

out the ten-day notification form because you said a moment ago nobody knows how to fill out those forms except secretaries? So since you didn't have a secretary --

A. Well, no. I -- let me rephrase that. You go by line item, you know. It asks you what to put there. If you have the answer, you put it there.

Q. Okay.

A. I mean, some of the things, you know. Some of the things, you just don't know. (Ex. 11, 199:9-201:11)

Q. In all this time that you were sending fax -- faxes to Nationwide and to the governmental authorities at the Department of Health and the EPA and all the phone calls trying to get assistance, did you ever place a single call to Safe Environment Company about anything?

A. No.

Q. Did you ever fax them anything?

A. No. (Ex. 11, 341:11-19.)

Yet Vadas submitted multiple revisions to ODH after he identified Petitioner's Ohio License on the original Notification Form. Vadas spent fifteen hours (eight hundred ninety-five minutes) communicating with Amaya by phone from August 31 2007 (the date on which he prepared the first Notification Form identifying "John P. Vadas" as the contact person for Petitioner's Ohio License) to September 21, 2007 (the date on which he changed the contact person to "Anthony Paganelli). (Ex. 86.)²³ During that time, he never sought the guidance or counsel of Petitioner. (Ex. 11, 207:11-209:7.)

g. Vadas Obtained a Bank Check and Forged the Remitter as "Safe Environmental" in Furtherance of His and Amaya's Fraud

Vadas obtained a bank money order from Harris Bank in Indiana on August 31, 2007, in the amount of sixty five dollars (\$65.00") payable to the State of Ohio ("Money Order") for submission with the Notification Form to ODH identified by serial number 097901223. (Ex. 21.) He had the bank indicate the remitter as "Safe Environment Corp." There is no requirement

²³ Exhibit 85 is a chart of phone records based on actual phone records that may be found in Exhibit 51.

of the Notification Form that the licensed contractor be the remitter. There is also no requirement that the fee be paid with a money order or bank check as Question 2²⁴ only requires that the fee be submitted by “check.” Exhibit 30 accompanied the Notification Form prepared and submitted by Vadas. The Money Order was obtained in an attempt to legitimize Petitioner’s Ohio License on the Notification Form. Initially, Vadas denied any knowledge of the Money Order (Ex. 30) and testified that Amaya either wrote an Asbestek check or used a credit card in order to pay the fee. (Ex. 11, 323:13-324:12.) When he was confronted with Exhibit 30, he again denied any knowledge of the bank check and indicated it must have been “remitted” by Paganelli. (Ex. 11, 350:15-24.) Yet ODH identifies Money Order No. 097901223 in the amount of \$65.00 as having been received along with the original Notification Form 00807547 that Vadas prepared and submitted to ODH on August 31, 2007 (Ex. 87.) Furthermore, Paganelli never authorized the Money Order and Petitioner has never drawn, issued or remitted an official bank check or money order for an application for any abatement project, instead always using Petitioner’s official company check. (Ex. 88.)

h. Vadas Purposely Created a Spurious Safe Environmental Envelope for Submission to the Ohio Department of Health in Furtherance of His and Amaya’s Deception

As discussed, Vadas submitted the original Notification Form to ODH on August 31, 2007. (Ex. 23.) He included with it the official bank money order drawn on Harris Bank and had the remitter identified as “Safe Environment Corp.” (Ex. 21.) He submitted these documents to ODH in an envelope that he generated using “Safe Environment Corporation of Indiana” as the return address (Ex. 24.) He then sent these documents from a post office in Hammond, Indiana three miles from his house. Vadas testified that it was acceptable for him to generate the spurious return envelope without permission from Safe Environmental. (Ex. 11,

²⁴ See Exhibit 12.

481:24-482:21). Vadas actually generated the spurious return envelope, along with the falsely remitted bank check, to make it appear that the Notification Form was authorized and prepared by Petitioner. The exhaustive steps taken by Vadas to “authenticate” the Notification Form to ODH in conjunction with (1) his concealment of the same information to the EPA, (2) his concealment of the Safe Environmental contact information to Nationwide, and (3) his inexplicable failure to make any contact with Petitioner during this process is evidence that at a minimum, Vadas and Amaya were wholly aware that there was no authority to “use” Petitioner’s Ohio License.

i. Phone Records of Amaya and Vadas Reflect Zero Communication with Petitioner—Before, During and After Asbestek’s Remediation Efforts at the Site

