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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY, **Justice.** **TRIAL/IAS PART 8**

IN RE: NASSAU COUNTY CONSOLIDATED MTBE (METHYL TERTIARY BUTYL ETHER) PRODUCTS LIABILITY LITIGATION.

INDEX NO.: 601516/2009
MOTION DATE: 09/15/2010
MOTION SEQUENCE: 004 and 014

WEST HEMPSTEAD WATER DISTRICT,

Plaintiff,

- against -

BUCKEYE PIPELINE COMPANY, L.P., COLONIAL PIPELINE COMPANY, L.P., IRVING OIL, LIMITED, IRVING OIL CORPORATION, LEON PETROLEUM, LLC, O.K. PETROLEUM DISTRIBUTION CORP. and O.K. PETROLEUM INTERNATIONAL, LTD.,

Defendants.

INDEX NO.: 007022/2010 *
MOTION DATE: ~~09/15/2010~~
MOTION SEQUENCE: 001 and 002

The following papers read on this motion:

Notice of Defendants' Joint Motion to Dismiss 1

Defendants' Memorandum of Law in Support of Joint Motion 2

Affirmation of Megan R. Brillaut in Support of Joint Motion 3

Plaintiffs' Memorandum of Law in Opposition to Joint Motion 4

Plaintiffs' Affirmation by Denise A. Rubin in Opposition to Joint Motion 5

Supplemental Submission by O.K. Petroleum Defendants on Defendants' Joint Motion to Dismiss 6

Supplemental Submission by Irving Oil on Defendants' Joint Motion to Dismiss 7

PRELIMINARY STATEMENT

In the Joint Motion to Dismiss, the defendants move to dismiss all claims in the Plaintiffs' complaints under CPLR § 3211(a)(7) for failure to state any cause of action. This Joint Motion and Irving Oil's Supplemental Submission on the 2004 *Plainview* opinion (*Plainview Water District v. Exxon Mobil, et al.*, Sup. Ct., Nassau County, March 11, 2004, Davis, J., index No. 997/01), have

been joined by all outstanding defendants. Additionally, the O.K. Petroleum defendants move to dismiss the complaint on the ground of a Stipulation for an Order of Dismissal. Finally, the Plaintiffs have cross-moved for sanctions against O.K. Petroleum on the ground that the O.K. Petroleum defendants' attorney has brought a frivolous motion.

BACKGROUND

The parties have relied on the Hampton Bays Water District's ("HB") and West Hempstead Water District's ("WH") complaints for their motion and opposition papers with respect to the consolidated MTBE products liability cases in Nassau and Suffolk counties. All complaints state the same causes of action and make out essentially the same allegations, except in regard to the description of each defendant. Additionally, the West Hempstead complaint contains several allegations with respect to Buckey Pipeline (¶¶ 41-43 & 45-46), Colonial Pipeline (¶¶ 37-38, 45-46), and O.K. Petroleum (¶¶ 52-55). Of the defendants listed in all consolidated complaints, only these defendants remain: Buckeye Pipeline Company, L.P., Colonial Pipeline Company, L.P., O.K. Petroleum Distribution Corp., O.K. Petroleum International, L.T.D., and Leon Petroleum, LLC.

Facts Alleged in the Complaints

The plaintiffs are water districts in Long Island that supply water from pump stations that draw from the "sole source" aquifer system in Long Island (designated by EPA as principal or sole drinking water source for an area). (HB ¶ 538). The chemical MTBE ("methyl tertiary butyl ether") has been detected in the Long Island aquifer system, including within the water districts' production wells. (HB ¶ 541). MTBE is a chemical that was added to gasoline as distributed, sold, and marketed by the defendants in order to boost Octane levels and because it was believed to reduce hydrocarbon emissions (HB ¶¶ 547, 549; WH ¶¶ 130, 132). This practice continued on the part of the defendants until MTBE was banned by the New York Legislature on January 1, 2004. (HB ¶¶ 546, 609; WH ¶¶ 129, 165).

MTBE is a "water-seeking" compound which dissolves and spreads much more quickly in water than other compounds found in gasoline, racing through underwater aquifer systems (HB ¶¶ 554-555, 566; WH ¶¶ 136-137, 148). Further, MTBE resists natural degradation, persisting for decades in underground water, as the experience in East Patchogue, New York has revealed. (HB ¶¶ 556, 579; WH ¶¶ 138, 156). MTBE contamination is therefore very likely to occur even from

small leaks or spills, and groundwater contamination is difficult to contain and remediate. (HB ¶¶ 592, 596-597; WH ¶¶ 142, 160-161).

MTBE is alleged to produce a foul, "turpentine-like" taste and odor in water even at very small concentrations (as low as one part per billion), making water that is contaminated with MTBE undrinkable. (HB ¶¶ 557-558; WH ¶¶ 139-140). The U.S. Environmental Protection Agency ("EPA") also believes MTBA may lead to cancer in humans, and it has been shown to produce cancer in animals. (HB ¶¶ 559, 599; WH ¶¶ 141). However, defendants did not conduct any tests of MTBE's toxicological effects prior to introducing MTBE in the stream of commerce. (HB ¶¶ 599-601, 682[b]; WH ¶ 239[b]). Further, TBA (*sic*) is an intermediate product of the breakdown of MTBE. TBA shares many properties with MTBE, which make it a "persistent and pernicious groundwater contaminant" (HB ¶ 620, WH ¶ 175); yet, TBA is more expensive to clean up, is highly toxic, irritates various human body tissues, and may cause cancer or tumors (HB ¶¶ 621-622; WH ¶¶ 176-177).

Plaintiffs impute superior knowledge of MTBE's harmful properties to the defendants by identifying some early publicized contamination incidents, several MTBE studies known to the oil industry, as well as some surreptitious industry communications regarding MTBE. (HB ¶¶ 566 *et seq.*; WH ¶¶ 152 *et seq.*) The early contamination incidents that the Plaintiffs identify include groundwater contamination in Rockaway, New Jersey in 1980 (HB ¶ 575, WH ¶ 153), in Jacksonville, Maryland in 1983 (HB ¶ 576, WH ¶ 154), in East Patchague, New York in 1988 (HB ¶¶ 577-579; WH ¶¶ 156-157), and Liberty, New York in 1990 and 1992 (HB ¶¶ 577, 580-581; WH ¶¶ 158-159). The identified MTBE studies include: the American Petroleum Institute's creation of the Toxicology committee in 1980 to study the effects of ingestion of MTBE due to its propensity to contaminate underground water (HB ¶¶ 567-570); the 1986 Garrett Report of the Maine Department of Environmental Protection, which was widely circulated within the oil industry and which found that MTBE easily contaminates groundwater, imparts a foul taste and odor to water, and is notably difficult to contain and clean up (HB ¶¶ 582-589; WH ¶¶ 160-161); the EPA's Blue Ribbon Panel's 1999 report concluding that MTBE was a serious threat to drinking water sources (HB ¶¶ 630-631; WH ¶¶ 185-186); and several internal studies by named defendants that are no longer in the present cases (HB ¶¶ 591, 593-597).

The plaintiffs also allege surreptitious conduct more broadly by the "oil industry." The 1986 Garret Report recommended banning MTBE or that it should be stored in double-contained facilities. (HB ¶ 583; WH ¶ 161). Representatives of the oil industry acted to discredit the report. (HB ¶ 584; WH ¶ 162). The Hampton Bays Water District's complaint also alleges the "Oxygenated Fuels Association" ("OFA") was "an agent of Defendants" (HB ¶ 567), and it distributed information pamphlets intended to mislead the public about MTBE (HB ¶¶ 605-607). The complaint indicates that this allegation refers to all named defendants (HB ¶ 15). The Hampton Bays Water District's complaint also alleges that the American Petroleum Institute ("API"), which represents the domestic oil industry and the defendants, misrepresented the information known about MTBE in some instances where individuals wrote to the National Well Water Association, spoke at conferences, or wrote to rebut published articles concerning the dangers of MTBE. (HB ¶¶ 586-88; 603-604). The Hampton Bays Water District's complaint further alleges that the OFA filed a lawsuit to stop the New York law banning MTBE from going into effect (HB ¶ 617).

The complaints allege that the defendants continued to use MTBE in Long Island until it was made unlawful in New York on January 4, 2004. (HB ¶ 609, 613-617; WH ¶¶ 165, 169-172). Plaintiffs had other alternatives to MTBE, including ethanol (HB ¶ 618, WH ¶ 131); yet it was widely adopted by the defendants, "moved by market factors and financial considerations." (HB ¶ 615, WH ¶ 131). Gasoline was sold with MTBE concentrations of up to 11 to 15 per cent. (HB ¶¶ 612, 616, WH ¶¶ 168, 172).

The Hampton Bays Water District's complaint alleges that five of its ten municipal supply wells have been contaminated with MTBE, and the remaining wells are threatened with contamination. (HB ¶¶ 9-10). The West Hempstead complaint alleges that six of its supply wells have been contaminated with MTBE, namely Supply Wells 1, 3, 4 5, 9, and 10. (WH ¶ 22). Supply Wells 3, 4, and 5 were taken off service in June 2006 because of levels exceeding the maximum contaminant level, requiring the West Hempstead Water District to construct an additional supply well (WH ¶¶ 23, 32-34).

