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

In re:	)	CERCLA 106(b) Petition No. _____
Safe Environmental Corporation of Indiana,	)	
	)	
Petitioner	)	
	)	
	)	
	)	

PETITION FOR REIMBURSEMENT OF COSTS, FEES, AND OTHER EXPENSES PURSUANT TO 42 U.S.C. § 106(b)(2)(A) AND (C)

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I. BACKGROUND INFORMATION

Pursuant to the "Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement for Petitions," Petitioner submits the following background information.

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U.S. EPA DOCKET NO.:

V-W-10-C-950

II. INTRODUCTION

Safe Environmental Corporation of Indiana ("Petitioner" or "Safe Environmental") respectfully submits this Petition for Reimbursement of Costs, Fees and Other Expenses ("Petition") pursuant to Section 106(b)(2)(A) and (C) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C. §

9606(b)(2)(A) and (C) to the Environmental Appeals Board ("EAB"). Petitioner seeks reimbursement of at least three hundred eighty-six thousand, seven hundred ninety-eight dollars ($386,798.00) plus interest, which includes response costs of two hundred ninety-five thousand, six hundred twenty dollars ($295,620.00) plus interest, attorney's fees of at least ninety thousand, five hundred seventy-eight dollars ($90,578.00), which is the current amount incurred by Petitioner, plus interest and expenses of six hundred dollars ($600.00) incurred in complying with the First Amended Administrative Order ("AO"), Docket No. V-W-10-C-950, issued by the United States Environmental Protection Agency, Region 5 ("EPA") pursuant to section 106(a) of CERCLA, 42 U.S.C. § 9606(a), on July 27, 2010. The AO required Petitioner and other Respondents, including Metin Aydin, the Joseph J. Piscazzi Revocable Trust, Gary L. Thomas, Nationwide Demolition Services, LLC and Asbestek, Inc. to perform a response action at the Cleveland Trencher Company, 21000 St. Clair Avenue, Euclid, Ohio 44117 ("Site"). The AO is attached as Exhibit 1.

Petitioner also seeks a determination from the EAB that it is not liable for administrative and/or oversight costs should the EPA assess any such costs to Petitioner. Despite Petitioner's requests, the EPA has not provided Petitioner with a formal accounting or determination of administrative and/or oversight costs associated with the AO.

The EPA prepared its Final Removal Pollution Report on November 29, 2011 and made the Final Pollution Report available to Petitioner on December 15, 2011. (Ex. 2.) Petitioner submitted its Final Report, revised pursuant to the EPA's instruction, on March 12, 2012. (Ex. 93.) On April 6, 2012, the EPA issued a Notice of Completion to Petitioner approving Petitioner's Final Report and acknowledging completion of the required action by Petitioner under the AO. (Ex. 95.)

Petitioner is entitled to reimbursement under CERCLA § 106(b)(2)(A) and (C) because Petitioner is not a liable party under CERCLA § 107(a) as explained more fully herein.

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 completion of the response action; and

3. Petitioner incurred response costs, attorney fees and other expenses in complying with the AO.

The EPA made Petitioner a Respondent to the AO based on a single, uncorroborated statement in an Affidavit of Tomas Amaya ("Amaya"). Amaya stated that Petitioner's then president, Anthony Paganelli ("Paganelli") let Amaya, and his one-man operation Asbestek, Inc. ("Asbestek"), use Petitioner's Ohio Asbestos Abatement Contractor License ("Ohio License") to abate friable asbestos at the Site. Subsequent to the AO, Amaya withdrew the single statement upon which the EPA relied. Amaya not only lied in his Affidavit, but his deposition testimony showed that he stole Petitioner's Ohio License and conspired with his *ad hoc* partner John Vadas ("Vadas") to forge Prior Notification for Asbestos Hazard Abatement Forms ("Notification Form") submitted to the Ohio Department of Health ("ODH") related to abatement efforts at the Site.[1] Additionally, subsequent to Amaya's deposition, Petitioner obtained Amaya's cell phone records which showed that Amaya lied in his deposition as well. Petitioner provided the cell phone records to the EPA and the EPA's regional counsel, Kevin Chow ("Chow") confronted Amaya with the records. In that meeting, Amaya reversed his deposition testimony again and lied to the EPA, thereby having provided four alternating, inconsistent versions of his original statement relied upon by the EPA in finding Petitioner liable under the AO. Amaya also outright

[1] In order to abate friable asbestos, ODH requires that the Notification Form identify the contractor that will perform the abatement and the contractor's Ohio License number.

admitted in his deposition that he fraudulently submitted false Abatement Specialist information the ODH for work at the Site in the exact same manner the Petitioner has proven he did with Petitioner's Ohio License.

Amaya and Asbestek were charged with and convicted of misdemeanor and felony charges in Cuyahoga County, Ohio related to their criminal abatement efforts at the Site. Amaya abandoned all obligations to Ohio authorities who investigated the failed abatement at the Site and made zero attempts to comply with the AO when it was his criminal actions that were at the root of all asbestos contamination identified in the AO. Amaya is incredible, unreliable, and not a shred of evidence, including phone records or the testimony of Vadas, corroborates any version of events he has described to date.

Petitioner denies it ever provided authority for Amaya to use its Ohio License and Petitioner had no involvement at the Site. Additionally, the following facts are **uncontested**: (1) Petitioner is not an owner of the Site; (2) Petitioner did not enter into any contracts relative to the Site; (3) Petitioner did not provide inspections, estimates, workers, advice, equipment, payment, insurance, applications, notifications, or any goods or services related to the Site; (4) Petitioner did not engage in the abatement, removal or transport of any material at the Site; (5) Petitioner did not submit any documents to the State of Ohio regarding the Site; (6) Amaya was not employed by Petitioner when Asbestek undertook its abatement efforts at the Site; and (7) Petitioner had no knowledge of the Site until Asbestek concluded its abatement efforts at the Site.

