MILWAUKEE DIE CASTING CO. v. FISHER CONTROLS INTERNATIONAL, INC. AND MONSANTO COMPANY
U.S. District Court - Eastern District of Wisconsin
Case No. 93-C-0325

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MILWAUKEE DIE CASTING CO. v. FISHER CONTROLS INTERNATIONAL, INC. AND MONSANTO COMPANY
U.S. District Court - Eastern District of Wisconsin
Case No. 93-C-0325

DATE	TITLE	TAB
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MILWAUKEE DIE CASTING CO., SLYMAN INDUSTRIES, INC. and THERESA A. SLYMAN,	)	
Plaintiffs,	)	
v.	)	No. 93-C-0325
FISHER CONTROLS INTERNATIONAL, INC.	)	Judge Reynolds
Defendant.	)	

STIPULATION AND ORDER
FOR DISMISSAL WITH PREJUDICE

Stipulation

Plaintiffs, Milwaukee Die Casting Co., Slyman Industries, Inc. and Theresa A. Slyman, and defendant Fisher Controls International, Inc., by their respective attorneys, hereby stipulate to the dismissal of this case with prejudice, with each party to bear her or its own costs and attorneys' fees.

MILWAUKEE DIE CASTING CO., SLYMAN INDUSTRIES, INC. and THERESA A. SLYMAN

By: _____
Carmen D. Caruso
NOONAN & CARUSO
122 South Michigan Avenue
Chicago, Illinois 60603

FISHER CONTROLS INTERNATIONAL, INC.

By: _____
Andrew R. Running
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601

ORDER

On the parties' foregoing stipulation, this case is hereby dismissed with prejudice, with each party to bear her or its own costs and attorneys' fees.

_____

UNITED STATES DISTRICT JUDGE

06523147

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MILWAUKEE DIE CASTING CO., SLYMAN INDUSTRIES, INC. and THERESA A. SLYMAN Plaintiffs, v. FISHER CONTROLS INTERNATIONAL, INC., Defendant.	)	No. 93-C-0325 Judge Reynolds

JOINT MOTION FOR POSTPONEMENT OF SETTLEMENT CONFERENCE

Plaintiffs and defendants, by their counsel, jointly move the Court for a 45 day postponement of the settlement conference currently scheduled for July 2, 1997 at 1:00 p.m. The reason for this request is that the plaintiffs are in the process of completing a site investigation of the contamination at their die casting facility. The results of that investigation are due to be submitted to the Wisconsin Department of Natural Resources in August. The site investigation will result in new soil and groundwater sampling data that could have a material impact on the selection of the site remedy (if any is required) and on the parties' allocation of responsibility for that remedy. The parties agree that it would be unproductive to hold a settlement conference

before each side receives and evaluates the results of this site investigation. A 45-day postponement of the July 2nd conference should be sufficient for that purpose.

Respectfully submitted,

MILWAUKEE DIE CASTING CO., SLYMAN INDUSTRIES, INC. and THERESA A. SLYMAN	FISHER CONTROLS INTERNATIONAL, INC.
By:_____ One of Their Attorneys	By:_____ By One of Its Attorneys

DATED: June 23, 1997

06103197

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

MILWAUKEE DIE CASTING CO.,
SLYMAN INDUSTRIES, INC., and
THERESA A. SLYMAN,

Plaintiffs,

v. **Civil Action No. 93-C-0325**

FISHER CONTROLS INTERNATIONAL, INC.,

Defendant.

ORDER

Following a court trial, this court ruled that defendant is liable to plaintiffs under CERCLA, 42 U.S.C. § 9613(f), for its equitable share of recoverable response costs for the remediation of hazardous wastes at the Milwaukee Die Casting Co. site. On December 13, 1996, at the request of the parties, final judgment was entered pursuant to Rule 54(b). Defendant then filed a notice of appeal. On May 9, 1997, the Seventh Circuit dismissed the appeal for lack of jurisdiction, finding the appeal to be premature because the damages issue had not yet been decided.

The parties request settlement assistance. This action is therefore referred to Magistrate Judge Gorence to conduct settlement proceedings on damages, pursuant to Local Rule 13.06(p) (E.D. Wis.).

On December 6, 1996, the parties filed a stipulation to submit the damages issue to binding arbitration following a final determination of the liability issue (i.e., after exhaustion of all appeals). Given the Seventh Circuit remand, this condition has not been satisfied, although the parties' May 9, 1997 status report indicates that should settlement be unsuccessful, the parties would proceed to arbitration. The court wishes to bring a resolution to this over four-year-old case. Accordingly, on or before thirty days from completion of settlement proceedings, regardless of whether successful, plaintiff shall, after consultation with defendant, submit the parties' proposal which would, for purposes of this court, finally dispose of this action within three months of the parties' proposal submission.

The Clerk of Court is instructed to forward the file for this action to Magistrate Judge Gorence.

SO ORDERED this 3rd day of June, 1997.

John W. Reynolds
United States District Judge

4/14/97

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

April 14, 1997

Before

Hon. RICHARD A. POSNER, *Chief Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

MILWAUKEE DIE CASTING COMPANY, a Wisconsin corporation, SLYMAN INDUSTRIES, INCORPORATED, a Delaware corporation and THERESA A. SLYMAN, an individual resident of Ohio, Plaintiffs-Appellees,	Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 97-1020 v.	No. 93 C 325
FISHER CONTROLS INTERNATIONAL, INCORPORATED, a Delaware corporation, Defendant-Appellant.	John W. Reynolds, Judge.

The following are before the court:

1. **JURISDICTIONAL MEMORANDUM OF FISHER CONTROLS INTERNATIONAL, INC.,** filed on February 11, 1997, by counsel for the appellant.

2. **RESPONSE OF APPELLEES TO APPELLANT'S JURISDICTIONAL MEMORANDUM,** filed on March 17, 1997, by counsel for the appellees.

The court, on its own motion, **DISMISSES** this appeal for lack of jurisdiction on the ground that it is premature. See Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737 (1976) (Declaration of liability without computation of damages may not be appealed even if the district court enters the judgment under Fed. R. Civ. 54(b)).

12/30/97

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MILWAUKEE DIE CASTING CO., SLYMAN INDUSTRIES, INC. and THERESA A. SLYMAN Plaintiffs, v. FISHER CONTROLS INTERNATIONAL, INC., Defendant.	)	No. 93-C-0325 Judge Reynolds

JURISDICTIONAL STATEMENT
ACCOMPANYING NOTICE OF APPEAL

Pursuant to Seventh Circuit Rules 3(c)(1) and 28(b), defendant Fisher Controls International, Inc. states as follows:

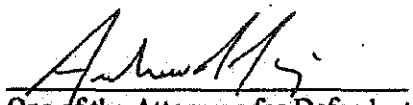
1. The jurisdiction of the District Court is based on 28 U.S.C. § 1331, federal question. The plaintiffs' claim arises from § 113(f) of the Comprehensive Environmental Response, Compensation & Liability Act of 1980, as amended, 42 U.S.C. § 9613(f) ("CERCLA").

2. The District Court's Partial Final Judgment was entered on December 13, 1996. No motion for a new trial or alteration of the judgment or any other motion that would toll the time within which to appeal has been filed. The judgment declares that the defendant is a liable party under CERCLA § 113(f), but does not resolve the amount of the plaintiffs' recoverable CERCLA response costs or the defendant's equitable share of those costs. However, the parties have agreed to submit those issues to binding arbitration in the event that the District Court's

liability ruling is sustained on appeal. Therefore, no further matters are pending at this time in the District Court. Pursuant to FRCP 54(b), the District Court has expressly determined in the order granting partial final judgment that there is "no just reason for delay in the entry of judgment as to liability."

DATED: December 30, 1996

Respectfully submitted,



One of the Attorneys for Defendant
Fisher Controls International, Inc.

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(414) 273-3500

Andrew R. Running
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(312) 861-2000

CERTIFICATE OF SERVICE

I hereby certify that I today caused the foregoing Notice of Appeal and Jurisdictional Statement Accompanying Notice of Appeal to be served on the following persons by first-class U.S. mail:

Carmen D. Caruso, Esq.
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Chicago, Illinois 60602

Laurie McElroy, Esq.
Whyte Hirschboeck Dudek, S.C.
111 East Wisconsin Avenue
Suite 2100
Milwaukee, Wisconsin 53202

Andrew R. Running

DATED: December 30, 1996

12/30/97

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

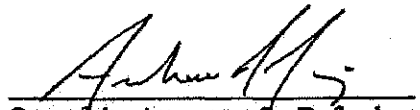
MILWAUKEE DIE CASTING CO., SLYMAN INDUSTRIES, INC. and THERESA A. SLYMAN	)	
Plaintiffs,	)	
v.	)	No. 93-C-0325
FISHER CONTROLS INTERNATIONAL, INC.,	)	Judge Reynolds
Defendant.	)	

NOTICE OF APPEAL

Notice is hereby given that defendant Fisher Controls International, Inc. hereby appeals to the United States Court of Appeals for the Seventh Circuit from the District Court's Rule 54(b) Partial Final Judgment entered in this action on December 13, 1996.

DATED: December 30, 1996

Respectfully submitted,



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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

MILWAUKEE DIE CASTING CO., SLYMAN INDUSTRIES, INC., and THERESA A. SLYMAN,

Plaintiffs,

v. **Civil Action No. 93-C-0325**

FISHER CONTROLS INTERNATIONAL, INC.,

Defendant.

ORDER: Final Judgment Entered on Plaintiffs' Claims

The court ...y and damages in this environmental cle... ...lowing a court trial on liability, the cou... ...ernational, Inc., is liable to plaintiffs. The ... final judgment pursuant to Rule 54(b) of ...ich request the court grants. The parties have agreed ... that if this court is affirmed on appeal with respect to the liability ... ...ng the exhaustion of any other appeals with respect to liability, the parties shall submit the issue of damages to binding arbitration. There is therefore no just reason for delay in the entry of judgment as to liability.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

MILWAUKEE DIE CASTING CO., SLYMAN INDUSTRIES, INC., and THERESA A. SLYMAN,

Plaintiffs,

v. **Civil Action No. 93-C-0325**

FISHER CONTROLS INTERNATIONAL, INC.,

Defendant.

ORDER

The court previously bifurcated the issues of liability and damages in this environmental clean-up action. On September 12, 1996, following a court trial on liability, the court found that defendant Fisher Controls International, Inc., is liable to plaintiffs. The parties have requested that the court enter final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, which request the court grants. The parties have agreed by stipulation filed with the court that if this court is affirmed on appeal with respect to the liability issue, and following the exhaustion of any other appeals with respect to liability, the parties shall submit the issue of damages to binding arbitration. There is therefore no just reason for delay in the entry of judgment as to liability.

IT IS THEREFORE ORDERED THAT final judgment be entered in favor of plaintiffs and against defendant on the issue that defendant is liable to plaintiffs under CERCLA § 113(f), 42 U.S.C. § 9613(f), for its equitable share of recoverable response costs for the remediation of hazardous wastes at the Milwaukee Die Casting Co. site, which is the subject of plaintiffs' amended complaint.

SO ORDERED this 13th day of December, 1996.

John W. Reynolds
John W. Reynolds
United States District Judge

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

EASTERN DISTRICT OF WISCONSIN

MILWAUKEE DIE CASTING CO., SLYMAN INDUSTRIES, INC. and THERESA A. SLYMAN,
V.
FISHER CONTROLS INTERNATIONAL, INC.

PARTIAL
JUDGMENT IN A CIVIL CASE

CASE NUMBER: 93-C-325

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court.

IT IS ORDERED AND ADJUDGED that the defendant is liable to plaintiffs under CERCLA § 113(f), 42 U.S.C. § 9613(f), for its equitable share of recoverable response costs for the remediation of hazardous wastes at the Milwaukee Die Casting Co. site, which is the subject of plaintiffs' amended complaint.

December 13, 1996
Date

SOFRON B. NEDILSKY
Clerk

(By) Deputy Clerk

Copy mailed to attorneys for parties by the Court pursuant to Fed. R. Civ. P. 77(d).

Copy mailed to attorneys for parties by the Court pursuant to Fed. R. Civ. P.77(d). 11-15-96

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

U.S. DIST. COURT EAST DIST. WISC.
FILED
NOV 15 1996
AT ____ O'CLOCK ____ M
SOFRON B. NEDILSKY

COURT MINUTES

Deputy Clerk Terri Suchy

Court Reporter Karen Smith

DATE: 11-15-96

CASE NO. 93-C-325

HON. JOHN W. REYNOLDS

MILWAUKEE DIE CASTING

cc: Team

v.

FISHER CONTROLS INTERNATIONAL

TIME CALLED: 2:05 TIME CONCLUDED: 2:10

NATURE OF HEARING: SCHEDULING CONFERENCE CALL

APPEARANCES: Pltfs: ~~Edward Heiser & Laurie McLeroy~~ 273-2100
and
~~James Figliulo &~~ Carmen Caruso 312-368-8330

Deft: Michael Ash ~~273-3500~~ 287-9570
and
Andrew Running (will call in)

DISPOSITION:

Defendant's Sept. 23, 1996 Petition to Certify Order for Interlocutory Appeal is WITHDRAWN.

Oct. 15, 1996 Joint Motion for Referral to Magistrate Judge is WITHDRAWN.

On or before December 6, 1996, the parties shall inform the court in writing of their agreement re. how this case shall proceed and submit an appropriate stipulation/order, if any.

NOV 22 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

cc: T. Bistline
G. Davidson
D. Moore
M. Shannon
M. Ash
J. Schink
R. Ellis
S. Gadzala

MILWAUKEE DIE CASTING CO., a Wisconsin corporation, SLYMAN INDUSTRIES, INC., a Delaware corporation, and THERESA A. SLYMAN, an individual resident of Ohio,	)	
Plaintiffs,	)	
v.	)	**No. 93-C-0325**
FISHER CONTROLS INTERNATIONAL, INC., a Delaware corporation,	)	**Judge Reynolds**
Defendant.	)	

PLAINTIFFS' RESPONSE TO PETITION FOR INTERLOCUTORY APPEAL

The plaintiffs, Milwaukee Die Casting Co., Slyman Industries, Inc. and Theresa A. Slyman (collectively "plaintiffs"), by their attorneys, state as follows:

1. Following the Court's "Decision Following Court Trial" dated September 12, 1996 (the "Order"), Defendant Fisher Controls, Inc. ("Fisher") petitioned the Court to certify the Order for interlocutory appeal pursuant to 28 U.S.C. §1292(b). The Court has scheduled a telephonic status conference on Ocober 18, 1996.

2. Fisher's petition contains an argument on the merits of the issue which the Court decided in the Order. Plaintiffs dispute Fisher's arguments and believe that the Order should be affirmed.

3. However, Plaintiffs do not oppose Fisher's petition for an interlocutory appeal. Plaintiffs agree that, for purposes of 28 U.S.C. §1292(b), the Order "involves a controlling question of law and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation."

3. Further, because the issue is a question of law which has been fully briefed in the District Court, plaintiffs submit that (pending completion of the transcript of the October 25 and 26, 1995 trial proceedings), the proposed interlocutory appeal should be expedited to the extent practicable and permissible to the United States Court of Appeals for the Seventh Circuit.

4. Plaintiffs further request that in the event the interlocutory appeal is approved, this Court should not stay the remaining trial court proceedings pending the completion of the interlocutory appeal.

Respectfully submitted,

MILWAUKEE DIE CASTING CO.,
SLYMAN INDUSTRIES, INC.
and THERESA A. SLYMAN

By: _____
One of Their Attorneys

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30 North LaSalle Street
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Chicago, Illinois 60602
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Laurie McElroy
WHYTE, HIRSCHBOECK
& DUDEK S.C.
111 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414)273-2100

10870-2list.app

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

CERTIFICATE OF SERVICE

The undersigned, being first duly sworn under oath, states that she caused a copy of the **PLAINTIFFS' RESPONSE TO PETITION FOR INTERLOCUTORY APPEAL** to be served upon the following persons by facsimile transmission and by First Class Mail on October 14, 1996.

Michael Ash, Esq. *(414) 273-5198*
James G. Schweitzer, Esq.
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Milwaukee, Wisconsin 53202

Andrew R. Running, Esq. *(312) 861-2200*
Robert B. Ellis, Esq.
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200 East Randolph Drive
Chicago, Illinois 60601

Linda M. Waschow

SUBSCRIBED and SWORN to before me on October 14, 1996.

Madeline D. Kanner
NOTARY PUBLIC

"OFFICIAL SEAL"
Madeline D. Kanner
Notary Public, State of Illinois
My Commission Expires 10/26/97

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

cc: T. Bistline
G. Davidson
D. Moore
M. Shannon
M. Ash
J. Schink
R. Ellis
S. Gadzala

MILWAUKEE DIE CASTING CO., a Wisconsin corporation, SLYMAN INDUSTRIES, INC., a Delaware corporation, and THERESA A. SLYMAN, an individual resident of Ohio,	)	
Plaintiffs,	)	
v.	)	**No. 93-C-0325**
FISHER CONTROLS INTERNATIONAL, INC., a Delaware corporation,	)	**Judge Reynolds**
Defendant.	)	

JOINT MOTION FOR REFERRAL TO MAGISTRATE JUDGE FOR MEDIATION

The plaintiffs, Milwaukee Die Casting Co., Slyman Industries, Inc. and Theresa A. Slyman (collectively "plaintiffs"), and the defendant, Fisher Controls International, Inc. ("Fisher"), by their respective attorneys, jointly move for a referral of this case to a Magistrate Judge for mediation of issues which remain in the case following the September 12, 1996 "Decision Following Court Trial."

MILWAUKEE DIE CASTING CO., SLYMAN INDUSTRIES, INC. and THERESA A. SLYMAN

By: _____
One of Their Attorneys

FISHER CONTROLS INTERNATIONAL, INC.

By: _____
One of Their Attorneys

OCT 22 1996

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Attorneys For Defendant

10870-2wtlp2

STATE OF ILLINOIS)
) SS.
COUNTY OF C O O K)

CERTIFICATE OF SERVICE

The undersigned, being first duly sworn under oath, states that she caused a copy of the **JOINT MOTION FOR REFERRAL TO MAGISTRATE JUDGE FOR MEDIATION** to be served upon the following persons by facsimile transmission and by First Class Mail on October 14, 1996.

Michael Ash, Esq. *(414) 273-5198*
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Andrew R. Running, Esq. *(312) 861-2200*
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200 East Randolph Drive
Chicago, Illinois 60601

Linda M. Waschow

SUBSCRIBED and SWORN to before me on October 14, 1996.

Madeline D. Kanner
NOTARY PUBLIC

"OFFICIAL SEAL"
Madeline D. Kanner
Notary Public, State of Illinois
My Commission Expires 10/26/97

89

9/20/96

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MILWAUKEE DIE CASTING CO., SLYMAN INDUSTRIES, INC. and THERESA A. SLYMAN	)	
Plaintiffs,	)	
v.	)	No. 93-C-0325
FISHER CONTROLS INTERNATIONAL, INC.,	)	Judge Reynolds
Defendant.	)	

FISHER'S PETITION TO CERTIFY THE COURT'S SEPTEMBER 12, 1996 ORDER FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. §1292(b)

For the reasons set forth in the accompanying Memorandum In Support, defendant Fisher Controls International, Inc. hereby petitions the Court to certify for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) its September 12, 1996 Decision Following Court Trial.

Respectfully submitted,

Dated: September 20, 1996

One of the Attorneys for Defendant
Fisher Controls International, Inc.

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Chicago, Illinois 60601
(312) 861-2000

9/20/96

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MILWAUKEE DIE CASTING CO., SLYMAN INDUSTRIES, INC. and THERESA A. SLYMAN	)	
Plaintiffs,	)	
v.	)	No. 93-C-0325
FISHER CONTROLS INTERNATIONAL, INC.,	)	Judge Reynolds
Defendant.	)	

MEMORANDUM IN SUPPORT OF FISHER'S PETITION TO CERTIFY THE COURT'S SEPTEMBER 12, 1996 ORDER FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. §1292(b)

The Court's September 12, 1996 Decision Following Court Trial holds as a matter of law that any parent corporation that acquires the assets of another company through a §368(a)(1)(C) reorganization must be deemed to be the corporate successor of that company, regardless of whether the parent immediately transfers those assets to an independent subsidiary. Fisher petitions the Court to certify that decision for permissive interlocutory appeal pursuant to 28 U.S.C. §1292(b), because it "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ."

I. The Decision Involves A "Controlling Question Of Law"

The Court's opinion expressly bases its liability finding on a legal determination arising from undisputed facts concerning the 1975 transaction in which New Milwaukee Die Casting Company acquired the assets of Old Milwaukee Die Casting. (Opinion at 3) The Court ruled as a

matter of law that Fisher's participation as an intermediary or conduit in that transaction was a sufficient basis to hold that Fisher is the corporate successor to Old Milwaukee Die Casting. The "controlling" nature of this ruling is exemplified by the fact that the Court considered it unnecessary to make any further liability findings. An interlocutory appeal of this decision would therefore clearly advance the ultimate resolution of the liability issues in this case.

