UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

September 26, 2019

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Brad Pollack, Esquire
753 South Main Street
Woodstock, VA 22664

Re: Magnate, LLC Site, Edinburg, Shenandoah County, Virginia: Lien Proceeding CERC 03-2019-0120LL

Dear Mr. Pollack:

Enclosed find *EPA's Rebuttal to Arguments Presented by Magnate, LLC in its July 4 and July 28, 2019 Objection to EPA's Perfection of a CERCLA § 107(l) Lien* filed today in connection with this matter.

Respectfully,

ANDREW S. GOLDMAN
Sr. Assistant Regional Counsel

Enclosure

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 3

In the Matter of:	:	
	:	
MAGNATE, LLC	:	**Docket No. CERCLA 03-2019-0120LL**
	:	
Magnate, LLC Site,	:	
Edinburg, Shenandoah	:	
County, Virginia	:	
	:	

EPA's Rebuttal to Arguments Presented by Magnate, LLC in its July 4 and July 28, 2019 Objection to EPA's Perfection of a CERCLA § 107(l) Lien

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EPA's Rebuttal to Arguments Presented by Magnate, LLC in its July 4 & July 28, 2019 Objection to EPA's Perfection of a CERCLA § 107(l) Lien

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This Rebuttal (1) sets forth the bases upon which the U.S. Environmental Protection Agency ("EPA" or "Agency") meets the statutory elements for perfecting a lien on property to secure the recovery of environmental investigation and cleanup costs incurred under the Superfund law, and (2) responds to arguments presented by the owner of such property to whom EPA provided notice and an opportunity to be heard prior to perfecting a statutory lien. For the reasons set forth herein, EPA contends that the legal predicates for the existence of the lien have been met, that EPA has a reasonable basis to perfect the lien, and that perfecting the lien is appropriate.[1]

I. Introduction

A. The CERCLA Statute

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. §§ 9601-9657, provides EPA with authority to respond to waste sites and recover the costs of its actions. Subject to certain exceptions not relevant here, Section 104(a) of CERCLA,

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[1] This Rebuttal has been prepared in anticipation of a conference with the property owner and the EPA Region 3 Regional Judicial Presiding Officer ("RJO"). The RJO will make recommendations to the EPA Region 3 Regional Counsel, who will decide whether perfection of the lien is appropriate. All contentions and arguments in this Rebuttal are those of the undersigned staff attorney and not the Regional Counsel.

42 U.S.C. § 9604(a), authorizes EPA to take action, consistent with the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 C.F.R. Part 300, to respond to the release or substantial threat of release of any hazardous substance into the environment.[2] Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), establishes four categories of persons from whom the United States may recover its costs of response. Defenses to liability are limited to those enumerated in Section 107(b) of CERCLA, 42 U.S.C. § 9607(b). One liability category is "the owner and operator of a vessel or a facility." 42 U.S.C. § 9607(a)(1).

Under CERCLA, a lien is established on property that is subject to or affected by a response action. Section 107(l)(1) of CERCLA, 42 U.S.C. § 9607(l), states that:

> "All costs and damages for which a person is liable to the United States under subsection (a) of this section (other than the owner or operator of a vessel under paragraph (1) of subsection (a)) shall constitute a lien in favor of the United States upon all real property and rights to such property which—
>
> (A) belong to such person; and
>
> (B) are subject to or affected by a removal or remedial action."

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[2] Authorities provided to the President under CERCLA by Congress that are relevant to this proceeding have been delegated to EPA. The terms "respond," "release," "hazardous substance," and "environment" are defined in Section 101 of CERCLA, 42 U.S.C. § 9601, and will be discussed in further detail as appropriate later in this Rebuttal.

This proceeding concerns perfection of a lien under this provision.

B. EPA Policy

EPA's lien policy provides that:

> "The Agency should provide notice to property owners who are potentially responsible parties ('PRPs') under CERCLA that the Agency intends to perfect a lien on their property prior to filing papers to perfect. The Agency will give such property owners the opportunity to be heard through their submission of documentation or through appearing before a neutral EPA official, or both."

Supplemental Guidance on Federal Superfund Liens (OSWER Directive No. 9832.12-1a (July 29, 1993) ("Lien Guidance"). *Exhibit 1 to this Rebuttal.*[3] This Rebuttal responds to the property owner's submission in advance of a meeting, requested by such owner, before a neutral EPA official.

C. Background Facts

EPA has expended $381,252.66 through May 23, 2019, pursuant to CERCLA in connection with the Magnate, LLC Site ("Site") in Edinburg, Shenandoah County, Virginia ("Site"). *Lien Filing Record Document ("LFR") 009*. The Site consists of six parcels comprising approximately thirty acres and is believed to be the former location of the Aileen, Inc. textile plant which closed in 1995 after the company filed for bankruptcy in 1994. *LFR 006, 007*. Magnate,

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[3] Unless otherwise stated, source references in this Rebuttal are to either exhibits to this Rebuttal or to the EPA Lien Filing Record compiled in this matter and provided to the property owner via letter dated September 12, 2019. Exhibits to this Rebuttal will hereinafter be identified as "*Rebuttal Exhibit* ___."

LLC ("Magnate") acquired the land in two transactions in 2007 and 2009 and subsequently subdivided to create the six parcels. *LFR 001-003.* The six parcels are identified in the Shenandoah County, Virginia land records as follows:

Magnate Site	
Map Number	Subject to This Lien Proceeding?
071 01 001	No
071 01 001B	Yes
071 01 001D	No
071 01 001E	No
071 01 001F	No
071 01 001G	Yes

Magnate engaged in scrapping activities at some point after acquisition. *LFR 006.*

In 2011, the Virginia Department of Labor and Industry ("VA DOL") conducted an inspection at the Site and found a large amount of suspected asbestos. Magnate subsequently retained a contractor to dispose of identified asbestos. At the completion of the project in September 2011, 40,000 cubic feet of asbestos-containing debris was removed for off-Site disposal. A significant amount of asbestos remained at the Site following this effort. *LFR 006, Rebuttal Exhibit 08.*

EPA collected samples from the Site in May and November 2016. For organizational purposes, the Site was divided up into various areas and debris piles. The May 2016 investigation revealed polychlorinated biphenyls ("PCBs") in sediments found in the basement in one of the buildings (Area 10); PCBs in

surface water in the basement (Area 10); friable asbestos in one surface water sample in the basement (Area 10); and friable asbestos in Pile 3 and in Area 5 of the Site. The November 2016 sampling event confirmed the quantity, location, and concentration of contaminants, particularly with respect to Area 10 (the basement had been flooded during the May 2016 visit). *LFR 006.*

