BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

U.S. Environmental Protection Agency's Reply to Owner, MAS Management, LLC's Brief Concerning a Perfected Superfund Lien

In a brief submitted on December 19, 2022, MAS Management, LLC ("MAS") concedes that the U.S. Environmental Protection Agency ("EPA" or "Agency") has established four of the five statutory elements required for the Agency to show it had a reasonable basis to perfect a Superfund lien on real property located at 2710 Lefevre Street in Philadelphia, Pennsylvania ("the Property") (Lien-Filing Administrative Record ("LFAR") 1.16 at 13-14). MAS has also conceded that the Property is a *facility* as defined by CERCLA (LFAR 1.16 at 14). *See* 42 U.S.C. §§ 9601(9) (definition of *facility*) and 9607(a) (owner liability provisions).

The Property comprises the Lefevre Street Container Site ("Site"), where EPA conducted a Superfund-financed (or "Fund-financed") removal action under Section 104(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA" or "Superfund"), 42 U.S.C. § 9604(a). The removal action addressed the release or threatened release of hazardous substances known as polychlorinated biphenyls ("PCBs") at the

Site (LFAR 1.04 and 1.05). MAS currently owns the Property, which they acquired in March 2018 (LFAR 1.01). Through October 2021, EPA had incurred $762,641.67 in response costs related to the removal action (LFAR 1.06).

The one statutory element for perfection of a lien not conceded by MAS is that the Property be owned by a person who is a potentially responsible party ("PRP") under Section 107(a) of CERCLA. This section provides that the owner of a *facility* at which hazardous substances have been disposed of is liable for all costs of removal action incurred by the United States not inconsistent with the National Contingency Plan ("NCP").[1] 42 U.S.C. § 9607(a)(1).

I. Legal Argument

A. MAS Cannot Prove All Elements of the "Innocent Landowner" Defense.

MAS alleges they can avail themselves of the "innocent landowner" defense to liability under Section 101(35)(A)(i) of CERCLA (LFAR 1.16 at 14). This section of CERCLA provides that a current owner of a facility has a defense to liability if they can establish by a preponderance of the evidence that (i) they acquired the facility after all disposal of hazardous substances had occurred, *and* (ii) at the time they acquired the facility, they did not know and had no reason to know that any hazardous substances had been disposed of at the facility. 42 U.S.C. § 9601(35)(A)(i).

In order to establish that they had no reason to know about the release of a hazardous substance on their property, an owner must demonstrate to a court that, on or before the date on which they acquired the facility, they carried out a type of environmental due diligence known as "all appropriate inquiries," which is expressly required under CERCLA. *See* 42 U.S.C. §

[1] The National Contingency Plan ("NCP") is formally known as the National Oil and Hazardous Substances Contingency Plan and is the set of regulations promulgated by EPA that must be followed for Superfund response actions. The NCP is codified at 40 C.F.R. Part 300.

9601(35)(B). The criteria for "all appropriate inquiries," as mandated by Congress, include the results of an inquiry by an environmental professional, among other things. *See* 42 U.S.C. § 9601(35)(B)(iii)(I).[2] In accordance with Congress' mandate, EPA promulgated regulations for "all appropriate inquiries" that were codified at 40 C.F.R. Part 312.

Thus, to avail themself of the "innocent landowner" defense, an owner of a facility would have the burden of proving by a preponderance of the evidence each single element of the defense, including that they performed "all appropriate inquiries," as described in 40 C.F.R. Part 312. Failure to prove any single element of an affirmative defense, such as the "innocent landowner" defense, would make the defense unavailable to a defendant. *Foster v. United States*, 922 F. Supp. 642, 654 (D.D.C. 1996).

In this case, MAS has not produced any evidence that they met the standards for "all appropriate inquiries" required for the "innocent landowner" defense under CERCLA. Significantly, MAS has not produced evidence of the written report by an environmental professional that must be conducted within one year prior to the acquisition of real property, and that must be signed and certified by an environmental professional. *See* 40 C.F.R. §§ 312.20(a) and 312.21(c) and (d). In light of this fact, EPA has a reasonable basis to believe that MAS would not meet their burden of proving by a preponderance of the evidence all the elements of the "innocent landowner" defense and that MAS, therefore, would be considered a PRP under Section 107(a)(1) of CERCLA because they are the current owner of the Property.

