# UNITED STATES DISTRICT COURT
# EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA and
THE STATE OF WISCONSIN,

Plaintiffs,

v. Case No. 10-C-910

NCR CORPORATION, et al.,

Defendants.

**ORDER**

Before me presently are the Plaintiffs' motion to strike and Defendant NCR's motion to certify the judgment. For the reasons given below, I will deny both motions.

**I. Motion to Strike**

The government seeks to strike the surrebuttal testimony of Mr. Butler regarding his "28 percent share" opinion, which was based on certain of Dr. Wolfe's estimates Butler obtained during the December 2012 trial. In support of its motion, the government argues that Butler's opinion, based on Wolfe's estimates, should have been disclosed prior to trial. It also argues that the opinion was not proper surrebuttal testimony because it was simply bolstering his prior testimony rather than being responsive to any matters raised during rebuttal testimony. Georgia-Pacific and the government raised these objections at trial, but they were overruled.

NCR raises a number of arguments in opposition to the motion to strike. In short, it defends admission of the testimony at trial, but it also questions whether the government's motion to strike

is procedurally appropriate. Finding it dispositive, I address only the latter objection.

At trial, this court overruled the objections to Butler's surrebuttal testimony, concluding both that it was procedurally appropriate and proper surrebuttal. (ECF No. 731, Tr. 2782-84.) Following the trial, the parties filed briefs. NCR's brief cited Butler's testimony about his use of Wolfe's estimates: "Even under Dr. Wolfe's higher estimates, the full contamination scenario would require approximately '40 percent higher dredge volumes than the NCR [alone] dredge volumes.'" (ECF No. 746 at 37.) NCR echoed its reliance on Wolfe in its brief on appeal: "Like the estimates presented by the Simon Team and Connolly, Wolfe's calculations showed that NCR was a minority contributor of PCBs in OU4. (Tr. 2267:23-2268:6.) The District Court rejected Braithwaite's and Jones's work and largely ignored the estimates by Wolfe and Connolly." (ECF No. 1050-1 at 6.) Noting this, the court of appeals remanded for consideration of whether Butler's use of Wolfe's estimates would present a reasonable basis for apportionment. It is true, as the government notes, that NCR did not specifically refer to the "28 percent" estimate Butler attributed to NCR at trial. Even so, both this court and the court of appeals were aware that NCR was attempting to show that the harm was divisible even if NCR relied on Georgia-Pacific's expert for the underlying estimates.

It is unclear whether, as NCR now says, the government should have pressed its objections to the admission of Butler's testimony in its post-trial briefing, its appellate briefs or at oral argument—or all three. But I need not conclude that the argument is waived to conclude that it is not properly before me. Though it is styled as a motion to strike, in essence it is a motion seeking reconsideration of my earlier evidentiary ruling. In support of its motion seeking reconsideration, the government cites a vague principle encouraging district courts to explore alternative bases for their decisions. *Young v. Verizon's Bell Atl. Cash Balance Plan,* 615 F.3d 808, 815 (7th Cir. 2010).

The government argues that even though it has won the case against NCR on other grounds, a ruling granting the motion to strike (as opposed to finding it moot) would provide a second, independent basis for the court of appeals to uphold the government's victory.

The government's earnest desire to bolster its case on appeal is understandable, but I am not aware of any procedural mechanism, nor any precedent, for entertaining a motion addressing a three-year-old previously-decided issue, particularly when that motion is brought by the party that has already won on another ground. Surely, the desire to have a second ground for that victory cannot be enough to justify reconsideration, or else parties would never cease asking for rulings, and re-dos of rulings, despite having won on other grounds. The only precedent the government cites is a case in which the Seventh Circuit praised a district court for developing the record fully and exploring alternative bases of decision: in *Young,* the district court, due to uncertainties in ERISA law, had decided to bifurcate a trial, applying different legal standards of review (deferential and *de novo)* to each phase of the trial. *Id.* at 814. In essence, the district court created a record that would allow the court of appeals to reach a complete result under either standard of review.

