UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA and
STATE OF WISCONSIN,

Plaintiffs,

v. Case No. 10-C-910

NCR CORP., et al.,

Defendants.

ORDER APPROVING CONSENT DECREE

In this action, the United States and State of Wisconsin (the "governments") seek approval of a settlement they have reached with Defendant Georgia-Pacific Corp. ("GP") and entry of a consent decree relating to GP's liability for PCB contamination of the Fox River. Following publication in the Federal Register and receipt of comments, and after briefing of the issue in this Court, I am satisfied that the proposed settlement is reasonable.

I. Analysis

As all sides agree, review of proposed settlements is deferential, but not a rubber stamp. "In the first place, it is the policy of the law to encourage settlements. That policy has particular force where, as here, a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement." *United States v. Cannons Engineering Corp.,* 899 F.2d 79, 84 (1st Cir. 1990). Moreover, "[t]hat so many affected parties, themselves knowledgeable and represented by experienced lawyers, have hammered out an agreement at arm's length and advocate its embodiment in a judicial decree, itself deserves weight in the ensuing balance." *Id.*

The starting point for the settlement is the fact that GP has already paid some $83 million for response costs and damages at the Fox River Site. The proposed settlement requires GP to stipulate that it is liable for performance of all required work downstream from an artificial dividing line that was negotiated by GP and the governments. The site from which GP's predecessor companies polluted the river is known as the Green Bay West Mill, or the former Fort Howard facility. The negotiated line was drawn roughly 1,050 feet southwest, or upstream, of that facility. The reason for this is that, although almost all of the PCB contamination flowed *down*stream from GP's plant (to the northeast and into Green Bay), at some times currents exist in the river that pull water *up*stream. Because of this phenomenon, known as seiche, contaminated sediment can be deposited in the river bed upstream of the discharge site. GP has retained a consulting firm that opines that this effect resulted in less than 0.1% of contaminated sediment settling upstream of the Green Bay West Mill. This small amount could be expected to have settled in an area roughly 400 feet upstream of that facility, according to the consulting firm. The United States consulted its own expert from the Army Corps of Engineers in assessing GP's consultant's report. Although the United States believed the essence of the report was sound, it believed that an additional buffer would be reasonable to account for any uncertainties (as well as the fact that the firm was being paid by GP). Accordingly, the parties negotiated a line that was 1,050 feet upstream of the polluting facility. This, they believe, more than adequately accounts for the fact that some small amount of PCBs flowed upstream from GP's facility.

In addition, by stipulating to liability for sections of the river downstream of the negotiated line, GP is (according to the governments) "accepting liability for more than half of the total expected cost of the work in all of OU4 and OU5," for a total of $331 million. (Dkt. 77 at 22.) This

is despite the fact that GP was not the cause of half of the PCB pollution in those sections of the river. Although volume discharge estimates must be taken with a grain of salt (given the inherent uncertainty in the process and the length of time that has passed), various estimates pin between 15% and 44% of the PCB pollution on GP. NCR's and AP's own expert estimated that GP contributed 44% of the PCBs in a section of the river known as OU4B but none or very little in OU4A. (Dkt. # 92, Ex. 5, ¶ 12). Other projections by government entities produced estimates between 22.5% and 29-40%. Thus, even taking the numbers supplied by Defendants NCR and AP, the settling parties argue that GP is taking on a share of liability in excess of its actual discharge. They further note that the equities of the case (as discussed in the related *Whiting* action, No. 08-C-16), demonstrate that GP's actual culpability for the PCB problem is quite low in relation to that of NCR and AP.

In addition to accepting liability for OU5 and the lower portion of OU4 (downstream of the negotiated line), the settlement also requires GP to pay $7 million into a Wisconsin DNR account to help fund continued oversight of the project. The governments have estimated that there are $17 million in unreimbursed past costs, plus $28 million in future oversight costs, for a total of $45 million. The $7 million payment from GP represents 16% of that total. For all these reasons, the settling parties argue that the proposed settlement is fair and reasonable.

The chief opponents to the settlement are Defendants NCR Corp. and Appleton Papers, Inc. I have concluded in the related *Whiting* action that these parties bear overwhelming equitable responsibility for the PCB problem in the Fox River, and these parties have also opposed the government's other efforts at settlement. I will address their arguments below.

1. Proportionality to the Harm

The chief complaint brought by NCR and AP is that the proposed settlement minimizes GP's contribution to the PCB problem. Although the governments now estimate GP's contribution to the PCB problem at 15-20% (a figure also used in a 2004 settlement that Judge Adelman approved), NCR and AP argue that such a figure is much lower than previous estimates and has no technical data to support it.

NCR and AP essentially suggest that the 15-20% figure has come out of left field, but that is only true if we rely on the figures that NCR and AP have cherry-picked from the record. First, the fact that the 15-20% figure was "the most recent estimate" as far back as 2004 undermines the suggestion of NCR and AP that this is some kind of "sweetheart deal" engineered for GP's benefit. *United States v. Fort James Operating Co.,* 313 F. Supp. 2d 902, 908-909 (E. D. Wis. 2004). Moreover, as the governments note, a 1999 WDNR study found GP's share to be 22.51%, and a 2000 report pegged GP's responsibility at between 22 and 40%. (Dkt. 76-24 at 122; Dkt. 90-1 at 13.) Thus, there is plenty of support in this Site's long history to back a figure at least in the low-twenties. If the "actual" figure is, say, 22.5%, then it is certainly reasonable for the government to allow GP to enter into a settlement based on a slightly smaller amount. Although NCR and AP do not seem to appreciate the distinction between a settlement negotiation and liability established at trial, the result reached here represents a *quid pro quo* commonly allowed in order to encourage finality and save the expense and effort of further inquiry.

That said, the governments explain that more recent calculations, including those that supported the 15-20% figure in the 2004 settlement approved by Judge Adelman, have lowered the range further, to the point that their current estimate is that GP contributed some 38,000 kg of PCBs

out of a total of more than 230,000 kg, or 16 percent. NCR and AP vigorously protest that they have not seen any data to back that figure up, but in fact the 16 percent figure is perfectly consistent with AP and NCR's own expert. Their expert concluded that GP was liable for 44% of the PCBs in OU4B and 0% liable for OU4A. These two subsections of the Site account for the overwhelming majority (the government says 91%) of all the residual PCB mass at the entire Site: Section OU4A (the section in which GP was not liable at all) contains 54% of the Site's sediment while OU4B (for which GP is 44% liable) contains 37%. Based on these figures, GP's share may be estimated by multiplying 44% (GP's estimated share of OU4B) by 37% (OU4B's share of the total sediment), which produces a figure of 16.3%. In plain English, that means GP contributed slightly less than half of the PCBs to a section of the Site that constitutes slightly more than one-third of the total contamination.[1]

The figure proposed by the government, a party with expertise and operating at arm's length, is a reasonable one. The demand by NCR and AP for more discovery would be more persuasive if the figure had indeed come from left field or stood in sharp contrast to liability estimates. But because the number is supported by other estimates in the record, and is consistent with the objectors' own expert, I conclude that more discovery is not required. The purpose of these proceedings is not to ascertain a perfect answer, it is to determine whether a proposed settlement

[1]In a sur-reply brief, AP and NCR protest that the government has mischaracterized their expert's report. That is not true. The expert report concluded that upstream sources contributed 38% of the PCBs to OU4A, while OU4A sources contributed the other 62%. (Dkt. # 76, Ex. 1 at 20.) That means that the entirety of OU4A pollution arrived from sources other than GP. Although it is true that the expert noted the seiche effect and some evidence that PCBs may have flowed upstream, there is no suggestion in his report that these amounts would materially alter his conclusion. In other words, none of the cautionary, preliminary language in the report would cause one to conclude that the seiche issue was anything more than a small detail that might have accounted for a percent or two.

is a reasonable effort to obviate the need for finding a perfect answer. By their very nature, settlements cut off further inquiry partly because the expense and effort such an inquiry might require would outweigh any benefit achieved. Here, I conclude that the number the governments now propose is consistent with multiple sources in the record and is therefore reasonable. And to the extent it might slightly underestimate GP's liability, that is a reasonable *quid pro quo* for obtaining settlement.

2. Upper OU4

NCR and AP also object to the settlement on the grounds that it relieves GP of liability for any portion of the Upper OU4 expenses (the area upstream of the dividing line). NCR and AP note that it is undisputed that, due to the seiche, *some* portion of GP's PCB releases traveled upstream. Thus, in their view it does not make sense to let GP off the hook for that portion of the river.

As noted above, however, the amount of PCB contamination that flowed upstream from the GP mill is minuscule. The governments credit GP's consultant, who concluded that 99.9% of its PCBs remained in lower OU4 rather than flowing upstream. Even if that figure were off, however, there is no serious reason to attribute environmental damage in upper OU4 to GP given the minute amounts involved. As noted above, GP is paying its fair share (or more than it) for lower OU4. And, as the governments point out, this is not an academic exercise in attributing blame – it is a proceeding to approve a *settlement.* By their nature, settlements involve judicious and reasoned compromises. NCR's and AP's expert, Dr. Jones, has questioned the government's figures (Roach Decl., Ex. 7), but his analysis does not undermine the central fact that, although the seiche may be an interesting phenomenon, in this case it is little more than a footnote. Even the aerial photographs provided by NCR and AP do not show upstream discharges going all the way to the Highway 172

bridge (the dividing line NCR and AP propose) – they appear instead to show upstream discharges limited to within the negotiated line's 1,050-foot buffer. To hold up a settlement based on unknown but clearly minor amounts of PCBs that may have flowed backwards would undermine the very purpose of settlement.

3. Other Objections

NCR and AP also suggest that accepting the proposed settlement would create an "orphan share" of liability that would ultimately be borne by the public. They also contend that entry of the consent decree would reward GP for its past history of ignoring administrative orders and failure to fund various cleanup efforts.