West Hempstead Water District alleges that the O.K. defendants have been cited by the New York Department of Conservation for leaks and spills that have contaminated and threaten the West Hempstead Water District's supply wells. (WH ¶ 55). The complaint also alleges that Buckey

Pipeline and Colonial Pipeline were "the distribution process" that supplied the gasoline containing MTBE to Long Island and to the plaintiff's "relevant geographic area" ("RGA"), so that but for Colonial and Buckeye's supply, the MTBE would not have reached the plaintiff's wells. (WH ¶¶ 37-39, 42-46).

The plaintiffs further allege that all defendants acted in concert to create a market for MTBE despite its dangers and colluding to misrepresent the dangers of MTBE to the public. (HB ¶¶ 642-643, WH ¶ 192). Moreover, plaintiffs adduce that defendants had knowledge of the threat to New York groundwater from leaking storage tanks and knew that use of MTBE in high concentrations would result in widespread contamination of groundwater through underground seepage and rainfall from its evaporation. (HB ¶¶ 560-566; WH ¶¶ 142-151). Lastly, plaintiffs assert that MTBE lacks a "chemical signature," which would permit identification of the particular source of any MTBE plume, such that plaintiffs must pursue all named defendants under concepts of joint and several liability, market share liability, alternative liability, concert of action, and enterprise liability. (HB ¶¶ 632-641;WH ¶¶ 188-199).

Plaintiffs' Proffered Evidence in Support of the Complaints

Attached as Exhibit 8 to the Plaintiffs' Affirmation by Tate J. Kunkle, in opposition to O.K. Petroleum's Motion to Dismiss, the plaintiffs have offered an order on consent from the New York State Department of Environmental Conservation ("NYS DEC"), where it is alleged that inspections by NYS DEC staff revealed several releases from O.K. Petroleum's petroleum bulk storage ("PBS") facilities. (Kunkle Aff. Exh. 8 ¶¶ 13, 32). The document also identifies the gasoline stations that O.K. Petroleum operates in Nassau and Suffolk counties. The plaintiffs contend that this document supports the plaintiffs' complaint allegations to the effect that the O.K. Petroleum defendants have experienced gasoline discharges which have resulted in the contamination of the plaintiffs' wells.

Plaintiffs' and O.K. Petroleum's Stipulation for Order of Dismissal

The West Hempstead Water District and O.K. Petroleum defendants have submitted a Stipulation for Order of Dismissal that was entered into by the parties and ordered by Judge Scheindlin of the Southern District of New York on February 22, 2010. (Engle Aff. Exh. A). The

Stipulated Order sets out that in exchange for certain discovery information from the O.K. Petroleum defendants, the plaintiff would re-file and serve a Summons and Complaint within 90 days of the voluntary dismissal of the 2008 West Hempstead Water District action. (*Id.* at ¶ 2). Attorney Debra Rothberg agreed to accept service of said Summons and Complaint on behalf of the O.K. Petroleum defendants, and it was further agreed that service would otherwise comply with the CPLR. (*Id.* at ¶ 3). Since a plaintiff who agrees to voluntary dismissal does not receive the benefits of CPLR § 205 for Statute of Limitations purposes, the O.K. Petroleum defendants agreed to waive any defense on the basis of Statute of Limitations or personal jurisdiction which could not have been asserted in the federal action. (*Id.* at ¶ 4). The Stipulated Order for Dismissal is signed by Judge Scheindlin, with signature date of February 22, 2010. (*Id.*)

Pursuant to the Stipulated Order, the plaintiff attempted service by mail as authorized under CPLR 312-a. (Kunkle Aff. ¶ 11). The plaintiff initially mailed the Summons and Complaint to Ms. Rothberg's former office address on April 22, 2010. (*Id.* at ¶ 12). After the executed waiver of service had not been returned, the Summons and Complaint was again mailed to Ms. Rothberg at her new office address via FedEx overnight, and Ms. Rothberg's office was in receipt of said Summons and Complaint on May 11, 2010. (*Id.* at ¶¶ 12-13). The expiration of the 90 days contemplated in the Stipulated Order for re-filing and serving the Summons and Complaint, was May 24, 2010. (Def. mem. p.6). Ms. Rothberg returned the Acknowledgment of Receipt on June 2, 2010, and the plaintiff also served Ms. Rothberg personally on May 28, 2010. (*Id.* at p.7).

I. DEFENDANT'S JOINT MOTION TO DISMISS[1]

A. PROCEDURAL STANDARD

CPLR 3211 (a)(7)

The defendants raise their joint motion to dismiss the plaintiffs' claims under CPLR 3211(a)(7) for failure to state any cause of action for which legal relief may be given. When determining a motion to dismiss for failure to state cause of action, the pleadings must be afforded a liberal construction and the court must determine only whether the plaintiff has any cause for relief

[1]The motion papers have been submitted as sequence No. 4 under index No. 601516/2009.

under any cognizable legal theory. (*Uzzle v. Nunzie Court Homeowners Ass',. Inc.* 55 A.D.3d 723 [2d Dept. 2008]). Thus, a pleading will not be dismissed for insufficiency merely because it is inartistically drawn; rather, such pleading is deemed to allege whatever can be implied from its statements by fair and reasonable intendment. (*Brinkley v. Casablancas,* 80 A.D.2d 815 [1st Dept. 1981]). Conversely, allegations that state only legal opinions or conclusions, rather than factual statements, are not afforded any weight. (*Asgahar v. Tringali Realty, Inc.*, 18 A.D.3d 408 [2d Dep't 2005]).

The plaintiff has no burden to produce documentary evidence supporting the allegations in the complaint in order to oppose a motion to dismiss under CPLR 3211(a)(7). (*Stuart Realty Co. v. Rye Country Store, Inc.*, 296 A.D.2d 455 [2d Dep't 2002]). However, if documentary evidence introduced in the record "flatly contradicts" any allegations in the complaint, such allegations will not be taken as true. (*Asgahar v. Tringali Realty, Inc.*, 18 A.D.3d 408 [2d Dep't 2005]). Also, the plaintiff can introduce documentary evidence to show that the allegations in the complaint are supportable with further proof. (CPLR §§ 3211(c) & 3211(e), *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633 [1976]).

To succeed at this juncture, therefore, a defendant must demonstrate either that all factual allegations when taken as true cannot make out any legal claim for relief, or that evidence in the record flatly contradicts all factual allegations that would make out a legal claim for relief. Accordingly, the Court will not speculate at this stage whether every plaintiff water district actually *could* prove cause in fact by the defendants' acts or omissions.[2] Under CPLR 3211(a)(7), it will suffice that the plaintiffs have alleged facts from which it may be inferred that the defendants have, through their activities, caused injury to the plaintiffs in a manner that permits legal recovery.

B. DISCUSSION

In oral argument the parties focused on the standard for review in a motion to dismiss under CPLR 3211(a)(7) and in the general nature of the allegations in the complaint. Nonetheless, the Court feels that it must address each claim individually, since the defendants' original joint motion

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[2] This Court therefore does not reach whether the plaintiffs must rely on traditional modes of proof or whether any of the alleged collective liability modes of proof are available to the plaintiffs. The parties did not brief or argue these issues.

to dismiss and the plaintiffs' opposition, both raised issues with regard to individual claims. Therefore, the Court feels compelled to examine each cause of action to determine whether it has been sufficiently alleged.

1. Public Nuisance

The defendants put in issue whether the plaintiffs have alleged sufficient facts to make out a claim for public nuisance. The defendants characterize the relevant complaint allegations as submitting only that the defendants were involved in selling, marketing and distributing gasoline that contained MTBE. Defendants contend that such conduct, which was not unlawful at the time, cannot make out a claim for recovery under a public nuisance theory. Because principles of proximate or legal cause counsel against extending liability to entities whose conduct did not immediately (or "proximately") produce the nuisance, a cause of action in public nuisance does not lie against Buckeye Pipeline and Colonial Pipeline on the alleged facts. A cause of action in public nuisance has been sufficiently pled against the O.K. Petroleum defendants and Leon Petroleum.

Legal Elements

A public nuisance is "a substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons." (*Copart Indus. v. Consolidated Edison Co.*, 41 N.Y.2d 564, 568 [1977]; *In re MTBE Products Liability Litigation*, 175 F. Supp.2d 593, 621 n.51 [SDNY 2001]); *accord* R2d Torts § 821B). To recover damages for a public nuisance, a plaintiff must demonstrate that it "suffered special injury beyond that suffered by the community at large." (*532 Madison Ave Gourmet Foods v. Finlandia Center*, 96 N.Y.2d 280, 292 [2001]; *accord* R2d Torts § 821C). Lastly, the injury that a plaintiff must establish in order to recover in a public nuisance action "is the actual invasion of interests in land." (*532 Madison Ave Gourmet Foods*, 96 N.Y.2d at 292; *cf. Copart Indus.*, 41 N.Y.2d at 567 ["common-law action on the case for nuisance, invoked only for damages upon the invasion of interests in the use and enjoyment of land, as well as of easements and profits"]).

