

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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HIGHLAND GROVE LLC,

Plaintiff,

**COMPLAINT**

v.

CITY OF ROCHESTER,

Civil Action No.:

Defendant.

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Plaintiff, HIGHLAND GROVE LLC (“Highland”), by and through its attorneys, Heisman, Nunes & Hull LLP, Ronald G. Hull, Esq., of Counsel, for its Complaint, states as follows:

**PRELIMINARY STATEMENT**

1. Highland brings this action as: 1) the owner of real property in the City of Rochester located at 625 South Goodman Street which was the location of the former Sherwood Shoe Company (“Site”); and 2) as the Volunteer obligated to investigate, remediate, monitor and maintain the Site pursuant to a Brownfield Cleanup Agreement (“BCA”) with the New York State Department of Environmental Conservation (“NYSDEC”). The Site has been designated by the NYSDEC as Site Number C828201.

2. In this action, Highland complains of discharge(s), release(s), spill(s) and/or disposal(s) (hereinafter the “disposal” or “disposals”) of hazardous substances, including Per- and Polyfluoroalkyl substances (“PFAS”), at the Site, resulting in continuing surface, soil and groundwater contamination at the Site.

3. These disposals, either with permission of a prior owner of the Site or resulting from trespass, have led to contamination at the Site and present or may present an imminent and substantial endangerment to health and/or the environment, and are a private and public nuisance.

4. This action arises from the negligent, intentional, wrongful and/or illegal acts and/or omissions of the City of Rochester (“City”).

5. The City has refused to investigate and remediate the contamination in, on or at the Site or to reimburse Highland for the response costs it has incurred as a result of the disposals of PFAS at the Site.

6. While Highland has performed Remedial Measures to remove contaminated soil from the Site, some contamination was left at the Site, particularly in the groundwater, which is hereafter referred to as “remaining contamination”.

7. Institutional and Engineering Controls have been incorporated into a Site Management Plan (“SMP”) to control exposure to remaining contamination to ensure protection of public health and the environment. An environmental easement granted to the NYSDEC, and recorded with the Monroe County Clerk, requires compliance with this SMP and all Institutional and Engineering Controls placed at the Site.

8. The SMP includes a Monitoring and Sampling Plan which requires ongoing monitoring of the remaining contamination, and specifically PFAS.

9. Pursuant to the Resource Conservation and Recovery Act (“RCRA”) and common law, Highland seeks an injunction generally requiring the City to investigate and monitor and/or remediate the remaining contamination, and pay for the monitoring required by the NYSDEC, due to the presence of PFAS at the Site.

10. Highland also seeks compensatory damages, equitable or implied indemnification and restitution.

### **THE PARTIES**

11. Highland is a limited liability company with offices at 301 Exchange Boulevard, Rochester, New York 14608.

12. Defendant City is a municipal corporation with offices at 30 Church Street, Rochester, New York 14614.

### **JURISDICTION AND VENUE**

13. This Court has federal question jurisdiction over this matter pursuant to 28 U.S.C. §1331 because this case arises under the laws of the United State, specifically RCRA, §1002, 42 U.S.C. §6901, et. seq., and the Comprehensive Environmental Response Compensation and Liability Act (CERCLA”), §101, 42 U.S.C. §9601, et. seq.

14. This Court has supplemental jurisdiction over the claims arising under New York State law pursuant to 28 U.S.C. §1367, which are so related to the claims arising under RCRA and CERCLA that they form part of the same case or controversy.

15. In addition, the Declaratory Judgments Act, 28 U.S.C. §2201, authorizes this Court to grant declaratory relief in this matter.

16. Venue is proper in this federal District Court because the disposals occurred within the Western District of New York, because the Site is located within the Western District of New York and because the events related to the claims in this Complaint occurred within the Western District of New York.

17. Highland served a timely Notice of Claim pursuant to New York General Municipal Law §50-e on the City.

18. Highland served a Notice of Intent to Sue pursuant to RCRA §7002(b)(2)(A), 42 U.S.C. §6972(b)(2)(A) on the City on November 16, 2018. More than ninety (90) days have elapsed since service of the Notice of Intent to Sue.

#### **GENERAL ALLEGATIONS**

19. Upon information and belief, PFAS are a family of synthetic chemicals containing fluorine and carbon atoms.

20. Upon information and belief, PFAS have strong surfactant properties, meaning they reduce the surface tension between a liquid and another liquid or solid, and are thus effective in products which require fire resistance.

21. Upon information and belief, PFAS are or have been used as a constituent in firefighting foams.

22. Upon information and belief, the first PFAS were developed in the 1930s but did not come into widespread commercial use until the 1950s.