EPA's position on MAS's liability status is supported by the plain language of CERCLA and 40 C.F.R. Part 312. MAS's situation is not unique. Courts, including the U.S. Supreme Court

[2] "In promulgating regulations that establish the standards and practices . . . [for the purpose of satisfying the requirement to carry out all appropriate inquiries], the Administrator [of EPA] shall include each of the following: (I) The results of an inquiry by an environmental professional. . . ." 42 U.S.C. § 9601(35)(B)(iii)(I).

and the U.S. Court of Appeals for the Third Circuit, have consistently found that liability under CERCLA is strict for persons covered under Section 107(a). *See, e.g., United States v. Atlantic Research Corp.*, 551 U.S. 128, 136 (2007) (". . . [E]ven parties not responsible for contamination may fall within the broad definitions of PRPs in §§ 107(a)(1)-(4)."). *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); *Von Duprin LLC v. Major Holdings, LLC*, 12 F.4th 751, 756 (7th Cir. 2021) (Current owners of a site where hazardous substances were released may be held liable under CERCLA without having caused a release).

Courts have also held that current owners, who cannot prove they have strictly met the specific criteria for the "all appropriate inquiries" required by 42 U.S.C. § 9601(35)(B) and 40 C.F.R. Part 312, cannot avail themselves of other protections from liability with similar requirements to the "innocent landowner" defense.[3] *See, e.g., Von Duprin LLC*, 12 F.4th at 769 (Defendant whose written report by an environmental professional did not include the required certifications by an environmental professional under 40 C.F.R. §§ 312.21 and 312.22, and whose "all appropriate inquiries" were conducted more than 180 days before acquisition of the property, was not eligible for bona fide prospective purchaser ("BFPP") liability protections under CERCLA); and *Voggenthaler v. Maryland Square LLC*, 724 F.3d 1050, 1063 (9th Cir. 2013) (Affidavit submitted by defendant's environmental professional failed to meet all the requirements for "all appropriate inquiries" under 40 C.F.R. §§ 312.10 and 312.20 and was

[3] The "innocent landowner" defense shares common elements with certain other CERCLA provisions extending liability protections to persons who may be contiguous property owners or bona fide prospective purchasers ("BFPPs"). "All appropriate inquiries" are among these common elements, all of which must be proved by a preponderance of the evidence. *See* 42 U.S.C. §§ 9601(40), 9607(q) and 9607(r).

insufficient to establish defendant was a BFPP within the meaning of CERCLA.)[4]

B. CERCLA Does Not Exempt Properties Zoned Residential from "All Appropriate Inquiries."

In this case, MAS alleges they are an "innocent landowner" because, when they acquired the Property, they did not know and had no reason to know about the releases of PCBs on the Property.

MAS suggests that the specific standards for "all appropriate inquiries" under CERCLA would not have applied to MAS's acquisition of the Property because they plan to develop the Property for residential purposes. For example, MAS argues, "The EPA wants to place the current lien based on the fact that the future buyer of the property – MAS – should have completed an inquiry that literally no residential property buyer undertakes." (LFAR 1.16 at 13). In a similar vein, MAS claims, "A buyer of residential property is expected to perform a reasonable inquiry into the property and its provenance." (LFAR 1.16 at p. 18). Notably, MAS does not cite any provision of CERCLA or the NCP or any other legal authority to support how these statements might relieve them of their obligation to satisfy all regulatory and statutory requirements of the "innocent landowner" defense.

In fact, whether a property is used for residential or another purpose is not a distinction made by CERCLA. In the provisions of CERCLA that address "owner" liability or potential defenses for owners, Congress used the term *facility*. *See, e.g.*, 42 U.S.C. §§ 9607(a)(1) ("The owner or operator of a . . . facility . . . shall be liable for . . . all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan. . ."); and 9601(35)(B)(i) ("All appropriate inquiries. . . To establish that the defendant had no reason to know of the matter described in subparagraph [9601(35)](A)(i), the

[4] The Ninth Circuit remanded the case on other grounds for further consideration by the District Court.