In accordance with principles of factual and legal cause, "[o]ne is subject to liability for a nuisance caused by an activity, not only when [it] carries on the activity but also when [it]

participates to a substantial extent in carrying it on." (Rest. 2d Torts § 834; *accord Penn Central Transp. v. Singer Warehouse & Trucking Corp.*, 86 A.D.2d 826 [1st Dep't 1982]). An action for public nuisance, unlike a claim for private nuisance, does not require proof of a specific state of mind such as negligence or intent to harm: a plaintiff "is liable for maintenance of a *public* nuisance irrespective of negligence or fault."[3] (*State of New York v. Shore Realty Corp.*, 759 F.2d 1032 [2d Cir. 1985]).

There is little controversy that contamination of groundwater or public water with noxious chemicals is a substantial interference with a common right of the public. (*Leo v. General Ele. Co.*, 145 A.D.2d 291 [2d Dep't 1984], *State v. Schenectady Chemicasl*, 103 A.D.2d 33 [3rd Dep't 1984], *State of New York v. Shore Realty Corp.*, 759 F.2d 1032, 1051 [2d Cir. 1985]; *In re MTBE Products Liability*, 175 F.Supp.2d 593, 627 n.51 [SDNY 2001]). However, the toxicity or harmfulness of the alleged contaminants is essential to establishing that the seepage into the public waters is a public nuisance. (*State v. Fermenta ASC Corp* (656 N.Y.S. 2d 342 [2d Dep't 1997]).

Analysis

In this motion the defendants do not dispute that MTBE contamination of groundwater, as alleged, is a substantial interference with the exercise of a common right of the public, or that the plaintiffs's alleged harm is distinct from the general public . These elements have been sufficiently alleged. (*Cf. State v. Schenectady Chemicasl*, 103 A.D.2d 33 [3rd Dep't 1984]). The parties dispute whether a legally sanctioned product can constitute a nuisance, whether control over the instrumentality causing the nuisance must be alleged, whether nuisance claims are limited to the land liability context, and whether proximate cause exists on the alleged facts.

(i) Defendants' Arguments Relying on Sturm and Hamilton

Defendants rely on *People v. Sturm* (309 A.D.2d 91 [1st Dep't 2003]) and *Hamilton v. Beretta*

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[3] *But see* N.Y. Pattern Jury Instructions 2d § 3B Introductory Statement (PJI 3:16) (distinguishing between public nuisances that are intentional, negligent, and based on abnormally dangerous activities). Courts have also held that conduct declared to be a nuisance as a matter of law (or a nuisance "per se") does not require a mental element: "In an action based on theory of nuisance per se, plaintiffs need only establish violation of law, and need not show that nuisance was intentional or negligent..." (*State v. Fermenta ASC Corp.*, 656 N.Y.S.2d 342,403 [2d Dep't 1997]). The conceptual affinity between public nuisance, nuisance per se, and nuisance due to an abnormally dangerous activity, may explain the discrepancy in the authorities.

U.S.A. Corp., (96 N.Y.2d 222 [2001]) for two propositions: (1) a lawful product sold in a heavily regulated industry is legally sanctioned and therefore not a nuisance as a matter of law; and, (2) the plaintiffs must establish control of the instrumentality which causes the nuisance. The *Sturm* case involved public nuisance claims against handgun manufacturers for intentionally targeting criminals in their design and marketing of handguns. The issue in the case was whether New York should "widen the range of common-law public nuisance claims" (*Sturm*, 309 A.D.2d at 96) in order to reach an industry where the "intervention of unlawful and frequently violent acts of criminals" attenuates the industry's responsibility, the industry's products are lawful and nondefective, and the harm complained of is a societal problem which the courts are ill-suited to remedy (*id.* at 99).

Acknowledging an open question "whether the concept of duty... play[s] any part in an examination of... [a] public nuisance lawsuit," (*id.* at 102), the Appellate Division relied principally on proximate cause to dismiss the plaintiffs' public nuisance claims against the handgun manufacturers. The Court did *not* deny, however, that public nuisance may be an appropriate legal tool to address some consequential harm from lawful and regulated commercial activity, such as where the business activity produces harm directly attributable to it (*id.* at 98 n.2), or where the harm, such as the "obnoxious, illegal and offensive behavior" from bar patrons, is "inextricably intertwined with defendant's commercial activity" (*id.* at 98).

The *Hamilton* case, also relied on by the defendants, was a preceding action in the New York Court of Appeals that involved similar claims against handgun manufacturers under a negligence theory. The *Sturm* decision refers frequently to the Court of Appeal's discussion in *Hamilton* of duty in the negligence context. The *Hamilton* case declined to expand the concept of public nuisance to reach negligence claims against handgun manufacturers, since the connection between the harm and the defendants' conduct was remote (*id.* at 234), the products were not defective (*id.* at 235), defendants lacked specific knowledge of gun vendors to raise a negligent entrustment claim (*id.* at 237), and public policy reasons favored leaving regulation of handguns to other branches of government (*id.* at 240).

The *Sturm* and *Hamilton* opinions did not define "instrumentality" as an element to be established in all nuisance claims, and neither did they hold that a nuisance claim could not be made

out against defendants engaged in lawful and heavily regulated business activities.[4] Rather, *Hamilton* and *Sturm* declined to extend liability to handgun manufacturers on the facts, through the judiciary's authority to define the orbit of liability for causes of action in the common law. *Hamilton* accomplished this analysis in the context of duty, and while *Sturm* considered some open questions regarding duty in the public nuisance context, it made its decision on the basis of proximate cause.

Here, the defendants' concerns are similarly more fitting in the context of proximate cause, rather than the new elements that they read in *Sturm* and *Hamilton*. Third-party control and regulation of defendant's commercial activity, in themselves, do not defeat a claim for public nuisance if legal cause is otherwise found to exist. (*See, e.g.*, *State v. Schenectady Chem.*, 117 Misc. 2d 960, 966 [Sup. Ct., Rennselaer Ct. 1983] [defendant chemical company could be held liable for the nuisance carried on by its independent contractors], *City of Rochester v. Premises Located at 10-12 South Washington Street*, 180 Misc.2d 17 [Sup. Ct, Monroe Cty. 1998] [injunction could issue against defendant nightclub for obnoxious conduct of bar patrons]).

(ii) *Connection to Land*

The defendants also contend that the plaintiffs have failed to allege sufficient facts to link their claim to land liability, so as to make out a public nuisance claim. The defendants cite to a case of the New Jersey Supreme Court, *In re Lead Paint Litig.*, (191 N.J. 405, 423-24 [2007]), which adopted a land control element in declining to extend liability sounding in nuisance to lead paint manufacturers. While persuasive, this case has not been adopted thus far in New York to introduce a similar element into the New York common law action for public nuisance. The explicit connection to land required in New York is in the context of damages, such that the plaintiff may recover in nuisance only for injury to its interests in land. However, the case is instructive in so far as it strives to define more clearly the bounds of nuisance liability, and is apposite to this Court's

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[4] Judge Scheindlin of the Southern District of New York dismissed a similar argument in the context of strict products liability. The court held that the fact that MTBE was a one of several legal oxygenate additives, which the EPA required gasoline manufacturers and distributors to use, did not determine the issue of product liability, since the determinations of the EPA involved air-quality factors, rather than safety of MTBE in drinking water. *In re MTBE Litigation*, 175 F.Supp. At 624. Similarly, Judge Schneidlin dismissed the defendants' attempts to analogize to handgun cases denying a public nuisance cause of action, though the handgun cases upon which defendants relied there were distinguishable on different grounds. (*See In re MTBE Prod. Liab.*, 175 F.Supp.2d at 628-29.

consideration of legal cause.

(iii) Proximate cause

In re Lead Paint Litig., *supra*, is instructive in so far as defendants argue that their relevant conduct in distributing gasoline which contained MTBE, lacks a sufficient spacial and temporal proximity to the plaintiffs' injury. This argument is of little avail to O.K. Petroleum and Leon Petroleum, which the plaintiffs allege have conducted operations in the vicinity of the plaintiffs' wells and O.K. Petroleum has in fact been cited for gasoline leaks near some of plaintiffs' wells. (Kunkle Aff. Exh 6). However, by plaintiffs' own allegations, Buckeye Pipeline's and Colonial Pipeline's operations terminate before reaching Nassau County or Suffolk County (where the alleged contamination has taken place), and their link to the plaintiffs' injury is that they supplied most of the gasoline that was eventually transported near the plaintiffs' wells. (WH ¶¶ 37-46).

