

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION**

APPLETON PAPERS INC. and)	
NCR CORPORATION,)	
)	
Plaintiffs,)	
)	No. 08-CV-00016-WCG
v.)	
)	
GEORGE A. WHITING PAPER COMPANY, et al.,)	
)	
Defendants.)	

NCR CORPORATION,)	
)	
Plaintiff,)	
)	
v.)	No. 08-CV-0895-WCG
)	
KIMBERLY-CLARK CORPORATION, et al.,)	
)	
Defendants.)	

**MEMORANDUM OF LAW OF PLAINTIFFS APPLETON PAPERS INC. AND
NCR CORPORATION IN OPPOSITION TO DEFENDANTS’ MOTION
FOR SUMMARY JUDGMENT FOR DECLARATORY RELIEF
FILED BY MENASHA CORPORATION**

Plaintiffs Appleton Papers Inc. (“API”) and NCR Corporation (“NCR”) (collectively, “Plaintiffs”), by their undersigned counsel, respectfully submit this Memorandum of Law in Opposition to Defendants’ Motion for Summary Judgment for Declaratory Relief Filed by Menasha Corporation.

INTRODUCTION

The Court has held that its denial of Plaintiffs' CERCLA contribution claims does not mandate that Defendants' contribution claims against Plaintiffs must be granted. (Dkt. # 826 (Order), p. 1 (“resolution of the counterclaims is not as simple as extrapolating from the basic principles set forth in this Court’s summary judgment order”).) Despite this, Defendants¹ argue the Court’s rationale in denying Plaintiffs’ past contribution claims automatically entitles them to declaratory relief for 100% of future costs or damages they incur in conjunction with remediating the Lower Fox River (“LFR”). However, Defendants are not entitled to this relief, and their summary judgment motion should therefore be denied, for five reasons.²

First, as Defendants lack standing to bring an action for natural resource damages recovery, they also lack standing to assert a claim for recovery of future natural resource assessment costs and natural resource damages. Therefore, as a matter of law, their request for such relief should be denied.

Second, despite the fact that Plaintiffs have been repeatedly and unfairly prevented from conducting full discovery in this matter, the available evidence in the record, which *must* be construed in favor of Plaintiffs, raises a genuine issue of material fact that the PCB contamination of the LFR is divisible. As a matter of law, Plaintiffs can only be held liable for their divisible share and cannot be held liable for all future response costs incurred by any Defendant. There is substantial evidence that the harms at the site can be divided based on geography, volumetric discharges, and type of PCB in the sediment, among other bases.

¹ “Defendants” includes: Menasha Corporation (“Menasha”), City of Appleton (“COA”); Georgia-Pacific Consumer Products LP (f/k/a Fort James Operating Company), Fort James Corporation and Georgia-Pacific LLC (collectively, “Georgia-Pacific”); CBC Coating, Inc. (“CBC”); Neenah-Menasha Sewerage Commission (“NMSC”); P.H. Glatfelter Company (“Glatfelter”); U.S. Paper Mills Corp. (“U.S. Paper”); and WTM I Company (“WTM”).

² In addition, it must be noted that Plaintiffs dispute the “facts” upon which Defendants attempt to base their motion. *See* Response of Plaintiffs Appleton Papers Inc. and NCR Corporation to Menasha Corporation’s Statement of Undisputed Facts in Support of its Motion for Summary Judgment, filed contemporaneously herewith.

Third, Defendants have not met their burden of establishing that undisputed facts demonstrate that Plaintiffs should be allocated 100% of all future response costs, jointly and severally. Defendants base their argument solely on the corporate knowledge of NCR in the 1960's. Defendants wholly ignore the knowledge of ACPC and Combined Locks, and therefore fail to establish their claim that the undisputed facts mandate a 100% allocation of future costs to both API and NCR. Moreover, additional equitable factors, when properly considered, result in genuine issues of material fact that can only be resolved at trial.

Fourth, for the same reasons that Defendants are not entitled to summary judgment on their claims for past response costs, as set forth in Plaintiffs' responses to other Defendants' summary judgment motions, Defendants are not entitled to summary judgment on their claims for future response costs. There are genuine issues of material fact on numerous issues which can only be resolved through full discovery and trial.