On this latter point, the fact is that very few PRPs have a relationship with the Site that can be described as altruistic. Given the complexities of this case and the relative culpability of numerous other parties, it is not surprising that some companies have not voluntarily participated in cleanup efforts. That said, there is nothing to suggest that GP has been intransigent or obstructive to the cleanup process. In engaging in settlement talks, the governments make judgments roughly analogous to those a prosecutor makes when he considers a criminal defendant's cooperation. In such matters, the governments have tremendous leeway to identify possible settlement candidates and negotiate with them. The premise of AP's and NCR's objection is that the past actions of some parties should bar them from settlement altogether (or at least require some enhanced penalty), but they have not cited any authority for such principles. Absent some unusual circumstance, a court will not second-guess a settlement based on the past conduct of a settling party. The question is whether the settlement is reasonable *today*, and thus proceedings like this one are not an invitation to engage in extended investigations of what happened in the past.

As for the possibility of an orphan share, I am satisfied that the reasons cited by the governments suffice to make that possibility an unlikely one. The premise of AP and NCR, of course, is that GP would have agreed to pay more here if only the governments had driven a harder bargain. That is merely speculation, however. I must assume that the settlement proposed here represents the best deal the governments were able to obtain. The governments are the representatives of the taxpayers, who would bear an orphan share, and this reasonable settlement is a well-judged effort to obtain payment from one of the PRPs.

4. Taking

Finally, NCR and AP object that entry of the consent decree would eliminate their ability to obtain contribution from GP for their cleanup expenses. This, they assert, would be an unconstitutional taking because their contribution claims are vested property interests.

This argument is really an objection to CERCLA itself more than anything else. The "claim" AP and NCR have is one that was created by CERCLA, and in a nutshell CERCLA says PRPs may bring contribution claims against other PRPs *so long as* that PRP has not settled with the government. Section 113(f)(1) creates the right to contribution, but § 113(f)(2) restricts that right by providing that "A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9613(f)(2). Reading CERCLA as creating a "vested" property right in a contribution claim would allow PRPs to foreclose the government's ability to settle with other PRPs by making the viability of such settlements contingent on when one of the PRPs filed its contribution lawsuit. That is, in NCR's and AP's view, once it decided to file a lawsuit for contribution, no more settlements could occur. Allowing

PRPs to drive the bus in cleanup actions is surely a novel principle, and one which finds no support in the case law. In short, if anything is "vested" about NCR's and AP's contribution claim, it is merely that it has a right to such a claim *subject to* § 113(f)(2)'s provision eliminating such claims if the PRP has settled with the government. In *United States v. BP Amoco Oil PLC,* the PRP filed a contribution action in 1997 and the consent decree was lodged in 1999. 277 F.3d 1012 (8th Cir. 2002). The district court rejected the PRP's argument that entry of the consent decree (which would bar the preexisting contribution claim) constituted a taking, and the Eight Circuit affirmed. The PRP "never had a vested property interest to be taken" because the contribution right is "subject to and limited by § 9613(f)(2)." *Id.* at 1017. The same holds true here.

5. Motion to Compel

As noted above, AP and NCR have filed a motion to compel production of documents and to supplement the administrative record. I have explained above why I do not believe further discovery is required. To summarize: the objection raised by NCR and AP would, if accepted, undermine the entire purpose of settlement. As the governments recognize, in a case like this a quest for some sort of scientific perfection would be so costly and time-consuming (and even quixotic) that the expenses and time incurred would outweigh any benefit achieved by any more accurate figures. And, of course, such figures would be vigorously contested on all sides, with equally impressive experts, just as they are now. In the *Whiting* case, I concluded that further inquiry was not required, or even advisable, because *any* of the figures that further discovery might plausibly support would have produced the same result in equity. More discovery would have been wasteful. The same is true here. There is no reason to believe that further inquiry into the exact amounts of discharge would materially change the result.

II. Conclusion

For the reasons given above, the proposed settlement is substantively and procedurally reasonable and is consistent with the purposes of CERCLA. The motion to approve the consent decree is hereby **GRANTED**. The motion to file a sur-reply is **GRANTED**. The motion for leave to file a reply is **GRANTED**. The motion to compel is **DENIED**.

SO ORDERED this 4th day of April, 2011.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES and
STATE OF WISCONSIN,

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Defendants.

ORDER

Settling Defendant Georgia-Pacific Consumer Products LP ("Georgia-Pacific") has paid $7,000,000.00 into a Court Registry Account as prescribed by a Consent Decree that was lodged with the Court (Dkt. 2-1) and a subsequent Order entered by the Court (Dkt. 29). The Court approved and entered that Consent Decree on April 4, 2011 (Dkt. 130). The Plaintiffs, acting on behalf of the Environmental Protection Agency ("EPA") and the Wisconsin Department of Natural Resources ("WDNR"), have now filed a Motion asking the Court to authorize the disbursement of Georgia-Pacific's payment (plus accrued interest) to Plaintiffs, as envisioned by that Consent Decree. With the assent of the United States and the State, Georgia-Pacific's payment currently is invested in a 30-day Treasury Bill that matured on June 2, 2011.

NOW, THEREFORE, in light of the Plaintiffs' Motion, and good cause appearing, **IT IS HEREBY ORDERED**:

1. Consistent with Paragraph 9 of the Consent Decree, the $7,000,000 that Georgia-Pacific paid into a Court Registry account (and all accrued interest on that deposit) shall be disbursed to the Plaintiffs. The settlement proceeds shall be applied as follows:

a. $6,000,000 shall be deposited in a Site-specific account to be established by WDNR, to be retained and used to conduct or finance response actions at or in connection with the Lower Fox River and Green Bay Superfund Site (the "Site").

b. $1,000,000, plus all accrued interest earned on all funds deposited in the Court Registry Account, shall be deposited in EPA's Lower Fox River and Green Bay Superfund Site Special Account within the EPA Hazardous Substance Superfund, to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

2. The Plaintiffs shall provide the Financial Manager in the Clerk's Office account information and payment instructions to facilitate the Court Registry Account disbursements described above.

3. Pursuant to 28 U.S.C. § 1914(b) and the Judicial Conference Schedule of Fees, no fees shall be charged for services rendered on behalf of the United States in conjunction with this use of a Court Registry Account.

Dated this 20th day of June, 2011.

/s William C. Griesbach
William C. Griesbach
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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DECISION AND ORDER

The United States has moved for a preliminary injunction to require Defendants NCR Corporation and Appleton Papers Inc. ("AP") to comply with a recent EPA directive that they complete sediment remediation in the Fox River at a rate substantially similar to remediation accomplished in past years. The motion is a reaction to submissions made to the government in which the Defendants have articulated their reasons for undertaking substantially less work this year. For the reasons given below, the motion will be denied.

I. Background

NCR and Appleton Papers have been performing river remediation activities in the Fox River for several years. At issue presently is work performed pursuant to a unilateral administrative order (UAO) issued by the EPA in 2007. The UAO requires the dredging and disposal of some 3.5 million cubic yards of contaminated sediment, as well as the creation and installation of caps and the use of sand to cover PCB-laden riverbed sediment in some areas. In 2009, NCR and AP created an LLC to perform the work. The LLC entered into a long-term contract with a company called

Tetra Tech to perform most of the remediation required under the UAO. In 2009 the company dredged roughly 550,000 cubic yards of material, and in 2010 it dredged about 743,000 cubic yards. The 2010 figure exceeded expectations substantially, and many involved in the process were generally pleased by the pace of the project.

By early 2011, however, AP and NCR began indicating that they wanted to scale back the project. This development likely arose because of several unfavorable rulings they had received from this Court, which had dimmed their hopes of recouping the costs they were expending in the cleanup effort. The EPA did not approve the AP/NCR plan for 2011, which called for dredging of some 250,000 cubic yards, but instead issued a modified work plan requiring the accomplishment of several specific benchmarks in different operating units, including the dredging of between 605,000 and 810,000 cubic yards in certain areas of OU4 and other specified areas. In the EPA's view, continuing the project at full bore is required in order to remove the most contaminated sediment and restore the river to its natural state. It points to the success of Little Lake Butte des Morts, where dredging recently concluded, and notes that a typical walleye caught there is now considered safe for human consumption.

II. Analysis

To justify a preliminary injunction, a plaintiff must show that it is likely to succeed on the merits, that it is likely to suffer irreparable harm without the injunction, that the harm it would suffer is greater than the harm that the preliminary injunction would inflict on the defendants, and that the injunction is in the public interest. These considerations are interdependent: the greater the likelihood of success on the merits, the less net harm the injunction must prevent in order for preliminary relief to be warranted. *Judge v. Quinn,* 612 F.3d 537, 546 (7th Cir. 2010).

A. Likelihood of Success on the Merits

The government argues it is highly likely to succeed on the merits of its UAO enforcement claim: NCR and AP are unquestionably liable for the contamination in OU2-OU5, and the cleanup remedy selected by the EPA and imposed by the UAO is amply supported.

1. Divisibility Defense

AP and NCR raise a number of arguments suggesting that the government has a low likelihood of success on the merits. Their chief focus is their divisibility defense. As discussed in other decisions in this and related actions, AP and NCR believe the harm caused to the Fox River is divisible in a number of ways. If they can show that they are responsible only for discrete portions of the river, measurable volumes of PCB pollution, or specific kinds of PCBs, then they believe they are not subject to the standard joint and several liability under CERCLA but are liable only for that portion of the harm that the court apportions to them. They believe their proper share of apportioned liability is low (or in AP's case, nonexistent). As such, if they are found liable only for a small, divisible, portion of the harm, then they should not be made to comply with the EPA's modified work plan.

