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

IN THE MATTER OF Southern Iowa Mechanical Site, Ottumwa, Iowa Titan Tire Corporation and Dico, Inc., Petitioners. Second Petition for Reimbursement Under Section 106(b)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9606(b)(2) and for Relief for Constitutional Violations [First Petition CERCLA 106(b) 09-01 filed on October 23, 2010]	Docket No. CERCLA-07-2009-0006 Petition No. Petitioners request oral argument.

SECOND PETITION FOR REIMBURSEMENT OF FUNDS EXPENDED BY PETITIONERS TITAN TIRE CORPORATION AND DICO, INC. IN COMPLYING WITH UNITED STATES ENVIRONMENTAL PROTECTION AGENCY CERCLA § 106(a) ADMINISTRATIVE ORDER NO. CERCLA-07-2009-0006 AND OTHER REQUIRED ACTIONS, AND FOR RELIEF FOR CONSTITUTIONAL VIOLATIONS

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IN THE MATTER OF Southern Iowa Mechanical Site, Ottumwa, Iowa Titan Tire Corporation and Dico, Inc., Petitioners. CERCLA § 106(a) ADMINISTRATIVE ORDER, U.S. EPA Region 7, CERCLA Docket No. CERCLA-07-2009-0006 [First Petition CERCLA 106(b) 09-01 filed on October 23, 2010]	Docket No. CERCLA-07-2009-0006 Petition No. Petitioners request oral argument.

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I. INTRODUCTION

On December 30, 2008, Titan Tire Corporation ("Titan Tire") and Dico, Inc. ("Dico") (collectively, "Petitioners") were issued a CERCLA § 106(a) Administrative Order (the "Unilateral Administrative Order" or "UAO") by the United States Environmental Protection Agency, Region VII ("EPA"), CERCLA-07-2009-0006, with regard to real property located at 3043 Pawnee Drive, Ottumwa, Wapello County, Iowa ("Site"). Exhibit 1.

Despite no liability, Titan Tire and Dico complied with EPA's required actions under the UAO and otherwise. Titan Tire and Dico are not liable because they are not "arrangers," or any other covered person, under CERCLA 107(a). Neither of them took "intentional steps to dispose of a hazardous substance." *Burlington Northern and Santa Fe Railway Company v. United*

States, 129 S.Ct. 1870, 173 L.Ed.2d 812, 77 USLW 4366 (2009). The facts in the undisputed sworn affidavits are that Petitioners sold buildings on property in Des Moines to the highest bidder, Southern Iowa Mechanical LLC ("SIM," "Southern Iowa Mechanical," or "Southern"), for over $150,000. SIM purchased the buildings for the purpose of re-assembling them as buildings on SIM's property in Ottumwa, Iowa, for use in connection with SIM's business activities. Titan Tire and Dico did not sell, nor did SIM purchase, the buildings for the purpose of disposing, treating or transporting any hazardous substances.

In addition, Titan Tire and Dico submit that: (1) the EPA acted arbitrarily, capriciously and not in accordance with law in ordering Petitioners to clean up the Site and in conducting the remediation; and (2) the UAO in this case or, in the alternative, the CERCLA UAO regime violates the Constitution of the United States.

The property located at the Site was termed the "Southern Iowa Mechanical Site" or "Site" in the UAO, *Id.* at ¶ 2, and the UAO states that the Site is the "facility" under CERCLA. *Id.* at ¶ 21(a). Southern Iowa Mechanical is the owner of the Site, and EPA did not name Southern Iowa Mechanical or any person other than Petitioners in the UAO.

The action required under the UAO was completed on May 18, 2010. *See* Section III, p. 19. Petitioners do not waive their belief that the completion date was October 12, 2009 and that their First Petition [First Petition CERCLA 106(b) 09-01 filed on October 23, 2010] was timely and properly filed. *See* Section III, p. 19; Exhibit 25, p. D0947.

Petitioners present for resolution the following issues: (1) whether Petitioners are liable for response costs under Section 107(a) of CERCLA; and (2) whether the EPA acted arbitrarily and capriciously in ordering Petitioners to clean up the Site and in conducting the remediation. Because Petitioners are not liable under CERCLA, and because the EPA's actions and conduct

were arbitrary and capricious or were otherwise not in accordance with law, Petitioners seek reimbursement pursuant to 42 U.S.C. § 9606(b)(2)(C) and (D) for the reasonable costs, plus interest, they have incurred in connection with the action required by the UAO and the other EPA required actions with respect to the same matter, as well as their attorneys fees and costs of investigating such action, negotiating with the EPA regarding such actions and complying with the UAO and EPA's required actions and pursuing this Second Petition for Reimbursement ("Second Petition"). Exhibit 25, p. D0946-47, 42 U.S.C. § 9606(b)(2).

Furthermore, Petitioners present for resolution whether the UAO in this case or, in the alternative, the CERCLA UAO regime is unconstitutional under the Due Process Clause of the Fifth Amendment of the Constitution of the United States. Petitioners request that the Environmental Appeals Board ("EAB" or "Board") require EPA or the United States Treasury or other appropriate United States governmental entity to pay Petitioners' reasonable costs, damages and attorney fees for the unconstitutional taking of their private property for public use without compensation and for the unconstitutional deprivation of their property without due process.

II. THE UAO

A. Excerpts from the UAO of December 30, 2008

Pertinent excerpts of the UAO are presented below:

At ¶ 1, EPA asserted that,

> This Order is issued to Dico, Inc. ("Dico") and Titan Tire Corporation ("Titan Tire"), referred to jointly as "Respondents," pursuant to the authority vested in the President of the United States by section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9606(a), as amended ("CERCLA").

At ¶ 2, EPA asserted that,

> This Order pertains to property located at 3043 Pawnee Drive in Ottumwa, Wapello County, Iowa, the "Southern Iowa Mechanical Site" or the "Site". This Order requires Respondents to conduct the removal actions described

herein to abate an imminent and substantial endangerment to the public health, welfare or the environment that may be presented by the actual or threatened release of hazardous substances at or from the Site.

At ¶ 8, EPA asserted that,

> As part of the Des Moines TCE Site Operable Unit 2 Remedial Investigation (OU2 R1), in January 1992, Dico's consultant Eckenfelder, Inc. ("Eckenfelder") sampled insulation in buildings designated Buildings 1 through 5 and the Maintenance Building on Dico's property at 200 Southwest 16th Street, Des Moines, Iowa (the Dico Property"). Eckenfelder collected samples at various depths within the insulation, ranging from the foil backing layer to insulation material adjacent to the roof. In general, higher concentrations of Polychlorinated Biphenyls ("PCBs") were found near the foil fabric lining than in the intermediate layer or the layer adjacent to the roof. The highest concentration of PCBs found was 29,000 mg/kg in Building 5[1]. Other hazardous substances, including aldrin, dieldrin, chlordane, heptachlor, 2, 4-D, 2, 4, 5-T, were found in the buildings.

At ¶ 9, EPA asserted that,

> In March 1994 EPA issued a Unilateral Administrative Order for Removal Action to Dico requiring it to prepare and, upon EPA approval, implement a work plan to, *inter alia*, repair, seal and protect the building insulation (*In the matter of Dico Inc.*, US EPA Docket No. VII-94-F-0017). In its March 1994 work plan Dico described the planned activities associated with the repair and encapsulation of PCB-contaminated insulation in the building walls and ceilings. Damaged ceiling insulation was to be repaired or replaced as necessary, and any insulation beyond repair would be removed and replaced with new insulation. Salvageable insulation would be covered with new foil backing and all joints would be taped with the duct tape or approved material. Following the repair of the insulation, all exposed interior surfaces of the buildings would be encapsulated with epoxy paint. Metal panels were to be installed along walls with exposed insulation to protect the insulation from further damage by machinery operating in the buildings.

[1] Petitioners object to EPA's characterization of the alleged January 1992 Eckenfelder report regarding PCBs because the report was in error and seven subsequent testings by the EPA, consultants and Treatment/Storage /Disposal Facilities (TSD) contradicted Eckenfelder's PCB finding and confirmed that no PCBs exceeded regulatory threshold levels. None of the other referenced "hazardous substances" reported by Eckenfelder exceeded any EPA-specified threshold levels. See discussion later in section II(C)(2) of this Petition.

At ¶ 10, EPA asserted that,

> As described in the work plan Dico installed metal panels along walls with exposed insulation to protect the insulation from further damage. Damaged ceiling insulation was repaired or replaced. Salvageable insulation was re-taped and covered with new foil backing. Exposed interior surfaces of the buildings were encapsulated with epoxy paint.

At ¶ 12, EPA asserted that,

> By agreement signed on or about July 26, 2007, Titan Tire, on behalf of Dico, arranged with Southern Iowa Mechanical to dismantle certain buildings, including the Maintenance Building and Buildings 4 and 5 on the Dico Property. The Maintenance Building and Buildings 4 and 5 contained insulation in walls and ceilings contaminated with Polychlorinated Biphenyls (PCBs") at levels up to 29,000 mg/kg.[2]

At ¶ 13, EPA asserted that,

> Metal siding was reportedly sent to a recycling facility and insulation, lighting fixtures, doors and miscellaneous materials were reportedly disposed of at a landfill. Southern Iowa Mechanical transported the steel structural members ("beams") to its facility in Ottumwa, Iowa. The beams are currently stacked in an open area covering approximately 1 acre.

At ¶ 14, EPA asserted that,

> On May 16, 2008, EPA collected wipe samples from the beams, soil samples from the area beneath the beams, and a bulk insulation sample. The wipe samples contained PCBs at concentrations up to 330 micrograms [330/1,000,000 of a gram] per 100 centimeters squared ("ug/cm2"). Soil samples contained PCBs at concentrations up to 3100 micrograms per kilogram ("ug/kg") [parts per billion]. The insulation sample contained PCBs at 6,300,000 ug/kg [parts per billion].[3]

At ¶ 21(a), EPA asserted that,

> The Southern Iowa Mechanical Site is a "facility" as defined by section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

---

[2] Petitioners object to EPA's characterization of 29,000 mg/kg of PCBs because this is based solely on the erroneous January 1992 Eckenfelder report mentioned in footnote 1. No other testing of the buildings at Dico in Des Moines ever showed PCBs that exceeded EPA and/or TSCA threshold levels.

[3] Petitioners object to EPA's characterization of samples EPA took at the Southern Iowa Mechanical Site because of flaws in the data and reports relied upon by EPA. See discussion later in section VI of this Petition.

At ¶ 21(e), EPA asserted that,

> **Each Respondent arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances at the Southern Iowa Mechanical facility, within the meaning of Section 107(a) of CERCLA, 42 U.S.C. § 9607(a)(3).**

(emphasis added). Exhibit 1.

B. Administrative Record

The EPA has not provided the administrative record to Petitioners for their review with respect to this Second Petition. Petitioners requested EPA to include the exhibits on the List of Exhibits in the administrative record. List of Exhibits, p. 72 of this Second Petition. With respect to the proceedings involving the First Petition, EPA omitted many of these exhibits from the administrative record. With respect to this Second Petition, Petitioners specifically request that EPA provide the full administrative record to the EAB and not withhold evidence unfavorable to EPA's case. *Kent County v. U.S. Environmental Protection Agency*, 963 F.2d 391, 395-96 (U.S. App. D.C. 1992); *Maritel, Inc. Collins*, 422 F.Supp.2d 188, 195-97 (D.C. 2006).

C. Factual Background Before UAO Issued

1. Arms-Length Transactions Relating to the Sale of Movable Storage Structures to Southern Iowa Mechanical for Re-Assembly and Use at Its Property in Ottumwa

On June 9, 2008, Southern Iowa Mechanical responded to EPA's 104(e) request for information. Exhibit 2. Jim Hughes, the President of Southern Iowa Mechanical, represented that the responses were accurate and correct. Exhibit 2, p. D0034. The following are excerpts from the responses:

> At the onset, **I think you have a misapprehension of what Southern was doing at the Property** [Dico Property in Des Moines, Iowa]. **Southern did not consider its activities as demolishing a building,**

> **instead, it considers the activities the disassembling of a movable storage structure to be rebuilt on property owned by Southern in Ottumwa** [the Site]. **That intent is evident by the fact that Southern purchased the steel structure from Titan Wheel Corporation ("Titan Tire") and agreed, as part of that purchase, to disassemble the building and remove it from the Property.**
>
> ****
>
> Further, when you [Mary Peterson, Project Manager for EPA Region VII] visited the Property in September and saw the disassembly in process, neither you nor anyone with your agency informed Southern or any of its employees that there was any restriction on removal.
>
> ****
>
> **As indicated, the intended purpose of the removal of the structures was to use the steel structures at Southern's property in Ottumwa, consequently the steel structures were taken to that property.**

(emphasis added). Exhibit 2, p. D0027, D0031.

Southern also produced photographs of the Site and the approximately 2300 steel beams stockpiled in Ottumwa, Iowa. Exhibit 3. The lengths of the steel beams are shown below:

Metal Beam Size	Approximate Number of Beams	Representative Percentage of Total Beams
35' - 45' Length Roof Trusses	60	3 %
25' Length H Pile Roof Truss Column Supports	150	7 %
10' – 12' Length Roof Truss Column Supports & Tails	32	1 %
12' – 25' Length Girts & Purlins	2,039	89 %

Exhibit 25, p. D0937. For purposes of later discussion about low occupancy area standards, please note on the photographs that the beams are piled in three areas in a large open field in the middle of an industrial park with no residences, schools or day care centers.

Moreover, Southern produced the June 26, 2007 purchase agreement referenced in paragraph 12 of the Order. Exhibit 4. This purchase agreement is signed by Bill Campbell, President of Titan Tire Corporation and Jim Hughes, President of Southern Iowa Mechanical. This agreement provides that Southern Iowa Mechanical shall purchase two buildings from Titan Tire Corporation for the purchase price of $143,200.

On August 7, 2008, Cecilia Tapia, Director of Region VII Superfund Division, sent a letter to Titan Tire Corporation. Exhibit 5. The letter alleges:

> EPA has documented that such a release [of hazardous substances] has occurred at the Southern Iowa Mechanical Site ("the Site") located in Ottumwa, Iowa.
>
> **Based on the information collected, EPA believes that Titan Tire may be liable under section 107(a) of CERCLA with respect to the Site as a person who by contract or agreement, arranged for the disposal, treatment, or transportation of hazardous substances at the Site.**

Exhibit 5, p. D0044-45.

On October 2, 2008, Titan Tire and Dico sent a letter to the EPA, which enclosed sworn affidavits from Bill Campbell and Jim Hughes. Exhibit 6. Nothing in the administrative record, or elsewhere, contradicts or disputes the facts stated in these affidavits. Mr. Campbell stated under oath in his affidavit:

1. I am the President of Titan Tire Corporation ("Titan Tire") and each of the facts stated herein are based upon my own personal knowledge or information reported to me in the ordinary course of my duties and responsibilities as President of Titan Tire by persons with personal knowledge.

2. Between 2004 and 2007, Southern Iowa Mechanical, L.L.C. ("SIM"), purchased certain buildings located on the Dico, Inc. ("Dico") property in Des Moines, Iowa. **It was my understanding and belief, based upon conversations with the president of SIM, Jim Hughes, that SIM intended to re-assemble each of the buildings it purchased on its property in Ottumwa, Iowa, and to use those buildings in its business operations.**

3. **Titan Tire, on behalf of Dico, entered into purchase agreements with SIM for the sale of the buildings. The total purchase price paid by SIM for these buildings was in excess of $150,000.**

4. Titan Tire, on behalf of Dico, had solicited bids for the purchase of these buildings from several other potentially-interested buyers. Titan Tire received oral bids from one or two other parties, and SIM's bid was the highest.

5. After entering into the purchase agreement for each building, SIM disassembled the buildings it had purchased and removed the building components from the Dico property. Neither Titan Tire nor Dico had any involvement in disassembling the buildings, loading the building components on SIM's trucks, or shipping the building components to SIM's property for re-assembly.

6. **At the time of the sale of the buildings to SIM, and at all times since then, I believed that Titan Tire, on behalf of Dico, was selling a commercially useful product or material for a reasonable value inasmuch as it was my understanding that SIM intended to reassemble the buildings on its property in Ottumwa, Iowa, for use in its business operations.**

7. **At no time during the sale of any of the buildings to SIM was I aware of any hazardous substances located on or in any of the building components.**

(emphasis added). Exhibit 6, p. D0064-65.

Mr. Hughes stated under oath in his affidavit:

1. I am the President of Southern Iowa Mechanical, L.L.C. ("SIM ") and each of the facts stated herein are based upon my own personal knowledge and are true and correct to my best knowledge, information and belief.

2. In 2004 and in 2007, SIM purchased several buildings located on the Dico, Inc. ("Dico") property in Des Moines, Iowa, as indicated on the attached map marked as "Attachment B" which has been previously provided to the United States Environmental Protection Agency ("USEPA") as required by USEPA information requests. The total purchase price paid by SIM for the buildings was in excess of $150,000.

3. SIM also paid its employees for the disassembly and paid for the shipping of the building steel structures to SIM's property in Ottumwa, Iowa.

4. **SIM purchased the buildings for the purpose of re-assembling them as buildings on SIM's property in Ottumwa, Iowa, for use in connection with SIM's business activities.**

5. **SIM purchased the buildings for a useful purpose in SIM's business**.