Petitioner submitted voluminous documentation to the EPA of the above evidence, and contested the EPA's tenuous finding and unsupported position that Petitioner was a liable party under the AO. Despite Petitioner's exhaustive efforts in this regard, the EPA declined to release Petitioner as a Respondent. Petitioner also made an offer of settlement to the EPA which the

EPA rejected. The EPA also declined to amend the order to add Vadas as a respondent when Vadas' own testimony proved that he was liable for contamination at the Site. Despite the six other parties who are all liable for friable asbestos contamination at the Site, only Petitioner complied with the AO to remove friable asbestos contamination. Petitioner complied with the AO in full and now seeks reimbursement of costs, attorney's fees and expenses because it is not and was not liable under CERCLA for response action at the Site. Petitioner is able to establish well beyond a preponderance of the evidence that it is not liable under CERCLA 107(a) and that reimbursement is warranted.

III. BACKGROUND

A. Factual Background

Petitioner is Safe Environmental Corporation of Indiana, located at 2301 Cline Avenue, Schererville, Indiana. Petitioner is licensed to perform asbestos, mold and other hazardous material abatement in multiple states. In 2007, Petitioner maintained Asbestos Hazard Abatement Contractor Licenses in Indiana, Illinois, Minnesota, Michigan and Ohio. (Ex. 3.)

In 1923, Cleveland Trencher was founded for purposes of manufacturing trenching machines. (Ex. 4.)

In 1987, Metin Aydin ("Aydin") purchased the Site from American Hoist & Derrick Co., of St. Paul, Minnesota and operated the factory until some point in the 2000s. (Ex. 4.)

On December 11, 2006, Amaya, an asbestos abatement supervisor who worked for Petitioner since 2001, incorporated Asbestek with the Indiana Secretary of State. (Ex. 5.) Amaya worked for Petitioner until he abruptly, and without notice, ceased further work on September 11, 2007, a date which coincided with Asbestek's abatement efforts at the Site.

At some time prior to 2007, through transactions unknown to Petitioner, Gary L. Thomas ("Thomas") obtained ownership of the Site. (Ex. 6.)

Also at some time prior to 2007, and also through transactions unknown to Petitioner, the Joseph J. Piscazzi Trust ("Piscazzi") became trustee of the Site through the Piscazzi Trust. (Ex. 7.)

On June 14, 2007, the City of Euclid, Ohio ("Euclid") issued a "Notice of Violation: Condemnation and Order to Demolish Unsafe Structure" to Thomas and Piscazzi relating to conditions at the Site. (Ex. 8.) In order to comply with the Notice, Thomas and Piscazzi learned that structures on the Site had asbestos that had to be removed prior to demolition.

On August 9, 2007, Affiliated Environmental Services ("Affiliated") prepared an Asbestos Survey of the Site and estimated the cost of asbestos abatement in the amount of one hundred two thousand, four hundred fifty dollars ($102,450.00). (Ex. 9.)

On August 14, 2007, Nationwide Demolition, LLC ("Nationwide"), through its owner Michael Collins ("Collins"), entered into a contract with Thomas to perform demolition services at the Site. (Ex. 10.) Thomas provided Collins with a copy of Affiliated's asbestos Survey.

On August 15, 2007, Collins, owner of Nationwide, contacted Vadas regarding Nationwide's need for asbestos abatement of structures on the Site. Vadas was an unemployed asbestos abatement worker who knew Collins from prior work. Vadas was a prior asbestos abatement supervisor with Petitioner who left on poor terms in 2005. (Ex. 11, 61:12-63:14; 310:24-311:20.) Collins faxed Vadas the Affiliated Survey with redacted estimate figures and inquired as to whether Collins could "get the job done for fifty thousand." (Ex. 11, 153:3-14.) Vadas contacted Amaya, whom he knew through his prior work with Petitioner, and whom Vadas was aware was attempting to start his own abatement business.

On August 15, 2007, Vadas and Amaya met in Hammond, Indiana to discuss using Asbestek to perform the asbestos abatement work for Nationwide. The two agreed that Vadas would be the project manager who would handle the paperwork. (Ex. 11, 155:13-3; 124:8-9; 128:18-19; 155:1-4.) Amaya would arrange for laborers, insurance and waste disposal. The two would split the profit, which Amaya estimated at $7,500 each. (Ex. 12, 82:13-18; 237:7-8.)

Also on August 15, 2007, Amaya and Vadas discussed the need for an Ohio License which is required by the ODH in order to undertake the **friable** asbestos abatement in Ohio.[2] According to Amaya, Vadas told him that Nationwide had an Ohio License that Asbestek could use for the abatement. (Ex. 12 77:1–16.) According to Vadas, Amaya advised that Asbestek did not have an Ohio License, but Amaya could get Petitioner's Ohio License if needed. (Ex. 11, 132:12 – 133:9.)

On August 15, 2007, despite either Amaya's or Vadas' deposition testimony regarding the intended source of a necessary Ohio License, Vadas sent a facsimile to Collins stating that Asbestek had applied for its Ohio License (Ex. 13.)

On August 16, 2007, Vadas prepared and signed a contract with Nationwide for non-friable and friable asbestos abatement at the Site for a fee of fifty thousand dollars ($50,000). He faxed the contract to Collins, who signed it and faxed it back to Vadas. (Ex. 14.)

On August 16, 2007, Vadas faxed Nationwide a letter stating that he was putting together a packet for the State because the State "may want to see something" and that the friable asbestos "profile may take several days to approve." (Ex. 15.)

On approximately August 18, 2007, Asbestek began non-friable abatement at the Site. (Ex. 12 130:9 - 131:3.)

[2] The distinction between friable and non-friable is emphasized because Asbestek ultimately undertook the non-friable remediation weeks prior to the friable abatement, the latter which required an Ohio License.

On August 23, 2007, eight days after discussing Asbestek's need for an Ohio License with Amaya, Vadas faxed Nationwide a letter informing Collins, Nationwide's owner, that he just learned that an Ohio License was required for friable asbestos abatement, even though he was fully aware of this requirement prior to entering into the contract. (Ex. 16; Ex. 11, 133:1 - 136: 23.) Vadas further advised Nationwide that had Asbestek known better, Asbestek would have applied for its Ohio License at the time it "registered" with the Ohio Secretary of State ("Secretary of State"). In fact, Asbestek's did not register with the Secretary of State until September 25, 2007, which was after Asbestek completed its friable asbestos abatement efforts at the Site. (Ex. 17.)[3] Vadas assured Nationwide that the non-friable asbestos removal, which was currently underway, would be completed on this date of August 23, 2007. (Ex. 16.)