Fifth, Defendants' request for declaratory relief is simply a blatant attempt to end-run their Court-acknowledged liability to the Government for future response costs. Even though the Court expressly ruled that its Order of December 16, 2009 did not absolve Defendants of their CERCLA liability to the governments, Defendants here are seeking to pawn off that liability to Plaintiffs. Such an effort to stretch the Court's Order to a place it expressly refused to go should not be tolerated.

SUMMARY JUDGMENT STANDARD

“Summary judgment is appropriate when the pleadings and supplemental materials present no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 596 (7th Cir. 1995). “The initial burden of production imposed on the moving party is to make a *prima facie* showing that it is entitled to

summary judgment.” *Sierra Perez v. U.S.*, 779 F. Supp. 637, 641 (D. Puerto Rico 1991), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 330-31 (1986) (emphasis in original). Only after the moving party establishes its initial burden of production does the burden of production shift to the nonmoving party to show there is a genuine issue of material fact precluding summary judgment. *Id.* However, the moving party still retains the burden of persuasion. *Id.* The Supreme Court described the interplay of these burdens as follows:

The burden of establishing the nonexistence of a “genuine issue” is on the party moving for summary judgment...This burden has two distinct components: an initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and an ultimate burden of persuasion, which always remains on the moving party...The court need not decide whether the moving party has satisfied its ultimate burden of persuasion unless and until the Court finds that the moving party has discharged its initial burden of production.

Celotex Corp., 477 U.S. at 330-31 (omitting citations).

When determining whether a moving party has satisfied its burden of persuasion, the “reviewing court examines the evidence in a light most favorable to the non-moving party.” *Bowyer v. U.S. Dept. of Air Force*, 804 F.2d 428, 430 (7th Cir. 1986). The “trial court should not weigh the evidence of the plaintiffs against that of the defendants. That is the function of the fact finder at trial.” *Staren v. Am. Nat’l Bank & Trust Co.*, 529 F.2d 1257, 1261 (7th Cir. 1976). Summary judgment must be denied if “any doubt remains as to the existence of a genuine issue of material fact.” *Id.* (citations omitted). The Supreme Court described the burden of persuasion as follows:

The burden of persuasion imposed on a moving party by Rule 56 is a stringent one... Summary judgment should not be granted unless it is clear that a trial is unnecessary, ..., and any doubt as to the existence of a genuine issue for trial should be resolved against the moving party... In determining whether a moving party has met its burden of persuasion, the court is obliged to take account of the entire setting of the case and must consider all papers of record as well as any materials prepared for the motion... As explained by the Court of Appeals for the Third Circuit in *In re Japanese Electronic Products Antitrust Litigation*,... “[i]f ... there is any evidence in the record from any

source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment....” 723 F.2d, at 258.

Celotex Corp., 477 U.S. at 330 n.2 (omitting citations).

ARGUMENT

I. AS A MATTER OF LAW, DEFENDANTS ARE NOT ENTITLED TO DECLARATORY JUDGMENT WITH REGARD TO FUTURE NATURAL RESOURCE ASSESSMENT COSTS AND DAMAGES.

Defendants ask the Court for summary declaratory judgment on future natural resource assessment costs and natural resource damages (collectively, “NRDs”). (Dkt. # 915 (Menasha Br.), p. 8.) Such relief is unavailable as a matter of law.

“A plaintiff who lacks standing to bring an action for natural resource damages recovery also lacks standing to bring an action for declaratory judgment regarding liability for future natural resource damage recovery.” *Borough of Sayreville v. Union Carbide Corp.*, 923 F. Supp. 671, 681 (D.N.J. 1996). This Court has already ruled, however, that such standing lies only with the Federal government or an authorized representative of a state; private parties lack standing to bring an action for NRDs. *See Appleton Papers Inc. v. George A. Whiting Paper Co.*, 572 F. Supp. 2d 1034, 1045 (E.D. Wis. 2008). Because Defendants lack the requisite standing to bring a claim for future NRDs, this aspect of Defendants’ motion must be denied as a matter of law.

