



**PLEWS SHADLEY  
RACHER & BRAUN<sup>LLP</sup>**  
ATTORNEYS AT LAW

1346 North Delaware Street  
Indianapolis, Indiana 46202  
Phone: (317) 637-0700  
Fax: (317) 637-0710  
[www.psrb.com](http://www.psrb.com)

**Andrea K. Townsend**  
[atownsend@psrb.com](mailto:atownsend@psrb.com)

May 3, 2019

***Via Email and U.S. Mail***

Indiana Department of Environmental Management  
Office of Land Quality  
State Cleanup Section, ATTN: Tim Johnson  
100 N. Senate Ave., Room N1101  
Indianapolis, Indiana 46204-6015

RE: KDL Investments, LLC – Defenses and Exceptions  
State Cleanup Site No. 0000783  
Arvin Industries Site  
1001 Hurricane Street, Franklin, Johnson County

Dear Tim:

As requested, please find enclosed correspondence related to KDL Investments, LLC's Defense and Exceptions that was sent to you via U.S. mail and email on April 15, 2019. The letter sent to you via U.S. mail was returned to Plews Shadley Racher & Braun LLP due to an incorrect zip code (see returned envelope attached).

Please contact me with any questions you may have concerning the enclosed or this matter.

Very truly yours,

Andrea K. Townsend

AKT/ehs

Enclosures

cc: S. Curtis DeVoe (w/o encls.)

**RECEIVED**  
MAY 09 2019  
DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT  
OFFICE OF LAND QUALITY



1346 North Delaware Street  
Indianapolis, Indiana 46202-2415

RECEIVED MAY 01 2019

*Handwritten initials: KR*

Indiana Department of Environmental Management  
Office of Land Quality  
State Cleanup Section, ATTN: Tim Johnson  
100 N. Senate  
Indianapolis

02 1P  
0003212172 APR 15 2019  
MAILED FROM ZIP CODE 46202

IXIE 462 DE 1 0004/28/19

RETURN TO SENDER  
INSUFFICIENT ADDRESS  
UNABLE TO FORWARD

BC: 46202241546 \*0785-02644-28-21

IA  
46202>2415



**PLEWS SHADLEY  
RACHER & BRAUN<sup>LLP</sup>**  
ATTORNEYS AT LAW

1346 North Delaware Street  
Indianapolis, Indiana 46202  
Phone: (317) 637-0700  
Fax: (317) 637-0710  
[www.psr.com](http://www.psr.com)

**Andrea K. Townsend**  
[atownsend@psrb.com](mailto:atownsend@psrb.com)

April 15, 2019

***Via Email and U.S. Mail***

Indiana Department of Environmental Management  
Office of Land Quality  
State Cleanup Section, ATTN: Tim Johnson  
100 N. Senate Ave., Room N1101  
Indianapolis, Indiana 46206-6015

RE: KDL Investments, LLC – Defenses and Exceptions  
State Cleanup Site No. 0000783  
Arvin Industries Site  
1001 Hurricane Street, Franklin, Johnson County

Dear Tim:

As you know, on July 13, 2018, the Indiana Department of Environmental Management's ("IDEM") sent a Request for Information for the above-referenced site (the "Site") to our client KDL Investments, LLC ("KDL"), as well as Arvin Exhaust Manufacturing, LLC, Arvin Industries Inc., and Meritor, Inc. (the "Arvin/Meritor Entities"). KDL responded to the Request for Information, reserving all its defenses. On February 11, 2019, IDEM sent a Notice of Liability letter to KDL and the Arvin/Meritor Entities. In its Notice of Liability letter, IDEM asked that KDL and the Arvin/Meritor Entities undertake response actions and gave sixty (60) days to assert the defenses and exceptions to liability. On March 15, 2019, KDL notified IDEM in writing that it did not intend to begin response actions but would continue to cooperate with IDEM and the Arvin/Meritor Entities, who had begun response actions. This letter provides briefing on KDL's defenses and exceptions for any hazardous substance and/or petroleum contamination at 1001 Hurricane Street, Franklin, Indiana (the "Property").