EPA selected a Removal Response Action in a document dated May 31, 2018 ("Action Memorandum"). The selected Removal Response Action consisted of the removal and off-site disposal of friable asbestos and certain PCB-contaminated sediments found at the Site and sealing off and marking the basement where residual PCBs will remain. *Id.*

Between April-June 2018, EPA and Magnate engaged in unsuccessful discussions for access to permit EPA to implement the selected Removal Response Action. *LFR 017, at ¶¶ 36-43, 46-49.* On October 11, 2018, the United States Department of Justice filed, on behalf of EPA and in the United States District Court for the Western District of Virginia, a complaint against Magnate seeking court-ordered access to the Site. *LFR 017.* On February 12, 2019, Magnate and the United States settled the action. The settlement, which provided access to Magnate's six parcels, was approved by the Court in a Stipulation and Order. *LFR 018.*

Between February and May 2019, EPA implemented the selected Removal Response Action at the Site. *LFR 008* (POLREPs ##6-13). Wastes were

consolidated into appropriate containers for offsite disposal. During the action EPA removed, for offsite disposal, six drums containing spent carbon, one drum containing PCBs, and 379.94 cubic yards of debris containing friable asbestos. *Rebuttal Exhibit 2.*

EPA will continue to expend funds in connection with the Site to, among other things, perfect the subject lien to secure its costs and to recover its costs from responsible parties.

D. CERCLA § 107(l) Lien Activities

By letter dated July 1, 2019, EPA notified Magnate of EPA's intent to perfect the lien on two of the six parcels included within the Site property ("Lien Notice Letter"). *Rebuttal Exhibit 3.* The two parcels that were described in the Lien Notice Letter as subject to the lien were identified as Shenandoah County Parcel Nos. 07101001B and 07101001G ("Lien Parcels").[5] The Lien Notice Letter:

1. Identified EPA's reasonable basis to believe that the statutory predicates for the lien had been satisfied;

[5] The six parcels comprising the Site are identified in the Shenandoah County, Virginia land records as Parcel Nos. 07101001, 07101001B, 07101001D, 07101001E, 07101001F, and 07101001G. Although EPA conducted response activities on all six parcels (*e.g.*, assessment work to determine the presence of hazardous substances), EPA elected to perfect the lien solely on Parcel Nos. 07101001B and 07101001G--the two parcels containing the waste removed from the Site during the selected Removal Response Action.

2. Notified Magnate of the availability of the Lien Filing Record consisting of documents upon which the decision to perfect the lien is based; and

3. Provided Magnate an opportunity to

a. notify EPA if Magnate believes EPA's information is incorrect,

b. submit written information and documentation relevant to the decision to perfect the lien, and/or

c. request a meeting with a neutral EPA official to present information relevant to EPA's basis for perfecting the lien.

EPA's letter additionally provided that

> "If EPA receives a written submission or a request for a meeting within 30 calendar days of your receipt of this letter, EPA will review your submission or request for a meeting. If EPA agrees, based on your submission, that it does not have a reasonable basis to perfect a lien on the Property, EPA will not perfect its lien and will so notify you. If EPA disagrees, the written submission or request, together with the Lien Filing Record, will be referred to a neutral EPA official selected for the purpose of reviewing the submission or for conducting the meeting.
> . . .
>
> "After reviewing your written submission, or conducting a meeting if one is requested, the neutral EPA official will issue a recommended decision based upon the Lien Filing Record, any written submission, and any information provided at the meeting. The recommended decision will state whether EPA has a reasonable basis to perfect a lien and will be forwarded to an EPA official authorized to perfect liens. You will be furnished with a copy of the recommended decision and notified of the Agency's action."

Id., at 3-4.

By email on July 28, 2019, Magnate's counsel notified EPA that

> "Magnate believes the EPA's information in the Acting Regional Counsel's July 1, 2019, letter to me is in error. Information relevant to the issues raised in it is attached.
>
> "We request to meet with a neutral EPA official to present information that indicates that EPA does not have a reasonable basis to perfect a lien on the property based on the statutory requirements."

Rebuttal Exhibit 4. The attachment to counsel's email was a July 4, 2019 unsigned letter from Magnate principal Darryl Bates to the undersigned counsel ("Bates Letter"). In the Bates Letter, Magnate:

- announced that it "will be exercising the 'Third Party Defense' also found in CERCLA 107";
- indicated that the company took this position when EPA first visited the Site "by informing the [EPA On Scene Coordinator] that Magnate had an abatement of the Site that should have rendered the Site free of asbestos & PCBs";
- stated that the "agents that summoned the OSC to the property" had "signed off on the abatement and were responsible for debris remaining on site";
- stated that "an illegal ATF/Sheriff's Office 'tobacco sting' had been conducted on the Site and that any contamination found by EPA "would have had to be planted";
- stated that EPA's On Scene Coordinator limited his investigation to "analytical evidence" and "completely

> avoided any accountability" which Magnate characterized as an "injustice"; and
>
> - stated that Magnate is "clearly not the responsible party."

Rebuttal Exhibit 5. The Bates Letter continued that

> "Magnate will certainly agree to a meeting before a neutral EPA officer. However, Magnate will require the use of rules of evidence and judicial procedures. This will be done to insure [sic] 'Due Process', which has been avoided to date. Magnate will also reserve the right to interrogate the OSC to have him confirm his actions or the lack thereof. Magnate will also require video tape recording of meeting [sic] to insure [sic] complete transparency that may be necessary to further adjudication.
>
> "Magnate will reserve the right to have adjudication of the findings in the courtroom of the Honorable Michael J. Urbanski."[6]

Id.

The undersigned counsel has reviewed and considered Magnate's arguments and continues to believe that EPA has a reasonable basis to perfect the lien. Pursuant to EPA procedure, the undersigned counsel submitted an Order of Assignment to the EPA Region 3 Regional Counsel, who signed the Order of Assignment on September 11, 2019. The signed Order of Assignment designated the EPA Region 3 Regional Judicial Officer ("RJO") as the neutral official to review this matter. *Rebuttal Exhibit 6.*

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[6] Judge Urbanski of the U.S. District Court for the Western District of Virginia presided over litigation brought by the United States against Magnate for access to the Site. This litigation is discussed in Section III.B.3 of this Rebuttal.