The Seventh Circuit has described divisibility as "the exception . . . not the rule," *United States v. Capital Tax Corp.,* 545 F.3d 525, 535 (7th Cir. 2008), and divisibility is "a rare scenario." *Metropolitan Water Reclamation Dist. of Greater Chicago v. North American Galvanizing & Coatings, Inc.,* 473 F.3d 824, 827 (7th Cir. 2007). The divisibility defense was given new life, however, by the Supreme Court's 2009 decision in *Burlington Northern and Santa Fe Railway Co. v. United States,* 129 S.Ct. 1870 (2009). In that case, which bears some extended discussion, Burlington Northern's predecessor railroad owned about an acre of land that it leased to B&B, a

chemical business. B&B also operated its own adjacent site, which was 3.8 acres. Over many years, three different harmful chemicals leaked into the groundwater, resulting in remediation efforts and significant cleanup expenses. In an action brought by the government, the district court accepted the railroad's divisibility argument and found that the railroad was only liable for 9 percent of the harm at the site. The Supreme Court described the district court's analysis as follows:

> The District Court calculated the Railroads' liability based on three figures. First, the court noted that the Railroad parcel constituted only 19% of the surface area of the Arvin site. Second, the court observed that the Railroads had leased their parcel to B & B for 13 years, which was only 45% of the time B & B operated the Arvin facility. Finally, the court found that the volume of hazardous-substance-releasing activities on the B & B property was at least 10 times greater than the releases that occurred on the Railroad parcel, and it concluded that only spills of two chemicals, Nemagon and dinoseb (not D-D), substantially contributed to the contamination that had originated on the Railroad parcel and that those two chemicals had contributed to two-thirds of the overall site contamination requiring remediation. The court then multiplied .19 by .45 by .66 (two-thirds) and rounded up to determine that the Railroads were responsible for approximately 6% of the remediation costs. "Allowing for calculation errors up to 50%," the court concluded that the Railroads could be held responsible for 9% of the total CERCLA response cost for the Arvin site.

Id. at 1882.

To paraphrase, the district court found a small share of liability because Burlington Northern had only owned a small portion of the site; it had owned it for less than half of the time period during which the chemicals were spilled; and the railroad property only had spills of two of the three chemicals found at the site.

In upholding the district court's analysis, the Supreme Court seemed moved by the fact that the site was not an area with uniform levels of pollution. Instead, the land was sloped towards a sump and a pond, and those areas, which were *not* on railroad property, contained the bulk of the pollution. "[T]he primary pollution at the Arvin facility was contained in an unlined sump and an

unlined pond in the southeastern portion of the facility most distant from the Railroads' parcel and that the spills of hazardous chemicals that occurred on the Railroad parcel contributed to no more than 10% of the total site contamination . . . some of which did not require remediation. With those background facts in mind, we are persuaded that it was reasonable for the court to use the size of the leased parcel and the duration of the lease as the starting point for its analysis." *Id.* at 1883.

The Supreme Court also upheld (albeit tepidly) the district court's conclusion that because one of the three chemicals on-site was not spilled on railroad property, the railroad should only be liable for two-thirds of the harm (in combination with the other multipliers the district court used). Even so, the Court recognized that the district court's underlying assumption might have been flawed. Specifically, the lower court had concluded that because two out of three chemicals had been spilled on railroad property, the railroad should be assessed a liability calculator of 66% (two-thirds). (Or, looked at another way, it received a one-third liability "discount.") But there had not been any evidence that the actual *harm* was so easy to calculate. Suppose there had been 50 spills of Chemical A, 40 spills of B, and 10 spills of C at the site. If Chemical C was the one that had not been spilled on railroad property, it would not make sense to reduce the railroad's liability by one-third when Chemical C only accounted for 10 percent of the total spills. Similarly, the different chemicals could have had different environmental impacts: a spill of one could be ten times more dangerous than another.

The Supreme Court got past these issues because the district court had added a 50% uncertainty factor to its analysis. Thus, it ultimately increased the railroad's liability to 9% (from 6%), and this factor cancelled out any error it may have made in the analysis described above. As such, the Supreme Court found the error harmless because the overall result (9% liability) was

sound and could be reached without application of the district court's dubious one-third "discount."

NCR and AP argue that the comparison to *Burlington Northern* is strong. They concede at the outset that because discovery on divisibility issues has not yet occurred (which to them is a reason for denying the motion for preliminary relief) we do not yet have a clear picture of the relative amounts of pollution caused by the different parties. Even so, based on preliminary evidence, it is clear that we have a number of PRPs who deposited distinct and potentially ascertainable amounts of PCBs into the Fox River. Thus, the divisibility argument may be addressed even though fully-developed figures are not before me.

a. Divisibility Based on Volume of PCB Discharges

Courts have recognized that § 433A of the Restatement of Torts is the starting point for a divisibility analysis, and NCR and AP argue that the examples found therein match the circumstances we have here. To illustrate their point, I cite three similar examples found in the Restatement.

> 3. Five dogs owned by A and B enter C's farm and kill ten of C's sheep. There is evidence that three of the dogs are owned by A and two by B, and that all of the dogs are of the same general size and ferocity. On the basis of this evidence, A may be held liable for the death of six of the sheep, and B liable for the death of four.
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> 4. Through the negligence of A, B, and C, water escapes from irrigation ditches on their land, and floods a part of D's farm. There is evidence that 50 per cent of the water came from A's ditch, 30 per cent from B's and 20 per cent from C's. On the basis of this evidence, A may be held liable for 50 per cent of the damages to C's farm, B liable for 30 per cent, and C liable for 20 per cent.
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> 5. Oil is negligently discharged from two factories, owned by A and B, onto the surface of a stream. As a result C, a lower riparian owner, is deprived of the use of the water for his own industrial purposes. There is evidence that 70 per cent of the oil has come from A's factory, and 30 per cent from B's. On the basis of this evidence, A may be held liable for 70 per cent of C's damages, and B liable for 30 per cent.

Rest. (2d) Torts, § 433A cmt. d.

Although the Defendants' analogy to these illustrations has some ostensible attraction, the analogy does not bear closer scrutiny. One principal distinction is that in the examples above, the damaged party was a private party who suffered private damages: dead sheep, a flooded farm, and loss of water use. A related distinction is that the private party's damages increased in direct proportion to the defendant's tortious activities. For example, the more hungry dogs A and B allowed loose, the more dead cattle and the more financial loss suffered by the cattle owner. And as A, B and C released more water, the farmer's land became more flooded, increasing his loss. In short, the damages in the examples increased in direct proportion to the number of dogs or amount of water released. Because of this proportional relationship between the defendants' activities and the damage sustained, it makes sense to divide liability along the same lines.

Instead of a dispute between private individuals suing about damages, this is an enforcement action brought by the government to require the Defendants to pay for the cleanup of the river. This cleanup, and its attendant costs, have little in common with the scenarios described above. In particular, the cost of the cleanup bears little relation to the relative volume of PCBs released into the River. For example, suppose that dredging one square foot of sediment from the river bed costs one dollar. It will cost roughly that same dollar whether the PCB levels are 20 parts per million or 200 parts per million. The sediment has to be sucked off the river bottom by a specially equipped barge and disposed of properly.[1] Transportation of the dredged material adds to the cost, and that cost is based on distance and volume rather than PCB concentration. Although the volumes of

[1]There are admittedly some differences in disposal costs when PCB concentrations exceed 50 parts per million, but overall the cost of cleanup is not largely dependent on relative PCB contamination.

PCBs discharged obviously have some correlation with the extent of the costs, the relationship between volume and cost of cleanup is a loose one. As such, apportioning liability based on volumes would not be advisable.

It is worth taking a detour to explore the premise of the government's argument. Implicit in my analysis so far is that the"harm" at issue here is the *cost* required to clean up the river. After all, this is not a case about the environment or pollution in the abstract, but about who should *pay* for cleaning up the Site. These cleanup costs – not the pollution itself – are what is subject to apportionment, and if these costs do not have a strong causal link with pollution volume, then there would seem to be little reason to apportion them on that basis. There is some precedent for this approach. *See Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.,* 746 F.Supp.2d 692, 738 (D.S.C. 2010) ("A method [of apportionment] that does not take . . . the cost of the remediation into account does not reasonably account for the harm at the Site."); *Chem-Nuclear Systems, Inc. v. Bush,* 292 F.3d 254, 260 (D.C. Cir. 2002) (finding that, to show divisibility, party must prove "the amount of the harm that it caused" was less than $7,660,315 worth of cleanup costs).

The divisibility cases before and after *Burlington Northern* do not generally focus on the harm's relationship to cleanup costs, however. Instead, they treat the divisibility issue as though the "harm" to be divided is the actual, physical pollution at issue: the plume of oil, the contaminated river, or the land itself. That is, many cases treat the divisibility question as a matter of whether the pollution in question can actually be divided, rather than whether the *cost* of cleaning up the pollution is separable based on geography or volume. This could be because in a typical divisibility case it is simply assumed that more pollution equals more cleanup cost, and that is surely a reasonable assumption in most cases, particularly when the pollution involves a discrete piece of

land or geographically distinct areas. But it could also be because CERCLA cases rely on divisibility considerations imported from the Restatement of Torts and the private injury paradigm, which do not translate perfectly to the CERCLA context. In short, cleaning up a polluted site is different than compensating a cattleman for his poisoned cows. As noted above, in a CERCLA enforcement action the plaintiff (the United States) is not seeking to be compensated for the value of the property it lost, it is seeking either to be compensated for its own cleanup efforts or (as here) to require others to undertake such efforts. Ultimately, the divisibility question is a causation question, and when the case is about cleanup we should be concerned with assessing to what extent the parties' behavior caused the cleanup expenses rather than which parties caused the pollution itself. Although in many cases the two questions have identical answers, here the cleanup expenses are not reasonably correlated with the volumes of pollution each party contributed. Thus, I agree with the United States that the "harm" at issue in this action is the cleanup cost, and I conclude that these costs are not reasonably divisible on the basis of volume.

But even if I were to view the "harm" here as the pollution itself, rather than the costs of cleaning it up, I would still conclude that the Site is not divisible based on volume. I reach this conclusion because, as with the cleanup costs, the extent and nature of the environmental harm in the River is not easily correlated with volumes of PCBs discharged by the various parties. Instead, numerous factors independent of the volume of pollution have affected the Site. First, I note that vast quantities of PCBs have flowed downstream and into Green Bay and Lake Michigan. We do not know exactly how much, of course, but the EPA has estimated the figure at 160,000 pounds:

> It is estimated that some 160,000 pounds of PCBs have already left the Fox River and entered Green Bay and Lake Michigan. On average, 300 to 500 additional pounds are flushed from the Lower Fox sediment each year. Floods would flush

> additional thousands of pounds into Green Bay. Once PCBs are released into the bay and Lake Michigan, they are extremely difficult, if not impossible, to recover. In addition, countless amounts of PCBs have been released into the air as well.

