EPA EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

APPLETON PAPERS INC. and NCR CORP.,

Plaintiffs,

v. Case No. 08-C-16

GEORGE A. WHITING PAPER CO., et al.,

Defendants.

ORDER

Following my grant of summary judgment to several Defendants, Plaintiffs have moved for entry of partial judgment under Rule 54(b). They argue that the Defendants' remaining counterclaims and other proceedings in this action could require a significant expenditure of time and resources; as such, they believe there is no just reason for delaying entry of a partial judgment, which would allow them to file an immediate appeal of the summary judgment decision as well as the denial of their motion to amend the complaint.

I note that the briefing places the parties in rather unusual circumstances. The Plaintiffs are in the position of arguing how extensive and lengthy resolution of the Defendants' counterclaims will be, whereas the Defendants are arguing, in effect, that their counterclaims are not a big deal. At this stage it is too soon to predict which side is right. Plaintiffs are probably correct that resolution of the counterclaims is not as simple as extrapolating from the basic principles set forth in this Court's summary judgment order: determining that A is not entitled to contribution from B does not mandate a conclusion that B *is* entitled to contribution from A. On the other hand, it is not as though the remaining claims have little to do with the Plaintiffs' action – there will be significant overlap, as all sides seem to recognize. Moreover, the complexity and difficulty of any remaining claims likely pale in comparison to the contribution claims brought by the Plaintiffs. Those claims were resolved in relatively short order (given the number of parties and number of issues raised), and I am satisfied that the remaining issues in this action can be resolved without substantially delaying entry of judgment.

The cases Plaintiffs cite suggest that certification of a Rule 54(b) judgment may be appropriate or permissible under these circumstances, but they do not suggest that certification *should* be entered. Instead, it must be remembered that the rule itself is permissive (Rule 54(b) states that a court "may" direct entry of a partial judgment), and the Seventh Circuit has pointed out that multiple judgments are the exception, not the norm.

> To avoid time-consuming duplicative appeals, the norm in litigation-embodied in the general rule that a final judgment is one that leaves nothing to be decided-is one appeal per case. The decision to send part of a case to immediate appeal under Rule 54(b) is left to the district court's discretion. But leaving the decision to the district court's discretion does not give that court carte blanche to send to this court any decision involving a separate claim or party. A district court may not enter judgment under Rule 54(b) merely to accommodate an attorney who wants to appeal immediately, and mechanically noting "no just cause for delay" on a judgment does not make it immediately appealable. Rather, because Rule 54(b) departs from the norm, and has the potential to multiply litigation costs for parties and the appellate court, the district court must carefully consider whether immediate appeal is appropriate in a particular case.

United States v. Ettrick Wood Products, Inc., 916 F.2d 1211, 1218 (7th Cir. 1990) (citations omitted).

The United States and some of the Defendants have proposed a briefing schedule that would allow the parties to file dispositive motions on the remaining claims. If such motions do not resolve the remaining claims, they propose that any remaining claims then be stayed so that an appeal may be taken. This approach allows for the possibility that all claims can be resolved relatively swiftly (i.e., this year), but still affords an "out" – a 54(b) certification and appeal – if the claims cannot. No one disputes that, barring settlement, a decision from the Court of Appeals on the important legal issues raised in this case will be crucial in directing how this case proceeds, if at all. But I believe a fuller resolution of this case at the district court level is achievable without excessive delay, and accordingly the motion for partial judgment is **DENIED**.

Dispositive motions as to any remaining claims may be filed by April 3. Responses may be filed by May 3, and replies, if any, by May 24.

SO ORDERED this 10th day of February, 2010.

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

EPA EXHIBIT 2

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

UNITED STATES OF AMERICA and
THE STATE OF WISCONSIN,

Plaintiffs,

v.

No. 10-CV-910-WCG

NCR CORPORATION, *et al.*,

Defendants.

**MEMORANDUM OF DEFENDANT APPLETON PAPERS INC.
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Defendant Appleton Papers Inc. ("API"), by its undersigned attorneys, respectfully submits this Memorandum in Support of its Motion for Summary Judgment.

