the United States; Meredian Properties, G.N.V.; Four Seasons of Massachusetts, Inc.; and Robin Brown, Peter G. Martin, Eugene J. Ribakoff, and Douglas A. Topous, individually and in their capacity as Trustees of Four Seasons Condominium Association.

Civ. A. No. 90–11929–Z.

Jan. 3, 1991.

Evan Slavitt, Fine & Ambrogne, Joel Lewin, Hinkley, Allen, Snyder & Comen, Boston, Mass., for plaintiffs.

George W. Mykulak, Louis J. Scerra, Jr., Posternak, Blankstein & Lund, Gary R. Greenberg, Goldstein & Manello, Boston, Mass., for defendants.

MEMORANDUM OF DECISION

ZOBEL, District Judge.

*1 Plaintiffs, Marvin and Jenny Cyker, bring this action against various developers, owners, operators and others associated with the Four Seasons Place Condominium, where the Cykers currently reside. Plaintiffs charge that their apartment was, for a period of several years, contaminated by chemically polluted air which came from an indoor pool adjacent thereto. In their complaint, they allege violations of the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. §§ 9601–9615 (Counts I, II and III); the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961–1968 (Count XV); and a host of state claims. Defendants have moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(6).

For purposes of defendants' motion, I accept as true all material allegations in the complaint. Williams v. City of Boston, 784 F.2d 430, 433 (1st Cir.1986). The Four Seasons Place Condominium, located in Boston, consists of both the Four Seasons Hotel and several expensive private residences. The building was completed in 1986. In that same year, the Cykers purchased a condominium in the building; they have since spent several hundred thousand dollars to complete and furnish their new home.

An indoor swimming pool, whirlpool, and health club (“the pool area”) shares a common wall with the Cykers' dining room on the eighth floor. Moreover, portions of the pool equipment rooms are

located immediately below the Cykers' apartment. Indeed, the apartment was originally designed to be a game room and part of the pool area. The air in the pool area contains several chemicals, including chlorine, chloroform, bromoform, and bromine, which are apparently used to maintain the pool water; these chemicals can be hazardous to human health. Within several months after moving in, the Cykers noticed the unpleasant odor of chemicals in their home, and soon began to develop serious symptoms of exposure to these substances, such as burning and watering eyes, headaches, coughing, and dizziness.

The Cykers (and other building residents) soon complained to the defendants, who told the Cykers via mail and telephone that the problem would be remedied. Instead, the defendants took steps to minimize the chemical problem only in the hotel rooms adjacent to the pool area, steps which actually made the Cykers' problem worse. While continuing to tell the Cykers that the problem had been corrected, defendants hired an outside consultant to prepare a report on the conditions threatening the Cykers. At first, this consultant advocated several relatively expensive remedial measures which would have solved the problem; however, under pressure from defendants these recommendations were dropped. Nor did defendants follow all the recommendations the consultant ultimately made in its final report issued in March, 1987. In fact, defendants allegedly did not take effective measures to correct the problem until sometime in 1989. In the interim, they continued to mislead plaintiffs and block any serious discussions which might have led to an earlier and complete solution.

*2 As a result of the conditions in their apartment, the Cykers were allegedly forced to move out of their apartment entirely for a period of some months, and were unable to use their dining room for several years. In addition, they were compelled to hire outside experts of their own and incurred considerable legal expenses in an effort to force the defendants to take remedial measures.

I. CERCLA Claim

One of the four elements necessary for a prima facie case in a private party lawsuit under CERCLA is that plaintiff must allege a "release or threatened release" of a hazardous substance from defendant's facility. 42 U.S.C. § 9607(a) (1988); Dedham Water Co. v. Cumberland Farms Dairy, 889 F.2d 1146, 1150 (1st Cir.1989).^{FN1} CERCLA elsewhere defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing *into the environment*." 42 U.S.C. § 9601(22) (1988) (emphasis added). Defendants contend that the complaint fails to make out a CERCLA claim because it contains no allegation that hazardous substances were ever released "into the environment."^{FN2} Plaintiffs urge that the release of chemicals from an indoor swimming pool is indeed a release "into the environment" under CERCLA.

As other courts have noted, it is lexically possible to treat "the 'environment' as everything pertaining to the planet Earth, so that the instant a container ... is opened [its contents are] released 'into the local portion of the environment.'" Covalt v. Carey Canada, Inc., 860 F.2d 1434, 1436-37 (7th Cir.1988). The statutory definition of "the environment"—"**ambient air** within the United States," 42

U.S.C. § 9601(8) (1988)—does little to limit the **meaning** of the phrase. But the broadest possible interpretation, such as that urged by plaintiffs, completely “erases [the phrase] as a limitation ... by ensuring that it is always satisfied.” Covalt, 860 F.2d at 1437. Nor is this generous interpretation consistent with the purposes of the statute. Even a cursory reading of CERCLA reveals that its aim is to create a national law and remedy in response to the crisis created by the unlawful and unregulated disposal of hazardous wastes. Electric Power Bd. v. Westinghouse, 716 F.Supp. 1069, 1081 (E.D.Tenn.1988). CERCLA was not **meant** to provide a civil remedy whenever hazardous substances are found in a building's interior. Indeed, the Environmental Protection Agency, charged with the implementation of CERCLA, has defined “ambient air” as “air that is not completely enclosed in a building or structure A release into the air of a building or structure that does not reach the ambient air is not a reportable event under CERCLA.” 50 Fed.Reg. 13,462–63 (1985), quoted in Wagar v. BASF Corp., No. 88–CV–90 (N.D.N.Y. Aug. 24, 1990); accord Covalt, 860 F.2d at 1439; Prudential Ins. Co. of Am. v. United States Gypsum, 711 F.Supp. 1244, 1255 n. 3 (D.N.J.1989). To define “the environment” so as to encompass the interior of a hotel/condominium complex would stretch the statute far beyond the particular ills that Congress sought to remedy. I therefore hold that plaintiffs have failed to state a claim under CERCLA. ^{FN3}

II. RICO Claim

*3 Count XV of the complaint purports to state a claim under the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961–1968. RICO imposes civil liability upon those who conduct an enterprise through a “pattern of racketeering activity.” 18 U.S.C. § 1962 (1988); H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 109 S.Ct. 2893, 2897 (1989). To establish such a pattern, plaintiff must show at least two predicate acts of racketeering activity; moreover, these acts must be related, and they must amount to or pose a threat of continued criminal activity. McEvoy Travel Bureau, Inc. v. Heritage Travel, Inc., 904 F.2d 786, 788 (1st Cir.1990) (quoting H.J., 109 S.Ct. at 2900). In their complaint, plaintiffs allege that defendants engaged in several instances of indictable mail and wire fraud, one of the statutorily defined predicate acts. 18 U.S.C. § 1961 (1988). Defendants move to dismiss this claim on the grounds that these acts, even taken as alleged, do not constitute a “pattern of racketeering” as required by RICO.

The Supreme Court in H.J. described “continuity” as “both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with the threat of repetition.” H.J., 109 S.Ct. at 2902. Here, plaintiffs do not allege that there remains a threat of future criminal activity; rather, this is a case of “closed-ended” continuity. “A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct.” *Id.* The acts complained of here took place over a period of about two years, from March, 1987 to March, 1989. While this covers more than a few months, the sheer duration of activity is not dispositive of the question of continuity. Sporadic or

isolated activity, however dressed up in a complaint, is not the long-term criminal conduct addressed by the statute. H.J., 109 S.Ct. at 2899–902. Here, defendants and others, via mail and telephone, allegedly failed to reveal all they knew about the hazardous conditions existing at the Cykers' apartment. Even assuming that this is a "scheme to defraud" within the meaning of the mail and wire fraud statutes, the bounded nature of this activity resists classification as a RICO wrong. There is no indication that these offenses are part of the defendants' regular way of doing business. Indeed, plaintiffs suggest that other residents of the hotel/condominium complex were treated more generously. Moreover, all the alleged misrepresentations were geared toward one result, namely, the delay of any response by the Cykers to the dangerous conditions at their apartment; this hardly represents the sort of ongoing, entrepreneurial criminal activity which Congress sought to prevent. It is difficult to see how such mischief might be repeated, or how it might contribute to the success of any ongoing enterprise.

*4 Once again, plaintiffs have stretched a federal statute beyond its intended scope. Because plaintiffs have failed to allege continuous criminal activity as contemplated by RICO, defendants' motion to dismiss plaintiffs' RICO claim, Count XV, is allowed.

State Claims

All that remains are plaintiffs' pendent state claims. In a case that combines federal and pendent state claims, and where federal jurisdiction is premised upon the presence of a federal question, the pendent claims may, in the Court's discretion, be dismissed, if the federal claims are no longer viable. United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725–27, 86 S.Ct. 1130, 1138–39 (1966). Because this case is, in any event, but an afterthought to two substantially identical complaints filed and still pending in the state court, I exercise that discretion to dismiss the state claims.

Conclusion

For the foregoing reasons, defendants' Motion to Dismiss is allowed with respect to all claims.

JUDGMENT

In accordance with the Memorandum of Decision, dated January 3, 1991, defendants' Motion to Dismiss having been allowed, it is

ORDERED that judgment be and it is hereby entered for defendants.

FN1. The other elements of a CERCLA claim are: (1) the defendant must fall within one of four categories of covered persons; (2) the release or threatened release must cause the incurrence of response costs by the plaintiff; and (3) the plaintiff's costs must be necessary costs of response, consistent with the national contingency plan. Dedham Water, 889 F.2d at 1150.

FN2. Defendants also argue that the indoor pool area is not a "facility" within the meaning of

CERCLA, and that, in any event, no liability attaches to these defendants because they are not “owners or operators” under that statute. Because I hold that the alleged emissions from an indoor swimming pool do not constitute a release into the environment under **CERCLA**, I do not reach these alternative arguments.

FN3. Plaintiffs suggest that, even under this narrower interpretation of “into the environment,” they have still made out a **CERCLA** claim if they allege that toxic fumes have escaped (or threaten to escape) out the hotel window. But this argument once again stretches **CERCLA** beyond its intended scope. Moreover, even if I were to accept this argument, there would remain a question as to whether an injury caused by substances not yet in the environment, but merely on their way out the window, are nevertheless cognizable under CERCLA. See *Wagar*, No. 88–CV–90 (N.D.N.Y. August 24, 1990).

D.Mass.,1991.

Cyker v. Four Seasons Hotels Ltd.

Not Reported in F.Supp., 1991 WL 1401 (D.Mass.), 32 ERC 1681, 59 USLW 2463, RICO Bus.Disp.Guide 7660

Tab 6

Slip Copy, 2011 WL 4502139 (W.D. Wash.)

(Cite as: 2011 WL 4502139 (W.D. Wash.))

United States District Court, N.D. Illinois, Eastern Division.
DIVERSE REAL ESTATE HOLDINGS LIMITED PARTNERSHIP, Plaintiff,

v.

INTERNATIONAL MINERAL AND CHEMICAL CORPORATION, a New York corporation, d/b/a
IMCERA, Defendant.

No. 91 C 8090.

Mar. 13, 1995.

MEMORANDUM OPINION AND ORDER

LINDBERG, District Judge.

INTRODUCTION

*1 This case involves a filled-in pond ("Pond") on property owned by plaintiff Diverse Real Estate Holdings Limited Partnership ("DLP"). The Pond was dug sometime between 1949 and 1951 as part of the construction of the Edens Expressway. Sometime after its excavation, but prior to 1961, the Pond was filled with two distinct layers of fill material. The lower layer is an amalgam of construction debris, bricks, boards, bottles, slag, and other assorted materials. The upper layer, which constitutes the top two to nine feet of fill, is a clay, soil-like material. Photographs of the material demonstrate, and all the witnesses agree, that the two types of fill are visually distinct. DLP has sued IMCERA pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675(c) (1988), claiming that IMCERA is responsible for the presence of the bottom layer of fill material in the Pond.

DLP asserts that only the lower layer of fill poses an environmental threat. There is no dispute that DLP could not build on the filled-in Pond with the lower layer of fill present because of foundation difficulties. This is true regardless of whether the lower fill posed any

environmental hazard.

IMCERA admits that after it bought the portion of the property containing the Pond, it caused the upper layer of fill to be placed in the Pond. IMCERA contends that the fill it specified, and the fill observed by the sole eyewitness to testify, was only consistent with the upper layer of fill, and that the lower layer of fill already was in the Pond when IMCERA bought that portion of the Property in July, 1958. DLP, on the other hand, argues that the Court should draw an inference that, despite IMCERA's specification and the eyewitness testimony, the lower layer of fill was surreptitiously placed in the Pond by IMCERA's contractor.

The parties also disagree over the magnitude of the threat, if any, posed by the lower level of fill and the degree to which DLP has complied with applicable regulatory standards limiting any recovery to only those expenditures which are necessary for environmental reasons. All these elements are required to maintain a cause of action under CERCLA, and DLP bears the burden of proof as to each element. The findings of fact and conclusions of law set forth below address each issue.

FINDINGS OF FACT

DLP currently owns a parcel of property located just west of the intersection of the Edens Expressway and the Chicago & Northwestern Railroad, between Golf Road and Old Orchard Road in Skokie, Illinois (the "Property"), on which the Pond is located. (Uncont. F. ¶ 5.) IMCERA is one entity in the chain of title of the Property prior to DLP. (Uncont. F. ¶ 6.)

Between 1949 and 1951, a large pit was dug on the southern portion of the Property as part of the construction of the Edens. The pit probably was a "borrow pit" dug to obtain soil used in building a nearby overpass; the pit ultimately filled with water and became the Pond. (Uncont. F. ¶ 8.) Aerial photographs taken in 1951, 1955, and 1958 show the Pond, but with some changes to its outline over time. (Exs. P4, P6, P8, and P10.) The aerial photographs do not provide information about what, if anything, is under the surface of the Pond at any given time.

*2 The aerial photographs of the Property taken between 1949 and 1961 also show that a similar borrow pit was dug to the east of the Edens and that that pit too was filled before 1958.

(Exs. P2, P4, P6, P8, and P10.) In addition, the aerial photos show that a riding stable was at one time present on the Property to the north of the Pond. (Exs. P2, P4, and P6.) The photographs also show a building allegedly owned and operated by an entity called Taylor Forge immediately adjacent to the Pond. (Exs. P4, P6, P8, and P10.) In the earlier photographs, two small buildings were present just east of Taylor Forge in the “foot-print” of the Pond. These buildings are not present in photographs after the Pond appears. (Exs. P2, P4.)

IMCERA purchased the Property in various parcels between 1951 and 1971. In the mid-1950s, IMCERA decided to move its corporate headquarters to the Property. (Tr. 275–76.) IMCERA placed Callix Miller, an IMCERA engineer, in charge of the corporate headquarters relocation project. (Tr. 276–77.) Construction on the headquarters began in approximately 1957. IMCERA did not then own the portion of the Property containing the Pond. Two aerial photographs of the Property taken on March 26, 1958, show that construction of IMCERA's headquarters on the northern part of the Property was nearly complete. (Exs. P8, P10.)