II. There Is Substantial Ground For Difference Of Opinion As To The Decision

The Court's opinion places unprecedented importance on the fact that the 1975 transaction was structured to qualify as a §368(a)(1)(C) reorganization for tax purposes. There is substantial ground for a difference of opinion as to the legal implications the Court finds to arise from that tax election. Equally important, while the Court states in its opinion that "equity decides the case," no reason is given why imposing successor liability on Fisher is necessary to prevent any inequity.

A. The Tax Code provides no basis for any finding of liability against Fisher.

There is no dispute that Fisher's momentary possession of Old Milwaukee Die Casting's assets prior to their transfer to New Milwaukee Die Casting is an insufficient basis for liability. The Court recognized in its June 23, 1995 summary judgment decision that "CERCLA does not extend so far as to impose liability on those who have merely taken brief record title to a facility as a conduit in an acquisition." (Summary Judgment Opinion at 14) The Court's September 12, 1996 trial ruling is therefore predicated not on the mere fact of Fisher's involvement as a conduit

in the 1975 transaction, but rather on the tax implications it reads into that transaction. The Court's decision is the first to base a finding of successor liability solely on that basis.[1]

In ruling that the tax aspects of the 1975 transaction are alone sufficient to support a finding of successor liability against Fisher, the Court reads unprecedented CERCLA implications into the tax aspects of the transaction. For example, the Court deems two Internal Revenue Service regulations applicable to §368(a)(1)(C) transactions to create a "binding admission that the purchaser intends to continue the business enterprise." (Opinion at 9) But at a minimum, the two regulations relied upon by the Court are subject to different interpretations.

The first IRS regulation relied upon by the Court provides: "A corporation remains a party to the reorganization although it transfers all or part of the assets acquired to a controlled subsidiary." (26 C.F.R. § 1-368-2(f); cited by Court at fn. 5, p. 8) The Court reads this regulation to mean that "Fisher cannot avoid the fact that it was the asset-acquiring party in a § 368(a)(1)(C) reorganization." (Opinion at 8) But Fisher has never denied that it acquired Old Milwaukee Die Casting Company's assets. The issue is whether any CERCLA liability should be imposed based upon Fisher's momentary role as an "asset-acquiring" conduit. And a closer reading of §1-368-2(f) makes it clear that being "a party to the reorganization" for tax purposes cannot be sufficient to impose CERCLA liability, or otherwise any time the stock of a parent company was used by a subsidiary in a §368(a)(1)(C) reorganization the parent would be held

---

[1] The CERCLA case on which the Court principally relies, In re Acushnet River & New Bedford Harbor Proceedings, 712 F. Supp. 1010, 1018 (D. Mass. 1989), is distinguishable because successor liability in that case was imposed on the subsidiary that actually continued the business, not on its parent. (The parent, RTE, did not participate as a conduit in the acquisition.) Fisher has never disputed that the common law factors relied upon by the court in Acushnet would support a finding that New Milwaukee Die Casting Company is the successor to Old Milwaukee Die Casting.

liable, regardless of whether the parent had any involvement whatsoever in the transaction. In the very next sentence after the second sentence of §1-368-2(f) quoted by the Court, the IRS provides another example to show how broad the term "party to a reorganization" is:

> (f) The term "a party to a reorganization" includes a corporation resulting from a reorganization, and both corporations in a transaction qualifying as a reorganization where one corporation acquires stock or properties of another corporation. A corporation remains a party to the reorganization although it transfers all or part of the assets acquired to a controlled subsidiary. A corporation controlling an acquiring corporation is a party to the reorganization when the stock of such controlling corporation is used in the acquisition of properties. . . .

Id., emphasis added. Applying the Court's reasoning, Fisher would have been "a party to the reorganization" and hence a CERCLA liable party even if New Milwaukee Die Casting had acquired Old Milwaukee Die Casting's assets in a direct transaction using Fisher's stock. Yet even the Acushnet opinion relied upon by the Court holds that Fisher would have no such liability in a direct transaction: "Acquiring Belleville through a wholly-owned subsidiary was an effective way for RTE [the parent] to protect itself from liability." 712 F. Supp. at 1017 (emphasis added). In sum, this Court cast too wide a net when it imposed CERCLA liability on Fisher merely because it was "a party to the reorganization."

The Court relies upon a second IRS regulation to hold that "[r]eorganizing under § 368(a) is, in effect, a binding admission that the purchaser intends to continue the business enterprise." (Opinion at 9) That regulation provides in relevant part: "Transactions qualifying for tax free treatment under §368(a) . . . must provide for a continuation of the enterprise." (26 C.F.R. §1.368-1(c); quoted by the Court at fn. 6, p. 9; emphasis added by the Court.) This regulation precluded Fisher from immediately selling Old Milwaukee Die Casting's assets to an unrelated third party. But there is no requirement that "the purchaser" continue the business directly, as the

Court's opinion suggests. To the contrary, 26 U.S.C. § 368(a)(2)(C) expressly authorizes the immediate transfer of "all or part of the assets acquired" to a wholly-owned subsidiary such as New Milwaukee Die Casting Company. (So does 26 C.F.R. § 1-368-2(f), the first IRS regulation quoted by the Court.) Having made that immediate transfer, Fisher contends that its role as a mere conduit in the 1975 transaction is insufficient as a matter of law to impose successor or CERCLA liability. See e.g., cases cited at p. 15 of the Court's June 23, 1995 Summary Judgment Decision, including John S. Boyd Co. v. Boston Gas Co., 992 F. 2d 401, 407 n.5 (1st Cir. 1993) ("this intermediate transaction does not alter any liability in this case by statute, contract or any other norm . . . ."). New Milwaukee Die Casting Company may well be the corporate successor to Old Milwaukee Die Casting Company, but Fisher is not.

B. Equity is satisfied by recognizing New Milwaukee Die Casting Company as the successor to Old Milwaukee Die Casting Company.

There are therefore substantial grounds for a difference of opinion as to whether any "binding admissions" should be read into the IRS regulations cited by the Court. But if "equity decides the case" (Opinion at 2), then there are also substantial grounds for concluding that the equitable interests of third-party creditors of Old Milwaukee Die Casting Company would be fully satisfied by recognizing New Milwaukee Die Casting as its successor. At the time the stock of New Milwaukee Die Casting Company was sold to the Slymans, the company's balance sheet and physical plant were vastly improved over that of Old Milwaukee Die Casting Company, as the Court found in its June 23, 1995 Summary Judgment Decision:

> However, new MDCC formally maintained a separate corporate existence, and remained adequately capitalized as a going, independently viable business. In fact, MDCC profited during Fisher Controls' stock ownership, retired debt, invested nearly two million dollars in capital expenditures, and increased its cash reserves.

Summary Judgment Decision at 4 (emphasis added). Given these undisputed facts, there is no basis in equity to reach to Fisher Controls to satisfy Old Milwaukee Die Casting's liabilities. If New Milwaukee Die Casting is now unable to satisfy its predecessor's obligations, the fault does not lie with Fisher.

III. An Immediate Appeal Would Materially Advance The Ultimate Termination Of The Litigation And Would Not Delay The Allocation Phase Of The Case.

Certifying the September 12, 1996 Decision for interlocutory appeal would clearly advance the ultimate resolution of this litigation and minimize the burdens on the courts and the parties. If the decision were reversed, the case would be over and the parties and the court would be spared the costs of discovery and trial of the allocation and cost recovery issues in this case. If the decision were affirmed, the parties' dispute over liability issues would be resolved and the prospects for an overall settlement of the case would be substantially increased.

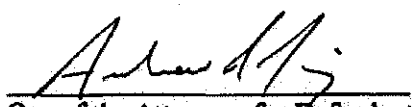
An interlocutory appeal would probably not delay any required allocation trial. The plaintiffs' site investigation and remedial planning is still at such an early stage that it is unlikely that a remedial plan will be submitted to and approved by the Wisconsin DNR within the time required to complete the appeal. According to the plaintiffs' counsel, little or no progress has been made on the site investigation, remedial planning or on the regulatory review process since the October 1995 liability trial. Until the need for remedial action is demonstrated and a remedial plan is approved by the Wisconsin DNR, it would be premature for the parties to attempt to prepare for a trial on the equitable allocation of the ultimate CERCLA response costs.

CONCLUSION

For the foregoing reasons, defendant Fisher Controls International, Inc. petitions this Court to certify the September 12, 1996 liability decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Respectfully submitted,

Dated: September 20, 1996



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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Fisher's Petition to Certify the Court's September 12, 1996 Order for Interlocutory Appeal Pursuant to 28 U.S.C. §1292(b) and Memorandum In Support of Fisher's Petition to Certify the Court's September 12, 1996 Order for Interlocutory Appeal Pursuant to 28 U.S.C. §1292(b) to be served on the following persons by the method indicated:

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DATED: September 20, 1996

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

MILWAUKEE DIE CASTING CO., SLYMAN INDUSTRIES, INC., and THERESA A. SLYMAN,

Plaintiffs,

v. **Civil Action No. 93-C-0325**

FISHER CONTROLS INTERNATIONAL, INC.,

Defendant.

DECISION FOLLOWING COURT TRIAL

BACKGROUND

The court held a bench trial on October 25 and 26, 1995, to determine whether Fisher Controls International, Inc. ("Fisher") shared in liability with its formerly owned subsidiary for releasing environmentally hazardous materials. The court holds that Fisher is liable as a successor of Milwaukee Die Casting Company.

Milwaukee Die Casting Company operated a die casting plant at the same location until 1975. Then Fisher acquired the operations through a transaction called a triangular merger. A triangular merger involves three parties: the parent company, its wholly-owned subsidiary, and the target company. Under I.R.C. § 368(a)(1)(c), this is a tax-free transaction. Fisher, the parent company, wanted to acquire the "old" Milwaukee

Die Casting Company ("Old MDCC"), the target company, so it incorporated a "new" Milwaukee Die Casting Company ("New MDCC"), the subsidiary. Then in a series of transactions, Fisher 1) acquired all of New MDCC's stock; 2) acquired virtually all of Old MDCC's assets and liabilities in exchange for stock of Fisher's parent company; and 3) transferred those assets and liabilities to New MDCC.

The property on which MDCC (both Old and New) has conducted its operations is contaminated with hazardous waste materials in violation of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9601 *et seq.*[1] New MDCC does not deny liability but seeks contribution from Fisher for any liability arising before or during Fisher's ownership. In a June 23, 1995 order, the court narrowed the scope of the trial to three issues: 1) whether Fisher is liable as successor of Old MDCC; or 2) whether Fisher is liable as an "owner" under CERCLA; and 3) whether Fisher had actual control of the operation and is thus liable as an "operator" under CERCLA.

Although the case involves complicated legal theories, sophisticated corporate transactions, and two dense and sometimes confusing federal statutory schemes (the Internal Revenue Code and CERCLA), in the end equity decides the case.

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[1]Polychlorinated biphenyl ("PCB") was released on the property.

FINDINGS OF FACT

Prior to trial, the parties stipulated that the trial would be limited to the already existing summary judgment record. The parties did not introduce any new facts or evidence at trial. The court heard no testimony. As noted in the court's June 23, 1995 order, the parties agree on the facts but disagree about the factual inferences and legal conclusions to be drawn from those facts. For these reasons, the court adopts the findings of fact from the June 23, 1995 order.

CONCLUSIONS OF LAW

As noted above, the trial was limited to three separate theories of liability. The court need only discuss the first theory, because it holds that Fisher is liable as a successor of Old MDCC because the transaction whereby Fisher acquired the die casting operations resulted in a *de facto* merger. While, at first glance, this case appeared as if it would be a detailed analysis of particular factual issues and inferences drawn from them, it actually involves a legal issue about the liability that attaches in corporate reorganizations.

Generally, a corporation can purchase another corporation's assets and not incur any of the seller's liabilities. Where it is not just an asset purchase, but is a statutory merger, the remaining corporation incurs "successor liability" for the obligations of its predecessors. In addition to a statutory merger, there are other ways for successor liability to attach to a corporation which purchases the assets of another.

For example, a *de facto* merger exists where the transaction is a merger in substance but does not technically constitute a statutory merger. Leannais v. Cincinnati, Inc., 565 F.2d 437, 439 (7th Cir. 1977). Successor corporations may be held liable for cleanup costs under CERCLA. In Re Acushnet River & New Bedford Harbor Proceedings Re Allegted PCB Pollution, 712 F. Supp. 1010 (D. Mass. 1989).

The *de facto* merger doctrine is equitable in nature; the court must look to the substance of the transaction to determine whether a merger has occurred. Id. at 1015. The parties disagree about whether state law or federal common law applies to this case.[2] However, the disagreement is not relevant; both the Seventh Circuit and the Wisconsin Supreme Court have adopted the same four elements for a *de facto* merger. See Travis v. Harris Corp., 565 F.2d 443, 447 (7th Cir. 1977); Fish v. Amsted Indus., Inc., 126 Wis. 2d 293, 376 N.W.2d 820 (Wis. 1985). A *de facto* merger occurs in a transaction when: 1) there is a continuity of the acquired business; 2) the shareholders of the target company become a "constituent part" of the purchasing company by transferring the target company's assets to the purchasing company for stock in the purchasing company or its parent;[3] 3) the seller ceases operations as soon as possible; and 4) the purchaser

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[2]Successor liability is determined by federal common law. Hunt's Generator Comm. v. Babcock & Wilcox Co., 863 F. Supp. 879, 882 (E.D. Wis. 1994.) However, federal common-law standards of successor liability are usually embodied in the state law standards. See Louisiana-Pac. Corp. v. Asarco, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990).

[3]The stock transferred can be that of the acquiring corporation or its parent. Louisiana-Pac., 909 F.2d at 1265 n.6, citing Acushnet, 712 F. Supp. at 1016-1017.

assumes all obligations necessary for the continuation of business operations. Id. Plaintiffs contend that the three-party transaction between Fisher, New MDCC, and Old MDCC was a *de facto* merger. The court agrees.

The parties only disagree on the first element; the last three are clearly satisfied. The second element, continuity of shareholders, involves whether cash or stock is given in exchange for the target company's assets. Travis, 565 F.2d at 447; Fish, 126 Wis. 2d at 293. This is the key element in Wisconsin and in the Seventh Circuit; if there is no stock transfer, there is no *de facto* merger. Id. The importance of exchanging stock and not cash is that the shareholders of the acquired company maintain an interest in the acquired assets. Here, Fisher exchanged the stock of its parent for the assets of Old MDCC, thus satisfying the continuity of shareholders element.

Eight days later, the third element, ceasing operations as soon as possible, was satisfied when Old MDCC ceased its operations and dissolved. Finally, the fourth element was satisfied when, in exchange for the stock of its parent, Fisher acquired all the assets and liabilities of Old MDCC necessary to continue business operations. The court is left with the issue of whether the disputed element, continuity of the business enterprise, has been satisfied.

Typically, where parties argue over the "continuity of business" element, the inquiry is a factual one, examining whether there was continuity of management,

personnel, physical location, assets and general business operations. Acushnet, 712 F. Supp. at 1015. Here, the business of Old MDCC was continued. This is not in dispute and was, in fact, the parties' intention. The same operations occurred at the same facility, with the same employees, the same management, and the same assets. Additionally, the entity maintained the same name (Milwaukee Die Casting Company) and manufactured the same product. Fisher intended that "the operation of the company remain strongly in the hands of the people who had really been responsible for it before." (Fisher memo at 5 ¶ 8.) That the business was continued is not in dispute. The parties' disagreement is one of law and semantics.

Plaintiffs argue that Fisher continued the business of Old MDCC. Fisher responds that, while the business of Old MDCC may have been continued, Fisher was not the entity that continued it. Plaintiffs reply that Fisher continued the business of Old MDCC through Fisher's subsidiary, New MDCC. The court examines how the law turns on these facts.

The court first notes that the existence of a parent-subsidiary relationship, by itself, is not sufficient to create parent liability under CERCLA. Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80, 82 (5th Cir. 1990), cert. denied, 498 U.S. 1108 (1991). Therefore, there must be something more than just a parent-subsidiary relationship. Here, the something more is the triangular merger or, more appropriately,

the triangular reorganization that occurred. A triangular reorganization is both a corporate acquisition technique and a tax convention that reduces taxes to the parties.

Parent companies can be found liable as successors to wholly-owned subsidiaries. Sedbrook v. Zimmerman Design Group Ltd., 190 Wis. 2d 14, 23, 526 N.W.2d 758, 761 (Ct. App. 1994), review denied, 531 N.W.2d 326 (1995). In Sedbrook, a parent purchased the assets of the target corporation and then ran the business through its wholly-owned subsidiary. The court performed the four-factor analysis and concluded that a *de facto* merger had occurred. Id. It is significant that in this case, the court did not look to corporate-veil piercing principles which defendant suggests is required by law.

Additionally, and perhaps more important is how the Internal Revenue Code (the "Code") treats the triangular reorganization and the parties' intentions with regard to the Code. The Code treats certain corporate transactions — "reorganizations" — as tax-free. I.R.C. § 368(a) defines which types of transactions are reorganizations. Fisher and Old MDCC structured this deal to qualify for tax-free treatment under § 368(a)(1)(C). Under § 368 (a)(1)(C), a tax-free reorganization takes place where one corporation exchanges stock in itself or its parent for substantially all the assets of the target company.[4] A mere cash purchase of assets will not qualify. 26 C.F.R. § 1-

[4]A § 368(a)(1)(C) reorganization is "the acquisition by one corporation, in exchange solely for all or a part of its voting stock (or in exchange solely for all or a part of the voting stock of (continued...)

368-2(a). These are the same requirements necessary for the second element of a *de facto* merger—a continuity of shareholders manifested by a stock-for-asset transfer.

Perhaps more significant is that, under § 368(a)(1)(c), even where an acquiring corporation transfers all or part of the assets acquired to a controlled subsidiary, the Code considers that corporation to remain a party to the reorganization. 26 C.F.R. § 1-368-2(f).[5] That is what occurred here. Fisher acquired substantially all of Old MDCC's assets in order to effect a reorganization under § 368(a)(1)(C). It then transferred those assets to New MDCC. Even though it transferred the assets to its controlled subsidiary, the Code still treats Fisher as a party to the transaction. Fisher cannot avoid the fact that it was the asset-acquiring party in a § 368(a)(1)(C) reorganization. As one court noted, "[t]he C reorganization subsection [§ 368(a)(1)(C)] evolved as a 'practical merger' alternative and was designed to permit corporate combinations which did not meet the applicable state requirements for a merger or consolidation." American Potash & Chem. Corp. v. United States, 399 F.2d 194, 201 (Ct. Cl. 1968).

Fisher argues that its participation as a "transactional conduit" does not result in a finding that it continued the business of Old MDCC. However, it cannot escape the

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(...continued)
a corporation which is in control of the acquiring corporation), of substantially all properties of another corporation."

[5]"A corporation remains a party to the reorganization although it transfers all or part of the assets acquired to a controlled subsidiary." 26 C.F.R. § 1-368-2(f).

form or the substance of the transaction. The form chosen was a reorganization under § 368(a)(1)(C). The substance of the transaction was a *de facto* merger. Fisher cannot have the cake of tax-free reorganization and deny the substance of the *de facto* merger. Reorganizing under § 368(a) is, in effect, a binding admission that the purchaser intends to continue the business enterprise.[6]

For the above reasons, the court holds that a *de facto* merger occurred and Fisher is a successor to Old MDCC.

CONCLUSION

Fisher Controls International, Inc., is a successor corporation to Milwaukee Die Casting Co. Therefore, Fisher Controls International, Inc., has contributory liability for Milwaukee Die Casting Co.'s CERCLA violations.

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[6]Transactions qualifying for tax free treatment under § 368(a) "must be an ordinary and necessary incident of the conduct of the enterprise and must provide for a **continuation of the enterprise**. A scheme, which involves an abrupt departure from normal reorganization procedure in connection with a transaction on which the imposition of tax is imminent, such as a mere device that puts on the form of a corporate reorganization as a disguise for concealing its real character, and the object and accomplishment of which is the consummation of a preconceived plan having no business or corporate purpose, is not a plan of reorganization." 26 C.F.R. § 1.368-1(c) (emphasis added).

Pursuant to the April 21, 1995 stipulation between the parties, the issue of damages is still pending. The court will conduct a telephonic scheduling conference on Friday, September 20, 1996, at 10:00 a.m., for the purpose of setting a trial date on the damages issue. The court will initiate the call.

SO ORDERED this 12th day of September, 1996.

