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July 9, 2021

Joseph J. Lisa, Esquire
REGIONAL JUDICIAL AND PRESIDING OFFICER
U.S. ENVIRONMENTAL PROTECTION AGENCY
1650 Arch Street
Philadelphia, Pennsylvania 19103

Re: Docket No. CERCLA 03-2019-0111LL
Turog Properties, Ltd., Post-Meeting Brief

Dear Regional Judicial Officer Lisa:

Enclosed is the Post-Meeting Brief submitted by and for Turog Properties, Ltd.

Very truly yours,

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ATTORNEY FOR TUROG PROPERTIES, LTD.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III

IN RE:	
Turog Properties, Ltd.	Docket No. CERCLA 03-2019-0111LL

BRIEF SUBMITTED BY TUROG PROPERTIES, LTD.,
AFTER THE HEARING/MEETING

Turog Properties, Ltd., hereby submits, to the Agency neutral official in the aforementioned lien matter, the instant Brief, submitted following the Hearing and/or Meeting held by said officer.

PROCEDURAL POSTURE. This matter came before the Regional Judicial and Presiding Officer for a Hearing (Meeting), the purpose of which is so that the Regional Judicial and Presiding Officer can recommend to Regional Counsel whether or not to perfect a lien upon the property. The instant Brief is submitted following the said meeting, which was held pursuant to the *Supplemental Guidance on Federal Superfund Liens* (1993), *as amended*.

No lien should be perfected.

INCORPORATION BY REFERENCE. In August of 2020, the undersigned filed, in the instant case, a "… *Brief Submitted Pre-Hearing* …." That Brief contained much of the legal argument regarding why, in the instant case, no lien should be perfected.

That Brief, from August of 2020, is hereby incorporated by reference.

FACTS. As the preceding sentence states, the instant Brief incorporates by reference the "FACTS" division of the brief submitted, in the instant case, in August of 2020.

Since then, the agency has held the Meeting, called for in the procedures set forth in the said *Supplemental Guidance*, based upon Turog's objections to lien perfection. Presiding at that Meeting was the Regional Judicial Officer, Joseph J. Lisa, Esquire, presiding as the Agency neutral official.

In that capacity, the Agency neutral official has heard testimony from Agency employees, from Mr. Becker, and from others. The facts thus introduced are part of the record facts in this matter.

The facts—as stated here (and as introduced at the hearing/meeting) in 2021, and as stated in "FACTS" section incorporated from the 2020 Brief)—are largely undisputed.

What IS disputed is whether acts or omissions by Turog or Mr. Becker did anything, whatsoever, which Turog wasn't already entitled, by law, to do. For example (and this is a very significant "example," because it goes to the crux of the Agency's disagreement with the property owner), Mr. Becker, acting for Turog, sometimes questioned the proposals which the contractors or the agency proposed. **Such a**s placing an installation right in the middle of the first-floor retail space (upon further consideration, at Turog's request, the agency put the installation in a corner closet!). And **such as** removing a large, fully mature tree (only to decide, later, to abandon the project for which the fully mature tree had been removed in the first place!) And **such as** communicating (communicating well?, or perhaps communicating not-so-well?—it doesn't matter) with Mr. Becker, about whether reports needed to be in paper form or in electronic format (Mr. Becker testified that when he did one, they asked for the other—and he complied).

ARGUMENT. Likewise, the instant Brief incorporates by reference the "ARGUMENT" division of the brief submitted, in the instant case, in August of 2020. (Some of the 2020 argument is repeated below, as well—as it matches the testimony from the hearing/meeting.) (References, herein, to the Notes of Testimony, are referred to simply as "Pages __ - __.")

The undersigned is very serious about the above-stated incorporation by reference. The undersigned has chosen to incorporate by reference, instead of doing a rather large cut-&-paste; the legal issues raised and addressed in the pre-Meeting brief, apply equally, post-Meeting.

The procedurally relevant disagreements are conclusions: whether the owner cooperated, whether the owner did due diligence before purchasing the property, and whether the owner exercised due care.

It is undisputed that the owner was a non-polluter.

I.e., it is undisputed that any materials that migrated from this property, had been placed there back when a former owner named "Chem-Fab" owned the site, from 1967 until it went out of business. Chem-Fab's ownership dated back to 1967. And it went out of business before (or during) the environmental cleanup.

The cleanup was completed, years before the Upset Sale.

Before the 21st-century additional cleanup, the current owner had converted the place into retail shoppes, with paying tenants. The current owner had entered into Brownfields agreements with PADEP.

When it came to subsequent EPA cleanup, the owner: disagreed, in several ways, with the EPA's plans; expressed his opinions and made his own suggestions; and insisted (for example, with regard to the need to drill in the center of the concrete floor, and with regard to similar items) that the EPA should explore, and should use, a better alternative, when available. (Which, indeed,

the EPA ended up agreeing was a better idea anyway.)

