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June 6, 2016

VIA E-MAIL AND  
CERTIFIED MAIL RETURN RECEIPT REQUESTED

James Morris, Esq.  
Associate Regional Counsel  
Office of Regional Counsel (C-14J)  
U.S. Environmental Protection Agency, Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604-3590

**Re: Lane Street Groundwater Superfund Site, Elkhart, Indiana  
2601 Marina Drive (f/k/a 53217 Marina Drive), Elkhart, Indiana**

Dear Mr. Morris:

As you know, the undersigned represents Dynamic Metals LLC (“Dynamic Metals”). I write in response to the General Notice Letter (“GNL”) dated March 11, 2016, regarding the Lane Street Groundwater Superfund Site (the “Site”), which Dynamic Metals recently received.

As you and I have discussed in our recent telephone conversations, Dynamic Metals strongly rejects U.S. EPA’s contention that Dynamic Metals “or a predecessor company, may have contributed hazardous substances that are contaminants of concern to the Site as a current or former owner/operator at the Site.” While not explained in the GNL, I understand that U.S. EPA believes that Dynamic Metals’ former operations at the property now known as 2601 Marina Drive, Elkhart, Indiana (f/k/a 53217 Marina Drive) – either as the successor to a company known as R.E. Jackson Company, Inc. (“REJCO”) and/or Dynamic Metals’ own limited activities – implicate liability to Dynamic Metals. U.S. EPA has included the 2601 Marina Drive property (hereinafter, the “REJCO Property”) within the boundaries of the Site.<sup>1</sup>

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<sup>1</sup> While Dynamic Metals is highly skeptical of any suggestion that releases of hazardous substances at the REJCO Property materially have contributed to the Lane Street groundwater contamination plume as currently delineated by U.S. EPA, Dynamic Metals reserves its right to refute at a later time, if necessary, the technical issues related to such assertions.

I would like to set forth the factual and legal bases why Dynamic Metals denies U.S. EPA's assertion of its potential liability at the Lane Street Site, and I ask that you immediately remove my client from the list of Potentially Responsible Parties (PRPs) at the Site with respect to any future actions by U.S. EPA.

## Background

As explained in Dynamic Metals' prior responses to U.S. EPA's information requests to Dynamic Metals under CERCLA §104(e) (submitted December 14, 2015), prior to April 2004, the REJCO Property was owned by an entity named Shelgor Enterprises, Inc. ("Shelgor"), and the operator on the REJCO Property was REJCO. In general, REJCO's operations on the REJCO Property consisted of the fabrication of windows, doors, locks and associated components for the railroad industry, including both freight and passenger rail. To the best of Dynamic Metal's knowledge, during 2004, the principal owner of both Shelgor and REJCO was Terry K. Shelly ("Shelly").

In April 2004, Dynamic Metals purchased certain assets of REJCO. (See Asset Purchase Agreement ("APA") dated April 20, 2004, at DM000040-194).<sup>2</sup> These assets were specifically listed in Schedule 2.1 of the APA. (DM000059-60). As set forth in the APA, the assets were purchased for \$495,000 in cash, in an arms'-length transaction between the two companies, that was fully negotiated and documented in the APA. (DM000061) No stock of Dynamic Metals passed to the owners of REJCO or vice-versa as part of the purchase price. (Nystrom Affidavit,<sup>3</sup> at ¶ 6). The purchase price of the assets represented the fair market value of the assets with no discounts. (*Id.* at ¶ 11). At no time was any equity holder in REJCO or Shelgor ever an equity holder in Dynamic Metals, or vice-versa. (*Id.* at ¶ 10). There was no affiliation of any kind between REJCO/Shelgor and Dynamic Metals, either before or after the transaction evidenced by the APA, except for the transaction itself. (*Id.*).

Out of the \$495,000 purchase price, as a condition of the sale, certain specified liabilities of REJCO were paid and did not devolve to Dynamic Metals, including but not limited to past due wages for REJCO employees, warranty claims and unpaid taxes (which reduced the net payment to REJCO). (See APA, at DM000061). Very few REJCO employees who were employed at the REJCO Property were subsequently hired by Dynamic Metals, and those who were hired first had to interview for positions like any other new employee. (Nystrom Affidavit, at ¶ 12; Thompson Affidavit<sup>4</sup> at ¶ 13).