(*See* http://www.dnr.state.wi.us/org/water/wm/foxriver/sites/depositn.html, last visited July 5, 2011.)

Whatever the exact figures are, it is undeniable that what's left in the River bottom *now* (the problem to be addressed by the cleanup) is not necessarily representative of the pollution that was released into the River decades ago during the period that carbonless copy paper was produced. The harm, in other words, is not a stable, stationary site but a dynamic one. The sediment that is currently at the bottom of the River is in many ways just a snapshot of the pollution that has persisted, often by the mere happenstance of river depth, currents, etc. Moreover, geography and the flow of the river over 50 years have created a variety of different areas requiring remediation. Some of these areas may be capped, while others must be dredged. The depth of the sites and their location largely control these decisions. These independent factors preclude an apportionment analysis that is based primarily on the volumes of PCBs that the parties discharged.

This conclusion is borne out by analogy to other examples from the Restatement. Illustrations 14 and 15 use the same river example described above, but impose joint and several liability because the damages were not dependent on the relative volumes of the oil discharged. Instead, independent factors played a role in causing the harm:

> 14. A Company and B Company each negligently discharge oil into a stream. The oil floats on the surface and is ignited by a spark from an unknown source. The fire spreads to C's barn, and burns it down. C may recover a judgment for the full amount of his damages against A Company, or B Company, or both of them.
>
> 15. The same facts as Illustration 14, except that C's cattle drink the water of the stream, are poisoned by the oil and die. The same result.

Rest. (2d) Torts, § 433A, cmt. 1, illus. 14, 15.

The key point in these examples is that the occurrence of the harm – the burned barn, the dead cattle – is *not* dependent on the volumes of oil polluted into the river. (Or at least it is not well-correlated with volume.) For example, if B had discharged only *half* the oil into the stream, presumably the barn would still have burned and the cattle would still have poisoned. And even if A polluted 90% of the oil and B polluted only 10%, it is possible that, due to the vagaries of dispersal of oil on a river, it was B's oil that actually ignited and caused the damage. The occurrence of independent events means we cannot reasonably conclude that either A or B actually caused the harm, and so joint and several liability is appropriate.

The overarching point is that divisibility allows a party to be liable only "for the portion of the total harm that he has himself caused." *Burlington Northern,* 129 S. Ct. at 1881 (emphasis added). Here, even if it could be determined that NCR and AP contributed, say, 25% of the PCBs into the river, there would not be a reasonable basis to further conclude that they only caused 25% of the harm. This is because the harm is the cost of remediation itself, and this is only loosely based on the actual PCB contributions of NCR, AP and the numerous other parties. And even if the harm is the actual pollution in the riverbed, independent factors and the passage of time have precluded our ability to conclude that any specific party caused given portions of harm. For these reasons, I conclude that NCR and AP have a low likelihood of success in meeting their burden to show that the harm is divisible on the basis of the companies' volume of PCB discharges.

b. Divisibility Based on Geography

NCR (but not AP) also argues that there is a basis for dividing OU4, which is the largest area of the river and the most expensive to remediate, on the basis of geography. Its expert, Dr. John

Connolly, argues that when a particular area of the river is found to have much higher concentrations of PCBs in it, compared to the area immediately upriver of that location, that signifies the presence of a new, independent source of contamination. The contribution of the new source can be measured by measuring the increased contamination. Dr. Connolly opined, based on core samples and Aroclor comparisons between different sites, that in OU4, upriver sources contributed 38% of the total PCBs in OU4A and 22% of the total PCBs in OU4B. The rest of the contamination in OU4 came from sources local to OU4 itself. Thus, he believes the contamination is divisible on the basis of geography. (Dkt. # 142 at ¶¶ 8-11.)

Even accepting Connolly's calculations, however, the divisibility argument suffers from the same problem identified above. Specifically, NCR has done nothing to link the cost of cleaning up OU4 to the specific amounts and locations of the PCB pollution. Even if it were true that upriver sources only contributed 38% of the total PCBs in the area known as OU4A, for example, that does not translate into the conclusion that such sources should only be liable for 38% of the cost of cleaning up that part of the river. As noted above, the cost of remediating a given section of the river is not directly dependent on the level of contamination, as many of the costs are fixed (dredging, transportation), and others are based on other independent factors. It might be another story if NCR could identify sections of the river into which its PCB discharges simply never flowed at all (for example, OU1, but that is not at issue here). In such a case, geographical divisibility could make sense because it is simple enough to measure the costs of cleaning up area A versus area B. "Typically, this will involve showing that the 'site consists of non-contiguous areas of soil contamination.'" *United States v. Capital Tax Corp.,* 545 F.3d 525, 535 (7th Cir. 2008) (quoting Hercules, 247 F.3d at 717-18 (quotations omitted)). But here, NCR's own expert concedes that

substantial quantities of its PCB discharges made their way into OU4. Thus, there are likely numerous sections of OU4 that would need to be cleaned up even if the other polluters had never existed. Other areas need to be capped or dredged (at different costs) based on how deep and how contaminated the sediment is. In sum, the geography argument is really just a twist on the volumetric argument. As such, I conclude that NCR would have little likelihood of success showing that areas of the river into which its PCBs flowed are separable on the basis of geography.

2. The Remedy

NCR and AP also argue that the United States has a low likelihood of showing that the remedy selected by the EPA is not arbitrary and capricious. In particular, they argue that dredging – as opposed to capping and sand covering – is a more expensive and potentially environmentally harmful remedy. In addition, they also argue that the EPA should have used a ROD amendment to account for cost increases between 2007 and the present rather than the more recent "Explanation of Significant Differences" ("ESD").

I address the procedural objection first, keeping in mind that the EPA is afforded substantial deference in construing its own regulations. Here, the regulations provide for two alternatives when a remedy requires significant changes:

> (2) After the adoption of the ROD, if the remedial action or enforcement action taken, or the settlement or consent decree entered into, differs significantly from the remedy selected in the ROD with respect to scope, performance, or cost, the lead agency shall consult with the support agency, as appropriate, and shall either:
>
> (i) Publish an explanation of significant differences when the differences in the remedial or enforcement action, settlement, or consent decree significantly change but do not fundamentally alter the remedy selected in the ROD with respect to scope, performance, or cost. To issue an explanation of significant differences, the lead agency shall:

> (A) Make the explanation of significant differences and supporting information available to the public in the administrative record established under §300.815 and the information repository; and
> (B) Publish a notice that briefly summarizes the explanation of significant differences, including the reasons for such differences, in a major local newspaper of general circulation; or
>
> (ii) Propose an amendment to the ROD if the differences in the remedial or enforcement action, settlement, or consent decree fundamentally alter the basic features of the selected remedy with respect to scope, performance, or cost.

40 C.F.R. § 300.435.

To summarize: under subsection (i), the agency may issue an explanation of significant differences if the differences "do not fundamentally alter the remedy selected in the ROD with respect to scope, performance, or cost." But under subsection (ii), an amendment to the ROD is required if the differences *do* "fundamentally alter the basic features of the selected remedy." (An amendment to the ROD requires a number of additional procedural steps, including a further round of public comment.)

Here, the government states that the changes, which resulted from additional data derived from subsequent design work, resulted in a 62% increase in the remedy cost estimate. In the outside world, a 62% increase in cost projections is exceptionally large, but that is not necessarily true here. In its ESD, the EPA explained its decision to use an ESD rather than a ROD amendment. (Dkt. # 147, Ex. 1 at 15.) Specifically, it explained that cost estimates have an expected accuracy range of -30% to +50% – in other words, a large built-in uncertainty factor. Because the +62% increase was close to the actual expected range, the additional 12% above the uncertainty factor was relatively minor. As such, although it was undeniably a significant difference in cost, the EPA did not believe it fundamentally altered the remedy because it was close to the expected range. Given the deference

owed to such determinations, I conclude that the government has a strong likelihood of succeeding in showing that it followed proper procedures in making the proposed changes.

As for the "merits" of the remedy, I reach the same conclusion. The capping-versus-dredging debate has been waged for a long time, and the EPA has explained at length why it has chosen to require dredging in some areas and allow the less expensive capping in others. Dredging has the obvious benefit of getting the PCBs out of the River entirely, whereas capping may be more appropriate when, for example, the PCBs are buried beneath clean sediment. NCR and AP's preferences for the less expensive option are clear, but these are merely preferences. They do not come close to showing that the EPA's decisions on these matters are arbitrary or capricious.

B. Irreparable Harm

NCR and AP also argue that the government has not shown that it or the public will suffer irreparable harm if the preliminary injunction is not issued. First, they argue that they are essentially being penalized for having performed ahead-of-schedule in previous years. In particular, last year (2010) was a record year for dredging, which means the cleanup project will not fall behind original projections if the preliminary injunction is denied. Moreover, they have agreed to spend some $50 million on cleanup costs this year and the cleanup effort is currently active (albeit not at the pace preferred by the government). The bottom line, they argue, is that even at the government's proposed pace, there will still be PCBs in the river at the end of 2011. As such, the government cannot say that the public will be harmed by any reduction in the pace of the cleanup.

It is true that the PCB problem will not be solved this year, regardless of the pace of cleanup. But it should go without saying that any significant reduction in pace in one year will forestall the full remediation of the problem in the future. Under the government's proposal, substantially more

dredging will be undertaken this year, which means the public will benefit from the full cleanup sooner. Depriving the public of that benefit is certainly irreparable harm. After all, we are not talking about picayune disputes at the margins of the cleanup effort but a fundamental difference involving hundreds of thousands of cubic yards and up to $44 million dollars. In addition, reduction in PCB levels, even if not a complete reduction, result in a safer river. People continue to eat fish from the Fox River despite warnings to the contrary, and the public health will thus be improved by entry of an injunction. Provided that the remedy proposed meets with the regulatory requirements addressed above, an injunction requiring an increased pace in river cleanup is clearly directed to avoiding the irreparable harm caused by continued exposure to PCBs.

