BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:	)	EPA DOCKET NO. CERCLA-03-2022-0129LL
Lefevre Street Superfund Site 2710 Lefevre Street Philadelphia, PA 19137	)	
MAS Management, LLC, Owner	)	PROCEEDING UNDER SECTION 107(*l*) OF THE COMPREHENSIVE ENVIRONMENTAL, RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980, AS AMENDED, 42 U.S.C. § 9607(*l*)

U.S. Environmental Protection Agency's Response to Owner, MAS Management, LLC's Request for a Meeting on a Perfected Superfund Lien

The U.S. Environmental Protection Agency ("EPA" or "Agency") believes it had a reasonable basis to perfect a Superfund lien on real property located at 2710 Lefevre Street in the City of Philadelphia, Pennsylvania ("the Property" or "Site"). All statutory elements required for perfection of a lien under Section 107(*l*) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9607(*l*), have been met; and MAS Management, LLC ("MAS"), the Property's owner since March 16, 2018, has not presented any facts that suggest it would meet its burden of proving any statutory defense or limitation on liability under CERCLA's strict liability scheme.[1]

[1] *See* 42 U.S.C. § 9607(a); *see also PA Dept. of Envtl. Prot. v. Trainer Custom Chem. LLC,* 906 F.3d 85, 90 (3d Cir. 2018) (A current owner under CERCLA § 107(a)(1) is liable for all response costs); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 259 (3d Cir. 1992) (CERCLA imposes strict liability on responsible parties).

The Property comprises the Lefevre Street Container Site, where EPA conducted removal response activities from 2018 through 2021, including a removal action in 2021, to address a release or substantial threat of release of hazardous substances known as polychlorinated biphenyls (or "PCBs"), at concentrations which posed an imminent and substantial danger to the public health or welfare or the environment. *See* 42 U.S.C. §§ 9604(a) and (b); *see also* 40 C.F.R. §§ 300.410 (the provision of the National Contingency Plan (or "NCP") authorizing removal site evaluation) and 300.415(b) (NCP provision authorizing removal action).[2]

The costs associated with EPA's removal response activities from September 2018 through October 2021 are approximately $762,641.67, as reflected in EPA's certified cost summary dated, November 15, 2022. These costs are the basis of the Superfund lien that EPA perfected on the Property on August 18, 2022, and do not reflect the full value of the United States' Superfund lien, as EPA has incurred additional Site-related response costs since October 9, 2021, the cut-off date of the current cost summary.[3]

In a letter dated September 9, 2022, requesting a meeting on the Superfund lien, MAS has raised one potential defense – i.e., that it is an "innocent purchaser"[4] – as well as several equitable arguments, including, among others, that no one "told" MAS that the Property might be contaminated; that the former owner, John F. Joyce, Jr. ("Mr. Joyce") allegedly told MAS that

[2] As discussed below, EPA also performed an emergency removal action at the Site from April through June 2009 ("the 2009 removal action"). The scope of the 2009 removal action was limited to: (i) the assessment and removal of drums, totes, and various other receptacles containing PCBs that were abandoned on-site by a prior owner; and (ii) the removal and recycling of uncontaminated heating oil found in an abandoned underground storage tank on the Property. The costs of the 2009 removal action are <u>not</u> part of the Superfund lien EPA recently recorded against the Property.

[3] *Response*, as defined by CERCLA, means "remove, removal, remedy, and remedial action; [and] all such terms (including the terms 'removal [action]' and 'remedial action') include enforcement activities related thereto." 42 U.S.C. § 9601(25).

[4] In the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Congress added an "innocent landowner" (a/k/a "innocent purchaser") defense under Section 101(35) of CERCLA, 42 U.S.C. § 9601(35). In addition, Congress has provided for a limitation on liability for a *bona fide prospective* ***purchaser*** ("BFPP"). *See* 42 U.S.C. § 9607(r); *see also* 42 U.S.C. § 9601(40) (describing the ongoing obligations a person must establish by a preponderance of the evidence to avail themselves of BFPP status).

the Property was "clean"; and that EPA has not identified other potentially responsible parties ("PRPs") who contributed to the PCB contamination at the Site.[5] None of MAS's equitable arguments is a defense to, or limitation on, liability under CERCLA. Neither MAS's allegation that it is an "innocent purchaser" nor its equitable arguments have caused EPA to change its belief that it had a reasonable basis to perfect the Superfund lien, which arose on the Property under Section 107(*l*) of CERCLA, 42 U.S.C. § 9607(*l*).[6]

I. Factual Background

MAS is the current owner of the Property, which MAS acquired from former owner, Mr. Joyce, on or around March 16, 2018. (Lien-Filing Administrative Record Exhibit ("LFAR Ex.") 1.01). The Property is currently a vacant lot encompassing approximately 10,450 square feet. Prior to EPA's removal action in 2021, the vast majority of the Property was covered by a concrete slab of varying thickness that served as the floor of the former warehouse. The Property borders residential parcels on three sides. (Final Trip Report, LFAR Ex. 1.05 at p. 1).

Based on information acquired from the City of Philadelphia ("the City"), EPA understands that Mr. Joyce's father acquired the Property in 1955 and, until his death in 1987, used a warehouse formerly located on the Property to store and sell electrical equipment. (City Archives

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[5] MAS may not have known that EPA sent a General Notice Letter to former owner, John F. Joyce, Jr., on March 1, 2021, informing him of his potential liability for the Site. Nevertheless, the Third Circuit has found that liability under CERCLA is joint and several unless there is a reasonable basis for division of liability. *See Trainer Custom Chem.*, 906 F.3d at 90; *Alcan Aluminum Corp.*, 964 F.2d at 267-69.

[6] In its September 9, 2022 letter, MAS argues that that "the lien, whether as a cleaning cost or a *windfall lien*, [is] inappropriate and inequitable." CERCLA does provide for a *windfall* lien on property owned by a BFPP when (i) the United States has unrecovered costs for a response action taken at the property; and (ii) the United States' response action increases the fair market value of the property above what it had been before the response action was initiated. *See* 42 U.S.C. §§ 9607(r)(2)-(4). As discussed below, MAS has not presented facts showing it would meet its burden of proof for BFPP status under Section 101(40) of CERCLA. *See* 42 U.S.C. § 9601(40). Accordingly, EPA has a reasonable basis to believe that the United States' lien in this case arose on property owned by a PRP – i.e., a lien under Section 107(*l*) of CERCLA – and that the lien is, therefore, not a *windfall* lien under Section 107(r) of CERCLA. Notwithstanding this reasonable belief, the Agency reserves its right to claim it has a windfall lien on the Property under Section 107(r) of CERCLA if a court were to determine that MAS had met its burden of proof under 42 U.S.C. § 9601(40). *See Trainer Custom Chem.*, 906 F.3d at 92, fn. 10 (Third Circuit observing that even if a new owner qualifies as a BFPP, the new owner would not be entitled to a windfall profit).

for 2710 Lefevre Street, pp. 5-27, Ex. A to this Response). Mr. Joyce acquired the Property from his mother, Mary Joyce, in 1988, and appears to have also used the Property for the storage and sale of electrical equipment until around 2008, when the City condemned and demolished the warehouse building. (LFAR Ex. 1.04).

