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

In re:	)	CERCLA 106(b) Petition No._____
Joseph J. Piscazzi, Trustee, Joseph J. Piscazzi Revocable Trust,	)	
Petitioner	)	

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

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APPENDIX

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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Cleveland Trencher Site
20100 St. Clair Avenue
Euclid, Ohio 44117

U.S. EPA DOCKET NO.:

V-W-10-C-950

II. INTRODUCTION

Joseph J. Piscazzi, Trustee of the Joseph J. Piscazzi Revocable Trust ("Petitioner" or "Piscazzi Trust") respectfully submits this Petition for Reimbursement of Costs, Fees and Other Expenses ("Petition") pursuant to Section 106(b) of the Comprehensive Environmental

Response, Compensation and Liability Act, as amended ("CERCLA"), 42 U.S.C. §9606(b)(2) to the Environmental Appeals Board ("EAB"). Petitioner requests reimbursement of at least $34,285 in costs and at least $23,250 in reasonable attorneys' fees incurred in complying with the 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(b) of CERCLA, 42 U.S.C. §9606(b), on June 21, 2010. The AO was amended once on July 27, 2010, to include an additional respondent and liable party. The AO, as amended, required Petitioner and other Respondents, including Metin Aydin, Gary L. Thomas, Nationwide Demolition Services, LLC, Asbestek, Inc., and Safe Environmental Corporation of Indiana to perform a response action at the Cleveland Trencher Site located at 20100 St. Clair Avenue, Euclid, Cuyahoga County, Ohio (the "Site"). The AO, as amended, is attached as Exhibit 1.

Petitioner prepared its Final Removal Action Report, revised pursuant to the EPA's instruction, on March 16, 2012. (Ex. 2.) 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. 3.)

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

Petitioner meets the statutory and regulatory threshold requirements for reimbursements:

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.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. History of Ownership

The underlying facts relevant to this Petition are largely undisputed. The property at issue is located in an industrial park area of Cleveland at 20100 St. Clair Avenue, Euclid, Cuyahoga County, Ohio (the "Site"). (Ex. 1.) The Cleveland Trencher Company ("Cleveland Trencher") was founded in 1923 for purposes of manufacturing heavy excavating and trenching machinery and equipment (Ex. 4.) In 1987, Metin Aydin ("Aydin") purchased the Site from American Hoist & Derrick Co., of St. Paul Minnesota and operated the factory until it ceased operations in 2006. (Ex. 4.)

In early 2002, Petitioner was approached by Gary Thomas ("Thomas"), a business associate of Petitioner, regarding an opportunity for Petitioner to provide a short-term commercial loan the Cleveland Trencher. Thomas explained to Petitioner that Cleveland Trencher was experiencing cash flow shortage and required additional capital to complete several large foreign contracts, after which Cleveland Trencher would be in a position to quickly pay off the loan. Petitioner insisted that the loan be secured by company-owned real estate and required the personal guaranty of owner of Cleveland Trencher, Metin Aydin and his wife, Pauline Aydin (together the "Aydins"). (Ex. 5.)

The Joseph J. Piscazzi Revocable Trust (the "Piscazzi Trust") was formed in 1997 for estate planning purposes, long before the Cleveland Trencher loan. (Piscazzi Ex. 6.) A retired businessman, Petitioner occasionally loaned monies to local businesses and individuals through the Piscazzi Trust in relatively small dollar figures. (Ex. 7.) Thomas had facilitated prior loans, therefore, when he approach Petitioner regarding a loan to the Cleveland Trencher, Petitioner

trusted that Thomas capable and competent to effectuate the transaction, and, specifically, protect Petitioner's loan by perfecting a security interest in the Site.

Based upon these facts, on February 14, 2002, the Piscazzi Trust loaned $205,000 to the Cleveland Trencher and Aydin by virtue of a Promissory Note (the "Note"). (Ex. 5). Contemporaneous to the execution of the Note, Cleveland Trencher also executed and delivered a typical mortgage ("Mortgage") in favor of the Piscazzi Trust, as well as a deed in trust ("Deed in Trust"), attached hereto as Exhibits 8 and 9, respectively. The Deed in Trust and Mortgage were both recorded contemporaneously on February 15, 2002. (Ex. 8-9.)

The manner in which the Piscazzi Trust attempted to secure its interests in the Site—utilizing both a Deed in Trust and Mortgage—has caused significant confusion among the parties involved in this matter, including EPA and local agencies and courts. Specifically, in the Deed in Trust, the Site was "deeded" to Thomas as security for repayment of the Note. As grantee, Thomas took the property under the generic title "trustee." Contrary to EPA's presumed interpretation, Thomas was never trustee of the Piscazzi Trust. (Ex. 6.)

Instead, Thomas' designation as "Trustee" comports with the designation of "trustee" that is a feature of a Deed in Trust. In other words, Thomas held title of the property "in trust" until the Cleveland Trencher paid off the debt to Petitioner, not as the trustee of any actual trust. The Deed in Trust provided that in the event of a default by the Cleveland Trencher, Petitioner could foreclose on the Site and demand that Thomas, as trustee in possession of title to the Site, sell or otherwise dispose of the Site on behalf of Petitioner. (Ex. 9.)

Cleveland Trencher quickly defaulted on the Note, and Petitioner declared a default and reduced the Note to cognovit judgment in Summit County on December 5, 2002. (Ex. 10.) As a

result, Thomas and Petitioner proceeded to take action to recover the Note balance by execution of Petitioner's security interest in the Site.

