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Environment and Natural Resources Division

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BY EMAIL AND U.S. MAIL

Confidential Settlement Communication; Not for Public Release

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Dear Don:

We are in receipt of your letters dated December 29, 2016 and January 25, 2017 (collectively, the "January 2017 Letters") regarding defenses that Mueller Industries, Inc. ("Mueller") asserts to potential CERCLA liability at the USS Lead Superfund Site in East Chicago, Indiana ("USS Lead Site").

Mueller's January 2017 Letters in turn attach two letters dated February 18, 2010 and April 1, 2010 to John Moscato, DOJ (collectively, the "*Moscato* Letters") regarding Mueller's defenses to potential CERCLA liability at the Eureka Mills Superfund Site in Eureka, Utah. In its January 2017 Letters, Mueller asserts that the defenses raised in the *Moscato* Letters apply with equal force to the USS Lead Site.

This letter provides the first response that the United States, regarding the USS Lead matter, makes to Mueller's January 2017 Letters and the *Moscato* Letters.[1] As we explain more fully later, we plan to supplement and expand this response over time.

Goal of this Letter. Mueller's reliance on transcripts, consent decrees, and numerous other filings in a thirty-year old case from Midvale, Utah, coupled with the sheer volume of arguments, assertions, and claims that Mueller raises in 40 single-spaced pages of letters with 104 copiously annotated footnotes, makes the task of responding to Mueller's defenses daunting, to say the least. After a first review of the materials, Mr. Khandeshi and I were tempted to throw up our

[1] The United States previously replied to Mueller's defenses in the Eureka Mills case.

hands and ask "why bother?" especially given the present resource pressures involved in the USS Lead Site.

However, once we took the time to apply a rigorous analysis to Mueller's arguments, the arguments became relatively simple and quite questionable. The real challenge here lies in cutting out the "noise," in separating the chaff from the wheat and in exposing the thinness of the arguments once they are laid bare.

Therefore, the goal of this letter is to distill Mueller's arguments down to their core and respond to them simply. The goal is not to provide a comprehensive response, complete with citations to the relevant transcripts, case law, and documents. While we have come a long way toward such a comprehensive response, we are not there yet. We will supplement this letter at a later time.

We hope that Mueller will start the process of participating with the currently existing group of PRPs at the Site and will work with the United States to resolve its liability. So far, neither USS Lead nor Mueller has contributed any money toward a cleanup that already has cost over $20 million and will require tens of millions more dollars before completion. We do not believe that Mueller's debatable view of the law justifies inaction any longer.

Definitions. Because of the nature and scope of Mueller's arguments, we found it useful to develop a list of definitions. Please see Appendix A.

Essence of Mueller's Arguments. The essence of Mueller's arguments against CERCLA liability relating to USS Lead's operation of the USS Lead Facility from 1920 to 1979 is that Mueller's predecessor, Sharon, did not assume the CERCLA liabilities of UV/USSRAM, USS Lead's parent. Instead, the CERCLA liabilities of UV/USSRAM were assumed by the UV Liquidating Trust. According to Mueller, the United States is now precluded from asserting that Sharon assumed UV/USSRAM's CERCLA liabilities because of positions, Court rulings, and settlements in the Midvale Litigation.[2]

Summary of US Response. The United States has developed a line of arguments in response to Mueller's defenses. That line of arguments can be found in Appendix B and its attachments at B-1 through B-5.[3]

Contrary to Mueller's assertions, Sharon assumed the CERCLA liabilities of UV/USSRAM through the 1979 Liability Assumption Agreement. Specifically, in that Agreement, Sharon

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[2] Mueller also asserts that UV/USSRAM itself likely is shielded from USS Lead's CERCLA liability because of the decision in *United States v. Bestfoods*, 524 U.S. 51 (1998). *See* December 29, 2016 Letter from E. D. Elliott to A. Lang at 2. The United States acknowledges its burden of establishing UV/USSRAM's liability for USS Lead. We have started to develop the facts necessary to carry this burden. However, we have not started a review of the documents from USS Lead's Redding CA warehouse because we are waiting for them to be coded. The coding should narrow our review. We may need to revisit California to undertake a further review of additional Redding CA warehouse documents in order to complete our analysis.

[3] We are also working on another line of arguments based on the radical undercapitalization of MRRC as a result of the Sharon bankruptcy. We are aware of the Bankruptcy Court's approval of the Plan of Reorganization that had the consequence of enabling that radical undercapitalization.

assumed "contingent" liabilities, that is, future, unknown liabilities. Moreover, the liabilities that Sharon assumed were without restriction: the language in the 1979 Liability Assumption Agreement was extremely broad. Therefore, Sharon assumed CERCLA liability even though the Agreement pre-dated CERCLA. The later ***1980*** UV Liquidating Trust Agreement (which also pre-dated CERCLA) was irrelevant to, and did not render ineffective, Sharon's ***prior*** assumption of liabilities in the ***1979*** Liability Assumption Agreement.

By virtue of the 1979 Liability Assumption Agreement and the 1980 UV Liquidating Trust Agreement, Sharon ***and*** the UV Liquidating Trust held a ***common liability*** to third party claimants, including the United States suing under CERCLA. Mueller's fundamental premise—that *either* Sharon *or* the UV Liquidating Trust assumed UV Industries' liability, but not both—is wrong.

Neither the positions taken by the United States in the Midvale Litigation nor the Court's statements made therein nor the two settlements reached in that Litigation preclude the United States from asserting that Sharon is a successor to UV/USSRAM in prospective USS Lead Litigation.

Because Mueller is a successor to Sharon, Mueller is a successor to UV/USSRAM.

Mueller's Preclusion Defenses and the United States' Response. We refer you to Appendices B–1 through B–5 for a more comprehensive response to Mueller's preclusion defenses. However, Mueller's preclusion defenses boil down to three. Our responses are as follows:

1. Argument: The Broad Covenant Not to Sue in the UV CD applies to Sharon and therefore to Mueller. (Mueller's novation theory and its *Res Judicata* claim preclusion theory both hinge on this assertion.)

   Response: The Covenants Not to Sue in the UV CD, including the Broad CNTS, expressly applied only to UV Industries and the UV Trust. Sharon was a not party to the UV CD. In Sharon's separate CD, the United States limited its CNTS to the Midvale Sites. Mueller is a successor to the Sharon CD, not the UV CD. Therefore, Mueller is the beneficiary of a CNTS only at the Midvale Sites, not the USS Lead Site.

2. Argument: The United States is precluded from asserting that Sharon succeeded to the liability of UV/USSRAM because in the Midvale Litigation the United States argued that the UV Trust succeeded to UV/USSRAM's liability and the District Court issued a decision holding that the UV Trust was the successor. (Mueller's *Res Judicata* claim splitting theory and its issue preclusion (*aka* "collateral estoppel") theory both hinge on this assertion.)

   Response: The District Court never issued any decision holding that the UV Trust succeeded to the liabilities of UV/USSRAM.

NOTE: The United States agrees that, in the Midvale Litigation, we argued that the UV Trust succeeded to UV/USSRAM's liability. But that position was not and is not inconsistent with the position that Sharon also succeeded to those liabilities. Both parties had a common shared liability. In the Midvale Litigation, the United States did not have to argue that Sharon succeeded to UV/USSRAM's liability because we argued that Sharon was liable under a direct owner/operator theory.

3. Argument: Judicial estoppel precludes the United States from now asserting that Sharon is the successor to UV/USSRAM's liability because in the Midvale Litigation, the United States asserted that the UV Trust was.

   Response: None of the requirements of judicial estoppel are met: the United States' position in prospective USS Lead Litigation is not inconsistent with its position in the Midvale Litigation; the United States never persuaded the District Court in the Midvale Litigation that the UV Trust succeeded to UV/USSRAM's liability; and the equities required by judicial estoppel clearly do not lie in Mueller's favor: the United States was left with tens of millions of dollars in unrecovered costs at the Midvale Sites and the United States and other PRPs are facing tens of millions of dollars in costs at the USS Lead Site.

Conclusion. Mueller's arguments are clever, artful, but wrong. We look forward to working with Mueller to resolve its liability and to seeing Mueller start to participate in the already-existing PRP Group at the Site.

Sincerely,

Annette M. Lang

Annette M. Lang
Senior Counsel

cc: Michael Elam
David Rieser
Patricia McGee
David Wallis
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Steve Kaiser
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Letter from A. Lang to E.D. Elliott, April 7, 2017

Appendix A

Definitions

APPENDIX A

Definitions

For purposes of this letter, the following definitions apply:

1979 Asset Purchase Agreement means the November 26, 1979 Agreement whereby Sharon Steel purchased the assets of UV/USSRAM.

1979 Liability Assumption Agreement means the November 26, 1979 Agreement whereby Sharon Steel assumed the liabilities of UV/USSRAM.

1979 Asset Purchase and Liability Assumption Agreements or **Agreements** mean the 1979 Asset Purchase Agreement and the 1979 Liability Assumption Agreement.

1980 UV Liquidating Trust Agreement means the March 24, 1980 Agreement between UV Industries and the UV Industries Liquidating Trust for the sale and liquidation of all of UV Industries' assets.

Broad CNTS or **Broad Covenant Not to Sue** means the covenant not to sue in the UV CD whereby the United States "agrees not to assert any [environmental] claims in the future on behalf of the Environmental Protection Agency or the Department of the Interior" against UV Industries and the UV Liquidating Trust. UV CD at ¶ VII.B.

Midvale Litigation means the action filed by the US in 1986 against, *inter alia*, Sharon Steel, UV Industries, and the UV Liquidating Trust involving two Superfund Sites in Midvale, Utah.

***Moscato* Letter** means the letters dated February 18, 2010, from D. Elliott, on behalf of Mueller Industries, to J. Moscato, *et al.*, on behalf of the United States.

***Moscato* Letters** means the letters dated February 18, 2010, and April 1, 2010, from D. Elliott, on behalf of Mueller Industries, to J. Moscato, *et al.*, on behalf of the United States.

Sharon means Sharon Steel Corporation.

Sharon CD means the partial Consent Decree between the United States and Sharon Steel entered on November 13, 1990, in the Midvale Litigation.

USS Lead means U.S.S. Lead Refinery, Inc.

USS Lead Litigation means a prospective action by the United States against Mueller for response actions and costs at the USS Lead Site in East Chicago, Illinois, under CERCLA Sections 106 and 107.

USS Lead Facility means the facility located at 5300 Kennedy Avenue, East Chicago, Indiana, that operated a lead refinery from approximately 1906 through 1986.

UV CD means the partial Consent Decree among the United States, UV Industries, and the UV Trust entered on November 13, 1990, in the Midvale Litigation.

UV, used alone, means both UV Industries and the UV Trust.

UV Industries means UV Industries, Inc.

UV Trust or **UV Liquidating Trust** means the UV Industries, Inc. Liquidating Trust.

UV/USSRAM means UV Industries and the US Smelting, Refining, and Metals Company ("USSRAM"). The two are consolidated in this definition because USSRAM merely changed its name to UV Industries in 1972. The two companies are one and the same.

Letter from A. Lang to E.D. Elliott, April 7, 2017

Appendix B

Line of Arguments Regarding Mueller's Liability as a successor
to the CERCLA Liability of USS Lead from 1920-1979

APPENDIX B

Mueller is Liable as a Successor to the CERCLA Liability of USS Lead from 1920 to 1979

1. USS Lead is liable under CERCLA for the releases from and disposals of hazardous substances at the USS Lead Facility from 1920 to the present.

2. UV/USSRAM is liable for the releases and disposals of hazardous substances of its subsidiary, USS Lead, from 1920 to 1979.