<sup>2</sup> Document control numbers ("DMxxxxx") correspond to documents produced in support of Dynamic Metals' December 2015 Responses to U.S. EPA's 104(e) Requests.

<sup>3</sup> Dennis Nystrom was the President of Dynamic Metals in 2004.

<sup>4</sup> Gene Thompson is an employee of Dynamic Metals and was one of only a few employees of REJCO who was hired by Dynamic Metals in April 2004.

Under the terms of the APA, Dynamic Metals only assumed certain specified liabilities of REJCO, which consisted primarily of accounts payable and certain executory contract obligations associated with the contracts sold by REJCO to Dynamic Metals. (APA, Schedule 2.3, DM000062). All other liabilities of REJCO were retained by REJCO, as specifically provided in Section 2.3 of the APA, including environmental liabilities:

### 2.3 LIABILITIES

\*\*\*\* The Retained Liabilities shall remain the sole responsibility, liability and obligation of Seller. "Retained Liabilities" shall mean every Liability of Seller other than the Assumed Liabilities, including without limitation:...(v) any Environmental Health and Safety Liabilities arising out of or relating to the operation by Seller of its business at the Elkhart Facility or Seller's leasing, ownership or operation of the Elkhart Facility, in each case prior to the Effective Time....

(DM000049).

It should be noted that the asset purchase by Dynamic Metals was concluded in early 2004, several years before the environmental issues at the Site came to light. (*See, e.g.*, IDEM Preliminary Assessment Report, U.S. EPA Administrative Record Document No. 300592). Thus, the environmental liabilities referenced in the APA were general and latent only, and were not intended to apply to the Site or any other specific known environmental obligations or liabilities of REJCO at the time of execution of the APA.

In addition, Dynamic Metals obtained from REJCO extensive representation and warranties related to the environmental condition of the REJCO Property and REJCO's operations on the REJCO Property. Specifically, REJCO represented and warranted that "To Seller's [REJCO's] best Knowledge, there has been no Release (or Remedial Action thereof) not in material compliance with applicable Environmental Laws, or, to the Knowledge of Seller, Threat of Release, or any Hazardous Materials at or from the Elkhart Facility, or from any of the Assets (whether real, personal or mixed)." (APA, sec. 3.9(f), DM000053-54). Thus, to the best of Dynamic Metals' knowledge, there were no environmental issues or concerns of any kind associated with its leasing of the REJCO Property.

To the best of Dynamic Metals' knowledge, subsequent to the transaction, REJCO continued in existence, and continued to be owned by Shelly. Based on public records from the Indiana Secretary of State's office, both REJCO and Shelgor continued to exist after the Dynamic Metals/REJCO asset purchase, and neither entity was officially dissolved until 2008 – years after the asset transaction.

The purpose of the Lease (DM000102-111) between Dynamic Metals and Shelgor was to allow Dynamic Metals time to move the equipment it purchased from REJCO to Dynamic Metals' primary location at 1937 Sterling Ave., Elkhart, IN, and to complete a few outstanding orders for

products that Dynamic Metals assumed from REJCO as part of the transaction. (Nystrom Affidavit, at ¶ 8). At no time prior to, during or after the Lease Period did Dynamic Metals ever hold title or any other ownership interest in the REJCO Property. (Nystrom Affidavit, at ¶ 9).

Based on public records, after the Lease Period ended in July 2004, Shelgor presumably rented the facility out to another tenant and/or sold the property. Dynamic Metals has no direct knowledge of the use of the REJCO Property after the end of the Lease Period, and has had no interest or involvement of any kind with respect to the REJCO Property since the end of the Lease Period. Public records indicate the current owner of the property is K F Investments, LLC and the current operator is Phoenix Cruiser, a manufacturer of recreational vehicles.

### **Direct CERCLA Liability for the Three-Month Lease Period (April-July 2004)**

As you know, under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq.*, four categories of potentially liable parties exist:

- Current owners and operators of a facility;
- Past owners and operators of a facility at the time hazardous substances were disposed;
- Generators and parties that arranged for the disposal or transport of the hazardous substances; and
- Transporters of hazardous waste that selected the site where the hazardous substances were brought.