INTRODUCTION

In its July 5, 2011 Decision and Order, the Court concluded that the United States "will have little success attempting to demonstrate that Appleton Papers Inc. is liable as a successor under CERCLA." Dkt. 172, p. 21. The Court later repeated that API is "unlikely to be deemed liable under CERCLA." *Id.*, p. 24. The Court reasoned that: (a) NCR Corporation ("NCR"), which sold assets to API in 1978, could not divest itself of its CERCLA liability; (b) NCR remains a viable company; and (c) there is no basis for imposing CERCLA liability on an asset purchaser where the seller remains liable and viable. *Id.*, p. 18. Any private financial arrangement between API and NCR is in the nature of an indemnity, which does not impose successor liability on API or make API liable under CERCLA. *Id.*, pp. 18-21. That analysis, made under the "likelihood of success" prong of the requirements for a preliminary injunction, should now be confirmed by granting summary judgment and dismissing with prejudice claims that the

United States and State of Wisconsin (collectively, the "Government") have asserted against API.

The Court's conclusion that successor liability does not apply here because NCR remains viable made it unnecessary for the Court to determine in its July 5 Decision whether API in fact assumed the Fox River liabilities in the 1978 transaction, and the same is true here. However, should the Court wish to consider an independent basis for granting summary judgment, API demonstrates below that it did not assume NCR's Fox River liabilities in that transaction. That is an additional reason why the Government's CERCLA claims against API are groundless.

Finally, the Court's July 5 Decision also addressed a new claim that the United States made in its reply to API's memorandum opposing the motion for a preliminary injunction. The Court wrote that the "United States also throws in a suggestion that Appleton Papers may have itself polluted PCBs into the river following its creation in 1978." *Id.*, p. 21, n.2. The Court rejected the claim, stating: "This argument has not been sufficiently supported and I cannot conclude it has much likelihood of establishing liability." *Id.* Indeed, despite fifteen years of investigation and access to hundreds of thousands of pages of documents, the United States has no credible support for its "suggestion" that API itself discharged PCBs into the river.

Accordingly, it is time to finally bring closure to the Government's baseless claims that API is liable under CERCLA. API respectfully requests that the Court enter summary judgment and dismiss the Government's claims against API with prejudice.

STATEMENT OF FACTS

A. The Government's Allegations As To API's Alleged Liability.

For 15 years, the United States has claimed that API is liable under CERCLA for PCB contamination in the Lower Fox River and Green Bay. Proposed Finding of Fact ("PFOF") ¶ 5.[1] In the Section 106 Order it issued to API and others in November 2007, the United States stated that API was liable under CERCLA because it is the successor to corporations that had such liability:

> Appleton Papers Inc. **("API") is a party that is liable** for payment of response costs and performance of response activities at the Site **because API is: (1) a successor** to one or more corporate predecessors that, at the time of disposal of hazardous substances, owned and/or operated a facility at which such hazardous substances were disposed of, and from which there has been a release of hazardous substances to the Site; and (2) **a successor** to one or more corporate predecessors that by contract, agreement, or otherwise arranged for disposal or treatment of hazardous substances at a facility owned or operated by another party or entity and from which there has been a release of hazardous substances to the site.

PFOF ¶ 7 (emphasis added). The United States based its successor liability claim on a 1978 asset purchase agreement with NCR:

> In 1978, Appleton Papers Inc. [API] . . . and . . . B.A.T. Industries, p.l.c. ("BAT") – acquired the assets of the Appleton Papers Division from NCR, and Appleton Papers Inc. and BAT assumed certain liabilities in connection with the asset purchase.

PFOF ¶ 8. In the 106 Order, the United States asserted no other basis for its CERCLA liability allegation. PFOF ¶ 9.

In its First Amended Complaint, the Government alleged that API "is a successor to certain relevant liabilities of NCR Corporation." PFOF ¶ 6. API denied that allegation. *Id.*

[1] API's Proposed Findings of Fact in Support of its Motion for Summary Judgment are being filed with this Memorandum.

B. API Did Not Acquire Assets From NCR Until Seven Years After The Use Of PCB's Had Ceased In 1971.

It is undisputed that the use of PCBs in making NCR brand carbonless copy paper ("CCP") ceased in 1971. PFOF ¶ 10. During the time that PCBs were used in CCP, Appleton Coated Paper Company ("ACPC") owned and operated a paper coating facility in Appleton, Wisconsin, at which CCP was manufactured. PFOF ¶ 11. From 1954 to 1969, Combined Papers Mills, Inc. owned and operated a paper mill in Combined Locks, Wisconsin. PFOF ¶ 12.