Specifically, on March 11, 2003, Petitioner brought an action for breach of contract and for declaratory judgment seeking the removal of certain liens on the subject property created by the Cleveland Trencher and/or the principals of the Cleveland Trencher. (Ex. 11.) These liens were intended to be subordinated to the interest of Petitioner, and the action sought to have these liens removed, pursuant to the express terms of the Mortgage and Deed in Trust. On November 21, 2003, the Summit County Court of Common Pleas ruled in favor of the Piscazzi Trust in the declaratory action and entered an entry releasing several liens upon the subject property. (Ex. 12.)

Thomas later filed an eviction action against Cleveland Trencher on March 23, 2006 in the Euclid Municipal Court, and obtained judgment against Cleveland Trencher. (Ex. 13.) The Cleveland Trencher ceased manufacturing operations and vacated the Site following its eviction in May 2006. *Id*. Since that time, Thomas has assumed the role of "trustee" of the Site in an effort to ultimately sell or otherwise dispose of the Site in order to secure payment on the Note. To the extent that Thomas holds "title" to the Site in trust, it is based solely on his designated role pursuant to the Deed in Trust. (Ex. 9.)

Similarly, any indicia of ownership attributable to Petitioner arises solely out of its attempt to secure the Cleveland Trencher Note. Indeed, it is uncontroverted that the Deed in Trust did not convey the Site to Petitioner—Cleveland Trencher is the named grantor and Thomas is the named grantee. (Ex. 9, 14.) Other than the Mortgage, no other conveyances or encumbrances in favor of the Piscazzi Trust have been executed and recorded. (Ex. 14.) Petitioner has never held itself out as the "owner" of the Site, nor did he ever take on the role as

operator. (Ex. 15-16.) Since the initial investigation into this matter by EPA in early 2010, Petitioner has consistently asserted and maintained that it holds no legal or equitable ownership interest in the Site. (Ex. 15-16.)

B. Demolition of the Site.

Upon taking possession of the Site after the eviction of Cleveland Trencher, it is undisputed that neither Thomas nor Petitioner conducted any business or manufacturing activities on-site. Instead, all efforts were made to recover the Piscazzi Trust's investment. For example, Thomas sold certain small pieces of equipment from the facility, which yielded a net result of approximately $20,000 to Thomas and Petitioner. (Ex. 16.) Thomas then explored selling the Site, as required by the terms of the Deed in Trust, and hired a real estate agent to list the Site in July 2007. (Ex. 17.) During that process, Thomas learned that the Site would be more attractive to potential buyers if the facility was demolished and the Site sold as vacant land.

As such, in 2007, Thomas contracted with Nationwide Demolition Services, LLC ("Nationwide") to demolish the buildings on Site in order to prepare the Site for sale. (Ex. 18.) As EPA is aware, Nationwide discovered asbestos-containing materials in the facility and hired Asbestek, Inc. ("Asbestek") to remove the same. (Ex. 19.) Asbestek represented to Nationwide that it was affiliated with and protected under the license and insurance of Safe Environmental Corporation of Indiana ("Safe Environmental"), a claim which Safe Environmental now disputes.

In any event, Asbestek apparently undertook its asbestos abatement process in an unacceptable manner and the Site demolition was eventually shut-down by EPA. (Ex. 1.) Thomas, Nationwide, Asbestek, and Safe Environmental are currently litigating these issues in the Richland County, Ohio Court of Common Pleas, 2008-CV-2002, and Petitioner believes that

case may have just settled. Petitioner is not directly involved in the Richland County litigation, as Petitioner was not directly or indirectly involved in the demolition and/or abatement processes. Likewise, Petitioner was not a party to any negotiation, agreement, or other arrangement entered into by the other Respondents with respect to the abatement and remediation of the Site.

C. Procedural Background.

In April 2010, EPA contacted Petitioner to gain access to the Site. (Ex. 15.) Although Petitioner indicated to EPA that the Piscazzi Trust is not the "owner" of the Site, EPA persisted and Petitioner agreed to execute a "Consent for Access to Property," with the caveat that the execution of such document could not be construed as an admission of ownership or liability under CERCLA. (Ex. 15.)

On May 26, 2010, Petitioner formally drafted a lengthy and detailed correspondence to EPA setting forth its position that, as a lender and nothing more, the Piscazzi Trust is not a responsible party under CERCLA. (Ex. 16.) In that correspondence, Petitioner went to great lengths to explain the relevant facts, specifically, the confusion surrounding the Deed in Trust and classification of Thomas as "trustee," as well as point out the fact that Petitioner is nothing more than a lender to Cleveland Trencher. (Ex. 16.) Petitioner even offered to fund the removal of barrels located on Site in a practical effort to compromise with EPA. (Ex. 16.)

Despite Petitioner's efforts, on June 21, 2010, EPA issued its first Administrative Order for the Site, naming Aydin, Thomas, Nationwide, Asbestek, and Petitioner 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. 1.) Therein, EPA concluded that Petitioner is a "present owner" of the Site or "arranged for disposal or transport

for disposal of hazardous substances at the Site." (Ex. 1.) EPA made no specific findings of fact with respect to Petitioner beyond the general language that Cleveland Trencher entered into the Note, Mortgage, and Deed in Trust with Petitioner, wherein Thomas was granted the right to sell the Site in the event of default on the Note. (Ex. 1.)

