ORIGINAL

SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE- NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA

JUSTICE

----------X **PART 6**

AQUA NY OF SEA CLIFF, PLAINVIEW WATER DISTRICT, MANHASSET-LAKEVILLE WATER DISTICET, BETHPAGE WATER DISTRICT, WEST HEMPSTEAD WATER DISTRICT, CITY OF GLEN COVER WATER DISTRICT, GREENLAWN WATER DISTICT, SOUTH FARMINGDALE WATER DISTRICT, INCORPORATED VILLAGE OF GARDEN CITY, GARDEN CITY PARK WATER DISTRICT, OYSTER BAY WATER DISTRICT, HAMPTON BAYS WATER DISTRICT, SOUTH HUNTINGTON WATER DISTRICT, TOWN OF HUNTINGTON/DIX HILLS WATER DISTRICT, TOWN OF RIVERHEAD WATER DISTRICT,

Plaintiffs,

-against-

BUCKEYE PIPELINE COMPANY, L.P. and COLONIAL PIPELINE COMPANY, L.P.,

Defendants.

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INDEX NO. 12188/11
XXX
MOTION DATE: 7/18/12
SEQUENCE NO. 002

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Motion by defendants, Buckeye Pipeline Company, L.P. ("Buckeye") and Colonial Pipeline Company i/s/h/a Colonial Pipeline Company, L.P. ("Colonial"), for an Order dismissing the plaintiff

water districts' consolidated complaints in their entirety, pursuant to both CPLR §3211(a)(1) and (7), is granted.

This action is the product of a consolidation order of this Court, dated February 29, 2012 and entered March 1, 2012. Pursuant to said Order, this Court, *inter alia*, consolidated an action brought by Aqua NY of Sea Cliff against defendants Buckeye and Colonial with fourteen related actions, all of which arise from identical claims by various water districts in Nassau and Suffolk Counties relating to the alleged contamination of public water wells with the chemical Methyl Tertiary Butyl Ether ("MTBE") (the "2011 Complaint"). Notably, counsel for all parties executed a stipulation agreeing to the consolidation of the fifteen actions in Nassau County Supreme Court.

By way of background, in 2009, several Suffolk and Nassau County water districts filed complaints against a group of more than sixty defendants, including defendants herein Buckeye and Colonial, who were involved in the petroleum industry. These complaints (the "Original 2009 Complaints") alleged that the defendants had "produced, refined, manufactured, used and/or distributed" gasoline containing MTBE. It was alleged that as a result of the defendants' allegedly "careless and negligent practices," MTBE had "entered into the drinking water aquifer system from where Plaintiff withdraws water." These complaints alleged that the defendants were liable for public and private nuisance, negligence, strict products liability, trespass, and violations of New York's General Business and Navigation Laws.

Thereafter, on April 9, 2010, plaintiff West Hempstead Water District filed a complaint against only Buckeye, Colonial and two other defendants (the "2010 West Hempstead Complaint"). This complaint contained new allegations specifically against Buckeye and Colonial, including that said defendants were liable as the "distribution process" by which MTBE-laden gasoline reached

New York.

Many of the defendants settled. Buckeye and Colonial however joined the remaining defendants' motion to dismiss the Original 2009 Complaints. For the purposes of the motion to dismiss, the 2010 West Hempstead Complaint was consolidated with the Original 2009 Complaints under the caption, In re: Nassau County Consolidated MTBE (Methyl Tertiary Butyl Ether) Products Liability Litigation, Index No.: 601516/2009 and West Hempstead Water District v. Buckeye Pipeline Co., L.P., Index No.: 007022/2010.

In an Order entered November 4, 2010, Justice Ira Warshawsky of this Court dismissed all of plaintiffs' causes of action set forth in the Original Complaints, including those for strict products liability and negligence, as to both Buckeye and Colonial. In the Order, Judge Warshawsky instructed the plaintiffs that its allegations in the Original 2009 Complaints for strict liability did not include the necessary element that Defendants "were sellers of MTBE-containing gasoline...." Judge Warshawsky's Order also advised plaintiffs that the allegations for negligence did not include "facts from which an affirmative duty to control third party handlers of gasoline...was owed by [Defendants] in relation to [] plaintiffs."

On November 22, 2010, plaintiffs filed a notice of appeal of Judge Warshawsky's Order with the Appellate Division, Second Department. After four separate motions to enlarge the time to file that appeal, plaintiffs never perfected the appeal.