John W. Reynolds
United States District Judge

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MILWAUKEE DIE CASTING CO., et al., Plaintiffs, v. FISHER CONTROLS INTERNATIONAL, INC., Defendant.	No. 93 C 0325 Judge Reynolds

FISHER'S TRIAL ARGUMENT OUTLINE

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DATED: October 25, 1995

OVERVIEW:

Plaintiffs seek to impose CERCLA liability on Fisher based on three theories:

1. Fisher's purchase of Old MDCC's assets on January 14, 1975 was a "de facto merger."

- **But Fisher did not "continue" the business of Old MDCC. New MDCC acquired Old MDCC's assets from Fisher immediately upon the closing of the Old MDCC/Fisher transaction. If there was any de facto merger, it was between Old and New MDCC.**

- **The Court correctly observed in its June 23rd summary judgment decision that:**
  The de facto merger concept "is a judicially created vehicle that courts sometimes use to treat an assets acquisition as if it were a merger . . . . In large measure, application depends on how a court views both the facts and the equities of an individual situation." (Opinion at 17, citation omitted)

- **But there would be no equitable basis for any de facto merger finding because no assets were stripped from the business in either step of the January 14, 1975 transaction.**

- **In conceding the facts and the equities do not support piercing the corporate veil between Fisher and New MDCC, Plaintiffs have also essentially conceded there is no equitable justification for finding a *de facto* merger. Both are common-law equitable doctrines. Both depend on the same balancing of the equities. Both recognize the fundamental importance of maintaining the limited liability of corporate shareholders:**

  "'By legal fiction the corporation is a separate entity and is treated as such under all ordinary circumstances.' That the 'legal fiction' of a corporation is not one to be lightly disregarded remains the law in Wisconsin as well as in most other jurisdictions . . . . 'This incentive to business investment has been called the most important legal development of the nineteenth century.'" Consumer's Co-op of Walworth County v. Olsen, 142 Wis. 2d 465, 474, 419 N.W.2d 211, 213-14 (Wis. 1988).

- **The Court's June 23, 1995 Opinion denied summary judgment to Fisher on this issue because of the dispute of fact over whether Fisher "continued" the business as the CERCLA "operator" of the plant. (Opinion at 18) But unless the Court agrees with the Sixth Circuit that CERCLA operator**

standard = Veil-piercing standard, more relaxed CERCLA standards should not be substituted for the common law standards for abuse of the corporate form.

2. Fisher was the CERCLA "owner" of the MDCC property because it held title to that property for an instant on January 14, 1975, and for the two-month period from December 24, 1981 until February 23, 1982.

- **But the Court recognized in its June 23rd Opinion that "CERCLA does not extend so far as to impose liability on those who have merely taken brief record title to a facility as a conduit in an acquisition." (Opinion at 14, citing John S. Boyd and Robertshaw Controls cases)**

- **The Court denied Fisher summary judgment on the CERCLA ownership issue solely because of the outstanding CERCLA operator issues. (Opinion at 15) But there is no dispute that Fisher held its ownership interests for the two brief periods in question solely to facilitate the Schroeder and Slyman transactions, and not for any other purpose.**

  For example, Fisher didn't use its title to exert any control over the plant, or to acquire a security interest for any debts. In assuming title, it was acting merely as a conduit.

- **As for the more significant 1981-82 period, the plaintiffs have never disputed that Fisher assumed title solely to accommodate the Slymans' tax objectives.**

3. **CERCLA Operator theory of liability.**

- **The relevant facts are not really in dispute, only the inferences to be drawn from those facts.**

- **Since this issue caused the Court to refrain from ruling on the other two theories, it makes sense to start here.**

- **But before moving directly to that issue, brief mention should be made of a theory of liability even the plaintiffs concede cannot be asserted against Fisher:**

I. **Plaintiffs concede they have no veil-piercing claim**

A. **7-part test for veil-piercing under both Wis. and Federal common law:**

1. **Inadequate Capitalization**
2. **Extensive or Pervasive Control By Parent over the Subsidiary**
3. **Intermingling of the Subsidiary's Properties or Accounts with those of the Parent**
4. **Failure to Observe Corporate Formalities**
5. **Siphoning of Funds from the Subsidiary**
6. **Absence of Corporate Records**
7. **Nonfunctioning Officers or Directors**

U.S. v. Kayser-Roth Corp., 724 F. Supp. 15, 20 (D. R. I. 1989), affirmed, 910 F. 2d 24 (1st Cir. 1990).

B. Plaintiffs have conceded they have no piercing case: "...the plaintiffs have correctly declined to argue that this court should pierce the corporate veil under these circumstances." (June 23, 1995 Opinion at 16)

II. The Sixth Circuit Recently Ruled That A Parent Corp. is not a CERCLA "Operator" Absent Evidence Sufficient To Pierce the Corporate Veil

U.S. v. Cordova Chemical Co. of Michigan, 59 F. 3d 584 (6th Cir. 1995)

A. The Sixth Circuit Observed that "the drafters of the statute distinguished an operator from a person who 'otherwise controlled' a facility:" CERCLA § 101(20)(A), 42 U.S.C. §9601(20)(A):

"The term 'owner or operator' means. . . (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unity of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand."

This statutory definition thus makes clear that anyone who controls activities at the facility is not necessarily an "operator."

B. The Sixth Circuit ruled that parental oversight consistent with traditional corporate law should not give rise to CERCLA liability:

> **"[W]hen a parent corporation actively participates in the affairs of its subsidiary consistent with the restrictions imposed by traditional corporate law, nothing in the definition just cited or in the rest of the statute indicates that the parent has assumed the role of operator." 59 F. 3d at 590.**

The alternative approach replaces "the relatively bright line provided by the doctrine of piercing the corporate veil... with a nebulous 'control' test:"

> **"When, precisely, is a parent acting in a manner consistent with its investment relationship as opposed to a manner that triggers operator liability? The indica enumerated by the district court, such as participation in the subsidiary's board of directors and involvement in specific policy decisions, offer little guidance. Certainly, these activities are not grounds traditionally relied upon to pierce the corporate veil." 59 F. 3d at 590.**

C. The following ties between parent and subsidiary were therefore found "to be inadequate to establish CERCLA operator liability:

1. **100% stock ownership**
2. **Parent's participation on Sub's Board of Directors**
3. **"a cross-pollination of officers <u>who were involved in decision-making and daily operations</u>" [MDCC's Fisher officers were <u>not</u> involved in decision-making or daily operations]**
4. **"active participation by [parent's] officials in environmental matters"**
5. **"financial control of [subsidiary] through approval of budgets and capital expenditures"**

59 F. 3d at 591.

III. Fisher did not "operate" MDCC even under the more nebulous "actual & pervasive control" test rejected by the Sixth Circuit

A. Even under the "pervasive control" test, extending CERCLA operator liability to parents of wholly-owned subsidiaries is justified only in exceptional cases:

> **"CERCLA does not define 'owners' or 'operators' as including the parent company of offending wholly-owned subsidiaries. Nor does the legislative history indicate that Congress intended to alter so substantially a basic tenet of corporation law." Joslyn Mfg. Co. v. T.L. James & Co., Inc., 893 F. 2d 80, 82 (5th Cir. 1990).**

> **". . . it is obviously not the usual case that the parent of a wholly owned subsidiary is an operator of the subsidiary. To be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership. At a minimum it requires active involvement in the activities of the subsidiary." U.S. v. Kayser-Roth Corp., 910 F. 2d 24, 27 (1st Cir. 1990)**

1. **"Pervasive Control" Required**

The First Circuit in Kayser described the degree of active involvement required as "pervasive control." 910 F. 2d at 27 n. 8.

2. **"Actual," "Pervasive" & "Daily" Control Required**

The Eleventh Circuit recently articulated the degree of involvement required as follows:

"[A] parent corporation may be held liable as an operator of its subsidiary's business only when it exercises actual and pervasive control of the subsidiary to the extent of actually involving itself in the daily operations of the subsidiary. . ." Jacksonville Electric Authority v. Bernuth Corp., 996 F. 2d 1107, 1110 (11th Cir. 1993).

B. Fisher Did Not "Operate" New MDCC/January 14, 1975 - June 1981

1. Undisputed Facts:

a. MDCC was financially self-sufficient

(1) **Retired $186,000 in old debt**
(2) **Invested $1,868,000 in new equipment and other capital from its own funds (Boyd Dep. at 16-17, 40, 77-78; DX-55)**
(3) **Increased its cash reserves by $2.3 million**
(4) **Was debt-free after 1979**
(DX-55 as to (1)-(4) above)
(5) **Paid its own bills and collected its own accounts receivable (Boyd Dep. at 31, 35; Kruse Dep. at 61)**
(6) **Paid its employee salaries directly (Boyd Dep at 71-72; Kruse Dep. at 61)**
(7) **Maintained its own pension plan (Suess Dep. at 91)**

b. New MDCC was independently managed

(1) Plant was run by John Wheeler until his death.

(a) As the Court quoted from the deposition of Wheeler's contact at Fisher, James Boyd:

"Boyd explained that Wheeler contacted him when there was an 'important issue to be resolved or some report on a specific accomplishment such as achievement of budget or achievement of sales.' Other than that, 'Mr. Wheeler <u>was basically independent in the direction and operation of Milwaukee Die Casting Company</u>, and was guided by me, as president, and by the board of directors, who were Fisher officers, <u>only in the very broad responsibilities of the company operation</u>.'" (Boyd Dep. at 51; June 23rd Opinion at 6)

(b) **Larry Kruse supervised MDCC after Boyd was transferred to St. Louis. Kruse also confirmed that:**

"Milwaukee Die, on a day-by-day situation, pretty much operated autonomously of Fisher Controls, but as all corporations require, it had to have someplace to report into, so I was assigned the responsibility." (Kruse Dep. at 14; June 23rd Opinion at 6)

(2) New MDCC prepared its own budgets and forecasts (Boyd Dep. at 31, 35; Kruse Dep. at 61)

(3) Contact between Fisher and New MDCC consisted primarily of monthly financial reports (Kruse Dep. at 64-65)

(4) MDCC determined its own product prices; nor did it grant Fisher any preferential treatment as a customer (Boyd Dep. at 35-36; Kruse Dep. at 55, 61; Suess Dep. at 259)

(5) Fisher knew it was in a different business and didn't have the expertise to run the MDCC plant on a day-to-day basis, and did not attempt to do so. (Boyd Dep. at 75-76, 78)

"[W]e seek more than just indicia of a parent-subsidiary relationship. . . . It is particularly important that the record contain such evidence in a case such as this, where the parent company. . . is in an entirely different business that that of the subsidiary. Certain isolated bits of evidence in this record may have greater meaning if attributed to a parent engaged in a similar endeavor such that a greater level of direct involvement and control by the parent could be presumed."
Jacksonville Electric Auth. v. Bernuth Corp., 996 F. 2d 1107, 1111 (11th Cir. 1993).

c. New MDCC Managed Its Own Environmental Affairs

<u>From Boyd Deposition:</u>

Q. Did you ever assert control over any environmental decisions at the plant?

A. No. (Dep. at 78)

(1) Permitting & Inspections Handled by Suess (MDCC's Plant Engineer) or Donohue (a local consultant hired by Suess) (Suess Dep. at 306)

(2) PCB Cleanup Managed by Suess

(a) Wheeler assigned him job in April 1980 (Dep. at 100)

(b) Educated on PCB Cleanup Regulations at DNR Public Meeting in 1979 (Dep. at 98-100)

(c) Dr. Craddock at Monsanto only gave Suess copy of EPA's May 31, 1979 Regs (Dep. at 104, 262)

(d) Suess testified that Craddock didn't tell him anything he did not already know (Dep. at 104, 262, 263-65)

(e) **Suess personally called EPA in Washington to learn PCB storage procedures (Dep. at 108-109)**

(f) **Suess personally devised MDCC's cleanup forms and procedures (Dep. at 105-106, 122)**

(g) **Suess personally set 10 ppm cleanup goal (Dep. at 145-47)**

(h) **Suess personally arranged for confirmatory PCB sampling (Dep. at 105-06, 122; MDC 185)**

2. January 1975 - June 1981 Fisher Contacts Cited By Plaintiffs

a. Fisher Oversight of Capital Spending

(1) Threshold high enough that daily operations not impacted (Kruse Dep. at 63; Boyd Dep. at 16-17)

(2) Fisher's Authority May Never Have Been Reached

Kruse Deposition:

Q. Did you ever have occasion, during the time that you were the director of the Fisher service companies, to review or receive capital expenditure requests from Milwaukee Die Casting?

A. To the best of my knowledge, we never had one that large. (Kruse Dep. at 63)

(3) Fisher Never Denied Any Capital Spending Requests Made By Wheeler (Kruse Dep. at 63; Boyd Dep. at 78) (Rogers Made None In His Caretaker Role)

(a) Relevant Issue: <u>Did Fisher actually EXERCISE Capital Spending Control?</u>

(b) Undisputed Answer: NO.

(c) Mere Oversight and <u>Unutilized</u> Authority to Control Cannot Be Sufficient, or Every Parent Will Be Deemed A CERCLA Operator.

b. Fisher's Supervision of Non-PCB Occupational Safety Matters

(1) Machine Guard Incident

(a) Wheeler received a critical note from Fisher about his failure to install Machine Guards (Suess Dep. at 292-93)

(b) Fisher's criticism prompted by an insurance inspection (Id.)

(c) Episode indicative of general but not pervasive oversight, and of sporadic rather than "daily" Fisher contacts

(d) Fisher's concern about Wheeler's depriving MDCC's workers of Machine Guards required by OSHA was certainly consistent with an "investment" relationship

i) Distinction Made By Third Circuit Between "Investor Oversight" and "Actual Control:

"Whereas a corporation's 'mere oversight' of the subsidiary... in a 'manner appropriate and consistent with the investment relationship' does not ordinarily result in operator liability, a corporation's 'actual participation and control' over the other corporation's decision-making does." Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F. 3d 1209 (3d Cir. 1993).

ii) **Had Fisher turned a blind eye to Wheeler's excessive frugality on worker safety matters, it might have exposed MDCC to OSHA fines, personal injury liability and to punitive damages**

iii) **A District Court in Michigan ruled earlier this year that a lender's**

- **performance of environmental surveys;**
- **removal of USTs;**

- **reporting of releases to the Michigan DNR; and,**

- **requirement that the debtor "comply with all applicable environmental laws and regulations"**

did <u>not</u> constitute a basis for imposing CERCLA operator liability:

The court determines that the Bank's requiring plaintiff to abide by all applicable environmental laws does not constitute "operation" of the Property. Nor does the Bank's request for environmental investigation of possible contamination to the Property securing its interest constitute the requisite involvement necessary to incur operator liability. The record reflects that the Bank took prudent and routine steps to protect its security interest only, and the

court will not punish the Bank for its insistence that plaintiff obey the law. Z&Z Leasing v. Graying Reel, Inc., 873 F.Supp. 51, 55 (E.D. Mich. 1995).

(e) Fisher didn't take control of OSHA Safety Matters even after discovering Wheeler's lapse of judgment

(f) Wheeler, NOT Fisher, made the decision to transfer responsibility from himself to Suess (not to Fisher). (Id.)

(2) Annual Monsanto "Safety and Property Protection Survey"

PX-207: July 1980 Recommendations

- **SPP Annual Surveys began in 1978, with recommendation that MDCC form an Executive Safety Committee (p. 4)**

- **Recommendations relate to machine guards, fire hazards, accident investigation procedures, and housekeeping.**

- **But ¶3 of the July 23, 1980 cover memo makes it clear that the local Executive Safety Committee is the "major resource for managing the overall safety program..."**

PX-301: August 1981 Recommendations

- **Memo makes some new safety recommendations**

- **Memo compliments Suess on new "Quality Circle Program" which "stresses involvement and team solutions to problems..."**

CERCLA SIGNIFICANCE OF THESE MONSANTO RECOMMENDATIONS:

(a) Irrelevant since Monsanto is not being accused of "operating" MDCC. Monsanto has been dismissed from this case with prejudice.

(b) By definition, Annual Surveys Don't Equate to "Daily" or "Pervasive" Control

(c) Program simply supplemented safety inspections done by MDCC's insurance company before and after 1975 (Suess Dep. at 308)

(d) CERCLA "Operator Liability" rules must not deter companies such as Monsanto from performing employee safety inspections at their subsidiaries

(e) Such annual inspections are consistent with the "investment" relationship any parent has in its subsidiaries

(f) BY THEIR VERY NATURE, Safety Audits are typically performed by OUTSIDE INSPECTORS. The PURPOSE of such audits is to get an INDEPENDENT appraisal of management's performance in this critical area. That a second-level parent (Fisher's parent) should want to supplement independent insurance inspections with its own inspections is not unusual, and certainly not improper.

c. OSHA Ambient Air & Noise Monitoring

(1) 1977 or 1978 (2 or 3 years after acquisition): Suess attends Monsanto 4-day seminar (Suess Dep. at 240-41)

(2) MDCC then buys air monitoring equipment so Suess can perform required OSHA tests himself (Suess Dep. at 254-55; Monitoring equipment listed on PX-215 at MD1366)

(3) Suess decides he is not qualified to use the equipment. (Dep. at 254-55)

(4) Neither Fisher nor Monsanto made that decision

(5) At Suess' request, Monsanto sent a tester to the plant periodically to perform the required air and noise sampling. (Id.)

(6) This involvement in performing sophisticated tests at MDCC's request is no different than if MDCC had hired an outside contractor to perform the testing--as MDCC did

after the Slymans bought the company.

d. Bruce Duncan's November 10, 1978 "Notebook" (PX-215)

Identified in Suess Dep. as follows:

Q. [D]id you use this in your work?

A. No.

Q. Just sat in your office?

A. Just sat there gathering dust. (Id. at 305)

(1) If Fisher had really "controlled" MDCC, this request for Suess to draft a formal Environmental Assessment wouldn't have been ignored. That it was ignored proves MDCC's independence, not Fisher's "control."

(2) Duncan's unanswered request was for Suess, not Fisher, to prepare the formal "Environmental Assessment."

e. Monsanto's July 29, 1977 Landfill Survey (PX-202)

(1) Fisher wrote Wheeler on <u>one occasion</u> asking for MDCC's landfill usage in order to respond to a Monsanto survey of the waste disposal facility demand of Monsanto and all of its subsidiaries.

(2) Suess filled out the survey form, but didn't recall talking to anybody about it. (Suess Dep. at 248-251)

(3) Nothing ever came of this survey.

f. August 21, 1978 Environmental Cost Survey (PX-203)

(1) No evidence survey was used for any management purpose:

"Like this survey here. I haven't the slightest idea what it's for. And when I go back and talk to him [Bruce Duncan at Fisher], what did you do with it, what did you find out, we haven't done anything with it yet. It seems like everything just sat in there." (Suess Dep. at 258)

(2) No evidence, for example, of any resulting restrictions on MDCC's environmental expenditures.

g. February 14, 1979 Environmental Cost Survey (PX-327)

(1) Environmental "cost" information requested of all Monsanto subsidiaries "worldwide," to be used for both internal and external purposes

(2) Intent was clearly to develop a total Monsanto environmental control cost figure to be used in governmental relations

(3) No indication whatsoever the survey is being used to impose any control or restrictions on MDCC.

h. Fisher's Personnel Oversight

All of this based on a file folder "discovered" by MDCC after the close of discovery

Court properly ruled in its June 23rd Opinion that it "shall accord them the weight they merit, taking into consideration the manner and time in which they were discovered and submitted." (at 25)

(1) What the "folder" (Ex. B) proves:

On <u>One Occasion</u> in <u>1980</u>:

(a) Wheeler informed Fisher in advance of several major personnel changes

(b) He provided this information in the form of "recommendations"

(c) He discussed his recommendations with Fisher

(d) He asked for Fisher's "approval"

(2) What the folder doesn't prove:

(a) **No evidence Fisher <u>ever so much as questioned Wheeler's recommendations</u> -- To the contrary, Boyd and Kruse testified they had no die casting experience and that Wheeler ran the plant**

(b) **The documents in the "folder" support the conclusion that the requests for approval were *pro forma*:**

<u>February 22, 1980 Letter</u>:

First sentence refers to discussions between Wheeler and Blanchard "[d]uring the past few months. . . in general terms" on the subject of organizational changes "I feel should be made at MDCC. . . ."

- **Nowhere in the three-page single spaced letter does Wheeler so much as allude to any comments Blanchard has made on personnel matters in general, or the specific MDCC employees in particular, in their prior discussions.**

- **Wheeler assumes in his letter that Blanchard has no familiarity with the people involved. Each**

person is introduced with a description of his current and proposed future job description.

Particularly remarkable since the recommendations include:

Plant Superintendent
Production Control Manager
Die Casting Foreman
Industrial Engineer

If Blanchard were involved in the "active, daily and pervasive" management of the MDCC plant, would he really have needed to be told who these key employees were?

<u>Undated MDCC Memo from Raetz to Kohlberg</u>

This is clearly a For Your Information memo, not a request for approval:

"To keep you informed regarding planned changes at MDCC, I've enclosed a revised organizational chart ..."

First ¶ refers to the changes becoming "effective on March 1, 1980," ONE WEEK after Wheeler's February 22nd letter to Blanchard first "proposed" them.