**I. BACKGROUND**

KDL purchased the Property from ArvinMeritor OE, LLC ("ArvinMeritor") on

or about June 2005. When KDL acquired the Property, it did not know or have reason to know that any hazardous substance was disposed of on or at the Property. As part of its due diligence in acquiring the Property, KDL physically inspected the property and hired August Mack Environmental to provide it with an environmental information review (the "draft 2005 August Mack Report"). ArvinMeritor also provided KDL with a copy of a Phase I Environmental Site Assessment conducted for Arvin Meritor, Inc. by Malcolm Pirnie, Inc. dated December 2004 (the "2004 Phase I Report"). KDL read both reports before its purchase of the Property.

## **II. IDEM'S CITED AUTHORITY**

In your February 11, 2019, Notice of Liability letter, you identify KDL as a Potentially Responsible Person ("PRP") under Indiana Code sections 13-25-4-8, 13-25-4-9, and/or 13-24-1-4, as well as Section 107(a) of CERCLA (42 U.S.C. § 9607(a)). These code sections equate to two sources of statutory authority. As you know, Indiana Code section 13-25 *et seq.* relates to hazardous substances, and Indiana Code section 13-24 *et seq.* relates to petroleum. Specifically, Indiana Code section 13-25-4-8(a), incorporates, with a few exceptions, Section 107(a) of CERCLA into Indiana law. Indiana Code section 13-24-1-4 provides that, unless an exception applies, the owner or operator of a petroleum facility is liable to the state for the reasonable costs of any response or remedial action taken under section 2 of Chapter 24.

## **III. DEFENSES AND EXCEPTIONS TO LIABILITY**

In response to your cited authority, KDL asserts the third-party defense to liability found at Ind. Code § 13-25-4-8(b) and 42 U.S.C. § 9607(b)(3). In addition, IDEM should not pursue KDL because KDL ultimately would not be allocated any cleanup costs and KDL is cooperating by providing reasonable access to other PRPs, the Arvin/Meritor Entities, which have indicated to KDL that they intend to take the lead in investigating contamination at the Property and responding to IDEM's request for response action. KDL is working with Arvin/Meritor Entities to grant them access to the site.

KDL also is not liable to the state under Indiana Code section 13-24-1-4 because any release from a "petroleum facility" on the Site was caused by an action or omission of a responsible person other than KDL.

## A. CERCLA DEFENSES

### 1. KDL Qualifies for the Third-Party Defense.

KDL satisfies all the elements of the third-party defense and is shielded from any liability as an owner under CERCLA Section 107(b)(3) (adopted by Indiana Code section 13-25-4-8(b)). There are four elements to this defense:

- (1) the release or threat of release of a hazardous substance was caused solely by the act or omission of a third party;
- (2) the third party was not the defendant's employee or agent, or one whose act or omission occurred in connection with a contractual relationship, existing directly or indirectly, with the defendant;
- (3) the defendant exercised due care with respect to the hazardous substances; and
- (4) the defendant took precautions against the foreseeable acts or omissions of the third party and the consequences that could foreseeably result from the acts or omissions.

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

Looking at the first element, there is no question that the alleged release or threat of release of hazardous substances on the Property were caused by the acts or omissions of third parties and that these third parties were not employees or agents of KDL. Specifically, historical records and reports indicate that various releases occurred under the ownership and operation of the Property by the Arvin/Meritor Entities.

Further, KDL has no contractual relationship in connection with a responsible third party's acts or omissions in causing the release. The "contractual relationship" element of the third-party defense has resulted in two defenses: the innocent landowner defense and the third-party defense. The term "contractual relationship" is defined to include "land contracts, deeds, easements, leases, or other instruments transferring title or possession[.]" 42 U.S.C. § 9601(35)(A). The innocent landowner defense, with its requirements for lack of knowledge and "all appropriate inquiries," is an exception to this definition of "contractual relationship." See 42 U.S.C. § 9601(35)(A) and (B).