II. Scope and Nature of This Proceeding

A. The Scope of This Proceeding is Limited to Determining Whether EPA Has a Reasonable Basis to Perfect a Lien on the Lien Parcels Pursuant to CERCLA § 107(l)

The Order of Assignment designated the RJO "to preside over this proceeding relating to the perfection of a lien on the property pursuant to Section 107(l) of [CERCLA] in accordance with procedures outlined in the [Lien Guidance]." *Rebuttal Exhibit 6.* The Lien Guidance states:

> "The neutral EPA official should consider all facts relating to whether EPA has a reasonable basis to believe that the statutory elements have been satisfied for the perfection of a lien. In particular, the neutral official should consider whether:
>
> - The property owner was sent notice of potential liability by certified mail.
> - The property is owned by a person who is potentially liable under CERCLA.
> - The property is subject to or affected by a removal or remedial action.
> - The United States has incurred costs with respect to a response action under CERCLA.
> - The record contains any other information which is sufficient to show that the lien notice should not be filed.
>
> "The property owner may present information or submit documents purporting to establish that EPA has erred in believing that it has a reasonable basis to perfect a lien based on the above factors, or has made a material error with respect to the above factors. In making his or her decision, the neutral EPA official should consider all facts in the Lien Filing Record established for

> the perfection of a lien and all presentations made at the meeting, which will be made part of the Lien Filing Record."

Rebuttal Exhibit 1, at 7-8. Accordingly, the scope of this proceeding should be limited to determining whether EPA has a reasonable basis to perfect the lien on the Lien Parcels.

B. The Proceeding Should be Conducted as an Informal Meeting, Not Bound by Rules of Evidence or Judicial Procedure, and With No Testimony by Witnesses

Notwithstanding Magnate's "requirement" that the meeting be conducted using the rules of evidence and judicial procedure, Magnate's reservation of the right to "interrogate" EPA's OSC, and Magnate's "requirement" that the meeting be videotaped, the guidance prescribes a very different environment. Specifically, the Lien Guidance states:

> "The neutral official should conduct the meeting as an informal exchange of information, not bound by judicial or administrative rules of evidence. Because of the informal nature of these proceedings, EPA will not apply the Administrative Procedure Act provisions for formal adjudication.
> . . .
>
> "The neutral official should conduct an orderly and fair meeting. Regional staff may present EPA's reason to believe that a lien may be perfected upon the property. The property owner or his or her counsel shall have a reasonable opportunity to address relevant issues and present his or her views. The neutral official may also allow discussions and interchanges between the parties, including responses to questions to the extent deemed appropriate. It is not the Agency's intent to provide EPA or the property owner an opportunity to engage in direct examination or cross-examination of witnesses. The neutral official may address questions to the property owner or

> his or her counsel or to EPA's representatives during the meeting.
> . . .
>
> "Because of the preliminary and informal nature of the proceedings under this guidance, and the fact that the neutral officer's recommended decision is limited to whether EPA has a reasonable basis to perfect the lien, the neutral official's recommended decision is not a binding determination of ultimate liability or non-liability. No preclusive effect attaches to any decisions made in the course of any proceeding pursuant to the guidance, nor shall any such decisions be given deference or otherwise constitute evidence in any subsequent proceeding."

Rebuttal Exhibit 1, at 8, 9. Accordingly, neither the rules of evidence nor judicial procedures should be used, no testimony should be permitted, and no videotaping should be allowed.

III. EPA Has a Reasonable Basis to Perfect the Lien

The undersigned counsel has reviewed and considered Magnate's arguments and contends that EPA continues to have a reasonable basis to believe that the statutory elements for the perfection of a lien on the Lien Parcels have been met.

A. The Lien Has Arisen By Operation of Law

The legal predicates for a lien are set forth in Section 107(l) of CERCLA, 42 U.S.C. § 9607(l), which provides:

> **"(l) Federal Lien**
>
> **(1) In general**
>
> All costs and damages for which a person is liable to the United States under subsection (a) of this section (other than the owner or operator of a vessel under paragraph (1) of subsection (a) of

> this section) shall constitute a lien in favor of the United States upon all real property and rights to such property which—
>
> (A) belong to such person; and
>
> (B) are subject to or affected by a removal or remedial action.
>
> **(2) Duration**
>
> The lien imposed by this subsection shall arise at the later of the following:
>
> (A) The time costs are first incurred by the United States with respect to a response action under this chapter.
>
> (B) The time that the person referred to in paragraph (1) is provided (by certified or registered mail) written notice of potential liability.
>
> Such lien shall continue until the liability for the costs (or a judgment against the person arising out of such liability) is satisfied or becomes unenforceable through operation of the statute of limitations provided in section 9613 of this title."

Accordingly, the legal predicates for the existence of a lien under this provision in this matter are: (1) Magnate is potentially liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a); (2) the land upon which EPA seeks to perfect the lien belongs to Magnate; (3) the land was subject to or affected by a removal or remedial action; (4) EPA incurred response costs; and (5) EPA provided Magnate with written notice of potential liability via certified or registered mail.

1. EPA Has a Reasonable Basis to Believe that Magnate is a Potentially Liable Party Under CERCLA § 107(a)

Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), sets forth four categories of persons who may be potentially liable for cleanup and/or response costs under the Superfund statute. That provision states in relevant part:

> "Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the owner and operator of a vessel or a facility,
> . . .
>
> shall be liable for—
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan."

The term "facility" is defined at Section 101(9) of CERCLA, 42 U.S.C. § 9601(9) to mean:

> "(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or
>
> "(B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel."

"Owner" is defined at Section 101(20)(A)(ii) of CERCLA, 42 U.S.C. § 9601(20)(A)(ii), in relevant part to mean "in the case of an onshore

facility or an offshore facility, any person owning or operating such facility."

"Hazardous substances" are defined at Section 101(14) of CERCLA,

42 U.S.C. § 9601(14), in relevant part to mean "any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title."

EPA records establish that the Site, including the Lien Parcels, is a "facility." Examples showing that the Site is a "site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located" include the following:

- Analysis of sediment samples taken by EPA from the Site during the May 2016 sampling event revealed PCBs in the form of Aroclor-1260 in Area 10. *LFR 006 and 40 C.F.R. Table 302.4.*[7]

- Analysis of surface water samples taken by EPA from the Site during the May 2016 sampling event revealed PCBs in the form of Aroclor-1260 in Area 10. *LFR 006 and 40 C.F.R. Table 302.4.*

- Analysis of samples taken by EPA from the Site during the May 2016 sampling event revealed asbestos in surface water in Area 10 and in Pile 3 and Area 5. *LFR 006 and 40 C.F.R. Table 302.4.*

- Analysis of samples taken by EPA from the Site during the November 2016 sampling event revealed friable asbestos in Pile 3, Area 5, and Area 10. *LFR 006 and 40 C.F.R. Table 302.4.*

- Analysis of sediment samples taken by EPA from the Site during the November 2016 sampling event revealed PCBs in Area 10. *LFR 006 and 40 C.F.R. Table 302.4.*

[7] 40 C.F.R. Table 302.4 identifies asbestos and PCBs as hazardous substances.

