Bateman Seidel

Karen L. Reed
kreed@batemanseidel.com
www.batemanseidel.com
Telephone DID: 503.972.9924
Fax DID: 503.972.9944

December 3, 2010

VIA U.S. CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Clerk of the Board
Environmental Appeals Board (Mail Code 1103B)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Petition for Reimbursement under CERCLA Section 106(b)
***In re* American Home Mortgage Servicing, Inc., Petitioner**

Dear Sir or Madam:

I am counsel for the above-referenced petitioner, and I have enclosed for filing with the Environmental Appeals Board a Petition for Reimbursement of Costs under CERCLA Section 106(b). U.S. EPA Region 10 issued the underlying administrative order, and I am serving a copy of this petition on Deniz Ergener, the appropriate Assistant Regional Counsel.

Ms. Ergener and I have discussed informal resolution of this petition, and I would be interested in receiving any information you have regarding procedures for alternative dispute resolution of matters pending before the Environmental Appeals Board. Please feel free to contact me if you have any questions or require any additional information.

Sincerely,

Karen L. Reed

Karen L. Reed

enc.

cc: (w/enc.) Deniz Ergener, EPA Region 10

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

In re:	)
American Home Mortgage Servicing, Inc.,	)
Petitioner	)

PETITION FOR REIMBURSEMENT OF COSTS

INTRODUCTION

AMERICAN HOME MORTGAGE SERVICING, INC., a Delaware corporation ("Petitioner"), which maintains an office at 4600 Regent Blvd., Suite 200, Irving, Texas 75063, submits this petition for reimbursement pursuant to section 106(b) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C. § 9606(b)(2). Petitioner requests reimbursement of approximately $200,000 in costs, plus interest thereon as provided by law, incurred in complying with a series of written demands, attached as Exhibit B through Exhibit E, and contemporaneous oral communications, from the U.S. Environmental Protection Agency ("EPA") to Petitioner, commencing on August 20, 2010, constituting the functional equivalent of a formal Administrative Order ("AO") issued by EPA pursuant to section 106(a) of CERCLA, 42 U.S.C. § 9606(a), requiring Petitioner to perform a response action at the Star Bright Plating site (EPA ID No. ORN001002884), 24225 South Highway 213, Mulino, Oregon 97013 ("Site"). EPA has not issued a formal notice of completion of the response action for the Site, but counsel for EPA orally informed undersigned counsel for Petitioner that the earliest possible date by which EPA would consider the response action completed was October 4, 2010.

As explained below, Petitioner is entitled to reimbursement under CERCLA § 106(b)(2) because Petitioner is not a liable party under CERCLA § 107(a). In addition, Petitioner meets the statutory and regulatory threshold requirements for reimbursement:

1. Petitioner complied fully with the terms of the AO.

2. This petition is being filed within 60 days after the earliest possible date of completion of the response action, as required by CERCLA § 106(b)(2)(a).

3. Petitioner incurred response costs in complying with the AO.

* * *

FACTUAL AND PROCEDURAL BACKGROUND

The Site is comprised of an approximately 4.65-acre parcel in Clackamas County, Oregon, outlined in red on Exhibit A attached hereto. The principle use of the Site and the majority of surrounding parcels is residential. Victor and Janet Van der Star owned the Site and resided thereon for many years, and on information and belief, the Van der Stars continue to reside on the Site. According to the records of the Oregon Department of Environmental Quality ("ODEQ"), the Van der Stars owned and operated a metal plating facility on the Site from 1990 to 2009. *See* Site Summary Full Report for Site ID 5291, ODEQ Environmental Cleanup Site Information Database, http://www.deq.state.or.us/lq/ECSI/ecsidetail.asp?seqnbr=5291 (last visited December 3, 2010). The plating operations occurred in and around a detached pole-barn structure on the Site. *Id.* Contaminants of concern include, among other things, hexavalent chromium, lead, copper, cyanide and nickel chloride. *Id.*

Petitioner is a residential loan servicing company, with its headquarters in Coppell, Texas. *See generally* https://www.ahmsi3.com/servicing/ahmsi_aboutus.asp (last visited December 3, 2010). Petitioner is the agent for Deutsche Bank National Trust Company, which is the trustee ("Trustee") for the Certificate Holders of Soundview Home Loan Trust 2005-OPT1, Asset-Backed Certificates, Series 2005-OPT1 ("Trust"). The Trust owned the loan and mortgage for the Site ("Loan"). However, the Trust did not originate the Loan; rather it acquired the Loan on the secondary markets after it had been finalized by another unrelated lender. As is the standard industry practice for bulk acquisitions of residential mortgages on the secondary markets, the Trust did not conduct an environmental assessment of the Site prior to acquiring the

Loan, and both Petitioner and Trustee were unaware of the environmental condition of the Site or its use history of use for nonresidential purposes.