3. **Fisher Did Not "Operate" MDCC During The June 1981 - February 23, 1982 Time Period**

Wheeler died in May. Rogers replaced him in June of 1981. (Rogers Dep. at 4)

a. **Draining, flushing and refilling of the hydraulic lines on the die casting machines and the trim presses had already been completed by the time that Rogers arrived at the plant. (Rogers Dep. at 18-19)**

b. **Plaintiffs have denied that any CERCLA "releases" occurred during their period of ownership (Plaintiffs' Answer to Counterclaims, at ¶ 3) BUT THERE IS NO DIFFERENCE BETWEEN ROGERS' TENURE AND THEIR SUBSEQUENT PERIOD OF OWNERSHIP**

c. **This trial record is devoid of any evidence of any "releases" during the June 1981 to February 23, 1982 time period. WHETHER OR NOT FISHER "OPERATED" THE PLANT DURING THAT NINE-MONTH PERIOD IS THEREFORE IRRELEVANT**

- **DX-81, submitted by plaintiffs, shows the significant labor expense for the flushing and refilling was incurred from September through December of 1980. (MDC 220) No internal time was recorded on the PCB cleanup during June, July and August. The $923.19 in time incurred from September to December was for the final round of confirmatory sampling and for the manifesting of the Rollins shipment. (See invoices for last round of Donohue sampling at MDC 251, 254)**

d. Rogers' frustration that he was not getting enough assistance in arranging for the disposal of the drummed PCB waste is further evidence the PCB cleanup was being managed locally, and not by Fisher.

e. Monsanto did ultimately assist MDCC in identifying a waste disposal firm that would take the waste.

(1) But Monsanto was acting as an INVESTOR interested in facilitating the sale of the company, not as an "operator" interested in micro-managing a subsidiary

(a) There was no reason why the barrels needed to be disposed of immediately, as Suess learned directly from EPA in Washington:

Q. [By Mr. Caruso] Did maybe Monsanto also help you to find a place that would accept the barrels for disposal?

A. Yeah. They were the ones that--Well, I found a place to get rid of them, because otherwise I checked all I could. I don't know how many telephone calls I made, but nobody would take the stuff. They were all full, and you got to wait a year or two or maybe three.

And I talked to EPA in Washington, and I told them my problem, and they said, well, just store them and wait, and wo we did. But what happened was when George Slyman bought the plant, he didn't want them damn things there. And so therefore it was put to Monsanto, what were you going to do about them.

And then they were the ones that got Rollins to pick them up and take it. (Suess Dep. at 132)

(b) **Slyman, not Fisher, was thus responsible for putting pressure on Monsanto to use its influence with Rollins to move MDCC up to the head of the line of companies waiting for scarce disposal capacity.**

(2) **The disposal of the drummed waste clearly did not contribute in any way to the alleged site contamination.**

f. Rogers' alleged failure to investigate the "distinct possibility" of PCB contamination under the paved driveway to the north of the plant.

"CERCLA operator liability attaches to those who actually and pervasively control plant operations at the time of the release or disposal causing the contamination." (June 23, 1995 Summary Judgment Opinion at 13, citing 42 U.S.C. § 9607(a)(2))

Second-guessing whether management should have investigated historic contamination is not part of the test for establishing CERCLA liability.

IV. There was no de facto merger between Fisher and Old MDCC

A. Fisher did not continue the business in 1975 for more than an instant

1. No dispute that "second step" of transaction immediately followed upon the closing of the first step at 2:00 pm on January 14, 1975.

2. Fisher did not "continue the business" for purposes of the common law de facto merger doctrine if it respected New MDCC's Corporate Veil

3. Plaintiffs are not even contending they have any evidence to pierce New MDCC's corporate veil during Fisher's period of stock ownership

4. Plaintiffs' argument really proves that New MDCC, not Fisher, is the "successor" to Old MDCC:

"The fact that the officers and directors of new MDCC were changed from old MDCC (as Fisher installed some of its employees in its Iowa office in these capacities) does not negate continuity of enterprise. . . . Continuity of enterprise requires a consideration, as one of many relevant factors, of whether there was sufficient continuity in

management--without regard to titles--to warrant the finding that the new business continues essentially unchanged. Here, the overwhelming weight of the evidence establishes continuing management, personnel, product line, customer base, name, location and general business operations, including capital exependitures. To paraphrase Acushnet, 'for all the world could tell from outward appearance', *there was no change in MDCC*." Plaintiffs' Memo In Opposition To Defendant's Motion For Summary Judgment, at 13.

B. There is no equitable basis to find a de facto merger here

1. New MDCC acquired all of the assets of Old MDCC -- No assets were stripped.

2. Thereafter, New MDCC enhanced its ability to satisfy any third-party liability by:

   a. Eliminating the company's debt

   b. Re-investing the company's earnings in capital improvements

3. **Fisher did not "profit" from the decision to structure the 1975 transaction as a §368(a)(1)(C) "reorganization."**

   a. **Fisher was penalized by the "C" reorganization structure because it acquired the Old MDCC assets at the transferor's basis, not the actual (higher) price Fisher paid. Fisher's depreciation basis was therefore reduced, and the tax gain on its eventual sale to the Slymans was increased, resulting in a tax penalty to Fisher equal to the tax benefit to the Schroeder family. (The rates of taxation for the Schroeder family individuals may have differed from Fisher's corporate tax rate, however.) See, e.g., Bittker and Eustice, Federal Income Taxation of Corporations and Shareholders (6th Ed.) at ¶12.43[2]:**

> **"Under §362(b), property acquired by a corporation in connection with a reorganization ordinarily takes a carryover basis equal to the transferor's basis, increased by any gain recognized to the transferor on such transfer. No such transferor gain recognition is possible in transactions that qualify as Type A or Type C reorganizations.**

If the acquisition transaction fails to qualify as a reorganization, the transferee corporation is entitled to a cost basis for the acquired properties under §1012, presumably equal to the fair market value of the consideration paid by the transferee."

b. The only ones who profited from the structuring of the 1975 transaction were the sellers, the Schroeder family.

C. The plaintiffs are asking the Court to impose an unprecedented, retroactive (20 years after the fact) CERCLA punishment on a common, recognized form of corporate acquisitions. The implications of such a ruling would be enormous. There is no indication in the statute that Congress ever intended such a result.

D. The Court should dispose of this de facto merger argument the way the First Circuit characterized a similar intermediate transaction in a CERCLA case:

"Because this intermediate transaction does not alter any liability in this case by statute, contract, or any other norm, we discuss Eastern no further." John S. Boyd Co. v. Boston Gas Co., 992 F. 2d 401, 407 n. 5 (1st Cir. 1993) (emphasis added).

V. **Fisher was not the CERCLA "Owner" of New MDCC's facility.**

A. **January 14, 1975 title possession was for an instant. Fisher's role as an intermediary title holder acting as the conduit for the ultimate owner, New MDCC, does not give rise to CERCLA liability. Robertshaw Controls Co. v. Watts Regulator Co., 807 F. Supp. 144, 150 (D. Maine 1992); In Re Diamond Reo Trucks, Inc., 115 B.R. 559, 568 (W.D. Mich. Bankr. 1990).**

B. **Fisher's role as an intermediary for Teresa Slyman's purchase of New MDCC's real property was no different.**

1. **As the Court noted in its June 23rd Opinion, "the Slymans were successfully able to represent to the Internal Revenue Service that they had effectively taken over New MDCC as of December of 1981." (Opinion at 9; see also Glaser Dep. at 67-74; DX-45, 53)**

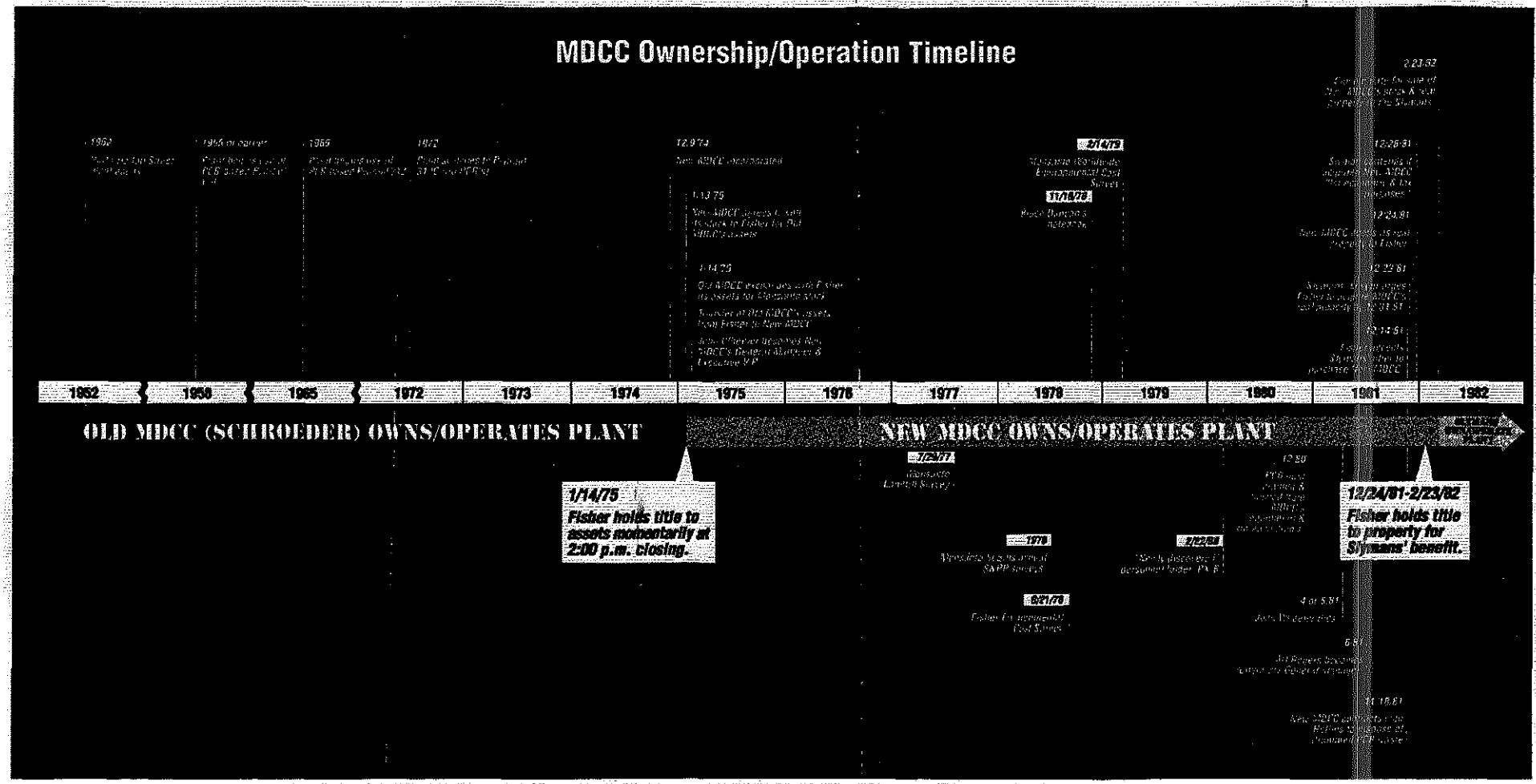
2. **Having taken this position for tax purposes, they should be estopped from taking a contrary position for CERCLA purposes.**

3. **In any event, Slyman's request that Fisher cause New MDCC to declare the property "dividend" before year-end 1981, and**

Slyman's contention that it had "economic" control over MDCC as of year-end (DX-53), refutes any possiblity that Fisher used its title ownership for any purpose other than to act as a conduit.

4. **The PCB cleanup had been completed one year <u>before</u> Fisher's second period of title ownership. Plaintiffs deny that any CERCLA releases occurred after this cleanup. So the second period of title ownership should be irrelevant to their liability case against Fisher.**

Timeline


MDCC Ownership/Operation Timeline
1952
1958
1965
1972
1973
1974
1975
1976
1977
1978
1979
1980
1981
1982
OLD MDCC (SCHROEDER) OWNS/OPERATES PLANT
NEW MDCC OWNS/OPERATES PLANT
1/14/75
Fisher holds title to assets momentarily at 2:00 p.m. closing.
12/24/81-2/23/82
Fisher holds title to property for Siljeans' benefit.

Timeline Citations

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MILWAUKEE DIE CASTING CO., et al., Plaintiffs, v. FISHER CONTROLS INTERNATIONAL, INC., Defendant.	No. 93 C 0325 Judge Reynolds

REFERENCE LIST FOR TIMELINE SUMMARY

1952: North Holton Street Plant Opens (Plaintiffs' Proposed Findings of Fact ("PPFOF") No. 2)

1958 or earlier: Plant begins use of Pydraul F-9 (Suess at 68)

1965: Plant begins use of Pydraul 312 (Suess at 72-73)

1972: Plant switches to Pydraul 312C (no PCBs) (Suess at 71-76)

12/9/74: New MDCC incorporated (DX-111, 94)

1/13/75: New MDCC agrees to sell its stock to Fisher for Old MDCC's assets (DX-97, 111)

1/14/75: Old MDCC exchanges with Fisher its assets for Monsanto stock (PX-314, 320)

1/14/75: Transfer of Old MDCC's assets from Fisher to New MDCC (DX-112, 113)

1/14/75: John Wheeler becomes New MDCC's General Manager & Exec. V.P. (Boyd at 31-32)

7/29/77: Monsanto Landfill Survey (PX-202)

1978: Monsanto begins Annual S&PP Surveys (PX-207)

8/21/78: Fisher Environmental Cost Survey (PX-203)

11/10/78: Bruce Duncan's Notebook (PX-215)

2/14/79: Monsanto Worldwide Environmental Cost Survey (PX-327)

1980: PCB fluid drained and flushed from MDCC's equipment and stored in drums (PPFOF No. 51, DX-81)

2/22/80: "Newly Discovered" Personnel Folder, PX-B

April or May 1981: John Wheeler dies (Rogers at 40)

June 1981: Art Rogers becomes Temporary General Manager (Rogers at 40)

11/18/81: New MDCC contracts with Rollins to dispose of drummed PCB waste (DX-76)

12/14/81: Fisher accepts Slyman's offer to purchase New MDCC (DX-20)

12/23/81: Slyman's lawyer urges Fisher to acquire MDCC's real property by 12/31/81 (DX-45)

12/24/81: New MDCC deeds its real property to Fisher (DX-109, 117)

12/26/81: Slyman contends it acquired New MDCC "for economic and tax purposes" (DX-53, Glaser Dep. at 71-74)

2/23/82: Closing Date for sale of New MDCC's stock and real property to the Slymans

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MILWAUKEE DIE CASTING CO., ET AL., Plaintiffs,	)	
v.	)	No. 93 C 0325
FISHER CONTROLS INTERNATIONAL, INC.,	)	Judge Reynolds
Defendant.	)	

LIST OF KEY WITNESSES

- **Fred J. Schroeder** - President and principal shareholder of Milwaukee Die Casting Company of Wisconsin ("Old MDCC").
- **John Wheeler** - Vice President and General Manager of Milwaukee Die Casting Co., Inc. ("New MDCC") until his death in 1981. Also was a manager at Old MDCC under Fred J. Schroeder.
- **Earl Suess** - New MDCC's Manager of Manufacturing. Suess was given responsibility at New MDCC for bringing the plant into full compliance with PCB regulations. Suess was in charge of the project to drain and flush PCB-based hydraulic fluid from MDCC's die casting machines in 1980.
- **Larry Kruse** - Director of Service Operations at Fisher. Mr. Kruse also served on the Board of Directors of New MDCC from August, 1981 until February 1, 1982.
- **James H. Boyd** - Vice President, Manufacturing at Fisher Controls. Mr. Boyd also was President of New MDCC from December, 1974 through April, 1979.
- **Art Rogers** - Manager at Fisher in the personnel department. Rogers was assigned as Temporary General Manager of New MDCC in 1981 after the death of John Wheeler.
- **George Slyman** - Chairman of the Board of Slyman Industries, a plaintiff in this action, until 1992. Husband to Teresa Slyman, present title holder to New MDCC's real property, also a plaintiff in this action.

- **Teresa Slyman** - Wife of George Slyman, she holds title to New MDCC's real property and is a plaintiff in this action.

- **Robert Glaser** - attorney for Slyman family who handled the Slymans' acquisition of New MDCC.

T. Running 16824

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Chambers of
JUDGE JOHN W. REYNOLDS

296 Federal Building
Milwaukee, Wis. 53202

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October 17, 1995

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Attorney at Law
200 E. Randolph Drive
Chicago, IL 60601

Dear Counsel:

Re: Case No. 93-C-325 Milwaukee Die Casting v. Fisher Controls

Subject: Notice from the Court that date for court trial

"Notice from the Court that the Court trial on
which the Court trial of 10/24/95 is changed
has b to 10/25/95."

☐ _____, referred to above,

on Tuesday, October 24, 1995

☒ X dar for said day -

☐ _____.

court calendar.

_____.

serve as notice that the court trial is hereby rescheduled at 10:00 a.m. on Wednesday, October 25, 1995 in Courtroom No. 284, Federal Building, Milwaukee, Wisconsin, before Judge John W. Reynolds.

Very truly yours,

Rita Zvers

Rita Zvers, Deputy Clerk

T. Running
10984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Chambers of
JUDGE JOHN W. REYNOLDS

296 Federal Building
Milwaukee, Wis. 53202

Telephone: (414) 297-3188

October 17, 1995

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Milwaukee, WI 53202

Mr. Andrew R. Running
Attorney at Law
200 E. Randolph Drive
Chicago, IL 60601

Dear Counsel:

Re: Case No. 93-C-325 Milwaukee Die Casting v. Fisher Controls

Subject: Change of date for court trial

The court trial, referred to above, which was scheduled at 10:00 a.m. on Tuesday, October 24, 1995 has been removed from the court calendar for said day -

☐ at the request of _____.

☒ XX because of a conflict on the court calendar.

☐ _____.

This letter will serve as notice that the court trial is hereby rescheduled at 10:00 a.m. on Wednesday, October 25, 1995 in Courtroom No. 284, Federal Building, Milwaukee, Wisconsin, before Judge John W. Reynolds.

Very truly yours,

Rita Zvers, Deputy Clerk

9/6/95

Copy mailed to attorneys for parties by the Court pursuant to Fed. R. Civ. P.77(d). 9-6-95

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

COURT MINUTES

Deputy Clerk RS

Court Reporter —

DATE: 9-6-95

CASE NO. 93-C-325

HON. JOHN W. REYNOLDS

MILWAUKEE DIE CASTING, et al.

(
(
(v.
(
(
(FISHER CONTROLS

TIME CALLED: 9:30 TIME CONCLUDED: 9:40

NATURE OF HEARING: SCHEDULING CONFERENCE CALL

APPEARANCES: Pltfs: Carmen D. Caruso ✓ 312-368-8330

Deft: Michael Ash ✓ 273-3500
&
Andrew R. Running ✓ 312-861-2000

DISPOSITION:

(NOTE TO LAW CLERK: Have certificates of interest been checked? —)

Plaintiff's Experts:

Defendant's Experts:

Dispositive Motions:

Discovery Cutoff:

FPT:

Est. Length of Trial: 1-2 days ✓

(CT) or JT: 10:00 a.m. Tuesday, Oct 24 1995, and every Tuesday

Other: No other FPT reports will be filed & a FPT is not necessary

SEP 12 1995

MILWAUKEE DIE CASTING CO. v. FISHER CONTROLS INTERNATIONAL, INC. AND MONSANTO COMPANY
U.S. District Court - Eastern District of Wisconsin
Case No. 93-C-0325

DATE	TITLE	TAB
03/27/95	Fisher's Responses to Plaintiffs' Statement of Facts in Opposition to Defendant's Motion for Summary Judgment of Counts I, II and III of Amended Complaint (WITH ATTACHMENT) (SEE FOLDER #5 DUE TO SIZE OF DOCUMENT)	74
03/30/95	Plaintiffs' Motion for Leave to File Surreply in Opposition to Defendant's Motion for Summary Judgment in Counts I, II and III of the Amended Complaint	75
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06/23/95	Decision and ORDER Granting Summary Judgment in Part (Fisher's motion for summary judgment against the plaintiffs' state law claims is Granted, and the state law claims are Dismissed; Fisher's motion for summary judgment against the plaintiffs' CERCLA claims under 42 U.S.C. § 9607(c) is Denied, but its motion to limit those claims to contributory liability rather than joint and several liability is Granted. Further, the plaintiffs' motion to supplement the record is Granted.)	82
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MILWAUKEE DIE CASTING CO. v. FISHER CONTROLS INTERNATIONAL, INC. AND MONSANTO COMPANY
U.S. District Court - Eastern District of Wisconsin
Case No. 93-C-0325

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02/3/95	Filed with the Clerk - Plaintiffs' Response to Motion for Partial Summary Judgment on Counts III, IV, and VI of Original Complaint	63
02/03/95	Plaintiffs' Response to Motion for Partial Summary Judgment on Counts III, IV, and VI of Original Complaint (with Exhibits)	64
02/06/95	Fisher Controls International, Inc.'s Answer to Plaintiffs' Amended Counts I thru III	65
02/09/95	Fisher Contorls International, Inc.'s Memorandum in Support of Partial Summary Judgment as to Counts I thru III of Plaintiffs' Amended Complaint - (SEE FOLDER #3 DUE TO SIZE OF DOCUMENT)	66
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02/24/95	Plaintiffs' Reply to Counterclaim	68
03/10/95	Plaintiffs' Response to Defendant Fisher Controls International, Inc.'s Statement of Facts	69
03/10/95	Plaintiffs' Statement of Facts in Opposition to Defendants' Motion for Summary Judgment on Counts I, II and III of Amended Complaints with Exhibits attached 3 Volumes (SEE FOLDER #4 DUE TO SIZE OF DOCUMENT)	70
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FOLDER 2

MILWAUKEE DIE CASTING CO. V. FISHER CONTROLS INTERNATIONAL, INC.