On August 24, 2007, Vadas faxed Nationwide an invoice for non-friable asbestos abatement. He claimed that Asbestek was now registered with the Secretary of State, which was false. Vadas wrote that Asbestek's Ohio License application was submitted, but that there may be a two to three week delay in receiving it. Vadas knew that no Ohio License application had ever been submitted to ODH. (Ex. 11, 130:19-131:4.; 187:11-188:6.) Vadas further stated that Asbestek was looking into working with a "business associate" who had an Ohio License, which would obviate the two or three week delay in being approved by the State of Ohio. (Ex. 18.) No such request for "approval" had ever been submitted to the State of Ohio.

On August 31, 2007, at 10:39 a.m., Vadas faxed Nationwide a letter stating that Asbestek will be "using" Petitioner's Ohio License. He also stated that the original Notification Form would be sent to ODH on this date. (Ex. 19.)

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[3] Amaya did not prepare Asbestek's registration application to the Ohio Secretary of State until a month later, on September 20, 2007, and immediately prior to Asbestek's friable asbestos abatement efforts at the Site. Notably, this registration application coincides with Vadas' eleventh hour, fourth revised Notification Form to ODH, the significance of which is discussed *infra*, in Section V.B.2.c.

Also on August 31, 2007, at 10:39 a.m., **after** advising Nationwide that Asbestek would be using Petitioner's Ohio License, Vadas faxed the Ohio Environmental Protection Agency ("Ohio EPA") the EPA Notification Form[4] and identified the Contractor as "Asbestek" with an Ohio License "pending in Ohio." (Ex. 20.) He did not advise the Ohio EPA about any relationship with Petitioner. Asbestek never submitted a revised Notification Form to the Ohio EPA despite multiple revised Notification Forms that were subsequently submitted to ODH.

Also on August 31, 2007, Vadas obtained a money order for sixty-five dollars ($65.00) from Harris Bank and had the teller list the remitter as "Safe Environment [*sic*] Corp."[5] (Ex. 21.) Petitioner did not authorize or cover the cost of this remittance.

Also on August 31, 2007, Vadas prepared (but did not file) an ODH Notification Form on his computer identifying the contractor as "Safe Environment [*sic*] Corp. of Indiana" with Petitioner's phone number and the contact person as Petitioner's then president Anthony Paganelli ("Paganelli"). Vadas identified the "Name of person filing this notice" as Paganelli. Vadas left the Abatement Specialist ("Specialist")[6] information blank. (Ex. 22.) This Notification Form was never submitted to ODH.

Also on August 31, 2007, Vadas edited Exhibit 22 by removing "Anthony Paganelli" as Petitioner's contact person and by adding his own name, "John Vadas," and by identifying the contact phone number for Safe Environmental as Vadas' own cell phone number. He added the

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[4] Like ODH, the Ohio EPA requires a Notification Form to be submitted pursuant to Ohio Administrative Code § 3745-20-03 at least ten working days prior to removal or disturbance of asbestos containing material.

[5] On all of his documentation, including Notification Forms, bank money orders, spurious envelopes, and communications, Vadas erroneously refers to Save Environmental as "Safe Environment" including in his attempts to use if formally, such as in "Safe 'Environment' Corp. of Indiana."

[6] In Ohio, a Specialist is required to oversee an asbestos abatement action. A Specialist requires an Ohio "Supervisor License." The terms are synonymous, and in deposition testimony are used interchangeably. Petitioner submits, and both Vadas and Amaya agree, that Bonilla was listed as the Specialist using Bonilla's Ohio Supervisor License on the Notification Form even though Bonilla was unrelated to the abatement at the Site and Amaya and Vadas had no plans for him to be present.

Specialist as "Carlos Bonilla" ("Bonilla"). He changed the "Name of person filing this notice" to John Vadas. He indicated that the project would begin on September 13, 2007 and would conclude on September 22, 2007, for a total of ten (10) days. (Ex. 23.)

Also on August 31, 2007, Vadas generated a spurious envelope to ODH purporting to be from "Safe Environment [*sic*] Corp." for submission of the Notification Form and payment to ODH. (Ex. 24; Ex. 11, 481:24-482:21.)

Also on August 31, 2007, at 3:42 p.m., Amaya faxed a copy of Petitioner's Ohio License, Bonilla's Ohio Abatement Supervisor License ("Supervisor License") and Bonilla's Supervisor Refresher Certificate ("Supervisor Certificate") each of which Amaya deceptively obtained from Petitioner. (Ex. 25; Ex. 12, 179:21-183:3)

Also on August 31, 2007, at approximately 4:30 p.m., Vadas sent by certified mail to ODH the Notification Form bearing fraudulent information (Ex. 23) and the forged money order (Ex. 21), in the spurious "Safe Environment Corp" envelope (Ex. 24) and mailed it to ODH.

Also on August 31, 2007, at 7:40 p.m., Vadas faxed a letter to Nationwide and listed "Safe Environment [*sic*]" on the letterhead. He indicated that the contact phone number for "Safe Environment" was Vadas' cell phone number. He faxed Nationwide a copy of Petitioner's Ohio License, Bonilla's Supervisor License and Bonilla's Supervisor Certificate (all of which he received from Amaya) and a copy of the ODH Notification Form that he mailed hours earlier to the ODH. He indicated in the facsimile that he foresaw "no problems" with the EPA. He suggested that the dates listed on the ODH Notification Form were purposely incorrect and that Nationwide should not be alarmed by this falsification by stating, "I just have to put something that looks good to the regulator." Unlike his documentation to ODH that the project would take ten days, he advised Nationwide that Asbestek will "knock it out in two days, 3 at the most." (Ex. 26.)

On September 11, 2007, Amaya worked his last day for Petitioner, abruptly and without notice to Petitioner, as he never showed up again to work. Amaya had no further communication with Petitioner after this date.

On September 12, 2007, Vadas faxed the first revised Notification Form to ODH. As in the original, he indicated the Safe Environmental contact person as "John Vadas," identified his own cell phone number as the Safe Environmental contact number, and identified the Specialist as Bonilla. He changed the dates of friable asbestos abatement from September 14, 2007 to September 24, 2007, for a total of eleven days. (Ex. 27.) Asbestek did not perform any friable asbestos abatement at the Site as of this date.

