

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

_____)	
IN RE:)	
)	
Southern Iowa Mechanical)	Petition No.
Superfund Site)	CERCLA 106(b) 10-01
Ottumwa, Iowa)	Docket No.
)	CERCLA-07-2009-0006
Titan Tire Corporation)	
)	
and)	
)	
Dico, Inc.,)	
)	
Petitioners)	
)	
Petition for Reimbursement Under)	
Section 106(b)(2) of the Comprehensive)	
Environmental Response, Compensation,)	
and Liability Act of 1980, as amended)	
42 U.S.C § 9606(b)(2))	
_____)	

MOTION TO STAY PROCEEDINGS

I. Introduction

The Respondent, the United States Environmental Protection Agency, Region 7 (“EPA” or the “Region”), by and through its Office of Regional Counsel, hereby moves the Environmental Appeals Board (“Board”) to stay further proceedings on the Second Petition for Reimbursement of Funds Expended by Petitioners Titan Tire Corporation and Dico, Inc. in Complying with United States Environmental Protection Agency CERCLA § 106(a) Administrative Order No. CERCLA-07-2009-0006 and Other Required Actions, and for Relief for Constitutional Violations (filed May 24, 2010) (“Second Petition”) until liability issues are

resolved either by settlement or litigation in federal district court. On October 26, 2010, the United States Department of Justice (“DOJ”) filed a civil complaint against Titan Tire Corporation and Dico, Inc. (“Petitioners”) pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9606, 9607. The requested relief is to recover costs, plus interest, incurred by the EPA in connection with the release and threat of release of polychlorinated biphenyls (“PCBs”) at the Southern Iowa Mechanical Site (“SIM Site”). The complaint also seeks assessment of civil penalties from Dico, Inc. (“Dico”) for violating the terms of Administrative Order No. VII-94-F-0009. This Order required that Dico preserve the encapsulation of PCB-contaminated insulation in the buildings on Dico’s property in Des Moines, Iowa. A copy of the complaint, as filed by DOJ, is attached as Exhibit 1.

Prior to filing the complaint, DOJ advised Petitioners that the United States hoped to resolve this matter amicably and, if they were willing to resolve this matter without resorting to litigation, the United States would consider a good faith settlement offer received by October 25, 2010. DOJ further advised Petitioners that any settlement would require Petitioners to withdraw the claims for reimbursement they made in this proceeding and to covenant not to renew those claims. When DOJ did not receive a good faith settlement offer by that date, the United States filed the necessary action to resolve its claims for cost recovery and penalties.

II. The United States District Court Is A Better Venue for Determining Liability

The basis for the United States’ claim for reimbursement of EPA’s SIM Site response costs is that Petitioners are liable for those response costs under Section 107(a) of CERCLA, 42 U.S.C. 9607(a). In the matter before the Board, Petitioners claim that they are entitled to reimbursement under Section 106(b)(2)(C) of CERCLA, 42 U.S.C. 9606(b)(2)(C), because they are *not* liable for response costs under Section 107(a) of CERCLA. Pet. at 1. Thus, the same

issue will be heard by the District Court that has been presented to the Board for consideration. The District Court, with the more expansive discovery provided for under the Federal Rules of Civil Procedure, is the more appropriate venue for determining Petitioners' liability for response costs.

III. Absent A Stay, Proceeding to Consider the Petition Will Result in an Unnecessary Expenditure of Resources.

The District Court case will consider, in part, issues that are identical to those before the Board. Furthermore, because the Board is not authorized to grant EPA's claim for cost reimbursement, even if the Board agrees with the Region that Petitioners are liable for response costs, the United States would be forced to litigate the same claim in District Court to recover those costs. This unnecessary duplication of effort would be avoided by the Board's granting a stay of this proceeding until the District Court makes a finding on Petitioners' liability. Finally, Petitioners would not be harmed by a stay even if they were to prevail on the liability issue because Section 106(b)(2)(A) provides for payment of interest on a prevailing Petitioners' claim from the date of the expenditure.

Petitioners recently filed what they referred to as Petitioners' Second Motion to Supplement, Correct and/or Amend the Administrative Record. EPA believes consideration of this Motion should be stayed along with consideration of the Second Petition and EPA is therefore not filing a substantive response to this Motion. Should the requested stay not be granted, EPA requests the opportunity to respond to this motion.

Furthermore, without getting into the substance of Petitioners' Motion, EPA notes that Petitioners refer to their Motion to supplement the administrative record filed with respect to their First Petition as having been unopposed. EPA did not file a response to that Motion

because the First Petition was dismissed as not having been timely filed, not because it agreed with Petitioners' Motion. Petitioners have not re-filed that Motion with respect to their Second Petition. EPA requests the opportunity to respond to that Motion if Petitioners were to re-file it or if the Board elects to consider it as having been filed with respect to the Second Petition.

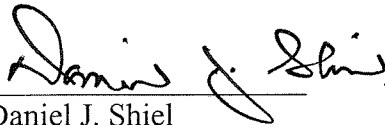
IV. Conclusion

For the reasons stated above, EPA respectfully requests that the Board stay further consideration of the Second Petition until Petitioners' liability has been determined by the District Court. EPA has consulted with counsel who has indicated that Petitioners will oppose the requested stay.

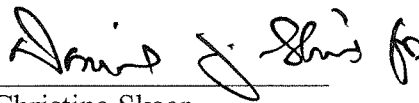
Dated this 28th day of October 2010.

Respectfully submitted:

By:



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CERTIFICATE OF SERVICE

I hereby certify that on the 28 th of October, 2010, I served a true and correct copy of the above Motion to Dismiss by mailing a copy via first class United States Mail to Mark Johnson, Stinson Morrison Hecker LLP, 1201 Walnut, Suite 2900, Kansas City, MO 64106-2150.

Kimberly W. Welfel