Magnate acquired parcels comprising the Site in 2007 and 2009. *LFR 001, 002.* Magnate currently owns the six parcels comprising the Site, including the Lien Parcels. *Rebuttal Exhibit 7.*

As the "owner" of the "facility," Magnate is potentially liable under Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1). Magnate does not dispute current ownership but rather asserts a defense under Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3), in an effort to defeat liability. EPA contends that this defense does not apply to protect Magnate from liability under the circumstances of this case. An analysis of this defense and its applicability in this matter is found in Section III.B of this Rebuttal.

2. EPA Has a Reasonable Basis to Believe that the Land Upon Which EPA Seeks to Perfect the Lien Belongs to Magnate

Magnate does not dispute that it owns the Site. Magnate currently owns the Site, including the Lien Parcels. *Rebuttal Exhibit 7.*

3. EPA Has a Reasonable Basis to Believe that the Land Upon Which EPA Seeks to Perfect the Lien Was, and Continues to Be, Subject to or Affected by a Removal or Remedial Action

EPA has conducted "removal action" at the Site, including at the Lien Parcels, within the meaning of Section 101(23) of CERCLA, 42 U.S.C. § 9601(23); continues to conduct "removal action" in connection with the Site through the present day; and is expected to conduct "removal action" in

connection with the Site in the future.

Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), which authorizes EPA to conduct response actions under CERCLA, provides in relevant part:

> "(1) Whenever
>
> (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or
>
> (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare,
>
> the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment."

Section 104(b) of CERCLA, 42 U.S.C § 9604(b), which authorizes EPA to, among other things, conduct studies and investigations, recover the costs of response, and otherwise enforce the provisions of CERCLA, provides in relevant part:

> "Whenever the President is authorized to act pursuant to subsection (a) of this section, or whenever the President has reason to believe that a release has occurred or is about to occur, or that illness, disease, or complaints thereof may be attributable to exposure to a hazardous substance, pollutant, or contaminant and that a release may have occurred or be occurring, he may undertake such investigations, monitoring, surveys, testing, and other information gathering as he may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of

> the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment. In addition, the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter."

Section 101(23) of CERCLA, 42 U.S.C. § 9601(23), defines "removal" to mean

> "the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604 (b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.C. 5121 et seq.]."

Thus "removal" includes, among other things, investigation work, selection of cleanup work, legal action to obtain access to perform cleanup work, performance of cleanup work, perfection of a lien to secure EPA's costs, and cost recovery. The Lien Filing Record documents EPA's performance of "removal action" at, and in connection with, the Site. For example, (1) EPA performed Removal Site Evaluation activities that included sampling events at the Site in May

and November 2016[8] (*LFR 006*), (2) EPA selected removal action for implementation at the Site in May 2018 (*id.*), (3) EPA attempted to secure voluntary access from Magnate to implement the selected removal action between April and June 2018 *(LFR 017),* (4) the United States brought a civil action against Magnate in the United States District Court for the Western District of Virginia seeking court-ordered access to permit EPA to implement the selected removal action (*LFR 017*), (5) following signature by the Court of a Stipulation and Order resolving the access matter, EPA conducted further removal site evaluation activities at the Site in February 2019 to determine if circumstances had changed between November 2016 and February 2019 (*LFR 008, POLREP 6*); and (6) EPA implemented the selected removal action at the Site between February and July 2019 (*LFR 008, POLREPS 6-13*). Removal activities continued with the issuance, on July 1, 2019, of the Lien Notice Letter (*Rebuttal Exhibit 03*) and will continue through, among other things, completion of this proceeding and subsequent actions to secure and recover EPA's costs.

Magnate does not dispute that the Site has been, and will continue to be, subject to or affected by removal response action.

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[8] "Removal Site Evaluation" is described in Section 300.410 of the NCP, 40 C.F.R. §300.410.

4. EPA Has a Reasonable Basis to Believe that it Incurred Response Costs

The Lien Filing Record documents the expenditure by EPA of at least $381,252.66 in response costs in connection with the Site through May 23, 2019. *LFR 009*. Magnate does not dispute that EPA has incurred response costs in connection with the Site.

5. EPA Has a Reasonable Basis to Believe that it Provided Magnate with Written Notice of Potential Liability Via Certified or Registered Mail

The Lien Filing Record documents that EPA provided written notice, via certified mail, of Magnate's potential liability with respect to the Site by letter dated June 5, 2019 (*LFR 011*) and that Magnate received such notice on June 8, 2019 (*LFR 011a*). Magnate does not dispute that EPA provided it with written notice of potential liability via certified or registered mail.

Having satisfied the legal predicates for the existence of the lien, EPA contends that the lien has arisen by operation of law. This proceeding pertains to perfection of the lien by filing a notice of the lien in the appropriate offices.

B. EPA Has a Reasonable Basis to Believe that Magnate Cannot Maintain the Defense Set Forth at CERCLA § 107(b)(3)

Magnate argues that it is entitled to the statutory defense to liability set forth at Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3), and that, accordingly, EPA has no basis to perfect the lien. Specifically, Magnate argues that hazardous

substances must have been "planted" at the Site following Magnate's 2011 asbestos abatement project. Magnate posits in its July 4, 2019 letter responding to EPA's notice of intent to perfect the lien:

> "Magnate will be exercising the 'Third Party Defense' also found in CERCLA 107. It is the same defense that Magnate has been offering since the first day that the OSC, Myles Bartos, first visited the site. At that time, Magnate initiated the Third Party Defense by informing the OSC that Magnate had an abatement of the property that should have rendered the property free of asbestos and PCBs. We also informed the OSC that the agents that summoned the OSC to the property, [sic] were the same agents that signed off on the previous abatement and were responsible for the debris remaining on site. At that initial meeting, responding to a complaint, when asked who had made the complaint; they were not at liberty to say [sic]. At that point, I pointed out that an illegal ATF/Sheriff's Office 'tobacco sting' operation had taken place on the property and their need to be covert had caused many suspicious events. I told the OSC that any contamination found would have had to be planted."

Rebuttal Exhibit 5, at first page.