Cell phone records for Amaya, Paganelli, Lovelace and Petitioner show that Amaya had regular contact with Paganelli, Lovelace and Petitioner while he worked as an abatement supervisor for Petitioner.²⁵ Petitioner’s work logs show that Amaya worked as a supervisor for Petitioner from August 12 to August 17, 2007 at the Mittal Steel Plant in Michigan City, Michigan. (Ex. 89.) He negotiated Asbestek’s contract with Nationwide while employed with Petitioner and never advised Petitioner about Asbestek’s contract. During this time he communicated regularly with Paganelli, Petitioner and Lovelace regarding his job responsibilities and requirements. From August 20, 2007 through September 11, 2007, Amaya worked as a supervisor for Petitioner at a Lake Forest, Illinois location. (Ex. 89.) During this time he communicated regularly with Paganelli, Petitioner and Lovelace regarding his job responsibilities and requirements. After September 11, 2007, eleven days prior to Asbestek’s commencement of friable asbestos abatement at the Site, Amaya had zero communication with

²⁵ Cell phone records for Amaya, Paganelli, Petitioner and Lovelace may be found in Ex. 51. Amaya’s cell phone number is 773.544.4848; Paganelli’s cell phone number is 708.417.0272; Petitioner’s office phone number is 219.322.0844; Lovelace’s cell phone number is 708.441.9526. Communication between Amaya and Paganelli, Petitioner and Lovelace has been organized into table format and may be found in Exhibit 85.

Paganelli, Petitioner or Lovelace. Vadas likewise had zero communication with Petitioner. Notably, Amaya took no effort to communicate with Petitioner during Asbestek's friable asbestos abatement at the Site. Despite this total lack of communication, Amaya spent nearly ten full hours on the telephone with Vadas from September 11, 2007 through September 25, 2007, the date on which ODH performed an unannounced inspection at the Site. Amaya claims that he repeatedly attempted to contact Paganelli when the inspection occurred on September 25, 2007. (Ex. 12, 234:1-24). As Petitioner pointed out to the EPA in its Contest of Liability, Amaya's phone records reflect two single calls to Paganelli. However, Paganelli's phone records show that no such calls were received by Paganelli's phone. (Ex. 90). This is explained by the possibility that in a state of panic due to the unauthorized use, Amaya had two fleeting thoughts of alerting Paganelli regarding his unauthorized use of Petitioner's Ohio License, but before each call could register to Paganelli's phone, Amaya abandoned these two efforts. Amaya made no attempts to contact Paganelli through Petitioner's main number. (Ex. 51.)

VI. STATEMENT OF INCURRED COSTS, FEES AND EXPENSES

Petitioner incurred costs of at least three hundred eighty-six thousand, seven hundred ninety-eight dollars (\$386,798) plus interest, which includes response costs of two hundred ninety-five thousand, six hundred twenty dollars (\$295,620.00) plus interest; attorney's fees of at least ninety thousand, five hundred seventy-eight dollars (\$90,578) plus interest; and expenses of six hundred dollars (\$600.00). Petitioner paid Precision Environmental in full on November 30, 2011 for response costs. Petitioner has likewise incurred and paid the attorney's fees associated with the AO.²⁶ Petitioner will have incurred expenses of six hundred dollars associated with the

²⁶ Pursuant to the EAB's "Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement for Petitions," § III.D, Petitioner has not included documentation of attorney's fees as evidence of the amount incurred or as evidence of their reasonableness.

AO, which is the amount that Precision Environmental will charge Petitioner for assisting in preparation of the Final Report. Consequently, Petitioner is entitled to reimbursement of costs of at least \$386,798.00 plus interest. Petitioner is prepared to demonstrate the reasonableness of costs, fees and expenses upon a finding by the EAB that Petitioner is entitled to reimbursement.

