

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,
Plaintiff,

v.

BENJAMIN FARBER, DISCH
CONSTRUCTION COMPANY, AND
ESSEX CHEMICAL COMPANY,
Defendants

BENJAMIN FARBER,

Defendant and Third
Party Plaintiff,

v.

PUREX CORPORATION, et. al.,
Third-Party Defendants

Honorable Alfred M. Wolin

Civil Action No.
86-3736 (AMW)

CONSENT DECREE

WHEREAS, the United States of America (the "United States"), on behalf of the Administrator of the U.S. Environmental Protection Agency ("EPA"), has filed a complaint herein against Defendants Benjamin Farber ("Farber"), Disch Construction Company ("Disch"), and Essex Chemical Corporation ("Essex"), pursuant to Sections 107(a) and 113(g) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. §§ 9607(a) and 9613(g), seeking recovery of costs incurred and to be incurred by the United States in

responding to the release or threat of release of hazardous substances at or in connection with a site located at 77-81 Jacobus Avenue, South Kearny, New Jersey ("the Site" or "Syncon Site"), and a declaratory judgment that Farber, Disch, and Essex are each jointly and severally liable for further response costs;

WHEREAS, defendants Farber, Essex, and Disch have filed third-party complaints and/or cross-claims for contribution, pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), against a number of parties, including Purex Corporation ("Settling Defendant");

WHEREAS, the United States has incurred, and continues to incur, Response Costs in responding to the release or threat of release of hazardous substances at or in connection with the Site;

WHEREAS, in response to the release or threat of a release of hazardous substances at and from the Syncon Site, EPA funded a Removal Action, which commenced on February 7, 1984, to abate an imminent and substantial threat caused by the abandoned drums found on the Site;

WHEREAS, the EPA funded a Remedial Investigation/Feasibility Study, completed in August, 1986, to study and analyze the conditions at the Site and to consider alternative remedial actions to be taken at the Site;

WHEREAS, on September 29, 1986, EPA signed a Record of Decision which embodied the selection of a remedy for the conditions at the Site;

WHEREAS, EPA completed the Remedial Design of the selected remedy in January 1989, and EPA is currently performing the Remedial Action at the Site;

WHEREAS, the Regional Administrator of the EPA, Region II ("Regional Administrator") has determined that prompt settlement of the potential liability of Settling Defendant for past and future response costs incurred and to be incurred by the United States is practicable and in the public interest;

WHEREAS, the Settling Defendant is the subject of a continuing process of corporate dissolution and that it is the manifest present intent of Settling Defendant to cease to exist;

WHEREAS, the United States has assessed factors including strength of evidence, litigative risks, public interest consideration, and precedential value in deciding to settle this matter, and has determined that this Consent Decree is appropriate pursuant to Section 122(f)(6)(B) of CERCLA, 42 U.S.C. § 9622(f)(6)(B);

WHEREAS, the United States and Settling Defendant recognize, and the Court by entering this Consent Decree finds, that settlement and resolution of the claims against and potential liability of the Settling Defendant do not constitute any

admission or adjudication of any issue of fact or law, and will avoid expensive and protracted litigation, and that entry of this Consent Decree, therefore, is fair, reasonable and in the public interest;

NOW, THEREFORE, it is ORDERED, ADJUDGED, and DECREED as follows:

I. JURISDICTION AND VENUE

A. This court has both personal and subject matter jurisdiction over this matter and the parties pursuant to Sections 107 and 113(b) of CERCLA, 42 U.S.C. §§ 9607 and 9613(b), and 28 U.S.C. §§ 1331 and 1345. The complaint states claims upon which relief may be granted. The Parties agree to be bound by the terms of this Consent Decree and not to contest its validity in any subsequent proceeding arising from it.

B. Venue is proper in this Court pursuant to 42 U.S.C. 9613(b) and under 28 U.S.C. §§ 1391(b) and (c).

II. PARTIES BOUND

A. This Consent Decree shall apply to and be binding upon the United States and upon the Settling Defendant and its directors, officers, employees, agents, successors, and assigns. The undersigned representative for the Settling Defendant certifies that he or she is fully authorized to enter into this Consent Decree and to execute and to bind legally such party to this document.

B. The Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that party with respect to all matters arising under or relating to this Consent Decree.