There are several problems with Magnate's attempt to raise the third party defense. First, Magnate has identified no evidence even remotely suggesting that hazardous substances were planted and does not identify who did the alleged planting. Magnate merely implies that the Site was cleared of asbestos as a result of the 2011 abatement and that any asbestos found would have to have been introduced to the Site by someone else.

Second, Magnate's own contractor acknowledged that asbestos remained at the Site after the 2011 abatement work was completed. In the cover letter transmitting its final report following the completion of the 2011 asbestos

abatement work, Winchester Environmental Consultants, Inc. noted the following:

1. "There remains a significant amount of asbestos material in the facility that was not removed due to time and budget constraints, as well the materials not being damaged. These materials consist primarily of any non-fiberglass pipe insulation in the building, and all floor tiles remaining in the building. In the future, and materials found in the facility that were not tested by [Winchester] in their inspection report dated 3/25/11 will need to be tested by a VA licensed asbestos inspector prior to any work that may disturb it [sic].

2. "The basement of the facility (under section 3, refer to attached map) still contains small amounts of damaged asbestos material mixed in with the significant amount of debris in the area. Due to flooding, and current disuse of the area along with budget concerns this area was not abated. However, poly barriers and signage were posted to prohibit access to this area. These barriers should remain in place until the area can be properly abated."

Rebuttal Exhibit 8.

Third, almost 4½ years elapsed from the time of the abatement completion in September 2011 and EPA's first visit to the Site in February 2016 (*LFR 008*). Magnate conducted scrapping activities at the Site in the years leading up to the abatement action completed in September 2011. It is not inconceivable that, after the 2011 abatement action, Magnate continued scrapping activities that could have resulted in new friable asbestos being released at the Site. In addition, continued deterioration of the buildings and weather events may also have created new friable asbestos at the Site during this time.

Fourth, Magnate cannot carry its burden under the third party defense set forth in Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3). Magnate mischaracterizes the predicates for immunity under this defense. Magnate appears to believe that if it can identify a third party responsible for "planting" hazardous substances at the Site, it is protected from liability under this provision. This interpretation ignores the statutory requirements for raising and maintaining the defense.

The third party defense described in Sections 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3), states in relevant part:

> "There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by–
> . . .
>
> "(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions."

Accordingly, in order to raise the defense, Magnate must establish, by a preponderance of evidence, that (1) the release or threat of release of hazardous

substances and the damage therefrom was caused solely by a third party; (2) the act or omission of the third party did not occur in connection, directly or indirectly, with a "contractual relationship" with the third party; (3) Magnate exercised due care with respect to the hazardous substances, in light of all relevant facts and circumstances; and (4) Magnate took precautions against foreseeable acts or omissions of the third party and the consequences that could foreseeably result from such acts or omissions.[10] Magnate has not offered any evidence to support any of the four elements of the third party defense. Moreover, EPA contends that Magnate cannot carry its burden under the third party defense.

1. Magnate Has Not Offered Any Evidence or Arguments to Support the Third Party Defense as Set Forth in CERCLA § 107(b)(3)

As described above, Magnate attempts to raise the third party defense by suggesting that (1) Magnate performed an asbestos abatement at the Site "that should have rendered property free and clear of asbestos & PCBs," (2) the officials who alerted EPA's OSC to conditions at the Site were the ones who "signed off" on the abatement and "were responsible for the debris remaining at the Site," (3) the Bureau of Alcohol, Tobacco, Firearms, and Explosives and the local sheriff's

[10] Magnate has not argued that it is an "innocent landowner" under Sections 107(b)(3) and 101(35) of CERCLA, 42 U.S.C. §§ 9607(b)(3) and 9601(35). The innocent landowner defense is a subset of the third party defense and carries additional evidentiary burdens to maintain. EPA reserves the right to submit additional arguments and evidence should Magnate later argue that it is entitled to the innocent landowner defense.

office conducted an "illegal . . . 'tobacco sting' operation" on the Site that "caused many suspicious events," and (4) any contamination found by EPA would have had to been "planted." *Rebuttal Exhibit 5*. Magnate has neither made representations, nor proffered any evidence, regarding any of the aforementioned statutory predicates for raising and maintaining the third party defense under Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3). Specifically, Magnate has neither argued nor produced evidence demonstrating that (1) the release or threat of release of hazardous substances and the damage therefrom was caused solely by the third party; (2) the act or omission of the third party did not occur in connection, directly or indirectly, with a "contractual relationship" with the third party; (3) Magnate exercised due care with respect to the hazardous substances, in light of all relevant facts and circumstances; and (4) Magnate took precautions against foreseeable acts or omissions of the third party and the consequences that could foreseeably result from such acts or omissions. EPA reserves the right to respond if and when Magnate produces evidence or makes arguments that are relevant to the defense.

2. Magnate Has Not "Exercised Due Care With Respect to the Hazardous Substance, in Light of All Relevant Facts and Circumstances" Because Magnate Failed to Secure and Maintain the Site

Magnate retained a contractor to conduct an asbestos abatement at the Site in 2011. As of September 2011, 40,000 cubic feet of asbestos-containing material

had been removed from the Site. At the conclusion of this project, Magnate's contractor wrote:

> "It is important to note that although the facility is currently in compliance with asbestos law the following conditions should be noted.
>
> 1. There remains a significant amount of asbestos material in the facility that was not removed due to time and budget constraints, as well the materials not being damaged. These materials consist primarily of any non-fiberglass pipe insulation in the building, and all floor tiles remaining in the building. In the future, and [sic] materials found in the facility that were not tested by WECI in their inspection report dated 3/25/11 will need to be tested by a VA licensed asbestos inspector prior to any work that may disturb it.
>
> 2. The basement of the facility . . . still contains small amounts of damaged asbestos material mixed in with the significant amount of debris in the area. Due to flooding, and current disuse of the area along with budget concerns this area was not abated. However, poly barriers and signage were posted to prohibit access to this area. These barriers should remain in place until the area can be properly abated."

Rebuttal Exhibit 8.

EPA's investigation of the Site almost five years later led to a determination, in January 2018, that the release or threatened release of hazardous substances (asbestos and PCBs) from the Site may present an imminent and substantial endangerment to public health or the environment ("Threat Determination"). *Rebuttal Exhibit 9.* In the Threat Determination, OSC Myles Bartos characterized the Site as follows:

"The Site contains, among other things, numerous buildings in various states of demolition, open pads where buildings once stood, debris piles, a basement and tunnel (pipe chase to the boiler house), and various water and oil storage tanks. Many of the remaining buildings are in advanced stages of decay. Asbestos from tiling, mastic, roofing materials, pipe wrap, and other sources is present on the ground both inside and outside many buildings. Recent scrapping/salvaging activities have likely contributed to the spread of asbestos. Bags of asbestos were also present in the basement and appear to have been dumped there.