On July 27, 2010, EPA issued its first amendment of the June 21, 2010 Administrative Order ("AO") adding Safe Environmental as a respondent and liable party. (Ex. 1.)

On August 11, 2010, a conference call was attended by counsel for Petitioner, Nationwide, Safe Environmental, EPA On-site Coordinator Stephen Wolfe ("Wolfe"), EPA Enforcement Specialist Carol Ropski ("Ropski"), and EPA Regional Counsel Kevin Chow ("Chow") to discuss removal requirements and initial deadlines under the AO.

On October 21, 2010, Petitioner submitted its Notice of Intent to Comply, which was initially disproved by EPA due to a deficiency in the scope of the work plan submitted. (Ex. 20-22.) Petitioner hired Precision Environmental Co. ("Precision") to conduct the removal actions required by the AO. (Ex. 23.) Pursuant to the AO requirements, Petitioner submitted a draft Work Plan for performing specific removal activities unrelated to the asbestos abatement on October 21, 2010 (a separate Work Plan for asbestos abatement and cleanup was submitted on June 30, 2011 by Precision). (Ex. 24-25.) The EPA disapproved the original Work Plan, but later approved an Amended Work Plan submitted by Petitioner, which incorporated the standards and protocols Precision set forth in its asbestos abatement work plan. Petitioner re-submitted its Notice of Intent to Comply on July 8, 2011, which was ultimately accepted by EPA. (Ex. 26.)

On August 22, 2011, Precision mobilized personnel and equipment to the Site and began preliminary set up and preparation activities in accordance with the approved Work Plan. (Ex. 2.) Petitioner was ultimately responsible for the following actions:

1. Onsite Drum Removal: Sorting, packaging, transport and disposal of approximately seventy-nine (79) drums located at the Site; analysis of material collected at the Site.
2. Old Drum Pad Removal: Packaging and disposal of a debris pile located cast of drum pad; scraping up of additional paint at drum pad; analysis of material collected at the Site.
3. Removal of Tank Contents: Vacuuming of product from smaller tank and disposal of contents at an EPA approved facilities; fill cap of smaller tank plugged with concrete upon completion of extraction and cleaning of tank; larger tank opened with excavator, and contents pumped out and disposed of; hole in the side of larger tank essentially rendered tank unusable.
4. Electrical Transformer Removal: Several pole-mounted electrical transformers that were identified as non-TSCA were removed; sent to transformer recycler for appropriate handling.

(Ex. 2.) The removal activities described above, as well as the asbestos abatement, were completed on November 14, 2011. (Ex. 2.) On November 23, 2011, EPA conducted a final Site inspection. EPA informed Petitioner that all cleanup requirements under the AO had been completed to the satisfaction of EPA. (Ex. 2.) On January 25, 2012, Petitioner submitted its Final Report to EPA, pursuant to Section 3.5 of the AO. (Ex. 27.) EPA later advised Petitioner that its Final Report was deficient and advised that it required increased specificity regarding action performed under the Work Plan. On March 16, 2012, Petitioner submitted its revised Final Report to EPA. (Ex. 2.) On April 6, 2012, the EPA approved Petitioner's Final Report and issued its Notice of Completion. (Ex. 3.) EPA acknowledged that Petitioner completed the requirements of the AO.

D. Response Action.

On behalf of Petitioner, Precision undertook decontamination, removal and disposal of hazardous materials at the Site between August 22, 2011 and November 14, 2011. Precision complied with ODH and Ohio EPA regulations (Ex. 2.) Approximately seventy-nine (79) containers were identified by EPA for removal. (Ex. 2.) Field observations and subsequent verification was used to characterize and classify listed containers and appropriate TSD facility profiles were completed. (Ex. 2.) Information used for characterization included generator knowledge, obvious odors, obvious labels, visual inspection of color and texture, pH, MSDS sheets, and previous analysis (if any). (Ex. 2.) Additional analysis (as necessary) was performed to provide a complete and full characterization of all materials. (Ex. 2.) Completed profiles were presented for review and signed profiles were submitted to TSDs for disposal approval. (Ex. 2.)

Each container was evaluated for structural integrity. All containers which were not in DOT shippable condition were repaired (i.e. replace lid, rings, bung/s), consolidated, over packed or repackaged. All containers were collected in a staging area in preparation for transportation off-site to an EPA approved disposal facility. (Ex. 2.)

Each container was properly labeled/marked as required. Appropriate shipping papers, manifests, and LDRs were prepared for each container. Containers were located to licensed transportation vehicles provided by Enviroserve, J.V., and transported off-site to EPA-approved disposal facilities, including EQ Detroit, Inc. located in Detroit, MI, and Chemical Solvents, Inc., located in Cleveland, OH. All bills of lading, manifests, and receipts related to the transportation and disposal of all waste collected by Precision were submitted to EPA for approval. (Ex. 2.)

Following removal of the containerized materials from the Site, the drum pad underlying the debris pile was scrapped for removal of any potentially hazardous seepage from the containers and debris. (Ex. 2.) Material collected from the drum pad was analyzed for lead-based substances. Laboratory analysis reports were submitted to EPA.

Approximately four (4) pole-mounted electrical transformers were identified on-site for removal by EPA. The transformers were identified as non-TSCA, and therefore, were sent to a transformer recycler for appropriate handling. The recycler verified the findings of non-TSCA PCB levels prior to recycling the transformers. (Ex. 2.)