Judge Scheindlin of the Southern District of New York held in *In re MTBE Products Liability* (175 F.Supp.2d 593 [SDNY 2001], that a cause of action for nuisance was made out even in the case of manufacturers which did not have operations on or near the plaintiff water districts' groundwater regions. The court reasoned that the complaint alleged that the "defendants have extensive knowledge of all phases of the petroleum business... including the design and manufacture of gasoline containing MTBE... [and] Defendants added MTBE to gasoline, marketed and distributed gasoline containing MTBE, all with the knowledge of the dangers MTBE poses to groundwater." (*Id.* at 629). Judge Scheindlin relied on the Restatement 2d of Torts § 834 ("One is subject to liability for a nuisance caused by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on").

On further investigation, it is evident that the Restatement 2d of Torts § 834 contemplated a narrower view of nuisance liability, and that the authors' intent was merely to uncouple the tort from landowner liability. In fact, Sections §§ 835-840A, which directly follow § 834, and together purport to define actors who may be liable for a nuisance, identify only an employer, an agent, a possessor, and a previous owner, as persons who may be liable for a nuisance. Further, the commentary to § 834 expounds on the authors' more limited view of the causation principle articulated in the provision. In Comment *c* to Restatement 2d of Torts § 834, for example, the

authors defined the contours of "participation in activity" as encompassing activities carried on by the defendant for another's benefit and those carried on by the defendant's agents:

> One participates in carrying on an activity that either directly or through the creation of a physical condition causes an invasion of another's interest in the use and enjoyment of land, not only when he acts for his own benefit, but also when he acts in the capacity of servant, agent or independent contractor. One is not relieved from liability merely because he acts for another's benefit rather than his own. A person also participates in an activity when the acts are done by his servants or agents with his authority or within the scope of their employment.

Similarly, the authors envision two categories for an "activity" that may constitute the legal cause of a nuisance, and it is noteworthy that the authors assume that these activities occur in neighboring land:

> those that cause harm only so long as the activity continues—such as directly sending noise, smoke, heat or gases *over neighboring land*—and those that create physical conditions that are *harmful to neighboring land* after the activity that created them has ceased.

(Rest. 2d Torts § 834 Comment *b* [emphasis added]).

The comments make clear that despite the broad language of the Restatement 2d of Torts § 834, the authors contemplated that the legal cause of a nuisance is any conduct that produces spill effects over neighboring or contiguous properties such that legal responsibility is attributable to the defendant. Indeed, in the early New York cases that the Restatement 2d of Torts cites in support of § 834, the non-landowners who were held liable were either persons who had previously owned the premises (*see, e.g., Wilks v. New York Tel. Co.*, 243 N.Y. 351 [1926], *Merrick v. Murphy*, 83 Misc.2d 39 [Sup. Ct., Del. Cty. 1975]), or persons who were working on the property where the nuisance was created (*see, e.g., Olmstead v. Rich*, 6 N.Y.S. 826, 53 Hun. 638 [4th Dep't 1889]).

The principal New York cases cited by the plaintiffs for the broader proposition that anyone who facilitates a nuisance may be liable, similarly involved situations where the defendant, though not an owner, created the nuisance while working on the property near the location of injury, or where the defendant was a previous owner of the property where the nuisance originated. (*See Hine v. Aird-Don Co.*, 232 A.D. 359 [3d Dep't 1931] [holding that workers could be held responsible for creating a nuisance by leaving parts of a furnace in an unsafe manner], *Penn Central Transp. v.*

Singer Warehouse & Trucking Corp., 86 A.D.2d 826 [1st Dep't 1982] [holding that a preceding owner could be held liable for constructing the structure that was subsequently a nuisance]).

While the New York cases cited for the proposition that a nuisance must be premised on the use of real property, did not expressly analyze the issue, the language of the decisions does reflect the origins of the nuisance cause of action in landowner liability and its modern extension to liability for activities that produce spill effects in neighboring properties, as was contemplated in the Restatement Second of Torts § 834. For example, *Little Joseph Realty v. Babylon* (41 N.Y.2d 738, [1977]) quotes the early "maxim that 'a man shall not use his property so as to harm another.'" (*Id.* at 744). The more recent case of *Domen Holding Co. v. Aranovich*, 1 N.Y.3d 117 (2003) premised liability (in eviction proceedings) of a tenant for the activities of a guest, on the principle that "[t]o constitute a nuisance the use of property must interfere with a person's interest in the use and enjoyment of land." (*Id.* at 123).

A cause of action for public nuisance therefore cannot lie against Buckey Pipeline and Colonial Pipeline, which did not conduct any operations near the relative geographic areas of the plaintiffs' wells, and where it is not alleged that any leaks in these defendants' operations could have reached the plaintiffs' wells to cause them recoverable damages. On the other hand, legal cause has been sufficiently alleged against O.K. Petroleum and Leon Petroleum, where the complaint states that these defendants have had gasoline discharges near the plaintiffs wells and the discharges permitted MTBE to enter the plaintiffs' water wells.

Summary

A cause of action in public nuisance cannot lie against Buckeye Pipeline and Colonial Pipeline, since legal cause does not lie on the alleged facts. (*Cf. Plainview Water Dist. v. ExxonMobil Corp.*, Sup. Ct., Nassau Cty., Mar. 11, 2004, Davis, J., index No. 9975/01). A cause of action in public nuisance has been sufficiently alleged against O.K. Petroleum and Leon Petroleum, since legal cause exists; moreover, the public policies against limitless liability enunciated in *Sturm*, *supra*, and *Hamilton*, *supra*, do not defeat the cause of action as alleged against these defendants, given that the defendants' conduct fits within the limited contours of proximate cause in the context of public nuisance.

2. Private Nuisance

Plaintiffs also allege a cause an action sounding in private nuisance. The defendants have made the same arguments with regard to both the public and private nuisance claims. The elements of a private nuisance claim are: (1) interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with person's right to use and enjoy land, (5) caused by another's conduct. (*Aristides v. Foster*, 73 A.D.3d 1105 [2d Dep't 2010] and citations therein). Since O.K. Petroleum and Leon Petroleum do not offer any different reasons for why the plaintiffs' private nuisance claims fail, a cause of action in private nuisance is sufficiently alleged against these defendants. Conversely, a cause of action in private nuisance cannot lie against Buckeye Pipeline and Colonial Pipeline, since the definition for who may be liable through causation is defined in the same manner for private and public nuisances, (*see* Rest. 2d Torts § 834 Comment *a*), and legal cause as to these defendants has not been established for the reasons already discussed in connection with public nuisance.

3. Strict Products Liability for Design Defect

The plaintiffs also bring action under a strict product liability theory, alleging that the MTBE-containing gasoline that the defendants marketed and distributed was defectively designed such that it was not reasonably safe and caused the plaintiff water districts' injuries. The defendants dispute whether a strict products liability claim has been sufficiently alleged under CPLR 3211(a)(7), arguing that duty and causation are essential elements which have not been established by the plaintiffs. The plaintiffs have sufficiently pled strict products liability claims against Leon Petroleum and the O.K. Petroleum defendants, but the plaintiffs have failed to allege essential facts necessary to impute strict liability against Buckeye Pipeline and Colonial Pipeline for introducing a defective product into the stream of commerce.

Legal Elements

A cause of action for defective design must allege that the defendant "marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiff's injury." (*Adams v. Genie Indus.*, 14 N.Y.3d 535, 542 [2010] and citations therein). The plaintiff must allege that the product was not reasonably safe because there was a substantial likelihood of harm given the product's design, and it was feasible to manufacture the product with

a safer alternative design. (*Id., accord* Rest. 3d Torts Prod. Liab. § 2[B]). Finally, the plaintiff's injuries must result from an intended use of the product or a reasonably foreseeable use.[5] (*Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 253 [1995], *Codling v. Paglia*, 32 N.Y.2d 330 [1973]). Thus, a plaintiff who was not injured as an end-user may recover within principles of proximate cause, if he was injured by another's foreseeable or intended use of the product. (*Id.*)

The issue of reasonableness in safety of design involves balancing the utility of the product as designed and the risks inherent in the allegedly unsafe design: "if the design defect were known at the time of manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner." (*Adams,* 14 N.Y.3d at 542).

Parties that may be liable under strict products liability include any manufacturer, retailer or other *seller* in the chain of distribution.[6] (Rest. 3d Torts Prod Liab § 1; *accord Rabon-Willimack v. Robert Mondavi Corp.*, 73 A.D.3d 1007 [2d Dep't 2010], *Speller ex rel. Miller v. Sears, Roebuck and Co.*, 100 N.Y.2d 38 [2003]; *see also* NY Prod Liab §§ 5:2, 5:3 & 5:5, 86 NY Jur 2d Prod Liab §§ 105-108). A distributor does not generally avoid strict products liability by claiming that it was an innocent conduit who sold the product to retailers.[7] (*Godoy v. Abamaster of Miami, Inc.*, 302 A.D.2d 57, 60 [2d Dep't 2003]). However, such liability appears to be particularly circumscribed

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[5] In an earlier articulation of the cause of action for design defect, the New York Court of Appeals stated: "a defectively designed product is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous *for its intended use*; that is one whose utility does not outweigh the danger inherent in its introduction into the stream of commerce." (*Robinson v. Reed-Prentice Div.*, 49 N.Y.2d . 471, 479 [1980] [emphasis added], *see also* Rest. 2d Torts § 402A Comment *g* [1965]). However, a plaintiff could also establish a case for design defect if the product is unreasonably safe for "an *unintended yet reasonably foreseeable* use." (*Robinson*, 49 N.Y.2d at 480, *DeRosa v. Remington Arms Co., Inc.*, 509 F.Supp. 762, 765 [E.D.N.Y. 1981]). The Restatement 2d Torts § 402A has now been superceded by the Restatement 3rd of Products Liability.

