APPENDIX

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APPENDIX A

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File Name: 22a0080p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GEORGIA-PACIFIC CONSUMER PRODUCTS LP; FORT JAMES CORPORATION; GEORGIA-PACIFIC LLC, *Plaintiffs-Appellees*, *v.* NCR CORPORATION, *Defendant*, WEYERHAEUSER COMPANY, *Defendant-Appellee*, INTERNATIONAL PAPER COMPANY, *Defendant-Appellant*.	No. 18-1806

On Petition for Rehearing En Banc.
United States District Court for the Western District of Michigan at Grand Rapids;
No. 1:11-cv-00483—Robert J. Jonker, District Judge.

Argued: October 28, 2021

Decided and Filed: April 25, 2022

Before: MOORE, KETHLEDGE, and DONALD, Circuit Judges.

COUNSEL

ARGUED: John D. Parker, BAKER & HOSTETLER LLP, Cleveland, Ohio, for Appellant. Mark W. Schneider, PERKINS COIE LLP, Seattle, Washington, for Appellee Weyerhaeuser Company. Michael R. Shebelskie, HUNTON ANDREWS KURTH LLP, Richmond, Virginia, for Georgia-Pacific Appellees. **ON BRIEF:** John D. Parker, BAKER & HOSTETLER LLP, Cleveland, Ohio, for Appellant. Mark W. Schneider, Kathleen M. O'Sullivan, Margaret Hupp, PERKINS COIE LLP, Seattle, Washington, Scott M. Watson, WARNER NORCROSS & JUDD LLP, Grand Rapids, Michigan, for Appellee Weyerhaeuser Company. Michael R. Shebelskie, Douglas M. Garrou, George P. Sibley, III, J. Pierce Lamberson, HUNTON ANDREWS KURTH LLP, Richmond, Virginia, Peter A. Smit, VARNUM LLP, Grand Rapids, Michigan, for Georgia-Pacific Appellees.

OPINION

KAREN NELSON MOORE, Circuit Judge. Decades of pollution in western Michigan led the EPA to designate the Kalamazoo River and Portage Creek as a high priority for cleanup. Decades of litigation followed, including many actions filed under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). In this dispute, two parties found liable on a CERCLA contribution claim raise a statute of limitations defense. Holding that defense to be meritorious, we **REVERSE** the judgment of the district court.

I. BACKGROUND

A. The Kalamazoo River

Since the late 1860s, paper mills have dotted the banks of the Kalamazoo River, and its tributary, Portage Creek, in southwestern Michigan. Elmer B. Hess, *The Kalamazoo Valley Paper Industry*, 69 PROC. OF THE IND. ACAD. OF SCI. 224, 226 (1959). Kalamazoo presented the ideal location for paper manufacturing, offering ample water and a prime location for nationwide distribution. *Id.* at 229–34. Paper played a major role in the region's development: by 1954, paper mills in Kalamazoo County registered sales of almost $175 million annually and accounted for 17% of the county's total household incomes. HAROLD T. SMITH, THE POSITION OF THE PAPER INDUSTRY IN THE ECONOMY OF KALAMAZOO COUNTY, MICHIGAN, IN 1954 1 (1958).

This major industry was not to last. At the end of the twentieth and into the twenty-first century, mills were closing at a rapid pace. *See, e.g.*, *G-P Set to Dismantle Kalamazoo Mill*, RECYCLING TODAY (Feb. 20, 2001), https://www.recyclingtoday.com/article/-b-g-p-set-to-dismantle-kalamazoo-mill--b-/ ("The area has seen the closing or planned closing of five paper mills since last fall.").

The mills left, but their environmental legacy remained. In the 1950s, researchers had already started raising concerns over the paper industry's environmental impact on the Kalamazoo River. SMITH, THE POSITION OF THE PAPER INDUSTRY IN THE ECONOMY OF KALAMAZOO COUNTY 7–8. That same decade, the river's environmental problems worsened substantially when paper mills undertaking

carbonless copy-paper recycling began releasing polychlorinated biphenyls ("PCBs") into the river and surrounding land. *Damage Assessment, Remediation, and Restoration Program: Kalamazoo River*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (last updated Oct. 21, 2021), https://darrp.noaa.gov/hazardous-waste/kalamazoo-river. PCBs produce a host of negative health effects, including possibly increasing exposed individuals' risk of cancer. *Polychlorinated Biphenyls (PCBs)*, ILL. DEP'T OF PUB. HEALTH (Feb. 2009), http://www.idph.state.il.us/envhealth/factsheets/polychlorinatedbiphenyls.htm.

The environmental devastation caused by the proliferation of PCBs led the EPA in 1990 to add the Kalamazoo River to the National Priorities List ("NPL"), which identifies the most important Superfund sites. ENV'T PROT. AGENCY, HISTORIC PRESERVATION AND MIXED-USE SUPERFUND REDEVELOPMENT: THE PLAINWELL PAPER MILL IN PLAINWELL, MICHIGAN 2 (2014). Litigation surrounding the contamination of the Kalamazoo River has since spanned decades, *see, e.g.*, *Kalamazoo River Study Grp. v. Menasha Corp.*, 228 F.3d 648 (6th Cir. 2000), and spawned hundreds of millions of dollars in cleanup costs, *see, e.g.*, DEP'T OF JUST., EPA AND JUSTICE DEPARTMENT ANNOUNCE $245 MILLION AGREEMENT FOR CLEANUP AT THE ALLIED PAPER INC./PORTAGE CREEK/KALAMAZOO RIVER SUPERFUND SITE (Dec. 11, 2019).

B. Environmental Litigation Regarding the Kalamazoo River

Today's litigation involves several firms and successors to firms that played a role in the

manufacture of paper along the Kalamazoo River and Portage Creek in the mid-twentieth century. There are four relevant firms in this matter: International Paper ("IP"), Weyerhaeuser, Georgia-Pacific ("GP"), and NCR Corporation ("NCR"). R. 432 (Phase I Op. at 1) (Page ID #12726).

In 1990, the same year that the EPA added this portion of the Kalamazoo River to the NPL, GP and two other paper companies—HM Holdings, Inc./Allied Paper Inc. and Simpson Plainwell Paper Company—formed the Kalamazoo River Study Group ("KRSG"),[1] which entered an Administrative Order on Consent ("AOC") with Michigan requiring KRSG to perform a site-wide remedial investigation and feasibility study. R. 737-1 (1990 AOC) (Page ID #21681–715); *Kalamazoo River Study Grp. v. Rockwell Int'l Corp.*, 355 F.3d 574, 578 (6th Cir. 2004).

In 1995, KRSG initiated a cost-recovery action under CERCLA § 107,[2] amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), seeking response costs from several firms that it alleged had released PCBs into the Kalamazoo River. R. 741-12 (KRSG Complaint) (Page ID #22142–209). IP was not one of the named firms.[3] KRSG

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[1] Fort James Corporation, another paper company, later joined the KRSG.

[2] All section references in this opinion are to CERCLA as amended, which appears at 42 U.S.C. § 9601 *et seq*.

[3] The complaint named many entities as defendants: Eaton Corp.; Rockwell International, Inc.; Benteler Industries, Inc.; Upjohn Co.; Menasha Corp.; Wells Aluminum Corp.; Hercules, Inc.; and Rock-Tenn Co. *Kalamazoo River Study Grp. v. Rockwell Int'l*, 107 F. Supp. 2d 817, 818–19 & n.1 (W.D. Mich. 2000).

sought a declaratory judgment that the defendants were liable for "any response costs that may be incurred by Plaintiff in the future in connection with the Site." *Id.* at 2 (Page ID #22143). Two defendants counterclaimed, asserting that the KRSG members were responsible for the PCB contamination at the site. R. 741-17 (KRSG 1998 Order at 6) (Page ID #22287). The district court held a trial concerning both sides' claims. *Id.* Its opinion, issued in 1998, found the KRSG members—including GP—liable "for the PCB contamination of the [relevant site]." *Id.* at 10, 12 (Page ID #22291, 22293). The same opinion also found one defendant—Rockwell—"liab[le] for the release of PCBs to the Site." *Id.* at 42 (Page ID #22323); *see also Kalamazoo River Study Grp. v. Rockwell Int'l*, 107 F. Supp. 2d 817, 819 (W.D. Mich. 2000).

In its 1998 opinion, the district court found another defendant—Eaton—not liable for any PCB discharges from its Battle Creek facility. R. 741-17 (KRSG Order at 31) (Page ID #22312). We reversed the district court's decision as to Eaton's liability, holding that the district court applied the incorrect legal standard. *Kalamazoo River Study Grp. v. Menasha Corp.*, 228 F.3d at 650. On remand, the district court found that Eaton was liable for the PCB releases at some facilities along the Kalamazoo River, but not others. *Kalamazoo River Study Grp. v. Eaton Corp.*, 142 F. Supp. 2d 831, 859 (W.D. Mich. 2001) (finding Eaton liable for PCB releases at Battle Creek and Kalamazoo facilities but not liable at its Marshall facility).

The 1998 KRSG judgment came at the end of the liability phase of the trial between KRSG and the defendants it sued. *Kalamazoo River Study Grp. v. Rockwell Int'l*, 107 F. Supp. 2d at 819. After the 1998 judgment and the Sixth Circuit's partial reversal, the district court proceeded to allocate response costs among the three groups that had been held liable: KRSG, Rockwell, and Eaton. In 2000, the district court declined to allocate any response costs to Rockwell, reaffirming the KRSG members' responsibility for "*the entire cost of response activities relating to* the NPL site" on this stretch of the Kalamazoo River. *Id.* at 840 (emphasis added). We affirmed this decision. *Kalamazoo River Study Grp. v. Rockwell Int'l Corp.*, 274 F.3d 1043 (6th Cir. 2001). In a subsequent decision, the district court held Eaton liable for a small portion of the costs of investigating parts of the NPL site but wrote "that it would not be equitable to require Eaton to share in the remediation of the NPL Site." *Kalamazoo River Study Grp. v. Eaton Corp.*, 258 F. Supp. 2d 736, 760 (W.D. Mich. 2003). We again affirmed. *Kalamazoo River Study Grp. v. Rockwell Int'l Corp.*, 355 F.3d at 578.

To sum up, the federal district court confirmed the KRSG members' liability for remediation costs three times: in 1998, 2000, and 2003.

C. Today's Dispute

Now, we turn to this case. In 2010, GP filed an action under §§ 107(a) and 113(f) against NCR and IP to recover its response costs involving the affected area. R. 1 (Compl.) (Page ID #1–33). GP later amended its complaint to add Weyerhaeuser as a defendant. R. 80 (First Am. Compl.) (Page ID #1202–

40). GP argued that IP and Weyerhaeuser were liable under § 107(a)(1) and (2) as successors to companies that owned and operated mills that discharged PCBs, and brought § 113(f) contribution claims against both firms. *Id.* at 28–38 (Page ID #1229–39); R. 1 (Compl. at 26–31) (Page ID #26–31). (Weyerhaeuser itself also owned a mill during the relevant time period.) (R. 80 (First Am. Compl. at 21) (Page ID #1222). GP alleged that NCR faced liability under §§ 107 and 113 because it arranged the disposal of PCB-containing substances at the affected area. R. 1 (Compl. at 20–25) (Page ID #20–25).

Weyerhaeuser, in its answer, did not contest that it owned a PCB-discharging facility at the NPL Site, while reserving the right to contest claims in the litigation and asserting twenty affirmative defenses. R. 105 (Weyer. Answer at 32, 55–57) (Page ID #1537, 1560–62). NCR denied liability. R. 29 (NCR Answer at 2) (Page ID #231). IP argued that even if its predecessor owned the Bryant Mill ("Mill") while it discharged PCBs, it was nonetheless not liable because it owned the property only as a secured creditor, which would shield it from CERCLA liability if true. R. 432 (Phase I Op. at 2) (Page ID #12727); § 101(20)(A).

After the first phase of a bifurcated trial, the district court found NCR liable as an "arranger" under CERCLA, and found IP liable as an owner, rejecting IP's claim that it fell within the secured-creditor exception. R. 432 (Phase I Op. at 3) (Page ID #12728).

After the phase I decision, the defendants (including IP and Weyerhaeuser) moved for summary judgment, arguing inter alia that GP's claims were

time-barred under CERCLA. R. 787 (SJ Op.) (Page ID #24179-97); R. 736 (Weyer. MSJ) (Page ID #21665–78); R. 739 (IP & NCR MSJ) (Page ID #21831–61). The district court observed that CERCLA imposes a three- year statute of limitations for § 113(f) contribution claims, and that the limitations period begins to run when a party receives a "judgment" in a CERCLA action or enters an "administrative settlement" concerning such an action. R. 787 (SJ Op. at 10) (Page ID #24188). The defendants identified four events that may have caused the statute of limitations to begin running: the 2003 declaratory judgment from the KRSG litigation, described above; the 1990 AOC and a 2007 Order by Consent that modified some of the 1990 AOC's terms; three Administrative Settlement Agreements and Orders on Consent ("ASAOCs") entered into between 2006 and 2007; and a 2009 ASAOC and consent decree. *Id.* at 10–18 (Page ID #24188–96).

The district court found that the claims concerning the 2006–07 ASAOCs and one sub-claim from the 1990 AOC were time-barred, but that the remaining claims were not. *Id.* at 18 (Page ID #24196). The district court's analysis concerning the ASAOCs and the AOC involved determining whether the agreements qualified as "administrative settlements" for CERCLA's purposes, an issue that the parties have not appealed. *Id.* at 12–18 (Page ID #24190–96). By contrast, the district court's analysis of the KRSG judgment, at issue in this appeal, concerned "traditional res judicata principles." *Id.* at 11 (Page ID #24189).

After the lengthy phase II trial, the district court apportioned forty percent of liability to GP, forty

percent to NCR, fifteen percent to IP, and five percent to Weyerhaeuser. R. 921 (Phase II Op. at 64) (Page ID #34699). All four parties appealed, but GP, NCR, and Weyerhaeuser dismissed their appeals, leaving IP as the sole appellant. R. 969 (Dismissal of NCR App. at 3) (Page ID #35328) (App. No. 18–1805); R. 971 (Dismissal of Weyer. App. at 3) (Page ID #35333) (App. No. 18–1858); R. 972 (Dismissal of GP App. at 4) (Page ID #35337) (App. No. 18–1818). Weyerhaeuser, however, remained as an appellee in IP's appeal, which is now before us.

Only two issues remain on appeal: whether the 1998, 2000, or 2003 judgments of liability in the KRSG litigation started CERCLA's statute of limitations to run for contribution claims; and whether IP owned the Mill from 1956–66 only as a "secured creditor." The district court answered both in the negative. We reach the first question alone and reverse the district court.

II. ANALYSIS

CERCLA "promote[s] 'the timely cleanup of hazardous waste sites' and [] ensure[s] that the costs of such cleanup efforts [a]re borne by those responsible for the contamination." *CTS Corp. v. Waldburger*, 573 U.S. 1, 3 (2014) (quoting *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009)).

CERCLA imposes liability on four types of Potentially Responsible Parties ("PRPs"):

> (1) the owner and operator of a vessel or a facility,
>
> (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,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances . . . at any facility . . ., and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . . .

§ 107(a)(1)–(4).

CERCLA contains several provisions that distribute cleanup costs among the relevant parties. *See Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757, 762 (6th Cir. 2014). Section 107(a)(4)(B) permits a private party to recover from another the "necessary costs of response incurred by any other person consistent with the national contingency plan."

Section 113(f)(1) creates a contribution right for any party sued under §§ 106 and 107. § 113(f)(1); *Hobart*, 758 F.3d at 762. That section provides:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title [§ 107(a)], during or following any civil action under section 9606 of this title [§ 106] or under section 9607(a) of this title.

§ 113(f)(1). The Supreme Court has held that "contribution" here means the "tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault." *United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 138 (2007) (quoting BLACK'S LAW DICTIONARY 353 (8th ed. 2004)). The Court also held that § 113(f) authorizes contribution suits before or after "the establishment of common liability." *Id.* at 138–39. Section 113(f) contribution claims are available only to parties that have first been sued under §§ 106 or 107(a). *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 160–61 (2004).

These two statutory rights under §§ 107 and 113(f) are mutually exclusive, providing causes of action "to persons in different procedural circumstances." *Atl. Rsch. Corp.*, 551 U.S. at 139 (quoting *Consol. Edison of N.Y., Inc. v. UGI Utils., Inc.*, 423 F.3d 90, 99 (2d Cir. 2005)). The Supreme Court explained the difference: "costs incurred voluntarily are recoverable only by way of § 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under § 113(f)." *Id.* at 139–40 n.6.

In *Hobart*, we held that "PRPs must proceed under § 113(f) if they meet one of that section's statutory triggers." 758 F.3d at 767. This is because of CERCLA's structure. For one thing, because § 107(a)(4)(B) "likely provides a broader avenue for recovery, and has a longer limitations period than § 113(f)," it provides a more attractive option for PRPs. *Id.* (internal citations omitted). For another, the Supreme Court has held that PRPs may bring

actions under § 113(f) only when they "demonstrate that certain preconditions [a]re met." *Id.* (citing *Cooper Indus.*, 543 U.S. at 165–66). Putting those two pieces together, we concluded that if a party *may* bring a suit under § 113(f), it *must* do so. *Id.* Otherwise, "[t]here would be no reason to limit § 113(f)'s availability" to parties who have faced §§ 106 or 107 actions as the Court did in *Cooper Industries*, because § 107(a)(4)(B) would always offer a (more attractive) fallback option. *Id.*

Not only do §§ 107 and 113(f) provide different avenues of recovery, but also they provide different statutes of limitations for their different types of actions:

> Cost-recovery actions under § 107(a)(4) must be brought within three years "after completion of the removal action" or "for a remedial action, within [six] years after initiation of physical on-site construction." § 113(g)(2). Actions for contribution under § 113(f), however, must be filed within three years of "(A) the date of judgment in any action under [CERCLA] for recovery of such costs or damages, or (B) the date of an administrative order under [§ 122(g)] (relating to de minimis settlements) or [§ 122(h)] (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages." § 113(g)(3).

Id. at 763; *see also RSR Corp. v. Com. Metals Co.*, 496 F.3d 552, 556–58 (6th Cir. 2007).

SARA, which amended CERCLA, contains "legislative history [that] indicates that . . . '[t]he [§ 113(f)] statute of limitations begins to run at the

date of judgment for recovery of response costs . . . .'" *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 15 (1st Cir. 2004) (quoting H.R. Rep. No. 99-253, pt. 1, at 79 (1985)). "The statute of limitations, however, is not triggered for costs not contained within the judgment." *Id.*

A. Statute of Limitations

This appeal requires us to determine whether the declaratory judgment on liability issued in the KRSG litigation commenced the running of CERCLA's statute of limitations. "The principal purpose of [CERCLA's] limitations periods in this setting is to ensure that the responsible parties get to the bargaining—and clean-up—table sooner rather than later." *RSR Corp.*, 496 F.3d at 559 (citing H.R. Rep. No. 99-253, pt. 1, at 80). "[W]e review de novo a district court's grant of summary judgment." *Hobart*, 758 F.3d at 765. Questions of law regarding whether a complaint was filed outside of the statute of limitations similarly receive de novo review. *City of Wyandotte v. Consol. Rail Corp.*, 262 F.3d 581, 589 (6th Cir. 2001).

1. CERCLA's Statute of Limitations

IP argues that GP is time-barred from bringing its contribution claim against IP because of a declaratory judgment issued against GP in 1998. We agree.

a. The Parties' Positions

As noted above, in 1995, KRSG sued several parties under § 107 for recovery of costs related to PCB contamination of the affected area. R. 741-12 (KRSG Compl.) (Page ID #22142–72). As a member of KRSG, GP sought a declaratory judgment for "any response costs that may be incurred by Plaintiff in the future in

connection with the Site." *Id.* at 2 (Page ID #22143). Some defendants counterclaimed, resulting in three separate judgments finding the KRSG members, including GP, liable and responsible parties under § 107 for the PCB contamination at the affected site. R. 741-17 (KRSG 1998 Order & Partial J. at 12) (Page ID #22293); *Kalamazoo River Study Grp. v. Rockwell Int'l*, 107 F. Supp. 2d at 840 (2000); *Kalamazoo River Study Grp. v. Eaton Corp.*, 258 F. Supp. 2d at 760 (2003). IP argues that GP's current action filed in 2010 is untimely because these judgments marked the commencement of the three-year statute of limitations period for all contribution actions for the entire cost of cleaning up the site. IP Br. at 32–33; *see* R. 787 (SJ Op. at 5) (Page ID #24183).