. . .

"Evidence of trespassing, including in the basement where the majority of the friable asbestos is located, includes trash, discarded beer bottles, and graffiti markings inside and outside buildings where friable ACM [asbestos-containing material] is located. There is no security at the facility and no fence exists. Trespassers may come into contact with ACM on the property. Numerous piles of debris contain non-friable asbestos that does not pose a substantial threat to human health at this time. This could change if the non-friable asbestos is actively broken down by further crushing or by extended exposure to weather.

. . .

"ACM has been observed and documented throughout the Site, including on the ground outside many buildings. ACM may break down further and migrate through the action of wind, rain, surface water, etc. Friable ACM within deteriorating buildings may migrate via winds moving through such buildings. Additional friable asbestos may be released to the environment as portions of such buildings continue to disintegrate and collapse.

"Asbestos and PCBs are present in the basement. Currently, during heavy rain events, water infiltrates the basement causing it to flood. This is likely due to degraded roofing, underground conveyances (tunnels), and open portholes in the ground level floor that lead to the basement. The waters, which may contain PCBs, eventually recede from the basement after the rain and may potentially spread contamination."

Id.

It is clear that Magnate was aware, through its own contractor, that asbestos was present at the Site following the 2011 abatement action. Nonetheless, Magnate failed to take action to prevent the migration of asbestos and friable asbestos, the creation of friable asbestos, or contact by the public with asbestos and friable asbestos. These failures are apparent from, among other things, the following observations made by OSC Bartos in 2016:

- The lack of security or fencing;
- Evidence of trespassing;
- The decayed condition of buildings which could contribute to the spread of asbestos via wind or disintegration;
- Asbestos from tiling, mastic, roofing materials, pipe wrap, and other sources found inside and outside buildings where weather could create and/or spread friable asbestos;
- Scrapping/salvaging operations which may have caused or contributed to the spread of asbestos;
- Open piles of debris containing friable asbestos; and
- Bags of asbestos in the basement where degraded roofing and open portholes permitted water to enter and spread asbestos and PCB contamination.

EPA contends that Magnate's failure to properly secure and maintain the Site to prevent the above-described conditions constitutes a failure to exercise due care with respect to hazardous substances at the Site within the

meaning of Section 107(b)(3)(a) of CERCLA, 42 U.S.C. § 9607(b)(3). EPA further contends that such failure to exercise due care makes it impossible for Magnate to establish, by a preponderance of evidence, that it "exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all facts and circumstances" as required by Section 107(b)(3) of CERCLA in order to maintain the third party defense.

3. Magnate Has Not "Exercised Due Care With Respect to the Hazardous Substance, in Light of All Relevant Facts and Circumstances" Because Magnate Denied Entry to EPA to Perform Cleanup Actions Even Though it was Aware of Site Risks

In February 2018, following the issuance of the Threat Determination, EPA issued a notice (1) advising Magnate of its potential liability, and (2) inviting Magnate to conduct work to address threats at the Site under a settlement with EPA ("General Notice Letter"). *LFR 010.* The General Notice Letter included a draft settlement document ("Consent Order") which, among other things, set forth a history of EPA's involvement with the Site and conditions found by EPA during its investigation. The Consent Order noted the existence of friable asbestos in Pile 3, Area 5, and Area 10; PCBs in Area 10; evidence of trespassing throughout the Site; and that EPA had determined, on January 18, 2018, that the Site may constitute an imminent and substantial endangerment to the public health or

welfare or the environment because of an actual or threatened release of hazardous substances from the facility. *Id.* EPA found, in support of this threat determination, that, among other things: (1) the Site was not fenced and had no security to prevent trespassers from coming into contact with friable asbestos; (2) wind, rain, and other weather events could cause friable asbestos to migrate from piles on the ground and from buildings as they continue to deteriorate; and (3) water infiltrated the basement during heavy rain events, which could spread the asbestos and PCB contamination at the Site. *Rebuttal Exhibit 9.*[14]

Discussions with Magnate to perform work in response to the General Notice Letter did not result in a settlement, and by letter dated April 3, 2018, OSC Bartos notified Magnate that EPA intended to perform the work using Federal funds and requested that Magnate consent to access to allow such work to be performed. An entry form was enclosed for Magnate's signature. *LFR 012.* What followed was an exchange of positions over a period of two months and a lawsuit for access that settled four months after its commencement on entry terms essentially identical to those sought by EPA over ten months prior. As a result of Magnate's denial of access, EPA was prevented from entering the Site to

[14] These risks were again identified in the formal document issued by EPA on May 31, 2018, selecting removal response action for the Site ("Action Memorandum") (*LFR 006*) as well as in the complaint filed by the United States against Magnate in the U.S. District Court for the Western District of Virginia on October 11, 2018, seeking court-ordered access (*LFR 017*).

implement necessary response work for 315 days.[15]

a. Exchange of Positions

A week after OSC Bartos requested access from Magnate in writing, Magnate requested, by letter dated April 10, 2018, a "cost analysis and budget to complete the job with a clean bill of health." *LFR 013*. The letter additionally stated:

> "Whereas Magnate maybe [sic] responsible for such a cost; Magnate will request a competitive bid for same work to be done by outside contractor.
>
> "Whereas Magnate will be in the process of a sale (Andros Foods or foreclosure); Magnates [sic] requests a time window to be established.
>
> "Whereas Magnate may sell the property contingent on cost analysis prior to work being done or finished (especially at foreclosure), Magnate requests a finding as to liability for cost recovery following Magnate or the property.
>
> "Whereas Magnate will need to receive enough at a foreclosure to protect it's [sic] investors; Magnate requests a letter of condition, requirement and cost to be presented at the sale, so that a fair price might be achieved, free from cloud of untold expensive consequences of purchase."

Id. Magnate's letter did not mention EPA's request for access and did not include a signed entry form.

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[15] The missing days are explained by the time it took EPA to refer the matter to the U.S. Department of Justice ("DOJ"), the time it took DOJ to staff the case and file a complaint, and a month-long government shut-down in January 2019 for which DOJ requested, and was granted, a stay.

