

NCD 003 233 756

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF: )  
Stridemark, LLC )  
Thomasville, Davidson County, NC )

Docket No. CERCLA 04-2008-3768

PURSUANT TO THE COMPREHENSIVE )  
ENVIRONMENTAL RESPONSE, )  
COMPENSATION, AND LIABILITY ACT )  
42 U.S.C. §§ 9604, 9606, 9607, 9622 )

AGREEMENT AND ORDER ON )  
CONSENT FOR REMOVAL ACTION BY )  
LENDER/NON-LIABLE PARTY )

Fifth Third Bank

**I. INTRODUCTION**

1. This Agreement and Order on Consent for Removal Action by Non-Liable Party ("Agreement") is voluntarily entered into by the United States Environmental Protection Agency ("EPA") and Fifth Third Bank ("Lender") (collectively, the "Parties") under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601, *et seq.* Under this Agreement, Lender, by and through ATEC, Inc., the Receiver for Stridemark, LLC, appointed by order dated December 28, 2007 (the "Order") of the Superior Court for Mecklenburg County, North Carolina, in the case known as Fifth Third Bank v. Stridemark, LLC, et al., Case No. 07-CVS-22814 (in such capacity, ATEC, Inc. is the "Receiver"), agrees to perform a removal action at or in connection with the property located at 200 Mason Way in Thomasville, Davidson County, North Carolina (the "Property"), known as the Component Concepts Site.

**II. JURISDICTION AND GENERAL PROVISIONS**

2. This Agreement is issued pursuant to the authority vested in the President of the United States by Sections 104, 106, 107 and 122 of CERCLA, 42 U.S.C. §§ 9604, 9606, 9607 and 9622, and delegated to the Administrator of EPA by Executive Order No. 12580, January 23, 1987, 52 Federal Register 2923, and further delegated to the undersigned Regional official. The Parties agree that the United States District Court for the Western District of North Carolina will have jurisdiction pursuant to Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), for any enforcement action brought with respect to this Agreement.

3. EPA has notified the State of North Carolina (the "State") of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).
4. The Lender represents that it holds indicia of ownership primarily to protect its security interest in the Property, that it has not participated in the management of the facility, and thus, that it qualifies for the exclusion from liability under CERCLA's Lender Liability Rule set forth in Section 101(20)(E) of CERCLA, 42 U.S.C. §9601(20)(E). The Lender also agrees that it will continue to comply with Section 101(20)(E) during the period in which it holds a security interest in the Property. In view, however, of the Work to be performed in connection with the removal action at the Site, and the risk of claims under CERCLA being asserted against Lender notwithstanding Section 101(20)(E) as a consequence of Lender's activities at the Site pursuant to this Agreement, one of the purposes of this Agreement is to resolve, subject to the reservations and limitations contained in Section XVII (Reservation of Rights by EPA), any potential liability of Lender under CERCLA for the Work and Oversight Costs, as defined below.
5. The resolution of this potential liability, in exchange for Lender's agreement to the performance of the Work by the Receiver, is in the public interest.
6. EPA and Lender recognize that this Agreement has been negotiated in good faith. Lender agrees to comply with and be bound by the terms of this Agreement and further agrees that it will not contest the basis or validity of this Agreement or its terms.

### **III. PARTIES BOUND**

7. This Agreement applies to and is binding upon EPA, upon Lender and its successors and assigns and upon the Receiver. Any change in ownership or corporate status of Lender or of the Receiver including, but not limited to, any transfer of assets or real or personal property shall not alter Lender's responsibilities under this Agreement.
8. Lender and the Receiver shall ensure that its contractors, subcontractors, and representatives comply with this Agreement, and, where appropriate, receive a copy of this Agreement. Lender or Receiver, as applicable, shall be responsible for any noncompliance with this Agreement.

### **IV. DEFINITIONS**

9. Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations, including any amendments thereto.
  - a. "Agreement" shall mean this Agreement and Order on Consent for Removal Action by Lender/Non-Liable Party and all appendices attached hereto (listed in Section XXII). In the event of conflict between this Agreement and any appendix, this Agreement shall control.