On September 17, 2007, Vadas faxed the second revised Notification Form to ODH. As in the original, he indicated the Safe Environmental contact person as "John Vadas" and identified his own cell phone as the Safe Environmental contact number. He changed the Specialist to Amaya, even though he knew Amaya did not have a valid Ohio Supervisor License. He changed the dates of friable abatement from September 21, 2007 to September 25, 2007, for a total of five days. (Ex. 28.) Asbestek did not perform any friable asbestos abatement at the Site as of this date.

On Friday, September 21, 2007, Vadas faxed the third revised Notification Form to ODH. He changed the contact person for Safe Environmental to "Anthony Paganelli" but concealed this change by failing to identify it in the Notification Form's "Revision Section."[7] He did acknowledge in the Revision Section that the Specialist had been changed to Amaya, even though this change occurred in the September 17, 2007 Notification Form. He changed the dates

[7] The Notification Form has a Revision Section that alerts the ODH to changes that are being made. In the third revised form, Vadas purposely did not identify that this change was being made, instead identifying a change that had been made in the second revised Notification Form.

of friable abatement from September 22, 2007 to September 26, 2007, for a total of five days. (Ex. 29.) Asbestek did not perform any friable asbestos abatement at the Site as of this date.

On Saturday, September 22, 2007, Asbestek commenced abatement of friable asbestos at the Site.

On Sunday, September 23, 2007, Asbestek concluded its friable abatement efforts at the Site, even though abatement was not properly done, for a total maximum abatement period of **two days**. Asbestek notified Nationwide that Asbestek concluded the friable asbestos abatement and that demolition could begin even though Vadas and Amaya were aware the abatement was incomplete. Vadas took no efforts to notify ODH that friable asbestos abatement concluded at this time, despite the change in abatement dates, but only did so two days later when ODH made an unannounced Site inspection.

On September 23 or 24, 2007, Nationwide began demolition of structures at the Site.

On September 25, 2007, ODH made an unannounced visit to the Site. (Ex. 30.) When Vadas learned of the inspection at the Site, he faxed the fourth revised Notification Form to ODH. He changed the dates of friable abatement to September 22, 2007 through September 23, 2007, for a total of two weekend days. (Ex. 31.) He changed the "setup" period to be included in the abatement period. He advised ODH that the friable asbestos abatement project was completed two days earlier.

On September 26, 2007, ODH contacted Petitioner regarding violations at the Site. ODH provided Petitioner's then Manager Rick Lovelace ("Lovelace")[8] with information on the Notification Form. Lovelace called the cell phone listed as the contact person for Safe Environmental and Vadas answered the phone. Lovelace told Vadas he had no authority to use

[8] Lovelace is currently Petitioner's president.

Petitioner's Ohio License and to cease any further use of it. Lovelace immediately informed ODH by faxed letter that Petitioner had no current projects in Ohio and that Vadas was not employed or authorized to act as an agent for Petitioner (Ex. 32.)

On September 27, 2007[9], Euclid issued a Stop Work order to Nationwide and Thomas. (Ex. 33.) based on Asbestek's failed abatement at the Site.

On September 28, 2007[10], Euclid declared the Site a public nuisance and ordered Piscazzi and Thomas to secure the Site and prevent entry. (Ex. 34)

From September 26, 2007 to the present, neither Vadas nor Amaya made any attempt to contact Petitioner in any manner despite the significant issues that had developed with abatement at the Site.

On November 10, 2008, Nationwide file a civil suit in the Court of Common Pleas for Richland County, Ohio, ("Richland County") Case No. 2008-CV-2002 for breach of contract and negligence against Petitioner, Asbestek, Thomas and Piscazzi relating to Nationwide's loss of revenue and property at the Site. (Ex. 35.) Nationwide alleged, in the alternative, that Asbestek did not have authority to use Petitioner's License and therefore fraudulently induced Nationwide to enter into a contract when Asbestek did not have an Ohio License. Defendants, including Petitioner, subsequently filed counterclaims and cross claims.

On January 14, 2010, the Office of the Ohio Attorney General ("OAG") prepared a criminal complaint against Amaya for recklessly causing or creating a substantial risk of physical harm related to the failed abatement at the Site. (Ex. 36.)

[9] Paul Beno ("Beno"), Euclid's Acting Commissioner, erroneously dated the September 27 letter "August 27."

[10] Similar to his letter from the day prior, Beno erroneously dated the September 28 letter "August 28."

On February 12, 2010, the OAG, through the Cuyahoga County, Ohio Prosecutor issued a complaint against Amaya for Criminal Damaging related to Asbestek's failed abatement at the Site in violation of Ohio Revised Code § 2909.06, a misdemeanor of the first degree. (Ex. 37.)

On February 16, 2010, Asbestek was indicted by the OAG through the Cuyahoga County Prosecutor for violating Worker Protection Requirements for Abatement Projects in violation of Ohio Revised Code § 3710.08, a felony of the fourth degree. (Ex. 38.)

On March 15, 2010, Amaya pled guilty to Criminal Damaging related to Asbestek's failed abatement at the Site in violation of Ohio Revised Code § 2909.06, a misdemeanor of the first degree, and were ordered to pay restitution in the amount of $1,500.00 to ODH; $1,500.00 to the Cleveland Division of Air Quality; and $500.00 to the Ohio EPA. (Ex. 39.)

Also on March 15, 2010, Asbestek and Amaya pled guilty to violating Worker Protection Requirements for Abatement Projects in violation of Ohio Revised Code § 3710.08, a felony of the fourth degree and was ordered to pay restitution a fine in the amount of ten thousand dollars ($10,000.00). Asbestek paid the fine on March 11, 2011. (Ex. 38.)

B. Procedural Background

On June 21, 2010 the EPA issued its first Administrative Order for the Site, naming Aydin, Piscazzi, Thomas, Nationwide and Asbestek as respondents and "liable parties" as defined by 42 U.S.C. § 9606(a) relating to the presence of hazardous substances at the Site including asbestos, lead and methyl ethyl ketone. (Ex. 40.)