6. At the time of the purchase of the buildings and until contacted by the USEPA, **SIM was not aware of any hazardous substances located on or in any of the buildings or their components** and no one had informed SIM of the presence of any such substances or of any USEPA involvement with the property where the buildings were located.

7. **SIM did not purchase the buildings for the purpose of disposing, treating, or transporting any hazardous substances.**

(emphasis added). Exhibit 6, p. D0066-67.

In the 12-page letter of October 2, 2008, Titan Tire and Dico cited numerous cases establishing why, as a matter of law, neither Titan Tire nor Dico were "arrangers" under CERCLA. Exhibit 6, p. D0058-62. The letter also explained numerous flaws in the data and laboratory reports being relied upon by the EPA. Exhibit 6, p. D0053-56. The conclusion of this letter stated:

> **Following the statutory analyses and reasoning of these cases, it is clear that neither Titan Tire nor Dico undertook any affirmative acts to "arrange" for the disposal of any hazardous substances. Titan Tire, on behalf of Dico, intended to, and believed that it was, selling commercially useful products when it sold the various buildings to SIM. It was the understanding of my clients that SIM intended to dismantle the building on Dico's property, ship the building components to SIM's property in Ottumwa, and re-assemble the building for use in SIM's business operations on SIM's property. In fact, SIM paid in excess of $150,000 for these buildings – it is inconceivable that anyone would pay that much money for something they merely intended to dispose of. After selling the buildings to SIM, my clients had no involvement in the dismantling, loading, shipping, off-loading, staging, or re-assembling of the buildings on SIM's property.**
>
> The facts and the law establish that EPA cannot prove that Titan Tire and/or Dico are arrangers under CERCLA. Any decision by EPA to the contrary would be without basis, and certainly would be arbitrary and capricious.
>
> Furthermore, because of the significant issues regarding the validity of the sampling and sampling results EPA is relying upon, which were taken without notice to my clients, and without affording them an opportunity to observe and to take their own samples, we have serious questions as to whether any remediation is necessary or if so, the nature and extent of any

such remediation, until we are afforded an opportunity to inspect the Site and conduct our own sampling.

(emphasis added). Exhibit 6, p. D0062-63.

2. Past History of Removal of Disputed PCBs in Insulation Adhesive Years before Sale of Buildings

With respect to the buildings themselves, the EPA alleges that in August 1992 consultant Eckenfelder found 29,000 mg/kg (parts per million) of PCBs in the silver foil backing of insulation tiles in one building.[4] However, the EPA omits in its Order that seven subsequent tests in the same building contradicted the report by Eckenfelder and showed no PCBs at unsafe levels. Exhibit 7. Petitioners believe that the Eckenfelder report made a simple mathematical mistake by putting the decimal point in the wrong place (proper finding was 29 mg/kg rather than 29,000) and that Eckenfelder actually found no PCBs above safe levels. As discussed later, the Aptus testing of the same alleged PCB waste found 28 mg/kg. Exhibit 7, p. D0071-72, D0273. The Aptus testing shows the mistake made by Eckenfelder. Exhibit 7, p. D0071-72, D0273.

Nothing confirmed or supported the August 1992 Eckenfelder report. Exhibit 7, p. D0077. In August 1993 EPA testing found no detectable PCB contamination. Exhibit 7, p. D0071, D0174, D0076, D0178-80, D0182-84, D0186-87. In October 1993 EPA testing found no detectable PCB contamination. Exhibit 7, p. D0071, D0197, D0199, D0201-03, D0205, D0207, D0210-12, D0214-17, D0222, D0225, D0229, D0231. Despite the EPA testing, the EPA issued a unilateral administrative order in March 1994 to Dico to remove insulation, foil, tiles and other materials that may be contaminated with PCBs, including the specific tiles tested by

[4] At one time, PCBs were used in the production of commercial adhesives applied to the backing of insulation panels—similar to lead being used at one time in the production of commercial paint. The predecessors of Dico installed commercial insulation in the buildings decades ago without any knowledge of any alleged PCB content in the adhesive backing to the insulation panels, nor did the Toxic Substance Control Act (TSCA) identify PCB as a hazard.

Eckenfelder. Exhibit 7, p. D0089. Dico complied. Exhibit 7, p. D0072. From May 1994 to October 1994, Dico shipped 54 55-gallon drums (approximately 122 cubic feet in volume) of alleged PCB waste, that was tested by Eckenfelder in 1992, to Westinghouse Environmental for incineration. Exhibit 7, p. D0072. Furthermore, in June 1994 Dico shipped approximately 1008 pounds of alleged PCB waste to Aptus Environmental for incineration. Exhibit 7, p. D0072. In June 1994 Aptus tested the same alleged PCB waste that was tested by Eckenfelder in 1992 and found no PCB contamination above EPA threshold levels. Exhibit 7, p. D0071-72, D0274. In August 1994 consultant ENSECO did testing on the same locations tested by Eckenfelder in 1992 and found no detectable PCB contamination in the buildings. Exhibit 7, p. D0071, D0246, D0248, D0250, D0252, D0254, D0257.

On February 5, 1997, Mary Peterson, Project Manager for EPA Region VII, wrote: "The U.S. Environmental Protection Agency (EPA) has received the twenty-ninth monthly progress report for the subject removal action. The report documents the completion of the activities necessary to bring this removal action to conclusion, with the exception of ongoing maintenance activities." Exhibit 7, p. D0072. In June 2000, consultant Environmental Science did testing for ongoing maintenance and found no detectable PCBs. Exhibit 7, p. D0072-73, D0309-31.

In a letter of November 8, 2007, Mary Peterson of EPA directed Dico to locate, sample and analyze insulation that Mr. Hughes of Southern Iowa Mechanical gave to his employees from the buildings that Southern Iowa Mechanical bought. Exhibit 7, p. D0075. Dico was not aware of this gift by Mr. Hughes, but Dico located the insulation in Malcolm, Iowa, and Grinnell, Iowa. Exhibit 7, p. D0075-76. Dico hired independent contractors to sample and test the insulation. Results showed concentrations of 0.57 mg/Kg (PPM) and 1.18 mg/Kg (PPM), both of which are over 25 times lower than the EPA-TSCA minimum regulatory threshold of 50

mg/kg (parts per million). Exhibit 7, Exhibit 12, p. D0074, D0368, Exhibit 13, D0373, Exhibit 17, p. D0407, D0412. Despite results that proved no PCBs at unsafe or regulatory levels, Ms. Peterson ordered Dico to cleanup the insulation and dispose the non-TSCA (less than 2 PPM for PCBs) as a waste at a TSCA facility in Nevada. Exhibit 7, p. D0074. Dico complied. Exhibit 7, D0074. Dico hired contractors to do so at a cost to Dico of approximately $32,000. Exhibit 7, p. D0074, Exhibit 17. Furthermore, Dico exercised good will by purchasing new insulation and donating it to the SIM employees.

After seven separate testing events by environmental specialists and a large-scale sampling effort by EPA, no evidence was found to confirm or support the August 1992 Eckenfelder PCB report. Exhibit 7, p. D0077. No PCBs at any level exceeding EPA and TSCA thresholds were ever found (including EPA's own testing) in the buildings or their insulation to confirm or support the Eckenfelder purported finding. Exhibit 7, p. D0077. Furthermore, the building materials put into question by the Eckenfelder report were removed and disposed of in the removal action that the EPA oversaw and acknowledged was completed by 1997. Exhibit 7, p. D0077.

3. EPA's Investigation of Southern Iowa Mechanical's Property in Ottumwa

Southern operates an industrial maintenance contracting business on the Site in Ottumwa. Exhibit 24, p. D0646. The Site is situated on approximately 2.6 acres in an industrial park area where the land use is predominantly industrial. Exhibit 24, p. D0646.

In March 2008, EPA required Petitioners to perform removal actions at two different locations, Malcolm and Grinnell, Iowa, to locate and remove EPA-alleged PCB insulation that was relocated from the SIM Site in Ottumwa, Iowa to the personal properties and residences of SIM employees. Exhibit 25 at 4 of 17 and Appendix B. Although the sample analysis of the insulation indicated PCB concentrations of 1.18mg/kg and 0.57mg/kg respectively (well below

the 50mg/kg regulatory threshold), at the direction of EPA, all insulation removed from Malcolm, Iowa and Grinnell, Iowa, was loaded on permitted DOT HAZMAT 30-yard end-dumps, properly manifested, placarded and transported to US Ecology's Beatty, Nevada landfill (an EPA-approved TSCA landfill) for disposal at a cost of approximately $32,000 in spite of the fact that TSCA rules acknowledge that this material was non-PCB waste. Exhibit 25 at 4 of 17 and Appendix B.

On May 16, 2008 and without notice to Titan Tire or Dico, EPA conducted a biased assessment at the Site in Ottumwa. Exhibit 24, p. D0646, Exhibit 6, p. D0533. EPA's Quality Assurance Project Plan ("QAPP") for the May 16, 2008 assessment stated that the standard for "low occupancy areas" should be applied to the soil sampling data collected at the Site. Exhibit 25, p. D0934; Exhibit 11, Attachments H and I. However, the EPA used the "high occupancy areas" standards. Exhibit 25, p. D0934. Greenleaf Environmental certified that EPA erroneously assigned the "high occupancy areas" standards to the Site rather than the appropriate "low occupancy areas" standards. Exhibit 25, p. D0934.

During the May 2008 assessment, EPA alleged that it found PCBs present in the location of adhesion areas of old insulation on areas of the steel beams stockpiled on the Site in the large open field. Exhibit 21, p. D0628, Exhibit 25, p.D0934. In order to obtain this outcome, EPA used: (1) biased sampling targeted at locations containing trace amounts of insulation residue; and (2) the beam surface concentration for the high occupancy area standard (10 ug/100cm^2) rather than the low occupancy area standard (100 ug/100cm^2) and the soil concentration for the high occupancy area standard (1mg/kg) rather than the low occupancy area standard (25mg/kg). Exhibit 25, p. D0934.

On October 17, 2008, counsel for Titan and Dico wrote the EPA. Exhibit 8. Excerpts from this letter state:

> During our conference call, we attempted to follow-up on several questions we have raised previously about the validity of the laboratory report and underlying data upon which EPA is relying in connection with this matter. During our previous conference call, Mary Peterson stated that there was no sampling plan or QAPP for the May 16, 2008 sampling at the SIM property [But see EPA's QAPP, Exhibit 11, Attachments H and I], and that EPA did not conduct any statistical sampling at the SIM property.
>
> During our call yesterday, Ms. Peterson confirmed that EPA did not conduct any statistical sampling at the SIM property. Instead, EPA intentionally conducted biased sampling targeted at locations containing insulation residue.
>
> ****
>
> During our conference call yesterday, Ms. Peterson also attempted to explain why the GC/EC results for 100-square-centimeter wipe samples were multiplied by 100 in the laboratory report. We are not aware of any laboratory procedures, protocols or guidelines which require such manipulation of data, nor are we aware of any laboratory testing procedures under which lab results for a 100-square-centimeter sample are reported in values per square centimeter. Pursuant FOIA, we request that you please provide us with the applicable laboratory procedures, protocols or guidelines that explain why these lab values for 100-square-centimeter wipe samples were purportedly reported in values per square centimeter, and had to be multiplied by 100 in order to reflect the results for a standard 100 square centimeter sample.
>
> **We were heartened to hear you state during our conference call yesterday that EPA understands that SIM purchased the various Dico buildings for the purpose of re-assembling the buildings on the SIM property.**
>
> Additionally, we appreciated Ms. Peterson's concession that she did not doubt that a solvent wash procedure "may very well do the job" in remediating any PCBs above action levels on the beams, although she believes that scarification is the more appropriate process under the TSCA regulations. We believe that we should discuss this issue in further detail as we move forward in our negotiations.

(emphasis added). Exhibit 8, p. D0450-51.

On November 10, 2008, counsel for Titan Tire and Dico wrote the EPA. Exhibit 9. This letter stated:

> We have reviewed the materials EPA provided to us on October 30, 2008, pursuant to our Freedom of Information Act requests dated October 6 and October 17, 2008. These documents have confirmed our previously stated belief that EPA has erroneously multiplied by 100 the laboratory results of the samples taken at the Southern Iowa Mechanical ("SIM") property in Ottumwa, Iowa, on May 16, 2008. It is only by reason of this erroneous 100-fold increase that the reported results exceed the applicable action levels. These erroneously manipulated laboratory results provide no valid basis for any administrative action in connection with the SIM property. I formally request that you include this letter and each of the attached exhibits in the administrative record for this matter, and that EPA consider this letter and each of the attached exhibits before taking any administrative action with regard to this matter.
>
> **Furthermore, as I have explained in my previous letters to you on this matter, there is no factual or legal basis for concluding that either Dico, Inc. ("Dico") or Titan Tire Corporation ("Titan Tire") acting on behalf of Dico, incurred any liability as a "covered person" under section 107(a) of CERCLA, 42 U.S.C. § 9607(a), by selling various Dico buildings to SIM for the purpose of disassembling the buildings, re-locating them to SIM's property in Ottumwa, and re-assembling them as commercial buildings on SIM's property. During our conference call on October 16, 2008, you stated that EPA understands that SIM purchased the various Dico buildings for the purpose of re-assembling the buildings on the SIM property. As stated in my October 2 and October 17, 2008, letters to you, by selling these commercially-useful buildings to SIM for more than $150,000, Dico and/or Titan Tire acting on behalf of Dico, did not arrange for the disposal of any hazardous substance.**

(emphasis added). Exhibit 9, p. D0454, D0456.

On December 30, 2008, EPA issued its UAO, which became effective on January 23, 2009. Exhibit 1. Petitioners believe that no basis exists in fact or law for the issuance of this UAO.

D. Factual Background After UAO Issued

On January 9, 2009, and pursuant to ¶ 78 and 79 of the UAO, Titan Tire and Dico requested a telephone conference with EPA. Exhibit 10. A telephone conference was held on

January 15, 2009, between Titan Tire and Dico legal and business representatives and EPA legal and project representatives. Exhibit 11, D0479. At the outset of the conference, EPA said, while Titan Tire and Dico were welcome to present any information or arguments that they desired, EPA had already made up its mind and would not be changing its position. Exhibit 11, D0479. EPA declined to rescind or alter the UAO. Exhibit 11, D0479.

On January 16, 2009, counsel for Titan Tire and Dico submitted a 60-page written response to the UAO pursuant to the deadline for written comments. Exhibit 11. This response summarizes the fatal defects in the UAO. Excerpts from this response state:

> I respectfully request that EPA consider this letter and each of the documents submitted with this letter, as well as each of the above-referenced documents. I further request that EPA reconsider this matter in light of the information, arguments, and proposals presented in all of these documents, and engage in good faith negotiation to resolve this matter before the effective date of the UAO.
>
> 1. **The Sampling Data Relied Upon By EPA Is Invalid, Unreliable, and Has Been Improperly Manipulated**
>
> 2. **EPA's Manipulation of the Applicable Soil Cleanup Standard Further Demonstrates the Arbitrary and Capricious Nature of This Enforcement Action**
>
> 3. **EPA Has No Evidence Supporting Its Notion That DICO Sold the Buildings At Issue With the Intent to Dispose of Hazardous Substances**
>
> **My clients have submitted sworn affidavits from representatives on both sides of the transactions, detailing the purpose and reasons for selling the various buildings to SIM (and for which SIM paid sums exceeding $150,000). Neither the president of Titan Tire, acting on behalf of DICO, nor the president of SIM knew that the buildings contained any hazardous substances or intended to dispose of any hazardous substances as part of the transactions. The president of Titan Tire, acting on behalf of DICO, and the president of SIM have both declared, under oath, that they believed that they were selling on behalf of DICO, and buying on behalf of SIM, commercially useful buildings which SIM intended to disassemble, relocate to Ottumwa, Iowa, and reassemble on SIM's property for use in SIM's business**

operations. *See* Affidavits of William Campbell and James Hughes, attached to my October 2, 2008, letter.

In addition to having no facts or evidence to support its position, EPA has ignored and refused to address any of numerous cases cited and discussed in my October 2 letter establishing that there is no legal basis for asserting "arranger" liability in this matter. These cases have repeatedly held, on very similar facts, that the mere sale of property containing hazardous substances is insufficient to impose arranger liability on the seller, and that the sale of a useful product, even though the product contains a hazardous substance, does not constitute a "disposal" subjecting the seller to CERCLA liability. *See, e.g., Ashland Oil, Inc. v. Sonford Prod.*, 810 F. Supp. 1057, 1061 (D. Minn. 1993); *G.J. Leasing Co., Inc. v. Union Elec. Co.*, 854 F. Supp. 539, 560), *aff'd*, 54 F.3d 379 (7th Cir. 1995); *U.S. v. B&D Elec., Inc.*, 2007 WL 1395468 (E.D. Mo. May 9, 2007); and each of the other cases cited and discussed in my October 2 letter.

4. EPA's Decision To Disregard All Facts and Evidence and To Reject the Proposed Alternative Remedy Is Arbitrary and Capricious

Even though we dispute the factual, scientific and legal basis for requiring my clients to undertake any remedial action with respect to the steel beams on SIM's property, I outlined an alternative remedy in my November 10 letter which my clients would be willing to undertake. As acknowledged in the Action Memo, this solvent wash remedy is expressly authorized under 40 C.F.R. § 761.79(b)(3), and we believe that it is the most applicable remedy.