C. The Relief Sought

1. Liability of Appleton Papers Inc.

Although the liability of NCR has not been contested, Appleton Papers argues that its own liability under CERCLA has not been established and that the government will have difficulty showing that it is liable as a successor in interest. Understanding its argument requires a brief corporate history. The PCBs at issue here were released into the Fox River by a plant in Appleton, owned by Appleton Coated Paper Company ("ACPC"), and at Combined Locks, a facility then owned by Combined Papers Mills, Inc. These two companies were merged into a company called Appleton Papers, Inc. (with a comma, a different entity than the Defendant of the same name), and that company was then merged into NCR in 1973.

In 1978 a company called Lentheric, Inc. bought the Appleton and Combined Locks plants from NCR. Lentheric then changed its name to Appleton Papers Inc., which is the Defendant here. Although the purchase of those plants was an asset purchase rather than a corporate stock purchase,

the buyer (i.e., the present Defendant) did agree to assume several of the plants' liabilities from the seller. As part of the asset purchase agreement, the future Appleton Papers Inc. agreed that it would "assume, pay, perform, defend and discharge, if and when due, to the extent not paid, performed, defended or discharged prior to the Closing Date," all of the following:

> all of Seller's obligations and liabilities of any kind, character or description relating to the period subsequent to the Closing Date, which are not known to Seller on the Closing Date, with respect to the compliance of the assets, properties, products or operations of APD [NCR's Appleton Papers Division] with all governmental laws, ordinances, regulations, rules, and standards; ...
>
> all of Seller's liabilities ... whether accrued, absolute, contingent, or otherwise ... whether asserted or not and whether arising from transactions, events or conditions occurring prior to or after the Closing Date, with respect to compliance of the Property ... with all applicable federal, state and local and other governmental environmental and pollution control laws, ordinances, regulations, rules and standards.

(Dkt. # 139, Ex. 3 at 17-21.)

As suggested above, when a company buys assets, rather than stock, it is not generally assuming the liabilities of the seller. In some cases, however, an asset-buying company may be held liable under CERCLA as a successor. *United States v. General Battery Corp., Inc.,* 423 F.3d 294, 305 (3d Cir. 2005); *United States v. Mexico Feed and Seed Co., Inc.,* 980 F.2d 478, 487 (8th Cir. 1992). The successor liability doctrine reflects courts' belief that, in enacting CERCLA, Congress did not want to "leave a loophole that would enable corporations to die 'paper deaths, only to rise phoenix-like from the ashes, transformed, but free of their former liabilities.'" *North Shore Gas Co. v. Salomon Inc.,* 152 F.3d 642, 649 (7th Cir. 1998) (quoting *Mexico Feed & Seed Co.,* 980 F.2d at 487). In other words, successor liability prevents polluters from being able to shift away their liabilities by agreement.

Here, the government argues that the terms of the 1978 asset purchase agreement demonstrate that Appleton Papers Inc. has assumed CERCLA liability as a successor to the activities of ACPC and Combined Paper Mills. It is true that the terms of the clauses quoted above generally cover liability arising out of the violation of environmental regulations and government investigations and the like. (The exact scope of these clauses is not before me.) But successor liability is an equitable doctrine designed to prevent injustice or fraud, not to create a wholly new suable entity with duplicate liability to the government. Here it is crucial that NCR, the seller of the assets, remains in existence and is undeniably liable to the United States under CERCLA. It is already funding substantial portions of the cleanup. The 1978 asset sale was not an attempt to shirk environmental liability, and no corporation died a "paper death." As such, none of the equitable considerations that would otherwise support imposition of successor liability are in play here. Because NCR was liable and remains so, there is no liability for Appleton Papers to "succeed" to. There cannot be a "successor" without a succession.

This conclusion flows not only from common law of successor liability but from CERCLA itself. Section 107(e) of CERCLA provides: "No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from ... any person who may be liable ... under this section, to any other person the liability imposed under this section." 42 U.S.C. § 9607(e)(1). In other words, agreements between private parties do not affect those parties' underlying CERCLA liability with respect to the government. This means that the 1978 asset agreement could not transfer liability *per se*, it merely transferred the financial risk of that liability, as with an insurance policy. If a tortfeasor has insurance, that does not give the injured party a second defendant to name. The insurer is not liable for the tort itself, it is liable as a result of its

indemnity agreement with the insured. And in fact the next sentence in § 107(e) of CERCLA provides that "Nothing in this subsection [107(e)] shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section." 42 U.S.C. § 9607(e). Thus, CERCLA allows parties to distribute the financial impact of liability by contract, they cannot contract away CERCLA liability itself. *Harley-Davidson, Inc. v. Minstar, Inc.,* 41 F.3d 341, 342-343 (7th Cir. 1994) ("we agree with every other appellate court that has been called on to interpret it that it does not outlaw indemnification agreements, but merely precludes efforts to divest a responsible party of his liability.") As the Seventh Circuit explained: "The first sentence speaks of 'transfer[ring] ... liability,' that is, of shifting liability from one person to another. Indemnification does not do that. The indemnified party remains fully liable to whomever he has wronged; he just has someone to share the expense with. The second sentence clearly permits sharing, just as the first forbids shifting." *Id.*

The above provisions of CERCLA mean that even if NCR had wanted to divest itself of CERCLA liability, its effort would have been void. Instead, at most the asset purchase agreement merely made Appleton Papers liable as an indemnitor to NCR rather than a substitute or successor to liability *vis-a-vis* the government. "Indemnification does not, as we have already explained, 'transfer' liability from the person indemnified. The latter remains fully liable to the victims of his wrongdoing. If a person buys automobile liability insurance and later is sued for damages arising out of an automobile accident, he cannot defend by saying, 'I have insurance, so am not liable to you; go sue the insurance company.'" *Harley-Davidson,* 41 F.3d at 343. The government has cited several cases involving successor liability arising out of asset purchase agreements, but these are all cases between private companies litigating the scope of such agreements. (Just as Appleton

Papers and NCR litigated and arbitrated the scope of their own agreement.) Notably, none of these cases involves an action by the United States seeking to hold a non-polluter liable as a successor under CERCLA itself merely by virtue of such an agreement. In sum, when the seller of assets is still in existence and its liability to the government is still "live," an assumption of liability agreement like the one at issue here does not create liability on the buyer's part, it merely creates a duty to indemnify the seller. "If the predecessor is still a functioning corporation which can compensate Plaintiffs, there is no equitable reason for holding Clark liable. The rationale behind successor liability in CERCLA, to distribute costs and to allocate the burden of the cleanup to others than the taxpayers are irrelevant if the predecessor can provide a remedy." *Ninth Ave. Remedial Group v. Allis-Chalmers Corp.,* 195 B.R. 716, 728 (N.D. Ind. 1996).

The United States also argues that a 1998 settlement agreement between NCR and Appleton Papers creates successor liability. But again, private agreements between companies cannot create or shift liability to the government under CERCLA. They merely distribute the risk of paying for that liability, and that is what the parties' settlement agreement did. It established a shared responsibility for payments, and subsequent arbitration adjusted those amounts further. Moreover, the agreement explicitly disclaimed any suggestion that either party was admitting to any liability whatsoever. All these agreements demonstrate is that Appleton Papers and NCR will share in the costs resulting from the Fox River cleanup. They do not establish that Appleton Papers is a successor to the liability that underlies this action.

In sum, private agreements such as the ones entered into by Appleton Papers and NCR can constitute evidence that one entity succeeded another. But here, they do not establish successorship because the original liability under CERCLA has remained with the seller. The United States has

not established any reason based on equity or CERCLA itself to allow it to sue an additional entity merely because of indemnity and settlement agreements. Accordingly, I find that it will have little success in attempting to demonstrate that Appleton Papers Inc. is liable as a successor under CERCLA.[2]

2. Appleton Papers Inc. as a Necessary Party

The United States argues that even if I conclude Appleton Papers Inc. is likely not liable under CERCLA, it should still be subject to the injunction because it is "joined at the hip" with NCR by virtue of the agreements described above. In addition, it has a controlling interest in the LLC that NCR and Appleton Papers have formed to undertake the cleanup. Thus, if an injunction bound NCR but not Appleton Papers, it would be ineffective because NCR does not control the LLC that is actually running the cleanup work.

I am not aware of any authority for issuing an injunction to a party when that party is not liable under the law that is the basis for the injunction motion. The United States cites Rule 19, but that is simply a rule governing the joinder of necessary parties to a lawsuit. Appleton Papers has never denied that it is a proper party to this lawsuit; it has asserted that, having been sued properly, it is not liable. Accordingly, Rule 19 does not provide authority for an injunction against Appleton Papers.

The government also cites Rule 65(d)(2)(C), which states that an injunction may bind the parties as well as "other persons who are in active concert or participation with" them. Fed. R. Civ.

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[2]The United States also throws in a suggestion that Appleton Papers may have itself polluted PCBs into the river following its creation in 1978. Thus, it would have primary liability under CERCLA. This argument has not been sufficiently supported, and I cannot conclude it has much likelihood of establishing liability.

P. 65(d)(2)(C). That rule "is a codification of the common-law rule allowing a non-party to be held in contempt for violating the terms of an injunction when a non-party is legally identified with the defendant or when the non-party aids or abets a violation of an injunction." *Illinois v. U.S. Dep't of Health & Human Servs.*, 772 F.2d 329, 332 (7th Cir. 1985). "Consistent with this purpose, we have explained that a person is in 'active concert or participation' with an enjoined party, and thus bound by the injunction, if 'he aids or abets an enjoined party in violating [the] injunction,' or if he is in privity with an enjoined party." *Blockowicz v. Williams,* 630 F.3d 563, 567 (7th Cir. 2010) (citations omitted). Here, the government has not suggested that Appleton Papers will be aiding and abetting any injunction violations. But by arguing that Appleton Papers is joined at the hip with NCR, it suggests that it is "in privity" with NCR and thus subject to any injunction this Court might issue.