As mentioned in footnote 2 above, EPA conducted an emergency removal action at the Site in 2009, the costs of which are not part of the Superfund lien EPA perfected on the Property. EPA conducted that removal action after the Philadelphia Fire Department's Hazardous Materials Administrative Unit ("HAMU") and the City's Department of Licenses and Inspections ("L&I") informed EPA that various drums, totes, and other receptacles containing PCBs had been abandoned at the Site and remained unsecured following L&I's demolition of the on-site warehouse under a Court order. The City had sampled the contents of the drums and totes, and analytical results found that several of the drums and totes contained PCBs. EPA On-Scene Coordinator ("OSC"), Jack Kelly, subsequently conducted a removal site evaluation under Section 300.410 of the NCP, 40 C.F.R. § 300.410, and determined that there was a substantial threat of release of PCBs into the environment from the containers stored at the Site, and that this threat presented an imminent and substantial danger to the public health or welfare or the environment. (LFAR Ex. 1.04 at p. 2).

On April 14, 2009, the OSC initiated an emergency removal action under his "Special Bulletin" authority and Section 300.415 of the NCP, 40 C.F.R. § 300.415, after he confirmed that high concentrations of PCBs were present in the containers.[7] (POLREP 1 and Special Bulletin, April 14, 2009, Ex. B to this Response). For instance, laboratory analyses showed that PCBs

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[7] *See* EPA Delegations Manual, CERCLA, Regional Delegation 14-2. Response. (Delegating authority under Section 104 of CERCLA to OSCs "to determine the need for response and to select and initiate removal actions costing up to $250,000 where site conditions constitute an emergency.").

were present in the contents of at least ten of the containers left on-site, ranging from 2.4 milligrams/kilogram ("mg/kg") to 278,000 mg/kg total PCBs. (LFAR Ex. 1.04 at p. 2). The 2009 removal action selected by the OSC was limited in scope to: (i) the removal and proper off-Site disposal of PCBs in the containers, as well as the containers themselves; and (ii) pumping non-contaminated heating oil from an abandoned underground tank at the Site and recycling this oil. Physical cleanup work ended in June 2009; and, in September 2009, the OSC determined that this limited-in-scope emergency removal action was complete. (Closeout Special Bulletin, Sept. 29, 2009, Ex. C to this Response).

In March 2018, EPA initiated a time-critical removal action at a different property owned by Mr. Joyce in the Port Richmond section of the City – the Belgrade Transformer Site – to address the release or threatened release of PCBs at that facility. In July 2018, during an EPA investigation of Mr. Joyce's compliance with Federal environmental laws at both the Belgrade and Lefevre Street facilities, EPA determined that there was credible information that disposal of PCBs may have occurred during Mr. Joyce's or his father's operations at the Lefevre Street Property. This information led EPA to contact MAS, who was then the owner of the Property, and to inform MAS that EPA believed the Property may be contaminated with PCBs. EPA also learned that MAS intended to build residential homes on the Property.

MAS consented to EPA's entry to the Property to conduct removal site evaluation, which EPA performed on August 9, 2018. The analytical results of surface-soil samples taken from various locations on the Property showed concentrations of PCBs exceeding standards established by regulations promulgated under the Toxic Substances Control Act of 1976, as amended ("TSCA"), 15 U.S.C. §§ 2601-2629.[8] Under these regulations ("the TSCA PCB

[8]The PCB levels reported by the laboratory for these samples in milligram/kilogram ("mg/kg") (1 part per million

regulations”), PCBs must not exceed concentrations of 1 part per million (“ppm”) in areas of high-occupancy use, which would include residential use. *See* Definition of *high occupancy area* at 40 C.F.R. § 761.3. PCBs at concentrations between 1 ppm and 10 ppm may remain in areas of high-occupancy use, provided they are capped in accordance with the TSCA PCB regulations. *See* 40 C.F.R. § 761.61(a)(4). Most of the sampling results obtained by EPA also exceeded the Agency’s Superfund residential Removal Management Levels (“RMLs”) for the specific PCBs detected in the analytical results – i.e., Aroclor 1248 (RML = 23 mg/kg) and Aroclor 1260 (RML = 24 mg/kg). (LFAR Ex. 1.04 at p. 3).

In September 2018, EPA returned to the Property to conduct subsurface sampling and collected a total of 19 samples at depths ranging from one to seven feet below grade. Eight samples taken did not detect PCBs. Analytical results for eight other samples showed concentrations of Aroclors 1248 and 1260 ranging between non-detect (“ND”) to 1 mg/kg. Results from three other subsurface samples ranged from 1 to 5.5 mg/kg PCBs. All three of the values above 1 mg/kg PCBs were collected at a depth of two to two-and-a-half feet.[9] *See* Pollution Report (“POLREP”) #1, June 2, 2020, Ex. E to this Response, also available in EPA’s Administrative Record for the June 11, 2020 Action Memorandum, at https://semspub.epa.gov/work/03/2303857.pdf; *see also* Ex. M to this Response.

After the sampling events conducted in August and September 2018, the OSC communicated with MAS on several occasions during 2018 and 2019 about the PCB analytical results and the need to conduct an adequate cleanup before residential development of the

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(“ppm”) = 1mg/kg) were, respectively, 0.15, 93, 230, 311, 357, 460, and 1050. (Sample Location Map, Aug. 28, 2018, Ex. D to this Response).

[9] EPA also performed a geophysical survey in September 2018. The underground tank identified during the 2009 removal action was located during the survey. Several other metallic anomalies below the ground surface were also noted.

Property could begin. MAS acknowledged that it was not familiar with federal regulatory requirements for PCB cleanups, and OSC Jack Kelly provided MAS with general information about TSCA and CERCLA requirements, the names of several local environmental consulting firms, potential landfill locations, helpful websites, and related matters. In these communications, MAS also raised concerns about whether it could pay for the cleanup of PCBs at the Property. For instance, in an email to Mr. Kelly on January 31, 2020, a representative of MAS wrote,

> I hope you understand how aggravating and frustrating this is for us, epa is the one that cleaned this property and told the previous owner that everything is clear, we literally are stuck in the middle of all this. Our project is delayed because of all this mess that was created not because of our fault. There are finances involved in this too, now you are throwing another curve ball at us telling us that we need to drop everything and handle this as a priority. We have to make sure that the cost is something that we can afford, we have to be realistic.

(Email correspondence dated January 31, 2020, from Zahra Saeed, MAS, to OSC Jack Kelly, Ex. L to this Response).

Through early 2020, the OSC continued to communicate with MAS about the need to clean up the Property. On occasional visits to the Property, the OSC observed deteriorating security conditions and evidence of more frequent access by trespassers. EPA's Superfund and Emergency Management Division ("SEMD") ultimately determined a removal action at the Site could no longer be delayed. (POLREP #1, June 2, 2020, Ex. E).

On April 20, 2020, EPA issued a General Notice Letter ("GNL") to MAS, formally notifying the owner of its potential liability for the Site and informing MAS that the Agency was making plans to take additional response actions under CERCLA "to assess, remove, or arrange for the removal of the PCBs at the Site." The GNL also invited MAS to contact EPA "to express its willingness or unwillingness to participate in future negotiations concerning a removal action at the Site." In addition, EPA stated that it was prepared to conduct a Superfund-financed (or

"Fund-financed") removal action at the Site if the Agency determined that MAS or any other PRPs could not promptly or properly perform the removal action. *See* 42 U.S.C. §§ 9604(a)(1) and 9622(a).[10] (LFAR Exs. 1.02 and 1.03).