- b. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601, *et seq.*
- c. "Day" shall mean a calendar day unless expressly stated to be a working day. "Working day" shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this 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.
- d. "Effective Date" shall be the effective date of this Agreement as provided in Section XXIV.
- e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.
- f. "Interest" shall mean interest 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.
- g. "Lender" shall mean Fifth Third Bank.
- h. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.
- i. "OSC" shall mean the On-Scene Coordinator as defined in 40 C.F.R. § 300.5.
- j. "Oversight Costs" shall mean all direct and indirect costs incurred by EPA after the Effective Date in monitoring and supervising Receiver's performance of the Work to determine whether such performance is consistent with the requirements of this Agreement, including costs incurred in reviewing plans, reports and other documents submitted pursuant to this Agreement, as well as costs incurred in overseeing implementation of the Work.
- k. "Paragraph" shall mean a portion of this Agreement identified by an arabic numeral or a lower case letter.
- l. "Parties" shall mean EPA and the Lender.

- m. "Property" shall mean the Component Concepts Site, encompassing approximately 5 acres, which is located at 200 Mason Way, Thomasville, Davidson County, North Carolina.
- n. "Section" shall mean a portion of this Agreement identified by a Roman numeral.
- o. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).
- p. "Receiver" shall mean ATEC, Inc., the Receiver for Stridemark, LLC, appointed by order dated December 28, 2007 of the Superior Court for Mecklenburg County, North Carolina, in the case known as Fifth Third Bank v. Stridemark, LLC, et al., Case No. 07-CVS-22814.
- q. "Site" shall have the same meaning as Property.
- r. "Supervising Contractor" shall mean Giant Resource Recovery ("GRR"). GRR is the principal contractor retained by the Receiver to supervise and direct the implementation of the Work agreed to in this Agreement and to sign and approve the Final Report submitted concerning such Work.
- s. "United States" shall mean the United States of America, its departments, agencies, and instrumentalities.
- t. "Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); and (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27).
- u. "Work" shall mean all removal activities Lender, by and through Receiver, is required to perform under this Agreement and is set forth specifically in paragraph 13 of this Agreement.

## **V. FINDINGS OF FACT**

10. For the purposes of this Order, EPA finds that:

a. The Site is an abandoned wood furniture component manufacturing facility located at 200 Mason Way in Thomasville, North Carolina, 27360. The facility is owned by Stridemark, LLC, and operated under the name Component Concepts.

b. On June 17, 2007, based on an October 11, 2006, inspection, the North Carolina Environmental Management Commission issued a penalty assessment to Stridemark, LLC, for numerous violations of its Air Quality Permit.

c. On December 13, 2007, an inspector with the North Carolina Division of Air Quality conducted a follow-up inspection and found the business closed and observed numerous 55-gallon containers, containing potentially hazardous substances, on a loading dock.

d. On January 7, 2008, the North Carolina Department of Environmental and Natural Resources ("DENR") referred the Site to EPA Region 4's Emergency Response and Removal Branch, for assessment and removal of the abandoned hazardous substances.

e. On January 15, 2008, after obtaining access, EPA On-Scene Coordinator ("OSC") Ken Rhame inspected the facility. He was accompanied by the Thomasville Fire Department. The Fire Department was concerned because it had responded to several fire alarms at the facility. It was determined that the fire alarm at the facility had gone off because sprinkler lines had burst.

f. Inside the facility the OSC observed several hundred drums, tanks, and containers containing various materials. The abandoned containers are related to the furniture manufacturing process and their contents include finishes, paints, varnishes, lacquers, and thinners; most being highly flammable. Based on the labels on the containers, and the Material Safety Data Sheets ("MSDS") found on Site, many of the containers contain highly flammable materials.

g. There were also containers located outside on the loading dock covered in ice. This raised concern as freezing can make some hazardous materials become unstable and this could cause the containers to rupture and release the hazardous substances into the environment.

h. On November 20, 2007, Stridemark, LLC filed a voluntary petition under Chapter 7 of the Bankruptcy Code. Then on January 22, 2008, the Chapter 7 trustee filed a motion to abandon the property because of the environmental contamination. EPA filed an objection to the motion to abandon.

i. The Lender has a security interest and lien on the Property and wishes to preserve and protect that security interest.

j. Neither the Lender nor the Receiver has participated in the management of the facility.

k. Lender holds indicia of ownership of the Property primarily to protect its security interest in the Property.

l. The facility poses an imminent and substantial risk if abandoned because of the hundreds of containers of highly flammable materials being stored throughout the facility. One leaking container could potentially cause an explosive or combustible atmosphere that could be ignited by an ignition source such as a light switch. Therefore, it is the best interest of the Lender and EPA to have the materials removed as soon as possible.