On August 19, 2011, plaintiffs filed the underlying 2011 Complaint, again in both Suffolk and Nassau Counties. These complaints only named Buckeye and Colonial as defendants and (again) include causes of action for strict liability and negligence, and again seek to establish Buckeye and Colonial's liability for alleged MTBE contamination of plaintiffs' water wells. The 2011 complaints

were consolidated by the undersigned, by Order dated February 29, 2012.

Upon the instant motion, defendants, seek an Order dismissing the plaintiffs'(consolidated) complaint for failure to state a cause of action, or alternatively, based on the documentary evidence. Insofar as a motion made pursuant to CPLR 3211 requires this Court to accept as true the allegations of the complaint (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]), the underlying facts are as follows[1]:

Plaintiffs provide the source of potable water to customers in their respective water districts. They operate public supply wells which are contaminated with MTBE, including all of its degradation products, such as tert-butyl alcohol. MTBE is a gasoline additive, that is highly soluble in water and does not readily biodegrade. It is a possible human carcinogen, a known animal carcinogen, and even in very small amounts (as little as 1 part per billion ["ppb"]), it imparts a foul taste and odor to water. Plaintiffs allege therein that despite knowing that MTBE has unique characteristics in water that allows it to contaminate water sources never seen, defendants chose to distribute, transport, supply, sell and/or market gasoline-containing MTBE. In doing so, plaintiffs claim that defendants unleashed an unprecedented assault on the water supplied to citizens in New York. All of plaintiff's supply wells are allegedly threatened by ever spreading MTBE contamination of the sole source aquifer system from which it draws its potable water supply.

Defendants, Buckeye and Colonial, are two of the largest pipeline common carriers of refined petroleum products in the United States, with thousands of miles of pipeline serving several

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[1]Since this Court consolidated all of the 2011 complaints with the complaint filed by Aqua NY of Sea Cliff, and since it was determined (Parga, J.) that the allegations in all complaints were identical, for the purposes of the instant motion to dismiss, this Court bases this decision on the allegations as advanced in the complaint of Aqua NY of Sea Cliff v. Buckeye Pipeline Company, L.P. and Colonial Pipeline Company, L.P., Index No., 12188/11.

states in the northeast, including New York. Defendants serve major population centers in the State of New York, many of which are on Long Island. Refined product received by defendants is transported via defendants' pipeline system to, *inter alia*, commercial bulk storage and distribution terminals on Long Island in the State of New York. Plaintiffs allege herein that the defendants engaged in one or more phases of the petroleum business, including but not limited to the distribution, transportation, supply, sale and/or marketing of gasoline containing MTBE in New York.

In bringing the within 2011 complaint, plaintiff advance four "counts" of claims: (1) Strict Liability – Design Defect and/or Defective Product; (2) Market Share Liability, Alternative Liability, Concert of Action, Enterprise Liability; (3) Strict Liability – Failure to Warn; and, (4) Negligence. Plaintiffs allege that the defendants were "sellers, transporters, distributors, marketers and/or suppliers" of MTBE-containing gasoline (Complaint, ¶¶128-30, 145, 154, 163); and owed an affirmative duty to warn, as well as other relevant duties in relation to plaintiffs (Complaint, ¶¶163-67).

It is undisputed herein that the 2011 complaint represents plaintiffs' attempts to cure the deficiencies cited by Judge Warshawsky in his Order dismissing the Original 2009 Complaints. Accordingly, since the first round of dismissal was pursuant to CPLR 3211 (a)(7) for pleading deficiencies in the causes of action, this complaint, with identical causes of action, will not be barred by res judicata to the extent that it attempts to remedy the deficiencies in the 2009 complaint. (*Addeo v. Dairymen's League Co-op. Ass'n*, 47 Misc.2d 426 [Sup. Ct. New York 1965]; *cf. Flynn v. Sinclair Oil Corp.*, 20 AD2d 636 [1st Dept.], *aff'd* 14 NY2d 853 [1964]); See also, *Spindell v. Brooklyn Jewish Hosp.*, 35 AD2d 962 [2nd Dept. 1970] *aff'd* 29 NY2d 888 [1972]).

Notwithstanding the foregoing, upon the instant motion, the defendants (again) seek to dismiss the plaintiffs' complaint.