The gravamen and focus of the Agency's argument is that Turog—merely by exercising its right to express its opinions and to put forth its own ideas—committed a "failure to exercise due care …" and a "failure to cooperate …," as those terms are used in § 107(b)(3) and in § 101(35)(A).

While the undersigned does not wish to present this matter as a First Amendment question, the facts do reveal that—by seeking to perfect a lien against a non-polluter in the instant case—the Agency is undertaking a punitive use of its statutory lien-perfection rights.

There were some communication mishaps, all of which were solved (simply as a result of better communications).

But everything else the Agency is trying to punish the non-polluter for consists of his expressing his own opinion.

Making suggestions.

Disagreeing.

And ***DECLINING TO CONSENT***, at a time and in a circumstance in which the Agency, at all times relevant, had the power and authority to exercise its own statutory right to issue an Access Order.

Declining to consent, is ***NOT*** the same thing as obstructing; Turog complied with the Access Order.

No harm.

No obstruction.

Just a citizen, with an opinion/

An opinion, I might add, that is based on 50 years' experience in buying-&-selling

neglected properties, many of which were from Sheriff's Sales and Upset Sales, and many of which indeed had some environmental concerns. Or, had some concerns that required construction remediation. Or, had some concerns that required exploring options, using outside-the-box thinking.

Mr. Becker's suggestions were good suggestions. Some were used; some were not. But in any event, what he's accused of is:

> (***a***) declining to "consent" to whatever the EPA suggested, instead making suggestions that preserved the ongoing landlord/tenant relationship with the retail stores that were paying the rent, which pays the property's expenses; and:
> (***b***) exercising his and the partnership's rights to make such suggestions. In addition, there was some mis-communication about reports, and things like that.

But there was never any obstruction.

And there was never any interference.

And, at all times, EPA and PADEP were admitted to the site, any time they wanted to go there.

ON THE EPA'S PRE-PURCHASE CLEAN-UP OF THE SITE

Turog Properties Ltd. believes that EPA has no reasonable basis for perfecting a lien on Turog's property.

There are several reasons for this—including but not limited to § 9607(b)(3).

First of all, Turog Properties Ltd. is an innocent property owner. Section § 9607(b)(3).

The contamination discovered on Turog's property was wholly caused, many decades ago, by Chem-Fab Corp., a third-party whose acts and omissions did *not* occur in connection with a contractual relationship with Turog Properties Limited, since there *was* *no* such contractual relationship between Chem-Fab and Turog Properties Ltd. (nor did the acts and omissions of Chem-Fab have anything to do with the later [MUCH later] tax sale purchase by 300 N. Broad

Street Ltd.)

At the meeting/hearing, Turog demonstrated that: (***1***) the actual or threatened release and damages were caused solely by a third party, Chem-Fab Corp.; (***2***) Chem-Fab Corp., the third party, did not cause the release in connection with a contractual, employment, or agency relationship with Turog Properties Limited, nor with 300 N. Broad Street, Ltd.; and (***3***) Turog Properties Ltd. exercised due care with respect to the hazardous substances, and took precautions against foreseeable results from the former acts or omissions of the responsible third party.

The Court in *American National Bank & Trust Co. v. Harcros Chemicals, Inc.*, 997 F. Supp. 994 (N.D. Ill 1998), studied CERCLA Section 107(b)(3), and held that:

> … the broader interpretation of § 107(b)(3) requiring a connection between the contractual relationship and the act or omission that resulted in the contamination is the most reasonable one based on the plain language of the statute. "To hold that any contractual relationship precludes asserting the defense would render the words 'in connection with' mere surplusage."

997 F. Supp. at 1001 (*quoting* *Reichhold Chemicals*, 888 F. Supp. 1116, 1130 (N.D. Fla. 1995), which, in turn was *citing* *A & N Cleaners and Launderers, Inc.*, 788 F. Supp. 1317, 1335 (S.D.N.Y. 1992)). This holding rejected the interpretation which the agency had been pressing for (the agency wanted to rely upon the real-estate-purchase contract, but the Court held that this was not a proper interpretation of § 107(b)). An owner, Weyerhaeuser, had had a contractual relationship with the third party (the former owner) which had caused the release—but only by means of a real estate contract executed as part of the property's acquisition by Weyerhaeuser. Indeed, there was no evidence that this contract had been in any way connected to the contamination; therefore, the Court held that the existence of a contractual relationship in the form of a real estate purchase agreement of sale, did nothing to prevent Weyerhaeuser from being an innocent landowner/ innocent property owner.

The facts in the instant case are the same as in *American National Bank & Trust Co. v. Harcros Chemicals, Inc.* In fact, in the instant case, there was LESS of a contractual relationship: the property was bought at a public-auction tax sale, and there was no sales contract, and no contractual relationship. Mr. Becker purchased from the Tax Claim Bureau, a statutory trustee, and there was no sales contract with Chem-Fab Corp., which lost title to the site involuntarily, and statutorily.

