No. 22-126

In The Supreme Court of the United States

GOULD ELECTRONICS, INC.,

Petitioner,

v.

LIVINGSTON COUNTY ROAD COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

LIVINGSTON COUNTY ROAD COMMISSION'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Gould owned property directly adjacent to property owned by LCRC where it manufactured pistons and connecting rods for small engines using Trichloroethylene ("TCE") as a degreaser. Gould systematically dumped an enormous quantity of TCE on the ground in locations close to the LCRC property line over the course of fifteen (15) years during the 1960s and 1970s. In 2017, after nearly three decades of scientific investigation and analysis—none of which ever implicated LCRC as a source of contamination—the Michigan Department of Environmental Quality ("MDEQ", now known as the Department of Environment, Great Lakes, and Energy ("EGLE")), determined that there was no evidence indicating a release on the LCRC property. The district court came to the same conclusion, which was affirmed by the Sixth Circuit. The specific conclusion was that:

> [T]here is no evidence demonstrating that there were any deposits of TCE onto the soils on the LCRC Property.
>
> * * *
>
> [The] evidence is sufficient to establish that no disposal of TCE occurred on the LCRC Property. Thus, the evidence demonstrates that Gould Inc., and not LCRC, generated the TCE contamination, which migrated onto the neighboring properties, including the LCRC Property.

(R. 265, PageID 83258).

QUESTION PRESENTED—Continued

Gould now seeks to have this Court set a precedent that any costs incurred for scientific investigation, analysis, and evaluation, are unrecoverable under CERCLA if any work product derived therefrom becomes the basis of a statutory defense.

The question for this Court is: Should the cost recovery principles of *Key Tronic Corp. v. United States,* 511 U.S. 809 (1994) regarding legal fees be expanded to disallow any costs incurred relative to anything that is ultimately used in litigation to advance a claim or defense?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Livingston County Road Commission ("LCRC") has no corporate affiliations. The LCRC is a Michigan road commission established pursuant to Michigan's County Road Law, MCL §224.1, *et seq*. The LCRC is a reporting entity to the Livingston County Board of Commissioners. The LCRC board is appointed by the County Board. "The board of county road commissioners shall act as an administrative board only and the function of the board shall be limited to the formulation of policy and the performance of official duties imposed by law and delegated by the county board of commissioners." MCL §224.9(2).

Petitioner, Gould Electronics, Inc. ("Gould"), is a shell-corporation organized under the laws of Arizona employing three (3) people, and existing for the sole purpose of suing neighbors of contaminated properties owned by its former alter egos.

An abridged version of Gould's corporate history from the record is as follows:[1]

1. Gould, Inc., based in Ohio, operated the Gould Property from 1961 through 1976,

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[1] *See* R. 189-21, PageID 64457-64460, 64465-64466, 64474-64475, 64488-64489, 64495-64497, 65426, 64528-64529, 64532-64534, 64536-64538, 64546-64547, 64550-64551, 64553, 64555, 64565, 64586-164587 (T. Rich); J. Callahan, Trial R. 260, PageID 82446, lns. 23-25 (J. Callahan); R. 249, PageID 91666 (J. Cronmiller).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT—Continued

during which time the Court found that it dumped copious amounts of industrial waste, including TCE, onto the ground, for which it is 100% responsible. Gould, Inc. abandoned the Gould Property and only returned to accept liability for its contamination when sued by Michigan National Bank in 1988.

2. By 1994, Gould, Inc. was a wholly owned subsidiary of Nippon Mining U.S., Inc., which itself was s subsidiary of Japan Energy Corporation, a Japanese Corporation.

3. On January 31, 1994, Gould, Inc., and Nippon Mining U.S., Inc., underwent a corporate restructuring resulting in the sale of assets and liabilities Gould, Inc. and Nippon Mining to Gould Electronics, Inc., an Ohio Corporation, and wholly owned subsidiary of Japan Energy Corporation.

4. In 1997, Gould, Inc. attempted to walk away from cleanup activities on the Gould Property, but the MDEQ declined as significant TCE contamination remained on the property.

5. Another corporate restructuring took place in 2003 when Gould Electronics, Inc. of Ohio sold its assets and liabilities to Nikko Materials USA, Inc. Gould

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT—Continued

Electronics, Inc. of Ohio was dissolved in December 2003.

6. Nikko Materials U.S., Inc. laid off all its employees, ceased operations, and changed its name to Gould Electronics, Inc., an Arizona Corporation, in 2006. Remaining manufacturing business of Nikko Materials was transferred to a new company, Nikko Metals, leaving Gould, Inc. liabilities with the newly named Gould Electronics, Inc., Arizona.

7. Gould Electronics, Inc. of Arizona, Plaintiff/Counter-Defendant in this case, is a subsidiary of JX Nippon Mining and Metals Corp., a Japanese Corporation.

