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U.S. DISTRICT COURT E.D.N.Y.
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LONG ISLAND OFFICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA,

Plaintiff,

- against -

GENESCO INC.,

Defendant.

- X

COMPLAINT

Civil Action

(NSI) CV-09 3917

SEYBERT, J.

LINDSAY, M.

The United States of America, by authority of the Attorney General of the United States and the United States Attorney for the Eastern District of New York, through the undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), files this complaint and avers as follows:

NATURE OF THIS ACTION

1. This is a civil action brought pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. §§ 9601-9675:

a. For injunctive relief pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), requiring Defendant Genesco Inc. ("Defendant") to perform certain response actions selected by EPA in order to abate conditions at the Fulton Avenue Superfund Site ("Site"), located in and around the Village of Garden City Park in Nassau County, New York, that present or may present an imminent and substantial endangerment to the public health or welfare or the

environment; and

b. For recovery against Defendant of response costs incurred, and to be incurred, by the United States pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), in connection with the release and threatened release into the environment of hazardous substances at the Site.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action pursuant to Sections 106, 107 and 113(b) of CERCLA, 42 U.S.C. §§ 9606, 9607 and 9613(b), and 28 U.S.C. §§ 1331 and 1345.

3. Venue is proper in this judicial district pursuant to Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and 28 U.S.C. §§ 1391(b), 1391(c) and 1395, because the claims arose, and the threatened or actual releases of hazardous substances occurred, in this district.

THE DEFENDANT

4. Defendant Genesco Inc. is a corporation with its principal place of business at 1415 Murfreesboro Road, Genesco Park, Nashville, Tennessee.

5. Defendant is a "person" as defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

STATUTORY BACKGROUND

6. CERCLA was enacted in 1980 to provide a comprehensive governmental mechanism for abating releases and threatened releases of hazardous substances and other pollutants and contaminants and for funding the costs of such abatement and related enforcement activities, which are known as "response actions." 42 U.S.C. §§ 9604(a), 9601(25).

7. Under Section 104(a)(1) of CERCLA:

> Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment . . . .

42 U.S.C. § 9604(a)(1).

8. Section 106(a) of CERCLA provides, in addition to the President's authority to undertake response actions under Section 104 of CERCLA, in relevant part, that:

> [W]hen the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the

> district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

42 U.S.C. § 9606(a).

9. For CERCLA response actions and enforcement purposes, the Administrator of EPA is the President's delegate, as provided in operative Executive Orders, and, within certain limits, the Regional Administrators of EPA have been re-delegated this authority.

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

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this Section-
>
> (1) the owner and operator of a vessel or a facility, [and]
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> . . .
>
> shall be liable for--
>
> (A) all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan . . . .

GENERAL FACTUAL ALLEGATIONS

Site Background

11. The Site includes a 0.8-acre commercial facility at 150 Fulton Avenue in Garden City Park (hereinafter, the "Fulton Property") which is a source of tetrachloroethylene ("PCE") groundwater contamination that extends south from the Fulton Property for approximately one mile and has impacted two public supply wells, Garden City Water District ("GCWD") wells 13 and 14. The groundwater contamination plume also includes a trichloroethene ("TCE")-dominant portion that overlaps the PCE-dominant portion of the plume.

12. The Fulton Property is located in an area characterized by mixed industrial-commercial and residential usage.

13. Gordon Atlantic Corporation ("Gordon"), the current owner of the Fulton Property, has owned the Fulton Property since 1963.

14. Pursuant to an October 29, 1964, lease, "Knitfabs Division, Flagg-Utica Corp." leased the Fulton Property from Gordon for a term initially running from January 1, 1965, to December 31, 1969. The lease was renewed for an additional term expiring December 31, 1974.

15. Flagg-Utica Corp. merged with Defendant on or about January 7, 1965.

16. Pursuant to the terms of the October 29, 1964, lease, including the rider thereto, Defendant, as lessee, acquired the

requisite indicia of ownership to be a *de facto* owner of the Fulton Property.

17. "Knit-Fabs, a Division of Genesco Inc." assigned its lease of the Fulton Property to Halperin Knitting Mills, Inc. ("Halperin") under an Assignment Agreement dated August 27, 1969.

18. Pursuant to an August 27, 1969, agreement, Knitfabs sold its assets at the Fulton Property, including one Permac Dry Cleaning Machine, Model 120, Serial No. 3093 ("Permac Dry Cleaning Machine"), to Halperin.