GP argues that these declaratory judgments do not impose recoverable costs or damages, but instead fix only liability; as a result, GP argues, declaratory judgments do not cause the statute of limitations period to begin to run for contribution claims. GP Br. at 19; *cf. Continental Cas. Co. v. Indian Head Indus., Inc.*, 941 F.3d 828, 835 (6th Cir. 2019) (stating, in the context of claim preclusion, "declaratory judgments are often prefaces to later actions for damages or an injunction."). But IP argues that the KRSG declaratory judgment in 1998 compelled GP to pay for "the entire cost of response activities relating to the NPL site" on this stretch of the Kalamazoo River. IP Br. at 32–33 (quoting *Kalamazoo River Study Grp. v. Rockwell Int'l*, 107 F. Supp. 2d at 840). According to IP, although those costs were not yet fixed, GP's liability was fixed no later than June 2003, the date of the third district court judgment in the KRSG litigation. IP Reply Br. at 4.

b. The District Court's Reasoning

The district court briefly discussed these arguments in its 2015 opinion, referencing general res judicata principles and citing no CERCLA cases. R. 787 (SJ Order at 11–12) (Page ID #24189–90). The district court declined to apply § 113's statute of limitations because doing so would "effectively bar some contribution claims even before they would normally accrue," which it was unwilling to do "in the absence of precedent . . . that would lend support to such an expansive interpretation." *Id.* at 12 (Page ID #24190).

c. Our Analysis

The limitations issue has two complicating factors. First, IP and Weyerhaeuser were not parties to the KRSG litigation. GP therefore argues that even if the KRSG litigation did start the statute of limitations to run with regards to some PRP's, it did not do so with regards to IP and Weyerhaeuser. GP Br. at 17–19. Second, the 1998 KRSG judgment awarded no specific amount of damages or costs, instead resulting in simply a determination of liability. *Id.* at 20. GP argues that this means that the judgment is not an action "for *recovery* of such costs or damages," because the judgment awarded no response costs or damages. *Id.* at 19 (quoting § 113(g)(3)(A)).

It does not matter for § 113(g)'s purposes whether the particular contribution action is pursued against a party to the liability-assigning judgment, or against a non-party to that judgment. As we explained in *RSR*, "Rather than focus on *who* settled the cost-recovery action, in short, the statute asks us to focus on *what* was settled." 496 F.3d at 557. Although we have not directly addressed this issue beyond *RSR*, we

believe that § 113(g)'s statute of limitations should bar an action against a nonparty beyond the statutory period. In *ASARCO LLC v. Shore Terminals LLC*, the Northern District of California noted that CERCLA, by referencing "*any* response costs or damages," "speak[s] of the response costs and damages that were part of the settlement, not whether the settlement involved a specific party." No. C 11-01384, 2012 WL 2050253, at *5–6 (N.D. Cal. June 6, 2012). We agree with this reasoning, which matches our earlier recognition that "[t]he principal purpose of limitations periods in th[e CERCLA] setting is to ensure that the responsible parties get to the bargaining—and clean up—table sooner rather than later." *RSR Corp.*, 496 F.3d at 559.

We next consider whether the 1998 declaratory judgment's bare-bones nature prevented it from beginning the running of § 113(g)(3)(A)'s statute of limitations.

First, the statute's text suggests that a declaratory judgment determining liability starts § 113(g)(3)(A)'s statute of limitations running. Section 113(g)(2) explains that, in any § 107 action (like the one between KRSG and their multiple defendants that produced the initial judgment of liability), "the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages." § 113(g)(2). Immediately after § 113(g)(2) discusses this "declaratory judgment on liability for *response costs*," § 113(g)(3) provides that "[n]o action for contribution for *any response costs* or damages may be commenced more than 3 years after . . . the date of judgment in any action under this

chapter for recovery of *such costs* or damages." § 113(g)(3)(A) (emphasis added). These three italicized references to a judgment for "response costs" strongly suggest that the "declaratory judgment on liability for response costs" mentioned in § 113(g)(2) can also serve as a "judgment in any action under this chapter for recovery of such costs or damages" causing the statute of limitations to begin to run, as described in § 113(g)(3)(A). Because the district court in 1998 issued such a judgment, the statute of limitations started to run on that date.

To bolster this reading, we next look to our precedents. Our caselaw does not indicate whether a bare declaratory judgment begins the running of CERCLA's statute of limitations for contribution claims. We have, however, answered a similar question arising in the context of a nearby CERCLA provision: the statute of limitations that begins to run by entry of a judicially approved settlement. § 113(g)(3)(B). In *RSR Corp. v. Commercial Metals Co.*, RSR had entered a settlement agreement with the government that required RSR to "undertake . . . further response actions to the extent necessary" to clean up a contaminated site. 496 F.3d at 554 (quotation marks omitted). Over three years later, RSR filed a CERCLA contribution action against Commercial Metals, which the district court dismissed on statute-of-limitations grounds. *Id.* Despite RSR arguing, like GP, that this consent decree did not cover future costs, we affirmed this dismissal, stating that "Because the consent decree established RSR's liability, its contribution action regarding those 'costs' accrued on the date of the consent decree . . . and expired three years later." *Id.*

at 558. *RSR* thus established a clear rule for CERCLA's statute of limitations in the settlement context: when a party assumes an obligation to pay response costs, including future costs, the statute of limitations for contribution actions regarding those response costs begins to run. And that is the case even when the specific amount owed in response costs is not yet known, or when all parties who could face contributory liability are not yet identified.

Many of the same factors that *RSR* evaluated in the settlement context also apply in the context of a judgment. For instance, with both settlements and judgments, "The principal purpose of limitations periods in this setting [of CERCLA contribution actions] is to ensure that the responsible parties get to the bargaining—and clean-up—table sooner rather than later." *RSR Corp.*, 496 F.3d at 559 (citing H.R. Rep. No. 99-253, pt. 1, at 80). *RSR* also highlighted a concern that applies here: if the statute of limitations does not begin running at the entry of the settlement/judgment, it is not clear when the limitations period *would* begin running. *See id.* at 557.

Of course, there are important contextual differences between judicially approved settlements and declaratory judgments. The primary one is that of consideration. When a party settles a CERCLA claim with the government, it gains a bargained-for reprieve from future government enforcement actions. This was central to *RSR*'s resolution. RSR had argued that it "could not have resolved its liability to the United States before the completion of the remedial action." *RSR Corp.*, 496 F.3d at 558. We rejected that claim because RSR had promised to assume *"all* liability (vis-a-vis the United States) for future

remedial actions" "in exchange for the United States' covenant not to seek further damages." *Id.* RSR opted into a settlement to secure peace for itself; here, GP could not engage in the same economic calculation prior to receiving the declaratory judgment. As a result, we cannot reflexively apply *RSR*'s holding to § 113(g)(3)(A)'s statute of limitations.

We next turn to other circuits' efforts to solve this problem. No circuit has confronted a case concerning the commencement date for the running of the statute of limitations when a party faces a bare declaratory judgment of liability. GP points us to several allegedly analogous cases, especially *American Cyanamid Co. v. Capuano*. In *American Cyanamid*, the First Circuit held that the phrase "such costs or damages" in § 113(g)(3)(A) referred only to "the costs or damages contained in the 'judgment' mentioned" in that subparagraph, not to "any response costs or damages that could arise in the future." 381 F.3d at 13. *American Cyanamid* concerned a declaratory judgment that had held a party "jointly and severally liable for all future costs of removal or remedial action incurred" by the government at a particular site. *Id.* at 12. The First Circuit held that a "declaratory judgment is binding on any subsequent actions to recover response costs or damages, but it is not itself a judgment for the recovery of such costs or damages." *Id.* at 13.

This language, which seems favorable to GP, weakens substantially when placed in context. *American Cyanamid* involved judgments for two separate types of environmental remediation: one litigation concerning soil remediation, and a separate investigation concerning groundwater remediation.

381 F.3d at 10–11. The court had to consider whether a declaratory judgment entered as to soil remediation caused the statute of limitations to begin running as to contribution regarding groundwater remediation. *Id.* at 12–13; *see also ASARCO, LLC v. Celanese Chem. Co.*, 792 F.3d 1203, 1214 (9th Cir. 2015) (distinguishing *American Cyanamid* on these grounds, and rejecting the broad proposition that CERCLA's limitations period does not begin running after a consent decree until costs under that decree "bec[o]me fixed"). Although *American Cyanamid* occasionally uses broader language, this distinction remains crucial: *American Cyanamid* did not deal with a case in which one declaratory judgment purported to assign sitewide liability.[4]

And in *Arconic, Inc. v. APC Investment Co.*, the Ninth Circuit held that a settlement that did not impose "any response costs or remedial obligations" did not cause the limitations period to begin running "merely because it foresaw the remediation of the" affected area. 969 F.3d 945, 952 (9th Cir. 2020). For two reasons, this case does not cleanly apply: first, it concerns a settlement, not a judgment. *Id.* at 951. Second, like *American Cyanamid*, the earlier settlement in *Arconic* did not cover the claims at issue in the later case. *Id.* at 952.

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[4] To be sure, *American Cyanamid* did endorse the position that, when "there has been no expenditure or fixing of costs for which a PRP may seek contribution," CERCLA's statute of limitations does not begin to run. 381 F.3d at 12 (quotation omitted). This position, rejected in *ASARCO LLC*, does not bind us, and we think that *RSR*'s language outweighs any persuasive value it may have.

We believe that the soundest course is to apply the rule from *RSR Corp.* and hold that the 1998 bare declaratory judgment caused the limitations period to begin to run. CERCLA aims to bring parties to the clean-up table as soon as possible. *See RSR*, 496 F.3d at 559. CERCLA provides that the limitations period begins to run on "the date of judgment in any action under [CERCLA] for recovery of such [response] costs or damages." § 113(g)(3)(A). Here, the KRSG decision issued in 1998 imposed such response costs or damages, compelling GP as a member of KRSG to pay for "the entire cost of response activities relating to the NPL site," i.e., PCB cleanups on this stretch of the Kalamazoo River. *Kalamazoo River Study Grp. v. Rockwell Int'l*, 107 F. Supp. 2d at 840 (2000). True, GP did not yet have a bill in hand for response costs or damages. But as we held in *RSR*, GP had received the responsibility to pay for "as-yet-unfinished" remedial work. 496 F.3d at 557. The 1998 declaratory judgment on liability therefore started the contribution clock ticking.

As described above, the district court in the KRSG litigation issued three separate declaratory judgments discussing the KRSG members' liability for response costs at the affected site. R. 741-17 (KRSG 1998 Order & Partial J. at 12) (Page ID #22293); *Kalamazoo River Study Grp. v. Rockwell Int'l*, 107 F. Supp. 2d at 840 (2000); *Kalamazoo River Study Grp. v. Eaton Corp.*, 258 F. Supp. 2d at 760 (2003). The district court here understood IP to argue that the third judgment, issued in 2002 and amended in 2003, caused the statute of limitations to begin to run. R. 787 (SJ Op. at 11) (Page ID #24189). At one point, the district court seemingly endorsed this position itself.

Id. at 5 (Page ID #24183) ("In 2003, the district court in that case entered judgment holding the [KRSG] liable for all past and future remediation costs associated with the [site].").

We read IP as arguing that the 1998 judgment started the statute of limitations. In IP's motion for summary judgment, it argued that the 1998 judgment "h[eld] GP liable for past and future response costs pursuant to the defendants' §§ 107 and 113 counterclaims." R. 739 (IP MSJ at 18) (Page ID #21853). IP also wrote that by 2010, "more than 12 years" had passed since the first § 107 judgment against GP. *Id.* at 18–19 (Page ID #21853–54). IP seems to maintain this position on appeal, arguing that "the court in the KRSG Litigation found GP *liable* on Eaton's and Rockwell's §§ 107 and 113 counterclaims for *all past and future* response costs" in 1998. IP Br. at 32. *But see* IP Br. at 33 (calling its statute-of-limitations argument "consistent with what the district court found in this case—namely, that in 2003, the court in the KRSG litigation" found GP, as a member of KRSG, liable for all past and future remediation costs at the site).

We agree with IP's conclusion, and conclude that the 1998 judgment caused the statute of limitations to begin to run. First, and most importantly, the 1998 order provides that "judgment as to liability is entered . . . against Plaintiff KRSG on Defendants' counterclaims." R. 741-17 (1998 Order at 1) (Page ID #22281). The 2000 and 2003 judgments simply allocated liability owed by various defendants and did not affect the KRSG members' already-fixed liability. Additionally, we have previously suggested, albeit obliquely, that the 1998 judgment assigned liability.

Kalamazoo River Study Grp. v. Rockwell Int'l, 274 F.3d at 1046 ("At the liability stage [in 1998] . . . [t]he district court determined that the KRSG and Rockwell had both released a sufficient amount of PCBs to face liability . . . .").

We note, however, that in this case it does not matter which judgment caused the statute of limitations to begin to run, because each of the judgments identified by IP and the district court issued more than three years before GP brought this action in 2010.

Because the 1998 KRSG judgment caused the statute of limitations to begin to run, the three-year statute-of-limitations period concluded before GP filed its 2010 action, and we must dismiss GP's action on limitations grounds.

2. The Statute of Limitations' Application to Weyerhaeuser

We next address whether the dismissal of GP's contribution action against IP also requires dismissal of the action against Weyerhaeuser, even though Weyerhaeuser dismissed its own appeal from the judgment in this matter. We conclude that § 113(g)(3) also bars the contribution claim against Weyerhaeuser.

Weyerhaeuser makes two arguments. First, it argues that time bars apply to all similarly situated defendants when the plaintiff had notice of the issue. Second, it argues that it raised the statute of limitations defense early in the litigation. We find both arguments compelling.

We apply time bars to all similarly situated defendants so long as the plaintiff was "on notice that,

to survive summary judgment, it had to come forward with evidence showing that the statute of limitations did not bar its [] claims." *Grand Rapids Plastics, Inc. v. Lakian*, 188 F.3d 401, 407 (6th Cir. 1999) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986)) (dismissing claim on statute-of-limitations ground even with respect to defendant who did not raise statute-of-limitations defense); *see also Thomas v. Mahoning Cnty. Jail*, No. 16-3495, 2017 WL 3597428, at *2 (6th Cir. Mar. 21, 2017) (order) (dismissing claim on statute-of-limitations ground when other movants advanced the defense). Here, IP and NCR moved for summary judgment on statute-of-limitations grounds, citing inter alia the 1998 KRSG judgment. R. 739 (Mem. of Law of NCR & IP re: MSJ) (Page ID #21831–61).[5] This put GP on notice that it needed to refute the statute-of-limitations argument to survive summary judgment. *See* R. 761 (GP Resp. re: Statute-of-Limitations MSJ at 11–18) (Page ID #23857–64). Because Weyerhaeuser is in the same factual position as IP for purposes of the statute-of-limitations issue, and because IP raised the issue and gave GP an opportunity to respond before the district court, the time bar applies to GP's claims against Weyerhaeuser as well.

Additionally, Weyerhaeuser may benefit from today's statute-of-limitations ruling because Weyerhaeuser raised a statute-of-limitations defense, albeit briefly. Weyerhaeuser's answer included 20

[5] Weyerhaeuser's Motion for Summary Judgment on statute-of-limitations grounds concerned two ASAOCs that GP and another KRSG member entered with the EPA in 2007. R. 736 (Weyer. MSJ) (Page ID #21665–78).

affirmative defenses, one of which read, "GP's claims are barred in whole or in part by the applicable statutes of limitations or waiver." R. 105 (Weyer. Answer, Affirmative Defenses, Countercl., and Cross-Cls. in Resp. to GP's First Am. Compl. at 56) (Page ID #1561). And later in the 2010 litigation, in 2013, GP and Weyerhaeuser entered a stipulation that did "not limit the rights of each party to litigate any other issues." R. 369 (Order Granting Revised Stip. on Phase I CERCLA Liab. at 3) (Page ID #9012). Weyerhaeuser argues that its brief invocation of the statute of limitations sufficed to put GP on notice of the issue. Weyer. Br. at 40. We agree. *See Herrera v. Churchill McGee, LLC,* 680 F.3d 539, 546–47 (6th Cir. 2012).

For those two reasons, CERCLA's statute of limitations applies to GP's claim against Weyerhaeuser.

3. GP's § 107 Claim

GP separately argues that, even if IP is correct and GP's § 113 contribution claims are barred by the 1998 KRSG judgment, it can still prevail on some of its other claims, which it has brought under § 107. Our decision today does not affect GP's § 107(a) claims that fall outside of the 1998 KRSG judgment's broad scope.

As discussed above, *Hobart* analyzed the interplay between §§ 107 and 113, concluding that "if a party is able to bring a contribution action, it must do so under § 113(f), rather than § 107(a)." 748 F.3d at 767. Section 107(a) provides the avenue for parties who incur costs on their own, and § 113(f) is the statutory tool to recover contribution for costs imposed via settlement or judgment. *Id.* at 762. And, as we

concluded above, the 1998 KRSG judgment started § 113(g)(3)(A)'s statute of limitations running and established GP's right to seek contribution "for the PCB contamination of the NPL site." R. 741-17 (1998 Order at 12) (Page ID #22293).

GP notes, correctly, that a party with a contribution claim under § 113(f) for costs from one judgment may later bring a § 107(a) claim for costs not contained within the judgment that led to the § 113(f) claim. GP Br. at 24. But as IP notes, and as we have already discussed, the 1998 KRSG judgment had a broad scope, covering "the costs of response activities for the NPL Site." R. 741-17 (1998 Order at 12) (Page ID #22293); IP Reply at 12–13. GP may bring § 107(a) claims for costs that fall outside of that judgment, but the judgment's breadth suggests that identifying such costs will prove difficult in practice.

GP therefore cannot pursue its § 107(a) claims for any costs that fall within the scope of the 1998 KRSG judgment.

B. Secured-Creditor Exception

Because we conclude that the statute of limitations on GP's contribution claim has run, we need not address IP's arguments concerning whether CERCLA's secured-creditor exception applies.

III. CONCLUSION

When the district court entered the 1998 declaratory judgment, CERCLA's statute of limitations for contribution claims began running. Because the district court here did not enforce that statute of limitations, we **REVERSE** its judgment and **REMAND** for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GEORGIA-PACIFIC CONSUMER PRODUCTS LP, FORT JAMES CORPORATION, and GEORGIA-PACIFIC LLC,

Plaintiffs,

v.

NCR CORPORATION, INTERNATIONAL PAPER CO., and WEYERHAEUSER CO.

Defendants. /

CASE NO. 1:11-CV-483

HON. ROBERT J. JONKER

PHASE II BENCH TRIAL OPINION & ORDER

I. INTRODUCTION

This case addresses responsibility under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") for clean up of the Kalamazoo River and Portage Creek in Southwest Michigan among four parties: Georgia Pacific, International Paper, and Weyerhaeuser, all paper companies with mills on the river–and NCR, the developer and a manufacturer of carbonless copy paper ("CCP").

The river area is contaminated with polychlorinated biphenyls ("PCBs"), a hazardous

substance under CERCLA. It is contaminated because the paper mills in the Kalamazoo River Valley discharged PCBs as part of their waste streams in the mid to late 20th century. The PCBs were in the mills' waste streams because they recycled wastepaper as a source of pulp, and some of that wastepaper was NCR's CCP which contained PCBs. More specifically, from 1954 to 1971 ("the production period"), NCR's CCP was made using Aroclor 1242, a source of PCBs. To address the potential harm of PCBs in the environment, the U.S. Environmental Protection Agency ("EPA") has declared 80 miles of the river and portions of the surrounding area a Superfund Site under CERCLA.

The case involves complex legal and factual questions, and the Court bifurcated the trial. In Phase I, the Court determined that all of the parties are potentially responsible parties under CERCLA. (ECF No. 432). Georgia Pacific, Weyerhaeuser, and International Paper are liable as owners or operators of mills. 42 U.S.C. § 9607(a)(1)–(2). NCR is liable as an arranger. 42 U.S.C. § 9607(a)(3). In Phase II, the parties ask the Court to determine the scope of costs at issue, whether the costs are divisible, and how to allocate costs among the parties. It was not a short task; 20 days of trial and thousands of exhibits were used to present the parties' positions on the issues. Based on the parties' presentations, the post-trial briefs, and all other matters of record, the Court renders its decision as to the parties' share of responsibility below. The Court concludes each party has an equitable share of responsibility for past costs and allocates those costs in the following overall percentages: Georgia Pacific 40%; NCR 40%;

International Paper 15%; and Weyerhaeuser 5%. The Court determines there is too much uncertainty about the allocation of appropriate future costs at this time, though a declaratory judgment regarding liability for these costs will enter as required by statute.

II. FACTUAL BACKGROUND

A. Overview of Operational History

The events at the heart of this case date back several decades. Much of the information from the production period is no longer readily available. Many potential witnesses, such as employees and officers of the mills, are no longer around to share memories of long-ago events. Many operational records have been lost or discarded in the intervening years of mergers, bankruptcies, and general business practices. The parties presented a plethora of documents, experts, and mathematical models in an effort to fill in the blanks. The trial testimony and exhibits provide exhaustive background on many topics, but a streamlined narrative is more fitting to describe the basis of the Court's decision. Ultimately, the finder-of-fact must draw inferences from the available evidentiary data points to present a coherent basis for decision.

1. The Mills

a. The De-Inking Process in General

The paper mills in this case were all engaged, at one time or another, in the business of recycling NCR's CCP. During the production period these mills operated de-inking mills, which meant that instead of using virgin wood as its feedstock, the mills used recycled paper as their primary source of fiber. Though the exact recycling process differed slightly

from mill to mill, Dr. Woodard explained that generally the wastepaper was put through a de-inking process that used a combination of heat, chemicals, and agitation to remove inks from the paper fibers. (ECF No. 839, PageID.28479–28482). The resulting de-inked paper fibers provided the basis for new paper, much of it fine paper like what this opinion is likely printed on. (*Id.*).