3. Sharon is a successor to the CERCLA liability of UV/USSRAM.

    a. Under the 1979 Liability Assumption Agreement, Sharon assumed the CERCLA liability of UV/USSRAM.

        i. The plain language of the 1979 Liability Assumption Agreement is extremely broad and general:

        "Sharon hereby ***assumes*** and agrees to pay, perform and discharge and to indemnify and hold UV [Industries] harmless from and against. . . ***all*** the debts, obligations, contracts and ***liabilities*** of UV as of the date hereof, ***of any kind, character or description, direct or indirect, whether accrued, absolute, contingent or otherwise and whether asserted before or after such date***. . . . The debts, obligations, contracts, and liabilities so assumed being, ***without limitation on the generality of the foregoing***, more particularly described as follows:

        > [A list of nine areas of liabilities then follows]; and
        >
        > "(x) all other debts, obligations and liabilities of UV as of the date hereof of any kind, character or description, whether direct or indirect, whether accrued, absolute, contingent or otherwise, whether asserted before or after the execution hereof ***and whether or not specifically mentioned or described herein***." 1979 Liability Assumption Agreement at 2, 5.

        ii. The plain language—twice— applies to **all** debts, obligations, contracts and liabilities.

        iii. The plain language—twice—does not limit the time for asserting the claim: "whether accrued, absolute, contingent or otherwise and whether **asserted before or after such date**," the "such date" clearly referring to November 26, 1979, the date of the 1979 Liability Assumption Agreement.

iv. The plain language—twice—does not limit liabilities to "existing" liabilities; rather, it includes **contingent** liabilities. "Contingent" means "dependent on something that might or might not happen in the future." *Black's Law Dictionary* (10th ed. 2014).

v. The plain language is **"without limitation on the *generality*"** of liabilities being assumed and does not limit the assumed liabilities to those "**specifically mentioned or described."**

vi. When a liability assumption agreement includes language as broad as this one and provides for an assumption of "contingent" liabilities, the buyer assumes CERCLA liabilities *even if* the agreement pre-dates CERCLA. *United States v. Iron Mountain Mines*, 987 F. Supp. 1233 (E.D. Cal. 1997) (buyer held liable under CERCLA based on pre-CERCLA contract where buyer "assume[d] all of the liabilities and contractual obligations"). *See Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 326-28 (7th Cir. 1994) (1972 agreement); *see also Olin Corp. v. Consol. Alum. Corp.*, 5 F.3d 10, 12-16 (2d Cir. 1993) (1973 agreement); *Joslyn Mfg. Co. v. Koppers Co., Inc.*, 40 F.3d 750, 753-60 (5th Cir. 1994) (various pre-enactment agreements). The language of the 1979 Liability Assumption Agreement is broader than that of *Iron Mountain*. *Compare John S. Boyd Co., Inc. v. Boston Gas Co.*, 992 F.2d 401, 406 (1st Cir. 1993) (CERCLA liability not assumed because the pre-CERCLA contract did not include any reference to "future or contingent liabilities").

vii. Mueller's reliance on the "as of" language of the 1979 Liability Assumption Agreement is misplaced. Mueller's interpretation of that language would render the "contingent" language within that same clause superfluous. The clear function of the "as of" language is to limit Sharon's assumption of liabilities to actions of UV/USSRAM prior to November 26, 1979. Without this limitation, Sharon could be held liable for actions postdating November 26, 1979. For example, if UV/USSRAM had not engaged in any actions prior to November 26, 1979, that generated CERCLA liability but engaged in actions thereafter, the "as of" phrase would shield Sharon from liability.

b. The 1980 UV Liquidating Trust Agreement did not alter Sharon's assumption of CERCLA liability under the 1979 Liability Assumption Agreement.

i. Mueller thoroughly muddies the waters by relying upon the liability assumption clause in the 1980 UV Liquidating Trust Agreement. In that clause:

"The Trustees hereby assume all the liabilities and claims (including unascertained or contingent liabilities and expenses) of UV." 1980 UV Liquidating Trust Agreement at ¶ 2.4.

ii. The UV Trust's assumption of UV Industries' liability occurred ***after*** Sharon's assumption of UV Industries' liability: 1980 v. 1979. Mueller cannot rely on a 1980 assumption of liabilities to render a 1979 assumption of liabilities ineffective.

iii. Sharon was not a party to or a beneficiary of the 1980 UV Liquidating Trust Agreement. Sharon was not mentioned at all.

c. Sharon and the UV Trust *share* a common liability for UV/USSRAM's CERCLA liabilities.

i. Section 107(e) precludes a party "from *eliminating* liability through a liability transfer agreement." *United States v. NCR Corp. et al.*, Case No. 10-C-910, Decision and Order (E.D. Wisc. Dec. 19, 2011) at 4 (emphasis in original) (opinion attached as Appendix C). Thus, UV Industries' liability was not eliminated through the 1979 Liability Assumption Agreement.

ii. However, Section 107(e) "does not preclude parties from *creating* additional liability, in effect, on the part of the buyer or anyone else." *Id*. Thus, the 1979 Liability Assumption Agreement *created* liability for Sharon.

iii. When an asset purchaser like Sharon agrees to assume liabilities, the seller and the purchaser share a common liability to third party claimants, including the United States suing under CERCLA. *Id*. at 1–6.[1] *See Plaintiffs' Joint Brief in Response to Motion for Summary Judgment on Non-Liability Filed by Defendant Appleton Papers Inc.* ("*Joint Brief*") (attached as Appendix E).[2]

iv. The United States is entitled to sue either the seller or the purchaser or both. *Joint Brief* at 14.

v. In the Midvale Litigation, the United States sued the UV Trust based on its assumption of UV Industries' liability through the 1980 UV Liquidating Trust Agreement. The United States sued Sharon based on direct

[1] In *NCR Corp*., the Court later reversed a separate part (at 6-11) of its December 19, 2011 Decision and Order, finding that the pre-CERCLA agreement in that case did not result in API's assumption of NCR's CERCLA liabilities. *Id*. Decision Granting Motion for Reconsideration (E.D. Wisc. April 10, 2012) (attached as Appendix D).

[2] We could not more eloquently, completely, or persuasively articulate the arguments and law supporting the *shared common* liability of the UV Trust and Sharon than what is set forth in the Joint Brief (App. E).

owner/operator liability. It had no need to assert a successor liability theory against Sharon and no requirement to assert one either.

d. The preclusion arguments that Mueller raises are meritless.

i. The novation argument is meritless. *See* Appendix B-1.

ii. The *Res Judicata* claim preclusion argument based on the liability release in the UV CD is meritless. *See* Appendix B-2.

iii. The *Res Judicata* claim preclusion argument based on claim splitting is meritless. *See* Appendix B-3.

iv. The *Res Judicata* issue preclusion argument (aka "collateral estoppel") is meritless. *See* Appendix B-4.

v. The judicial estoppel argument is meritless. *See* Appendix B-5.

4. Mueller is the successor to the CERCLA liability of Sharon.

a. Mueller *is* the reorganized Sharon.

b. Mueller is the successor to the covenant not to sue in the Sharon CD. In the Sharon CD, the United States covenanted not to sue Sharon *only* at the Midvale, Utah Sites. In the Sharon CD, the United States did not provide Mueller with a covenant not to sue at any other site in the country, including the USS Lead Site.

APPENDIX B–1

Response to Mueller's Novation Argument

Mueller's Novation Argument:
(*Moscato* Letter, Argument I.A; middle of p. 4 through bottom of p. 7)

1. In the 1990 UV CD, the United States released UV from liability for CERCLA claims at all future sites around the country, which would include the USS Lead Site.

2. As a matter of law, a liability release for a predecessor releases the successor.

3. Because UV is the predecessor to Sharon, Sharon is released.

4. Because Sharon is the predecessor to Mueller (*i.e.*, Mueller is the reorganized Sharon), Mueller is released.

United States' Response:

I. The CNTS in the UV CD expressly did not apply to Sharon.

A. Two complementary but distinct Consent Decrees settled the Midvale Litigation: the UV CD and the Sharon CD.

B. The specific provisions of each of these distinct Consent Decrees govern the scope of the covenant not to sue and, if applicable, liability release in that particular Consent Decree.

C. Under the UV CD, the United States provided two covenants:

1. First, it covenanted not to sue UV for liability at the Tailings and Slag Sites (*i.e.*, the Midvale, Utah Sites) and at the Re-Solve Site (in Massachusetts). UV CD at ¶ VII.A.

2. Second, it also "agree[d] not to assert any [environmental] claims in the future on behalf of the Environmental Protection Agency and the Department of the Interior" against UV. UV CD at ¶ VII.B.

D. The covenants not to sue in the UV CD, including the second, **Broad CNTS**, explicitly did not and does not apply to Sharon:

"This Section *[Section VII, the "Covenant Not to Sue" section]* ***shall not be construed as a Covenant not to Sue any other Person****, other than UV, the Trust, or any Trustee thereof.* ***This Covenant not to Sue applies only to UV, the Trust, the Trustees, the United States and the State****."* UV CD at ¶ VII.C.

II. The Covenant Not to Sue in the Sharon CD expressly did apply to Sharon.

A. Under the Sharon CD, the United States covenanted not to sue Sharon only for the Tailings and Slag Sites in Midvale, Utah. Sharon CD at ¶ VIII.A.

B. The United States expressly reserved its claims against Sharon with respect to every site in the country except for the Tailings and Slag Sites:

> "***Nothing in this Decree shall be deemed to impair*** any claims identified in the United States' Proof of Claim, or ***any other claims of the United States on behalf of EPA, other than the United States' claims with respect to the Tailings Site and the Slag Site.***" Sharon CD at ¶ X.A.

III. As a result of the Plan of Reorganization, the debtor—Sharon—became Mueller Industries. At no time did UV Industries or the UV Trust become Mueller Industries. Therefore, the resolution of liability that Mueller succeeded to is found in the Sharon CD, not the UV CD.

IV. Mueller's reliance on the principle that "successor liability does not attach if the predecessor's liability has been discharged" is wholly misplaced.

A. In this case, separate settlement agreements expressly governed the terms of the liability resolution that the United States provided.

B. The case law cited in the *Moscato* Letters is not relevant.

V. Mueller is trying to have it both ways. On the one hand, it ***denies being a successor to UV/USSRAM*** for purposes of liability at the USS Lead Site. On the other hand, in order to make this novation argument, Mueller asserts that: (1) Sharon is a successor to UV/USSRAM; and (2) Mueller is a successor to Sharon; therefore, (3) the CNTS in the UV CD applies to Sharon and hence to Mueller.

APPENDIX B-2

Response to Mueller's *Res Judicata* Argument 1.a: Claims Preclusion through UV CD

Mueller's *Res Judicata* Argument 1.a: Claims Preclusion thru "global" release in UV CD: (*Moscato* Letter, Argument I.B."First"; bottom of p. 7 through middle of p. 8)

1. In the 1990 UV CD, the United States released UV from liability for CERCLA claims at all future sites around the country, which would include the USS Lead Site.

2. Under the claims preclusion branch of the doctrine of *res judicata*, the United States cannot now assert a claim against Mueller in the USS Lead Litigation because:

    a. The release of UV in the UV CD applies to Sharon because Sharon is a successor to UV.

    b. The release of UV in the UV CD applies to Mueller because Mueller is a successor to Sharon.

    c. For purposes of the doctrine of *res judicata*, successors are in privity with their predecessors.

    [Note: A large part of this *Res Judicata* claims preclusion argument is the same as Mueller's novation argument. However, the legal requirements for satisfying a *Res Judicata* claims preclusion argument are more extensive than those applying to a novation argument. Therefore, this argument is even weaker than the novation argument.]

United States' Response:

I. *See* App. B-1 (Response to Novation Argument).

The United States' response to Mueller's novation argument applies with equal force here. The CNTS in the UV CD applied only to UV and not to any other persons. Sharon got a separate CNTS in its own CD. The Sharon CNTS expressly reserved all claims against Sharon except for claims at the Midvale, Utah Sites. Because Sharon became Mueller as a result of the 1990 Plan of Reorganization, Mueller succeeded to the CNTS in the Sharon CD. Mueller did not succeed to the CNTS in the UV CD.

II. Mueller cannot satisfy at least two of the requirements of the "claims preclusion" branch of *Res Judicata*

A. Under the "claims preclusion" branch of the doctrine of *Res Judicata*, the following requirements must be met:

> "(1) Identity of the claim;
> (2) Identity of the parties, which include those in 'privity' with the original parties; and
> (3) A final judgment on the merits."
>
> *Ross ex rel. Ross v. Board of Educ. Of Twp. High Sch. Dist. 211*, 486 F.3d 279, 283 (7th Cir. 2007), cited in *Cannon v. Burge*, 752 F.3d 1079, 1101 (7th Cir. 2014).

B. There is no identity of the claim.

1. "In order to decide whether the two cases involve the same claim, we ask whether they arise out of the same transaction." *Ross*, 486 F.3d at 283. The "'same transaction' test is decidedly fact-oriented. Once a transaction has caused injury, all claims arising from the transaction must be brought in one suit or be lost." *Care Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir. 1986).

2. The claim in the Midvale Litigation was for CERCLA response actions and costs at two Sites in Utah. The transactions that gave rise to the injury were the release and disposal of hazardous substances at the Midvale Sites and EPA's incurrence of response costs there.

3. The claim in the USS Lead Litigation is for CERCLA response actions and response costs at the USS Lead Site in East Chicago, Indiana. The transactions that gave rise to this injury were as the release and disposal of hazardous substances at the USS Lead Site and EPA's incurrence of response costs there.

4. While both claims are under CERCLA, they arise out of completely separate underlying transactions and resulted in completely separate injuries: one in Utah and one in Indiana.

5. Mueller's attempt to confuse the issue by claiming that the relevant transaction or series of transactions are the 1979 Asset Purchase and Liability Assumption Agreements is misguided. The 1979 Asset Purchase and Liability Assumption Agreements did not cause the environmental injury that gave rise to the United States' claims in either the Midvale Litigation or the USS Lead Litigation.

6. Mueller conflates one aspect of the United States' theory of the liability against the UV Trust—*i.e.*, that the UV Trust succeeded to the liabilities of UV/USSRAM—with the *claims* that the United States asserted in its

complaint in the Midvale Litigation—*i.e.*, that the defendants are liable under CERCLA for response actions and costs at the Midvale Site. The two are not the same.

7. The logical extension of Mueller's argument would lead to absurdity. It would mean that any time the United States sued a company under CERCLA for response actions and response costs at one Superfund Site, the United States would also have to sue that company for liability at any other Superfund Site in the country where the company might also have liability. That clearly is not the law.