23. Upon information and belief, PFAS have been used as a constituent in firefighting foams since the 1960s.

24. Upon information and belief, firefighting foams in use since the mid-1960s are a complex mixture of PFAS. Foams were produced to meet firefighting specifications, rather than formulated to contain a specific mixture of PFAS.

25. Upon information and belief, firefighting foams have been released into the environment through a variety of practices and mechanisms, including, but not limited to, discharge of firefighting foam for apparatus testing, for training firefighters in the use of foam and for firefighting.

26. Upon information and belief, firefighting foam is applied by mixing foam concentrate and water to make foam solution. When discharged, the foam solution is aerated at the nozzle, yielding finished foam. After application, the finished foam reverts to foam solution and releases PFAS which infiltrate from the ground surface into and through the soil and into groundwater, causing both soil impacts and groundwater contamination.

27. Upon information and belief, the chemical structure of PFAS makes them mobile and extremely resistant to breakdown in the environment.

28. Upon information and belief, studies have shown that PFAS have the potential to bioaccumulate and biomagnify in wildlife and humans.

29. Upon information and belief, the United States Environmental Protection Agency (“USEPA”) issued Health Advisories warning that drinking water containing PFAS above a combined value of 70 parts per trillion pose adverse human health risks. The Health Advisories were announced on May 19, 2016 and published in the Federal Register on May 25, 2016.

30. Studies completed in 2015 on PFAS by the Agency for Toxic Substances and Disease Registry (“ATSDR”), the Public Health Service and the U.S. Department of Health and Human Services show that PFAS may be adverse to human health and the environment.

31. The ATSDR and the U.S. Department of Health and Human Services prepared a Draft Toxicological Profile (“DTP”) for Perfluoroalkyls that was released for public comment on June 20, 2018.

32. The DTP was prepared pursuant to CERCLA §104(i), 42 U.S.C. §9604(i), and characterizes the toxicological and adverse health effects of PFAS based on studies of 14 PFAS.

33. The DTP concludes that there are associations between PFAS exposure and several adverse health effects and that there is suggestive evidence that PFAS may be carcinogenic.

34. In January, 2016, NYSDEC issued an emergency rulemaking listing perfluorooctanoic acid (“PFOA”) as a hazardous substance, followed in April 2016 by an emergency rulemaking listing perfluorooctanoic sulfonic acid (“PFOS”) as a hazardous substance. PFOA and PFOS are PFAS and have been detected at the Site.

35. The Final Rule adding PFOA and PFOS, and perfluorooctane sulfonate (“PFOS-SALT”), to the list of hazardous substances at 6 NYCRR §597.3 became effective March 3, 2017.

36. On July 24, 2019, the New York State Department of Health proposed amendments to 10 NYCRR §5-1.52, Table 3 proposing to establish maximum contaminant levels of 10 parts per trillion for PFOS, PFOA and 1,4-dioxane in drinking water.

### THE CONTAMINATION

37. The Site is located in the City of Rochester and is identified as Section 121.650 Block 2 and Lot 39 on the City of Rochester Tax Map. The Site is approximately 1.798 acres and is bounded by Interstate 490, Karges Place, Uhlen Place and South Goodman Street.

38. Highland acquired the Site from Mark IV Construction, Inc. (“Mark IV”) by deed recorded in the Monroe County Clerk’s Office on September 21, 2016 at Book of Deeds 11757, page 0352.

39. Mark IV had acquired the Site that same day from the State of New York by deed recorded in the Monroe County Clerk’s Office at Book of Deeds 11757, page 0346.

40. Upon information and belief, the State of New York acquired the property in or about 1971 by eminent domain for the construction of the Genesee Expressway, now known as Interstate 490.

41. Upon information and belief, an abandoned manufacturing building located on the Site was destroyed by fire on July 1, 1971, and the vacant Site was thereafter used by the New York State Department of Transportation as an equipment and material staging area but remained vacant until acquired by Highland.

42. Upon information and belief, the City of Rochester Fire Department used the vacant Site periodically for training exercises, including among other activities, the release and disposal of firefighting foam.

43. The use of the property by the City Fire Department was unknown to Highland until 2018 when a contractor encountered City firefighters trespassing on the Site and training with firefighting foam.

44. In 2012, the City retained Stantec Consulting Services, Inc. to perform a Phase I Environmental Site Assessment of the Site. Stantec prepared a report dated December 19, 2012

which concluded there were several “recognized environmental conditions” associated with the past uses of the Site.

45. The Phase I Report does not mention, and Stantec was presumably unaware of, the occasional use of the Site for training by the City Fire Department.

46. The Phase I Report raised the possibility that the Site might be contaminated as a result of releases of petroleum and other substances associated with past uses on the Site.