(emphasis added). Exhibit 11, p. D0478-79, D0487-90.

On January 27, 2009, counsel for Titan Tire and Dico wrote the EPA. Exhibit 12. Excerpts from this letter state:

For each of the reasons stated in my letter of January 16, 2009, and in each of our previous letters and documents, we believe that Dico and Titan Tire are not liable and that EPA's administrative actions with regard to this matter, including the above Order and the selected remedy, are arbitrary, capricious and contrary to law. Nonetheless, in order to avoid the punitive financial penalties which may be imposed if my clients fail to comply with the Order, the EPA correctly concluded that my letter of January 16, 2009, is the notice of intent to comply by Titan Tire and Dico pursuant to paragraph 23 of the Order.

> My clients reserve all of their rights to challenge EPA's administrative actions in this matter, including the above Order and the selected remedy, and to seek restitution or reimbursement of all monies paid to comply with EPA's mandates under the Order, and any other remedies available to them in equity or at law.

Exhibit 12, p. D0538.

On May 4, 2009, counsel for Titan Tire and Dico sent an e-mail to the EPA. Exhibit 13. Excerpts from this e-mail state:

> **Dan [EPA Regional Counsel] and DeAndré [EPA Project Manager for the Site who replaced Mary Peterson], attached is today's United States Supreme Court decision regarding arranger liability ["*BNSF*" herein]. The Court found that Shell is not liable as an arranger under Section 9607(a)(3). For the same reasons as stated in this decision, Titan Tire and Dico are not arrangers.**
>
> **Based on this decision, Titan Tire and Dico respectfully request that the United States dismiss all claims against them regarding this Site. They also request that the United States dismiss and withdraw the Order for Removal Response Activities issued on or about December 30, 2008. No basis exists in fact of law for the Order against Titan Tire and Dico.**

(emphasis added). Exhibit 13, p. D0546, citing *Burlington Northern and Santa Fe Railway Company v. United States*, 129 S.Ct. 1870, 173 L.Ed.2d 812, 77 USLW 4366 (2009). **EPA never responded to this e-mail.**

III. COMPLIANCE WITH THE UAO

Petitioners complied with the UAO. Exhibit 25, p. D0947. On March 18, 2009, Titan Tire and Dico entered into an Access Agreement to the Site with Southern Iowa Mechanical pursuant to ¶ 47 and 48 of the UAO. Exhibit 14. On June 3, 2009, the EPA approved the submitted Quality Assurance Project Plan, Work Plan and affiliated documents. Exhibit 15, p. D0564. Attached is the EPA-approved Work Plan. Exhibit 16. Attached is the EPA-approved Quality Assurance Project Plan ("QAPP"). Exhibit 17.

On June 22, 2009, Petitioners' contractors mobilized to the Site. Exhibit 25, p. D0936. Petitioners' contractors completed work at the Site on August 28, 2009. Exhibit 25, p. D0942. On September 2, 2009, Petitioners submitted to EPA the Report PCB Sampling Activities at Ottumwa, Iowa, by independent contractor 21st Century Resources, Inc. Exhibit 24. The EPA RPM, Mr. Singletary, scheduled a "final walk through" of the Site on August 25, 2009, but then called on August 24 to advise that no need existed for a final site evaluation. Exhibit 25, p. D0942.

Final Project Report Submitted on October 21, 2009

Petitioners timely submitted their Final Project Report by Greenleaf Environmental Services, LLC, on October 21, 2009 ("Final Report"), as required by ¶ 46 of the UAO. The Final Report is attached hereto as Exhibit 25. Greenleaf Environmental certified that Dico and Titan Tire completed the action required by the UAO on October 12, 2009, and that Dico and Titan Tire complied with such UAO. Exhibit 25, p. D0947.

Petitioners respectfully submit that EPA "approval" of a final report is not a prerequisite to a person's statutory right to petition for reimbursement under CERCLA. Most recently, in *City of Rialto v. West Coast Loading Corp.*, 581 F.3d 865 (9th Cir. 2009), Goodrich Corporation attempted to assert a "pre-enforcement" action against EPA for engaging in a pattern and practice of issuing unilateral administrative orders beyond its statutory authority and routinely delaying issuance of certificates of completion of work required under its orders for the purpose of thwarting judicial review. Although ultimately determining that Goodrich's claim was not yet ripe, because Goodrich admitted that it had not completed the work required by the UAO, the Court observed:

> [O]nce Goodrich believes that it has completed the work, Goodrich has a claim under a standard reimbursement action brought under § 9606(b)(2)(B) and can argue in that action that the EPA's refusal to

> certify completion is in error. Critically, § 9606(b)(2)(A) authorizes a PRP to petition the government for reimbursement "60 days *after completion of the required action*" (emphasis added), not 60 days *after the EPA certifies completion.* **The EPA's certification is not a prerequisite to bringing suit.**

581 F.3d at 878-79 (italics supplied by Court; bold emphasis added).

Similarly, in *Employers Insurance of Wausau v. Browner*, 52 F.3d 656, 662-63 (7th Cir. 1995), *cert. denied,* 516 U.S. 1042 (1996) (quoted in *City of Rialto*, 581 F.3d at 879), EPA argued that it could "block" a petition for reimbursement by refusing to acknowledge compliance with the order, and limit judicial review to an action for declaratory judgment by a party aggrieved by a final agency action. The Court rejected this argument, noting that EPA's acknowledgment of completion of the work is not required before a petition for reimbursement can be submitted. The Court explained:

> If the party ordered to clean up a contaminated site claims to have completed the work, he has a claim for reimbursement, the reimbursement provision being available to "any person who receives and complies with the terms of any" Superfund clean-up order. § 9606(b)(2)(A). If the EPA turns down the claim on the grounds that the clean-up has not been completed . . ., the party has a right to sue and the agency can defend by showing that the clean-up has not been completed and thus that a condition of maintaining such a suit has not been fulfilled. The district court will adjudicate this ground for dismissal.

Id. at 662.

On October 23, 2009, Petitioners therefore timely submitted a Petition for Reimbursement pursuant to Section 106(b)(2) of CERCLA, 42 U.S.C. § 9606(b)(2) (the "First Petition"). Petition No. CERCLA 106(b) 09-01. On November 25, 2009, the United States Environmental Protection Agency, Region 7 ("EPA"), filed a motion to dismiss the Petition on the basis of "ripeness." Petitioners filed their Amended Brief in Opposition to Respondent's Motion to Dismiss the Petition on the Basis of "Ripeness," and then Respondent filed a reply brief. On January 25, 2010, the EAB filed its Order Dismissing Petition for Reimbursement

Without Prejudice. The Order dismissed the First Petition, ruling that "EPA review and approval" of the final report was a prerequisite for seeking reimbursement. The Order, however, recognized in footnote 4 that there may be circumstances in which the EPA has unreasonably declined to certify completion and cited *In re Glidden Co. and Sherwin-Williams Co.*, 10 E.A.D. 738, 749 (EAB 2002).

In *Glidden* the EAB recognized the following circumstances:

> While discussing the concept of substantial compliance only in dicta, the leading case in this area is the Seventh Circuit's decision in *Employers Ins. of Wausau v. Browner*, 52 F.3d 656 (7th Cir. 1995). In *Wausau,* the court, although ultimately finding that the party seeking reimbursement in that case had not, in fact, completed the action required by the UAO, discussed at some length the kinds of circumstances in which something less that total completion of work under a UAO might nonetheless be sufficient for purposes of seeking reimbursement under Section 106(b). Of particular concern to the court were circumstances in which "**the agency takes steps to postpone completion**, making it impossible for the party to argue that it had completed the action required of it by the agency," *id.* at 662; where the **Agency unreasonably refused to certify completion**, id.; "where the party cannot complete the required action for reasons beyond its control," *id.* at 663; or where the **Agency issues "unreasonably, oppressively broad orders** [i.e., orders that include requirements far removed from the environmental problem for which the PRP is arguably responsible]." *Id.* at 664. In such circumstances, the Seventh Circuit surmised that common law doctrines such as impossibility, impracticability, and frustration might be drawn on to allow for substantial compliance "when to require more would be unreasonable***." *Id.* at 663.

Id. at 749 (emphasis added).

Revision I of Final Project Report Submitted on February 18, 2010

After the EAB's Order, Mary Peterson of EPA Region VII issued its official review letter of January 29, 2010 ("EPA Letter I"). Exhibit 28. EPA Letter I disapproved the Final Report. EPA Letter I failed to identify any action at the Site that was not completed and did not require any additional action at the Site. EPA Letter I made defamatory accusations and dictated that Petitioners and Greenleaf Environmental, their contractor, omit or delete specific language in the

Final Report that disagreed with or criticized the EPA conduct or policies in connection with the Site.

On February 18, 2010, Petitioners delivered their letter in response to EPA Letter I. Exhibit 29. On the same day, Petitioners delivered to EPA Revision I Final Project Report ("Revision I Report"). Exhibit 30.

Revision II of Final Project Report Submitted on March 25, 2010

Mary Peterson of EPA Region VII issued its second official review letter of March 12, 2010 ("EPA Letter II"). Exhibit 31. EPA Letter II disapproved the Revision I Report. EPA Letter II also failed to identify any action at the Site that was not completed and did not require any additional action at the Site. EPA Letter II primarily dictated changes to language that had not been questioned in EPA Letter I. EPA Letter II dictated changes to language that was not favorable to EPA and attempted to require Petitioners and its contractors to make statements that they believed to be false.

On March 25, 2010, Petitioners delivered their letter in response to EPA Letter II. Exhibit 32. On the same day, Petitioners delivered to EPA Revision II Final Project Report ("Revision II Report"). Exhibit 33. Petitioners' letter of March 25 stated as follows:

> On October 21, 2009, Titan/Dico delivered to EPA Greenleaf Environmental's Final Project Report ("Final Report"). Under protest, Titan/Dico delivered on February 18, 2010, to EPA the Revision I Final Project Report ("Revision I Report"), which complied with each of the material requirements specified in EPA Letter I. Attached to Titan/Dico Letter I [Exhibit 29; February 18 letter] were redline versions showing the omissions or changes required by EPA Letter I. Titan/Dico requested that Titan/Dico Letter I, EPA Letter I, the Final Report, the Revision I Report and the redline versions be included in the administrative record and that EPA reconsider its actions in light of these materials.
>
> Under protest, Titan/Dico delivers today to EPA the Revision II Final Project Report ("Revision II Report"), which complies with each of the material requirements specified in EPA Letter II. Attached to this letter are redline versions showing the omissions or changes required by EPA

Letter II. Titan/Dico requests that this letter, EPA Letter II, the Revision II Report and the redline versions be included in the administrative record and that EPA reconsider its actions in light of these materials.

Titan/Dico protest EPA Letter II and the required submittal of the Revision II Report and fully reserve, without any waiver, their rights regarding them. EPA Letter II primarily dictates new and additional deletions and changes that were not raised in EPA Letter I, and any future attempt to raise new issues that delay the proceedings before the EAB would be inappropriate. Titan/Dico make this submittal under protest for several reasons.

First, Titan/Dico and its contractors deny that any false, misleading or inaccurate information was contained in the Final Report or Revision I Report. The accusations in EPA Letter I and EPA Letter II are without basis.

Second, EPA sent EPA Letter I and EPA Letter II in an attempt to settle old scores and in retaliation for Titan/Dico's filing of a petition for reimbursement before the Environmental Appeals Board. EPA Letter I and EPA Letter II are an unfair, arbitrary and capricious attempt to gain tactical advantage in the proceedings before the Board. EPA Letter I and EPA Letter II fail to mention any required action at the Site that was not completed. Moreover, Greenleaf Environmental prepared the Final Report and the Revision I Report for Titan/Dico, its clients, as well as for EPA. EPA Letter I and EPA Letter II dictate wording deletions and changes that have no impact on the technical merit of the Final Report or Revision I Report and no impact on human health or the environment at the Site. EPA Letter I and EPA Letter II are EPA's attempted vehicle to require Titan/Dico and its contractors to delete or change statements in the Final Report and Revision I Report that are not favorable to EPA.

For example, Ms. Peterson in EPA Letter I and EPA Letter II directs Mr. Brown, the Project Coordinator at the Site for Greenleaf Environmental LLC ("GES"), to change GES's report to say that EPA personnel: (1) did not select sampling locations; (2) did not deviate from the EPA-approved Work Plan and QAPP; and (3) instead exercised "appropriate oversight." However, to comply with Ms. Peterson's direction, GES would have to make false and inaccurate statements in the report. GES accurately and truthfully states the following in the Revision II Report:

Prior to initiating wipe sampling activities, sample location selection was discussed with Todd A. Campbell and DeAndre' Singletary of USEPA Region VII. Mr. Campbell and Mr. Singletary inquired about discriminate bias sampling by selecting the sample locations based on potential indications of residual insulation and/or adhesive. GES Project

Coordinator, Jeff Brown, explained that, per the EPA-approved Work Plan and QAPP, random indiscriminate sampling was the approved sampling method and that the EPA regulations for PCB sampling described methods to accomplish random sample selection. Mr. Campbell and Mr. Singletary orally directed that sampling proceed by their visual selection of sampling locations based on potential indications of residual insulation and/or adhesives rather than random indiscriminate sampling approved by EPA in the Work Plan and QAPP. GES, on behalf of Dico/Titan, generated the Work Plan and QAPP, received approval of them by EPA and had no reason or desire to modify them. Since EPA did not memorialize in writing its oral direction and modification in accordance with Paragraph 73 of the UAO, Mr. Johnson e-mailed the letter of objection to Mr. Shiel and Mr. Singletary dated August 20, 2009, which is attached in Appendix A, Exhibit 8. Mr. Johnson and Mr. Brown do not recall receipt of any response by EPA to this letter.

Mr. Brown in his letter of March 24, 2010, to EPA states in response to Ms. Peterson's direction to change GES's report:

The language in the fourth paragraph has been revised to include a more detailed description of the site sampling discussions. It must be noted that at no time did Dico/Titan, their site contractors or representatives have any need to alter or request any modification from the EPA-approved Site Work Plan or QAPP. The modification from the site sampling procedure in the EPA-approvedWork Plan and QAPP was a direct result of the actions of the on-site EPA representatives. When the oral direction and modification by EPA was not memorialized in writing by the RPM pursuant to Paragraph 73 of the UAO, Mark Johnson provided his letter of objection dated August 20, 2009. You request that GES state that EPA representatives did not orally direct and modify the selection of the sampling locations under the Work Plan and QAPP, but to do so as you request would not be accurate or truthful.

21st Century Resources, Inc., the third party sampling contractor at the Site, states in its Revision 2 Report of PCB Sampling Activities:

According to the approved QAPP, EPA's recommended wipe sampling method was to be utilized, where an indiscriminate "grab" sample is collected from ten (10%) percent of the metal beams visually identified not to contain residual insulation or adhesives to verify PCB concentrations do not exceed 10 µg/100 cm^2. However, USEPA personnel directed that the majority of the wipe sampling be conducted by visually selecting sampling locations based on potential indications of residual insulation and/or adhesives. Per the USEPA on-scene coordinator, the wipe samples were not indiscriminate grab samples as indicated in the USEPA-approved work plan and QAPP.

Out of the six wipe samples collected during the first wipe sampling event (July 14, 2009), USEPA personnel directed sampling [100 %] from beam edges (representing a side and an edge) as depicted on the photographs provided in this report.

Out of the 59 wipe samples collected from beams during the second wipe sampling event (July 21, 2009), at least 53 sample locations (~90 %) were selected by USEPA personnel. Selected sampling locations were mainly from beam edges (representing a side and an edge) and two of the sampled locations were from ends of two beams as depicted on the photographs provided in this report.

Out of the 26 wipe samples collected from beams during the third wipe sampling event (August 11, 2009), at least 20 sample locations (~75 %) were selected by USEPA personnel. Due to the large size of the majority of the beams during this event, sampling locations represented mainly homogeneous surfaces as depicted on the photographs provided in this report.

GES, 21st Century Resources and Titan/Dico cannot comply with the dictates of Ms. Peterson of EPA because they believe that to do so would require them to make a false and inaccurate statement to EPA.

Third, the EPA in EPA Letter I and EPA Letter II regulates the content of the speech of Titan/Dico and its contractors in violation of the First Amendment by dictating that they omit or change any criticism or questioning of the public officials and policies of the EPA. The First Amendment bars the government from dictating what citizens say and protects the right to criticize the government and public officials and to petition the government for redress of grievances. EPA Letter I required the deletion of or changes to several paragraphs that were not favorable to EPA. EPA Letter II continues the changing of language not favorable to EPA and further attempts to require Titan/Dico and its contractors to make false and inaccurate statements. The EPA Letters are arbitrary, capricious and against the law. Titan/Dico and its contractors submit the Revision II Report, which complies with the EPA dictates to the extent possible, without any waiver of their belief that the original Final Report was proper, honest and accurate.

Titan/Dico request immediate approval by the EPA of the Revision II Report without any further delay or obstruction of Titan/Dico's good faith compliance with the terms of the UAO and prosecution of the petition for reimbursement. If Titan/Dico do not receive such approval on or before Monday, April 12, 2010, Titan/Dico will seriously consider their legal remedies.

Exhibit 32.

Final Approved Revision of Final Project Report Submitted on May 18, 2010

Mary Peterson of EPA Region VII issued its third official review letter of April 27, 2010 ("EPA Letter III"). Exhibit 34. EPA Letter III approved the Revision II Report provided that it shall be deemed approved when submitted with EPA Letter III as Appendix L. EPA Letter III failed to identify any action at the Site that was not completed and did not require any additional action at the Site.