The holding in *American National Bank & Trust Co. v. Harcros Chemicals, Inc.* supports Turog's § 107(b) defense. Mr. Becker, getting ready for the tax sale, relied upon the statements of a representative of the EPA—a person with specific knowledge of the site and of the removal actions by the EPA. Mr. English had been the on-site coordinator (OSC) during the EPA's responses at the Chem-Fab site. Mr. English told Mr. Becker that the EPA had removed the hazardous materials from the Chem-Fab site, and, thus, that, as the tax sale was approaching, Mr. Becker would not be purchasing a contaminated site. Pages 2-3, Docket Number 30. When the EPA tells a prospective buyer that there are no hazardous materials remaining at a site, one is entitled to rely upon that representation.

ON THE EPA'S ACTIONS AT THE SITE

While getting ready for a particular phase of the remediation, the EPA had initially informed Turog (and Turog's tenants) that the entire surface of the site, to the extent that it was not covered by buildings, would be excavated, to a depth of 10 feet, and that the contaminated, excavated soil would be replaced with clean earth. Mr. Becker attempted to negotiate with EPA regarding the needs of the tenants: if there were to be such a huge and disruptive excavation, the tenants would need to be able to access their entrances; they (and their customers) would need to park remotely; and the design of the scaffolding would need to accommodate the tenants' need to

provide access to their retail entrances OVER the projected 10-foot-deep chasm. Mr. Becker's efforts to address these needs were primarily unsuccessful: EPA authorized its contractors to erect steel fencing which cordoned off the tenants' and customers' parking, and they installed a large office trailer for the excavation contractors. The employees of the contractors swarmed onto the property, and tenant and customer parking was pre-empted. The EPA then informed Mr. Becker that the three fully mature trees on the site would be preemptively removed, because their root-balls were sequestering contaminating dirt. Without addressing Mr. Becker's questions, which asked about the actual need for such drastic sudden measures, and without having tested for the alleged contamination of the root-balls, the EPA had all three of the fully mature trees removed. The removal of the largest tree—an oak some 3 feet in diameter, with a huge canopy—was particularly destructive of the beauty of the retail complex, which had been very attractive in the Borough of Doylestown, and which had been an obvious factor in being able to attract and retain commercial tenants (who, in turn, had to attract customers to their businesses).

Thereafter, the EPA, without explanation, had the large office trailer suddenly removed. All of the chain-link security fencing was suddenly removed. And the contractors disappeared. Much later, the EPA informed Mr. Becker that the 10-foot-deep excavation of the total surface area of the entire property, which was scheduled to follow the tree removal (and which had been the ONLY reason FOR removing the trees in the first place!), would not, in fact, take place.

It had been canceled.

No contamination of the earth, warranting such measures, had actually been found.

So, the gigantic take-over of the site, the large office trailer, the security fencing which had blocked the parking lot, the preparation of the tenants for a long-term disruption of their businesses, and the total removal of 3 fully mature trees, was all for naught. Pages 66-74.

Then, when the EPA later announced that their contractors were going to drill holes in the middle of the floors of the tenants' retail stores, and that the EPA's contractors were going to install large vertical vacuum pipes through to the roof in the tenants' retail stores, at locations solely selected by the contractor, the tenants swarmed Mr. Becker, threatening to vacate if the announced plans were carried out. Therefore, it was very understandable, and very reasonable, for Mr. Becker to question these plans, and to object to the EPA about such unfettered discretion being given to a contractor—discretion to make decisions which would have severely impacted the businesses of the tenants, and which would have severely impacted the usefulness and value of the building itself.

Leaving the drilling and piping locations to be solely selected by an EPA contractor, based upon the contractor's OWN ease of installation, would have had severe repercussions. Turog feared that such an unfettered choice, left to the contractor, might be beneficial *to the contractor*, by allowing the contractor to choose the locations that were easiest (and which, being less costly, would have been more profitable) for the contractor, benefitting only the contractor, but ruining the tenants' spaces. Turog was also apprehensive that such drilling in the middle of the floors could result in severing natural gas, electrical, or other utility piping buried in the concrete floor. Drilling into a natural gas line, or an electrical line, could have been catastrophic.

Consequently, Turog declined to allow the contractor to start that work—not until EPA had taken command of the problems mentioned above (*i.e.*, taking control into the EPA, instead of outsourcing critical and potentially dangerous decisions to a profit-motivated private contractor). Pages 52-58.

The EPA eventually acquiesced, and agreed that the drilling and piping locations were to be in the corners of the tenants' spaces, or in the existing closets in those spaces. A sensible

resolution was thus agreed upon. However, in the instant case, the EPA designates these access issues as Number 2 & 3 on their list of 6 items. Page 129. Even though these items were amicably resolved—and had been resolved ONLY because Mr. Becker had questioned the plans in the first place. Turog was entitled to raise such questions.