III. DEFINITIONS

A. Unless otherwise expressly provided herein, the terms of this Consent Decree shall have the meaning assigned to those terms by CERCLA and its implementing regulations and the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 et seq.

B. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 et seq.

C. "Certification of Completion" shall mean the document or other instrument, and the date thereof, in which the United States certifies that remedial action has been completed at the Site, in accordance with Section 122(f)(3) of CERCLA, 42 U.S.C. § 9622(f)(3).

D. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

E. "Future Liability" shall mean a responsible party's obligation to perform any response activities at the Site in addition to those activities required as part of Present

Liability, or reimburse costs incurred by the United States in performing any additional response activities, that are necessary to protect human health and the environment.

F. "Hazardous substances" shall mean any substance meeting the definition of: (1) "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); and (2) "pollutant" or "contaminant" under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33).

G. "Parties" shall mean the United States and the Settling Defendant.

H. "Present Liability" shall mean a responsible party's obligation to pay those response costs already incurred by the United States at the Site and to complete those remedial activities necessary to meet any performance standards set forth in the Record of Decision or Scope of Work or other measures established through the remedial design process.

I. "Regional Administrator" shall mean the Regional Administrator of EPA, Region II.

J. "Response Costs" shall mean all costs, including but not limited to, direct and indirect costs, together with accrued interest, that the United States has incurred, is incurring and/or will incur in response to the release or threatened release of hazardous substances at or connected with the Site.

K. "Section" shall mean a portion of this Consent Decree identified by a roman numeral and including one or more paragraphs.

L. "Settling Defendant" shall mean Purex Corporation, a California corporation, and its successor, Purex Industries, Inc., a Delaware corporation.

M. "Syncon" or "Site" shall mean the site located at 77-81 Jacobus Avenue. South Kearny, New Jersey. The Syncon Site is comprised of three (3) lots, numbers 12, 13, and 13R of Block 289 of the Tax Map of the Town of Kearny.

N. "United States" shall mean the United States of America and its agencies, departments and instrumentalities.

O. "Waste Materials" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any "pollutant or contaminant" under Section 101(33), 42 U.S.C. § 9601(33); or (3) any hazardous waste as defined under Section 1004(5) of RCRA, 42 U.S.C. § 9604(5).

IV. COMMITMENTS OF SETTLING DEFENDANT

A. Settling Defendant agrees to pay to the United States the sum of \$715,000 to settle the claims against it for Response Costs under Section 107(a) and 113(g) of CERCLA, 42 U.S.C. §§ 9607(a) and 9613(g), relating to the Syncon Site.

B. Payment of the amount specified in paragraphs IV.A. above, shall be made to the Hazardous Substance Superfund within thirty (30) days of entry of this Consent Decree by this Court.

C. Payment of the amount specified in paragraph IV.A., shall be by Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice ("DOJ") lockbox bank, referencing the CERCLA Number NJD064263817, and the U.S.A.O. file number DOJ # 90-11-3-116. Payment shall be made in accordance with instructions provided by the United States to the Settling Defendant upon execution of the Consent Decree. Any EFTs received at the DOJ lockbox bank after 11:00 A.M. (Eastern Time) will be credited on the next business day.

D. Within one week of the EFT, the Settling Defendant shall send a letter, which references the date of the EFT, the amount, the name of the Site, the civil action number of this case, the DOJ case number (#90-11-3-116), and the name and address of the Settling Defendant, to the following:

Chief, New Jersey Superfund Branch
Re: Syncon Resin Site
Office Of Regional Counsel
U.S. Environmental Protection Agency, Region II
290 Broadway
New York, New York 10278

Chief, Environmental Enforcement Section
Re: DOJ #90-11-3-116
Environmental and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611, Benjamin Franklin Station
Washington, D.C. 20044

E. In the event that payment required by paragraph IV.A. is not made within thirty (30) days of the effective date of this Consent Decree, the Settling Defendant shall pay interest on the unpaid balance at the same rate as is specified for interest on the investments of the Hazardous Substance Superfund, and such interest shall be compounded each federal fiscal year. The interest on such unpaid balance shall begin to accrue on the 30th day after the effective date of this Consent Decree.

F. If the United States must bring an action to collect any payment required under this Consent Decree, the Settling Defendant shall reimburse the United States for all costs of such action, including, but not limited to, attorneys' fees.

