

environment as in effect on the closing date of the Agreement "

The agreement further required both parties to acknowledge the SPA between Pneumo Abex and Whitman. As part of the asset purchase agreement, BFG received a copy of the SPA and was to comply with the SPA and the asset purchase agreement's indemnification provisions so that Pneumo Abex could in turn be indemnified by Whitman for certain environmental remediation expenditures.

On March 12, 1996, Pneumo Abex filed a complaint against BFG (Pneumo complaint) alleging that BFG violated certain indemnity terms of the asset purchase agreement. In it, Pneumo Abex claimed that BFG sought indemnification for environmental expenses that were outside the scope of the agreement. Specifically, Pneumo Abex alleged that BFG attempted to shift to Pneumo Abex the obligation to pay for a wide array of expenses associated with environmental activities that BFG had chosen to incur voluntarily and that were beyond the scope of "covered losses" enumerated in the indemnification provisions of the agreement.

Further, according to Pneumo Abex, BFG failed to notify it of environmental claims with reasonable promptness and specificity as *863 required under section 13.5 of the asset purchase agreement. In particular, section 13.5 of the agreement, which governed indemnification between the parties for certain environmental liabilities, required that either party, upon becoming aware of any environmental claim, was to notify the other party with reasonable promptness and reasonable specificity.

Pneumo Abex claimed that, in 1994, it began receiving communications from BFG vaguely describing various environmental conditions discovered at the Miami, Tullahoma, and Cleveland facilities. Beyond these vague communications, Pneumo Abex alleged that BFG failed to provide reasonable advance notice or an opportunity to monitor and/or consult on all proposed actions and failed to provide reasonable specificity of its claims in violation of the agreement. Specifically, Pneumo Abex alleged that BFG (1) failed to provide it with proposed work plans, draft reports, consultant correspondence, or work schedules so that field and sampling activities could be monitored by Pneumo Abex, (2) failed to advise or consult with Pneumo Abex concerning the anticipated selection of possible consultants, (3) withheld consultant's invoices and other invoices related to the claimed activities, risk assessment reports, data, and results of other remediation studies, and (4) supplied Pneumo Abex with information that was inconsistent and outdated.

The Pneumo complaint alleged that BFG sent Pneumo Abex letters on August 25, 1994, and October 27, 1994. The August 25, 1994, letter concerned a situation at the Miami facility regarding environmental permits but stated that the letter was "preliminary to any formal notification" for indemnification under the agreement. The October 27, 1994, letter contained a summary of the results of BFG's environmental reviews at the Cleveland and Tullahoma facilities for which BFG **301 ***107 sought costs to be shared under the agreement. However, Pneumo Abex alleged that the letter failed to explain the basis for BFG's belief that these remedial procedures were indemnifiable claims under the agreement.

The Pneumo complaint further alleged that Pneumo Abex requested in writing that BFG provide information relating to matters on which BFG sought indemnity. It informed BFG that, under the agreement, BFG could not pursue indemnification claims where advance notice had not been provided to Pneumo Abex. The Pneumo complaint claimed that, in response, BFG failed to provide Pneumo Abex with the required information, and furnished only limited information, all of which was provided months after the activities had been completed. According to Pneumo Abex, BFG's deliberate violation of the agreement prejudiced Pneumo Abex by, among other things, *864 "precluding Pneumo Abex from monitoring BFG's activities and/or from consulting with respect to actions taken." In a letter dated February 1, 1995, Pneumo Abex reiterated its concerns that BFG had disregarded the indemnification procedures outlined in the agreement and specifically requested that BFG specify any indemnification claims under the agreement. Four months later, BFG responded with a letter notifying Pneumo Abex of an alleged obligation to indemnify BFG for all investigative work performed to date and for all identified contamination, regardless of the cause or source or legal obligation. Pneumo Abex responded with two letters communicating that it could not acknowledge or disclaim any indemnification obligations without being supplied with the information contemplated by the agreement. On November 3, 1995, BFG responded stating that it had supplied sufficient information necessary to satisfy the terms of the agreement. In response to another letter from Pneumo Abex requiring more information, BFG sent a letter demanding payment in the amount of \$130,349.65.

Also in the Pneumo complaint, Pneumo Abex claimed that BFG's actions threatened its ability to seek indemnification from Whitman under the SPA. Section 13.5(f) of the agreement provided, in pertinent part "Buyer and Seller at all times shall use their reasonable