A couple of tanks were identified by EPA as potentially hazardous. Precision vacuumed product from the tanks, containerized the product so as to comply with DOT shipping requirements, and disposed of the contents at an EPA approved facility in the manner described above. Analysis of the tank contents was performed. At completion of the draining and disposal, the smaller tank was plugged with concrete, while a hole on the side of the larger tank essentially rendered it unusable. (Ex. 2.)

On November 23, 2011, EPA conducted a Site Inspection at which time it advised that removal and remediation actions had been completed to EPA's satisfaction. At that time, EPA provided Petitioner with requirements for the Final Report. Petitioner submitted its Final Report on January 25, 2012, and later filed its amended Final Report on March 16, 2012, in response to comments and requests by EPA. (Ex. 2, 27.) On April 6, 2012, EPA approved Petitioner's Final Report and issued its Notice of Completion to Petitioner. (Ex. 3.)

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 undisputed facts fit squarely within the CERCLA safe harbor provisions for secured lenders. The relevant facts are beyond dispute: (1) the Piscazzi Trust loan $205,000.00 to the Cleveland Trencher; (2) the Piscazzi Trust attempted to secure this loan through a mortgage and deed in trust on the subject real estate; (3) Cleveland Trencher and its guarantors defaulted on the loan; (4) the Piscazzi Trust is not the titled owner of the property on any deed; (5) the Piscazzi Trust and its business associate, Thomas, asserted creditor's rights against the real estate; (6) any ownership interest or indicia of ownership vested in Thomas or the Piscazzi Trust arose out of the Piscazzi Trust's role as a lender; and (7) the Piscazzi Trust did not arrange for the disposal or transportation of any hazardous waste from the Site prior to its compliance with the AO.

V. ARGUMENT

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

The Piscazzi Trust is entitled to reimbursement of costs pursuant to CERCLA §106(b) because, as a lender, the Trust is not a liable party under CERCLA §107(b).

CERCLA grants broad authority to the Federal government to require the cleanup of sites contaminated with hazardous substances. For example, where there is an imminent and substantial endangerment of harm to public health or welfare or the environment, the Federal government may, pursuant to Section 106(a), 42 U.S.C. § 9606(a), issue such administrative orders as may be necessary to protect public health and welfare and the environment. An administrative order issued under Section 106(a) may direct potential responsible parties, or

"PRPs," to clean up the facility. In the instant matter, the Region utilized this approach to achieve cleanup of the Site. (See Ex. 1.)

Failure of a PRP to comply with a UAO subjects a PRP to costs that the EPA incurs in undertaking the responsive action, which may include damages of up to three time the costs incurred by the EPA and fines up to $37,500 per day. 42 U.S.C. § 9607(c)(3); 42 U.S.C. § 9606(b)(1); 73 Fed.Reg. 75,340-46 (Dec. 11, 2008). To avoid the risks associated with non-compliance, the PRP may comply with the UAO and then seek reimbursement of the costs associated with the compliance under CERCLA § 106(b)(2)(A) and (C) (42 U.S.C. § 9606(b)(2)(A) and (C)).

CERCLA § 106(b)(2)(A) provides:

> Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investment of the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26.

CERCLA Section 106(b)(2)(A); 42 U.S.C. § 9606(b)(2)(A).

The EAB has held that there are four statutory prerequisites the petitioner must establish before the EAB will consider the merits of a reimbursement request. *In re A&W Smelters and Refiners, Inc.*, 6 E.A.D. 302, 315 (EAB 1996). Specifically, the petitioner must establish that it: 1) complied with the order; 2) completed the required action; 3) submitted the petition within sixty days of completing the action; and 4) incurred costs responding to the order. *Id.* In addition, the petitioner must have received an order issued under CERCLA Section 106(a)

requiring the petitioner to perform the work for which reimbursement is sought. *In re Katania Shipping Co.*, 8 E.A.D. 294 (EAB 1999).

Reimbursement is available to a party who receives and complies with the terms of an administrative order. *Employers Insurance of Wausau v. Browner*, 52 F.3d 656, 662 (7th Cir. 1995) (right of petitioner ripens after completion of the required action, the required action being those actions required by the order). Petitioner complied with the AO and completed the required action on April 6, 2012, when the EPA issued its Notice of Completion. *In re Glidden Co.*, 10 EAD 738, 747 n.7 (EAB 2002) (citing *in re Solutia, Inc.*, 10 E.A.D. 193 (EAB 2001) (region issued Notice of Completion); *In re ASARCO, Inc.*, 6 E.A.D. 410, 419 (EAB 1996) (region sent letter stating that work required by UAO had been complete)). Compliance with the AO requires the EPA's confirmation that the required actions have been completed.

It is beyond dispute that Petitioner fulfilled each statutory prerequisite. The Region issued the AO to Petitioner on June 21, 2010, pursuant to CERCLA Section 106(a), wherein the Region ordered Petitioner to complete various environmental remediation activities at the Site. (Ex. 1.) Petitioner complied with the AO, completed the required action, and incurred costs responding to the AO. (Ex. 2-3.) Lastly, this petition was filed within sixty (60) days of completing the action. (See Ex. 3 issued on April 6, 2012). The sixty day period commences on the date that the EPA confirms that the required actions have been completed. *In re Glidden Co.*, 10 EAD 738, 747 n.7 (EAB 2002) (citing *In re Solutia, Inc.*, 10 E.A.D. 193 (EAB 2001). Accordingly, the deadline for filing this Petition is June 5, 2012.