C. There is no identity of or privity between the parties.

1. The parties to the USS Lead Litigation would be the United States and Mueller.

2. The parties to the UV CD in the Midvale Litigation were the United States, UV Industries, and the UV Trust.

a) The parties to the UV CD in the Midvale Litigation are the only relevant parties for purposes of claims preclusion because the UV CD is the only "final judgment on the merits" that provides the Broad CNTS.

b) Mueller tries to obfuscate this fact by indicating that Sharon was a party in the Midvale Litigation. *Moscato* Letter at 7 (see the first sentence in the last paragraph). However, the fact that Sharon was a party in the Midvale Litigation is irrelevant. The "final judgment on the merits" that applied to Sharon was ***not*** the UV CD; it was the Sharon CD. *See* App. B-1 (Response to Novation Argument).

3. Neither UV Industries nor the UV Trust is actually the *same* party as Mueller.

4. Neither UV Industries nor the UV Trust was or is in privity with Mueller.

a) UV Industries and the UV Trust ("UV") were not in privity with Sharon in the Midvale Litigation.

(1) The question of whether two parties are in privity with each other is a "particularly fact-based" inquiry.

(2) UV and Sharon did not have "parallel" interests in the Midvale litigation. Indeed, they diametrically opposed one another by asserting that the other retained CERCLA liability for the Midvale Sites.

(3) Sharon was not a "mere continuation" of UV Industries.

(4) The fact that Sharon succeeded to the liabilities of UV Industries does not answer the question of whether Sharon and UV were in privity in the Midvale Litigation. It is a fact-specific inquiry.

(5) The Fifth Circuit case that Mueller relies on, *Russell v. SunAmerica Securities*, is not in point.

b) Because UV was not in privity with Sharon during the Midvale Litigation, Sharon's reorganized self—Mueller—is not now in privity with UV.

III. As with its novation argument, Mueller is trying to have it both ways. On the one hand, it ***denies being a successor to UV/USSRAM*** for purposes of liability at the USS Lead Site. On the other hand, in order to make this claims preclusion argument, Mueller asserts that: (1) Sharon was in privity with UV Industries because Sharon is a successor to UV Industries; and (2) Mueller is a successor to Sharon and therefore is also in privity with UV Industries.

APPENDIX B-3

Response to Mueller's *Res Judicata* Argument 1.b: Claim Preclusion through Claim Splitting

Mueller's *Res Judicata* Argument 1.b: Claim Preclusion through Claim Splitting:
(*Moscato* Letter, Argument I.B."Second"; middle of p. 8 through middle of p. 13)

1. In the Midvale Litigation, the United States sued, *inter alia*, Sharon, UV Industries and the UV Liquidating Trust.

2. In the Midvale Litigation, the United States took the position orally and in writing that the UV Trust was the successor to the environmental liabilities of UV Industries.

3. The United States did not take the position orally or in writing that Sharon was the successor to the environmental liabilities of UV Industries

4. The "transaction or series of transactions" at issue in the Midvale Litigation—the legal consequences of the 1979 Asset Purchase and Liability Assumption Agreements and the 1980 UV Liquidating Trust Agreement—is the same transaction or series of transactions that would be at issue in USS Lead Litigation.

5. Because the same transaction or series of transactions are at issue, the prohibition against "claims splitting" prevents the United States from taking the position in USS Lead Litigation that Sharon is the successor to the environmental liabilities of UV Industries.

United States' Response:

I. Mueller cannot satisfy any of the requirements of the "claims splitting" branch of *Res Judicata*.

A. Under the "claims splitting" or "merger" branch of *Res Judicata*, each of the following requirements must be met (just as with the other "claims preclusion" branch of *Res Judicata*):

(1) Identity of the claim;
(2) Identity of the parties, which include those in 'privity' with the original parties; and
(3) A final judgment on the merits.

Barr v. Board of Trustees of Western Ill. Univ., 796 F3d 837, 840 (7th Cir. 2015) (*res judicata* claim splitting case); *accord Ross ex rel. Ross v. Board of Educ. Of Twp. High Sch. Dist. 211*, 486 F.3d 279, 283 (7th Cir. 2007) (*res judicata* claim preclusion case based on prior settlement), cited in *Cannon v. Burge*, 752 F.3d 1079, 1101 (7th Cir. 2014).

B. There is no identity of the claim. *See* App. B-2 at II.B.

The United States' response to Mueller's first claim preclusion argument applies with equal force here. The transaction or series of transactions that gave rise to the injury, and hence the "claim," in the Midvale Litigation were the releases and disposals of hazardous substances at the Midvale Sites in Utah. Contrary to Mueller's assertions, the 1979 Asset Purchase and Liability Assumption Agreements and the 1980 Liquidating Trust Agreement were *not* the relevant transactions. They did not rise to the injuries or the United States' claims in the Midvale Litigation.

The transaction or series of transaction that gave rise to the injury, and hence the claim, in the USS Lead Litigation were the releases and disposals of hazardous substances at the USS Lead Site in East Chicago, Indiana.

The claims as between the Midvale Litigation and the USS Lead Litigation are completely separate and distinct.

C. There is no identity of or privity between the parties. *See* App. B-2 at II.C.

D. The Midvale Litigation did not proceed to a final judgment on the merits of the question of who succeeded to the liabilities of UV/USSRAM.

1. The two CDs in the Midvale Litigation were final judgments on the merits of the *claims* asserted in the complaint.

2. The two CDs were not final judgments on the *issue* of who succeeded to the liabilities of UV/USSRAM.

3. There was no final judgment on the merits of the issue of who succeeded to the liabilities of UV/USSRAM. *See* Appendix 4 (Response to Mueller's RJ Argument 2: Issue Preclusion (aka Collateral Estoppel).

II. Mueller's "claim splitting" argument is no different from its issue preclusion argument. (We respond to that argument in Appendix 4.) Mueller just disguises its "issue preclusion" argument in "claim splitting" garb.

APPENDIX B-4

Response to Mueller's *Res Judicata* Argument 2: Issue Preclusion (aka Collateral Estoppel)

Mueller's *Res Judicata* Argument 2: Issue Preclusion (aka Collateral Estoppel):
(*Moscato* Letter, Argument I.C; bottom of p. 13 through top of p. 15)

1. In the Midvale Litigation, the District Court issued a ruling holding that the UV Trust was the successor to the liability of UV/USSRAM.

2. That issue is identical to the one that would be raised in the USS Lead Litigation.

3. Therefore, the ruling by the Court in the Midvale Litigation on this issue is binding on the United States in the USS Lead Litigation.

United States' Response:

I. Mueller cannot satisfy one of the primary requirements of "issue preclusion:" namely, that the District Court in the Midvale Litigation issued a decision holding that the UV Trust succeeded to the liabilities of UV/USSRAM.

A. The law is clear that issue preclusion "treats as final only those questions ***actually and necessarily decided*** in a prior suit." *Brown v. Felsen*, 42 U.S. 127, 139, n. 10 (1979) (emphasis added).

B. The transcript of the partial summary judgment hearing clearly shows that Judge Jenkins did not issue a decision finding that the UV Trust succeeded to the liabilities of UV Industries.

C. Mueller's selective additions to and reordering of the text of the transcript do not change the actual language of the transcript.

D. Other aspects of the Midvale Litigation demonstrate that Judge Jenkins never issued a decision on successor liability in the Midvale Litigation.

E. A decision on who succeeded to the liabilities of UV/USSRAM was not necessary to the resolution of the Midvale Litigation because the litigation was resolved by consent decrees.

F. The plain language of the UV and Sharon CDs refutes any claim that the District Court determined that the UV Trust succeeded to the liabilities of UV Industries.

> "**No previous Ruling of this Court** in the Actions on any issue of Law or fact **shall be deemed to be binding** upon the Parties hereto for any

purpose **in any other Action or Legal Proceeding** of any type of kind." UV CD at VI.I (bold added).

"Therefore, **without adjudication of any issue of law or fact** and upon the consent of the parties thereto, it is hereby ORDERED, ADJUDGED, and DECREED, as follows." UV CD at p. 8 (emphasis added); Sharon CD at p. 5 (bold added).

G. The District Court's statement that, in approving the Consent Decrees, he was not withdrawing any Finding or Opinion or Order does not change the fact that he did not issue any Finding, Opinion, or Order regarding the successor to the liabilities of UV/USSRAM.

APPENDIX B-5

Response to Mueller's Judicial Estoppel Argument

Mueller's Judicial Estoppel Argument:
(*Moscato* Letter, Argument I.D; middle of p. 15 through top of p. 16)

1. In the Midvale Litigation, the United States took the position orally and in writing that the UV Trust was the successor to the environmental liabilities of UV/USSRAM.

2. The United States did not take the position orally or in writing that Sharon was the successor to the environmental liabilities of UV/USSRAM

3. The United States' current position—that Sharon succeeded to the liabilities of UV/USSRAM—is inconsistent with the position it took in the Midvale Litigation.

4. The United States was successful in asserting that the UV Trust succeeded to the liabilities of UV/USSRAM in the Midvale Litigation.

5. Sharon relied upon the United States' position in the Midvale Litigation.

6. Judicial estoppel prevents the United States from asserting a contrary position—*i.e.*, the Sharon succeeded to the liabilities of UV/USSRAM—in the USS Lead Litigation.

United States' Response:

I. Mueller cannot satisfy any of the requirements of judicial estoppel.

A. Under judicial estoppel, the following requirements must be met:

1. A party's position must be "clearly inconsistent" with its earlier position;
2. The party must have succeeded in persuading a court to accept that party's earlier position; and
3. The party seeking to assert the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Hampshire v. Maine, 532 U.S. 742, 750 (2001).

B. The United States' position in the USS Lead Litigation is not "clearly inconsistent" with the United States' position in the Midvale Litigation.

1. *Both* Sharon and the UV Trust can *share* UV/USSRAM's liability. *See NCR Corp.* at 1–6 (Appendix C); *Plaintiffs' Joint Brief in Response to*

Motion for Summary Judgment on Non-Liability Filed by Defendant Appleton Papers, Inc. (Appendix E).

2. In the Midvale Litigation, the United States had no need to argue that Sharon succeeded to the liabilities of UV/USSRAM: the United States asserted direct owner/operator liability against Sharon for the Midvale Sites.

   a. The only party that the United States had to assert successor liability against was the UV Trust.

   b. Nothing *required* the United States to assert that Sharon, in addition to its direct liability, also succeeded to the liabilities of UV/USSRAM.

3. Because *both* Sharon and the UV Trust could share a common liability as successors to UV/USSRAM's liability, the United States' current position now is not "clearly inconsistent" with the position it asserted in the Midvale Litigation.

C. The United States never was successful in persuading Judge Jenkins that the UV Trust succeeded to the liabilities of UV/USSRAM. *See* Appendix B-4 (Response to Issue Preclusion Argument).

D. The United States would not derive an unfair advantage if the Court did not estop the United States.

1. EPA's unrecovered costs at the Midvale Sites were in the tens of millions of dollars and Mueller went on to become a multi-billion dollar corporation.[3]

2. In the USS Lead Litigation, EPA already has incurred approximately $15 million in outstanding unrecovered costs. Certain PRPs have provided $18.5 million to fund EPA's current response actions. Eventual total costs for Operable Unit 1 will be in the tens of millions of dollars. Total costs for Operable Unit 2 are not included in this projection.

   UV/USSRAM is one of the largest PRPs on the Site. UV/USSRAM owned and operated the USS Lead facility 75% of the time. Mueller will not suffer any injustice if it is found liable for UV/USSRAM's share of liability. Indeed, if Mueller is not found liable, other PRPs alone or in combination with the United States will have to pick up Mueller's share.

[3] We are retrieving records to establish the total amount of the United States' costs at the Midvale Site, including the total amount of the United States' unrecovered costs. (We already have information indicating that unrecovered costs were in the tens of millions of dollars.) From there, we can determine the percentage that Sharon's $22 million contribution represented.

E. An unfair detriment would not be imposed on Mueller if the Court did not estop the United States.

1. Mueller did not detrimentally rely upon the Court's alleged decision that the UV Trust was the successor to UV/USSRAM because the Court never issued such a decision. Moreover, a review of the relevant transcript indicated that the United States and Sharon reached their settlement prior to the time of the Court's alleged decision.

2. Mueller has not contributed any funds to the cleanup of Operable Unit 1.

II. Judicial estoppel is an equitable argument and the equities are clearly in the United States' favor.

Letter from A. Lang to E.D. Elliott, April 7, 2017

Appendix C

United States v. NCR Corp., *et al*.

Case No. 10-C-910 (E.D. Wisc. December 19, 2011)

Decision and Order Denying Motion for Summary Judgment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 10-C-910

NCR CORP. and APPLETON PAPERS INC.,

Defendant.

DECISION AND ORDER

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

I. Successor Liability when the Seller Survives the Transaction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. The 1978 Agreement

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

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

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

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

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

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

and corrective action.

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

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

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

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

for CERCLA liability:

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

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

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

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

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

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

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

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

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

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

share of liability upon API.

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

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

III. Conclusion

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

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

SO ORDERED this 19th day of December, 2011.

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

Letter from A. Lang to E.D. Elliott, April 7, 2017

Appendix D

United States v. NCR Corp., *et al*.