In 1969, NCR acquired the stock of Combined Paper Mills, Inc., which became its wholly-owned subsidiary. PFOF ¶ 13. In 1970, NCR acquired the stock of ACPC, making it a wholly-owned subsidiary. PFOF ¶ 14. In 1971, ACPC and Combined Paper Mills, Inc. were merged into Appleton Papers, Inc. (with a comma – a different corporation than API). PFOF ¶ 15. The merged entity, Appleton Papers, Inc., was then merged into NCR Corporation in 1973, at which time it became the "Appleton Papers Division" of NCR. PFOF ¶ 16.

On June 30, 1978, NCR sold the assets of its Appleton Papers Division, including the Appleton and Combined Locks plants, to Lentheric, Inc., a subsidiary of B.A.T Industries, p.l.c. ("BAT"). PFOF ¶ 17. The terms of the purchase and sale were set forth in an asset purchase agreement ("1978 Agreement"). *Id.* Lentheric, Inc. then changed its name to "Appleton Papers Inc." (no comma), the Defendant in this action. PFOF ¶ 18. API first began doing business in July 1978 after it purchased the assets of the Appleton Papers Division. PFOF 19. The 1978 Agreement between NCR and API and BAT does not make any reference to Fox River liabilities, CERCLA liabilities or PCBs. PFOF ¶ 20.

It is undisputed that NCR continued to exist after the 1978 asset transaction, remains in existence today, and is a Defendant in this action. PFOF ¶ 32.

C. The United States' Claims Regarding API's Alleged Liability In Its Motion for Preliminary Injunction.

On March 29, 2011, the United States (but not the State of Wisconsin) filed a Motion For A Preliminary Injunction. PFOF ¶ 21. In its brief in support of the Motion, the United States devoted a single paragraph to the issue of NCR and API's alleged liability under CERCLA stating, in part: "There is no question that NCR and API are liable under CERCLA for the contamination in OUs 2-5." PFOF ¶ 22. The United States, however, offered no facts or argument to show that API (as opposed to NCR) was liable under CERCLA. *Id.* It was not until the United States filed its reply brief ("Preliminary Injunction Reply Brief") that it offered any facts or argument to support its contention that API is liable under CERCLA. PFOF ¶ 23. The United States raised three purported bases for that claim.

1. Alleged Successor Liability Based Upon The 1978 Agreement.

The United States cited three provisions in the 1978 Agreement as the basis for its claim that API had assumed, and therefore was a successor to, NCR's Fox River liability. PFOF ¶ 23. These provisions are set forth and discussed below. The United States provided nothing but argument to support its allegation that NCR's Fox River liability fell within the express terms of these provisions. PFOF ¶¶ 24-31.

2. Alleged Successor Liability Based Upon The 1998 Agreement.

In its Preliminary Injunction Reply Brief, the United States claimed for the first time that API expressly assumed NCR's CERCLA liability in a 1998 settlement and 2005 arbitration. PFOF ¶ 34. By way of background, the State of Wisconsin first identified

NCR (but not API) as a potentially responsible party ("PRP") for remediation of the PCB contamination in the Fox River in 1995. PFOF ¶ 35. Thereafter, NCR sued API and BAT, claiming that they must indemnify NCR against any Fox River liability pursuant to the terms of the 1978 Agreement. PFOF ¶ 38. In 1998, NCR, API and BAT mediated and settled the case, entering into a "Confidential Settlement Agreement Between NCR Corporation and B.A.T Industries P.L.C. and Appleton Papers Inc." (the "1998 Settlement Agreement"). PFOF ¶ 45. The 1998 Settlement Agreement provided that it was not an admission of liability:

> 7. **NO ADMISSION OF LIABILITY**: By entering into this Settlement Agreement, and the exhibits hereto, **the parties are not admitting to any** unlawful conduct or **liability on their part.** The parties further acknowledge and agree that this Settlement Agreement shall not be admissible as evidence in any federal, state, local, tribal, or administrative agency proceeding, except in a proceeding to enforce same.

PFOF ¶ 46.