Petitioner, therefore, complied with all statutory prerequisites for consideration of its Petition under CERCLA § 106(b), and is entitled to consideration by the EAB of the merits of its Petition for reimbursement.

B. Petitioner is Not Liable for Responsive Action or Costs under CERCLA § 107(a).

Petitioner is required to establish by a preponderance of the evidence that it is not liable for response costs under CERCLA § 107(a) and that costs for which it seeks reimbursement are reasonable in light of the action required by the AO. CERCLA § 106(b)(2)(C), *In re Grand Pier Center, LLC* Petition No. 04-01, *In re Chem-Nuclear Sys., Inc*., 6 E.A.D. 445, 454 (EAB 1996). CERCLA § 106(b)(2)(C) provides:

> [T]o obtain reimbursement, the petition shall establish by a preponderance of the evidence that it is not liable for response costs under section 107(a) and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

CERCLA § 106(b)(2)(C), 42 U.S.C. § 9606(b)(2)(C). Section 107(a) lists four categories of responsible parties who are liable for the costs associated with an administrative order under CERCLA § 106(a), 42 U.S.C. § 9606(a):

(1) the owner and operator of a vessel or facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrent of response costs, of a hazardous substance * * * .

Petitioner does meet the criteria for any subsection under CERCLA § 107(a). Petitioner is and never has been the owner of the Site; Petitioner did not contract, agree or otherwise arrange for disposal or treatment of hazardous materials, including asbestos, at the Site; Petitioner does not

and did not own or possess any hazardous materials identified at the Site; and Petitioner did not transport any hazardous materials to, at or from the Site.

In the AO, the only specific finding of fact made by EPA with respect to Petitioner simply establishes that Petitioner is a secured creditor of Cleveland Trencher:

> In 2002, [Cleveland Trencher] entered into a promissory note and mortgage with the Joseph J. Piscazzi Revocable Trust (Trust), as well as a Deed of Trust in which Mr. Gary L. Thomas was granted as a trustee the right to sell the Site in the event [Cleveland Trencher] defaulted on the note from the Trust. CT defaulted on the note and was eventually evicted in 2006.

(Ex. 1.) Rather than establish liability under one of the categories of liable persons set forth in CERCLA § 106(a), EPA's findings of fact merely corroborate Petitioner's long-held position that its only relationship to the Site is that of a lender—Petitioner loaned funds to Cleveland Trencher, which it attempted to secure by the Mortgage and Deed in Trust. As such, Petitioner fits squarely within the safe harbor created by CERCLA for secured lenders and creditors.

1. CERCLA Created a Safe Harbor for Secured Lenders.

The term "owner or operator" is defined by statute, and explicitly excludes any "person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility." CERCLA § 101(20), 42 U.S.C. § 9601(20)(A)(iii). See also *Kelley v. Environmental Protection Agency*, 15 F.D. 1100, 1103 (1994) ("Congress created a safe harbor provision for secured creditors, however, in the definition of internal "owner or operator," providing that "such term does not include a person, who without participating in the management of a …facility, holds indicia of ownership primarily to protect his interest in …the facility.") (citing §9601(20)(a)).

What is more, Congress created an express safe harbor under CERCLA § 101(20)(E), providing that an "owner or operator does **not include a person that is a lender that did not**

participate in management of a …facility **prior to foreclosure**, notwithstanding that the person – (i**) forecloses on the…facility**; and (ii) after foreclosure, sells, releases…, or liquidates the ...facility, maintains business activities, winds up operations, undertakes a response action under Section 9607(d)(1) of this title…, **or takes any other measure to preserve, protect, or prepare the…facility prior to sale or disposition**." CERCLA § 101(20)(E)(i)-(ii); 42 U.S.C. § 9601(20)(E)(i)-(ii) (emphasis added).

The term "lender" is defined to include "any person . . . that takes or acquires a security interest from a nonaffiliated person." *Id*. at § 9601(20)(G)(iv). Further, the term "participate in management," as applied to a lender who holds indicia of ownership primarily to protect a security interest, is limited to persons who, while the borrower is still in possession of the facility, (i) "exercises decision making control over the environmental compliance" of the facility; or (ii) "exercises control at a level comparable to that of a manager" of the facility with responsibility for environmental compliance. *Id*. at § 9601(20)(F)(ii). Lastly, "security interest" includes "a right under a **mortgage, deed in trust** . . . and any other right accruing to a person to secure the repayment of money." Id. at § 9601(20)(G)(vi) (emphasis added).

Exclusion of secured lenders from liability under CERCLA comports with the legislative intent, as CERLCA was enacted "to accomplish the dual purpose of ensuring the prompt cleanup for hazardous waste sites and imposing the costs of such cleanups on *responsible parties*." *Dico, Inc. v. Diamond*, 35 F.3d 348, 349 (8th Dist. 1994) (emphasis added). Thus, the lender safe harbor provision is intended to protect otherwise innocent lenders from incurring liability simply by holding and/or executing a security interest in real property that is the subject of an EPA investigation. *Stearns & Foster Bedding Co. v. Franklin Holding Corp.*, 947 F. Supp. 790, 802,

n.6 (D.N.J. 1996) (noting that lender safe harbor amendments were "aimed at providing greater protection to lenders under CERCLA").

