

CE FLN000 409734

IN THE MATTER OF:)
)
)
19th Avenue Drum Site)
Opa Locka, Dade County, Florida)
)
)
Alvin Wilpon,)
and Filpak, Inc.,)
(SETTLING PARTIES))
)
)
)

**SETTLEMENT AGREEMENT
FOR RECOVERY OF
PAST RESPONSE COSTS**

U.S. EPA Region 4
CERCLA Docket No. 04-2008-3773

PROCEEDING UNDER SECTION
122(h)(1) OF CERCLA
42 U.S.C. § 9622(h)(1)

I. JURISDICTION

1. This Settlement Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency (EPA) by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. § 9622(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D, and further redelegated from the Regional Administrator through the Director of the Superfund Division (formerly the Waste Management Division), through the Associate Division Director of the Office of Superfund and Emergency Response, to the Chief of the Superfund Enforcement and Information Management Branch (formerly the Chief of the Waste Programs Branch), by EPA Regional Delegation R-14-14-D.

2. This Settlement Agreement is made and entered into by EPA and Alvin Wilpon and Filpak, Inc., who are the Settling Parties. The Settling Parties consent to and will not contest EPA's authority to enter into this Settlement Agreement or to implement or enforce its terms.

II. BACKGROUND

3. This Settlement Agreement concerns the 19th Avenue Drum Superfund Site (Site), located in the public roadway adjacent to 14060 NW 19th Avenue, in Opa Locka, Dade County, Florida. EPA alleges that the Site is a "facility," as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4. An abandoned trailer was discovered at the Site on December 27, 2004. Owners of the property at 14060 NW 19th Avenue, adjacent to the abandoned trailer, became suspicious and called the Opa Locka police. The police transported the trailer to the Opa Locka Police



Department's impoundment lot. On January 6, 2005, the Florida Department of Environmental Protection (FDEP) Bureau of Emergency Response notified EPA about the abandoned drums containing unknown materials, some of which were leaking. On January 7, 2005, EPA On-Scene Coordinator, Brooke Bass, arrived at the impoundment lot to assist FDEP in stabilizing the situation. Due to space limitations at the impoundment lot, a decision was made to transfer the trailer to a staging area at the United States Coast Guard's Air Station at the Opa Locka Airport. At FDEP's request, EPA assisted with transporting the trailer and drums to the Air Station. On January 19, 2005, EPA aided with container sampling. The sampling results indicated there were both hazardous and nonhazardous substances in the trailer. It contained 2955 gallons of flammable waste solids, including naphthalene, benzene, and diethylphthalate, 95 gallons of solid potassium hydroxide, and 4735 gallons of non-Resource Conservation and Recovery Act (RCRA) - regulated waste. At FDEP's request, EPA labeled, prepared for shipment, and disposed of all hazardous and nonhazardous waste from the trailer. Therefore, in response to the release and substantial threat of release of hazardous substances into the environment, EPA undertook response actions, pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604.

5. In performing the response action, EPA incurred response costs and continues to incur response costs in connection with the Site.

6. EPA alleges that Settling Parties are responsible parties pursuant to Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3), and are jointly and severally liable for response costs incurred or to be incurred at or in connection with the Site.

7. EPA has determined that the total past and projected response costs of the United States at or in connection with the Site will not exceed \$500,000, excluding interest.

8. EPA and Settling Parties recognize that this Settlement Agreement has been negotiated in good faith and that this Settlement Agreement is entered into without the admission or adjudication of any issue of fact or law.

III. PARTIES BOUND

9. This Settlement Agreement shall be binding upon EPA and upon Settling Parties and their successors and assigns. Any change in ownership or corporate or other legal status of the Settling Parties, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter such Settling Parties' responsibilities under this Settlement Agreement. Each signatory to this Settlement Agreement certifies that he or she is authorized to enter into the terms and conditions of this Settlement Agreement and to bind legally the party represented by him or her.

IV. DEFINITIONS

10. Unless otherwise expressly provided herein, terms used in this Settlement Agreement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meanings assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Settlement Agreement or the appendix attached hereto, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

b. "Day" shall mean a calendar day. In computing any period of time under this Settlement Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

c. "Effective Date" shall mean the effective date of this Settlement Agreement as provided by Section XV.

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies, or instrumentalities of the United States.

e. "Interest" shall mean \$1,176.81 in interest on \$71,914.85 in response costs, accrued from January 14, 2008, the date of the Notice Letter from EPA to the Settling Parties, until May 30, 2008. It shall also mean interest on any amount not paid, pursuant to Paragraphs 11 through 14, at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

f. "Paragraph" shall mean a portion of this Settlement Agreement identified by an Arabic numeral or a lower case letter.

g. "Parties" shall mean EPA and the Settling Parties.

h. "Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that EPA has paid at or in connection with the Site, through the Effective Date of this Settlement Agreement.

i. "Section" shall mean a portion of this Settlement Agreement identified by a Roman numeral.

j. "Settlement Agreement" shall mean this Settlement Agreement between EPA, Alvin Wilpon, and Filpak, Inc.

k. "Settling Parties" shall mean Alvin Wilpon and Filpak, Inc.

l. "Site" shall mean the 19th Avenue Drum Superfund Site, a portion of the public roadway adjacent to 14060 NW 19th Avenue, in Opa Locka, Dade County, Florida.

m. "United States" shall mean the United States of America, including its departments, agencies, and instrumentalities.