47. In September-October, 2015, Highland had Stantec conduct a Phase II Environmental Site Assessment at the Site to evaluate the recognized environmental conditions identified in the Phase I Report.

48. The Phase II investigation included test pits, soil borings and groundwater monitoring wells across the Site.

49. The Phase II Report identified elevated concentrations of several semi-volatile organic compounds (“SVOCs”), polychlorinated biphenyls (“PCBs”), cyanide, heavy metals and pesticides in soils at the Site, particularly in shallow soils. Several compounds were detected at levels above NYSDEC standards for unrestricted use and/or restricted residential use.

50. In addition, chlorinated volatile organic compounds (“CVOCs”) were identified in soil and groundwater. Specifically, trichloroethylene (“TCE”) and cis-1, 2-dichloroethene were detected in a soil sample above the NYSDEC standards for groundwater quality standards and standards for unrestricted use and protection of groundwater.

51. As a result of the findings in the Phase I and Phase II reports, Highland applied to the NYSDEC to enroll the Site in the NYSDEC Brownfield Cleanup Program. A Brownfield Cleanup Agreement became effective in March 2018.

52. A remedial investigation work plan was created, and a remedial investigation was conducted at the Site to further define the extent of contamination at the Site.

53. As part of the remedial investigation, NYSDEC required Highland to investigate soil and groundwater for the presence of PFAS.

54. PFAS were identified during the remedial investigation in the central-eastern and southeastern portions of the Site in groundwater and in surface soils, with the highest concentrations identified in the top one foot of soils.

55. Groundwater from monitoring well RIMW-06 had a concentration of 83 parts per trillion total PFOA and PFOS, which is above the USEPA Drinking Water Health Advisory Level

of 70 parts per trillion for these compounds and more than 8 times the proposed State standard for drinking water.

56. Pursuant to the Brownfield Cleanup Agreement, Highland prepared an Interim Site Management Plan (“ISMP”) in August 2018.

57. To implement the ISMP and prepare the Site for redevelopment, approximately 13,266.44 tons of soil and fill material were removed from the Site and transported to a solid waste management facility for disposal.

58. Highland had intended to transport and dispose the soil and fill at the Mill Seat Landfill in Monroe County; however, due to the presence of PFAS among the contaminants in the soil and fill, the landfill operator rejected the material as inappropriate for disposal at Mill Seat Landfill.

59. The soil and fill were subsequently accepted for disposal at Seneca Meadows Landfill in Waterloo, New York.

60. As a result of the shift from Mill Seat Landfill to Seneca Meadows Landfill, Highland incurred increased costs of disposal, increased transportation costs and additional days for equipment and excavation at the Site due entirely to the presence of PFAS as contaminants in the soil and fill.

61. In addition, based on the presence of CVOCs and PFAS above groundwater standards, long-term groundwater monitoring will be required at the Site. Monitoring will be required until permission to discontinue monitoring is granted in writing by NYSDEC. If groundwater contaminant levels become asymptotic at a level that is not acceptable to the NYSDEC, additional source removal, treatment and/or control measures may be required.

62. Highland has not identified any potential source for the PFAS contamination at the Site other than the firefighting training activities of the City Fire Department, which on one occasion was witnessed by Highland’s environmental consultant after Highland acquired ownership of the Site.

#### **DAMAGES AND INJUNCTIVE RELIEF**

63. Highland seeks to recover from the City for damages and losses suffered by Highland as a result of the City’s acts and omissions, including its disposal of PFAS, which have resulted in contamination in the soil and groundwater at the Site.

64. Upon information and belief, as a result of the City's acts and omissions, Highland will incur ongoing damages associated with long-term groundwater monitoring and the potential for future remedial action to address the residual contamination in the soil and the contamination in the groundwater.

**FIRST CAUSE OF ACTION UNDER THE  
RESOURCE CONSERVATION AND RECOVERY ACT**

65. Highland repeats and realleges paragraphs 1 through 64 of this Complaint as if set forth herein.

66. The contamination at the Site from the disposal of PFAS described above presents an imminent and substantial endangerment to human health or the environment.

67. On November 26, 2018, Highland sent a formal notice of intent to sue under RCRA to the City via certified mail, return receipt requested, with copies to the Administrator of the USEPA and the Commissioner of the NYSDEC, among others.

68. Upon information and belief, the City is a "person" subject to the citizen suit provision of the RCRA which allows Highland to commence an action regarding disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

69. The PFAS at the Site are solid wastes as defined in RCRA, 42 USC §6903(27), because they are discarded material resulting from the breakdown of firefighting foam dispensed at the Site by the City Fire Department.