In the 1998 Settlement Agreement, the parties agreed that if any costs were ever imposed upon any of them arising from the Fox River PCB contamination or other sites as defined in the 1998 Settlement Agreement, those costs would be split with API/BAT together bearing 55% and NCR bearing 45% of the first $75 million. PFOF ¶ 47. The 1998 Settlement Agreement established parameters for a "compulsory, binding arbitration to allocate as between them . . . costs in excess of $75 million." *Id.* The parties agreed in a contemporaneous Subsequent Allocation Arbitration Agreement that neither side would be allocated more than 75% or less than 25% of the amounts to be expended beyond $75 million, but that: "within that range, the arbitrators may select any allocation that they deem appropriate." PFOF ¶ 48. Under this charge, the arbitrators were not required to base their allocation upon the terms of the 1978 Agreement. *Id.*

Consistent with the terms of the 1998 Settlement Agreement, NCR, API and BAT participated in an arbitration in October and November 2005. PFOF ¶ 49. The arbitrators were not asked to determine, and did not determine, whether NCR's Fox River liability fell within the terms of the assumption provisions in the 1978 Agreement. Rather, the parties' arbitration agreement authorized the arbitrators, within the bounds noted above, to "select any allocation that they deem appropriate." PFOF ¶ 50. Consistent with this charge, the arbitrators made the following division of costs above $75 million:

> Pursuant to this agreement of the parties, the Arbitrators deem appropriate the following allocation:
>
> API/BAT: Sixty (60) percent
>
> NCR: Forty (40) percent.

PFOF ¶ 51. The arbitration award represented the panel's "collective judgment on the appropriate allocation under the terms of the Allocation Agreement." PFOF ¶ 52. The parties have abided by that private settlement arrangement.[2]

3. Alleged Direct Liability.

In its Preliminary Injunction Reply Brief, the United States also alleged that API is liable under CERCLA because there may have been discharges of PCBs from API's facilities when they were owned and operated by API. PFOF ¶ 53. The United States offered no evidence of PCB discharges from the Appleton facility when API owned and operated that facility. PFOF ¶ 63. Instead, the United States submitted documents

[2] Any disputes that may arise as to the rights and obligations of NCR, API and/or BAT are subject to the dispute resolution provisions of the 1998 Settlement Agreement, as explained in API's July 25, 2011 Response of Defendant Appleton Papers Inc. To Defendant NCR Corporation's Filing Regarding The United States' Motion for Entry of Revised Proposed Terms of an Injunction. Dkt. 192.

regarding a leak from a transformer at the Combined Locks plant that was captured by a containment pad (PFOF ¶¶ 54-57) and certain unidentified analytical results of a water sample. PFOF ¶¶ 59-60. These documents provide no evidence of a PCB discharge to the river during the time API owned the Combined Locks plant. PFOF ¶ 63. Moreover, API submitted undisputed evidence that discharges from the Combined Locks plant during the time API owned it did not add PCBs to the river. PFOF ¶ 62.

D. The Court's Decision And Order Denying The Preliminary Injunction.

After reviewing the United States' submissions and arguments, the Court issued its Decision and Order (Dkt. 172) denying the United States' Motion for Preliminary Injunction. PFOF ¶ 64. The Court concluded that it was unlikely that the United States could show that API is liable under CERCLA. *Id.*, p. 24 ("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 that I find unlikely to be deemed liable under CERCLA."). PFOF ¶ 65. The Court reiterated its ruling in its July 28, 2011 Order Denying Renewed Motion For Preliminary Injunction. Dkt. 193. The Court's Decision and Order is discussed in detail below.

LAW AND ARGUMENT

I. API IS ENTITLED TO SUMMARY JUDGMENT BASED UPON THE REASONING IN THE JULY 5, 2011 DECISION AND ORDER.

In its July 5, 2011 Decision and Order, the Court concluded that it is unlikely that the United States can prove that API has successor liability under CERCLA because its alleged predecessor, NCR, retained the CERCLA liability and remains a viable company. The Court ruled that there is no basis for the imposition of successor liability in such circumstances.

The Court briefly summarized the pertinent 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.

Dkt. 172, p. 16.

When a company buys assets, it generally does not succeed to the liabilities of the seller. *Id.*, p. 17. The United States argued that NCR's Fox River liability fell within the scope of certain assumption provisions in the 1978 Agreement. *Id.*, pp. 17-18. However, the Court did not need to reach this issue, ruling that "the exact scope of these clauses is not before me." *Id.,* p. 18.

Rather, the Court ruled that "none of the equitable considerations that would otherwise support the imposition of successor liability are in play here" because NCR remains liable:

> 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.