In June 1958, a young man drowned in the Pond. (Uncont. F. ¶ 11; Ex. P25.) In July 1958, IMCERA acquired the parcel containing the Pond. (Ucont. F. ¶ 10.) This parcel, adjacent to the Taylor Forge, was located south of IMCERA's headquarters. (Tr. 283–84.) Mr. Miller testified that IMCERA's motives for the purchase included the possibility that IMCERA would expand in the future. (Tr. 284.) After its purchase, IMCERA decided to fill the Pond to prevent further accidents. (Tr. 286–87.) IMCERA placed Mr. Miller in charge of the project. (Tr. 287.) The Court finds Mr. Miller's testimony to be credible and entitled to considerable weight. Mr. Miller was the only eyewitness to testify about actual observations of the filling of the Pond.

At trial, Mr. Miller testified that he specified “clean, non-deleterious material capable of compaction” be placed in the Pond. (Tr. 288.) He picked this standard because he wanted to ensure that IMCERA would not have any structural problems if it later chose to build on the area of the Pond. Mr. Miller testified that he did not investigate what fill already might have been placed in the Pond at the time IMCERA purchased the Pond parcel. (Tr. 285.) He also stated that IMCERA would not have put any material in the Pond prior to its purchase. (Tr. 286.)

Mr. Miller testified that his specification was the basis for bids received by IMCERA. (Tr.

287.) Once IMCERA selected a contractor and the work began, Mr. Miller visited the Pond on three occasions to observe filling operations. (Tr. 291.) Mr. Miller observed the contractor using the "mud wave" technique to fill the Pond. (Tr. 289.) Dump trucks carrying fill material would drive up to the Pond and dump a load of fill on the ground where it was clearly visible. Next, front-end loaders would push the fill material into the Pond on a uniform wave and compact the fill material. (Tr. 290.) Mr. Miller's recollection was that the work began at about 7:00 a.m., stopped by 4:45 p.m., and that the job took less than two weeks. (Tr. 293–94.) Mr. Miller's visits to the Pond were all unannounced and were conducted as spot checks of the contractor's work. (Tr. 293.)

***3** Mr. Miller testified that he could see the contractor working at the Pond even when he was not actually visiting the Pond. (Tr. 300.) His route to work took him by the Pond each day and as he passed he never saw more than six trucks at the Pond at any one time nor did he see any trucks lined up on Golf Avenue. (Tr. 292–93.)

At trial, Mr. Miller was shown photographs of the fill in the Pond. (Ex. D49B.) Mr. Miller testified that the photograph of the upper layer of sandy brown fill looked like the material he saw dumped on the ground and being placed in the Pond. (Tr. 294.)

At trial, Mr. Miller also examined a photograph of the lower layer of fill, showing a much darker material including timbers, bricks and assorted debris. Mr. Miller testified that this material was not what he saw being placed in the Pond by IMCERA's contractor in 1958, nor was the material consistent with his specification. (Tr. 294–95.) According to Mr. Miller, as well as DLP's witnesses, the lower layer of fill, which contains wood and other organic materials, would not be suitable for compaction because the organic material in the lower layer of fill would decay, cause voids, and ultimately subside. (Exs. D2A, D2B; Tr. 294–95.) Mr. Miller would not have accepted the lower fill and would have known immediately upon seeing it that it did not meet his specification. (Tr. 295–96.)

Mr. Miller also testified that the fill material in the Pond would not have naturally formed two distinct layers, *i.e.*, stratified, if the two layers had been mixed when they were dumped into the Pond, or if the contractor had alternated loads of acceptable and unacceptable fill. (Tr.

309–10.)

IMCERA introduced expert testimony regarding the significance of features in the March, 1958 photographs, before IMCERA purchased the Pond, and also regarding the mechanics of placing all the fill, rather than just the upper layer, in the time Mr. Miller specified. Martin Hamper, IMCERA's expert, testified that the dark areas in the northeast corner of the Pond in the March, 1958 photos, are exposed lower fill, based on rainfall data. (Exs. P8, P10; Tr. 364, 367–70.) If the lower layer of fill was not in the Pond by March, 1958, then, based on the boring logs, there would be nothing to expose unless the water level in the Pond dropped by over 16 feet. Because there was only a two month rainfall deficiency, the water level likely only fell a few feet, exposing the already in place lower fill. (Tr. 367–70.)

Mr. Hamper also testified that in order for both layers of fill to be placed in the Pond at the same time, as DLP argues, the contractor would have needed to dump at least one load of fill material every two minutes to complete the job within the two-week time frame that Mr. Miller described. (Tr. 370.)

DLP contends that the court should draw an inference that IMCERA's contractor brought unacceptable fill material to the Pond when Mr. Miller was not present. In its cross-examination of Mr. Miller, DLP sought to establish that the contractor had this opportunity. (Tr. 306–07.) However, the opportunity, without any evidence of action, is not enough to contradict Mr. Miller's testimony. The photographs are susceptible to differing interpretations, and the conflicting testimony regarding them does not cast doubt on Mr. Miller's testimony about what he ordered and what he saw.

DLP's Involvement with the Property

*4 An aerial photograph taken on November 7, 1961, shows the Pond completely filled. (Ex. P12.) In 1971, IMCERA sold the Property, including the Pond, to Brunswick Corporation. (Uncont. F. ¶ 14.) In 1982, LaSalle Partners created LP Equity Associate Limited Partners, now known as DLP, to acquire, hold, and sell real estate. (Tr. 28–29.) LaSalle Partners currently provides environmental advice and other services to DLP. (Tr. 29.) In 1984, DLP purchased the property from Brunswick Corporation. DLP did not investigate environmental conditions at the

Property prior to purchase. (Uncont. F. ¶ 22.) DLP intended to develop the Pond parcel through construction of a hotel or other commercial structure. (Tr. 57.)

Beginning in 1986, DLP engaged a series of consultants to advise it regarding conditions at the Pond. In 1986, STS Consultants, Ltd. ("STS") told DLP that during its investigation STS had encountered miscellaneous fill covered with a silty clay layer in the area of the Pond. (Ex. D11.) STS advised DLP that the lower layer of fill was not suitable for foundations and recommended that the lower layer be removed. (Ex. D11; Tr. 348.)

DLP subsequently engaged Roy F. Weston ("Weston") to conduct an environmental investigation. In December, 1988, Weston issued a report concluding that neither layer of fill material posed a threat to human health and the environment, and that there had been no migration from the fill material to the surrounding clay layers. (Ex. D16.)

In 1989, DLP hired Eldredge Engineering to further characterize the site and develop a plan to address the filled in Pond. Plaintiff's expert, James McGuigan, was Eldredge's project manager. (Tr. 158.) Eldredge's investigation, like the previous inquiries, concluded that there were two layers of fill in the Pond and that only the lower layer contained significant hazardous substances. (Uncont. F. ¶ 15; Ex. D34.) Tests of the fill water within the former Pond area detected arsenic, barium, cadmium, copper, lead, nickel, and zinc. (Uncont. F. ¶ 16.) These materials are hazardous substances within the meaning of CERCLA.^{FN1} In addition to examining the material in the Pond, Eldredge also drilled wells to sample the groundwater outside the Pond. (Tr. 161.) The groundwater testing indicated that there is no evidence of a release of hazardous substances from the Pond to the groundwater outside the Pond. (Ex. D34.)

Both DLP's expert, Mr. McGuigan, and IMCERA's expert, Mr. Hamper, testified regarding the migration of hazardous substances from the lower fill to the surrounding groundwater. It was Mr. McGuigan's opinion that although the material surrounding the former Pond has very low permeability, the upper layer of fill that covers the Pond is very permeable. Mr. McGuigan testified that hazardous substances could flow through the permeable upper layer into the surrounding soil, although there is no evidence that this has yet occurred. (Tr. 204–05.) Mr. Hamper opined that the former Pond is like a "bathtub" with partial sides. (Tr. 382.) The

material on the bottom and sides prevent the water in the Pond from migrating into its surroundings. (Tr. 379–82.) However, water can “overflow” the bathtub into the sandy upper layer and then into the surrounding groundwater. (Tr. 382.)

*5 Mr. Hamper testified that although such an overflow is a possibility, tests of the monitoring wells around the Pond indicate that there has been no migration of hazardous substances to the groundwater outside the Pond during the more than thirty years since Mr. Miller witnessed the placement of the upper layer. (Tr. 383.) Mr. Hamper also testified that such a migration is unlikely in the future because the hazardous substances in the Pond, metals, are not very mobile and are present in relatively low concentrations, thus reducing their availability for migration. (Tr. 379, 403.)

In addition to documenting its investigation, Eldredge's reports discussed the plan for addressing the fill in the Pond. In the initial reports, only one option was considered—the excavation and off-site removal of the lower fill. (Exs. D30, D34.) The testimony established that the lower layer of fill would not be acceptable for DLP's purposes regardless of environmental concerns because DLP could not build over it. (Tr. 102–04.)

In late 1990, DLP selected a contractor, SET Environmental (“SET”). SET was to dispose of the lower level of fill off-site and reuse the upper layer on-site. (Ex. D35.) No other option was considered by SET or DLP. (Tr. 108–09.) In January 1991, DLP submitted this plan to the Illinois Environmental Protection Agency (“IEPA”). (Ex. D44.) The IEPA approved the plan as a voluntary clean-up in April 1991. (Ex. P26.) In November 1991, seven months after the voluntary plan had been approved by IEPA, Eldredge submitted another final report to DLP in which Eldredge discussed options for the lower fill other than excavation and off-site disposal. (Ex. D49.) Although Eldredge discussed other options, it still concluded that the option already approved by IEPA was the best one. (Ex. D49.)

CONCLUSIONS OF LAW AND FINDINGS OF FACT

In order to recover response costs under CERCLA, DLP must establish four elements. Those elements are: (1) the Pond in question is a facility, as defined by CERCLA; (2) there has been a release or threatened release of a hazardous substance from the facility; (3) the defendant falls

into one of the categories of covered persons; and (4) the release or threatened release has caused the plaintiff to incur response costs that are necessary and consistent with the national contingency plan. C. Greene Equip. Corp. v. Electron Corp., 697 F.Supp. 983, 986 (N.D.Ill.1988); United States v. Johnson, No. 88 C 20185, 1990 WL 304258 (N.D.Ill. May 1, 1990).

The parties stipulated that the Pond is a “facility” within the meaning of § 101(a) of CERCLA, 42 U.S.C. § 9601(a),^{FN2} and that the lower portion of the fill material in the Pond contains “hazardous substances” within the meaning of § 101(14) of CERCLA, 42 U.S.C. § 9601(14). (Uncont. F. ¶ 15, ¶ 17.) It also is undisputed that DLP has spent money investigating the fill material in the pond. (Uncont. F. ¶ 18.)

The parties disagree, however, with respect to whether IMCERA placed the lower layer of fill material in the Pond, whether there has been a threatened release of hazardous substances from the Pond, and whether the threatened release has caused the plaintiff to incur response costs that are necessary and consistent with the NCP. In addition, both parties say that even if they are liable, the equities demand awarding the lion's share of liability to the other. The Court will address each of these points in turn.

Owner Liability

*6 At trial, DLP asserted that IMCERA was a “covered person” under section 107(a)(2) of CERCLA. According to DLP, IMCERA caused both layers of fill to be placed in the Pond after it purchased the Pond parcel in July, 1958. DLP bears the burden of proof with respect to this contention. Dana Corp. v. American Standard, Inc., No. 3:92-CV-581RM, 1994 WL 608562 (N.D.Ind. Oct. 24, 1994). DLP's sole evidence is a series of aerial photographs of the Property. These photographs show that an outline of the Pond was present in April, 1955; that the outline was still present in March, 1958, albeit changed; and that the outline disappeared by 1960. (Exs. P6, P8, P10, and P29.) The Court finds that the foregoing photographic evidence is insufficient to prove by a preponderance of the evidence that IMCERA owned the Pond when the bottom layer of fill was placed in the Pond.

As a preliminary matter, the court finds that there are two layers of fill in the Pond as have been previously discussed. Callix Miller testified regarding his specification and also that the

material he witnessed being placed in the Pond was only consistent with the upper fill. In response to Mr. Miller's essentially uncontroverted testimony, DLP argued that the court should draw an inference that IMCERA's contractor somehow must have "slipped" in the bottom layer of material. (Tr. 423.) DLP introduced no factual testimony in support of this assertion, nor did DLP's expert offer an opinion regarding who placed the lower fill in the Pond.

DLP's inference is nothing more than one possible explanation for how the lower layer of fill came to be placed in the Pond, and therefore, standing alone, is insufficient as a matter of law to meet its burden of proof. Aside from Mr. Miller's contrary eyewitness testimony, DLP has offered no evidence from participants in the 1958 events. The photographs and the sequence of events lend themselves equally well to other possibilities such as the lower layer of fill being construction debris from the Edens placed in the Pond when it was excavated.^{FN3}

Mr. Miller's visits to the Pond were unannounced and the contractor would not have known when it could safely ignore Mr. Miller's specification. In addition, the stratification of the fill is consistent with IMCERA placing only the upper layer. (Exs. D2A, D2B.) The materials would not have stratified so precisely if they were mixed when placed by IMCERA's contractor. Other factors which militate against the inference DLP proposes include the mechanics of the filling process. Mr. Hamper's calculations show that in order for both the upper and lower fill to have been placed in the Pond within a two-week period, loads would have had to arrive every two minutes. This constant filling activity would have resulted in a veritable "conga line" of dump trucks stretching down Long Avenue and onto Golf Road. But Mr. Miller testified that he never saw trucks lined up in this way or more than six trucks at the Pond on any one occasion.

***7** Finally, considerable attention was focused on the 1958 aerial photos, which show a change in the outline of the Pond. (Exs. P8, P9, P10, and P11.) Witnesses for both parties testified that there were dark areas in the northeast corner of the Pond in the March, 1958, photographs. The conflicting evidence regarding rainfall data and the significance of the dark areas in the Pond does not support DLP's inference that all the fill was placed by IMCERA.

Based on the evidence adduced at trial, it is more likely that the lower fill was in the Pond prior to IMCERA's placing the upper fill. DLP has not carried its burden of establishing that it is more likely than not that IMCERA caused the lower fill to be placed in the Pond.

Releases of Hazardous Substances

Even if DLP could carry its burden of proof and establish that IMCERA owned the Pond when the lower layer of fill was deposited there, DLP must also prove that there has been a release or threat of release of a hazardous substance from the Pond into the surrounding environment in order to prevail. *See, e.g., Powell Duffryn Terminals, Inc. v. CJR Processing, Inc.*, 808 F.Supp. 652 (N.D.Ill.1992); 42 U.S.C. § 9607(a) (1988). Because DLP conceded that there is no evidence of a release of hazardous substances from the Pond, the evidence adduced at trial focused on whether there is any evidence of a “threatened release” of hazardous substances from the Pond to outside the Pond.

It was the opinion of DLP's expert, Mr. McGuigan, that there is a threat that hazardous substances will escape the Pond area and be released into the surrounding area. However, in order to constitute a threat of release, the threat must be real or “concrete.” *Powell Duffryn Terminals*, 808 F.Supp. at 656. The threat can not be so speculative or theoretical that the postulated threat is unlikely to ever come to fruition.