8. JX Nippon Mining and Metals Corp., which is a subsidiary of JX Holdings, Inc. a publicly traded Japanese corporation. At the time of trial JX Holdings had been renamed JTXG Holdings, Inc.

See R. 189-21, PageID 64457-64460, 64465-64466, 64474-64475, 64488-64489, 64495-64497, 65426, 64528-64529, 64532-64534, 64536-64538, 64546-64547, 64550-64551, 64553, 64555, 64565, 64586-164587 (T. Rich); J. Callahan, Trial R. 260, PageID 82446, lns. 23-25 (J. Callahan); R. 249, PageID 91666 (J. Cronmiller).

Since trial, Gould has filed a Disclosure of Corporate Affiliations and Financial interest with this Court

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT—Continued

listing Gould as "an indirect subsidiary of Eneos Corp. (formerly JTXG)" while also listing "Nippon Oil and Energy Corp., a publicly-traded company in Japan" as a company with financial interest in the outcome of the appeal.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Sixth Circuit, Case Nos. 20-2257 & 20-2267, *Gould Electronics, Inc. v. Livingston County Road Commission,* judgment entered on May 10, 2022.

U.S. District Court for the Eastern District of Michigan, Case No. 2:17-cv-11130-MAG-DRG, *Gould Electronics, Inc. v. Livingston County Road Commission,* final judgment entered November 19, 2020.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

DECISIONS BELOW

The district court's opinion and order following the bench trial in this matter and its final judgment memorializing the findings therein are reprinted in the Appendix ("Pet. Appx.") at Pet. Appx. 26-166. The Sixth Circuit's opinion and judgment affirming the district court's opinion in whole are reprinted at Pet. Appx. 1-26.

STATEMENT OF JURISDICTION

On May 10, 2022, the Sixth Circuit issued its opinion affirming the district court's conclusion that LCRC's statutory defenses failed, and apportioning LCRC 5% of past and future costs of remediation despite also finding LCRC 0% responsible for causing the contamination. The lower courts had jurisdiction under 42 U.S.C. §§ 9601, *et seq.*, 28 U.S.C. § 1331, and 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

42 U.S.C. § 9607(a) allows a private party that has directly incurred environmental response costs to recover said costs from one or more potentially responsible persons. Under this statute: "(1) the owner and operator of a . . . facility; and (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous

substances were disposed of . . . shall be liable for [remediations costs].]

42 U.S.C. § 9607(a)(4)B) states in relevant part, that recoverable costs include:

> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan.

The two primary statutory defenses within CERCLA are found in 42 U.S.C. § 9607(b)(3) (the "third-party defense"), and 42 U.S.C. § 9607(q) (the "innocent contiguous landowner defense").

42 U.S.C. § 9607(b)(3) states in relevant part:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—
>
> * * *
>
> (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous

> substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. . . .

42 U.S.C. § 9607(q) is quite lengthy, but states in relevant part:

> (q) Contiguous properties.
>
> (1) Not considered to be an owner or operator.
>
> (A) In general. A person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from, real property that is not owned by that person shall not be considered to be an owner or operator of a vessel or facility under paragraph (1) or (2) of subsection (a) solely by reason of the contamination if—
>
> (iii) the person takes reasonable steps to—
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> (I) stop any continuing release;
>
> (II) prevent any threatened future release; and

(III) prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person;

(B) Demonstration. To qualify as a person described in subparagraph (A), a person must establish by a preponderance of the evidence that the conditions in clauses (i) through (viii) of subparagraph (A) have been met.

(D) Groundwater. With respect to a hazardous substance from one or more sources that are not on the property of a person that is a contiguous property owner that enters groundwater beneath the property of the person solely as a result of subsurface migration in an aquifer, subparagraph (A)(iii) shall not require the person to conduct groundwater investigations or to install groundwater remediation systems, except in accordance with the policy of the Environmental Protection Agency concerning owners of property containing contaminated aquifers, dated May 24, 1995.

The May 24, 1995, U.S. EPA Policy Toward Owners of Property Containing Contaminated Aquifers incorporated by reference into 42 U.S.C. § 9607(q)(1)(D) states in relevant part:

> Not only is groundwater contamination difficult to detect, but once identified, it is

> often difficult to mitigate or address without extensive studies and pump and treat remediation. Based on EPA's technical experience and the Agency's interpretation of CERCLA, EPA has concluded that the failure by such an owner to take affirmative actions, such as conducting groundwater investigations or installing groundwater remediation systems, is not, in the absence of exceptional circumstances, a failure to exercise "due care" or "take precautions" within the meaning of Section 107(b)(3).
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> * * *
>
> [I]t is the Agency's position that where hazardous substances have come to be located on or in a property solely as the result of subsurface migration in an aquifer from a source or sources outside the property, EPA will not take enforcement action against the owner of such property to require the performance of response actions or the payment of response costs.[2]

42 U.S.C. § 9613(f)(1) states in relevant part that:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section

[2] The May 24, 1995, U.S. EPA Policy Toward Owners of Property Containing Contaminated Aquifers is attached to LCRC's Conditional Cross Petition. (App. 1-14).

