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File Number: 92123-00004

December 5, 2008

By Certified Mail
Return Receipt Requested

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
1341 G Street, N.W. Suite 600
Washington, D.C. 20005

Re: CERCLA Section 106(b) Petition
Walton CWCA Golden West 70, LLC

Dear Sir or Madam:

We represent Walton CWCA Golden West 70, LLC ("Walton"). Please find enclosed Walton's Petition for Reimbursement pursuant to the Comprehensive Environmental Response Compensation, and Liability Act ("CERCLA") section 106(b). Walton requests reimbursement of costs plus interest in complying with Unilateral Administrative Order, 9-2008-0012 issued by the United States Environmental Protection Agency, Region 9 pursuant to section 106(a) of CERCLA, 42 U.S.C. § 9606(a) on April 11, 2008.

Please contact me with any questions.

Sincerely,


Roger J. Holt

RJH/sl
Enclosures

cc: Andrew Helmlinger, Esq. (EPA Region 9)

Roger J. Holt
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December 5, 2008

Attention: Andrew Helmlinger, Esq.
U.S. EPA Region 9
75 Hawthorne Street
San Francisco, CA 94105

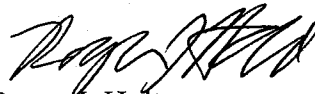
Re: CERCLA Section 106(b) Petition
Walton CWCA Golden West 70, LLC

Dear Andrew:

Please find enclosed Walton CWCA Golden West 70, LLC's ("Walton") Petition for Reimbursement pursuant to the Comprehensive Environmental Response Compensation, and Liability Act section 106(b). Walton is requesting reimbursement of costs plus interest in complying with Unilateral Administrative Order, 9-2008-0012 issued by the United States Environmental Protection Agency, Region 9 pursuant to section 106(a) of CERCLA, 42 U.S.C. § 9606(a) on April 11, 2008.

Please contact me with any questions.

Sincerely,


Roger J. Holt

RJH/sl
Enclosures

cc: Robert Munson
Walton CWCA Golden West 70, LLC

Appendix to this Petition as Exhibit 1; a copy of the Action Memorandum which was attached to the UAO is included in the Appendix to this Petition as Exhibit 2.

The UAO directed Walton to conduct removal activities of certain hazardous substances found at the property commonly known as 9330 7th Avenue, Suite A, Rancho Cucamonga, California (the "U.S. Colloidal Site"). EPA issued a Notice of Completion on October 8, 2008.

As discussed below, reimbursement is appropriate because:

1. Walton is not liable under CERCLA, 42 U.S.C. § 9606(b) because Walton qualifies for CERCLA's Innocent Landowner Defense pursuant to CERCLA, 42 U.S.C. §§ 9601(35)(A)(i); 9607(b)(3);
2. In the alternative, Walton is not a liable party under CERCLA, 42 U.S.C. § 9606(b) because Walton qualifies for the Bona Fide Prospective Purchaser Defense pursuant to CERCLA, 42 U.S.C. §§ 9601(40), 9607(r);
3. Walton has fully complied with the UAO;
4. Walton incurred response costs in complying with the UAO;
5. Walton timely filed this petition within 60 days after completion of the response action in compliance with CERCLA § 106(b)(2)(a).

In accordance with the requirements set forth in the Environmental Appeals Board Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions dated November 10, 2004 (the "Revised Guidance"), Walton submits the following:

II. BACKGROUND INFORMATION

A. Petitioner's Name, Address and Title

Walton CWCA Golden West 70, LLC
900 N. Michigan Avenue, Suite 1900
Chicago, IL 60611

B. Petitioner's Attorney Contact

Roger J. Holt, Esq.
Greenberg Glusker Fields Claman & Machtinger LLP
1900 Avenue of the Stars, 21st Floor
Los Angeles, CA 90067
Telephone: 310.553.3610

C. Name and Address of Facility Where Response Action Was Implemented

The facility was formerly occupied by U.S. Colloidal Essence, Inc. ("U.S. Colloidal") and is located at 9333 7th Avenue, Suite A, Rancho Cucamonga, California.

D. U.S. EPA Docket Number

The U.S. EPA Docket Number for the Unilateral Administrative Order for the Performance of a Removal Action is: U.S. EPA Docket No. 9-2008-0012. Exhibit 1, UAO.

III. STATUTORY PREREQUISITES

Walton has satisfied all four statutory prerequisites for obtaining review of its Petition for Reimbursement as set forth in the Revised Guidance.

A. Walton Complied with the Unilateral Administrative Order

Walton has fully complied with the UAO. Section XXIII of the UAO provides that the “provisions of the Order shall be deemed satisfied on Respondents’ receipt of written notice from EPA that Respondents have demonstrated to the satisfaction of EPA that all of the terms of this Order, including any additional tasks that EPA has determined to be necessary, have been completed.” On October 8, 2008, EPA issued a Notice of Completion to Walton regarding Walton’s compliance with the UAO (the “Notice of Completion”). A copy of the Notice of Completion is included in the Appendix to this Petition as Exhibit 3.

The Notice of Completion provides, in pertinent part, that Walton has:

demonstrated, to the satisfaction of EPA, that all of the terms of EPA Unilateral Order (UAO) 9-2008-0012 have been completed. This letter is written notice to you as anticipated in Section XXIII of the UAO. Completion includes the documented removal and off-site transfer of hazardous substances and wastes under EPA-approved Work Plans as required by the UAO.