CERCLA, §107(a)(1-4).

Of these four categories of PRPs, only the second, ‘past owners and operators of a facility at the time hazardous substances were disposed,’ can possibly implicate liability to Dynamic Metals. This is because Dynamic Metals is not a current owner/operator of the REJCO Property, and did not arrange for disposal or transport hazardous substances for disposal to or at the REJCO Property or anywhere within the Lane Street Site (it being a multi-parcel groundwater contamination site, not a landfill site). As explained below, there is also no factual basis to support any assertion that the very limited operations of Dynamic Metals at the REJCO Property caused the release or disposal of any hazardous substances during the Lease Period.

According to Mr. Thompson, who began working at REJCO in March 2000, prior to the asset purchase by Dynamic Metals the REJCO facility did no painting of window or door frames, except for very minor touch ups using common canned spray paint. (Thompson Affidavit at ¶ 6). There was no paint/spray booth at the Facility. (*Id.*). A water test tank existed at the facility, but was used only to test the integrity of window gasket seals. (*Id.* at ¶ 7). To the best of

Thompson's knowledge, since March 2000, no chlorinated solvents<sup>5</sup> were used at the REJCO Property, and none were listed on Schedule 3.9 of the APA, which inventoried all chemicals present that were included in the asset sale to Dynamic Metals in April 2004. (DM000065-66; Thompson Affidavit at ¶¶ 10-11).

After the asset sale was finalized on or about April 20, 2004, Dynamic Metals' activities at the REJCO Property were focused on transferring the purchased assets to its main facility in Elkhart. (Thompson Affidavit at ¶ 14). Dynamic Metals' operations were limited to closing out some of the open purchase orders for windows and doors, and related components. (*Id.*) Very few chemicals, if any, besides common window cleaner, were used to finish the outstanding jobs. (Thompson Affidavit at ¶ 16). The water test tank in particular was never operated by Dynamic Metals. (Thompson Affidavit at ¶ 12).

No chemicals in addition to those listed on Schedule 3.9 were ordered and received at the Facility subsequent to April 2004. (Thompson Affidavit at ¶ 11). All of the chemicals listed on Schedule 3.9 were either disposed of properly, or moved to the Dynamic Metals main location. (Thompson Affidavit at ¶ 17). All equipment and other assets that were purchased were completely moved out by the end of August 2004, and all of the equipment went to the existing Dynamic Metals space at 1937 Sterling Avenue, about five miles away from the REJCO Facility. (Thompson Affidavit at ¶ 17). Dynamic Metals later moved to its current location at 54347 Highland Ave. in Elkhart.

Based on the very limited and inconsequential operations for the very short period of time Dynamic Metals operated at the REJCO Property, there is simply no credible evidence to suggest that whatever environmental operations that occurred in the past that may connect the REJCO Property to the Site (if any), such operations were conducted during the Lease Period. Accordingly, Dynamic Metals cannot be held liable under CERCLA as an operator of the REJCO Property at the time of a disposal of a hazardous substance.

### **Dynamic Metals Liability as the Legal Successor to REJCO**

As noted above, U.S. EPA contends in the GNL that Dynamic Metals "or a predecessor company, may have contributed hazardous substances that are contaminants of concern to the Site...." While no evidence to support this contention is provided with the GNL, my discussions with you have revealed that U.S. EPA bases its supposition for this "successor" claim because of

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<sup>5</sup> Based on U.S. EPA's investigation of the REJCO Property and the Lane Street Site, the only connection between the REJCO Property and the Site is the apparent present of certain chlorinated solvents (*e.g.*, perchloroethylene and trichloroethylene) near or on the REJCO Property. According to the available records, the only reference to the use or presence of chlorinated solvents on the REJCO Property was in the 1980s and early 1990s. *See, e.g.*, Elkhart County Health Department Inspection Reports, U.S. EPA Lane Street Site Administrative Record, Reference 70, Document No. 325126.

certain website references to the use of the name “R.E. Jackson” in the context of “R.E. Jackson, a Division of Dynamic Metals,” a designation used by Dynamic Metals for some purposes in the wake of the asset purchase in 2004.