In the instant case, it is undisputed that the upper sandy layer was placed in the Pond in the summer of 1958, approximately thirty-six years ago. Since then, there has been unimpeded groundwater flow through the upper layer, yet the uncontroverted facts demonstrate that there has been no detectable release of hazardous substances from the Pond into the surrounding groundwater.

Mr. Hamper's testimony on this issue was persuasive and entitled to considerable weight. Mr. Hamper opined that there is no concrete threat of release from the Pond. He testified that the hazardous substances in the lower layer of fill are present in relatively low concentrations, and thus, their availability for transport is greatly reduced. He also testified that the type of hazardous substances in the lower layer, metals, are less mobile than other types of hazardous substances and do not as readily migrate. None of these opinions were contradicted by DLP's expert, who DLP did not recall to testify in rebuttal to Mr. Hamper's testimony.

Accordingly, based on the relatively low concentrations of hazardous substances in the

Pond, their lack of mobility, and because there is no evidence of a release of hazardous substances into the surrounding groundwater over the last thirty-six years, the Court concludes that the plaintiff has failed to prove by a preponderance of the evidence that there is a realistic, concrete threat of a release of hazardous substances into the environment.

Consistency with the NCP

*8 To recover under CERCLA, DLP must also establish that its investigation and remedy selection complied with the requirements of the National Contingency Plan ("NCP"), a set of regulations designed to ensure consistency in environmental remediation. See 42 U.S.C. § 9601 et seq.; 40 C.F.R. Part 300. Under the NCP, a party must investigate a potential problem, must consider different options, must conduct a risk assessment and must involve the public.

The 1985 NCP required strict compliance with its standards and procedures. See Channel Master Satellite Sys., Inc. v. JFD Electronics Corp., 748 F.Supp. 373, 383 (E.D.N.C.1990). Failure to comply with these standards bars any recovery. See Amland Properties Corp. v. Aluminum Corp., 711 F.Supp. 784 (D.N.J.1989). The NCP was subsequently amended in 1990 to require substantial, rather than strict, compliance. G.J. Leasing Co., Inc. v. Union Elec. Co., 854 F.Supp. 539, 563-64 (S.D.Ill.1994).

Under either standard, DLP would be hard pressed to establish that it had met its burden of proof. As DLP's own witnesses admitted, DLP's reaction upon being informed of the fill in the former Pond area was to arrange to quickly excavate the fill to facilitate DLP's planned development. As noted in the STS report, the lower portion of the fill was not capable of compaction and thus, was not suitable for the planned hotel foundation. DLP neither considered the requirements of the NCP nor endeavored to comply with those requirements in deciding to remove the fill. See G.J. Leasing, 854 F.Supp. at 562 (finding that "[t]o the extent that actions were taken for purposes other than responding to an actual and real public health threat, there is no CERCLA liability"). Indeed, David Clark, a DLP witness, stated it was not until 1991 that DLP even thought about ensuring that its costs complied with the NCP. (Tr. 38.) By 1991, DLP already had selected its excavation remedy. In 1990, Eldredge had completed its investigation of the Pond and provided DLP with a final report.

Based on the foregoing, the Court concludes that DLP has failed to show by a preponderance of the evidence that it complied with even the most basic elements of the NCP. DLP made its determination to excavate and dispose of the lower portion of fill before evaluating any other option, before seeking public comment or holding a public meeting, and without assessing the risk, if any, posed by the hazardous substances in the Pond.

Equitable Allocation

Both IMCERA and DLP argued that, if liability were to be apportioned, the other party should be allocated the lion's share of responsibility. CERCLA provides for an equitable allocation between liable parties. Town of Munster, IN v. Sherwin-Williams Co., Inc., 27 F.3d 1268, 1272 n. 2 (7th Cir.1994); United States v. A & F Materials Co., Inc., 578 F.Supp. 1249, 1256 (S.D.Ill.1984). In this case, DLP as a current owner is liable under CERCLA. Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co., 14 F.3d 321, 325 (7th Cir.1994); 42 U.S.C. § 9607(a)(1). Because the Court has concluded that DLP has not carried its burden in establishing that IMCERA is similarly liable, there need not be such an allocation.

*9 Even had DLP carried its burden, however, evidence adduced at trial suggests that DLP itself would be allocated the majority of liability. For example, DLP did not investigate the Property prior to purchase, although CERCLA had already been enacted. DLP easily could have avoided this problem or negotiated a lower price for the Property based on a minimum of investigation. In addition, DLP would remove the lower fill regardless of environmental condition to accommodate DLP's development plans. Moreover, although DLP has argued that the fill poses a threat, DLP has not taken any action in response to this purported problem.

The Court has wide latitude in considering various equitable factors. *See Town of Munster*, 27 F.2d at 1271 n. 2; *see also United States v. Stringfellow*, 661 F.Supp. 1053, 1060 (C.D.Cal.1987). If liability had had to be divided, DLP would have been allocated the bulk of the responsibility.

CONCLUSION

In view of the findings of fact and conclusions of law set out herein, the Court finds that the plaintiff has failed to prove by a preponderance of the evidence that IMCERA is an owner under CERCLA, that a threatened release from the Pond is likely to occur, or that plaintiff's response

costs were consistent with the NCP. Based on the foregoing, the Court hereby finds in favor of the defendant on plaintiff's CERCLA claim and declaratory judgment claim. Judgment will be entered accordingly.

FN1. Hazardous substances are distinct from hazardous wastes. Hazardous substances are present throughout the environment. Hazardous wastes are defined in regulations promulgated pursuant to Resource Conservation and Recovery Act ("RCRA") as either specific listed wastes or wastes that contain hazardous substances at certain concentrations. 42 U.S.C. § 6901 et seq. Based on the testimony at trial, the materials in the Pond are not hazardous wastes because the hazardous substances contained in the lower layer of fill material are below the concentrations for hazardous waste.

FN2. A CERCLA "facility" is a site or area where a hazardous substance is placed or has come to be located. 42 U.S.C § 9601(9)(B).

FN3. Other possible explanations as to the origin of the lower layer of fill include cinders from the operations of Taylor Forge. It is undisputed that such cinders are buried on other parts of the Property. (Uncont. F. ¶ 23.) Another possible explanation is that the lower layer of fill is comprised of the small buildings to the east of Taylor Forge, which were located in the "footprint" of the Pond prior to it being excavated. DLP could have examined the materials in the lower layer of fill to glean more information about the origins of that material, but chose not to do so. DLP cannot meet its burden of proof by relying upon one possible explanation out of many. To prevail, DLP must show, by a preponderance of the evidence, that IMCERA caused the lower fill to be placed in the Pond.

N.D.Ill.,1995.

Diverse Real Estate Holdings Ltd. Partnership v. International Mineral and Chemical Corp.
Not Reported in F.Supp., 1995 WL 110138 (N.D.Ill.), 40 ERC 2102

END OF DOCUMENT

Tab 7

Not Reported in F.Supp., 1988 WL 102641 (E.D.Pa.)

(Cite as: 1988 WL 102641 (E.D.Pa.))

Only the Westlaw citation is currently available.

United States District Court, W.D. Washington,
at Tacoma.

IRON PARTNERS, LLC, Plaintiff,

v.

MARITIME ADMINISTRATION, United State Department of Transportation; **Kaiser Ventures, LLC**; KSC
Recovery, Inc.; **Kaiser Steel Corporation**; and **Kaiser Company, Inc.**, Defendants.

No. 3:08-CV-05217-RBL.

Sept. 28, 2011.

Elizabeth E. Howard, Jack D. Hoffman, Anne Foster, Kate L. Moore, Dunn Carney Allen Higgins &
Tongue, Portland, OR, for Plaintiff.

Kate L. Moore, David S. Fishback, Kent E. Hanson, US Department of Justice, Washington, DC, Steven G.
Jones, Svend A. Brandt-Erichsen, Marten Law Group, Seattle, WA, for Defendants.

ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT [Dkt. # 89]

RONALD B. LEIGHTON, District Judge.

I. INTRODUCTION

*1 THIS MATTER comes before the Court upon Plaintiff Iron Partners' Motion for Partial Summary

Judgment against Kaiser only. [Dkt. # 89]. Iron Partners seeks a ruling as a matter of law that: Kaiser is liable under Washington's Model Toxics Control Act (MTCA); that the cleanup of the Property was the substantial equivalent of an Ecology-conducted cleanup; and that Kaiser is therefore liable to Iron Partners for the entire cost of that cleanup.

While it effectively concedes the first point (as it must), Kaiser argues that Iron Partners' cleanup was far more expensive than an Ecology-conducted or - supervised cleanup would have been, and that it was done for business reasons. It denies that it is liable for that cost, much less that it can be so found on Summary Judgment.

For the reasons that follow, Iron Partners' Motion is DENIED.

II. BACKGROUND

This lawsuit concerns the investigation and environmental cleanup of the following three adjacent parcels of real property located in the Columbia Business Center in Vancouver, Washington: (1) Plaintiff's 2.75-acre parcel; (2) the 11.64-acre Marine Park and Boat Launch Facility owned by the City of Vancouver; and (3) a 3.13-acre parcel owned by L & L Land Company. In the 1940s, Defendant Kaiser Company owned the properties and buried a significant amount of waste accumulated from its shipbuilding operations. Plaintiff now seeks Kaiser's contribution under the Model Toxics Control Act for the remediation performed on its parcel.

A. Acquisition of the Iron Partners Parcel

Iron Partners, an Oregon general partnership (Iron Partners), purchased the property related to this dispute in December 1991. [Brandt-Erichsen Dec., Dkt. # 104-6, at 13]. Defendant Kaiser's expert maintains that a 1991 Dames & Moore Site Assessment identified contamination of the property "consisting of copper, zinc, lead, and chromium in black sand on the surface of the property," but that Iron Partners never had the soil analyzed to determine the mobility of the contaminants as recommended in the assessment. [Jewett Dec., Dkt. # 104, at 4-5]. A copy of this assessment is not included in the record.

In 2006, subsurface investigation of the parcel was performed by Brady Environmental, Inc. (BEI), which included background information about the property. [Hoffman Dec., Dkt. # 90-1, at 4]. According to this report, Iron Partners did in fact contract with Dames & Moore to complete a Phase I environmental site assessment (ESA) because it had previously conducted a Phase I ESA on other properties within the Columbia Business Center. *Id.* Dames & Moore decided that a Phase II ESA would

be necessary to address the environmental concerns on the property. *Id.* The report claims that the Phase II ESA led to the removal of an underground storage tank and associated contaminated soils located in the northern portion of the property. *Id.* The Phase II ESA apparently did not discover the buried landfill that is the subject of this motion. *Id.* After the Phase II ESA was completed, Iron Partners purchased the property. *Id.*

*2 Plaintiff Iron Partners, LLC acquired the property from Iron Partners in January 2007. [Brandt-Erichsen Dec., Dkt. # 104-6, at 16]. Prior to this acquisition, the buried landfill had already been discovered, and the first soil samples were taken in June 2006.

B. Discovery of the Buried Debris

In Spring 2005, Iron Partners discovered buried debris on the southern portion of its property during an excavation project to install new footings for a crane rail system. In June 2006, Plaintiff hired BEI as a consultant to determine when the waste had been dumped and whether any of the surrounding soil posed a threat to human health or the environment.

[Hoffman Dec., Dkt. # 90-1]. During BEI's first subsurface investigation, it determined that the debris dated back to the 1940s, that contaminants were present in the soil, and that the landfill likely spilled over onto adjacent properties.^{FN1} [*Id.* at 6]. The report also recommended that Iron Partners not use the bridge crane over the buried debris area. *Id.*

FN1. Kaiser alleges in its response that Iron Partners also “accepted the recommendation of its consultant, who told them that he could find a way to have others pay for removing the non-structural fill and restoring full use of the crane through pursuit of contribution claims under the CERCLA and MTCA.” [Def. Resp., Dkt. # 104, at 2].

Iron Partners began investigating previous owners of the property to determine who dumped the waste in order to provide all potentially liable parties with notice of the contamination. It discovered that during World War II, Defendant Kaiser used the property to build U.S. Navy and merchant ships pursuant to a contract with the United States Maritime Administration. BEI investigated the property on two more occasions and determined that the buried debris located on the southern portion of Iron Partners' property was approximately 8,500 tons. [Hoffman Dec., Dkt. # 90-10, at 4]. Subsequent investigations continued to indicate that soils were contaminated above levels established by the MTCA and therefore would likely require remedial action. [Hoffman Dec., Dkt. # 90-4, # 90-10]. BEI never took any groundwater samples to confirm whether the contaminants were migrating or

leaching. *Id.*

In January 2007, Iron Partners notified Kaiser, the United States, and the Washington Department of Ecology (Ecology) of the contamination. [Hoffman Dec., Dkt. # 90–2, at 2]. The buried debris extended towards the south, encroaching on the Marina Park and Boat Launch Facility owned by the City of Vancouver and extended towards the east, encroaching on L & L Land Company's parcel. [Hoffman Dec., Dkt. # 91, at 14]. But the operational area of Kaiser's WWII dump and its incinerator had been located on Iron Partners' property. [Hoffman Dec., Dkt. # 92–1, at 11]. Ultimately, 8,312 square feet of the City's 11.64 acre property and 18,932 square feet of Iron Partners' 2.75 acre property were deemed a “dangerous waste area.” [Hoffman Dec., Dkt. # 91, at 21].

In April 2008, Iron Partners filed a complaint against Kaiser and the United States. It continued to discuss potential remedial actions with the other parties. In Fall 2008, BEI dug additional soil test pits at Kaiser's request and a third-party environmental consultant and archaeologist representing Kaiser were present. [Hoffman Dec., Dkt. # 90–10, at 3]. The soil samples of this subsurface investigation confirmed that groundwater had not yet been impacted by the buried debris, but the report also concluded that groundwater was “believed to be close to the bottom of the buried landfill” and that monitoring wells would likely be a necessary condition. *Id.* The archaeologist confirmed that the debris was from the 1940s, and he recommended that the buried landfill be preserved as a historic archaeological site. [Hoffman Dec., Dkt. # 90–20, at 14].

*3 Eventually, both Iron Partners and the City entered Ecology's voluntary cleanup program. Through the Fall of 2009, the parties continued to discuss the most appropriate remedial action with cost-sharing plans proposed and rejected. Iron Partners suggested the construction of a concrete environmental cap, installation of monitoring wells, and two years of groundwater monitoring. [Hoffman Dec., Dkt. # 90–14, at 2]. Iron Partners also asked for either an indemnity agreement or an insurance policy paid by Kaiser to cover the uncertainty of potential groundwater contamination. *Id.* Kaiser rejected this proposal. *Id.*

In November 2009, the City of Vancouver hired a consultant, Pacific Groundwater Group, Inc. (PGG), to complete a site-wide remedial investigation, feasibility study, and disproportionate cost analysis (RI/FS/DCA) on all three properties. The samples PGG took confirmed the presence of hazardous substances in the debris, including lead, cadmium, and petroleum hydrocarbons. [Hoffman Dec., Dkt. # 91, at 14]. The nature and extent of the soil contamination indicated that “much of the debris exceed[ed] soil cleanup levels.” [*Id.* at 20]. PGG's groundwater monitoring showed no signs of

contamination downgradient from the Site, and it found no indication that the hazardous substances were leaching into groundwater. [*Id.* at 22]. PGG concluded that because the debris had been buried since the 1940s, “site conditions are not expected to change and cause leaching or transport of contaminants from the debris.” [*Id.* at 23.] However, PGG never installed monitoring wells on or near the portion of the property that it designated as a dangerous waste area. [*See id.* at 21].