DATE	TITLE	TAB
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01/05/95	Notice of Filing - Plaintiffs' Reply in Support of Motion for Leave to Amend Complaint	52
01/05/95	Plaintiffs' Reply in Support of Motion for Leave to Amend Complaint (with Affidavit of Carmen D. Caruso and two pages of Robert E. Glaser's deposition dated 11/9/94)	53
Undated	Stipulation (regarding taking of expert witness depositions and inspection after January 20, 1995)	54
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01/24/95	Fisher Controls International, Inc.'s Motion for an Extension of Time	58
01/25/95	ORDER (Order Dated August 30, 1994 is amended as provided in the Stipulation of the Parties filed on January 23, 1995)	59
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01/26/95	Notice of Filing (of plaintiffs' Amended Complaint)	61
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NOTICE OF SCHEDULING CONFERENCE CALL D. C. Form No. 18 (Rev. Sept. 1953)

United States District Court

FOR THE

EASTERN DISTRICT OF WISCONSIN

16484
A. Running
8/22/95

MILWAUKEE DIE CASTING, et al.,

v.

FISHER CONTROLS, et al.

No. 93-C-325

TAKE NOTICE that the above-entitled case has been set for conference call at 9:30 a.m., on Wed., September 6, 1995, before Judge John W. Reynolds, to discuss further scheduling of this case. The court will initiate the call.

Date August 22, 1995

SOFRON B. NEDILSKY
Clerk.

By Rita Zvers
Rita Zvers Deputy Clerk.
414-297-3188

To

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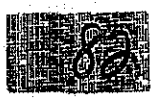

Copy mailed to Attorneys for parties by the court pursuant to rule 77 (d) Federal rules of civil procedure. 6-23-95

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

MILWAUKEE DIE CASTING CO., SLYMAN INDUSTRIES, INC., and THERESA A. SLYMAN,

Plaintiffs,

v.

Civil Action No. 93-C-325

FISHER CONTROLS INTERNATIONAL, INC.,

Defendant.

DECISION AND ORDER GRANTING SUMMARY JUDGMENT IN PART

In this case, the plaintiffs, Milwaukee Die Casting Co. and the die casting plant's present owners, sue the plant's former owner, Fisher Controls International, Inc., because the plant property is contaminated with PCBs. Milwaukee Die Casting and its owners allege violations of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601(9), and state law breach of contract, misrepresentation, and fraud claims. Fisher Controls has filed two motions for partial summary judgment which, together, request that the court dismiss all of the plaintiffs' claims. In the first motion, Fisher Controls asserts that the state law claims are barred by the applicable statute of limitations, and that motion is granted. The other motion asserts that Fisher does not meet the definition of a liable party under CERCLA, and so the CERCLA claim should be dismissed; or, in

the alternative, that Milwaukee Die Casting's owners do not have standing to sue, and so their CERCLA claims should be dismissed; and finally, that any claims for CERCLA liability which this court allows against Fisher Controls should be for its proportionate share of the clean-up costs, and not for full (i.e. joint and several) liability. The motion for summary judgment against the CERCLA claims shall be denied, and all CERCLA claims shall remain in the case. However, the court agrees that the plaintiffs' CERCLA claims should be limited to contributory liability, and not joint and several liability, and so that portion of the summary judgment motion shall be granted. Thus, all of the plaintiffs' CERCLA contribution claims remain.

I. FACTS

The parties do not disagree on the facts of this case, but they differ drastically over what factual inferences to draw and what legal conclusions to make.

Milwaukee Die Casting Company, a Wisconsin corporation from 1909 to 1975 ("Old MDCC"), and a Delaware corporation from 1975 to the present ("New MDCC")[1], has for decades supplied Fisher Controls International, Co. ("Fisher Controls"), with aluminum and zinc die casting for manufacturing regulators and control valves. The Schroeder family owned and managed Old MDCC until Fisher Controls acquired it in 1975. Monsanto Company ("Monsanto") was Fisher Controls' parent company from 1969 to 1992.

[1]At all relevant times, Old and New MDCC have been located on two parcels of real property at North Holton and West Hubbard Streets in Milwaukee, Wisconsin.

In the mid 1960's and early 1970's Old MDCC used a Monsanto fire-retardant oil which contained PCBs[2] in the hydraulic lines running to the die casting machines. Earl Suess ("Suess"), a 43-year veteran of MDCC and the plant manager in charge of the PCB clean-up in the 1970's and early 1980's, testified by deposition that die casting machines "always" leak oil, and that in the '60's and '70's, the oil that dripped on to the floor at Old MDCC was sucked up by vacuums, and was either dumped on the grounds, in the sewer, or in a dumping tank for fluids. Ken Worzalla, an Old MDCC maintenance employee in the early 1970's, testified that he and others had on several occasions dumped 45-50 gallons of oil and debris gathered from the die casting floor out onto Old MDCC's gravel parking lot. Willie Means, a shipping and receiving employee, also testified to witnessing two or three oil dumps onto the gravel between 1976-1980. Suess and Worzalla explained that the barrels in which the oils had been stored were often partially emptied into a tank and then tipped over outside to drain. Suess also told of hydraulic fluid seeping into the concrete in the die casting area.

In the summer of 1974, Old MDCC's president and principal shareholder, Fred Schroeder, informed Fisher Controls that he intended to retire and that he and his family, who together owned all stock in Old MDCC, wanted to sell the company.

---

[2] Dorland's Illustrated Medical Dictionary 201 (28th ed. 1994) defines polychlorinated biphenyl (PCB) as: "[A]ny of a group of substances in which chlorine replaces hydrogen in biphenyls, used as heat-transfer agents and as insulators in electrical equipment. They are chemically very stable and accumulate in animal tissues, causing a variety of toxic effects including carcinogenesis."

Fisher Controls did not want to risk business disruption from its largest die casting vendor, and seeing that Old MDCC had been a profitable concern, decided to buy out the Schroeder family. For tax purposes, Schroeder and Fisher Controls structured the sale in two parts. First, a New MDCC was incorporated in Delaware in December of 1974, and then on January 13, 1975, Fisher Controls acquired all New MDCC shares in exchange for the promise to transfer to New MDCC the business and assets of Old MDCC. On January 14, 1975, Old MDCC deeded its business and assets to Fisher Controls, which immediately deeded them to New MDCC.

Fisher Controls owned all of New MDCC's shares from January 13, 1975, until February 23, 1982. Fisher Controls' manufacturing vice president, James Boyd ("Boyd"), became president of New MDCC, and Fisher Controls' president and its chief financial officer served as members of the New MDCC board of directors. However, new MDCC formally maintained a separate corporate existence, and remained adequately capitalized as a going, independently viable business. In fact, MDCC profited during Fisher Controls' stock ownership, retired debt, invested nearly two million dollars in capital expenditures, and increased its cash reserves. MDCC prepared its own yearly budget and forecasts, paid its own bills, collected its own accounts receivable, paid its employee salaries directly, and maintained a pension plan separate from Fisher Controls.

Having little or no experience in die casting, Fisher Controls took limited actions regarding most of the operations at New MDCC from 1975 until 1981. The New MDCC board of directors (all Fisher Controls personnel) chose Old MDCC

employee, John Wheeler, to be the New MDCC general manager and executive vice president. Fisher Controls' manufacturing vice-president explained:

> Other than a user of die castings, we had no expertise within the Fisher organization relating to the manufacture of die castings . . . .
>
> . . . .
>
> Mr. Wheeler had become Mr. Schrader's [sic] understudy in a broad sense in the management of the business, and it was Mr. Schrader's [sic] recommendation that we name Mr. Wheeler to the responsibility for the operation of the company. . . .
>
> And again, I would emphasize that we looked to him of necessity because we didn't have those kind of capabilities and that because we didn't have those capabilities, the operation of the company remained strongly in the hands of the people who had really been responsible for it before . . . .

(Boyd Dep. at 75-76.)

From 1975 until his retirement in the late 1970's, Boyd acted as Fisher Controls' contact point for monthly financials from New MDCC. Fisher Controls authorized New MDCC to make certain levels of capital expenditures on its own, but when expenditures exceeded those levels, New MDCC needed Boyd's authorization. Boyd, in turn, could authorize expenditures up to a certain level, and then would have to advance them to his boss or to the Fisher Controls board. Boyd explained that Wheeler contacted him when there was an "important issue to be resolved or some report on a specific accomplishment such as achievement of budget or achievement of sales." (Id. at 51.) Other than that, "Mr. Wheeler was basically independent in the direction and operation of Milwaukee Die Casting Company, and was guided by

[Boyd], as president, and by the board of directors, who were Fisher Controls officers, only in the very broad responsibilities of the company operation." (Id.) Boyd testified in his deposition that he did not remember ever being told of environmental problems or of the use or clean-up of PCBs at MDCC.

After Boyd retired, Larry Kruse ("Kruse"), the director of service operations at Fisher Controls, "took on responsibility for Milwaukee Die." (Kruse Dep. at 13.) As Kruse explains the situation: "Milwaukee Die, on a day-by-day situation, pretty much operated autonomously of Fisher Controls, but as all corporations require, it had to have someplace to report into, so I was assigned the responsibility." (Id. at 14.) Kruse took in financial reports and handled capital expenditure requests.

During Wheeler's tenure as general manager, from 1975 to 1981, the company began to flush out the hydraulic fluid in its die casting equipment. Suess testified that Wheeler put him in charge of cleaning out the hydraulic lines to get the PCB levels down well below the maximum of 50 parts per million ("ppm"). After flushing the lines, Suess got them all below the maximum allowed by law. The flushed-out liquid was stored in barrels, and Suess turned to Monsanto employee, Dr. Craddock, for advice on how to store and dispose of those barrels. They were put in a well-marked PCB storage area, quite visible to those who toured the plant. Suess explained that no one from Fisher Controls had anything to do with the actual flushing of the PCB fluids.

Fisher Controls took a more active role in non-PCB plant safety matters. An insurance company inspected New MDCC on a bimonthly basis, and sent reports to Fisher Controls. When Wheeler did not act promptly on safety recommendations regarding noise and other non-PCB related hazards, Fisher Controls wrote him to get moving on these safety measures, and he did. In July of 1977, Fisher Controls sent a letter to Wheeler telling him to fill out a Monsanto questionnaire on waste disposal needs, and on August 21, 1978, Fisher Controls' environmental operations director requested a summary of New MDCC's projected environmental costs for 1978 and 1979. In addition, Fisher Controls' parent, Monsanto, conducted quarterly OSHA inspections at New MDCC.

In May 1981, Wheeler died suddenly, and Fisher Controls found itself with a subsidiary in need of help to fill a "big hole in the organization." (Kruse Dep. at 26.) Although personnel at Fisher Controls thought of New MDCC as a "stepchild", and tried to keep their distance from New MDCC as customer and a parent corporation, Fisher Controls had to take responsibility when Wheeler died. So they sent Arthur Rogers ("Rogers"), a Fisher Controls manager with a background in personnel management, to New MDCC as the interim general manager. Rogers also maintained his title at Fisher Controls, and he understood that his mandate was to oversee union contract negotiations and to "evaluate the staff or go outside and interview candidates as possible successors to the GM position." (Rogers Dep. at 6.) Although Rogers acquired bottom-line responsibility for the day-to-day operations of the plant and its profitability, he knew nothing of die casting, and relied heavily on its

employees to continue their thus far successful operations. Rogers stayed out of all negotiations over pricing and sales to Fisher Controls because he felt he could not be objective in his dual role as Fisher Controls employee and New MDCC general manager. Rogers reported to Kruse at Fisher Controls, who described himself during that period as in a "caretaker role to make sure that day-by-day operations were going on in the same fashion as before [Wheeler's death]." (Kruse Dep. at 50.) Kruse reported to Fisher Controls' head of North American operations, Jim Teegarden ("Teegarden"), who had "ultimate responsibility [for Fisher Controls] throughout." (Id. at 49.)

Kruse testified that there came a time when he learned that there were PCBs at New MDCC, and he discussed it with Rogers and Teegarden. Kruse said he did not know that hydraulic lines had been flushed, but he knew that barrels of PCB-laden fluid needed removal. He received status reports on PCB removal from Rogers, and passed them on to Teegarden. As the months passed, Fisher Controls decided to sell the plant, and Rogers' role changed to one of overseeing removal of barrels of PCB fluid and the sale of the company. In a lengthy handwritten letter to Kruse at Fisher Controls, Rogers indicated how frustrated he was with Fisher Controls' lack of assistance on the PCB removal. In late 1981, Suess informed Rogers that there was some potential for PCB hazards on the grounds—both outside under the now-paved parking lot, and inside in the die casting area, but Rogers does not specifically remember whether he told Kruse or other Fisher Controls personnel about the

potential problem. No steps were taken to confirm or deny the contamination possibility.

In the fall of 1981 and early 1982, George Slyman decided that his company, Slyman Industries, Inc.[3] would buy New MDCC. For tax purposes, Fisher Controls again became the record owner of the property from December 24, 1981 to February 23, 1982. On January 7, 1982, the United States Environmental Protection Agency (the "EPA") issued an administrative complaint against New MDCC for PCB regulatory violations found during an inspection of the plant almost two years earlier, on April 21, 1980. Counsel for Fisher Controls informed the EPA that the PCB hydraulic fluid had been removed from the machines and disposed of properly, and the case was eventually resolved with a $1,500 fine. George Slyman's attorney was informed of the EPA complaint in January 1982. The transfer took place nonetheless, and on February 23, 1982, Fisher Controls sold all of the common shares of New MDCC to Slyman Industries and the property to Theresa Slyman, George's wife—although the Slymans were successfully able to represent to the Internal Revenue Service that they had effectively taken over New MDCC as of December of 1981.

Section 14 of the contract defined the agreement Slyman and Fisher Controls had made regarding Fisher Controls' future liability to the Slymans for PCB contamination at Milwaukee Die:

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[3] The common stock of Slyman Industries is wholly owned by members of the Slyman family, and Slyman Industries owns all shares in New MDCC.

> The Company has received a Complaint and Notice of Opportunity for Hearing dated January 7, 1982 concerning alleged violations of the Toxic Substances Control Act arising out of alleged concentrations of PCB's within its die casting machines. The Company also received a letter dated November 28, 1975 from the Department of Natural Resources, State of Wisconsin, advising of an apparent violation of WPDES permit no. WI-0001465 and subsequently under letter dated December 10, 1975, the Company apprised the Department of the actions taken to correct any violation. . . . [A]ny violation of any law, rule or regulation in existence on the date of the closing arising out of the use by Company of PCB's prior to the closing shall be the obligation and responsibility of the Seller. Any personal injury claims against the Company or the Buyer arising out of the use by Company of PCB's prior to the closing shall remain the obligation and responsibility of the Seller as provided herein. . . . Seller's obligations under this Section 14 shall terminate on December 31, 1984 as to die casting machines and on December 31, 1989 as to other property except for claims asserted by Buyer in writing prior to such dates.

(Dec. 23, 1995, Fisher Mem. Ex. E at 15-16.)

On December 23, 1983, New MDCC was tested for PCB contamination. All results for die casting machines fell below the federal maximum of 50 ppm. However, four areas of the plant tested at PCB concentrations ranging from 75 ppm to 2,800 ppm, and the sewer below a die casting machine tested at 55 ppm. In February 1984, Slyman Industries' lawyer wrote Fisher Controls giving formal notice of Slyman Industries' claim for indemnification for future PCB testing and cleanup costs at the entire MDCC facility. Slyman Industries advised Fisher Controls that there were thirteen areas of concern, and that more tests would be taken because employees had disclosed that oil had been dumped behind the factory years ago. Fisher Controls responded with a request for detailed information regarding PCB

concerns and the need for additional action, but received no further correspondence on the subject of PCB contamination for the next seven years and eight months.

In September 1991, New MDCC's lender's environmental consultant found PCB contamination on New MDCC's concrete and wooden floors, utility tunnels, sewer trenches, soils, and other locations on the premises and on the property. On November 4, 1992, Slyman Industries again contacted Fisher Controls regarding the contaminants. Slyman Industries and Theresa Slyman have hired environmental consultants to audit the new MDCC property. The consultants estimated the costs of decontamination to exceed $1.5 million.

On April 12, 1993, Theresa Slyman, Slyman Industries, and New MDCC filed this suit against Fisher Controls.

II. ANALYSIS

The court must grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, admissions, and affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of asserting the absence of any dispute of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). To withstand summary judgment, however, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The court must draw all reasonable inferences that a fact finder could summon from the record in favor of the non-moving party. Johnson v. Pelker, 891 F.2d 136, 138 (7th Cir. 1989). This is so

Paul Fire & Marine Ins. Co., 985 F.2d 323, 327 (7th Cir. 1993).

A. STATE LAW CLAIMS

The plaintiffs have sued for breach of contract, negligent and strict liability misrepresentation, and fraud under Wisconsin law. All three are barred by the applicable Wisconsin statutes of limitations, each of which is six years.[4] The plaintiffs causes of action arose no later than February of 1984[5] when they discovered their claims and demanded that Fisher Controls indemnify them for testing and cleanup costs. Yet the plaintiffs chose to wait to determine the extent of the possible PCB problem until late 1991 and early 1992. They did not sue until 1993. The six-year limitations periods had long since run. Fisher Controls' motion for summary judgment against plaintiffs' state law claims is GRANTED.

[4]Section 893.43 of the Wisconsin Statutes grants an aggrieved party six years from the date of accrual to sue on a contract.

Section 893.52 of the Wisconsin Statutes affords a six-year limitations period for non-contract actions to recover damages for an injury to property.

Section 893.93(b) also provides for a six-year statute of limitations for fraud, which is deemed to have accrued upon discovery of the facts constituting the fraud.

[5]The contract cause of action accrued even earlier—from the moment the alleged breach occurred. See CLL Assoc. Ltd. Partnership v. Arrowhead Pac. Corp., 497 N.W.2d 115, 117 (Wis. 1993) (breach of contract cause of action accrues from the time the breach occurs, even if the facts of the breach are not known by the party having the right of action).

B. CERCLA CLAIMS

Fisher Controls has have asserted three bases for complete or partial summary judgment on the CERCLA claims. First, it contends that it is not liable as an "owner or operator" under CERCLA. Second, it argues that Theresa Slyman and Slyman Industries do not have standing to assert a CERCLA violation. Finally, Fisher Controls asks the court to declare this a case of contribution for clean-up costs rather than joint and several liability.

1. "Owner or Operator" Liability

CERCLA liability rests with "any person who at the time of disposal of any hazardous substance[6] owned or operated any facility[7] at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). Present owners of facilities are also liable as potentially responsible parties ("PRPs") "without a showing that they owned the property at the time of the release or that they contributed to the polluted conditions at the site." William H. Rodgers, Jr. Environmental Law: Hazardous Wastes and Substances, vol. 4, § 8.12 at 668-69

[6]The term "hazardous substance" under CERCLA encompasses all substances and pollutants designated as high risk under other environmental laws, such as the Clean Air and Water Acts, the Solid Waste Disposal Act, and the regulations. 42 U.S.C. § 9601(14); 40 C.R.R. § 302.

[7]42 U.S.C. § 9601(9) formally defines a "facility" as a building, structure, site, or area "where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located."

(1992): 42 U.S.C. § 9607(a)(4).[5] PCBs are hazardous substance within the meaning of 42 U.S.C. § 9610(14) and 40 C.F.R. § 302.

The terms "owner" and "operator" go mostly unclarified in CERCLA, which was the product of brisk legislative negotiations in 1980. On first glance, ownership seems an easy question in this case, for Fisher Controls owned all of the stock in New MDCC for six years and on two brief occasions also owned the property upon which New MDCC sat. Courts have not applied owner and operator liability quite so broadly, however, and so the plaintiffs must come forth with evidence which meets one or more of many tests for determining whether Fisher Controls was an owner or operator under CERCLA. The following subsections discuss those tests and their applications to this case.

a. Record Title to Property

Generally, one who owned record title to a facility and property when hazardous substances were disposed of on that property is liable as an owner under CERCLA.[6] However, CERCLA does not extend so far as to impose liability on those who have merely taken brief record title to a facility as a conduit in an acquisition.