The defendants predicate their entire motion to dismiss the underlying 2011 complaint on the grounds that they are common carriers involved in the transport of petroleum products for others and that neither Buckeye nor Colonial are sellers, marketers, distributors, or suppliers of gasoline that would subject them to products liability or negligence claims. They also submit that any charge as to their constructive knowledge of the dangers of MTBE is unsubstantiated, for the plaintiffs fail to identify any spills or occurrences of contamination, let alone any that were caused by Buckeye or Colonial, which are known to have contributed to the contamination of plaintiffs' wells.

The same standards apply to the within CPLR 3211 motion as applied in the previous motions determined by Judge Warshawsky. That is, 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 under any cognizable legal theory (*Leon v. Martinez*, 84 NY2d 83 [1994]). 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 (*Sokoloff v. Harriman Estates Development Corp*, 96 NY2d 409 [2001]). Conversely, allegations that state only legal opinions or conclusions, rather than factual statements, are not afforded any weight (*Asgahar v. Tringali Realty, Inc.*, 18 AD3d 408 [2nd Dept. 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 AD2d 455 [2nd Dept. 2002]). However, if documentary evidence

introduced in the record "flatly contradicts" any allegations in the complaint, such allegations in the complaint will not be taken as true (*Asgahar v. Tringali Realty, Inc.*, supra). Also, the plaintiff can introduce documentary evidence to show that the allegations in the complaint are supportable with further proof (CPLR 3211[c], [e]; *Rovello v. Orofino Realty Co.*, supra).

To succeed at this juncture, therefore, defendants 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. 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.

Plaintiffs claim for design defect and/or defective product under a strict products liability theory (Count 1) is based upon allegations 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. Plaintiffs allege that the defendants were sellers, transporters, distributors, marketers and/or suppliers of petroleum products on Long Island, New York, including the gasoline containing MTBE (Complaint, ¶128) and as such they owed a duty to all persons to whom their petroleum products might foreseeably harm, including the plaintiff, not to market any product which is unreasonably dangerous for its intended and foreseeable use (Complaint, ¶129). They claim that the defendants had knowledge of the risks and failed to use reasonable care in the design, distribution, transportation, marketing and/or sale of gasoline containing MTBE to Long Island, New York (Complaint, ¶131) and that they represented the quality and merchantability of this MTBE-containing gasoline to retailers and other distributors and transporters (Complaint, ¶134).

Plaintiffs allege that gasoline containing MTBE poses greater dangers to groundwater than would be expected by ordinary persons such as the plaintiffs, users, downstream handlers and the general public exercising reasonable care (Complaint, ¶135) and that these risks outweigh MTBE's utility in boosting the octane level of gasoline and/or supposedly reducing air pollution by increasing the oxygen content of gasoline (Complaint, ¶136). Plaintiffs allege that for the purposes of increasing both the octane level and oxygen content of gasoline, safer alternatives to MTBE exist and have been available to defendants at all times relevant to this litigation (Complaint, ¶137).

In advancing their strict liability theory, plaintiffs claim that the defects of the gasoline containing MTBE exceeded the knowledge of the ordinary person and by the exercise of reasonable care plaintiffs would not be able to avoid the harm caused by the product (Complaint, ¶138). Instead, they submit that the defendants, who transported, distributed, supplied, sold and/or marketed the gasoline containing MTB, reached the consumer and the environment in a condition substantially unchanged from that in which it left the defendants' control and as a direct and proximate result of the dangerous and/or defective condition of gasoline containing MTBE and its introduction into the stream of commerce by defendants, MTBE has, *inter alia*, contaminated the groundwater and plaintiffs' production wells and/or aquifer system (Complaint, ¶¶139-141). Plaintiffs claim that the defendants had actual knowledge of MTBE's propensity to contaminate groundwater and that MTBE did, in fact, contaminate groundwater where gasoline containing MTBE was sold in Long Island, New York. Plaintiffs claim that the defendants intentionally undertook the conduct described above to promote the distribution, transportation, supply and/or sale of MTBE and gasoline containing MTBE in conscious and/or reckless disregard of known risks of injury to health and property. It is alleged that defendants committed each of these acts and omissions knowingly, willfully, and/or with

fraud, oppression, or malice, and with conscious and/or deliberate disregard for the health and safety of others, the safety of groundwater and drinking water supplies, and for plaintiff's water rights (Complaint, ¶142). Further, plaintiffs claim that because defendants acted with malice in their conscious, willful, and wanton disregard of the probable dangerous consequences of their conduct and its foreseeable impact upon the plaintiff, plaintiffs are entitled to punitive damages (Complaint, ¶143).