Case No. 10-C-910 (E.D. Wisc. April 10, 2012)

Decision Granting Motion for Reconsideration

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 10-C-910

NCR CORP. and APPLETON PAPERS INC.,

Defendant.

DECISION GRANTING MOTION FOR RECONSIDERATION

On July 5, 2011, this Court denied the government's motion for a preliminary injunction against Defendants NCR and Appleton Papers Inc. ("API") on the basis that the government was unlikely to prove Appleton Papers was a liable party. In a December 19, 2011 decision, I denied API's motion for summary judgment on that point and instead accepted the government's argument that it appeared API had in fact agreed by contract to assume CERCLA liability when it purchased the Appleton Papers Division from NCR. API soon moved to reconsider, citing several points of error. For the reasons given below, I agree with API to the extent that the purchase agreement in question was not drafted broadly enough to encompass API's direct liability for the CERCLA liability at issue in this case. The motion for reconsideration will therefore be granted in part.

To recall, the result reached in my December 19, 2011 Decision and Order was based on two discrete conclusions. First, I concluded that NCR's continued existence did not *per se* preclude an agreement to create liability to a third party such as the government. Although it was not a traditional "successorship" liability situation (because NCR did not go out of business), I found that

there was nothing within CERCLA that would preclude parties, as a matter of contract, from effectively creating additional liability under CERCLA (although presumably that would be a rare scenario). The second aspect of my decision required interpretation of the purchase agreement, between NCR and API's predecessor, for NCR's Appleton Papers Division. I concluded that the language and matters disclosed in Schedule A to that agreement were broad enough to encompass the CERCLA liability at issue in this case. Because I now conclude otherwise, I do not address the first prong of that decision, which is now moot.

I. The 1978 Agreement

In 1978 NCR sold its Appleton Papers Division to API's predecessor, which for ease of understanding will be referred to simply as API. A key clause in that agreement provided that API agreed to "assume, pay, perform, defend and discharge . . . all of Seller's obligations and liabilities of any kind, character or description relating to the period subsequent to the Closing Date which arise out of or in respect of any state of facts, matter, event or disclosure set forth on an attachment to the agreement that was designated as Schedule A." (Section 1.4.4; Dkt. # 139, Ex. 3 at 19.)

Schedule A contains the following clause:

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

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

In my previous decision, I concluded that because NCR had disclosed that the Appleton Papers Division "receives" (present tense) notice of various environmental violations, which "may

result" (in the future) in corrective action, the buyer was accepting liability for the Division's "proclivity" for environmental violations. In other words, the buyer was on the hook not just for specific past violations but for any future environmental issues as well.

A. The present liability does not arise from any "violation" of law or any "compliance" issue

I am now convinced that there are at least two problems with the approach taken at the summary judgment stage. First, the clauses that trigger liability require notice of the "violation" of environmental laws and standards, as well as past and potential fines for those violations. API notes that no one has argued that the PCB pollution at issue in this case was the product of any legal or regulatory violations. CERCLA did not yet exist in 1978, of course, and the PCBs were released into the environment primarily in the 1960s before they were regulated. In fact, as noted in the parallel contribution action, No. 08-C-16, in more recent years PCBs were released in smaller quantities at least partly with governmental acquiescence due to the difficulty in separating them from recyclable paper.

In response, the government now attempts to bolster my earlier ruling by citing, for the first time, the federal Refuse Act, as well as Wisconsin law barring the unauthorized disposition of refuse into waterways. 33 U.S.C. § 407. It also cites the Clean Water Act, 33 U.S.C. § 1311(a), which regulates discharge of pollutants. Because the Appleton Papers Division may have been operating in violation of those laws, the government argues, that should trigger the liability clause in Schedule A.

API notes that these are new arguments and, as such, are waived. Even if the argument is not waived, however, the violations of various environmental laws now alleged would not be enough to create CERCLA liability under the terms of the 1978 agreement. To recall, Schedule A discloses that the Division may have been operating in violation of various environmental laws and

regulations, and thus the buyer would be assuming any liability arising out of those violations. Here, the massive CERCLA liability at issue, which is based on the discharge of PCBs, does not "arise out of" any Clean Water Act, Refuse Act or other state or federal statutory or regulatory violations. First, for the period in question the release of PCBs was not known to be environmentally toxic, and so their release would not have given rise to any statutory or regulatory violations.[1] Second, violations of laws like the Clean Water Act are not a precondition to CERCLA liability, which is strict. Put another way, the liability that CERCLA creates does not depend on any "violations" of, or compliance with, then-existing environmental laws. Thus, even if the Division had been operating in violation of, say, the Refuse Act, that does not mean that CERCLA liability "arises out of" those violations. CERCLA liability is its own creature.

Moreover, Schedule A appears to premise liability on receipt of a "notice" of a violation. Schedule A tells the buyer that the Division has received notices of noncompliance with laws and regulations and might receive similar notices in the future. This creates liability for those "claims" and anything "arising" from them. The clause underscores the fact that the liability being assumed is not open-ended environmental liability but is instead linked to specific claims and notices of environmental violations. Needless to say, the Appleton Papers Division had never received a "notice" that it was "violating" CERCLA. Had the parties wanted to draft a broader clause, it would have been much easier to simply say so in the text of the agreement itself. Instead, by drafting a schedule, the parties were clearly limiting liability to the particular circumstances disclosed therein.

The government also cites other sections of the purchase agreement (§§ 1.4.3 and 1.4.9) that create liability arising out of "compliance" with applicable environmental laws. It argues that the

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[1]With the exception that certain insiders began to appreciate the risks of PCBs in the late 1960s.

present CERCLA enforcement action is itself an action to assure "compliance" with CERCLA's requirement that liable parties clean up pollution sites. That is, the government appears to argue that this lawsuit is *itself* a trigger for liability because it is being brought to ensure compliance with CERCLA.

The claim that the government, simply by bringing a lawsuit, has the power to trigger the very liability it is seeking to enforce is a wholly circular argument. That is, the government's argument begs the question of API's liability: this is only an action to enforce "compliance" with CERCLA to the extent API is actually *liable* under CERCLA, and of course that is one of the centerpiece questions being adjudicated in this lawsuit. It makes little sense to argue that the very act of suing someone *under* CERCLA makes a defendant "non-compliant" with CERCLA. Accordingly, I cannot find that liability exists on the basis of any compliance issues.

In sum, even if the Appleton Papers Division were operating in violation of certain environmental laws, I am unable to conclude that CERCLA liability "arises out of" such laws. The various environmental laws now cited by the government have their own provisions for liability and their own remedies, none of which are integral to a CERCLA action. The government has not explained how, for example, violating the Clean Water Act could make a party liable to pay for the billion-dollar cleanup of a large river. Because liability under CERCLA is distinct from these other provisions, it does not arise out of (or even relate to) those alleged violations. And, as API points out, had the parties wanted to include all environmental liability, it would have been simple enough to do so.

B. At a Minimum, the Contractual Language is Silent, Which Means No Liability

Ultimately, perhaps the most important point is that the 1978 agreement is silent about CERCLA liability and lacks a broad "catch-all" environmental liability clause. The question of

API's liability has a long history. In 1995 NCR sued API in the Southern District of New York to resolve liability for the PCB cleanup. In a brief ruling, the district court concluded that it was unable to determine from the 1978 asset purchase agreement whether API had, in fact, assumed liability for PCB cleanup expenses. (Dkt. # 208, Ex. 2 at 8.) It found that the contract was negotiated before CERCLA came into existence and that none of the clauses in the asset purchase agreement was conclusive as to liability. The parties agreed to arbitrate the matter, and an arbitration panel also concluded that the agreement was unclear. The arbitration panel concluded that API pay 60% and NCR 40% of any expenses in excess of $75 million. The panel found, like the district judge, that the contractual language "is not sufficiently clear and unambiguous with respect to the issue of responsibility for the environmental costs at issue to permit an award based solely on the contract language." (Dkt. # 208, Ex. 1 at 4.) Thus, three judicial bodies (including this one) have now concluded that there is no clear language indicating that API's successor agreed to assume liability *to the government* for any CERCLA claims. At most, as the arbitrators found, API agreed to indemnify NCR for a *portion* of such liability.

The contract's silence on the point is enough to support a finding that API did not agree to assume direct CERCLA liability. In *Olin Corp. v. Consolidated Aluminum Corp.,* the Second Circuit noted that indemnification agreements are interpreted strictly under New York law (which applies here at the agreement of the parties). 5 F.3d 10, 15 (2d Cir. 1993). If an arbitration panel and another district court could not even conclude that API had agreed to *indemnify* NCR for its CERCLA liability, it should go without saying that the notion that API had agreed to become liable to a *third* party is even more tenuous. In *Olin*, where the Second Circuit found an assumption of liability, the district court had noted that "One would be hard pressed to draft broader or more inclusive indemnification provisions than those entered into by Conalco and Olin." 807 F.Supp.

1133, 1142 (S.D.N.Y. 1992). Here, the opposite is true. The parties drafted a number of indemnification and liability clauses, but each of those clauses contains limitations linking liability to Schedule A or compliance with applicable regulations and the like. They are not the narrowest of clauses, but neither are they the "extremely broad language" at issue in *Olin.* 5 F.3d at 15. Ultimately, API's overarching point remains salient: if the parties had wanted to make the buyer liable for all future unknown environmental liabilities, it would have been much easier to simply use the kind of broad language used in *Olin* and the other cases. That lawyers and courts have spilled so much ink on the question for more than seventeen years is itself suggestive of an intent *not* to create CERCLA liability.

C. Given NCR's continued viability, the negating clause precludes the creation of additional CERCLA liability to third parties

API has also cited what it describes as the purchase agreement's negating clause, which in its view bars the government from seeking to enforce the contract as a third party beneficiary. That clause provides that "Nothing in this Agreement, express or implied, is intended to confer upon any other person not a party to this Agreement any rights and remedies hereunder." (Dkt. # 139, Ex. 4 at § 10.10.) The government asserts that this is not a true negating clause and, in any event, it could not operate to bar the federal government from suing a party under CERCLA.

I agree with the government in part. Specifically, I conclude that a negating clause (or "no third parties" clause) cannot be dispositive of the issue of successor liability in cases in which the seller ceases its existence. Otherwise, a simple negating clause could leave both the seller and the buyer off the hook for CERCLA liability, even if the buyer would otherwise be deemed a successor. Clearly that would not be a satisfactory result, as private parties cannot simply "contract out" of CERCLA liability to the government.

But where, as here, the seller remains in existence, we are not dealing with successorship in an equitable sense, we are dealing with successorship in a contractual sense, which means we must explore the question of the parties' contractual intentions. In that context, a negating clause is dispositive. Ultimately, the clause underscores the point made above: if the parties had intended to create liability to the government, surely they would have done so more clearly. They would not have transferred very specific environmental liabilities referenced in Schedule A and then used a negating clause to make clear that they wanted no third parties to be able to benefit from the contract. Thus, even though a negating clause could not be determinative of the issue in a traditional successorship context, I conclude here that it precludes any reading of the Agreement that would make API directly liable to the government for CERCLA-type liability.

D. No estoppel applies

The government and some of the other Defendants in this action argue that the arbitration order, which was confirmed by the New York district court, means that API is estopped from arguing that it is not liable under CERCLA. Yet the arbitration panel, like the district court, was not persuaded that API had actually assumed CERCLA liability through the asset purchase agreement. Instead, the arbitration was the product of a settlement between NCR and API, a settlement made advisable for the principal reason that API's actual liability was *not* crystal clear (as the district court found). In dividing responsibility 60/40 between the parties, the panel was not concluding that API was directly liable under CERCLA or that it had become a successor to NCR's liability. Instead, the 60/40 division appears to have been the result of a number of quasi-equitable factors that pointed to requiring API to bear a larger share of responsibility.

More importantly, the arbitration and the award itself were an assessment of how much each party should *pay*, which is an entirely different question than whether API had assumed direct

CERCLA liability. No one ever posed that question to the arbitrators, and in fact it is doubtful that private arbitration could ever resolve a question involving one party's liability to the federal government. Accordingly, it would be improper to view the arbitration award as having any kind of estoppel effect on API's ability to argue that it never agreed to become directly liable under CERCLA.[2]

II. Conclusion

For the reasons given above, I conclude that the terms of the 1978 assumption agreement are not broad enough to encompass the CERCLA liability at issue here. Accordingly, the motion for reconsideration is **GRANTED** in part, and API is entitled to summary judgment that it is not a liable party under CERCLA. All claims against API are **DISMISSED**.

SO ORDERED this 10th day of April, 2012.

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

[2]In previous briefing, the other Defendants opposing API's motion argued (the government does not join this argument) that summary judgment would have been improper because there are countless documents and witnesses that have not been produced in discovery. But these Defendants do not explain how additional discovery would shed any light on any terms in the 1978 agreement. Most importantly, they do not even identify any of the terms they believe to be ambiguous. The Rule 56(d) declaration lists numerous categories of information that have not been subject to discovery, but that is irrelevant if the contract not ambiguous.