## **VI. DETERMINATIONS**

11. Based on the Findings of Fact set forth above, and the Administrative Record supporting this removal action, EPA has determined that:
- a. The Stridemark Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).
  - b. The potentially hazardous substances found at the Site, as identified in the Findings of Fact above, include(s) [a] "hazardous substance(s)" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).
  - c. Lender and Receiver are "persons" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).
  - d. The conditions described in the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).
  - e. Lender qualifies for the exclusion from liability under CERCLA's Lender Liability Rule set forth in Section 101(20)(E) of CERCLA, 42 U.S.C. § 9601(20)(E).
  - f. The Work is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Agreement, will be considered consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

## **VII. AGREEMENT**

12. In consideration of and in exchange for EPA's Covenant Not to Sue in Section XVI, Lender and Receiver (subject, however, to any limitations imposed on the Receiver by the Order or by the laws of the State of North Carolina governing receivers) agree to comply with all provisions of this Agreement, including, but not limited to, all attachments to this Agreement and all documents incorporated by reference into this Agreement. As used herein, further references to Lender shall be deemed to include or refer to the Receiver, as appropriate.

## **VIII. WORK TO BE PERFORMED**

13. Lender, by and through Receiver, shall remove and dispose of the drums containing stains, paints, coatings and solvents used while the Site was still operating. The Work to be performed under this Agreement is set forth as follows:

The receiving facility is Sumter, Inc. (GRR). Sumter Inc. is a fully licensed, permitted hazardous waste processing facility. The Part B was received in 1987 and renewed in 2002. The facility EPA ID# is SCD036275626.

GRR began discussions with ATEC, INC., the Receiver for Stridemark, LLC, on January 31, 2008 regarding the abandoned Stridemark facility in Thomasville, NC. GRR formerly handled waste disposal from the facility when it was owned by Component Concepts, Inc., the operator of the business prior to Stridemark. Waste profile information has also been completed under Stridemark's name.

Materials at the plant requiring special handling consist of stains, paints, coatings and solvents used in furniture finishing operations.

After plant closure, a Stridemark supervisor retained by ATEC, completed the packaging and labeling of process materials into their appropriate waste categories. These categories include: a) paints and solvents for fuel blending; b) solids contaminated with paints and solvents for solid fuels or incineration; c) water based coatings hazardous for flammability; and d) nonregulated water based coatings

The disposal of all of the above categories will be managed by GRR.

There are numerous drums, empty or partially empty, that were stored outside. The drums were not properly sealed and therefore collected substantial rain water. The product labels on these drums denoted that they were nonhazardous coatings. To determine proper waste classification the drums were grouped and a composite sample collected from each group. Four samples representing composites from these groups will be analyzed for flashpoint, pH, volatiles and semi volatiles. Upon proper classification the appropriate waste disposal method will be applied.

Final waste approval requires that the signed waste characterization forms be submitted and reviewed for approval. Waste approval numbers will be assigned. All drum labels and shipping papers will be prepared and provided by GRR.

Inbound waste, into the GRR Sumter facility, is QC'd and compared to the approved waste profile. Samples are collected and tested for: specific gravity, water content, BTU, chlorine, and flashpoint.

Lender shall perform all actions required by this Agreement in accordance with all applicable local, state, and federal laws and regulations, except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 9621(e), and 40 C.F.R. §§ 300.400(e) and 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all on-Site actions required pursuant to this Agreement shall, to the extent practicable, as determined by EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements ("ARARs") under federal environmental or state environmental or facility siting laws.

14. Work Plan and Implementation.

- a. The Work to be performed under this Agreement has been approved by Lender and EPA and is memorialized at paragraph 13 above.
- b. Lender, by and through Receiver, may commence performance of the Work as of the Effective Date of this Agreement.