Dr. Wolfe testified that not all of the inputs to the papermaking process at the de-inking mills ended up as sellable paper products. Instead, the de-inking process resulted in two "streams." (ECF No. 838, PageID.28228–28229). One stream contained the paper fibers that ultimately went on to become new paper. The other stream contained the sizeable amount of waste discharge from the recycling process. This effluent contained a mix of unusable paper fibers, ink, clay, caustic soda, and trace metals. Testimony at trial established that the paper mills sometimes discharged the waste directly to the Kalamazoo River or to Portage Creek, but that the mills also used primary, and then secondary, treatments for its effluent. Throughout the production period the effluent sometimes contained PCBs from NCR's CCP.

Dr. Wolfe also testified that during the de-inking process gelatin capsules containing the PCBs could rupture and release PCBs. He explained that PCBs are hydrophobic, and would primarily attach to the surface area of solids within the effluent. The PCBs could be released at several different points. The capsules could rupture during the de-inking process, or the capsules could remain intact but release PCBs through diffusion. Some of the capsules could also remain intact, but degrade after being discharged in

the effluent. When the capsules degraded in the environment, they would release PCBs into the river water and sediment. (ECF No. 838, PageID.28228–28229).

b. The Kalamazoo River Valley Mills Connected to this Case

There were a little over a dozen paper mills in the Kalamazoo River Valley that operated at least for some time during the production period. Below, the Court highlights those mills that are at the center of the case.

i. The Kalamazoo Paper Company Mill

The Kalamazoo Paper Company ("KPC") operated a large mill along the Kalamazoo River during the production period. Georgia Pacific later acquired KPC, so Georgia Pacific is a responsible party in this case as the owner and operator of the KPC mill. The KPC mill was one of the largest de-inking mills on the Kalamazoo River. Until 1954, the waste from the mill was discharged directly into the river. (*See* Tx. 11464).[1] At that time, KPC started operating a clarifier, which is a form of primary treatment that allowed residual solids in the mill's effluent to settle. The settled residual solids were then removed to settling ponds and, ultimately, to nearby landfills adjacent to the Kalamazoo River. (Tx. 4691 at -046). In 1967, the mill connected to the Kalamazoo Water Reclamation Plant for secondary treatment of its wastewater. Secondary treatment typically involves

[1] "Tx" refers to the trial exhibits in this case. Where possible the Court refers to the specific page of the exhibit using the last three digits of the Bates number appearing on the exhibit or, if no Bates number is provided, the sequential pdf page.

using oxygenation to encourage biological breakdown of the compounds that remain in wastewater after primary treatment.

ii. The King Mill

A second major de-inking paper mill, the King mill, was located across the Kalamazoo River from the KPC mill. The King mill produced similar products in similar quantities to the KPC mill. It therefore had a similar output of wastes, both to the Kalamazoo River and to nearby landfills. Prior to 1955, wastewater from the King mill was discharged directly to the Kalamazoo River. (Tx. 4877 at -691). Thereafter the mill operated a clarifier. (*Id.* at -696). The mill ceased its de-inking operations in 1965 and shut down completely in 1971. (*Id.* at -732). The King mill was owned and operated by Allied Paper Company, which has since gone bankrupt.

iii. The Bryant Mill

The Bryant mill was the third large de-inking mill in the area. The Bryant mill was owned by the St. Regis Company, which was later acquired by International Paper. St. Regis owned and operated the Bryant mill until 1956, when it leased the mill to the Allied Paper Company. Allied then purchased the mill from St. Regis in 1966. International Paper is a responsible party in this litigation as owner of the mill while substantial PCB discharges were being made.

Unlike the KPC and King mills that sit on the banks of the Kalamazoo River, Bryant mill sits next to Portage Creek, a tributary to the Kalamazoo River. During the production period Portage Creek was dammed at Alcott Street which created a pond approximately 29 acres in size. (Tx. 6574 at 315). The

pond was colloquially known as the Bryant mill pond. A large portion of the discharges from the Bryant mill, including many of the discharges from the de-inking facility, were made into the mill pond. The pond had relatively tranquil water which meant that some of the suspended solids in the mill's effluent settled in the pond. Those solids that did not settle flowed down Portage Creek and into the Kalamazoo River, approximately three miles away. In a sense, the Bryant mill pond worked as a clarifier. The dam was sometimes lowered for various reasons, which meant that settled solids were sometimes stirred up and released downstream. After St. Regis had transferred ownership of the mill to Allied, the dam was lowered for a time in 1972 and then permanently in 1976, which meant that settled sediment, and PCBs, were scoured from the pond. The remaining contents of the pond were removed in a remedial action in 1998. (Tx. 6765).

Bryant mill added an actual primary treatment system in 1954, and connected to the Kalamazoo public sewage treatment system for secondary treatment in 1969. Settled residual solids from Bryant mill clarifiers were disposed of in nearby landfills.

iv. Plainwell Mill

The fourth mill in this case is the Plainwell mill, which is located downstream of the KPC and King mills on the Kalamazoo River, and downstream of the confluence of Kalamazoo River and Portage Creek. The Plainwell mill, also called the Simpson-Plainwell or the Hamilton mill, was a de-inking mill until 1963, when it switched to using virgin pulp as its primary

feed source. (ECF No. 840, PageID.28546). In 1954, the Plainwell mill began operating a primary treatment system for its effluent and thereafter experimented with secondary treatment over different time periods. Although the Plainwell mill had similar operations to the three mills discussed above, the mill operated at a smaller scale and produced substantially less paper as compared to the KPC, King, or Bryant mills.

The Plainwell mill was owned and operated between 1954 and 1970 either by Weyerhaeuser or by companies for which Weyerhaeuser has assumed liabilities. Accordingly, Weyerhaeuser is also a responsible party.

2. NCR and Carbonless Copy Paper

NCR is a multifaceted corporation that was based in Dayton, Ohio during the production period. In the early 1950s, NCR developed specialty paper that allowed people to write or type in duplicate without messy carbon sheets. NCR started selling this carbonless copy paper in 1954, and it became a profitable product line. NCR created CCP by creating an emulsion with tiny capsules of colorless ink. That emulsion was coated on the back of a sheet of paper. A second sheet of paper was coated on its front with a clay compound, then the two sheets of paper were put together. When a person wrote or typed on the paper, the pressure broke the tiny capsules and released the dye, which reacted with the clay to become dark and reproduce what was being written. Chris Wittenbrink testified at trial that the transfer solvent in the emulsion was made of PCBs, namely Aroclor 1242, that were purchased from the Monsanto company.

(ECF No. 852, PageID.29783). NCR would pay independent coating companies to put the emulsion on paper, and then buy the resulting paper that was then used to create finished products such as forms, receipts, and tickets.

(*Id.*).

In the CCP production process, a sizeable portion of the paper did not become finished product because it was trimmed away, had manufacturing defects, or was otherwise unusable. Spent forms were also included in waste streams after end users were finished with them. The unused or discarded material, called broke and trim, was sold to brokers of recycled paper, who would sell it to the de-inking mills to use as feedstock to produce new paper. Broke and trim CCP was used by mills as one component in mixes of different feedstock.

At first, CCP was not a good candidate for use as a feedstock because the de-inking process would rupture many of the tiny capsules and the ink inside would react with clays in the mixture. This tended to give the recycled paper produced from it a bluish tint. In response, NCR developed a process that allowed de-inking mills to wash away most of the capsules before they ruptured. The capsules containing PCBs were therefore mostly washed out with the wastewater. At the end of the production period, in 1971, NCR switched to a different emulsion to coat its CCP that did not contain PCBs.

3. The Kalamazoo River's Contaminants

PCBs were not the only substances the mills discharged in their waste effluents. Over the years, measurements of Total Suspended Solids (TSS) and

Biochemical Oxygen Demand (BODs) demonstrated significant loading to, and burden on, the Kalamazoo River and Portage Creek. Witnesses at the Phase II trial testified that during the production period both the Kalamazoo River and Portage Creek were heavily polluted. For example John Hesse described the surveys of Portage Creek he conducted as part of his work for the State of Michigan. He testified the creek appeared turbid, and had a consistency and color of a blueberry milkshake. (ECF No. 829, PageID.27581). For purposes of this litigation the Court concludes that PCBs are the contaminant of concern for this CERCLA site. (ECF No. 806, PageID.24937). NCR contends the TSS and BOD loading is at least relevant, both as it relates to determining the mills' relative contribution of PCBs to the Superfund Site and to the mills' culpability. The Court acknowledges these, and many other things, may well bear on overall equitable allocation. However, the Court accepts the testimony of the regulatory officials that PCBs are driving the cleanup costs.

Not all PCBs are the same. The Monsanto company produced and sold a range of PCBs in the United States. NCR purchased PCBs in the form of Aroclor 1242 (meaning the product contained an average amount of 42 percent chlorine) from Monsanto and used Aroclor 1242 to manufacture the emulsion for use in its CCP. In his deposition Dr. Vodden, a former Monsanto employee, testified that PCBs with lower chlorine content tend to be more volatile and break down relatively quickly in the environment. Higher chlorinated PCBs, such as Monsanto's Aroclor 1254 and Aroclor 1260, which are used extensively in electrical applications, are more stable. (ECF No. 875-

8). Aroclor 1242 was between these two poles. Dr. Vodden testified that once released into the environment, the lower chlorinated components could break down, leaving only the higher chlorinated components. Therefore, PCBs in the environment with a lower chlorine content can be consistent with an original profile of Aroclor 1254. (*Id.* at PageID.31271). Dr. Vodden's testimony is supported by an internal Monsanto study that found Aroclor 1242 residues resembled Aroclor 1254 / 1260. (ECF No. 856, PageID.30164 (citing Tx. 2240 at -379)).

NCR argues that up to a quarter of the PCBs in environmental samples have a profile consistent with higher chlorinated PCBs for which its CCP would not be responsible. The Court acknowledges the possibility of some contributions apart from CCP, but the Court concludes as a matter of fact that the vast majority of the PCBs are linked to CCP. Moreover, the Court is satisfied as a matter of fact and law that there is no proper basis for parsing out the PCBs that may be unrelated to the CCP. The costs of addressing the PCBs linked to CCP would not be materially lower even if there were some way to quantify and then divide any non-CCP sources of PCBs.

B. The Kalamazoo River Superfund Site

The CERCLA site has been studied by the state of Michigan and the federal government for decades. Mr. Hesse testified that in 1965, he worked with Dr. Knight to research the organic loadings in the river and the impact of those loadings on the river's health. (ECF No. 829, PageID.27537). Mr. Hesse returned to the area in the early 1970s to perform biological surveys and narrow down the source of PCBs that

were being discharged into Lake Michigan from the Kalamazoo River. (ECF No. 829, PageID.27543).

Studies of the river continued, and on May 5, 1989, the EPA proposed that the Kalamazoo River Superfund Site (the "Superfund Site") be placed on the National Priorities List ("NPL"). The EPA then listed the Site on August 30, 1991. (ECF No. 806, PageID.24937). In his deposition, James Saric, an EPA remedial project manager at the Superfund Site, testified that PCBs were the toxic substances used to evaluate whether the area should be placed on the NPL. When the area ultimately was listed, PCBs were in fact the substances that justified the listing. (ECF No. 875-10, PageID.31310–31311). The EPA further determined that the major historical source of PCBs in the Kalamazoo River were wastewater discharges from the paper industries. (ECF No. 875-10, PageID.31322; *see also* Tx. 2461 at -953).

The Superfund Site in total includes approximately eighty miles of the Kalamazoo River (from Morrow Dam to Lake Michigan) and roughly three miles of Portage Creek running up from its confluence with the Kalamazoo River past the Bryant and Monarch mills. It further includes disposal areas, adjacent river banks and contiguous flood plains, all of which are contaminated with PCBs. The EPA has divided the Superfund Site into several current or former operable units ("OUs") to manage, study, and cleanup the Superfund Site. The river itself is OU5, and is divided into seven separate work areas tied mostly to current or former dams. The EPA has provided a detailed description of each operable unit (Tx. 2175) and this Section provides a short summary of those

units. An overview map of the superfund site is attached as Exhibit A.

1. Unit Associated Mostly with International Paper: Operable Unit 1

OU1 covers 89 acres along Portage Creek. The unit includes the Bryant mill pond and former operational areas for the Bryant mill and the Monarch mill.[2] The former operational areas include dewatering lagoons, a landfill, and 19-acre disposal area that received dewatered paper mill residuals from the dewatering lagoons. (Tx. 5683 at 17–20). OU1 received paper mill waste from the Bryant and Monarch mills until the late 1980s. The EPA performed a Time-Critical Removal Action ("TCRA") in 1998 to remove PCB contaminated sediments from the Bryant mill pond portion of OU1. (Tx. 6419 at -768). Other actions include the collection of groundwater, which is sent to the Kalamazoo Wastewater Treatment Plant. (Tx. 2175 at 20). The EPA released a feasibility study for OU1 in January 2015, and in September 2015 the EPA issued a proposed remedial action plan. (Tx. 9853). A final remedy has not yet been selected.

2. Units Associated Mostly with Georgia Pacific

a. Operable Unit 2

OU2 involves approximately 32 acres consisting of two inactive disposal areas, and is contaminated with PCBs from the recycling of NCR's CCP. OU2 is located on the south side of the Kalamazoo River and

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[2] The Monarch mill was a de-inking mill operated by Allied and located along Portage Creek. (Tx. 6334 at -691 & -692). Like the Bryant mill, effluent from its clarifier was discharged above the Bryant mill pond. The mill ceased de-inking in 1957.

is upstream from the confluence of the Kalamazoo River and Portage Creek. The operable unit includes the Willow Boulevard and A-Site Landfills that were used to dispose of dewatered papermaking residuals from the King and KPC mills. (Tx. 4691 at -046). Those landfills received paper waste from the mills during the 1960s, '70s and '80s. Over the years PCBs from the landfills have eroded into the soil and sediment either adjacent to or in the Kalamazoo River.

Remedial action at OU2 began in May 2011 and was completed in June 2014. (Tx. 9431 at 27). Garry Griffith, a Georgia Pacific environmental engineer, testified that the history of remedial work at OU2 included excavation of materials containing PCBs, construction of a cover system, stabilization of banks and berms, installation of a groundwater monitoring network, establishment of erosion controls, and establishment of procedures for long-term monitoring programs. (ECF No. 831, PageID. 28011–28013). Future activities in the unit include operation, maintenance, and continued monitoring.

b. Operable Unit 3

OU3 covers roughly 23 total acres of the Superfund Site and includes the King Highway Landfill, approximately 7 acres of former dewatering lagoons on the former KPC mill site, and the King Street storm sewer. The King Highway lagoons received paper mill waste from the KPC Mill from the late 1950s until 1977. KPC continued to deposit paper mill waste at the landfill from 1977 through 1997. Like the disposal areas in OU2, PCBs have migrated via erosion or surface water runoff from the landfills into adjacent areas and the Kalamazoo River. (Tx. 2175 at

28–29). Erosion of the landfills, in general, was discussed at trial by Mr. Hesse. Mr. Hesse testified that he observed the landfills during his study with Dr. Knight and saw that they extended down to the water. (ECF No. 829, PageID.27610).

A record of decision, or ROD, for OU3 was issued in 1998. (Tx. 6410). Georgia Pacific conducted remedial response activities at OU3 from 1996 to 2003. The response activities included the installation of sheetpiling, removal of PCB-contaminated soils, sediment, and paper residuals, and the construction of a final cover system at the Landfill. (Tx. 2175, at 41–43). Georgia-Pacific completed the final remedy for OU3 in 2003.

c. Operable Unit 6

There is currently no OU6 in the Superfund Site. The former OU6 was located north of OU2, across the Kalamazoo River. It included the former KPC and Hawthorne Mill properties.[3] Mr. Griffith testified that between 2000 and 2009 a removal action was conducted that removed residual solids from the mill lagoons. After the completion of the work, Georgia Pacific petitioned the EPA to have the mill property delisted from the Superfund Site. (ECF No. 831, PageID.28024–28025). The petition was granted on June 30, 2009, after the EPA determined the mill

[3] The Hawthorne mill was located along the Kalamazoo River between the Morrow Dam and the river's confluence with Portage Creek. The mill was a fine paper mill, but its owners state it did not recycle NCR's CCP. (Tx. 11786). The EPA has stated it is unclear whether de-inking occurred at the mill. (Tx. 4118 at -668). PCBs were detected in a waste sludge discharge pipe at the mill. (*Id.*). Georgia Pacific purchased the former mill property in 1978.

property was no longer a source of PCBs to the river. (Tx. 2175 at 7). Accordingly the EPA does not currently have an OU6 at the Superfund Site. (*Id.*) If, however, investigations at any of the remaining paper mill properties result in a determination that those properties are a source of PCB contamination, the EPA will designate that property as OU6. (*Id.*)

3. Units Associated Mostly with Weyerhaeuser

a. Operable Unit 4

OU4 is located on the west side of the Kalamazoo River immediately downstream from the Plainwell Dam. OU4 includes the 12th Street Landfill, which is approximately 6.8 acres in size, and other associated areas, all of which were contaminated by PCBs from NCR's CCP. The landfill is bordered by the Kalamazoo River and wetlands to the North. OU4 received paper mill waste, some of which contained PCBs, from the Plainwell mill from approximately 1955 until 1981.[4] The landfill was closed in 1984. (Tx. 7821 at -991). Mr. Gross testified Weyerhaeuser Company completed the remedial actions in OU4 in 2012, subject to ongoing operations and maintenance. (ECF No. 846, PageID.29096; *see also* Tx. 7821 at -972).

b. Operable Unit 7

OU7 encompasses 35 total acres and includes the former Plainwell mill property which is located on the west side of the Kalamazoo River and upstream from the Plainwell dam. The unit is further divided into three historical operational areas including the mill

[4] After the production period, residual solids from the lagoons were removed and placed in the landfill.

buildings and dewatering lagoons that contained residual solids contaminated by PCBs. (Tx. 7815 at -001). Weyerhaeuser has completed a Remedial Investigation / Feasibility Study for OU7 (*Id.*) and the EPA has issued a Record of Decision (Tx. 8015). Mr. Gross testified Weyerhaeuser has already implemented some of these remedial actions and will continue that work. (ECF No. 846, PageID.29097).

4. The Unit Associated With all Parties: Operable Unit 5

OU5 is the river portion of the site. It includes the 80 miles of the Kalamazoo river and a 3 mile stretch of Portage Creek. OU5 is contaminated with NCR's PCBs from the paper mills' effluents.

For purposes of its removal and remediation activity, the EPA subdivided OU5 into seven work areas. (Tx. 2175 at 76). Area 1 covers the lower portion of Portage Creek as well as a portion of the Kalamazoo River from Morrow dam downstream to the Plainwell dam. Work Area 1 is further subdivided into Area 1A for the stretch of Portage Creek from below the Bryant Mill dam to Portage Creek's confluence with the Kalamazoo River; Area 1B for the stretch of Kalamazoo River between the Morrow dam and the confluence of Portage Creek with the Kalamazoo River; and Area 1C for the stretch of the Kalamazoo River between the confluence of Portage Creek with the Kalamazoo River down to the Plainwell dam. The EPA has approved the remedial investigation report and feasibility study for Area 1.

The other areas are: Area 2 for the Kalamazoo River from Plainwell dam downstream to the Otsego City dam; Area 3 for the Kalamazoo River from Otsego

City dam downstream to Otsego dam; Area 4 for the Kalamazoo River from Otsego dam downstream to Trowbridge dam; Area 5 for the Kalamazoo River from Trowbridge dam downstream to Allegan City dam; Area 6 for Lake Allegan; and Area 7 for the Kalamazoo River from Allegan dam downstream to Lake Michigan.

There have been several TCRAs conducted in order to remove PCB-impacted sediments and flood plain soils from the river unit. (ECF No. 806, PageID.24939). Two TCRAs involved the former Plainwell impoundment and Plainwell dam No. 2 impoundment. The Plainwell impoundment TCRA was funded by Georgia Pacific and Millennium Holdings LLC. Work began in 2007 and was completed in 2009. The Plainwell dam No. 2 area TCRA began work in 2009 and was completed in 2010. (*Id.*) Work on the third TCRA was completed in 2013 and covered PCBimpacted sediment in Portage Creek between the Bryant mill dam and the creek's confluence with the Kalamazoo River. A forth TCRA removed contaminated solids from the Bryant mill pond. (ECF No. 875-10, PageID.31324).

Except for Area 1, the EPA has not finalized a remedy for any portion of OU5. Chase Fortenberry, a project manager for the Superfund Site, testified that the EPA issued a ROD for Area 1 on September 28, 2015. (ECF No. 831, PageID.28057). The approved remedy includes removing contaminated sediment and flood plain soils in the work area, engineering and institutional controls, and monitored natural recovery. (Tx. 9881).