VII. PETITIONER IS ENTITLED TO REIMBURSEMENT OF COSTS

Petitioner is not liable for response costs under 42 U.S.C. § 9607(a) and therefore Petitioner is entitled to reimbursement of response costs pursuant to 42 U.S.C. § 9606(b)(2)(C). *Employers Insurance of Wausau v. Browner*, 52 F.3d 656, 662 (7th Cir. 1995). Petitioner does not meet even the remotest statutory threshold for liability under CERCLA § 107(a) and has established by a preponderance of the evidence that it has no liability under the AO. The single, subsequently denied, statement of Amaya that he or Asbestek obtained authority to “use” Petitioner’s License is insufficient to establish that Petitioner contracted, agreed or otherwise arranged for the disposal or treatment of hazardous substances at the Site. As the forgoing establishes by greater than a preponderance of evidence, Petitioner is not liable for response costs associated with compliance with the AO and reimbursement is warranted. 42 U.S.C. § 9606(b)(2)(C). The costs that Petitioner paid to Precision Environmental to perform the cleanup was solely and entirely as a result of the AO and are therefore subject to reimbursement. *Flanders Industries, Inc. v. State*, 2003 WL 22717887, * 6 (Mich. App. Nov. 18, 2003) (a PRP is entitled the recover costs incurred as a result of complying with an administrative order.)

VIII. PETITIONER IS ENTITLED TO RECOVER ATTORNEY FEES AND EXPENSES

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

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

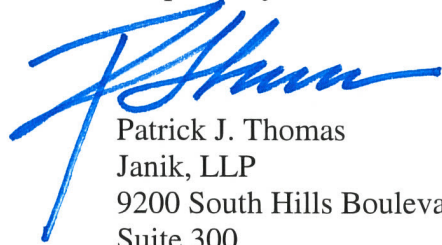
28 U.S.C. 2412(b) and (d) allows for the award of attorney's fees and other expenses associated with a civil action brought against the United States, unless a court finds that the United States was substantially justified or special circumstances make an award unjust. While 28 U.S.C. 2412 deals with court actions, 5 U.S.C. § 504 allows for recovery of attorney's fees in administrative actions. *In re Donald Cutler*, EAJA Appeal No. 05-01 (2007). Attorney's fees are warranted in this matter because Petitioner submitted substantial evidence on multiple occasions that it was not a liable party at the Site. Petitioner invited the EPA to attend the depositions of Amaya and Vadas (which the EPA did) and provided the EPA with their entire transcripts. Petitioner provided the EPA with its Contest of Liability which, through multiple exhibits, demonstrated that not only did Petitioner not provide Amaya with authority to use its Ohio License, but that Amaya and Vadas knowingly, through a pattern of fraud and deceit, used Petitioner's Ohio License without permission. Petitioner exhausted great efforts in attempting to resolve its liability status with the EPA, including agreeing not to subject its Contest of Liability to restrictions of the Freedom of Information Act, meeting personally with Chow and Wolfe on multiple occasions, offering a settlement, obtaining and providing phone records to cast all doubt on Amaya's initial claim, obtaining and providing all ODH and Ohio EPA records to establish the pattern of fraud and deception committed by Vadas and Amaya, and, ultimately complying with every required action under the order, when Petitioner was not liable. The EPA was

provided with every document, argument and exhibit available to Petitioner in this regard. Consequently, should the EAB determine that Petitioner is entitled to reimbursement, Petitioner respectfully submits that an award of attorney's fees is likewise warranted. Similarly with respect to costs, Petitioner is prepared to demonstrate that its attorney's fees and other expenses are reasonable.

IX. CONCLUSION

For the foregoing reasons, Petitioner has established by a preponderance of the evidence required by 42 U.S.C. 9606(b)(2)(C) that it is not liable under 42 U.S.C. 9607(a) and respectfully requests that the EAB find that Petitioner is entitled to reimbursement of at least \$386,798.00, plus interest, which includes response costs of \$295,620.00, plus interest, attorney's fees of at least \$90,578, plus interest, and expenses of \$600.00.

Respectfully submitted,



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Date: 2/13/2012

APPENDIX

Exhibits are attached to the Petition as hard copies. A compact disc containing all ninety (90) Exhibits in electronic format is enclosed for convenience. The Exhibits are as follows.