The Van der Stars defaulted on the Loan, and Petitioner, in its role as agent for the Trustee, completed foreclosure proceedings on May 6, 2010. Less than three months later, on July 26, 2010, Petitioner became aware of the Site's environmental condition, when EPA personnel first contacted Petitioner demanding performance of an emergency abatement action. Numerous communications between Petitioner and EPA ensued, as more fully described in the Argument below, including for example an electronic communication on August 20, 2010, attached as Exhibit B, from EPA's counsel to Petitioner succinctly summarizing the Site's conditions: "There are thousands of gallons of hazardous materials in unsecured, open-topped vats. These vats are within an unlocked building and constitute an imminent and substantial endangerment to the public health or welfare." *See* CERCLA § 106(a).

In response to EPA's demands, Petitioner employed a contractor to perform an emergency abatement action, under the supervision and direction of EPA staff, which remained on Site throughout the process. However, Petitioner never took exclusive possession of the Site. Despite the foreclosure, the Van der Stars remained in possession of the Site and continued to reside there and to exercise control thereof during the entire abatement process. Mr. Van der Star, while acknowledging responsibility for the Site conditions, refused to perform the work because he claimed to be unable to pay for any response activities. Mr. Van der Star generally cooperated with Petitioner and Petitioner's contractor during the performance of the emergency abatement and voluntarily signed hazardous waste manifests acknowledging that he was the generator of the hazardous wastes.

On or about October 4, 2010, the last of the known hazardous substances contained in drums and vats was removed from the Site for disposal. On or about November 8, 2010, EPA personnel conducted sampling at the Site. The sampling results are not expected until late December 2010, and Petitioner does not know at this time whether there are any remaining residual hazardous substances or contamination from releases of hazardous substances present on the Site. Since September 2010, Petitioner has been negotiating diligently with the Van der Stars to accept voluntary reconveyance of title, so the Trustee can divest itself of title to the Site, as provided under CERCLA § 101(20)(E)(ii).

* * *

SUMMARY OF ARGUMENT

Petitioner is entitled to reimbursement under CERCLA § 106(b)(2)(C) because Petitioner is not a liable party under CERCLA § 107(a), for the following reasons:

1. The release or threat of release of hazardous substances at the Site and the damages resulting therefrom were caused solely by an act or omission of a third party, the Van der Stars, pursuant to CERCLA § 107(b)(3).

2. The disposal or placement of hazardous substances on the Site occurred wholly before Trustee acquired title to the Site through foreclosure, pursuant to CERCLA § 101(35)(A).

3. Trustee is excluded from the definition of "owner or operator" of the Site because it is a lender that, without participating in the management of the Site, held indicia of ownership primarily to protect the Trust's security interest in the Site and after foreclosure thereof has diligently sought to divest itself of title thereto at the earliest practicable, commercially reasonable time, pursuant to CERCLA § 101(20)(E) - (G).

4. Petitioner is merely the agent of Trustee and, as such agent, is not within the scope of covered persons enumerated in CERCLA § 107(a)(1) through (4).

* * *

ARGUMENT

Petitioner is entitled to reimbursement of its response costs at the Site under CERCLA § 106(b)(2)(C). This argument explains why Petitioner has met the statutory and regulatory threshold requirements for such reimbursement and why Petitioner is not a liable party under CERCLA § 107(a).

A. Existence of CERCLA Section 106 Order

EPA issued Petitioner a series of written demands that along with contemporaneous oral communications constituted the functional equivalent of a formal AO under CERCLA § 106(a), which is summarized as follows:

- Email dated August 20, 2010, from Deniz Ergener, Assistant Regional Counsel for EPA Region 10, stating: (i) EPA's "expectation and understanding" that Trustee/Petitioner[1] will hire a contractor to remove the hazardous substances from the Site by August 25, 2010; (ii) EPA's factual conclusion that the Site constitute "an imminent and substantial endangerment to the public health or welfare;" and (iii) EPA's assertion that, if Trustee/Petitioner fail to act, it will conduct the removal or issue a unilateral administrative order ("UAO") under CERCLA. Exhibit B.