15. Quality Assurance and Sampling.

- a. All sampling and analyses performed pursuant to this Agreement shall conform to EPA direction, approval, and guidance regarding sampling, quality assurance/quality control ("QA/QC"), data validation, and chain of custody procedures. Lender shall ensure that the laboratory used to perform the analyses participates in a QA/QC program that complies with the appropriate EPA guidance. Lender shall follow, as appropriate, "Quality Assurance/Quality Control Guidance for Removal Activities: Sampling QA/QC Plan and Data Validation Procedures" (OSWER Directive No. 9360.4-01, April 1, 1990), as guidance for QA/QC and sampling. Lender shall only use laboratories that have a documented Quality System that complies with ANSI/ASQC E-4 1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995), and "EPA Requirements for Quality Management Plans" (QA/R-2) (EPA/240/B-01/002, March 2001), or equivalent documentation as determined by EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program ("NELAP") as meeting the Quality System requirements.
- b. Upon request by EPA, Lender shall have a laboratory that meets the requirements of Paragraph 15.a above analyze samples submitted by EPA for QA monitoring. Lender shall provide to EPA the QA/QC procedures followed by all sampling teams and laboratories performing data collection and/or analysis.
- c. Upon request by EPA, Lender shall allow EPA or its authorized representatives to take split and/or duplicate samples. Lender shall notify EPA not less than 5 days in advance of any sample collection activity, unless shorter notice is agreed to by EPA. EPA shall have the right to take any additional samples that EPA deems necessary. Upon request, EPA shall allow Lender to take split or duplicate samples of any samples it takes as part of its oversight of Lender's implementation of the Work.



16. Reporting.

a. Due to the nature of the Work to be performed under this Agreement, Lender shall not be required to submit periodic progress reports to EPA, unless otherwise directed in writing by the OSC. To the extent necessary, any report shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

b. To the extent necessary, Lender shall submit 2 copies of all plans, reports or other submissions required by this Agreement. Upon request by EPA, Lender shall submit such documents in electronic form to be specified by EPA.

17. Final Report. Within 30 days after completion of all Work required by this Agreement, Lender shall submit for EPA review and approval in accordance with Section XXIII (Notice of Completion) a final report summarizing the actions taken to comply with this Agreement. The final report shall conform, at a minimum, with the requirements set forth in Section 300.165 of the NCP entitled "OSC Reports." The final report shall include a statement of actual costs incurred in complying with the Agreement, a listing of quantities and types of materials removed off-Site or handled on-Site, a discussion of removal and disposal options considered for those materials, a listing of the ultimate destination(s) of those materials, a presentation of the analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant documentation generated during the removal action (e.g., manifests, invoices, bills, contracts, and permits). The final report shall also include the following certification signed by the Supervising Contractor who supervised or directed the preparation of said report:

"Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

18. Off-Site Shipments.

a. Lender shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-State waste management facility, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility's state and to the OSC. However, this notification requirement shall not apply to any off-Site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

i. Lender shall include in the written notification the following information: 1) the name and location of the facility to which the Waste Material is to be

shipped; 2) the type and quantity of the Waste Material to be shipped; 3) the expected schedule for the shipment of the Waste Material; and 4) the method of transportation. Lender shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

ii. The receiving facility is Sumter Inc. (GRR), 755 Industrial Road, Sumter, South Carolina 29151.

b. The Sumter Inc. (GRR) facility is operating in compliance with the requirements of CERCLA Section 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. The receiving facility's EPA ID # is SCD036275626.

#### **IX. AUTHORITY OF THE ON-SCENE COORDINATOR**

19. The OSC shall be responsible for overseeing Lender's implementation of this Agreement. The OSC shall have the authority vested in an OSC by the NCP, including the authority to halt, conduct, or direct any Work required by this Agreement, or to direct any other removal action undertaken at the Site. Absence of the OSC from the Site shall not be cause for stoppage of work unless specifically directed by the OSC.

#### **X. PAYMENT OF OVERSIGHT COSTS**

20. Payment of Oversight Costs Upon Receipt of Periodic Bills.

a. Lender shall pay EPA all Oversight Costs not inconsistent with the NCP in an amount not to exceed \$10,000. The Parties agree that the first bill shall include a charge for \$2,800, representing EPA's Site-related costs accrued prior to the Effective Date. Lender shall make all payments required by this Paragraph by check made payable to "EPA Hazardous Substance Superfund," referencing the name and address of Lender, the Site name, EPA Region and Site/Spill ID Number A4RR, and the EPA docket number for this action. Lender shall send each check to:

US Environmental Protection Agency  
Superfund Payments – Region 4  
Cincinnati Finance Center  
PO Box 979076  
St. Louis, Mo 63197-9000

b. In the event that a payment for Oversight Costs is not made within 30 days of Lender's receipt of a bill, Lender shall pay Interest on the unpaid balance. Interest shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment.

c. The total amount to be paid by Lender pursuant to this Paragraph shall be deposited by EPA in the EPA Hazardous Substance Superfund.

d. At the time of each payment, Lender shall send notice that such payment has been made to:

Paula V. Batchelor  
EPA - Region 4  
Attention: Program Services Branch  
61 Forsyth Street, S.W.  
Atlanta, GA 30303

21. Pursuant to Section XII (Dispute Resolution), Lender may dispute all or part of a bill for Oversight Costs if Lender determines that EPA has made a mathematical error or included a cost item that is outside the definition of Oversight Costs, or if Lender believes EPA incurred excess costs as a direct result of an EPA action that was inconsistent with the NCP. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before payment is due, Lender shall pay the full amount of the uncontested costs to EPA as specified in Paragraph 20.a on or before the due date.