III. PROCEDURAL HISTORY

In 2010, Georgia Pacific brought this CERCLA action seeking recovery from International Paper, NCR, and Weyerhaeuser for its past and future costs related to its investigation and cleanup activities. The parties engaged in extensive factual and expert discovery over the next three years. Given the size and complexity of the case, the Court bifurcated the trial into two phases. The Court devoted Phase I to the determination of the parties' liability under CERCLA. Phase II, which is at issue here, focused on the allocation of damages among the responsible parties.

After a bench trial, the Court resolved Phase I by issuing an Opinion and Order on September 26, 2013. In that decision, the Court found all the parties were liable under CERCLA. (ECF No. 432). Both Georgia Pacific and Weyerhaeuser had acknowledged their responsibility as owners and operators of de-inking mills during the production period, so the focus there was on the remaining two parties. In the Phase I decision, the Court determined that both NCR and International Paper were also liable: NCR as an arranger and International Paper as an owner or operator (or both). *Id.*

The Court held that NCR is liable as an arranger in this case because it supplied CCP broke and trim to the de-inking mills, and the broke and trim contained PCBs. As a result, the mills used the broke and trim as part of their repulping operations and released PCBs to the river. At least some of the broke generated by NCR and its coaters reached the Superfund Site. (ECF No. 432, PageID.12746–12747).

Of course all, or virtually all, of the PCB-containing wastepaper is ultimately traceable back to NCR because NCR developed and controlled the proprietary process for the PCB-containing CCP.

The Court held that the PCB-containing waste was, at least originally, a product the paper mills were willing to pay for as feed for their recycling businesses. But by no later than 1969, NCR knew that the CCP scrap was not useful for a fully informed buyer. Rather, it was a worthless waste product at best, and a serious environmental hazard and liability at worst. (*Id.* at PageID.1274312744). NCR did not disclose this knowledge to the paper industry. Instead it continued to sell CCP broke and trim to brokers and recyclers even though it knew that the wastepaper was an environmental and economic liability. More than that, NCR actively attempted to conceal the hazards associated with CCP wastepaper from recyclers, the public, and the government by delaying public announcement and minimizing the significance of what it was learning. (*See id.* at PageID.12745). Even after an NCR-affiliate in the UK stopped circulating the waste in the UK, NCR continued feeding the market in the U.S.

The Phase I decision also determined that International Paper is liable as an owner or operator because it is the successor-in-interest to St. Regis, who was the owner of the Bryant Mill at a time when the Mill was recycling CCP and thereby disposing of PCBs at the Superfund Site. (*Id.* at PageID.12756). None of the ownership and disposal facts were seriously contested. Rather, International Paper argued that St. Regis's ownership fell within a statutory exception to ownership held primarily to secure a loan. The

Court found the exception inapplicable. (*Id.* at PageID.12755–12756). As such, International Paper, as the successor-in-interest to St. Regis, qualified as the owner of the Bryant mill for purposes of CERCLA liability. (*Id.* at PageID.12756).

Having determined liability, the matter proceeded to Phase II. There Georgia Pacific asked the Court to determine the parties' share of responsibility for its past costs as well as to allocate the parties' responsibility for future costs.

IV. Claimed Costs & Statute of Limitations

Before proceeding with the Phase II analysis, the Court will first discuss the total amount in past costs Georgia Pacific avers it has spent before the Phase II trial. Then the Court will determine the total approximate costs it concludes are not time-barred, are proper claimed costs under CERCLA, and are consistent with the National Contingency Plan.

A. Georgia Pacific's Initial Claimed Costs

At trial, Roger Hilarides testified that Georgia Pacific was seeking to recover approximately 105.5 million dollars in response costs spent at the Superfund Site. (ECF No. 831, PageID.278986). The chart below provides an overview by operable unit of the amounts Georgia Pacific claims to have spent through September of 2014 and is seeking to recover in Phase II. (Tx. 2617).[5]

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[5] During Phase II, Mr. Hilarides testified that Georgia Pacific has spent an additional two to three million dollars since September 2014 (ECF No. 831, PageID.27897). In filings after trial, Georgia Pacific avers it has spent several million dollars more.

Cost Category	Order	Location	Costs	Credits	Net Total
Georgia-Pacific's OU5 Costs	1990 AOC	OU5-Central	$293,113.28	-	$293,113.28
	1990 AOC	OU5-East	$406,860.72	$3,542.70	$403, 318.02
	1990 AOC	OU5-General	$12,316,472.68	($395,165.46)	$11,921,307.22
	1990 AOC	OU5-Portage Creek	$8,814.81	-	$8,814.81
	1990 AOC	OU5-West	$2,895,276.57	($6,200.54)	$2,889,076.03
	2007 Plainwell TCRA	OU5-West	$18,850,746.76	($1,025,000.00)	$17,825,746.76
	2007 SRI/FS AOC	OU5-Central	$7,377,526.38	-	$7,377,526.38
	2007 SRI/FS AOC	OU5-East	$8,524.61	-	$8,524.61
	2007 SRI/FS AOC	OU5-General	$8,487,789.11	($89,357.02)	$8,398.432.09
	2007 SRI/FS AOC	OU5-Portage Creek	$38,570.03	-	$38,570.03
	2007 SRI/FS AOC	OU5-West	$5,704,008.43	-	$5,704,008.43
	2007 Termination AOC	OU5-General	$167,817.10	($94,001.36)	$73,815.74
	2008 Response Cost AOC	OU5-General	$1,845,000.00	-	$1,845,000.00
	2009 Plainwell No. 2 TCRA	OU5-Central	$8,828,123.79	($1,999,496.75)	$6,828,627.04
	N/A (Mead . Rock-Tenn)	OU5-General	-	($1,581,250.00)	($1,581,250.00)
				SUBTOTAL	$62,034,630.44

Cost Category	Order	Location	Costs	Credits	Net Total
Georgia-Pacific's OU2 Costs	1990 AOC	OU2	$4,434,433.48	-	$4,434,433.48
	N/A (2007-2009 Costs)	OU2	$598,857.68	-	$598,857.68
	2007 Termination AOC	OU2	$953.93	-	$953.93
	2009 Consent Decree	OU2	$15,628,975.64	-	$15,628,975.64
				SUBTOTAL	$20,663,220.73

Cost Category	Order	Location	Costs	Credits	Net Total
Georgia-Pacific's OU3 Costs	1990 AOC	OU3	$5,960,703.58	-	$5,960,703.58
	2000 AOC	OU3	$5,985,341.70	-	$5,985,341.70
				SUBTOTAL	$11,946,045.28

Cost Category	Order	Location	Costs	Credits	Net Total
Georgia-Pacific's Mill Property (OU6) Costs	1990 AOC	GP Mill Property	$1,778,538.82	($2,259.55)	$1,776,279.27
	2006 GP Mill Property TCRA	GP Mill Property	$3,611,485.47	-	$3,611,485.47
	2007 Termination AOC	GP Mill Property	$3,017.18	-	$3,017.18
	N/A (Gould Paper Corp. Settlement)	GP Mill Property	-	($100,000.00)	($100,000.00)
				SUBTOTAL	$5,290,781.92

Cost Category	Order	Location	Costs	Credits	Net Total
Ft. James's Costs	1990 AOC	Ft. James Mill Property	$13,369.32	-	$13,369.32
	1990 AOC	OU5-Central	$94,349.59	-	$94,349.59
	1990 AOC	OU5-East	$103,254.21	($1,518.30)	$101,735.91
	1990 AOC	OU5-General	$4,309,939.58	($9,636.49)	$4,300,303.09
	1990 AOC	OU5-Portage Creek	$670.86	-	$670.86
	1990 AOC	OU5-West	$1,099,968.95	($2,657.37)	$1,097,311.58
	N/A (Rock-Tenn Settlement)	OU5-General	-	($81,250.00)	($81,250.00)
				SUBTOTAL	$5,526,490.35
				TOTAL COSTS CLAIMED:	$110,852,504.26
				TOTAL CREDITS CLAIMED:	($5,391,335.54)
				NET TOTAL CLAIMED:	$105,461,168.72

B. Statute of Limitations

In 2014, on the eve of the Phase II trial, the Sixth Circuit clarified the relevant statute of limitations for filing an action for contribution under Section 113(f). In *Hobart Corp. v. Waste Management of Ohio, Inc.*, the Sixth Circuit held that:

> Actions for contribution under § 113(f) must be filed within three years of "(A) the date of judgment in any action under [CERCLA] for recovery of such costs or damages, or (B) the date of an administrative order under [§ 122(g)] (relating to de minimis settlements) or [§ 122(h)] (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages."

758 F.3d 757, 763 (6th Cir. 2014) *cert. denied*, 135 S. Ct. 1161 (2015). Moreover, the Sixth Circuit held that responsible parties must seek reimbursement in the form of a contribution action under Section 113(f), rather than a direct cost recovery under Section 107 if they met one of Section 113's statutory triggers. *Id.* at 767.

Based on the Sixth Circuit's holding in *Hobart*, the Defendants moved for summary judgment. The Defendants argued that prior litigation in 2010, to which Georgia Pacific was a party, triggered the company's obligation to assert Section 113(f) contribution claims against Defendants within three years of that date. Therefore, Defendants argued all of Georgia Pacific's claims were now time-barred. In the alternative, Defendants claimed that several administrative agreements entered into by Georgia Pacific (1990 AOC, 2006 ASAOC, 2007 ASAOC for RI/FS, and the 2007 ASAOC for Plainwell) triggered the statute of limitations period, resulting in at least some of the contribution claims being time-barred.

On August 12, 2015, this Court issued its Order on Defendants' motions for summary judgment. (ECF No. 787). The Court held that the 2010 litigation did not trigger Georgia Pacific's duty to assert its claims under Section 113(f), and that its claims were therefore not time-barred in their entirety. As to the costs associated with the administrative agreements, the Court held that the 1990 AOC by itself, and even when read in conjunction with the 2007 Order by Consent, did not constitute "administrative settlements" for purposes of triggering the Section 113 three-year statute of limitations. As such, the Court denied Defendants' motion for summary judgment

relating to Georgia Pacific's costs under the 1990 AOC for removal actions in OU5, OU2, and OU6. These costs were not time-barred in a Section 107 cost-recovery action. Similarly, the expenses related to OU3 were not time-barred under Section 113 because the contribution statute did not trigger them. However, under the timing rules for Section 107, the OU3 costs were time-barred, as even Georgia Pacific conceded, so the Court entered summary judgment on those costs.

As to the costs associated with the 2006 ASAOC, 2007 ASAOC for RI/FS, and the 2007 ASAOC for Plainwell, the Court held that those agreements constituted "administrative orders" for purposes of Section 113's statute of limitations under the Sixth Circuit's holding in *Hobart*. Therefore, the statute of limitations on Georgia Pacific's claims under these agreements had run, and the Court granted summary judgment for costs falling under those agreements to the Defendants.

C. Claimed Costs After the Statute of Limitations Ruling

After the Phase II trial, Georgia Pacific amended its cost calculations. Per Georgia Pacific's post-trial briefing, the Court's Order on Defendants' motions for summary judgment resulted in the following costs (net of credits) being time-barred (ECF No. 882, PageID.31888):

Category	Cost
2007 Plainwell TCRA	$17,825,746.76
2007 SRI/FS	$21,523,518
2006 GP Mill Property TCRA	$3,511,486
OU3 Costs	$11,946,045
Total:	$54,806,796.35

The chart below updates the earlier chart of the amounts Georgia Pacific claims it has spent by operable unit by adding in those costs that are now time-barred:

Cost Category	Order	Location	Costs	Credits	Net Claim	Time Barred	Net Recoverable
Georgia-Pacific's OU5 Costs	1990 AOC	OU5-Central	$293,113.28	-	$293,113.28	-	$293,113.28
	1990 AOC	OU5-East	$406,860.72	($3,542.70)	$403,318.02	-	$403,318.02
	1990 AOC	OU5-General	$12,316,472.68	($395,165.46)	$11,921,307.22	-	$11,921,307.22
	1990 AOC	OU5-Portage Creek	$8,814.81	-	$8,814.81	-	$8,814.81
	1990 AOC	OU5-West	$2,895,276.57	($6,200.54)	$2,889,076.03	-	$2,889,076.03
	2007 Plainwell TCRA	OU5-West	$18,850,746.76	($1,025,000.00)	$17,825,746.76	($17,825,746.76)	$0.00
	2007 SRI/FS AOC	OU5-Central	$7,377,526.38	-	$7,377,526.38	($7,377,526.38)	$0.00
	2007 SRI/FS AOC	OU5-East	$8,524.61	-	$8,524.61	($8,524.61)	$0.00
	2007 SRI/FS AOC	OU5-General	$8,487,789.11	($89,357.02)	$8,398,432.09	($8,398,432.09)	$0.00
	2007 SRI/FS AOC	OU5-Portage Creek	$38,570.03	-	$38,570.03	($38,570.03)	$0.00
	2007 SRI/FS AOC	OU5-West	$5,704,008.43	-	$5,704,008.43	($5,704,008.43)	$0.00
	2007 Termination AOC	OU5-General	$167,817.10	($94,001.36)	$73,815.74	-	$73,815.74
	2008 Response Cost AOC	OU5-General	$1,845,000.00	-	$1,845,000.00	-	$1,845,000.00
	2009 Plainwell No. 2 TCRA	OU5-Central	$8,828,123.79	($1,999,496.75)	$6,828,627.04	-	$6,828,627.04
	N/A (Mead/Rock-Tenn	OU5-General	-	($1,581,250.00)	($1,581,250.00)	-	$1,581,250.00
				SUBTOTAL	$62,034,630.44	($39,352,808.30)	$22,681,822.14

Cost Category	Order	Location	Costs	Credits	Net Claim	Time Barred	Net Recoverable
Georgia Pacific's OU2 Costs	1990 AOC	OU2	$4,434,433.48	-	$4,434,433.48	-	$4,434,433.48
	NA (2007 - 2009 Costs)	OU2	$598,857.68	-	$598, 857.68	-	$598,857.68
	2007 Termination AOC	OU2	$953.93	-	$953.93	-	$953.93
	2009 Consent Decree	OU2	$15,628,975.64	-	$15,628,975.64	-	$15,628,975.64
				SUBTOTAL	$20,663,220.73	($0)	$20,663,220.73

Cost Category	Order	Location	Costs	Credits	Net Claim	Time Barred	Net Recoverable
Georgia Pacific's OU3 Costs	1990 AOC	OU3	$5,960,703.58	-	$5,960,703.58	($5,960,703.58)	$0
	2000 AOC	OU3	$5,985,341.70	-	$5,985,341.70	($5,985,341.70)	$0
				SUBTOTAL	$11,946,045.28	($11,946,045.28)	$0

Cost Category	Order	Location	Costs	Credits	Net Claim	Time Barred	Net Recoverable
Georgia Pacific's Mill Property (OU6) Costs	1990 AOC	GP Mill Property	$ 1,778,538.82	($2,259.55)	$1,776,279.27	-	$1,776,279.27
	2006 GP Mill Property TCRA	GP Mill Property	$3,611,485.47	-	$3,611,485.47	($3,611,485.47)	$0
	2007 Termination AOC	GP Mill Property	$3,017.18	-	$3,017.18	-	$3,017.18
	N/A/ (Gould Paper Corp. Settlement)	GP Mill Property	-	($100,000.00)	($100,000.00)	-	($100,000.00)
				SUBTOTAL	5,290,781.92	($3,611,485.47)	$1,679,296.45

Cost Category	Order	Location	Costs	Credits	Net Claim	Time Barred	Net Recoverable
Fort James's Costs	1990 AOC	Ft. James Mill Property	$13,369.32	-	$13,369.32	-	$13,369.32
	1990 AOC	OU5-Central	$94,349.59	-	$94,349.59	-	$94,349.59
	1990 AOC	OU5-East	$103,254.21	($1,518.30)	$101,735.91	-	$101,735.91
	1990 AOC	OU5-General	$4,309,939.58	($9,636.49)	$4,300,303.09	-	$4,300,303.09
	1990 AOC	OU5-Portage Creek	$670.86	-	$670.86	-	$670.86
	1990 AOC	OU5-West	$1,099,968.95	($2,657.37)	$1,097,311.58	-	$1,097,311.58
	N/A (Rock-Tenn Settlement)	OU5-General	-	($81,250.00)	($81,250.00)	-	($81,250.00)
				SUBTOTAL	$5,526,490.35	-	$5,526,490.35

TOTAL COSTS CLAIMED	$110,852,504.26
TOTAL CREDITS CLAIMED	($5,391,335.54)
NET CLAIMED	$105,461,168.72
TIME BARRED	($54,910,339.05)
NET RECOVERABLE	$50,550,829.67

Based on its amended cost calculations, The Court finds Georgia Pacific currently seeks a net recovery of approximately $50,650,829.67 in non-time-barred past costs.[6]

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[6] The Court's calculation of the time-barred costs relating to the 2007 SRI/FS AOC differs slightly from the costs that Georgia Pacific provided in its Post Phase II Trial Brief (ECF No. 882, PageID.31888) and in its proposed findings of fact (ECF No. 883, PageID.32089). The Court uses the numbers as provided by Georgia Pacific in its Proposed Findings of Fact (ECF No. 801) and applies the statute of limitations consistent with its ruling.

D. Consistency with NCP

Having determined the amount of non time-barred past costs that Georgia Pacific seeks to recover, the Court moves on to determine whether all those past costs may be recovered under CERCLA. Specifically, in order to recover under CERCLA, a private plaintiff bears the burden of showing by a preponderance of the evidence that the costs it seeks are necessary and consistent with the EPA's National Contingency Plan. *See* 42 U.S.C. § 9607(a)(4)(B). "A cleanup will be consistent . . . if, taken as a whole, it is in 'substantial compliance' with 40 C.F.R. § 300.700(c)(5)–(6), and results in a "CERCLA-quality cleanup." *Franklin Cty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 543 (6th Cir. 2001).

> A "CERCLA-quality cleanup" is a response action that (1) protects human health and the environment, (2) utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable, (3) is cost-effective, (4) satisfies Applicable and Relevant or Appropriate Requirements ("ARARS") for the site, and (5) provides opportunity for meaningful public participation.

Id.

Several witness for Georgia Pacific, such as Roger Hilarides, described the costs incurred and how those

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There are a lot of moving parts, and some amounts may be misclassified. As stated below, the Court will require the parties to submit a Proposed Judgment consistent with its allocation ruling, which may clarify and correct–or at least frame disputes–over any necessary adjustments.

were handled and documented. Mr. Hilarides testified that Georgia Pacific began tracking its costs in 1990 with the formation of the Kalamazoo River Study Group and that Georgia Pacific regularly made entries in its databases to record and preserve the response costs it incurred at the Superfund Site. (ECF No. 831, PageID.27890). Mr. Hilarides testimony is supported by the testimony of Garry Griffith, who stated he would review invoices from Georgia Pacific's contractors to make sure they were consistent with the agreement that applied to the work, and then submit the invoice to his supervisor. Once the invoice was approved by the supervisor, it was submitted for payment, which would be recorded in Georgia Pacific's databases. (ECF No. 831, PageID.28001–28002). Mr. Saric also testified the EPA approved several cleanup actions and that the EPA believed each of them was reasonable and necessary. (ECF No. 875, PageID.31320–21).

The Court finds that Georgia Pacific has established by a preponderance of the evidence that it incurred reasonable costs that were consistent with the NCP. In fact, nearly all of the non time-barred past costs incurred by Georgia Pacific at the Superfund Site are necessary and consistent with NCP. The costs are well documented and are in substantial compliance with the regulations. There are two exceptions. At trial, Dr. David Johns, a witness for Weyerhaeuser, identified $643,889 in costs Georgia Pacific incurred to study natural resource damages. (ECF No. 849, PageID.29530–29532; *see also* Tx. 8054). This amount was "essentially the same" as that found by NCR's witness, Jeffrey Zelikson. (ECF No. 861, PageID.30614). The

Court has held that natural resource damages are outside the scope of this case. (ECF No. 547, PageID.15191). The Court credits Dr. Johns and Mr. Zelikson's testimony on this point and so approximately $643,889 in general costs for Operating Unit 5 are removed from what Georgia Pacific can recover from other parties in this action. Mr. Zelikson also identified $340,059 in costs that are more properly described as advocacy than response costs. (ECF No. 861, PageID.30615). The Court credits this testimony as well and therefore a further amount of $340,059 in general costs are also removed from what Georgia Pacific may recover.

Both Dr. Johns and Mr. Zelikson, as well as other witnesses for the Defendants such as Raymond Dovell and Robert Rock, identified additional response costs that the Defendants contend were not adequately documented and /or are not necessary and consistent with NCP. The Court is not persuaded by this testimony. NCP is not a high bar, and the burden on Georgia Pacific to show consistency with NCP is simply a preponderance of the evidence. The argument Georgia Pacific advanced on cross with these witnesses was that there was enough information documenting its incurred costs from the context of the materials and invoices submitted and maintained, and the Court agrees. Furthermore, once consistency with NCP is established, CERCLA defendants are usually subject to joint and several liability. Thus to the extent the parties seek further detail of allocation by area, it is up to the defendants to carve up the costs and establish divisibility, if they can.