Here, the uncontroverted facts establish that: (1) the Piscazzi Trust was a secured lender to Cleveland Trencher by virtue of the Mortgage and Deed in Trust; (2) the Piscazzi Trust did not participate in the management of the Site; (3) all actions by the Piscazzi Trust and/or Thomas were taken to preserve, protect and prepare the Site prior to sale; (4) there exists no other indicia of ownership attributable to the Piscazzi Trust as it holds no legal or equitable title to the Site.

2. Petitioner is a Lender of the Cleveland Trencher.

The Piscazzi Trust's sole relationship to and involvement with the Site arose out of its role as a lender to Cleveland Trencher, the owner-operator of the Site prior to 2006.

As outlined above, the Piscazzi Trust's attempt to secure its loan to Cleveland Trencher has caused considerable confusion because deeds of trust are not often utilized in Ohio to secure interests in real property. Petitioner believes that this confusion has led EPA to erroneously conclude that Petitioner is a liable party. Specifically, the confusion appears to arise out of two related issues: (1) utilization of both the Deed in Trust and Mortgage; and (2) classification of Thomas as "trustee" in the Deed in Trust.

a. Confusion Regarding Utilization of the Deed in Trust.

Generally, there are two ways to perfect the security interest in a parcel of real property. A deed in trust creates a mechanism by which real property is deeded to a "trustee," who holds title to the property "in trust" until such time as the loan has been repaid. *Hoffman v. Mackall*, 5 Ohio St. 2d 124, 124 (Ohio 1855); see also *Martin v. Alter*, 42 Ohio St. 94 (1884). If and when the loan is repaid as agreed, the trustee then conveys title of the property back to the borrower. *Id*. Moreover, under Ohio law, "[a] conveyance of real estate to a trustee to secure payment of

bonds issued for the construction of a building on real estate of the grantor **does not convey absolute title** so as to make the trustee owner of the premises under foreclosure." *Commerce-Guardian Bank v. Catawba Beach Club*, 54 Ohio App. 437, syllabus ¶ 1 (1936) (emphasis added).

Although execution of a mortgage, which acts as an encumbrance on the property, is generally utilized in the State of Ohio, the Ohio Revised Code explicitly recognizes a "deed of trust" as a form of mortgage instrument. See O.R.C. § 5301.232(E)(1) (defining "mortgage" to include "a mortgage deed of trust or other instrument in the nature of a mortgage"). Thus, the most significant difference between the deed in trust mechanism and the ordinary mortgage mechanism is that, in the deed in trust, legal title actually conveys to a "trustee" who holds title on behalf of the lender, whereas no title transfers in the mortgage process.

Based on this authority, as well as the form and substance of the underlying documents, one can only reasonably conclude that neither Thomas nor the Piscazzi Trust obtained title to the Site. The Deed in Trust and Mortgage were both intended to create a security interest in the nature of a mortgage as evidence by the form and substance of the instruments.

In spite of the controlling authority set forth in the Ohio Supreme Court and Ohio Revised Code, in the forcible entry and detainer (eviction) action, the Euclid Municipal Court ruled that Petitioner did not perfect its security interest in the Site since the Deed in Trust and Mortgage were recorded simultaneously. Specifically, the Euclid Municipal Court ignored the form and substance of the Deed in Trust and failed to interpret it as a security interest in favor of Petitioner. Instead, the Court interpreted the Deed in Trust as a typical "deed," and held that fee simple title to the Site conveyed to Thomas prior to recording of Petitioner's Mortgage. As such, the Court concluded that the Piscazzi Trust is an unsecured lender with respect to Cleveland

Trencher, and that Thomas is the titled owner. No court has ever held that the Piscazzi Trust holds any legal or equitable ownership interest in the Site.

Despite the muddled legal effect of the Deed in Trust, for purposes of determining Petitioner's status as a responsible party under CERCLA § 106(a), the relevant facts are uncontroverted. Cleveland Trencher executed the Deed in Trust and Mortgage with the intent to provide Petitioner with a security interest. The form and substance of both instruments reflects such intent. Both deeds in trust and mortgages fall squarely within the definition of "security interest" under CERCLA. Likewise, Ohio Supreme Court precedent establishes that a deed in trust does not convey absolute title, but rather acts as a mortgage security interest.

b. Confusion Regarding the Title "Trustee."

Even assuming *arguendo* that fee simple title transferred to Thomas by virtue of the Deed in Trust, the Piscazzi Trust would be nothing more than an unsecured lender of Cleveland Trencher because Thomas, not the Piscazzi Trust, would be "owner" of the Site.

Since Petitioner happens to be a revocable trust, execution of a Deed in Trust appears to have confused EPA, in that, at first glance, it appears that Thomas is the trustee of Petitioner, the Joseph J. Piscazzi Revocable Trust.[1] According to the Trust documents, however, Thomas is not and has never been a trustee of Petitioner. Instead, Thomas' designation as "trustee" in the Deed in Trust comports with the generic designation of trustee that is a feature of a deed in trust. In other words, Thomas held title to the property "in trust" until the Cleveland Trencher paid off the debt to Petitioner, not as the trustee of any actual trust.

Indeed, the language utilized in the Deed in Trust reflect this intent—that Thomas held title to the Site until Cleveland Trencher either defaulted on the Note or paid the Note in full:

[1] For example, a Notice of Violation letter from the City of Euclid addresses Thomas as "Trustee, the Joseph J. Piscazzi Revocable Trust." (Ex. 28.)