#### **XI. RECORD RETENTION, DOCUMENTATION, AND AVAILABILITY OF INFORMATION**

22. Lender shall preserve all documents and information relating to the Work, or relating to the hazardous substances, pollutants or contaminants found on or released from the Site, and shall submit them to EPA upon completion of the Work required by this Agreement, or earlier if requested by EPA.
23. Lender may assert a business confidentiality claim pursuant to 40 C.F.R. § 2.203(b) with respect to part or all of any information submitted to EPA pursuant to this Agreement, provided such claim is allowed by Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7). Analytical and other data specified in Section 104(e)(7)(F) of CERCLA shall not be claimed as confidential by Lender. EPA shall disclose information covered by a business confidentiality claim only to the extent permitted by, and by means of the procedures set forth at, 40 C.F.R. Part 2 Subpart B. If no such claim accompanies the information when it is received by EPA, EPA may make it available to the public without further notice to Lender.

#### **XII. DISPUTE RESOLUTION**

24. Unless otherwise expressly provided for in this Agreement, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Agreement. EPA and Lender shall attempt to resolve any disagreements concerning this Agreement expeditiously and informally. If EPA contends that Lender is in violation of this Agreement, EPA shall notify Lender in writing, setting forth the basis for its position. Lender may dispute EPA's position pursuant to Paragraph 25.

25. If Lender disputes EPA's position with respect to Lender's compliance with this Agreement or objects to any EPA action taken pursuant to this Agreement, including billings for Oversight Costs, Lender shall notify EPA in writing of its position unless the dispute has been resolved informally. EPA may reply, in writing, to Lender's position within 10 days of receipt of Lender's notice. EPA and Lender shall have 10 days from EPA's receipt of Lender's written statement of position to resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA. Such extension may be granted orally but must be confirmed in writing.
26. Any agreement reached by the Parties pursuant to this Section shall be in writing and shall, upon signature by both Parties, be incorporated into and become an enforceable part of this Agreement. If the Parties are unable to reach an agreement within the Negotiation Period, an EPA management official at the Division Director level or higher will review the dispute on the basis of the parties' written statements of position and issue a written decision on the dispute to Lender. EPA's decision shall be incorporated into and become an enforceable part of this Agreement. Lender's obligations under this Agreement shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Lender shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs.

### **XIII. FORCE MAJEURE**

27. Lender agrees to perform all requirements of this Agreement within the time limits established under this Agreement, unless the performance is delayed by a *force majeure*. For purposes of this Agreement, a *force majeure* is defined as any event arising from causes beyond the control of Lender, or of any entity controlled by Lender, including but not limited to its contractors and subcontractors, which delays or prevents performance of any obligation under this Agreement despite Lender's best efforts to fulfill the obligation. *Force majeure* does not include financial inability to complete the Work, or increased cost of performance.
28. If any event occurs or has occurred that may delay the performance of any obligation under this Agreement, whether or not caused by a *force majeure* event, Lender shall notify EPA orally within 24 hours of when Lender first knew that the event might cause a delay. Within 15 days thereafter, Lender shall provide to EPA in writing an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Lender's rationale for attributing such delay to a *force majeure* event if it intends to assert such a claim; and a statement as to whether, in the opinion of Lender, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall preclude Lender from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure.

29. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Agreement that are affected by the *force majeure* event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, EPA will notify Lender in writing of its decision. If EPA agrees that the delay is attributable to a *force majeure* event, EPA will notify Lender in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.
30. If Lender elects to invoke the dispute resolution procedures set forth in Section XII (Dispute Resolution), Lender shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Lender shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Lender complied with the requirements of Paragraphs 29 and 30 above. If Lender carries this burden, the delay at issue shall be deemed not to be a violation by Lender of the affected obligation of this Agreement.