On May 18, 2010, Petitioners delivered their letter in response to EPA Letter III. Exhibit 35. On the same day, Petitioners delivered to EPA Final Approved Revision of the Final Project Report as directed by EPA in EPA Letter III. ("Revision III Report"). Exhibit 36. On May 18, 2010, EPA finally approved the Revision III Report.

EPA's Arbitrary and Capricious Approval Process for the Final Project Report

Under the circumstances in this case, EPA Region VII has taken steps to postpone completion of the final report and has unreasonably refused to certify completion. EPA Letters I II and III are unfair, arbitrary and capricious attempts to gain tactical advantage in the proceedings before the EAB. EPA Letters I, II and III fail to identify any required action at the Site that was not completed. EPA did not require anything to be done at the Site to complete the required action. EPA's Letters I, II and III dictated wording changes that have: (1) no impact on the technical merit of the final report; and (2) no impact on human health or the environment at the Site. EPA Letters I, II and III are the EPA's attempted vehicle to require Petitioners and its contractor to change statements in the final report that are not favorable to EPA.

In addition, EPA Region VII in the EPA Letters I, II and III regulates the content of the speech of Petitioners and their contractor in violation of the First Amendment by dictating that they omit or change any criticism or questioning of the public officials and policies of the EPA. *Jenkins v. Rock Hill Local School District*, 513 F.3d 580, 588 (6th Cir. 2008); *Bioganic Safety*

Brands, Inc. v. Ament, 174 F.Supp.2d 1168, 1179-82 (D. Colo. 2001); *Gibson v. United States*, 781 F.2d 1334, 1338,1341-42 (9th Cir. 1986). The First Amendment bars the government from dictating what citizens say and protects the right to criticize the government and public officials and to petition the government for redress of grievances.

Despite the arbitrary and capricious conduct of EPA Region VII that caused additional costs to Petitioners, EPA has now approved the final report effective on May 18, 2010. Exhibit 36. The EAB should conclude that this Second Petition is ripe for review. This Second Petition has been filed less than sixty (60) days after the date of completion of the required action, as interpreted by the EAB in its January 25, 2010 Order Dismissing Petition Without Prejudice in Petitioners' first reimbursement action, Petition No. CERCLA 106(b) 09-01. Petitioners also do not waive their belief that the First Petition was timely and properly filed within 60 days of October 12, 2009.

Recovery of Costs Sought by Petitioners

Petitioners have been directly involved in implementing the actions necessary to comply with the UAO and the other EPA required actions regarding this matter, *i.e.*, hiring contractors and having them perform the work. Petitioners have incurred costs and paid all amounts necessary to comply with the UAO and the other required actions. Exhibit 25, p. D0946. Pursuant to the Environmental Appeals Board's (the "Board" or "EAB") Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions (November 10, 2004) ("2004 Guidance"), Petitioners will submit documentation regarding costs and damages incurred at a later time. *In Re Solutia Inc.*, 10 E.A.D. 193, 195 (EAB 2001).

The project management and oversight, performance bond costs, physical work at the site, sampling and laboratory costs, transportation and disposal costs and other costs to comply with EPA's required actions are currently estimated at $580,000, not including interest. Exhibit

25, p. D0946; Exhibit 30, p. 16 of 17. Legal fees and disbursements associated with investigating the Site, researching various legal issues, responding to EPA's allegations, negotiating and conferring with the EPA, negotiating and working on submittals to the EPA, negotiating the Site Access Agreement, working on documents and coordination of complying with the UAO, oversight of contractors and disposal, receiving and preparing communications with the EPA, and researching and preparing the First Petition and this Second Petition, and the accompanying attachments, and responding to EPA's motion to dismiss the First Petition, are currently estimated at $200,000. Exhibit 25, p. D0946. These figures will be more completely documented at the appropriate time.

IV. STANDARD FOR RECOVERY UNDER § 106(B)(2)(C) AND (D)

Parties who comply with an administrative orders issued under CERCLA Section 106(a) may petition for reimbursement of the reasonable costs, plus interest, of compliance. CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A). The President's authority to decide claims for reimbursement under Section 106(b) has been delegated to the EPA Administrator, and the Administrator has re-delegated that authority to the Board. See Exec. Order 12580; U.S. Envtl. Prot. Agency, *Delegation of Authority* 14-27, *Petitions for Reimbursement* (June 2000). The Board is also authorized, as appropriate, to authorize payments of such claims. See *Delegation of Authority* 14-27 § 1.a.

Pursuant to § 106(b)(2)(A) of CERCLA, any person "who receives and complies with" an order issued under § 106(a) may petition for reimbursement from the Superfund for the "reasonable costs of such action, plus interest." 42 U.S.C. § 9606(b)(2)(A).

One ground for such recovery is provided in § 106(b)(2)(C), which states that "the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 9607(a) of this title and that costs for which it seeks reimbursement are

reasonable in light of the action required by the relevant order." 42 U.S.C. § 9606(b)(2)(C). Under this provision, the EPA's preliminary conclusion that a party is liable under CERCLA "is entitled to no consideration, let alone the deference afforded the typical administrative agency adjudication." *Kelley v. EPA*, 15 F.3d 1100, 1107 (D.C. Cir. 1994); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, FN 24 (11th Cir. 1996); *General Electric Company v. Johnson*, 362 F.Supp.2d 327, 341 (D.D.C. 2005). Congress "has designated the courts and not EPA as the adjudicator of the scope of CERCLA liability." *Kelley* at 1107-08; *Redwing* at FN 24; *General Electric* at 341. Petitioners rely upon this provision.

In the alternative, Petitioners rely upon § 106(b)(2)(D), which allows a "petitioner who is liable for response costs under section 9607(a)... [to] recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law." 42 U.S.C. § 9606(b)(2)(D). Should the Board determine that Petitioners are liable under § 107(a) of CERCLA, Petitioners should nonetheless be reimbursed for the costs it expended in responding to the UAO and other EPA required actions.

The Board has held that under both § 106(b)(2)(C) and (D), the burden is upon the petitioner to prove its claim for recovery. *See, e.g., In re CoZinCo, Inc.*, 7 E.A.D. 708, 728 (EAB 1998); *In Re Solutia*, 10 E.A.D. 193, 204 (EAB 2001). Accordingly, to obtain reimbursement under Section 106(b)(2)(C) and (D), Petitioners must demonstrate that, more likely than not, they are not liable for response costs. *Solutia* at 204. The petitioner must first establish its right to reimbursement before the issue of the reasonableness of the costs incurred is raised. *See* 2004 Guidance; *Solutia* at 204.

The first basis for recovery (not liable for response costs under section 9607(a)) is discussed first below. The second basis for recovery (the arbitrary and capricious nature of the UAO and other EPA required actions) is discussed second below. The third basis for recovery (the unconstitutionality of the UAO and the UAO regime) is discussed third below.

V. DISCUSSION OF WHY PETITIONERS ARE NOT LIABLE UNDER CERCLA

A. Liability under CERCLA

To establish a prima facie case of liability under CERCLA, the EPA must establish that: (1) the Site is a "facility;" (2) the defendants are "covered persons" under 42 U.S.C. § 9607(a); (3) there has been a "release" or "threatened release" of a "hazardous substance" at the Site; and (4) such release or threatened release caused the plaintiff to incur response costs. *United States v. Aceto Agr. Chems. Corp.*, 872 F.2d 1373, 1379 (8th Cir. 1989).

Under CERCLA, four "covered persons" may be held liable. They are (1) current owners and operators of a facility; (2) past owners and operators who owned or operated the facility at the time of disposal; (3) those who "arranged for disposal" of hazardous substances at the facility; and (4) transporters. *See* 42 U.S.C. § 9607(a); *In re William H. Oliver*, 6 E.A.D. 85, 94 (EAB 1995). There is no dispute, and EPA has never asserted, that Petitioners fall into any category of "covered persons" other than possibly the third, *i.e.*, the "arranger" category. *See, e.g.*, Order, at ¶ 21(e), p. D0008. Neither Petitioner owns or operates, or has ever owned or operated, the Southern Iowa Mechanical Site, which is the "facility." Neither Petitioner owns, and has not owned since Petitioners sold in 2007, the buildings, or the beams located at the Southern Iowa Mechanical Site that were the subject of the Work pursuant to the Order. Order, ¶ 29, p. D0010. Finally, neither Petitioner transported the beams to the facility. Exhibit 6, p. D0064-66. Therefore, EPA's theory can only be that Petitioners' sale of the buildings to Southern Iowa Mechanical in 2007 constituted an arrangement for disposal. Order, at ¶ 21(e), p.

D0008. However, as will be seen below, EPA's argument that there was an arrangement for disposal cannot withstand scrutiny.

B. Petitioners are not "arrangers" under CERCLA

On May 4, 2009, the Supreme Court of the United States decided the landmark case of *Burlington Northern and Santa Fe Railway Company v. United States,* 129 S.Ct. 1870, 173 L.Ed.2d 812, 77 USLW 4366 (2009) (herein, *"BNSF"*) (The Supreme Court reversed the rulings of the lower courts and held: "Accordingly, we conclude that Shell was not liable as an arranger for the contamination that occurred at B & B's Arvin facility."). The Supreme Court directly addressed what the EPA must prove to qualify a person as an "arranger" under CERCLA. Neither Titan Tire nor Dico qualifies as an "arranger" under § 9607(a)(3) because neither Petitioner took "intentional steps to dispose of a hazardous substance." *BNSF* at 1879; *Hinds Investments v. Team Enterprises*, 2010 WL 922416 (E.D. Cal. March 12, 2010) (granted motion to dismiss as a matter of law that defendant did not take intentional steps to dispose of a hazardous substance).

The first section below addresses the history and development of the principles of "arranger liability" under CERCLA before *BNSF.* The second section below discusses the principles adopted in *BNSF.*

1. The history and development of the principles of "arranger liability" under CERCLA, before *BNSF,* show that Petitioners are not "arrangers"

The only issue addressed here is whether EPA can prove that Titan Tire and/or Dico fall into the "arranger" category of "covered persons" under § 107(a)(3) of CERCLA. Section 107(a)(3) defines an "arranger" as follows:

> (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, ...

(emphasis added). 42 U.S.C. § 9607(a)(3).

The courts have held that "arranger" liability only attaches under CERCLA to parties that have taken an affirmative act to dispose of a hazardous substance or material as opposed to convey a useful substance or material for a useful purpose. For instance, see the following cases:

- *U.S. v. B & D Electric, Inc.*, 2007 WL 1395468 (E.D. Mo. May 9, 2007) (holding that sellers of used *transformers* for a useful purpose were not arrangers);

- *Yellow Freight Sys. v. ACF Indus.*, 909 F.Supp. 1290 (E.D. Mo. 1995) (holding that seller of tract of land with building containing asbestos and transformers sold a usable parcel of industrial land it could no longer use without any intent to dispose of any hazardous substance; both seller and buyer knew the building contained asbestos and transformers);

- *Ashland Oil, Inc. v. Sonford Prod.,* 810 F.Supp. 1057 (D. Minn. 1993) (holding that a lender, which foreclosed on a debtor's assets and sold them to a third party, was not an arranger *because* the lender took no affirmative action regarding disposal);

- *G.J. Leasing Co., Inc. v. Union Elec. Co.,* 854 F.Supp. 539 (S.D. Ill. 1994), *aff'd*, 54 F.3d 379 (7th Cir. 1995) (holding that the seller of a power plant, on a tract of land that had commercial value, was not an arranger because it sold a useful product without any intent to *dispose* of hazardous substances);

- *Jersey City Redevelopment Auth. v. PPG Indus.*, 655 F. Supp. 1257 (D. N.J. 1987) (holding that the seller of the Garfield plant on a tract of land was not an arranger because seller did not affirmatively act to dispose of the waste itself);

- *Kelley v. ARCO Indus. Corp.*, 739 F. Supp. 854 (W.D. Mich. 1990) (holding that sellers-suppliers of neoprene compounds, which contained the hazardous substance toluene, for use in plaintiff's manufacture of rubber goods and products, were not arrangers because they took no affirmative act to dispose of a hazardous substance as opposed to convey a useful substance for a useful purpose); and

- *Prudential Ins. Co. v. U.S. Gypsum*, 711 F. Supp. 1244 (D. N.J. 1989) (holding that the seller of asbestos-containing materials that were used in the construction and maintenance of various buildings was not an arranger because it took no affirmative act to dispose of a hazardous substance as opposed to convey a useful substance for a useful purpose).

In *Ashland*, the Court declared:

> Several cases with analogous facts have held that the mere sale of property containing hazardous substances is insufficient to impose arranger liability on the seller. . . .
>
> **In the present case, IFC [lender-seller] did not make any crucial decisions regarding disposal of hazardous substances or take any other affirmative action regarding disposal. Rather, IFC merely sold the former Sonford [debtor] assets to Park Penta [buyer] in order to maintain the value of its security interest. Neither the language of CERCLA nor the cases cited by the parties provide for "arranger" liability in this situation. Therefore, the court finds IFC is not liable for cleanup costs as an arranger under CERLA.**

(emphasis added). 810 F. Supp. at 1061 (citations omitted).

In *G.J. Leasing Co., Inc.*, the Court explained:

> The mere sale of property containing hazardous substances is insufficient to impose arranger liability on the seller. . . .
>
> **The sale of a useful product even though the product contains a hazardous substance, does not constitute a "disposal" subjecting the seller to CERCLA liability. . . .**
>
> There is absolutely no evidence that U.E. [seller] intended to dispose of hazardous substances by selling the Cahokia Power Plant. Every single U.E. witness, whether called by plaintiffs or defendant, credibly testified that U.E. was motivated by economic considerations relating to the cost of producing power at the plant and that the presence of asbestos or other alleged hazardous substances was not a factor at all in the decision either to decommission or sell the plant. U.E. believed that the property and attached equipment had commercial value and use in the commercial resale market. Indeed, the evidence established that U.E. was correct in its view that the property, building and attached equipment had commercial value.

(emphasis added). 854 F. Supp. at 560 (citations omitted). The Seventh Circuit Court of Appeals affirmed the district court's analysis in *G.J. Leasing Co.*, and further reasoned:

> **There are many routes to this conclusion, but the simplest is that the sale of a product which contains a hazardous substance cannot be equated to the disposal of the substance itself or even the making of arrangements for its subsequent disposal. . . .**

> **These distinctions are necessary because otherwise the sale of an automobile would be the disposal of a hazardous substance, since an automobile contains a battery, and a battery contains lead, which is a hazardous substance. (For that matter, the equipment sold along with the power plant in this case contained hundreds of tons of lead, but G.J. Leasing [buyer] makes nothing of that.) And the sale of any building that contained asbestos insulation (and we are told that more than 700,000 commercial buildings in the United States fit this description) would be the disposal of a hazardous substance, because while the asbestos is harmless as long as the asbestos fibers are not allowed to leak out of the walls or other building components in which the insulation was placed, asbestos is, like lead, a hazardous substance.**

(emphasis added). 54 F.3d at 384.

In *Prudential,* the Court stated:

> Looking at the term disposal in the context of the statute, however, it is clear that liability attaches to a party who has taken an affirmative act to dispose of a hazardous substance, that is, "in some manner the defendant must have *dumped* his waste on the site at issue," as opposed to convey a useful substance for a useful purpose. . . .
>
> This is so because the use of the phrase disposal:
>
> clearly circumscribes the types of transactions in hazardous substances to which liability attached, narrowing liability to transactions in the disposal or treatment of such substances. . . . [Thus,] liability for . . . damage under § 9607(a)(3) attaches only to parties who transact in a hazardous substance in order to dispose of or treat the substance.
>
> * * *
>
> **Hence, the sale of a hazardous substance for a purpose other than its disposal does not expose defendant to CERCLA liability. . . .**
>
> Applying this analysis to the facts as plead it appears that plaintiffs claim that defendants manufactured processed, marketed, distributed, supplied and sold asbestos-containing products for use in a variety of building materials, including fire-proofing and insulation. Although in the portions of their complaint related specifically to their CERCLA claim plaintiffs purport that defendants engaged in disposal, the factual allegations reveal that the transfer of the asbestos-containing products was indeed a sale of a substance for the use in the construction of a building. **Hence, as there was no affirmative act to get rid of the asbestos beyond the sale of it as part of a complete, useful product, for use in a building structure, the**

> **plaintiffs' allegations fail to reveal that there has been an arrangement for the disposal of hazardous substances, even though such substances may have come to eventually flake off and potentially pose a health risk. Plaintiffs' factual allegations even taken as true, therefore, do not reveal that the transfer of the asbestos-containing products was tantamount to a disposal of same, but rather reveal that there had been a conveyance of a useful, albeit dangerous product, to serve a particular, intended purpose. To say that such a transaction constitutes a CERCLA-type disposal "would require too strained an interpretation of the statutory definition of [the] terms.** "*Corporation of Mercer University v. National Gypsum, Co.,* No. 85-126-3 (MAC) slip op. at 20 (M.D.Ga. March 9, 1986) (unpublished). *See also 3550 Stevens Creek Assoc. v. Barclays Bank,*, No. C-87-20672, slip op. at 3 (N.D. Cal. Filed Sept. 28, 1988) (unpublished), *appeal docketed* No. 88-15503 (9th Cir. 1988), in which the court held that CERCLA does not provide for the recovery costs incurred in the removal of asbestos from buildings.
>
> Thus, even assuming that the other elements of § 9607(a)(3) liability have been met, the absence of factual allegations which support a conclusion that there has been a "disposal" as defined under CERCLA, fails to state a viable CERCLA claim. As there has been no "disposal" under the factual scenario alleged in plaintiffs' complaint, plaintiffs fail to state a claim under CERCLA upon which relief may be granted and therefore this cause of action must be dismissed and defendants request that I do so is hereby granted. In light of this disposition, and for all of the reasons set forth above, plaintiffs' cross-motions are denied.