Finally, Georgia Pacific has received insurance payments to help cover liability costs at 23 sites, including the Kalamazoo River. The other parties would have that amount taken away from what Georgia Pacific can seek in reimbursement to avoid a possible double recovery by Georgia Pacific. NCR offered the testimony of Professor Ken Abraham who stated that Georgia Pacific received a total of $69,852,000 in insurance proceeds associated with its settlements. Professor Abraham provided information on how insurance payments worked, and the role that offsets play to prevent double recovery. (ECF No. 861, PageID.30633–30634). The Court does not see the concern of double recovery present in this case. There is no risk of double payment because: 1) Georgia Pacific has incurred costs that, by operation of the Court's statute of limitations ruling, it is not able to recover from the parties in sums that would amount to double payment; and 2) the insurance settlement involved over 20 sites that are not part of this case. Furthermore, Georgia Pacific paid insurance premiums to help cover events like this, and it encourages prudent insurance coverage to allow the company to receive at least some benefit from the coverage it paid for.

Accordingly the Court finds a total of approximately $983,948 in claimed costs are not necessary and consistent with NCP. Accounting for the previous calculations, the Court finds a total past cost amount of approximately $49,666,881.67 that is non-time-barred and consistent with NCP. With the total amount of recoverable past costs established, the Court moves on to the parties' arguments on whether

that amount is divisible, and how it should be allocated.

V. SUMMARY OF THE PARTIES' CONTENTIONS

Georgia Pacific acknowledges that the paper mills appropriately bear some responsibility for cleanup, but insists the most culpable wrongdoer is NCR. NCR developed the PCB-containing paper and fed it into the repulping stream. It continued to do this even after it learned of the risks, and the mills did not. In fact, Georgia Pacific believes NCR concealed what it knew and this makes NCR uniquely culpable (and principally responsible) for its costs. Georgia Pacific further contends the mills' responsibility should be apportioned principally on volume estimates because precise calculations, such as year by year discharge calculations, are not possible. Finally, Georgia Pacific suggests that any allocation to Georgia Pacific should reflect credit for its proactive and constructive engagement with the authorities, and its overall efforts to address PCB contamination at the Superfund Site.

NCR disputes the basis for arranger liability. But even assuming it is an arranger, NCR says its share of responsibility must be limited to the factual premises of its liability and apportioned accordingly. In NCR's view, only a small fraction of CCP can even arguably be traced from NCR to the Kalamazoo Valley, and the majority of NCR's broke and trim was recycled at the Fox River. Applying layers of mathematical analysis, NCR isolates its maximum exposure to 2% of the total PCB load in the Superfund Site. And even as to this load, NCR contends that the

paper mills are more culpable than NCR because the mills were the parties that actually put the waste into the river. Finally NCR contends that any allocation must take into account the operational decisions of the paper mills, and the fact that the mills benefitted from recycling CCP.

International Paper also contests the basis for its liability as successor to St. Regis. But even assuming it's liable, International Paper says it is not an actively culpable party. Rather, it is simply a technical legal successor to a mill operation that discharged to a tributary creek and to the Bryant mill pond where most of the solids settled. According to International Paper, the operation of the mill pond meant that most of the PCBs International Paper is responsible for never reached the Kalamazoo River. Moreover, International Paper says its predecessor's loading was nowhere near as high as other parties suggest. And International Paper further argues Georgia Pacific's laches uniquely harmed it. Based on all these considerations, and more, International Paper argues it should receive only a minimal allocation.

Weyerhaeuser admits liability, but says it has already contributed more than it could possibly be responsible for based on any rational allocation of past costs because it is accountable only for the Plainwell mill's discharges, and all parties agree the mill discharged significantly less effluent than the other mills. Weyerhaeuser states it has already paid over $10 million to clean up the area by the Plainwell operation. This is more than enough, it says, to cover whatever allocation could fairly be made against it.

VI. PHASE II ANALYSIS

A. Legal Standards

1. CERCLA Cost Recovery and Contribution

CERCLA has two cost-shifting provisions that have been invoked in this case. Section 107 provides a mechanism for recovery of costs incurred by either the government or a private party. 42 U.S.C. § 9607(a). In cost recovery actions, defendants are usually subject to joint and several liability if the plaintiff has shown that reasonable costs incurred were consistent with the National Contingency Plan of the U.S. Environmental Protection Agency ("EPA"). However, if a defendant shows that a harm is divisible or capable of apportionment, the defendant is only severally liable for its share of the harm. To show divisibility, a defendant must show that: 1) a harm is theoretically capable of apportionment; and 2) the record supports a reasonable basis for apportionment in that particular case. *Burlington Northern and Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 615 (2009).

Section 113 provides for equitable contribution of costs from one party to another "using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1). Contribution can be sought by a person liable under Section 107 or a person who has entered an administrative or judicially approved settlement. 42 U.S.C. § 9613(f). CERCLA was intended to "facilitate the prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible for hazardous wastes." *Kalamazoo River Study Grp. v. Menasha Corp.*, 228 F.3d 648, 652 (6th

Cir. 2000). Courts use equitable factors to encourage those goals by allocating costs appropriately among liable parties. *Id.* at 656.

Courts in the Sixth Circuit have sometimes turned to non-exhaustive lists of equitable factors to help in this exercise. For example, the Gore factors direct a court to look at:

- The ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of a hazardous waste can be distinguished;
- The amount of the hazardous waste involved;
- The degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;
- The degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and
- The degree of cooperation by the parties with the Federal, State, or local officials to prevent any harm to the public health or environment.

Centerior Serv. Co. v. Acme Scrap Iron & Metal, 153 F.3d 344, 354 (6th Cir. 1998). Similarly, the Torres factors focus the analysis on:

- The extent that clean-up costs are attributable to a specific party;
- The party's level of culpability;
- The degree to which the party benefitted from the disposal of the waste; and
- The party's ability to pay its share of the cost.

United States v. Consol. Coal Co., 345 F.3d 409, 413 (6th Cir. 2003). In summary, a court has broad discretion to promote the goals of CERCLA when handling contribution claims. *Id.*

2. Disentangling Cost Recovery and Contribution

Courts have long struggled to disentangle claims under Sections 107 and 113 of CERCLA. *See Hobart Corp. v. Waste Management of Ohio, Inc.*, 758 F.3d 757, 766–67 (6th Cir. 2014). The Sixth Circuit has said that the two avenues are mutually exclusive, and that contribution under Section 113 is the appropriate mechanism when it is available. *Id.* at 767. Courts have cautioned against "slicing and dicing" costs between cost recovery and contribution. *NCR Corp. v. George A. Whiting Paper Co.*, 768 F.3d 682, 692 (7th Cir. 2014); *Ford Motor Co. v. Michigan Cons. Gas Co.*, No. 08-13503, 2015 WL 540253 at *12 (E.D. Mich. Feb. 10, 2015). Although Section 107 and Section 113 are both at play in this case, the ultimate outcome is driven by the equitable allocation among the parties, so the Court focuses on the facts relevant to that analysis.[7]

B. Overview of the Court's Phase II Ruling

These are the Court's Phase II findings and conclusions, in summary form:

1. The contaminant of concern in the Kalamazoo River is PCBs. PCB loads are what drive the

[7] To the extent cross or counter claims for contribution have not been adequately pled, the Court would exercise its discretion under FED. R. CIV. P. 15(a)(2) to allow amendment of the pleadings.

need to remediate the river, and the costs of investigation and cleanup to date.

2. As found in Phase I, all of the parties before the Court are liable parties under CERCLA. The record in Phase II has reinforced that finding.
3. No party is uniquely culpable for PCBs in the Kalamazoo River that have required a massive and ongoing cleanup effort. Each party played a significant role in creating and perpetuating the PCB pollution at the Superfund Site.
4. The Court finds no convincing basis for divisibility of harm in the river system. In particular the Court rejects NCR's attempt to mathematically segment its responsibility to a tiny fraction of the PCB loading. To the extent a party's geographic activity in the river system–International Paper in the Portage Creek tributary, and Weyerhaeuser downstream in Plainwell–affect equitable responsibility for costs, the Court's allocation of the past costs accounts for it.
5. The Court's allocation is for past costs only. The allocation may well inform allocation of future costs, but the Court finds the present record insufficient to provide any reasonable and equitable basis for apportioning costs yet to be incurred. The Court will enter a declaratory judgment holding all parties liable, but leave for future proceedings determination and allocation of the future costs.

C. Explanation of Findings and Conclusions

1. The contaminant of concern in the Kalamazoo River is PCBs. PCB loads are what drive the need to remediate the river, and the costs of investigation and cleanup to date.

In a sense, it is easy to reach the conclusion that PCBs are the contaminant of concern at the Superfund Site. The parties in fact agree on this point (ECF No. 806, PageID.24937) and this admission was reinforced by the testimony of several witnesses including James Saric of the EPA (ECF No. 875-10, PageID.31310), Paul Bucholtz of the MDEQ (ECF No. 875-11, PageID.31345), Garry Griffith, a former Georgia Pacific project manager (ECF 831, PageID.28010), and Scott Cornelius, who also worked as a project manager at the Superfund Site. (ECF No. 852, PageID.29656). Exhibits introduced at trial similarly establish PCBs are the contaminant of concern. (*See, e.g.*, Tx. 2463). Clearly PCB pollution is what is driving remedial efforts at the Superfund Site. Furthermore, the presentations during Phase II established the major source of PCBs at the Site is the effluent from the de-inking mills that recycled NCR's CCP. (*See* Tx. 2464 at -953). Mr. Saric testified that the EPA agrees wastewater from the paper mills that recycled CCP was the "major historical source" of PCBs. (ECF No. 875-10, PageID.3122).

But in another sense the issue is more complicated because not all PCBs are the same. NCR argues that more than a nominal amount of PCBs in the river up–to 25%–did not come from NCR's CCP emulsion. And NCR contends that other pollutants in the paper mills' effluents are very much relevant in apportioning

responsibility. The Court is satisfied that NCR's CCP accounts for by far the greatest volume of PCBs in the Kalamazoo River, and that any PCB contribution from other sources has had a negligible impact on investigation and cleanup costs to date. There has been no reliable showing that there was any significant contributor of PCBs to the Superfund Site other than from the paper mills. NCR witness, John Butler, admitted as much when he testified at trial he had not seen documentation of any other source of PCBs to the river other than from the paper mills. (ECF No. 965, PageID.30984–30985). Therefore, regardless of how ubiquitous PCBs may have been during the production period, at this Superfund Site, the paper mills are the only known source of PCBs.

Accordingly, the PCBs from the paper mills' effluent are a hazardous substance and possible carcinogen. They are what led the EPA to place the Kalamazoo River on the National Priority List and are driving the investigation and cleanup costs.

2. As found in Phase I, all of the parties before the Court are liable parties under CERCLA. The record in Phase II has reinforced that finding.

In Phase I, the Court concluded all of the parties are liable under CERCLA as an arranger or as owners, operators, or both. Nothing in the presentations in Phase II cause the Court to question that conclusion. The evidence presented at Phase II in fact buttresses the Phase I ruling that all parties are liable under CERCLA. Since Georgia Pacific and Weyerhaeuser admitted they were liable in Phase I, here it is only necessary to discuss NCR and International Paper.

a. NCR

In its earlier decision, the Court concluded NCR had a hand in all of the CCP that was responsible for the PCB contamination at the Kalamazoo River Superfund Site, and that NCR knew "no later than March of 1969" that the PCBs in its CCP had dangerous properties. At least by that point, no fully informed paper mill would elect to purchase CCP broke and trim as a useful product. (ECF No. 432, PageID.12746).

In Phase II, NCR tried to move this date forward by offering evidence to try to show that Monsanto, the manufacturer of PCBs, was still insisting during the production period that PCBs did not threaten the environment or human health. For example, at trial NCR pointed to a letter dated near the end of the production period—February 9, 1970—from Monsanto to its customers. Monsanto's letter acknowledged the then recent press reports about studies that had discovered PCBs in the environment. (Tx. 4424 at -733). Monsanto admitted that the PCBs in these reports "strongly resemble[d]" its Aroclors 1254 and 1260. But Monsanto went on to assure its customers that PCBs with a chlorine content of less than 54 percent, which implicitly includes Aroclor 1242, had not been found in the environment and did not appear to present a potential problem to the environment. (*Id.*) NCR also called several experts whose testimony largely overlapped with the Court's Phase I evidence. Marcia Williams' testimony, for example, was that PCB use during the production period was ubiquitous, and that it would not have been reasonable to conclude during this period that Aroclor 1242 posed a material risk of environmental

harm to water bodies. (ECF No. 854, PageID.29940; *see also* Tx. 12572). The other parties, and especially, Georgia Pacific, responded by citing several communications within NCR and Monsanto, and calling witnesses such as Dr. Joe Rodricks, Dr. Vodden, Dr. Paton, and Dr. James Kittrell, all in an attempt to show that NCR dragged its feet about switching from PCBs to a more expensive alternative even as it was increasingly aware that its PCBs were toxic.

In accord with the Phase I Opinion, the Court finds that NCR knew at least by the late 1960s that its CCP broke was, at best, not a useful product for a fully informed paper mill and, at worst, a serious environmental hazard. Georgia Pacific laid out a time line that helps place the Monsanto letter in context and provides a solid foundation that reinforces NCR's liability as an arranger. For example, Dr. Vodden testified at his deposition about his communications with NCR and that the concerns with PCBs at the time were not driven by their toxicity, but rather by the uncertainty of what might happen if PCBs were allowed to continue to accumulate in the environment. (ECF No. 875-8, PageID.31284; *see also* Tx. 2286, 2983). Dr. Kittrell also testified that NCR knew as early as 1954 that "free" Aroclor 1242, that is PCBs that were not encapsulated, could be toxic and that NCR knew that the capsules were ruptured in the repulping process. (ECF No. 830, PageID.27709–27710 (citing Tx. 1357)). All this strengthens the Court's Phase I conclusion.

By reaching this determination, the Court necessarily rejects any attempt to relitigate Phase I.

In the Court's mind Phase II must build off of the factual findings and conclusions from Phase I. Any overlap from Phase I must be read in that context. Phase II is not an opportunity to relitigate Phase I. Ms. William's testimony focused on re-weighing the evidence and performing a retrospective analysis that at least implicitly undermined, or tried to undermine, Phase I conclusions. The matter at hand, however, is on the current problem of PCBs in the Superfund Site and the only question now is how to divide the cost. The Court remains satisfied that NCR is liable as an arranger in this case.

b. International Paper

In Phase I, the Court found that Georgia Pacific had not shown by a preponderance of the evidence that PCBs were discharged by the Bryant mill between 1946 and June 30, 1956, the period when International Paper's predecessor actually operated the mill. (ECF No. 432, PageID.12749–12750). But the Court concluded there was no question that Georgia Pacific met its burden of showing that PCBs were discharged by the Bryant mill between July 1956 and 1966, the period when the mill was operating under International Paper's predecessor. The Phase II presentations reinforced this conclusion. Witnesses such as Mr. Hesse and Dr. Woodard described the pollution from the Bryant Mill that entered Portage Creek and the Kalamazoo River. Thus International Paper is responsible for its predecessor, who owned one of the large mills while thousands of pounds of PCBs were being released to the site.[8]

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[8] Much of the evidence of releases in the case is based, at least in part, on mediation questionnaires filled out in earlier

3. No party is uniquely culpable for PCBs in the Kalamazoo River that have required a massive and ongoing cleanup effort. Each party played a significant role in creating and perpetuating the PCB pollution at the Superfund Site.

The three paper mills largely agree that NCR should be found uniquely culpable in this action because NCR developed the CCP emulsion containing Aroclor 1242. They believe NCR is also uniquely culpable because NCR encouraged the paper mills to continue recycling its CCP while NCR was hiding the growing body of evidence that Aroclor 1242 was toxic. NCR employees admitted as much, Georgia Pacific argues, in an October 24, 1975, memo that stated the paper mill "recycling companies are the innocent victims of circumstances created by" CCP manufacturers. (Tx. 1625).

According to Georgia Pacific, NCR accumulated knowledge about the hazards of PCBs throughout the production period and that knowledge is sufficient to find NCR uniquely culpable for the PCBs at the Superfund Site. Georgia Pacific's time line begins in 1960. By this point, Georgia Pacific argues that NCR should have been aware of the toxicity of free PCBs and that recycling NCR broke would contaminate food.

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litigation, and later certified and submitted to regulators as Section 104(e) responses. Experts for each party relied on these questionnaires. International Paper objects to admission of the questionnaires on hearsay grounds. The Court finds that the questionnaires are the type of facts or data "experts in a particular field would reasonably rely on . . . in forming an opinion on the subject." FED. R. EVID. 703. They properly come into evidence under Rule 703 to assist in evaluating the strength of the opinion testimony on loading.

Five years later, in 1965, Georgia Pacific contends NCR continued to sell its CCP broke, despite "definitely" being aware, according to Dr. Rodricks, that there was a risk of contaminating paper that could be used in food contact. (ECF No. 828, PageID.27386–28387). A year later, Dr. Sören Jensen discovered that PCBs persisted in the environment (Tx. 1458) and in 1967 Monsanto sent a copy of Dr. Jensen's lecture to NCR. (Tx. 1466). Scott Tucker, a former Monsanto employee, testified at his deposition that he was asked to review Jensen's work and found it to be valid and the information produced to be real. (ECF No. 875-12, PageID.31358). Then, by October 28, 1969, Monsanto began to consider effluents from re-pulping mills as a source of PCBs in the environment. (Tx. 1521).

In the following years, Georgia Pacific contends NCR continued to promote its broke despite growing press and governmental inquiries. NCR in fact urged Monsanto to delay any disclosures and align the parties' stories. (ECF No. 882). According to Georgia Pacific, Monsanto resisted NCR's efforts and on April 13th, 1970, Monsanto finally suggested sending a warning about its Aroclors, including Aroclor 1242, to Monsanto customers. (Tx. 4828). The warning stated studies had found PCBs were an environmental contaminant and that extreme care should be taken to prevent entry of the product into the environment. (Tx. 1644). Notwithstanding that warning, Georgia Pacific argues NCR continued to supply its CCP emulsion to its coaters until May 25, 1971. (ECF No. 432, PageID.12745).

For its part NCR, through the testimony of witnesses like Scott Cornelius, contends that it never

hid its knowledge about PCBs to the mills. Furthermore, NCR avers it would not have mattered how much of the available information was shared with the mills because their behavior throughout this period indicates the mills would have discharged PCBs to the river regardless of what the mills knew. This is because the mills discharged other pollutants they knew to be toxic, and because the mills benefitted economically from delaying implementation of treatment systems.

According to NCR, the mills treated the Kalamazoo River and Portage Creek as open sewers throughout the production period with little regard for the environment. (ECF No. 885, PageID.32677 (citing ECF No. 840, PageID.28654)). Dr. Allen, one of NCR's witnesses, testified that the paper mills in the Kalamazoo River Valley discharged roughly 800 million pounds of total suspended solids to the Superfund Site. (ECF No. 861, PageID.30510). NCR's briefing also references an article from Professor Frank Emerson who wrote that in the mid 20th century the paper mills " were, in effect, using the [Kalamazoo] River as a free sewer for the disposal of wastewaters bearing a large load of inorganic and biodegradeable materials." (Tx. 4350 at 188). Professor Emerson went on to write that "there was much evidence of septic action. Gas eruptions from the water gave the appearance of splashes of raindrops all about. Chunks of sludge, varying in size up to that of a platter, were raised from the bottom of the river by gases." (*Id.* at 191). During trial, NCR called other witnesses like James Pope, who described the Kalamazoo River as a "dead river." Mr. Pope testified the river was "virtually totally white from the

titanium dioxide used in the paper mill process." Furthermore "there was evidence of sludge building up, breaking up from the bottom of the river." (*See* ECF No. 854, PageID.29868).

NCR goes on to argue that the paper mills saved substantial sums by delaying the implementation of primary and secondary treatment systems. (ECF No. 867, PageID.31116–31117). Even when the mills finally installed waste-treatment systems, NCR argues, the mills routinely bypassed those systems. Robert Barrick, for example, testified that bypassing was a considerable issue at the Bryant mill. (ECF No. 863, PageID.30741). Mr. Pope similarly testified that during the 1960s, bypass was a "major problem" at the paper mills. (*Id.* at 29873–29874). Dr. Woodard, on cross examination, agreed that bypasses were a problem at all of the Kalamazoo mills. (ECF No. 840, PageID.28603–28604; *see also* Tx. 4309). Other discharges came through the mills' landfills that were created near, and sometimes on, the Kalamazoo River. Both Dr. Wolfe and Mr. Hesse testified about erosion from the landfills into the river. (ECF No. 829, PageID.27632; ECF No. 838, PageID.28265). Mr. Hagen expanded on this testimony and testified the landfills released PCBs into the Kalamazoo River. (ECF No. 856, PageID.30191).

NCR claims that this disregard by the mills shows there is little doubt the mills would not have change their recycling practices regardless of whether the paper mills had access to the available knowledge of PCBs. There was little to discourage them from doing so, and not even a 1929 Michigan law that made it a criminal offense "for any person to discharge or permit to be discharged into any of the lakes, rivers, streams,

or other waters of this state any waste or pollution of any kind that will tend to destroy fish life or be injurious to public health" (Tx. 12587 at 598) could persuade the mills otherwise. NCR argues the mills admitted they were violating the law, and as an example points to a December 31, 1958 memo from the Allied Paper Corporation which states the King mill was "in flagrant violation of our Michigan Water Resources Commission orders on the amount of waste that we may discharge into the Kalamazoo River." (Tx. 4323).