#### **XIV. STIPULATED PENALTIES**

32. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 43 of Section XVII (Reservation of Rights by EPA), Lender shall be liable for a stipulated penalty in the amount of \$25,000.
33. The stipulated penalty described in Paragraph 32 shall accrue on the day EPA assumes performance of a portion or all of the Work pursuant to Paragraph 43 of Section XVII (Reservation of Rights by EPA).
34. Following EPA's determination that Lender has failed to comply with a requirement of this Agreement, EPA may give Lender written notification of the failure and describe the noncompliance. EPA may send Lender a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Lender of a violation.
35. All penalties accruing under this Section shall be due and payable to EPA within 30 days of Lender's receipt from EPA of a demand for payment of the penalties, unless Lender invokes the dispute resolution procedures under Section XII (Dispute Resolution). All payments to EPA under this Section shall be paid by certified or cashier's check(s) made payable to "EPA Hazardous Substances Superfund," shall be mailed to U.S. Environmental Protection Agency, Cincinnati Accounting Operations Region 4, Mellon Lockbox 371099M, Pittsburgh, Pennsylvania 15251-7099, shall indicate that the payment is for stipulated

penalties, and shall reference the name and address of Lender, the Site name, the EPA Region and Site/Spill ID Number A4RR, the EPA Docket Number CERCLA 04-2008-3768. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to EPA as provided in Section XXVII (Notices and Submissions).

36. The payment of penalties shall not alter in any way Lender's obligation to complete performance of the Work required under this Agreement.
37. Penalties shall continue to accrue during any dispute resolution period, except as provided in Paragraph 33 above, but need not be paid until 15 days after the dispute is resolved by agreement or by receipt of EPA's decision.
38. If Lender fails to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Lender shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 34. Nothing in this Agreement shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Lender's violation of this Agreement or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 106(b) of CERCLA, 42 U.S.C. § 9606(b), provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this Agreement. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Agreement.

#### **XV. CERTIFICATION**

39. By entering into this agreement, Lender certifies that to the best of its knowledge and belief it has fully and accurately disclosed to EPA all information known to Lender and all information in the possession or control of its officers, directors, employees, contractors and agents which relates in any way to any past or potential future release of hazardous substances, pollutants or contaminants at or from the Site and to its qualification for this Agreement. Lender also certifies that to the best of its knowledge and belief it has not caused or contributed to a release or threat of release of hazardous substances or pollutants or contaminants at the Site. If EPA determines that information provided by Lender is not materially accurate and complete, the Agreement, within the sole discretion of EPA, shall be null and void and EPA reserves all rights it may have.

#### **XVI. COVENANT NOT TO SUE BY EPA**

40. In consideration of the actions that will be performed and the payments that will be made by Lender under the terms of this Agreement, and except as otherwise specifically provided in this Agreement, EPA covenants not to sue or to take administrative action against Lender pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for the Work and for Oversight Costs. This covenant not to sue shall take effect upon the complete

and satisfactory performance by Lender of all obligations under this Agreement, including, but not limited to, payment of Oversight Costs pursuant to Section X. This covenant not to sue extends only to Lender and Receiver and does not extend to any other person.

## **XVII. RESERVATION OF RIGHTS BY EPA**

41. Except as specifically provided in this Agreement, nothing herein shall limit the power and authority of EPA to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Agreement, from taking other legal or equitable action as it deems appropriate and necessary.

42. The covenant not to sue set forth in Section XVI above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Agreement is without prejudice to, all rights against Lender, if any, with respect to all other matters, including, but not limited to:

- a. claims based on a failure by Lender to meet a requirement of this Agreement;
- b. liability for costs not included within the definitions of Work or Oversight Costs to the extent that EPA is otherwise entitled to such costs under federal law;
- c. liability for performance of response action other than the Work;
- d. criminal liability;
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- f. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site; and
- g. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site.

43. **Work Takeover.** In the event EPA determines that Lender has ceased implementation of any portion of the Work, is seriously or repeatedly deficient or late in its performance of the Work, or is implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portion of the Work as EPA determines necessary. Prior to taking over the Work, EPA will issue written notice to Lender specifying the grounds upon which such notice was issued and providing Lender with 5 days within which to remedy the circumstances giving rise to EPA's issuance of the notice. Lender may invoke the procedures set forth in Section XII (Dispute Resolution) to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Notwithstanding any other provision of

this Agreement, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

### **XVIII. COVENANT NOT TO SUE BY LENDER**

44. Lender covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, Oversight Costs, or this Agreement, including, but not limited to:

- a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, 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 claim arising out of response actions, including any claim under the United States Constitution, 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; or
- c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613.