In the RI/FS/DCA, PGG selected three remedies to analyze that could be implemented so that the properties would be protective of human health and environment: (1) No action; (2) Contain the waste and implement institutional controls, including long-term monitoring and a restrictive covenant; and (3) Excavation of the debris and contaminated soils, off-site disposal of contaminated soils, and clean backfill. PGG quickly dismissed the first alternative, stating that it “is unlikely to achieve the goal of protecting human health and the environment.” *Id.* Alternative 2 (Containment and Controls) and Alternative 3 (Excavation, Off-Site Disposal, and Backfill) were both considered viable alternatives. [*Id.* at 27]. Although Alternative 3 achieved the highest benefit score by providing for both immediate and long-term protection, PGG found Alternative 2 to be the Site's preferred remedy based on its disproportionate cost analysis. [*Id.* at 28]. According to PGG's analysis, both Alternative 2 and 3 received similar benefits scores, but the cost of implementing excavation and off-site disposal would exceed \$3.7 million. *Id.* Containment and control, on the other hand, had an estimated cost of \$137,800. *Id.*

Iron Partners apparently wished to avoid implementing a remedial action that would burden its property with a restrictive covenant prohibiting, among other things, “drilling, digging, placement of any objects or use of equipment which deforms or stresses the surface beyond its load bearing capability, piercing the surface with a rod, spike, or similar item, bulldozing, or earthwork.” [Hoffman Dec., Dkt. # 92–4, at 4]. Iron Partners alleges that it used its property for fabrication and storage, and included a permanently installed bridge crane, and that the containment and control alternative would have been significantly burdensome on its future business operations. Thus, it commissioned BEI to begin a supplemental analysis of other alternatives that PGG did not consider, including partial excavation, waste segregation, or waste stabilization. BEI was concerned that PGG's analysis underestimated the cost of Alternative 2 and overestimated the cost of Alternative 3, and BEI believed that there was another costeffective alternative that would be more protective than simply containing and controlling the waste on site. [Hoffman Dec., Dkt. # 9–21, at 3–5]. Kaiser alleges (and supports with evidence) that Iron Partners intended to do a more thorough cleanup for business reasons, and asked BEI to justify that choice after PPG suggested that Alternative 2 was more efficient.

*4 BEI concluded that the most cost-effective remedial action was to segregate and stabilize the waste on site, which reduced the cost of off-site disposal because the uncontaminated soil was placed back into the excavation area as backfill. This alternative would also allow Iron Partners to preserve some of the waste for archaeological preservation. Kaiser rejected this proposal in late 2009. [Hoffman Dec., Dkt. # 91–6, at 4]. Nevertheless, Iron Partners sought Ecology's approval for the plan, which was granted in February 2010. Shortly after, BEI began the remedial excavation. Since then, Ecology has issued a No Further Action letter to Iron Partners.^{FN2} The cost of BEI's remediation action was \$784,545, which included the excavation of unexpected gasoline-soaked soil. Nevertheless, the costs proved to be less than the \$3.7 million estimated by PGG.^{FN3}

FN2. Ecology has also issued a No Further Action determination with respect to the Containment and Control remedy implemented on the City's parcel.

FN3. It is not clear whether PGG's estimate of the Containment and Control remedy on the City's parcel proved to be accurate.

Iron Partners now moves for partial summary judgment against Kaiser, seeking a finding that (1) Kaiser is liable under the MTCA; (2) its remedial action was the substantial equivalent of an Ecology-conducted or -supervised cleanup; and (3) Kaiser is liable for all of its remediation costs and reasonable attorney fees. Kaiser does not dispute that it is a liable party under the MTCA.^{FN4}

FN4. A party is strictly liable under the MTCA if it is (1) the owner or operator of the facility; (2) the owner or operator of the facility at the time of disposal or release of hazardous substances, (3) any person who facilitated the disposal of hazardous substances, or (4) any person who transported hazardous substances to the facility. RCW 70.105D.040(1). Accordingly, both Kaiser and Iron Partners are liable parties under the MTCA.

III. DISCUSSION

A. Standard of Review

Summary judgment is appropriate when the record shows that there is no genuine issue of fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party has the initial burden of showing that no genuine issue of material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); U.S. v. Carter, 906 F.2d 1375, 1376 (9th Cir.1990). When a properly supported motion for summary judgment is made, the burden then shifts, and the

opposing party must set forth specific facts showing that there is a genuine issue for trial. Anderson, 477 U.S. at 250. Put another way, summary judgment should be granted when the nonmoving party fails to offer evidence from which a reasonable jury could return a verdict in its favor. Id. at 252. When viewing the evidence at this stage, all justifiable inferences are drawn in favor of the nonmoving party. Id. at 255.

B. Liability under the Model Toxics Control Act (MTCA) is strict, joint, and several.

MTCA recognizes that every person has a “fundamental and inalienable right” to a healthy environment. RCW 70.105D.010. MTCA also acknowledges the public's interest “to efficiently use our finite land base, to integrate our land use planning policies with our cleanup policies, and to clean up and reuse contaminated industrial properties in order to minimize industrial development pressures on undeveloped land and to make clean land available for future social use.” RCW 70.105D.010(4). In order to effectuate these purposes, MTCA imposes strict, joint, and several liability for “all remedial action costs” on current and past owners and operators of the facility at the time of either the release or disposal of hazardous substances. RCW 70.105D.040(2).

*5 A private right of action to recover the costs of a remediation from a potentially liable party is allowable if the remedial action is the substantial equivalent of an Ecology-conducted or -supervised cleanup.^{FNS} RCW 70.105D.080. The court shall base the amount of recovery on equitable factors that it deems appropriate, and the prevailing party shall recover reasonable attorneys' fees and costs. Id. To determine whether a remediation is the substantial equivalent of an Ecology-supervised cleanup, the court should evaluate the MTCA guidelines as a whole. WAC 173–340–454(1). A claim should “not be disallowed due to omissions that do not diminish the overall effectiveness of the remedial action.” Id.

FNS. “Remedial action means any action or expenditure consistent with the purposes of this chapter to identify, eliminate, or minimize any threat or potential threat posed by hazardous substances to human health or the environment including any investigative and monitoring activities with respect to any release or threatened release of a hazardous substance ...” RCW 70.105D.020(26).

C. Iron Partners seeks judgment as a matter of law that its “Alternative 3” cleanup was the substantial equivalent of an Ecology-conducted or -supervised cleanup.

Iron Partners claims that it is entitled to full recovery costs from Kaiser for the excavation, segregation, and disposal of the hazardous soils located on its parcel because this remedial action was

the substantial equivalent of an Ecology-conducted or -supervised cleanup. Ecology has promulgated a series of regulations to assist the courts in making such a determination.

1. *Guidelines for Courts in Evaluating Whether an Independent Remediation is the Substantial Equivalent to an Ecology-supervised or -conducted cleanup*

Ecology considers any independent remedial action that includes the following elements to be the substantial equivalent of a department-conducted or - supervised clean up: (1) Information on the site and the conducted remedial action were properly reported to Ecology; (2) Ecology has not objected to the remediation being conducted; (3) Advance public notice was provided; (4) The remediation was conducted substantially equivalent with Ecology's technical standards and evaluation criteria; and (5) Where facilities have disposed of hazardous waste as part of the remedial action, proper documentation has been provided to Ecology. WAC 173-340-545(2)(c). However, the Washington Court of Appeals has held that these elements are merely guidelines to assist private parties rather than absolute requirements. Taliesen Corp. v. Razore Land Co., 135 Wash.App. 106, 120, 144 P.3d 1185 (2006). Instead, courts should look at the "overall effectiveness" of the remediation to determine whether it was the substantial equivalent of an Ecology-supervised cleanup. *Id.*

In this case, Iron Partners reported the contamination to Ecology soon after its discovery and submitted a report to the department once the remediation was completed. [Hoffman Dec., Dkt. # 90-2, at 2]. BEI discussed Iron Partners' selected cleanup with Ecology prior to its implementation. [Hoffman Dec., Dkt. # 91-7]. The department approved the plan and, once the remediation was completed, issued a No Further Action determination for Iron Partners' parcel. [Hoffman Dec., Dkt. # 90-3]. Iron Partners gave notice to all potentially liable parties three years before commencing the remediation, and it also complied with the public notice requirements established by Ecology. [See, e.g., Hoffman Dec., Dkt. # 91-5]. Finally, Iron Partners properly notified the department of the location of the disposed hazardous waste. [Hoffman Dec., Dkt. # 92-1].

*6 Kaiser argues that Iron Partners did not comply with the technical standards and evaluation criteria as set forth in the regulations. In particular, it claims that because the containment and control remedy would have met the substantial equivalent standard, then any costs that went "beyond the scope of that remedy are not 'necessary' response costs recoverable under RCW 70.105D.080." [Def. Resp., Dkt. # 104, at 16].

Kaiser's position relies on the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Kaiser argues that a more expensive yet more permanent remedial action

cannot be considered the substantial equivalent (particularly not on summary judgment) because it was not necessary to protect human health or the environment. Although CERCLA requires the response costs to be ‘necessary’ to address the threat to human health or the environment, this language is absent from MTCA.

2. MTCA does not expressly require that the chosen method of cleanup be “necessary” to protect the environment or human health.

When evaluating compliance with the technical standards and evaluation criteria to determine substantial equivalence, “it should be recognized that there are often many alternative methods for cleanup of a facility that would comply with [the] provisions” set forth in the MTCA regulations. Kaiser argues that notwithstanding compliance with MTCA regulations, the remediation costs must still be necessary to qualify as the substantial equivalent of an Ecologyconducted cleanup. It argues, persuasively, that “[t]he notion that response costs must be ‘necessary’ in order to be recoverable is more precisely articulated under CERCLA, but no less applicable under MTCA.” [Def. Resp. Dkt. # 104, at 16].

MTCA was modeled after CERCLA, and in many sections, the language was copied exactly. Where similar language is used, federal cases interpreting CERCLA may be used as persuasive authority when interpreting the MTCA. In this case, CERCLA states that recovery is limited to “necessary costs of response incurred by any other person consistent with the national contingency plan.” 42 U.S.C. § 9607(a)(4)(A)(B). MTCA drafters did not include this language in the state statute. Iron Partners asks the Court to presume that the language was deliberately omitted. Although CERCLA also requires the remediation be cost-effective, 42 U.S.C. § 9621(a), there is no such requirement under the MTCA.

Instead, the MTCA specifies only the minimum requirements for a remediation, which do not include any language that might suggest only the necessary costs for the least expensive cleanup may be recovered. Under the MTCA, the selected cleanup action shall (1) protect the environment and human health; (2) comply with cleanup standards; (3) comply with applicable state and federal laws; and (4) provide compliance monitoring. WAC 173-340-360(2)(a). When selecting from among remedial alternatives that all meet these threshold requirements, “the selected action shall use permanent solutions to the maximum extent practicable.” WAC 173-340-360(2)(b)(i). Iron Partners points out that, during public comment for the 2001 amendments to the MTCA, Ecology explained that “[i]n addition to meeting each of the minimum requirements specified in WAC 173-340-360, cleanup

actions shall not rely primarily on institutional controls and monitoring where it is technically possible to implement a more permanent cleanup action for all or a portion of the site.” [Moore Dec., Dkt. # 106–1, at 2–3].

*7 Iron Partners selected a cost-effective, permanent remedial action that excavated, segregated, and disposed of contaminated soils located on its property. It received a No Further Action decision from the Department of Ecology, which stated that the remediation was protective of human health and the environment and that it complemented the City's less permanent containment and control remedy. [Hoffman Dec., Dkt. # 92–3, at 5]. Iron Partners complied with all applicable regulations even though omissions on its part would still have allowed a claim under the MTCA as long as “the overall effectiveness of the remedial action” was not diminished. See WAC 173–340–545(1); Talisen, 135 Wash.App. at 120, 144 P.3d 1185.

From this, Iron Partners asks the court to find and conclude as a matter of law that, because these minimum requirements were met, Iron Partners' remediation was the substantial equivalent of an Ecology-conducted or - supervised cleanup as a matter of law.

Kaiser argues that under MTCA, a party's recovery “shall be based on such equitable factors as the court determines are appropriate.” [Citing RCW 70.105D.080.] Recovery of remedial action costs shall be limited to those remedial actions that, when evaluated as a whole, are the substantial equivalent of a department-conducted or department-supervised remedial action. Substantial equivalence shall be determined by the court with reference to the rules adopted by the department under this chapter. *Id.*

Kaiser is correct. Iron Partners claims that MTCA permits full recovery, without regard to the economic efficiency or ecological necessity of the cleanup. This position finds no legal or logical support in the authorities it cites, and is not good policy. This is particularly true where, as here, there is evidence that Iron Partners chose the cleanup it did for business reasons.

For these reasons, the court cannot rule as a matter of law that the Iron Partners' clean up was the substantial equivalent of an Ecology—conducted or—supervised cleanup, and that Kaiser is required to pay the full cost of it. The Motion for Summary Judgment is DENIED.

3. *A cleanup undertaken for business reasons is not subject to full contribution.*

Kaiser argues that *Talisen* stands for the proposition that liable parties may not be asked to pay for another liable party's past business decisions. There, the court determined that *Talisen*'s remediation was the substantial equivalent of an Ecology-conducted cleanup because it had removed all soils that

had any detectable levels of contamination. Talisen, 135 Wash.App. at 122, 144 P.3d 1185. The cleanup was protective of human health and the environment even though it was not cost-effective, and because of the cleanup's overall effectiveness, the court held that it met the standard of substantial equivalence. *Id.* Nevertheless, the court limited Talisen's recovery and allocated almost half of the allowable costs of cleanup to the prevailing party. Id. at 140, 144 P.3d 1185.

*8 Though the facts of *Talisen* were more egregious than those alleged by Kaiser here, there is, at the very least, a question of fact as to whether Iron Partners remediated its property to a higher standard than an equivalent Ecology—conducted or—supervised cleanup for business reasons. For this reason as well, the Plaintiff's Motion for Summary Judgment is DENIED.

IT IS SO ORDERED.

W.D.Wash.,2011.

Iron Partners, LLC v. Maritime Admin.

Slip Copy, 2011 WL 4502139 (W.D.Wash.)

END OF DOCUMENT

Tab 8

Not Reported in F.Supp., 1988 WL 102641 (E.D.Pa.)

(Cite as: 1988 WL 102641 (E.D.Pa.))

Only the Westlaw citation is currently available.

United States District Court, E.D. Pennsylvania.

BCW ASSOCIATES, LTD., and Knoll International, Inc.

v.

OCCIDENTAL CHEMICAL CORP., and Firestone Tire and Rubber Company.