defendant must demonstrate to a court that . . . on or before the date on which the defendant acquired the facility, the defendant carried out all appropriate inquiries. . .") (Emphasis added). Congress defined *facility* broadly to mean "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . ." *See* 42 U.S.C. 9601(9)(B).[5]

Under CERCLA, the key distinction is not a property's past, present, or proposed future use, but whether hazardous substances have come to be located on the property. There are no exceptions under CERCLA for properties that are zoned residential, as is the case here.[6] CERCLA's requirements for "all appropriate inquiries" were applicable to MAS's acquisition of the Property because it is a *facility*, and these requirements were not excused, or substituted for, by MAS's intended future development and use of the Property, the City's zoning of the Property, Mr. Joyce's former approved plans for the Property, or the title policy issued by Fidelity National Title Insurance Company. Simply put, MAS's inability to prove that they conducted the "all appropriate inquiries" required by CERCLA makes the "innocent landowner" defense unavailable to MAS.

II. Additional Discussion About Facts in Dispute

The sole purpose of this proceeding is to determine whether EPA had a reasonable basis to believe that all statutory elements under 42 U.S.C. § 9607(*l*) are satisfied for perfection of a

[5] MAS has conceded that the Property is a *facility* under CERCLA. (LFAR 1.16 at 14).
[6] Under EPA's 1991 *Policy Towards Owners of Residential Property at Superfund Sites* ("*Policy*"), the Agency will exercise its enforcement discretion in relation to owners of "residential property" at Superfund sites. The *Policy* uses the term "residential property" to refer to "single-family residences of one to four dwelling units, including accessory land, buildings or improvements incidental to such dwellings, which are exclusively for residential use." *Policy* at 3. This *Policy* would not apply in a case such as this in which the Property contains no single-family residences or similar dwelling units and has been purchased by MAS for the purpose of residential development. In any case, the *Policy* does not "constitute rulemaking by the Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with the Policy or its internal implementing procedures." *Policy* at 6. The *Policy* may be found at https://www.epa.gov/enforcement/guidance-owners-residential-property-superfund-sites. (Last checked on Dec. 31, 2022).

Superfund lien. As discussed above, EPA believes it had a reasonable basis to perfect the lien based on the facts of this case and on the law. MAS has disputed several facts that EPA addresses for the record immediately below.

A. "Exceptional Circumstances" under EPA's *Supplemental Lien Guidance*

EPA's *Supplemental Lien Guidance on Federal Superfund Liens* (July 29, 1993) advises

> 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 . . . imminent transfer of all or a portion of a property, imminent perfection of a secured interest which would have priority under applicable state law, or indications that these events are about to take place.

Supplemental Lien Guidance at pp. 5-6.[7] (Emphasis added).

Based on information received by EPA from a prospective purchaser of the Property and its agent, the Agency had a reasonable basis to believe exceptional circumstances existed in this case when it perfected the United States' Superfund lien on August 18, 2022.

On July 31, 2022, EPA obtained information via email from, Ms. Jessica Church, executive assistant of a prospective purchaser, that a contract for sale of the Property would be executed that week.[8] A copy of this email has been submitted as Exhibit 1 with this Reply Brief ("Ex. 1").

EPA previously submitted for inclusion in the LFAR a completed "Comfort Letter" Questionnaire, dated August 1, 2022, by a prospective purchaser, Best Choice Management, LLC ("Best Choice").[9] (Exhibit H in LFAR 1.15 (Exs. to LFAR 1.14)). In the Questionnaire,

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[7] The Supplemental Lien Guidance is available at https://www.epa.gov/sites/default/files/2013-09/documents/guide-liens-rpt.pdf (last checked Dec. 29, 2022).

[8] Ms. Church had previously submitted a request for information about the Site under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The request was docketed as FOIA Request #EPA-R3-2022-005425. EPA's response to the request is available at FOIA Online at https://foiaonline.gov/foiaonline/action/public/submissionDetails?trackingNumber=EPA-R3-2022-005425&type=Request.

[9] Since 1996, EPA has issued comfort letters to prospective purchasers who are concerned about the status of

Best Choice stated that its intention was to develop the Property into desirable housing with parking (LFAR 1.15, Ex. H, at no. 7). Best Choice also told EPA that it needed a draft Comfort Letter within 10 days due to contractual deadlines in the agreement of sale between seller and buyer (LFAR 1.15, Ex. H, at no. 9). On the basis of the information provided in communications with Best Choice and Ms. Church, EPA reasonably concluded that the sale of the Property may be imminent.