On June 11, 2020, EPA issued an Action Memorandum for the Site, selecting a removal action to address the PCB waste disposed of at the Site. The removal action included, among other things, (i) improved Site-security measures; (ii) removal and off-site disposal, or the on-site capping, of PCB-contaminated soil in accordance with the cleanup levels for bulk PCB remediation waste in high-occupancy areas required under the TSCA PCB regulations at 40 CFR § 761.61(a)(4)(i)(A); (iii) off-site disposal of all concrete found on-site with PCB concentrations exceeding 1.0 ppm, unless the concrete was cleaned in accordance with the TSCA PCB regulations; (iv) evaluation of the underground metallic anomalies found during the August-September 2018 removal site evaluation to determine if these items contained, or were releasing, hazardous substances, pollutants or contaminants, including non-PCB Aroclors; and (v) restoration of all areas of the Site where PCB-contaminated soils and other materials (e.g., PCB-contaminated concrete) were excavated and removed for off-Site disposal. (LFAR Ex. 1.04).

When EPA issued the Action Memorandum, the Agency immediately sent a copy to MAS along with a proposed administrative settlement agreement and order on consent ("ASAOC"), which, if entered into, would provide for MAS to conduct the removal action with EPA oversight. (June 11, 2020 email correspondence to Ed Paul, then-counsel for MAS, from Robert Hasson, Assistant Regional Counsel, EPA Region 3, Ex. F to this Response). EPA requested MAS's response to the settlement proposal by June 26, 2020, after which date, EPA would begin

[10] "When . . . [EPA] determines that such action will be done properly and promptly by the owner or operator of the facility or vessel or by any other responsible party, . . . [EPA] may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 9622 of this title." 42 U.S.C. § 9604(a)(1).

to evaluate its other cleanup and enforcement options for the Site under CERCLA. (June 18, 2020 email correspondence to Ed Paul, then-counsel for MAS, from Robert Hasson, Assistant Regional Counsel, EPA Region 3, Ex. G to this Response). For approximately nine months, from June 11, 2020, through March 19, 2021, EPA attempted to reach a settlement with MAS, but ultimately determined that MAS could not or would not perform the removal action properly and promptly as required under 42 U.S.C. §§ 9604(a)(1) and 9622(a). During that time in early March 2021, EPA began to mobilize to the Site to begin preparations for the removal action.

On March 19, 2022, EPA notified MAS that the Agency would perform the entire removal action as a Fund-financed response. EPA also reserved its rights to bring an enforcement action under Sections 106 and 107 of CERCLA against MAS and any other PRPs for the Site. EPA conducted the removal action selected in the Action Memorandum from early March 2021 through August 4, 2021; and a Final Trip Report describing the removal action, as performed, was issued on December 8, 2021. (LFAR Ex. 1.05).

As reflected in EPA's Cost Summary dated November 15, 2022, EPA incurred approximately $762,641.67 in Site-related response costs from September 16, 2018, through October 9, 2021. These costs exclude EPA expenditures that have accrued since October 9, 2021, and any prejudgment interest.[11] (LFAR Ex. 1.06). In accordance with Section 101(25) of CERCLA, EPA's Site-related response costs include those incurred for removal site evaluation, removal action, and enforcement activities "related thereto" (including, but not limited to, the agency's legal costs associated with enforcement activities). *See* 42 U.S.C. § 9601(25).

On or around August 1, 2022, EPA learned that an entity known as Best Management,

[11] Section 107(a) of CERCLA provides that "the amounts recoverable in an action under this section shall include interest on the amounts recoverable . . . Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned." 42 U.S.C. § 9607(a).

LLC, intends to purchase the Property, and that this purchase is imminent. (Response to Comfort Letter Questionnaire, August 1, 2022, Ex. H to this Response). EPA understands that Best Management, LLC plans to develop the Property for residential use.

EPA's *Supplemental Guidance on Federal Superfund Liens*, OSWER Directive No. 9832.12-1a (July 29, 1993) (*"Supplemental Lien Guidance"*) provides that "the Agency may, in exceptional circumstances, perfect a lien prior to offering or providing a property owner with a meeting. . . . Exceptional circumstances for this course of action include . . . instances in which EPA's interests in the property could be impaired, such as . . . [the] imminent transfer of all or a portion of the property." *Supplemental Lien Guidance*, at p. 5. When EPA learned of the imminent sale of the Property by MAS to Best Management, LLC, the Agency determined that an exceptional circumstance, as contemplated by the *Supplemental Lien Guidance*, exists in this case and recorded a Notice of Lien against the Property on August 18, 2022. (LFAR Exs. 1.07 and 1.08). EPA also promptly notified MAS of the Notice of Lien and of its opportunity for a meeting with a neutral Agency official on August 18, 2022. (LFAR Ex. 1.10).

On September 9, 2022, Joseph P. Howard, Esq., counsel for MAS ("Mr. Howard"), requested a formal meeting with a neutral EPA official on the Superfund lien, an informal meeting with the Office of Regional Counsel ("ORC") and OSC Jack Kelly, and certain Site-related information. (LFAR Ex. 1.11). EPA has provided Mr. Howard with much of the information he requested, as well as with directions for a submission of a request under the Freedom of Information Act, 5 U.S.C. § 552, to the extent the requested information has not been provided by EPA and is not already publicly available. (September 12, 2022 email correspondence from Robert Hasson, Assistant Regional Counsel, to Joseph P. Howard, Esq., counsel for MAS, Ex. I to this Response). On October 27, 2022, EPA responded separately to

Mr. Howard's request for an informal meeting with ORC and OSC Jack Kelly.

On September 28, 2022, Regional Counsel Cecil Rodrigues signed an Order of Assignment, designating Regional Judicial Officer Joseph L. Lisa as the neutral Agency official who will preside over the meeting on the Superfund lien in accordance with the procedures established in *Supplemental Lien Guidance*. (LFAR Ex. 1.12). EPA has provided MAS with a copy of the Order of Assignment. (September 28, 2022 email correspondence from Robert Hasson, Assistant Regional Counsel, to Joseph P. Howard, Esq., with Order of Assignment and Certificate of Service, Ex. J to this Response).

II. Framework and Purpose of an EPA Lien Hearing

EPA's lien-filing practice follows Section 107(*l*) of CERCLA, 42 U.S.C. § 9607(*l*), and the *Supplemental Lien Guidance*. As provided in the *Supplemental Lien Guidance*, EPA gives notice to property owners believed to be PRPs under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), informing them that the Agency intends to perfect, or has perfected, a Superfund lien on their property under Section 107(*l*) of CERCLA. The *Supplemental Lien Guidance* states that EPA will give the property owner an opportunity to be heard concerning the Superfund lien. *See Reardon v. United States*, 947 F.2d 1509, 1523-24 (1st Cir. 1991) (Without notice and an opportunity to be heard, CERCLA's lien provisions violate the Fifth Amendment's "due process" clause).

As described in the *Supplemental Lien Guidance*, the property owner's opportunity to be heard is a meeting before a neutral EPA official, who should be an attorney employed by the Agency with no prior involvement in the case at issue. The neutral official "should consider all facts relating to whether EPA has a reasonable basis to believe that the statutory elements have been satisfied for the perfection of a lien." *Supplemental Lien Guidance*, at p. 7.