The third-party defense, however, is a straightforward statutory

interpretation of Section 107(b)(3). Pursuant to the statute, a defendant must have more than a “contractual relationship” with an alleged responsible third party. The contractual relationship must possess the requisite “connection” with the responsible third party’s act or omission resulting in the disposal or release of a hazardous substance. See *Westwood Pharm., Inc. v. Nat’l Fuel Gas Distribution Corp.*, 964 F.2d 85, 89 (2nd Cir. 1992) (applying the third-party defense to the seller-operator / previous owner of the contaminated site); see also *New York v. Lashins Arcade Co.*, 91 F.3d 353, 360 (2nd Cir. 1996) (applying *Westwood* to the current owner). In *Westwood*, the Second Circuit agreed that “[t]he mere existence of a contractual relationship between the owner of land on which hazardous substances are or have been disposed and a third party whose act or omission was the sole cause of the release or threatened release of such hazardous substances into the environment does not foreclose the owner of the land from escaping liability[.]” *Id.* at 89 (emphasis in original). The court held that the third-party defense under Section 107(b)(3) is precluded only when the contractual relationship at issue has some connection with the responsible third party’s acts or omissions causing the release:

[A] landowner is precluded from raising the third-party defense only if the contract between the landowner and the third party somehow is connected with the handling of hazardous substances. The result would be the same if the contract allows the landowner to exert some control over the third party’s actions so that the landowner fairly can be held liable for the release or threatened release of hazardous substances caused solely by the actions of the third party.

*Id.* To construe Section 107(b)(3) otherwise would effectively have rendered the “in connection with” language superfluous.

In *Lashins Arcade*, applying *Westwood*, the Second Circuit affirmed summary judgment in favor of the current owner based upon the third-party defense provided by Section 107(b)(3). 91 F.3d 353, 355 (2nd Cir. 1996). *Westwood* and *Lashins* reflect the law not only in the Second Circuit but also in the Seventh Circuit. See *G.J. Leasing Co. v. Union Elec. Co.*, 54 F.3d 379, 385–86 (7th Cir. 1995) (relying upon *Westwood* in applying the third-party defense to the seller of a building containing asbestos). Further, other district courts within the Seventh Circuit agree that the statutory language of “in connection with” must not be ignored in interpreting the third-party defense. See *Am. Nat’l Bank & Trust Co. v. Harcros Chemis.*, 997 F. Supp. 994, 1001 (N.D. Ill. 1998) (applying *Westwood* to the current owner); accord *City of Gary v. Shafer*, 683 F. Supp. 2d 836, 858–60 (N.D. Ind. 2010) (applying the third-party defense analysis from *American National Bank* under the misnomer of the innocent landowner defense).

In *American National Bank*, the Northern District of Illinois followed a simple analysis:

Here, it is true that [the current owner] had a contractual relationship with [the prior owner-operator], the third party allegedly responsible for a release at Canal D, based upon the real estate contract those two parties executed when [the current owner] purchased the Wolcott Site. But there is no evidence in the record that this contract was in any way connected to the contamination in Canal D, and defendants do not suggest that this was the case. Therefore, [the current owner] satisfies this element of the defense.

*Id.* at 1001.

Applying *Westwood*, *Lashins Arcade*, and *American National Bank*, KDL satisfies the second element of the third-party defense. KDL has no contractual relationship *in connection with* the Arvin/Meritor Entities, Amphenol Products Company's, or any other known responsible third party's acts or omissions in causing the alleged release or threat of release of hazardous substances on the Property. The only contract between KDL and the Arvin/Meritor Entities was the contract for purchase and sale of the Property; that purchase agreement is not connected in any way to the activities causing any alleged contamination at the Site. *Cf. Am. Nat'l Bank & Trust Co.*, 997 F. Supp. at 1001. Similar to the current owners in *Lashins Arcade* and *American National Bank*, the activities causing the alleged contamination likely occurred years before KDL's purchase of the site. *Cf. Lashins Arcade*, 91 F.3d at 356, 360, 362 (more than fifteen years before the current owner's purchase); *Am. Nat'l Bank & Trust Co.*, 997 F. Supp. at 996, 1001 (eighteen years before the current owner's purchase). Further, KDL is not in the chain of title with Amphenol, another likely responsible third party. Finally, if the source of contamination at the Property is from another property, that other property was not the subject of the purchase agreement.