(emphasis added). 711 F.Supp. at 1253-55 (citations omitted)(footnote omitted).

The Board's most recent precedent on the "useful product" defense is *In Re Solutia,* 10 E.A.D. 193 (EAB 2001). In 1997 and 1998, the EPA, Region II, inspected the Buffalo Merchandise Center warehouse, which was being used by Morgan Materials, Inc. to store off-specification and discontinued chemicals. The warehouse contained approximately 2,000 55 gallon drums containing flammable liquids in the form of various off-specification solvent-based industrial adhesives, which contained hazardous substances. The drums included off-specification non-A-Grade adhesives (Gelva) manufactured by Monsanto Company which were sold to Morgan in 1986.

Petitioner Solutia Inc. was created as part of a spin-off of Monsanto's chemical business, including its adhesive business. Solutia was the recipient of a unilateral administrative order issued by the Region that required it to remove and destroy the drums located at the Buffalo Merchandise Center. Solutia sought reimbursement of costs spent in complying with the order. Petitioner contended that it was not an "arranger" under Section 107(a)(3) of CERCLA. Petitioner submits that the 1986 sale of non-A-Grade adhesives to Morgan by Monsanto was the sale of a useful product. The Board held:

> **For the foregoing reasons, the Board concludes that Solutia's Petition for Reimbursement should be granted. Solutia has demonstrated by a preponderance of the evidence that the sale of non-A-Grade Gelva to Morgan by Monsanto in 1986 was the sale of a useful product, rather than an arrangement for disposal of a hazardous substance.**

(emphasis added). *Solutia* at 217.

2. *BNSF* establishes the test for "arrangers" under CERCLA

The facts in *BNSF* are as follows. In 1960, Brown & Bryant, Inc. (B & B), began operating an agricultural chemical distribution business, purchasing pesticides and other chemical products from suppliers such as Shell Oil Company (Shell). Using its own equipment, B &B applied its products to customers' farms. B & B opened its business on a 3.8 acre parcel of former farmland in Arvin, California, and in 1975, expanded operations onto an adjacent .9 acre parcel of land owned by two railroads. Both parcels of the Arvin Facility were graded toward a sump and drainage pond located on the southeast corner of the primary parcel. Neither the sump nor the drainage pond was lined until 1979, allowing waste water and chemical runoff from the facility to seep into the groundwater below. *BNSF*, 129 S.Ct. at 1874-75.

During its years of operation, B & B stored and distributed various hazardous chemicals on it property. Among these were the pesticide D-D sold by Shell. Originally, B & B purchased D-D in 55-gallon drums; beginning in the mid-1960's, however, Shell began requiring its

distributors to maintain bulk storage facilities for D-D. From that time onward, B & B purchased D-D in bulk. When B & B purchased D-D, Shell would arrange for delivery by a common carrier. When the product arrived, it was transferred from tanker trucks to a bulk storage tank located on B & B's primary parcel. From there, the chemical was transferred to bobtail trucks, nurse tanks and pull rigs. During each of these transfers leaks and spills could and often did occur. Because D-D is corrosive, bulk storage of the chemical led to numerous tank failures and spills as the chemical rusted tanks and eroded valves. Shell was aware of these leaks and spills of the D-D and was aware that D-D contained hazardous substances, and Shell took steps to encourage its distributors to reduce the likelihood of spills and leaks. Although these steps helped, leaks and spills continued and seeped into the soil and groundwater of the Arvin facility. By 1989 B & B became insolvent and ceased all operations. That same year, the Arvin facility was added to the National Priority List. *BNSF*, 129 S.Ct. 1875-76.

The Supreme Court declared the elements that EPA must prove to establish "arranger" liability under CERCLA:

> Although we agree that the question whether§ 9607(a)(3) liability attaches is fact intensive and case specific, such liability may not extend beyond the limits of the statute itself. Because CERCLA does not specifically define what it means to "arrang[e] for" disposal of a hazardous substance, see, *e.g., United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1231 (C.A.6 1996); *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (C.A.7 1993); *Florida Power & Light Co.*, 893 F.2d, at 1317, we give the phrase its ordinary meaning *Crawford v. Metropolitan Government of Nashville and Davidson Cty.*, 555 U.S. ----, 129 S.Ct. 846, 172 L.Ed.2d 650 (2009); *Perrin v. United States*, 444 U.S.37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979). In common parlance, the word **"arrange" implies action directed to a specific purpose.** See Merriam-Webster's Collegiate Dictionary 64 (10th ed. 1993) (defining "arrange" as "to make preparations for: plan[;] . . . to bring about an agreement or understanding concerning"); see also *Amcast Indus. Corp.*, 2 F.3d at 751 (**words "'arranged for' . . . imply intentional action"**). **Consequently, under the plain language of the statute, an entity may qualify as an arranger under § 9607(a)(3) when it takes intentional steps to dispose of a**

> **hazardous substance.** *See Cello-Foil Prods., Inc.*, 100 F.3d, at 1231 ("[I]t would be error for us not to recognize **the indispensable role that state of mind must play** in determining whether a party has 'otherwise arranged for disposal . . . of hazardous substances'").
>
> ****
>
> Although the evidence adduced at trial showed that Shell was aware that minor, accidental spills occurred during the transfer of D-D from the common carrier to B & B's bulk storage tanks after the product had arrived at the Arvin facility and had come under B & B's stewardship, the evidence does not support an inference that **Shell intended such spills to occur**. To the contrary, the evidence revealed that Shell took numerous steps to encourage its distributors to *reduce* the likelihood of such spills, providing them with detailed safety manuals, requiring them to maintain adequate storage facilities, and providing discounts for those that took safety precautions. Although Shell's efforts were less than wholly successful, given these facts, Shell's mere knowledge that spills and leaks continued to occur is insufficient grounds for concluding that Shell "arranged for" the disposal of D-D within the meaning of § 9607(a)(3). **Accordingly, we conclude that Shell was not liable as an arranger for the contamination that occurred at B & B's Arvin facility.**

(emphasis added). *BNSF,* 129 S.Ct. at 1879-80.

3. The application of *BNSF* to the facts of this case show that Petitioners are not "arrangers" under CERCLA

The affidavits of Mr. Campbell and Mr. Hughes, the two principal people involved in the sale of the buildings and the people who signed the purchase agreement, establish the undisputed facts in this case. Exhibit 6, p. D0064-67. Titan Tire, on behalf of Dico, solicited bids for the purchase of the buildings from several other potentially-interested buyers. Exhibit 6, Campbell Aff. ¶ 4, p. D0064. Titan Tire received oral bids from one or two other parties, and Southern's bid was the highest. Exhibit 6, Campbell Aff. ¶ 4, p. D0064. In 2004 and in 2007, Southern purchased several buildings located on the Dico property in Des Moines, Iowa. Exhibit 6, Hughes Aff. ¶ 2, p. D0066, Campbell Aff. ¶ 2, p. D0064. The total purchase price paid by Southern for the buildings was in excess of $150,000. Exhibit 6, Hughes Aff. ¶ 2, p. D0066, Campbell Aff. ¶ 3, p. D0064. Southern also paid its employees for the disassembly and paid for

the shipping of the building steel structures to Southern's property in Ottumwa, Iowa. Exhibit 6, Hughes Aff. ¶ 3, D0066; Campbell Aff. ¶ 5, p. D004-65.

Titan Tire and Dico sold, and Southern purchased, the buildings for the purpose of re-assembling them as buildings on Southern's property in Ottumwa, Iowa, for use in connection with Southern's business activities. Exhibit 6, Hughes Aff. ¶ 4, p. D0066, Campbell Aff. ¶ 2, p. D0064-65. Titan Tire and Dico sold and Southern purchased the buildings for a useful purpose in Southern's business. Exhibit 6, Hughes Aff. ¶ 5, p. D0066, Campbell Aff. ¶ 6, p. D0064-65. Neither Petitioners nor Southern were aware of any hazardous substances located on or in any of the buildings or their components. Exhibit 6, Campbell Aff. ¶ 7, p. D0065, Hughes Aff. ¶ 6, p. D0066. Titan Tire and Dico did not sell, and Southern did not purchase, the buildings for the purpose of disposing, treating, or transporting any hazardous substances. Exhibit 6, Hughes Aff. ¶ 7, p. D0066, Campbell Aff. ¶ 2, 6, p. D0064-65.

Based on the facts, Titan Tire and Dico did not take intentional steps to dispose of a hazardous substance. *BNSF,* 129 S.Ct. at 1879. They did not intend any release of PCBs to occur. Id. at 1880. They were not aware that the buildings or their components contained any hazardous substances. Id. at 1879-80. Accordingly, Titan Tire and Dico are not liable as "arrangers" for any contamination that occurred at Southern's Site. Id.; *Hinds Investments v. Team Enterprises*, 2010 WL 922416 (E.D. Cal. March 12, 2010).

VI. DISCUSSION OF WHY EPA'S ACTIONS WERE ARBITRARY, CAPRICIOUS AND NOT IN ACCORDANCE WITH LAW

For EPA to issue an order under § 106(a), there must be sufficient proof that there may be "an imminent and substantial endangerment to the public health or welfare or the environment **because of** an actual or threatened release of a hazardous substance from a facility." 42 U.S.C.

§ 9606(a) (emphasis added); *A&W Smelter and Refiners, Inc. v. Clinton*, 146 F.3d 1107 (9th Cir. 1998); *In re Cyprus Amax Minerals Co.*, 7 E.A.D. 434, 450 (EAB 1997).

In order to prove an imminent and substantial endangerment, a proponent, such as EPA, must prove that "there is reasonable cause for concern that someone or something may be exposed to a risk of harm if remedial action is not taken." *Foster v. United States*, 922 F.Supp. 642, 661 (D.D.C. 1996). In order to establish "imminence," the proponent "must prove that the risk of threatened harm is currently present on the Site, and that the potential for harm is great." Id. at 661. Any "alleged endangerment must be substantial or serious, and there must be some necessity for the action." Id. at 661.

EPA made a "Determination" in the UAO that there was such an "imminent and substantial endangerment" here. Exhibit 1 at ¶ 18. This EPA Determination was erroneous, arbitrary, and capricious.

The Board has held that an argument that no "imminent and substantial" endangerment existed is an argument that no response action should have been ordered. *In re CoZinCo, Inc.*, 7 E.A.D. 708, 746 (EAB 1998); *In re Cyprus Amax Minerals Co.*, 7 E.A.D. at 450-51 (citing *A&W Smelters and Refiners,* 6 E.A.D. 302, 325 (EAB 1996)). The Board evaluates such claims under CERCLA § 106(b)(2)(D), which the Board says "is broad enough to allow an argument that the Agency acted arbitrarily and capriciously in selecting a remedy where no remedy selection was authorized because the statutory prerequisites to the issuance of an order did not exist." *A&W Smelters and Refiners*, 6 E.A.D. at 325.

The statutory prerequisites to the issuance of the UAO and EPA's other required actions did not exist in this case. The reasons are as follows.

A. The sampling data relied upon by EPA is invalid, unreliable, and has been improperly manipulated

The sampling data relied upon by EPA is invalid and unreliable for several reasons. First, the sample collection process in May 2008 was conducted without any notice to Titan Tire or Dico, and without any opportunity to monitor or participate in the sampling process. Exhibit 6, p. D0053, Exhibit 11, p. D0479. Second, the secret sampling process failed to comply with EPA protocols and procedures–there was no map, sketch or permanent marking made to identify the location where each sample was collected and the precise dimensions of the area from which wipe samples were taken; and no field blanks, replicates, or other quality assurance samples were collected or tested in accordance with 40 C.F.R. § 123, to help verify the reliability of the data. Exhibit 6, p. D0053-54, Exhibit 8, p. D0450, Exhibit 11, Attachment A[5] (Dr. John H. Smith, PCB Disposal Section, Chemical Regulation Branch, United States Environmental Protection Agency, "Wipe Sampling and Double Wash/Rinse Cleanup as Recommended by the Environmental Protection Agency PCB Spill Cleanup Policy," at 8, 10 (June 23, 1987, revised and clarified on April 18, 1991)(excerpts).

Third, in his field notes, sampler Todd Campbell reports that some of the wipe samples were taken from Z channel beams which were too small for a standard 100 square centimeter sampling area, so the samples were taken in "side by side" areas of 5x10 centimeters. Exhibit 11, Attachment B (Field Notes). Mr. Campbell does not identify which–or whether all–samples were taken in this manner, or what, if any, instruments he used to accurately measure the 5x10 centimeter areas (since most standard wipe samples use a fixed, unadjustable 10x10 template[6]).

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[5] The attachments to the letter of January 16, 2009, were identified as Exhibits A, B, etc. In order to prevent confusion, the letter of January 16, 2009, is Exhibit 11 and the attachments are referred to herein as Attachments A, B, etc. rather than as Exhibits A, B, etc.

[6] The EPA has stated: "Care must be taken to assure proper use of a sampling template. Different templates may be used for the variously shaped areas which must be sampled. A 100 cm^2 area may be a 10 cm x 10 cm square, a

Exhibit 11, p. D0480. Obviously, if he "guessed" at the size of the wipe sample areas–and we cannot determine whether or not he did, since Petitioners were not afforded any notice or opportunity to attend and participate in the secret sampling, and since he failed to permanently mark the area from which he took the samples–the sampling results would be meaningless when attempting to compare them to the TSCA action levels for samples taken from 100 square centimeter areas. Exhibit 11, p. D0480.

Additionally, EPA failed to provide all of the documents Petitioners requested in FOIA requests sent on October 6 and October 17, 2008, and January 9, 2009, and thus additional errors, flaws, discrepancies or deviations from standard operating procedures may have existed but EPA did not produce all of the information requested. Exhibit 11, p. D0480, Exhibits 17, 18 and 19.

B. Three-day gap in chain of custody

The identity and integrity of the samples purportedly collected at the Site by the EPA were severely compromised when the samples were apparently left unattended somewhere at or outside the EPA Regional Lab over the weekend of May 16-19, 2008. Exhibit 11, p. D0480. According to Todd Campbell's field notes, Exhibit 11, Attachment B:

- he called "Nicole" sometime during the day on May 16, "to tell her that we would not be able to make" the 4:00 drop-off deadline for delivering the samples to the Regional Lab;
- Nicole told Todd to call Mary Peterson to "get her OK" to leave the samples in the sample cooler over the weekend; and
- "Mary gave us her blessing".

Exhibit 11, p. D0480-82.

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rectangle (e.g., 1 cm x 100 cm or 5 cm x 20 cm), or any other shape. The use of a template assists the sampler in the collection of a 100 cm^2 sample and in the selection of representative sampling sites." *Verification of PCB Spill Cleanup by Sampling and Analysis*, EPA-560/5/5-85-026, August, 1985.

The "EPA Chain of Custody Record" for these samples is Exhibit 11, Attachment C. This record indicates that:

- Todd Campbell relinquished custody of the samples to "Adam R" at 1752 (5:52pm) on Friday, May 16, for the purpose of "delivering the samples to the lab";
- Adam R. relinquished custody of the samples at 2039 (8:39pm) on May 16 (apparently making the 225 mile drive from 3043 Pawnee Drive in Ottumwa, Iowa, to downtown Kansas City, Kansas, in two hours and 47 minutes—an average of 80.8 miles per hour);
- Nicole Roblez signed the Chain of Custody Record indicating that she "received" the samples on Monday, May 19.

Exhibit 11, p. D0480-82.

Todd Campbell's field notes indicate that he called and left a voice message for "Nicole" at 1400 (2:00pm) on May 19, "**to make sure samples were found**." Exhibit 11, Attachment B. (emphasis added). Obviously, he understood that the samples had been left unattended (and not properly preserved in accordance with EPA's own protocols) somewhere at or near the Regional Lab since Friday evening, and was concerned that they might not be discovered or located. Exhibit 11, p. D0480-82. He received a voicemail reply at 5:00 p.m., reporting that the samples had been located. Exhibit 11, Attachment B.

The purpose of the chain-of-custody requirement is to ensure that the samples have been in the possession of, or secured by, a responsible person at all times. Exhibit 11, p. D0480-82. The field notes show a three-day gap in which no responsible person was in custody of the samples. EPA has provided no documentation indicating exactly where the samples were located during the three-day gap in the chain of custody, between Friday evening, May 16, and Monday, May 19. Exhibit 11, p. D0480-81. EPA has provided no documentation indicating what efforts were made to protect the samples from tampering, or to preserve the integrity, authenticity, and temperature of the samples. Exhibit 11, p. D0481-82. This critical gap in the

chain of custody violates the procedures required by the August 2004 *Polychlorinated Biphenyl Inspection Manual*, published by EPA's Office of Compliance, Office of Enforcement and Compliance Assurance, sections 6.5 (Sample Documentation) and 6.5.2 (Chain-of-Custody), and invalidates the reliability of the analysis of the putative samples.[7] Exhibit 11, excerpts of the *Inspection Manual* in Attachment D, p. D0480-82.