19. The Permac Dry Cleaning Machine used PCE to clean fabric.

20. Upon information and belief, Knitfabs' operations at the Fulton Property included the cutting and processing of knitted fabrics.

21. Upon information and belief, Halperin's operations at the Fulton Property included the cutting and processing of knitted fabrics.

22. Upon information and belief, Knitfabs' operations at the Fulton Property included the dry cleaning of fabrics with PCE.

23. Upon information and belief, Halperin's operations at the Fulton Property included the dry cleaning of fabrics with PCE.

24. Upon information and belief, PCE was disposed of into the environment at the Fulton Property during the time of Knitfabs' operations there.

25. Upon information and belief, PCE was disposed of into the

environment at the Fulton Property during the time of Halperin's operations there.

Response Actions at the Site

26. Hazardous substances as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), including PCE and TCE, have been detected in soil and groundwater at the Site.

27. Beginning in 1986, numerous investigations were conducted by the Nassau County Departments of Health and Public Works to identify source(s) of chlorinated volatile organic compounds impacting numerous public supply wells in Nassau County located downgradient of the Fulton Property.

28. On March 6, 1998, EPA placed the Site on the National Priorities List ("NPL") of hazardous substance sites, which was established pursuant to Section 105(a) of CERCLA, 42 U.S.C. § 9605(a).

29. The New York State Department of Environmental Conservation ("NYSDEC") was the lead regulatory agency for the Site until February 2007.

30. On September 18, 1997, NYSDEC issued an administrative order pursuant to which Defendant performed a Remedial Investigation and Feasibility Study from August 1997 to February 2007.

31. Pursuant to the September 18, 1997, NYSDEC Administrative Order, Defendant conducted an Interim Remedial Measure ("IRM") from

August 1998 to December 2001. In order to prevent further migration of contaminants into the aquifer and into the indoor air at the Fulton Property, the IRM removed PCE and other contaminants from a drywell on the Fulton Property. The IRM included the excavation of soils from the bottom of the drywell.

32. The IRM also included installation, maintenance and operation of a soil vapor extraction ("SVE") system to address residual soil contamination. Defendant removed over 10,000 pounds of PCE from the PCE source area during the operation of the SVE system. Defendant also installed a sub-slab depressurization system under the building at the Fulton Property to provide additional protection to the occupants from exposure to the contamination.

33. NYSDEC approved Defendant's Remedial Investigation report in November 2005.

34. From approximately October 2002 until February 2007, Defendant conducted a Feasibility Study in order to evaluate remedial alternatives for the Site.

35. Between approximately February 2006 and February 2007, NYSDEC and EPA reviewed Defendant's draft Feasibility Study reports.

36. In February of 2007, EPA produced an addendum to Defendant's FS report to clarify issues in the Defendant's draft report and to propose a new remedial alternative.

37. NYSDEC approved Defendant's FS, including EPA's FS Addendum, on February 15, 2007.

38. EPA replaced NYSDEC as the lead agency for the Site at the conclusion of the RI/FS process in February 2007.

39. On February 23, 2007, pursuant to Section 117(a) of CERCLA, 42 U.S.C. § 9617(a), EPA released for public comment its Proposed Plan identifying the Agency's preferred Operable Unit 1 ("OU1") interim remedy for the Site.

40. On August 16, 2007, EPA issued an administrative order to Defendant which directed Defendant to collect groundwater samples from several groundwater monitoring wells at the Site in order to monitor the movement of the groundwater contamination plume.

41. On September 28, 2007, EPA issued a First Operable Unit Record of Decision ("OU1 ROD") for the Site, in which EPA selected a remedial action to address the portion of the groundwater contamination plume at the Site that is primarily contaminated with PCE. The OU1 ROD includes, among other things, pumping and treating of the PCE-dominant portion of the groundwater plume. In the OU1 ROD, EPA estimated the present-worth cost of the OU1 remedy at $10,696,860.

42. On August 17, 2009, EPA issued a second administrative order to Defendant which directed Defendant to collect groundwater samples at the Site.

43. Pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, EPA

has taken actions in "response" to releases or threatened releases of hazardous substances at the Site, as the term "response" is defined in 42 U.S.C. § 9601(25). These response actions have included, without limitation: review of Defendant's draft Remedial Investigation and Feasibility Study reports; preparation and issuance of the addendum to Defendant's Feasibility Study report; preparation and issuance of the February 2007 Proposed Plan; preparation and issuance of the OU1 ROD; preparation and issuance of the August 2007 and August 2009 administrative orders directing Defendant to collect groundwater samples from wells at the Site; and other investigation and enforcement activities.

EPA's Response Costs

44. As of February 28, 2009, EPA had incurred at least $699,644.75 performing response actions regarding the Site, including the response actions described above. The United States continues to incur response costs within the meaning of Section 101(25) of CERCLA, 42 U.S.C. § 9601(25).

45. By letter dated April 25, 2002, EPA notified Defendant of its status as a potentially responsible party for the Site pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

46. By letter dated April 10, 2008, EPA demanded payment of its past response costs from Defendant.

47. Defendant has not reimbursed the United States for any of its response costs at the Site.

FIRST CLAIM FOR RELIEF
INJUNCTIVE RELIEF UNDER CERCLA SECTION 106(a)

48. Paragraphs 1 through 47 are re-alleged an incorporated herein.

49. The Site is a "facility" within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

50. There have been and continue to be "releases" of "hazardous substances" within the meaning of Sections 101(22) and (14) of CERCLA, 42 U.S.C. §§ 9601(14) and (22), into the environment at the Site.

51. Defendant was an "operator" of the Fulton Property at the Site within the meaning of Section 101(20)(A) of CERCLA, 42 U.S.C. § 9601(20)(A).

52. Defendant is liable to the United States pursuant to Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2), as an operator of the Site at a time of disposal of hazardous substances at the Site.

53. Defendant was a *de facto* "owner" of the Fulton Property within the meaning of Section 101(20)(A) of CERCLA, 42 U.S.C. § 9601(20)(A).

54. Defendant is liable to the United States pursuant to Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2), as an owner of the Site at a time of disposal of hazardous substances at the Site.

55. In accordance with Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), the Director of the Emergency and Remedial Response Division, EPA Region 2, has determined that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of the actual and/or threatened releases of hazardous substances at the Site.

56. The remedy selected in the OU1 ROD is not inconsistent with the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 C.F.R. Part 300.

57. Pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), Defendant is liable to perform certain response actions selected by EPA in order to abate conditions at the Site that present or may present an imminent and substantial endangerment to the public health or welfare or the environment.

SECOND CLAIM FOR RELIEF
COST RECOVERY UNDER CERCLA SECTION 107(a)

58. Paragraphs 1 through 57, inclusive, are reaverred and incorporated herein by reference.

59. The releases or threatened releases of hazardous substances at the Site have caused the United States to incur response costs, as the term "response" is defined by Section 101(25) of CERCLA, 42 U.S.C. § 9601(25), in connection with the Site. The United States will continue to incur response costs in connection with the Site in the future.

60. The costs of the response actions taken and to be taken

by the United States in connection with the Site are not inconsistent with the NCP, 40 C.F.R. Part 300.

61. Pursuant to Section 107(a), 42 U.S.C. § 9607(a), Defendant is liable to the United States for the response costs incurred, and to be incurred, by the United States in connection with the Site.

PRAYER FOR RELIEF

WHEREFORE, plaintiff, the United States of America, respectfully requests that this Court:

1. On the First Claim for Relief, enter judgment against Defendant, in favor of the United States, ordering Defendant to perform certain response actions selected by EPA in order to abate the conditions at the Site;

2. On the Second Claim for Relief, enter judgment against the Defendant, in favor of the United States, for all past and future response costs incurred or to be incurred by the United States in connection with the Site, including enforcement costs and interest;

3. Award the United States its costs of this action; and

4. Grant such other and further relief as the Court deems appropriate.

JOHN C. CRUDEN
Acting Assistant Attorney General
Environment and Natural Resources
Division
United States Department of Justice

Dated: Central Islip, NY
September 10, 2009

BENTON J. CAMPBELL
United States Attorney
Eastern District of New York
United States Attorney's Office
Eastern District of New York
610 Federal Plaza
Central Islip, New York 11722

By:

ROBERT B. KAMBIC (RK-1622)
Assistant United States Attorney
(631) 715-7852

Of Counsel

DOUGLAS FISCHER
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
290 Broadway, 17th Floor
New York, New York 10007-1866