II. PLAINTIFFS HAVE THE RIGHT TO SEEK A DETERMINATION THAT THE HARM IS DIVISIBLE.

Defendants seek a ruling that Plaintiffs are jointly and severally liable for 100% of all future response costs incurred by each Defendant. Such a ruling cannot be granted, however, if there is sufficient factual evidence showing that the harm at the site is capable of apportionment. Where the harm, in this case the PCB contamination of the LFR, is divisible, each party “is subject to liability only for the portion of the total harm that he has himself caused.” *Burlington*

N. & Santa Fe Ry. Co. v. U.S., 129 S. Ct. 1870, 1881 (2009). At a minimum, Plaintiffs are entitled to assert divisibility of the harm as a defense to Defendants' counterclaims, including the counterclaim for declaratory judgment as to future costs. (Dkt. # 751 (Decision and Order), p. 7.) "It is called a divisibility defense." *Id.*

The determination of whether the harm is divisible involves a two-step approach. First, as a question of law, a court must decide whether the harm is "theoretically capable of apportionment." Then, as a question of fact, the fact-finder must determine whether there is a reasonable basis for apportioning the harm. (See Dkt. # 560 (Plaintiffs' brief), pp. 9-12.) This approach was mandated by the Supreme Court in *Burlington Northern*. 129 S. Ct. at 1881.

Clearly, the PCB contamination of the LFR is *theoretically capable of apportionment*. Defendants concede many facts supporting this position. (See Dkt. # 878 (Glatfelter's and WTM I's Br. in Support of Mot. for Summ. J.), pp. 23-24.) Plaintiffs, therefore, are entitled to present evidence demonstrating their divisible share of the PCB contamination of the LFR.

Demonstrating divisible shares is a fact-intensive process and therefore unsuitable for resolution on summary judgment. Moreover, the Court, upon Defendants' request, has prohibited Plaintiffs from taking discovery outside of the narrow confines of Phase I. (See Dkt. # 252 (Case Management Decision and Scheduling Order); Dkt. # 843 (Order).) As a result, the existing record is insufficient to support any final determination on this issue.

Plaintiffs have a right, and therefore must be allowed, to take full discovery into all matters regarding Defendants' past uses and discharges of all PCBs prior to any determination on divisibility. *See, generally*, Fed. R. Civ. P. 16, 30, 31, 33, 34, 36; *see also Devlin v. Scardelletti*, 536 U.S. 1, 15-16 (2002) (Scalia, J., dissenting) ("Federal Rules of Civil Procedure ... confer upon 'parties' to the litigation the right to take such actions as conducting discovery"); *Am. Stock*

Exchange, LLC v. Mopex, Inc., 215 F.R.D. 87, 95 (S.D.N.Y. 2002) (“Clearly, a party has a right to conduct discovery on the claims brought against it ...”); *June v. George C. Peterson Co.*, 155 F.2d 963 (7th Cir. 1946) (purpose of Federal Rules of Civil Procedure “was to make broad and flexible the litigant’s *right to discovery*.”)(emphasis added). Denial of the discovery necessary to support a defense to liability is a denial of Plaintiffs’ due process.

Moreover, although more discovery would likely disclose further evidence, *see* Rule 56(f) Declaration of Kathleen L. Roach, ¶¶ 21-26, the evidence that does currently exist provides a basis to establish that the harm to the LFR is divisible. This evidence, which is explained below, must be construed in favor of the non-moving parties, *i.e.*, Plaintiffs. *Bowyer*, 529 F.2d at 430. Therefore, Plaintiffs, as a matter of law, cannot be held liable for 100% of future response costs incurred by any Defendant, and Defendants’ summary judgment motion for declaratory relief must be denied.