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[5]Current owners are strictly liable without regard to causation. New York v. Shore Realty Corp., 759 F.2d 1032, 1044-1045 (2d Cir. 1985) (to interpret the law otherwise "would open a huge loophole in CERCLA's coverage. It is quite clear that if the current owner of a site could avoid liability merely by having purchased the site after chemical dumping had ceased, waste sites certainly would be sold, following the cessation of dumping, to new owners who could avoid the liability otherwise required by CERCLA.")

[6]The defendants have not argued that they are not liable under CERCLA because no PCBs were released into the environment during the period that they allegedly "owned or operated" New MDCC.

See John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401, 407 n.15 (1st Cir. 1993) (parent acting merely as intermediate holder not liable under CERCLA as successor corporation); Robertshaw Controls Co. v. Watts Regulator Co., 807 F. Supp. 144, 150 (D. Me. 1992) (refusing to impose owner liability under CERCLA on the basis of a one-day period of title possession during a two-step sales transaction). In this case, Fisher Controls had record title to the Old MDCC property for one day in 1975, and to the New MDCC property for two months in late 1981 and early 1982. Fisher Controls claims that the court should find that this ownership did not suffice to make Fisher Controls a CERCLA-liable party. But as discussed below, Fisher Controls did not act *merely* as a conduit during or in between these instances of record ownership, and so the issue of whether it was a CERCLA-liable owner shall go to trial.

b. Piercing the Corporate Veil

The majority of federal appellate courts have declared that CERCLA does not impose "owner" liability on a parent company of a wholly-owned corporation that disposed of hazardous wastes simply because of stock ownership. Jacksonville Elec. Authority v. Bernuth Corp., 996 F.2d 1107, 1110 (11th Cir. 1993), United States v. Kayser-Roth Corp., 910 F.2d 24, 27 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991); Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80, 82 (5th Cir. 1990), cert. denied, 498 U.S. 1108 (1991). Courts rarely hold a parent company or individual stockholder liable as an "owner" under CERCLA unless the plaintiff can prove that corporate formalities have not been observed so that the court should "pierce the

corporate veil." E.g., Lansford-Coaldale Joint Water Authority v. Tonolli Corp., 4 F.3d 1209, 1220 (3d Cir. 1993); Joslyn Mfg., 893 F.2d at 82. In order to veil-pierce, courts must consider: (1) whether the subsidiary failed to maintain adequate capitalization; (2) whether the parent and subsidiary intermingled properties or accounts or failed to observe corporate formalities and separateness; (3) whether the parent siphoned funds from the subsidiary; and (4) whether the parent exercised pervasive and actual control over the subsidiary.[10] Kaiser v. Roth, 724 F. Supp. 15, 20 (D.R.I. 1989, aff'd 910 F.2d 24. Of these factors, the plaintiffs have only provided evidence of Fisher Controls' control over New MDCC, and the plaintiffs have correctly declined to argue that this court should pierce the corporate veil under these circumstances.

However, the principles of limited liability do not completely constrain CERCLA; Arst v. Pipefitters Welfare Educ. Fund, 25 F.3d 417 (7th Cir. 1994); and a parent corporation can be found liable as an "owner" when courts find reason to deem it a successor corporation, and as an "operator" when the parent exercised particularized control over the subsidiary. Cf. id. The plaintiffs have asserted that Fisher Controls is subject to both types of liability in this case.

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[10]Federal common law applies to veil-piercing questions in CERCLA cases, but Wisconsin veil-piercing considerations parallel the federal common law. See Consumer Co-op of Walworth County v. Olsen, 419 N.W.2d 211 (Wis. 1988).

First, the plaintiffs contend that when Fisher Controls acquired Old MDCC, it acquired Old MDCC's liabilities. Generally, when a corporation acquires the assets of another, it does not acquire its liabilities. However, when, for example, the acquisition is deemed a de facto merger, successor liability applies. Fisher Controls' acquisition of Old MDCC and creation of New MDCC did not follow the requirements of a de jure merger, but the plaintiffs argue that Fisher Controls' acquisition should be considered a de facto merger and Fisher Controls should be held liable for the conduct of Old MDCC as if it were a merger de jure. See, e.g., HRW Sys. v. Washington Gas Light Co., 823 F. Supp. 318, 334-36 (D. Md. 1993). The de facto merger concept "is a judicially created vehicle that courts sometimes use to treat an assets acquisition as if it were a merger. . . . In large measure, application depends on how a court views both the facts and the equities of an individual situation." Larry D. Soderquist & A.A. Sommer, Jr. Understanding Corporation Law, at 241-42 (1990) (footnote omitted).

In this case, Fisher Controls created what commentators call a "three-cornered" or "triangular" merger by forming a subsidiary and then having the target corporation (Old MDCC) merge into the subsidiary (New MDCC), with the shareholders of Old MDCC receiving stock in Monsanto (the parent's parent) in exchange for Old MDCC's business and assets. See id. However, that does not mean that corporate formalities should automatically be eschewed and a de facto merger declared. The elements this court must consider in analyzing allegations of a

de facto merger are: (1) continuation of the enterprise by the acquiring corporation; (2) continuity of shareholders; (3) dissolution of the selling corporation; and (4) assumption of operating liabilities by the purchasing corporation. Id.; Hunt's Generator Comm. v. Babcock & Wilcox Co., 863 F. Supp. 879, 883 (E.D. Wis. 1994). In CERCLA cases, courts may also consider applying successor liability when the corporate structure was created as an attempt to continue the business of a company without taking on its environmental liabilities. U.S. v. Carolina Transformer Co., 978 F.2d 832 (4th Cir. 1992).

The plaintiffs argue that Fisher Controls' acquisition of Old MDCC fits these elements because: (1) Fisher Controls created New MDCC to continue the business with nearly the same personnel as Old MDCC; (2) Old MDCC's shareholders sold their shares in Old MDCC for Monsanto (Fisher Controls' parent) stock; (3) Old MDCC dissolved; and (4) New MDCC assumed the operating liabilities of Old MDCC. The defendants contend that the plaintiffs misconstrue the de facto merger theory in this case by ignoring the separate corporate identities of Fisher Controls and New MDCC. However, as discussed below, the question of whether or not Fisher Controls "continued" the activities at New MDCC or New MDCC conducted those activities independently is a question of fact to be resolved at trial, and the court shall not dismiss the de facto merger theory of liability on summary judgment.

d. Operator Liability

A parent company which actually controls the operations of a subsidiary is derivatively responsible as a parent corporation "operator" under CERCLA.

Lansford-Coaldale, 4 F.3d 1209; Kayser-Roth, 910 F.2d 24; Shore Realty, 759 F.2d 1032; cf. Arst, 25 F.3d 417 (individual stockholder). Courts of appeals are divided over whether authority to control, rather than the exercise of that authority, is sufficient. Compare Donahey v. Bogle, 987 F.2d 1250, 1254 (6th Cir. 1993), vacated on another issue, 114 S. Ct. 2668 (1994) (sole shareholder's authority to control sufficient); Carolina Transformer, 978 F.2d 832 (declining to exercise control should not be rewarded when authority exists); with Lansford-Coaldale, 4 F.3d 1221 (actual substantial control necessary); Kayser, 910 F.2d 24 (same). The Court of Appeals for the Seventh Circuit has not set forth a test for a parent company's operator liability for its subsidiary's CERCLA wrongdoings. In a case in which it found that a corporate officer could be personally liable under CERCLA, it applied an "actual control" standard, and in fact, indicated that the control needed to be over hazard itself, and not merely over the corporation. Arst, 25 F.3d 417. The distinguishing factor in this case is that the defendant is a parent corporation and not an individual shareholder, and this court adopts the majority view that a parent's "operator" control includes control over non-environmental daily operations. E.g., Kayser, 910 F.2d 24. Nevertheless, the plaintiffs have established enough evidence to meet their burden under either test. For instance, while Wheeler was the general manager—chosen by a New MDCC board comprised of Fisher Controls officers—Fisher Controls became actively involved in supervising non-PCB related safety measures. Fisher Controls was not merely a dumping point for financial reports, as Fisher Controls would like the court to find. Fisher Controls personnel

required environmental cost reports and waste disposal information, and Fisher Controls required that New MDCC ask for approval before making a certain level of capital expenditure. Once Wheeler died and Fisher Controls sent its own personnel manager, Rogers, to act as New MDCC general manager, Rogers took on the responsibility for the daily operations at New MDCC. He dealt with labor, disposal of the barrels of PCB, the sale to Slyman Industries, and, as he put it, "the bottom line." Rogers sent PCB-removal status reports to Fisher Controls. Rogers indicated in depositions that he felt that Fisher Controls was still his boss, and he expressed his frustration with the lack of assistance he encountered from Fisher Controls regarding the PCB removal and New MDCC sale. Suess told Rogers that the property might be contaminated with PCBs, but Fisher Controls did nothing. These facts are enough to foreclose summary judgment in this case.

2. Theresa Slyman and Slyman Industries' Standing to Sue

Fisher Controls insists that Theresa Slyman and Slyman Industries do not have standing to maintain a CERCLA contribution or cost recovery action because the only response cost they have incurred was $10,260 in expert witness fees for Robert Parsons. See Key Tronic Corp. v. United States, 114 S. Ct. 1960, 1967 (1994) (costs incurred to pursue litigation against other allegedly responsible parties are not recoverable response costs under CERCLA). However, Theresa Slyman and Slyman Industries swore that they hired Mr. Parsons for a dual purpose—to provide expert testimony *and* to investigate, assess, and evaluate the extent of the PCB contamination and recommend future appropriate activities consistent with a National

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(Rev. 8/82)

Contingency Plan. The court accepts this assertion and rejects Fisher Controls' standing argument.

3. Contribution or Cost Recovery?

Finally, Fisher Controls argues that New MDCC and the Slymans are potentially responsible parties (PRPs) themselves, and therefore cannot assert a cost recovery claim seeking a declaration that Fisher Controls is jointly and severally liable for all response costs under sec. 9607(a), but must instead bring their claim against Fisher Controls as a contribution action under 42 U.S.C. § 9613. Under sec. 9607(a), owners and operators are jointly and severally liable for, inter alia, all "necessary costs of response incurred by any . . . person consistent with the national contingency plan." In contrast, sec. 9613(f) allows any person to "seek contribution from any other person who is liable or potentially liable" under CERCLA "during or following" any civil action on liability, and then the court parcels out the liability. Generally, a contribution action takes place after a jointly and severally liable party has discharged its liability and seeks to recover from another jointly and severally liable party an appropriate share of the payment the first has been compelled to make. Akzo Coatings v. Aigner Corp., 30 F.3d 761, 764 (7th Cir. 1994); accord Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 87-88 (1981). Thus, when a CERCLA-liable party who has been compelled by the EPA to remediate sues another allegedly liable party to recover a pro rata portion of the remediation costs, the action must be brought as a contribution action under CERCLA, 42 U.S.C. § 9613, not as a cost recovery action under § 9607. Akzo Coatings, Inc. v. Aigner

Corp., 30 F.3d at 764; United Technologies Corp. v. Browning-Ferris Indus., 33 F.3d 96, 100 (1st Cir. 1994), cert. denied, 115 S. Ct. 1176 (1995); United States v. Colorado & Eastern R.R., 25 Envtl.L.Rep. 20,309, 20,311 (10th Cir. 1994); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 672 (5th Cir. 1989).

However, this case falls "outside the statutory parameters established for an express cause of action for contribution." United Technologies, 33 F.3d 96, 99 n.8. New MDCC and the Slymans are PRPs who have "spontaneously initiate[d] a cleanup without governmental prodding." Id. The United States Supreme Court has explained that CERCLA "expressly authorizes a cause of action for contribution in [§ 9613] and impliedly authorizes a similar and somewhat overlapping remedy in [§ 9607]." Id. The Court of Appeals for the First Circuit further explains that "In the event the private-action plaintiff itself is potentially 'liable' to the EPA for response costs, and thus is akin to a joint 'tortfeasor,' section 9607(a)(4)(B) serves as the pre-enforcement analog to the 'impleader' contribution action permitted under section 9613(f)." In re Hemingway Transp., Inc., 993 F.2d 915, 931 (1st Cir.), cert. denied, 114 S. Ct. 303 (1993). Thus, the plaintiffs have pursued an implied right of action for contribution under 42 U.S.C. § 9607(c). See United Technologies, 33 F.3d at 99, n8.

Contrary to the parties' contentions, the fact that the court finds that the plaintiffs have brought their action pursuant to a right implied by sec. 9607 does not resolve the real disagreement—whether this action is one for a declaration that Fisher Controls is liable to the plaintiffs for proportionate contribution or jointly and

severally liable for all costs of remediation. A finding that Fisher Controls was an "owner or operator" under CERCLA would make it jointly and severally liable for all costs of remediation incurred by an innocent party. But when PRPs, such as the plaintiffs in this case, sue under *an implied right of contribution*, that is exactly what they are entitled to get if they win. Thus, if this court finds Fisher Controls liable as an "owner or operator", the liability is for contribution, at least as to the plaintiffs in this case.

Two policy issues also direct the court in this case. The plaintiffs argue that they should be rewarded for their "spontaneous" clean-up action by getting a full recovery-of-costs rather than pro rata contribution claim. However, the plaintiffs are not CERCLA-innocent parties. When the Slymans bought New MDCC, they knew that Old MDCC had used PCBs and that New MDCC needed to dispose of them, and this presumably factored into the price they paid for the company. They have known since 1983 that at least four areas of the property were contaminated, and they have suspected far-reaching contamination. Now they seek a declaration of liability against Fisher Controls to ameliorate the minimal past costs and the potentially huge future costs of clean-up. They have initiated a preemptive strike, and there is no reason to put them in a better position than a company who is under a consent decree to clean up hazardous waste. Further, even if the court were to allow the plaintiffs to seek full cost recovery, Fisher Controls would likely bring a contribution claim against the plaintiffs after incurring all expenses. CERCLA is already legendary

for the business it creates for lawyers, and the court sees no reason to drag out this litigation any more than necessary.

C. MOTION TO SUPPLEMENT THE RECORD

The plaintiffs have moved to supplement the record on summary judgment with an affidavit of Gregory Slyman attaching letters and memoranda sent between former New MDCC general manager, John Wheeler, and Fisher Controls management regarding organizational charts and personnel promotions and transfers. The plaintiffs offered these documents as an indication that Wheeler needed to get approval from Fisher Controls to make personnel changes. The defendants protest that these documents should be excluded as prejudicial because they were offered after the discovery deadline passed (and thus after any witnesses could be deposed on them) and after full briefing on summary judgment. Further, they contend that Slyman has failed to provide a sufficient foundation and authentication for the documents. Gregory Slyman simply states: "On March 29, 1995, I reviewed a folder of documents discovered by Robert Smits, the comptroller at MDCC. This folder contained organizational charts of Fisher Controls' and MDCC's intrastructure . . . . Mr. Smits informed me that he located the folder . . . in a drawer of inactive personnel files" while he was searching for another personnel file. (Slyman Aff. ¶¶ 3-4.)[11] The court has already ruled that the issue of "control" will go to trial without relying on these letters. The documents shall be allowed at court trial,

[11]The plaintiffs have not replied to Fisher Controls' opposition to their motion to supplement the record.

however, and the court shall accord them the weight they merit, taking into consideration the manner and time in which they were discovered and submitted.

III. CONCLUSION

Therefore, Fisher's motion for summary judgment against the plaintiffs' state law claims is **GRANTED**, and the state law claims are **DISMISSED**; Fisher's motion for summary judgment against the plaintiffs' CERCLA claims under 42 U.S.C. § 9607(c) is **DENIED**, but its motion to limit those claims to contributory liability rather than joint and several liability is **GRANTED**. Further, the plaintiffs' motion to supplement the record is **GRANTED**.

SO ORDERED this 23rd day of June, 1995.

John W. Reynolds
John W. Reynolds
United States District Judge

5/5/95

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Chambers of
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May 5, 1995

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Dear Counsel:

Re: Case No. 93-C-325
Milwaukee Die Casting v. Fisher Controls

Subject: Cancellation of court trial

The court trial, referred to above, which was scheduled at 10:00 a.m. on May 10, 1995, has been removed from the court calendar for said day -

[XX] at the request of the court.

[ ] because of a conflict on the court calendar.

[XX] The hearing will be rescheduled at a later date.

Sincerely,

Rita Zvers, Deputy Clerk

MAY 10 1995

4/21/95

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MILWAUKEE DIE CASTING CO., SLYMAN INDUSTRIES, INC. and THERESA A. SLYMAN	)	
Plaintiffs,	)	
v.	)	No. 93-C-0325
FISHER CONTROLS INTERNATIONAL, INC.,	)	Judge Reynolds
Defendant.	)	

STIPULATION AND AGREED MOTION TO BIFURCATE TRIAL AND TO LIMIT LIABILITY TRIAL TO SUMMARY JUDGMENT RECORD

Pursuant to Local Rule 6.07 and Fed.R.Civ.P. 42(b) and 56(d), the plaintiffs, Milwaukee Die Casting Co., Slyman Industries, Inc. and Theresa A. Slyman, and defendant Fisher Controls International, Inc., by their respective attorneys, jointly move to bifurcate the trial in this cause on the issues of liability and damages and to limit the "liability trial" to evidence which the parties have respectively submitted in support of and in opposition to the defendant's pending motion for summary judgment on counts I, II and III of the Amended Complaint. In support, the Plaintiffs and Defendant state:

1. Plaintiffs have filed an Amended Complaint alleging three claims for declaratory relief against Fisher under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). In essence, Plaintiffs seek a declaratory judgment that Defendant is liable for response costs which have been and will be incurred in remediating the presence of PCBs at the Milwaukee Die Casting Company (MDCC) facility in Milwaukee, Wisconsin.

2. Defendant has answered the Amended Complaint, denying liability. Defendant has also filed a motion for summary judgment on counts I, II and III of the Amended Complaint (the "Motion"). The Motion is now fully briefed.[1] The Motion addresses the questions of whether Fisher is liable under CERCLA §§ 107 (a)(1), 107(a)(2) and/or 113(f) under various claimed facts and legal theories which the parties have fully briefed in support of and in opposition to the Motion (the "Liability Issues").

3. The Liability Issues raised in Motion are threshold issues in this CERCLA action. If those issues are decided in favor of Plaintiffs, the Court would then be asked to decide damage issues such as whether or not plaintiffs' claimed response costs are recoverable under CERCLA as well as equitable allocation issues ("Damage Issues"). On the other hand, if the Liability Issues are decided in favor of Defendant -- either on the Motion or at trial -- the Damage Issues would be moot.

4. In the interests of judicial economy, and pursuant to Fed.R.Civ.P. 42(b), the parties move jointly to bifurcate the Liability and Damage Issues in this case. ***Hydrate Chem. Co. v. Calumet Lubricants Co.***, 47 F.3d 887, 890 (7th Cir. 1995). Courts have recognized that bifurcation of CERCLA cases into liability and damages phases is appropriate. ***E.g., Amoco Oil Co. v. Borden, Inc.***, 889 F.2d 664, 667 (5th Cir. 1989) ("Because of the complexity of CERCLA cases . . . courts have bifurcated the liability and remedial, or damages, phases of

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[1] Defendant has also filed a separate motion for summary judgment on the state law claims in the original complaint which also remains pending at this time. That motion should not be confused with the Motion that is addressed to the CERCLA claims in counts I, II and III of the Amended Complaint which is the subject of this instant motion.

CERCLA litigation."); ***United States v. Wade***, 653 F. Supp. 11, 15 (E.D. Pa. 1984) (bifurcating CERCLA action between liability and damages: "[A] finding of no liability would obviate the need for any evidence on costs incurred, resulting in an obvious saving of time and expense for all parties.").

5. The parties jointly submit that bifurcation is particularly appropriate in this case because, in submitting their respective evidence (including exhibits and deposition testimony) in support of and in opposition to the Motion, the parties have developed a complete record on the Liability Issues in this CERCLA action. For example, on the Liability Issue of whether or not Defendant is liable as a "successor corporation" as a result of an alleged *de facto* merger, the parties agree that there are no questions of material fact and that the issue may be decided as a question of law. Likewise, on the Liability Issues of whether or not Defendant was an "owner" or "operator" of the MDCC facility from 1975 to 1982, the parties agree that the legal issues predominate over factual issues. Moreover, the Court may fully, properly and fairly adjudicate any limited factual questions relating to those issues under the trial standard of the preponderence of the evidence based on the exhibits and deposition testimony which the parties have respectively submitted.

6. Therefore, Plaintiffs and Defendant jointly move pursuant to Fed.R. Civ. P. 56(d) that any "trial" on the Liability Issues in this CERCLA action should be restricted to the evidence (including exhibits and deposition testimony) which the parties have submitted in support of or opposition to the Motion. This motion is intended to permit the Court to adjudicate

the Liability Issues based on a record consisting of the briefs, factual submissions and evidence which the parties have already submitted in connection with the Motion.