Here, I am not concluding that any specific term is "ambiguous," I am simply concluding that because the contract is silent as to CERCLA liability, because it lacks a broad enough liability assumption provision, and especially because it contains a negating clause, API did not assume direct liability under CERCLA. Thus, I do not believe additional discovery could shed light on the question of the parties' intent, particularly given that CERCLA had not even been enacted at the time.

Letter from A. Lang to E.D. Elliott, April 7, 2017

Appendix E

United States v. NCR Corp., *et al*.

Case No. 10-C-910 (E.D. Wisc. August, 26, 2011)

Plaintiffs' Joint Brief in Response to Motion for Summary Judgment on Non-liability Filed by Defendant Appleton Papers Inc.

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

UNITED STATES OF AMERICA and THE STATE OF WISCONSIN,	)	
Plaintiffs,	)	Civil Action No. 10-C-910
v.	)	Hon. William C. Griesbach
NCR CORPORATION, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' JOINT BRIEF IN RESPONSE TO MOTION FOR SUMMARY JUDGMENT ON NON-LIABILITY FILED BY DEFENDANT APPLETON PAPERS INC.

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PLAINTIFFS' JOINT BRIEF IN RESPONSE TO MOTION FOR SUMMARY JUDGMENT ON NON-LIABILITY FILED BY DEFENDANT APPLETON PAPERS INC.

Background

For more than a decade, Appleton Papers Inc. ("API") and NCR Corporation ("NCR") acted in a unitary manner concerning the Lower Fox River and Green Bay Superfund Site (the "Site"), as parties that shared a common liability under corporate successorship principles. The joint complaint that API and NCR filed in the *Whiting* case described the two companies as "leaders among the responsible parties" at the Site (Dkt. 92-1 at 2) and until at least 2009 their briefs in that contribution lawsuit referred to API and NCR both as "successors" to the companies that originally made PCB-coated NCR Paper® at the Appleton Coating Facility and the Combined Locks Mill (Dkt. 124-8 at 12-13).[1]

At the same time, API pursued insurance coverage litigation against its old comprehensive general liability carriers based on its successor liability exposure. *See Westport Ins. Corp. v. Appleton Papers Inc.*, 787 N.W.2d 894, 909 (Wis. App. 2010). A set of secret agreements governing the relationship between API and NCR first came to light in that insurance coverage litigation, including a 1998 confidential settlement agreement between the companies (the "1998 Settlement Agreement") and a cost sharing arbitration award that was filed under seal and entered as a federal district court judgment in 2007. Dkt. 124-1; Dkt. 124-2 at 6-11.

API settled with all or nearly all of its insurers by 2010, collecting tens of millions of dollars from them. Dkt. 124-3 at 12-13. At that point, API and Arjo Wiggins Appleton Limited – API's former corporate parent, which remained on the hook as API's main corporate indemnitor – changed their tune and began denying that API has successor liability.

[1] The corporate history of API, NCR, and the prior owners of those two NCR Paper® production facilities is largely undisputed and it has been detailed in prior filings and decisions in this case, so we will not repeat it here. *See, e.g.*, Dkt. 30-1 at 7-8; Dkt. 64 at 13; Dkt 143 at 9; Dkt. 204 at 4-6.

The Court's first chance to consider the successor liability issue came after accelerated briefing on a host of issues raised by the United States' motion for a preliminary injunction. In a July 5 ruling, the Court found that "Plaintiffs have set forth a *prima facie* basis for preliminary relief against NCR, but not against Appleton Papers Inc." because the Court considered API "unlikely to be deemed liable under CERCLA." *United States v. NCR Corp.*, No. 10-C-910, 2011 WL 2634262, at *13 (E.D. Wis. Jul. 5, 2011). Accepting an equity-based argument made by API, the Court reasoned that API's direct liability to the government was questionable because:

> [W]hen the seller of assets is still in existence and its liability to the government is still "live," an assumption of liability agreement like the one at issue here does not create liability on the buyer's part, it merely creates a duty to indemnify the seller.

Id. at *11. The United States reserved its objections but did not challenge that ruling in a renewed motion for a preliminary injunction. Dkt. 179 at 2. API's motion for summary judgment seeking a non-liability determination followed, with API arguing that it has no successor liability because "NCR remains liable and viable." Dkt. 197 at 19.

Summary of Argument

The predecessor's viability is legally irrelevant under the traditional common law successor liability doctrine that applies to API. API assumed direct liability for environmental claims in its agreements with NCR, and the law imposes successor liability under CERCLA when a "purchaser expressly or impliedly agrees to assume the liabilities." *N. Shore Gas Co. v. Salomon Inc.*, 152 F.3d 642, 651 (7th Cir. 1998).[2] We will refer to that traditional successor liability rule in this brief as the "assumption doctrine."

[2] *North Shore Gas* is the seminal CERCLA successor liability decision in this circuit. The Seventh Circuit has overruled an unrelated aspect of the decision concerning the standard of appellate review for evaluating district court's discretionary decisions to hear Declaratory Judgment Act claims. *See Envision Healthcare, Inc. v. PreferredOne Ins. Co.*, 604 F.3d 983, 986 n.1 (7th Cir. 2010). But the decision's core successor liability analysis remains good law. *See., e.g., Westport v. API*, 787 N.W.2d at 902 n.10 (citing and applying *North Shore Gas*).

API has not cited a single assumption doctrine case applying the predecessor viability test it advocates. And there is no legal or equitable reason for applying that test in an assumption case. Thus, the authorities summarized below hold that third party claimants can sue the predecessor, the successor, or both of them in an assumption doctrine case like this.

API's motion poses a number of important legal issues, but the potentially dispositive facts – such as NCR's viability – are undisputed. The argument section of this brief makes the following key points:

> First, when an asset purchaser like API has agreed to assume relevant liabilities, the seller and the purchaser share a common liability to third party claimants, including governmental plaintiffs suing under CERCLA.
>
> Second, API made an assumption agreement here, not just an indemnity agreement.
>
> Third, when a seller and a purchaser share a common liability based on an assumption agreement, a third party claimant can pursue both of them.
>
> Fourth, the case-specific equities support holding API liable as a successor.
>
> Finally, if the Court rules as a matter of law that API cannot have successor liability because NCR is viable, then the Plaintiffs cannot survive API's motion for summary judgment.

Argument

1. When an Asset Purchaser Like API has Agreed to Assume Relevant Liabilities, the Seller and the Purchaser Share a Common Liability to Third Party Claimants, Including Governmental Plaintiffs Suing Under CERCLA.

A. The Asset Seller Remains Liable to Third Parties

The majority rule at common law is that "a sale of assets does not vitiate the original company's liability," although the seller and buyer "can regulate how such liability will be allocated among themselves" by separate indemnity provisions in their agreement. *Grant-Howard Assocs. v. Gen. Housewares Corp.*, 472 N.E.2d 1, 3 (N.Y. 1984). *Accord* 15 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 7123 (perm.

ed., rev. vol. 2008) (citing *Grant-Howard* in support of that proposition).[3] Thus, if Company S sold its chain saw business to Company B and Company B agreed to assume liabilities associated with the prior operation of the business, then: (1) Tort Victim V can still pursue Company S (the asset seller) for injuries caused by a defective chain saw that was designed and sold by Company S; and (2) Company S may or may not have a right of indemnity from Company B (the asset buyer) depending on the terms of their purchase and sale agreement. But pre-CERCLA case law in at least one jurisdiction held that an asset purchaser's assumption of the seller's tort liabilities actually *shielded* the seller from direct liability to tort plaintiffs harmed by products the asset seller made and sold. *See Bippus v. Norton Co.*, 437 F. Supp. 104 (E.D. Pa. 1977) (applying Pennsylvania law). Tort Victim V could no longer sue Company S after Company B's express assumption of S's liabilities. Congress specified that the countervailing majority rule would apply in CERCLA cases. CERCLA Section 107(e)(1) provides as follows:

> No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

42 U.S.C. § 9607(e). As the Seventh Circuit has recognized, what the first sentence of Section 107(e) precludes is any "efforts to divest a responsible party of his liability" under CERCLA. *Harley-Davidson, Inc. v. Minstar, Inc.*, 41 F.3d 341, 342 (7th Cir. 1994). *Accord N. Shore Gas*, 152 F.3d at 653 ("CERCLA . . . prohibits a party from transferring away its direct liabilities"). That is why NCR remains liable to the Plaintiffs.

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[3] *Accord In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 837 F. Supp. 1123, 1126 (N.D. Ala. 1993) ("It is beyond dispute that one company's transfer of assets to another under circumstances resulting in the transferee's becoming responsible for tort liabilities to third-parties – as upon an express agreement to assume such liabilities – does not, as to the third-parties, relieve the transferor of those same responsibilities.").

B. The Asset Purchaser Also is Liable to Third Parties

Asset purchasers can inherit derivative liability to third parties under traditional common law successor liability principles. The Seventh Circuit has articulated the well-recognized rule that a third party claimant can pursue an asset purchaser directly based on the asset seller's liability-creating conduct where: "(1) the purchaser expressly or impliedly agrees to assume the liabilities; (2) the transaction is a *de facto* merger or consolidation; (3) the purchaser is a 'mere continuation' of the seller; or (4) the transaction is an effort to fraudulently escape liability." *N. Shore Gas*, 152 F.3d at 651. *Accord* 15 FLETCHER, *supra*, § 7122. The *North Shore Gas* court and every court of appeals that has considered the question have held that those traditional common law successor liability doctrines apply under CERCLA. *See N. Shore Gas*, 152 F.3d at 651.[4] As the Seventh Circuit recognized, a "firm, corporation, association, . . . [or] commercial entity" can qualify as a liable "person" under CERCLA, 42 U.S.C. § 9601(21), and when terms such as "company" or "association" are used in CERCLA and other federal statutes to refer to a corporation they "shall be deemed to embrace the words 'successors and assigns of such company or association,'" 1 U.S.C. § 5. *N. Shore Gas*, 152 F.3d at 649.

Each successor liability doctrine has its own unique requirements and justification. API's liability turns on the assumption doctrine.[5] Under the example used above, if Company B

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[4] *Accord United States v. Gen. Battery Corp., Inc.*, 423 F.3d 294, 298 (3d Cir. 2005); *United States v. Davis*, 261 F.3d 1, 54 (1st Cir. 2001); *New York v. Nat'l Servs. Indus.*, 352 F.3d 682 (2d Cir. 2003); *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 92 (3d Cir.1988); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837 (4th Cir.1992); *Anspec v. Johnson Controls, Inc.*, 922 F.2d 1240, 1245 (6th Cir. 1991); *United States v. Mex. Feed & Seed Co.*, 980 F.2d 478, 486 (8th Cir. 1992); *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 364 (9th Cir. 1997).

[5] In *North Shore Gas*, the Seventh Circuit assumed that federal common law would govern successor liability issues in that CERCLA case without deciding whether federal common law or state law should truly apply. 152 F.3d at 650-51. But there is no conflict of law that necessitates resolving that issue in this case. The outcome here would be no different under federal common law, the law of Wisconsin (the forum state), or the law of New York (where the agreements between NCR and API were made). The assumption doctrine is a traditional rule of successor liability that varies little from jurisdiction to jurisdiction. *See id.* at 651 (noting that an assumption of liability imposes successor liability under federal common law); *Tift v. Forage King Indus., Inc.*, 322 N.W.2d 14, 15, 16 (Wis. 1982)

bought the assets of Company S's chain saw business and agreed to assume liabilities associated with the prior operation of the business, then Tort Victim V can sue Company B for injuries caused by defects in an old saw that was designed and manufactured by Company S.[6] The corresponding rule has been applied in a number of CERCLA cases – *i.e.*, where a purchaser has agreed to assume an asset seller's environmental liabilities, that assumption enables the government to pursue the purchaser directly under CERCLA. *See U.S. Bank Nat'l Assn. v. EPA*, 563 F.3d 199, 205-07 (6th Cir. 2009); *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1233, 1238-44 (E.D. Cal. 1997); *United States v. Chrysler Corp.*, Nos. 88-341, 88-534, 1990 WL 127160, at *4-7 (D. Del. Aug. 28, 1990). In each of those cases, the asset purchaser's successor liability to the government was based solely on: (1) the asset seller's liability-creating conduct; and (2) the asset purchaser's assumption of pertinent liabilities in its private agreement with the seller. The courts also have imposed successor liability under similar circumstances in CERCLA cases brought by non-governmental plaintiffs that had no involvement with the original asset sale transaction.[7]

(same under Wisconsin law); *Schumacher v. Richards Shear Co.*, 451 N.E.2d 195, 198 (N.Y. 1983) (same under New York law).

The language of the agreements between NCR and API should be construed in accordance with state law. *See Minstar*, 41 F.3d at 344; *N. Shore Gas*, 152 F.3d at 652. Again the result here would be no different if the Court utilized Wisconsin law (based on the State's interest in ensuring the Site cleanup) or New York law (based on the choice of law provision in the agreements). Dkt 139-4 at 44; Dkt 124-1 at 22.