Example 1: Divisibility of OU1 Harms from Any Harms Due to Discharges from Plaintiffs’ Predecessors’ Facilities

Evidence exists that shows that Plaintiffs are not liable for the harm in OU1. Neither Plaintiffs nor their predecessors ever discharged PCBs directly into Operable Unit 1 (“OU1”), as both the Appleton Facility and the Combined Locks Facility were miles downstream from OU1.³ In addition, as explained in Plaintiffs’ Memorandum of Law in Opposition to Motion of Defendants P.H. Glatfelter Company and WTM I Company for Summary Judgment on Counterclaims, which is incorporated herein by reference, there is overwhelming evidence that Plaintiffs cannot be held liable for remediating PCB deposits in OU1 on the theory that they are

³ Nor did any discharges from Plaintiffs’ predecessors’ facilities ever migrate into OU1 or contribute to the PCB deposits there. *See* Plaintiffs’ Statement of Proposed Findings of Fact in Opposition to Motion for Summary Judgment for Declaratory Judgment Filed by Menasha Corporation (“PFF”), ¶ 1.)

liable as “arrangers” for the sale of broke by the Appleton Coated Paper Company.⁴ This evidence, which must be construed in Plaintiffs’ favor, demonstrates that the PCB contamination of the LFR is divisible in that any harms in OU1 are entirely distinct from any harms caused by discharges from Plaintiffs’ predecessors’ facilities. This type of situation – where there is a geophysical impossibility that releases from one location could have contributed to or caused the harms at another location – represents the prototypical case in which divisibility has been recognized and allowed. *See e.g., Burlington Northern*, 129 S. Ct. at 1884 (court of appeals was correct in noting that “divisibility may be established by . . . appropriate geographic considerations”); *United States v. Hercules, Inc.*, 247 F.3d 706, 717-19 (8th Cir. 2001) (“Defendants may be able to demonstrate that harms are distinct based on geographical considerations”); *United States v. Broderick Inv. Co.*, 862 F. Supp. 272, 277 (D. Colo. 1994) (harms divisible where there were two geographically distinct, non-mingled plumes of groundwater contamination); *Kamb v. U.S. Coast Guard*, 869 F. Supp. 793, 799 (N.D. Cal. 1994) (finding distinct harms where site was comprised of two geographically discrete sections). Therefore, Plaintiffs, as a matter of law, cannot be held liable for all future response costs incurred by any Defendant in OU1, and Defendants’ summary judgment motion for declaratory relief must be denied.

Example 2: Divisibility of Harms Based on Volume of PCBs Discharged

Another recognized basis for divisibility is the volumetric contribution of each party. *See Burlington Northern*, 129 S. Ct. at 1881-1883. Evidence exists that Defendants discharged excessive amounts of PCBs to the LFR attached to suspended solids, which the Defendants were

⁴ Although the PHG/WTM brief only addresses OU1, the same rationale applies to any Defendant claiming Plaintiffs were “arrangers.” Plaintiffs’ sale of a new and useful product without intent to dispose of a hazardous waste cannot qualify them as arrangers for the sale of broke. (*See Plaintiffs’ Memorandum of Law in Opposition to Motion of Defendants P.H. Glatfelter Company and WTM I Company for Summary Judgment on Counterclaims.*)

ordered to control. Plaintiffs have not been allowed to conduct full discovery into the volume of PCBs discharged into the LFR by the Defendants. (See Dkt. # 795 (Order), p. 39). As explained in the Restatement (Second) of Torts, § 433A, the “pollution of a stream by two or more factories... ‘... may be treated as divisible in terms of degree, and may be apportioned among the owners of the factories, on the basis of evidence *of the respective quantities of pollution discharged* into the stream.” *Matter of Bell Petroleum Services, Inc.*, 3 F.3d at 896 (emphasis added), *citing* Restatement (Second) of Torts, § 433A. Such volumetric calculations can and should be done with respect to the LFR. As indicated in Plaintiffs’ Memorandum of Law in Opposition to Georgia-Pacific LLC’s and Certain Defendants’ Motion for Summary Judgment on Equitable Factors, which is hereby incorporated herein by reference, proper volumetric calculations can be used to quantify the pollution caused by the Defendants for which the Plaintiffs are not liable. This evidence, which must be construed in Plaintiffs’ favor, demonstrates that there is a factual basis for apportioning the PCB contamination of the LFR on a volumetric basis. Therefore, as a matter of law, Plaintiffs cannot be held liable for all future response costs incurred by any Defendant arising from PCBs, and Defendants’ summary judgment motion for declaratory relief must be denied.