9609 of this title or under section 9607(a) of this title.

SUMMARY OF ARGUMENT

Gould seeks to expand the principles of *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994) to improperly expand the well settled principles of cost recovery to include any scientific information that ultimately forms the basis of a statutory defense. The Sixth Circuit properly rejected this meritless argument.

The law regarding recoverable investigation costs is well settled. The lower courts properly concluded that costs incurred by LCRC to investigate, analyze, and evaluate the source, fate, and transport of Trichloroethylene contamination were recoverable costs of response under CERCLA. Gould had been engaged in scientific investigation of the plume since 1994. LCRC was determined to be a facility in 2007. Therefore, LCRC first had to obtain and review thirteen (13) years of data and reports produced by Gould prior to engaging in its own investigation.

All data obtained from Gould and from LCRC's own $1.2 million investigation clearly indicated that: (1) Gould was the sole cause of the release; (2) the release occurred solely upon the Gould property; (3) that there was no TCE in the soils of the LCRC property; (4) that the only contamination on the LCRC

property was found in the groundwater; and (5) LCRC's groundwater was contaminated through passive migration flowing from the Gould property.

All of the above scientific conclusions formed the basis of LCRC's statutory defenses under 42 U.S.C. § 9607(b)(3) and § 9607(q). It is LCRC's position, as further addressed in its Conditional Cross Petition for a Writ of Certiorari, that the black letter law of both statutory defenses do not require groundwater investigations or installation groundwater remediation systems when contamination is found solely in groundwater due to passive subsurface migration from an adjacent property. *See* 42 U.S.C. § 9607(q)(1)(D). As such, LCRC pursued these obvious defenses with both the Michigan Department of Environmental Quality ("MDEQ", now the department of Environment, Great Lakes and Energy ("EGLE")), and the district court, relying upon the all data produced by Gould and by LCRC's investigation. Both the MDEQ and the district court found that Gould was the sole cause of the contamination and that the only contamination on the LCRC property was found in groundwater passively migrating from the release on Gould's property.

LCRC objects to the district court's finding, as affirmed by the Sixth Circuit, that LCRC did not fully comply with the MDEQ as the district court ignored substantial testimony from MDEQ management while placing inappropriate weight on testimony

of staff. As such, LCRC should have prevailed on its defenses.

INTRODUCTION

The district court did a masterful job parsing through the voluminous record. LCRC incorporates the district court's narrative by reference, barring any assertion the LCRC failed to comply with regulatory agencies. LCRC Object's to Gould's attempt at reframing the meticulous fact-finding of the district court to fit its narrative.

In short, Gould owned property directly adjacent to property owned by LCRC where it manufactured pistons and connecting rods for small engines using Trichloroethylene ("TCE") as a degreaser. Gould systematically dumped an enormous quantity of TCE on the ground in locations close to the LCRC property line. In 2017, after nearly three decades of investigation and analysis, the Michigan Department of Environmental Quality determined that there was no evidence indicating a release on the LCRC property. The district court came to the same conclusion also finding that Gould was 100% responsible for the release, and that the release occurred on the Gould property, only. As such, the only contamination located on the LCRC is in aquifer, which became contaminated through passive migration from the Gould release.

REASONS FOR DENYING THE WRIT

I. This Court should deny Gould's Petition as the law regarding the recovery of investigative and analytical costs as remedial activity is long settled. Gould seeks to improperly expand the law to bar recovery of any scientific investigation that ultimately becomes the basis of a defense.

The law regarding recoverable investigation costs is well settled. Relying on the well settled law, the lower courts properly concluded that costs incurred by LCRC to investigate, analyze, and evaluate the source, fate, and transport of Trichloroethylene contamination were recoverable costs of response under CERCLA. Gould had been engaged in scientific investigation of the plume since 1994. LCRC was determined to be a facility in 2007. Therefore, LCRC first had to obtain and review thirteen (13) years of data and reports produced by Gould prior to engaging in its own investigation.

All data obtained from Gould and from LCRC's own $1.2 million investigation clearly indicated that: (1) Gould was the sole cause of the release; (2) the release occurred solely upon the Gould property; (3) that there was no TCE in the soils of the LCRC property; (4) that the only contamination on the LCRC property was found in the groundwater; and (5) LCRC's groundwater was contaminated through passive migration flowing from the Gould property.

All of the above scientific conclusions formed the basis of LCRC's statutory defenses under 42 U.S.C. § 9607(b)(3) and § 9607(q). It is LCRC's position, as further addressed in its Conditional Cross Petition for a Writ of Certiorari, that both statutory defenses do not require groundwater groundwater investigations or installation groundwater remediation systems when contamination is found solely in groundwater due to passive subsurface migration from an adjacent property. *See* 42 U.S.C. § 9607(q)(1)(D). As such, LCRC pursued these obvious defenses with both the Michigan Department of Environmental Quality ("MDEQ", now the department of Environment, Great Lakes and Energy ("EGLE")), relying upon the all data produced by Gould and by LCRC's investigation.