The meeting with the neutral official is conducted "as an informal exchange of information, not bound by judicial or administrative rules of evidence." *Id.*, at p. 8. "Neither EPA nor the property owner waives any claims or defenses by the conduct of the meeting or the outcome." *Id*. There is no direct examination or cross-examination of witnesses. Ultimately, the only issues and information that are relevant and will be considered at the meeting relate to: (i) whether EPA has a reasonable basis to perfect a Superfund lien based on consideration of the statutory elements outlined below; or (ii) whether EPA has reason to believe the property owner is not entitled to the "innocent landowner" or other statutory defense or limitation on liability under CERCLA. *Id.*; *see also*, *Reardon,* 947 F.2d at 1522 ("EPA may only need to demonstrate probable cause or reason to believe that the land would be 'subject to or affected by' a cleanup, or that the landowner was not entitled to an 'innocent landowner' defense.") The meeting will <u>not</u> include an analysis of the property owner's liability under CERCLA, a trier of fact, or the introduction of evidence and related arguments, as this type of inquiry would amount to pre-enforcement review, which is barred under Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).[12] *See Reardon*, 947 F.2d at 1512-1514 (Holding that 42 U.S.C. § 9613(h) bars federal courts from hearing pre-enforcement challenges to the merits of any particular lien, including challenges to the liability that a lien secures); *see also United States v. Princeton Gamma-Tech, Inc.,* 31 F.3d 138, 142 (3d Cir. 1994), *rev'd on other grounds*, *Clinton Co. Com'rs v. U.S. E.P.A.*, 116 F. 3d 118, 120 (3d. Cir. 1997) (It is the cost-recovery suit that opens the door for alleged responsible parties to contest their liability); *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380,

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[12] 42 U.S.C. § 9613(h) prohibits pre-enforcement judicial review of challenges to EPA removal or remedial actions under 42 U.S.C. § 9604, except under certain circumstances (e.g., filing of a cost-recovery action under Section 107(a) or filing a lawsuit to enforce a cleanup order or for injunctive relief under 42 U.S.C. § 9606). None of the exceptions to Section 113(h)'s bar on pre-enforcement judicial review are present in this case. Indeed, CERCLA defines *removal* (or *response*) *action* to include enforcement activities related thereto, such as the filing of a lien notice. *See* 42 U.S.C. § 9601(25).

1390 (5th Cir.1989) (PRPs cannot seek judicial review until the United States has brought an actual cost-recovery suit).

Following the meeting, the neutral official will issue a written recommended decision. "Because of the preliminary and informal nature of the proceedings . . . , and the fact that the neutral official's recommended decision is limited to whether EPA has a reasonable basis to perfect the lien, the neutral official's recommended decision is not a binding determination of ultimate liability or non-liability." *Supplemental Lien Guidance*, at p. 9. The recommended decision would not be admissible as evidence in any future proceeding.

III. Statutory Elements for Perfection of Superfund Lien

Section 107(*l*) of CERCLA provides that the response costs for which a person is liable to the United States under Section 107(a) of CERCLA shall constitute a lien in favor of the United States on real property that is owned by this person and that is subject to or affected by a removal (or remedial) action. 42 U.S.C. §§ 9607(*l*)(1)(A) and (B). The lien imposed by Section 107(*l*) of CERCLA arises upon the later of two occurrences: (i) when response costs are first incurred by the United States on the affected real property, or (ii) when the person owning the affected real property is given written notice of their potential liability. 42 U.S.C. §§ 9607(*l*)(2)(A) and (B). The lien "shall continue until the liability for the costs (or any judgment against the person arising out of such liability) is satisfied or becomes unenforceable through operation of the statute of limitations provided in section 113 [of CERCLA]." *Id*.

Thus, there are five statutory elements (or conditions) that must exist for EPA to have a reasonable basis to perfect a Superfund lien:

1. There must be real property subject to or affected by a removal or remedial action under CERCLA;

2. The real property subject to or affected by a removal or remedial action must be owned by a person who is a potentially liable party under Section 107(a) of CERCLA;

3. Response costs must have been incurred by the United States on the affected real property;

4. The person owning the affected real property must have received from EPA written notice of their potential liability; and

5. The liability for the costs (or any judgment against the person arising out of such liability) must not have been satisfied or must not have become unenforceable through operation of the statute of limitations provided in Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2).

IV. Argument

A. EPA had a reasonable basis to believe that all the statutory requirements for a federal Superfund lien have been met.

As discussed below, and as supported by EPA's LFAR, each of the statutory requirements under CERCLA for perfection of a federal Superfund lien on the Property have been met. Therefore, EPA believes it had a reasonable basis to perfect a lien on the Property.

1. _Statutory Element No. 1_*: There is real property subject to or affected by a removal or remedial action under CERCLA.*

As discussed above, the Property has been the subject of an EPA removal action as defined by Section 101(23) of CERCLA, which defines *removal* to include "actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release." 42 U.S.C. § 9601(23).

In 2018, based on credible information that disposal of PCBs may have occurred during past operations at the Property, EPA performed a removal site evaluation of the Property under Section 300.410 of the NCP, 40 C.F.R. § 300.410 (LFAR Exs. 1.02, 1.04, 1.05, and 1.09).[13] Sampling results obtained during the removal site evaluation confirmed a release of PCBs in soil and subsurface soil at the Property. In June 2020, EPA issued an Action Memorandum, selecting a removal action, which included, among other things, the cleanup of soil on the Property to meet, to the extent practicable considering the exigencies of the situation, the criteria for high-occupancy use under the TSCA PCB regulations (LFAR Ex. 1.04).[14] *See* 40 C.F.R. § 761.61(a)(4)(i)(A)(Cleanup levels); and 40 C.F.R. § 761.3 (Definition of *high occupancy area* to include, among other places, a residence(s)).

Beginning in March 2021, EPA mobilized to the Site to conduct the removal action, which included the excavation and off-site disposal of PCB-contaminated soils and other contaminated materials (e.g., PCB-contaminated concrete) from the Site (LFAR Ex. 1.10). Based on post-excavation sampling, which showed that PCB concentrations in some areas of the Property remained above the TSCA cleanup standards for high-occupancy use, EPA conducted additional soil excavation, off-site disposal, and confirmatory sampling, and installed a soil and clay cover over the entire Property.

2. <u>Statutory Element No. 2</u>*: Real property subject to or affected by a removal or remedial action is owned by a potentially liable party under Section 107(a) of CERCLA.*

Section 107(a) of CERCLA contains the liability provisions of the statute. Section 107(a)(1) of CERCLA provides that, "[n]otwithstanding any other provision or rule of law, and

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[13] PCBs are *hazardous substances* as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), and as listed at 40 C.F.R. Part 302.4 (List of Hazardous Substances and Reportable Quantities).

[14] The NCP provides that "Fund-financed removal actions under CERCLA section 104 . . . shall, <u>to the extent practicable considering the exigencies of the situation</u>, attain applicable or relevant and appropriate requirements (ARARs) under federal environmental or state environmental or facility siting laws." 40 C.F.R. § 300.410(j). (Emphasis added).

subject only to the defenses set forth in . . . [Section 107(b) of CERCLA]," the owner of a *facility* shall be liable for "all costs of removal or remedial action incurred by the United States . . . not inconsistent with the National Contingency Plan . . . ." 42 U.S.C. § 9607(a)(1).

Section 101(9) of CERCLA defines the term *facility* to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9). The Third Circuit has interpreted an *owner* under Section 107(a)(1) to be the current owner of the Site. *See Trainer Custom Chem.*, 906 F.3d at 90, and cases cited therein.

In our current case, the Property fits CERCLA's definition of *facility* because, as revealed by analytical results of sampling done during EPA's removal site evaluation and removal action, the Property is a site or an area where the hazardous substances, PCBs, have been disposed of, or have otherwise come to be located (LFAR Exs. 1.02, 1.04, 1.05, and 1.09). The most recent deed for the Property shows that MAS is the current owner of the Property, having acquired it from Mr. Joyce on March 16, 2018 (LFAR Doc. Ex. 1.01). Under these facts, MAS is a potentially liable party under Section 107(a) of CERCLA as the current owner of the Property (LFAR Ex. 1.02).

3. <u>*Statutory Element No. 3*</u>*: Response costs have been incurred by the United States on the affected real property.*

As reflected in EPA's certified cost summary report dated November 15, 2022, the Agency incurred approximately $762,641.67 in response costs from September 16, 2018, through October 9, 2021, for a removal action at the Property (LFAR Ex. 1.06).