Example 3: Divisibility of Harms Caused by Types of PCBs Not Used in Carbonless Copy Paper

Given the urbanization and industrialization of the Fox River watershed, and the widespread use of non-Aroclor 1242 PCB materials in multiple commercial products, much evidence exists that Aroclor 1242 is not the only PCB material present in Fox River sediments. (PFF, ¶ 2.) It is also undisputed that some Defendants discharged these non-1242 Aroclors into the LFR.

For example, in 1982, Donald F. Kiesling, a Fort Howard senior in-house attorney, wrote

the following to the Wisconsin Department of Natural Resources:

Don DeMeuse [a Fort Howard executive] ... indicated our concern for some overreaction or misinformed reaction in regard to PCB's. We are concerned that seldom is there a differentiation made between Aroclor 1242 which is the PCB mixture sometimes found in the effluents of recycled pulp and paper mills, and the other Aroclors which are the principal environmental contaminants.

(PFF, ¶ 3.) Thereafter, Fort Howard began to test its wastepaper for Aroclor 1254 in addition to Aroclor 1242. (PFF, ¶ 4.) Testing of Fort Howard wastepaper samples in each year from 1983 through 1989 revealed the presence of Aroclor 1254 in most of Fort Howard's samples.⁵ (PFF, ¶ 5.)

Numerous other sources demonstrate the discharge of non-1242 Aroclors to the LFR by Defendants, including:

- The Wisconsin Department of Natural Resources ("WDNR") has profiled many dischargers to the LFR and detected non-1242 Aroclors in their effluent data. This list includes: Neenah-Menasha Sewerage Commission (Aroclor 1248); City of Appleton (Aroclors 1248 and 1254); US Paper, Menasha Division (Aroclor 1248); Consolidated Paper (Aroclor 1254); CBC Coating, Inc./Riverside Paper Company (Aroclor 1248); and Fort James Corp./Georgia-Pacific (Aroclor 1248). (PFF, ¶ 7.)
- A report prepared by the Institute of Paper Chemistry regarding PCBs in the LFR reveals the presence of non-1242 Aroclors, including Aroclors 1248 and 1254, in LFR sediments. (PFF, ¶ 8.)
- The Basis of Design Report, prepared for the Fox River Group and WDNR for the Sediment Removal Demonstration Project in Sediment Management Unit 56/57 immediately adjacent to the former Ft. Howard facility, showed that significant levels of Aroclors 1254, 1268 and, in particular, 1260 had been detected. (PFF, ¶ 9.)
- In the PCB Pathway Determination prepared for U.S. Fish and Wildlife, U.S. Dept. of Justice, and the U.S. Dept. of the Interior, 13.4% of samples contained higher chlorinated Aroclors. (PFF, ¶ 10.)

Discovery thus far has not provided an opportunity to generate an adequate record regarding Aroclors other than Aroclor 1242. However, it cannot be disputed that non-1242

⁵ Interestingly, during this time period when Fort Howard reported the results of its testing to the government, they continually referred to PCBs generally, rather than by the specific Aroclors for which they tested. (PFF, ¶ 6.)

Aroclors are: (1) present in the Lower Fox River; (2) being remediated; (3) more environmentally toxic than Aroclor 1242;⁶ and (4) not attributable to Plaintiffs. (PFF, ¶ 11.) Some areas of the river sediment contain 13% non-1242 Aroclors and other areas contain as much as much as 26.3% non-1242 Aroclors. (PFF, ¶ 13.) The non-1242 Aroclor contained in the LFR is substantial in terms of both amount and biological impact, and therefore cannot be ignored as part of a divisibility determination.