MAS argues that EPA's perfection of the Superfund lien was unwarranted under the circumstances because the sale of the Property was not imminent. EPA disagrees. Although MAS alleges they never intended to sell the Property, the facts available to EPA at the time supported the prudent exercise of its discretion to perfect the Superfund lien prior to notice to and a meeting with MAS. In their Response Brief, MAS concedes that their own realtor had spoken with Best Choice about a sale of the Property and that MAS actually received a proposed contract for sale of real estate ("CSRE") from Best Choice (LFAR 1.16 at 8).

B. Site Security and Trespass

In EPA's earlier filed brief in this proceeding (LFAR 1.14 at 28-30), the Agency states that Site conditions in early 2020, including evidence of potential trespassing, strongly suggest that MAS would also likely not establish by a preponderance of the evidence the "due care" element of the "innocent landowner" defense. Congress and the courts have stated that the "due care" required for a third-party defense under CERCLA is the type of care a similarly situated reasonable and prudent person would have taken under the circumstances. LFAR 1.14 at 27-30. *See State of New York v. Lashins Arcade Co.*, 91 F.3d 353, 361 (2d Cir. 1996), *citing* H.R. Rep.

impacted properties that may present CERCLA cleanup and liability issues. Additional information about EPA comfort letters, including EPA's *2019 Policy on Issuance of Comfort/Status Letters* and model comfort letters, may be found at https://www.epa.gov/enforcement/comfortstatus-letters-guidance (last checked on Dec. 30, 2022).

No. 1016, 96th Cong., 2d Sess., pt. 1, at 34 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6137 ("For 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 a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances").

MAS refutes EPA's statement, claiming there was no evidence of trespass and that "the site was completely enclosed by tall fencing on all four sides." (LFAR 1.16 at 7). However, photographs taken by EPA at the Site in early February 2020 belie MAS's claim and clearly show an unsecured Property with missing or non-intact fencing, as well as discarded cigarette lighters and other items that are circumstantial evidence that trespassers entered the Property. These photographs are included as Exhibit 2 to this Reply Brief.

MAS alleges their employees and contractors kept an eye on the Site "during 2020 and 2021," but offers no evidence of this assertion. In short, the facts suggest that MAS cannot prove by a preponderance of the evidence that they consistently exercised "due care" or took other precautionary measures at the Site during the years between August 2018, when MAS first learned about the release of PCBs on the Property, and February 2020, when the attached photographs were taken.[10]

C. EPA's Decision to Perform a Fund-Financed Removal Action at the Site

EPA and MAS differ in their versions of how EPA came to conduct a Fund-financed removal action at the Site, as authorized by Section 104(a) of CERCLA and Section 300.415 of the NCP, 40 C.F.R. § 300.415. MAS "vigorously objects" to EPA's characterization of the more

[10] The limitation on liability (or "safe harbor") available to a BFPP under CERCLA similarly requires an owner to exercise "appropriate care with respect to hazardous substances found at the facility by taking reasonable steps . . . to prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance." *See* 42 U.S.C. § 9601(40)(B)(iv). In this case, MAS would also likely not meet a BFPP's burden to establish by a preponderance of the evidence that it took reasonable steps (e.g., maintenance of a fence) to prevent human exposure to PCBs.

than *nine* months that passed from June 11, 2020, when EPA first offered MAS an opportunity to enter into a settlement to conduct the removal action selected in the June 10, 2020 Action Memorandum, and March 19, 2021, when EPA informed MAS that EPA would proceed with a Fund-financed cleanup.

Without proof, MAS alleges that they "presented plans to the EPA that would comprehensively address all existing contamination and clean-up concerns," and that "EPA rejected all plans put forth by MAS and moved to complete their own project." (LFAR 1.16 at 7-8). MAS also alleges that "EPA demanded a site cleaning from site owner MAS and then completely ignored and dismissed the plans presented to them." (LFAR 1.16 at 19).