On June 14, 2017, the MDEQ issued a letter stating in part that:

> [T]he DEQ agrees with the LCRC that there is no indication that a release of chlorinated solvents to unsaturated site soils occurred, and no releases of chlorinated solvents in LCRC property site soils are demonstrated to be directly attributable to LCRC's historic operations." (R. 201-12).

On June 23, 2017, the MDEQ issued another letter reiterating the statement in paragraph 29, and further stating that:

> Regarding the DEQ's expectations relative to the [June 14, 2017] Letter, the DEQ is not requesting the performance of more sampling or

> report submittals by the LCRC concerning the origin of the TCE contamination on the [LCRC Property]. Based on the data and information submitted and currently available to the DEQ, and the May 11, 2017, technical meeting, the DEQ has no further regulatory interest in the origin of the TCE contamination on [the LCRC Property]. (R. 201-13).

On November 19, 2020, the district court explicitly ruled that that:

> [T]here is no evidence demonstrating that there were any deposits of TCE onto the soils on the LCRC Property.
>
> * * *
>
> [The] evidence is sufficient to establish that no disposal of TCE occurred on the LCRC Property. . . . Thus, the evidence demonstrates that Gould Inc., and not LCRC, generated the TCE contamination, which migrated onto the neighboring properties, including the LCRC Property.

(R. 265, PageID 83258).

On May 10, 2022, the Sixth Circuit affirmed these findings.

Gould is simply irritated that LCRC's scientific investigation, analysis, and evaluation proved a meritorious defense. Thus, relying primarily on *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994), Gould now

seeks to improperly expand the well-settled principles of cost recovery to include any scientific information that ultimately forms the basis of a statutory defense. As properly concluded by the Sixth Circuit:

> Gould *expands* Supreme Court precedent and describes [LCRC's] prohibited costs as those "aimed at exonerating itself from liability.
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> * * *
>
> [T]he *Key Tronic* requirement that costs be tied to the "actual cleanup" applied only to legal costs . . . but Gould elides that distinction and attempts to place all attempts at exoneration in the nonrecoverable column.

Gould's position is facially meritless.[3]

[3] If Gould is correct in this argument, then it is essentially seeking to overturn the lower courts' findings relative to recoverability of its own response costs. Gould's TCE investigation began in 1994. Despite being advised to install a pump and treat system in 2005, Gould took its first true remedial action 11 years later in 2016 with the installation of a single pilot phase pump and treat system at a cost of roughly $20,000.00. As such, of the $4,253,297.00 occurring over 22 years, nearly all of it was for purposes of investigation aimed at foisting liability onto LCRC. (R. 258, PageID 82092, 82108-82112 (Browning)).

A. The lower court properly awarded LCRC response costs incurred investigating TCE contamination on its property emanating from the Gould property. LCRC's investigation and analysis clearly indicated that: (1) Gould was the sole cause of the release; and (2) LCRC's property was contaminated only through passive groundwater migration from the Gould release, which formed the basis of its statutory defenses pursuant to 42 U.S.C. § 9607(b)(3) and § 9607(q).

Gould argues that the lower courts erred in finding that LCRC's costs incurred during investigation and evaluation of the TCE plume at issue are not recoverable as such costs are not consistent with the National Contingency Plan, and were aimed solely at exonerating LCRC from liability. the investigation and evaluation proved that Gould was the sole cause. This argument is contrary to longstanding law.

First, the Sixth Circuit has ruled that:

> Although consistency with the NCP is a necessary element for recovery of remedial costs, it does not necessarily follow that consistency with the NCP is required for recovery of monitoring or investigative costs. In *Carlyle Piermont Corp. v. Federal Paper Board Co*., 742 F. Supp. 814 (S.D.N.Y. 1990), the Court held that such costs are recoverable without regard to compliance with the NCP. *See also Artesian Water Co. v. Government of New Castle County*, 851 F.2d 643 (3d Cir. 1988)

> (monitoring and impact evaluation costs recoverable regardless of existence of other compensable response costs).

Donahey v. Bogle, 987 F.2d 1250, 1255-56 (6th Cir. 1993), vacated and remanded by *Donahey v. Bogle*, 1998 U.S. App. LEXIS 27687 (1998), reinstated by *Donahey v. Bogle*, 2000 U.S. App. LEXIS 16192 (2000); *see also Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986) (held, costs of testing and investigation recoverable even where on-site cleanup costs are not sought); *Cadillac Fairview/California v. Dow Chemical Co*., 840 F.2d 691, 695 (9th Cir. 1988) (following *Wickland* in "rejecting the distinction between investigatory costs and on-site clean-up costs"); *Northwestern Mutual Life Insurance Company v. Atlantic Research Corporation*, 847 F. Supp. 389 (E.D. Va. 1994) ("[C]osts incurred for purposes of evaluation and investigation . . . qualify as "response costs.").