As to their cause of action for strict liability under a failure to warn theory (Count 3), plaintiffs claim that as sellers, transporters, marketers and/or distributors of gasoline containing MTBE, defendants had a duty to issue warnings to the plaintiff, the public, downstream handlers, and users of the risk posed by MTBE (Complaint, ¶154). They claim that the defendants knew that gasoline containing MTBE would be purchased, transported, stored, handled and used without notice of the hazards that MTBE posed to groundwater and wells. Indeed, plaintiffs claim that the defendants had an actual and/or constructive knowledge of MTBE's hazardous properties to groundwater and production wells (Complaint, ¶¶155-156). Plaintiffs claim that the defendants breached their duty to warn by unreasonably failing to provide warnings to plaintiff, downstream handlers, users and/or general public and that it was their failure to warn that proximately caused reasonably foreseeable injuries to the plaintiff. Plaintiffs allege that they and others would have heeded legally adequate warnings and MTBE would not have gained approval in the marketplace for use in gasoline and/or gasoline containing MTBE would have been treated differently in terms of procedures for transportation, distribution, handling, storage, emergency response and/or environmental cleanup. Plaintiffs claim that as direct and proximate result of defendants' failure to give warnings, MTBE has, *inter alia*, posed and continues to pose a threat to groundwater and

plaintiffs' production wells and contaminated, continues to contaminate and/or will contaminate production wells or groundwater in the vicinity of plaintiffs' wells (Complaint, ¶¶157-159).

In support of their motion, defendants rely upon a videotaped deposition transcript (taken pursuant to Federal Rules of Civil Procedure 30(b)(6)) of James Edward Brown, a witness for Colonial Pipeline Company in the action entitled, In re: Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation, brought in the United States District Court, Southern District of New York. The deposition is dated January 18, 2008 and is attached as Exhibit A to the plaintiffs' 2011 complaint[2] which is made part of the motion papers as Exhibit B. Also in support of their motion, the defendants rely upon filed tariffs of Buckeye and Colonial for the relevant time periods, attached to the motion papers herein as Exhibits F and G. Defendants submit that the deposition transcript and the filed tariffs show that Buckeye and Colonial are common carriers involved in the transport of petroleum products for others and that neither Buckeye nor Colonial are sellers, marketers, distributors, or suppliers of gasoline that would subject them to products liability or negligence claims.

Defendants submit, *inter alia*, the sworn affidavits of James Edward Brown for Colonial and Richard E. Bishop for Buckeye, and contend that defendants were interstate transporters of oil and gasoline by pipeline. As such, they contend that they are regulated as "common carriers." Defendants explain that regulation of oil pipeline operators as common carriers commenced in 1906 with amendments to the Interstate Commerce Act (*U.S. v. Ohio Oil Co*, 234 US 548 [1914]), which had previously only applied to railroads, but now also includes several industries including oil pipelines,

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[2]Aqua NY of Sea Cliff v. Buckeye Pipeline Company, L.P. and Colonial Pipeline Company, L.P., Index No. 12188/11.

under the Act's purview. Pursuant to the Act, the Interstate Commerce Commission was created to regulate the industries. Subsequently, in 1977, the Federal Energy Regulatory Commission ("FERC") was created (42 USC §7134) and was vested with the Interstate Commerce Commission's powers of regulating oil pipeline operators (49 USC § 60502). FERC has since promulgated regulations that govern common carrier pipeline operators including requiring "[e]ach carrier to publish, post, and file with [FERC] tariff publications" (18 CFR §341[b][1]). The tariff publications detail the rates common carriers charge for transporting oil (18 CFR §341.3). Defendants submit that as common carriers, both Buckeye and Colonial comply with FERC's requirements. Further, they submit that as FERC regulated common carriers, they never hold title to the products transported through their pipelines. As such, they cannot be sellers, distributors, marketers and/or suppliers of petroleum products. They are nothing more than a common carrier transporter of a product for a fee.

Under New York law, a plaintiff seeking to recover under a theory of strict products liability must prove "that the product [at issue] was defective as a result of either [1] a manufacturing flaw, [2] improper design, or [3] failure to provide adequate warnings regarding the use of the product" (*Godoy v. Abamaster of Miami, Inc.*, 302 AD2d 57 [2nd Dept. 2003]). No matter which of the three theories of strict products liability is advanced, the plaintiff must also prove that the defendant is one on whom courts will place the "burden of strict liability" (*Id*; *Sukljian v Ross & Son Co.*, 69 NY2d 89 [1986]). In addition to manufacturers, policy considerations have led courts to place the "burden of strict liability" on "certain *sellers*" of allegedly defective products, including "retailers and distributors" (*Id*).