Specifically, the Record of Decision (“ROD”) for OUs 3, 4 and 5 recognizes bioaccumulative properties of PCBs, and the contamination levels in fish. (PFF, ¶ 14.) The ROD identifies “significantly elevated levels of PCBs were detected in all species of fish in all OUs.” *Id.* The evidence to date, however, suggests that if Aroclor 1242 had been the only source of PCBs in the LFR, fish tissues in the LFR would contain less than 1% of PCB homolog groups with six or more chlorines. (PFF, ¶ 15.) Non-Aroclor 1242, on the other hand, and specifically homolog groups with five or more chlorines, composed approximately 25% of the total PCB in LFR fishes. (PFF, ¶ 16.) Therefore, on average, **25% of the total PCB in fish** results from Aroclor mixtures that incorporated heavier non-Aroclor 1242 homolog groups, such as Aroclor 1248, 1254, and 1260. *Id.*

It is undisputed that neither Plaintiffs nor their predecessors discharged these PCBs as part of the CCP production process. This evidence, which must be construed in Plaintiffs’ favor, demonstrates that there is a clear factual basis for dividing the harms caused by Aroclor 1242 from those caused by other types of PCBs. Therefore, as a matter of law, Plaintiffs cannot be held liable for all future response costs incurred by any Defendant, and Defendants’ summary judgment motion for declaratory relief must be denied.

⁶ Aroclors with higher chlorine content (e.g., 1254, 1260 and 1268) “have higher bioconcentration potential and generally greater toxicity to fish and higher organisms, including man.” (PFF, ¶ 12.)

Example 4: Aroclor 1242 Contamination Unrelated to CCP

The Court limited discovery in this case to the narrow issue of when parties knew, or should have known, that the recycling of CCP would result in the discharge of PCBs to a waterbody, thereby risking environmental damage. (Dkt. # 252 (Case Management Decision and Scheduling Order), p. 8.) Because Aroclor 1242 was the only PCB utilized in the CCP, discovery was inherently further limited to when each party knew, or should have known, that recycling CCP would result in the discharge of *Aroclor 1242* to a waterbody, thereby risking environmental damage.

However, CCP was not the only use for Aroclor 1242. In fact, Aroclor 1242 was utilized in many products, including electrical transformers, hydraulic fluids, rubber plasticizers, adhesives, wax extenders and gas transmission turbine lubricants. (PFF, ¶ 17.) In addition, evidence exists that Aroclor 1242 use other than in CCP resulted in discharges to the LFR. The co-location of other compounds found in the sediment with the Aroclor 1242 provides potential evidence of source attribution and evidence of divisibility. (PFF, ¶ 18.) Defendants have not provided any evidence demonstrating that Plaintiffs are liable for releases of Aroclor 1242 unrelated to CCP. This evidence, which the Court must construe in Plaintiffs' favor, makes clear that the PCB contamination of the LFR is divisible on the basis of the source of Aroclor 1242. Therefore, as a matter of law, Plaintiffs cannot be held liable for any future response costs incurred by any Defendant, and Defendants' summary judgment motion for declaratory relief must be denied.

Example 5: Discharges Relating to Recycling Post-Consumer CCP and Recycling CCP Trim Received from Paper Converters

As the Court has already recognized, evidence exists and it is undisputed that various

Defendants recycled post-consumer CCP and CCP trim received from paper converters, both of which contained PCBs. (Dkt. # 795 (Order), p. 7.) PCBs were released from this recycling activity both directly into the LFR and through other Defendants' wastewater treatment plants. Plaintiffs cannot be held liable for these discharges, as Defendants have no "arranger" argument to make with respect to this recycling activity. The evidence of post-consumer CCP and paper converter CCP recycling, which must be construed in Plaintiffs' favor, demonstrates that the PCB contamination of the LFR is divisible. Therefore, as a matter of law, Plaintiffs cannot be held liable for any future response costs incurred by any defendant, and Defendants' summary judgment motion for declaratory relief must be denied.

On an incomplete factual record and based on the limited discovery the Court has permitted, Plaintiffs have demonstrated above five separate grounds upon which the evidence, when construed in favor of Plaintiffs, shows that harm to the LFR is divisible. Full discovery and an opportunity to fully develop the case for trial is likely to reveal further grounds for divisibility of the harm. Because the Court must consider the evidence Plaintiffs have adduced here in a light that favors Plaintiffs, and because further evidence may be discovered that supports further bases for divisibility, Defendants' motion must be denied.