Civ. A. No. 86-5947.

Sept. 29, 1988.

Robert A. Swift, Kohn, Savett, Klein & Graf, Philadelphia, Pa., Robert F. Hill, Hill & Robbins, Denver, Colo., pro hac vice.

Geoffrey K. Barnes, The Firestone Tire & Rubber Co., Akron, Ohio, for Firestone Tire & Rubber Co., pro hac vice.

John B. Bulgozdy, Paul Gutermann, Squire Sanders & Dempsey, Washington, D.C., pro hac vice.

Duane, Morris & Heckscher, Amy E. Wilkinson, David C. Toomey, Philadelphia, Pa., for Occidental Chemical Corp.

Patricia A. Mattern, Philadelphia, Pa., for Firestone Tire & Rubber Co.

J. Brian Molloy, Douglas H. Green, Stephen R. Mysliwicz, Piper & Marbury, Washington, D.C., for Occidental Chemical Corp., pro hac vice.

OPINION

CAHN, District Judge.

*1 In this action, the plaintiffs seek to recover response costs pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601 et seq. (1983 & Supp.1987).^{FN1} Specifically, the plaintiffs seek to recover from the defendants costs incurred to remove lead dust from a warehouse in Pottstown, Pennsylvania.^{FN2} The matter was tried without a jury. Therefore, in accordance with the dictates of Rule 52(a) of the Federal Rules of Civil Procedure, I make the following:

FINDINGS OF FACT

A. Parties

1. Plaintiff BCW Associates, Ltd., is a Pennsylvania limited partnership with its principal place of business at Johnson and Cherry Streets, Jenkintown, Pennsylvania. BCW is engaged in the business of owning, developing and leasing commercial properties.

2. Plaintiff Knoll International, Inc., is a corporation organized and existing under the laws of Delaware with its principal place of business at 655 Madison Avenue, New York, New York, 10021. Knoll is engaged in the business of manufacturing and selling office furniture.

3. Defendant Firestone Tire and Rubber Company is a corporation organized and existing under the laws of the State of Ohio with its principal place of business at 1200 Firestone Parkway, Akron, Ohio, 44317. Firestone is engaged in the business of manufacturing and selling tires and other rubber products and is registered to do business in Pennsylvania.

4. Defendant Occidental Chemical Corporation is a corporation organized and existing under the laws of the State of New York with its principal place of business at 10889 Wilshire Boulevard, Los Angeles, California, 90024. Occidental is engaged in the business of manufacturing and selling chemicals and is registered to do business in Pennsylvania.

B. The Pottstown Warehouse

5. The warehouse at issue is part of a manufacturing complex located on Armand Hammer Boulevard (formerly Firestone Boulevard) in Pottstown, Pennsylvania.

6. The warehouse consists of about 800,000 square feet, and is divided into 8 bays of approximately 100,000 square feet of floor space each. The warehouse is constructed of cinder block

with a brick veneer, and the interior of the warehouse contains structural steel columns and beams. The eight bays are separated by firewall partitions that penetrate the roof of the warehouse. A railway siding runs through bays D, E, and F adjacent to the firewall separating those bays from bays X, A, and B.

7. The bays were built in three stages: X bay was constructed in 1952; A, B, and C bays were constructed in 1955 and D, E, F, and G bays were constructed in 1963.

8. From 1952 to 1980 Firestone owned and operated the Pottstown warehouse which was adjacent to the plant where it manufactured tires.

9. On September 16, 1980, Firestone entered into an agreement of sale whereby Firestone sold the entire Pottstown facility to Occidental, including the Pottstown warehouse. The contract provided Firestone with certain indemnification rights against Occidental including indemnity against damage or loss arising out of the warehouse or Occidental's use of the warehouse after the closing of the sale. See plaintiffs' Exhibit 6 at ¶ 9.2. The sale between Firestone and Occidental closed on December 1, 1980.

*2 10. On July 19, 1984, Occidental entered into an agreement to sell the Pottstown warehouse to the Donesco Company for approximately \$3 million. The contract provided that Donesco would purchase the warehouse "AS/IS." The contract also provided that Donesco would have 45 days to inspect the warehouse and conduct any test or other investigation of their condition that Donesco wished to perform. See plaintiffs' Ex. 7 at ¶ 4(a)(i).

11. Before closing the sale, Donesco assigned all of its rights to BCW, a partnership formed to acquire and develop the Pottstown site.

12. Leon Winitsky is a general partner of Winitsky Associates. Winitsky Associates is the general managing partner of BCW; Donesco and Belz Enterprises are the other general partners of BCW. Mr. Winitsky and other BCW representatives inspected the Pottstown warehouses several times before the purchase. BCW was aware that it was purchasing a dusty, old warehouse.

13. On October 3, 1984, having completed its inspection of the warehouse, BCW/Donesco formally waived its right to terminate the Agreement of Sale under the 45-day look-see provision. See plaintiffs' Ex. 8 at ¶ 12.

14. As part of the sale, BCW leased back to Occidental the right to occupy a portion of the warehouse. The particular bays occupied by Occidental changed over time, but at the time of the filing

of this case, Occidental occupied bays X, D, and a portion of bay A. Occidental continues to occupy a portion of the X bay.

15. In the second quarter of 1985, Richard Spotts, Vice President for Expansion for Knoll International, Inc., was attempting to locate a new warehouse facility for Knoll's furniture distribution operations. As part of his search, Mr. Spotts investigated the BCW Pottstown facility.

16. During the second quarter of 1985, Mr. Spotts inspected the BCW Pottstown facility several times. Mr. Spotts observed dust on the floor, fixtures and structural members of the facility from the first day that he entered the facility to inspect it.

17. As part of his investigation of the BCW Pottstown facility, Mr. Spotts hired Greylag Technical Services, Inc. to perform a site evaluation focusing on potential environmental problems. On July 15, 1985, Greylag reported to Knoll that there was no environmental hazard at the BCW Pottstown facility likely to affect the health and safety of Knoll employees at the facility. *See* defendants' Ex. 19.

18. Despite Greylag's report, Mr. Spotts was suspicious about the environmental condition of the building. Mr. Spotts nevertheless declined to investigate the matter any further because of the expense of additional testing and because Knoll wanted to move quickly to find a new warehouse facility. Instead, Knoll obtained a provision in its lease with BCW whereby BCW would indemnify Knoll in the event of any unforeseen environmental problem. *See* plaintiffs' Ex. 69.

19. On July 19, 1985, Knoll leased the warehouse from BCW for use as a furniture storage and distribution center. As part of its lease with BCW, Knoll became the sublessor of the X and D warehouses to Occidental. Knoll proceeded to occupy six of the eight bays in September 1985.

*3 20. Under its lease, Knoll is required to pay an annual rent of \$1,250,000 for the initial term, with an escalation at certain anniversaries. Knoll has a "triple net" lease under which it has also agreed to pay all applicable taxes, utility bills, and maintenance expenses. BCW, therefore, collects the annual rent free and clear of these expenses. *See* plaintiffs' Ex. 69.

C. Discovery of Lead in the Dust

21. At the time BCW purchased the warehouse, it had accumulations of gray dust in all the bays. BCW and Knoll regarded the dust as nuisance dust and saw no reason to have it sampled for hazardous substances.

22. Before BCW purchased and Knoll leased the premises, each had independent reports prepared by engineering firms which did not find the lead contamination. Specifically, after signing the agreement of sale with Occidental, BCW/Donesco retained an engineering consulting firm to evaluate the structure and prepare a written report. The consultant's report did not identify any environmental problems with the warehouse. BCW/Donesco also had a professional underwriting firm conduct an engineering and loss control inspection of the warehouse for insurance purposes. That firm concluded that "the buildings being purchased and occupied by BCW, *et al.* are free of any hazardous wastes or contaminants." See defendants' Ex. 42. In addition, Occidental gave comfort letters to Donesco and to the First National Bank of Maryland on behalf of BCW in which Occidental represented that no hazardous materials were stored in the warehouse.

23. In the fall of 1985, Knoll's activity in the warehouse caused dust to "rain down" from the rafters. Knoll received complaints from its employees about the dust, but took no immediate action to correct the situation.

24. During November or December 1985, a senior manager of Knoll International, Mr. James Wakeling, received a complaint from a customer to the effect that certain textiles that had been shipped by Knoll from Pottstown were soiled.

25. After receiving complaints about the dust from employees and customers, Knoll arranged to have a commercial cleaning company, ASK, Inc., clean the dust from the warehouse. ASK had provided Knoll with janitorial services on a regular basis.

26. On its own initiative, ASK tested the dust prior to cleaning the warehouse to determine the content of the dust. ASK's preliminary tests showed the dust contained approximately .3% (by weight) lead. Knoll's environmental officer, Louis G. Newett, was notified of ASK's findings.

D. Testing

27. On or about December 4, 1985, Mr. Newett had additional testing done to confirm the presence of lead in the dust. See plaintiffs' Ex. 47.

28. During the holiday shutdown, Mr. Newett had further testing done to determine the extent of the lead contamination in the warehouse. Those tests showed that airborne lead levels were below the EPA ambient air standard of 1.5 micrograms of lead per cubic meter, and that the dust in the warehouse had an average lead content of approximately 2,500 milligrams per kilogram. Some samples of dust showed lead concentrations as high as 9/10 of 1% (9000 mg/kg).

*4 29. Both BCW and Knoll hired experienced environmental consultants to conduct and advise them as to tests of the dust and to recommend cleanup methods.

30. During the holiday shutdown, Knoll formulated the “KDC [“Knoll Distribution Center”] Action Plan” to address issues presented by the lead dust in the warehouse. The KDC Action Plan covered four areas of activity: 1) health of employees working in the facility, 2) integrity of the product, 3) clean-up issues, and 4) legal issues—recovering the costs of the clean-up.

31. Knoll commenced wet vacuuming of the floors of the six bays it occupied. When Knoll's workers returned in January 1986, Knoll issued Tyvec protective clothing to every warehouse employee. The Tyvec protective clothing was in conformity with OSHA standards. Knoll reduced almost immediately the number of workers who received Tyvec clothing and discontinued the use of the clothing in less than one month. Knoll took that action several months before the cleanup of the structural members of A, B, C, E, F, and G bays began in June 1986.

32. In January 1986, Knoll began construction of two clean rooms to be used to clean furniture before it was shipped. Knoll completed one clean room, which it used for one week. The second clean room was never completed. The first clean room was subsequently used not as a staging area for cleaning product before shipment, but as an area where furniture could be taken to be dusted off before being returned to the storage racks.

33. On or about January 8, 1986, Knoll had blood lead tests performed on its warehouse employees. The blood lead levels of Knoll employees in the warehouses were all below 12 micrograms of lead per deciliter of whole blood. Almost two thirds of the Knoll employees showed blood lead levels below 5 micrograms per deciliter. *See* defendants' Exs. 10 and 87. The OSHA permissible exposure limit is 30 micrograms of lead per deciliter of whole blood. All of the Knoll blood lead test results were substantially below OSHA limits.

34. On January 10, 1986, Mr. Newett had an EP Toxicity test performed by Chem–Clear, Inc., on waste water generated from wet vacuuming of dust from the floor of the warehouse. The EP Toxicity test for lead showed that the waste water was non-hazardous. *See* defendants' Ex. 4.

35. On January 14, 1986, Mr. Newett determined whether the dust conditions in the warehouse had stabilized. *See* defendants' Ex. 47. Mr. Newett testified that around that time the dust on the rafters in the warehouses had stabilized and had stopped “raining down.”

36. On January 21, 1986, in response to an inquiry from the Occupational Health & Safety

Administration ("OSHA"), Mr. Newett informed OSHA that Knoll had instituted a number of personnel protection procedures to insure employee safety. These procedures included the wearing of protective equipment such as respirators, dust masks, tyvec coveralls, gloves and tyvec shoe covers. In addition, daily floor cleaning using a wet vacuuming system, was begun throughout the facility. Employees were instructed in personal hygiene practices. The consumption of food and beverages as well as smoking were restricted to a controlled area which is thoroughly cleaned daily. Blood lead level tests were made available to all employees to determine if lead associated health hazards existed. With over 90% of the blood tests received, no hazardous exposure levels are evident.

*5 Defendants' Ex. 9. Mr. Newett concluded that "the above stated safety and communication programs represent an aggressive effort to protect the health of Knoll employees from the potential hazards posed by the dust containing lead at our Upper Pottsgrove facility. While we appreciate the concern expressed by our employees and your agency, we feel that our actions have been very responsible." Defendants' Ex. 9.

37. In January and February, 1986, BCW through its counsel, notified Firestone and Occidental of the presence of lead dust in the warehouse and demanded that Firestone and Occidental clean the warehouse, or, in the alternative, reimburse BCW for costs it would incur in performing the clean-up itself. The letters sent by counsel for BCW specifically referenced the applicable provisions of CERCLA. Moreover, copies of the letters were sent to the Pennsylvania Department of Environmental Resources and the United States Environmental Protection Agency.

38. On or about January 13, 1986, BCW, through its attorney, hired Owen B. Douglass, Jr., of Roy F. Weston, Inc., to analyze the dust in the Knoll warehouses and to provide an evaluation of the condition of the Knoll warehouses. Mr. Douglass' tests showed airborne lead levels that were below the EPA ambient air standard of 1.5 micrograms of lead per cubic liter, and that the dust had lead content averaging approximately 2,500 milligrams of lead per kilogram of dust.

39. Knoll retained two testing firms to determine the identity of the lead compound in the dust. Structure Probe, Inc. performed x-ray diffraction analysis on a dust sample, but was unable to identify the lead compound. See Plaintiff's Ex. 52. Princeton Testing Laboratories also was unable to identify the lead compound.

40. In order to "finger print" the lead compound contained in the dust, BCW's environmental consultant had the dust subjected to x-ray photoelectron spectroscopy by Rocky Mountain Laboratories, one of four commercial laboratories in the United States doing such work.

41. X-ray photoelectron spectroscopy was developed in the 1960's and is an accepted methodology in the scientific community to determine the existence and type of elements and compounds on the surface of samples by measuring electron binding energies.

42. The analysis of dust samples from the warehouse by Rocky Mountain Laboratories showed it highly probable that the lead compound in the dust was lead sulfate. Rocky Mountain Laboratories' conclusion was reached over a year and a half before Firestone disclosed its records showing that lead sulfate was contained in the zinc oxide used in the white sidewall of its tires.

43. I found the testimony of Rocky Mountain Laboratories' analytical chemist, Craig Butler, to be highly credible. I therefore find that the plaintiffs have proved, by a preponderance of the evidence, that the lead compound contained in the dust was lead sulfate. I find that the plaintiffs have proved, by a preponderance of the evidence, that in early 1986, there was a threat that the lead dust would be released into the environment on the clothing and shoes of workers leaving the warehouse and on the furniture Knoll shipped to its customers.

**6 E. Clean-up*

44. Knoll first provided its employees with personal protective equipment and rented a Zamboni machine to clean the floors of the warehouse.

45. Beginning in January of 1986, representatives of BCW and Knoll met to decide upon the method to be used to remedy the dust conditions in the Pottstown facility.