None of these arguments convinces the Court that any party is uniquely culpable here. The effort by the paper mills is to show that the combined, accumulated knowledge by NCR about PCBs was sufficient to give NCR all it needed to stop supplying its effusion to the coaters well before it did. The exhibits supporting Georgia Pacific's time line, however, must be read in context. The testimony from Dr. Rodricks for example, is focused on the risk of PCBs in recycled paper used in food packaging. The basic point from this testimony was that PCBs were bad for food and food packaging. But this is only an indirect link, at most, to the paper mills' effluents from the de-inking process that were discharged into the environment. It provides only limited insight on NCR's responsibility, and certainly does not establish unique culpability.

The other documents relied on by Georgia Pacific certainly support NCR's culpability, but not to the extent that the Court can assign NCR unique culpability. The documents show that the wide distribution of information about PCBs took time for NCR to assimilate and process in order to complete the puzzle. It makes sense that NCR would ask

Monsanto for a delay of a few weeks, not an indefinite period, to investigate Aroclor 1242. (Tx. 1539). As Dr. Vodden testified, it was the uncertainty regarding the PCBs accumulating in the environment that drove concerns. (ECF No. 875-8, PageID.31284). This was also the thrust of the testimony from Cumming Paton, a former Monsanto specialist, who testified about Monsanto's communications with NCR during the late 1960s. (ECF No. 875-9). And there was conflicting information too. As noted, Monsanto told its customers in 1970 that it did not believe lower chlorinated PCBs were hazardous to the environment. And in November 1969, Monsanto, while recognizing Aroclor was in the effluent of its plants, found no reports of finding Aroclor 1242 in the environment, and stated there was no harmful effect known to man or other mammals after 40 years of production. (Tx. 2585 at -636).

So when NCR concluded in 1975 that the mills were innocent victims, it was not because NCR was admitting to the scheme alleged by Georgia Pacific; rather it was because NCR knew it had supplied PCBs that, in hindsight, it should not have done. This is made clear by a further reading of the same memo that states although NCR "did use PCB there was no evidence at that time that their use would create a future pollution problem." (Tx. 1625). The memo further mentions that the manufacturers replaced PCBs voluntarily, and based on only limited information. (*Id*). While this does not absolve NCR of its culpability as an arranger, the Court does find the evidence shows a lot of back and forth and uncertainty, especially in the early going, that viewed overall shows NCR responded to emerging information,

rather than engaged in any sort of extended coverup. All that said, it is more than clear that NCR did, as discussed in the Phase I opinion, drag its feet.

NCR's focus on other pollutants to argue the mills would have continued discharging PCBs no matter how much of the available information they had does not absolve NCR, or make the mills uniquely culpable. The evidence at hand establishes that the entire industry, including NCR, had little concern for the environment by modern reckoning. That's the problem everyone now has to acknowledge in figuring out how to pay for the cleanup of a mess we wish, in retrospect, had never been made. Pointing out the paper mills' contribution cannot eliminate NCR's own responsibility for developing the CCP product that generated the source of the PCBs now driving investigation and cleanup costs. The task now is to remove those PCBs and part of the economic assessment is to share the cost of cleanup amongst the responsible parties. This supports a fair allocation, not zero allocation.

Therefore, based on all the above reasons, the Court does not see a basis for concluding that any party is uniquely culpable in the matter.

4. The Court finds no convincing basis for divisibility of harm in the river system. In particular the Court rejects NCR's attempt to mathematically segment its responsibility to a tiny fraction of the PCB loading. To the extent a party's geographic activity in the river system–International Paper in the Portage Creek tributary, and Weyerhaeuser downstream in Plainwell–affect equitable responsibility for costs, the Court's allocation of the past costs accounts for it.

NCR and the paper mills provide differing theories of divisibility. NCR advances a series of considerations that it argues should lead to a very small apportionment. The paper mills' theory of divisibility is based on the mills' geographic locations in the Superfund Site, and the undisputed fact that their discharges did not travel upstream. The Court briefly addresses both arguments and its reasons for concluding why one overall equitable allocation is a better resolution here for costs to date.

a. NCR's Divisibility Arguments

NCR advances four main premises for divisibility that it claims should cap its responsibility at roughly 2%: 1) NCR had nothing to do with 25% of the PCB contamination at the site; 2) NCR did not own or control most of the potential sources of CCP; 3) only very little of NCR's CCP reached the site because of successful markets elsewhere; and 4) the vast majority of PCBs were discharged prior to 1969, the date when it has been found to be an arranger. (ECF No. 885, PageID.32664). The Court has dealt with the first three elsewhere; they are, in the Court's view, not

theoretical or practical bases for divisibility, but simply factors in equitable allocation to the extent the Court finds them factually supported.[9] In regards to the fourth premise, NCR marshaled a series of experts that assembled the available data and combined it with assumptions to build interlocking layers of mathematical estimates: 1) inputs of CCP combined with discharges of solids in wastewater can give PCB discharge estimates; 2) PCB discharges allow for estimates of how those pollutants made their way through the river system; 3) this, in turn, allows for estimates of which areas will need to be remediated; finally, 4) models can allocate responsibility for certain remediation to discharges from a particular mill in a particular year.

The Court rejects NCR's divisibility theory. At a general level, the NCR divisibility argument fails because it is based on a faulty legal premise. NCR reads the Phase I Opinion to establish the company as liable only for discharges after March 1969. However, Phase I focused on determining whether the parties were liable, and the Court found NCR liable as an arranger. In Phase II, the Court takes the liable parties and determines how to allocate costs among them. NCR's attempt to push the March 1969 date forward is, in the Court's view, largely immaterial to the outcome of the divisibility argument. NCR is liable as an arranger for generating at least some of the PCBs now in an undifferentiated mass in the

[9] The Court does not find the first factually supported, as noted earlier in the discussion of Mr. Butler's testimony. The second and third factors–even if factually supported–are not as exonerating as NCR makes them out to be, as noted later in the discussion on equitable allocation.

Kalamazoo River. Moreover it had a hand in all of the PCB discharges from the paper mills, as NCR was the sole producer of CCP paper. Whether paper was coated by NCR or an independent coater (while NCR still held title to the emulsion), NCR was the one who benefitted from selling the useful product. True, some of the CCP broke and trim that reached the site came from coaters other than NCR, but the use of that recycled paper was only viable thanks to a process NCR developed to prevent blueing. The particular timing of when PCB discharges occurred provides no meaningful basis for divisibility. As most, the timing is a factor to consider in equitable allocation.

Eliminating the fallacy of the timing premise erodes the fundamental basis of the interlocking expert theories that NCR tried to advance. Dr. Rausser relied on the flawed assumption in his simulations. (ECF No. 867, PageID.31122). Mr. Butler relied on it in his standalone analysis. (ECF No. 865, PageID.31014). Mr. Wittenbrink relied on it in his site nexus analysis. (ECF No. 852, PageID.29825). NCR's expert on cesium dating, Dr. Reible, testified about the date at which PCBs had been deposited into the river. While comparing the years in which PCBs and cesium-137 from thermonuclear testing were released may be an interesting theoretical exercise, it also involved substantial uncertainty. Dr. Reible had to make assumptions about whether deposition rates changed or stayed constant over time, which is not a simple question when impoundments were being removed along the river at the time. In fact, assumptions about deposition rates made by different NCR experts conflicted with each other. More importantly, the

entirety of the cesium dating exercise relied on seven core samples from Lake Allegan to determine the timing of PCB releases in the entire Kalamazoo River system. While a small sample size like seven may be justified in some circumstances, it is particularly problematic when there were thirty cores available, including three others in Lake Allegan. One in particular was excluded explicitly because its data did not match the story, showing PCB releases earlier than the other cores. The Court does not find seven hand-selected samples to be an adequate basis for any expert opinion. The Court puts no weight on the cesium-137 analysis.

The substantial uncertainty in Dr. Reible's model applies to the models of NCR's other experts. The Court is satisfied that there is no other mathematically precise way for divisibility in this case. The liability for each of the four parties rests on different bases. In particular, NCR is an arranger, while all others are mill owners or operators. NCR's models rest primarily on calculated or modeled loadings, which naturally skew responsibility to the mills, and do not take seriously NCR's role as the creator of the CCP in the first place. Moreover, NCR's experts had to piece together loading estimates based on a few data points, uncertain estimates of mill production, and other rough assumptions. The estimates of suspended solids released by each of the mills, which were often used as a proxy for PCB loads, are inherently uncertain. Mills did not conduct regular testing of their effluents, and when they did, records were not always kept. When records were kept, they were not always retained. Other considerations, such as discharges from landfills, mill

ponds, overflows, and bypasses, all add to the uncertainty of the suspended solids discharged into the Superfund Site. Loading data, whether from mediation summaries, or otherwise, is not reliable for the type of precise calculations that NCR offers. Moreover, it is not just uncertainty regarding the inputs of PCBs loading that bears on the Court's conclusion there is no other basis for divisibility. There is also uncertainty on the amount of PCBs that have been washed from the Kalamazoo River system and into Lake Michigan. Like all mathematical models, these kinds of uncertainly on both the input and the output cells creates the opportunity for the modeler to manage the uncertainties in a way that generates desired modeling results.

The big unknown variable of PCB loading into the river means NCR's attempts to develop a more specific model are unsuccessful because they are built on unreliable numbers. NCR's experts largely conceded that specific numbers could not be reached. The experts had to make too many assumptions, tried to do too much with too little, and built upon other estimates that did the same. Dr. Scott's mass energy balance model, for example, is based on a cascade of assumptions based on limited data and the model varied widely based on the data used and the updates of the other witnesses to their reports. As Dr. Allen admitted, if the inputs are off, the output of a model will also be off, regardless of the reliability of the model itself. (ECF No.861, PageID.30557). And the partition coefficient of Dr. Allen's model includes a number of assumptions that leaves room for a lot of flexibility in the math. (ECF No. 861, PageID.30515). Dr. Nairn's model, which builds from Dr. Allen's

estimates, includes a plus or minus of 50% change to the PCB loads. That only underscores the uncertainty of his model. (ECF No. 859, PageID.30415). Mr. Butler's standalone cost model then teeters atop numbers that are not very stable or reliable.

In sum, there is a basic agreement on the paper mills' relative contribution of PCBs: the Bryant, King, and KPC mills all released comparable amounts of PCBs, with the Plainwell mill releasing a lesser, though more than de minimis, amount. There is too much uncertainty and lack of data to reach much beyond that. Ultimately what occurred in the past, and the experts' diverging opinions on those events, must all be viewed against the reality of the presence of a substantial amount of undifferentiated PCBs at the Superfund Site to which all parties contributed, including NCR.

For all these reasons, the Court rejects NCR's divisibility arguments.

b. The Paper Mills' Geographic Arguments

All of the parties recognize the physical reality that PCBs travel downstream, and not upstream, when they enter the river system. Based on geography, PCBs found in sediment upstream in the Kalamazoo River from the confluence with Portage Creek must be from either the KPC or King mills, unless someone trucked them from a downstream source to an upstream discharge point first, and there is no evidence of that. Likewise, PCBs found in Portage Creek must be from the Bryant mill, and PCBs up river from the Plainwell mill and its landfill were not discharged from the Plainwell mill. On the other hand, PCBs found down river from any particular

point of original discharge could have come from any or all of the upstream sources, and there is no reliable way to sort out what particular source is responsible for any particular downstream PCB.

How, if at all, should the parties and the Court account for this in apportioning or allocating costs for investigation and cleanup of the river unit itself—OU5? Georgia Pacific has split OU5 into four geographic segments that correspond with the physical conditions of the river and the locations of the mills, much as the EPA has divided the river into several work areas. (ECF No. 831, PageID.27894).[10] At trial, Roger Hilarides testified that OU5-East includes the portion of the Kalamazoo River from the Marrow Dam to the confluence of the Kalamazoo River and Portage Creek. (*Id.* at 27895). OU5-Portage Creek includes the lower portion of Portage Creek up to its confluence with the Kalamazoo River. (*Id.*) OU5-Central begins with the confluence of the Kalamazoo River with Portage Creek and moves downstream to the Plainwell mill location. (*Id.*) OU5-West then includes the remainder of OU5, from the Plainwell mill downstream until Lake Michigan. (*Id.*) Georgia Pacific also created a non-geographic segment, OU5-General, that would cover costs that were not specific to one of the four geographic segments. (*Id.* at PageID.27894). Georgia Pacific then proposes different allocations for each unit.

This is certainly a plausible approach, but not one the Court favors because it too presumes more certainty than is possible at this Site. All parties have

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[10] A map of Georgia Pacific's geographic segmentation is attached as Exhibit B.

a common interest in source removal upstream to the extent it contains PCBs before they spread further downstream. Moreover, the upstream loadings are very uncertain in any event. The Court sees no basis for divisibility or apportionment on this geographic basis. To the extent the geography matters in equitable allocation, the Court has taken this into account in its single overall allocation for costs to date. Accordingly, the Court will consider the river segments, that is OU5 East, West Central, and Portage Creek, together and make an overall equitable allocation based on the relevant equitable allocation factors, including the position of the mills along the Kalamazoo River and Portage Creek. For the reasons detailed below the Court's allocation covers the work at OU2 as well.

For these general and specific reasons, the Court finds that the harms in this case are not reasonably capable of apportionment on this record, despite the laudable efforts that certainly made the record longer, richer, and more interesting. Ultimately, however, the Court is not satisfied they establish a basis for divisibility.

5. The Court's allocation is for past costs only.

CERCLA provides that "the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent . . . actions to recover further response costs or damages." 42 U.S.C. § 9613(g)(2). Article III of the United States Constitution limits the jurisdiction of courts to cases or controversies. U.S. Const. Art. III, § 2, Cl. 1. To satisfy this requirement, "a party seeking declaratory relief must allege facts to support a likelihood that it

will incur future costs recoverable under CERCLA." *GenCorp, Inc. v. Olin Corp.*, 390 F.3d 433, 451 (6th Cir. 2004). There is no doubt future costs will be incurred, so there is a proper basis for entry of a declaratory judgment, and the Court will do so.

But is there a basis for declaratory judgment that includes an advanced equitable allocation? Georgia Pacific urges the Court to allocate future costs of investigation and remediation of PCBs in the Kalamazoo River. Defendants argue the Court should wait to see what costs are actually incurred. The Court sees no basis for an advanced equitable allocation. There is a high level of uncertainty as to the shape of what remedies will actually apply, and no real basis to assess costs without even knowing the remedy. The only thing that is certain right now about the future costs at the Superfund Site is that it will take decades to complete the work–and it may take that long even to select a remedy. It makes sense to wait until the process is further along and the remediations more concrete before allocating future costs.

The uncertainty of the contour of the remedies was made evident through the testimony of individuals such as James Saric, who testified that although the EPA expects there will be remediation activities, the EPA has not made any final remediation decision for any parts of the Kalamazoo River (ECF No. 875-10, PageID.31321, 31337) and Dr. Martin Lebo, a fact witness and former project manager for the OU5 portion of the Superfund Site. Dr. Lebo testified that hydrology changes from the Plainwell impoundment TCRA changed the erosion pattern downstream. (ECF No. 846, PageID.29153). This testimony only

adds to the uncertainty here. Though it appears a ROD has issued since Mr. Saric's testimony, a final decision has not yet been reached for the vast majority of OU5. The allocation assigned for past costs in this case may be a useful starting point for the future, but the Court will not enter a judgment with any fixed future allocation.

D. Equitable Allocation

All of the above considerations lead to the task of determining an equitable allocation for the liable parties, and the application of the Gore and Torres factors. Much of what has previously been discussed is still relevant to determine the equitable allocation of responsibility between Georgia Pacific, International Paper, Weyerhaeuser, and NCR—all of whom have been found liable in this action. Each party proposes their own allocation method based on various considerations, and each party believes it should be allocated no more than a nominal share. Ultimately, the Court must come up with its own allocation based on all matters of record. Below, the Court briefly summarizes NCR and GP's methodologies and its reasons for rejecting them. Then the Court will discuss its own rationale and present its overall allocation determination that takes into account the arguments of the parties.

1. NCR's Allocation Alternative

NCR contends that an economically sound allocation should take into account several basic factors, many of which overlap with the Gore and Torres factors. These facts include the relative discharges of each of the mills, the parties potentially responsible for the discharges at each mill, the

proportional assignment of any discharges made by non-parties, and an equitable division between parties responsible for a single discharge. (ECF No. 867, PageID.31119–31120).

Dr. Rausser testified that the mills benefitted economically by recycling paper rather than creating paper with virgin pulp. He estimated the mills saved a total of $695,000,000 by recycling paper between 1964 and 1981. When it came to NCR's allocation, Dr. Rausser performed a "simulation analysis" that inputted contribution estimates from several different experts, the assumed arranger period, an assumed amount of NCR CCP that reached the Site, and an equitable division for any of the CCP that reached the Site. (ECF No. 867, PageID.31125). Dr. Rausser then ran his model 100,000 times. (*Id.* at 31129–31130). Based on his model of the experts, Dr. Rausser assigns Georgia Pacific an allocation of 55.1 %, International Paper an allocation of 35.7%, Weyerhaeuser an allocation of 7%, and NCR an allocation of 2.3%. (ECF No. 867, PageID.31134).

2. Georgia Pacific's Allocation Alternative

Georgia Pacific proposes a method of allocating costs based on the geographic segments of the river, the paper mills' contributions to that segment, the parties' connected to the mills, an allocation of responsibility, and then an aggregation of the results. International Paper and Weyerhaeuser tacitly agree with the methodology, to the extent it takes into account the mills' relative discharges, the geographic location of the mills, and NCR's role as the source of the PCBs in the river. Accordingly, the Court will sketch out Georgia Pacific's proposal below, and then

explain why it is rejecting it in favor of the overall amalgamation of all factors into a single number.

Georgia Pacific proposes a four step method for allocating costs to OU5 and OU2. (ECF No. 882, PageID.31930). The method begins "by identifying the mills whose PCB discharges are relevant as physical sources of PCBs in that section of the Site and in what proportion." (*Id.*) Second, Georgia Pacific proposes to identify the parties connected to the PCB discharges from each mill. Generally, this means identifying the owner / operator of the mill as well as attaching NCR as an arranger. (*Id.* at 31933). Third, Georgia Pacific contends the Court should allocate responsibility for the PCBs attributable to the mill amongst the parties connected to that mill in step 2. Here, Georgia Pacific argues that NCR should fully indemnify Georgia Pacific at this point. (*Id.*) At the fourth step, Georgia Pacific believes the Court should aggregate steps 1 and 3 and then adjust as necessary, taking into account any non volumetric factors. (*Id.*) The attached appendix provides an example of Georgia Pacific's methodology as applied to the central portion of OU5 as well as OU2.

3. The Court's Reason for Rejecting the Parties' Proposed Methods

In the previous section, the Court rejected NCR's argument that there exists a mathematical basis for divisibility. The same reasoning leads the Court to reject NCR and Georgia Pacific's attempts to demonstrate a mathematically precise equitable allocation as an alternative approach.

The Court was unpersuaded by Dr. Rausser's economic benefit approach. For one thing, it ignores

the fact that NCR dragged its feet on sharing knowledge about PCBs with the paper mills. And on cross, Dr. Rausser retreated from his testimony by admitting that, at least for the Plainwell mill, the savings from recycling CCP would not have been meaningful. (ECF No. 867, PageID.31157). Furthermore Dr. Rausser did not include Weyerhaeuser's documents that detailed the actual cost of installing secondary treatment in his analysis. (*Id.* at 31164). But the main flaw with Dr. Rausser's model is that he ignores the fact that NCR greatly benefitted from the sale of its CCP broke and trim. On cross, he admitted that NCR had profit margins of twenty percent and experienced over $2.1 billion in revenues from the production of its CCP in 1970–1972 alone. (ECF No. 867, PageID.31177, 31179). Thus the attempt to shift the burden nearly entirely to the mills because of their economic benefits from recycling is entirely unpersuasive.

Turning to Georgia Pacific's four-step method, the Court finds it to be too legalistic and more mathematically precise than an allocation in this case can actually be. The approach also needlessly separates out several equitable considerations into separate steps. Considerations such as the parties' relative contributions, a party's connection to a certain mill site, culpability, knowledge of the hazard, and degree of cooperation are all equitable considerations covered by the Gore and Torres factors and are more properly considered together.

As it relates to OU5, the Court reiterates that downstream mills still realize a very real benefit from upstream studies and remedial work that may reduce downstream costs. That said, the Court recognizes

the physics of the matter and that a mill or landfill's discharges, in all likelihood, did not move upstream. The Court has factored that reality into its allocation. Accordingly all the mills as well as NCR, are responsible with respect to the entirely of OU5. As for OU2, the physics are more pronounced–removal of solids from an upstream landfill. But even here, all parties benefit from source control, and many uncertainties remain that belie the apparent mathematical neatness of it all. At this stage of the case, a single allocation figure is still better able to account for all equitable factors.