Accordingly, Walton is in compliance with the UAO. *See* CERCLA, 42 U.S.C. § 9606(b)(2).

B. Walton Has Completed the Cleanup

As discussed above, EPA has found that Walton has completed the cleanup. *See* Exhibit 3, Notice of Completion.

C. This Petition is Timely

CERCLA, 42 U.S.C. § 9606(b)(2)(a) requires a petition for reimbursement be submitted “within 60 days after completion of the required action.” Pursuant to the Notice of Completion, Walton completed the required action as of October 8, 2008. *See* Exhibit 3, Notice of Completion. Walton has filed this Petition within 60 days of completion. Accordingly, this Petition is timely under CERCLA, 42 U.S.C. § 9606(b)(2)(a) and the Revised Guidance.

D. Walton Has Incurred Costs

Walton has incurred costs in complying with the UAO. Specifically, Walton estimates that it has incurred approximately \$438,897.40 in costs in its compliance with the UAO including, without limitation, restricting access to the U.S. Colloidal Site, preparing a Work Plan for removal activities to be conducted at the U.S. Colloidal Site and conducting removal activities in accordance with EPA directive. *See* Declaration of Karen Fish Exhibit 4 to the Appendix to this Petition, ¶ 19.

Pursuant to the Revised Guidance, Walton will provide evidence of the costs incurred and the reasonableness of these costs once the Environmental Appeals Board (“EAB”) makes a determination that Walton is entitled to reimbursement. *See* Revised Guidance, p. 6.

IV. **STATEMENT OF GROUNDS FOR REIMBURSEMENT**

CERCLA, 42 U.S.C. § 9606(b)(2) authorizes any person who has complied with an EPA administrative order issued pursuant to section 9606(a) to petition the EAB for reimbursement of the reasonable costs incurred in complying with the order, plus interest. To establish a claim for reimbursement, the person must demonstrate that it is not liable for response costs under section 9607(a) of CERCLA. As set forth below, Walton is not liable for the response costs under section 9607(a) because the “third party defense” pursuant to CERCLA, 42 U.S.C. § 9607(b)(3) applies because Walton is an “innocent landowner” or, in the alternative, Walton is a bona fide prospective purchaser pursuant to CERCLA, 42 U.S.C. §§ 9601(40) and 9607(r).

A. Factual Background

1. Walton’s Acquisition of the U.S. Colloidal Site

On or about June 1, 2007, Walton purchased the property commonly known as the Golden West Business Park located at 9320 to 9500 7th Street, Rancho Cucamonga, California

(the "Golden West Property") from CalWest Industrial Properties LLC ("CalWest"). The Golden West Property is a large 100 suite multi-structure complex with offices, commercial and light manufacturing tenant uses. Exhibit 2, Action Memorandum, p. 2. Davis Partners, Inc. ("Davis Partners") has managed the Golden West Property on behalf of Walton since September 2007. Exhibit 4, Declaration of Karen Fish ¶ 2. Karen Fish managed the Property on behalf of Davis Partners since September 24, 2007. Exhibit 4, Declaration of Karen Fish ¶ 3. The U.S. Colloidal Site at issue in this Petition is one tenant unit of the overall Golden West Property that Walton acquired. Walton believes that U.S. Colloidal was a tenant at the U.S. Colloidal Site for at least the past 14 to 15 years prior to Walton's acquisition of the Golden West Property. Exhibit 4, Declaration of Karen Fish ¶ 6.

As part of Walton's acquisition of the Golden West Property, Walton had ATC Associates Inc. ("ATC") perform a Phase I Environmental Site Assessment of the Golden West Property (the "Phase I"). A copy of the Phase I is included in the Appendix to this Petition as Exhibit 5. The U.S. Colloidal Site was reviewed as part of the Golden West Property Phase I. Exhibit 5, Phase I. The Phase I "was conducted in accordance with ASTM Standard Practice E 1527-05, consistent with a level of care and skill ordinarily practiced by the environmental consulting profession currently providing similar services under similar circumstances." Exhibit 5, Phase I, p. 4. The individual consultants who performed the Phase I also certified that they "developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR part 312." Exhibit 5, Phase I, p. 1.

The scope of the Phase I included, without limitation, an evaluation of the following:

- "Physical setting characteristics of the property through review of referenced sources such as topographic maps and geologic, soils and hydrologic reports;"

- “Usage of the property, adjoining properties and surrounding area through a review of referenced historical sources such as land title records, fire insurance maps, city directories, aerial photographs, prior reports and interviews;”
- “Observations and interviews regarding current property usage and conditions including: the use, treatment, storage, disposal or generation of hazardous substances, petroleum products, hazardous wastes, non-hazardous solid wastes and wastewater;”
- “Usage of adjoining and surrounding area properties and likely impact of known or suspected releases of hazardous substances or petroleum products from those properties on the property;” and
- “Information in referenced environmental agency databases and local environmental records, within the specified approximate minimum search distance from the property.”

Exhibit 5, Phase I, p. 4.