As to the delay in providing an acceptable work plan to operate the vapor mitigation system, Turog proposed some draft work plans, which the EPA initially found unacceptable partly for the stated reason that Turog's draft work plan had failed to include the telephone number for the electrical contractor designated by Turog to repair the electrical wiring for the radon fan system, in the event that the electrical wiring might happen to fail in the future. So, Mr. Becker listed that phone number on the next iteration of the draft work plan, the format of which the EPA ended up preferring—and, thereafter, Turog accepted EPA's version of the work plan, after exchanging various iterations. Mr. Becker had never before seen such a work plan, while the EPA routinely employed such work plans; one wonders why the EPA did not propose their preferred form at the inception. Pages 114-115. Yet, the EPA has designated these very same work-plan issues as Number 4 & 5 on their list of 6 items. Page 129.

ON THE RADON FANS, & ON THE QUARTERLY REPORTS

Turog has provided quarterly reports of the radon fans' vacuum weekly readings, from their initial run date, to the present day. This process began in an unusual way. The EPA's contractor—without the knowledge or permission of Turog nor of A-Gas, Turog's tenant—had chosen to connect the entire radon fan/vapor extraction system to the electrical panel of A-Gas, which the contractor apparently deemed the most expedient [from the contractor's OWN point of view, taking into account the contractor's OWN convenience (and profit)!]. Unfortunately, the CEO of A-Gas died, and A-Gas vacated its space, and (of course) stopped paying for its electricity.

The result was that all of the radon fans—which had (wrongly!) been wired, by an EPA contractor, into a ***TENANT***'S electrical panel—immediately stopped running! Mr. Becker received an emergency call from the EPA's OSC, requesting Mr. Becker to have the electricity turned back on in Turog's name.

- Mr. Becker immediately agreed. And:
- Mr. Becker immediately got PECO to implement their switch-over. And:
- Mr. Becker immediately began to read the meters again. And:
- Mr. Becker immediately began to pay the monthly bills.

Pages 75-77.

Mr. Becker, unaware of the specifics of the EPA's protocol regarding reporting, had included the information statements in the weekly reports (instead of in the quarterly report, which was the method EPA preferred, but Mr. Becker didn't know that). Thus, each ***weekly*** report submitted by Turog *contained* that information which the EPA [as Mr. Becker *later* learned] wanted to have on a summary ***quarterly*** report. The correct, required information ***had*** been reported, but too often.

No harm.

And definitely no obstruction.

Even though Turog had been routinely paying the monthly electrical bills—after having been asked to initially pay them (at the emergency request of the EPA), thus enabling the radon fans to function again after A-Gas had shut off ITS electricity—Turog had failed to routinely state, in the reports, that the bills had, in fact, been paid. (The bills HAD BEEN paid, but the reports, apparently, should have SAID so.) When the EPA eventually informed Mr. Becker that his reports had failed to include this statement, Mr. Becker immediately obtained the past billing statements from PECO, and immediately provided these "paid" electrical bills to the EPA. The undersigned mentions this detail mentioned, because it is illustrative of EPA's demands, demanding Turog to

follow EPA's *exact* protocols, even when there had been no reasonable way for Turog to know that such reporting was required, and even when the EPA did not explain to Turog that Turog was not doing what the EPA expected.

Mr. Becker, seeing the immediate necessity of having the fans re-supplied with electricity, had gotten PECO to switch the system over, and had gotten PECO to bill the owner, Turog. Because the fans were obviously running, thus consuming electricity (as electrical motors require), and because the vacuum readings in the weekly reports proved that the fans were running (and that, therefore, electricity WAS being paid for), of course the separate question ("is electricity being paid for?") was already answered in the weekly reports. But EPA wanted that separate question, separately answered.

THIS is one of the flaws that Turog is allegedly guilty of.

That Turog was to continuously repeat the statement that the electrical bills had been paid, had not been understood by Mr. Becker. When informed that this statement was repetitively required as per their protocol, Becker immediately amended the reporting, to routinely include that statement. Pages 84-87. Yet, the EPA has designated these progress report issues as Number 6 & 7 on their list of 6 items. Page 129.

Mr. Becker discovered that water had infiltrated two fans, due to their faulty installation by the EPA contractors' installation [they were too low, and they sucked up ground water after a rain event] and the resultant odd meter reactions. The meter needles began to wildly oscillate. These observations were immediately notified to the EPA's OSC, Mr. Rovira. Pages 77-79.

ON THE RECORDING OF REQUESTED DOCUMENTS

The EPA's interest in the real estate is already fully recorded.

Mr. Becker recorded a Land Record Notice on December 9, 2019. (At the request of the EPA.) Mr. Becker had proposed a draft of the same, and Mr. Goldman had amended the same. After proposing the Land Record Notice's text to the Recorder of Deeds, and notifying Mr. Goldman of certain required changes (required to conform to the requirements of Bucks County), a final draft was approved by Mr. Goldman. This, was then recorded. Pages 112-113. The EPA designated this as the work plan issue as Number 10 on their list of 6 categories of events. Page 129.

ON OTHER MATTERS (reporting; etc.)