Gould is well aware of this line of caselaw. In its section of the Joint Final Pretrial Order filed July 10, 2020 (R. 244) and the Joint Final Pretrial Order in the "old case" filed May 25, 2012 (*see* 2012 U.S. Dist. LEXIS 167347, 2012 WL 5817937), Gould stated the following:

> Under CERCLA's expansive definition of "removal," it follows that a "response" includes environmental studies of a facility undertaken to "monitor, assess, and evaluate" the release of hazardous substances. Thus, costs incurred for purposes of evaluation and investigation . . . qualify as 'response costs'" *Northwestern Mutual Life Insurance Co. v. Atlantic*

> *Research Corp.*, 847 F. Supp. 389, 396 (E.D. Va. 1994).

(R. 244, p. 10 (JFPTO)).

Gould seizes on one sentence from the district court's opinion on which it bases nearly its entire argument: "Although LCRC has undertaken some investigation of the contamination, its efforts were aimed at exonerating itself from liability as opposed to mitigating the spread of the contamination." (App. 130). However, Gould ignores a substantial portion of the opinion dedicated to the question at issue in this appeal. (App. 161-164). After considering the caselaw presented by Gould, the district court reasoned as follows:

> As in *ITT Industries*,[4] even though LCRC incurred its costs in connection with a successful defensive strategy establishing that it was not a source of the TCE contamination, LCRC's investigation was relevant and responsive to EGLE's interest in determining the sources of the contaminants. *See* 700 F. Supp. 2d at 884. Furthermore, the results of LCRC's investigation have been informative of the overall effort to address the TCE plume. *See* id. Consequently, because LCRC's response costs were necessary and reasonable, they may be recovered . . .

Furthermore, LCRC's scientific investigation, which included review of thirteen (13) years of data and reports prepared by Gould and independent

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[4] *ITT Indus. v. BorgWarner, Inc.*, 700 F.Supp.2d 848 (W.D. Mich. 2010).

testing and analysis, uncovered voluminous evidence that cut directly to the heart of its statutory defenses.[5] Under innocent contiguous landowner defense 42 U.S.C. § 9607(q), a person that owns real property that is contiguous to or otherwise similarly situated with respect to, and that is or may be contaminated by a release or threatened release of a hazardous substance from real property that is not owned by that person, *shall not be considered to be an owner or operator of a . . . facility under paragraph (1) or (2) of 42 U.S.C. § 9607(a)* solely by reason of that contamination, if the person establishes the elements set forth in 42 U.S.C. § 9607(q)(1)(A)(i)-(viii) by a preponderance of the evidence.

Then, 42 U.S.C. § 9607(q)(1)(D), explicitly states:

> **Groundwater.** With respect to a hazardous substance from one or more sources that are not on the property of a person that is a contiguous property owner that enters groundwater beneath the property of the person solely as a result of subsurface migration in an aquifer, subparagraph (A)(iii) shall not require the person to conduct groundwater investigations or to install groundwater remediation systems, except in accordance with the policy of the Environmental Protection Agency concerning owners of property containing contaminated aquifers, dated May 24, 1995.

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[5] Just as Gould's scientific investigation just so happened to form the basis of its claims.

The May 24, 1995 U.S. EPA Policy Toward Owners of Property Containing Contaminated Aquifers, which states in relevant part that:

> Not only is groundwater contamination difficult to detect, but once identified, it is often difficult to mitigate or address without extensive studies and pump and treat remediation. Based on EPA's technical experience and the Agency's interpretation of CERCLA, EPA has concluded that the failure by such an owner to take affirmative actions, such as conducting groundwater investigations or installing groundwater remediation systems, is not, in the absence of exceptional circumstances, a failure to exercise "due care" or "take precautions" within the meaning of Section 107(b)(3).
>
> * * *
>
> [I]t is the Agency's position that where hazardous substances have come to be located on or in a property solely as the result of subsurface migration in an aquifer from a source or sources outside the property, EPA will not take enforcement action against the owner of such property to require the performance of response actions or the payment of response costs.

Under the CERCLA defenses, as discussed in detail in LCRC's Conditional Cross Petition, once it was discovered that the only contamination on the LCRC property was found in groundwater passively migrating from the release on the Gould property, no further

groundwater investigation or remediation was required. Had the MDEQ properly administered the law, it's investigation of LCRC would have ended. However, the MDEQ continued to inappropriately press LCRC to expend public funds on investigations that were not legally required.