7. Limiting the first trial to the CERCLA Liability Issues, and restricting that trial to the summary judgment record, should promote the prompt and efficient resolution of what appears to the parties to be primarily a dispute of law. An early resolution of that dispute is in the interests of both parties. In the event that the Court holds that Defendant is liable under CERCLA, the parties will be in a better position to try the remaining Damage issues after further site investigation work is performed and further discussions are held with the responsible regulatory authorities. On the other hand, in the event that the Court holds that Defendant is not liable under CERCLA, the Damages Issues will be moot.

Dated 4-31, 1995.

Respectfully submitted,

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4/10/95

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MILWAUKEE DIE CASTING CO., SLYMAN INDUSTRIES, INC. and THERESA A. SLYMAN,

Plaintiffs,

-vs-

FISHER CONTROLS INTERNATIONAL, INC.,

Defendant.

Case No. 93 C 0325

Judge Reynolds

FISHER CONTROLS INTERNATIONAL, INC.'S OPPOSITION TO MOTION TO SUPPLEMENT RECORD

INTRODUCTION

Plaintiffs did not produce the documents attached to their Motion to supplement the record in accordance with the requirements of Local Rule 7.07, nor did they produce the documents in response to Fisher's discovery requests. Instead, after fact discovery has been closed for over two months, and after briefing of Fisher's dispositive motion was concluded, they request the Court to "supplement" the record with "newly discovered" documents based on the second-hand affidavit of George Slyman's son -- a person with no personal knowledge of the documents who did not even "discover" them himself. Plaintiffs' claim that their attempt to include these documents in the record is "without prejudice to Fisher" is absurd because none of the witnesses the parties deposed were afforded the opportunity to testify about these documents.

Secondly, plaintiffs' assertion that the belatedly-produced documents "buttress" their position that Fisher was an operator of the MDCC facility under CERCLA is erroneous. This Court should deny plaintiffs' motion to supplement the record.

ARGUMENT

I. "Supplementing" The Record With The Belatedly-Produced Documents Would Prejudice Fisher.

Local Rule 7.07 provides that plaintiffs must produce within thirty days of being served with an answer "each and every document or report" that plaintiffs contend supports their claims. Plaintiffs did not produce the documents attached to their Motion to Supplement the Record within thirty days of being served with Fisher's answer. Indeed, plaintiffs did not produce the documents to Fisher until after fact discovery in this case was closed, and until after the conclusion of all fact depositions in the case.

Contrary to plaintiffs' suggestion, Fisher would be prejudiced by plaintiffs' attempt to use those documents now in opposition to Fisher's motion for summary judgment. Fisher did not have access to these documents during fact discovery and, in particular, Fisher did not have the opportunity to explore the relevance of these documents, if any, during the depositions of the fact witnesses. Use of the documents now in opposition to Fisher's motion for summary judgment plainly would prejudice Fisher.

II. There Is Neither Adequate Justification For The Belated Production Of These Documents, Nor Adequate Foundation For Their Use.

Gregory Slyman's affidavit indicates only that Robert Smits told Slyman that he located a folder containing the documents "when he was searching for another personnel file at the MDCC facility." Apparently, neither Slyman nor Smits prepared, sent, or received, or otherwise have any knowledge of any of these documents which all appear to be at least 14 years old. The affidavit does not specify when Smits allegedly found the documents, nor does it set forth any good reason why such documents were not discovered and provided to Fisher many months ago.

Fisher objects to consideration of these documents in connection with the pending summary judgment motions on the following grounds: (1) They were not timely produced in response to discovery requests and no sufficient excuse for such nonproduction is present; (2) They are not properly identified or authenticated under Fed. R. Evid. 901; (3) They contain inadmissible hearsay. See Fed. R. Evid. 802; and (4) The Affidavit of Gregory Slyman does not comport with the requirements of Fed. R. Civ. Pro. 56(e).

III. The Belatedly-Produced Documents Do Not "Buttress" Plaintiffs' Claims That Fisher Owned The MDCC Facility Under CERCLA.

Even if this Court were to consider the documents plaintiffs have belatedly produced, those documents do not

support plaintiffs' assertion that Fisher "operated" the MDCC facility. Plaintiffs refer to the documents apparently in an effort to show that Fisher exercised control over the day-to-day operations of MDCC. However, the documents, on their face, belie plaintiffs' claims.

The documents show that MDCC's John Wheeler, not Fisher, planned personnel changes at MDCC and made his own decisions regarding employee responsibilities and compensation. Further, the February 22, 1980 memo from John Wheeler to Dennis Blanchard shows that Wheeler's employees at MDCC had direct responsibility for all aspects of MDCC's daily operations, including manpower, machines, maintenance and manufacturing. Although plaintiffs construe these documents to show the need for Fisher "approval" (Motion to Supplement at ¶4), there is no evidence of record indicating that Fisher's approval was necessary, nor is there evidence that Fisher ever overruled any of Mr. Wheeler's decisions relating to his own employees' positions or compensation.

As Fisher pointed out in its Reply brief, plaintiffs made no effort in their opposition to Fisher's motion for summary judgment to rebut Fisher's evidence that MDCC's local management was responsible for the day-to-day operations of MDCC. (Fisher Reply at 9). Rather, plaintiffs relied exclusively on Fisher's alleged "environmental" contacts with MDCC in support of their assertion that Fisher operated MDCC. (Fisher Reply at 10).

Plaintiffs' belatedly-produced documents fall far short of showing that Fisher exercised the requisite control over MDCC's daily operations necessary to hold Fisher liable as an "operator" under CERCLA.

Dated this 10th day of April, 1995.

FISHER CONTROLS INTERNATIONAL, INC.

By One of Its Attorneys

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Fisher Controls International, Inc.'s Opposition to Motion to Supplement Record to be served on the following person[s] by First Class Mail on the date set forth below:

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Dated: April 10, 1995

Michael Ash

4/4/95

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MILWAUKEE DIE CASTING CO., SLYMAN INDUSTRIES, INC. and THERESA A. SLYMAN,

Plaintiffs,

-vs-

FISHER CONTROLS INTERNATIONAL, INC.,

Defendant.

Case No. 93 C 0325

Judge Reynolds

FISHER CONTROLS INTERNATIONAL, INC.'S RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SURREPLY

Plaintiffs move for leave to file a "surreply." Although Fisher denies the facts and disagrees with the arguments that premise this request, Fisher does not object to the Court's considering plaintiffs' surreply. However, Fisher requests that the Court also consider the following with respect to the Surreply's accusation that Fisher misrepresented to this Court the facts and holdings of two cases, John S. Boyd, Inc. v. Boston Gas Co., 992 F.2d 401 (1st Cir. 1993) and In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1010 (D. Mass. 1989).

Plaintiffs are wrong. Nowhere in its Reply does Fisher state that the transaction at issue in Boyd was identical to the transaction at issue in this case.[1] Nor does it need to be.

[1] The description of the Boyd transaction contained in the District Court's opinion is only an excerpt of the SEC descriptions and does not provide all of the details of the transaction. John Boyd Co. v. Boston Gas Co., 1992 U.S. Dist. LEXIS 13088, *8 (D. Mass. Aug. 18, 1992). However, the First (continued...)

The relevant conclusion reached by the First Circuit in Boyd was that, however the transaction was structured, the effect of the transaction was that NEES, the parent, first acquired Lynn Gas and then, in a second step executed on the same day, sold Lynn Gas to its wholly-owned subsidiary, Boston Gas:

> Technically, NEES sold the Lynn Gas Co. first to Eastern Gas and Fuel Associates, the parent company of Boston Gas. Eastern then sold Lynn Gas on the same day.

John S. Boyd, 992 F.2d at 407 n.5. The Boyd court held that NEES's actions as an intermediary in the transaction did not alter "any liability" in the case. Id. (emphasis added). Fisher's Reply states precisely that conclusion; nothing more, nothing less. (Fisher Reply at 4-5)

Plaintiffs' accusation that Fisher misrepresented the facts and holding of In re Acushnet also is without basis. First, it was plaintiffs that initially cited the Acushnet case without acknowledging the critical distinction recognized in that case between a parent's derivative liability and a wholly-owned subsidiary's successor liability. Second, the facts stated in Fisher's reply are precisely as they are stated in Acushnet. RTE incorporated Aerovox as a wholly-owned subsidiary in preparation for the acquisition (just as Fisher incorporated "new MDCC"

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[1] (...continued)
Circuit, which undoubtedly had the details of the transaction available to it, concluded that the effect of the transaction was NEES first acquiring Lynn Gas and then, in a second transaction, selling it to Boston Gas. Boyd, 992 F.2d at 407 n.5.

here). In re Acushnet, 712 F. Supp. at 1012. Later, three parties - - RTE, Aerovox (the newly incorporated subsidiary), and Belleville - - all entered into an agreement (as did Fisher, "new MDCC," and "old MDCC" here) that resulted in Aerovox receiving Belleville's assets (as "new MDCC" received "old MDCC's" assets here). Id. Aerovox, the subsidiary, not RTE, carried on the business enterprise of the seller, Belleville (just as "new MDCC," not Fisher, carried on the business of "old MDCC"). Id.

Nowhere did the Acushnet court hold, as plaintiffs claim, that RTE's role in the transaction was "limited to providing its stock as consideration for its subsidiary's (Aerovox's) acquisition of Belleville's assets and liabilities." (Plaintiffs' Surreply at 4) Indeed, the court noted that "terms of the agreement were somewhat complex." Id. More important, the Acushnet court made clear that because RTE's wholly-owned subsidiary Aerovox acquired the assets of Belleville and was the corporation that actually continued Belleville's business, it was Aerovox and not RTE that succeeded to Belleville's liability:

> Acquiring Belleville through a wholly-owned subsidiary was an effective way for RTE to protect itself from liability. The acquisition structure did not, however, insulate Aerovox from succeeding to Belleville's liability.

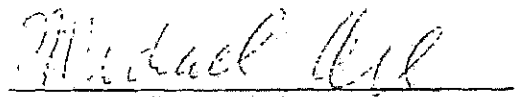
Id. at 1017.

Both Acushnet and Boyd made clear that the "successor corporation" is the corporation that actually acquires the assets of the seller and continues the seller's business enterprise.

See also Atlantic Richfield Co. v. Blosenski, 847 F. Supp. 1261, 1292 (E.D. Pa. 1994). Plaintiffs do not dispute that it was "new MDCC" that ultimately acquired the assets of "old MDCC," and that it was "new MDCC," not Fisher, that continued the business of "old MDCC." Indeed, plaintiffs have admitted as much in their Surreply: "New MDCC acquired old MDCC's assets/liabilities through Fisher." (Plaintiffs' Surreply at 4)(emphasis added) Although plaintiffs have theorized that "the purchasing corporation cannot escape successor liability by subsequently transferring its newly-acquired 'enterprise' to a subsidiary," (Plaintiffs' Surreply at 5), they have failed to cite a single case in support of this proposition.

Dated this 4th day of April, 1995.

FISHER CONTROLS INTERNATIONAL, INC.



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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Fisher Controls International, Inc.'s Response to Plaintiffs' Motion for Leave to File Surreply to be served on the following person[s] by facsimile transmission and by First Class Mail on the date set forth below:

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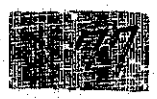
Milwaukee, Wisconsin 53202

Dated: April 4, 1995

Michael Ash



4/3/95

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MILWAUKEE DIE CASTING CO., SLYMAN INDUSTRIES, INC. and THERESA A. SLYMAN	)	
Plaintiffs,	)	
v.	)	No. 93-C-0325
FISHER CONTROLS INTERNATIONAL, INC.,	)	Judge Reynolds
Defendant.	)	

MOTION TO SUPPLEMENT THE RECORD

Plaintiffs, Milwaukee Die Casting Co., Slyman Industries, Inc. and Theresa A. Slyman (collectively "plaintiffs"), by their attorneys, for their Motion to Supplement the Record state as follows:

1. On February 10, 1995, Fisher Controls International, Inc. ("Fisher"), moved for summary judgment on Counts I, II and III of the Amended Complaint. Plaintiffs filed their response and a statement of facts in opposition to summary judgment along with the exhibits thereto on March 13, 1995.

2. Fisher filed its reply on March 27, 1995. Plaintiffs have moved this Court for leave to file a brief surreply.

3. On March 29, 1995, Gregory Slyman, the Vice President of Slyman Industries, Inc., reviewed a folder of documents that was previously not known to have existed. Mr. Slyman's Affidavit explaining the circumstances of this review is attached hereto as Exhibit A.

4. The folder included a letter dated February 22, 1980 from John Wheeler, MDCC's general manager, to Fisher representative Dennis Blanchard, seeking Fisher's authorization for

proposed organizational changes at MDCC. In another letter, MDCC requested Fisher's approval of new grade levels for employees and informed Fisher that "[p]osition descriptions to document and support the new grade levels will be developed at your [Fisher's] request." An apparently related handwritten note requested Fisher's approval for salary increases.

5. These documents buttress plaintiffs' position that Fisher was an operator of the MDCC facility under CERCLA. Copies of the pertinent documents are attached hereto as Exhibit B.

6. Plaintiffs' attempt to include these documents in the record is made in good faith and done without prejudice to Fisher. Copies of all of the materials in the file folder have been forwarded to Fisher's attorneys.

WHEREFORE, plaintiffs, Milwaukee Die Casting Co., Slyman Industries, Inc., and Theresa A. Slyman, respectfully request this Court to include the attached documents in the record for consideration of Fisher's Motion for Summary Judgment.

Dated this 3/ day of April, 1995.

Respectfully submitted,

MILWAUKEE DIE CASTING CO., SLYMAN INDUSTRIES, INC. and THERESA A. SLYMAN

By: Carmen D. Caruso
One of Their Attorneys

James R. Figliulo
Carl A. Gigante
Carmen D. Caruso
FORAN & SCHULTZ
30 North LaSalle Street, Suite 3000
Chicago, Illinois 60602
(312) 368-8330

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MILWAUKEE DIE CASTING CO. et al,	)	
Plaintiffs,	)	
v.	)	No. 93-C-0325
FISHER CONTROLS INTERNATIONAL, INC.	)	
Defendants.	)	

AFFIDAVIT OF GREGORY SLYMAN

Gregory Slyman, being duly sworn on oath, and under penalty of perjury, states as follows:

1. I am currently and have been for the past three years the Vice President of Slyman Industries, Inc., a Delaware Corporation with its principal place of business at 800 West Liberty Street, Medina, Ohio 44256.

2. In 1982, Slyman Industries purchased the stock of Milwaukee Die Casting Company ("MDCC") from Fisher Controls International, Inc. ("Fisher").

3. On March 29, 1995, I reviewed a folder of documents discovered by Robert Smits, the comptroller at MDCC. This folder contained organizational charts of Fisher's and MDCC's intrastructure, and correspondence between MDCC and Fisher related to MDCC's intrastructure. Copies of pertinent documents from this folder are attached hereto and submitted as Exhibit B to plaintiffs' motion to supplement the record.

4. Mr. Smits informed me that he located the folder which contained Mr. Wheeler's letter in a drawer of inactive personnel files. Mr. Smits stated that he happened to see this folder when he was searching for another personnel file at the MDCC facility. Until Mr. Smits advised me of this file's existence, I was not aware that such a file existed.

5. Ordinarily, MDCC does not keep organizational charts in its files that date as far back as fifteen years. Apparently, this file had been misplaced in the inactive personnel drawer many years ago and has since gone undetected.

6. As soon as I reviewed these documents, I immediately turned them over to my attorney Carmen D. Caruso of Foran & Schultz.

FURTHER AFFIANT SAYETH NOT.

Gregory Slyman

SUBSCRIBED and SWORN to before
me this 3rd day of April, 1995.

NOTARY PUBLIC

"OFFICIAL SEAL"
Linda M. Waschow
Notary Public, State of Illinois
My Commission Expires 06/04/96

February 22, 1980

Mr. Dennis E. Blanchard
Fisher Controls Company
P. O. Box 190
Marshalltown, Iowa 50158

Subject: Proposed Organizational Changes at MDCC

Dear Dennis:

During the past few months we have discussed, in general terms, several organizational changes I feel should be made at MDCC in order to adequately support our increased level of shipments on a three shift basis. Below I am listing the specific changes I am recommending in order to support our long term sales goal:

Mike Mathews, presently Production Control Manager. It is recommended Mike be promoted to a new position entitled Production Superintendent. The purpose of this position is to support MDCC's profit goals through the use of an effective Production Plan and to concentrate on improving utilization of manpower, machines and manufacturing methods. In this capacity, all of the production foremen would report to Mike Mathews. In addition, our recent hire for Production Control work, Joseph Baldukas, would move into Mike's old position of Production Control Manager and report to him. This move would not only strengthen our manufacturing function, but would also serve as a meaningful step in the personal development plan for Mike Mathews.

William Bowman, presently Plant Superintendent. I am recommending Bill be named to a new position entitled Manager, Technical Services. The purpose of this position is to support the manufacturing goals of MDCC by managing all manufacturing technology and facilities planning. Reporting to Bill in this position would be another new position entitled Supervisor, Manufacturing Engineering, who would be responsible for the tool room and maintenance department activities in addition to other responsibilities. All of Bill Bowman's goals in this new position would be in support of Mike Mathews in his new position. This would

enable us to take full advantage of Bill's metallurgical background and his extensive experience in the die casting industry. It would enable him to devote his full effort to the technical aspects of our business insuring that we stay current with all new technology as compared to his present position where a meaningful amount of time must be devoted to non-technical matters. Bill is extremely competent technically and I am confident in this new capacity he would be able to make an even greater contribution to MDCC in the future.

Walter Hohner, presently Toolroom Foreman. I am recommending Walt be promoted to a new position entitled Supervisor, Manufacturing Engineering. The purpose of this position is to provide support for the Manufacturing function by coordinating all tooling activities to ensure adequate tooling to meet production requirements. In addition, he would be responsible for the tool room and maintenance department activities on a three shift operation basis. In this capacity, Walt would report to Bill Bowman. This will enable Bill to impart his knowledge to Walt which, in my opinion, will be an important part of his development for future manufacturing management positions. As indicated above is the purpose of the position, he would be responsible for the coordination and communication of all tooling activities between the Tool Engineering Department (Earl Suess's group) and the Manufacturing Department. I sincerely believe this new function or new position will contribute substantially to having an effective three shift operation.

John Laxton, presently Die Casting Foreman, second shift. With the retirement of Lee Bartel, a 44 year employee, I am proposing John be promoted to a new position entitled General Foreman, Die Casting Department. The purpose of this position is to support our production and profit goals by implementing our die casting production plan on a three shift basis. In this capacity, John would transfer to the first shift and all other die casting foremen on all shifts would report to him. John would report to Mike Mathews in his new capacity of Production Superintendent. One of the real benefits of this new position, in my opinion, will be improved coordination between the shifts in the casting department which I feel will result in a more consistent support of our production and P.I. goals. John has exhibited the leadership qualities, judgement and dedication to handle this additional responsibility. It will also serve as an important step in John's development for possible future manufacturing management positions.

Maynard Pribek, presently Industrial Engineer. I am recommending Maynard be promoted to Supervisor, Industrial Engineering. The principal purpose of this position is to support our increased shipment and profit goals by effective management

of our incentive system and providing the manufacturing expertise for the development and implementation of our manufacturing cost system. He presently supervises one Industrial Engineer. A substantial amount of his time has been and will be spent on supervising the implementation of our cost system. His contribution in this area has, in my opinion, been outstanding. With the resignation of Tom Murphy, Maynard will provide the necessary continuity for us to follow our implementation schedule.

I am attaching a current and a revised proposed organization chart with position descriptions which I think will help put these changes in perspective. We are also forwarding to Joe Kohlberg in Marshalltown justification requests, change of status forms and position descriptions on all of the above, for evaluation of position grades.

If these changes meet with your approval, I would like very much to implement them effective April 1, 1980. I will look forward to discussing this with you at your convenience.

Sincerely yours,

John C. Wheeler

JCW/bg
Enclosure
cc: R. A. Ginivan
cc: J. I. Kohlberg

MILWAUKEE DIE CASTING COMPANY, INC.

To: Joseph I. Kohlberg - FCCD

Fr: D. A. Raetz

Re: MDCC Organizational changes

To keep you informed regarding planned changes at MDCC, I've enclosed a revised organizational chart which identifies filled and vacant positions. The vacant positions shown were either previously approved or submitted with the 1980 budget package. The planned increases in manning are based on two main considerations: the 1) implementation of three shift operations, which began in November, 1979, and 2) support of sales and profit income goals for the period 1980-82. The changes, which are to become effective on March 1, 1980, include the following:

- Bill Bowman, presently Plant Superintendent, Grade 36, will become Manager, Technical Services. It is expected that his new responsibilities will support a Grade 36.

- Mike Mathews, presently Production Control Manager, Grade 32, will become Production Superintendent. An initial increase to Grade 34 is requested.

- With Les Bartel's retirement on January 31, 1980, John Laxton will become Die Casting Production Manager. John will have total responsibility for die casting operations. We suggest a Grade 34.