46. Plaintiffs did not obtain public comment. Instead, they notified their employees, public agencies like EPA, DER, and OSHA, and potentially responsible parties of the lead hazard and their plans to perform a clean-up.

47. BCW, Knoll, and their environmental consultants evaluated the test data, considered the medical risks to Knoll's employees and customers and decided the lead had to be removed from the warehouse. They considered, but rejected, doing nothing. The threat that the dust would leave the warehouse on goods shipped to Knoll's customers was a substantial factor in causing the plaintiffs to incur response costs.

48. Knoll had considered removing the dust for aesthetic and quality control reasons even before Knoll knew of the presence of lead. Knoll threatened that it would leave the premises if BCW did not take action to clean up the dust.

49. BCW undertook to clean up the warehouse at least in part because of the threat that Knoll would vacate the warehouse and because Knoll's lease required BCW to indemnify Knoll for costs associated with cleaning the dust. See Plaintiffs' Ex. 60.

50. Although BCW and Knoll did not specifically consider the effect of the lead dust on the families of Knoll employees, the dust posed a health hazard not only to Knoll employees and customers but also to the families of Knoll employees.

51. The ingestion of lead by human beings leads to a variety of serious physical disorders. Pregnant women, fetuses and small children are especially at risk since their systems are sensitive to lower accumulations of lead. See Testimony of Drs. Alf Fischbein and Julian Chisolm. The Knoll work force had approximately 20 women of child-bearing age. The families of workers were threatened with exposure to lead because of the possibility that the dust would be carried outside the warehouse on the skin and clothing of workers and deposited on surfaces in automobiles and homes.

52. BCW, Knoll and their environmental consultants considered alternative methods of clean-up of the lead-laden dust and agreed that the most cost efficient, technologically feasible and environmentally sound method was to clean all warehouse surfaces with HEPA vacuums and then encapsulate those surfaces that were difficult to clean. The alternative of washing the warehouse surfaces with water was more costly, would have required the disposal of large quantities of lead-containing water, and posed the risk that merchandise stored in the warehouse would be damaged.

53. BCW and Knoll entered into an Agreement on June 24, 1986 specifying the clean-up method that would be employed and the measures that would be taken to assure adequate quality control.

*7 54. BCW obtained three bids from responsible contractors for the cleanup and selected the least costly.

55. Prior to accepting any bid, BCW put Firestone on notice by letter dated February 19, 1986 that the clean-up was Firestone's responsibility, demanded that Firestone perform it, offered to give Firestone testing results and enclosed copies of bid proposals for the clean-up.

56. Similarly, BCW put Occidental on notice that the clean-up was Occidental's responsibility, demanded that Occidental perform it, offered to give Occidental testing results and enclosed copies of bid proposals for the clean-up.

57. In February, 1986, BCW contracted with Savage Brothers for the clean-up contemplated by the agreement between BCW and Knoll.

58. BCW and Knoll divided the responsibility for cleaning the Knoll warehouse. BCW assumed responsibility for cleaning the structure of the warehouse, including structural members, walls, ceilings, floors, and piping. Knoll was to clean its own furniture and the racks on which it stored its goods.

59. Before beginning the clean-up, BCW and Knoll agreed upon a criteria for certification that the structural parts of the warehouse were adequately cleaned. The clean-up criteria prescribed: 1) that airborne lead levels in the warehouse would not exceed 2 micrograms of lead per cubic meter of air; and 2) that a certified industrial hygienist retained by BCW would perform a subjective, visual inspection to determine whether the dust remaining was within acceptable limits. See Plaintiffs' Exs. 55, 57, and 58.

60. Bays A, B, C, E, F and G were cleaned successively, each bay taking 7 to 10 days. Bays D and X were cleaned after Occidental vacated them in the spring of 1987.

61. On August 13, 1986, Mr. Douglass certified that bays A, B, C, E, F, and G were clean according to the certification standard. See Plaintiffs' Ex. 55.

62. Mr. Douglass certified D bay pursuant to the clean-up certification standard on April 21, 1987. Mr. Douglass certified X bay pursuant to the clean-up certification standard on May 27, 1987. See Plaintiffs' Ex. 58.

F. Firestone's Operations in the Pottstown Warehouse

63. From 1952 to 1980, Firestone conducted a white sidewall grinding operation in portions of bays X and A and stored tires in the remaining bays. At certain times, Firestone used portions of X and A bays for plastics operations and storage. The white sidewall grinding operation in Pottstown continued for 3 shifts a day, 6 to 7 days a week.

64. White sidewall grinding operations were part of the final inspection phase of the production of white sidewall tires. At one point in the manufacturing process, the white sidewall is covered with a thin film of black rubber to protect the white sidewall from damage and discoloration. During final inspection, the thin film of black rubber and part of the white sidewall are ground off using first a rough and then a fine grinding stone to reveal the white sidewall.

*8 65. The material used to make white sidewalls contains approximately 10 percent zinc oxide. A naturally-occurring contaminant in zinc oxide is lead. Firestone's specifications for zinc oxide required that its suppliers supply zinc oxide with a lead content no greater than fifty-five one hundredths percent (.55%). Firestone used zinc oxide as an ingredient in the white wall of its tires. Firestone's records show that lead was present in the zinc oxide in the form of lead sulfate.

66. The grinding operation produced significant amounts of gray particles and dust.

67. The grinding dust filled the air in the bays of X and A bays and was transported into other bays of the warehouse on tires and pallets and by wind currents, especially during the summer months when doors between the bays were kept open to cool and ventilate the warehouse.

68. The grinding dust also landed upon Firestone employees who used air hoses mounted near the grinding machines to blow the dust off their skin, hair and clothes.

69. There is no evidence that Firestone ever cleaned the bays of the warehouse except when it cleared the grinding machines of particles with an air hose and swept up the particles on the floor of the bays where grinding was performed.

70. Several former Firestone employees who worked in all bays of the warehouse stated that they observed the gray tire grinding dust on surfaces, tires and pallets in all bays of the warehouse. They further identified the gray dust in the warehouse in 1986 as being the same color as the gray tire grinding dust they observed when they worked in the warehouse.

71. Grinding samples taken by Firestone's expert, Mr. Waggener, at the Oklahoma City plant are not especially probative of the amount of lead generated by the tire grinding operations at the Pottstown plant. The relevant time periods, in the first place, are different. Tire grinding operations at Pottstown spanned the years 1952 to 1980; Mr. Waggener tested samples of tire grindings that were taken from Firestone's Oklahoma City Plant on February 8, 1988. Moreover, the grinding machines and dust removal systems were different in the two plants, and the plants acquired zinc oxide from different sources. Mr. Waggener's observations of grinding dust on pallets and tires in all bays of the Oklahoma City warehouse, however, confirm that grinding dust is regularly transported throughout the warehouse by that means.

72. Based on all the evidence at trial, including the evidence that the lead in both the warehouse and in the white sidewalls was lead sulfate, I find that the plaintiffs have proved by a preponderance of the evidence that Firestone's white sidewall grinding operation was the source of the lead dust in the

warehouse.

G. Occidental's Operations in the Pottstown Warehouse

73. Firestone's tire grinding operations in several of the bays had ceased prior to Occidental's purchase of the warehouse, and Occidental did not continue any part of Firestone's tire operations.

*9 74. Occidental continued pigment mixing operations formerly conducted by Firestone, in a portion of X bay. Color pigments were mixed with certain liquids for use in the manufacturing of plastics, which took place in a different building at the Pottstown complex.

75. A wall had been built by Firestone dividing X bay in half so that tire grinding operations conducted by Firestone in the half of X bay adjacent to D bay would be separated from the pigment mixing operations in the other half of X bay.

76. Witnesses Gerald D. Lloyd and Jack Wolfsperger described the pigment mixing operation conducted by Occidental in X bay. Pigments were mixed in one small area of one-half of X warehouse for approximately 15 minutes per day. The actual mixing area was vented and enclosed by walls on three sides. Only modest amounts of pigment were used, approximately a half-dozen bags per day. Care was taken in the handling and storing of all pigments. The pigments were stored only in X bay of the warehouse.

77. The half of X bay where pigments were mixed and stored was clean. The area was not dusty, and plaintiffs presented no evidence that any employees who worked in that area had ever complained about dust.

78. Spills from the bags of color pigment were infrequent. The pigment was expensive, and when spills did occur the pigment was carefully cleaned up. A solvent was then used to clean the floor.

79. Although some of the brightly colored pigments contained lead compounds, pigment mixing was a confined, well vented, and clean operation. Mr. Lloyd testified that it was inconceivable that the modest amount of dust generated in the mixing operation itself could contaminate eight separate bays of a warehouse that covered 800,000 square feet.

80. The predominant lead compound used in the pigments containing lead, which were the yellow and orange pigments, was lead chromate. See Testimony of Mr. Lloyd; Plaintiffs' Ex. 19. None of the several tests that were done in an effort to identify the lead compound present in the dust concluded

that the compound was lead chromate.

81. Mr. Newett testified that Knoll asked two independent laboratories, Princeton Testing Laboratory and Structure Probe, to analyze the dust. Princeton Testing Laboratory's tests were inconclusive, and Structure Probe, which was asked specifically to determine if the lead compound was lead chromate, could not conclude that it was.

82. In addition, Mr. Douglas testified that he asked Oneida Research Services, Inc. ("Oneida") to analyze the lead compound in the dust, specifically looking for lead chromate. Oneida could not confirm the identity of the lead compound. Thereafter, Mr. Douglas asked Rocky Mountain Analytical Laboratories, Inc. ("Rocky Mountain") to analyze the dust. Rocky Mountain concluded that there was only one lead compound present, and that the XPS characteristics of the lead compound most resembled lead sulfate.

83. Various witnesses identified the lead-contaminated dust as being grayish-black in color. Plaintiffs' Exhibit 66, which is a sample of the dust, is also grayish black in color.

*10 84. As Mr. Lloyd testified, the color pigments which contain lead are bright orange and bright yellow. None of plaintiffs' witnesses testified that they had ever noticed any orange or yellow coloration in the contaminated dust in any part of the warehouse.

85. In December 1985, Knoll occupied bays A, B, C, E, F, and G. Occidental occupied bays X and D. No evidence was presented that Occidental conducted any activity in D bay, and the evidence showed that Occidental's limited color mixing operation in X bay was far different, both in its nature and its scope, from Knoll's furniture storage and retrieval operations in the other six bays.

86. Knoll's activities within the six bays it occupied disturbed the settled dust, causing dust to accumulate on Knoll's products within the warehouse and causing Knoll's employees to complain about the dust. Plaintiffs presented no evidence that any of Occidental's activities in X and D bays disturbed the dust in those warehouses or that any Occidental employees complained about dust.

87. Plaintiffs have shown that there was a threat that the lead-contaminated dust would exit the six bays occupied by Knoll on the surface of Knoll's products and on the clothing of Knoll's workers. Plaintiffs, however, did not contend and presented no evidence that any products were shipped from the warehouses occupied by Occidental, that any such products contained lead-contaminated dust, that the clothing of any Occidental employees became soiled with dust in the course of their work, or that any such dust threatened to be released into the environment on the employees' clothing. Hence,

plaintiffs presented no evidence that there was a release or threatened release of contaminated dust from the X and D warehouses while they were occupied by Occidental.

88. Occidental's color mixing operation did not contribute in any way to the lead contamination in the dust. In addition, Occidental's activities were not the cause of any release or threatened release of lead into the environment.

H. Lead Paint in the Warehouse

89. Although BCW's sampling shows that the entire facility is painted with lead-based paint, the lead in the dust did not come from the paint in the warehouse.

90. If the paint was the source of the lead in the dust, the paint should show signs of blistering, peeling, chipping or flaking, and there should be some evidence of paint pigments in the dust.

91. Although there are varying levels of lead in the paint on the ceiling, bar joists and columns, the paint is in good condition and, with the exception of one small area, is not blistering, peeling, chipping or flaking.

92. X-ray photoelectron spectroscopy showed to a high degree of probability that the lead compound in the paint was not the same as the lead compound in the warehouse dust.

93. There was no evidence that the warehouse dust contained paint pigments.

I. Findings Relevant to Equitable Apportionment

94. BCW (Donesco) purchased the warehouse from Occidental "as is." BCW had a right to inspect the premises and terminate the purchase agreement within 45 days after it was executed. BCW was aware that it was purchasing a dusty, old warehouse. BCW's acceptance of the risk that something might be wrong with the building was reflected in the purchase price from Occidental. BCW could have exacted the same indemnification clause from Occidental as Knoll exacted from BCW, but it chose not to. BCW retained two engineering firms to inspect the warehouse and neither firm discovered the presence of lead in the dust.

*11 95. Knoll knew that it was leasing a dusty, old warehouse and was suspicious about the environmental condition of the building. Knoll nonetheless declined to investigate the matter to any great extent because of the expense of additional testing and because of its urgent need for warehouse space.

96. Firestone's tire grinding operations were the source of the lead in the dust. Firestone's grinding operations were extremely dusty and its housekeeping practices were poor. Although Firestone periodically tested its employees' blood lead levels, it was not overly concerned about the health risk posed by the dust.

97. It was the activities of BCW's lessee, Knoll, that were the cause of the threatened release of the lead dust into the environment.

98. BCW initiated a clean-up of the warehouse, at least in part, because of the threat that Knoll would vacate the premises and because Knoll's lease required BCW to indemnify Knoll for costs associated with cleaning the dust.

99. Knoll demanded that BCW clean the premises, at least in part, out of a concern for the health of its employees and the happiness of its customers. These concerns were prompted by inquiries from OSHA and by customer complaints.

100. As a result, BCW and Knoll's response to the lead dust, at least to the extent that the dust presented a threat to the environment, was something of an overreaction. BCW and Knoll overreacted to the problem, in general, to an extent greater than that which could be taken into account by disallowing costs that were not "necessary costs of response" within the meaning of 42 U.S.C. § 9607(a)(4)(B).

101. BCW received a substantial economic benefit from the clean-up that is not precisely measurable. Mr. Spotts testified that the replacement value of the warehouse that BCW purchased in late 1984 for 3 million dollars was more than 15 million dollars. Mr. Winitsky testified that he will use the clean-up certifications to assure future tenants that the building is free of any toxic substances. BCW purchased a dusty warehouse from Occidental at a discounted price and now has a clean, valuable industrial property.

102. Knoll has also received a substantial economic benefit from the clean-up. Knoll knowingly leased a dusty warehouse to use as its furniture distribution center, with the condition of the warehouse reflected in the rental price. As a result of the clean-up, Knoll now has the use of a warehouse that is especially well-suited to its furniture operations. Knoll received an economic benefit from the clean-up because it increased the value of its lease. Moreover, the clean-up not only satisfied Knoll's obligation under CERCLA, but it also satisfied Knoll's employees, customers, and Knoll's OSHA responsibilities. The lead dust was not only a threat to the outside environment but was also a threat,

and maybe a greater threat, to Knoll's employees inside the warehouse.

103. Firestone has not obtained any economic benefit from the cleanup. Firestone is twice removed from ownership of the warehouses, having sold them to Occidental which in turn sold them to BCW. Occidental has received only a minimal benefit from the clean-up.