45. Nothing in this 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).

### **XIX. CONTRIBUTION**

46. Nothing in this Agreement precludes the United States or Lender from asserting any claims, causes of action, or demands for indemnification, contribution, or cost recovery against any person not a party to this Agreement, including any claim Lender may have pursuant to Section 107(a)(4)(B). Nothing herein diminishes the right of the United States, pursuant to Sections 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 actions and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

47. In the event of a suit or claim for contribution brought against Lender, notwithstanding the provisions of Section 107(r)(1) of CERCLA, 42 U.S.C. § 9607(r)(1), with respect to the Work and Oversight Costs (including any claim based on the contention that Lender does not qualify for the exclusion from liability under CERCLA's Lender Liability Rule set forth in Section 101(20)(E) of CERCLA, 42 U.S.C. § 9601(20)(E), or has lost qualification under the Lender Liability Rule as a result of response actions taken in compliance with this Agreement or at the direction of the OSC), the Parties agree that this Agreement shall then constitute an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that Lender would be entitled, from 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 Agreement. The "matters addressed" in this Agreement are the Work and Oversight Costs.

48. In the event Lender were found, in connection with any action or claim it may assert to recover costs incurred or to be incurred with respect to the Work or Oversight Costs, not to qualify for the exclusion from liability under CERCLA's Lender Liability Rule set forth in Section 101(20)(E) of CERCLA, 42 U.S.C. §9601(20)(E), or to have lost qualification under the Lender Liability Rule as a result of response actions taken in compliance with this Agreement or at the direction of the OSC, the Parties agree that this Agreement shall then constitute an administrative settlement within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), pursuant to which Lender has resolved its liability for the Work and Oversight Costs.

49. Lender agrees that with respect to any suit or claim brought by it for matters related to this Agreement it will notify EPA in writing no later than 60 days prior to the initiation of such suit or claim.

50. Lender also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Agreement it will notify EPA in writing within 10 days of service of the complaint on it.

## **XX. INDEMNIFICATION**

51. Lender shall indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Lender, its officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Agreement. In addition, Lender agrees to pay the United States all costs incurred by the United States, including but not limited to attorneys fees and other expenses of litigation, arising from or on account of claims made against the United States based on negligent or other wrongful acts or omissions of Lender, Lender's officers, directors, employees, agents, contractors, subcontractors and any persons acting on Lender's behalf or under Lender's control, in carrying out activities pursuant to this Agreement. The United States shall not be held out as a party to any contract entered into by or on behalf of Lender in carrying out activities pursuant to this Agreement. Neither Lender nor any such contractor shall be considered an agent of the United States.

52. The United States shall give Lender notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Lender prior to settling such claim.

53. Lender waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between Lender and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Lender shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or

arrangement between Lender and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

## **XXI. MODIFICATION**

54. The OSC may make minor modifications to the Work to be performed under this Agreement in writing or by oral direction to Supervising Contractor. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the OSC's oral direction. Any other requirements of this Agreement may be modified in writing by mutual agreement of the Parties.

55. If Lender seeks permission to deviate from the Work to be performed under this Agreement, the Supervising Contractor shall submit a written request to EPA for approval outlining the proposed modification and its basis. Lender may not proceed with the requested deviation until receiving oral or written approval from the OSC.

56. No informal advice, guidance, suggestion, or comment by the OSC or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Lender shall relieve Lender of its obligation to obtain any formal approval required by this Agreement, or to comply with all requirements of this Agreement, unless it is formally modified.

## **XXII. APPENDICES**

57. Attached hereto as Appendix 1 is the Enforcement Action Memorandum of Kenneth B. Rhame, OSC (the "Action Memorandum"), which is incorporated into this Agreement. To the extent that there are any discrepancies between the Action Memorandum and this Agreement, the terms and provisions of this Agreement shall control.

## **XXIII. NOTICE OF COMPLETION**

58. EPA will provide written notice to Lender when EPA determines, after EPA's review of the Final Report, that all Work has been fully performed in accordance with this Agreement. If EPA determines that any such Work has not been completed in accordance with this Agreement, EPA will notify Lender and provide a list of the deficiencies. Lender shall address any deficiencies and submit a modified Final Report in accordance with the EPA notice, or dispute the EPA's determination as set forth in Section XII (Dispute Resolution) of this Agreement.