As in their initial complaint, the plaintiffs fatally fail to establish that strict products liability is applicable to either Buckeye or Colonial. Specifically, in 2010, Judge Warshawsky dismissed

plaintiffs' causes of action as to strict products liability, noting that "[t]he plaintiffs' allegations that [Buckeye and Colonial] are 'the distribution process' that transported gasoline to Long Island, lack crucial details that are necessary to haul these defendants to court" to answer for strict products liability. Specifically, Judge Warshawsky stated that the original complaints failed to "indicate whether these defendants actually *sold*...a generic petroleum product to all gasoline retailers, or whether petroleum producers and retailers merely leased [Buckeye and Colonial's] infrastructure or otherwise contracted to transport gasoline through [Buckeye and Colonial's] pipelines and other infrastructure." Judge Warshawsky concluded that the allegations in the Original 2009 Complaints did not establish 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." In light of these deficiencies, Judge Warshawsky found that "a cause of action under strict products liability [against Buckeye and Colonial] ha[d] not been stated on the alleged facts."

In an attempt to cure the defects identified by Judge Warshawsky, plaintiffs' have added new allegations, albeit conclsuory, including that Buckeye and Colonial "sold and/or marketed generic petroleum product to gasoline retailers." This however, is explicitly refuted by plaintiffs' own evidence, to wit, the deposition testimony of James Edward Brown. Mr. Brown specifically testified "Colonial Pipeline doesn't own – we never have ownership of product. So as far as the agreements around anything with buying and selling, or ownership, no" (Brown Deposition, p. 81).

A copy of any writing attached to a complaint "is a part thereof for all purposes" (CPLR 3014). Having attached a copy of Brown's deposition transcript to their complaint, the plaintiffs have made it "a part thereof" (*Id*). As such, Brown's deposition transcript, and all statements contained therein, are part of the 2011 complaint. For purposes of deciding a motion to dismiss a complaint,

a writing attached to the complaint must be considered part thereof (*Wernham v. Moore*, 77 AD2d 262 [1st Dept. 1980]).

Furthermore, as stated by Judge Warshawsky, "[l]abeling 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" subject to the burden of strict products liability (citations omitted, emphasis added). Based upon the papers submitted herein, it is clear to this Court that neither Buckeye nor Colonial is a "seller" of MTBE-laden gasoline. As a matter of law, Buckeye and Colonial are common carriers governed by FERC. The gasoline shipped by Buckeye and Colonial's customers is owned by the shipper from the time it enters the pipeline until it is delivered to the shipper or the shipper's designee at the delivery point. No "sale" ever occurs. Neither Buckeye nor Colonial ever made any statements or representations as to the product's "quality and merchantability to retailers or other defendants." Indeed, Brown's deposition transcript supports the conclusion. As such the 2011 complaint fails to aver that either Buckeye or Colonial should be subject to the "burden of strict liability" for either manufacturing defect or failure to warn.

Moreover, the written tariffs from the relevant time period provide additional documentary proof (for purposes of a motion made pursuant to CPLR 3211(a)(1)) that Buckeye and Colonial do not own the product that is transported through their pipelines. Pursuant to the tariffs, the defendants have a "security interest" in the petroleum products; i.e., they do not "own" the product transported in their pipelines and are not "sellers" or "marketers" that could be subject to strict liability.

The fact is that "selling and/or marketing" of a product is what potentially leads to strict products liability. Indeed Judge Warshawsky previously stated the same:

> [T]he 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.

The evidence herein "flatly contradict(s)" any suggestion that Buckeye and Colonial were "sellers" or "marketers" of MTBE gasoline or that they ever made any representations to anyone about the "quality and merchantability" of the product that was transported through their pipelines. Rather, the evidence herein shows that the Buckeye and Colonial are: 1) common carrier, 2) did not own the product transported through their pipelines, 3) were not sellers of MTBE-containing gasoline and 4) provided the same product to their customers at the exit points of the pipelines that these specific customers placed into the entry points of the pipelines.

Plaintiffs attempt to use the broad terms "supplier" or "distributor" in describing the defendants so as to subject them to traditional strict liability is unavailing particularly since in dismissing the Original 2009 Complaints, Judge Warshawsky held:

> 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****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.

Here, it is undisputed that the defendants did not profit from making any representation regarding MTBE-containing gasoline. In fact, there is no allegation that gasoline containing MTBE was material to Buckeye and Colonial. Buckeye and Colonial are not "distributors" or "suppliers" as those terms are used in products liability cases. They are nothing more than "transporters" of the product in their pipelines.