EPA disputes these specific allegations. First, EPA never demanded that MAS perform the cleanup. On June 11, 2020, EPA *offered* MAS the opportunity to enter into an administrative settlement and order on consent ("settlement") under which MAS would perform the removal action selected by EPA in the June 10, 2020 Action Memorandum.[11] (Ex. 3). The only quasi-demand that EPA made to MAS was that they reply to EPA's settlement offer by a deadline (i.e., June 26, 2020) (Ex. 4), something that is standard when EPA offers to negotiate a settlement for removal action with any PRP. MAS's case is not unique in this regard.

When EPA gave MAS a deadline for reply, EPA clearly stated that after June 26, 2020, the Agency would begin evaluating its other cleanup and enforcement options under CERCLA. (Ex. 4). Under CERCLA, these other cleanup and enforcement options would have included, among others, (i) EPA performance of a Fund-financed cleanup, as authorized by Section 104(a)

[11] Section 104(a) of CERCLA permits EPA to enter into settlements for removal action "when [EPA] determines that such action will be done *properly and promptly* by the owner or operator of the facility . . . or by any other responsible party . . . ." 42 U.S.C. § 9604(a) (Emphasis added). *See also* 40 C.F.R. § 300.415(a) ("Where the responsible parties are known, an effort initially shall be made, to the extent practicable, to determine whether they can and will perform the necessary removal action *promptly and properly*.") (Emphasis added).

of CERCLA, and (ii) recovery of any response costs incurred by the government from the PRPs under Section 107(a); or (iii) issuance of an administrative cleanup order under Section 106(a) of CERCLA. As discussed in Section II.D below, MAS missed multiple deadlines for their response to EPA's proposed settlement. Nonetheless, EPA tried to be accommodating, while consistently reserving its rights to proceed with a Fund-financed removal action. The fact that EPA ultimately chose to proceed in that manner should not have been a complete surprise to MAS.

MAS's consultant may have prepared a draft "comprehensive" cleanup plan for the removal action, as MAS alleges. However, EPA never received such a workplan. Submission of a removal action work plan ("work plan") for EPA's approval was a required deliverable under the proposed settlement, and the work plan would have been subject to EPA's approval. (See Ex. 5 (proposed administrative settlement or "ASAOC"), at ¶ 19). MAS did not enter into the proposed settlement, so they were not under an obligation to submit a work plan; and EPA never had the opportunity to review, let alone demand or reject, MAS's draft work plan for the removal action.

On March 3, 2021, MAS's counsel, Steven Miano, informed EPA, " I do know that [MAS's consultant] RT Environmental is preparing a plan for the remainder of the work based on its recent sampling at the site (which sampling it shared with EPA). We would need to have EPA's sign off on this plan as part of an ASAOC. I believe RT is just about done with the plan but I will check on its progress."[12] (Ex. 6) (Emphasis added). As discussed in Section II.D below, the decision by EPA senior management not to agree to MAS's demand that the Agency

[12] MAS's consultant, RT Environmental, was preparing a plan for "the remainder of the work" because, by March 3, 2021, EPA had already initiated the removal action. Given these circumstances, MAS's allegation that it had prepared a "comprehensive" cleanup plan that EPA rejected is misleading.

pre-approve MAS's work plan as a last-minute condition to settlement effectively terminated negotiations of the proposed settlement. (*See* Exs. 7, 8, and 9).

MAS also alleges that EPA undertook "a cleanup at more than double the cost of the site owner's proposal" (LFAR 1.16 at 19) and that "the proposed lien . . . was more than three times the owner's proposed plan cost." (LFAR 1.16 at 2). Having never reviewed MAS's plan or the costs associated with it, EPA cannot confirm whether this allegation is correct. However, EPA notes for the record that the amount of its Superfund lien, as reflected in the November 15, 2022 cost report (LFAR 1.06), is not strictly limited to costs incurred for the cleanup. The Superfund lien includes all costs of removal action incurred by EPA not inconsistent with the NCP, including costs of removal site evaluation, enforcement, and indirect costs.[13] *See* 42 U.S.C. § 9607(a); *see also* 42 U.S.C. §§ 9601(23) (definition of *remove* or *removal*) 9601(25) (the term *removal action* includes enforcement related thereto).