EPA also failed to produce any documentation evidencing that these samples were maintained at temperatures below 4° C. at all times throughout the weekend of May 16-19, as required by EPA procedures for PCB samples. *See* EPA's *Polychlorinated Biphenyl Inspection Manual*, section 6.4.2 (Sample Preservation), Exhibit 11, Attachment D. *See also* 40 C.F.R. § 136.3, Table II. Exhibit 11, p. D0481. Since the temperature reached a high of 86° F. (30^0 C.) over that weekend (*see* Weather History, Exhibit 11, Attachment F), the failure to secure and preserve the samples in accordance with EPA procedures further invalidates the reliability of any lab results. Exhibit 11, p. D0481-82.

Finally, there is no evidence that the samples were ever logged in at the laboratory where the integrity of the samples was checked, the chain-of-custody documentation was verified, and the holding times were determined to fall within specified requirements. Exhibit 11, p. D0481-82, *See* Loftus, *Chain of Custody Procedure*, Exhibit 11, Attachment E. In fact, there is no documentation explaining what happened to the putative samples between the time Ms. Roblez signed the Chain of Custody Record indicating that she "received" them on Monday, May 19, and the time they were analyzed by Lorraine Iverson several days later. Exhibit 11, p. D0481-82.

[7] The Maine Department of Environmental Protection describes the effect of a failure to follow chain-of-custody procedures as follows: "Your results are worthless for legal purposes." Tim Loftus, Maine Dept. of Env. Protection, *Chain of Custody Procedure* at http://www.lagoonsonline.com/laboratory-articles/custody.htm (2003), Exhibit 11, Attachment E).

Failure to establish links in the chain of custody results in the inadmissibility of the samples and lab reports. *See, e.g., Thomas v. Martin*, 202 F.Supp. 540, 543-44 (E.D. Va. 1961) (holding that blood test results were inadmissible where "defendant failed to establish every link in the chain of identification between the taking and analysis" of the blood sample); *Todd v. United States*, 384 F.Supp. 1284, 1293 (M.D. Fla. 1974), *aff'd*, 553 F.2d 384 (5th Cir. 1977) (holding that the "chain of custody is so replete with gaps and unexplained circumstances" that the evidence has no probative value); *Amaro v. City of New York*, 351 N.E.2d 665, 671 (N.Y. 1976) (holding that a lab report on a blood sample was inadmissible because no chain of custody could be established); *Durham v. Melly*, 14 A.D.2d 389, 392-93 (N.Y. App. Div. 1961) (holding that a blood test was inadmissible where the chain of possession and the unchanged condition of the sample, from the taking of the sample from the hospital to the performance of the analysis, could not be established). In *Williams v. Halpern*, No. 111138/02, 2006 WL 1371691 at *3 (N.Y. Sup. Ct. Apr. 12, 2006), the court declared: "Inquiries involving chain of custody of evidence sought to be used in legal proceedings are made in order to insure that a proffered specimen has the same identity and is in the same condition as it was when first produced or seized from an individual. . . In other words, there must be certainty that the evidence used is truly what it is purported to be. Where that is not the case, then the entire integrity of the legal result is in question.") Therefore, EPA's samples and lab report are inadmissible, and no basis exists for EPA's enforcement action against Titan and Dico. Exhibit 11, p. D0480-82.

C. Laboratory irregularities

EPA procedures require that PCB samples "should be analyzed as soon as possible after collection," but the maximum time that "samples may be held before analysis and still be considered valid" is 7 days (168 hours). 40 C.F.R. § 136.3, Table II & n.4. *See also* EPA's *Polychlorinated Biphenyl Inspection Manual*, section 6.4.2 (Sample Preservation), Exhibit 11,

Attachment D. While an email from lab technician Lorraine Iverson indicates that the wipe samples were analyzed on May 22, 2008, the sixth day after collection, and the soil samples were analyzed approximately 165 hours after extraction (i.e., at the end of the seventh day). Exhibit 11, p. D0482. The delays in analysis, when coupled with the initial three-day break in the chain-of-custody, the subsequent failure to log the samples into the laboratory, and the failure to document preservation of the temperature of the samples during the week following collection, further compromises the validity of the lab results. Exhibit 11, p. D0482.

More disconcerting, however, is EPA's acceptance of results which were fraught with instrument malfunctions, errors and guesswork. For example:

- On May 22, Ms. Iverson reported that some of the wipe samples contained concentrations of either Aroclor 1248 or 1254, but that "it is difficult to see the difference in pattern" at such levels. (Exhibit 11, Attachment G).

- On May 23, Ms. Iverson had to guess that Sample 9 (the insulation sample, mislabeled as a soil sample) "contains Aroclor 1254 **(?)**". (Exhibit 11, Attachment G) (emphasis added).

- On May 23, Ms. Iverson reported that Sample 9 "completely blew my instrument." Consequently, she warned that "[t]hese (especially the soils) may be late, as I have to perform instrument maintenance and rerun them." (Exhibit 11, Attachment G).

- On May 23, Ms. Iverson continued: "The maintenance I did on my instrument did not correct my problem with the baseline." (Exhibit 11, Attachment G).

- On May 27, Ms. Iverson consoled Mary Peterson that it is "not your fault that my instrument could not handle the sample extracts." (Exhibit 11, Attachment G).

- In the May 30, 2008 report of the sample analysis results, Sample 9 (the insulation sample) is repeatedly described as a soil sample, and the results for Sample 115 were coded with a "J", meaning that the reported value failed to meet the established quality control criteria for either precision or accuracy.

Exhibit 11, p. D0482-84.

In the October 6, 2008 FOIA request by Titan Tire and Dico, Petitioners requested the technician's raw data and calculations relating to each of the samples, together with all lab notes,

records, data, electronically stored information, printouts and documents of any kind reflecting or regarding the EPA lab work in connection with the Site. Exhibit 11, p. D0483. EPA produced no documentation as to how Ms. Iverson's instrument malfunctioned while analyzing the samples purportedly taken from the Site so as to require the referenced maintenance, or whether the instrument was ever fully repaired. Exhibit 11, p. D0483. Nor has EPA ever produced any documentation certifying that the instrument used to analyze the samples purportedly taken from the Site was properly calibrated. Exhibit 11, p. D0483. Petitioners have received no lab notes, logs, records, data, or any other documents relating to the lab work performed by Ms. Iverson, other than a handful of emails and the final lab report. Exhibit 11, p. D0483-84.

Petitioners' FOIA request of January 9, 2009, repeated the previous FOIA request for all documents relating to the lab work and calculations performed on the samples from the Site. Exhibit 11, p. D0483. During telephone conference on January 15, 2009, EPA confirmed that it will not produce any additional documents responsive to Petitioners' FOIA requests. Exhibit 11, p. D0483.

Because EPA has not produced any of Ms. Iverson's lab notes, logs, raw data, calculations, records, applicable software, electronically stored information, printouts or other documents relating to each of the samples, counsel for Petitioners requested during the telephone conference of January 9, 2009, that EPA permit counsel for Petitioners to interview Ms. Iverson to gain a better understanding of exactly what she did with each of these samples, how she addressed each of the problems or issues reflected in her emails, what if any steps she undertook to attempt to verify that her machine was properly calibrated and functioning when she analyzed each of the samples, what if any steps she undertook to assess or establish the

validity and reliability of each of her results, and exactly what policies or procedures she followed in making the data manipulations reflected in the May 30, 2008 lab report. Exhibit 11, p. D0483-84. EPA advised that it would not authorize any such interview. Exhibit 11, p. D0483-84.

D. Mis-matched Aroclor "fingerprint"

The EPA sampling errors in the field, the three-day break in the chain-of-custody, and Ms. Iverson's lab irregularities are particularly relevant to the direct conflict between the chemical fingerprint of the PCB molecules reportedly found at the Ottumwa Site and the chemical fingerprint of the PCB molecules reportedly found in the buildings on the Dico property in Des Moines. Exhibit 11, p. D0484-85, Exhibit 6, p. D0055.

Aroclors[8] are the forensic fingerprint or simply the DNA for PCB tracking. Exhibit 11, p. D0484, Exhibit 6, p. D0055. The EPA in May 2008 and 21st Century Resources in September 2009 found a different species of PCB molecules at the Ottumwa Site, namely the Aroclor 1248 marker, than Eckenfelder in August 1992 reported for the PCB molecules at the Des Moines site, namely the Aroclor 1260 marker. Exhibit 11, p. D0484-85, Exhibit 24, p. D0732-42. Two different and distinct "DNA's" cannot exist for allegedly the same insulation and adhesive backing. Exhibit 11, p. D0484-85. Specific Aroclors do not "mutate" to others due to time or other conditions. Exhibit 11, p. D0484-85.

The crucial Aroclor 1260 marker is not present in the samples taken from the Ottumwa Site during the EPA inspection and the removal action ordered by EPA. Exhibit 11, p. D0484-85. This mismatch in the chemical fingerprint or DNA of the PCB molecules from the two different sites—Ottumwa and Des Moines—and the absence of the Aroclor 1260 marker

[8] "PCB fingerprinting is a set of well-established techniques used to distinguish the sources of contamination.... PCB profile comparisons are often used in situations when potentially responsible parties (PRPs) used markedly different Aroclors in their operations." Exhibit 26, p. D1229.

demonstrate that the PCBs found at the Site did not come from the Dico property in Des Moines. Exhibit 11, p. D0484-85, Exhibit 6, p. D0055.

In the Action Memo of December 30, 2008, EPA attempts to dismiss the conflict in the chemical fingerprint by declaring that Aroclor 1254 was found in the insulation sample purportedly taken from the SIM Site (Sample 9), and Aroclor 1254 was found in insulation samples taken from the Dico property in Des Moines. Exhibit 11, p. D0484. This comparison over-simplifies the chemical fingerprint and the associated marker(s) of the sample analyses, and disregards the critical flaws, errors, and irregularities associated with EPA's handling of the Site investigation. Exhibit 11, p. D0484.

In 1992, Eckenfelder Inc. reported an association between Aroclors 1254 and 1260 in the samples containing detectable levels of PCBs at the DICO property.[9] Exhibit 11, D0484. None of the Eckenfelder samples detected the presence of any Aroclor 1248. Exhibit 11, p. D0484. In other words, Aroclor 1260 is a "marker" which, when found present with Aroclor 1254, uniquely identifies the PCBs reportedly identified at the Dico property. Exhibit 11, D0484, *See* 1992 Eckenfelder report attached to Exhibit 7, p. D0128-138. In the May 30, 2008 EPA report of samples purportedly taken from the Site, all of the detected Aroclors were either 1248 or 1254. Exhibit 11, p. D0484. Ms. Iverson reported that Sample 9 (the insulation sample mislabeled as a soil sample) "blew her instrument," and she was not certain whether it was "Aroclor 1254 (?)" or 1248 ("it is difficult to see the difference in the pattern"). Exhibit 11, p. D0484. **None of the**

[9] The 1992 Eckenfelder Inc. report is the only test which ever reported actionable levels of PCBs in any buildings on the Dico property, and the validity of this report has been substantially undermined. EPA conducted at least 5 separate site investigations of the Dico property between 1993 and 2000, and in each of the tests conducted during those investigations, no actionable levels of PCBs were found. See earlier discussion in section II(C)(2). Nonetheless, Dico complied with the removal action mandated by EPA in 1994, and completed the removal action in early 1997 by removing all of the insulation suspected of containing PCBs, and encapsulating all of the beams which were believed to have come in contact with adhesive containing PCBs.

May 2008 samples Ms. Iverson analyzed detected the presence of any Aroclor 1260. Exhibit 11, p. D0484.

Each Aroclor has its own chemical fingerprint, and the association of unique Aroclors can be used to forensically trace PCBs to a particular source. Exhibit 11, p. D0484, Exhibit 6, p. D0055. The Aroclor 1254/1260 association reported by Eckenfelder does not match – and is distinctly different from – the Aroclor 1248/1254 association reported in EPA's May 30, 2008 analysis of samples purportedly collected at the Site. Exhibit 11, p. 0484-0485. The crucial "marker" of Aroclor 1260 is not present in the samples purportedly taken from the Site. Exhibit 11, p. D0484-85; Exhibit 24, p. D0732-42.

None of the samples taken from the Site during the removal action detected the presence of any Aroclor 1260

Independent contractor, 21st Century Resources, Inc., took samples at the Southern Iowa Mechanical Site during July and August, 2009, and had the samples analyzed by an independent laboratory. Exhibit 24, p. D0732-42. 21st Century Resources reported the results in its Report—PCB Sampling Activities dated September 2, 2009. Exhibit 24, p. D0732-42. At the direction of EPA, 21st Century Resources took 139 samples at the Site to try to detect PCBs. Exhibit 24, p. D0732-42. The laboratory analysis of the 139 samples found no Aroclor 1260. Exhibit 24, p. D0732-42. **No Aroclor 1260 was found in even one of the 139 samples.** Exhibit 24, p. D0732-42.

During the removal action in July and August, 2009, EPA took its own samples at the Site under the direct supervision of and direction by EPA Region VII staff. Exhibit 25, p. D0941-42, Appendix A, Exhibit 10. The EPA staff then had the samples analyzed by the EPA laboratory. Exhibit 25, p. D0941-42, Appendix A, Exhibit 10. The soil results primarily do not

detect any PCBs while a few of the results show traces of PCBs that are well below the soil concentration standard of 1 mg/Kg level imposed by EPA for high occupancy areas (whereas the soil concentration standard for low occupancy areas is 25 mg/kg). Exhibit 25, p. D0941-42, Appendix A, Exhibit 10. The wipe sample results for the beams primarily do not detect any PCBs while a few of the results show traces of PCBs that are well below the surface concentration standard of 10 ug/100cm^2 imposed by EPA for high occupancy areas (whereas the surface concentration standard for low occupancy areas is 100 ug/100cm^2).[10] Exhibit 25, p. D0941-42, Appendix A, Exhibit 10. The EPA laboratory results from the EPA soil and surface samples in July and August, 2009, were all well below regulatory thresholds. Exhibit 25, p. D0941-42, Appendix A, Exhibit 10. This directly refutes the May 2008 EPA testing, which was the basis for the issuance of the UAO. Exhibit 25, p. D0941-42, Appendix A, Exhibit 10.

Even with the trace amounts, EPA testing showed significant forensic fingerprints different from the ones EPA relied on to issue the UAO. Exhibit 25, p. D0941-42, Appendix A, Exhibit 10. **EPA testing did not duplicate the PCB component, namely Aroclor 1260, from the Eckenfelder report. EPA testing continued to show a different PCB source, namely Aroclor 1248, which was never identified by EPA in all the tests of the buildings at the Des Moines site.** Exhibit 25, p. D0941-42, Appendix A, Exhibit 10. The absence of the Aroclor 1260 marker demonstrates that the PCBs found at the Site did not come from the Dico property in Des Moines. Exhibit 11, p. D0484-85. In addition, soil samples 4508-6 and 4508-9 found more Aroclor 1248 than Aroclor 1254. Exhibit 25, p. D0941-42, Appendix A, Exhibit 10. These

[10] The EPA regulations and policy provide that the reference or reporting standard for wipe testing is in micrograms of PCBs per 100 square centimeters (ug/100cm^2). 40 CFR 761.3, 761.310, 761.79(b)(3)(i)(A), *Wipe Sampling and Double Wash/Rinse Cleanup as Recommended by the Environmental Protection Agency PCB Spill Cleanup Policy,* June 23, 1987, revised and clarified April 18, 1991, p. 10, 12, Table 2. EPA reported its May 2008 results in ug/100cm^2. However, rather than follow its regulations and policy, EPA reported its July and August, 2009 wipe testing in micrograms per **one** square centimeter rather than **100** square centimeters. Petitioners submit that this manipulation of the results is a transparent attempt to disguise EPA's laboratory error of multiplying lab results by 100 as described later in section VI(E).

sample results show that Aroclor 1248 was the major contributor and not Aroclor 1254. Exhibit 25, p. D0941-42, Appendix A, Exhibit 10. The EPA never investigated the source of the Aroclor 1248. The source was not the Dico property in Des Moines because no testing at this property ever found Aroclor 1248.

Furthermore, at this low concentration (below 1 ug/kg or part per million), EPA soil Sample 9 from May 2008 could not have been the reason for "disabling" the instrument at the EPA lab (Ms. Iverson reported that Sample 9 "completely blew my instrument"). The crash of Ms. Iverson's instrument can only be explained by serious procedural errors, faulty reference standards and/or sample manipulation. Exhibit 11, Attachment G.

The source of PCBs found at the Site

Southern Iowa Mechanical hauled the building components from the Dico property in Des Moines to the Ottumwa Site, which was owned by Southern Iowa Mechanical. Exhibit 6, p. 0066. Southern Iowa Mechanical placed the building components in 2004 and 2007 in three piles at the Ottumwa Site. Exhibit 6, p. D0066, Exhibit 24, p. D0674.

From where did the Aroclor 1248/1254 PCBs come? Although EPA did not investigate, the evidence shows several sources of PCBs other than the Dico property.