As part of the Phase I, ATC inquired of the local regulatory agencies as to whether they had any information regarding the Golden West Property. Exhibit 5, Phase I, p. 15. The San Bernardino County Department of Environmental Health informed ATC that although it had no information pertaining to the Golden West Property, the San Bernardino County Fire Department, Hazardous Materials Division (the “SBCFD-HMD”) maintains hazardous materials records of the area in which the Golden West Property is located. Exhibit 5, Phase I, p. 4. Although ATC submitted a request to review the SBCFD-HMD’s files, the SBCFD-HMD did not respond to ATC’s request prior to ATC’s completion of the Phase I report. Exhibit 5, Phase I, p. 4 and Appendix I. The Phase I concluded that although the lack of response represents a

data gap, “considering the information reviewed from other interview sources, the site reconnaissance, and historical data reviewed, the data gap is not considered to be *significant*.” Exhibit 5, Phase I, p. 4 (emphasis in the original). Walton learned after its acquisition of the Golden West Property that in January 2007 the SBCFD-HMD issued a Notice of Violation for U.S. Colloidal’s improper management of hazardous materials. Exhibit 2, Action Memorandum, p. 2. However, Walton was unaware of this Notice of Violation because the SBCFD-HMD did not respond to ATC’s request for information regarding the Property. Exhibit 5, Phase I, p. 4. Moreover, the seller of the Golden West Property did not inform Walton or ATC of any issues regarding U.S. Colloidal’s storage of the hazardous materials prior to Walton’s acquisition of the Golden West Property.

The findings of the Phase I concluded that the “assessment has revealed no evidence of *recognized environmental conditions* in connection with the property.” Exhibit 5, Phase I, p. 2 (emphasis in the original). The Phase I did not find any recognized environmental conditions with respect to the U.S. Colloidal Site. With respect to the presence of hazardous substances in tenant spaces at the Golden West Property, the Phase I did not identify the U.S. Colloidal Site as containing any hazardous substances. Exhibit 5, Phase I, p. 24-25. Accordingly, based on the findings and conclusions of the Phase I, Walton did not know and had no reason to know that hazardous substances were being stored at the U.S. Colloidal Site which posed a threat of release.

2. Discovery of the Improper Management of the Hazardous Substances by U.S. Colloidal and the Removal Action

On or about March 12, 2008, the Rancho Cucamonga Fire Department (“RCFD”) informed Ms. Fish that they had been investigating U.S. Colloidal and U.S. Colloidal’s owner, Scott Kim. Exhibit 4, Declaration of Karen Fish ¶ 7. The RCFD further informed Ms. Fish that Mr. Kim would likely be arrested and that the EPA may conduct an investigation of the U.S.

Colloidal Site. Exhibit 4, Declaration of Karen Fish ¶ 7. To assist RCFD and other government agency representatives with their investigation of U.S. Colloidal and Mr. Kim, Ms. Fish provided them with a key to a vacant tenant unit that was near the U.S. Colloidal Site. Exhibit 4, Declaration of Karen Fish ¶ 8.

On March 17, 2008, a “strike force” of local city, SBCFD-HMD officials, a district attorney, sheriff investigators and a U.S. Food and Drug Administration representative executed a search warrant at the U.S. Colloidal Site. Exhibit 2, Action Memorandum, p. 2. According to the Action Memorandum, the RCFD observed the condition of the U.S. Colloidal Site, “including the presence of a large quantity of improperly stored hazardous materials and numerous waste code violations and ‘red tagged’ the facility.” Exhibit 2, Action Memorandum, p. 2. The SBCFD-HMD requested EPA’s assistance with the management and/or removal of hazardous substances from the U.S. Colloidal Site due to fire code violations and hazardous materials mismanagement. Exhibit 2, Action Memorandum, p. 2. Prior to this date, Walton was unaware that U.S. Colloidal was storing hazardous materials at the U.S. Colloidal Site in a way that may threaten human health or the environment. Exhibit 4, Declaration of Karen Fish ¶ 10.

On March 18, 2008, EPA conducted a site assessment of the U.S. Colloidal Site to identify improperly managed hazardous substances. Exhibit 2, Action Memorandum, p. 3. Ms. Fish was present at the site assessment. Exhibit 2, Action Memorandum, p. 3. Ms. Fish assisted EPA in the site assessment including, without limitation, providing EPA with access to the U.S. Colloidal Site. Exhibit 4, Declaration of Karen Fish ¶¶ 8, 11, 15-17.

Based on EPA’s observations during the site inspection, “hazardous substances at the Site [were] found in a large quantity of liquid and solid hazardous waste streams that include: caustic, acidic, flammable and surfactant materials.” Exhibit 1, UAO, p. 5. The U.S. Colloidal Site contained approximately one hundred 55-gallon drums, two dozen process tanks, large quantities of reagent chemicals and small containers of hand-marked solutions and poly totes ranging from 250 gallons to 4,000 gallons. Exhibit 1, UAO, p. 5. The chemicals at the U.S. Colloidal Site

were not segregated according to hazard class and were not staged in secondary containment. Exhibit 1, UAO, p. 5.