First, it should be noted that the name “R.E. Jackson” was one of the corporate assets purchased from REJCO by Dynamic Metals under the APA, and Dynamic Metals had a legal right to use the name however it chose. (APA, at DM000059). Such usage by asset-purchasing entities is not unusual. Moreover, based on the well-established case law controlling the common law principles of successor liability, the use of the name of R.E. Jackson as a “division” of Dynamic Metals falls far short of what is required to establish successor liability.

### **Common Law General Rule**

Typically, corporate liabilities follow a transfer of stock, not a sale of assets. *North Shore Gas Co. v. Salomon Inc.*, 152 F.3d 642, 651 (7<sup>th</sup> Cir. 1998); *Cooper Industries, LLC v. City of South Bend*, 899 N.E.2d 1274, 1287 (Ind. 2009).<sup>6</sup> However, an asset purchaser may succeed to the liabilities of the asset seller when one of four specific common law exceptions is met:

- The purchaser expressly or impliedly agrees to assume the liabilities of the asset seller;
- The transaction is viewed as a *de facto* merger;
- The transaction is fraudulent; or
- The purchaser is a mere continuation of the predecessor.

*North Shore Gas*, at 651; *Cooper Indus.*, at 1287.

As discussed below, none of the four traditional exceptions to the general rule apply to the Dynamic Metals / R.E. Jackson asset transaction.

First, as noted above, the plain language of the APA clearly indicates that any environmental liabilities (although no specific ones were known at the time) would remain with REJCO, and not inure by virtue of express assumption to Dynamic Metals. APA, Sec. 2.3 (DM000049). There also can be no question that the asset transfer was not fraudulent with respect to the Lane Street Site liability, simply because the environmental issues at the Site were not known (or even suspected) at the time of the transaction, and could not have served as the basis for fraudulent intent on the part of Dynamic Metals to escape that liability. *U.S. v. Mexico Feed and Seed Co., Inc.*, 980 F.2d 478, 489-90 (8<sup>th</sup> Cir. 1992).

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<sup>6</sup> While CERCLA itself does not specifically acknowledge corporate successor liability claims, courts have universally applied such basic corporate principles to environmental liability cases where successor claims have been raised. *See, e.g., Ninth Avenue Remedial Group v. Allis-Chalmers Corp.*, 195 B.R. 716, 722-23 (N.D. Ind. 1996)(examining federal courts of appeal cases).

Finally, the transaction was neither a *de facto* merger of Dynamic Metals and REJCO, nor a “mere continuation” of REJCO under the guise of Dynamic Metals. It is well-accepted that for both of these exceptions, there must be “an identity of officers, directors, and stock between the selling and purchasing corporations.” *See Travis v. Harris Corp.*, 565 F.2d 443, 447 (7<sup>th</sup> Cir. 1977)(applying Indiana law); *North Shore Gas*, at 654; *Glentel, Inc., v. Wireless Ventures, LLC*, 362 F. Supp. 2d 992, 1005 (N.D. Ind. 2005).

The *sine qua non* of both *de facto* merger and “mere continuation” is continuity of ownership between the owners of the asset-purchasing company and the asset-selling company, typically evidenced by payment for the assets of the selling company with stock of the acquiring company. *E.g., Travis v. Harris Corp.*, 565 F.2d 443, 447 (7<sup>th</sup> Cir. 1977)(“Where the assets are sold for cash, no basic, fundamental change occurs in the relationship of the stockholders to their respective corporations, and absent continuity of shareholder interest, the two corporations are strangers, both before and after the sale.”); *see also U.S. v. General Battery*, 423 F.3d 294, 306 (3d. Cir. 2005)(“The continuity of shareholders element is designed to identify situations where the shareholders of a seller corporation retain some ownership interest in their assets after cleansing those assets of liability.”), *cert. denied*, 549 U.S. 941 (2006). In this situation, that would have required Dynamic Metals to pay Shelly with stock of Dynamic Metals, such that post-transaction, Shelly would have been a (part) owner of the so-called surviving company. As documented in the APA, no stock of Dynamic Metals was involved in the transaction, being an arms’-length, cash-only deal. (DM000061). Thus, neither *de facto* merger nor “mere continuation” can implicate environmental liability to Dynamic Metals. *See also Glentel v. Wireless Ventures, LLC*, 362 F. Supp. 2d 992, 1004-06 (N.D. Ind. 2005).