First, I note that the rule does not explicitly apply because it deals with "other persons" (non-parties), and here Appleton Papers is a party. The rule, and the cases applying considerations of "non-party privity" thus do not apply. *See, e.g., National Spiritual Assembly of Baha'is of U.S. Under Hereditary Guardianship, Inc. v. National Spiritual Assembly of Baha'is of U.S., Inc.,* 628 F.3d 837, 850 (7th Cir. 2010). The ultimate question is: on what basis would Appleton Papers be bound by an injunction? It is not CERCLA itself, as discussed above. Instead, its liability here is to NCR – not to the government – by virtue of the asset purchase and settlement agreements described above. The government, of course, was not a party to these agreements and cannot enforce their terms through the injunction it is proposing. Accordingly, I cannot discern any basis upon which I could enjoin Appleton Papers Inc. to comply with the EPA's unilateral administrative order and recent directive that it complete sediment remediation in 2011 pursuant to that order when

the underlying liability of Appleton Papers Inc. is so questionable.

3. The Proposed Injunction

Above I concluded that the United States has established, at least in the abstract, a sound basis supporting preliminary injunctive relief against NCR but not against Appleton Papers Inc. This creates a number of practical problems, as all sides appear to concede. The principal problem is that Appleton Papers Inc. controls the LLC that is directing the cleanup. Normally, a court would not find itself hamstrung by the private agreements entered into by defendants subject to its injunctive power. But the circumstances here create an exception. The LLC the Defendants have created has all the contracts with the environmental contractor, a company called Tetra Tech, which in turn controls one or more subcontracts. These entities are currently in place and are performing the cleanup. Given the complexity of the cleanup action and the equipment involved, not to mention the paperwork, it is undisputed that the LLC is the only instrument that could accomplish the government's directive *this season*. Because Appleton Papers – not NCR – controls that instrument, however, an injunction directed solely at NCR would essentially be meaningless. NCR simply does not have the power to achieve what the government wants. Accordingly, the injunction sought by the United States will be denied. If NCR and Appleton Papers are truly "joined at the hip" (to use the government's phrase), then an injunction against only one entity will be pointless.[3]

D. Conclusion

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[3]This is not to say that private agreements can preclude injunctive relief. It is only the particular circumstances of this case that make the specific relief sought by the government unavailable. The findings set forth above support injunctive relief of some kind against NCR, which would then apparently be entitled to indemnification from AP. The government may seek appropriate relief to compel NCR to undertake or continue the clean-up, but it has not done so in its current motion. For example, NCR may be able to contract directly with Tetra Tech in the event the LLC discontinues its efforts. This or other possible avenues of relief are not currently before the Court.

I conclude that the Plaintiffs have set forth a *prima facie* basis for preliminary relief against NCR, but not against Appleton Papers Inc., an entity I find unlikely to be deemed liable under CERCLA. I am unable to discern any basis for asserting preliminary equitable power over an entity whose liability under the statute sued upon is highly questionable. Because that entity controls the only means that apparently could implement the preliminary relief sought by the government, the motion for preliminary relief must be denied. Although I cannot find a legal basis for ordering the relief the government seeks, it is hoped that both Defendants will find it in their interest to comply with the proposed injunction to the extent feasible. Ultimately, it is doubtful that Appleton Papers Inc. will be able to have it both ways. It cannot continue to control the means of cleanup and yet remain outside the injunctive power of this Court. The fact that it does control the cleanup is only a practical bar to the injunctive relief sought here; the parties' private arrangement cannot pose a long-term bar to the government's enforcement powers.

The motion for a preliminary injunction is **DENIED**. The motion for registration of judgment is **GRANTED**. The motion to file a sur-reply is **GRANTED**.

SO ORDERED this 5th day of July, 2011.

/s William C. Griesbach
William C. Griesbach
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 10-C-910

NCR CORP. and APPLETON PAPERS INC.,

Defendant.

ORDER DENYING RENEWED MOTION FOR PRELIMINARY INJUNCTION

On July 5, 2011, this Court denied the government's motion for a preliminary injunction against Defendants NCR and Appleton Papers Inc. In doing so, I found that although the government had set forth a sound basis for relief against NCR, it had not done so against Appleton Papers because I was unable to find that Appleton Papers was liable, under CERCLA, as a successor. (Appleton Papers did not pollute itself, but signed an agreement stating that it would indemnify NCR for certain environmental liability.) I concluded that awarding relief against only one of the two Defendants was not feasible, however, because the non-liable party, Appleton Papers, held control of the limited liability company that is undertaking the cleanup of the Fox River. All sides appeared to agree that this LLC and its contractors were the only entities that could accomplish what the government wanted this year. Given the public interest and possibility of irreparable harm, however, I left open the possibility that some form of appropriate relief might be feasible.

The government has now filed an expedited motion seeking such relief, and the Defendants have responded. The government argues that even if Appleton Papers is not liable under CERCLA,

I could nevertheless order it to revoke the proxy to vote its shares in the cleanup LLC from a company called Arjo Wiggins Appleton (Bermuda) Ltd., which is Appleton's own indemnitor, and grant NCR a proxy to vote its shares. This way, the LLC will no longer be controlled by Appleton Papers (or its indemnitor) and this Court could order the relief the government seeks against NCR, the only party liable under CERCLA, who would then direct the LLC to recommence the river cleanup.

The government describes such relief as ancillary and minor, but it seems anything but. In essence, I would be ordering a party I have preliminarily concluded *not* to be liable under CERCLA to rescind authority over a company in which it has a controlling interest. This would produce the very result sought in the government's original motion for a preliminary injunction, and thus it is hard to describe the relief as "minor." The government has cited Supreme Court authority indicating that in some cases a non-liable party will be forced to bear the collateral consequences that necessarily follow from the grant of relief to one party. For example, in *International Brotherhood of Teamsters v. United States*, the plaintiffs alleged that the employer had a practice of discriminating against black and Hispanic employees. 431 U.S. 324 (1977). They further alleged that the employees' union perpetuated that discrimination by virtue of its seniority rules, which allowed exclusively white employees the best jobs and pay. The Court agreed that the employer was liable, but found the union not liable. Even so, it stated in a footnote that the union should remain in the case "so that full relief may be awarded the victims of the employer's post-Act discrimination." 431 U.S. at 356 n.43. In its footnote, the Court cited Fed. R. Civ. P. 19(a) for the rule governing mandatory joinder. The Court apparently recognized that because the employees are represented by the union, the union itself would have to be bound by a remedial injunction.

Importantly, however, the *Teamsters* Court ordered that "the District Court's injunction against the union must be vacated" because the union was not itself liable. *Id.* at 356. Finding that a non-liable party should remain in the case is not the same as enjoining a party based on a statutory violation. Being named as a party under Rule 19 merely allows that party to participate in the litigation – it is not a substitute for liability or a basis for injunctive relief itself.

In the same footnote, the *Teamsters* Court cited a Sixth Circuit case as support for keeping the non-liable union in the case. In *EEOC v. MacMillan Bloedel Containers, Inc.,* that court concluded as follows:

> We believe that the EEOC followed the proper course when it joined the Union under Rule 19(a), Fed. R. Civ. P. This provides the Union with a full opportunity to participate in the litigation and the formulation of proposed relief against MacMillan. As a practical matter, the Union need not play a role in the litigation until the court finds that MacMillan has violated Title VII. Such an opportunity will allow the Union to protect adequately the interests of its members, will provide the discriminatee with full and complete relief and will also insure that the suit is handled at one time and in one forum. This procedure is fully consistent with Title VII's emphasis on judicial expediency.

503 F.2d 1086, 1095 (6th Cir. 1974).

Thus, the purpose of keeping the union as a defendant in both cases was to allow the union to "participate" in the litigation and the relief, not to order the non-liable union to *provide* the relief. The government cites two other Supreme Court cases, but these are also employment discrimination cases involving unions. The upshot of these cases is that courts must be allowed to award retroactive seniority to remedy past discrimination, even if such awards naturally upset existing collective bargaining agreements. *See Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 399-400, 102 S.Ct. 1127, 1135-1136 (1982); *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania,* 458 U.S. 375, 399 (1982). The fact that the unions represent the employees makes it necessary to involve the

union in the remedy. The analogy with the present case is weak. Although the government suggests Appleton Papers would merely be ordered to amend its LLC agreement with NCR – just as the unions were in the above-cited cases – in reality it is being asked to cede complete control of the enterprise.

Appleton Papers also notes that the ball is in the government's court at this point. If the government stipulates to a judgment of no liability is its favor, that would trigger a clause in its LLC agreement requiring it to cede control to NCR. NCR could then be ordered to begin dredging itself. Assuming the government will not so stipulate, Appleton Papers also states that a summary judgment motion on non-liability is imminent. It is conceivable that there is a way for the government to concede to an expedited entry of judgment on the question even while maintaining its objection and right to appeal. For example, the government could concede that there are no remaining issues of material fact (the matter having been explored at some length already). This Court could then grant the motion for summary judgment for the reasons already given in its July 5 order. In that event, the government would not have waived any right to appeal my legal conclusion based on the conceded factual record, and the dredging, controlled by NCR, could recommence.

In sum, I remain unpersuaded that I have the authority to require Appleton Papers to do what the government asks. It is of course tempting to look for creative solutions to a problem like the one we face here, and the government cannot be blamed for doing that. And I must reiterate that the private agreements of parties can almost never present a roadblock to the entry of legitimate injunctive relief. But here, parties on all sides appeared to be operating under the assumption that Appleton Papers Inc. was liable under CERCLA, and thus it made sense for it, as the 60%

indemnitor of NCR, to control the means of cleanup. Unfortunately, that has hamstrung the parties' ability to move forward, despite NCR's apparent willingness to do so. But, as noted above, there are other possibilities for relief. A final decision on liability could get things moving. And it remains unclear why NCR could not just side-step the LLC and hire the same contractors itself, assuming they are available and willing to work. For now, however, I am not persuaded that I have the authority to order a non-liable party to give up the right to vote shares in a company over its objection.