Based on the site assessment, the SBCFD-HMD requested federal action. Exhibit 2, Action Memorandum, p. 5. In the interim, Walton took steps to prevent any release of the hazardous substances and to ensure that the public would not come into contact with the hazardous substances. For example, Walton agreed to work with “EPA toward the goal of providing specific Site access for continued EPA characterization activities.” Exhibit 2, Action Memorandum, p. 5. As requested by EPA, Walton also established 24-hour security patrol commencing on March 18, 2008 to prevent Mr. Kim, his affiliates and the public from accessing the hazardous substances. Exhibit 4, Declaration of Karen Fish ¶ 12; A copy of a letter from the Rancho Cucamonga Fire Department dated April 3, 2008 regarding the request for Davis Partners to establish security is included in the Appendix to this Petition as Exhibit 6. Subsequently, Walton installed an alarm system at the U.S. Colloidal Site to ensure that no one could access the property. Exhibit 4, Declaration of Karen Fish ¶ 14. Walton also immediately re-keyed the U.S. Colloidal Site after being notified by EPA of the potential risk if third parties accessed the site. Exhibit 4, Declaration of Karen Fish ¶ 13.

On March 21, 2008, Ms. Fish met with EPA and other government agency representatives for a second walk-through inspection of the U.S. Colloidal Site to discuss and determine future removal action at the U.S. Colloidal Site. Exhibit 2, Action Memorandum, p. 5. Ms. Fish, on behalf of Walton, also “provided EPA with a generally broad written license for access to sample and conduct any necessary response activities.” Exhibit 2, Action Memorandum, p. 5; a copy of the Consent for Access is included in the Appendix to this Petition as Exhibit 7. Walton also continued to assist EPA and other government agency representatives in their response action including, without limitation, providing requested information to EPA, meeting with EPA at least once or twice per week and providing EPA and other government

agency representatives with access to the U.S. Colloidal Site. Exhibit 4, Declaration of Karen Fish ¶ 17.

Based on its observations, EPA also determined that the “potential for fire, vandalism and deterioration of containers at the unmanaged Site may result in the combustion, physical exposure or commingling of incompatible hazardous substances and thereby cause harm to the public health or welfare or the environment.” Exhibit 2, Action Memorandum, p. 6. EPA determined that the U.S. Colloidal Site “represents a significant threat of release affecting nearby populations.” Exhibit 2, Action Memorandum, p. 6. EPA proposed a response action to “inventory, characterize, segregate, bulk, re-containerize, and remove all unmanaged hazardous substances and contaminated materials left in drums, containers, and tanks” at the U.S. Colloidal Site. Exhibit 2, Action Memorandum, p. 9.

On April 11, 2008, EPA issued the UAO to Walton, U.S. Colloidal and Mr. Kim (“Respondents”). Exhibit 1, UAO. Walton was named as the “owner” of the U.S. Colloidal Site and U.S. Colloidal and Mr. Kim were named as the “operators” of the U.S. Colloidal Site. Exhibit 1, UAO, p. 4. The UAO stated that “[t]hreats to public health or the environment stem from the significant potential for releases at the unmanaged Site due to vandalism, fire, and deteriorating containers.” Exhibit 1, UAO, p. 6. The UAO ordered Respondents to perform removal work which included submitting a work plan, securing the U.S. Colloidal Site, identifying and characterizing all chemical substances, segregating the hazardous substances, containerizing the hazardous substances, performing air monitoring and sampling work and properly disposing of the hazardous substances. Although Mr. Kim and U.S. Colloidal were named in the UAO, they did not participate in the removal action monetarily or otherwise.

Shortly after receiving the UAO, Walton contracted with Kemron Environmental Services (“Kemron”) on April 16, 2008 to perform the work required in the UAO. A copy of the Kemron Contract is included in the Appendix to this Petition as Exhibit 8. Kemron completed the work, including supervising the disposal of the waste, in September 2008 and submitted its

completion report (the "Completion Report") to Davis Partners and EPA. A copy of the Completion Report is included in the Appendix to this Petition as Exhibit 9. On October 8, 2008, Walton received the Notice of Completion from EPA which provided, in pertinent part, that Walton has "demonstrated, to the satisfaction of the EPA, that all of the terms of EPA Unilateral Administrative Order (UAO) 9-2008-0012 have been completed." Exhibit 3, Notice of Completion, p. 1. The Notice of Completion also thanked Walton for its "past cooperation with EPA." Exhibit 3, Notice of Completion, p. 1.

B. Walton Qualifies for the Third Party Defense as an Innocent Landowner

Walton is not liable under CERCLA because it meets the requirements of the "third party defense" as an "innocent landowner." See 42 U.S.C. § 9601(35)(A). Under the third party defense set forth in CERCLA, 42 U.S.C. § 9607(b)(3) (the "Third Party Defense"), a defendant is not liable under CERCLA if it establishes that the release or threatened release was caused solely by:

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 evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substances, in light of all relevant facts and circumstances [the "Due Care Requirement"], 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 [the "Precautionary Requirement"].

42 U.S.C. § 9607(b)(3). Although the Third Party Defense is not applicable if one whose act or omission occurred in connection with a "contractual relationship," including a lessor and lessee relationship, there is an exception if the lessor is an "innocent landowner" (the "Innocent Landowner Defense"). See 42 U.S.C. § 9601(35)(A).