4. <u>*Statutory Element No. 4*</u>*: The person owning the affected Property has received written notice of its potential liability.*

On April 20, 2020, EPA sent MAS a written GNL notifying it of its potential liability

under Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1), as the current owner of the Property (LFAR Ex. 1.02). On April 23, 2020, Ms. Zahra Saeed, writing on behalf of MAS, acknowledged receipt of this notice letter (LFAR Ex. 1.03).[15]

5. _Statutory Element No. 5_: *Liability for the costs or any judgment against MAS arising out of such liability has not been satisfied and has not become unenforceable through operation of the statute of limitations provided in Section 113(g)(2) of CERCLA.*

To date, the United States has not brought a civil action against MAS for its potential liability under Section 107(a)(1) of CERCLA. Therefore, any potential liability MAS may have for the United States' Site-related response costs under CERCLA has not been satisfied.

Concerning the statute of limitations ("SOL"), Section 113(g)(2) of CERCLA provides, in relevant part, that an initial action for recovery of costs for removal action must commence within three years _after the completion of the removal action_. 42 U.S.C. § 9613(g)(2) (emphasis added). In this case, EPA completed on-site activities related to the removal action less than three years ago, on or around August 4, 2021 (LFAR Ex. 1.05). Therefore, the United States' cost-recovery claim would still be enforceable under Section 113(g) of CERCLA.[16]

Since all five statutory requirements for a Superfund lien under Section 107(*l*) of CERCLA are satisfied in this case, EPA believes a Superfund lien in favor of the United States has arisen on the Property as a matter of law and that the Agency had a reasonable basis to perfect this lien.

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[15] EPA sent MAS the GNL at a time when EPA's Region 3 office was closed because of the COVID-19 pandemic. At that time, all Agency correspondence was sent via email, although multiple attempts were made to send MAS certified mail via the U.S. Postal Service. Return receipt was requested in each such attempt by EPA, but was never received. Besides Ms. Saeed's acknowledgement of her receipt of the email sending MAS the GNL, MAS's then-counsel, Ed Paul, acknowledged their receipt of the GNL during an April 24, 2020 phone call with Assistant Regional Counsel Robert Hasson and in correspondence dated April 27, 2020. This correspondence is being submitted with this Response as Ex. K.

[16] Notwithstanding EPA's statement here on the SOL, the Agency reserves its right to argue that, under 42 U.S.C. § 9613(g) and controlling case-law precedent, an action for recovery of the United States' removal costs in this case would _not_ be time-barred after August 4, 2024.

B. EPA is not aware of any other information in the LFAR that is sufficient to show that the lien should not have been perfected.

The standard of review under the *Supplemental Lien Guidance* requires the neutral official to consider the statutory elements described above, as well as whether the LFAR contains any information that is sufficient to show that the Superfund lien should not have been perfected. *Supplemental Lien Guidance,* p. 7. EPA is currently not aware of any such information in the LFAR or in other records acquired by the Agency pertaining to the Site. Further, as discussed below, EPA is not aware of any information that would support MAS's assertion of the "innocent landowner" defense or any other statutory defense or limitation on liability available under CERCLA, as amended by SARA and the Small Business Liability Relief and Brownfields Revitalization Act of 2001 ("Brownfields Amendments").[17]

C. CERCLA is a strict liability statute, and a defendant has the burden of proving all elements of an affirmative defense.

In his September 9, 2022 response to EPA's notice of lien, Mr. Howard has alleged that the Superfund lien is "unreasonably and inequitably punitive"; that MAS is an "innocent purchaser"; that EPA had previously found the Property to be "cleaned"; and that the Superfund lien "does nothing to the actual contaminating party or parties." (LFAR Ex. 1.11). As explained more fully below, these arguments either do not take into account CERCLA's strict liability scheme under Section 107(a) of CERCLA, or fail to aver facts sufficient to satisfy the required elements of an affirmative defense under Section 107(b) of CERCLA, 42 U.S.C. § 9607(b), or criteria for the limitations on liability provided under the Brownfield Amendments. *See,* 42

[17] Pub. L. No. 107-118. The Brownfields Amendments amended CERCLA to provide liability limitations for owners who qualify as (i) bona fide prospective purchasers ("BFPPs"), (ii) contiguous property owners ("CPOs"), or (iii) innocent landowners ("ILOs"). "Congress intended these provisions to be self-implementing, enabling private parties to save time and costs, in part, by reducing EPA involvement in most private party transactions." *See Enforcement-Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners* ("*Common Elements Guidance*") (July 29, 2019), p. 1.

U.S.C. §§ 9601(40)(B) and 9607(q)-(r). The "innocent landowner" (or "innocent purchaser") defense is an affirmative defense, which requires a defendant to prove each element of the defense by a preponderance of the evidence. *United States v. Price*, 577 F. Supp. 1103, 1114 (D.N.J. 1983). Failure to prove any single element of an affirmative defense would make it unavailable to a defendant. *Foster v. United States*, 922 F. Supp. 642, 654 (D.D.C. 1996) (citation omitted).

1. The Strict Liability Scheme under CERCLA

CERCLA is a strict liability statute, subject only to the affirmative defenses set forth in Section 107(b) of the statute. *See* 42 U.S.C. § 9607(a). *See also United States v. Mexico Feed and Seed Co., Inc.,* 980 F.2d 478 (8th Cir. 1992) (explaining that CERCLA is a remedial strict liability statute, and its focus is on responsibility, not culpability). Time and again, courts have been clear that Section 107(a)(1) "imposes strict liability on the current owner of a facility." *Alcan*, 964 F.2d at 265 (citing *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985)). Equitable factors are not considered by courts when determining liability under Section 107(a) and are appropriately raised only in an action for contribution under Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), when allocating responsibility for damages among jointly and severally liable defendants. *See Matter of Bell Petroleum Services, Inc.*, 3 F.3d 889, 900-901 (5th Cir. 1993) (citing, among other cases, *Alcan*, 964 F.2d at 270 n. 29); *see also Trainer Custom Chem.*, 906 F.3d at 92 (*citing Litgo New Jersey Inc. v. Comm'r N.J. Dept. of Envtl. Prot.*, 725 F.3d 369, 383 (3d Cir. 2013)) (A PRP who must bear more than its fair share of cleanup costs in a cost-recovery action can seek a more equitable distribution of those costs through a contribution action against other PRPs). For these reasons, Mr. Howard's equitable arguments that the Superfund lien in this case is "unreasonably and inequitably punitive," and that other parties may

also be responsible for the Property's contamination, are not pertinent to the current proceeding, the focus of which is whether EPA had a reasonable basis to perfect the United States' lien.

2. The Elements of the Third-Party Defense under CERCLA

Section 107(b)(3) of CERCLA, provides for a third-party defense:

> There shall be no liability under [Section 107(a)] for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—
>
> > . . . an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant, . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts or circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions . . . .

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

Thus, to avail oneself of the third-party defense, a person must prove, by a preponderance of the evidence, each of the following things:

(1) The release or threat of release of the hazardous substances and the resultant damages were caused solely by the act or omission of a third party;

(2) This third party was not the defendant's employee or agent, or a person in a direct or indirect contractual relationship with the defendant;

(3) The defendant exercised due care with respect to the hazardous substances concerned; and

(4) The defendant took precautions against the foreseeable acts or omissions of a third party and the foreseeable consequences thereof.