When contractors and representatives of Titan Tire/Dico inspected the Ottumwa Site in October 2008, they observed that Southern Iowa Mechanical, in the vicinity of the three piles of steel beams, stored transformers, capacitors, fluorescent light ballasts, voltage regulators, electrical switches, reclosers, bushings, electromagnets, oil used in motors and hydraulic systems, cable insulation and other sources of PCBs on its property in Ottumwa. Exhibit 25, p. D0936, D1192-212. Exhibit 25 attaches photographs of these sources of PCBs taken at the inspection of the Ottumwa property in October 2008. Exhibit 25, p. D1192-212. During the

EPA sampling in May 2008, EPA ignored the presence of these large, PCB sources on the Ottumwa Site and made no mention of them in the EPA notes and reports.

These Southern Iowa Mechanical sources of PCBs could have accounted for the Aroclor 1248/1254 PCBs found at the Ottumwa Site. Exhibit 25, p. D1192-212. Furthermore, Titan Tire and Dico cannot discount the possibility that someone tampered with the samples during the sampling errors in the field, three-day break in the chain-of-custody or during the suspicious EPA lab irregularities, which would explain the different chemical fingerprint. Exhibit 11, p. D0484-85, Exhibit 6, p. D0055. But Titan Tire and Dico do know that the absence of Aroclor 1260 in any of the samples by the EPA and 21st Century Resources shows that the PCBs found at Ottumwa did not come from the Dico property in Des Moines. Exhibit 11, D0484-85.

EPA's refusal to consider or investigate the source or cause of this mismatch in the chemical fingerprint between the two sites, and its insistence upon using invalid and unreliable data to support its findings, further demonstrates that the EPA's decision to issue the Order in this matter is arbitrary and capricious and contrary to law. Exhibit 11, D0485.

E. EPA's improper manipulation of data by a factor of 100 resulted in lab results that exceeded action levels

On or about May 16, 2008, EPA entered the Ottumwa Site and took samples. Exhibit 6, p. D0053. EPA then issued a laboratory report dated May 30, 2008. Exhibit 6, p. D0053. EPA acknowledges in the report that the lab multiplied its results by 100. Exhibit 6, p. D0054.

In both letters of October 2 and November 10, 2008, from Petitioners to EPA, Petitioners discussed at considerable length their concern that each of the lab results for the wipe samples were improperly multiplied by 100, purportedly because each sample was taken from a standard 100 square centimeter sampling area. Exhibit 6, p. D0054-55; Exhibit 9, p. D0454-56. **But for the improper manipulation of the lab results by a factor of 100, none of the reported results**

would exceed the EPA-assigned high occupancy action levels mandated by TSCA.[11] Exhibit 9, D0454-56, Exhibit 11, p. D0485. There is no indication in any of the documents produced by EPA that the laboratory instrument or software used to analyze the Site wipe samples divides the quantity of the sampled chemical by 100 in generating the lab result–thus creating the need for a laboratory procedure of multiplying the lab value by 100 to reflect the total amount of the chemical of concern collected from the sampled area. Exhibit 11, p. D0485.

Neither EPA procedures for wipe sampling, referenced earlier, nor the specified testing method (SW-846 Method 8082: Polychlorinated Biphenyls (PCBs) by Gas Chromatography, which is the method used by all EPA-approved laboratories) have any multiplication step by 100. The value obtained by this method directly represents the concentration found (in micrograms or "ug") in an area of 100 square centimeters. In other words, suppose a sample collection cloth is wiped over a 100 square centimeter area. Exhibit 11, p. D0485. The wipe sample is analyzed by extracting all of the chemical of concern from the cloth, and measuring the amount of chemical in the sample. Exhibit 11, D0485. The resulting value – suppose it is 1 microgram – is the total amount of chemical collected from the entire 100 square centimeter area sampled. Exhibit 11, p. D0485. The sample result is 1 microgram per 100 square centimeters. Exhibit 11, p. D0485.

Only if, for some inexplicable reason, the laboratory instrument is programmed to divide the total amount of chemical in the sample by 100–in order to report the quantity in micrograms per square centimeter (in the case of the example, .01 micrograms per square centimeter)–would it be necessary to multiply the reported value by 100 in order to report the quantity in

[11] Petitioners also note, that one of the wipe sample results relied upon by EPA – in addition to being improperly multiplied by a factor of 100 – is reported with a J-code, meaning that the reported value failed to meet the established quality control criteria for either precision or accuracy. There is no explanation in the report as to why the lab could only provide a J-coded value, but it certainly undermines the credibility and reliability of the lab analysis of these samples. Such an estimated, J-coded result should not be the basis upon which EPA takes any administrative action.

micrograms per 100 square centimeters. Exhibit 11, p. D0485-86. On the other hand, if the instrument is programmed to report the result **as if** the entire amount of chemical collected from the 100 square centimeter sample was concentrated in a single square centimeter (in the case of the example, if it was incorrectly reported as 1 microgram per square centimeter), then the calculation required to correct the misreported value would be to ***divide*** the area by 100, so that the reported result is correctly stated for the true area sampled. Exhibit 11, p. D0485-86. Petitioners repeatedly requested, pursuant to FOIA, that EPA produce any documents evidencing that the laboratory instrument is programmed to make any such divisions, including the software that might make any such divisions, all procedures or calculations which show any division by 100 of any sampled material, and all policies, procedures or protocols which describe the circumstances under which reported laboratory results are to be multiplied by a factor of 100, and any lab manuals or procedures discussing or describing any such process. Exhibit 11, p. D0486-87. EPA has repeatedly responded that no such documents exist. Exhibit 11, p. Do486-87.

In Ms. Tapia's cover letter that accompanied the UAO, Ms. Tapia states that the procedure for multiplying lab results by 100, to account for the area from which the sample was collected, is specified in the laboratory's standard operating procedures produced by EPA in response to one of Petitioners' FOIA requests. Exhibit 11, p. D0486. However, Ms. Tapia does cite any section or page of the lab's standard operating procedures which describes this procedure. Exhibit 11, p. D0486.

Petitioners thoroughly reviewed all of the documents produced to them by EPA, including the lab's standard operating procedures, and cannot find any mention or discussion of any circumstance under which lab results are to be multiplied by any factor–to account for the

area from which the sample was collected, or for any other reason. Exhibit 11, p. D0486. In the January 9, 2009 letter, Petitioners wrote to EPA, requesting that EPA either identify the page or section of any documents previously produced where that procedure is specified, or produce the document which contains the procedure if it has not been previously produced. Exhibit 11, p. D0486. Petitioners were advised in the telephone conference on January 15, 2009, that Petitioners have received everything that EPA has with respect to this issue. Exhibit 11, p. D0486-87.

During the telephone conference on January 15, 2009, Petitioners raised this issue with EPA again, and asked EPA to identify the specific page of the lab's standard operating procedures referenced in Ms. Tapia's cover letter. Exhibit 11, p. D0486. Following the conference, EPA sent an email, attaching a copy of the RLAB Method No. 3210.1D, previously produced in response to Petitioners' FOIA request, and citing page 7 of 9 and Attachment 1 as the support for this argument. Exhibit 11, p. D0486. Neither of these referenced pages, nor any other provisions of this procedure manual, contain any procedures for reducing the concentration of chemicals extracted from a sample cloth wiped over an area greater than a square centimeter to a value reported in micrograms per square centimeter. Exhibit 11, p. D0486. Nor do either of the referenced pages, or any other provisions of this procedure manual, contain any procedures for multiplying the value reported by the gas chromatography instrument by a factor of 100 after analyzing a wipe sample. Exhibit 11, p. D0486.

As mentioned above, during the January 15, 2009 telephone conference, EPA refused Petitioners' request for permission to interview Ms. Iverson with regard to this, or any of the other issues and irregularities outlined in this Second Petition. Exhibit 11, p. D0486-87. It is incomprehensible that EPA lab technicians would manipulate lab results by a factor of 100

without a detailed and specific written procedure, protocol or guideline expressly authorizing such manipulation and specifying the circumstances under which such manipulation is to take place–unless they are instructed to do so in order to support a pre-determined outcome. Exhibit 11, p. D0486-87. Manipulating data to support a pre-determined outcome, or to justify a personal agenda, is indisputably arbitrary and capricious and contrary to law.[12] Exhibit 11, p. D0487.

F. EPA's improper manipulation of the applicable cleanup standards further demonstrates the arbitrary and capricious nature of this enforcement action

EPA regulatory cleanup standards for PCBs are different depending upon whether a site is a high occupancy area or a low occupancy area. Exhibit 21, p. D0628. The steel beam surface concentration standard for a high occupancy area is 10 ug/100cm^2 whereas such concentration for a low occupancy area is 100 ug/100cm^2. Exhibit 21, p. D0628. The soil concentration standard for a high occupancy area is 1 mg/kg whereas such concentration for a low occupancy area is 25 mg/kg. Exhibit 21, p. D0628.

In the EPA's Action Memo of December 30, 2008, Ms. Peterson contended–for the first time in any communications relating to the Site–that the lab results for one of the six soil samples taken in May 2008 exceeds the cleanup standard for a high occupancy area, which has never before been identified as applying to the Site. Exhibit 11, p. D0487. At various places in the Action Memo, Ms. Peterson describes this standard as either the "any-use cleanup standard," or the "unrestricted use" standard, and describes the threshold for this standard as being either "1 part per million," or "1 mg/kg, " or "1,000 ug/kg." Exhibit 11, p. D0487.

[12] In the cover letter, Ms. Tapia suggests that if we would prefer that the lab results not be arbitrarily multiplied by 100, then EPA's alternative would be to reduce the cleanup standard by a factor of 100 to 0.10 micrograms. The mere suggestion that EPA can (or will) lower the applicable action levels by a factor of 100 in order to compel one company to shoulder the burden of a site cleanup costing several hundred thousand dollars, while not lowering the regulatory action levels for anyone else or any other site, further demonstrates that EPA's actions in this matter are completely arbitrary and capricious and contrary to law.

Setting aside the problems created by the three-day gap in the chain of custody, the lab result reported for the referenced soil sample was 3.1 mg/kg, which is substantially below the low occupancy standard of 25 mg/kg. Exhibit 11, p. D0487.

However, in the EPA Quality Assurance Project Plan ("QAPP") for the May 2008 sampling of the Site, Exhibit 11, Attachment H, EPA declared: "Soil sampling data will be compared to the cleanup standard of **25 mg/kg** for bulk remediation and porous surfaces for low occupancy areas suggested by the November 2005 guidance [*Polychlorinated Biphenyl (PCB) Site Revitalization Guidance Under the Toxic Substances Control Act (TSCA).*]" Exhibit 11, Attachment G (emphasis added). Excerpts from the November 2005 Guidance referred to in the QAPP is Exhibit 11, Attachment I, Exhibit 11, p. D0487.

Pursuant to the November 2005 Guidance, "low occupancy areas" are defined as any area where annual occupancy for any individual not wearing dermal and respiratory protection is less than 840 hours (an average of 16.8 hours per week) for non-porous surfaces and less than 330 hours (an average of 6.7 hours per week) for bulk PCB remediation waste – including in-situ soil or sediment. Exhibit 11, p. D0487. The Guidance explains: "Examples include … a location in an industrial facility where a worker spends small amounts of time per week (**such as an unoccupied area outside a building**, … or in the non-office space in a warehouse where occupancy is transitory.)" Exhibit 11, Attachment I, p. 4 (emphasis added), Exhibit 11, p. D0487. The open field where the beams were stored at the Site is an unoccupied area outside of a building.

By contrast, examples of "high occupancy areas" include bulk PCB remediation waste inside a residence, a school, a day care center, a cafeteria in an industrial facility, a control room, and a work station at an assembly line. *Id.* at pp. 3-4, Exhibit 11, p. D0487. The staging area at

the Site where the steel beams are currently stored is in the middle of a large open field, in the middle of an industrial park, with no residences within at least a quarter mile. See the photographs in Exhibit 3, Exhibit 11, p. D0487-88.

There is no evidence to support any characterization of the open field, in which the building components were stored for re-assembly, as anything other than a "low occupancy area," as EPA correctly stated in the QAPP that EPA prepared for this Site. Exhibit 11, p. D0488. The QAPP also stated the appropriate and applicable cleanup standard of 25 mg/kg. *See* 40 C.F.R. § 761.61(a)(4)(1)(B), Exhibit 11, p. D0488.

EPA's reported lab results for the soil samples purportedly collected at the Site were well below the QAPP cleanup standard. Exhibit 11, p. D0488. In a number of conversations with representatives of Dico during the summer and fall of 2008, Ms. Peterson repeatedly stated that the soil sample results were far below the applicable action levels, that EPA had no concern about soil contamination at the SIM Site, and that no further action will be required with respect to the soil. Exhibit 11, p. D0488. As EPA observed both before and after the QAPP was prepared, the Site is a large open field in a low-density industrial park setting. Exhibit 11, p. D0488, Exhibit 24, p. D0646, D0673-74.

Greenleaf Environmental, the independent contractor at the Site, observed the large open field and the low-density industrial park setting. Exhibit 25, p. D0934. Based on its observations and experience, Greenleaf Environmental determined and certified that the EPA erroneously assigned high occupancy standards to the Site rather than the appropriate low occupancy standards. Exhibit 25, p. D0934. 21st Century Resources, Inc., another independent contractor at the Site, reached the same determination. Exhibit 24, p. D0646, D0673-74.

However, after Petitioners expressed various concerns about the legal basis for asserting liability against Petitioners, the validity of data relied upon by EPA, and the appropriateness of EPA's proposed remedy, Ms. Peterson made an abrupt, 180° change in position. Exhibit 11, p. D0488. Without citation to any regulations or guidance documents which explain or describe the new cleanup standard she relies upon, or the criteria under which it should be applied–and without any explanation as to why she apparently now believes that EPA's own QAPP was wrong, and why she apparently now believes that she was wrong every time she told Titan Tire and Dico representatives that the soil sample results were well below the applicable cleanup standards–Ms. Peterson appears to have erroneously, arbitrarily and capriciously selected a different cleanup standard, simply to punish Titan Tire and Dico for questioning her authority and the validity of her data. Exhibit 11, p. D0488. This punishment costs Petitioners substantial money by having to comply under the UAO with the "high occupancy areas" cleanup standards rather than the "low occupancy areas" standards during the removal action sampling at the Site in July and August 2009. Exhibit 11, p. D0488, Exhibit 25, p. D0934.

G. EPA's decision to disregard all facts and evidence and to reject the proposed alternative remedy is arbitrary and capricious

Even though Petitioners dispute the factual, scientific and legal basis for requiring them to undertake any removal action with respect to the steel beams on Southern's property, Petitioners outlined an alternative remedy—solvent wash rather than scarification--in their November 10, 2008 and January 16, 2009 letters. Exhibit 9, p. D0457-58; Exhibit 11, p. D0490-91. As acknowledged in EPA's Action Memo, this solvent wash remedy is expressly authorized under 40 C.F.R. § 761.79(b)(3). Exhibit 11, p. D0490-91. The EPA Project Manager, Mary Peterson, conceded that she did not doubt that a solvent wash procedure "may very well" do the job in remediating any PCBs on the beams. Exhibit 8, p. D0451.

Without reference to any facts, evidence or other basis for its belief, EPA summarily rejected this alternative remedy because EPA purportedly did not believe that the beams were ever in contact with liquid PCBs. Exhibit 11, p. D0490. Assuming that there are PCBs above action levels on the beams (a fact which Petitioners strenuously dispute, and for which EPA has failed to collect any valid or reliable supporting data), the only potential source for the PCBs would have been in the liquid adhesive which would have been brushed or sprayed onto the beams to affix the insulation when it was installed decades ago. Exhibit 11, D0490. While some of the beams have been subsequently painted in certain areas, the only areas where PCBs have been detected are on unpainted surfaces. Exhibit 11, p. D0490. EPA has presented no evidence that any PCBs have been detected above action levels on any painted surfaces. Exhibit 11, p. D0490.

Because PCBs have only been detected on unpainted, nonporous metal surfaces, which most likely came into contact with liquid PCBs in the form of liquid adhesive (if they came into contact with any form of PCBs at all), there is no factual or evidentiary basis for EPA's declaration that "EPA does not consider this [the solvent wash process authorized under 40 C.F.R. § 761.79(b)(3)] to be an acceptable option." Exhibit 11, p. D0490-91. In spite of Petitioners' offer, in the November 10, 2008 letter, Exhibit 9, p. D0457-58, to discuss this option with EPA in further detail, and in spite of two unanswered voicemail messages requesting an opportunity to discuss this option in further detail, EPA summarily rejected this TSCA-compliant remedy and refused to engage in any good faith negotiations to resolve this matter. Exhibit 11, p. D0490-91.

Petitioners also raised the issue of potential negative environmental impacts on the air and adjacent areas because beam grinding could result in the release of PCB-dust particles and

the consequent potential for tracking of PCB-dust into un-impacted areas of the Site. The solvent wash process would have provided a safer environment for operators and controlled any potential release into the adjacent soils. In spite of Petitioners' efforts, EPA continued its refusal.

EPA's baseless refusal to consider Petitioners' proposed alternative remedy, and refusal to respond to their requests for an opportunity to discuss this remedy, further demonstrates that EPA's administrative actions in this matter are arbitrary and capricious and contrary to law. Exhibit 11, p. D0490-91. Despite the objections of Petitioners, the UAO requires scarification (essentially, sandblasting to grind them to "near white" metal) of the beams which costs substantially more than a solvent-wash cleanup. Exhibit 11, p. D0490-91; UAO ¶ 29(a).