- Email dated August 25, 2010, from Ms. Ergener providing a scope of work for EPA's demand that Petitioner perform a CERCLA removal action at the Site. Exhibit C.

- Email dated August 27, 2010, from Ms. Ergener: (i) setting a deadline of August 30 to September 3, 2010, for Petitioner to perform "substantial work" as described in the preceding scope-of-work email; (ii) stating that failure to "perform the work to abate the imminent and substantial endangerment at the [S]ite" would result in EPA's issuance of a UAO to Petitioner "to perform the removal action;" and (iii) stating that noncompliance with a UAO would result in EPA performing the specified work. Exhibit D. Contemporaneous oral communications from Mr. Ergener to undersigned counsel clarified that, if EPA performed the work, it would seek reimbursement from Petitioner

[1] Power REO Management Services, Inc. is a Texas corporation that is an affiliate of Petitioner and has provided staff under Petitioner's direction to support Petitioner's activities as agent for Trustee.

for all of its costs, which would probably exceed Petitioner's costs to perform the same work.

- Email dated September 2, 2010, from Ms. Ergener reiterating the emergency nature of Site conditions, again using the terms "imminent and substantial endangerment," and insisting that Petitioner "communicate clearly and in a timely manner." Exhibit E. In a telephone conversation with undersigned counsel on the same day, Ms. Ergener stated that issuance of a UAO was imminent if she did not receive confirmation that Petitioner would proceed with work in compliance with the prior communications.

As the Environmental Appeals Board noted in *In re Katania Shipping Co.*, 8 E.A.D. 294, 299 (EAB 1999), "there is neither a statutorily nor regulatorily defined format for 106(a) orders." In this case, the cumulative effect of these communications from EPA was to leave Petitioner with only the choices of undertaking the specified cleanup activities or of facing enforcement under CERCLA § 106 for failure to do so. Thus, unlike the letter analyzed in *Katania*, these communications enjoyed the "key attributes" of a section 106(a) order: "First, the essence of a section 106(a) order is a directive requiring the recipient to undertake certain cleanup activities. Second, a section 106(a) order carries the force of law." *Id.* There was no doubt that EPA was asserting authority under CERCLA § 106(a), after its repeated assertions that conditions at the Site constituted "an imminent and substantial endangerment to the public health or welfare" and that Petitioner must take immediate action to abate these conditions.

Moreover, unlike in *Katania*, there can be no argument that Petitioner was motivated to conduct its activities at the Site because it had negotiated to receive any favorable regulatory treatment. Instead Petitioner proceeded under the threat of enforcement and despite the fact that EPA refused Petitioner's repeated requests for written or oral assurances that EPA would not pursue Petitioner for remedial costs following completion of the emergency abatement action. Petitioner's counsel openly acknowledged this situation in an email to Ms. Ergener, attached as Exhibit F, dated October 5, 2010, the day after Petitioner completed its abatement activities: "Please understand that my client is in a rather awkward position of having incurred significant

expenses without having any commitments in advance from EPA, because we understood the seriousness of the situation on the ground at the site and wanted to do the right thing to protect public health and safety."

Thus, public policy strongly militates in favor of finding that EPA issued a CERCLA § 106(a) order to Petitioner. Petitioner was aware that the Site conditions were both extremely urgent and hazardous, involving a high potential for a great degree of harm to the public and the environment. Petitioner requested favorable regulatory treatment, but did not receive it. Instead, EPA reiterated its intent to pursue enforcement under section 106. Under these circumstances, Petitioner demonstrated responsible conduct that should be encouraged, by proceeding expeditiously to contain and remove the hazardous substances from the Site, rather than waiting for the inevitable UAO to be issued and enforced. It would severely undermine the public policies underlying CERCLA, and elevate form over substance, to find that Petitioner should have resisted EPA's demands to act immediately to protect public health merely to assure that it constructed the best possible case for reimbursement under CERCLA § 106(b). For all these reasons, the Board should find that EPA issued Petitioner an order under CERCLA § 106(a).