In 1986, Congress passed SARA and amended CERCLA to include a provision – Section

101(35) – which clarified what is meant by a "contractual relationship" under Section 107(b)(3), and which expanded the third-party defense to include what has come to be known as the "innocent landowner" (or "innocent purchaser") defense. *See* 42 U.S.C. § 9601(35)(A)(i).[18]

a. The "Innocent Landowner" (or "Innocent Purchaser") Defense and its Elements

Section 101(35)(A) of CERCLA defines "contractual relationship" to include, among other things, land contracts, deeds, easements, leases, or other instruments transferring title or possession. 42 U.S.C. § 9601(35)(A). With this amendment, Congress made clear that a person who purchased real property under a deed with a liable third party could not avail himself of the third-party defense under Section 107(b)(3) because a deed transferring title is a contractual relationship. However, Section 101(35)(A) of CERCLA also adds a defense for an "innocent landowner" who, in spite of being in a "contractual relationship" with a third-party PRP, can show by a preponderance of the evidence that "[a]t the time . . . [they] acquired the facility . . . [they] did not know and had no reason to know that any hazardous substance, which is the subject of the release or threatened release, was disposed of on, in, or at the facility." 42 U.S.C. § 9601(35)(A)(i). To establish that it did not know and had no reason to know that PCBs were disposed of on the Property, a defendant is required to prove that it performed "all appropriate inquiries" prior to having purchased the Property. The defendant must also prove that it exercised "due care" and took precautionary measures as required under CERCLA's third-party defense. *See* 42 U.S.C. §§ 9607(b)(3)(a) and (b).

[18] Section 101(35) also added an inheritance defense and a defense for a governmental entity that acquired property through escheat, involuntary acquisition, or eminent domain. EPA commonly refers to the defense available under Section 101(35)(A)(i) as the "innocent landowner" defense. However, some courts have also referred to this defense as the "innocent purchaser" defense, which is the terminology Mr. Howard has used in his September 9, 2022 letter. *See, e.g., United States v. 150 Acres of Land*, 204 F.3d 698, (6th Cir. 2000); *Idylwoods Assocs. v. Mader Capital*, Inc., 956 F. Supp. 410 (W.D.N.Y. 1997).

b. The "All Appropriate Inquiries" Requirement for the "Innocent Landowner" Defense and Liability Protection for BFPPs under CERCLA

Section 101(35)(B)(i) of CERCLA, as later amended in 2001 by the Brownfields Amendments, provides that, to establish that they had "no reason to know" about the hazardous substance that is the subject of the release or threatened release at a facility, a defendant must demonstrate to a court that—

(I) on or before the date on which the defendant acquired the facility, the defendant carried out all appropriate inquiries, as provided in clauses (ii) and (iv), into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices; and

(II) the defendant took reasonable steps to—

(aa) stop any continuing release;

(bb) prevent any threatened future release; and

(cc) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance.

42 U.S.C. §§ 9601(35)(B)(i)(I) and (II) (Emphasis added).

Under the Brownfield Amendments, Congress required the EPA Administrator to promulgate regulations establishing standards and practices for the purpose of satisfying the requirement to carry out "all appropriate inquiries" under Section 101(35)(B)(i). 42 U.S.C. § 9601(35)(B)(ii). In addition, Section 101(35)(B)(iii) of CERCLA set forth the criteria required by Congress to be included in these regulations. 42 U.S.C. § 9601(35)(B)(iii).

To that end, EPA established the federal standards and practices for "all appropriate inquiries" in a final rule published on November 1, 2005. 70 Fed. Reg. 66070 (Nov. 1, 2005). These regulations are codified at 40 C.F.R. Part 312 and "establish the specific regulatory

requirements and standards for conducting . . . inquiries into the previous ownership and uses of a property for the purpose of meeting the 'all appropriate inquiries' provisions necessary to qualify for certain landowner liability protections under CERCLA," including, among others, the "innocent landowner" defense under Section 101(35)(A)(i) and the limitation on liability available to a BFPP under Sections 107(r) and 101(40) of CERCLA. 42 U.S.C. §§ 107(r) and 101(40); *see* 70 Fed. Reg. 66070.

c. The "Due Care" Element of the Third-Party Defense

Even if a defendant can prove they conducted the "all appropriate inquiries" required for the "innocent landowner defense", the defendant must also prove they exercised "due care" with respect to the hazardous substance(s), as required by Section 107(b)(3)(a) of CERCLA. The legislative history of CERCLA suggests that Congress intended "due care" to mean the type of care a similarly situated reasonable and prudent person would have taken under the circumstances. *See State of New York v. Lashins Arcade Co*., 91 F.3d 353, 361 (2d Cir. 1996) (Citing legislative history reflecting Congress' intent on the standard for "due care" under Section 107(b)(3)(a) of CERCLA).

3. MAS has not presented facts showing it could meet its burden of proving a defense or limitation on liability under CERCLA.

i. MAS has not shown it conducted "all appropriate inquiries" prior to its purchase of the Property.

In his September 9, 2022 letter, Mr. Howard alleges that MAS "is an innocent purchaser," but offers no facts sufficient to prove this potential defense to liability. Based on the available record, EPA believes MAS would not meet its burden of proving the elements of the "innocent landowner" defense under CERCLA. Therefore, EPA believes it had a reasonable basis to perfect a Superfund lien on the Property.

To qualify as an "innocent landowner" under CERCLA, MAS must first prove that it acquired the Property after the disposal of hazardous substances on it. Then, MAS must prove that they did not know, and had no reason to know, that any hazardous substance had been released at the Property. 42 U.S.C. § 9601(35)(A)(i). For MAS to show it had no reason to know hazardous substances were released at the Property, MAS would need to establish that, prior to its purchase of the Property, it had conducted the "all appropriate inquiries" required under Section 101(35)(B)(i) of CERCLA. As explained below, MAS has never provided EPA with any evidence that it conducted the "all appropriate inquiries" required under CERCLA and 40 C.F.R. Part 312.

As an initial matter, "all appropriate inquiries" must be conducted or updated within 180 days of, and prior to, the date a property is acquired. The purchaser must hire an "environmental professional", as defined by 40 CFR § 312.10, to identify conditions indicative of releases or threatened releases of hazardous substances. *See* 40 C.F.R. §§ 312.21 and 312.22. The inquiry by the environmental professional must include, by way of example, interviews with past and present owners, reviews of historical sources, reviews of government records, and visual inspections. 40 C.F.R. § 312.21. The results of such an inquiry must be documented in a written report that satisfies the requirements of 40 C.F.R. § 312.21(c), and in which report the environmental professional is required to sign a declaration that s/he meets the definition of an environmental professional as defined in 40 C.F.R. § 312.10 and that s/he performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 CFR Part 312, to the best of her or his professional knowledge and belief. 40 C.F.R. § 312.21(d).

Unless MAS can produce a written report that was prepared and certified by an environmental professional prior to MAS's March 16, 2018 purchase of the Property, and this

report also satisfies all of the requirements in 40 C.F.R. Part 312, the "all appropriate inquiries" requirement of the "innocent landowner" defense cannot be proven by MAS by a preponderance of the evidence.