- Walt Hohner, presently Tool Room Foreman, Grade 32, will become Supervisor, Manufacturing Engineering. Walt will retain the Tool Room and pick up responsibility for Plant Maintenance. Recommend a Grade 34.

- Maynard Pribek, presently titled Industrial Engineer, Grade 32 will become Supervisor, Industrial Engineering to reflect increased responsibilities. Suggest a Grade 34.

- Joseph Baldukas, Production Control Manager, Grade 32, hired January 7, 1980 to replace Mike Mathews.

MDCC Organizational changes

The major change, as you can see, will be in Mathew's and Bowman's responsibility. Position descriptions to document and support the new grade level requests will be developed, at your request.

Please let me know if you need any additional information at this time.

cc: J. C. Wheeler
R. A. Ginivan

DR:jmb

[redacted]

Bowman

Hohner

Lasher

Matheson

* awaiting Tom Shinn's approval; OK to communicate per J. Kohlberg

3/29/79
Divine Rady
Als Randle
JW

FISHER CONTROLS COMPANY

MARSHALLTOWN, IOWA 50158

Inter-Office Correspondence

March 26, 1979

To: John Wheeler

Attention:

Subject: May 1979 Organization Charts

As you will recall, last year we targeted to update all organization charts semi-annually in May and November. With the May 1 date in mind, I am asking you to review your attached organization chart(s) and return to me by April 10, 1979. We recognize that in many cases there will be changes pending which cannot be announced by that date. In this situation, please don't hesitate to show the position title with no incumbent, and at least that much information can be included on your chart.

If your chart is correct as shown, simply change the date and return to me. If you prefer not to respond, we propose to reissue your present chart under the new date. Please remember that new charts can be issued any time you feel that sufficient changes have occurred. The goal of publishing the charts semi-annually merely assures that our company organization charts will be current, at least twice a year.

Thank you.

Bob

R. A. Ginivan

RAG/jky

cc: T. M. Shive
John Wells

P.S. If there are any changes on your chart, please have it approved by the officer involved.

FISHER CONTROLS COMPANY

MARSHALLTOWN, IOWA 50158

Inter-Office Correspondence

D. Retz

April 24, 1979

To: Jim Wheeler
MDCC

Attention:

Subject: MDCC ORGANIZATION CHART

Jim - Pls. call Janet and tell her the chart is OK as up-dated.

called 5/7/79 To O.K. JB

Jim, attached is a copy of the MDCC organization chart as we have up-dated it. Please let me know if everything on it is okay or if there are any correction, additions, etc. to be made.

Thank you for your assistance.

Janet Yoch
Secretary

jy

Enclosure

P.S. If the chart is fine the way it is just give me a call. My number is (515) 754-3980.

10/18/79
D. Raetz

FISHER CONTROLS COMPANY

MARSHALLTOWN, IOWA 50158

Inter-Office Correspondence

October 11, 1979

To: J. C. Wheeler

Attention:

Subject: December 1979 Organization Charts

As you will recall, last year we targeted to update all organization charts semi-annually. To that end, I am asking you to review your attached organization chart(s) and return to me by October 29, 1979, anticipating changes as of December 1, 1979. We recognize that in many cases there will be changes pending which cannot be announced by that date. In this situation, please don't hesitate to show the position title with no incumbent, and at least that much information can be included on your chart.

If your chart is correct as shown, simply change the date and return to me. If you prefer not to respond, we propose to reissue your present chart under the new date. Please remember that new charts can be issued any time you feel that sufficient changes have occurred. The goal of publishing the charts semi-annually merely assures that our company organization charts will be current, at least twice a year.

Thank you.

Bob Ginivan

R. A. Ginivan

RAG:jvw

cc: T. M. Shive
John Wells

P.S. If there are any changes on your chart, please have it approved by the Officer involved.

CERTIFICATE OF SERVICE

The undersigned states on oath, that she caused a copy of the below named pleading(s) to be served upon the attorney(s) named below, at their respective address(es) as indicated on April 3, 1995.

MOTION TO SUPPLEMENT THE RECORD

By Messenger:

Andrew R. Running
Robert B. Ellis
KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601

SUBSCRIBED and SWORN to before me this 3rd day of April, 1995.

NOTARY PUBLIC

"OFFICIAL SEAL"
LINNEA A. MAHONEY
Notary Public, State of Illinois
My Commission Expires 6/30/98

3/30/95

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MILWAUKEE DIE CASTING CO., SLYMAN INDUSTRIES, INC. and THERESA A. SLYMAN	)	
Plaintiffs,	)	
v.	)	No. 93-C-0325
FISHER CONTROLS INTERNATIONAL, INC.,	)	Judge Reynolds
Defendant.	)	

PLAINTIFFS' SURREPLY IN OPPOSITION
TO MOTION FOR SUMMARY JUDGMENT ON
COUNTS I, II AND III OF AMENDED COMPLAINT

1. SUCCESSOR LIABILITY

Plaintiffs Were Not Required To "Plead" Fisher's Successor Liability

Fisher's criticism that plaintiffs did not plead a successor liability "theory" is irrelevant, for plaintiffs have alleged that Fisher is liable as an owner/operator under CERCLA §107. Fisher's successor liability falls within this section. *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1247 (6th Cir. 1991)(cited by Fisher at *Reply*, p. 6)

Moreover, Fisher should not even be permitted to make this objection because it withheld until December 30, 1994 the documents relating to its 1975 acquisition which reveal that the transaction was an asset purchase. (*See*, letters, Caruso to Running, 12/21/94, and Running to Caruso, 12/30/94, copies attached hereto) Before it finally produced these documents, Fisher

had incorrectly asserted that its 1975 acquisition was only a stock purchase.[1] Having concealed the truth for as long as it could, Fisher cannot reasonably argue that plaintiffs delayed in asserting successor liability.

Fisher Has Misrepresented The Law

Fisher's only argument on the *de facto* merger issue is that its January 14, 1975 sale of the assets of old MDCC to its wholly owned subsidiary (new MDCC) purportedly destroyed "continuity of enterprise" and thereby precludes the Court from ruling that Fisher entered into a *de facto* merger when (earlier on January 14, 1975) it purchased old MDCC's assets. (*Reply*, pp. 1-7)

However, Fisher has misrepresented the case law. Fisher cites a footnote in *John S. Boyd, Inc. v. Boston Gas Co.*, 992 F.2d 401 (1st Cir. 1993), where the court of appeals observed that a parent corporation's (Eastern's) purchase of a company (Lynn Gas) -- and its purported same day sale of Lynn Gas to its subsidiary (Boston Gas) -- "does not alter any liability" under CERCLA. As the court noted:

> Technically, NEES sold the Lynn Gas Co. first to Eastern Gas and Fuel Associates, the parent company of Boston Gas. Eastern then sold Lynn Gas to Boston Gas on the same day. Because this intermediate transaction does not alter any liability in this case by statute, contract, or any other norm, we discuss Eastern no further. *Id.* at 407, n. 5 (*Reply*, p. 4, 5)

Fisher contends that the "two part transaction" in *Boyd* was "similar to New MDCC's acquisition of Old MDCC". *Id.*, p. 4. However, the appellate opinion cited by Fisher does not

[1] As late as December 22, 1994, Fisher represented to the Court that it "acquired the common stock of MDCC on January 13, 1975" -- without acknowledging its asset purchase from old MDCC on January 14, 1975. (*See*, Fisher's "Memorandum in Support of Motion for Partial Summary Judgment" on the state law claims in the original complaint, ¶1)

reveal the details of the initial transaction between NEES and Eastern. Those facts are set forth in the district court's opinion, and they belie Fisher's contention:

> [I]n 1972, NEES executed a purchase and sale agreement with Eastern Enterprises, the owner of Boston Gas, concerning three subsidiaries, including Lynn Gas. The SEC described the transaction as follows: "Concurrently with the acquisition of [93.77% of] the stock [of Lynn Gas] ..., Eastern will cause Lynn [Gas ...] to sell for cash all of [its] assets to Boston Gas Company ... and Boston Gas will assume [its] liabilities. ***John Boyd Co. v. Boston Gas Co.***, 1992 U.S. Dist. LEXIS 13088, *8 (D. Mass. August 18, 1992) (copy of LEXIS opinion attached hereto).

Unlike Fisher, the parent corporation in ***Boyd*** (Eastern) did not acquire the assets of the company which was sold (Lynn Gas). It merely acquired the majority of Lynn Gas' *stock* with a provision in the purchase instrument that it would direct Lynn Gas to convey its assets to Boston Gas. *Id.* There was no contention in ***Boyd*** that Eastern, by purchasing stock, had entered into a *de facto* merger with Lynn Gas. Therefore, the ***Boyd*** footnote (cited by Fisher) was obviously not a "ruling" on a non-existent *de facto* merger question. The court merely noted that "because" the intermediate transaction (Eastern's purchase of Lynn Gas' stock) "[did] not alter" the CERCLA liabilities, there was no reason to discuss Eastern any further in the text of the opinion. ***Boyd*** provides no support to Fisher.

Fisher has similarly misstated the facts and holding of ***In re Acushnet River & New Bedford Harbor***, 712 F.Supp. 1010 (D. Mass. 1989), cited in our Memorandum. (*Reply*, p. 5) Unlike Fisher, the parent corporation in ***Acushnet*** (RTE) did not purchase the assets and liabilities of the company which was sold (Belleville). There was a three-party contract among the seller (Belleville), the parent corporation (RTE) and the subsidiary (Aerovox), but the subsidiary (Aerovox) acquired Belleville's assets *directly* from Belleville:

> ... Aerovox acquired all of Belleville's assets, property, and rights of any kind, including the rights to the name "Aerovox". Aerovox agreed to assume all of Belleville's balance sheet liabilities and to perform all of its contracts ... . 712 F.Supp. at 1012.

The parent corporation's (RTE's) role as a party to the contract was limited to providing its stock as consideration for its subsidiary's (Aerovox's) acquisition of Belleville's assets and liabilities. *Id.*[2] Since RTE did not purchase those assets and liabilities, there was no contention that RTE was liable as a successor corporation, and obviously, there was no ruling by the court on that non-existent issue. Fisher quotes the court's observation that "[a]cquiring Belleville *through* a wholly-owned subsidiary was an effective way for RTE to protect itself from liability", but Fisher forgets that new MDCC acquired old MDCC's assets/liabilities *through* Fisher -- the exact opposite of the situation in *Acushnet*. *Id.* at 1017. *Acushnet* provides no support to Fisher.

Fisher also asserts that "if a large corporation created a wholly owned subsidiary to acquire the assets and continue the enterprise of a CERCLA responsible party, the subsidiary would be liable as a successor ... " (*Reply*, p. 6, citing ***Atlantic Richfield Co. v. Blosenski***, 847 F.Supp. 1261, 1292 (E.D. Pa. 1994)) That statement is inapposite, for Fisher did not "create a wholly owned subsidiary to acquire" old MDCC's assets. It was Fisher, not new MDCC, that entered into the purchase contract with the Schroeders and directly acquired old MDCC's assets.

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[2] RTE's role was comparable to the role of Monsanto (Fisher's corporate parent) in Fisher's 1975 acquisition of old MDCC -- for Fisher delivered Monsanto stock to old MDCC for distribution to its shareholders as consideration for its purchase. There is no contention that Monsanto entered into a *de facto* merger with old MDCC -- just as in *Acushnet*, there was no contention that RTE entered into a *de facto* merger with Belleville.

Fisher is unable to cite a single case where a purchasing corporation was excused from successor liability because, following its asset purchase, it transferred the "enterprise" to a wholly-owned subsidiary. That type of secondary transfer does not disturb any of the factors which are necessary to find continuity of enterprise: "continuity of management, personnel, physical location, assets and operations." (*Reply*, p. 3) Fisher is asking this Court to add a requirement to the "continuity of enterprise" test (that the parent corporation *must* own and operate the enterprise *itself* instead of through a subsidiary), but such a requirement would be unprecedented under state law and CERCLA, and it would contradict the equitable nature of the *de facto* merger doctrine. (Pltfs.' Memorandum in Opp. ("Memo."), pp. 11, 12, and cases cited therein)

Fisher, not plaintiffs, has confused successor and derivative liability. (*Reply*, p. 6) Where a corporation purchases another company in a transaction which meets each criteria for a *de facto* merger, the purchasing corporation cannot escape successor liability by subsequently transferring its newly-acquired "enterprise" to a subsidiary. The secondary transfer is simply an internal corporate decision which may limit the parent corporation's liability *for events which occur after the secondary transfer is completed* (derivative liability), but there is no authority for the proposition that the secondary transfer would nullify the legal effect of *the already completed asset purchase* (successor liability).[3] Fisher's argument on the *de facto* merger issue is without merit.

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[3] This is particularly true where, as here, the initial acquisition was purposefully structured as a tax-free reorganization under Internal Revenue Code §368 and the parent corporation reaped the benefits of that acquisition. (Memo., pp. 15-17) Fisher makes no reply to the plaintiffs' "tax benefits" argument. It does not deny that it received the tax benefits, and does not dispute that its tax benefits are a significant factor in assessing its successor liability.

2. OWNER LIABILITY

Fisher criticizes the plaintiffs for citing a "single, unpublished district court opinion" (*Truck Components, Inc. v. Beatrice Co.*), wherein Judge Conlon accurately stated the rule that under CERCLA, owner liability may be imposed against shareholders based on their *own* conduct (and not derivatively) in two alternative situations: (1) where the shareholders become "record owners of the contaminated property"; or (2) without record ownership, where the shareholders exercised control over the site in question ("site control") 1994 U.S. Dist. LEXIS 13319 (N.D. Ill. 1994) Fisher does not contest that holding. (*Reply*, p. 7)[4]

Fisher now cites to the First Circuit's decision in *Boyd*, *supra*, for its claim that corporations that merely serve as "conduits" are not record owners – but as set forth above, Fisher is unfamiliar with the facts of that case. The parent corporation in *Boyd* (Eastern) purchased the stock of Lynn Gas. It never "owned" the contaminated property, and there was no contention that it was an "owner". (1992 U.S. Dist. LEXIS 13088 at *8).

We have already distinguished Fisher's remaining 'conduit cases' as cited on page 8 of its Reply. Those cases (where a shareholder owned the property only one time, for less than 24 hours) are inapposite because Fisher owned the property twice (in 1975 and 1981/82) and also had site control, as evidenced by its ability in 1981 to command the return of the property from new MDCC for purposes of the sale to the Slymans (as well as its control over the limited PCB cleanup as fully set forth in our Memorandum).

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[4] Judge Conlon cited ample authority for this holding, and contrary to Fisher's desire for the plaintiffs to cite more cases, it is unnecessary to "string cite" the cases in our brief.

3. OPERATOR LIABILITY

Fisher's claim that it had only "isolated employee safety and 'environmental' contacts with new MDCC is refuted by the facts which are fully set forth in our Memorandum. Since summary judgment should be granted only "if there is no genuine issue as to any material fact"; all facts must be read in a light most favorable to plaintiffs; and plaintiffs are entitled to all reasonable inferences from the evidence, Fisher's *factual* arguments are plainly insufficient to warrant a summary judgment. *McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 371 (7th Cir. 1992); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Fisher claims in a footnote that the plaintiffs should not be permitted to cite Monsanto's involvement as evidence that Fisher was an operator, but that argument is unpersuasive. (*Reply*, p. 10, n. 5) In its memorandum in support of this motion, Fisher argued that "Fisher and its parent Monsanto Company exercised some oversight ... [but] their overall involvement was minimal." (Fisher's Memo., p. 7, ¶10) Now that plaintiffs have presented substantial evidence to refute Fisher's view of its and Monsanto's coordinated "oversight" activities, Fisher suddenly argues that Monsanto's role was completely unrelated and should not be considered. This is specious. The testimony of Art Rogers, among other evidence, establishes that Fisher requested Monsanto's assistance and both companies were acting in concert with respect to their supervision of MDCC's environmental affairs. (Pltfs.' Memo., pp. 6-10, 18, 19)

4. THE STANDING OF THERESA SLYMAN AND SLYMAN INDUSTRIES

Fisher misstates the facts by asserting that the fees paid by Theresa Slyman and Slyman Industries to Robert Parsons are not "response costs" because Mr. Parsons was retained by plaintiffs' attorneys as an expert witness in connection with this case. As set forth in our

Memorandum, Mr. Parsons has been retained for a dual purpose. In addition to providing expert testimony, he has been retained to investigate, assess and evaluate the extent of the PCB contamination already identified at the MDCC facility and recommend future appropriate activities consistent with the National Contingency Plan (NCP). (Parson Affidavit, ¶3-6); (T. Slyman Affidavit, ¶¶ 3 ,4); (G. Slyman Affidavit, ¶¶ 3, 4; see also, letter, Caruso to Running, 3/30/95, copy attached hereto); ***Grindell v. American Motors Corp.***, 108 F.R.D. 94, 95 (W.D. N.Y. 1985) (holding that an expert may serve more than one function in a case). The cases cited in our Memorandum (p. 21) -- which Fisher simply ignores -- establish that Mr. Parsons' fees for his investigatory services and recommendations consistent with the NCP are recoverable response costs. Therefore, Theresa Slyman and Slyman Industries have CERCLA standing.[5]

5. FISHER'S JOINT AND SEVERAL LIABILITY UNDER CERCLA § 107(a)

Fisher erroneously accuses plaintiffs of misrepresenting as the majority view the position that a potentially responsible party (PRP) such as MDCC may bring an action for joint and several liability under CERCLA § 107(a) (*Reply*, p. 13). First, the cases cited by plaintiffs at pages 23-26 of their Memorandum are anything but outdated. With one exception, each case was decided after Congress amended CERCLA in 1986 to include an express right of contribution under §113. Furthermore, plaintiffs have cited three cases decided since 1991 which specifically reject Fisher's argument that only an "innocent" plaintiff can bring a cost recovery action under § 107(a). *See e.g.*, ***U.S. v. Kramer***, 757 F.Supp. 397, 416 (D. N.J. 1991)

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[5] Fisher also ignores the standing which Theresa Slyman and Slyman Industries have under the Declaratory Judgement Act, which confers standing upon any party that has a legal interest threatened in an actual controversy. ***Collin County v. Homeowners Assoc.***, 915 F.2d 167, 170 (5th Cir. 1990).

More importantly, with respect to a PRP such as MDCC that has initiated a cleanup process without governmental prodding, plaintiffs' cases represent the majority view. Fisher cannot cite a single case which holds that a PRP who spontaneously initiates a cleanup without governmental pressure is precluded from bringing a cost recovery action for joint and several liability under CERCLA § 107(a). We have already responded to *Akzo Coatings, Inc. v. Ainger Corp.*, 30 F.3d 761 (7th Cir. 1994); *United Technologies v. Browning-Ferris Industries*, 33 F.3d 96 (1st Cir. 1994)[6]; and *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1992). Fisher now cites *United States v. Colorado & Eastern R.R. Co.*, 25 Env. L. R. 20,309 (10th Cir. 1994)[7] -- but the PRP in *Colorado & Eastern* did not initiate a cleanup spontaneously. It was sued by the U.S. E.P.A. and later filed a cross-claim against other PRPs. 1995 U.S. App. LEXIS 5562 at *3-4. This distinction from the instant case is critical. As stated in *Kramer*, *supra*:

> [S]ections 107 and 113 serve distinct purposes. CERCLA was enacted to facilitate cleanup of the tens of thousands of hazardous waste sites in this country. Section 107 permits the Government or a private party to go in, clean up the mess, pay the bill, then collect *all* its costs not inconsistent with the NCP from other responsible parties -- even if plaintiff was also responsible for the contamination. Any PRP is entitled under section 113 to bring a contribution action against other PRPs -- including the PRP who previously cleaned up the mess and was paid for its trouble through a section 107 proceeding -- to apportion costs equitably among all the PRPs. Practically speaking, section 107, permits a PRP, including the Government, to collect all its response costs, even those that the same PRP may be required to pay back to the other

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[6] *United Technologies* supports plaintiffs' position that PRPs who spontaneously initiate the cleanup of a contaminated facility may sue under § 107(a). 33 F.3d at 99-100 fn. 8.

[7] The opinion cited by Fisher has been withdrawn and is replaced by the opinion at 1995 U.S. App. LEXIS 5562 (10th Cir. 1995)(copy attached hereto)

PRPs as its equitable share in a section 113 proceeding. 757 F.Supp. at 416.

The cases cited by Fisher do not dispute this statement of the law. PRPs such as MDCC that spontaneously initiate a cleanup should be permitted to recover all of their response costs under CERCLA §107. This Court should reject Fisher's attempt to penalize MDCC for taking the initiative with respect to this cleanup.

CONCLUSION

WHEREFORE, for all the reasons stated in this Surreply and in our Memorandum in Opposition to Fisher's Motion, the Court should deny Fisher's Motion for Summary Judgment on Counts I, II and III of the Amended Complaint.

Dated this 30th day of March, 1995.

Respectfully submitted,

MILWAUKEE DIE CASTING CO., SLYMAN INDUSTRIES, INC. and THERESA A. SLYMAN

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