Id.

The Court explained that a party like NCR cannot divest itself of CERCLA liability through a private agreement. CERCLA § 107(e), 42 U.S.C. § 9607(3)(1). That conclusion is confirmed by the Seventh Circuit's decision in *Harley-Davidson, Inc. v. Minstar, Inc.,* 41 F.3d 341, 342-43 (7th Cir. 1994), which held that § 107(e) "precludes efforts to divest a responsible party of his liability" by "shifting liability from one person to another." Dkt, 172, p. 19. Accordingly, "the 1978 Asset Agreement could not transfer liability *per se*, it merely transferred the financial risk of that liability, as with an insurance policy." Dkt. 172, p. 18.

This Court then reviewed and summarized the extensive case law holding that where an asset seller remains liable and viable, there is no basis for imposing successor liability on the buyer:

> 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).

Dkt. 172, p. 20.[3] The United States concedes that NCR is still a functioning corporation that is capable of providing the relief it seeks. PFOF ¶ 33. Thus, "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." Dkt. 172, p. 19. Private agreements between API and NCR "do not establish successorship because the original liability under CERCLA has remained with the seller." *Id.*, p. 20.

This Court's analysis is supported by Judge Stadtmueller's decision in *A-C Reorganization Trust v. E.I. DuPont de Nemours & Co.*, No. 94-C-574, 1997 WL 381962

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[3] This Court's ruling is consistent with other reported decisions. *See, e.g., Durham Mfg. Co. v. Merriam Mfg. Co.*, 294 F. Supp. 2d 251, 273-74 (D. Conn. 2003) (refusing to impose CERCLA successor liability where the seller continued to exist as a viable entity); *United States v. Mexico Feed & Seed Company, Inc.*, 980 F.2d 478, 490 (8th Cir. 1992) (refusing to impose CERCLA successor liability where the asset seller continued to be a viable entity because "the very concern animating the doctrine of corporate successor liability – that the corporate veil thwart plaintiffs in actions against corporations which have sold their assets and distributed the proceeds – is not present.").

(E.D. Wis. 1997).[4] In that case, Reichhold Chemicals, Inc. ("Reichhold") had entered into Acquisition and Assumption Agreements with Tenneco Chemicals in which Reichhold stated that it "assumes and agrees to pay, perform, and discharge, all debts, obligations, contracts and liabilities" of Tenneco Chemicals. *Id.* *5. The Court ruled that that provision "is best viewed as an indemnification" because "Reichhold could not assume the CERCLA liability itself." *Id.* *6. The Court held that the contractual assumption provision did not impose CERCLA successor liability on Reichhold:

> **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.** 42 U.S.C. § 9607(e)(1); *Harley-Davidson, Inc. v. Minstar, Inc.,* 41 F.3d 341, 342 (7th Cir. 1994). While the decision in *Harley-Davidson* theoretically leaves open the possibility that pre-CERCLA transfers of liability could be effective, the Seventh Circuit's discussion and the statute's language both indicate that Congress meant to foreclose all transfers of liability. *Id.* at 343-44. Furthermore, **the court's research revealed no cases holding that CERCLA liability may be transferred by agreement of the parties. Thus, the statute eliminates the exception for express or implied assumption of liabilities in an asset sale.**

Id. at *7 (emphasis added). The court further held that, due to § 107(e)(1), there can be no CERCLA liability where the sole basis for alleged CERCLA liability is a contractual assumption of liability:

> **If there is no transfer of liability in a mere asset sale (and there [is] neither an argument nor a basis in the record for applying any of the other exceptions to the general rule), then Reichhold cannot have acquired liability even if it agreed to do so.** Under the Agreements, Reichhold agreed to assume the obligations and liabilities of Tenneco Chemicals with respect to the Newport Division. Amended Fourth Party Complaint Ex. C at 11. However, CERCLA nullifies this portion of the agreement with respect to CERCLA liability, because Reichhold could not assume Tenneco Chemicals' CERCLA liability. **As there is no indication or allegations that Reichhold is a PRP, there is no basis for successor liability, and the court finds no authority in CERCLA for a possible statutory indemnification [i.e., contribution] action.**

[4] A copy of such decision is attached as Exhibit 5 to the Declaration of Ronald R. Ragatz in Support of Appleton Papers Inc.'s Motion for Summary Judgment.