Accordingly, the renewed motion for a preliminary injunction is **DENIED**.

SO ORDERED this 28th day of July, 2011.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 10-C-910

NCR CORP. and APPLETON PAPERS INC.,

Defendant.

ORDER

The Plaintiffs have filed an expedited motion seeking an extension of time in which to answer the counterclaims brought against them by several Defendants. They assert that answering them would be burdensome. Normally, that is no reason not to answer (an answer being required by the Rules of Civil Procedure), but they assert that the pending consent decree, if approved by this Court, would obviate their need to answer because it would eliminate most of the counterclaims against them. Thus, they ask that they be allowed to delay answering until the matter of the consent decree is decided.

The motion has been met with a chorus of objections from a number of the Defendants. Several of the Defendants argue that any answers the Plaintiffs file would be directly relevant to the matters at issue in the proposed consent decree. They also suggest that the matters at issue in the consent decree would not affect their counterclaims seeking declaratory relief. Finally, they note that the counterclaims were filed in 2010 and thus it is not as though the governments are being asked to make a swift and harried response.

Although I am not without sympathy for the governments' position, in my view the nature of the proposed consent decree (i.e., one agency of the government settling with other agencies of the same government) is unusual enough that the opposing Defendants should be entitled to the fullest possible opportunity to explore its fairness. This includes receiving answers to their counterclaims. Although I find it unlikely that the answers will add anything to the extensive research and debate the issue will undoubtedly receive, I think it best to err on the side of caution and require the Plaintiffs to answer in the normal course. My conclusion is made easier by virtue of the stipulation filed on July 29, which offers something of a split-the-baby approach. Specifically, the parties have agreed that if I deny the motion for an extension of time, the Plaintiffs will have 45 days to answer, rather than the 10 days initially envisioned. Other extensions are graciously provided for those opposing the consent decree. This seems a reasonable approach to accommodating the needs of all sides, and accordingly I will adopt it.

The motion for an extension of time is **DENIED**. The stipulation filed July 29, 2011 is approved and will govern the time in which the parties must answer and respond.

SO ORDERED this 2nd day of August, 2011.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 10-C-910

NCR CORP. and APPLETON PAPERS INC.,

Defendant.

DECISION AND ORDER

On July 5, 2011, this Court denied the government's motion for a preliminary injunction against Defendants NCR and Appleton Papers Inc. In doing so, I found that although the government had set forth grounds for relief against NCR, it had not done so against Appleton Papers because it was unlikely that Appleton Papers had successor liability under CERCLA. Appleton Papers ("API") has now moved for summary judgment on the issue of liability. For the reasons given below, I will deny the motion.

I. Successor Liability when the Seller Survives the Transaction

The issue of successor liability has already received significant treatment in this Court's denial of preliminary relief to the government. In sum, I have concluded that although API may have agreed to indemnify NCR as a part of its purchase of some of NCR's assets (more on this below), that agreement did not constitute a "successorship" to liability because (among other reasons) NCR continued to remain in business. Without an actual "succession," I concluded there could be no successor liability. In addition, I noted that CERCLA § 107(e)(1) precluded parties'

efforts to shift liability to other entities. That statutory bar on the transfer of liability supported my conclusion that there was no succession here. Finally, I found that the equitable purposes of the successor liability doctrine were directed toward preventing the kind of fraud or injustice that would result if a liable entity were allowed to shirk its liability through a liability-shifting transaction. Because that did not occur here (given that NCR continued to remain liable), I found the successorship doctrine inapplicable. Having already effectively ruled in favor of API, I will focus my attention on the government's arguments that my preliminary conclusion was incorrect.

To recall, in the common law there are four established ways in which a purchaser of assets can be deemed a successor: "(1) Where there is an express or implied agreement of assumption; (2) where the transaction amounts to a consolidation or merger of the purchaser or seller corporation; (3) where the purchaser is merely a continuation of the seller; or (4) where the transaction is for the fraudulent purpose of escaping liability for the seller's obligation." *Moriarty v. Svec,* 164 F.3d 323, 327, 164 F.3d 323 7th Cir. 1998) (quoting *Vernon v. Schuster,* 688 N.E.2d 1172, 1175 (Ill. 1997). Here, we are dealing only with the first of these, the express agreement of assumption. The principal focus of the government's present effort is its argument that NCR's continued existence as a viable company is irrelevant to the successorship analysis. It concedes that the seller's continued existence might preclude some ways of establishing successor liability, such as in the application of the "mere continuation" doctrine or a *de facto* merger. For example, if Company A sold some assets to Company B, it would be difficult to conclude that the transaction was actually a consolidation or merger of the two businesses if Company A remained a viable going concern. In that case, we would not view Company B as a successor.

But the government claims that the seller's continued existence is *not* relevant when successor liability is premised on an explicit agreement of liability assumption. If the buyer has

signed an agreement explicitly stating that it is assuming the liabilities of the seller, then the concerns about continuity, fraud and *de facto* merger go by the wayside because the parties have saved us the trouble by negotiating successor liability as a matter of contract, a contract to which the public is a third-party beneficiary.

This argument faces at least two hurdles. First, as has been noted already, "the purpose of corporate successor liability is to prevent corporations from evading their liabilities through changes of ownership." *United States v. Mexico Feed & Seed Co.,* 980 F.2d 478, 487 (8th Cir.1992). Here, because NCR remains viable, there has been no effort to "evade" liability. No one has disputed that NCR is a solvent corporation that has the ability to pay any judgment here, and neither has anyone suggested that the purpose of the asset sale to API was to shirk liability. Thus, the case, on its face, does not cry out for application of the successorship doctrine.

A second, and possibly related, problem is that there is almost no precedent for finding successor liability when the seller has remained a viable entity. For example, in *United States v. Iron Mountain Mines, Inc.,* which the United States cites, the court found successor liability based on two assumption agreements. 987 F. Supp.2d 1233 (E. D. Cal. 1997). But there, the predecessor companies had been dissolved. In fact, the court concluded that the requirements for a *de facto* merger were likely met, although it did not reach that issue given the existence of the express assumption agreement. *Id.* at 1242 n.19. Except for an unpublished case decided more than two decades ago, it does not appear that successor liability has been found under the circumstances we have here. *See United States v. Chrysler Corp.,* 1990 WL 127160, *4-7 (D. Del. 1990) (finding assumption of liability through agreement even though selling company remained in-tact).

Despite these hurdles, I am satisfied that API may be deemed a successor to the liability of NCR even though NCR itself remains liable to the government. First, all of the CERCLA cases

addressing successor liability recognize that a company may become liable as a successor by expressly agreeing to become liable. *Moriarty v. Svec,* 164 F.3d at 327. These cases do not condition liability-by-agreement on the non-existence of the selling corporation. Perhaps the problem is that assumption of CERCLA liability through an agreement is not actually a "succession," because in common parlance a succession implies that the successor has assumed liability *in lieu* of the transferor. Instead of talking about succession, it might be clearer to state that a party may assume direct CERCLA liability by agreement even though it may not "succeed" to it in the traditional understanding of the term. In any event, CERCLA case law is clear that parties may assume liability through agreement (though they may not transfer it away), and none of the cases requires that an assumption is only valid if the seller ceases to exist. Accordingly, the fact that NCR continues to be liable should not be an obstacle to finding API liable.

A second consideration motivating my denial of preliminary relief was the fact that CERCLA explicitly prevents parties from shifting liability to other entities. 42 U.S.C. § 9607(e)(1). "Although the law of corporate succession contemplates that corporate parties may allocate liabilities in an asset sale, CERCLA § 107(e)(1) nullifies any attempted transfer of CERCLA liability." *A.C. Reorganization v. Dupont,* 1997 WL 381962, *7 (E.D. Wis. 1997). If CERCLA invalidates such attempts to transfer, API argued, then how could the direct liability of NCR be assumed by API (even if that were the parties' intent)? Section 107(e)(1)'s prohibition on liability transfer appeared to bolster my conclusion that API was not a successor.

The government now persuasively argues that although § 107(e)(1) would preclude a party from *eliminating* liability through a liability transfer agreement, it does not preclude parties from *creating* additional liability, in effect, on the part of the buyer or anyone else. The court in *A.C. Reorganization* cited *Harley–Davidson, Inc. v. Minstar, Inc.* for the principle that CERCLA

precludes efforts to divest liability. 41 F.3d 341, 342 (7th Cir. 1994). But that is not the same as saying that CERCLA prohibits a non-liable party from entering an agreement to take on direct liability *in addition to* that of the already-liable party: the only condition CERCLA imposes is that the directly liable party must remain liable. It might be argued that such an agreement would have no purpose: if the seller cannot escape direct liability, then what is the point of "transferring" liability to the buyer if the seller still remains on the hook for that liability? It is true that the primary value in such an arrangement might manifest itself in the indemnification provision that makes the buyer compensate the seller for any liability, rather than the assumption of direct liability itself. But by making the buyer *itself* directly liable, the seller has obtained something of value: an additional defendant to help share the burden of defense. Where there was one defendant there are now two. Although this might not be the overarching purpose of such an arrangement, neither is it a trifle.[1] The point is that not only is an assumption agreement allowed by CERCLA (subject to the conditions noted above), such an agreement also makes commercial sense. Thus, CERCLA's bar on the transfer of liability does not preclude a finding that API could be liable in addition to NCR.

With those considerations favoring the imposition of successor liability, the only remaining problem is that the purpose underlying the successor liability doctrine does not appear to apply here. To recall, the cases tell us that the successor liability doctrine is intended to prevent corporations from dying "paper deaths" only to reemerge having eliminated their environmental liability. *United States v. Mexico Feed and Seed Co., Inc.,* 980 F.2d 478, 487 (8th Cir. 1992). Obviously such a concern is absent here. But just as the continued existence of the seller does not matter in an

[1]And of course indemnification agreements are not self-executing. Having an indemnitor on the line for *direct* liability saves the indemnitee the trouble of collecting on his indemnification agreement.

assumption-by-agreement case, the concerns underlying the successor liability doctrine fall by the wayside as well. As noted above, the problem may be one of nomenclature: the "succession" doctrine applies when a buyer has actually succeeded (exclusively) to the liabilities of the seller, who has either been dissolved or merged in some fashion. In these circumstances, courts rightly view the doctrine as a means of preventing the injustice that would occur if a liable entity were allowed to simply paper away that liability through private agreements. But when a buyer expressly agrees to assume the environmental liabilities of the seller, we need not worry about such concerns because shirking environmental liability—something CERCLA prohibits— was never the intent of the agreement in the first place. In a case like this, it is not so much that a "doctrine" of successor liability is being applied as it is simply a matter of enforcing an explicit contract that created additional liability. Viewed in that light, the fact that the concerns underlying the succession doctrine are absent in an assumption-by-agreement case is not all that surprising.