On April 19, 2018, the undersigned counsel sent a letter to Magnate which:

- Notified Magnate that EPA regarded the company's April 10, 2018 letter as a denial of consent for entry;

- Stated that Magnate had been given ample opportunity to consult with an environmental contractor to inform itself of the costs of performing the work, that EPA is under no obligation to provide a cost estimate or budget as a condition of access, and that an estimate of the costs to perform the work would be available when the project is formally approved and funded;

- Clarified that performance of the work by EPA would not result in a "clean bill of health" but that the work would address certain threats to human health and/or the environment to be identified in the funding document;

- Advised that any attempt to handle the wastes that are the subject of EPA's response could result in further human health or environmental damage and increased financial liability for Magnate and that interfering with an ongoing response could prompt EPA to take an enforcement action against the company;

- Advised that a schedule for performance of the work would be established by EPA following receipt of consent to enter the Site;

- Explained that costs incurred by EPA in connection with the response constitute a lien on the Site and that transfer of the Site would affect neither Magnate's status as a responsible party nor the validity of the lien;

- Explained that, at the conclusion of the work to be performed, EPA will not be in a position to make any representations regarding environmental conditions at the Site other than to say that the work for which access was sought has been completed;

- Advised that financial reports identifying EPA's costs are periodically compiled by EPA and would be available upon request;

- Reiterated EPA's request for consent to enter Magnate's Site to perform the work described in the notice letter;

- Explained EPA's options for securing entry in the face of a denial of consent; and

- Explained the potential consequences to Magnate of failing to cooperate with EPA's request for entry to perform the work.

LFR 014. Counsel's letter requested that Magnate sign and return the entry form (again enclosed with the letter) no later than five business days following Magnate's receipt of the letter. *Id.* The letter continued that if "[EPA does] not receive a signed entry form or otherwise hear from [Magnate] by the above-stated deadline, [EPA] will assume that Magnate LLC declines to consent to the entry requested above." *Id.* According to United Parcel Service, the letter was delivered on Friday, April 20, 2018. *Rebuttal Exhibit 10.* A response would therefore have been due by April 27, 2018. No response was received before this deadline.

By email to EPA's OSC on May 10, 2018, Magnate submitted a draft list of access "conditions" which included the following:

- A restriction on the number of parcels for which access would be provided;

- A requirement that the OSC answer a series of questions "under [the Freedom of Information Act]";

- A requirement for a 10 minute "Q&A" at the start and end of the response;
- Remote video recording (unclear whether this was something Magnate intended to do or it the company required EPA to do it); and
- A requirement that then EPA Administrator Scott Pruitt read, sign, and notarize a 7-page statement of facts to be provided by Magnate.

LFR 015.

On June 4, 2018, the undersigned counsel and OSC Bartos participated in a conference call with Magnate principal Darryl Bates and Magnate's counsel Brad Pollack. During that call, Mr. Bates continued to bring up facts and circumstances not relevant to EPA's request for access. Among the issues raised were:

- Mr. Bates' suspicion that hazardous substances were planted;
- that an illegal "sting" operation was performed by Alcohol Tobacco and Firearms and possibly state agencies;
- that the State endorsed (through permits) all of the asbestos abatement activities performed by the company;
- that EPA knew about the Site 40 years ago and did nothing about it;
- that all of the people who could provide "exculpatory" evidence (including Magnate's own abatement contractor) have vanished into thin air; and
- that EPA's finding of friable asbestos in Pile 3 is suspect because it was not found during the first Site visit.

At the conclusion of the call, Mr. Bates and his lawyer stated that Magnate would consent to access to the basement (Area 10) only but not to Pile 3 or Area 5. EPA advised that such a proposal placed a condition on entry that EPA would not accept.[16] *LFR 016.*

By email to OSC Bartos on June 8, 2018, Magnate transmitted (a) a document entitled "Access Agreement" which contained Magnate's summary of the June 4, 2018 telephone call, including Magnate's offer of access to Area 10 and

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[16] CERCLA provides authority for entry, inspections, and sampling subject only to requirements not relevant here (see 42 U.S.C. § 9604(e)(1), (3), & (4)). EPA's 1987 access guidance provides in relevant part:

> "Persons on whose property EPA wishes to enter often attempt to place conditions upon entry. EPA personnel should not agree to conditions which restrict or impede the manner or extent of an inspection or response action, impose indemnity or compensatory obligations on EPA, or operate as a release of liability. The imposition of conditions of this nature on entry should be treated as denial of consent and a warrant or order should be obtained."

Further, EPA regulations construe the imposition of conditions on access as a denial giving rise to the right to take enforcement action which is authorized only when consent is not provided. 42 U.S.C. § 9604(e)(5)(A) authorizes EPA to take steps to enforce a request for consent *"[i]f consent is not granted regarding any request . . . under [42 U.S.C. § 9604(e)(2), (3), or (4)*" (emphasis added). The National Oil and Hazardous Substances Pollution Contingency Plan (NCP), at 40 C.F.R. § 300.400(d)(4)(i), provides in part:

> "If consent is not granted under the authorities described in paragraph (d)(1) of this section, *or if consent is conditioned in any manner*, EPA, or the appropriate federal agency, may issue an order pursuant to section 104(e)(5) of CERCLA directing compliance with the request for access made under § 300.400(d)(1). EPA or the appropriate federal agency may ask the Attorney General to commence a civil action to compel compliance with either a request for access or an order directing compliance."

Emphasis added. The NCP thus equates conditioned consent as a denial since EPA cannot take enforcement action under CERCLA without a denial of consent.

denial of consent for entry to Piles 3 and 5, and (b) an unsigned letter to then EPA Administrator Pruitt dated December 18, 2017, containing Magnate's recitation of facts it considered relevant. *Rebuttal Exhibit 11.*

b. The Access Litigation

On October 11, 2018, the U.S. Department of Justice filed, on behalf of EPA, a complaint against Magnate in the U.S. District Court for the Western District of Virginia seeking entry to the Site to perform cleanup actions. *LFR 017.* On November 26, 2018, the United States filed a Motion for an Order in Aid of Access together with a legal memorandum and declaration from OSC Bartos. On February 12, 2019, the morning the United States expected to argue its Motion before the Court, Magnate agreed to settle the case by providing EPA with entry on terms essentially identical to those sought by EPA in April 2018. On that date, Magnate, the United States, and the Court signed a Stipulation and Order In Aid of Access ("Stipulation and Order") requiring Magnate to provide EPA with the access necessary to perform the removal action selected in the Action Memorandum and, in addition, access necessary for "determining the need for any additional response actions, and taking such additional or different response actions as EPA may select via a modification or amendment to the response action selected on May 31."[17] *LFR 018.*

[17] The United States requested this additional access because of the time that had elapsed since EPA was last on the Site.

c. Failure to Exercise Due Care

During the 315 days that elapsed between EPA's request for access to implement removal action at the Site and the date EPA obtained that access via the Stipulation and Order, Magnate was aware that:

- A significant amount of asbestos remained at the Site following its abatement action in 2011 and that Magnate's contractor recommended testing of such materials before they are disturbed. *Rebuttal Exhibit 8.*

- Damaged asbestos remained in the basement at the Site following the abatement in 2011; the basement was not abated due to flooding, disuse, and budget constraints; and Magnate's contractor left poly barriers and signage which, the contractor recommended, should remain until proper abatement. *Id.*

- Five years after the abatement action by Magnate, EPA confirmed the presence of friable asbestos in Pile 3, Area 5, and Area 10 (the basement) and PCBs in sediments in Area 10. *LFR 006, 011.*

- At the time EPA investigated the Site in 2016, EPA found visible signs of trespassing including trash and graffiti in various areas of the Site including Area 10. *Id.*

- On January 18, 2018, EPA determined that a threat to public health, welfare, or the environment existed due to the actual or threatened release of hazardous substances from the Site. *Id.*

- EPA determined that Site conditions may constitute an imminent and substantial endangerment to public health or welfare or the environment within the meaning of Section 106 of CERCLA, 42 U.S.C. § 9606. *Id.*

- EPA determined that a removal action was necessary to protect the public health or welfare or the environment. *Id.*

Risks presented by the Site were further detailed in the January 18, 2018 Threat Determination and the May 31, 2018 Action Memorandum. *See* Section III.B.2 of this Rebuttal. Despite knowing that asbestos remained at the Site after the 2011 abatement; that EPA had found asbestos and PCBs at the Site in 2016; that EPA had found evidence of trespassing; that the Site was not fenced or secured; that buildings at the Site were in various states of decay; that open debris piles at the Site contained asbestos and some contained friable asbestos; that EPA found Site conditions presented a threat to public health, welfare or the environment and may constitute an imminent and substantial endangerment to public health, welfare, or the environment; Magnate nonetheless prevented EPA from addressing risks to human health and/or the environment by refusing to permit entry to the Site to conduct necessary response work for over three hundred days.

EPA contends that Magnate's failure to permit EPA to enter the Site to address Site risks constitutes a failure to exercise due care with respect to hazardous substances at the Site within the meaning of Section 107(b)(3)(a) of CERCLA, 42 U.S.C. § 9607(b)(3). EPA further contends that such failure to exercise due care makes it impossible for Magnate to establish, by a preponderance of evidence, that it "exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all facts and circumstances" as required by Section 107(b)(3)

of CERCLA in order to maintain the third party defense.

IV. Conclusions

For the reasons stated above, EPA contends that:

1. The lien arose by operation of law pursuant to Section 107(l) of CERCLA, 42 U.S.C. § 9607(l).

a. EPA has a reasonable basis to believe that Magnate is a responsible party as described in Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a), as the owner of the Site upon which a release or threatened release of hazardous substances occurred;

b. EPA has a reasonable basis to believe that the land upon which EPA seeks to perfect a lien was subject to or affected by removal action;

c. EPA has a reasonable basis to believe that it expended response costs at this Site in conducting removal actions at the Site; and

d. EPA has a reasonable basis to believe that it provided Magnate with written notice of its potential liability via certified mail.

2. Magnate has not offered any evidence to support a third-party defense under Section 107(b)(3) of CERCLA.

3. EPA has a reasonable basis to believe that Magnate cannot carry its evidentiary burden under Section 107(b)(3) of CERCLA.

a. Magnate cannot establish, by a preponderance of the evidence, that it exercised due care with respect to asbestos and PCBs at the Site

because it (1) failed to secure the Site to prevent access by the public to friable asbestos and PCBs located there, (2) failed to maintain the Site to prevent the release of friable asbestos and PCBs into the environment, (3) failed to maintain the Site to prevent the creation and migration of friable asbestos from asbestos-containing sources that were not protected from weather and trespassers; and

b. Magnate cannot establish, by a preponderance of the evidence, that it exercised due care with respect to asbestos and PCBs at the Site because it prevented, for over three hundred days, entry to EPA to perform necessary removal action to abate risks at the Site.

4. Magnate has not demonstrated that EPA lacks a reasonable basis to perfect a lien on the Lien Parcels.

5. EPA has demonstrated that it has a reasonable basis to perfect the lien.

6. Perfection of the statutory lien is therefore appropriate.

9/26/19
Date

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List of Exhibits

1. "Supplemental Guidance on Federal Superfund Liens" (OSWER Directive No. 9832.12-1a (July 29, 1993).

2. Email from Myles Bartos to Andrew Goldman, re: Disposal Reports for Magnate" (August 28, 2019).

3. Letter from Cecil Rodrigues, Acting Regional Counsel, to Brad Pollack, Esquire, re: "Notice of Intent to Perfect Federal Superfund Lien; Opportunity to be Heard" (July 1, 2019).

4. Email from Brad Pollack to Andrew Goldman, re: "Notice of Intent to Perfect CERCLA 107(l) Lien" (July 28, 2019).

5. Letter from Darryl W. Bates to Andrew S. Goldman, re: "Letter of Response To Notice of Intent to Perfect Federal Superfund Lien" (July 4, 2019).

6. Order of Assignment (September 11, 2019).

7. Email from Carlyn Prisk to Andrew Goldman, re: "Magnate-Ownership Research" (September 5, 2019).

8. Letter from James C. Sigurdson to Darryl Bates, re: "Final Report/Asbestos Abatement/523 Aileen Rd. Edinburg, VA" (September 8, 2011).

9. Memorandum from Myles Bartos to Bonnie Gross, re: "Recommendation for Determination of Imminent and Substantial Endangerment at the Magnate LLC Site" (approved January 18, 2018).

10. UPS Tracking Sheet from Internet (June 6, 2018).

11. Email from Darryl Bates to Myles Bartos, re: "Conference Call" (June 8, 2018).

Docket No. CERCLA 03-2019-0120LL

CERTIFICATE OF SERVICE

I hereby certify that a copy of the documents identified below were provided to the following persons:

By Certified Mail (Return Receipt Requested):

Bradley G. Pollack, Esquire
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By Hand Delivery:

Joseph Lisa (3RC00)
Regional Judicial Officer
U.S. Environmental Protection Agency
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	Documents Provided
1.	EPA's Rebuttal to Arguments Presented by Magnate, LLC in its July 4 and July 28, 2019 Objection to EPA's Perfection of a CERCLA § 107(l) Lien.

Andrew S. Goldman, Esquire
Sr. Assistant Regional Counsel

9/26/19
Date