70. The PFAS at the Site are hazardous wastes as defined by RCRA, 42 USC §6903(5), because, as determined by USEPA, NYSDEC and the New York State Department of Health, the presence of these chemicals in groundwater pose a substantial present or potential hazard to human health or the environment.

71. The Court should issue an injunction, pursuant to 42 USC §6972(a), requiring the City to undertake the long-term monitoring of groundwater at the Site and carry out and pay for any remedial action which may be required by the NYSDEC.

72. This Court should also award Highland Costs of this litigation (including reasonable attorney and expert witness fees) pursuant to 42 USC §6972(a).



**SECOND CAUSE OF ACTION UNDER THE  
ENVIRONMENTAL RESPONSE,  
COMPENSATION AND LIABILITY ACT**

73. Highland repeats and realleges paragraphs 1 through 72 of this Complaint as if set forth herein.

74. The City is a “person” as defined by Section 101(21) of the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 USC §9601(22) and have resulted in contamination of the Site.

75. Upon information and belief, the PFAS released or disposed at the Site are hazardous substances.

76. The disposal of PFAS at the Site are “Releases” within the meaning of CERCLA §101(22), 42 USC §9601(22) and have resulted in contamination of the Site.

77. As a result of the Releases of hazardous substances, Highland has incurred and continues to incur response costs within the meaning of CERCLA.

78. All such costs are necessary costs of response and, to the extent required, consistent with the National Contingency Plan.

79. Highland will continue to incur response costs in the future.

80. Highland is entitled to full reimbursement from the City for all response costs to address PFAS at the Site pursuant to CERCLA §107(a), 42 USC §9607(a).

81. Highland did not cause the release of any hazardous substances at the Site.

**THIRD CAUSE OF ACTION FOR NEGLIGENCE**

82. Highland repeats and realleges paragraphs 1 through 81 of this Complaint as if set forth herein.

83. The City, including its officers, agents, servants and/or employees, owed a duty to Highland not to use its property for training firefighters and not to permit or allow the disposal of firefighting foam at the Site.

84. The City, including its officers, agents, servants and/or employees, acted negligently and breached its duty by conducting firefighting training exercises on the Site and by the improper release and disposal of firefighting foam and by its failure to abate and remediate the contamination which resulted from the release and disposal of firefighting foam.

85. As a result of these breaches, Highland has been required to expend additional resources to remove and dispose of contaminated soil and will continue to incur response costs to monitor the remaining contamination at the Site.

**FOURTH CAUSE OF ACTION FOR PRIVATE NUISANCE**

86. Highland repeats and realleges paragraphs 1 through 85 of this Complaint as if set forth herein.

87. The City, by causing contamination of the soil and groundwater, has substantially interfered with Highland's use or enjoyment of the Site.

88. The City intentionally released or disposed of firefighting foam at the Site resulting in an unreasonable interference with Highland's use or enjoyment of the property.

**FIFTH CAUSE OF ACTION FOR TRESPASS**

89. Highland repeats and realleges paragraphs 1 through 88 of this Complaint as if set forth herein.

90. The City, by the intentional acts of its officers, agents and/or employees, entered the Site without permission and released or disposed of firefighting foam at and on the Site, which resulted in contamination of the soil and groundwater.

91. The City is liable to Highland, by reason of this trespass, for the damages proximately caused by its acts and omissions.

**SIXTH CAUSE OF ACTION FOR  
EQUITABLE AND/OR IMPLIED INDEMNIFICATION**

92. Highland repeats and realleges paragraphs 1 through 91 of this Complaint as if set forth herein.

93. The City, including its officers, agents, servants and/or employees had a duty to Highland and the public to prevent the release of PFAS to the soil and groundwater.

94. As a result of the breach of this duty by the City, the City is responsible for Highland's damages and expenses in the investigation, remediation and continued response to the contamination and should, in equity, indemnify Highland for its expenses, costs and damages.

**DEMAND FOR JURY**

Highland hereby demands a trial by jury in this action.

**PRAYER FOR RELIEF**

WHEREFORE, Highland requests a trial by jury on all causes of action so triable, and judgment:

1. Directing the City to remediate all PFAS that may present an imminent and substantial endangerment to health or the environment;
2. Awarding all response costs incurred by Highland under CERCLA and declaring that the City is liable for all response costs to be incurred by Highland;
3. Awarding attorneys' fees and all costs and disbursements from this litigation;
4. Awarding Highland compensatory damages in amounts to be determined by the evidence at trial; and
5. Granting such further relief as the Court deems just and proper.

Dated: September 2, 2019  
Rochester, New York

HEISMAN NUNES & HULL LLP



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