[6] While Rest. 3d Torts Prod Liab § 20 indicates that bailments and other non-sale transactions may qualify to impose strict liability for product defects, Comment *a* of that Section acknowledges the relatively recent and case-by-case expansion of this area of the law. Thus far, no New York case has adopted wholesale this section of the Restatement, and the authorities that the Restatement cites rely principally on a New Jersey case, which applied strict liability to a business that had furnished the defective product through a lease (*see Cintrone v. Hertz Truck Leasing & Rental Serv.*, 212 A.2d 769 [N.J.1965]).

[7] New York Jurisprudence 2d on Products Liability § 108 (2010) acknowledges some doubt on whether New York courts hold distributors generally liable for product defects, perhaps because the test for design defect as articulated in *Voss* used language applying strict liability only to a manufacturer. 59 N.Y.2d at 106.

and will not be expanded lightly. Judge Scheindlin acknowledged in the consolidated federal *MTBE Products Liability Litigation* that "for product liability claims New York courts favor liability for entities higher in the chain of distribution, reasoning that manufacturers are in the best position to know when products are suitably designed and properly made, as well as to diffuse the cost of safety in design and production." (*In re MTBE*, 591 F.Supp.2d 259, 276 [SDNY 2008]). This much is at least clear: a distributor which does not actually sell or introduce the product into the stream of commerce would not be held strictly liable without fault. (*Joseph v. Yenkin Majestic Paint Corp.*, 173 Misc.2d 95 [Sup. Ct., Kings Cty. 1997], *aff'd* 261 A.D.2d 512 [2d Dep't 1999]).

Analysis

The defendants do not put in issue whether the plaintiffs have sufficiently alleged that there were feasible, safer alternative designs,[8] that discharge of gasoline containing MTBE created a substantial likelihood of harm, that discharges of gasoline containing MTBE would be a substantial factor in causing plaintiffs' injury, or that the dangers inherent in MTBE outweigh its utility. These elements have been sufficiently alleged in the complaints. The defendants dispute whether they owed any duty specifically to the plaintiffs and whether the plaintiffs' harm occurred as a result of an intended or foreseeable use of their product. In oral argument, Buckeye Pipeline and Colonial Pipeline also disputed whether they could be held responsible for any design defect, since they were only a "conduit" rather than a seller or manufacturer for the gasoline containing MTBE.

The defendants' discussion of duty in strict products liability actions is misguided. The Court of Appeals has recently confirmed that the duty in the strict products liability case is the "duty to market safe products." (*Adams v. Genie Industries*, 14 N.Y.3d 535, 542 [2010]). New York has long allowed recovery for product defects in the absence of privity of contract, (*MacPherson v. Buick Motor Co.*, 217 N.Y. 382 [1916]), and thus non-consumers and non-users may recover within principles of proximate cause. (*Codling v. Paglia*, 32 N.Y.2d 330, 339 [1973]). The cases that the defendants cite, *Hamilton* (96 N.Y.2d at 232) and *Holdampf v. A.C. & S., Inc.*, (6 N.Y.3d 486, 494 [2005]), analyzed the question of duty within the context of negligence rather than strict products

[8]The complaints allege that the defendants could have used ethanol in place of MTBE to accomplish the same ends. (HB ¶ 664 ; WB ¶ 219).

liability. These cases are therefore more apposite to the defendants' arguments in the context of negligence.

The defendants argue that the plaintiffs have failed to allege that gasoline containing MTBE was defectively designed, because it was not defective when used as intended, and it produced an injury to the plaintiffs only when it leaked into the ground. A product may be defective if the injury occurred as a result of a foreseeable, albeit unintended, use. (*Robinson*, 49 N.Y.2d at 480, *DeRosa*, 509 F.Supp. at 765). Judge Scheindlin of the Southern District of New York found that "the release of the product [gasoline containing MTBE] is alleged to occur from foreseeable and expected storage and transport of the product." (*In re Products Liability*, 175 F.Supp.2d at 625 n.48). Justice Davis found similar allegations sufficient in *Plainview Water District v. Exxon Mobil Corp.*, (Sup. Ct., Nassau Cty., May 22, 2002, Davis, J., index No. 9975/01) . The plaintiffs here have alleged that the discharge of gasoline was foreseeable from the ordinary use and transport of gasoline, and, injury to the plaintiffs in particular was foreseeable from even small leaks and minute concentrations in rainwater, given the information that was known to the petroleum industry regarding MTBE's properties. (HB ¶¶ 660-62, WH ¶¶ 214-17). In the absence of any evidence to flatly contradict these allegations, these facts as stated are sufficient to satisfy this element of a strict products liability claim.[9]

Colonial Pipeline and Buckeye Pipeline also contended during oral argument on this motion that they should not be held liable in strict products liability since they were not manufacturers or retailers responsible for the design of the gasoline containing MTBE. This argument does not save Leon Petroleum or O.K. Petroleum, since it is alleged that they are retailers of gasoline, which may be held to answer in strict liability for their products, and O.K. Petroleum and Leon Petroleum do not contest such allegations at this stage. On the other hand, the complaint alleges as to Colonial

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[9]The defendants also cite and discuss *Pfohl v. Amax, Inc.*, (222 A.D.2d 1068 [1995]) for the proposition that a MTBE cannot be defectively designed because it caused injury only when it was discharged into the ground. The case involved homeowners who sought to recover damages for the devaluation of their homes and alleged harm caused by latent effects of substantial exposure to a nearby landfill. Arguably, strict products liability would not allow recovery for such damages since the landfill was not a "product" marketed by the defendants in the stream of commerce, and even if the landfill is viewed as a product, the alleged harm would be an inherent risk that would be contemplated by the ordinary consumer (such as the risks inherent in a knife). The case is therefore distinguishable and inapposite to the allegations in the complaints here.

Pipeline and Buckeye Pipeline only that they were "the distribution process" which carried the majority of refined petroleum into Long Island. (WH ¶¶ 37-45).

Labeling a business entity as a "distributor" does not automatically bring upon it strict liability. A so-called "distributor" which does not actually sell or introduce the allegedly defective product into the stream of commerce, is not held strictly liable for said product's design. (*Joseph v. Yenkin Majestic Paint Corp.*,173 Misc.2d at 98). Perhaps by analogy to cases involving "as is" used goods sellers—who do not represent the products' merchantability or have much control over the product's design—it has also been held that a seller which incorporates a third-party's allegedly defective product, cannot be held strictly liable for any failure to warn as to the third-party's product; similarly, such seller would not be held strictly liable for design defect, if the final product was not defective in the condition that it left the seller's control. (*Rabon-Willimack,* 73 A.D.3d 1007 [2d Dep't 2010], *cf. Michael v. General Tire, Inc.*, 297 A.D.2d 629 [2d Dep't 2002]). Strict liability for design defect is therefore strictly circumscribed as applied to distributors or others who are not responsible for the product's design, according to the policies justifying application of strict liability. (*In re MTBE*, 591 F.Supp.2d at 276). Thus, it is unlikely to be applied as to intermediaries who do not profit from representing the product's merchantability as designed, or have other particular incentive for affecting the design choice as between safer alternative designs.

The plaintiffs' allegations that Buckeye Pipeline and Colonial Pipeline are "the distribution process" that transported gasoline to Long Island, lack crucial details that are necessary to haul these defendants to court for the design choice of MTBE-containing gasoline. The allegations do not indicate whether these defendants actually sold, for example, a generic petroleum product to all gasoline retailers, or whether petroleum producers and retailers merely leased these defendants' infrastructure or otherwise contracted to transport gasoline through these defendants' pipelines and other infrastructure. Therefore, the allegations do not make out the crucial and necessary element that these defendants were *sellers* of MTBE-containing gasoline, who represented its quality and merchantability to retailers or other distributors. To fill the gap in the plaintiffs' allegations and presume such a fact, would go beyond any favorable and reasonable inference that must be accorded to the complaint allegations under CPLR § 3211(a)(7), and would transcend to the realm of conjecture and guesswork. It is patently unfair to impose on these defendants the cost and burden

of defending themselves from suit simply because this Court might speculate and assume that under some hypothetical facts—that are not to be gleaned from the complaint—the plaintiffs could conjure a claim for legal relief against these defendants. Here the plaintiffs' facts, as alleged and with the benefit of all *reasonable* inferences, do not make out such a limited circumstance so as to explain the plaintiffs' hauling Colonial Pipeline and Buckeye Pipeline to this Court to defend in strict liability against the plaintiffs' prayer for recovery.