In *Von Duprin LLC v. Major Holdings, LLC*, the Seventh Circuit affirmed the district court's holding that the defendant ("Major") had not satisfied all the requirements of 40 C.F.R. Part 312 and, therefore, could not avail itself of a defense or liability protection under CERCLA. Major had completed a Phase 1 Environmental Assessment ("Phase 1") according to the provisions of ASTM International Standard E1527-05, and this Phase 1 would have satisfied many of the requirements of 40 C.F.R. Part 312. However, Major's Phase 1 submission did not include the required attestations under 40 C.F.R. §§ 312.21 and 312.22 about the professional qualifications of the environmental professional conducting the "all appropriate inquiries" for Major. As a consequence, the district court held that Major could not establish by a preponderance of the evidence that it had complied with all the requirements for "all appropriate inquiries" under CERCLA and was not eligible for a defense to liability for one of the parcels Major owned. 12 F.4th 751, 769 (7th Cir. 2021). The Seventh Circuit also affirmed the district court's holding that Major was not eligible for a defense under CERCLA in connection with another parcel because its "all appropriate inquiries" occurred approximately 14 months prior to its lease of the parcel, not within the 180 days required under 40 C.F.R. § 312.20(b). *Id.*

From 2018 through the present, MAS has had multiple opportunities to provide EPA with evidence that it conducted "all appropriate inquiries" and has not done so, though it has been represented by experienced and competent counsel, including Mr. Howard and MAS's former counsel, Ed Hall and Steven Miano. Under the circumstances, EPA believes that if evidence of MAS's "all appropriate inquiries" existed, it would have already been provided to the Agency by

MAS or its counsel. In fact, MAS has essentially conceded on multiple occasions that it did not perform "all appropriate inquiries" for the Property and relied instead on the word of the former Site owner, Mr. Joyce, that the Site was "clean", or on City zoning variances allowing for residential development of the Site, as if either of these things would, in and of themselves, satisfy the rigorous inquiry required by Congress in 42 U.S.C. § 9601(35)(B)(iii) and by EPA in 40 C.F.R. Part 312.

Unfortunately, MAS has tried to distract attention from its mistake by blaming EPA for the limited scope of the Agency's 2009 removal action. However, this issue is the proverbial red herring and has nothing to do with the matter at hand: MAS failed to do what federal regulations require before its acquisition of the Property. Had MAS conducted "all appropriate inquiries" in accordance with 40 C.F.R. Part 312 and discovered the PCB contamination, MAS would not have been required to conduct or pay for the removal action, although, as discussed below, MAS would have been required to meet the other BFPP criteria under 42 U.S.C. § 9601(40)(B)(i)-(viii) to enjoy the protection from liability afforded to a BFPP. Mr. Howard's September 9, 2022 letter compounds things by misrepresenting what is actually stated in Tetra Tech's December 8, 2021 Final Trip Report (LFAR Ex. 1.05). The letter states that, concerning the 2009 removal action, the Trip Report "confirm[s] that EPA removed PCB containing drums, and the property moved into a 'no further action' status." However, the words "no further action status" do not appear anywhere in the Trip Report, and EPA made no such determination about the Site in 2009 and has made no such determination at this time.

At best, MAS fundamentally misunderstands the nature of the 2009 removal action, which, as described above, was limited to (i) the investigation and removal of the drums, totes, and other receptacles containing PCBs that were left at the Property by Mr. Joyce, and (ii) the

removal and recycling of heating oil in an abandoned underground storage tank. An environmental professional, as required by 40 C.F.R. Part 312, would have helped MAS navigate the risks associated with the purchase of a former industrial property, such as this Site, and would have obtained for MAS more accurate information about potential environmental conditions at the Property than MAS received from Mr. Joyce.

Since MAS has not presented any facts showing it complied with the "all appropriate inquiries" requirement of the "innocent landowner" defense under CERCLA, it cannot avail itself of this affirmative defense; and EPA, therefore, has a reasonable basis to believe that all the statutory elements for a lien under Section 107(*l*) of CERCLA have been met and that there is no other information in the record suggesting the Superfund lien on the Property should not have been perfected.

ii. MAS also did not exercise the due care required for the "innocent landowner" defense.

As noted above, a defendant's failure to meet one element of an affirmative defense, such as the "innocent landowner" defense, precludes the defendant from availing itself of the defense. MAS's inability to meet the "all appropriate inquiries" requirement of the "innocent landowner" defense forecloses MAS from availing itself of this defense. Nevertheless, another element of the "innocent landowner" defense – due care under Section 107(b)(3)(a) of CERCLA – has implicitly been alleged in Mr. Howard's September 9, 2022 letter. As discussed below, MAS also would not meet its burden of proving that it exercised due care as to the PCBs it knew were at the Site as early as August 24, 2018. (August 24, 2018 email from OSC Jack Kelly to Amer and Zahra Saeed, MAS, Ex. N to this Response).

In his September 9, 2022 letter, Mr. Howard states, "Prudently, MAS repaired fencing in the area to secure the Property at the time of acquisition. In 2019, they had a company come in

and mow the standing grass. To this date they have, in no way, undertaken steps to clear or disturb the property, the surface soil/debris or the existing cement foundations." (LFAR Ex. 1.11, at p. 1.) These actions would not meet the "due care" contemplated by Congress when drafting CERCLA or determined to be sufficient by courts considering this issue. ". . . [F]or a defendant to establish that he exercised due care, the defendant must demonstrate that he took all precautions with respect to the particular waste that <u>a similarly situated reasonable and prudent person</u> would have taken in light of all relevant facts and circumstances." H.R. Rep. No. 1016, 96th Cong., 2d Sess., pt. 1, at 34 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6137 (Emphasis added). *See State of New York v. Lashins Arcade Co*., 91 F.3d 353, 361 (2d Cir. 1996). *See also PCS Nitrogen, Inc. v. Ashley II of Charleston, LLC*, 714 F.3d 161, 180-81 (4th Cir. 2013) (upholding District Court's determination that owner's inaction and failure to monitor site conditions did not amount to "appropriate care" under CERCLA's Brownfields Amendments); *United States v. DiBiase Salem Realty Trust*, 1993 WL 729662 (D. Mass. Nov. 19, 1993), *aff'd* 45 F.3d 541, 545 (1st Cir. 1995) (To do nothing to forestall the readily foreseeable hazards posed by waste others may have dumped on your land is not due care); *New York v. Shore Realty*, 759 F.2d 1032, 1049 (2d Cir. 1985) (same).

For one thing, "due care" as an element of the third-party and "innocent landowner" defenses would have required some affirmative steps to address the releases of PCBs at the Property once MAS learned about them in the late summer and fall of 2018. Arranging for the grass to be mowed in 2019 does not come close to fitting the bill, especially if MAS failed to inform the person(s) mowing the grass about the risk of exposure to PCBs in surface soils. MAS's repair of a fence at the time it acquired the Property in March 2018, which was prior to MAS's obtaining information about the PCB releases, would also not meet the "due care"

required for the third-party defense. Rather, the installation of a more secure fence with signs warning trespassers and visitors about the hazardous conditions on the Property after the date MAS learned about the PCBs on its Property would likely have been the type of "due care" required for the CERCLA affirmative defense.

In addition, MAS's statements about the alleged actions it took to safeguard the Property are somewhat misleading. Observations recorded in EPA's Action Memorandum (Doc. 1.04 at pp. 2 and 5) belie MAS's arguments that it took actions that exhibited prudence.

> Residential yards border the Site on two sides. <u>Trespassers readily gain access to the Site</u>, as evidenced by cigarette lighters and beverage cans EPA has observed strewn throughout the Site property. <u>On March 11, 2020, an approximate 20-foot section of a wooden fence, separating a residential yard from the Site along LeFevre Street was observed by the OSC to be completely torn down. In addition, a portion of a cyclone fence along LeFevre Street was pulled away, allowing trespass</u>.
>
> . . . Based on observations by the OSC, trespassers have entered the Site and appear to spend considerable time there. Discarded beverage cans, cigarette lighters, and consumer packaging were observed. <u>The fence separating the Site property from several residential yards and from the LeFevre Street pavement is damaged in several places allowing for easy access</u>. Given the proximity of the yards and the unknown nature of when and how the soil became contaminated, PCBs may have migrated to residential properties. The PCB levels found in many of the locations sampled at the Site far exceed the cleanup values required under the TSCA PCB regulations. <u>PCBs may exist in the concrete slab at the Site that trespassers walk on and may sit upon based on the pattern of discarded consumer products</u>. (Doc. 1.04, emphasis added).