H. EPA's decision to direct biased sampling at the Site, in violation of the EPA-approved Work Plan and Quality Assurance Project Plan, demonstrates the arbitrary and capricious nature of this enforcement action

Pursuant to the UAO, Petitioners submitted a Work Plan and Quality Assurance Project ("QAAP") to EPA for review and approval. Exhibits 16 and 17. On June 3, 2009, the EPA approved the submitted QAAP, Work Plan and affiliated documents. Exhibit 15. The EPA-approved Work Plan and QAPP required that indiscriminate and random statistical sampling be done rather than biased sampling. Exhibit 25, p. D0939-40, D0945, Exhibit 21 p. D0628-29, Exhibit 24, p. D0644. For example, section 5.1 Metal Surface Sampling of the Work Plan and QAAP require: "Using the EPA's recommended wipe sampling method, an indiscriminate "grab" sample will be collected from ten (10) percent of the metal beams visually identified not to contain residual insulation or adhesives to verify PCB concentration do[es] not exceed 10 ug/100cm^2." Exhibit 17, p. D0597. EPA policy warns that: "Wipe sampling is best used in conjunction with statistical random sampling and/or area sampling techniques. Reduction in sampling errors for all kinds of sampling procedures can be accomplished by statistical selection of the smaller sampling sites selected to represent a larger area." *Wipe Sampling and Double*

Wash/Rinse Cleanup as Recommended by the Environmental Protection Agency PCB Spill Cleanup Policy, June 23, 1987, revised and clarified April 18, 1991, p. 5.

On June 22, 2009, Petitioners' contractors mobilized to the Site. **During the work at the Site, EPA representatives directed the sampling contractor to collect samples from the beams at specific locations chosen by EPA.** Exhibits 25, p. D0939-40, D0945, Exhibit 21, p. D0628-29, Exhibit 24, p. D0650, D0667. **EPA representatives at the Site admitted in the presence of Petitioners' representatives that they were doing "biased sampling."** Exhibit 21, p. D0628-29, Exhibit 25, p. D0939-40, D0945. 21st **Century Resources, Inc., the independent sampling contractor, observed that "over 85% of the samples were biased and not indiscriminate grab samples as indicated in the USEPA-approved work plan and QAAP."** Exhibit 24, p. D0650, D0651 (100% biased), D0652 (over 90% biased), D0655 (majority biased).

Such directions by EPA: (1) distort and bias the sampling results; (2) violate the express terms of the EPA-approved Work Plan and QAAP; and (3) cost more money to do the work. Exhibit 25, p. D0939-40, D0945. Petitioners objected to this conduct by EPA and memorialized in writing this oral direction by EPA pursuant to Paragraph 73 of the UAO. Exhibit 22, Exhibit 25, p. D0939-40, D0945. This conduct is arbitrary and capricious and otherwise not in accordance with law.

VII. DISCUSSION OF WHY THE UAO IN THIS CASE AND/OR THE CERCLA UAO REGIME ARE UNCONSTITUTIONAL

Petitioners seek a finding that the UAO in this case or, in the alternative, the CERCLA UAO regime violates the Constitution of the United States.[13] Petitioners challenge EPA's failure

[13] General Electric Company has presented a similar argument pending on appeal in *General Electric v. Jackson*, Case No. 09-5092 (D.C. Cir. 2010). However, this Titan Tire/Dico case is different because the *General Electric* argument does not challenge a specific UAO against General Electric Company. The General Electric argument

to provide procedural due process under the Fifth Amendment before issuance of the UAO in this case and to recipients of UAOs issued pursuant to Section 106 of CERCLA. 42 U.S.C. § 9606. The UAO in this case and CERCLA UAO regime subject targeted potentially responsible parties ("PRPs"), such as Petitioners, to immediate deprivations of property without any opportunity for pre-deprivation hearings to challenge the orders before a neutral decision-maker. The UAO in this case and UAOs in general are not used in cases of emergency and, to the contrary, are generally not issued until a year or more after EPA becomes involved at a contaminated site, thus allowing ample time for due process review. This demonstrates that Section 106 is unconstitutional, as applied in this case, on its face and as implemented through EPA's pattern and practice.

The Supreme Court has made clear that the government is required to provide at least **some type** of pre-deprivation hearing absent exigent circumstances, and EPA provides none. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (The Supreme Court "consistently has held that **some sort of hearing is required** before an individual is finally deprived of a property interest.") (emphasis added); *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) ("[T]he root requirement of the Due Process Clause" is "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.") (citations omitted); *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) ("Although the Court has held that due process tolerates variances in the form of a hearing appropriate to the nature of the case... the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect.") (internal citations and quotations omitted); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) ("Many controversies have raged

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only challenges the CERCLA UAO regime on its face and as implemented through EPA's pattern and practice without challenge to a specific UAO.

about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and an opportunity for hearing appropriate to the nature of the case."). The UAO and the CERCLA UAO regime violate this basic principle.

The EPA has three options under CERCLA when it determines an environmental cleanup is required at a contaminated site. First, EPA may conduct the cleanup itself and file suit against a PRP in federal district court to recover the costs of cleanup. 42 U.S.C. § § 9604(a), 9606(a), 9607(a), 9611(a), 9613. Second, EPA may file an abatement action in federal district court to compel a PRP to conduct a specified response action. *Id.* Third, EPA may issue a UAO compelling a PRP to conduct a specified response action without court involvement. *Id.*

Under each of the first two options, a PRP targeted by EPA is provided with a right to a meaningful hearing before a neutral decision-maker in which it can challenge EPA's determination that the PRP is liable and EPA's selection of the response action at the site. These hearings often result in findings in favor of the PRP,[14] and Petitioners do not contest EPA's exercise of its authority under either of these statutory alternatives.

A PRP that receives a UAO, on the other hand, is not provided any right to a hearing to challenge EPA's adjudicatory determinations. Under CERCLA § 113(h), federal courts lack jurisdiction to hear challenges to a UAO until the required action under the UAO has been completed or until EPA brings an enforcement action. 42 U.S.C. § 9613(h). Further, although EPA may conduct informal conferences with PRPs, EPA guidance documents make clear that

[14] E.g., *Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S.Ct. 1870, 1883-84 (2009) (EPA erred in liability determination because PRP Shell Oil was not an arranger under CERCLA); *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 904-08 (5th Cir. 1993) (EPA acted arbitrarily and capriciously in deciding to provide alternative water supply absent evidence of public health need); *United States v. B & D Elec., Inc.*, No. 1:05CV63, 2007 WL 1395468, at*9 (E.D. Mo. May 9, 2007) (EPA erred in designating defendants as liable parties); *United States v. Wedzeb Enters., Inc.*, 844 F.Supp. 1328, 1338 (S.D. Ind. 1994) (EPA erred in designating GE and another defendant as liable parties).

such conferences are not due process hearings and do not afford PRPs the opportunity to challenge the UAO. The EPA in this case told Petitioners at the outset of such a conference that, while Titan Tire and Dico were welcome to present any information or arguments that they desired, EPA had already made up its mind and would not be changing its position. Exhibit 11, D0479.

A PRP accordingly has only two options upon receiving a UAO. First, it can comply with the UAO, in which case it has no opportunity to challenge the UAO through a meaningful hearing until the response action is completed and then can seek reimbursement only of a portion of its UAO-related costs. 42 U.S.C. § 9606(b) Petitioners in this case complied with the UAO and were deprived of their property through the costs of the ordered response action before any opportunity for a hearing before a neutral decision-maker to challenge the UAO. Second, the PRP can refuse to comply with the UAO, in which case it again has no opportunity to challenge the UAO through a meaningful hearing and is subject to penalties of $32,500 for each day of noncompliance and, once the response is performed by EPA, to punitive treble damages on top of the costs of the ordered response action. Id. § § 9606(b), 9607(c)(3). The PRP must sit in limbo as these fines accumulate until EPA brings an enforcement action, which EPA can file at its sole discretion as late as five years after the date of the "violation." 28 U.S.C. § 2462. Moreover, a PRP that chooses not to comply has a significant deprivation through the impacts on the PRP's market value, cost of financing and brand value. Not surprisingly, in light of the massive and sustained contingent liability thereby created, PRPs have very rarely availed themselves of the option of noncompliance.

The UAO and the CERCLA UAO regime are powerful enforcement tools that are unique in federal law because of the magnitude of the obligations imposed on PRPs by UAOs, the

unilateral nature of EPA decision-making in issuing the UAO, the inability of private parties to obtain timely and independent review of that EPA decision-making and the extraordinarily severe sanctions for noncompliance. Because this power is unchecked and overwhelmingly coercive, EPA long ago abandoned use of the CERCLA statutory provision for judicial abatement actions, adopting instead a policy of issuing UAOs to every PRP that does not enter into an EPA consent decree. EPA also consciously leverages its UAO power to coerce concessions from PRPs by making the terms of the UAOs overly onerous. In this way, EPA makes its settlement demands often appear to be more attractive that the UAO alternative. In sum, EPA's exercise of its UAO power is the antithesis of what normally passes as due process.

For these reasons, Petitioners seek a finding that EPA's issuance of the UAO in this case or, in the alternative, the CERCLA UAO regime violates the Due Process Clause of the Fifth Amendment. EPA gave no opportunity to Petitioners for a hearing to challenge the UAO before a neutral decision-maker and gives no such opportunity to other recipients of UAOs. Since the UAO and/or the UAO regime are unconstitutional, Petitioners are not liable or, in the alternative, the response action ordered by EPA was arbitrary and capricious or was otherwise not in accordance with law. Petitioners seek recovery of their reasonable costs, damages and attorney fees for the unconstitutional taking of their private property for public use without compensation and for the unconstitutional deprivation of their property without due process.

VIII. CONCLUSION: (1) CERCLA § 106(B)(2) IS WRITTEN FOR CASES LIKE THIS ONE; AND (2) THE UAO IN THIS CASE AND/OR THE CERCLA UAO REGIME ARE UNCONSTITUTIONAL

The intent of Congress when it included § 106(b)(2) in CERCLA must have been to provide relief in cases just like this one. On its face, it allows petitioners to recover the costs incurred in responding to an EPA UAO and other required actions where the petitioners were not

liable under CERCLA or where the orders were arbitrary and capricious. Both circumstances exist in this case with regard to Titan Tire and Dico. Reimbursement should be granted.

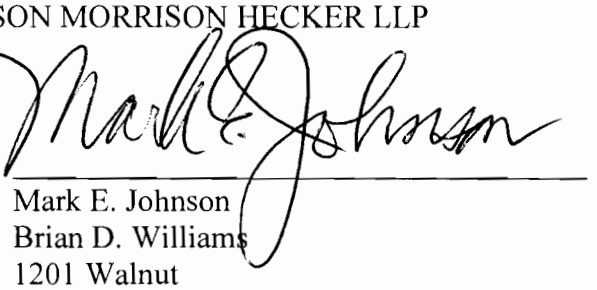
Moreover, the UAO in this case and/or the CERLCA UAO regime are unconstitutional because no pre-deprivation hearing is provided before a neutral decision-maker. Petitioners should be awarded their reasonable costs, damages and attorney fees for the unconstitutional taking of their private property for public use without compensation and for the unconstitutional deprivation of their property without due process.

WHEREFORE, (1) upon the basis of Petitioners having complied with the UAO and other EPA required actions and completed the work required thereunder, and upon the above arguments, Petitioners request an Order finding Petitioners not liable under CERCLA and requiring EPA or the United States Treasury or other appropriate United States governmental entity, pursuant to 42 U.S.C. § 9606(b)(2), to reimburse Petitioners for the reasonable costs they have incurred in connection with the actions required by the UAO and EPA's other required actions. In addition, Petitioners also are statutorily entitled to interest on such amounts. *Id.* Petitioners also are entitled to their attorneys fees incurred and costs in connection with the UAO and pursuing this Petition for Reimbursement, as they never would have been incurred were it not for the EPA's allegations and compliance with the UAO and EPA's other required actions. Evidence of such costs will be provided upon order or request from the Board following a finding of no liability of Petitioners under CERCLA, or alternatively, a finding that the UAO was arbitrary and capricious and not in accordance with law; and (2) Moreover, in the alternative, Petitioners request an Order finding that the UAO in this case and/or the CERCLA UAO regime are unconstitutional and requiring EPA or the United States Treasury or other appropriate United States governmental entity to pay Petitioners' reasonable costs, damages and

attorney fees for the unconstitutional taking of their private property for public use without compensation and for the unconstitutional deprivation of their property without due process. Petitioners request oral argument.

Respectfully submitted,

STINSON MORRISON HECKER LLP

By: 

Mark E. Johnson
Brian D. Williams
1201 Walnut
Suite 2900
Kansas City, Missouri 64106
816-691-2724
Fax 816-412-1208
mjohnson@stinson.com
bwilliams@stinson.com
Attorneys for Petitioners Titan Tire Corporation and Dico, Inc.

CERTIFICATE OF SERVICE

With approval of the Clerk of the Environmental Appeals Board, the undersigned hereby certifies that one paper original and one paper copy of the Second Petition, with PDFs of the Second Petition and Exhibits 1 through 36 on two CDs, have been sent by Federal Express on this 24th day of May, 2010, to the following:

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

In addition, on this same date, the Second Petition was filed electronically with the EAB's electronic filing system.

In addition, on this same date, true copies of the Second Petition, with PDFs of the Second Petition and Exhibits 1 through 36 on two CDs, were sent by U.S. mail to the following:

Mary Peterson
USEPA, Region VII
Remedial Project Manager
Iowa/Nebraska Remedial Branch
Superfund Division
901 North Fifth Street
Kansas City, KS 66101

Daniel Shiel, Esq.
Regional Counsel
USEPA, Region VII
901 North 5th Street
Kansas City, KS 66101

Attorney for Petitioners

IX. LIST OF EXHIBITS

EXHIBIT NUMBER	DESCRIPTION
1	12/30/2008 — CERCLA § 106(a) UAO
2	6/9/2008---Southern Iowa Mechanical Response to EPA's 104(e) request for information
3	Photographs that Southern produced of the Site and the approximately 2300 steel beams stored in open field in Ottumwa, Iowa
4	6/26/2007---Purchase Agreement referenced in paragraph 12 of the UAO
5	8/7/2008---Letter from Cecilia Tapia, Director of Region VII Superfund Division, to Titan Tire Corporation
6	10/2/2008---Letter from Titan Tire and Dico to EPA, which enclosed sworn affidavits from Bill Campbell and Jim Hughes
7	5/20/2008---Letter and enclosures from Dico to EPA
8	10/17/2008---Letter from Titan Tire and Dico wrote to EPA
9	11/10/2008---Letter from Titan Tire and Dico to EPA
10	1/9/2009---E-Mail from Tire and Dico requesting a telephone conference with EPA
11	1/16/2009---Written Response and Attachments A-I from Titan Tire and Dico to the UAO pursuant to the deadline for written comments
12	1/27/2009---Letter from Titan Tire and Dico to EPA
13	5/4/2009---E-mail and *BNSF* case from Titan Tire and Dico to EPA
14	3/18/2009---Access Agreement between Titan Tire and Dico and Southern Iowa Mechanical
15	6/3/2009---Letter from EPA approving the submitted Quality Assurance Project Plan, Work Plan and affiliated documents
16	6/3/2009---EPA-approved Work Plan
17	6/3/2009---EPA-approved Quality Assurance Project Plan ("QAPP")

EXHIBIT NUMBER	DESCRIPTION
18	10/6/2008---FOIA request
19	10/17/2008 FOIA request
20	1/9/2009---FOIA request
21	8/14/2009---Progress Report from Contractor to EPA
22	8/20/2009---Titan Tire and Dico Letter to EPA regarding biased sampling
23	8/21/2009--Letter to Dan Shiel and DeAndre Singletary from Mark Johnson regarding status
24	9/2/2009--Report PCB Sampling Activities at Ottumwa, Iowa by contractor 21st Century Resources, Inc.
25	10/12/2009--Final Report by contractor Greenleaf Environmental Services, LLC
26	2007—Exponent, Environmental Forensics, Volume 2, *Polychlorinated Biphenyls (PCBs)—When you need to know: Whose contamination is it? What is my share? When did it happen?.*
27	4/28/2008 Letter from Tom Wuehr of Iowa DNR; and 5/22/2008 Letter from Cheri Holley on behalf of Dico, regarding the Dico Des Moines site
28	1/29/2010—Letter to Jeffrey Brown from Mary Peterson of EPA with copy to Mark Johnson re review of Final Report
29	2/18/2010—Letter to Mary Peterson of EPA from Mark Johnson for Petitioners with redline versions of text of Final Report and Revision I Report
30	2/11/2010—Revision I Final Project Report ("Revision I Report")
31	3/12/2010—Letter to Jeffrey Brown from Mary Peterson of EPA with a copy to Mark Johnson re review of Revision I Report
32	3/25/2010—Letter to Mary Peterson of EPA from Mark Johnson for Petitioners with redline versions of text of Revision II Reports
33	3/24/2010—Revision II Final Project Report ("Revision II Report")
34	4/27/2010—Notice of Approval Letter to Jeffrey Brown and Mark Johnson from Mary Peterson of EPA

EXHIBIT NUMBER	DESCRIPTION
35	5/17/2010—Letter to Mary Peterson of EPA from Mark Johnson of Petitioners re approval of Final Project Report
36	5/7/2010—Approved Final Revision of the Final Project Report