> Grantor does grant unto the Trustee [Thomas] the property . . . **IN TRUST to secure the payment** due to Joseph J. Piscazzi, Trustee, of Joseph J. Piscazzi Revocable Trust . . . . Grantor does hereby expressly grant to Trustee the **right and power to commence and secure the sale of the property in the event that Grantor defaults on the note, in order to secure payment on the note** . . . . Upon full payment of the note and the performance of all promises and covenants contained therein, . . . the Trustee shall execute to Grantor a Deed of Release . . . .

Therefore, in the event of default, Thomas could foreclose on the Site and secure the sale of the property on behalf of Petitioner. If, however, Cleveland Trencher had repaid the Note in full, Thomas would have been legally obligated to execute a deed releasing the Site back to the Cleveland Trencher.

Therefore, even assuming, *arguendo*, that title to the Site transferred to Thomas in 2002 by the execution and recording of the Deed in Trust, Petitioner's interest in the Site as a lender remains unchanged. Thomas is and was nothing more than a business associate of the Petitioner, not its trustee or legal representative. As such, the Piscazzi Trust does not hold legal or equitable title to the Site—its sole relationship to the Site is that of a lender.

3. Any indicia of Ownership Attributed to Petitioner Arises Out of Its Status as a Lender to the Site's Former Owner-Operator.

In light of the facts outlined above, it is beyond dispute that any indicia of ownership vested in Thomas and/or the Piscazzi Trust arose solely out of a security interest in the Site. In addition, any actions taken by Thomas on Site following the eviction of Cleveland Trencher were taken to preserve, protect, or prepare the facility prior to sale pursuant to his express duties under the Deed in Trust. It is clear, therefore, that Petitioner is entitled to protection under the CERCLA Lender Safe Harbor Provisions.

Specifically, the term "lender" includes "any person . . . that takes or acquires a security interest from a nonaffiliated person." 42 U.S.C. § 9601(20)(G)(iv). Moreover, "security

interest" is defined as the rights accruing to a person to secure the payment under both a mortgage and deed in trust. *Id*. at § 9601(20)(G)(vi). Petitioner fits squarely within the CERCLA definition of a lender. Petitioner loaned funds to Cleveland Trencher, an unaffiliated third party. Petitioner secured payment under the Note by execution of the Mortgage and Deed in Trust—both of which are explicitly recognized by CERCLA as appropriate and acceptable security interest mechanisms. Accordingly, as the beneficiary of a mortgage and deed in trust security interest, Petitioner is defined by CERCLA as a "lender."

4. Petitioner Did not Participate in the Management of the Site prior to Attempting to Execute on his Security Interest in the Site.

It is undisputed that Petitioner was never involved in the management of the Site or Cleveland Trencher. Petitioner was never employed by Cleveland Trencher, never served as a director, officer, consult, agent or other fiduciary of Cleveland Trencher. Petitioner did not participate in the management of the Site facilities or Cleveland Trencher. Petitioner was not involved, in any conceivable capacity, in the environmental compliance or disposal of hazardous waste generated or maintained by Cleveland Trencher.

Rather, Petitioner's only relationship to and/or interest in the Site arose from his position as a lender to the prior owner-operator of the Site, Cleveland Trencher. The definition of "owner or operator" explicitly excludes any person who is a lender that did not participate in the management of the Site. Moreover, the term "participate in management" does not include "holding a security interest" or "monitoring or enforcing the terms and conditions of the . . . security interest." The undisputed facts establish that Petitioner's role in and relationship to Cleveland Trencher and the Site is exclusively limited to "holding a security interest."

Indeed, after taking possession of the Site, Thomas sought to execute on Petitioner's security interest by preparing the Site for sale. Thomas entered into a listing agreement with a real estate agent. Thomas hired Nationwide to demolish the facilities located on Site in anticipation of selling the vacant Site. The Site was not operated for any business purpose after Cleveland Trencher closed its doors in 2006. Therefore, the mere fact that Petitioner, through the actions of Thomas, took "measure[s] to preserve, protect, or prepare" the Site for sale or disposition cannot serve as the basis for imposition of liability, when such actions were taken with the intent to recover a lender's secured interest in property. 42 U.S.C. § 9601(20)(E)(i)-(ii).

Accordingly, Petitioner cannot be liable as an owner or operator of the Site because, as a lender that did not participate in management of the Site, Petitioner falls within the CERCLA lender safe harbor. EPA wrongfully categorized Petitioner as an owner or operator of the Site, and Petitioner is entitled to reimbursement of costs on this basis.

5. Petitioner Did not Contract, Agree, or Otherwise Arrange for the Disposal, Treatment or Transport of any Hazardous Substances.

In the AO, EPA generally avers that Petitioner and Thomas "were persons who arranged for the disposal or transport for disposal of hazardous substances as the Site" without making any specific findings of fact in support of its conclusion. Specifically, EPA noted that "[i]n 2007, Mr. Thomas entered into an agreement with a demolition contractor, Nationwide . . . to demolish buildings on Site in order to prepare the property for sale." (Ex. 1.)

As an initial matter, this finding of fact comports with Petitioner's contention that all actions taken by Thomas were intended to preserve Petitioner's investment and secure repayment on the Note. Furthermore, it is undisputed that Petitioner never directly or indirectly contracted, agreed, or arranged for the disposal or transport of any hazardous substances from the Site. Petitioner was not engaged in hiring or oversight of Nationwide, Asbestek, Safe Environmental

or any other party involved in the demolition or remediation of the Site prior to the EPA's involvement. In fact, none of the voluminous contracts, agreements and correspondence between and among the other Respondents prior to the EPA's involvement were ever acknowledged or executed by Petitioner or Joseph Piscazzi, as Trustee. Moreover, as discussed extensively, *supra*, Thomas is not a trustee of the Piscazzi Trust. Any actions taken by Thomas to arrange for the disposal or transport of hazardous waste from the Site cannot be imputed to Petitioner.