LFAR Ex. 1.04, at pp. 2 and 5.

Indeed, these site conditions, which existed about 19 months *after* MAS knew its Property was contaminated with PCBs, were identified by EPA to establish that conditions at the Property met one of the factors for determining the appropriateness of a removal action under Section 300.415(b)(2) of the NCP – i.e., the actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants or contaminants. 40 C.F.R. § 300.415(b)(2)(i).

As mentioned above, in September 2018, EPA notified MAS about analytical results from sampling done on the Property during the August 2018 removal site evaluation. These results showed elevated concentrations of PCBs in surface soil in various places on the Property. EPA subsequently had multiple conversations with MAS about Site conditions and the need to clean up the PCBs, something MAS stated it wanted to do. Nevertheless, MAS allowed the fencing around the Property to fall into the state of disrepair described in the 2020 Action Memorandum. As a result, trespassers who entered the Property were exposed to PCBs. Even after MAS had known about the hazardous substances on its Property for more than a year, MAS griped in late January 2020 about EPA "telling us that we need to drop everything and handle this as a priority." CERCLA's third-party and "innocent landowner" defenses require ongoing, actual, affirmative steps to prevent human exposure to, or further releases of, hazardous substances, such as the PCBs that MAS knew were on its Property as earlier as August 2018. In truth, MAS never prioritized its "due care" obligations for the Property.

The unsafe and deteriorating security conditions at the Site described in EPA's Action Memorandum, as well as MAS's own words, demonstrate that MAS failed to exercise or prioritize due care with respect to the PCBs present at the Property. A similarly situated reasonable and prudent owner, upon learning of the PCB contamination at the Property, would have taken affirmative steps to ensure the Property was secured and that those entering the Property were warned about the contamination. This would especially be true in a situation, like this, where the Property is in a residential neighborhood and shares property boundaries with multiple rowhomes and a sidewalk with the public. In light of the facts in this case, EPA believes that MAS cannot meet the "due care" prong of the "innocent landowner" defense. Accordingly, EPA believes it had a reasonable basis to perfect a Superfund lien against the Property.

iii. MAS is also not eligible for the BFPP protections from liability under CERCLA.

In his September 9, 2022 letter, Mr. Howard alleges that MAS "is an innocent purchaser." The concept of an "innocent purchaser" is not expressly mentioned within CERCLA, although, as discussed above, the "innocent landowner" defense is occasionally referred to as the "innocent purchaser" defense. *See, e.g., United States v. 150 Acres of Land*, 204 F.3d 698 (6th Cir. 2000).[19] However, if Mr. Howard meant to argue that MAS is an "innocent purchaser" because it qualifies for the protections from liability under CERCLA enjoyed by a category of purchaser known as a BFPP, such an argument would also fail because, as discussed above, MAS cannot prove by a preponderance of the evidence that it performed "all appropriate inquiries," which is also a criterion required to prove BFPP status under Section 101(40)(B)(ii) of CERCLA. *See* 42 U.S.C. §§ 9607(r) and 9601(40)(B).

Section 107(r) of CERCLA provides that "[n]otwithstanding subsection [107](a)(1), a bona fide prospective purchaser [BFPP] whose potential liability for a release or threatened release is based solely on the . . . [BFPP] being considered to be an owner or operator of a facility shall not be liable as long as the . . . [BFPP] does not impede the performance of a response action or natural resource restoration." 42 U.S.C. § 9607(r)(1). Section 101(40)(B) of CERCLA lays out the eight criteria that a person must establish by a preponderance of the evidence to achieve BFPP status. 42 U.S.C. § 9601(40)(B). These criteria include, among others, that (i) "the person made all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and

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[19] The "innocent purchaser" defense is also recognized as a defense to liability under certain state cleanup statutes that are analogous to CERCLA. *See, e.g.*, the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11g(d)(2) and (5); *see also, New Jersey Schs Dev. Auth. v. Marcantuone*, 54 A.3d 830 (N.J. Super. Ct. App. Div. 2012) (rejecting defendant's innocent purchaser argument and determining that liability may exist for an owner who purchased previously contaminated land and failed to conduct environmental due diligence prior to purchase).

practices . . . ," and specifically those required under Section 101(35)(B); and (ii) "the person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to—

(I) stop any continuing release;

(II) prevent any threatened future release; and

(III) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance."

See 42 U.S.C. §§ 9601(40)(B)(ii) and (iv). In short, to obtain the limitation on liability available to a BFPP, a person must meet virtually identical (or at least analogous) standards to those required for the "innocent landowner" defense under Section 101(35) of CERCLA. As discussed above, MAS cannot meet these standards: it has not shown it conducted "all appropriate inquiries" under 40 C.F.R. Part 312; it has not shown that it exercised due care as required by Section 107(b)(3)(a); and it has not shown it has exercised "appropriate care" by taking "reasonable steps . . . to prevent or limit human exposure to [a] previously released hazardous substance" at the Site, as required by Section 101(40)(B)(iv) of CERCLA, 42 U.S.C. § 9601(40)(B)(iv). In light of all the facts in this case, there are no other factors in the record that would cause EPA to change its belief that it had a reasonable basis to perfect the Superfund lien on the Property.

V. Conclusion

EPA had a reasonable basis to perfect a Superfund lien on the Property under Section 107(*l*) of CERCLA because all required statutory elements for this lien have been met for the Property, and no other information has been presented to show that the lien should not have been perfected. EPA performed response activities at the Property, including a removal action, as

defined and authorized under CERCLA, from about August 2018 through at least October 2021. As the current owner of the Property, MAS is a potentially liable party under Section 107(a)(1) of CERCLA and controlling Third Circuit precedent. EPA has incurred at least $762,641.67 in response costs at or related to the Property, and these costs are recorded in the November 15, 2022 certified cost report, which is included in the LFAR. EPA notified MAS in writing about its potential liability under CERCLA on or around April 20, 2020. EPA's potential claims against MAS have not been satisfied and are not time-barred under CERCLA's relevant statute of limitations for removal actions. Finally, EPA is not aware of any other information in the LFAR that is sufficient to show that the lien should not have been perfected.

For all the foregoing reasons, EPA respectfully submits that it had a reasonable basis to perfect a Superfund lien on the Property.

Respectfully submitted on behalf of the U.S. Environmental Protection Agency,

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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:	)	
	)	EPA DOCKET NO.
	)	CERCLA-03-2022-0129LL
Lefevre Street Superfund Site	)	
2710 Lefevre Street	)	
Philadelphia, PA 19137	)	
	)	
	)	
	)	PROCEEDING UNDER SECTION
MAS Management, LLC,	)	
Owner	)	107(*l*) OF THE COMPREHENSIVE
	)	ENVIRONMENTAL, RESPONSE,
	)	COMPENSATION, AND
	)	LIABILITY ACT,
	)	42 U.S.C. § 9607(*l*)
	)	

Certificate of Service

I hereby certify that (i) U.S. Environmental Protection Agency's Response to Owner, MAS Management, LLC's Request for a Meeting on a Perfected Superfund Lien, and (ii) Exhibits thereto have been filed with the Regional Hearing Clerk and were served by email on the following counsel for the Owner –

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