> Count II of the amended fourth-party complaint must be dismissed for failure to state a claim upon which relief may be granted.

Id. at *8 (footnotes omitted; emphasis added). The court granted Reichhold's FRCP 12(b)(6) motion to dismiss, holding there was no possible § 113 contribution claim against Reichhold. The *A-C* decision was expressly grounded on the Seventh Circuit's decision in *Harley-Davidson.*

In its Preliminary Injunction Reply Brief, The United States cited a Third Circuit case in support of an argument that express assumption language creates direct CERCLA liability. *Caldwell Trucking PRP v. Rexon Technology Corp.*, 421 F.3d 234 (3rd Cir. 2005). However, in *Caldwell* the original holder of the liability, Rexon, was no longer viable or capable of providing any relief:

> As noted earlier, the suit before us was filed on April 6, 1995. Rexon was served with process in April and May 1995 and its **certificate of dissolution was not filed until June 30, 1995.** Pullman points out that **Rexon's facilities in Wayne and Fairfield had ceased operations in September, 1994,** the bank had attached the remaining assets, and **by June 30, 1995 Rexon had liquidated.**

Id. at 245. Less than three months after the action was filed "Rexon was tottering on the edge of its grave." *Id.* While Rexon could still be sued, it had no ability to provide meaningful relief. Thus, the situation in *Caldwell,* where the original holder of the liability was an empty shell that had been liquidated and dissolved, bears no resemblance to this case, where the Government took pains to tell the Court that NCR is viable and capable of providing relief. Dkt, 126, p. 13, n.7.[5]

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[5] *Caldwell* also is distinguishable on other grounds. It involved a sale of stock (rather than assets) in which the seller (not the buyer), Pullman, was alleged to be responsible for the liability of the subsidiary, Rexon. The language at issue was a provision in the stock purchase agreement captioned "[Pullman] Retention of Certain Liabilities" in which Pullman agreed to pay Rexon's "Superfund liabilities." *Caldwell*, 421 F.3d at 242.

The United States also cited a second case in support of its argument, *In Re Safety-Kleen Corp.,* 380 B.R. 716 (D. Del. 2008), which is also readily distinguishable. In that case, a bankrupt debtor, Safety Kleen, had sold certain assets to Clean Harbors and the bankruptcy court entered a "Sale Order" approving the sale. Clean Harbors agreed to assume Safety Kleen's obligations under two settlement agreements involving the Kramer Landfill Superfund Site. *Id.* at 731-35. When Clean Harbors tried to renege on the deal, and Safety Kleen's creditors brought an adversary proceeding against Clean Harbors. The bankruptcy court held that the Kramer Landfill settlement obligations were covered by the Sale Order and Acquisition Agreement and that "the Sale Order expressly conferred third-party beneficiary rights on interested parties, including the creditors of Safety Kleen." *Id.*, p. 740. *Safety Kleen* is not at all similar to the facts here where there has been no bankruptcy, no court-ordered sale approved by creditors, no conferral of third-party beneficiary rights on those creditors, no finding of an express assumption, and no need to even consider the equitable principles against imposing CERCLA liability where the asset seller is viable.

The cases cited by the United States are inapposite. The Court correctly ruled in its July 5 Decision and Order that there is no basis to apply the equitable doctrine of successor liability where, like here, the asset seller is viable. API is, therefore, entitled to summary judgment dismissing the Government's claims against it.

II. THE GOVERNMENT CANNOT PROVE THAT NCR'S FOX RIVER LIABILITY WAS WITHIN THE SCOPE OF THE 1978 AGREEMENT.

Having determined that successor liability was inapplicable because NCR remained viable, the Court did not address the factual predicate upon which the Government's successor liability theory is based, namely, that API assumed NCR's Fox

River liabilities in the 1978 Agreement. In fact, however, the United States was unable to explain how NCR's Fox River liability would fall within the scope of the 1978 Agreement. The provision upon which the United States principally relied in claiming that API has successor liability states that API assumed the following:

> . . . all of Seller's liabilities (other than liabilities with respect to claims asserted by or on behalf of private parties), whether accrued, absolute, contingent or otherwise, and whether or not reflected or reserved against on the Financial Statements or the Closing Date Balance Sheet or 1977 Balance Sheet or on the books of account or other records of APD, 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 or the products or operations, of APD with all applicable federal, state and local and other governmental environmental and pollution control laws, ordinances, regulations, rules and standards.**

PFOF ¶ 24 (emphasis added). The abbreviation "APD" in the above quote refers to the Appleton Papers Division of NCR. *Id.*, n.3. The Appleton Papers Division was formed in 1973 and operated until the sale of assets to API in June 1978. PFOF ¶ 25. Thus, the Appleton Papers Division operated for only about five years, 1973-78, all of which were after the use of PCBs in making carbonless copy paper had ceased. The term "Property" refers to the assets that were being purchased. PFOF ¶ 24, n.3.