In sum, I do not believe the hurdles identified above suffice to preclude enforcement of an explicit agreement to assume CERCLA liability. Nothing in federal common law requires that the seller cease to exist before another entity may assume its CERCLA liability. And the concerns underlying the other "successor" liability doctrines, such as *de facto* merger or mere continuation, are not relevant when two companies have explicitly agreed that the buyer will become liable along with the seller. Finally, nothing within CERCLA itself invalidates an attempt to create additional CERCLA liability, so long as the agreement does not purport to *transfer* that liability. Thus, the next question is whether the agreement signed by NCR and API actually does operate to create direct liability on the part of API.

II. The 1978 Agreement

In 1978 NCR sold its Appleton Papers Division to API's predecessor, a company called

Lentheric, Inc., hereinafter referred to simply as API. As part of the asset purchase agreement memorializing that transaction, API agreed to assume several liabilities and to indemnify NCR as follows:

> Purchaser agrees that it shall assume, pay, perform, defend and discharge, if and when due, to the extent not paid, performed, defended or discharged prior to the Closing Date, all of the following:
>
> . . .
>
> 1.4.4 all of Seller's obligations and liabilities of any kind, character or description relating to the period subsequent to the Closing Date which arise out of or in respect of any state of facts, matter, event or disclosure set forth on an attachment to the agreement that was designated as Schedule A; and
>
> 1.4.5 all of Seller's obligations and liabilities of any kind, character or description relating to the period subsequent to the Closing Date which arise out of or in respect of any . . . action, claim, investigation by a government body, or legal . . . proceeding set forth on Schedules A and M, and
>
> . . .
>
> 1.4.9 all of Seller's liabilities . . . whether accrued, absolute, contingent, or otherwise . . . whether asserted or not and whether arising from transactions, events or conditions occurring prior to or after the Closing Date, with respect to compliance of the Property . . . with all applicable federal, state and local and other governmental environmental and pollution control laws, ordinances, regulations, rules and standards

(Dkt. 139, Ex. 3 at 19-21.)

Two of these assumption of liability clauses refer to Schedule A of the asset purchase agreement. As relevant here, Schedule A contains the following clause:

> Seller has reason to believe that the facilities of Appleton Papers Division located in Pennsylvania and Wisconsin may be operating; in violation of applicable federal, state, local and other governmental environmental and pollution control laws, ordinances, regulations, rules and standards.
>
> APD receives and has received notices from time to time from various federal, state, local and other governmental authorities claiming violation of environmental and pollution control laws, ordinances, regulations, rules and standards (collectively "laws"). These claims may result, and have resulted in fines

and corrective action.

(Dkt. # 195, Ex. 3 at 4.)

The United States argues that each of these clauses shows that API's predecessor explicitly assumed liability for the cost of environmental cleanup at issue in this action. The question is whether the language in the asset purchase agreement is broad enough to encompass the liability at issue here even though neither CERCLA nor the extent of the PCB problem had been in the minds of the parties at the time the contract was signed.

"A party may indemnify another party for liability arising out of a law not in existence at the time of contracting." *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.,*14 F.3d 321, 327 (7th Cir. 1994). But when that happens the parties cannot be said to have a meeting of the minds as to the specific liability at issue. Instead, if the parties have expressed a meeting of the minds, their agreement goes to the division of liability when some unforseen liability emerges; in other words, the parties may contract to shift the risk of the unknown. In *Kerr-McGee,* for example, the court found a pre-CERCLA agreement broad enough to encompass CERCLA liability when the indemnitor had agreed to pay for "the maintenance of any action, claim or order concerning pollution or nuisance." 14 F.3d 321, 327 (7th Cir. 1994). Given the breadth of this language ("any action . . . concerning pollution") the court had no trouble concluding that the indemnitor had indeed agreed to pay for the CERCLA liability in question even though such liability was not specifically envisioned by the parties when the contract was signed.

Similarly, in *Olin Corp. v. Consolidated Aluminum Corp.,* the Second Circuit noted that indemnification agreements are interpreted strictly under New York law (which applies here at the agreement of the parties). Even so, and despite the fact that CERCLA had not been enacted at the time of the agreement in question, the court found in the parties' agreement an intent to indemnify

for CERCLA liability:

> The Purchase Agreement requires Conalco to indemnify Olin against "all liabilities, obligations and indebtedness of Olin related to [its aluminum business] ... as they exist on the Closing Date or arise thereafter." (emphasis added). In the Assumption Agreement executed at the closing, Conalco agreed to "indemnify Olin against, all liabilities (absolute or contingent), obligations and indebtedness of Olin related to [the aluminum business] ... as they exist on the Effective Time or arise thereafter with respect to actions or failures to act occurring prior to the Effective Time."

5 F.3d 10, 15 (2d Cir. 1993).

Both of these cases reflect the scenario in which although the parties did not—*could* not—know about CERCLA liability, they made a business decision to shift the risk of the unknown (both "known unknowns" and "unknown unknowns," of which CERCLA was likely the latter) from party A to party B.

Although two of the assumption clauses in this case are similar, § 1.4.4 appears to be broader than § 1.4.5 because it includes "any state of facts" or "matters," whereas the latter section merely applies to governmental investigations or claims. Either way, the question is whether the CERCLA liability at issue here arises out of any "matters," etc., or governmental actions disclosed in Schedule A. (Schedule M is not relevant here.) As noted earlier, the relevant portion of Schedule A reads as follows:

> Seller has reason to believe that the facilities of Appleton Papers Division located in Pennsylvania and Wisconsin may be operating; in violation of applicable federal, state, local and other governmental environmental and pollution control laws, ordinances, regulations, rules and standards.
>
> APD receives and has received notices from time to time from various federal, state, local and other governmental authorities claiming violation of environmental and pollution control laws, ordinances, regulations, rules and standards (collectively "laws"). These claims may result, and have resulted in fines and corrective action.

(Dkt. # 195, Ex. 3 at 4.)

The second paragraph just quoted indicates not only that APD had received notices from

governmental authorities in the past, but that it continued to do so at the time of the asset purchase. These notices not only *had* resulted in fines and corrective action but "*may* result" in fines and corrective action in the future. That is a "matter" disclosed in Schedule A. When API received notices from the EPA that it was a PRP for the Fox River PCB problem, that was a notice from a federal authority claiming violation of environmental laws. Although the PCB problem was not the subject of any notices APD had received as of 1978, the clause is broad enough to indicate that the division *generally* received such notices and would continue to do so in the future. Such notices "may result" (as they did here) in corrective action. By disclosing the division's proclivity for receiving corrective notices from the government, the seller was alerting the buyer that this was an issue for which it was accepting responsibility, both for problems already disclosed and for those that had not yet arisen. It would therefore not be difficult to conclude that liability for the PCB problem arose out of a matter disclosed on Schedule A.

Although I may be able to reach that conclusion from the asset purchase agreement alone, the parties recognize that the purchase agreement may no longer be read in a vacuum. In 1995 NCR sued API in the Southern District of New York to resolve liability for the PCB cleanup. The parties ultimately reached a two-part settlement of that issue. First, they agreed to split the first $75 million of any liability between them. Second, they agreed to submit the question to binding arbitration with respect to any amounts in excess of $75 million.

The arbitration panel concluded that API was liable for 60% and NCR 40% of any expenses in excess of $75 million. The panel found that the contractual language "is not sufficiently clear and unambiguous with respect to the issue of responsibility for the environmental costs at issue to permit an award based solely on the contract language." (Dkt. # 208, Ex. 1 at 4.) Based on testimony and documents produced to the panel, however, the panel decided to impose a larger

share of liability upon API.

Although the panel did not make its decision solely on the basis of the contract, the parties had agreed that the arbitrators would settle the question of liability for cleanup expenses once and for all. By agreeing to have the matter resolved by arbitration, the arbitration, in effect, altered the terms of the original purchase agreement. The entirety of the agreement is thus the product of the arbitration, which imposed liability upon API. In fact, given the agreed structure and mission of the arbitration, which guaranteed that API would be found liable for *some* part of the expenses, API had essentially already conceded liability just by virtue of entering into the arbitration.

API protests that in entering into the settlement agreement that led to arbitration, API and NCR had explicitly agreed that neither party was admitting liability of any kind. (Dkt. # 124, Ex. 1.) Although that may be true, that was simply an agreement between those private parties that neither of them were conceding liability. That does not mean, however, that one of the signatories could not assume the liability that another party was actually found to have, regardless of the lack of any concessions or admissions. If NCR were ultimately found to be liable under CERCLA, as it has been, API could have agreed to assume that liability. In other words, the fact that neither one was conceding it was liable in 1978 has no impact on whether or not one party assumed the liability that the other actually was later *found* to have (irrespective of any concessions). For these reasons, I am satisfied that the purchase agreement, as interpreted and applied by the arbitration panel, could impose liability upon API. Accordingly, API's motion for summary judgment will be denied.

III. Conclusion

For the reasons given above, I conclude that the government is correct that the continued existence and liability of NCR does not preclude a finding that API assumed CERCLA liability. Moreover, I further conclude that the terms of the 1978 assumption agreement, as applied in the

parties' arbitration, are broad enough that they could encompass that liability. Accordingly, API's motion for summary judgment is **DENIED**.

SO ORDERED this 19th day of December, 2011.

/s William C. Griesbach
William C. Griesbach
United States District Judge