4. The Court's Allocation

a. Summary of the Court's Reasoning

Due to the lack of reliable data from the production period, almost a half century ago, the Court prefers a single overall allocation that accounts for all of the Gore and Torres factors and one that applies across all the costs incurred so far. This allocation reflects the Court's conclusion that all of the parties are responsible for a portion of the costs incurred for investigating and remediating PCB contamination because all of them have a degree of culpability regarding the contamination. NCR had a hand in all of the carbonless copy paper that was responsible for the PCB contamination and, as found in Phase I, knew that there were environmental and human dangers to releasing the wastewater from recycling CCP, even as it encouraged the de-inking mills to continue to recycle its product. Georgia Pacific operated one of the largest paper mills in the area that experts from all the parties agree contributed a large share of the PCB contamination. International Paper

owned another one of the largest paper mills in the area that experts agree was one of the large contributors of PCBs, but International Paper was less actively involved in the release of PCBs because it leased the mill out to another company that ran it. Moreover, the primary discharges were to Portage Creek, which somewhat dampened the flow of PCBs into the river itself. Weyerhaeuser operated a smaller paper mill that nonetheless contributed a nonnegligible portion of PCB contamination to the river. Its discharge point was much farther down river than any other mill.

Further all of the mill parties used landfills that had inadequate protections in place to prevent PCBs from eroding into the river.[11] Finally although there are some PCB profiles that would be consistent with other Aroclors, and thus with non-papermaking sources, there has been no convincing showing that those other PCBs have affected cleanup of the Superfund Site at this point in such a way that justifies shifting the equitable allocation. These considerations all bear the Gore and Torres factors,

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[11] The Court could have attempted to allocate the river costs OU5–different from some of the landfill work—such as OU2. The Court considered several different approaching involving different allocations by operating unit. Ultimately, however, the Court opted for one overall allocation to take into account all factors, including the geographical reality of some of the landfill work, such as OU-2. All parties benefit to some extent from the landfill removal work because it reduces loading sources to the river, so all parties may fairly bear a share. On the other hand, downstream mills can persuasively argue they benefit less than the actual operator or former operator of the landfill. Rather than attempt to parse the equities on a unit-by-unit-basis, the Court molded all considerations into a single number.

including the parties' respective culpability, the ability of the parties to demonstrate their contribution can be distinguished, the degree of the parties' involvement at the Superfund Site, the degree of care and cooperation exercised by the parties, the extent that costs are attributable to a specific parties, and the degree to which the parties benefitted from the disposal of PCBs. *Consol Coal* Co., 345 F.3d at 413; *Centerior*, 153 F.3d at 354.

Therefore, based on an equitable weighing of the many factors in play, the Court determines the following allocation is a just outcome for past costs to date: NCR 40%; Georgia Pacific 40%; International Paper 15%; and Weyerhaeuser 5%. Thus the majority of the allocation—60%—goes to the paper mills, with their differences in volume, location, and approach to the problem reflected in the different percentage for each mill. But NCR, as the creator of the PCB-containing emulsion and the party that encouraged the recycling of its CCP, still takes a significant share that the Court believes fairly reflects its equitable allocation.

b. The Court's Allocation to Each Party

i. NCR

NCR argues its equitable share of response costs is very small. This is because the paper mills, NCR says, were responsible for discharging PCBs, along with other pollutants, and the mills flouted state laws and regulations designed to protect the environment. NCR insists that it, on the other hand, acted in good faith when it chose to replace Aroclor 1242 in its CCP emulsion, and could have arranged for only a small fraction of the CCP recycled at the site. The mills

disagree, and contend that a substantial amount, if not the entire amount, of the allocation should go to NCR. Applying the Gore and Torres factors, the Court concludes NCR's allocation is 40%.

Although NCR would like to cabin its responsibility to an "arranger period" starting in 1969, the Court must consider the equitable factor that NCR was involved in the release of PCBs even before then. NCR was more involved in the release of PCBs than the general public. Indeed, NCR was not open with the public about its use of PCBs in CCP, but instead tried to keep its use of PCBs out of the press or regulator cross-hairs until a suitable alternative was found. While NCR's actions were not enough to make it uniquely culpable, there is sufficient information to show it is culpable here and, as earlier described, was dragging its feet when it came to switching from Aroclor 1242 in its emulsion.

Witnesses such as Chris Wittenbrink, tried to show that NCR should be responsible only for its specific arrangement. This argument fails, first of all, because the Court has declined to adopt NCR's divisibility argument. But it also fails under application of the Gore and Torres factors. Even before NCR had a knowledge and intent that made it an arranger of disposal under Section 107's definition, NCR was still involved in the release of PCBs. NCR created the PCBcontaining emulsion, held title to the product as it was converted to usable paper, and then sold that finished product. As Dr. Kittrell testified, NCR developed a process to enable de-inking mills to use CCP as a feedstock, a process that resulted in most of the PCBs being emitted in waste streams. (ECF No. 830, PageID.27700). Furthermore, there has been no

reliable showing on how additional PCBs to the Superfund Site should shift the equitable allocation. NCR's argument is largely based on the fact that PCBs were ubiquitous during the production period, and used in a variety of applications across the country. (*See, e.g.*, Tx. 12572). This argument was largely discredited by the testimony of NCR's expert John Butler, who testified that he had not seen any documentation that shows a significant source of PCBs at the Superfund Site other than from the mills. (ECF No. 865, PageID.30984–30985).[12] All these observations justify a substantially higher percentage of responsibility than that asked for by NCR.

ii. Georgia Pacific

Georgia Pacific owned and operated a sizeable mill that released thousands of pounds of PCBs to the site. Georgia Pacific makes much of being the only party to actively step up and cooperate with regulators to investigate and remediate the site, and the Court does factor in Georgia Pacific's cooperation. However, that positive element is at least partially offset by evidence that Georgia Pacific was not always making good faith efforts to clean up the site in the most efficient and expeditious manner. Some documents submitted to regulators were described as arguments by lawyers

[12] The other parties sought to hold Georgia Pacific to its position in previous litigation that up to 25% of PCBs came from non-Aroclor 1242 sources. The argument is largely immaterial based on the fact that the Court has not been convinced that any non-Aroclor 1242 PCBs have affected cleanup costs. To the extent the estoppel argument survives this practical observation, the Court is satisfied there exist sufficient differences between this litigation and earlier litigation that render estoppel inapplicable.

instead of findings by scientists. The Court credits Scott Cornelius' testimony about the frustrations the State had with the study group's proposals. (ECF No. 852, PageID.29701–29702; Tx. 4468). There is bound to be some friction between regulators and a company facing a possible ten-figure tab to clean up an eighty mile stretch of river, but the Court finds that the conflict between Georgia Pacific and regulators, particularly Michigan's Department of Environmental Quality, went beyond the normal friction that occurs in these situations.

When it comes to quantity of PCBs at the Superfund Site, Georgia Pacific's main witness on the issue of contaminated sediment fate and transport was Dr. Wolfe. Dr. Wolfe opined that PCBs were released by the paper mills during the de-inking process and tended to settle in the quiescent areas of the Kalamazoo River downstream from the major mills. (ECF No. 838, PageID.28227–28228). Dr. Wolfe further opined that, because of the lack of available data, only a "coarse grouping" of those dischargers was possible. (*Id.* at 28228). Still, Dr. Wolfe found enough information to estimate loads of PCBs at the Superfund Site (*see, e.g.*, Tx. 155), though Dr. Wolfe insisted his model was of limited use and could not, for example, be used to construct an estimate of the mills' yearly discharges. Furthermore Dr. Wolfe clarified that he was not, in fact, suggesting that the PCB mass provided in his report was actually the amount of PCBs discharged by the mills. (ECF No. 838, PageID.28297).

The Court found the basic mechanics and physical processes, as described by Dr. Wolfe, to largely be undisputed. The parties mostly agree about the

movement of particles down the river, and the settlement in the quiet areas. And the Court agrees that, as another witness would testify, an estimate of the relative contribution potential of the mills' discharges can be reached. Beyond that, any attempt to calculate more exact numbers is limited by the uncertainty that Dr. Wolfe himself identified. As Georgia Pacific's counsel suggested, "the specific numbers aren't very important." (ECF No. 838, PageID.28287).

Applying the equitable considerations, the Court concludes Georgia Pacific's allocation is 40%.

iii. International Paper

International Paper also argues it should receive only a very small share of the equitable allocation. International Paper argues that the PCB contributions from the Bryant and Monarch mills, unlike the other mills, can be reasonable quantified, and that the Bryant and Monarch mills were de minimis contributors of PCBs. Furthermore, International Paper argues that, as a passive owner of the Bryant mill, it is less culpable than the other mills who each were more active in contributing PCBs to the Superfund Site; and for that same reason International Paper says it did not benefit from the activities that caused the contamination as much as those active operators did. (ECF No. 881, PageID.31796). Finally, International Paper argues that its share should be reduced because many of its potential witnesses and supporting documents have been lost to time, and International Paper is relatively new to this case as compared to the other defendants.

Thus, it claims Georgia Pacific's laches uniquely hurt the company.

The Court agrees that International Paper's share of responsibility is less than NCR and Georgia Pacific. International Paper was less directly involved in the operation of Bryant mill when the mill was releasing PCBs. Thus, while still culpable as an owner, the culpability consideration weighs differently than as to Georgia Pacific and Weyerhaeuser. But International Paper's efforts to paint its contribution of PCBs to the Kalamazoo River as de minimis largely fails. International Paper asked Dr. Franklin Woodard to estimate the amount of PCBs discharged by the paper mills. Using a "solids balance" approach, Dr. Woodard estimated the Bryant and Monarch mill discharged between 13,249 and 22,099 pounds of PCBs from 1954 through 1985. (Tx. 6849). According to his math, the KPC mill was the largest discharger, with the King and Bryant mills following as higher-level dischargers. (ECF No. 840, PageID.28521). Mr. Helgen added to Dr. Woodard's testimony with a mass-balance approach and opined that very few of these PCBs discharged by the Bryant mill found their way to the Kalamazoo River. This was because the Bryant mill pond operated as a sort of super clarifier that trapped the vast majority of PCBs with an efficiency approaching 95%. (ECF No. 843, PageID.28899).

While several experts agreed that the Bryant Mill point did trap PCBs-and this is borne out in the fact that the EPA removed PCBs from the pond in the TCRA–Mr. Helgen's estimates far exceed the others. Furthermore, the estimate is punctured by uncertainty. Mr. Helgen's testimony is based on Dr. Woodard's work. And Dr. Woodard largely depends

on the role of the Bryant mill pond. But the mill itself is unpredictable. As Dr. Woodard admitted, the mill was an "uncontrolled settling pond." There were times when the solids would settle, and other times when the solids would be scoured from the bottom and flow over the dam. (ECF No. 840, PageID.28636). And at one point Mr. Helgen stated that because of uncertainty, his estimate of 95% efficiency was similar to Dr. Annear's estimate of only 71% efficiency. (ECF No. 843, PageID.28909).

Thus reality and uncertainty get in the way of this analysis, as it does for many of the witnesses in this case. Mr. Hesse's testimony about the turbidity of Portage Creek, for example, is inconsistent with International Paper's theory that the vast majority of suspended solids settled before reaching the creek and river. And as was noted in Mr. Helgen's cross, if the mill pond did operate with such a high efficiency in trapping solids, there would have been little reason for the mill to connect to Kalamazoo's treatment system, which would have been comparatively less efficient by trapping only roughly seventy percent of solids. (ECF No. 843, PageID.29068).

So International Paper is in a different position both as its status as an owner while the mill was being operated by Allied and by operation of the Bryant mill pond, which did capture at least some PCBs. But the Court declines to find that the mill's share was only de minimis. As an owner, International Paper's predecessor had contractual rights to inspect the facility and require adequate environmental controls. International Paper was more involved than the general public in the relevant releases. And the releases for the mill contributed an amount of PCBs

on par with the King and KPC mills, although some were trapped in the uncontrolled mill pond. Accordingly the Court assigns International Paper an equitable allocation of 15%.

iv. Weyerhaeuser

Weyerhaeuser owned and operated the Plainwell mill while the mill was releasing PCBs. Weyerhaeuser also argued its contribution of PCBs to the river was minimal and that it should be assigned only 0.38% of the allocation. Weyerhaeuser's argument begins with Dr. Neil Ram, who testified in Phase II about the relative total suspended solid loadings amongst the paper mills in the Kalamazoo River Valley. Dr. Ram looked at both primary and secondary documents containing numbers on total suspended solids and testified that in total, he inputted roughly 50,000 data points. (ECF No. 846, PageID.29213). Another expert, Steven Werner, then converted the data to an annual discharge rate. Mr. Werner agreed there was not enough information for specifics, and instead developed a relative PCB contribution potential of the mills using the relative amount of total suspended solids, the relative amount of CCP available in a given year, and concentration data from waste solids. (ECF No. 848, PageID.29410). Under his method, Mr. Werner concluded the Plainwell mill had a relative PCB contribution of 1.9% to the Superfund Site, while the King, Bryant, and KPC mills all had much higher contributions collectively contributing about 89% of the PCBs that went into the Kalamazoo River. (Tx. 8071). Weyerhaeuser further reduces its share by referencing cases where another party was found to have unique knowledge about the waste being

disposed of. Those cases allocate roughly 75% of the response costs to the party with such knowledge. Therefore, after adding in a further 5% shift due to Weyerhaeuser's cooperation with the government, Weyerhaeuser argues its 1.9% share should be split with 80% going to NCR and 20% going to Weyerhaeuser, leaving Weyerhaeuser with only a 0.38% equitable allocation. (ECF No. 876, PageID.31496).

Other experts, like Dr. Wolfe, Dr. Woodard, and Dr Allen, largely agreed with Mr. Werner that the Plainwell mill is responsible for substantially fewer PCBs in the Superfund Site, and the Court agrees that under any analysis the Plainwell dam did discharge a lesser amount of PCBs, and indeed the difference amounts to an order of magnitude. The Court does not believe this amounts to only a 1.9% allocation (before accounting for other factors). Mr. Werner's report depended, in part, on Dr. Ram's and Dr. Allen's numbers and though Dr. Ram based his report on a large data set, Dr. Ram admitted there were gaps present. Furthermore, the level of Weyerhaeuser's cooperation in cleanup is at least partially offset by the fact that the Plainwell mill, as is true for all of the mills, were the ones releasing PCB with their effluents and depositing residual solids in landfills on the banks of the river. Compounding the issue were the bypasses and leaks of the treatment systems the mill did install. (Tx. 11182). Based on the consideration of the Gore and Torres factors, the Court assigns Weyerhaeuser a 5% allocation.

E. Form of Judgment

Entry of Judgment under Rule 58 will still require consideration of a variety of issues, even with a simplified single allocation approach. The Court will require the parties to submit a Proposed Judgment consistent with the allocation percentages here, and the recoverable costs that have not been time-barred. Accordingly, no later than May 31, 2018, the parties shall file with the Court either a stipulated form of judgment or, alternatively, proposed competing forms of judgment with briefing on disputed issues.

F. Other Matters

There are four pending motions yet to be resolved. In the first, (ECF No. 878) International Paper asked the Court to admit four exhibits (Tx. 5714, 5715, 6740, and 12520) against Georgia Pacific. This include a report from an expert and trial exhibits from earlier litigation. Georgia Pacific opposes the motion. (ECF No. 886). The second motion (ECF No. 887) also seeks to admit several exhibits that NCR objects to (Tx. 2920, 2923, 9857, 9859, 9913, and 9916). (ECF No. 887). In a short filing, NCR states its objections should be well taken, but that it is not necessary for the Court to resolve the objections because none of the exhibits supports the proposition for which Georgia Pacific seeks to use them. (ECF No. 891, PageID.33113). The Court will grant both of these motions. The Court has factored in the parties' arguments on the weight and persuasiveness of the documents into its equitable allocation.

The remaining motions (ECF Nos. 913 and 917) seek a scheduling conference, specifically on the costs that Georgia Pacific has incurred after the Phase II

trial. The motions will be denied without prejudice. The Court intends to hold a scheduling conference, if necessary, after the parties' submissions on the proposed judgment.

VII. CONCLUSION

Georgia Pacific has established by a preponderance that it incurred reasonable costs consistent with the National Contingency Plan. Those costs are not divisible by time and mill because there is too much uncertainty, and the Court does not agree with the assumptions relied upon by experts attempting to establish divisibility. The equitable allocation for costs to date is 40% to NCR, 40% to Georgia Pacific, 15% to International Paper, and 5% to Weyerhaeuser. A declaratory judgment of future liability will be entered against the parties, but no allocation is given for future costs because there is too much uncertainty about the costs and remediation options that may unfold over a period of many years.

No later than **May 31, 2018**, the parties shall file with the Court either a stipulated form of judgment or, alternatively, proposed competing forms of judgment with briefing on disputed issues. The Court will hold a hearing on the matter if necessary.

International Paper and Georgia Pacific's Motions that seek to admit certain exhibits (ECF Nos. 878 and 887) are **GRANTED.** Georgia Pacific's Motions for a Scheduling Conference (ECF Nos. 913 and 917) are **DENIED WITHOUT PREJUDICE.**

IT IS SO ORDERED.

Date: March 29, 2018

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX

Georgia Pacific's Allocation Methodology Applied to OU5-Central and OU2

A. Step 1 - Identify the Relevant Mills

The relevant mills under Georgia Pacific's analysis are those that are not downstream of the relevant geographic segment. OU5-Central therefore includes only the Bryant, King, and KPC mills because the Plainwell mill is downstream of the segment. Based oon the testimony of witnesses that largely grouped the relative PCB contribution of these three mills' discharges together, Georgia Pacific assigns each mill relevant in OU5-central an equal share, as follows:

OU5 Segments	Bryant	King	KPC	Plainwell
OU5-Central	33.33%	33.33%	33.33%	0%

B. Step 2 - Identify the Parties Connected to PCB Discharges from Each Mill

At the second step of Georgia Pacific's method, International Paper is connected, as an owner, to the Bryant Mill. NCR is also connected to the mill as an arranger. The only party connected to the King Mill is NCR as an arranger since the mill's owner, Allied, went bankrupt. Georgia Pacific and NCR are both connected to the KPC mill: Georgia Pacific as an owner and operator, and NCR as an arranger. The updated table appears as follows:

OU5-CENTRAL					
Step 1	Bryant (33.33%)		King (33.33%)	KPC (33.33%)	
Step 2	NCR	IP	NCR	NCR	GP

C. Step 3 - Allocation of Responsibility for Each Mill's Contribution to the Parties Connected to that Mill.

At the third step, Georgia Pacific proposes to allocate each mill's contribution to the party or parties connected to that mill. For its part, Georgia Pacific argues that NCR should completely indemnify Georgia pacific. Georgia Pacific's example splits responsibility for the Bryant Mill equally:

OU5-CENTRAL					
Step 1	**Bryant (33.33%)**		**King (33.33%)**	**KPC (33.33%)**	
Step 2	NCR	IP	NCR	NCR	GP
Step 3	50%	50%	100%	100%	0%

D. Step 4 - Aggregative the Results and Adjust as Necessary

Georgia Pacific's fourth step actually consists of two separate steps. First the results of step 1 and step 3 are aggregated.

OU5-CENTRAL					
Step 1	**Bryant (33.33%)**		**King (33.33%)**	**KPC (33.33%)**	
Step 2	NCR	IP	NCR	NCR	GP
Step 3	50%	50%	100%	100%	0%
Step 4 **before adjustments**	• NCR: 83.33% total OU5-Central share • IP: 16.67% total OU5-Central share • Georgia Pacific: 0% total OU5-Central share • Weyerhaeuser: 0% total OU5-Central share				

After performing this aggregation Georgia Pacific argues that further adjustment may be necessary in order to account for non-volumetric considerations. (ECF No. 882, PageID.31934). For example, International Paper could argue for a reduction based on its status as an owner, but not an operator, for much of the production period.