Nevertheless, LCRC voluntarily expended over $1.2 million to investigate and evaluate the TCE plume, including source, fate, and transport analysis, which indicated that TCE contamination was only found in the groundwater of the LCRC property and had passively migrated in groundwater flowing from the Gould property.[6]

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[6] LCRC's investigation was significantly hindered by Gould's failure to produce any meaningful documents regarding its activities on the Gould property. At trial, Gould contended that there was "no evidence" showing that Gould used or dumped TCE is simply a red herring and conveniently avoids the following facts: (1) the great weight of the available evidence implicated Gould and exonerated LCRC; (2) all but two of Gould's former employees are deceased; and (3) Gould's lack of documentary evidence regarding its operations at the Gould Property was by design. As properly noted by the lower court, "James Cronmiller, Gould's former director of environmental affairs, stated that he has no knowledge regarding what might have become of the operating records from the RSF Facility and admitted to making no effort to determine what became of them." (Opinion, R. 265, PageID 83257). In addition, John Browning, who testified at length for Gould, testified that he did not review records of Gould, did not investigate Gould's manufacturing process, or solvent use and disposal practices. He did not attempt to locate or interview any former Gould employees, and did not review any deposition testimony or affidavits of former employees during his investigation. (R. 258, PageID 82102-82106). As a result of this lackluster investigation, Mr. Browning astonishingly testified that he believed that Gould

Between May 2012 and May 2017, LCRC and Gould were engaged in an ongoing dialogue with MDEQ. LCRC submitted a voluminous and comprehensive TCE RAP in 2016 after years of soil and groundwater testing done at the direction of MDEQ, which underwent numerous rounds of geological review and comment. The RAP included all raw data reports, expert analyses of Constance Travers, Keith Gadway, and Dr. John Lehman, documentary evidence, deposition testimony, and affidavits. (R. 259, PageID 82305, lns. 15-24 (Taylor); LCRC RAP, R. 170–172-17).

Between 2012 and 2017, Gould was in constant contact with MDEQ submitting its own data and reports, and even commenting upon the MDEQ's opinions of LCRC's submissions and submitting materials in rebuttal. Gould's consultants even received information relative to LCRC's investigation and MDEQ comments thereon directly from MDEQ staff without

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manufactured cadmium batteries for the airline industry at the Gould Property, despite that fact that the testimony of every other witness confirmed that Gould was actually manufacturing pistons and connection rods for engines.[6] (R. 258, PageID 82102-82106). Gould's lack of investigation and failure to produce any documentary evidence of its operations at the Gould Property, in conjunction with the evidence presented in the voluminous record, clearly allowed the lower court to draw an adverse inference against Gould. *See Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir. 1988) ("That an adverse presumption may arise from the fact of missing evidence is a generally accepted principle of law that finds its roots in [an] 18th century case. . . . *See Armory v. Delamirie*, 1 Strange 505, 93 Eng. Rep. 664 (1722); *see generally* Stier, *Revisiting the Missing Witness Inference*, 44 Md. L. Rev. 137, 142 & n.22 (1985). The venerable principle of *Armory v. Delamirie* remains good law.").

filing FOIA requests. (R. 259, PageID 82290-82291 (Taylor)).

On June 14, 2017, the MDEQ issued a letter stating in part that:

> [T]he DEQ agrees with the LCRC that there is no indication that a release of chlorinated solvents to unsaturated site soils occurred, and no releases of chlorinated solvents in LCRC property site soils are demonstrated to be directly attributable to LCRC's historic operations." (R. 201-12).

On June 23, 2017, the MDEQ issued another letter reiterating the statement in paragraph 29, and further stating that:

> Regarding the DEQ's expectations relative to the [June 14, 2017] Letter, the DEQ is not requesting the performance of more sampling or report submittals by the LCRC concerning the origin of the TCE contamination on the [LCRC Property]. Based on the data and information submitted and currently available to the DEQ, and the May 11, 2017, technical meeting, the DEQ has no further regulatory interest in the origin of the TCE contamination on [the LCRC Property]. (R. 201-13).

The reports, sampling, data, response activity plans and other documents submitted by the LCRC and Gould considered by the MDEQ in reaching its conclusion is the same body of investigative work that was presented at trial by both LCRC and Gould at trial

and based on that body of work the district court concluded that:

> [T]here is no evidence demonstrating that there were any deposits of TCE onto the soils on the LCRC Property.
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> * * *
>
> [The] evidence is sufficient to establish that no disposal of TCE occurred on the LCRC Property. . . . Thus, the evidence demonstrates that Gould Inc., and not LCRC, generated the TCE contamination, which migrated onto the neighboring properties, including the LCRC Property.

(R. 265, PageID 83258).

In light of the foregoing and the evidence within the extensive record, it is clear that the lower court appropriately determined that costs incurred by LCRC during its investigation and evaluation of the TCE contamination at issue were recoverable response costs under CERCLA.

B. The Sixth Circuit properly affirmed as Gould seeks to unreasonably expand the principles of *Key Tronic* to improperly expand the well settled principles of CERCLA cost recovery to include *any* scientific information that ultimately forms the basis of a statutory defense. This argument is patently unreasonable.