*12 104. Although the lead dust presented a threat to the environment, the hazard posed by the level of lead in the dust was low. BCW and Knoll cleaned only the six bays operated by Knoll in 1986. BCW did not clean the other two bays occupied by Occidental for more than a year.

105. Occidental did not generate the lead dust, nor did it in any way cause or contribute to the threat of release of the dust into the environment.

106. Occidental's housekeeping practices were commendable, both while it owned the warehouse and afterwards, when it occupied two of the bays through a sublease entered into with Knoll. Occidental's activities in the warehouse after 1984, in comparison with those of Knoll, were minimal.

J. Response Costs

(i) BCW's Expenses

107. BCW presented evidence that it spent \$17,556.11 for sampling and testing.

108. BCW's sampling and testing costs included an amount paid to Roy F. Weston, Inc. for sampling of warehouse dust. *See* Plaintiffs' Ex. 60. BCW was able to provide the Court and Firestone with invoices for Weston's sampling and testing charges in the amount of \$6,618.00, presented as disbursements on the bills of the law firm of Kohn, Savett, Klein & Graf.

109. BCW's costs for sampling and testing included a sum paid to E.F. Williams and Associates for dust sampling at a Firestone facility in Memphis, Tennessee. Mr. Winitsky testified that he investigated the Memphis facility as a potential buyer of the property. BCW's testing of the Memphis facility was for Mr. Winitsky to decide whether to purchase that facility.

110. BCW incurred costs for sampling and testing of \$6,348.00 for the X-ray photoelectron spectroscopy analyses performed by the Rocky Mountain Analytical Research Laboratories. BCW incurred this cost to identify the source of the lead contamination.

111. BCW presented evidence that it incurred \$629,634.52 for removal of contamination.

112. BCW's removal of contamination costs include \$590,795.25 paid to Savage Brothers for vacuuming and disposal of dust from the structural members of the warehouses and encapsulation of dust left on the structural members. Mr. Ronald Schmoyer testified for the plaintiffs that his company would have charged approximately \$11,100.00 to remove the dust from the warehouse if the dust had not contained lead. Under cross examination, Mr. Schmoyer testified that he would have increased the charge 30 percent if it was necessary to damp wipe the warehouse structure. Mr. Schmoyer testified that he would have increased the charge an additional 20 percent if vacuuming was necessary. Mr. Schmoyer's company, therefore, would have charged approximately \$16,650.00 to do the equivalent of what Savage Brothers did if the dust had not contained lead. As a result, \$574,145.25 of the amount charged by Savage Brothers was attributable to the lead in the dust. In January and February of 1986, BCW sent Firestone and Occidental copies of bid proposals for the clean-up and there is no evidence that Firestone or Occidental objected to the amounts contained in those proposals.

***13** 113. BCW included in its costs for removal of contamination a sum paid to Winitsky Associates for supervision of the clean-up. Mr. Winitsky testified that, acting as representative of BCW, he did not receive invoices from Winitsky Associates, supervise Winitsky Associates' activities, or obtain independent review of its charges. On behalf of BCW, Mr. Winitsky simply wrote checks to Winitsky Associates. There was no evidence showing that the payments to Winitsky Associates were reasonable or that they were necessary costs of response.

114. BCW incurred costs for removal of contamination of \$9,583.71 paid to Weston in connection with the certification of clean-up in the warehouses.

115. BCW presented evidence that it incurred \$24,933.52 for legal and accounting fees prior to suit. BCW's legal fees were incurred for such matters as investigating the conditions in the warehouse, strategy meetings with BCW, Knoll and consultants, negotiating with Knoll as to responsibility for the clean-up, and developing a clean-up standard. The legal fees incurred by BCW totalled \$19,870.22. BCW's accounting fees were incurred for income tax advice relating to the tax treatment of costs incurred in the clean-up.

116. BCW presented evidence of miscellaneous charges of \$67.50 for express mail or courier fees, but did not offer any evidence as to why use of courier or express mail was necessary.

117. BCW presented evidence that it borrowed funds to pay for the clean-up costs it incurred. BCW did not offer any evidence that it was necessary for BCW to borrow the money.

(ii) Knoll's Expenses

118. Knoll presented evidence that it incurred \$64,563.86 for sampling and testing.

119. Knoll's sampling and testing costs included \$53,455.24 to BCM Eastern for industrial hygiene consulting services. Plaintiffs did not offer any evidence as to the specific nature of BCM's services or whether BCM actually performed any sampling and testing. Moreover, the plaintiffs did not present sufficient evidence to prove what percentage of the amount charged by BCM Eastern was incurred in response to a threatened release of lead into the environment and what percentage was incurred to monitor indoor airborne lead levels in order to comply with OSHA standards.

120. Knoll included in the costs for sampling and testing a \$17.00 Federal Express charge for sending material to one of its law firms. There was no evidence as to how this cost related to sampling and testing.

121. Knoll presented evidence that it paid \$703.22 to two laboratories to determine the source of the dust in the warehouse.

122. Knoll incurred \$4,448.00 for blood lead tests of its Pottstown warehouse employees.

123. Knoll incurred \$5,940.00 for sampling and testing of dust conditions in the warehouses by Cooperative Ventures, Inc.

124. Knoll presented evidence that it incurred \$93,627.93 for outside temporary labor.

125. Knoll's costs for outside temporary labor included \$78,156.28 to Burens Environmental for supervising activities in the clean room. Mr. Stoudt testified that approximately one-sixth of the labor expended in cleaning the goods stored in the warehouse would have been necessary even if the dust had not contained lead. It follows that Burens Environmental spent one-sixth of its time supervising the cleaning of goods that would have had to be cleaned anyway. Accordingly, Knoll paid Burens Environmental \$65,130.23 for services directly related to the clean-up of the lead dust.

*14 126. Knoll initially claimed \$4,912.34 for janitorial services performed by ASK, Inc. Mr. Newett testified that the correct amount to be allocated to dust clean-up for wet vacuuming warehouse floors by ASK was \$2,860.53.

127. Knoll incurred \$5,783.34 for services provided by several temporary labor agencies. The evidence showed that the temporary employees performed ordinary warehousing activities in place of Knoll employees who were involved in dust clean-up activities.

128. Knoll incurred a cost of \$4,776.00 for security services necessitated by the presence of independent contractors performing the clean-up of the lead dust.

129. Knoll presented evidence that it incurred \$23,993.48 for disposal of the lead dust and for the disposal of wastewater generated by the wet vacuuming process. The plaintiffs stipulated during trial that \$3,652.50 should be subtracted from this amount for costs incurred in removing PCB's from the warehouse. The total incurred, therefore, for removal of the lead contamination was \$20,340.98.

130. Knoll claimed costs of \$47,131.50 for rental equipment. The majority of Knoll's rental equipment cost was for rental of the wet vacuuming (Zamboni) machine.

131. Knoll presented evidence that its internal expenses attributable to the clean-up were \$171,656.00.

132. Many of the items included in this amount were for actions Knoll would have probably taken even if there was no lead in the dust. These actions were taken for sound business reasons and primarily benefitted Knoll's customers. The amounts claimed for plybags, packaging, soiled textiles, textile room labor and packaging room labor would all have been incurred even if there were no lead in the dust.

133. Knoll presented evidence of \$102,195.02 for clean room labor. Mr. Stoudt testified that one-sixth of this labor would have been necessary even if there had been no lead in the dust. The amount expended on clean room labor, therefore, directly related to the lead contamination was \$85,162.52.

134. Knoll introduced evidence showing that it spent \$182.37 on travel directly related to testing.

135. Knoll introduced evidence showing that it incurred a cost of \$23,165.36 to pay forklift operators who transported goods stored in the warehouse before and after clean-up. Approximately one-half of this amount was directly related to clean-up activities necessitated by the lead contamination. The other one-half of the forklift operators' time primarily benefitted Knoll's customers. The amount attributable to the lead contamination, therefore, is \$11,582.68.

136. Knoll presented evidence that it incurred \$109,182.61 for clean-up materials.

137. Knoll's costs for clean-up materials includes \$32,101.79 for the purchase by Knoll of a Zamboni machine for wet vacuuming floors. Mr. Newett testified that Knoll continues to use the Zamboni machine today, over a year after the completion of the cleanup. Because Knoll continues to obtain value from the machine, roughly one-half of the purchase price, or \$16,050.90, is attributable to the clean-up of the lead dust.

*15 138. Knoll included in the cost of clean-up materials several items related to the clean room, a response action that Mr. Newett admitted was in retrospect not necessary. It should have been apparent to the plaintiffs at the outset that a clean room was not warranted by the nature of the threat posed by the dust. Plaintiffs spent approximately \$20,281.30 on the construction of the clean room. This amount was paid to Rich Industries, Occidental Chemical Corporation, Greene Manufacturing Company, Triangle Building Centers, Swartley Brothers, and Amandus D. Moyer. The amount paid was for polyvinyl, gaskets, lumber, electrical wiring, and stapling materials.

139. Knoll spent \$45,877.31 on personal protective equipment and disposable clothing from ASK, Arbill, and Belmar Safety Equipment.

140. Knoll spent \$2,718.95 on safety equipment from Stauffer Manufacturing Company, \$7,613.45 on 55 gallon drums from Continental Vanguard, \$343.95 on janitorial supplies from McMaster-Carr and these items total \$10,676.35.

141. Knoll claimed as a clean-up expense \$247.77 paid to United Refrigeration. Although Knoll stated at trial that this charge had something to do with HEPA vacuums, it was unable to prove the exact nature of the goods or services provided by United Refrigeration.

142. Knoll presented evidence that it incurred \$31,474.71 in legal fees for advice relating to cleanup procedures and negotiations with BCW. Of this amount, \$1,052.00 was for air taxi fares to fly one of Knoll's attorneys from Washington, D.C. to Pottstown. Knoll did not present any evidence showing that this latter charge was necessary. The total amount spent on legal fees minus the air taxi fares is \$30,422.71.

143. There is no evidence that Knoll borrowed money to pay its cleanup costs or that it was necessary for Knoll to do so.

DISCUSSION

A. Occidental's Liability

At the close of plaintiffs' case at trial, I granted defendant Occidental Chemical Corporation's motion to dismiss pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. At that time, I found that the plaintiffs had failed to prove by a preponderance of the evidence that Occidental was a "person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). Occidental owned and operated the warehouse from 1980 until 1984. During that time, Occidental used the warehouse primarily to store raw materials and finished goods. Occidental also used one portion of one bay of the warehouse for a color mixing process connected with its plastics operations. The color mixing process involved the use of certain stabilizers and pigments which contained lead chromate. The plaintiffs attempted to show that the pigments were occasionally spilled and therefore were a source of the lead in the lead dust. In light of the facts that 1) there was no evidence that the lead dust contained any pigments; 2) the pigment mixing operation was well contained; 3) spills were infrequent, small, and promptly collected; and 4) plaintiffs' expert testified that the lead in the dust was probably lead sulfate, not lead chromate, plaintiffs failed to establish that any hazardous substances were disposed of while Occidental owned and operated the facility between 1980 and 1984.

*16 Another source of potential liability, however, is 42 U.S.C. § 9607(a)(1). Section (a)(1) provides for the liability of persons who are owners and operators at the time of a release or threatened release, "without regard to causation." New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir.1985). After selling the warehouse in 1984, Occidental continued to occupy bays X and D through a sublease it entered into with Knoll. Occidental's activities in the warehouse, however, were limited in scope, well-confined, and unrelated to the disposal or release of hazardous substances. It is doubtful that Occidental's limited activities in the warehouse after 1984 are sufficient to subject it to liability as an "operator" of the facility. See, e.g., Shore Realty, 759 F.2d at 1052 (one factor in determining "operator" status is whether person "manages" or is "in charge of the operation" of the facility); Developments in the Law—Toxic Waste Litigation, 99 Harv.L.Rev. 1458, 1514 (1986) ("Courts have generally resolved ambiguity with respect to whether a particular party falls within one of the statutory definitions [of liable persons] by inquiring into the degree of the defendant's control over some essential link in the disposal decision.").

However, even assuming that Occidental is an “operator” of the facility pursuant to Section (a)(1), it was clear at the close of plaintiffs' case that Occidental's responsibility for the disposal and threatened release of the lead dust was, as a matter of equitable apportionment pursuant to 42 U.S.C. § 9613(f)(1), nonexistent. It was therefore proper to enter judgment in favor of Occidental and against the plaintiffs at that time. It should be borne in mind that the defendants were presenting a unified defense, that Firestone possessed contractual indemnification rights against Occidental, that Firestone did not file a cross-claim for contribution from Occidental, and that Firestone did not oppose Occidental's Rule 41(b) motion. It therefore was not error to grant Occidental's motion before Firestone had a chance to present its evidence.

B. Firestone's Liability

In order to recover under CERCLA, the plaintiffs must establish the following five elements:

- (1) Firestone is a “covered person” within the meaning of CERCLA Section 107(a);
- (2) There was a release or threatened release of a hazardous substance from the warehouse into the environment;
- (3) The release or threatened release caused the plaintiffs to incur response costs;
- (4) Plaintiffs' costs were necessary costs of response;
- (5) The costs of response incurred by the plaintiffs were consistent with the national contingency plan.

42 U.S.C. § 9607(a); Artesian Water Co. v. New Castle County, 659 F.Supp. 1269, 1278–79 (D.Del.1987), aff'd, 851 F.2d 643 (3d Cir.1988). Firestone attacks the plaintiffs' case at each juncture.

Firestone concedes that it owned and operated the Pottstown facility from 1952 to 1980. It denies, however, that there was a disposal of any hazardous substance at the warehouse during that time. See 42 U.S.C. § 9607(a)(2); Shore Realty, 759 F.2d at 1044 (“Prior owners are liable only if they owned or operated the facility ‘at the time of disposal of any hazardous substance.’ ”). Despite Firestone's contention to the contrary, the evidence at trial showed that Firestone's tire grinding operation generated lead dust which was subsequently deposited throughout the warehouse. 42 U.S.C. § 9601(29) defines “disposal” by reference to Section 1004 of the Solid Waste Disposal Act, 42 U.S.C. § 6903. 42 U.S.C. § 6903(3) provides:

*17 The term “disposal” means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

Firestone's interpretation that a disposal “into or on any land or water” precludes finding a disposal within a warehouse is unduly narrow. See *Emhart Indus., Inc. v. Duracell Int'l, Inc.*, 665 F.Supp. 549, 574 (M.D.Tenn.1987) (spilling of a hazardous substance during its use in a manufacturing process constitutes a disposal). It is clear that Congress intended the term “land” to encompass buildings and other types of real estate: 42 U.S.C. § 9607(a)(2) contemplates the disposal of hazardous substances at a “facility” and 42 U.S.C. § 9601(a) defines “facility” to include “any building, structure, [or] installation.”

Firestone also argues that CERCLA should be construed to apply only to traditional hazardous waste dumps. Again, Firestone's reading of the Act is unduly constricted. If Firestone had acted responsibly, it would have carefully collected all of the dust generated by its tire grinding operation and disposed of it at an appropriate waste disposal facility. If the dust had then been released into the environment, Firestone would have been liable under CERCLA as a generator pursuant to 42 U.S.C. § 9607(a)(3). Firestone cannot circumvent this liability by allowing the lead dust to remain in the warehouse.