III. DEFENDANTS HAVE NOT SATISFIED THEIR BURDEN OF PROVING THAT PLAINTIFFS CAN BE HELD JOINTLY AND SEVERALLY LIABLE FOR ALL FUTURE RESPONSE COSTS.

The general rule is that joint and several liability is not available in a 113 action. *See, e.g., Eleentis Chromium v. Coastal States Petroleum Co.*, 450 F.3d 607, 612 (5th Cir. 2006) (stating that "the overwhelming majority of our sister circuits have concluded that liability is

merely several under § 113(f) and citing cases from the 6th, 9th, 10th and 11th Circuits).⁷ The party seeking contribution bears the burden of proving an appropriate allocation.

It is El Paso, as the party bringing an action for contribution, that bore “the burden of proving the defendant is a responsible party under § 107(a) of CERCLA and also the burden of proving the defendant’s equitable share of costs.” *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 348 (6th Cir. 1998); *see also Minyard Enters., Inc. v. Se. Chem. & Solv. Co.*, 184 F.3d 373, 385 (4th Cir. 1999) (same).

Elementis, 450 F.3d at 613. Defendants have not even attempted to meet their burden for imposing 100% equitable allocation jointly and severally on NCR and API. They state conclusorily that both API and NCR are successors to the liabilities of ACPC and Combined Locks. (Brief at p. 10.) The single equitable factor on which they rely is “knowledge of risk,” yet, Defendants have presented no evidence about the knowledge of risk, if any possessed by Combined Locks. Likewise, the Defendants have produced essentially no evidence that ACPC had any knowledge of risk. For example, Defendants have never rebutted the declaration of Ron Jezerc that throughout the time that Aroclor 1242 was used in the production of carbonless copy paper, ACPC had no knowledge of environmental dangers from the use of Aroclor 1242. (PFF, ¶ 19.) Defendants have virtually ignored the question of what ACPC did or did not know. Instead, Defendants have focused almost exclusively on the knowledge of NCR as the manufacturer and seller of CCP in the 1960’s, knowledge that ACPC has not been shown to have had. Plaintiffs disagree that that is the proper approach as to NCR and submit that there are abundant genuine issues of material fact in dispute with respect to the relevant knowledge of NCR.⁸

However, it is undisputed that API did not have such knowledge. API did not come into

⁷ The Seventh Circuit has not gone that far. In a case where the two defendants at issue were a corporation and its responsible officer in charge, the Court indicated that joint and several liability was “optional.” *Browning-Ferris Industries v. Ter Maat*, 195 F.3d 953, 956 (7th Cir. 1995).

⁸ *See* Dkt. #658 (Pls.’ Memo. of Law in Opp’n to Certain Defs.’ Mot. for Summ. J. or, alternatively Partial Summ. J.).

existence until seven years after the use of Aroclor 1242 in CCP had ceased. It has been judicially determined that API itself did not contribute in any way to the PCB contamination in the Fox River. (PFF, ¶ 20.) The only basis on which API can be liable, then, is as an alleged successor to ACPC and Combined Locks, based upon certain provisions in a 1978 agreement for the purchase of assets formerly owned by ACPC and Combined Locks. However, API was not aware of any Fox River PCB liabilities at the time of that agreement and the agreement made no reference to such liabilities. (PFF, ¶ 21.) Thus, Defendants have not met their burden of showing that a 100% allocation based solely on the alleged knowledge of NCR in the 1960's should be applied to NCR and API jointly and severally.

IV. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THEIR CLAIM THAT PLAINTIFFS MUST PAY 100% OF FUTURE RESPONSE COSTS FOR THE SAME REASONS THEY ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THEIR CLAIMS FOR PAST COSTS.