Becker had immediately notified the EPA of a deficient fan reading, immediately, when he first observed it. Then, immediately, Turog had that fan replaced, and paid for the fan replacement. (Even though the reason for the fan's failure had been due to the defective installation of that fan by the EPA's own contractor.) That fan had sucked up water, causing corrosion of the electrical components. Pages 79-80.

Even though these were not the property owner's fault, the EPA has designated these as pressure problems with the fans then-numbered as Number 8 & 9 on their list of 6 categories of events. Page 129.

Mr. Becker was not told by the EPA of any formatting-reporting deviations until 2020, even though Mr. Becker had been submitting the required reports since as early as 2018, and no one from the EPA had ever informed Mr. Becker, until 2020, that his format was not what was wanted. Pages 77, 79-84, 91-98, 105-106, 108-110.

Mr. Becker was informed by the EPA, in 2019, that it had not received certain weekly

reports. Becker, in response, sent copies of the weekly reports, and thereafter he sent his future reports by email, ***and*** by USPS mail, utilizing the USPS Certificate of Mailing (USPS Form 3817, postmarked by a post office clerk at a post office customer service counter) to prove that they had been correctly mailed. Pages 122-124.

Even though these reports were done, as requested - - and even though any problem was fixed, immediately, as soon as it was made known - - the EPA has designated these ***non-issues*** as progress report ***issues***, and has included them on the agency's list of problems, as Number 6 & 7 on their list of 6 categories of events. Page 129.

Mr. Becker - - years after the site had been purchased at the tax sale - - learned of hidden septic tanks at the site, and learned of their prior use for disposal of presumably hazardous materials by Chem-Fab Corp., decades ago. Mr. Becker immediately notified the EPA, as soon as he learned of their possible existence and significance. Pages 60-61.

Mr. Becker, having discovered maps made by the PADEP, prior to 2007, which identified the locations of the contaminants beneath the concrete slab, immediately notified the EPA of their existence. Mr. Becker immediately offered EPA immediate access to excavate and to remove the said septic tanks. The EPA declined. Mr. Becker, on behalf of Turog, offered to have the same accomplished at Turog's expense under the supervision of the EPA. Again, the EPA declined. Mr. Goldman, on behalf of the EPA, explained that the policy of the EPA was to leave such materials in place, as long as they were "capped" (a result which the concrete floor itself, accomplished). Pages 64-66.

The instant case's property is in the Borough of Doylestown, in ***Bucks County***. One of the things the EPA is complaining about is the fact that Mr. Becker didn't supply the EPA with financial information regarding a totally unrelated property in ***Northampton County***—information

about the monthly collected rents from more than a decade ago. Mr. Becker had made a diligent search, and had found that those records had long ago been discarded. All of the financial data from that transaction, which was only tangentially relevant to the site (because Turog was in title), ***was*** provided to the EPA. Pages 115-116.

Turog Properties, Ltd., cooperated with the EPA regarding their proposed work at the site, and raised objections ONLY when the proposed work appeared to be patently unreasonable, because the proposed work would unnecessarily impact the tenants of the buildings at the site. (And, in each such situation, the EPA ultimately agreed with the objection itself.)

TUROG PURCHASED WITHOUT KNOWLEDGE (in fact,
Turog had affirmatively done diligence)

On November 10, 1998, Heywood Becker, as agent for a limited partnership in formation, 300 N. Broad Street, Ltd., submitted the highest bid for the subject property at the 1998 Bucks County Upset Tax Sale, and, pursuant to the state statute, a deed was later recorded by the Tax Claim Bureau naming 300 N. Broad Street, Ltd. as the grantee. The previous owner had been Chem-Fab Corp., and the Bucks County Tax Claim Bureau, following state's statutory procedures, sold the subject real property at an auction sale. Neither Heywood Becker, nor 300 N. Broad Street, Ltd., for whom he was bidding, had a contractual relationship with Chem-Fab Corp. No contract, no agreement. The resulting deed from the tax claim bureau was not a contract, nor an agreement. It was a statutory conveyance.

The United States District Court, in *Continental Title Company v. The Peoples Gas Light and Coke Company*, 1999 WL 1250666, decided that a tax deed "does not create a contractual relationship within the meaning of CERCLA between the prior owner and the tax purchaser." (The quote is from the R&R [report and recommendation] of a United States Magistrate for the United States District Court; the United States District Court adopted the Magistrate's R&R as its

own decision; *see* 1999 WL 753933.) The District Court stated that this legal issue appeared to be a question of first impression, and therefore made a careful analysis (on pp. 5-6 of the cited case) of **the legal effect of a tax deed under CERCLA'a "contractual" relationship test.** The tax deed had been issued under Illinois law, which is identical, in pertinent part, to tax deeds in Pennsylvania. Turog relies on the holding and legal analysis in *Continental Title*, *supra.* The tax sale purchase by Becker, as agent, did not effectuate a contractual relationship with Chem-Fab Corp., the prior owner, and polluter of the Site.