The Innocent Landowner Defense was enacted in 1986 and is promulgated at CERCLA, 42 U.S.C. § 9601(35)(A)(i). Read in conjunction with the Third Party Defense, the Innocent Landowner Defense provides a defense for liability from hazardous substance removal activities when the landowner did not know or had no reason to know about the hazardous substances prior to purchasing the property. Under the Innocent Landowner Defense, the phrase “contractual relationship” for purposes of the Third Party Defense is defined as including “land contracts, deeds, easements, leases, or other instruments transferring title or possession” *unless*:

At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.

42 U.S.C. § 9601(35)(A)(i); *See also* EPA, Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability, dated March 6, 2003 (the “Common Elements Guidance”). To satisfy the requirement that the defendant did not know and had no reason to know that any hazardous substance which is the subject of a threatened release was on the property, the defendant must have undertaken “all appropriate inquiry” into the previous ownership and uses of the property before acquisition. 42 U.S.C. § 9601(35)(B).

To obtain the Innocent Landowner Defense, the defendant must also establish compliance with the Third Party Defense requirements of “due care” and the “precautionary requirement.” Common Elements Guidance, p. 3. Thus, to assert the Innocent Landowner Defense a party must demonstrate the following:

1. The hazardous substances that are the subject of the cleanup were caused by a third party prior to the defendant’s purchase of the land;
2. The defendant took “all appropriate inquiry” into the previous ownership and uses of the property before acquisition;

3. The defendant took reasonable steps to stop any continuing release, prevent any threatened future release and prevent or limit any human environment, or natural resource exposure to any previously released substance;
4. The defendant fully cooperated with and assisted persons conducting response actions;
5. The defendant complied with any land use restrictions and institution controls established in connection with a response action;
6. The defendant satisfied the due care requirement by exercising due care with respect to the hazardous substances concerned; and
7. The defendant satisfied the precautionary requirement.

CERCLA, 42 U.S.C. §§ 9601(35)(A); 9607(b)(3); *see also* Common Elements Guidance.

“Landowners who meet the requirements of CERCLA § 101(35)(A) will not be found to be in a ‘contractual relationship’ with the party responsible for the release of hazardous substances at the property” and therefore, will not be liable under CERCLA. *U.S. v. A & N Cleaners and Launderers, Inc.*, 854 F.Supp. 229, 238 (S.D.N.Y. 1994). As discussed more fully below, Walton satisfies each of the requirements for the Third Party Defense as an Innocent Landowner.

1. The Hazardous Substances Which Were the Subject of a Threatened Release Were Caused by a Third Party Prior to Walton’s Acquisition of the Property

As stated in the UAO, the mismanaged hazardous substances which were the subject of the threatened release resulted from U.S. Colloidal’s operations at the U.S. Colloidal Site. *See*

e.g., Exhibit 1, UAO pp. 5-6. According to the Action Memorandum, U.S. Colloidal “ostensibly developed formulas and manufactured personal care products (i.e., skin creams and hair care products), industrial strength cleaners, degreasers, and detergents.” Exhibit 2, Action Memorandum, p. 2. Based on a review of documents, Walton believes that U.S. Colloidal operated on the U.S. Colloidal Site for approximately 14 to 15 years prior to Walton’s acquisition of the property in July 2007. Exhibit 4, Declaration of Karen Fish ¶ 6.

According to the UAO, since at least January 2007 – six months prior to Walton’s acquisition of the U.S. Colloidal Site – U.S. Colloidal was “the subject of several municipal and county inspections and violation notices related to hazardous waste and hazardous materials.” Exhibit 1, UAO p. 2. In January 2007, the SBCFD-HMD issued a Notice of Violation to U.S. Colloidal for the improper containment of hazardous substances. Exhibit 1, UAO p. 2. Although Walton was unaware of this prior to acquiring the U.S. Colloidal Site, it establishes that the hazardous substances that are the subject of the UAO were present on the U.S. Colloidal Site prior to Walton’s acquisition of the Golden West Property.

2. Walton took “All Appropriate Inquiry”

Walton took an “all appropriate inquiry” in conformance with 42 U.S.C. section 9601(35)(B)(i)(I). For a landowner to establish that they “did not know and had no reason to know” that any hazardous substances which are the subject of the threatened release were at the facility, the landowner must have undertaken, at the time of acquisition, an “all appropriate inquiry into the previous ownership in accordance with generally accepted good commercial or customary practice in an effort to minimize liability.” 42 U.S.C. § 9601(35)(B).

In November of 2005, EPA issued a final rule establishing standards for All Appropriate Inquiries (the “AAI Rule”) for purposes of the Innocent Landowner Defense, bona fide prospective purchaser defense and contiguous landowner defense. STANDARDS AND PRACTICES

FOR ALL APPROPRIATE INQUIRIES, 70 Fed. Reg. 66070 (Nov. 1, 2005); 40 C.F.R. part 312. The AAI Rule became effective on November 1, 2006. *See* 70 Fed. Reg. at 66070.