KDL also satisfies the third and fourth elements of the third-party defense. KDL exercised appropriate care with respect to the historic impacts to the Property by reading the environmental reports it received during its due diligence (the draft 2005 August Mack Report and the 2004 Phase I Report) to understand the location of any hazardous substance impacts on the Property. KDL further has exercised appropriate care with respect to the historic impacts to the Property identified in these reports by:

- not introducing potential chemical contaminants to the Property;

- not releasing any new contaminants;
- cooperating with and granting access to the Arvin/Meritor Entities, other PRPs, to conduct investigations and, if necessary, response actions; and
- maintaining the exterior of its facility and surrounding paved parking area to ensure that the buildings and impermeable surfaces continued to operate as an effective cap over the Property.

KDL is not aware of any land use restrictions established or relied on in connection with prior response actions on the Property and is willing to consider new institutional controls employed in connection with a response action. KDL also has been and will continue to provide full cooperation, assistance, and access for authorized response actions. KDL already has responded to IDEM's request for information. KDL also is in the process of negotiating an access agreement with and providing access to the Arvin/Meritor Entities to conduct additional investigations at the Property.

KDL also has taken precautions against the foreseeable acts and omissions of any third parties by reading the environmental reports it received during its due diligence to understand the location of any hazardous substance impacts on the Property and continuing to rely on municipal water. Finally, KDL's leases with its tenants include standard provisions requiring compliance with all environmental laws and requirements, and requiring notification of and response to any disposal or release of any hazardous substance at or from the Property.

## **2. Ultimately, KDL Would Not Be Allocated Any Cleanup Costs.**

In any event, KDL ultimately would not be allocated any response costs under 42 U.S.C. § 9613(f), and forcing KDL to undertake or pay for any response actions on the Site would not be fair to KDL or an efficient use of IDEM's resources, particularly since the Arvin/Meritor Entities appears ready, willing, and able to do so. CERCLA allows potentially responsible parties who pay for cleanup costs to seek contribution for those costs from other potentially responsible parties. 42 U.S.C. § 9613. "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). In *Burlington Northern & Santa Fe Ry. v. United States*, the Supreme Court considered geographic factors (e.g. evidence of where spills occurred and where they went), chronological factors (e.g. pro rata length of ownership), and volumetric factors (e.g. types and amounts of hazardous waste involved). 556 U.S. 599, 617–19 (2009). But, true to Section 9613(f)(1), there



is no one set of equitable factors.<sup>1</sup>

Under any equitable factors, however, KDL would not be liable for any contribution. It is clear that KDL has not contributed in any way to the alleged release or threat of release of hazardous substances on the Property. Unlike prior operators and owners of the Property, KDL has operated solely as a landlord and has not been and is not engaged in manufacturing or any other operations at the Property other than managing and maintaining the building and premises for its tenants.

This decision would be consistent with court decisions in the Seventh Circuit permitting non-polluting landowners to recover all of their cleanup costs from polluting prior owners. *See, e.g., PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 616 (7th Cir. 1998) (noting it would be “an unexceptionable decision” to hold only the prior owner 100% responsible for cleanup costs under 42 U.S.C. § 9613(f)(1) if all the pollution had occurred prior to the current owner taking over the property); *Padgett Bros. LLC v. A.L. Ross & Sons, Inc.*, No. 1:10-CV-00858, 2014 U.S. Dist. LEXIS 97069, at \*29 (S.D. Ind. July 17, 2014) (finding current owner not subject to any contribution where current owner’s actions had not contributed to the contamination on the site); *see also Burlington*, 556 U.S. at 602 (stating that CERCLA was designed to ensure that the costs of cleaning up hazardous waste sites “were borne by those responsible for the contamination”).