For these reasons, this Court finds that the defendants' motion to dismiss the plaintiffs' causes of action predicated upon Strict Liability theories – to wit, Counts 1 and 3 – is hereby granted.

As to plaintiffs' fourth "count" sounding in Negligence, the plaintiffs allege that as sellers, transporters, marketers and/or distributors of gasoline containing MTBE, defendants owed a duty to the plaintiffs as well as to all persons whom defendants' petroleum products might foreseeably harm to exercise due care in the handling, control, disposal, sale, testing, labeling, use, warning, and instructing for use of gasoline containing MTBE (Complaint, ¶163). Plaintiffs claim that the defendants had a duty and the financial and technical means to test MTBE and gasoline containing MTBE and to warn public officials, downstream handlers, users and the general public of any hazardous characteristics of MTBE known to them, their agents and employees (Complaint, ¶164). Plaintiffs alleged that the defendants had a duty not to contaminate the environment (Complaint, ¶165), and that they negligently breached their duties of care to the plaintiffs, downstream handlers, users and/or the general public by, among other things, failing to adequately test, identify and remediate wells that are contaminated with MTBE (Complaint, ¶167). It is alleged that as a direct and proximate result of the defendants' negligent acts or omissions, MTBE has, *inter alia*, posed and continues to pose a threat to groundwater and plaintiffs' production wells (Complaint, ¶168). Plaintiffs allege that defendants had actual knowledge of MTBE's propensity to contaminate groundwater and that MTBE did, in fact, contaminate groundwater where gasoline-containing MTBE was sold. Plaintiffs contend that defendants intentionally undertook this conduct to promote the sales of MTBE and gasoline containing MTBE in conscious and/or reckless disregard of the known risks of injury to health and property. It is alleged that the defendants committed each of these acts and omissions knowingly, willfully, and/or with fraud, oppression, or malice and with conscious and/or deliberate disregard for the health and safety of others, the safety of groundwater and drinking water supplies and for plaintiffs' water rights (Complaint, ¶169). As such, plaintiffs claim that they are

entitled to punitive damages (Complaint, ¶170).

In this Court's prior decision and order, Judge Warshawsky, stated that the general negligence claims can be summarized as claims for "negligence for failure to test, negligent marketing and negligent handling or storage" of MTBE containing gasoline. Judge Warshawsky was clear in dismissing the plaintiffs' negligence claims:

> [Buckeye and Colonial's] operations are too remote from the plaintiffs' wells for liability to lie in negligent handling or storage of MTBE-containing gasoline***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.***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.***As regards negligent marketing, the complaints do not allege that these defendants conducted any marketing and do not offer any specific marketing statements.

To establish a cause of action for common law negligence, the plaintiffs must allege "(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) a showing that the breach of that duty constituted a proximate cause of the injury" (*Ingrassia v. Lividikos*, 54 A.D.3d 721 [2nd Dept. 2008]). Thus, "[t]he threshold question in any negligence action is: does defendant owe a legally recognized duty of care to plaintiff?" (*Hamilton v Beretta U.S.A. Corp.,* 96 NY2d 222 [2001]). A plaintiff must show that a defendant "owed not merely a general duty to society but a specific duty to [the plaintiff], for "[w]ithout a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm" (*Id.*, *citing Lauer v. City of New York*, 95 NY2d 95, 100 [2000]).

Here, as in the Original 2009 Complaints, plaintiffs allege that Buckeye and Colonial owed "a duty to plaintiff as well as all persons whom Defendants' petroleum products might foreseeably

harm (Complaint, ¶163) and "a duty not to contaminate the environment" (Complaint, ¶165). Such broad statements of a legal duty owed are precisely the sort of "general duties to society" that Courts are loath to find because they subject defendants to unlimited liability to an indeterminate class of potential victims. Plaintiffs' fatal flaw, again, was their failure to allege sufficient facts to give rise to a specific duty running from defendants to plaintiffs.

Furthermore, plaintiffs have failed to allege that Buckeye and Colonial should be liable for the failure to control the actions of third party "downstream handlers"; that is plaintiffs' theory of Buckeye and Colonial's liability is dependent on the negligent handling of gasoline by third parties – the downstream handlers – over whom Buckeye and Colonial had no control. In the absence of a special relationship, liability cannot be imputed upon defendants for the conduct of the downstream handlers. As Judge Warshawsky stated in his prior decision and order, plaintiffs cannot recover for negligence where, as here, they have "fail[ed] to allege any facts from which an affirmative duty to control third-party handlers of gasoline, or any other relevant duty, was owed by [Buckeye and Colonial] in relation to the plaintiffs."