On July 9, 2010, counsel for Nationwide notified the EPA about the Richland County action. (Ex. 41.) Counsel further provided a March 24, 2010, Affidavit of Amaya (Ex. 42) and a March 27, 2010, Affidavit of Collins (Ex. 43) for the purpose of compelling the EPA to add Safe Environmental as a Respondent and liable party. Amaya stated in his affidavit that Asbestek used Petitioner's Ohio License with "full permission and authority" from Paganelli, testimony

that he later denied. (Ex. 42; Ex. 12, 157:13 – 159:4; 177:2-4.) Collins stated, *inter alia*, in his affidavit that Asbestek warranted that Petitioner would "take over" the project if Asbestek was unable to procure an Ohio License, testimony which is wholly unsupported by Amaya in his deposition. (Ex. 12.)

On July 27, 2010, the EPA issued its first amendment of the June 21, 2010 Administrative Order ("AO") adding Petitioner as a respondent and liable party. The EPA made no specific findings of fact with respect to Petitioner beyond the language it used in the original AO but simply amended the language to add Safe Environmental as a contracting party with Nationwide and Asbestek. (Ex. 1.) No such contract ever existed.

On July 23, 2010, Lovelace, Petitioner's counsel, Nationwide's counsel, and EPA On-Scene Coordinator Stephen Wolfe ("Wolfe") conducted a site inspection to allow Petitioner to determine the cost of cleanup. Lovelace determined that under the removal action identified in the AO, i.e. addressing asbestos contaminants as well as other hazardous chemical issues, the extent of the demolition remnants and improperly abated standing structures required a total demolition of all structures and transport of all materials at a cost of approximately eight hundred thousand dollars ("$800,000.00").

On August 11, 2010, a Conference call was attended by counsel for Petitioner, Nationwide and Piscazzi, Wolfe, EPA Enforcement Specialist Carol Ropski, and EPA Regional Counsel Kevin Chow ("Chow") to discuss removal requirements and deadlines under the AO. On this date the EPA identified August 23, 2010, as the date for the Notice of Intent to Comply with the AO, with the Work Plan and Safety Plan to follow statutorily thereafter.

On August 20, 2010, the EPA extended deadlines for the Notice of Intent to Comply and the Work Plan and Safety Plan to September 21, 2010. (Ex. 44.)

On August 23 and 24, and September 3, 2010, Safe Environmental's counsel took the video depositions of Amaya and Vadas for purposes of defending the Richland County matter and to provide evidence to the EPA that Petitioner was not liable under the AO. Petitioner invited the EPA to attend these depositions, which the EPA did in their entirety. Amaya's transcript and accompanying deposition exhibits (Ex. 12) and Vadas' transcript and accompanying deposition exhibits (Ex. 11) are attached hereto. Paganelli was and has remained available for his deposition, but no party has requested to depose him as of this Petition. Similarly, Petitioner offered the EPA the opportunity to interview Paganelli on a number of occasions, but no such interview was ever conducted by the EPA.

On September 20, 2010, the EPA again extended Respondents' deadlines for the Notice of Intent to Comply and the Work Plan and Safety Plan to October 21, 2010. (Ex. 45.)

On October 20, 2010, Petitioner submitted to the EPA a formal Contest of Responsibility and Request for Release as a Liable Party ("Contest of Responsibility"). Petitioner provided the EPA sworn deposition testimony from Amaya that refuted Amaya's affidavit statement that Petitioner's gave Amaya authority to use Petitioner Ohio License. Petitioner also provided evidence that Amaya and Vadas engaged in fraud and deceit in its use of Petitioner's Ohio License. (Ex. 46.) Despite this evidence, the EPA declined to release Petitioner as a liable party.

On October 21, 2010, Petitioner submitted its Notice of Intent to Comply. (Ex. 47.)

Also on October 21, 2010, Petitioner submitted its Work Plan and Safety Plan. (Ex. 48)

On November 8, 2010 the EPA requested clarification of Petitioner's Notice of Intent to Comply and found the Work Plan to be deficient. (Ex. 49.) The EPA gave Petitioner until November 15, 2010 to provide clarification and correct deficiencies.

On November 10, 2011, the EPA extended the deadline for Petitioner to provide clarification and correct deficiencies to November 23, 2010. (Ex. 50)

On November 11, 2010, Petitioner submitted to the EPA supplemental evidence in support of its Contest of Responsibility. (Ex. 51) Specifically, Petitioner provided cellular phone records to the EPA that contradicted Amaya's sworn deposition testimony with respect to circumstances surrounding his claim of obtaining authority for use of Petitioner's Ohio License.

On November 15, 2010, the EPA acknowledged that Petitioner's supplemental evidence identified in Exhibit 51 prompted the EPA to interview Amaya.

On November 16, 2010 the EPA interviewed Amaya and confronted him with the cellular phone records provided by Petitioner. Upon confrontation, Amaya modified his previously sworn testimony yet again. The EPA was satisfied with Amaya's third version of events and again declined to release Petitioner as a liable party.

On November 18, 2010, Petitioner submitted to the EPA additional supplemental evidence in support of its Contest of Responsibility. (Ex. 52.) Specifically, Petitioner identified new factual contradictions raised by Amaya before the EPA on November 16, 2011.

Also on November 18, 2010, Petitioner and its attorney met with the EPA at the Regional Office in Chicago to discuss factual findings, procedural requirements and settlement. Chow advised that the EPA would review all settlement offers submitted. Of specific concern to Petitioner was the extent of potential contamination of hazardous substances at the Site which required, as the EPA agreed, complete demolition and removal of all structures at the Site. Wolfe agreed with Petitioner that complete demolition and removal, in order to address the required action under the AO, would cost a private contractor approximately $800,000 as estimated by Petitioner. At the meeting, Chow pointed out that Petitioner relied on the testimony of Amaya and Vadas in support of its arguments against liability but Petitioner had not offered any deposition testimony from Paganelli. Petitioner informed the EPA that it continually made Paganelli available for deposition to all parties in the Richland County action but none of the

parties has ever requested to take his deposition. However, Petitioner advised the EPA that Paganelli was available for any interview that the EPA wished to conduct. Despite this, the EPA never interviewed Paganelli.

On November 22, 2010, Safe Environmental made a monetary settlement offer of fifty thousand dollars ($50,000.00) to the EPA in an effort to resolve its status under the AO pursuant to 42 U.S.C. §9622. (Ex. 53.)