On the same day as EPA's promulgation of the AAI Rule, ASTM International issued a revised standard for conducting all appropriate inquiries known as Standard E1527-05 and entitled "Standard Practice for Environmental Site Assessment Process ("Standard E1527-05"). In the AAI Rule, EPA endorsed the Standard E1527-05 as being "consistent with" the AAI Rule and "compliant with the statutory criteria for all appropriate inquiries." 70 Fed. Reg. at 66081. EPA further concluded that "[p]ersons conducting all appropriate inquiries may use the procedures included in the ASTM E1527-05 standard to comply with today's final rule." *Id.*

As discussed above, ATC conducted a Phase I of the U.S. Colloidal Site for Walton in "conformance with the scope and limitations of ASTM Standard Practice E 1527-05." *See* Exhibit 5, Phase I, p. 2; *see also* Exhibit 5, Phase I, p. 4 ("This Phase I ESA was conducted in accordance with ASTM Standard Practice E 1527-05 in connection with the property at the time of the site reconnaissance."). The Phase I site reconnaissance did not identify the presence of any hazardous substances at the U.S. Colloidal Site which were the subject of the threatened release. Exhibit 4, Phase I, pp. 24-25. The Phase I concluded that the "assessment has revealed no evidence of *recognized environmental conditions* with the property." Exhibit 5, Phase I, p. 2 (emphasis in the original).

Therefore, based on the Phase I, Walton did not know and had no reason to know that there were any hazardous substances at the U.S. Colloidal Site which are the subject of the UAO. As Walton conducted an all appropriate inquiry in conformance with EPA's approved standard, Walton has complied with this requirement.

3. Walton Took Reasonable Steps to Stop and/or Prevent any Release or Threatened Release

Walton took reasonable steps to stop any continuing release, prevent any threatened future release and prevent or limit any human, environmental or natural resource exposure to any previously released hazardous substance in conformance with 42 U.S.C. section 9601(35)(B)(i)(II). Upon being informed of the hazardous substance condition at the U.S. Colloidal Site, Walton's property manager, Karen Fish, immediately cooperated with government officials including, without limitation, EPA and SBCFD, to prevent any harm to any human or the environment due to the conditions at the U.S. Colloidal Site. Indeed, Walton assisted EPA and other government officials even before EPA's issuance of the UAO.

As documented in the Action Memorandum and the Completion Report, Walton took the following actions:

- On March 18, 2008, Walton's property manager, Ms. Fish, accompanied EPA and other government agency representatives in a site inspection of the U.S. Colloidal Site (Exhibit 2, Action Memorandum, p. 2);
- Walton "agreed to establish a security watch at the facility and work with EPA toward the goal of providing specific Site access for continued EPA characterization activities" (Exhibit 2, Action Memorandum, p. 5);
- Walton installed an alarm at the U.S. Colloidal Site to ensure that no one could access the property (Exhibit 4, Declaration of Karen Fish ¶ 14);
- Walton re-keyed the U.S. Colloidal Site to further limit access to the U.S. Colloidal Site and ensure that Mr. Kim and his affiliates would be unable to access the site (Exhibit 4, Declaration of Karen Fish ¶ 13);

- On March 21, 2008, Ms. Fish met with EPA and other government agency representatives for a second walk-through inspection of the U.S. Colloidal Site to discuss and determine future removal action at the U.S. Colloidal Site (Exhibit 2, Action Memorandum, p. 2);
- Walton also “provided EPA with a generally broad written license for access to sample and conduct any necessary response activities” (Exhibit 2, Action Memorandum, p. 2; Exhibit 7, Access Agreement);
- On April 16, 2008, Walton hired Kemron to manage the segregation and disposal of liquid and solid hazardous materials from the U.S. Colloidal Site in accordance with the UAO and EPA directive (Exhibit 9, Kemron Completion Report, p. 1; Exhibit 8, Kemron Contract);
- Walton completely complied with all terms of the UAO and fully cooperated with EPA. Exhibit 3, Notice of Completion.

As exemplified above, Walton took proactive steps to prevent any release or threatened release of the hazardous substances from the U.S. Colloidal Site. Walton took these actions immediately upon being notified of the dangerous condition and prior to the issuance of the UAO.

4. Walton Fully Cooperated with and Assisted Persons Conducting Response Actions

As documented in the Action Memorandum and the Notice of Completion, Walton fully cooperated with and assisted persons conducting response actions at the U.S. Colloidal Site:

- Upon learning that the RCFD and other government agency representatives were investigating U.S. Colloidal and Mr. Kim, Ms. Fish on behalf of Walton provided

them with a key to a vacant tenant unit that was near the U.S. Colloidal Site.
(Exhibit 4, Declaration of Karen Fish ¶ 8);

- On March 18, 2008, Ms. Fish accompanied EPA and other government agency representatives in a site inspection of the U.S. Colloidal Site (Exhibit 2, Action Memorandum, p. 2);
- Walton “agreed to establish a security watch at the facility and work with EPA toward the goal of providing specific Site access for continued EPA characterization activities” (Exhibit 2, Action Memorandum, p. 5);
- On March 21, 2008, Davis Partners on behalf of Walton entered into an access agreement with EPA to authorize EPA and its affiliates to access the U.S. Colloidal Site to conduct its investigation and response action (Exhibit 7, Access Agreement);
- On March 21, 2008, Ms. Fish met with EPA and other government agency representatives for a second walk-through inspection of the U.S. Colloidal Site to discuss and determine future removal action at the U.S. Colloidal Site (Exhibit 2, Action Memorandum, p. 2);
- After EPA’s initial site inspections, Walton continued to assist EPA and other government agency representatives in their assessment and investigation of the U.S. Colloidal Site including, without limitation, providing requested information, meeting with EPA at least once or twice per week and providing EPA and other government agency representatives with access to the U.S. Colloidal Site (Exhibit 4, Declaration of Karen Fish ¶ 17); and
- As reflected in the Notice of Completion, Walton fully cooperated with EPA in complying with the UAO. Indeed, EPA thanked Walton in the Notice of

Completion for its "past cooperation with EPA." (Exhibit 3, Notice of Completion p. 1).