In addition, plaintiffs' claim that the defendants were negligent for failing to warn of the dangers of MTBE, lacks a legal basis. Indeed, as Judge Warshawsky stated in his prior decision and order, "there is no duty to warn generally of public dangers or a duty to warn public officials." Notwithstanding this ruling, plaintiffs re-allege this in their instant complaint. Judge Warshawsky ruled on this issue when he concluded that the Court was unable to locate any cases finding a defendant liable for failure to warn public officials regarding the dangers of a product.

Moreover, it cannot be overlooked that, as Judge Warshawsky previously held, "[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 dangers associated with gasoline spilling are well known and common knowledge. Indeed, as Judge Warshawsky previously held, requiring additional warnings to ultimate consumers about the characteristics of MTBE would not be effective. Furthermore, a defendant's superior knowledge and proximity to a zone of danger are insufficient to give rise to a duty to warn. Defendants cannot be held liable for failure to warn where they did not manufacture the offending product or did not have superior knowledge regarding the risk of harm (*Rabon-Willimack v. Robert Mondavi Corp.*, 73 AD3d 1007 [2nd Dept. 2010]). Plaintiffs have again failed, as Judge Warshawsky ruled, "to indicate why this affirmative duty [to warn] was owed by the particular defendants against the plaintiffs, other than the defendants' presence in the gasoline-distribution industry, and the allegations that the defendants might have superior knowledge of the dangers of MTBE****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." Just as in 2009, the within 2011 complaint falls short of giving rise to such an inference.

Inasmuch as the 2011 complaint includes several allegations that Buckeye and Colonial were privy to certain information regarding the dangers of MTBE as a result of their access to reports, memoranda, and investigations of several gasoline manufacturers and other industry experts (Complaint, ¶¶39-40, 42, 55, 64, 75-80, 82-85, 116-119), and insofar as the 2011 complaint contains allegations that Buckeye and Colonial were aware of certain MTBE spills throughout the United States (Complaint,¶¶ 70, 71, 114), just as in the Original 2009 Complaints, "[t]he plaintiffs [again] do not allege why they were not aware of these publicly known incidents or studies, particularly since they may relate to their operations." As noted by Judge Warshawsky, "[w]hile advancing post-sale knowledge of a product defect may be imputed to a seller,***the allegations in the

complaint[s] do not offer any facts indicating why generally advancing knowledge, such as the later findings by the EPA***should be imputed only to the defendants, and not the plaintiffs."

The fact is that the plaintiffs have failed to plead any duties, additional to the ones pled in the Original 2009 Complaints, on which to predicate their negligence claims. Indeed the plaintiffs have pled the identical duties in the Original 2009 Complaints. Judge Warshawsky has resoundingly dismissed said claims dealing with the defendants "duty to plaintiff as well as all persons whom Defendants' petroleum products might foreseeably harm." He opined that "by plaintiffs' own allegations, [Buckeye and Colonial'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." Such a tangential relationship between the alleged duty and the claimed harm does not give rise to a cause of action in negligence. As Judge Warshawsky stated "these defendants' operations are too remote from the plaintiffs' wells for liability to lie" in negligence.

As Judge Warshawsky stated in dispelling the theory of recovery, "[s]ince 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." In the absence of duty, there is no breach. Without any breach, there is no liability (*Ocera v. Zito*, 212 AD2d 681 [2nd Dept. 1995]).

In opposition to defendants' instant motion to dismiss, the plaintiffs do not advance any arguments, other than those previously presented to this Court before Judge Warshawsky. It is plain from a reading of the prior decision and order Judge Warshawsky rejected any negligence claims against Buckeye and/or Colonial. Not having appealed that ruling, and failing to advance new

allegations to substantiate any claim for negligence, plaintiffs are barred by the principles of res judicata from pursuing such claims in these 2011 complaint (*Flynn v Sinclair Oil Corp.*, 14 NY2d 853 [1964]).

Finally, as to their second claim for "Market Share Liability, Alternative Liability, Concert of Action, Enterprise Liability" (Count 2) said claim is also dismissed.