Accordingly, any assumption under ¶ 1.4.9 of the 1978 Agreement was limited to liabilities arising from the failure of the Property or the products or operations of the Appleton Papers Division to comply with applicable governmental environmental and pollution control laws. The Fox River PCB liability did not result from the failure of the assets acquired in 1978, or the products or operations of the Appleton Papers Division to comply with applicable governmental environmental and pollution control laws. The United States has not even suggested otherwise. It has never identified any environmental law with which the Property or products or operations of the Appleton

Papers Division failed to comply during the period when APD existed, 1973-78. PFOF ¶ 26.

A second provision which the United States cited provides that API assumed: "all of Seller's obligations and liabilities . . . **with respect to the compliance of the assets, properties, products or operations of APD with all governmental laws**, ordinances, regulations, rules and standards." PFOF ¶ 27 (emphasis added). Like ¶ 1.4.9, ¶ 1.4.3 requires a failure of the assets, properties, products or operations of the Appleton Papers Division to comply with governmental laws. The United States offered no facts to suggest that the assets, properties, products, or operations of the Appleton Papers Division were in non-compliance with any law – much less that NCR's Fox River liabilities arose from such non-compliance. PFOF ¶ 28. CERCLA did not exist at the time and CERCLA's later enactment did not establish that any of Appleton Papers Division's operations failed to comply with any laws. CERCLA later created liability for activities that were in compliance with applicable laws, but that is not an obligation assumed under the 1978 Agreement. NCR had no obligation or liability with respect to *compliance* of the Appleton Paper Division's assets, properties, products, or operations with governmental laws in 1978.

The third provision cited by the Government is as follows:

> . . . **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** threatened suit, patent infringement suit, patent or trademark interference or opposition, action, claim, investigation by any governmental body, or legal, administrative or arbitration **proceeding set forth on Schedules A or M,** in each case whether such obligation or liability is accrued, absolute, contingent or otherwise and whether or not such obligation or liability is reflected or reserved against on the Financial Statements or the Closing Date Balance Sheet;

PFOF ¶ 29 (emphasis added).

The United States quoted an excerpt from Schedule A that says that "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." Dkt. 150, p. 7. This language could not have related to CERCLA; CERCLA was not enacted until 1980. Neither Schedule A nor Schedule M to the 1978 Agreement disclose any pending or threatened suit, claim, action, investigation or proceeding relating to PCBs or the Lower Fox River or Green Bay. PFOF ¶ 30. Nor did the United States offer any evidence that the violation that "may be" occurring in 1978 had anything to do with the later-determined Fox River PCB liabilities. PFOF ¶ 31.

The Government has the burden of proving API's liability. *United States v. Hercules, Inc.*, 247 F.3d 706, 715 (8^{th} Cir. 2001). The United States put forth argument in connection with its preliminary injunction motion in an effort to show a reasonable likelihood of success on the merits. The argument does not hold up factually as explained above, and was rejected by this Court. The Government has not demonstrated, and cannot demonstrate, that NCR's Fox River liability – whatever that liability is ultimately adjudicated to be – falls within the scope of any assumption provision in the 1978 Agreement.[6] The inability of the United States to make even a *prima facie* showing in that regard is a second and independent basis for granting summary judgment dismissing the Government's claims against API. The sole obligation of API regarding the Fox River contamination is as a partial indemnitor (jointly and severally with BAT) to

[6] A ruling by this Court that API did not assume NCR's Fox River liabilities will not affect API's indemnification obligations to NCR. Those obligations arise under the 1998 Settlement Agreement, in which the parties released claims relating to the Fox River based upon the 1978 Agreement. Dkt. 124-1, at 16-18.