EPA's unsubstantiated conclusion that Petitioner was involved in the disposal, treatment or transport of hazardous waste at or from the Site is, therefore, without merit and further supports Petitioner's position that it is not a liable party, and therefore, entitled to reimbursement of costs.

V. STATEMENT OF INCURRED COSTS, FEES, AND EXPENSES

Petitioner incurred costs of at least fifty-seven thousand five hundred thirty-five dollars ($57,535) plus interest, which includes response costs of at least thirty-four thousand two hundred eighty-five dollars ($34,285) plus interest; and attorney fees of at least twenty-three thousand two hundred fifty dollars ($23,250) plus interest. Petitioner paid Precision Environmental Co. in full for response costs. Petition has likewise incurred and paid the attorney's fees associated with the AO.[2] Consequently, Petitioner is entitled to reimbursement of costs of at least $57,535 plus interest. Petitioner is prepared to demonstrate the reasonableness of costs, fees and expenses upon a finding by the EAB that Petitioner is entitled to reimbursement.

[2] Pursuant to the EAB's "Revised Guidelines on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement for Petitions," §III.D, Petition has not included documentation of attorney's fees as evidence of the amount incurred or as evidence of their reasonableness.

VI. PETITIONER IS ENTITLED TO REIMBURSEMENT OF COSTS

Petitioner is not liable for response costs under 42 U.S.C. § 9607(a) and therefore Petitioner is entitled to reimbursement of response costs pursuant to 42 U.S.C. § 9606(b)(2)(C). *Employers Insurance of Wausau v. Browner*, 52 F.3d 656, 662 (7th Cir. 1995). Petitioner does not meet even the remotest statutory threshold for liability under CERCLA § 107(a) and has established by a preponderance of the evidence that it has no liability under the AO. As for the forgoing establishes by greater than a preponderance of evidence, Petitioner is not liable for response costs associated with compliance with the AO and reimbursement is warranted. 42 U.S.C. § 9606(b)(2)(C). The costs that Petitioner paid to Precision to perform the cleanup was solely and entirely as a result of the AO and are therefore subject to reimbursement. *Flanders Industries, Inc. v. State*, 2003 WL 22717887, * 6 (Mich. App. Nov. 18, 2003) (holding that a PRP is entitled the recover costs incurred as a result of complying with an administrative order).

VII. PETITIONER IS ENTITLED TO RECOVER ATTORNEY FEES AND EXPENSES

Reimbursement may be granted for costs, fees and other expenses associated with compliance with the AO. 42 U.S.C. 9606(b)(2)(E) provides in pertinent part:

> Reimbursement awarded by a court under subparagraph (C) or (D) may include appropriate costs, fees, and other expenses in accordance with subsections (a) and (d) of section 2412 of title 28.

28 U.S.C. 2412(b) and (d) allows for the award of attorney's fees and other expenses associated with a civil action brought against the United States, unless a court finds that the United State was substantially justified or special circumstances make an award unjust. While 28 U.S.C. § 2412 deals with court actions, 5 U.S.C. § 504 allows for recovery of attorney's fees in administrative actions. *In re Donald Cutler*, EAJA Appeal No. 05-01 (2007). Attorney's fees are warranted in this matter because Petitioner submitted substantial evidence on multiple

occasions that it was not a liable party at the Site. Petitioner made numerous settlement offers to EPA. Petitioner exhausted great efforts in attempting to resolve its liability status with EPA, including extensive correspondence and conversations with Chow and Wolfe on multiple occasions, offering a settlement, and obtaining and providing documentation to establish Petitioner's role as a secured lender and nothing more. EPA was provided with every document, argument and exhibit available to Petitioner in this regard. Consequently, should the EAB determine that Petitioner is entitled to reimbursement, Petitioner respectfully submits that an award of attorney's fees is likewise warranted. Similarly with respect to costs, Petitioner is prepared to demonstrate that its attorney's fees and other expenses are reasonable.

VIII. CONCLUSION

For the foregoing reasons, Petitioner has established by a preponderance of the evidence required by 42 U.S.C. § 9606(b)(2)(C) that it is not liable under 42 U.S.C. § 9607(a) and respectfully requests that the EAB find that Petitioner is entitled to reimbursement of at least $57,535, plus interest, which includes response costs of $34,285, plus interest, and attorney's fees of at least $23,250, plus interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing CERCLA 106(b) Petition and Exhibits 1 - 28 were filed by electronic submission to the Environmental Appeals Board ("EAB") through the Central Data Exchange this 4th day of June, 2012. A hard copy of the original Petition, along with Exhibits 1 - 28 have been sent by First Class Mail this 4th day of June, 2012, to the following:

US Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
Ronald Reagan Building, EPA Mail Room
1300 Pennsylvania Avenue, NW
Washington, DC 20004

Date: June 4, 2012

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I hereby certify that a copy of the foregoing CERCLA 106(b) Petition was served on the US Environmental Protection Agency electronically to chow.kevin@epamail.epa.gov this 4th day of June, 2012. A hard copy of the original Petition, along with Exhibits 1 - 28 have been sent by First Class Mail this 4th day of June, 2012, to the following:

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