[6] *See, e.g., Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1094-95 (5th Cir. 1991) (purchaser of asbestos business assets held directly liable to tort victims based on its express assumption of liabilities stemming from the prior operation of the business); *Beck v. Roper Whitney, Inc.*, 190 F. Supp. 2d 524, 533 (W.D.N.Y. 2001) (asset purchasers held directly liable to worker injured by a piece of industrial equipment based on their contractual assumption of liabilities associated with the original equipment manufacturer's business); *Emrich v. Kroner*, 434 N.Y.S.2d 491, 492 (N.Y. App. Div. 1980) ("Where the acquisition agreement between a manufacturer and the purchaser of its assets reveals an express or implied assumption of tort liability, a duty may be imposed on the purchaser to third parties injured by the predecessor's product . . . .").

[7] *See Clean Harbors, Inc. v. Arkema, Inc. (In re Safety-Kleen Corp.)*, 380 B.R. 716, 739-40 (Bankr. D. Del. 2008) (asset purchaser that expressly agreed to assume the seller's environmental liabilities held directly liable to a private party CERCLA claimant); *Ashley II of Charleston, L.L.C. v. PCS Nitrogen,*

In API's insurance coverage case, the Wisconsin Court of Appeals acknowledged the "general rule" that a mere asset purchaser does not acquire liability under CERCLA, as well as the proviso that successor liability will apply when "the purchaser expressly or impliedly agrees to assume the liabilities." *Westport v. API*, 787 N.W.2d at 902 n.10 (citing and quoting *North Shore Gas*, 152 F.3d at 651). The court then noted:

> Here, the 1978 Sale Agreement makes it clear that API agreed to assume a variety of NCR liabilities, thus abrogating any "general rule" under CERCLA that might apply if API in fact purchased only assets without assuming any NCR liabilities.

Id.

API relies heavily on a CERCLA decision from this district that preceded *North Shore Gas* and most of the assumption doctrine cases discussed above: *A.C. Reorganization Trust v. E.I. duPont de Nemours & Co.*, No. 94-C-574, 1997 WL 381962 (E.D. Wis. Mar. 10, 1997). In that case, Judge Stadtmueller opined that CERCLA Section 107(e)(1) "eliminates" the common law successor liability rule founded on an express or implied assumption of liabilities based on the view that any such agreed assumption would constitute an impermissible liability "transfer" under Section 107(e)(1). *Id.* at *8. That is wrong. Successor liability always extends liability from a one entity to another entity that had no original exposure – often an asset purchaser. *See N. Shore Gas*, 152 F.3d at 650-51; *GNB Battery*, 65 F.3d at 617-19; *Iron Mountain Mines*, 987 F. Supp. at 1238-44. But an extension of derivative liability is not a liability "transfer" within the meaning of Section 107(e)(1). As used in that provision, the term "transfer" means an attempt to pass off or shift liability from one person to another. *See Minstar*, 41 F.3d at 343 ("The first sentence speaks of 'transfer[ring] ... liability,' that is, of shifting

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Inc., No. 2:05-2782, 2007 WL 2893372, at *4-8 (D.S.C. Sept. 28, 2007) (same); *Nw. Mut. Life Ins. Co. v. Atl. Research Corp.*, 847 F. Supp. 389, 399 (E.D. Va. 1994) (same). An assumption of liabilities also can be enforced in a suit between the parties to the assumption agreement. *See, e.g.*, *GNB Battery Techs., Inc. v. Gould, Inc.*, 65 F.3d 615, 617-19, 621-25 (7th Cir. 1995) (affirming entry of a declaratory judgment in favor of the seller holding that the buyer assumed CERCLA liabilities).

liability from one person to another.").[8] Another court explained that "Section 107(e)(1) does not impinge on successor liability" in a very similar case involving an express assumption of liabilities:

> [T]he intent of § 107(e)(1) is to expand, not restrict, the group of potentially responsible parties. Section 107(e)(1) ensures that if a party is found liable for response costs under § 107(a), 'that party cannot escape liability by means of a contract with another party.'

Iron Mountain Mines, 987 F. Supp. at 1239 n.12 (quoting *John S. Boyd Co., Inc. v. Bos. Gas Co.*, 992 F.2d 401, 405 (1st Cir. 1993)). *Accord Minstar*, 41 F.3d at 342 (Section 107(e)(1) "merely precludes efforts to divest a responsible party of his liability"); *United States v. Lang*, 864 F. Supp. 610, 614 (E.D. Tex. 1994) (Section 107(e)(1) ensures that a responsible party "cannot extricate itself from the CERCLA liability web simply by entering into an indemnification agreement with another party"). Thus, "§ 107(e)(1) is not a shield which prevents [a party that took on an asset seller's liabilities] from attaining the status of a successor corporation." *Lang*, 864 F. Supp. at 614. If it were a shield, then the Seventh Circuit's decision in *North Shore Gas* and all of the other CERCLA successor liability decisions cited above would have come out differently.

[8] *See also United States v. Lang*, 537 F.3d 718, 721 (7th Cir. 2008) (noting that the *American Heritage Dictionary of the English Language* (4th ed. 2000) defines the term "transfer" as "to convey or cause to pass from one place, person, or thing to another."); *United States v. Hoover*, 240 F.3d 593, 596 (7th Cir. 2001) (*Webster's Third New International Dictionary* (1961) defines "transfer" as "to carry or take from one person or place to another").

2. API Made an Assumption Agreement, Not Just an Indemnity Agreement.

While misconstruing the liability "transfer" prohibition in the first sentence of Section 107(e)(1), the *A.C. Reorganization* court seemingly tried to do justice by treating the Assumption Agreement in that case as an indemnity agreement saved by the second sentence of Section 107(e)(1). 1997 WL 381962, at *4-7. That too was a mistake. The *A.C. Reorganization* case involved an "Assumption Agreement" that described the "liabilities of [the seller]" that the purchaser was "assum[ing] and agree[ing] to pay." *Id.* at *5. Assumption agreements and indemnity agreement are distinct and different. And the distinction matters when successor liability is alleged: an assumption agreement gives rise to successor liability while an agreement to indemnify is "irrelevant" to successor liability. *Grant-Howard Assocs.*, 472 N.E.2d at 3.[9] An indemnity provision may be included in an asset purchase and sale agreement precisely because a corresponding assumption provision cannot cut off the seller's primary liability to third parties. (*E.g.*, Company S may insist that Company B not only agree to assume direct liability for third party claims arising from prior operation of its chain saw business, but also agree to indemnify Company S for costs stemming from its own continuing exposure to such third party claims.) Thus, the two may go together as flip sides of the same coin, but in any given case the language of the agreements must be scrutinized to determine whether it includes an assumption agreement, an indemnity agreement, or both.

Here we have both.

The 1978 agreements for the purchase and sale of NCR's Appleton Papers Division assets to API (then called Lethneric, Inc.) included an express assumption provision under a

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[9] *Accord Vine St., LLC v. Keeling*, 460 F. Supp. 2d 728, 743 n.73 (E.D. Tex. 2006) ("Contractual indemnity for liabilities and assumption of liabilities under the doctrine of successor liability are very different. Just as an indemnity agreement does not relieve a party from its underlying liability to a CERCLA claimant seeking response costs, the Court is unaware of any legal authority that an indemnity agreement – by itself and without contemporaneous reference to an *assumption* of liabilities – expressly or impliedly *creates* a party's direct liability to such a claimant." (citations omitted)).

section heading entitled "1.4 Assumption of Contractual Obligations and Liabilities." Section 1.4 of the Agreement of Purchase and Sale of Assets says that API, as the purchaser "agrees that it shall assume, pay, perform, defend and discharge" certain liabilities and obligations of NCR including:

> (1) "all of Seller's obligations and liabilities of any kind, character or description relating to the period subsequent to the Closing Date, which are not known to Seller on the Closing Date, with respect to the compliance of the assets, properties, products or operations of [the Appleton Papers Division] with all governmental laws, ordinances, regulations, rules, and standards;"
>
> (2) "all of Seller's liabilities . . . whether accrued, absolute, contingent, or otherwise . . . whether asserted or not and whether arising from transactions, events or conditions occurring prior to or after the Closing Date, with respect to compliance of the Property . . . with all applicable federal, state and local and other governmental environmental and pollution control laws, ordinances, regulations, rules and standards;" and
>
> (3) "all of Seller's obligations and liabilities of any kind, character or description relating to the period subsequent to the Closing Date which arise out of or in respect of any state of facts, matter, event or disclosure" set forth on an attachment to the agreement that was designated as Schedule A; and
>
> (4) "all of Seller's obligations and liabilities of any kind, character or description relating to the period subsequent to the Closing Date which arise out of or in respect of any . . . action, claim, investigation by a government body, or legal . . . proceeding" set forth on Schedules A and M.

Dkt. 139-3 at 17, 19, 20; Dkt. 195-3 at 4. The provisions that referenced Schedules A and M to the agreement made clear that they would apply "whether such obligation or liability is accrued, absolute, contingent, or otherwise" and Schedule A used broad terms in disclosing potential environmental liabilities that API would be assuming, as follows:

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

> standards (collectively "laws"). These claims may result, and have resulted in fines and corrective action.

Dkt. 139-3 at 19-20; Dkt. 195-3 at 4. Schedules A and M also identified certain known liabilities to third parties that API was agreeing to assume, including responsibility for disputes over identified contracts with NCR and its predecessors, employment discrimination claims that had been brought against NCR and at least one of its predecessors, potential maternity disability claims dating back to 1972, and a previously-filed civil enforcement action by the United States alleging Clean Water Act violations by NCR and one of its predecessors at an Appleton Papers Division facility in Pennsylvania. Dkt. 195-4 at 19-26; Dkt. 195-3.[10] The express assumption of specific liabilities stemming from predecessors' operations negates API's strained argument that the assumption only covered liabilities that actually arose when the business was operated through NCR's Appleton Papers Division (*i.e.*, between 1973 and 1978). Dkt. 197 at 14-16.

API repeated its commitment to "assume[] and agree[] to perform, pay, defend or otherwise discharge" those same liabilities and obligations in a separate "Assumption Agreement" that it signed. Dkt. 203-3 at 2. The language used in those contract provisions – including the explicit agreement to "assume" particular liabilities and obligations – makes them assumption provisions rather than indemnity provisions. *See Bouton v. Litton Indus., Inc.*, 423 F.2d 643, 651 (3d Cir. 1970) (when the purchaser "assumes and agrees to pay or discharge" liabilities and obligations the "language of the contract is that of assumption not of indemnification"); *Caldwell Trucking PRP v. Rexon Technol. Corp.*, 421 F.3d 234, 241-43 (3d Cir. 2005) (citing and applying *Bouton* in a CERCLA case). As recognized by the Wisconsin Court of Appeals, the assumption doctrine is implicated here because the 1978 agreements

[10] API and NCR ultimately resolved the government's Clean Water Act enforcement case in 1980 by entry into a Consent Decree that required API to pay a $150,000 civil penalty. Dkt. 203-1; Dkt. 203-2.

included "API's broad contractual assumption of various NCR liabilities." *Westport v. API*, 787 N.W.2d at 902 n.10.[11]

The 1978 agreements also included a separate set of cross-indemnities in a different section of their agreement entitled "9. Indemnification." Dkt. 139-4 at 34-36. Differing indemnity commitments were made by NCR, on one hand, and by API and its corporate parent at the time, British American Tobacco ("BAT"). Dkt. 139-4 at 34-36; *accord Westport v. API*, 787 N.W.2d at 902 ("The 1978 Sale Agreement also contained reciprocal indemnification agreements by NCR and API."). But once again, those cross-indemnity arrangements are "irrelevant" to successor liability. *Grant-Howard Assocs.*, 472 N.E.2d at 3. *Accord Aluminum Corp. of Am. v. Beazer E., Inc.*, 124 F.3d 551, 566 (3d Cir. 1997) (when the agreement at issue in a CERCLA case includes both assumption language and indemnity language, "the compound nature of the provision in no way detracts from the clarity of the assumption of liabilities language").

Because NCR and API shared a common liability for Fox River-related claims after the original assumption agreement, their 1998 Settlement Agreement reconfirmed the companies' "joint and common legal interests with respect to the Fox River sites," their agreement "to continue to cooperate, coordinate, and assist one another in the defense of the Sovereigns' and third-party claims related to the Fox River sites" and "to implement a coordinated and joint defense effort among themselves," and their commitment "to work together as closely as possible as if the parties are one entity" in the defense of such claims. Dkt. 124-1 at 20-21.[12]

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[11] The broad language from the 1978 agreements covers potential CERCLA liabilities, even though it was drafted before enactment of the statute. *See Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 326-28 (7th Cir. 1994) (1972 agreement); *see also Olin Corp. v. Consol. Alum. Corp.*, 5 F.3d 10, 12-16 (2d Cir. 1993) (1973 agreement); *Joslyn Mfg. Co. v. Koppers Co., Inc.*, 40 F.3d 750, 753-60 (5th Cir. 1994) (various pre-enactment agreements).