In affirming the findings of the district court, Sixth Circuit correctly reasoned as follows.

> Seizing on the holding in *Key Tronic*, Gould repeats language from the circuit cases that refer to *Key Tronic* using phrases like "legal fees" and "litigation-related costs,"[7] but Gould *expands* Supreme Court precedent and describes the Commission's prohibited costs as those "aimed at exonerating itself from

[7] The restrictive nature of the *Key Tronic* principles regarding in *Key Tronic* are being questioned by lower courts. *See Garrison Southfield Park LLC v. Closed Loop Ref. & Recovery, Inc.*, No. 2:17-cv-783, 2019 U.S. Dist. LEXIS 217764, at *32-33 (S.D. Ohio Dec. 16, 2019) ("While the *Key Tonics* court set forth a narrow rule for the recovery of attorney's fees under Section 107(a) of CERCLA, it nevertheless did so five years before the passage of SREA in 1999. *See generally Key Tronic Corp.*, 511 U.S. at 811; *see also United States v. Atlas Lederer Co.*, 97 F. Supp. 2d 830, 833 (S.D. Ohio Feb. 16, 2000). In 1999, CERCLA was amended by SREA adding, among other things, Section 127(j) which created the statutory right to attorney's fees for Section 113(f) contribution actions. *Atlas Lederer Co.*, 97 F. Supp. 2d at 833.); *see also Vill. of Milford v. K-H Holding Corp.*, 390 F.3d 926 (6th Cir. 2004) (clarifying how attorney fees can be recovered under CERCLA post SREA).

> liability." A distinction should be drawn, at the outset, between fees paid to lawyers (who investigate and litigate cases) and fees paid to environmental consulting firms (who investigate in a different sense and prepare maps and reports). The Commission's costs are not the former, regardless of whether they uncovered evidence later used by lawyers. The question, then, is whether the costs of environmental consultation are more like "litigation-related costs" or like "costs of response." The answer is plainly the latter. The justification in *Key Tronic* for excluding litigation costs was that courts compensating lawyers is extraordinary; the Court expressed doubt that a fee award would be implied in the statute. 511 U.S. at 818. By contrast, there is no special disfavoring of consulting costs, and any private landowner accused of contaminating its property would be well advised to seek out an independent determination of how responsible it is and how bad the damage is—i.e., and environmental assessment. What is more, the *Key Tronic* requirement that costs be tied to the "actual cleanup" applied only to legal costs. *Id.* At 820, but Gould elides that distinction and attempts to place all attempts at exoneration in the nonrecoverable column. The district court recognized that this was improper, and we affirm.

Then, in a footnote, the Sixth Circuit touches upon legitimate policy considerations:

> As a policy matter, a failure to reimburse nonliable (or less-liable) parties for the costs of retaining environmental consultants in CERCLA cases would run the risk of discouraging thorough investigation. A landowner who knows his investigation costs (whether legal or environmental) are nonrecoverable is liable to spend less. But costs saved by private parties are costs incurred by public investigators.

The Sixth Circuit's reasoning is consistent with the well settled principles of CERCLA cost recovery, as is currently being more liberally expanded by the courts in light of the enactment of the Superfund Recycling Equity Act ("SREA").

What is more, Gould's argument is a double-edged sword. If Gould argument is adopted by this Court, then not only is it seeking to have essentially all scientific investigation costs deemed nonrecoverable in the context of statutory defenses, but it is seeking to have all investigation that is eventually used in the context of litigation deemed unrecoverable. The practical result of Gould's argument is to overturn the lower courts' findings relative to recoverability of its *own* response costs. Gould's TCE investigation began in 1994. Despite being advised to install a pump and treat system in 2005, Gould took its first true remedial action 11 years later in 2016 with the installation of a single pilot phase pump and treat system at a cost of roughly $20,000.00. As such, of the $4,253,297.00 occurring

over 22 years, nearly all of it was for purposes of investigation aimed at foisting liability onto LCRC. (R. 258, PageID 82092, 82108-82112 (Browning)). Gould is guilty of the same acts of which it accuses LCRC.

C. LCRC objects to the lower courts' contention that LCRC did not fully cooperate with the MDEQ. In so concluding, the courts ignored the black letter law of the CERCLA statutory defenses, and ignored substantial testimony of MDEQ executive management regarding the unreasonable scope of its requests. Not only did LCRC fully comply with the MDEQ, but should have prevailed on its defenses.

As discussed above, and in further detail in LCRC Condition Cross Petition, all evidence indicated that: (1) the release occurring solely on the Gould property; (2) Gould was the sole cause of the release; (3) no release occurred on the LCRC property; and (4) the only contamination on the LCRC property was found in groundwater contaminated through passive migration from the Gould property. Both the MDEQ and district court eventually came to the same conclusion, and the Sixth Circuit affirmed.