300 N. Broad Street, Ltd. was formed by Heywood Becker, with a trust as the General Partner, which had Heywood Becker as Trustee, to take title to the real estate by deed dated by the Tax Claim Bureau on May 27, 1999, and recorded by the Tax Claim Bureau on June 3, 1999. The General Partner was the said trust; the Limited Partner of 300 N. Broad Street, Ltd., was the wife of Heywood Becker, Karin Becker. The funding for the acquisition, and for all subsequent renovations to the subject property, was provided by Heywood Becker and Karin Becker.

On September, 2, 2005, after the renovations had been completed, the owner of the property (the aforementioned 300 N. Broad Street, Ltd.) granted a mortgage to Heywood Becker and Karin Becker, as security for the money Mr. and Mrs. Becker had expended on the subject property. On October 4, 2005, Heywood Becker and Karin Becker assigned their mortgage to Turog Properties Limited, a limited partnership formed years earlier by Heywood Becker, in which Karin Becker was the Limited Partner, to hold title to a property in Northampton County. The General Partner of Turog Properties Limited was a corporation, of which Heywood Becker was President, when Turog Properties Limited was formed. Thereafter, in lieu of foreclosure, 300 N. Broad Street, Ltd., gave a deed in lieu of foreclosure to Turog Properties Limited, on October 21, 2005. Thus, title to the subject real property thereby shifted from one entity to a related family-

owned limited partnership, both having being formed by Heywood Becker, who had been the Trustee of the initial General Partner, and later, the President of the corporate General Partner. The limited partner of both partnerships remained the same person, Karin Becker. The transfer of title was made by Heywood Becker, who had seen that having a trust as general partner was ill-advised, and who had opined and recommended that having a corporation was a more suitable legal entity as a General Partner.

The net effect was that Karin Becker remained the sole Limited Partner, and that Heywood Becker, who has been the continuous Site Manager of the subject property since the acquisition at tax sale, simply had a different title.

300 N. Broad Street, Ltd. (whose agent at the Bucks County Upset Tax Sale in 1998 was Mr. Becker, and at which sale his successful bid had resulted in a tax deed being issued to 300 N. Broad Street, Ltd.) and Turog Properties, Ltd. are alter ego entities, having the same close, family ownership, and the same management.

Neither 300 North Broad Street, Ltd., nor Turog Properties, Ltd., had a contractual relationship with Chem-Fab Corp., the prior owner of the subject site, nor with any of their employees, principals, or agents, whose actions caused the present release or threat of release of a hazardous substance at the subject site. And both 300 North Broad Street, Ltd., and Turog Properties, Ltd. exercised due care with respect to the subject hazardous substance or substances, taking into consideration their characteristics, in light of all relevant facts and circumstances, and took such precautions against foreseeable acts or omissions of Chem-Fab Corp., and the consequences that could foreseeably result therefrom.

Turog Properties, Ltd., is an alter ego entity, having the same family ownership and the same management as 300 N. Broad Street, Ltd. The two entities should be considered as one and

the same for the purposes of answering the legal question of whether there was a contractual relationship with Chem-Fab, Inc., the owner of the Site prior to the tax sale. If 300 N. Broad Street, Ltd. is deemed a separate entity, then the subsequent owner, Turog Properties Ltd., although admittedly in a contractual relationship with 300 N. Broad Street, Ltd., is in no way jeopardized, because 300 N. Broad Street, Ltd.—the purchaser at the tax sale—did not contaminate the site, nor release hazardous materials at the site.

Described below are some of the reasons why the EPA should not perfect a lien, partly because there is no reasonable basis for doing so and partly because doing so would be superfluous, inequitable, and damaging to Turog.

1. More than a decade prior to the tax sale, the EPA entered, investigated, and remediated the Site.
2. Prior to the tax sale, Mr. Becker had read in published, publicly available materials that the EPA had removed all of the hazardous materials from the Site.
3. Prior to the tax sale, Mr. Becker called Mr. George English, the EPA's then-OSC of the Site, and specifically and explicitly asked Mr. English whether hazardous materials remained at the Site. Mr. English answered by telling Mr. Becker that the EPA had removed all of the known hazardous materials from the Site. Pages 136-137.
4. No mention was made in any published EPA report that there was any discovered leak of chromic acid from the single UST found at the Site, which had already been carefully emptied by EPA and/or its contractors, and the chromic acid had been removed, by the EPA and/or its contractors, from the Site.
5. No mention was made in any published EPA report, nor by Mr. English, of any chromate contamination of the deep aquifer underlying the Site, nor of any VOC sub-slab contamination under the Main Building on the subject Site.
6. The EPA had not discovered such hazardous materials when they had been in possession of the Site twice. They had been in possession, specifically for the purposes of hazardous waste removal. Since, at the time of the tax sale, the EPA ***itself*** did not have any knowledge of the (later-discovered) chromate contamination of the deep aquifer, nor any knowledge of the (later-discovered) VOC sub-slab contamination under the Main Building on the subject Site, no prospective purchaser could have known of these things, either - - *i.e.*, of the chromate contamination of the deep aquifer, nor of the VOC sub-slab contamination under the Main Building on the subject Site - - prior to the county upset tax sale in 1998.