Summary

Sufficient facts have been alleged to state a claim under strict products liability against the O.K. Petroleum defendants and Leon Petroleum. However, a cause of action under strict products liability has not been stated on the alleged facts against Buckeye Pipeline and Colonial Pipeline.

4. Failure to Warn in Strict Liability and Negligence

The plaintiffs also bring claims in strict liability and negligence for failure to warn. The defendants jointly argue in the motion papers that they did not owe the plaintiffs any duty of care in failure to warn. Further, the defendants submit that a failure to warn cannot be the legal or proximate cause of injury in this case, since the dangers associated with spilling gasoline and consequent groundwater contamination are obvious and common knowledge, such that additional or more specific warnings to end users would not have been any more effectual in preventing leaks or spills. Though Judge Scheindlin of the Southern District of New York dismissed some of these arguments, (*MTBE,* 175 F.Supp.2d at 625-626), the plaintiffs' allegations against the present defendants—none of which manufactured MTBE-containing gasoline—fail to state a cause of action for failure to warn.[10]

Legal Elements

A failure to warn may arise in strict products liability if the lack of warning makes the product defective—that is, "not reasonably safe"—and a reasonable warning could have reduced or avoided the product's foreseeable risk of harm. (Rest. 3d Torts Prod Liab §2[C]). The failure to warn may give rise to liability in negligence if the defendant "(a) knows or has reason to know that the

[10]As discussed earlier, Judge Scheindlin acknowledged in a later decision of the MTBE litigation that New York courts favor liability for entities higher in the chain of distribution. (*In re MTBE*, 591 F.Supp.2d at 276).

chattel is or is likely to be dangerous for the use for which it is supplied, (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous." (Rest. 2d Torts §§ 399, 388[C]; *accord Kerr v. Koemm*, 557 F.Supp. 283, 286-87 [SDNY 1983]). A claim for failure to warn does not give rise to liability if the plaintiff or user actually knew of the danger associated with the product, if the failure to warn was otherwise not the proximate cause of the injury, or, in the negligence context, if the defendant did not owe the plaintiff any duty of care. (*Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 241 [1998], *see* 1 N.Y. Prod Liab 2d § 17:23).

Analysis

The Plaintiffs do not have any cause of action against the current defendants for any failure to warn. Firstly, the plaintiffs' claim requires a considerable expansion of a seller's duty to warn of latent defects. The plaintiffs claim that the defendants failed to warn three relevant classes: the plaintiff water districts, the general public, and public officials (HB ¶¶ 609, 670, WH ¶¶ 164, 227); plaintiffs allege that failure to warn these classes made MTBE-containing gasoline defective. A product is deemed defective for a failure to warn *users*, not the general public or third parties.[11] Product warnings must be designed to prevent known, dangerous *uses* of the product, since "warnings alert users and consumers to the existence and nature of product risks so that they can prevent harm either by appropriate conduct during use or consumption or by choosing not to use or consume." (Rest. 3d Torts Prod Liab § 2 Comment *i*).

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[11] The Restatement 2d of Torts § 388 Comment *b* makes this point quite clear:

> This Section states that one who supplies a chattel for another to use for any purpose is subject to liability for physical harm caused by his failure to exercise reasonable care to give *to those whom he may expect to use the chattel* any information as to the character and condition of the chattel which he possesses, and which he should recognize as necessary to enable them to realize the danger of using it. A fortiori, one so supplying a chattel is subject to liability if by word or deed he leads those who are to use the chattel to believe it to be of a character or in a condition safer for use than he knows it to be or to be likely to be. (Emphasis added).

While the Restatement 3d Torts–Products Liability § 2 Comment *i* does not foreclose the possibility that warnings may be necessary to non-users who are in a position to avoid or reduce the risk of harm, there does not appear to be any case authority for imposing strict liability in such cases, and the Section otherwise discusses the rule in the language of users or consumers.

Surely the plaintiffs do not claim that the defendants' failure to warn them caused the plaintiffs to discharge MTBE-containing gasoline into the ground, which in turn caused contamination of their own wells. Indeed, the allegations are also incoherent in so far as they argue that the defendants (which originally included manufacturers) should have warned "downstream handlers" of the dangers of MTBE, (HB ¶¶ 609, 670, WH ¶¶ 164, 227), and the remaining defendants are only transporters, suppliers, or retailers of gasoline and thus downstream handlers who should have been warned by manufacturers. (*See In re MTBE*, 379 F.Supp.2d 348, 398 [SDNY 2005]).

Moreover, the Court is unable to find any products liability case suggesting that a failure to warn public officials about dangerous uses of a product, gives rise to liability for defective products. Such general allegations that the defendants had a duty to warn the general public and public officials, is better characterized as an affirmative duty to warn. No facts are alleged to indicate why this affirmative duty was owed by the particular defendants against the plaintiffs, other than the defendants' presence in the gasoline-distribution industry, and allegations that the defendants might have superior knowledge of the dangers of MTBE.(HB ¶¶ 566-573, WH ¶¶ 148-151). Generally, superior knowledge and even proximity to a zone of danger are not sufficient to give rise to an affirmative duty to warn. (Rest. 2d Torts § 314; *accord Mulvey v. Cuviello*, 687 N.Y.S. 2d 584 [Sup. Ct., Nassau Cty. 1999], *Harper v. Herman*, 499 N.W.2d 472 [Minn. 1993]). In this case, the plaintiffs seek to collect damages for injuries they received as third-parties, with no special relationship to the particular defendants. There is no basis on the face of the complaint to find such an affirmative duty to warn the plaintiffs as third parties.

The Court in any case agrees with the defendants that the dangers associated with spilling gasoline are common knowledge, such that additional warnings delivered to ultimate consumers regarding the characteristics of MTBE, would not be effective. The authors of the Restatement Third of Torts–Products Liability § 2, noted in Comment *j* that "warnings that deal with obvious or generally known risks may be ignored by users and consumers and may diminish the significance of warnings about non-obvious, not-generally-known risks. Thus, requiring warnings of obvious or generally known risks could reduce the efficacy of warnings generally." Therefore, courts have been loathe to require laundry-lists of warnings to end-users: "Requiring too many warnings trivializes

and undermines the entire purpose of the rule, drowning out cautions against latent dangers of which a user might not otherwise be aware." (*Liriano*, 92 N.Y.2d at 242).

Finally, the alleged facts do not give rise to an inference that the particular defendants before this Court had any more reason to know of the dangers of MTBE, than the plaintiff water districts. The Hampton Bays Water District's complaint raises several allegations with regard to memoranda and investigations of several manufacturers who are no longer in these actions (*See, e.g.*, HB ¶¶ 590-597, 605-607). These allegations are not in the West Hempstead Water District complaint. The remaining allegations adduce only that the defendants should have been aware of certain early incidents of MTBE contamination, (HB ¶¶ 574-581, WH ¶¶ 152-159), and a study conducted by Peter Garrett and Marcel Moreau of the Maine Department of Environmental Protection, (HB ¶¶ 582-590, WH ¶¶ 160-163). As discussed earlier, a plaintiff may not recover for a failure to warn if the plaintiff was aware of the danger, since a warning in that case would be ineffectual. The plaintiffs do not allege why they were not aware of these publicly known incidents or studies, particularly since they may relate to their operations. While advancing and post-sale knowledge of a product defect may be imputed to a seller, (*Cover v. Cohen*, 61 N.Y.2d 261, 274-75 [1984]), the allegations in the complaint do not offer any facts indicating why generally advancing knowledge, such as the later findings by the EPA, (HB ¶¶ 630-631, WH ¶¶ 185-186), should be imputed only to the defendants, and not the plaintiffs. At this stage, it is irrelevant that the issue of knowledge is a fact issue for the jury, since the Court now must decide if any facts preliminarily *exist* on the face of the complaint, from which the plaintiff may recover; as part of this analysis, the Court assumes that a jury would find all facts to be true as alleged.

Summary

The facts as alleged in the complaints do not state any cause of action for failure to warn against any of the present defendants. This Court is not alone in denying liability for failure to warn against defendants that did not manufacture the product or have any superior knowledge regarding the risk of harm. (*See, e.g., Rabon-Willimack,* 73 A.D.3d 1007 [2d Dep't 2010], *Martin v. Hacker*, 156 A.D.2d 914 [3d Dep't 1989]). In addition, the plaintiffs here do not seek damages from injuries they suffered as users, and there is no duty to warn generally of public dangers or a duty to warn public officials. The facts from which constructive knowledge of MTBE's dangers may be imputed,

apply equally to the plaintiffs and the defendants. And, it is unlikely that additional warnings to end-users regarding the specific characteristics of MTBE would have been effectual in preventing injury to the plaintiff water districts. (*See Coppola v. Amerada Hess Corp.*, No. 201/3995 [Sup. Ct. Duchess Cty. July 31, 2002] and *Molloy v. Amerada Hess Corp.*, No. 2001/3996 [Sup. Ct. Duchess Cty. Aug. 1, 2002]).