D. Timeline Related to EPA's Decision to Perform the Removal Action

Beginning in August 2018, after elevated concentrations of PCBs were found at the Site, MAS had an opportunity to remediate the Property on their own. On or about October 30, 2018, EPA's On-Scene Coordinator Jack Kelly met with MAS to discuss the PCB sampling results from the Site and steps they might take to accomplish site remediation. EPA also recommended that MAS confer with an environmental consultant. Based on its communications with MAS, EPA understands that MAS made some efforts to hire an environmental consultant(s), but time passed, and throughout the remainder of 2018, all of 2019, and into early 2020, MAS did not undertake remediation of the PCBs at the Property. (LFAR 1.15, Ex. N).

[13] Indirect costs, which are similar to overhead costs, are non-site-specific costs incurred by EPA in support of the overall Superfund program.

Consequently, on June 10, 2020, based on analytical sampling results from the Site and other Site-related conditions, senior officials in EPA's Superfund & Emergency Management Division determined that the Site presented an imminent and substantial danger to the public health and welfare and selected a removal action in an Action Memorandum (LFAR 1.04). EPA's endangerment determination and response selection are authorized actions under CERCLA and the NCP. *See* 42 U.S.C. § 9604(a) and 40 C.F.R. § 300.415(b).

As mentioned above, after issuing the Action Memorandum in June 2020, EPA offered MAS the opportunity to enter into a settlement under which MAS would perform the removal action with EPA oversight. MAS initially would not agree to the proposed settlement until they understood the full extent of contamination ("EOC") at the Site (LFAR 1.15, Ex. K). Such an EOC study would have been required work under the proposed settlement (Ex. 5 at ¶ 17.d). MAS considered doing the EOC study themselves, but did not, and EPA ultimately performed it on October 13, 2020.[14] (Exs. 11 and 12).

On December 8, 2020, EPA provided MAS with the analytical results from the October 13, 2020 EOC study and requested that MAS inform EPA by December 30, 2020, whether they would enter into the proposed settlement (Ex. 13). MAS did not provide a timely response.

On January 5, 2021, EPA's Office of Regional Counsel sent an email to MAS's then-counsel, Ed Paul, notifying him of the situation and requesting a response to EPA's settlement proposal by January 8, 2021. In this email, EPA expressly reserved its rights under CERCLA, including the authority to issue an administrative order to MAS or to perform a Fund-financed removal action and recover response costs from MAS in a separate legal action (Ex. 14). Again, MAS did not provide a timely response.

[14] MAS first broached the subject of doing an EOC study in late May 2020, prior to EPA's issuance of the June 10, 2020 Action Memorandum. (Ex. 10).

On January 12, 2021, EPA notified MAS through then-counsel Ed Paul that EPA would proceed with a Fund-financed removal action beginning the week of February 1, 2021. However, EPA gave MAS the option still to enter into the proposed settlement, noting that EPA's decision to initiate a Fund-financed cleanup did "not immediately foreclose EPA and MAS Management [from] reaching an agreement under terms substantially similar to those offered in the proposed [settlement]. EPA remains open to entering into an agreement, provided it is signed by January 22, 2021." (Ex. 15).

On January 20, 2021, EPA was contacted by attorney Steven Miano, who informed the Agency that he had been retained by MAS in this matter. During the Office of Regional Counsel's initial conversation with Mr. Miano, he requested an additional 30- to 60-day extension of the deadline for MAS to respond to EPA's proposed settlement. (Ex. 16). EPA carefully considered MAS's request, but elected not to agree to it, given the seven months (since June 11, 2020) that had already passed since MAS first received the proposed settlement. EPA's decision on the requested extension was also informed by CERCLA's requirement that EPA only enter into settlements with PRPs for performance of response actions when the Agency has determined they will do the work *properly and promptly*. As stated in EPA's response to MAS's requested extension, "Given MAS's delays and indecision about the proposed [settlement], EPA has not, at this time, made the requisite determination under CERCLA that MAS Management will properly and promptly perform the removal action." EPA also expressly stated that, although it would be proceeding with plans for a Fund-financed removal action, the Agency remained open to entering into the proposed settlement with MAS for performance of all or part of the removal action, provided that EPA could make the required determinations under CERCLA and the NCP that MAS would perform the action properly and promptly. (Ex. 17).