## **XXIV. EFFECTIVE DATE**

59. This Agreement shall be effective 3 days after the Agreement is signed by the Regional Administrator and/or his delegate, with the exception of Section X (Payment of Oversight Costs), which shall be effective when EPA issues notice to Lender that public comments received pursuant to Section XXVIII (Public Comment), if any, do not require EPA to modify or withdraw from Section X of this Agreement.

## **XXV. DISCLAIMER**

60. This Agreement in no way constitutes a finding by EPA as to the risks to human health and the environment which may be posed by contamination at the Property or the Site nor constitutes any representation by EPA that the Property or the Site is fit for any particular purpose.

## **XXVI. PAYMENT OF COSTS**

61 If Lender fails to comply with the terms of this Agreement, it shall be liable for all litigation and other enforcement costs incurred by EPA to enforce this Agreement or otherwise obtain compliance.

## **XXVII. NOTICES AND SUBMISSIONS**

62. Any notices, documents, information, reports, plans, approvals, disapprovals, or other correspondence required to be submitted from one party to another under this Agreement, shall be deemed submitted either when hand-delivered or as of the date of receipt by certified mail/return receipt requested, express mail, or facsimile.

Submissions to Lender shall be addressed to:

Robert H. Newman, Vice President  
Fifth Third Bank  
6000 Fairview Road, Suite 1200  
Charlotte, NC 28210

With copies to:

Bradley E. Pearce  
Andrew T. Houston  
Katten Muchin Rosenman LLP  
401 S. Tryon Street, Suite 2600  
Charlotte, NC 28202

Joe Vierling  
ATEC Liquidators, Inc.  
1188 Walters Way Lane  
St. Louis, MO 63132

Submissions to U.S. EPA shall be addressed to:

Kenneth B. Rhame  
Federal On-Scene Coordinator  
US EPA Region 4  
Emergency Response Branch  
NCSU Campus Box 8008  
Room 2219 Jordan Hall Addition  
800 Faucette HC Drive  
Raleigh, NC 27695-8008

### XXVIII. PUBLIC COMMENT

63. Final acceptance by EPA of Section X (Payment of Oversight Costs) of this Agreement shall be subject to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i), which requires EPA to publish notice of the proposed settlement in the Federal Register, to provide persons who are not parties to the proposed settlement an opportunity to comment, solely, on the cost recovery component of the settlement, and to consider comments filed in determining whether to consent to the proposed settlement. EPA may withhold consent from, or seek to modify, all or part of Section X of this Agreement if comments received disclose facts or considerations that indicate that Section X of this Agreement is inappropriate, improper or inadequate. Otherwise, Section X shall become effective when EPA issues notice to Lender that public comments received, if any, do not require EPA to modify or withdraw from Section X of this Agreement.

IT IS SO AGREED:

BY:

\_\_\_\_\_  
Name (Lender)

\_\_\_\_\_  
Date

IT IS SO AGREED:

BY:

  
\_\_\_\_\_  
Name (Receiver)

5-8-08  
\_\_\_\_\_  
Date

IT IS SO AGREED:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY:

\_\_\_\_\_  
Shane Hitchcock, Chief  
Emergency Response and Removal Branch

Submissions to U.S. EPA shall be addressed to:


Kenneth B. Rhame  
Federal On-Scene Coordinator  
US EPA Region 4  
Emergency Response Branch  
NCSU Campus Box 8008  
Room 2219 Jordan Hall Addition  
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IT IS SO AGREED:

BY:

 4/8/08  
Name (Lender) Date

IT IS SO AGREED:

BY:

\_\_\_\_\_  
Name (Receiver) Date

IT IS SO AGREED:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY:

\_\_\_\_\_  
Shane Hitchcock, Chief  
Emergency Response and Removal Branch

Submissions to U.S. EPA shall be addressed to:

Kenneth B. Rhame  
Federal On-Scene Coordinator  
US EPA Region 4  
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IT IS SO AGREED:

BY:

\_\_\_\_\_  
Name (Lender)

\_\_\_\_\_  
Date

IT IS SO AGREED:

BY:

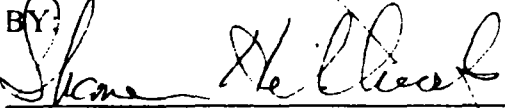
\_\_\_\_\_  
Name (Receiver)

\_\_\_\_\_  
Date

IT IS SO AGREED:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY:

  
Shane Hitchcock, Chief  
Emergency Response and Removal Branch