5. General Negligence

The plaintiffs also bring claims in negligence for failure to test, negligent marketing, and negligent handling or storage of MTBE-containing gasoline.[12] The alleged facts fail to make out any cause of action in negligence against Buckeye Pipeline and Colonial Pipeline. As previously discussed in regard to public nuisance, these defendants' operations are too remote from the plaintiffs' wells for liability to lie in negligent handling or storage of MTBE-containing gasoline. (*Cf. Plainview Water Dist. v. ExxonMobil Corp.*, Sup. Ct., Nassau Cty., Mar. 11, 2004, Davis, J., index No. 9975/01). The plaintiffs fail to allege any facts from which an affirmative duty to control third-party handlers of gasoline, or any other relevant duty, was owed by these defendants in relation to the plaintiffs. (*See Hamilton*, 96 N.Y.2d at 232). Moreover, since the plaintiff water districts seek to recover damages for injuries they incurred as third-parties, without any relationship with these defendants, it is not clear that these defendants owed *any* duty of care to the plaintiffs that would permit recovery of damages in negligence. Indeed, suppliers do not have a duty to test a product that is obtained from a reputable manufacturer or where the supplier is not alerted of a need for testing. (*See* 86 N.Y. Jur. 2d Prod Liab §49 [2010]). As regards negligent marketing, the complaints do not allege that these defendants conducted any marketing and do not offer any specific marketing statements.

At this stage, it would be premature to dismiss the negligence causes of action against the O.K. Petroleum defendants and Leon Petroleum. These defendants had operations near the plaintiffs' wells and it is alleged that they caused MTBE to enter the groundwater from which the plaintiffs'

[12]The issues of negligent design and negligent labeling or failure to warn, also alleged, have already been addressed. For discussion of the convergence of products liability in negligence and strict liability for design defect, see *Adams v. Genie Indus.* (14 N.Y.3d 535, 542 [2010]).

wells draw water. (HB ¶ 682[l], WH ¶ 239[j]). Moreover, the plaintiffs have come forward with information that tends to show that the O.K. Petroleum defendants, at least, were negligent in the handling or storage of gasoline at the relevant time period. (Kunkle Aff. Exh. 8 ¶¶ 13, 32).

6. General Business Law § 349

The complaints also seek a cause of action under General Business Law § 349 for deceptive business practices. The plaintiffs allege in very general terms that but for defendants' deceptive practices in advertising and selling MTBE-containing gasoline, they would not have suffered their injuries, since consumers would presumably not have purchased the MTBE-containing gasoline. The plaintiffs allegations fail to state a cause of action under GBL § 349. While a private cause of action under GBL § 349 does not require privity of contract or any particular consumer transaction if sufficient consumer-oriented harm is alleged, a plaintiff may not recover damages under GBL § 349 for purely indirect or derivative losses that were the result of third-parties being allegedly misled or deceived. (*City of New York v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616 [2009] [The plaintiff "has failed to establish standing here because its claimed injury, in the form of lost tax revenue, is entirely derivative of injuries that it alleges were suffered by misled consumers who purchased defendants' cigarettes over the Internet"] and citations therein). Moreover, allegations that do not detail the materially misleading or deceptive acts of defendants are insufficient to plead a cause of action under GBL § 349. (*See, e.g.*, *Weaver v. Chrystler Corp.*, 172 F.R.D. 96 [SDNY 1997], *Small v. Lorillard Tobacco Co., Inc.*, 94 N.Y.2d 43 [1999]).

7. Navigation Law § 181

The plaintiffs further seek to recover damages in a private cause of action under Navigation Law § 181. The parties dispute whether the defendants fit within the definition of "discharger" in the statute. This Court finds that a valid cause of action under Nav. L. § 181 lies against the O.K. Petroleum defendants and Leon Petroleum, but not against Colonial Pipeline and Buckeye Pipeline.

The plaintiffs attribute responsibility to the Buckeye Pipeline and Colonial Pipeline defendants, in so far as the MTBE that contaminated the plaintiffs' wells would not have reached Nassau and Suffolk counties, but for these defendants' distribution system which terminated near

Linden, NJ for Colonial Pipeline and Inwood, NY for Buckeye Pipeline. Thus the plaintiffs do not allege that they suffered injuries because these defendants discharged petroleum, and the petroleum traveled underground to the plaintiffs' wells. Because the plaintiffs do not allege that they suffered harm as a result of discharges from Buckeye and Colonial, the plaintiffs have not alleged a valid cause of action against these defendants under Nav. L. § 181. (*In re MTBE Prod Lib*, 591 F.Supp.2d 259, 282 [SDNY 2008] ["only the spillers may be liable for the discharge of gasoline under the New York Navigation Law"]).

The plaintiffs attribute responsibility to O.K. Petroleum and Leon Petroleum, because these defendants were suppliers and retailers of gasoline who owned and operated gasoline stations. The plaintiffs have alleged that these defendants caused MTBE to enter the groundwater near the plaintiffs' wells (HB ¶¶ 694, 682[l]; WH ¶¶ 251, 239[j]) and they have offered documentary evidence tending to show that O.K. Petroleum has in fact had discharges of petroleum in areas likely to affect the plaintiffs (Kunkle Aff. Exh 8). Therefore, the plaintiffs have stated a valid cause of action against O.K. Petroleum and Leon Petroleum. (*DiBuono v. Abbey*, 69 A.D.3d 670 [2d Dep't 2010]).

8. Trespass

The plaintiffs allege a last cause of action in trespass. The parties dispute whether trespass requires "willful intent" such that the facts as alleged do not make out a claim for relief in trespass. As in nuisance, principles of proximate cause counsel against applying trespass liability to entities who immediate conduct did not produce the trespass. Therefore, on the alleged facts no cause of action in trespass has been made out against Buckeye Pipeline and Colonial Pipeline. A cause of action in trespass has been sufficiently pled against the O.K. Petroleum defendants and Leon Petroleum.

In New York, trespass is an intentional tort. To be liable, however, the trespasser "need not intend or expect the damaging consequences of his intrusion." *Phillips v. Sun Oil Co.*, 307 N.Y. 328, 331 [1954]). It is sufficient that the intrusion is "the immediate or inevitable consequence of what the trespasser willfully does, or which he does so negligently as to amount to willfulness." (*Id.*) *Phillips* has become the standard articulation for trespass in New York. The case involved

allegations that noxious fluids has migrated underground to cause the trespass. In that context, the Court of Appeals held:

> even when the polluting material has been deliberately put onto, or into, defendant's land, he is not liable for his neighbor's damage therefrom, unless he (defendant) had good reason to know or expect that subterranean and other conditions were such that there would be passage from defendant's to plaintiff's land.

(*Id.*)

There is a split among New York courts on the issue whether a discharge of petroleum producing underground contamination has the requisite intent to constitute a trespass. For example, the Second Department, Appellate Division, denied a motion to dismiss where allegations in the complaint created fact issues as to whether defendants had "good reason to know or expect that contaminants would pass from the gasoline service station to the plaintiffs' property." (*Hilltop Nyack Corp. v. TRMI Holdings, Inc.*, 264 A.D.2d 503, 505 [2d Dep't 1999]). In contrast, the Fourth Department, Appellate Division, following its earlier precedent in *Snyder v. Jessie* (164 A.D.2d 405 [4th Dep't 1990]), upheld a dismissal of a similar trespass claim in *Drouin v. Ridge Lumber, Inc.* (209 A.D.2d 957, 959 [4th Dep't 1994]), because the spill or discharge was unintentional. In any case, the key issue for a motion to dismiss under CPLR 3211(a)(7) appears to be whether the complaint alleges that the defendant had "good reason to know or expect" that the alleged contaminant would migrate to and invade the plaintiffs' property.

Here the plaintiffs have alleged that the defendants had good reason to know or expect that MTBE, due to its affinity to water and other characteristics, was likely to reach the plaintiffs' wells through foreseeable leaks or spills on soil over the Long Island aquifer system. At least for Leon Petroleum and the O.K. Petroleum defendants, which had operations over Long Island, such allegation could raise the inference that these defendants' conduct in discharging gasoline constituted a trespass. (*Cf. In re MTBE Litigation*, 379 F.Supp.2d 348, 427 [SDNY 2005]). As in all other claims, however, a claim in trespass has not been made against Buckeye Pipeline and Colonial Pipeline, where it is only alleged that they committed a trespass by their participation in the chain of distribution of MTBE-containing gasoline.

C. CONCLUSION

In brief, the plaintiffs factual allegations fail to make out any cause of action against Buckeye Pipeline and Colonial Pipeline for which relief may be given. Further, plaintiffs's allegations, as against Leon Petroleum and the O.K. Petroleum defendants, fail to establish any cause of action for failure to warn or for violations of GBL § 349.