G. Payments made under paragraphs IV.E. and F. shall be in addition to any other remedies or sanctions available to the United States by virtue of Settling Defendant's failure to make timely payment, as required by this Consent Decree.

V. STIPULATED PENALTIES

A. On any amount due under paragraph IV.A., but not paid by the required date, the Settling Defendant shall pay as a stipulated penalty, in addition to the interest and costs required by paragraphs IV.E. and F., \$1000.00 per day for each day that such payment is tendered untimely. The payment of stipulated penalties is due upon demand.

B. All amounts owed to the United States under paragraph V.A. shall be due and payable within thirty (30) days of Settling Defendant's receipt from EPA of a demand for payment of the penalties. All payments made under paragraph V.A. shall be by cashier's or certified checks made payable to the EPA Hazardous Substance Superfund," which shall be transmitted to:

EPA - Region II
Attention: Superfund Accounting
Re: NJDO64263817
P.O. Box 360188M
Pittsburgh, Pennsylvania 15251

The checks and the transmittal letters shall reference the name of the Site, the civil action number of this case, the DOJ case number (#90-11-3-116), and the name and address of the Settling Defendant. Copies of the checks and transmittal letters shall also be submitted to EPA and DOJ, as follows:

Chief, New Jersey Superfund Branch
Re: Syncon Resins Site
Office of Regional Counsel
U.S. Environmental Protection Agency
Region II
26 Federal Plaza
New York, New York 10278

Chief, Environmental Enforcement Section
Re: DOJ #90-11-3-116
Environmental and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611, Benjamin Franklin Station
Washington, D.C. 20044

C. In the event Settling Defendant fails to pay stipulated penalties pursuant to paragraph V.A., above, EPA may institute proceedings in this action or a new action in the United States

District Court to recover such stipulated penalties and any other appropriate relief. The stipulated penalties set forth in paragraph V.A. do not preclude EPA from electing to pursue any other remedies or sanctions which may be available to EPA by reason of a refusal or failure to comply with the terms or conditions of this Consent Decree.

D. Any payment made pursuant to paragraph V.A. is not deductible for tax purposes.

VI. CIVIL PENALTIES

In addition to any other remedies or sanctions available to the United States, if the Settling Defendant fails or refuses to comply with any terms or conditions of this Consent Decree, the Settling Defendant shall be subject to a civil penalty of up to \$25,000.00 per day of such failure or refusal pursuant to Section 122(1) of CERCLA, 42 U.S.C. § 9622(1).

VII. ACCESS TO INFORMATION

A. The Settling Defendant shall provide to EPA, upon request, copies of all documents and information within its possession or control or that of its contractors or agents relating to activities at the Site, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, sample traffic routing, correspondence, or other documents or information related to the Site.

B. Until ten (10) years after the entry of this Consent Decree, the Settling Defendant shall preserve and retain all records and documents now in its possession or control, or which come into its possession or control, which relate in any manner to response actions taken at the Site or liability of any person for response actions conducted or to be conducted at the Site, regardless of any corporate retention policy to the contrary, provided, however, that at any time prior to the elapsing of ten (10) years after the entry of this Consent Decree, the Settling Defendant may, without penalty, provide EPA with such records and documents.

C. If, at the conclusion of the ten (10) year document retention period, the Settling Defendant has not provided EPA with such records or documents, the Settling Defendant shall notify the United States at least ninety (90) days prior to the destruction of any such records or documents, and, upon request by the United States, shall deliver any such records or documents to EPA.

D. The Settling Defendant may assert business confidentiality claims concerning part or all of the documents or information submitted to EPA under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA

will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified the Settling Defendant that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), the public may be given access to such documents or information without further notice to the Settling Defendant.

E. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site, and any other information relating to potentially responsible parties at the Site.

F. The Settling Defendant may assert that certain documents, records, and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendant asserts such a privilege, it shall provide EPA with the following information:

- (1) the title of the document, record, or information;
- (2) the date of the document, record, or information;
- (3) the name and title of the author of the document, record, or information;
- (4) the name and title of each addressee and recipient;
- (5) a

description of the subject of the document, record, or information; and (6) the privilege asserted. However, no document, reports, or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on the grounds that they are privileged.