- Exhibit 1 EPA Amended Unilateral Order (AO), Includes Petitioner
- Exhibit 2 EPA Final Pollution Report
- Exhibit 3 Affidavit, Anthony Paganelli, September 15, 2010
- Exhibit 4 Cleveland Trencher Company History
- Exhibit 5 Indiana Secretary of State, Asbestek, Inc. Business Entity Information
- Exhibit 6 Gary Thomas, Statement of Ownership
- Exhibit 7 Piscazzi Access Agreement, Evidence of Ownership
- Exhibit 8 City of Euclid, Ohio, Notice of Violation
- Exhibit 9 Affiliated Environmental Services, Inc., Estimate
- Exhibit 10 Nationwide/Thomas Contract
- Exhibit 11 Deposition Transcript of Vadas, with Exhibits
- Exhibit 12 Deposition Transcript of Amaya, with Exhibits
- Exhibit 13 August 15, 2007 Vadas Facsimile to Nationwide
- Exhibit 14 Asbestek/Nationwide Contract
- Exhibit 15 August 16, 2007 Vadas Facsimile to Nationwide
- Exhibit 16 August 23, 2007 Vadas Facsimile to Nationwide
- Exhibit 17 Ohio Secretary of State, Asbestek, Inc. Business Entity Information
- Exhibit 18 August 24, 2007 Vadas Facsimile to Nationwide
- Exhibit 19 August 31, 2007 Vadas Facsimile to Nationwide
- Exhibit 20 August 31, 2007 Vadas Facsimile to Ohio EPA and Ohio EPA Notification Form
- Exhibit 21 Harris Bank Money Order, \$65.00
- Exhibit 22 Vadas' First Prepared ODH Prior Notification Form, Not Submitted to ODH
- Exhibit 23 Vadas' First Submitted ODH Prior Notification Form, August 31, 2007
- Exhibit 24 Vadas' "Safe 'Environment' Corp. of Indiana" Return Envelope
- Exhibit 25 Bonilla Refresher Course, Bonilla Certification, Safe Environmental Ohio License
- Exhibit 26 August 31, 2007 Vadas Facsimile to Nationwide
- Exhibit 27 Vadas' Second Submitted ODH Prior Notification Form, September 12, 2007

- Exhibit 28 Vadas' Third Submitted ODH Prior Notification Form, September 17, 2007
- Exhibit 29 Vadas' Fourth Submitted ODH Prior Notification Form, September 21, 2007
- Exhibit 30 ODH Inspection Sampling Record
- Exhibit 31 Vadas' Fifth Submitted ODH Prior Notification Form, September 25, 2007
- Exhibit 32 Lovelace's Facsimile to ODH, September 26, 2007
- Exhibit 33 City of Euclid, Ohio, August 27, 2007 Stop Work Order to Nationwide
- Exhibit 34 City of Euclid, Ohio, August 28, 2007 Notice of Violation to Thomas and Piscazzi
- Exhibit 35 Nationwide's Richland County, Ohio Civil Complaint
- Exhibit 36 Ohio Attorney General Complaint against Amaya
- Exhibit 37 Cuyahoga County, Ohio, Misdemeanor Complaint for Amaya
- Exhibit 38 Cuyahoga County, Ohio, Felony Indictment for Asbestek
- Exhibit 39 Cuyahoga County, Ohio, Docket Entry for Amaya
- Exhibit 40 First Unilateral Administrative Order, Petitioner Not Included
- Exhibit 41 Nationwide Counsel's Correspondence to EPA, July 9, 2010
- Exhibit 42 Affidavit, Tomas Amaya, March 24, 2010
- Exhibit 43 Affidavit, Michael Collins, March 27, 2010
- Exhibit 44 EPA Correspondence to Petitioner's Attorneys, August 20, 2010
- Exhibit 45 EPA Correspondence to Petitioner's Attorneys, September 20, 2010
- Exhibit 46 Petitioner's Contest of Liability to EPA, October 20, 2010
- Exhibit 47 Petitioner's Notice of Intent to Comply, October 21, 2010
- Exhibit 48 Petitioner's Work Plan and Health and Safety Plans, October 21, 2010
- Exhibit 49 EPA's Request for Clarification, November 8, 2010
- Exhibit 50 EPA's Rejection of Extension for Clarification, November 11, 2010
- Exhibit 51 Petitioner's Supplemental Information to EPA, November 11, 2010
- Exhibit 52 Petitioner's Second Supplemental Information to EPA, November 18, 2010
- Exhibit 53 Petitioner's Settlement Offer to EPA, November 22, 2010
- Exhibit 54 EPA's Rejection of Petitioner's Settlement Offer, November 22, 2010
- Exhibit 55 Petitioner's Correspondence to EPA, November 23, 2010
- Exhibit 56 EPA's Correspondence to Petitioner, November 26, 2010
- Exhibit 57 Petitioner's Correspondence to EPA, June 29, 2011
- Exhibit 58 Petitioner's Correspondence to EPA, June 30, 2011
- Exhibit 59 Petitioner's Correspondence to EPA, June 30, 2011