In the end, despite some productive meetings between MAS and EPA in February 2021, MAS demanded that EPA pre-approve MAS's removal action work plan ("work plan") as a condition of settlement, although EPA had already informed MAS that the longstanding policy of EPA Region 3's Superfund & Emergency Management Division is that it does not negotiate or pre-approve a work plan as part of the negotiations of a proposed settlement for removal action; and work plans are required submissions under such settlements. (Ex. 8). Aside from this particular demand, MAS never attempted to negotiate a single other term of the 36-page proposed settlement in the nine-plus months they had the opportunity to do so. Given MAS's indecision about committing to the proposed settlement, uncertainty about their ability to pay for the cleanup, and the aforementioned delays, EPA made a determination under its statutory authorities to proceed with a Fund-financed cleanup. (Ex. 9).

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Finally, EPA wishes to briefly address and deny on the record a few of MAS's other unsubstantiated allegations related to EPA's response action that are not otherwise appropriate issues for this particular proceeding, the sole purpose of which is to determine whether EPA had a reasonable basis to believe the statutory elements for perfecting a lien were satisfied.[15] If the government's potential liability claims against MAS under Section 107(a) of CERCLA were to proceed to federal district court, MAS would have an opportunity then to challenge EPA's response action and costs in accordance with the express parameters set by Congress in Sections 113(j) of CERCLA, 42 U.S.C. § 9613(j).

Near the end of its brief, MAS alleges that "EPA arrived at this site under very suspicious circumstances" and baselessly accuses EPA of having "created a fiction that the [former]

[15] *See Supplemental Lien Guidance*, p. 8.

owner's nearby site was contaminated, so that prompted them to check Lefevre Street." (LFAR 1.16 at 19). EPA denies these unfounded allegations of malfeasance that appear to refer to the Belgrade Transformer Site, which John F. Joyce, Jr., the former owner of MAS's Property, currently owns, and at which EPA conducted a removal action from 2018 through 2020. The PCB contamination at the Belgrade Transformer Site was no fiction. Information about this removal action and conditions at the Belgrade Transformer Site can be found in the publicly available administrative record at https://semspub.epa.gov/src/collection/03/AR65626. (Last checked on January 4, 2023). A basic Google search for "Belgrade Transformer Site" would also yield similar publicly available information.[16] The relationship between the Belgrade Transformer Site and the investigation of Mr. Joyce's environmental practices conducted by former EPA investigator Nicole Bien were also not fictions. MAS obviously knows this because it has admitted that its principal, Amer Saeed, met with Ms. Bien. (LFAR 1.11 at 2). MAS's baseless accusations of EPA malfeasance are inappropriate for this or any other civil proceeding.

The same can be said about the *ad hominem* attacks MAS makes on On-Scene Coordinator Jack Kelly, who sincerely tried to guide MAS through a problem they never anticipated. *See* LFAR 1.18 and Exs. 18 and 19, hereto.[17] MAS's commentary on Mr. Kelly crosses the line of civil argument and is inaccurate. For instance, concerning EPA's initial removal site evaluation in August and September 2018, MAS incorrectly states, "But through all this testing, OSC Kelly never revealed that he had learned a decade before that there were discharges back in the late 1980s." EPA denies this allegation, which is simply not true. Mr. Kelly was transparent with MAS from the start. Indeed, in *two* separate emails dated July 10,

[16] *See* https://cumulis.epa.gov/supercpad/CurSites/csitinfo.cfm?id=0304212. (Last checked on January 5, 2023).
[17] These three exhibits provide examples of a few of the many instances in which Mr. Kelly considerately dealt with MAS over the years.

2018, and July 16, 2018, Mr. Kelly shared as much information as he could about the 2009 emergency removal action with MAS, including, in both instances, the Closeout Memorandum, which contains information about the potential PCB disposal on the Property in the 1980s that MAS now alleges Mr. Kelly withheld from them:

> On July 2, [2009], the OSC informed the City of Philadelphia Law Department about a claim by a reputable source that PCB oils may have been permitted to leak in the rear portion of the vacant lot. This individual, formerly employed by the City, inspected the facility in the early 1980s when the electrical parts warehouse was in operation and had obtained information suggesting this. The OSC suggested that the City make this a requirement before any future development of the property. He offered to arrange for sampling of the area if the City wished.