On November 22, 2010, the EPA rejected the settlement offer, stating that the "offer of settlement is insufficient in light of [Petitioner's] liability and the degree of asbestos-related work to be done at the Site, the cost of which is likely to be multiple times that of [the] offer." (Ex. 54.)

On November 23, 2010, Petitioner responded to the EPA's requests for clarifications and requests for corrections in deficiencies. (Ex. 55.)

On November 26, 2010, the EPA advised Petitioner that it was considered to be in "non-compliance" with AO Section 2 ("Designation of Contractor, Project Coordinator, and On-Scene Coordinator") and Section 3.1 (Work Plan and Implementation) and that the EPA would consider its options with respect to enforcing the AO. (Ex. 56.) The EPA never informed Petitioner that it was out of compliance with respect to Petitioner's Intent to Comply nor did the EPA take any action against Petitioner to enforce the AO. Additionally, the EPA did not perform any cleanup or remediation of the Site.

On March 15, 2011, Petitioner contacted the EPA to determine whether the EPA was open to continued discussion with respect to Petitioner's position on liability and/or settlement.

On March 16, 2011, the EPA advised Petitioner that it was reviewing the manner in which it intended to proceed under the AO. The EPA requested that Petitioner keep the EPA

apprised of the Richland County trial as the outcome was likely to influence the EPA's enforcement actions. Trial is currently scheduled for June 14, 2012.

On May 12, 2011, Petitioner learned during discussions at a pretrial for the Richland County case that the EPA had determined that asbestos-related cleanup could be performed without the necessity of razing standing structures on the Site.

On June 3, 2011, the EPA confirmed with Petitioner' attorney that the cleanup could be performed without demolition of existing structures.

On June 6, 2011, the EPA advised Petitioner that the EPA was preparing to perform the cleanup of the Site but remained willing to allow Respondents to do the work. Petitioner renewed its November 2010 request to the EPA of being responsible under the AO solely for friable asbestos removal. The EPA responded that it would reconsider this request.

On June 15, 2011, the EPA advised Petitioner that it would "look favorably" on Petitioner's Intent to Comply being limited to addressing asbestos contamination at the Site. In response, Petitioner requested that Wolfe meet with Petitioner at the Site to address the extent of the EPA's requirements for asbestos remediation and removal.

On June 27, 2011, Petitioner and its counsel attended a Site inspection during which Wolfe identified the EPA's requirements for asbestos remediation and removal. (Ex. 57.) Petitioner brought two separate abatement companies, Hygieneering, Inc. of Willowbrook, Illinois ("Hygieneering") and Precision Environmental, 5500 Old Brecksville Road, Independence, Ohio 44131 ("Precision Environmental") to the inspection in order to obtain independent estimates for abatement of existing structures and removal of multiple asbestos-contaminated debris piles.

On June 28, 2011, Hygieneering provided Petitioner with an estimate for asbestos related remediation and removal at a cost of greater than five hundred thousand dollars ($500,000.00.)

Also on June 28, 2011, Precision Environmental provided Petitioner with an estimate of two hundred thirty-six thousand dollars ($236,000.00).

On June 30, 2011 the EPA advised Petitioner's that its individual compliance under the AO would be limited to asbestos remediation and removal. The EPA extended the deadline for Petitioner's Intent to Comply and the Work Plan and Safety Plan to July 8, 2011. The EPA also agreed to review a Work Plan and Safety Plan submitted prior to July 8, 2011 and provide any necessary guidance. (Exs. 58, 59.)

Also on June 30, 2011, the EPA advised Petitioner that although its deadline for the Notice of Intent to Comply and the Work Plan and Safety Plan had been extended to July 8, 2011, the EPA reserved the right to commence cleanup of the site on July 5, 2011. Petitioner advised the EPA that the EPA's decision to commence cleanup prior to the Intent to Comply deadline of July 8, 2011 was arbitrary and capricious and was detrimental to Petitioner's ability to meet the July 8, 2011 deadline in light of modified requirements under the AO. (Ex. 59.)

On July 1, 2011, Petitioner submitted its Work Plan and Safety Plan for preliminary review by the EPA. (Ex. 60.)

On July 5, 2011, the EPA indicated that Petitioner's Work Plan and Safety Plan were under review. (Ex. 61.)

On July 8, 2011, Petitioner submitted a modified Intent to Comply. (Ex. 62.) Specifically, Petitioner confirmed the EPA's prior approval that the Work Plan from Petitioner would be limited to asbestos contamination cleanup at the Site, that the cleanup of asbestos contamination would be performed by Precision Environmental, that the cleanup of asbestos would commence August 15, 2011, and that the EPA would allow a reasonable period of time for submission of a revised Work Plan. In the Intent to Comply, Petitioner denied that the

compliance was an admission of liability and specifically denied any liability with respect to the findings in the AO.

On July 8, 2011, the EPA approved Safe Environmental's Intent to Comply.

On July 13, 2011, with authorization from the EPA, Petitioner submitted a revised Work Plan. (Ex. 63.)

On July 14, 2011, due to revisions in the Work Plan (Ex. 63), Precision Environmental revised its estimate to two hundred ninety-five thousand, six hundred twenty dollars ($295,620.00).

Also on July 14, 2011, with authorization from the EPA, Petitioner submitted its Asbestos Air Sampling Monitoring Plan. (Ex. 64.)

On July 27, 2011, Petitioner submitted a revised Work Plan and Health and Safety Plan pursuant to guidance from the EPA to Precision Environmental. (Ex. 65.)

On August 1, 2011, Petitioner submitted a subsequently revised Work Plan and Health and Safety Plan pursuant to additionally guidance from the EPA to Precision Environmental. (Ex. 66.)

On August 5, 2011, the EPA approved the August 1, 2011 revised Work Plan and Safety Plan and incorporated it into the AO. The EPA authorized Petitioner to have Precision Environmental and its subcontractor, RCS Environmental Group, LLC ("RCS") contact EPA's On-Scene Coordinator directly for implementation of the Work Plan and Safety Plan. (Ex. 67.)

On August 10, 2011, Petitioner requested an extension of the start date from August 15, 2011 to August 22, 2011. (Ex. 68.)