7. Prior to the county tax sale in 1998, the Site was completely fenced on all four sides by a high, chain-link, steel fence, woven with plastic strip-inserts, making it opaque, so that no physical examination could have been lawfully conducted by any prospective purchaser prior to the county upset tax sale in 1998.
8. No potential auction bidder had a right to enter the Site, prior to the county tax sale, due to the state trespass law.
9. After purchase of the Site, Turog Properties Ltd., entered into a settlement and release agreement with the PADEP, for PADEP testing and for PADEP future remediation of the Site. PADEP represented to Turog Properties Ltd. that it (PADEP) was in partnership with the EPA for the remediation work to be done at the subject Site.

ON THE DUE CARE EXEMPLIFIED BY TUROG

Turog exercised the Section 107(b) "due care" requirement with respect to the hazardous materials discovered by the EPA at the Site under the concrete slab of the Main Building. As the ***only*** contamination at the Site that can be remediated is under the Main Building on the Site, Mr. Becker believed that—rather than leaving the small amounts of the chemicals causing the VOC's to accumulate under the concrete slab in place, and vacuuming their fumes up into the atmosphere—instead, removal of the contaminated earth by excavation of the slab would have been the preferred solution. On behalf of Turog, Mr. Becker offered to remove the contaminated earth, by excavation, at the expense of Turog, under the supervision of the EPA, but Mr. Goldman informed Mr. Becker that the national policy of the EPA was not to remove such materials, but to "cap" them in place, and Mr. Goldman informed Mr. Becker that the concrete slab was not to be disturbed, nor excavated, because the concrete slab functioned as such a "cap." This effort by Turog is an example of Turog's "precautions to prevent the threat of release or other foreseeable consequences arising from the pollution of the Site." *See, e.g.,* *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*, 14 F.3d at 325 (7th Cir. 1994).

Under the standards set forth in *City of Gary v. Shafer*, 683 F. Supp. 2d 836 (N.D. Ind. 2010), Turog exercised due care and took appropriate precautions, taking positive steps to reduce

the threat posed by the hazardous substances by coöperating - - first, with PADEP, and later, with the EPA - - by running and maintaining the radon fan extraction system installed to remove VOC's from beneath the slab, by reporting to the EPA on the performance of the radon fan extraction system, by drafting and recording the notice required by EPA in the Bucks County Recorder of Deeds, by informing its tenants of their obligations to the EPA regarding their conduct at the Site, and by communicating, to its tenants, the results of the work of the EPA. Turog was specifically informed about, but was not permitted by the EPA to attempt to remove, hazardous substances from the Site on its own. The EPA cautioned Turog not to attempt any self-help with regard to any hazardous substance found to be present.

Turog relies on the legal analysis by the Court in *State of New York v. Lashins Arcade Co.*, 91 F.3d 353 (2d Cir. 1996) regarding the due care test. In *Lashins*, the Court found that Lashins had satisfied the due care standard by regularly taking water samples, by sending the samples to a laboratory for analysis, by issuing instructions to tenants at the property related to the contaminants present, and by conducting periodic inspections to ensure that the tenants were complying with its instructions. *Id*. at 361. In the instant case, Turog did what the *Lashins* defendant did. Reading and reporting the vacuum readings is the same work as taking and reporting water samples. The EPA will argue that Turog failed to follow its Order, and thus failed to exercise due care; however, any failure by Turog was due, at most, to a misunderstanding of the complicated dictates of the 36-page EPA Order, and to Turog's not being plainly apprised of what was actually wanted. Immediately, whenever the EPA informed Turog of any specific shortcomings, Turog immediately corrected its communications and its other involvement. Turog never refused to perform any of the tasks assigned to it by the EPA.

The 2018 case from the 9th Circuit, *California Department of Toxic Substances Control* v. *Westside Delivery, LLC*, 888 F.3d 1085 (9th Cir. 2018), is distinguishable. The *Westside* case was a California tax sale case, and was based on the statutory law of California. Here, in the 3rd Circuit, Pennsylvania's statutory tax sale law, which uses the county tax claim bureau as a trustee to convey the real estate, is so different as to make the *Westside* case inapplicable. The rationale of that Court was also as far from text-based as possible, as a matter of statutory interpretation: that Court found that *any* real estate transaction was contractual, even in the complete absence of a contract. The applicable law at issue plainly states there must be a contractual relationship, and a plain reading of the words of the law should be employed. And the rationale of *Continental Title Company v. The Peoples Gas Light and Coke Company*, *supra*, should be used, holding that, within the meaning of CERCLA, a tax deed does not create a contractual relationship between the prior owner and the tax purchaser.