U.S. EPA may be tempted to focus on the limited post-asset purchase use in certain situations of the “R.E. Jackson” name by Dynamic Metals as relevant to the “mere continuation” analysis. Notwithstanding that the lack of continuity of ownership between the two companies is immediately fatal to this theory as explained above, the focus of “mere continuation” is “not the continuation of the business operation, but rather the continuation of the corporate entity.” *Glentel*, 362 F. Supp. 2d 992, 1001; *accord North Shore Gas Co.*, 152 F.3d 642, 654 (“[T]he inquiry focuses on whether the purchaser continues the *corporate entity* of the seller, not so much on whether the purchaser continues the *business operations* of the seller...”)(emphasis in original), *overruled on other grounds by Envision Healthcare, Inc. v. PreferredOne Ins. Co.*, 604 F.3d 983 (7<sup>th</sup> Cir. 2010); *New York v. Nat’l Service Indus.*, 352 F.3d 682, 693 (2d. Cir. 2003)(Leval, J., concurring)(“If a seller’s CERCLA liability could be imposed on a purchaser of assets merely because it continued in substantially unchanged form the operations of the seller, the rule would result in disastrously unfair consequences, which furthermore would be harmful to the economy as a whole.”)

For example, in *Berg Chilling Sys. v. Hull Corp.*, 435 F.3d 455, 469 (3d. Cir. 2006)(cited with approval in *Cooper Indus.*, 899 N.E.2d 1274, 1288), the U.S. Court of Appeals for the Third Circuit found that there was no “mere continuation” of the asset purchaser, even though:

There is ample evidence to support the conclusion that [the asset purchaser] continued the business operations of [the asset seller]. [The purchaser] purchased all of the [seller's] equipment and inventory, assumed tenancy of the [seller's] manufacturing facilities (though eventually did not purchase the associated real estate), manufactured the same products, took over many contractual obligations, and used the same personnel, telephone number, and fax number. [Purchaser] also renamed its [division after the seller] specifically to take advantage of the [seller] name's acceptance in the community, and purchased the [seller's] logo for the same purpose.

435 F.3d at 469-70.

Put another way, the “mere continuation” exception “asks whether the predecessor corporation should be deemed simply to have re-incarnated itself, largely aside of the business operations.” *Cooper Indus.*, 899 N.E.2d 1274, 1290. There is no doubt that based on the facts of the transaction, Dynamic Metals is not the “reincarnation” of REJCO, and cannot be held accountable for any of its CERCLA liabilities under the “mere continuation” theory.

Some courts have expanded the “mere continuation” exception more broadly to encompass certain situations where no transfer of stock takes place, known as the “substantial continuity” theory. However, even this minority exception cannot operate to implicate liability to Dynamic Metals for the prior acts of REJCO, as explained below.

### **CERCLA Substantial Continuity Test**

In regard to successor liability under CERCLA, a minority of courts have applied a “substantial continuity test,” which is a federal common law doctrine originally developed in employment law cases (and later extended to product liability cases). *Mexico Feed and Seed Co., Inc.*, 980 F.2d 478, 489-90.<sup>7</sup> In applying the substantial continuity test, common ownership of stock is not required, and a range of factors will be considered to determine whether the successor substantially continued the predecessor’s enterprise, including the following: (i) retention of the same employees; (ii) retention of the same supervisory personnel; (iii) retention of the same production facilities; (iv) production of the same product or service; (v) retention of the same name; (vi) continuity of assets; (vii) continuity of general business operations; and (viii) holding itself out as a continuation of the previous enterprise. *See, e.g., Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 812 F. Supp. 124, 129 (N.D. Ill. 1993).