A general preference for thoroughness, or for exploring alternate bases for a decision, does not warrant revisiting issues decided long ago, however. *Young* involved a district court that created an alternative basis for its decision in the first instance, not on a motion for reconsideration years later. The case is before me presently with directions to consider certain evidence, not to consider whether that evidence should have been allowed in the first place. Whether or not this court's December 2012 evidentiary ruling is outside the scope of the mandate or law of the case, it remains true that the matter is now before me only because of a completely unrelated issue. The remand to consider the matters the Seventh Circuit cited was not an invitation to open the door to revisit other

issues. Accordingly, the motion to strike will be denied as moot.[1]

**II. Motion to Certify Appeal Under § 1292(b)**

NCR has requested certification, for immediate appeal, of this court's October 19, 2015 decision finding that NCR had failed to prove its divisibility defense. To guide the district court, there are four statutory criteria for the grant of a section 1292(b) petition: there must be a question of law, it must be controlling, it must be contestable, and its resolution must promise to speed up the litigation. *Ahrenholz v. Bd. of Trustees of Univ. of Illinois,* 219 F.3d 674, 675 (7th Cir. 2000).

The parties opposed to the certification argue that the question decided in my October 19 order was essentially one of fact, rather than law; after all, the Seventh Circuit had remanded the action to this court so that this court could undertake certain findings of fact pertinent to the divisibility defense. Thus, there is not a question of "law" susceptible to easy resolution by the court of appeals. NCR argues just the opposite, claiming that the divisibility defense is indeed a question of law because it relied on the Seventh Circuit's directives about the proper legal standards for divisibility.

It is true, as NCR says, that there are questions of law "involved" in the proposed appeal, but at their core they are tied up with difficult questions of fact. The Seventh Circuit has explained that the "question of law" clause in section 1292(b) refers to a "pure" question of law, e.g., "a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine"—the kinds of things a court of appeals could decide "quickly and cleanly without having to study the record." *Id.* at 677. Here, it should go without saying that appellate review would

[1]Similarly, this court has not considered the declaration the government wants to strike, either. Accordingly, its motion is moot as to the declaration as well.

require much more than a "quick and clean" review of a discrete legal question.

Accordingly, the request for § 1292(b) certification is **DENIED**. Having found that judgment should not be entered at this time (under § 1292(b) or otherwise), I will decline to enter the judgment proposed by the government. The motion to strike is **DENIED**. The clerk will set the case on the calendar for a telephonic scheduling conference.

**SO ORDERED** this 25th day of January, 2016.

/s William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court

# UNITED STATES DISTRICT COURT
# EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 10-C-910

NCR CORPORATION, et al.,

Defendants.

**ORDER**

**I. NCR's Motion to Compel**

Plaintiff NCR has moved to compel the United States to produce a full, unredacted copy of the 2002 Amendola report, which NCR believes the United States has relied on in supporting its consent decrees. It asks that the court conduct an *in camera* review of the report to determine whether that was the case and, if so, for an order requiring production. For the reasons given below, the motion will be denied.

NCR argues that the government has selectively quoted and more extensively relied upon the 2002 report, which contains different estimates from previous versions of the report. For example, when it negotiated a consent decree with Georgia-Pacific, the United States estimated that GP was responsible for roughly 16% of the PCBs discharged to the river. Similarly, it used Amendola information to estimate a .03% share to Kimberly-Clark. Previously, the government criticized NCR's expert for relying on earlier versions of the report, and yet now it will not produce what appears to be the final report. NCR thus argues that for this and other reasons, the government

has waived any privilege it might have had with respect to the documents in question. In addition, the government accidentally disclosed several unredacted documents, including the information NCR now seeks. NCR agreed to destroy its versions of the documents, and the government eventually produced redacted versions, justifying the redactions by citing work-product privilege. NCR also argues that this disclosure serves as a waiver of any privilege.