B. Other Threshold Requirements

Petitioner complied fully with the terms of the AO. The scope of work for the AO is contained in Exhibit C: "Removal [sic] all hazardous materials which are unsecured in open vats, including all liquids and sludges containing hazardous substances, by an EPA approved method(s). Transport hazardous substances and materials removed from the Star Bright site location to an EPA approved disposal facility." As EPA has acknowledged, Petitioner completed this scope of work on October 4, 2010. Petitioner is submitting hazardous waste

manifests and scale tickets demonstrating this compliance attached as Exhibit G through Exhibit N.

This petition is being filed within 60 days after the earliest possible date of completion of the response action, as required by CERCLA § 106(b)(2)(a). As noted above, EPA has not issued a formal notice of completion of the response action for the Site. *C.f. Raytheon Aircraft Co. v. United States*, 435 F. Supp. 2d 1136, 1156 (D. Kan. 2006) ("[T]o be entitled to seek reimbursement under the CERCLA [§ 113(h)(1)] regime, the EPA must issue a formal notice of completion ....").[2] However, on November 1, 2010, counsel for EPA orally informed undersigned counsel for Petitioner that the earliest possible date by which EPA would consider the response action completed was October 4, 2010. This date is documented in Exhibit M and Exhibit N, which are hazardous waste manifests showing this as the date when the final shipment of hazardous wastes was transported off the Site.

Petitioner incurred response costs in complying with the AO, as demonstrated on the invoices attached as Exhibit O through Exhibit R. However, these invoices do not represent all the costs that Petitioner incurred, as Petitioner incurred additional removal costs and other costs that are reimbursable under CERCLA § 106(b)(2)(E). The approximate total of all of these costs is $200,000, and Petitioner will document the precise amount and reasonableness of these costs following the Board's determination of Petitioner's entitlement to reimbursement.

C. Petitioner Is Not a Liable Party

Petitioner is entitled to reimbursement under CERCLA § 106(b)(2)(C), which provides in pertinent part that "to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under [CERCLA § 107(a)]." Petitioner has four separate and independent defenses to liability as a responsible party under CERCLA, and a

[2] This petition for reimbursement falls under CERCLA § 113(h)(3).

finding in Petitioner's favor on any of these defenses will establish its entitlement to reimbursement.

1. Third-Party and Innocent Landowner Defenses

The third-party and innocent landowner defenses are both applicable to this case, and each defense provides an independent basis to find that Petitioner is not a liable party under CERCLA. *See generally Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 871 (9th Cir. 2001) (en banc) (discussing both third-party and innocent landowner defenses). However, because these defenses rely on common statutory provisions, they are discussed together in this petition for ease of presentation. The third-party defense is contained in CERCLA § 107(b), which provides:

> 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 (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such 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;
> ....

CERCLA's explanation of the innocent landowner defense also contains a definition of "contractual relationship for purposes of the third-party defense. CERCLA § 101(35)(A) provides:

> The term "contractual relationship", for the purpose of section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds, easements,

> leases, or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:
>
> (i) 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.
>
> ....

It is undisputed that the Van der Stars solely caused the release or threat of release of hazardous substances at the Site and the damages resulting therefrom. During all relevant time periods, they had possession and control of the Site, and they alone were responsible for the metal plating operations that occurred there. In addition, after the Van der Stars ceased operating the Site as a metal plating facility in 2009, no hazardous substances were brought onto or disposed on the Site. *See* ODEQ Site Summary for Site ID 5291, *supra* at 3; *see also Carson Harbor Village*, 270 F.3d at 887 (holding that passive migration of hazardous waste contamination during a period of ownership does not constitute "disposal" under CERCLA). The disposal or placement of hazardous substances on the Site occurred wholly before Trustee acquired title to the Site through foreclosure.

When Trustee acquired title, neither Trustee nor Petitioner had actual or constructive knowledge that the Site as contaminated. In addition, there is no "contractual relationship," as defined in CERCLA § 101(35)(A), between the Van der Stars and Trustee, because Trustee took title to the Site through a Trustee's Deed, attached as Exhibit S, after a foreclosure sale, which is an involuntary conveyance and does not give rise to privity of contract. The liability of Petitioner, as Trustee's agent, cannot exceed Trustee's liability, and in fact Petitioner, which never took title to the Site in any form, is even further removed from the chain of potential

liability for the Site. Thus, the third-party defense and the innocent landowner defense protect Petitioner from potential liability for the Site.