II. O.K. PETROLEUM DEFENDANTS' MOTION TO DISMISS THE WEST HEMPSTEAD COMPLAINT[13]

Besides moving under CPLR §3211(a)(7), the O.K. Petroleum defendants move to dismiss the West Hempstead Water District complaint against them, under CPLR § 3211(a)(1) and CPLR §3211(a)(5), because full service of process was not completed within 90 days of dismissal of the West Hempstead Water District action in the Southern District of New York. The O.K. Petroleum defendants aver that a Stipulated Order of Dismissal was entered into by themselves and the West Hempstead Water District for the mutual benefit of the parties. (Def. mem. p.5). The parties do not dispute that the Stipulated Order of Dismissal should be strictly enforced in this case. (*Cf. Morrison v. Budget Rent A Car Sys., Inc.*, 203 A.D.2d 253 [2d Dep't 1997]). The parties dispute whether the Summons and Complaint for this action was properly served in accordance with the CPLR and the Stipulated Order.

The plaintiff adamantly claims that the O.K. Petroleum defendants' argument regarding service in accordance with the Stipulated Order is moot, since these defendants agreed not to assert an affirmative defense for lack of personal jurisdiction. (Kunkle Aff. Exh. A ¶ 4). The O.K. Petroleum defendants' motion, however, does not rest on lack of personal jurisdiction; rather, it asserts that the plaintiff has failed to follow the express terms of the Stipulated Order, and this is documentary evidence warranting dismissal under CPLR § 3211(a)(1).

The defendants' argument is simple. The Stipulated Order was an agreement between the West Hempstead Water District and the O.K. Petroleum defendants, whereby the West Hempstead Water District agreed to voluntarily dismiss its 2008 federal action in exchange for certain discovery

[13] Papers for this motion have been submitted as sequence No. 2 under index No. 7022/2010.

documents from the O.K. Petroleum defendants. (Kunkle Aff. Exh. A ¶ 1). The agreement further stipulated that the O.K. Petroleum defendants would waive affirmative defenses relating to the statute of limitations or personal jurisdiction (*id.* at ¶ 4) and Debra Rothberg would accept service on behalf of these defendants (*id.* at ¶ 3), so long as the plaintiff filed *and served* the Summons and Complaint within 90 days of its signing by Judge Scheindlin (*id.* at ¶ 2).[14] The parties further agreed that "service shall otherwise comply with all requirements of the New York Civil Practice Law and Rules." (Engle Aff. Exh. A ¶ 3). It is undisputed that the plaintiff chose mail by service under CPLR § 312-a, which becomes effective only when the Acknowledgment of Receipt is returned within thirty days. Moreover, the plaintiff did not properly address and mail the Summons and Complaint to Ms. Rothberg's office until May 10, 2010. Ms. Rothberg received the Summons and Complaint on May 11, 2010, just 13 days before the expiration of the 90 day period on May 24, 2010. (Def. mem. p.6). The expiration of the 90 day period that the Stipulated Order contemplated for service, passed without further incident. Only after this period had passed, the plaintiff served the Summons and Complaint by hand to Ms. Rothberg on May 28, 2010, and Ms. Rothberg's office returned the Acknowledgment of Receipt on June 2, 2010. (Def. mem. p.7). On these facts, the defendants submit that by failing to serve a Summons and Complaint within the contemplated 90 days, the plaintiff waived its option, as agreed in the Stipulated Order, to re-file the 2008 WHWD federal action in state court.

The parties do not ask this Court to inquire into the consideration for the plaintiff's agreement to dismiss the federal action on the terms stated above. Both parties seek to enforce the Stipulated Order as to this matter, and the plaintiff does not contend that it has brought suit against the defendants independently of the terms on the Stipulated Order. As such, it is clear that the plaintiff did not bring this action in a manner that complied with the express terms of the Stipulated Order: It failed to serve the O.K. Petroleum defendants by any method permitted in the CPLR within 90 days of the signing of the Stipulated Order.

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[14] "Plaintiff may initiate an action in a New York State court... by filing and serving a Summons and Verified Complaint... within 90 days of the signing of this Order." (Engle Aff. Exh. A ¶ 2).

The plaintiff argues that Ms. Rothberg's agreement to accept service on behalf of the O.K. Petroleum defendants obligated her to return the Acknowledgment of Receipt within the 90 days that the plaintiff had to effect service, or it should imply that service was complete when Ms. Rothberg was in possession of the Summons and Complaint. The terms of CPLR § 312-a are unambiguous. New York courts have consistently held that service under this Section is effective only when the Acknowledgment of Receipt is returned, and that a potential defendant has no legal duty to assist the plaintiff by returning the Acknowledgment of Receipt; if the Acknowledgment of Receipt is not returned within 30 days, the plaintiff's only remedy is recovery for the cost of in-hand service under CPLR § 312-a(f). (*See Patterson v. Balaquiot*, 188 A.D.2d 275 [1 Dep't 1992]; *Horseman Antiques, Inc. v. Huch*, 50 A.D.3d 963 [2d Dep't 2008]). Ms. Rothberg did accept service and complied with CPLR § 312-a by returning the Acknowledgment of Receipt on June 2, 2010. She did not otherwise agree by the terms in the Stipulated Order to return the Acknowledgment of Receipt in such a way as would assist the plaintiff in effecting service within 90 days of Judge Scheindlin's signing of the Stipulated Order of Dismissal.

For the above reasons, the O.K. Petroleum defendants' motion to dismiss the West Hempstead Water District complaint against them is granted.

But for this motion relating to service of process, the court's rulings on the balance of the case, as previously set forth in this decision, would apply to the West Hempstead case as well.

III. PLAINTIFFS' CROSS-MOTION FOR SANCTIONS AGAINST THE O.K. PETROLEUM DEFENDANTS[15]

The plaintiff West Hempstead Water District cross-moves against the O.K. Petroleum defendants for the imposition of sanctions on the basis of these defendants' motion to dismiss, contending that such motion was frivolous, harassing, and sanctionable under 22 NYCRR § 130-1.1. This regulation permits this Court to impose costs or other financial sanctions on an attorney or his firm for frivolous conduct. Part (c) of said section establishes that conduct is frivolous if:

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[15]Papers for this motion have been submitted as sequence No. 14 under index No. 601516/2009, although this cross-motion is in response to the O.K. Petroleum defendants' submission as sequence No. 2 under index No. 7022/2010.

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reveral of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.

The section instructs courts to consider "the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party." (*Id.*) The amount of sanctions imposed should reflect the party's culpability in engaging in frivolous conduct as well as prejudice to the adversary. (*Vicom v. Silverwood*, 188 A.D.2d 1057 [4th Dep't 1992], *Tropeano v. Tropeano*, 35 A.D.3d 444 [2d Dep't 2006).

This Court finds the circumstances here to be analogous to the facts in *Sydney Attractions Group Pty Ltd. v. Schulman* (74 A.D.3d 476 [1st Dep't 2010]). There, the defendant contended that the plaintiff's bringing suit in a jurisdiction which circumvented a forum selection clause, amounted to frivolous conduct. The court disagreed, since a party may have legal arguments available to defeat a forum selection clause. Similarly, the O.K. Petroleum defendants have legal arguments available as to the scope of any obligation to accept service in light of plaintiff's chosen method of service.

The plaintiff's cited case, *Park Health Center v. Country Wide Ins. Co.* (2 Misc.3d 737 [Sup. Ct., Queens Cty. 2003]), which involved willful and continuing misrepresentations by the attorneys, is not in any way analogous to the conduct at issue in this matter. In any case, the O.K. Petroleum defendants submitted their motion to dismiss (on the basis of the Stipulated Order) in the context of their joining the joint defendants' motion to dismiss the MTBE litigation complaints under CPLR 3211(a)(7) for failure to state a cause of action. Such conduct was not in any way malicious, vexing, or baseless. (*Cf. Hinckle v. Resciniti*, 159 A.D.2d 276 [1st Dep't 1990])

For all the above reasons, the plaintiff's cross-motion for sanctions is denied.

IV. ORDER

The defendants' joint motion to dismiss under CPLR § 3211(a)(7) is granted in part. All plaintiffs' claims against Buckeye Pipeline and Colonial Pipeline are hereby dismissed for failure to state any cause of action upon which relief may be granted. Plaintiffs' claims in strict liability or negligence for failure to warn and in private right of action under GBL § 349, are hereby dismissed against Leon Petroleum and the O.K. Petroleum defendants, for failure to state a cause of action upon which relief may be granted. The joint motion to dismiss is otherwise denied in part, and the plaintiffs' remaining claims survive as against the O.K. Petroleum defendants and Leon Petroleum.

The O.K. Petroleum defendants' motion to dismiss the West Hempstead Water District's complaint under CPLR § 3211(a)(1) is hereby granted, because documentary evidence bars the plaintiff's suit as brought before this Court.

The West Hempstead Water District's cross-motion for sanctions under 11 NYCRR §130-1.1 against the O.K. Petroleum defendants and their attorney, is hereby denied for want of merit.

Enter Judgment on Notice pursuant to the above decision.

It is SO ORDERED.

Dated: October 22, 2010

Ira B Warshawsky

J.S.C.