The United States responds that NCR (and Appvion) have already tried to get the documents in question, but have been rejected by this court and the Seventh Circuit. "Even though the government used portions of its reports in two consent decrees, that use does not waive work product immunity for all the related content." *Appleton Papers, Inc. v. E.P.A.,* 702 F.3d 1018, 1020 (7th Cir. 2012). Moreover, the essence of NCR's argument—that fairness dictates that the disclosure of *some* portions of the reports means the government must disclose them in their entirety—is not a persuasive argument here because the government's references to its continued work with Amendola were tangential and limited. As such, NCR is not forced to labor under an unfairly incomplete record, and in fact I conclude it would be unfair to require the government to disclose the work product of its litigation consultant merely because it made a few references to his work at various points in this litigation. This court has already held that, "[g]iven the limited disclosures made here (which involved wiggle words like "estimates" and "suggestions"), it cannot be argued that the government's disclosures were done selectively or that it had cherry-picked certain data in order to create a misleading impression." *Appleton Papers Inc. v. E.P.A.,* No. 11-CV-318, 2012 WL 1079884, at *5 (E.D. Wis. Mar. 30, 2012).

It is not as though NCR has no recourse at all. First, the government is not a party to the contribution action, which is where NCR believes the information may be used against it. Thus,

it is difficult to envision how the government will enjoy some sort of unfair litigation advantage over NCR. Second, to the extent any other parties attempt to rely on the government's partial disclosures, NCR will be able to point out any limitation arising out of the fact that we have been presented with only limited information. Conceivably, the absence of full disclosures will affect the weight properly accorded to that information. Accordingly, the motion [1083] is **DENIED**. The duplicate motion filed in No. 08-C-16 will also be denied.

**II. The United States' Rule 7(h) Motion to Compel**

The United States has filed a motion to compel certain documents from Appvion. As with the documents described above, these documents have been the subject of previous motion practice, with this court denying motions to compel and for sanctions. Previously, this court ruled that the documents sought, which relate to UK litigation between B.A.T. and Appvion, were not relevant to Appvion's status as an indemnitor because that issue had been decided by the Seventh Circuit. (ECF No. 1774.) More recently, this court "clarified," at P.H. Glatfelter's request, that Appvion's status had not in fact been conclusively resolved, because the Seventh Circuit was merely concluding that Appvion could *sue* under § 107, not that it definitively was a PRP rather than an indemnitor. (ECF No. 1788.) Based on that ruling, the government argues that the documents, which could relate to Appvion's status as either a PRP or an indemnitor, are now in play and should be turned over. In short, Appvion's relevance argument is no longer persuasive.

Appvion's response relies on this court's earlier rulings and interpretations of the Seventh Circuit's decision. As just noted, however, Appvion's status as either a PRP or indemnitor has not been conclusively established, and so the United States is correct that Appvion's principal relevance

objection is unconvincing. Given the breadth of discovery generally allowed, it is conceivable that the UK litigation documents could be relevant or could lead to relevant information. In the UK litigation, B.A.T. sought indemnity from Appvion and Windward Prospects for Fox River liability. In a dispute over indemnification of Fox River expenses, it is not a stretch to believe that the nature of Appvion's own payments to NCR could have arisen. With Appvion's key relevance objection out of the way, the documents should be produced.

NCR's motion [1083] is **DENIED**. The duplicate motion filed in No. 08-C-16 will also be denied. The United States' motion [1096] is **GRANTED**.

**SO ORDERED** this 19th day of August, 2016.

/s William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court

# 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 RECONSIDERATION**

Defendants P.H. Glatfelter and Georgia-Pacific have filed a motion seeking reconsideration of this court's October 11, 2016 orders approving stipulated resolutions of claims between the United States, Appvion and Kimberly-Clark. The motion asserts that some implications of the stipulations were not fleshed out in the stipulations themselves. For instance, the stipulations do not state how much Appvion's claims against the remaining Defendants might be reduced by virtue of its settlement. Nor do they specify that one or more other parties might still be able to appeal this court's decision finding Appvion not liable under CERCLA.

Glatfelter and Georgia-Pacific have not cited any principle of law that would require settlements to specify anything other than the agreement reached between the signatory parties. In other words, I am aware of no requirement that a settlement approved by a court must offer quasi-advisory rulings as to the implications, to *other* parties, of the settlement terms that are reached therein. Even if the concerns raised in the motion to reconsider and the response to the stipulation are valid, that does not mean those concerns must be addressed through the stipulations themselves,

which are agreements to which the objecting Defendants are not a party. Accordingly, the motion for reconsideration is **DENIED**.

**SO ORDERED** this 3rd day of November, 2016.

/s William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court