Plaintiff's attempt to cast liability upon the defendants under a market share liability theory is unavailing given that in New York, the Courts have failed to apply it outside of DES cases (*Hymowitz v. Eli Lilly & Co.*,73 NY2d 487 *cert. den.* 493 US 944 [1989]; *but see, Matter of New York State Silicone Breast Implant Litigation*, 166 Misc.2d 85 [Sup. Ct. New York 1995]; *Brenner v. American Cyanamid Co.*, 263 AD2d 165 [4th Dept. 1999]; *Hamilton v. Beretta*, 96 NY2d 222 [2001]). In any event, as the Court of Appeals explained in *Hamilton v. Beretta* (involving handgun manufacturers), where the pool of possible plaintiffs is very large, liability should not be imposed without a more tangible showing that "the defendants were a direct link in the causal chain that resulted in the plaintiffs' injuries, and that the defendants were realistically in a position to prevent the wrongs." The *Hamilton* Court found that the defendants did not owe a duty to the plaintiffs; thus, it was arguably unnecessary for it to address the market share issue. Similarly, in this case, the plaintiffs have failed to establish that the defendants owed the plaintiffs a duty, *supra.* Accordingly, the market share liability theory is hereby dismissed.

In order for plaintiffs to recover under a theory of alternative liability, they "must demonstrate that all possible tortfeasors are before the court; that all have breached a duty toward the plaintiff; that the conduct of one of the defendants has caused his injuries; and that the defendants, as a group, have better access to information concerning the incident than does the plaintiff" (*Canavan v.*

Galuski, 2 AD3d 1039 [3rd Dept. 2003] *citing New York Tel. Co. v. AAER Sprayed Insulations*, 250 AD2d 49, 52 [1st Dept. 1998]). The First Department explained in *New York Tel. Co. v. AAER Sprayed Insulations*, "[u]nder alternative liability, a nexus between each defendant's conduct and the plaintiff's injury is fundamental." That is, the plaintiff must demonstrate the defendant owes the plaintiff a duty. Indeed, without a duty owed nor a breach of such duty, plaintiffs cannot recover under this theory (*Canavan v. Galuski*, supra). Again, as a result of the plaintiffs' failure to establish a duty owed by the defendants, plaintiffs' alternative theory of liability is also dismissed.

Equally insufficient is plaitniffs' attempt to cast liability upon the defendants under a concert of action/enterprise liability theory. Under a concerted action liability theory, if two or more persons enter into an agreement, expressed or tacit, to commit a tortious act, then each such person is jointly and severally liable for the full extent of injuries the tortious act caused the plaintiff (*Hymowitz v. Eli Lilly & Co.*, supra; *Rastelli v. Goodyear Tire & Rubber Co.*, 79 NY2d 289 [1992]). Because the concerted action doctrine, a form of joint liability, requires an actual agreement to commit a tortious act, the doctrine is not applicable merely when manufacturers or others happen to engage in parallel activity (*Rastelli v. Goodyear Tire & Rubber Co.*, supra at 375–376; *Hymowitz v. Eli Lilly & Co.*, supra at 946–47; *Brenner v. American Cyanamid Co.*, supra)). Instead, a cause of action for concerted action requires the existence of an independent tort to provide a basis for liability (*Brenner v. American Cyanamid Co.*, supra). "It is essential that each defendant charged with acting in concert have acted tortiously and that one of the defendants committed an act in pursuance of the agreement which constitutes a tort" (*Rastelli v. Goodyear Tire & Rubber Co.*, supra at 295).

On the other hand, under an enterprise liability theory, the plaintiff must show that all members of the industry, *acting independently*, adhered to a tortious uniform standard or custom

(*Hall v. E. I. Du Pont De Nemours & Co.*, 345 F Supp. 353, 374 [EDNY1972]).

Here, having failed to allege an independent tort committed to further a common plan, plaintiff is precluded from seeking recovery under a concert of action/enterprise liability claim (*Brenner v. American Cyanamid Co.*, supra).

Accordingly, defendants' motion to dismiss the plaintiff's second "Count" for "Market Share Liability, Alternative Liability, Concert of Action, Enterprise Liability" is herewith granted.

Therefore, defendants' motion seeking to dismiss plaintiffs' consolidated 2011 complaint, in its entirety, is granted, and plaintiffs' consolidated complaint is hereby dismissed.

The parties' remaining contentions have been considered and do not warrant discussion. Further, any request for relief not specifically addressed herein is denied..

This shall constitute the Decision and Order of this Court.

Dated: September 4, 2012

Anthony L. Parga, J.S.C.

ENTERED

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