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<sup>7</sup> Explaining that originally, where a “bona fide purchaser, acquiring, *with knowledge that the wrong remains unremedied*, the employing enterprise which was the locus of the unfair labor practice, may be considered in privity with its predecessor for the purposes of [unfair labor practices].” *Mexico Feed and Seed*, 980 F.2d at 487-88 (*quoting Golden State Bottling Co. v. NLRB*, 414 U.S. 168, at 180 (1973)[emphasis added]).



However, this watered-down theory of successor liability has come under increasing attack in recent years, especially in light of the U.S. Supreme Court's decision in *U.S. v. Bestfoods*, 524 U.S. 51 (1998). In the wake of *Bestfoods*, several courts have determined that because the substantial continuity test departs from the common law rules of successor liability, the doctrine should no longer be applied as a matter of federal common law. See, e.g., *General Battery Corp.*, 423 F.3d 294, 309. Other courts have held that the "substantial continuity" doctrine should be applied only if the controlling corporate law of the relevant state would allow its application. *U.S. v. Davis*, 261 F.3d 1 (1<sup>st</sup> Cir. 2001). Still other courts have cast doubt on its viability but not directly ruled on the issue. *K.C. 1986 Limited Partnership v. Reade Manufacturing*, 472 F.3d 1009, 1022 (8<sup>th</sup> Cir. 2007).

The Seventh Circuit has not spoken directly as to the viability of the "substantial continuity" doctrine as a matter of federal common law, post-*Bestfoods*. *North Shore Gas*, 152 F.3d 642, 650-51. However, it is likely that the Seventh Circuit would follow the trend of most federal courts and refrain from applying the doctrine unless the relevant state court's corporate law specifically embraced the concept.<sup>8</sup> Indiana corporate common law has not been expanded by state courts considering successor issues (see, e.g., *Reed v. Reid*, 980 N.E.2d 277 (Ind. 2012); *Cooper Indus.*, 899 N.E.2d 1274, 1288-1291) and, thus, the "substantial continuity" exception is not applicable to assert liability against Dynamic Metals.

In any event, even if the Seventh Circuit were to apply, post-*Bestfoods*, the minority "substantial continuity" test in the CERCLA context, the vast majority of courts that have addressed the issue have required knowledge of the environmental liability at issue at the time of the transaction, before ruling that an asset-purchasing company has acceded to the environmental liabilities of the selling company. See *Ninth Avenue Remedial Group v. Allis-Chalmers Corp.*, 195 B.R. 716, 726 (N.D. Ind. 1996)(examining Seventh Circuit cases involving employment discrimination and union pension funds, and applying the "substantial continuity" exception if the successor knew or had notice of the potential CERCLA liability); accord *Norfolk Southern Ry. Co. v. Gee Co.*, 2001 WL 710116, at \*23 (N.D. Ill. June 25, 2001); see also *K.C. 1986 Limited Partnership*, 472 F.3d. at 1022-23; *U.S. v. Vermont American Corp.*, 871 F. Supp. 318, 322 (W.D. Mich. 1994); *Allied*, 812 F. Supp. 124, 129 (citing *Mexico Feed and Seed*, 980 F.2d at 488).

As noted above, there is no question that, at the time of the asset purchase, Dynamic Metals had no knowledge or notice of the Lane Street Site contamination that is the subject of the GNL. There can be no dispute that the problems associated with the Site surfaced years after the transaction, and there is no documentary evidence or testimony to suggest that the asset transaction was structured in a way to fraudulently avoid this specific liability. Thus, even if the disfavored "substantial continuity" exception would be entertained by the federal district court

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<sup>8</sup> See APPLICATION OF THE REMEDIAL PURPOSE CANON TO CERCLA SUCCESSOR LIABILITY ISSUES AFTER *UNITED STATES V. BESTFOODS*: WHY STATE CORPORATE LAW SHOULD BE APPLIED IN CIRCUITS ENCOMPASSING SUBSTANTIAL CONTINUITY EXCEPTION STATES, 30 N. Ill. U. L. Rev. 387, 427-28 (Spring 2010).

and upheld by the Seventh Circuit Court of Appeals, such allegations would fail in this case based on the lack of knowledge on the part of the asset purchaser, Dynamic Metals.