5. Walton Complied with Any Land Use and Institutional Controls

According to EPA's Common Elements Guidance, to meet the statutory criteria of complying with any land use and institutional controls, "a party may not impede the effectiveness or integrity of any institutional control employed in connection with a response action." Common Elements Guidance p. 8. As set forth in the Notice of Completion, Walton completely complied with the UAO and all EPA directives.

6. Walton Exercised Due Care With Respect to the Hazardous Substances

Walton exercised due care with respect to the hazardous substances. As discussed above, as soon as Walton was notified of the threat from U.S. Colloidal's mismanagement of the hazardous substances, Walton immediately took steps to secure the area, cooperated with the EPA and other government agency officials in performing their site investigation and contracted with Kemron to perform the removal action.

7. Walton Took Precautions Against Foreseeable Acts or Omissions of any Third Parties and the Consequences that Could Result from Such Acts or Omissions

As discussed above, as soon as Walton was notified of the threat from U.S. Colloidal's mismanagement of the hazardous substances, Walton immediately took steps to secure the area, cooperated with the EPA and other government agency officials in performing their site investigation and contracted with Kemron to perform the removal action.

Based on the foregoing, Walton qualifies for the Innocent Landowner Defense.

C. Walton Qualifies for the Bona Fide Prospective Purchaser Defense

In the alternative, should the EAB determine that Walton “should have known” of U.S. Colloidal’s mismanagement of the hazardous substances prior to its acquisition of the Golden West Property, Walton qualifies as a Bona Fide Prospective Purchaser (the “BFPP Defense”). CERCLA, 42 U.S.C. §§ 9601(40) and 9607(r). The BFPP Defense is almost identical to the Innocent Landowner Defense; however, it applies when a purchaser “knew or should have known” of the hazardous substances which are the subject of the action. *See e.g.*, Common Elements Guidance. As discussed above, Walton did not know of the presence of the hazardous substances at the U.S. Colloidal Site prior to acquisition of the Golden West Property. However, should the EAB determine that Walton should have known about the hazardous substances, Walton qualifies for the BFPP Defense.

To qualify for the BFPP Defense, a purchaser must meet the criteria set forth in CERCLA, 42 U.S.C. section 9601(40). 42 U.S.C. § 9601(40); Common Elements Guidance p.

3. These criteria include the following:

1. The BFPP acquired the property after January 1, 2007;
2. All disposal of hazardous substances on the property occurred prior to the BFPP’s acquisition of the property;
3. The BFPP made an “all appropriate inquiry;”
4. The BFPP provided all legally required notices with respect to the discovery of any hazardous substances on the property;
5. The BFPP took reasonable steps to stop any continuing release, prevent any threatened future release and prevent or limit any human environment, or natural resource exposure to any previously released substance;
6. The BFPP fully cooperated with and assisted persons conducting response actions;
7. The BFPP complied with any land use restrictions and institution controls established in connection with a response action;

8. The BFPP complied with all information requests and administrative subpoenas; and
9. The BFPP is not affiliated with a PRP.

42 U.S.C. § 9601(40).

As set forth below, Walton meets each of these criteria:

1. Walton Acquired Ownership of the U.S. Colloidal Site After January 1, 2002

Walton acquired the Golden West Property, of which the U.S. Colloidal Site is a part of, on June 1, 2007.

2. All Disposal of the Hazardous Substances Occurred prior to Acquisition

As discussed above, U.S. Colloidal's mismanagement of the hazardous substances which gave rise to the UAO occurred prior to Walton's acquisition of the U.S. Colloidal Site during U.S. Colloidal's tenancy at the property. Therefore, this requirement is satisfied.

3. Walton Conducted an All Appropriate Inquiry

To qualify for the BFPP Defense the purchaser must have made "all appropriate inquiry" in conformance with the standards set forth in the Innocent Landowner Defense. 42 U.S.C. § 9601(40)(B). As discussed in section IV.B.2 above, Walton conducted an all appropriate inquiry which satisfied the requirements of the Innocent Landowner Defense.

4. Walton Provided All Legally Required Notices

To qualify for the BFPP Defense the purchaser must have provided "all legally required notices with respect to the discovery or release of any hazardous substances at the facility." 42 U.S.C. § 9601(40)(C). As discussed in section IV.A. above, Walton did not discover the presence of any hazardous substances at the U.S. Colloidal Site until after the SBCFD notified

Walton of the presence of hazardous substances in March 2008. Accordingly, there were no legal notices required for Walton to provide.

5. Walton Took Reasonable Steps to Stop and/or Prevent any Release or Threatened Release

To qualify for the BFPP Defense the purchaser must take reasonable steps to stop any continuing release, prevent any threatened future release; and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substances. 42 U.S.C. § 9601(40)(D). Upon being informed of the hazardous substance condition at the U.S. Colloidal Site, Walton's property manager immediately cooperated with government officials to prevent any harm to any human or the environment due to the conditions at the U.S. Colloidal Site.