VIII. CERTIFICATION AND STIPULATION

A. The Settling Defendant certifies, for purposes of this Consent Decree and to the best of its knowledge, that it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents, or other information relating to its potential liability regarding the Site since notification of potential liability by the United States or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Section 104(e) of CERCLA, 42 U.S.C. § 9604(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

IX. COVENANT NOT TO SUE

A. Subject to the reservation of rights in Section X, and upon the United States' receipt from the Settling Defendant of the amount specified in Section IV, paragraph A, the United States covenants not to sue or to take any civil or administrative action against the Settling Defendant, for "Response Costs," as that term is defined under this Consent Decree.

B. Except with respect to Future Liability, this covenant not to sue under this Section, shall take effect upon the receipt by EPA of the payment required by Section IV, paragraph A, above. With respect to Future Liability, this covenant not to sue shall take effect upon Certification of Completion of the remedial action at the Site.

C. This covenant not to sue only extends to Settling Defendant and does not release any other person from liability. Nothing in this Consent Decree shall preclude EPA from enforcing the provisions of this Consent Decree in any administrative or judicial proceeding.

D. The Settling Defendant hereby covenants not to sue and agrees not to assert any causes of action, claims, or demands against the United States, its agencies, officers, representatives, contractors or employees with respect to the Site or this Consent Decree, or arising out of or relating to response activities at the Site, including, but not limited to, any direct or indirect claim for reimbursement from the Hazardous Substance Superfund under Sections 106(b)(2), 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9611, 9612, or 9613, or any other provision of law; any claim against the United States, including any department, agency, or instrumentality of the United States under Section 107 or 113 of CERCLA, 42 U.S.C. §§

9607 or 9613, related to the Site; or any claims arising out of response activities at the Site.

E. Nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. §§ 9611, or 40 C.F.R. § 300.700(d).

F. This Consent Decree constitutes an extraordinary circumstances settlement entered into pursuant to Section 122(f)(6)(B) of CERCLA, 42 U.S.C. § 9622(f)(6)(B).

X. RESERVATION OF RIGHTS

A. The United States reserves all claims, demands, and causes of action, past or future, judicial or administrative, in law or equity, including but not limited to, cost recovery and injunctive relief and natural resource damages, against any person or entity, not a signatory to this Consent Decree. Nothing contained herein shall in any way limit or restrict the response and enforcement authority of the United States to initiate appropriate action, either judicial or administrative, under Sections 104, 106, and 107 of CERCLA, 42 U.S.C. §§ 9604, 9606, 9607, or any other provision of law, against any person or entity not a party to this Consent Decree. Any claim or defense which the United States or the Settling Defendant may have against any other person or entity not a party to this Consent

Decree, including but not limited to claims for indemnity or contribution, is expressly reserved.

B. Nothing in this Consent Decree is intended to be nor shall it be construed as a release or a covenant not to sue for any claim or cause of action, administrative or judicial, at law or in equity, which the United States, including EPA, may have against Settling Defendant for:

- (1) claims based upon the failure of the Settling Defendant to meet the requirements of this Consent Decree;
- (2) liability for damages for injury to, destruction of, or loss of natural resources, including the reasonable cost of assessing such injury, destruction or loss;
- (3) claims based on criminal liability;
- (4) liability arising from future disposal activities by the Settling Defendant at the Site; or
- (5) any claim or cause of action not expressly included in the covenant not to sue set forth in Section IX, paragraph A, of this Consent Decree.

C. If the Settling Defendant has made material misrepresentations in the certification made pursuant to Section VIII, (i) nothing in this Consent Decree constitutes a covenant not to sue or to take action or otherwise limits the ability of

the United States to seek or obtain further relief from the Settling Defendant, and (ii) the covenant not to sue in Section IX, paragraph A, of this Consent Decree is null and void.

D. Nothing in this Consent Decree shall be deemed to limit the authority of the United States under Section 104 or 106 of CERCLA, 42 U.S.C. §§ 9604 or 9606, or as otherwise provided by law, to take any response actions in connection with the Site.

E. The United States and the Settling Defendant agree that the actions undertaken by the Settling Defendant in accordance with this Consent Decree do not constitute an admission of any liability by the Settling Defendant. This Consent Decree shall not be used as evidence in any judicial or administrative proceeding except one to enforce this Consent Decree.