(Exs. 18 and 19).[18]

In truth, Mr. Kelly was very open with MAS from the start, and almost two months prior to EPA's removal site evaluation (or "testing"), MAS possessed the information it now baselessly accuses Mr. Kelly of hiding from them.

III. Conclusion

Given MAS's concessions in LFAR 1.16, as discussed above, this proceeding exclusively hinges on whether EPA had a reasonable basis to believe that MAS is a PRP under Section 107(a) of CERCLA. Based on CERCLA's strict liability scheme and MAS's failure to provide evidence that they would meet their burden of proof for all elements of the "innocent landowner" defense or any other protection from liability under CERCLA, EPA believes that all statutory

[18] MAS chastises EPA for its communication with the City's Law Department, rather than other City departments. However, this was (and remains) common practice, as the City's late environmental counsel, Patrick O'Neill, provided legal counsel on environmental matters to multiple departments within the City. As such, he and his staff were often EPA's main points of contact in the City on environmental issues. *See, e.g.*, Exs. 20, 21, and 22. Moreover, EPA exercises its Superfund and other environmental authorities within a system of cooperative federalism in which state and local governments, including the City, are the lead on most environmental matters under authorized state or local programs. Occasionally, state and local governments refer matters to EPA because it has more experience with the problem or greater resources with which to deal with it. PCB remediation is one of the problems frequently referred to EPA by the Pennsylvania Department of Environmental Protection ("DEP") or the City.

elements for perfection of a Superfund lien have been satisfied in this case and that the Agency had a reasonable basis to perfect the Superfund lien under Section 107(*l*) of CERCLA, 42 U.S.C. § 9607(*l*).

Respectfully submitted,

ROBERT HASSON

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Robert S. Hasson
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U.S. Environmental Protection Agency – Region 3
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Exhibits

1. July 31, 2022 email from Jessica Church, Century 21, to On-Scene Coordinator Jack Kelly;
2. Photos of Site Taken February 2020;
3. June 11, 2020 email from Robert Hasson, EPA, to Ed Paul, counsel for MAS;
4. June 18, 2020 email from Robert Hasson, EPA, to Ed Paul, counsel for MAS;
5. Proposed Administrative Settlement Agreement and Order on Consent for Removal Action (Docket No. CERCLA-03-2020-0114DC) (January 5, 2021 revision);
6. March 3, 2021 email from Steven Miano, counsel for MAS, to Robert Hasson, EPA;
7. March 4, 2021 email from Robert Hasson, EPA, to Steven Miano, counsel for MAS;
8. March 12, 2021 letter from Steven Miano, counsel for MAS, to Robert Hasson, EPA;
9. March 19, 2021 letter from Robert Hasson, EPA, to Steven Miano, counsel for MAS;
10. May 27, 2020 email chain (EOC);
11. July 21, 2020 email exchange between MAS and EPA (EOC);
12. Oct. 16, 2020 email from Jack Kelly, EPA, to MAS (re: EOC);
13. Dec. 8, 2020 email from Jack Kelly, EPA, to MAS (re: EOC results);
14. Jan. 5, 2021 email from Robert Hasson, EPA, to Ed Paul, counsel for MAS;
15. Jan. 12, 2021 email from Robert Hasson, EPA, to Ed Paul, counsel for MAS;
16. Jan. 21, 2021 email from Steven Miano, counsel for MAS, to Robert Hasson, EPA;
17. Jan. 25, 2021 letter from Robert Hasson, EPA, to Steven Miano, counsel for MAS;
18. July 10, 2018 email exchange between Jack Kelly, EPA, and Zahra Saeed, MAS;
19. July 16, 2018 email from Jack Kelly, EPA, to Zahra Saeed, MAS;
20. June 12, 2009 email exchange between Jack Kelly, EPA, and Leonard F. Reuter, Assistant City Solicitor;
21. July 2, 2009 email from Jack Kelly, EPA, and Patrick O'Neill, Divisional Deputy City Solicitor; and
22. January 4, 2018 email exchanges among EPA, City Solicitor, and PA DEP.