Exhibit 60 Petitioner's Correspondence to EPA, July 1, 2011

Exhibit 61 EPA's Correspondence to Petitioner, July 5, 2011

Exhibit 62 Petitioner's Intent to Comply to EPA, July 8, 2011

Exhibit 63 Petitioner's Correspondence to EPA, Work Plan and Safety Plan, July 13, 2011

Exhibit 64 Petitioner's Correspondence to EPA, Air Sampling Plan, July 14, 2011

Exhibit 65 Petitioner's Work Plan and Safety Plans, July 26, 2011

Exhibit 66 Final Work Plan, Approved by EPA, August 1, 2011

Exhibit 67 EPA's Correspondence to Petitioner, August 5, 2011

Exhibit 68 Petitioner's Correspondence to EPA, Start Date, August 10, 2011

Exhibit 69 Petitioner's Correspondence to EPA, Access Agreements, August 10, 2011

Exhibit 70 EPA's Correspondence to Petitioner, Start Date, undated

Exhibit 71 Petitioner's Correspondence to EPA, Completion Date, October 3, 2011

Exhibit 72 EPA's Correspondence to Petitioner, Completion Date, October 12, 2011

Exhibit 73 EPA's Correspondence to Petitioner, Completion Date, October 31, 2011

Exhibit 74 Precision Environmental Correspondence to Petitioner, Invoice, November 1, 2011

Exhibit 75 Petitioner's Section 3.5 Final Report to EPA, December 15, 2011

Exhibit 76 EPA's Correspondence to Petitioner, Site Inspection, November 10, 2011

Exhibit 77 Petitioner Correspondence to EPA, Inspection and Final Report November 28, 2011

Exhibit 78 Petitioner's Correspondence to EPA, Final Pollution Report, December 12, 2011

Exhibit 79 Petitioner's Correspondence to EPA, Statute of Limitations, January 12, 2012

Exhibit 80 EPA's Correspondence to EPA, Final Report, January 17, 2012

Exhibit 81 Petitioner's Correspondence to Precision Environmental, January 17, 2012

Exhibit 82 EPA's Correspondence to Petitioner, Required Action, February 3, 2012

Exhibit 83 Petitioner's Correspondence to EPA, 30-Day Reports, November 10, 2011

Exhibit 84 Affidavit, Anthony Paganelli, September 15, 2010

Exhibit 85 Affidavit, Carlos Bonilla, September 11, 2010

Exhibit 86 Chart of Amaya's Phone Records

Exhibit 87 ODH Receipt from Vadas' Original Notification Form and Payment

Exhibit 88 Affidavit, Anthony Paganelli, January 17, 2012

Exhibit 89 Petitioner's Work Records for Amaya

Exhibit 90 Paganelli's Cell Phone Records for September 24 and 25, 2007

CERTIFICATE OF SERVICE

I hereby certify that the foregoing CERCLA 106(b) Petition was filed by electronic submission to the Environmental Appeals Board ("EAB") through the Central Data Exchange this 13th day of February 2012. I further certify that the original signed hard copy has been forwarded to the EAB by U.S. Express Mail this 13th day of February 2012; and four sets of Petition Exhibits 1-90 both as hard copy and in electronic pdf format were forwarded the EAB by U.S. Express Mail on the 9th day of February 2012 to:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
Ronald Regan Building, EPA Mail Room
1300 Pennsylvania Avenue, N.W.
Washington, DC 20004

Date: 2/13/2012



Patrick J. Thomas
Attorney for Petitioner

I hereby certify that a copy of the foregoing CERCLA 106(b) Petition was served on the U.S. Environmental Protection Agency electronically to chow.kevin@epamail.epa.gov this 13th day of February 2012. I further certify that a hard copy of the CERCLA 106(b) Petition has been forwarded to the EPA by U.S. Express Mail this 13th day of February 2012 to:

Richard C. Karl
Director, Superfund Division – Region 5
United States Environmental Protection Agency
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Carol Ropski
United States Environmental Protection
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Kevin Chow
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United States Environmental Protection
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Chicago, IL 60604-3590

I further certify that Petition Exhibits 1-90 both as hard copy and in electronic pdf format were served on the EPA by U.S. Express Mail on the 13th day of February 2012 to:

Kevin Chow
Associate Regional Counsel
United States Environmental Protection Agency – Region 5
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Chicago, IL 60604-3590

Date: 2/13/2012



Patrick J. Thomas
Attorney for Petitioner