In any case, KDL understands that the Arvin/Meritor Entities have hired a consultant and fully intend to do whatever work would be otherwise assigned by KDL in response to IDEM’s request for response action.

## B. PETROLEUM DEFENSES

KDL also is not liable to the state under Indiana Code section 13-24-1-4 because no petroleum storage facilities remain at the Property and any release from a “petroleum facility” on the Site was caused by an action or omission of a responsible person other than KDL.

Indiana Code section 13-24-1-4 provides that, unless an exception applies, the “owner or operator” of a “petroleum facility” is liable to the state for the reasonable costs of any response or remedial action taken under section 2 of Chapter 24.

---

<sup>1</sup> Courts apportioning costs under Section 9613(f) also have relied on factors created by then-Senator Al Gore. *See Env’tl. Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F2d 503, 508 (7th Cir. 1992), *cited by Padgett Bros. LLC v. A.L. Ross & Sons, Inc.*, No. 1:10-CV-00858, 2014 U.S. Dist. LEXIS 97069, at \*27–28 (S.D. Ind. July 17, 2014).

“Owner or operator,” for purposes of a petroleum facility under Indiana Code section 13-24-1 *et seq.*, means “a person who owns or operates the facility.” Ind. Code § 13-11-2-151(a). “Petroleum facility,” for purposes of Indiana Code section 13-24-1 *et seq.*, means any of the following: a building, a structure, a ditch, etc. Ind. Code § 13-11-2-161(a). The term does not include the following: a consumer product in consumer use or a UST. *Id.* at (b).

First, to the extent the contamination resulted from a UST such as the former 10,000 gallon fuel/heating oil UST, pursuant to the statute, the Site cannot be a petroleum facility because that UST would be excluded from the statutory definition of “petroleum facility.” Furthermore, that UST was removed prior to KDL’s ownership or operation, and no petroleum storage or other operations involving petroleum have occurred since KDL purchased the Property.

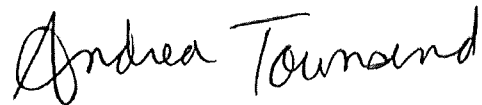
Second, regardless of whether there ever was or still is a “petroleum facility” at the Site, KDL is not liable to the state for the costs of any response or remedial action because any release from a “petroleum facility” on the Site was caused by an action or omission of a responsible person other than KDL. *See* Ind. Code § 13-24-1-4(a). The acts or omissions of the Arvin/Meritor Entities, which engaged in activities including heavy manufacturing at the Site for over 70 years (since 1934) and whose operations included use of petroleum products (and removal of a petroleum UST), were the sole possible cause of any release of the contamination at concern.

### C. CONCLUSION

For these reasons—KDL’s satisfaction of the third-party defense, the fact that KDL would not be allocated any cleanup costs, and the near certainty that any release from a “petroleum facility” on the Site was caused by a person other than KDL—KDL should not be liable for any response action or response costs incurred resulting from the alleged release or threat of release of hazardous substances and/or petroleum on the Site. KDL will continue to cooperate with the Arvin/Meritor Entities to provide continuing access to the Property for investigation and, if necessary, response action, and will continue to cooperate with IDEM in its ongoing investigation of the nature and source of hazardous substance and/or petroleum contamination at and around the Property. Beyond that, however, KDL respectfully requests that IDEM not require KDL to spend more time and money defending against the asserted claims, and that IDEM exercise its discretion not to pursue direct claims by IDEM against KDL with respect to the contamination on the Site. Please contact me or Curt DeVoe with any questions.

Tim Johnson  
April 15, 2019  
Page 9 of 9

Very truly yours,

A handwritten signature in black ink that reads "Andrea Townsend". The signature is written in a cursive style with a large, looped initial 'A'.

Andrea K. Townsend

cc: S. Curtis DeVoe  
Kevin D. Lawrence  
Joe Amato