Turog has been always prohibited by the EPA from doing any remediation work at the Site. The EPA has had the exclusive role and authority regarding any work which might involve a release of hazardous materials at the Site. Turog may not even make any penetrations in the concrete floors inside the Main Building (only surface work is permitted by the EPA). In a vacant office space in the Main Building, over the past several months, Turog Properties Ltd. detailed the perimeter edges of the slab, and then sealed those perimeters, hoping that such work would enhance the radon fans' performance. The vapor mitigation system contractor for the EPA, William Broadhead, recently reported, by email to the EPA, on the results achieved:

> "Heywood asked me to do a quick check on what he had done at the Broad St. vapor intrusion mitigation (VIM) site. The sealing he did is very thorough and resulted in substantial improvement in sub-slab vacuum."
>
> —June 24, 2021, email from the EPA contractor to the EPA's OSC, reporting the results of Turog's

> spontaneous and voluntary performance of interior floor *surface* work, performed to protect the occupants, who are the tenants of Turog.

Turog saw from the outset how the EPA intended to control and operate at the Site, and learned that the EPA could be very wrong in its decision-making. Removal of all of the fully mature trees from the Site, for what turned out to be a mistake, and retracting their plan for the total excavation of the Site, without explanation, was the basis for Turog's subsequent caution and reluctance to automatically follow the dictates of the EPA, when those dictates seemed wrong. In particular, for example, Turog initially opposed the EPA's plan for EPA's contractor to have ***complete*** discretion to drill and install piping in the offices of the main building, and Turog did decline to grant such ***unfettered*** access to a profit-motivated private contractor, whose decisions in his ***complete*** discretion would necessarily) be motivated by his ***own*** convenience. The EPA eventually relented, and had its contractor take into consideration the needs of the tenants, so that their retail stores would not be ruined. The contractor then installed the radon fan evacuation system ***at sensible locations***—but without informing Turog of the details of their electrical installation. When the electrical panel selected by that contractor turned out to be that of a *TENANT* (which subsequently vacated its space) suddenly went dead, the EPA's OSC requested that Turog remedy the problem. Turog did so immediately, and from then on, Turog immediately paid the electrical bills, and immediately monitored the fan meter readings, and immediately notified the OSC when problematic readings were observed.

The EPA took control of the Site in 2007, but did not have the radon fans installed until approximately 2018. So, 11 years went by, and the multiple tenants occupied their spaces, with the interior air being as it had been. After the fans were installed, after more than a decade of NO radon-fan remediation, the EPA argues that, *THEN*, it was Turog who caused its tenants to be

exposed to hazardous air. Not true. The facts are plainly otherwise. Turog operated the system from its inception, to protect its tenants, and it had been the EPA's contractor's error in choosing an electrical panel - - an error which was immediately cured by Turog at the emergency request of the EPA, and the fan system has been operated continuously by Turog thereafter. Any deficits in the performance by Turog, identified by the EPA, are inconsequential. The vacuum fans have been continuously monitored, observed, and replaced, when necessary, by Turog.

CONCLUSION

Many CERCLA lien situations involve placing a lien of several hundreds of thousands of dollars, onto a multi-million-dollar property.

However, in the instant case, that is flip-flopped.

I.e., the property is worth LESS than a million dollars, especially since any prospective buyer (now) knows that—even when the cleanup is certified as having been "completed"—it can raise its ugly head again, and again in the future.

And the lien for which perfection is being considered is for MORE THAN $10,000,000.

That, of course, completely crushes all value.

And, most of all, the landowner DID lots and lots of "due diligence" before bidding at the tax sale, and the landowner DID NOT cause any release of any hazardous substance due to any lapse of "due care," and the owner DID NOT interfere, nor obstruct, nor deny access to EPA. Both EPA and PADEP had access, any time they wanted it.

In the final analysis, it should not be overlooked that, given the due diligence, and the due care, and the cooperation that DID occur, the EPA is most bothered by the fact that their own plans were questioned.

Mr. Becker simply made suggestions, for less intrusive ways of doing things. And some

of his suggestions made it into the work project.

I'm not sure that this matter is technically a First Amendment matter, but it is clear, from the facts, that this owner is entitled to be seen (**with regard to** due care) as a non-polluter, and (**with regard to** due diligence) as a good-faith purchaser, and (**with regard to** cooperation) as an owner who may have asked questions, but who neither obstructed nor interfered.

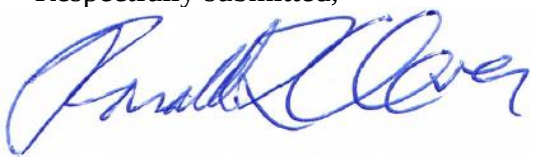
The Agency's plan to perfect a $10,000,000 lien on a property worth less than $1,000,000 should not be executed.

This is so, for the reasons stated in the arguments set forth above.

And this is so, also, because it almost seems retaliatory, retaliating against an owner who—instead of unquestioningly accepting the plans being imposed—made suggestions instead.

The Agency neutral official should please recommend that no lien should be perfected.

Respectfully submitted,



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