### Conclusion

In sum, there is simply no basis for U.S. EPA to continue to identify Dynamic Metals as a PRP at the Lane Street Site, either as a direct CERCLA-liable party for its few months of limited activities at the REJCO Property, or as the alleged corporate successor to REJCO under any of the common law exceptions to the general rule that corporate liabilities do not flow to asset purchasers.

Given the prejudice and expense that inures to companies that are identified as PRPs for significant sites like the Lane Street Site, it would be highly inequitable and unfair to Dynamic Metals if U.S. EPA were to include it as a PRP on any future notices, or to otherwise continue to assert CERCLA liability against Dynamic Metals, unless U.S. EPA promptly develops conclusive evidence and arguments to refute the facts and legal theories discussed above.

Very truly yours,

Miller, Canfield, Paddock and Stone, P.L.C.

By:   
Lawrence W. Falbe

LWF:me

cc: Mr. Don Nystrom  
Brad Arbuckle, Esq.



5. In April 2004, Dynamic Metals purchased certain assets of REJCO as memorialized in an Asset Purchase Agreement (“APA”) dated April 20, 2004. These assets were specifically listed in Schedule 2.1 of the APA.

6. The REJCO assets were purchased for \$495,000 in cash. The shareholders of REJCO did not receive any stock of Dynamic Metals, and no stock of REJCO was purchased or obtained by Dynamic Metals, or any of its officers, shareholders or directors.

7. REJCO did not own the REJCO Property where it operated at 53217 Marina Drive. However, the REJCO Property was owned by an affiliated company also owned by Mr. Shelly, named Shelgor.

8. In conjunction with the asset purchase, Dynamic Metals entered into a short-term lease (the “Lease”) with Shelgor. The purpose of the Lease was to allow Dynamic Metals time to move the equipment it purchased from REJCO to Dynamic Metals’ primary location at 1937 Sterling Ave., Elkhart, IN, and to complete a few outstanding orders for products that Dynamic Metals assumed from REJCO as part of the transaction. As I recall, Dynamic Metals had completely removed all the equipment from the REJCO Property and had vacated the building by the end of June 2004.

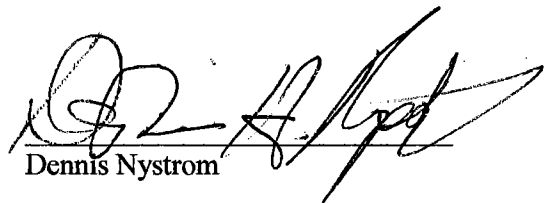
9. At no time prior to, during or after the Lease Period did Dynamic Metals ever hold title or any other ownership interest in the REJCO Property.

10. At no time was any equity holder in REJCO or Shelgor ever an equity holder in Dynamic Metals, or vice-versa. Overall, there was no affiliation of any kind between REJCO/Shelgor and Dynamic Metals, either before or after the transaction evidenced by the APA, except for the transaction itself.

11. The purchase price of the REJCO assets represented the fair market value of the assets with no discounts for environmental concerns or other liabilities.

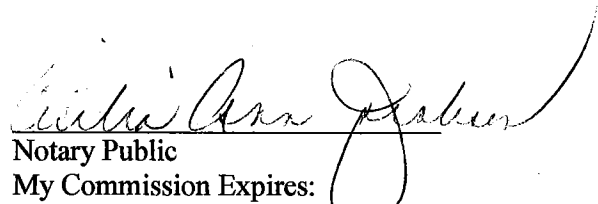
12. Dynamic Metals hired on very few REJCO employees who were employed at the REJCO Property. Those who were hired first had to interview for positions like any other new Dynamic Metals employee.

FURTHER AFFIANT SAYETH NOT.

  
Dennis Nystrom

STATE OF INDIANA     )  
                                  )     SS:  
COUNTY OF ELKHART    )

Sworn to and subscribed in my presence by DENNIS NYSTROM, this 6<sup>TH</sup> day of June, 2016.