Also on August 10, 2011, Petitioner provided the EPA and Precision Environmental with access agreements from Piscazzi, Thomas and Pauline Aydin, widow of Aydin. (Ex. 69.)

On August 11, 2011, the EPA approved the start date of August 22, 2011. (Ex. 70.)

On August 22, 2011, Precision Environmental commenced cleanup at the Site on behalf of Petitioner.

On October 3, 2011, Petitioner requested a modification of the completion date in the Work Order from September 27, 2011 to October 12, 2011. (Ex. 71.)

On October 12, 2011, the EPA approved extension of the Work Plan completion date to October 26, 2011. (Ex. 72.)

On October 31, 2011, the EPA extended the completion date to November 14, 2011. (Ex. 73.)

On November 1, 2011, Precision Environmental submitted an invoice to Petitioner in the amount of $295,620.00 along with waste manifests. (Exs. 74, 75.) Precision Environmental notified Petitioner that it would forward Air Monitoring Reports when they were completed.

On November 11, 2011, the EPA requested that Petitioner attend a final inspection once the EPA determined that the remediation and removal was completed. (Ex. 76.)

On November 17, 2011, Petitioner received the Asbestos Monitoring Report from Precision Environmental. (Ex. 75.)

On November 23, 2011, the EPA conducted a final Site inspection. The EPA informed Petitioner that all cleanup requirements for friable asbestos under the AO had been completed to the satisfaction of the EPA. (Ex. 77.)

On November 29, 2011, the EPA issued its Final Pollution Report. The Final Pollution Report was not made available to Petitioner until December 12, 2011. (Ex. 78.)

On December 15, 2011, Petitioner submitted its Final Report to the EPA, pursuant to Section 3.5 of the AO. (Ex. 75.)

On January 9, 2012, the EPA advised Petitioner that its Final Report was deficient and advised that it required increased specificity regarding action performed under the Work Plan.

The EPA also advised Petitioner that approval of the Final Report and the EPA's Notice of Completion were required prior to Petitioner's submission of its CERCLA §106(b) petition. Petitioner advised the EPA that while it would address its deficiencies and submit a revised Final Report, Petitioner disagreed that EPA approval of the Final Report or the EPA's Notice of Completion were "required actions" under the AO that determined commencement of the sixty day statute of limitations for purposes of a CERCLA §106(b) petition. Petitioner asserted that submission of the Final Report itself was completion of the "required action" thereby commencing the statute of limitations. Petitioner and the EPA discussed the possibility of a tolling agreement to address the statute of limitations issue.

On January 12, 2012, the EPA advised Petitioner that it would not enter into a tolling agreement to address the "required action" and the statute of limitations issues due to jurisdictional restriction. Petitioner informed the EPA that in the absence of a tolling agreement, Petitioner would be required to consider submission of the Final Report, regardless of approval, as completion of the required action. (Ex. 79.)

On January 17, 2012, the EPA advised Petitioner that the EPA would not consider the required action under the AO to be complete until a Final Report met the requirements of the AO and 40 C.F.R. §300.165 and that the sixty-day time statutory period for a CERCLA § 106(b) petition is not triggered until such requirements are met. (Ex. 80.)

Also on January 17, 2012, Petitioner sought Precision Environmental's assistance in preparing a revised Final Report pursuant to the EPA's January 9, 2012 requested modifications. (Ex. 81.)

On January 19, 2012, Petitioner requested that the EPA issue an amended AO stating that approval of the Final Report was a "required action" under the AO.

On February 3, 2012, in a discussion with Petitioner's attorney, Chow advised that the EPA, after having considered an amendment to the AO, declined to issue an amendment. The EPA maintained its position that a Final Report meeting the requirements of 40 C.F.R. § 300.165 is a "required action" under the AO. (Ex. 82.) Petitioner's attorney advised Chow that it expected to have an amended Final Report submitted to the EPA in the near future but that absent an amended AO or a tolling agreement, Petitioner was obligated to file its CERCLA § 106(b) Petition within the statute of limitations.

On February 13, 2012, Petitioner filed a Petition for Reimbursement of Costs, Fees, and Other Expenses Pursuant to 42 U.S.C. § 106(B)(2)(A) and (C) along with Exhibits 1-90 with the EAB, Petition No. CERCLA 106(b) 12-01.

On March 2, 2012, Petitioner submitted its revised Final Report to the EPA. (Ex. 91.)

On March 9, 2012, the EPA requested additional revisions to Petitioner's Final Report (Ex. 92.)

On March 12, 2012, Petitioner submitted its second revised Final Report incorporating the EPA's requested revisions. (Ex. 93.)

On March 28, 2012, the EPA filed a Motion to Dismiss Petitioner's February 13, 2012 Petition ("Motion") with the EAB on the bases that the EPA had not approved the Final Report and had not issued a Notice of Completion. (Ex. 94.) The EPA advised in its Motion that the EPA would determine by April 6, 2012 whether Petitioner completed the required action.

On April 6, 2012, the EAB granted the EPA's Motion and dismissed the Petition without prejudice, finding that the required action under the AO was not completed until the EPA made this determination. In its order, the EAB acknowledged Petitioner's right to re-file the Petition upon the EPA's confirmation of completion of the required action under the AO. (Ex. 95.) The EAB did not grant Petitioner the opportunity to oppose the Motion.

Also on April 6, 2012, the EPA approved Petitioner's Final Report and issued its Notice of Completion. (Ex. 96.) The EPA acknowledged that Petitioner completed the requirements of the AO.

C. Response Action

On behalf of Petitioner, Precision Environmental undertook decontamination, removal and disposal of asbestos contaminated material at and from the Site between August 22, 2011 and November 14, 2011. Precision Environmental followed the Work Plan submitted on July 26, 2011, and approved by the Agency on August 5, 2011. Under the Work Plan, Precision Environmental removed and disposed of asbestos-containing pipe insulation, hanging roof materials and debris piles, and decontaminated the interior building structures and exterior concrete slabs located throughout the Site. Removed material included steel, concrete, brick, wood, roofing material, plastic, insulation, fireproofing, and other undetermined building components. During the removal period, Precision Environmental maintained Ohio License AC1154. Precision Environmental complied with ODH and Ohio EPA regulations. (Ex. 75.)