NCR pursuant to the 1998 Settlement Agreement, which does not impose CERCLA liability on API or make API liable to the Government at all.

III. THERE IS NO BASIS FOR IMPOSING DIRECT CERCLA LIABILITY ON API.

As the Court noted in the July 5 Decision and Order, the United States threw in a suggestion that API itself may have discharged PCBs into the river.

> 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.

Dkt, 172, p. 21, n.2.[7]

The United States cited three documents to support its allegation that PCBs were discharged by the Combined Locks facility after June 30, 1978: PFOF ¶ 53; Dkt 147-3; Dkt 147-4; and Dkt 147-5. *See* Dkt. 150, p. 6 of 35. The first two are a memorandum and letter about a leak from a transformer that was detected and stopped with a minor level of PCBs detected on the concrete floor beneath the transformer. Dkt. 147-3, 147-4. PFOF ¶¶ 54-58. There is no evidence of any release to the environment, much less any discharge to the Lower Fox River. *Id.*

The final document, Dkt. 147-5, purports to be a laboratory analytical report from 1989, showing the results of analysis of a sample collected from the Combined Locks facility's effluent. PFOF ¶¶ 59-60. The document does not identify the substances for which the sample was analyzed; the words "PCBs" or 'polychlorinated biphenyl" do not appear on the document. *Id.*

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[7] The Court confirmed this in its July 28, 2011 Order Denying Renewed Motion For Preliminary Injunction, Dkt. 193, where the Court stated: "Appleton Papers did not pollute itself, but signed an agreement stating it would indemnify NCR for certain environmental liability," thus recognizing that API's obligation is in the nature of an indemnity arising from the 1998 Settlement Agreement.

Even if one assumes, however, that the test result relates to PCBs, the results are meaningless because the document does not show the level of PCBs that came *into* the Combined Locks facility as *influent* from the Fox River that the plant used as process water. In sampling events analyzing both the influent into *and* the effluent from the Combined Locks facility during API's period of ownership, whenever PCBs were detected in the effluent leaving the facility, they were no higher than the pre-existing level of PCBs in the river water drawn into the plant. PFOF ¶¶ 62-63. Thus, the evidence before the Court shows that the Combined Locks facility was not contributing PCBs to the River. This is supported by testimony from a Combined Locks plant employee:

> A Basically the findings were that we would remove PCBs from the water. It was going back – the effluent that we were discharging had less in it than the water that we were taking in.
>
> Q Okay. Can you explain that for the jury a little bit? What kind of water were you taking into the mill?
>
> A We were taking the raw river water, and we were processing that in our water treatment system, and that was used in the papermaking and pulp making operations, and what we discharged from the paper machines, that went through our primary and secondary waste treatment systems, and someplace along the line PCBs were removed.
>
> Q So in essence the mill was cleaning up the river?
>
> A That's correct.

PFOF ¶ 62 (Dkt. 139-20, pp. 5-6).

The United States has no credible evidence in support of a last-minute allegation of direct discharges thrown in after 15 years of silence on such a theory. Such a theory was never mentioned in the Section 106 Order. It has no basis in fact, as the Court has already recognized. Rather, the evidence establishes that the Combined Locks facility did not contribute to PCB contamination in the Lower Fox River.

CONCLUSION

The Government has had fifteen years to investigate (including the ability to issue mandatory information requests) and build its case against API.[8] However, when the United States was forced to put its cards on the table to support its preliminary injunction motion, the United States' inability to prove a case against API was finally exposed to the Court.

NCR remains liable and viable. That fact alone precludes successor liability. Even if the Court were, despite NCR's viability, interested in expending judicial resources to explore the meaning of the agreements in issue, they do not establish an assumption of NCR's liability. And there is no basis to conclude that API has direct CERCLA liability.

Accordingly, API respectfully requests that the Court enter summary judgment in its favor and against the United States and the State of Wisconsin as to all claims in the First Amended Complaint and dismiss all such claims with prejudice.

[8] In its effort to build its case against API, the United States has served information requests pursuant to CERCLA § 104(e) upon API on at least seven occasions, pursuant to which API has produced thousands of pages of documents. PFOF ¶ 66.

Dated this 28th day of July, 2011.

APPLETON PAPERS INC.

By /s/ Ronald R. Ragatz
One of Its Attorneys

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EPA EXHIBIT 3

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.

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.
>
> 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.
>
> 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