  
Notary Public  
My Commission Expires:

**CECILIA ANN JACOBSON**  
Notary Public, State of Michigan  
County of Oakland  
My Commission Expires Sep. 20, 2021  
Acting in the County of

**In Re Lane Street Groundwater  
Contamination Site, Elkhart, IN**

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STATE OF INDIANA        )  
                                  )        SS:  
COUNTY OF ELKHART    )

**AFFIDAVIT OF GENE THOMPSON**

Gene Thompson, being first duly sworn, deposes and states as follows:

1. I am over 18 years of age. I have personal knowledge of the facts contained in this affidavit, and I am competent to testify thereto.

2. I am currently employed by Dynamic Metals LLC (“Dynamic Metals”) as Director of Transportation Development. I have worked for Dynamic Metals since late April 2004 (except for a period between April 2011 through March 2014).

3. I began my career as a tool and die maker/machinist directly out of high school. I had several jobs at small companies in the Goshen/Elkhart, Indiana area before beginning employment with R.E. Jackson Company, Inc. (“REJCO”) at its location at 53217 Marina Drive in Elkhart, Indiana, in March 2000. I worked there continuously until Dynamic Metals bought the assets of REJCO in late April 2004.

4. Initially, I reported to Erv Fitzski, who was vice president of operations. Mr. Fitzski left in 2002 or 2003, at which point I reported directly to the owner of REJCO, Mr. Terry Shelly.

5. REJCO's primary business was fabricating steel and aluminum frames for windows and doors largely for the railroad industry, including diesel engines and passenger railcars. REJCO did not manufacture the window glass, but rather integrated glass produced from the outside to assemble finished metal-framed windows with rubber gaskets as the final product.

6. REJCO did no painting of window or door frames, except for very minor touch-ups using common canned spray paint. There was no paint/spray booth at the REJCO facility.

7. There was a hand-fabricated "water test tank" at the facility. It was used to spray water to test gasket seals on windows for certain customer contract specifications.

8. There was a small portable vapor degreaser (split 55 gallon drum) present at the facility when I began working there in March 2000. The degreaser was not being used much if at all when I arrived, and use was totally discontinued about six months after I arrived. The degreaser was disposed of in 2001 as scrap metal.

9. I do not know what degreaser was used, but I never saw any chlorinated solvents such as trichloroethylene (TCE) at the Facility at any time.

10. The REJCO facility used few chemicals. I have reviewed a handwritten list titled "Schedule 3.9," that seems to be a handwritten list of chemicals and quantities that were present at the Facility in April 2004 when the asset transaction occurred. I do not specifically recognize the handwriting on "Schedule 3.9" but it might have been Mr. Shelly's.

11. No chlorinated solvents were used at the REJCO Property just prior to the asset sale to Dynamic Metals, and none were listed on "Schedule 3.9."

12. The water test tank in particular was never operated by Dynamic Metals during the lease period.

13. Dynamic Metals bought the assets of REJCO in April 2004. I interviewed for a job with Dynamic Metals and was hired. However, not everyone who worked at REJCO was asked to interview for a position by Dynamic Metals, and only a handful of REJCO employees were ultimately hired by Dynamic Metals.

14. I understand that Dynamic Metals entered into a short-term lease for the REJCO Property with Mr. Shelly. Dynamic Metals' use of the REJCO Property was focused on transferring the purchased assets to its main facility in Elkhart. After the asset sale was finalized, Dynamic Metals began ramping down operations immediately. Dynamic Metals' operations were limited to closing out some of the open purchase orders for windows and doors, and related components.

15. After the asset purchase in April 2004, no chemicals in addition to those listed on Schedule 3.9 were ordered and received at the property.


16. Very few chemicals, if any, besides window cleaner, were used to finish the outstanding jobs.

17. All of the chemicals listed on Schedule 3.9 were either properly disposed or moved to the Dynamic Metals main location.

18. To my knowledge, Dynamic Metals never had anything further to do with the REJCO Property after the equipment was moved out.


FURTHER AFFIANT SAYETH NOT.



  
Gene Thompson

STATE OF INDIANA     )  
                                  )  
COUNTY OF ELKHART    )     SS:

Sworn to and subscribed in my presence by GENE THOMPSON, this 6<sup>th</sup> day  
of June, 2016.

  
Notary Public     RITA M. HOLTZ  
My Commission Expires:  
JANUARY 28, 2024  
ELKHART COUNTY