XI. CONTRIBUTION PROTECTION

A. With regards to claims for contribution against the Settling Defendant for matters addressed in this Consent Decree, the Parties hereto agree that, upon receipt by the United States of the payment required by Section IV, the Settling Defendant is entitled to such protection from contribution actions or claims as is provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2).

B. The Settling Defendant agrees that with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree it will notify the United States in

writing no later than sixty (60) days prior to the initiation of such suit or claim. The Settling Defendant also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree it will notify in writing the United States within ten (10) days of service of the complaint on it. In addition, the Settling Defendant shall notify the United States within ten (10) days of service or receipt of any Motion for Summary Judgment and within ten (10) days of receipt of any order from a court setting a case for trial for matters related to this Consent Decree.

C. In any subsequent administrative or judicial proceeding initiated by the United States for appropriate relief related to the Site, the Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defense based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this paragraph affects the enforceability of the covenant not to sue set forth in Section IX, paragraph A.

XII. PUBLIC COMMENT

A. This Consent Decree shall be subject to a thirty-day public comment period. The United States may withdraw or

withhold its consent to a judgment based on this Consent Decree if comments received disclose facts or considerations that indicate that this Consent Decree is inappropriate, improper or inadequate. The Settling Defendant agrees to the entry of this Consent Decree without further notice.

B. The Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States has notified the Settling Defendant in writing that it no longer supports entry of this Consent Decree.

XIII. MODIFICATION

No modification shall be made to this Consent Decree without written agreement of both parties and written notification to and written approval of the Court. The notification required by this Section shall set forth the nature of and reasons for the requested modification. No oral modification of this Consent Decree shall be effective. Nothing in this paragraph shall be deemed to alter the Court's power to supervise or modify this Consent Decree.

XIV. RETENTION OF JURISDICTION

The District Court shall retain jurisdiction of this matter for the purpose of enforcing the terms of this Consent Decree.

XV. EFFECTIVE DATE

This Consent Decree shall become effective upon entry by the Court.

So Ordered This _____ Day Of _____ 1995.

UNITED STATES DISTRICT JUDGE
DISTRICT OF NEW JERSEY

FOR PLAINTIFF - UNITED STATESLJ SchifferDATE: 8/7/95

Lois J. Schiffer
Assistant Attorney General
Environment and Natural Resources
Division
United States Department of Justice
10th & Pennsylvania Avenue
Washington, DC 20530

Peter M. FlynnDATE: 10/12/95

Peter M. Flynn
Trial Attorney
Environment and Natural Resources
Division
United States Department of Justice
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044-7611

Faith S. Hochberg
United States Attorney
District of New Jersey

BY:

Susan C. CassellDATE: 10/13/95

Susan C. Cassell
Assistant United States Attorney
Deputy Chief, Civil Division
970 Broad Street, Room 502
Newark, New Jersey 07102

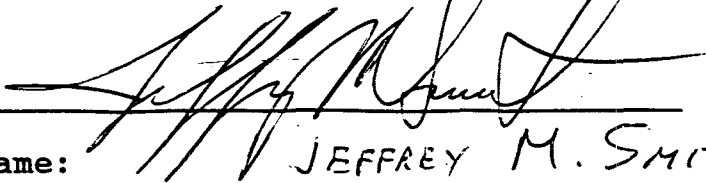
William J. Magyn
Jeanne M. Fox
Regional Administrator
U.S. Environmental Protection Agency
Region II
290 Broadway
New York, New York 10278

DATE: 9/29/95

Deborah L. Mellott
Deborah L. Mellott
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Region II
290 Broadway
New York, New York 10278

DATE: 9/28/95

FOR SETTLING DEFENDANT,
PUREX INDUSTRIES, INC., SUCCESSOR TO PUREX CORPORATION


Name: JEFFREY M. SMITH

DATE: 3/3/95

Title: ATTORNEY

Address: 801 SOUTH FIGUEROA STREET, 18TH FLOOR
LOS ANGELES, CA 90017-5556

Agent authorized to accept service on behalf of the
above-signed party:

Weil, Gotshal & Manges
1615 L Street, N.W.
Washington, D.C. 20036

Attention: Mitchell J. Rotbert