Precision Environmental transported all asbestos containing material to Minerva Enterprises, Inc., 9000 Minerva Rd., Waynesburg, OH 44688 ("Minerva") between September 6, 2011 and October 16, 2011. Minerva is licensed to accept asbestos-contaminated waste by the Ohio EPA through Permit No. P0104984. Precision Environmental removed one thousand six hundred thirty-seven and fourteen one-hundredths (1,637.14) tons of material from the Site to Minerva for disposal. Asbestos removal was monitored by RCS. RCS conducted its monitoring by employing a support zone and a decontamination facility, a personal protective equipment protocol, an air sampling plan, a daily perimeter air monitoring plan, a daily personal air monitoring plan and a final clearance evaluation. Air Monitoring Reports include (1) transmission electronic microscopy air monitoring data sheets; (2) polarized light microscopy

data sheets; (3) daily field logs; and (4) certifications. Analytical results for all data are contained in each respective section. On October 31, 2011, RCS prepared an Asbestos Monitoring Report.

On November 23, 2011, Petitioner appeared at a Site Inspection at which time the EPA advised that removal and remediation actions had been completed to the EPA's satisfaction. At that time the EPA provided Petitioner with requirements for the Final Report. Petitioner submitted its Final Report on December 15, 2011. In response to comments and requests by the EPA, Petitioner filed amended Final Reports on March 2, 2012 and March 12, 2012.

On April 6, 2012, the EPA approved Petitioner's Final Report of March 12, 2012 and issued its Notice of Completion to Petitioner.

IV. SUMMARY OF ARGUMENT

Petitioner is not liable under CERCLA §107(a) (42 U.S.C. § 9607(a)) and is entitled to reimbursement of costs and attorney fees under CERCLA § 106(b)(2)(A) and (C) (42 U.S.C. § 9606(b)(2)(A) and (C)) for its compliance with the AO. The EPA's determination that Petitioner is liable resulted from the single, uncorroborated affidavit statement of Amaya that Amaya received "full permission and authority from Petitioner to 'use' Petitioner's Ohio License for a "small job in Ohio." Subsequent to the EPA's reliance on Amaya's statement, Amaya withdrew his statement when he was deposed by Petitioner. He also testified in his deposition that he never had personal contact with Paganelli when he obtained Petitioner's Ohio License, and then lied to the EPA and said Paganelli was present. He testified that he purposely forged Specialist information to ODH for Asbestek's abatement at the Site, which by itself establishes Amaya's proclivity for lying and strips him of any credibility. The multiple, inconsistent and contradictory statements by Amaya make him completely unreliable and no reasonable fact

finder could find that Petitioner had any liability under CERCLA 107(a) based on his statement. All other evidence, including statements by Vadas, Collins, Bonilla, Paganelli and Lovelace, and phone records of Amaya and Petitioner, invalidate Amaya's claim that Petitioner's ever provided its Ohio License for work at the Site.

Furthermore, it is uncontested by the EPA, ODH, the Ohio EPA, and all witnesses, including Amaya, Vadas, Collins, Thomas, and Piscazzi that: (1) Petitioner lacked any knowledge of the Site, including its name, location, work Asbestek was to perform there, prior estimates, parties involved or even that Asbestek existed; (2) Petitioner did not provide workers, equipment, assessments, estimates, inspections, payments, or insurance to any effort at the Site; (3) Petitioner did not prepare, review, or submit notifications, applications, payments, or any documents to any State agency regarding any effort at the Site; and (4) Petitioner did not engage in any contracts, verbal or written, with Amaya, Asbestek, Nationwide, Thomas or Piscazzi.

Furthermore, substantial evidence shows that Amaya and Vadas never had any authority, but in fact stole Petitioner's Ohio License and used it in order to perform work under Asbestek's contract with Nationwide. This evidence includes the following: (1) Amaya and Vadas are inconsistent in their versions of attempts to obtain an Ohio License; (2) Notification Forms were fraudulently prepared to avoid detection and thwart inspection by the Ohio EPA and ODH; (3) Amaya and Vadas admittedly supplied false information to ODH with respect to Bonilla; (4) Bonilla never authorized Amaya or Vadas to use his Supervisor License; (5) Vadas tailored his communications to conceal Asbestek's use of Petitioner's Ohio License from the Ohio EPA and to conceal Petitioner's contact information from ODH; (6) neither Vadas nor Amaya had any communication with Petitioner; (7) Vadas fraudulently obtained a bank check in Petitioner's name; (8) Vadas admittedly prepared a spurious envelope to deceive ODH; and (9) Amaya

provided the EPA with a version of obtaining Petitioner's Ohio License that is wholly controverted by his deposition testimony.

Not only did Amaya lie in his affidavit, in his deposition, and to the EPA, but Amaya was convicted of crimes related to his purposeful, improper abatement that Amaya, Vadas and Asbestek's crew performed at the very Site at issue in the AO. Yet the EPA disregarded this evidence. Petitioner unsuccessfully presented all the above arguments to the EPA in contesting the EPA's findings and determination that Petitioner was a responsible party. The EPA also denied Petitioner's offer of Settlement. Petitioner complied with the requirements of the AO to reduce the exorbitant financial risks associated with non-compliance. Having complied, Petitioner is entitled to reimbursement of costs, attorney fees and expenses associated with its compliance.

V. LAW AND ARGUMENT

A. Petitioner Complied with All Required Actions under the Administrative Order

CERCLA gives the EPA the authority to take direct responsive action to clean up hazardous waste sites or to require parties responsible for the hazardous waste to perform the cleanup themselves. *Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323, 1324 (7th Cir. 1990). A party determined by the EPA through a unilateral administrative order ("UAO") to be a potentially responsible party ("PRP"), and therefore liable for hazardous conditions at a site, are subject to the EPA's "receive and comply" power granted by CERCLA, which restricts a PRP's ability to challenge its status as in District Court. 42 U.S.C. § 9613(h); *Employers Insurance of Wausau A Mutual Company v. Bush*, 791 F.Supp. 1314, 1320 (N.D.Ill. 1992); *General Electric Company v. Jackson*, 610 F.3d 110, 115 (C.A.D.C. 2010). Failure of a PRP to comply with a UAO subjects a PRP to costs that the EPA incurs in undertaking the responsive action, which