As such, under the black letter law of the CERCLA statutory defenses, which incorporate EPA policy by reference, LCRC was not required to engage in any additional groundwater investigation or to install groundwater remediation systems. The MDEQ's continued

unreasonable requests for more and more investigation despite thousands of pages of evidence implicating Gould, alone, was plainly inappropriate. Inappropriateness notwithstanding, LCRC expended over $1.2 million of public funds to investigate the plume.

Additionally, despite spending over $1.2 million dollars of public funds on unnecessary scientific investigation and evaluation, which led MDEQ upper management to conclude that LCRC was innocent, the lower courts found that LCRC did not cooperate with the MDEQ stated in part that "[Senior Advisor to the Director of the MDEQ Tim] O'Brien did not testify that the scope of investigation required by EGLE [MDEQ] with respect to the LCRC Property was inappropriate." However, Mr. O'Brien testified on that subject as follows:

> In my experience and in this case, I have encountered career staff in the DEQ organization to be substantively competent, but often times very narrowly focused and certainly not focused necessary on the principal mission of the DEQ which was to protect the environment and citizens of this state and so they can get caught up in the technical search for absolute knowledge, absolute uncontroverted knowledge. Very few of these cases are that clear cut and I feel we could have been on a, at DEQ, a perpetual search for evidence [to] effect the objective of trying to prove a negative and that more and more testing would not [have] changed the results. There had been extensive [testing] and that's the culture as I

> saw it, sort of endless search for a fact and at some point you have to make a decision based on the facts that you have. Certainly Sue [Leeming] and I and Heidi Grether [MDEQ Director] felt that [at] this point we have overwhelming factual record to make the decision that we did.
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> * * *
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> We felt that DEQ resources had been if anything over-expended here, but should not be further expended, that LCRC had spent extensive resources. You know, that's not directly our concern, but obviously they'd made a substantial effort to help us determine the facts. . . .

(R. 261, PageID 82714-82715 (O'Brien)).

Though he did not come out and directly say "the investigation was inappropriate," he eloquently stated that he disagreed with the route taken by his staff in language becoming of his position.[8] For years, the

[8] Mr. O'Brien held several high-profile positions with Ford Motor Company throughout his storied career, retiring after serving as the Duty Chief of Staff to the Chairman and CEO. During his tenure at Ford, he managed worldwide environmental affairs of 160 manufacturing facilities in twenty-eight (28) countries and managed the Ford real estate portfolio worth hundreds of billions. He was asked to be the Director of the MDEQ, but declined, eventually accepting an appointment by Governor Snyder to function as Senior Advisor to the Director. In that capacity he helped draft the legislative amendments to Part 201 (NREPA), Michigan's state counterpart to CERCLA. (R. 261, PageID 82688-82698).

MDEQ applied the same impossible burden of proof that the lower courts erroneously applied.

The lower courts also made the unsupported assumption that "EGLE's change of course in 2017 may well be explained by the fact that the contamination was already being fully addressed [by Gould], rendering further action by LCRC unnecessary." (R. 265, p. 80). However, there is no evidence in the record to support this assumption. In fact, there is significant testimony by MDEQ upper management to the contrary. In addition to Tim O'Brien's testimony cited above, Mr. O'Brien further testified that:

> [T]his matter had been under review by our staff for a very long time. There had been extensive testing required of the LCRC to determine whether or not they had contributed in any way to the contamination and despite those years of research and testing and expended resources both financial and personnel both at DEQ and LCRC certainly, we were not able to identify any specific source of contribution from the LCRC to this contamination plume . . .
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> * * *
>
> Putting this in much plainer terms we essentially both had the same view, which was look, [this] has gone on for a very long time, we have no evidence despite extensive investigation to indicate that LCRC contributed to the chlorinated solvent contaminants. It also appeared from the record as presented by LCRC and undisputed by our staff that LCRC

> actually had negligible, minimal use of chlorinated solvents in any capacity cumulatively over a period of many, many years and that in contrast, there was a very substantial record of substantial use of chlorinated [solvents by Gould].
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> * * *
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> [The June 23, 2017 "no further regulatory interest" letter] does not equivocate or complicate the basic finding of the DEQ management that we had no further regulatory interest in this, we did not believe there were data gaps and that as far as we were concerned, LCRC . . . had not been demonstrated after years of testing and expended resources by both the LCRC and the DEQ, there had been no evidence to demonstrate that LCRC had contributed to the source of contamination.

(R. 261, PageID 82706-82707, 82711 (O'Brien)).

Considering the foregoing and LCRC's Cross Petition, LCRC should have clearly emerged victorious on its defenses rendering LCRC's 42 U.S.C. § 9613(f) contribution counterclaim moot.

CONCLUSION

The Court should deny Gould's Petition for a Writ of Certiorari for the reasons set forth herein.

Respectfully submitted,

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