V. PAYMENT OF RESPONSE COSTS

11. The Parties agree that Settling Parties will reimburse EPA for 85% of the Past Response Costs that EPA has incurred through the Effective Date of this Agreement, plus an additional sum of \$1,176.81 of Interest on \$71,914.85 (calculated from January 14, 2008, the date of the Notice Letter to the Settling Parties, to May 30, 2008). Payment shall be made within 30 days of the receipt of the letter from EPA informing Settling Parties that the Settlement Agreement is effective (as provided in Section XV), as well as the amount of payment due.

12. Payment shall be made to EPA by Electronic Funds Transfer (EFT) in accordance with current EFT procedures to be provided to Settling Parties by EPA Region 4, and shall be accompanied by a statement identifying the name and address of the Settling Parties, the Site name, the EPA Region, Site/Spill ID Number A4HA, and the EPA docket number for this action.

13. At the time of payment, Settling Parties shall also send notice that payment has been made to EPA in accordance with Section XII (Notices and Submissions). Such notice shall reference the EPA Region, the Site/Spill ID Number A4HA, and the EPA docket number for this action. The total amount to be paid pursuant to Paragraph 11 shall be deposited in the EPA Hazardous Substance Superfund.

VI. FAILURE TO COMPLY WITH SETTLEMENT AGREEMENT

14. Interest on Late Payments. If Settling Parties fail to make any payment required by Paragraph 11 by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

15. Stipulated Penalty.

- a. If the amount due to EPA under Paragraph 11 is not paid by the required date, Settling Parties shall be in violation of this Agreement and shall pay to EPA, as

a stipulated penalty, in addition to the Interest required by Paragraph 14, \$500 per violation per day that such payment is late.

- b. Stipulated penalties are due and payable within 30 days of demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made by certified or cashier's check, made payable to the "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall reference the name and address of the Settling Parties, the Site name, the EPA Region, the Site/Spill ID #A4HA, and the EPA docket number for this action, and shall be sent to:

U.S. Environmental Protection Agency
Superfund Payments
Cincinnati Finance Center
P.O. Box 979076
St. Louis, MO 63197-9000

- c. At the time of each payment, Settling Parties shall send notices that such payment has been made to EPA in accordance with Section XII (Notices and Submissions). Such notice shall identify the Region, the Site/Spill ID # A4HA, and the EPA docket number for this action.
- d. Penalties shall accrue as provided above regardless of whether EPA has notified Settling Parties of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due, and shall continue to accrue through the date of payment.

16. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to EPA by virtue of Settling Parties' failure to comply with the requirements of this Settlement Agreement, if Settling Parties fail or refuse to comply with the requirements of this Settlement Agreement, they shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States, on behalf of EPA, brings an action to enforce this Settlement Agreement, Settling Parties shall reimburse the United States for all costs of such action, including, but not limited to, costs of attorney time.

17. The obligations of Settling Parties to pay amounts owed to EPA under this Settlement Agreement are joint and several. In the event of the failure of one of the Settling Parties to make the payments required under this Settlement Agreement, the remaining Settling Party shall be responsible for such payments.

VII. COVENANT NOT TO SUE BY EPA

18. Covenant Not to Sue EPA. Except as specifically provided in Section VIII (Reservations of Rights by EPA), EPA covenants not to sue or take administrative action against Settling Parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant shall take effect upon receipt by EPA of all amounts required by Section V (Payment of Response Costs) and any amounts due under Section VI (Failure to Comply with Settlement Agreement). This covenant not to sue is conditioned upon the satisfactory performance by Settling Parties of their obligations under this Settlement Agreement. This covenant not to sue extends only to Settling Parties and does not extend to any other person.

VIII. RESERVATIONS OF RIGHTS BY EPA

19. EPA reserves, and this Settlement Agreement is without prejudice to, all rights against Settling Parties with respect to all matters not expressly included within the Covenant Not to Sue by EPA in Paragraph 18. Notwithstanding any other provision of this Settlement Agreement, EPA reserves all rights against Settling Parties and EPA reserves, and this Settlement Agreement is without prejudice to, all rights with respect to:

- a. liability for failure of Settling Parties to meet a requirement of this Settlement Agreement;
- b. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs;
- c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;
- d. criminal liability; and
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

20. Nothing in this Settlement Agreement is intended to be, nor shall it be construed as, a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation, or other entity not a signatory to this Settlement Agreement.