2. Lender Liability Exemption

Petitioner and Trustee are excluded from the definition of "owner or operator" of the Site because they qualify for protection under CERCLA's lender liability exemption. This exemption provides: "The term 'owner or operator' does not include a person that is a lender that, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect the security interest of the person in the vessel or facility." CERCLA § 101(20)(E)(i). As explained above, the Trust owned the Loan, which constituted a security interest in the Site. Under CERCLA, "participation in management" requires actual participation and "does not include merely having the capacity to influence, or the unexercised right to control, ... facility operations." CERCLA § 101(20)(F)(i). Until approximately three weeks before EPA issued the first written directive comprising the AO, Petitioner and Trustee were unaware that the Van der Stars had operated a metal plating facility at the Site, so there is no way that they could have participated in the management of this facility.

Furthermore, neither the foreclosure nor the performance of the response action under the AO converted Petitioner or Trustee into an owner or operator.

> The term "owner or operator" does not include a person that is a lender that did not participate in management of a vessel or facility prior to foreclosure, notwithstanding that the person—
>
> (I) forecloses on the vessel or facility; and
>
> (II) after foreclosure, ... undertakes a response action under section 9607(d)(1) of this title or under the direction of an on-scene coordinator appointed under the National Contingency Plan, with respect to the vessel or facility, or takes any other measure to preserve, protect, or prepare the vessel or facility prior to sale or disposition,
>
> if the person seeks to ... divest the person of the vessel or facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.

CERCLA § 101(20)(E)(ii). As explained above, neither Petitioner nor Trustee sought or obtained exclusive possession of the Site following the foreclosure. Instead, they limited their activities on the Site following foreclosure to complying with EPA's directives to abate emergency conditions on the Site. Shortly after commencing abatement activities, Petitioner commenced negotiations, which it is continuing to pursue diligently, with the Van der Stars to accept voluntary reconveyance of title to the Site. Thus Petitioner and Trustee are covered under CERCLA's exemption from liability for lenders.

3. Petitioner, as Trustee's Disclosed Agent, Is Not Liable under CERCLA

Petitioner is merely the agent of Trustee and, as such agent, is not within the scope of covered persons enumerated in CERCLA § 107(a)(1) through (4). "So long as an agent acts within the scope of his authority, discloses his representative capacity to the third party and makes the contract in his principal's name, the agent is not personally liable thereon." *Free v. Wilmar J. Helric Co.*, 688 P.2d 117, 119 (Or. App. 1984); *accord White v. White*, 880 F.2d 1324 at *4 (9th Cir. 1989) (unpublished table decision) (citing *Free*). Petitioner disclosed its agency relationship to Ms. Ergener in an email dated September 3, 2010, attached as Exhibit T, and in contemporaneous telephone conversations, in which Petitioner's counsel explained to Ms. Ergener that Petitioner was acting as the agent of Trustee, which was the title owner as a result of the foreclosure. Petitioner provided further explanation of this relationship in the email attached as Exhibit F. Thus, Petitioner does not fall within the statutorily prescribed categories of liable persons under CERCLA, as it is not an owner, operator, arranger or transporter of the hazardous substances, the release or threat of release of which caused the incurrence of response costs at the Site. *See* CERCLA § 106(a).

* * *

CONCLUSION

For the foregoing reasons, Petitioner requests reimbursement of approximately $200,000, plus interest thereon as provided by law, the precise amount of which will be documented for the Board following the determination of Petitioner's entitlement to reimbursement.

Respectfully submitted this 3rd day of December, 2010:

BATEMAN SEIDEL MINER BLOMGREN CHELLIS & GRAM, P.C.

By: Karen L. Reed, Esq.
888 SW Fifth Ave., Suite 1250
Portland, OR 97204
Phone: (503) 972-9924
Fax: (503) 972-9944
Email: kreed@batemanseidel.com

Attorneys for Petitioner

Facility:
Star Bright Plating Site
EPA ID No. ORN001002884
24225 South Highway 213
Mulino, Oregon 97013

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Petition for Reimbursement of Costs in the matter of American Home Mortgage Servicing, Inc., Petitioner, to be served by United States First Class Mail, postage prepaid, and by electronic mail on the following person, this 3rd day of December, 2010:

Deniz Ergener
Assistant Regional Counsel
US EPA Region 10
Ergener.Deniz@epamail.epa.gov
Mail Stop ORC-158
1200 6th Ave., Suite 900
Seattle WA 98101

Karen L Reed
Attorney for Petitioner