Firestone denies that there was a release or threatened release of the lead dust into the environment. The evidence at trial, however, showed that there was a threatened release of the lead dust on goods being shipped to Knoll's customers and on the shoes and clothing of workers leaving the warehouse. Firestone at no time argued, perhaps because it was in its interest not to, that the plaintiffs should have shut down the warehouse and ceased activities there in order to remove the threat of a release into the environment. Firestone also denies that this threatened release caused the plaintiffs to incur response costs. In support of this argument, Firestone contends that the plaintiffs were motivated not by CERCLA liability in initiating the clean-up but rather by concerns relating to products liability, quality control, and employee health. Firestone confuses causation with motivation. More importantly, however, it was clear at trial that the threat that the dust would be released via goods being shipped by Knoll was a substantial factor in causing the plaintiffs to incur response costs. See *Artesian Water*, 659 F.Supp. at 1283. Whether Knoll was initially motivated by business or by environmental concerns in responding to this threatened release is not relevant to the causation inquiry.

Firestone contends that the response costs incurred by the plaintiffs were not consistent with the national contingency plan (NCP). Section 300.71 of the NCP delineates different requirements for achieving consistency with the NCP depending on whether a response is characterized as a removal action or a remedial action. See 40 C.F.R. § 300.71(a)(2)(i), (a)(2)(ii). A threshold question, therefore, is whether the response taken by the plaintiffs is better characterized as a removal action or as a remedial action. The terms “remove” and “removal” are defined as”

***18** the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief Act of 1974.

42 U.S.C. § 9601(23). “Remedy” and “remedial action” are defined, in relevant part, as:

those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment.... [T]he term *includes* offsite transport and offsite storage, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials.

42 U.S.C. § 9601(24) (emphasis added).

There is obviously some overlap in the actions covered by these two sections. As the Court of Appeals for the Third Circuit has stated, "CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for inartful drafting and numerous ambiguities attributable to its precipitous passage. Problems of interpretation have arisen from the Act's use of inadequately defined terms, a difficulty particularly apparent in the response costs area." Artesian Water Co. v. New Castle County, 851 F.2d 643, 648 (3d Cir.1988). The general teaching is that removal actions are primarily those intended for short-term clean-up arrangements and interim responses while remedial actions effect long-term or permanent remedies. See Shore Realty, 759 F.2d at 1040; T E Indus. Inc. v. Safety Light Corp., 680 F.Supp. 696, 706 (D.N.J.1988); City of New York v. Exxon Corp., 633 F.Supp. 609, 614 (S.D.N.Y.1986). The mere fact, however, that what would otherwise be a removal action effects a permanent remedy does not convert that action into a remedial action. The EPA has clearly contemplated that a removal action might effect a permanent remedy. See 40 C.F.R. § 300.65(e) ("If the lead agency determines that the removal action will not fully address the threat or potential threat posed by the release and the release may require remedial action, the lead agency shall ensure an orderly transition from removal to remedial response activities.").

***19** Credible testimony at trial established that the EPA uses a 12 month time period as a benchmark for distinguishing between removal and remedial actions—that is, actions taken within 12 months after a clean-up is initiated are generally considered to be removal actions while actions taken after 12 months have elapsed are considered to be remedial actions. Section 300.65(b)(3) of the NCP states that removal actions "shall be terminated after \$1 million has been obligated for the action or six months have elapsed from the date of initial response...." 40 C.F.R. § 300.65(b)(3). Although 40 C.F.R. § 300.65(i) specifically provides that private party responses are exempt from 40 C.F.R. § 300.65(b)(3), section 300.65(b)(3) lends support to the proposition that the cost and duration of a response action is relevant to determining whether that action is a removal or a remedial action. Moreover, it would seem incongruous to require that an inexpensive and small-scale clean-up comport with the detailed requirements of the NCP applicable to remedial actions.

Most important, perhaps, is the nature of the action actually taken. Remedial actions are designed "to prevent or minimize the release of hazardous substances ... so that they do not migrate." 40 C.F.R. § 300.68(a)(1). The prototypical remedial action involves the onsite structural confinement of hazardous waste. Although the term "remedial action" may, under certain circumstances, include offsite transport and storage, off-site actions are more easily characterized as removal actions. In

addition, it cannot be ignored that the word "removal" is descriptive as well as denotative.

None of these tests, taken alone, adequately characterize a response action as a removal or a remedial action. The better approach is to view the action taken by the plaintiffs in light of several factors: the cost, complexity, and duration of the clean-up; the immediacy of the release or threatened release; and the nature of the action actually taken. Having examined each of these factors, I believe that the plaintiffs' response to the lead dust in the warehouse was a removal action: it was simple, of relatively short duration, and cost approximately \$968,000; although a release was not imminent, the threat of a release was relatively immediate; and the response essentially involved the collection and removal offsite of the dust in the warehouse. While the vacuuming of the lead dust was clearly a removal action, the encapsulation of the remaining dust appears at first glance to be more remedial in nature. However, because removal of all the dust was impossible, encapsulation was an integral and inseparable part of the removal process. The entire clean-up, therefore, will be treated as a removal action.

In order to comply with the NCP, a person taking a removal action must "act in circumstances warranting removal and implement removal action consistent with § 300.65." 40 C.F.R. § 300.71(a)(2)(i). Section 300.65 requires, in relevant part, the following:

***20** (a)(1) In determining the appropriate extent of action to be taken at a given release, the lead agency shall first review the preliminary assessment and the current site conditions to determine if removal action is appropriate.

(2) Where the responsible parties are known, an effort initially shall be made, to the extent practicable considering the exigencies of the circumstances, to have them perform the necessary removal....

(b) ...

(2) The following factors shall be considered in determining the appropriateness of a removal action pursuant to this subsection.

(i) Actual or potential exposure to hazardous substances or pollutants or contaminants by nearby populations, animals, or food chains;

(ii) Actual or potential contamination of drinking water supplies or sensitive ecosystems;

(iii) Hazardous substances or pollutants or contaminants in drums, barrels, tanks, or other bulk storage containers, that may pose a threat of release;

(iv) High levels of hazardous substances or pollutants or contaminants in soils largely at or near the surface, that may migrate;

(v) Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released;

(vi) Threat of fire or explosion;

(viii) Other situations or factors which may pose threats to public health or welfare or the environment.

(f) Although Fund-financed removal actions and removal actions pursuant to CERCLA section 106 are not required to comply with other Federal, State, and local laws governing the removal activity, including permit requirements, such removal actions shall, to the greatest extent practicable considering the exigencies of the circumstances, attain or exceed applicable or relevant and appropriate Federal public health and environmental requirements. Other Federal criteria, advisories, and guidance and State standards also shall, as appropriate, be considered in formulating the removal action.

40 C.F.R. § 300.65. The evidence at trial showed that the plaintiffs undertook an adequate site assessment of the threatened release pursuant to 40 C.F.R. § 300.64 and that they reviewed this assessment and the current site conditions in determining that a removal was appropriate. The plaintiffs also requested that the defendants, the alleged responsible parties, perform the necessary removal action. In addition, the plaintiffs considered the actual or potential exposure of nearby populations, animals, or the food chain, most notably Knoll's employees and customers. Although Mr. Douglass tested the soil surrounding the warehouse, there were not "high levels" of hazardous substances present. Finally, there has been no allegation by the defendants that the plaintiffs' response did not attain or exceed applicable public health and environmental requirements. The plaintiffs, in fact, explicitly considered requirements imposed by OSHA in developing its response strategy. The other enumerated factors were not relevant to the threat posed by the lead dust. The plaintiffs' assessment of the threat posed by the dust and their consideration of alternative response strategies were relatively simple, but the nature of the situation warranted no more. In short, I find

that the plaintiffs fully complied with the requirements of the NCP applicable to removal actions.^{FN3}

***21** Firestone and each of the plaintiffs have invoked the third-party defense to liability provided by 42 U.S.C. § 9607(b)(3). Firestone's defense fails because the evidence at trial failed to establish that Firestone exercised due care with respect to the hazardous substance concerned and also failed to establish that Firestone took precautions against the foreseeable acts of third parties. The plaintiffs contend that they are entitled to invoke the third party defense because they did not introduce any lead into the warehouse. The evidence at trial, however, clearly established that Knoll's activities were responsible for the threatened release. In light of BCW's knowledge concerning the dust in the warehouse and the nature of Knoll's activities, it cannot be said that it exercised due care or took adequate precautions. Firestone, BCW, and Knoll, therefore, are all liable for response costs.

Firestone argues that the majority of the costs incurred by the plaintiffs are not necessary costs of response. I find that the following costs incurred by the plaintiffs were necessary costs of response:

BCW's costs

\$6,618.00 for sampling and testing

\$6,348.00 for XPS analyses

\$574,145.25 for vacuuming and
encapsulation

\$9,583.71 for certification

\$19,870.22 for legal fees

\$616,565.18

Knoll's costs

\$703.22 for source testing

\$4,448.00 for blood lead tests

\$5,940.00 for sampling and testing

\$65,130.23 for supervision

\$2,860.53 for wet vacuuming

\$4,776.00 for security services

\$20,340.98 for disposal

\$47,131.50 for rental equipment

\$85,162.52 for clean room labor

\$182.37 for travel

\$11,582.68 for forklift operators

\$16,050.90 for a Zamboni machine

\$45,877.31 for personal protective
equipment

\$10,676.35 for safety equipment

\$30,422.71 for legal fees

\$351,285.30

Total:

\$967,850.48

*22 I find that the remaining costs incurred by the plaintiffs were unnecessary, not sufficiently connected to the threat posed to the outside environment, or not adequately supported by the evidence. The reason for disallowing each of these costs is more specifically set out in the response costs section of the findings of fact.

Firestone has counterclaimed for contribution from the plaintiffs. 42 U.S.C. § 9613(f)(1) provides that “[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.” Because there are three responsible parties, it is appropriate to divide the amount incurred into contributory shares of one-third each. After weighing the facts and considerations relevant to the apportionment issue, I find that it would be equitable to set Firestone's share at one-third and to set Knoll and BCW's combined share at two-thirds. The facts I considered are set out in Section I of the findings of fact—the most important among them being that BCW purchased the warehouse “as is” and received substantial collateral benefits from the clean-up, see *Smith–Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 92 (3d Cir.1988), and that Knoll was not only suspicious of the environmental condition of the warehouse but also was primarily responsible for the threatened release of the lead dust. Judgment, therefore, will be entered in favor of the plaintiffs and against Firestone in the amount of \$322,616.82. The plaintiffs are also entitled to interest pursuant to 42 U.S.C. § 9607(a) in an amount to be calculated by the parties.^{FN4}

Having considered the foregoing discussion and findings of fact, I now make the following

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this matter pursuant to 42 U.S.C. § 9613(b) and 28 U.S.C. § 1331.
2. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) and (c) and 42 U.S.C. § 9613(b).
3. Firestone was an “owner or operator” of the Pottstown warehouse from 1952 until December 1980. See 42 U.S.C. §§ 9601(20)(A) and 9607(a)(2).
4. Firestone was a generator of hazardous substances at the Pottstown warehouse from 1952 until December 1980. See 42 U.S.C. § 9607(a)(3).
5. Occidental was not an “owner or operator” of the Pottstown warehouse within the meaning of 42 U.S.C. § 9607(a)(2).
6. Occidental was not an “owner and operator” of the warehouse within the meaning of 42 U.S.C. §

9607(a)(1).

7. Even if Occidental was an "owner and operator," it would not be liable for any share of the response costs after equitable apportionment pursuant to 42 U.S.C. § 9613(f).

8. Knoll and BCW were "owners and operators" of the Pottstown warehouse from 1984 until the present. See 42 U.S.C. § 9607(a)(1).

9. Lead is a hazardous substance under CERCLA. See 40 C.F.R. § 302.4.

10. There was a threatened release of lead dust into the environment during the time that Knoll operated the warehouse.

***23** 11. The threatened release caused BCW and Knoll to incur response costs.

12. BCW and Knoll incurred \$967,850.48 of necessary response costs.

13. BCW and Knoll's response to the threatened release constituted a removal action.

14. Plaintiffs' costs of response were consistent with the national contingency plan's requirements for removal actions. See 40 C.F.R. §§ 300.65, 300.71.

15. Neither Firestone, nor BCW, nor Knoll is entitled to invoke the third-party defense to CERCLA liability provided for by 42 U.S.C. § 9607(b).

16. After equitable apportionment, Firestone is liable for a contributory share of one-third of the necessary response costs, or \$322,616.82.

17. The plaintiffs are entitled to statutory interest on this amount pursuant to 42 U.S.C. § 9607(a).

18. Plaintiffs' prayer for administrative costs, attorney's fees, and other litigation costs in addition to those allowed as necessary costs of response is denied.

An appropriate order follows.

ORDER

AND NOW, this 29 day of September, 1988, IT IS ORDERED that judgment is hereby ENTERED against Firestone Tire and Rubber Company and in favor of the plaintiffs in the amount of \$322,616.82 plus applicable interest pursuant to 42 U.S.C. § 9607(a) in an amount to be calculated by the parties.

This is a final order and the Clerk of the Court is directed to close the docket of this case.

FN1. By order dated May 11, 1987, I declined to exercise jurisdiction over plaintiffs' state law claims.

FN2. By order dated March 4, 1988, I denied defendants' motion for summary judgment. In that order I rejected several arguments raised by the defendants, including the argument that plaintiffs' claim is barred by the doctrines of *caveat emptor*, waiver and equitable estoppel. In a memorandum dated May 5, 1988, I granted in part plaintiffs' motion to strike various affirmative defenses raised by the defendants. The issues discussed in the order and in the memorandum will not, for the most part, be revisited in this opinion.

FN3. The plaintiffs argue that their response costs were consistent with the NCP even if their response is characterized as a remedial action. While the requirements of the NCP should not be applied in a Procrustean manner, I cannot agree that compliance with the NCP is reducible to an inquiry into whether the clean-up was cost efficient and environmentally sound. When the EPA revised the NCP in 1985, it "modified § 300.71 to specify in detail what private parties must do in order to act consistently with the NCP." 50 Fed.Reg. 47912, 47934 (November 20, 1985). Plaintiffs did not meet the requirements of the NCP applicable to remedial actions in several respects—most notably by failing to document why they chose the response action they did. *See, e.g.,* 40 C.F.R. §§ 300.68(g), 300.69(a).

FN4. Although I allowed plaintiffs to recover attorney's fees that were incurred in order to respond to the threatened release and to comply with the requirements for cost recovery under CERCLA, the plaintiffs are not entitled to recover attorney's fees that were incurred to pursue this litigation. *See T & E Industries, Inc. v. Safety Light Corp., 680 F.Supp. 696, 707–08 (D.N.J.1988)*. Plaintiffs' prayer for administrative costs, attorney's fees, and other litigation costs, in addition to those allowed as necessary costs of response, therefore, is denied.

E.D.Pa.,1988.

BCW Associates, Ltd. v. Occidental Chemical Corp.

Not Reported in F.Supp., 1988 WL 102641 (E.D.Pa.)

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