IX. COVENANT NOT TO SUE BY SETTLING PARTIES

21. Settling Parties covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs or this Settlement Agreement, including, but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claims arising out of the response actions at the Site for which the Past Response Costs were incurred, including any claim under the United States Constitution, the Constitution of the State of Florida, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.

22. Nothing in this Settlement Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

X. EFFECT OF SETTLEMENT/CONTRIBUTION

23. Nothing in this Settlement Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Settlement Agreement. The Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that it may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this Settlement Agreement diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. §9613(f)(2) and (3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

24. EPA and Settling Parties agree that the actions undertaken by Settling Parties in accordance with this Settlement Agreement do not constitute an admission of any liability by the Settling Parties. Settling Parties do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Settlement Agreement, the validity of the facts or allegations contained in Section II of this Settlement Agreement.

25. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. §9613(f)(2), and that Settling Parties are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Settlement Agreement. The "matters addressed" in this Settlement Agreement are Past Response Costs. The Parties further agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(3)(B) of

CERCLA, 42 U.S.C. §9613(f)(3)(B), pursuant to which Settling Parties have, as of the Effective Date, resolved their liability to the United States for Past Response Costs.

26. Settling Parties agree that with respect to any suit or claim for contribution brought by them for matters related to this Settlement Agreement, they will notify EPA in writing no later than 60 days prior to the initiation of such suit or claim. Settling Parties also agree that, with respect to any suit or claim for contribution brought against them for matters related to this Settlement Agreement, they will notify EPA in writing within 10 days of service of the complaint or claim upon it. In addition, Settling Parties shall notify EPA within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Settlement Agreement.

27. In any subsequent administrative or judicial proceeding initiated by EPA, or by the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Parties shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue by EPA set forth in Section VII.

XI. RETENTION OF RECORDS

28. Until 10 years after the effective date of this Settlement Agreement, Settling Parties shall preserve and retain all records, reports, or information (hereinafter referred to as "records") now in their possession or control, or which come into their possession or control, that relate in any manner to response actions taken at the Site or to the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

29. After the conclusion of the 10-year document retention period in the preceding paragraph, Settling Parties shall notify EPA at least 90 days prior to the destruction of any such records and, upon request by EPA, Settling Parties shall deliver any such records to EPA. Settling Parties may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Parties assert such a privilege, they shall provide EPA with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to EPA in redacted form to mask the privileged information only. Settling Parties shall retain all records that they claim to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Parties' favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

30. Settling Parties hereby certify individually that, to the best of their knowledge and belief, after thorough inquiry, they have not altered, mutilated, discarded, destroyed, or otherwise disposed of any records, reports, or information relating to their potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against them regarding the Site and that they have fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XII. NOTICES AND SUBMISSIONS

31. Whenever, under the terms of this Settlement Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Settlement Agreement with respect to EPA and Settling Parties.

As to EPA:

Karen Singer
Associate Regional Counsel
U.S. Environmental Protection Agency, Region 4
61 Forsyth Street, SW
Atlanta, Georgia 30303

Paula V. Painter
U.S. Environmental Protection Agency
Superfund Enforcement and Information Management Branch
61 Forsyth Street, SW
Atlanta, Georgia 30303

As to Settling Parties:

Alvin Wilpon
15831 S.W. 14th Street
Pembroke Pines, FL 33025

Neil G. Taylor, Esq.
Law Offices Neil G. Taylor, P.A.
2701 South Bayshore Drive, Suite 315
Miami, FL 33133

XIII. INTEGRATION

32. This Settlement Agreement constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Settlement Agreement. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Agreement.

XIV. PUBLIC COMMENT

33. This Settlement Agreement shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, EPA may modify or withdraw its consent to this Settlement Agreement if comments received disclose facts or considerations which indicate that this Settlement Agreement is inappropriate, improper, or inadequate.

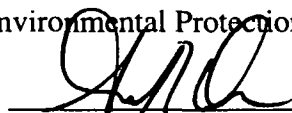
XV. EFFECTIVE DATE

34. The effective date of this Settlement Agreement shall be the date upon which EPA issues written notice to Settling Parties that the public comment period pursuant to Paragraph 33 has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Settlement Agreement.

IT IS SO AGREED:

U.S. Environmental Protection Agency

By:



Anita L. Davis,
Chief, Superfund Enforcement and Information
Management Branch
Superfund Division

9/10/08
Date

THE UNDERSIGNED SETTLING PARTIES enter into this Settlement Agreement in the matter of CERCLA Docket No. _____, relating to the 19th Avenue Drum Site:

FOR SETTLING PARTY:

Alvin Wilpon
Alvin Wilpon

9/2/08
Date

FOR SETTLING PARTY:

FILPAK INC.
Filpak, Inc.

By: Alvin Wilpon
Name

9/2/08
Date

President
Title