As documented in the Action Memorandum and the Completion Report, Walton took the following actions:

- On March 18, 2008, Walton's property manager accompanied EPA and other government agency representatives in a site inspection of the U.S. Colloidal Site (Exhibit 2, Action Memorandum, p. 2);
- Walton "agreed to establish a security watch at the facility and work with EPA toward the goal of providing specific Site access for continued EPA characterization activities" (Exhibit 2, Action Memorandum, p. 5);
- Walton installed an alarm at the U.S. Colloidal Site to ensure that no one could access the property (Exhibit 4, Declaration of Karen Fish ¶ 14);

- Walton also re-keyed the U.S. Colloidal Site to ensure that no third party, including Mr. Kim and/or his affiliates, could access the property (Exhibit 4, Declaration of Karen Fish ¶ 13);
 - On March 21, 2008, Ms. Fish met with EPA and other government agency representatives for a second walk-through inspection of the U.S. Colloidal Site to discuss and determine future removal action at the U.S. Colloidal Site (Exhibit 2, Action Memorandum, p. 2);
 - Walton “provided EPA with a generally broad written license for access to sample and conduct any necessary response activities” (Exhibit 2, Action Memorandum, p. 2; Exhibit 7, Access Agreement);
 - On April 16, 2008, Walton contracted with Kemron to manage the segregation and disposal of liquid and solid hazardous materials from the U.S. Colloidal Site in accordance with the UAO and EPA directive (Exhibit 9, Kemron Completion Report, p. 1; Exhibit 8, Kemron Contract);
 - Walton completely complied with all terms of the UAO. Exhibit 3, Notice of Completion.
6. Walton Fully Cooperated with Those Authorized to Conduct Response Actions

A BFPP must provide “full cooperation, assistance, and access to persons that are authorized to conduct response actions.” 42 U.S.C. § 9601(40)(E). As discussed in section IV.B.4 above, Walton provided full cooperation to EPA and other government agency officials in their site investigation and response actions with respect to the U.S. Colloidal Site including, without limitation, accompanying EPA on site visits, providing EPA with site access, providing requested security and hiring Kemron to conduct the removal action. As reflected in the Notice

of Completion, EPA thanked Walton for its “past cooperation with EPA.” (Exhibit 3, Notice of Completion p. 1).

7. Walton Complied with Any Land Use and Institutional Controls

According to EPA’s Common Elements Guidance, to meet the statutory criteria of complying with any land use and institutional controls, “a party may not impede the effectiveness or integrity of any institutional control employed in connection with a response action.” Common Elements Guidance p. 8. As set forth in the Notice of Completion, Walton completely complied with the UAO and all EPA directives. Moreover, Walton provided 24-hour security patrol, installed an alarm and re-keyed the locks to ensure that no unauthorized person would access the U.S. Colloidal Site.

8. Walton Complied With all Information and Administrative Subpoenas

As reflected in the Notice of Completion, Walton completely complied with the EPA’s investigation of the U.S. Colloidal Site including providing EPA with “broad written license for access to sample and conduct any necessary response activities.” Exhibit 2, Action Memorandum, p. 5; Exhibit 7, Access Agreement.

9. Walton is Not Affiliated with U.S. Colloidal

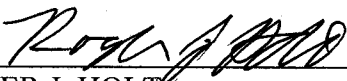
The last requirement for the BFPP Defense is that the purchaser cannot be “affiliated with any other person that is potentially liable, for response costs at a facility.” 42 U.S.C. § 9601(40)(H). As set forth in the UAO, Walton is not affiliated with U.S. Colloidal or Mr. Kim. Mr. Kim was the owner and operator of U.S. Colloidal. U.S. Colloidal is not affiliated with Walton.

V. CONCLUSION

Walton fully cooperated with EPA and other government agency representatives in their site investigation and removal action at considerable expense to Walton. As set forth above, Walton is not liable under CERCLA because Walton is either an Innocent Landowner or the BFPP Defense applies. Accordingly, Walton respectfully requests \$438,897.40 plus interest in reimbursement. Walton reserves the right to amend this Petition prior to the EAB making a decision on the Petition.

DATED: December 4, 2008

Respectfully submitted,
GREENBERG GLUSKER FIELDS CLAMAN
& MACHTINGER LLP

By: 

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PROOF OF SERVICE BY MAIL

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I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1900 Avenue of the Stars, 21st Floor, Los Angeles, California 90067. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On December 5, 2008, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

Petition for Reimbursement Under Section 106(b)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980

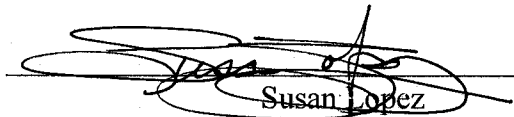
in a sealed envelope, postage fully paid, addressed as follows:

Certified Mail - Return Receipt Requested
Andrew Helmlinger, Esq.
U.S. EPA Region 9
75 Hawthorne Street
San Francisco, CA 94105

Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 5, 2008, at Los Angeles, California.


Susan Lopez