[12] The 1998 Settlement Agreement's "No Admission of Liability" provision has no bearing on the successor liability question. The *Bouton* case cited above involved an agreement with a similar

The 1998 Settlement Agreement and the subsequent arbitration award and judgment also established an interim and final method "to allocate as between NCR and API/BAT all Claims, Damages, and Defense Costs . . . arising out of or relating to the Fox River sites." Dkt. 124-1 at 4; Dkt. 114-; Dkt. 144-3. Under the 1998 Settlement Agreement, API accepted ultimate responsibility for at least 25% of the joint costs in excess of $75 million "imposed upon, or incurred by NCR or API/BAT." Dkt. 124-1 at 8, 14; Dkt. 139-13 at 20. Through the agreed arbitration process, API was deemed responsible for 60% of those joint costs. Dkt. 144-2; Dkt. 144-3. That outcome was judicially confirmed, so the "arbitration award counts as a final judgment for collateral estoppel purposes." *Manion v. Nagin*, 394 F.3d 1062, 1066-67 (8th Cir. 2005). *Accord Coffey v. Dean Witter Reynolds Inc.*, 961 F.2d 922, 927-28 (10th Cir. 1992). Thus, API is estopped from denying that it shares joint responsibility with NCR for any CERCLA liabilities associated with this Site.

Like their original agreements, the 1998 Settlement Agreement and the arbitration award and judgment addressed both: (1) API's and NCR's joint common liability to third parties (because API expressly and impliedly assumed such liability); and (2) a reckoning process for sharing the joint costs of API and NCR (an indemnity-like arrangement). And just like the indemnity provisions of their original agreement, the substitute cost sharing arrangement between API and NCR can regulate how their shared liability to third parties will be allocated among themselves, but it cannot limit either party's direct exposure to third party claims. *See*

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disclaimer, but that did not negate the purchaser's status as a successor based on its express assumption of potential liability for third party claims. 423 F.2d at 650-52. Asset purchasers that assume liabilities routinely reserve the right to contest the merits of any third party claims covered by the assumption. For example, by assuming liabilities associated with the prior operation of the business, Company B has not admitted that Company S made defective chain saws or that Tort Victim V has a valid product liability claim. We do not contend that the 1998 Settlement Agreement was "an admission of liability" to the Plaintiffs and we do not cite the agreements to prove primary "liability for . . . a claim" within the meaning of Fed. R. Evid. 408, as API has argued. Dkt.143 at 20-21. The agreements here simply establish successorship.

42 U.S.C. § 9607(e); *Grant-Howard Assocs.*, 472 N.E.2d at 3. The indemnity features of the API/NCR agreements do not negate API's CERCLA liability to third parties under the assumption doctrine.

The agreements and arrangement between API and NCR reflect API's unambiguous assumption of Fox River-related liabilities. *See* Dkt. 124-1; Dkt. 139-3; Dkt. 139-4; Dkt. 139-13; Dkt. 144-2; Dkt. 144-3; Dkt. 203-3; s*ee also Westport v. API*, 787 N.W.2d at 902 n.10 ("Here, the 1978 Sale Agreement makes it clear that API agreed to assume a variety of NCR liabilities"). The "[i]nterpretation of an unambiguous contract is a question of law" and "if the language of the contract unambiguously provides the answer to the question at hand, the inquiry is over." *Rizzo v. Pierce & Assocs.*, 351 F.3d 791, 793 (7th Cir. 2003) (internal citations and quotations omitted). On the other hand, if the Court sees any ambiguity, then the meaning of the agreements cannot be resolved at the summary judgment stage and API's motion must be denied. *See Curia v. Nelson*, 587 F.3d 824, 832 (7th Cir. 2009).[13]

3. When a Seller and a Purchaser Share a Common Liability Based on an Assumption Agreement, a Third Party Claimant Can Pursue Both of Them.

The authorities cited above demonstrate that a plaintiff may sue either the seller or the purchaser when there has been an assumption of relevant liabilities. But there also is ample authority allowing a plaintiff to sue both the seller and the purchaser in a case like this.

In *Beck v. Roper Whitney, Inc.*, 190 F. Supp. 2d 524 (W.D.N.Y. 2001), the court found that multiple defendants with a common corporate lineage all had successor liability in that product liability case. The corporate history analyzed in *Beck* included a number of name changes to particular corporate entities, but we will skip over those name changes here to avoid

[13] If the agreements are deemed ambiguous, API's motion also must be denied because the Plaintiffs have not yet had an opportunity to discover facts and extrinsic evidence that may be relevant to the interpretation of any ambiguities. *See id.*; *Wheatley v. Guardian Life Ins. Co. of Am.*, No. 06-5228, 2007 WL 2893383, at *2-6 (D.N.J. Sept. 28, 2007); Dkt. 203 at 2.

making a complicated fact pattern more confusing. The original product manufacturer (Roper Whitney, Inc.) had been merged into one of the defendants (Roper Properties, Inc.), which made that defendant liable as a successor by merger. *Id.* at 533.[14] The relevant assets – which comprised one operating division of the business – were then transferred to a second defendant with an express assumption of the associated liabilities by that company. *Id.*[15] That second defendant (Roper Industries, Inc. (Del.)) was held liable as a successor based on its agreed assumption of the relevant liabilities. *Id.* The court also found several subsequent purchasers of the assets liable as successors in light of their agreed assumption of liabilities and one *de facto* merger. *Id.* A predecessor's viability has no relevance whatsoever under the assumption doctrine, as shown by the string of predecessors and successors that were found to be proper defendants in *Beck*.

One of the defendants in *Beck* made the same argument that API offers here: it claimed that it could not have successor liability because its immediate corporate predecessor was not "extinguished," and was, in fact, a co-defendant in the case. *Id.* at 540 & n.8. The court rejected that argument as one founded on an incorrect reading of successor liability law, because the predecessor's continued existence is pertinent only under the "mere continuation" and the "*de facto* merger or consolidation" successor liability doctrines. *Id.* at 535, 540. Unlike the assumption doctrine, those other two doctrines are based on the concept of virtual corporate *identity*. *See Tift*, 322 N.W.2d at 17 ("in substance the successor business organization which the plaintiff sues is, despite organizational metamorphosis, the same business organization which manufactured the product which caused his injury."); *Grant-Howard Associates*, 472 N.E.2d

[14] The pre-1971 corporate owners of the Appleton Coating Facility and the Combined Locks Mill were likewise merged into NCR. Dkt. 82 at 12-13; Dkt. 139-1; Dkt. 139-2; Dkt. 195-1; Dkt. 195-2.

[15] In much the same manner, API acquired NCR's Appleton Paper Division assets and assumed associated liabilities.

at 3. Thus, it may be difficult to prove a corporate continuation if the predecessor survives and exists separately.

That is why successor liability could not be established in the continuation doctrine cases cited by API. *See United States v. Mex. Feed and Seed Co.*, 980 F.2d 478, 482, 487-90 (8th Cir. 1992) (substantial continuation case where asset purchaser expressly assumed no liabilities); *Ninth Ave. Remedial Grp. v. Allis-Chalmers Corp.*, 195 B.R. 716, 720, 722-29 (N.D. Ind. 1996) ("the agreement excluded assumption of liability for environmental claims," so the plaintiffs were pursuing a substantial continuation theory); *Durham Mfg. Co. v. Merriam Mfg. Co.*, 294 F. Supp. 2d 251, 273-74 (D. Conn. 2003) (substantial continuation case). Those three CERCLA cases all involved an offshoot of the mere continuation doctrine – the "substantial continuation" theory – which is "not as widely accepted" as the traditional mere continuation doctrine. *N. Shore* Gas, 152 F.3d at 654 n.8.[16] While there is no absolute requirement that the predecessor be "extinguished" under the traditional mere continuation doctrine recognized under Wisconsin law, New York law, and federal common law,[17] the cases relied on by API illustrate that a surviving predecessor weighs against finding successor liability under a corporate continuation-based legal theory.

But the predecessor's viability simply does not matter in an assumption case – as opposed to a continuation case – due to the doctrinal differences recognized in *Beck* and the other cases discussed above. A leading treatise that is regularly cited in successor liability decisions draws a clear distinction:

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[16] The Wisconsin Supreme Court has declined to recognize the non-traditional "substantial continuation" theory and the related "product line" theory of successor liability. *See Fish v. Amsted Indus., Inc.*, 376 N.W.2d 820, 825-29 (Wis. 1985).

[17] *See Tift*, 322 N.W.2d at 16-18 (confirming a tort plaintiff's right to sue both the predecessor and the corporate successor in a traditional mere continuation case); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, No. 1:00-1898, 2008 WL 3163634, at *4 (S.D.N.Y. Aug. 6, 2008) (same); *N. Shore Gas*, 152 F.3d at 654 ("no single factor is supposed to be determinative" under the federal common law version of the mere continuation doctrine).

> As a general rule, *in the absence of an express or implied assumption of debts and obligations*, the successor will not be held liable if the predecessor is still a viable, ongoing entity, amenable to personal service and financially responsible.

15 FLETCHER, *supra*, § 7123.10 (emphasis added). The Wisconsin Supreme Court made the same point in *Tift*: "where there is an express or implied assumption of the selling corporation's liabilities – tort, contract, or both – the problem is obviated" and the predecessor and the successor can both be sued. 322 N.W.2d at 16.

In many assumption doctrine cases, the predecessor may happen to be defunct, but a third party claimant can still pursue all available remedies against the predecessor and the successor. For example, in the *Grant-Howard Associates* case, a tort plaintiff bought product liability suits against both the original product manufacturer and another company that was alleged to have assumed pertinent liabilities. 472 N.E.2d at 3. By the time the tort suits were filed, the original manufacturer had dissolved, so the tort plaintiff also sued the former shareholders and an affiliated partnership. The court made clear that when there has been an assumption of liabilities, "the injured party can elect to proceed against the defunct corporation, the successor corporation, or both" and that right of election "cannot be altered *per se* by the corporations." *Accord* 15 FLETCHER, supra, § 7123 (citing *Grant-Howard Associates* as support for that rule). Even if the predecessor has been dissolved, it may still have assets worth pursuing, such as insurance coverage or funds that must be reserved for the benefit of creditors under state wind-up statutes.[18] The possibility of relief against the predecessor does not bar an action against the successor in an assumption doctrine case.

The same rule applies in assumption doctrine cases under CERCLA.

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[18] *See, e.g.*, *Bouton*, 423 F.2d at 645 (personal injury claimants brought suits to recover from a liquidating corporate predecessor and its insurer as well as a corporate successor). *See also Tift*, 322 N.W.2d at 16 n.1("Statutes will affect the answerability of a defunct corporation to subsequent lawsuits"); N.Y. BUS. CORP. LAW § 1005 (limiting a dissolved corporation's ability to liquidate before "paying or adequately providing for the payment of its liabilities"); *id.* at § 1006 (reserving third parties' remedies against a dissolved corporation during its wind-up process).

In a CERCLA case involving a large Superfund site in California, the court found that Rhône-Poulenc acquired successor liability through a 1968 agreement that included an assumption of liabilities from Mountain Copper and its subsidiaries, which had owned and operated the site for many years. *Iron Mountain Mines*, 987 F. Supp. 1233. Mountain Copper had been dissolved by the time the United States filed suit, but the court emphasized that Mountain Copper's status was immaterial to Rhône-Poulenc's successor liability under CERCLA and the assumption doctrine:

> [I]f Mountain Copper and its subsidiaries still existed, the Government could pursue those corporations for payment of response costs as an owner and operator of Iron Mountain Mine. Any attempted transfer of CERCLA liability would be nullified under § 107(e)(1). Section 107(e)(1) does not impinge on successor liability, however. The Government still would be able to pursue Rhône-Poulenc on the ground that it is Mountain Copper's corporate successor.

Id. at 1239 n.12. By the same reasoning, NCR's status should be immaterial to API's successor liability in this assumption doctrine case.

The United States sued both a predecessor corporation and its alleged successor (ARCO Chemical Company or "ACC") that assumed liabilities as part of a transfer of chemical business assets in a CERCLA case concerning a Superfund site in Texas. *Lang*, 864 F. Supp. at 611-12. ACC argued that successor liability could not be extended from one co-defendant to another under CERCLA. *Id.* at 612. The court disagreed, holding that CERCLA did not prevent subsequent owners of the chemical business "from being added to the chain of cleanup accountability." *Id.*

In a Delaware CERCLA case, the United States successfully pursued claims against the predecessor (Harvey & Harvey, Inc.) and a corporate successor (Knotts, Inc.) that had agreed to assume relevant liabilities when it acquired the predecessor's garbage hauling business. *Chrysler*, 1990 WL 127160, at *1-7. The predecessor settled by entry into a Consent Decree with the United States and Knotts argued that it could not have successor liability in light of that

settlement with its predecessor. *Id.* at *7. The court disagreed and granted summary judgment that Knotts was liable to the United States under the assumption doctrine. *Id.*

In another case arising from the bankruptcy reorganization of Safety-Kleen Corporation, Safety-Kleen sold the assets of one of its operating divisions to Clean Harbors and Clean Harbors expressly agreed to assume associated environmental liabilities. *Clean Harbors, Inc. v. Arkema, Inc. (In re Safety-Kleen Corp.)*, 380 B.R. 716, 726 (Bankr. D. Del. 2008). When other potentially responsible parties at a particular Superfund site began pressing Clean Harbors, Clean Harbors took the position that Safety-Kleen remained responsible for that site after its reorganization and Clean Harbors sought a declaratory judgment that it had no directly liability to the other PRPs under successor liability principles. *Id.* at 719-35. The court rejected Clean Harbor's plea for a non-liability determination, reasoning that "[w]hen a buyer expressly assumes liabilities of a seller, it becomes directly liable therefore, regardless of any language in the sale agreement otherwise purporting generally to disclaim third-party beneficiary rights." *Id.* at 740.[19] The successor could not avoid direct liability to third parties by pointing to its predecessor.