For a host of reasons, summary judgment cannot be granted with respect to Defendants' claims for past response costs. These reasons similarly preclude summary judgment on Defendants' claim for future declaratory relief. Defendants' motion for future response costs should be denied because: (a) Defendants' discharged the vast majority of the PCBs to the LFR, which is highly relevant given the fundamental principle of CERCLA that the "polluter pays; (b) Defendants are not entitled to contribution for their own intentional pollution; (c) Genuine issues of material fact regarding Defendants' relative culpability preclude summary judgment; (d) other equitable factors, including cooperation with the government, the made whole doctrine, and ability to distinguish harm weigh in favor of Plaintiffs, and (e) there are genuine issues of material fact as to whether awarding Defendants contribution for future costs will result in a double recovery. These arguments are made in other Memoranda of Law being submitted

contemporaneously herewith, and therefore Plaintiffs incorporate by reference and refer the Court to the arguments contained in those Memoranda of Law, so as to not unnecessarily burden the Court with duplicative argument.

It is inconsequential that Georgia-Pacific's and U.S. Paper's summary judgment motions request contribution for past costs, whereas the current motion requests contribution for future costs; whether past or future response costs are recoverable under CERCLA are analyzed in an identical manner. *See United States v. Davis*, 31 F. Supp. 2d 45, 60 (D.R.I. 1998). Accordingly, Plaintiffs incorporate by reference and refer the Court to the arguments contained in the responses to those summary judgment motions in order to refrain from unnecessarily burdening the Court with duplicative argument.

V. DEFENDANTS SHOULD NOT BE ALLOWED TO SHIRK THEIR LIABILITY TO THE GOVERNMENT THROUGH A DECLARATORY JUDGMENT ASSIGNING 100% LIABILITY TO PLAINTIFFS.

As the Court has acknowledged, nothing in this case has exonerated Defendants' liability to the Government for the PCB contamination of the LFR. (Dkt. # 795 (Order), p. 47.) Yet by requesting a declaratory judgment assigning responsibility for all future response costs to Plaintiffs, Defendants hope to enlist the Court's help in an end-run around this liability. This should not be allowed. Whether Defendants are liable to the Government is an issue between Defendants and the Government that should not be resolved, in a back-door fashion, in this matter. Nor should the Court countenance Defendants' effort to stretch the Order of December 16, 2009 into a ruling the Court expressly refused to make in that order.

Further, allowing this relief would potentially lead to irreconcilable judicial determinations and thus unfairly prejudice Plaintiffs' inherent right to defend themselves against

any future claims brought by the Government, which the Government has asserted it will bring.⁹ In a future 107 action by the Government, Plaintiffs will have the right to prove divisibility as a defense. Upon proof of their divisible share, Plaintiffs' liability for the entire Site will be limited to that share, in accordance with the Supreme Court's decision in *Burlington Northern*. A future ruling limiting Plaintiffs' share, however, will be irreconcilable with the ruling the Defendants here are asking the Court to make granting them 100% contribution from Plaintiffs without even addressing the divisibility of the harm. As this Court stated in its Order of November 18, 2009:

In addition, I am satisfied that allowing Plaintiffs to pursue a divisibility case at this stage would upset the government's right to proceed as it sees fit against Plaintiffs and other PRPs. As the United States notes, in its enforcement role it is entitled significant leeway as to when, and how, it wishes to enforce the environmental laws. Divisibility is primarily a defense to liability vis-à-vis the government itself, and the government's role in this action is somewhat tangential. In other words, it would not be advisable to allow the Plaintiffs to litigate the divisibility issue and require the government to accede to any rulings this Court might make as to whether the harm is divisible or not.

Order (Docket No. 751) at p. 8. Similarly, allowing Defendants effectively to pre-litigate divisibility in this motion, where the Court has expressly prevented Plaintiffs from litigating divisibility, would also interfere with the Government's right to proceed as it sees fit against Defendants and would effectively block the Government from seeking recourse from Defendants.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment for Declaratory Relief Filed by Menasha Corporation should be denied in its entirety.

⁹ The Government has acknowledged that in May or June that it will have to begin an enforcement action. (See Dkt. # 806 (Letter from Attorney Oakes to Court, dated January 15, 2010), p. 2 n.3.)

Respectfully submitted,

APPLETON PAPERS INC.

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