In *Caldwell Trucking*, 421 F.3d 234, a corporate predecessor (Rexon) and two of its successors (Pullman and Mark IV) were co-defendants in another assumption doctrine case brought by private party CERCLA plaintiffs. The key agreement in that case included a commitment by Pullman to "assume" relevant liabilities as well as a promise that Pullman would "indemnify" Rexon. *Id.* at 241. Mark IV later assumed the liabilities of Pullman. *Id.* at 241 n.2.

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[19] In essence, the assumption doctrine treats a third party claimant as something akin to a *de jure* third party beneficiary under the assumption agreement. *See* FLETCHER, *supra*, § 7114 ("[T]he assumed liability or indebtedness may be enforceable by the plaintiff against the surviving or assuming corporation as a third-party beneficiary under the agreement"); *Grant-Howard Assocs.*, 472 N.E.2d at 3 (where the buyer is assuming potential liability to third-parties, the buyer and the seller "cannot affect the rights of a stranger to their contract" including the right of "an injured plaintiff to proceed against [the] successor corporation").

Rexon filed for dissolution after the lawsuit began, but Rexon remained in the case and Pullman financed its defense in accordance with Pullman's indemnity commitment. *Id.* at 244-45.[20] The Third Circuit affirmed the district court's judgment holding Rexon, Pullman, and Mark IV jointly and severally liable to the plaintiffs under CERCLA – because Rexon remained liable as the predecessor and because the agreed assumption of liabilities by Pullman and Mark IV enabled the plaintiffs to pursue them directly as successors to Rexon. *Id.* at 241-44.[21] The court of appeals found that Rexon was "neither dead nor buried" so "the suit against Rexon was permissible" and the judgment against it was valid. *Id.* at 245. *Caldwell Trucking* disproves the theory advanced by API. Mark IV had two viable predecessors and Pullman had one, but Mark IV, Pullman, and Rexon all shared a common liability under a straightforward application of the traditional successor liability assumption doctrine.

The Seventh Circuit's decision in the *GNB Battery Technologies* case illustrates the same point. 65 F.3d 615. In that case, Gould sold its battery division assets to GNB and the companies sued each other seeking a judicial determination on whether GNB (as the asset purchaser) was a potentially responsible party at certain sites under Section 107(a) of CERCLA. *Id.* at 618. State agencies and private plaintiffs had instituted lawsuits concerning dump sites that had been used by Gould and old Gould plants that were sold or closed prior to the asset sale, and Gould and GNB disagreed about whether GNB had assumed CERCLA liabilities for those sites. *GNB Inc. v. Gould, Inc.*, No. 90 C 2413, 1994 WL 110210, at *2 (N.D. Ill. Mar. 25, 1994), *aff'd*, 65 F.3d 615 (7th Cir. 1995). Much like NCR and API, Gould and GNB existed separately after the asset sale and both remained viable throughout the litigation. The court of appeals

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[20] Seven years after filing for dissolution, Rexon also initiated insurance coverage litigation against its carriers. *Id.* at 245.

[21] *Caldwell Trucking* was a contribution lawsuit under CERCLA Section 113; the district court allocated Rexon, Pullman, and Mark IV a collective 8.05% share of the costs at issue in that case. 421 F.3d at 241.

nonetheless affirmed the district court's determination that GNB assumed the relevant CERCLA liabilities through its 1983 Assumption Agreement with Gould. 65 F.2d at 617. Once again, that outcome exposes a fundamental flaw in API's theory: the asset purchaser became a potentially responsible party under CERCLA by an application of the traditional common law assumption doctrine even though the asset seller remained viable.

The issue here is governed by *GNB Battery Technologies* and the other assumption doctrine cases described above and it differs markedly from the one posed in the *Ninth Avenue Remedial Group* decision and the other "substantial continuation" cases cited by API. Dkt. 197 at 10. There may be no compelling reason to *stretch* the common law to impose successor liability under a non-traditional theory when the predecessor can still be sued, as noted in the *Ninth Avenue Remedial Group* case. 195 B.R. at 728. But there also is no reason to *narrow* the traditional common law rules of successor liability here by importing a new predecessor viability test that has never been used in assumption doctrine cases.

4. The Equities Support Holding API Liable as a Successor.

In some instances it may be unfair to impose successor liability "when the successor did not have the opportunity to protect itself by an indemnification clause in the acquisition agreement or a lower purchase price," as stated in one of the cases that API has cited. *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 750 (7th Cir. 1985).[22] But a contractual assumption of liabilities can and should be enforced against a purchaser because the purchaser likely "received a discount in price reflecting the probability that a costly cleanup might at some point be

[22] *Musikiwamba* was an employment discrimination suit. The successor liability rules followed in labor and employment cases more closely resemble the non-traditional "substantial continuation" doctrine than the traditional common law rules. *See Mex. Feed and Seed*, 980 F.2d at 487 ("The 'substantial continuity' test originated with a line of Supreme Court labor relations cases"). There was no agreed assumption of liabilities in *Musikiwamba* and the court employed a variant on an eight factor labor law test that has no relevance here. *See* 760 F.2d at 750. Thus, the court's conclusion that "the ability of the predecessor to provide relief" was one of the most "critical" factors under that multi-factor test provides no useful guidance in this CERCLA case. *See id.*

required." *Kerr-McGee*, 14 F.3d at 328. Here, the assumption was explicitly described as part of the "consideration of the transfer to Purchaser of the Property." Dkt. 203-3 at 1. There is no reason to disallow direct claims against API here, where it bargained and agreed to assume the potential liability and where the company has been adjudged liable for a majority share of the joint costs of NCR and API. Dkt. 144-2; Dkt. 144-3. As noted in the arbitration award that fixed the 60% API - 40% NCR cost sharing arrangement, API and NCR both "had knowledge that PCBs were a growing environmental concern" when API purchased NCR's Appleton Papers Division assets and the disclosures made in Schedule A of their asset purchase agreement "were sufficient to create the potential for some kind of risk relative to the Appleton Papers Division operation," but "API/BAT's business interest predominated in consummating the transaction" despite the known liability risk. Dkt. 144-2 at 4.

A successor liability finding also would not impose a significant added burden on API. The company's financial outlay for this Site will be roughly the same whether or not it has direct liability to the Plaintiffs, because the API has not denied and cannot deny the NCR cost sharing obligation established by the arbitration award and judgment registered by this Court. Dkt. 144-2; Dkt. 144-3; Dkt. 172 at 24. API admits that any dismissal of the Plaintiffs' claims against the company "will not affect API's indemnity obligations to NCR, which are governed by wholly separate agreements." Dkt. 187 at 11.

API demands to be excused from this case because "NCR remains a viable company" (Dkt. 197 at 1) but API's dismissal could prejudice the other parties to this lawsuit. The Plaintiffs do not dispute that NCR seems viable today: its recent SEC filings estimate that the company's Fox River-related liabilities will only "have a moderate, but manageable impact on

[NCR's] liquidity and cash flow." Dkt. 124-4 at 20.[23] But why should a viability test be applied to release a party like API at a preliminary stage of this lawsuit, before entry of any other judgments on the merits that might mitigate the risk of unfairness to other parties? Among other things, this suit seeks entry of a permanent injunction and a declaratory judgment for performance of all work required by EPA's Unilateral Administrative Order for the Site and some of that work is expected to continue for decades.[24] There is no way to ensure that a defendant that is financially viable today will remain so for so long a period of work.[25] And the total cleanup costs and damages for the Site have been estimated at up to $1.5 billion. Dkt. 93-5 at 6; Dkt. 93-6 at 6; Dkt. 124-3 at 5; Dkt. 124-4 at 24-25. Thus, in these circumstances, granting the dismissal of a successor corporation on a predecessor's apparent current viability would be a gamble for which the government and the other defendants bear all the risk. The potential unfairness to the other litigants militates against entry of summary judgment for API based on NCR's current viability.

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[23] The answer would be less clear if the question were asked of other defendants in this case. WTM I Company is now in bankruptcy, but it has indemnity rights that can provide a limited source of funds for payment of defense costs, response costs, and natural resource damages associated with this Site. Several other defendants have active, ongoing businesses, although they probably could not afford to pay all of the cleanup costs and damages at issue here on their own. We do not know whether those companies would pass or fail the corporate viability test advocated by API and the test certainly could yield unpredictable and unfair results in other cases.

[24] For example, the UAO covers requirements for long-term maintenance of underwater sediment caps that are being installed at the Site, as well as other maintenance and long-term monitoring activities. Dkt. 30-1 at 24 ("Even after certification of completion of the remedial action by U.S. EPA, the Affected Respondents shall continue to perform any ongoing elements of the Phase 2B Work, including [any] operation, maintenance, and monitoring activities required by the Phase 2B Work Plan"); Dkt. 136-43 at 23 ("If long term monitoring shows that a cap is deteriorating, the Amended Remedy allows USEPA and WDNR to require that the cap be enhanced or removed (along with removal of the underlying sediment."); Dkt. 136-43 at 27-28 (noting that the remedy cost estimate included the "present worth of long-term monitoring and maintenance costs over 100 years.").

[25] Lehman Brothers was in business for more than 150 years and the company probably seemed perfectly "viable" before its prompt demise in the subprime mortgage lending crisis of 2008. *See generally* http://www.library.hbs.edu/hc/lehman/history.html.

If the Court believes that equitable considerations matter in making a successor liability determination, as suggested by its July 5 ruling, then API's recent course of conduct surely supports the imposition of successor liability. The Court emphasized in that ruling that API "cannot continue to control the means of cleanup and yet remain outside the injunctive power of this Court." *United States v. NCR*, 2011 WL 2634262, at *13. API and its indemnitors have been told that they cannot "have it both ways" (*id.*) but they have discontinued and prevented the resumption of full-scale dredging work through their control of the Lower Fox River Remediation LLC and its contractors. Dkt. 137 at 3; Dkt. 141 at 5-7; Dkt. 178 at 2-5. And even since API filed its motion for summary judgment, API and its indemnitor have resisted a formal EPA directive that they relinquish control of the cleanup project to NCR. Dkt. 203-4; Dkt. 203-5; Summary judgment in API's favor is not warranted under those circumstances.

5. If the Court Rules as a Matter of Law that API Cannot Have Successor Liability Because NCR is Viable, then the Plaintiffs Cannot Survive API's Motion for Summary Judgment.

API asserts that: "NCR remains liable and viable. That fact alone precludes successor liability." Dkt. 197 at 19. If the Court accepts that view of the law, then the Plaintiffs cannot avoid the entry of summary judgment in API's favor.[26]

The Plaintiffs only contend that API has CERCLA liability to the Plaintiffs in this case if API can be classified as a corporate successor to NCR and certain other corporate predecessors that owned and operated the Appleton Coating Facility and the Combined Locks Mill before

[26] API also adds the following:

> The Court's conclusion that successor liability does not apply here because NCR remains viable made it unnecessary for the Court to determine in its July 5 Decision whether API in fact assumed the Fox River liabilities in the 1978 transaction, and the same is true here.

Dkt. 197 at 2. If the Court concludes that NCR's viability is *not* dispositive, then the Court should deny API's motion for summary judgment based on the assumption of liability language in the relevant agreements, the above-cited cases concerning the construction of such language, and the successor liability case law discussed in this brief.

those facilities were sold to API in 1978.[27] NCR's current status as a viable corporate defendant in this case is undisputed, as noted in Plaintiffs' Joint Response to API's Statement of Proposed Material Facts under Civil L.R. 56(b)(2)(B). Dkt. 204 at 12. Thus, the Plaintiffs cannot establish their claims against API under CERCLA if the Court concludes, as a matter of law, that NCR's viability precludes API's successor liability. If the Court is inclined to enter summary judgment against the Plaintiffs on that basis, the Plaintiffs respectfully request that the Court: (1) refrain from making an immediate entry of its judgment as a partial final judgment under Fed. R. Civ. P. 54(b); and (2) afford the Plaintiffs a separate opportunity to request that the Court certify that judgment as a partial final judgment under Fed. R. Civ. P. 54(b), so that the Plaintiffs can consider a possible appeal before resolution of all other claims against all other parties.

Conclusion

The potentially dispositive facts – such as NCR's viability – are undisputed. For the foregoing reasons, the Court should deny API's motion for summary judgment based on a proper application of traditional common law successor liability principles.

[27] The Plaintiffs have made the following clarification in their Joint Response to API's Statement of Proposed Material Facts under Civil L.R. 56(b)(2)(B) (Dkt. 204 at 19):

> Plaintiffs do not contend that API has liability for the Site under CERCLA §§ 106 or 107 based on releases or threatened releases of PCBs from the Appleton Coating Facility or the Combined Locks Mill after API acquired those facilities in July 1978. Plaintiffs contend that API is liable solely by virtue of the disposal and release of PCBs by alleged corporate predecessors of API before July 1978.

Respectfully submitted,

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Dated: August 26, 2011

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