E. Applying Georgia Pacific's Method to OU2

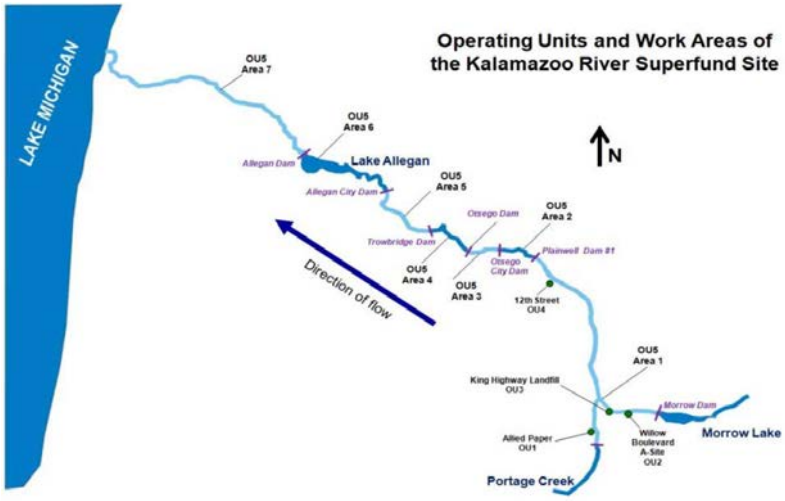
Georgia Pacific's method with respect to the landfills that make up OU2 is similar, though it includes differences based on the history of the Willow Boulevard and A-Site landfills. Georgia Pacific alleges KPC used the Willow Boulevard landfill from 1967 through 1975, and that the King mill used the A-Site landfill from the 1960s until the mill closed in 1971. (ECF No. 882, PageID.31942). While Georgia Pacific later purchased the A-Site in 1975, Georgia Pacific claims that because this was afer the production period when pre-consumer CCP would have been available, all of the PCBs in the Willow Boulevard landfill are attributable to the KPC mill, while the PCBs in the A-Site landfill are attributable to the King Mill. Under Georgia Pacific's method, the allocation to the landfills appears as follows:

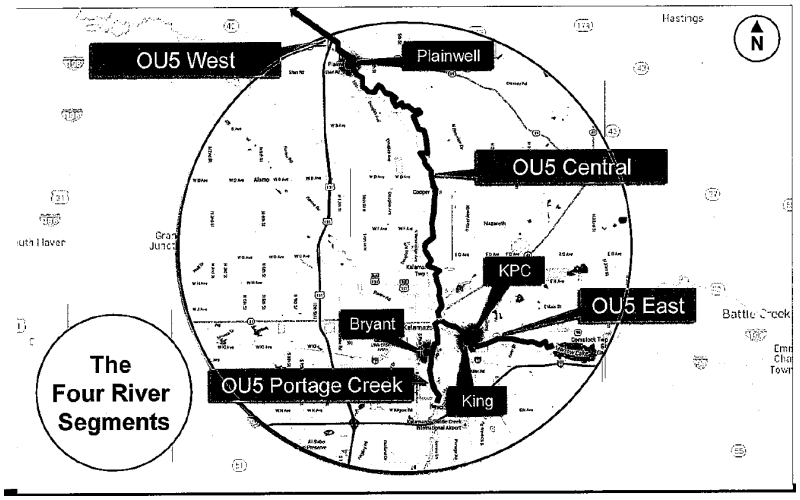
OU2-A Site	
Step 1	**King 100%**
Step 2	NCR
Step 3	100%
Step 4 **before any adjustments**	• NCR: 100% OU2-A Site share • IP: 0% OU2-A Site share • Georgia Pacific: 0% OU2-A Site share • Weyerhaeuser: 0% OU2-A Site share

(ECF No. 883, PageID.31941)

OU2-Willow Boulevard		
Step 1	**KPC 100%**	
Step 2	NCR	GP
Step 3	100%	0% (accounting for indemnification)
Step 4 **before any adjustments**	• NCR: 100% OU2-Willow Boulevard share • IP: 0% OU2-Willow Boulevard share • Georgia Pacific: 0% OU2-Willow Boulevard share • Weyerhaeuser: 0% OU2-Willow Boulevard share	

(ECF No. 882, PageID.31942).





APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GEORGIA-PACIFIC CONSUMER PRODUCT LP, et al.,

Plaintiffs,

v.

NCR CORP., et al.,

Defendants. /

CASE NO. 1:11-CV-483

HON. ROBERT J. JONKER

OPINION AND ORDER

This action arises under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 94 Stat. 2767, as well as the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 100 Stat. 1613, both of which are codified at 42 U.S.C. § 9601, *et seq*. Before the Court are Defendant International Paper's motion for partial summary judgment regarding Equitable Responsibility for the Battle Creek Mills (docket no. 732), Defendant Weyerhaeuser's motion for partial summary judgment on Statute of Limitations (docket no. 735), and Defendants International Paper and NCR Corporation's Joint Motion for Summary Judgment on Statute of Limitations (docket no. 738).

I. BACKGROUND

This is but one chapter in a protracted litigation battle concerning environmental waste in the waterways of Southwestern Michigan. Between 1972 and 1989, the Michigan Department of Natural Resources—and later the Michigan Department of Environmental Quality and the United States Environmental Protection Agency ("EPA")—conducted several studies on and around the Kalamazoo River. These studies revealed that the Kalamazoo River, later designated a Superfund Site, was contaminated with polychlorinated biphenyl ("PCB"), a hazardous material associated with carbonless-copy paper. For purposes of investigating and remediating the Kalamazoo River Superfund Site, the Michigan Department of Environmental Quality divided the Site into several "operable units." The governmental entities went after the corporations that they determined were potentially responsible parties to the contamination, and directed them to shoulder responsibility for investigation and cleanup costs.

Plaintiff Georgia Pacific is a liable party under CERCLA that has spent millions of dollars on investigation and cleanup at the Kalamazoo River Superfund Site. Georgia Pacific incurred many of the costs under various agreements with state and federal environmental agencies relating to the contamination at the Kalamazoo River Superfund Site. For purposes of the current motions, the following agreements are of interest:

(1) Two state agreements, one in 1990 and one in 2007: a 1990 Administrative Order by

Consent ("AOC") with the Michigan Department of Natural Resources, in which Georgia Pacific agreed to perform various studies on the Kalamazoo River Superfund Site; and a 2007 Administrative Order by Consent ("AOC") with the Michigan Department of Environmental Quality and the Michigan Department of Attorney General, which purported to terminate certain duties and measures associated with the 1990 AOC.

Cleanup work associated with the 1990 AOC involved Operable Unit Two ($4.44 million), Operable Unit Three ($5.96 million), Operable Unit Five ($19.49 million), and Operable Unit Six ($1.79 million). Cleanup efforts at Operable Unit Two were completed by or before May 2011, at Operable Unit Six by or before June 2009, and are still ongoing or otherwise incomplete at Operable Unit Five. Notably, cleanup associated with Operable Unit Three ($5.96 million) commenced in 1996 and concluded by or before September of 2003.

Georgia Pacific claims a total sum of *$31.69 million* in costs in connection with cleanup work performed under the 1990 AOC.

(2) Three federal agreements from 2006 and 2007: a 2006 Administrative Settlement Agreement and Order on Consent ("ASAOC") with the EPA, a 2007 ASAOC for Remedial Investigation/Feasibility Study (RI/FS) with the EPA, and a 2007 ASAOC concerning the

Plainwell Impoundment with the EPA. Together, these agreements directed Georgia Pacific to perform investigatory and cleanup actions at Operable Units Five and Six, undertake time-sensitive removal actions at the Plainwell Impoundment, and conduct other remedial investigations and feasibility studies relating to the river contamination.

Importantly, the three 2006 and 2007 ASAOC agreements differed from the previous 1990 AOC agreement. In exchange for undertaking these actions, and as expressly provided in all three of the agreements, the EPA indicated that Georgia Pacific had resolved its liability to the federal government, and that Georgia Pacific was entitled to protection from contribution actions under CERCLA sections 113(f)(2) and 122(h)(4). Furthermore, all three of the 2006 and 2007 ASAOC agreements unequivocally and expressly indicated that they constituted "administrative settlements" for purposes of CERCLA section 113.

Georgia Pacific claims $3.51 million under the 2006 ASAOC, $21.57 million under the 2007 ASAOC for RI/FS, and $18.05 million under the 2007 ASAOC for Plainwell, for a total sum of approximately *$43.13 million*.

(3) Two federal agreements from 2009: the 2009 ASAOC concerning the Plainwell Dam with the EPA, and the 2009 federal court Consent Decree. These agreements required

> Georgia Pacific to undertake time-sensitive removal actions at the Plainwell Dam and to remedy sediment-related costs at Operable Unit Two. These agreements, just like the federal agreements from 2006 and 2007, expressly provided that Georgia Pacific had resolved its liability to the federal government by entering into and performing the agreements.
>
> Georgia Pacific claims $6.83 million under the 2009 ASAOC, and $16.23 million under the 2009 Consent Decree, for a total sum of approximately *$23.06 million*.

Also relevant to the limitations issue is Georgia Pacific's membership in the Kalamazoo River Study Group ("KRSG," an association of paper manufacturers located along the Kalamazoo River that filed suit in 1995 under CERCLA against eight corporate defendants for past and future cleanup costs associated with the Kalamazoo River Superfund Site. The Defendants counterclaimed against the *KRSG* and its members. In 2003, the district court in that case entered judgment holding the Kalamazoo River Study Group liable for all past and future remediation costs associated with the Kalamazoo River Superfund Site. Neither NCR, IP, nor Weyerhaeuser were defendants in that litigation.

On December 3, 2010, Georgia Pacific filed this CERCLA action against Defendants, who, like Georgia Pacific, also own (or are otherwise associated with) property on or around the Kalamazoo River Site, in an effort to seek contribution from them for costs associated with the cleanup. After conducting a two-

week bench trial in this matter, the Court found that Defendants are liable under CERCLA for PCB disposal at the Kalamazoo River Superfund Site (docket no. 432). Georgia Pacific now seeks the sum of the past costs listed above, for a total recovery of about $100 million in past costs from the Defendants. The Defendants have moved for summary judgment barring recovery of some or all of the claimed past costs based on the statute of limitations. In addition, Defendant International Paper has moved for summary judgment precluding Georgia Pacific from relying on International Paper's role at certain upstream mills near Battle Creek for an equitable allocation of response costs at issue in this case.

II. LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986). Material facts are those necessary to apply the substantive law. *Id.* at 248. A dispute is genuine if a reasonable jury could return judgment for the non-moving party. *Id.* In deciding a motion for summary judgment, the court must draw all inferences in a light most favorable to the non-moving party, but may grant summary judgment when "'the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.'" *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992) (quoting *Matsushita Elec. Indus. Co.,*

Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)). Whether a complaint was filed outside of the applicable statute of limitations, however, is solely a question of law, and does not turn on factual disputes. *See Tolbert v. State of Ohio Dep't of Transp.*, 172 F.3d 934, 938 (6th Cir. 1999).

III. DISCUSSION

A. Defendant International Paper's Equitable Responsibility for the Battle Creek Mills

Defendant International Paper argues that there is no evidence that PCBs allegedly released from two mills located in Battle Creek, Michigan, approximately twenty miles upstream of the Morrow Lake Dam, *reached* the Site. In other words, there is conclusive evidence that PCBs were disposed of at the mills, and conclusive evidence that PCBs were detected downstream, but in International Paper's view, no evidence that PCBs were detected in the distance between these two locations. Therefore, International Paper asserts that all evidence regarding the Battle Creek mills should be barred as a matter of law on the issue of equitable responsibility for past and future cleanup costs. Effectively, International Paper is arguing that nothing concerning the Battle Creek Mills can, as a matter of law, affect the Court's equitable allocation decisions. International Paper cites *Kalamazoo River Study Group v. Rockwell International Corporation*, 171 F.3d 1065, 1068 (6th Cir. 1999), in which the Sixth Circuit affirmed the district court's grant of summary judgment in favor of one of the defendants, relieving that defendant of liability because "where hazardous substances are released at one site and allegedly

travel to a second site, in order to make out a prima facie case, the plaintiff must establish a causal connection between the defendant's release of hazardous substances and the plaintiff's response costs incurred in cleaning them up." *Id.* International Paper argues that the same lack of causal connection compels the same conclusion here.

The Court disagrees. That case involved a factually distinct situation. The circumstances in that case involved a "ditch," *see id.* at 1069, which could thwart the river's tendency to carry sediment downstream from one point to another. So merely finding the same contaminant above and below the ditch was insufficient to link the two sites. Some evidence of a contaminant pathway was needed. The facts here are different. The obvious pathway that connects upstream and downstream contamination is the river itself. It cannot be said as a matter of law that the absence of a detection between the upstream and downstream locations conclusively establishes that PCBs "disappeared" or otherwise did not reach the Site. (docket no. 752, Pl. Resp. Br. at 9.) This is evidenced by the testimony and conclusions of various experts hired by the parties, some of which indicate that the PCBs may have traveled downstream. (docket no. 756, Co-Def. Resp. Br. at 9.) In the Court's view, this is an issue for the trier of fact based on all the evidence.

The case International Paper cites is also legally distinguishable. In the *KRSG* decision, the issue was whether the Defendant was liable at all as a potentially responsible party under CERCLA. Here, the issue of liability has already been resolved against it on the basis of its downstream ownership of

facilities that contributed PCB's to the river. The only remaining issue is whether International Paper's upstream mills at Battle Creek may be a fair consideration for the Court in equitably allocating costs among liable parties. International Paper's arguments concerning the Battle Creek mills can be fully vetted in the allocation stage of this litigation. But International Paper is not entitled now to a ruling as a matter of law excluding a potentially relevant consideration. In a CERCLA equitable allocation decision, a court has broad discretion in making CERCLA contribution allocation decisions, and virtually any factor may be potentially relevant. *See United States v. Consolidation Coal Co.*, 345 F.3d 409, 413 (6th Cir. 2003) (noting ten different equitable factors that may be potentially relevant, and noting that these ten factors are not "exhaustive or exclusive"); *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 572 (6th Cir. 1991)("[B]y using the term 'equitable factors' Congress intended to invoke the tradition of equity under which the court must construct a flexible decree balancing all the equities in the light of the totality of the circumstances . . . . the court may consider any factor it deems in the interest of justice in allocating contribution recovery."); *see also* 42 U.S.C. § 9613(f)(1) ("In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.") Accordingly, the motion is **DENIED**.

B. *Defendants' Statute of Limitations Defense*

Defendants advance two arguments as to why the statute of limitations precludes Georgia Pacific from bringing its CERCLA sections 107 and 113 claims and

recovering various costs associated with its cleanup efforts. First, Defendants argue that the litigation pertaining to the Kalamazoo River Study Group—of which Georgia Pacific was a member—constituted a "judgment" that triggered the three-year statute of limitations applicable to such claims. Second, in the alternative, Defendants argue that the administrative agreements between Georgia Pacific and various governmental agencies constituted "administrative settlements" that triggered the three-year statute of limitations applicable to such CERCLA claims. The Court first discusses in general terms CERCLA claims of this nature, and then the Court considers in turn each argument.

1. CERCLA Primer

"Congress enacted CERCLA in 1980 to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2180 (2014) (internal quotation marks omitted). CERCLA provides several options by which the government may ensure funding for the cleanup of contaminated areas. The Sixth Circuit has recently explored these options and explained how CERCLA's cost-shifting mechanisms work under each. One option "for the government is to clean up the site itself and enter into a settlement agreement with [potentially responsible parties, or PRPs] to cover the government's response costs." *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757, 762 (6th Cir. 2014) *cert. denied*, 135 S. Ct. 1161 (2015). Another option is for the government to enter into an agreement with a potentially responsible party that requires the party to incur the costs

associated with rehabilitating the site. *See id.* When a party such as Georgia Pacific incurs these cleanup costs upfront, it may partially recover those response costs from other parties who were also liable for the contamination, but that did not initially contribute to the remedial effort. *See id.*

The Sixth Circuit recently noted the following with respect to private actions of this nature:

> While there are multiple avenues for the government and PRPs to apportion the costs of contamination and clean up, CERCLA contains several specific statutes of limitations as to the timing of lawsuits. Cost-recovery actions under § 107(a)(4) must be brought within three years "after completion of the removal action" or "for a remedial action, within [six] years after initiation of physical on-site construction." § 113(g)(2). Actions for contribution under § 113(f), however, must be filed within three years of "(A) the date of judgment in any action under [CERCLA] for recovery of such costs or damages, or (B) the date of an administrative order under [§ 122(g)] (relating to de minimis settlements) or [§ 122(h)] (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages."

Id. at 763 (citing *RSR Corp.*, 496 F.3d at 556–58).

The Sixth Circuit has concluded, as have several other circuits, that parties such as Georgia Pacific must seek reimbursement in the form of a contribution action under § 113(f) if they meet one of that section's statutory triggers, rather than in the form of cost-recovery action under § 107(a). *Id.* at 767.

In other words, CERCLA sections 113 and 107 provide mutually exclusive remedies, and only one is available to any party seeking recovery of any particular set of costs. *See id.* Moreover, the Sixth Circuit concluded for purposes of section 113 that if a party received a "judgment" in a CERCLA action, or entered into an "administrative settlement," this would serve as a "statutory trigger" that would start the proverbial ticking clock, as far as section 113's three-year statute of limitations is concerned.

Accordingly, parties such as Defendants have an incentive to identify a "statutory trigger," particularly if such trigger occurred more than three years before a private party filed a lawsuit seeking cleanup costs from other parties. This would have the effect of barring recovery under both section 107 (because the statutory trigger permits a contribution claim) and section 113 (because the three-year statute of limitations period for a contribution claim had run). Defendants argue that a statutory trigger applies here so that Georgia Pacific is limited to contribution under section 113. Defendants further argue that at least some of the contribution claims are barred by the running of the three-year limitations period.

2. The* KRSG *Litigation

Defendants first point to the litigation associated with the Kalamazoo River Study Group ("KRSG"). Defendants note that the common liability at issue in the *KRSG* litigation was "all past and future response costs" at the Kalamazoo River Superfund Site.[1]

[1] Defendants also note that Georgia Pacific was subject to section 107 claims in the lawsuit brought against it by the federal government.

(docket no. 773, Def. Rep. Br. at 5.) Defendants argue that as soon as the defendants in the *KRSG* litigation asserted their own section 107 counterclaims against Georgia Pacific, Georgia Pacific was "subject to a civil action" under section 107, which in turn triggered a section 113 claim for costs associated with the Kalamazoo River Superfund Site. Defendants also argue that all of the section 113 costs sought by Georgia Pacific must be barred because the district court entered judgment finding KRSG liable for past and future response costs in June of 2003. Under this view, Georgia Pacific had the obligation to identify and sue all potentially responsible parties within three years of June 2003, or be forever barred, regardless of what it discovers or spends later. Because Georgia Pacific waited until December of 2010 to file this suit, Defendants argue that CERCLA's three year statute of limitations bars Georgia Pacific's Recovery for the entire $100 million sum associated with the cleanup efforts.

The Court disagrees that the ostensible section 107 counterclaims asserted by the defendants in the *KRSG* litigation—none of which is a party to the present action—obligated Georgia Pacific to assert section 113 contribution claims against Defendants Weyerhaeuser, NCR Corporation, and International Paper—none of which was a party to the *KRSG* action—for costs that Georgia Pacific incurred separate from those involved in *KRSG*. It is well established that generally, "a judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 798 (1996). Accepting the

argument advanced by Defendants would require this Court to read CERCLA to be broader than the typical reach of traditional res judicata principles. *See id.* Indeed, it would effectively bar some contribution claims even before they would normally accrue. The Court declines the opportunity to read CERCLA so broadly, particularly in the absence of precedent, controlling or otherwise, that would lend support to such an expansive interpretation. Accordingly, the Court rejects the defense theory barring all recovery based on the *KRSG* decree.

3. *The Administrative Agreements*

In the alternative, Defendants point to the various agreements between Georgia Pacific and federal and state government agencies as evidence that the statute of limitations under section 113(g)(3)(B) has passed. According to this argument, CERCLA's three year statute of limitations bars Georgia Pacific from recovering the costs associated with the first two categories of agreements listed above, *see supra* Section I, because they are "administrative settlements" that serve as the "statutory trigger" which would foreclose Georgia Pacific's section 107 claims in their entirety, as well as start the ticking of the statute-of-limitations clock on the section 113 claims.

Analyzing this argument depends on applying two decisions of the Sixth Circuit. The most recent decision is *Hobart*, 758 F.3d at 757. *Hobart* provides the Court with a four-part test to determine whether an agreement triggers the statute of limitations on a section 113 claim. *See id.* at 768. First, does the agreement "explicitly state that [the parties] have

resolved their liability" with respect to a specific section of CERCLA? *See id.* at 768–69. Second, does the agreement itself indicate that it is an "administrative settlement" providing the party "protection from contribution actions or [CERCLA] claims?" *See id.* at 769. Third, does the title of the document match the statutory language in section 113, and therefore indicate that the parties intended to resolve their liability? *See id.* And fourth, did the governmental agency covenant not to file suit under CERCLA against the party for future response costs? *See id.* Where the answer to those four questions was "yes," the Sixth Circuit found that the parties intended for the agreement to resolve liability to the government, and therefore, the agreement was an "administrative settlement" that triggered the ticking of the three-year statute of limitations clock. *See id.* at 768–69. The second decision is *ITT Industries, Inc. v. BorgWarner, Inc.*, 506 F.3d 452 (6th Cir. 2007). In this earlier decision, the Court of Appeals found that a particular agency agreement did not trigger a right of contribution under the particular language of the agreement at issue. *Id.* at 459.

Georgia Pacific argues that *Hobart* is in conflict with *ITT Industries*, and that *ITT Industries* must control as the earliest published court authority on the issue. The Court disagrees. The controlling effect of *Hobart* is plainly evident in light of both the lengthy explanation the Sixth Circuit provided as to why *ITT Industries* was distinguishable, and the striking parallels between the agreements at issue in *Hobart* and some of the agreements here. *Hobart*, 758 F.3d at 768–71 (noting "important differences" between *ITT Industries* and *Hobart*). It is therefore unsurprising

that the Sixth Circuit has, even more recently, squarely rejected the argument that *Hobart* conflicts with *ITT Industries*, and firmly upheld the validity of *Hobart*. *See LWD PRP Grp. v. Alcan Corp.*, 600 F. App'x 357, 365 (6th Cir. 2015) (observing that *ITT Industries* does not prevent application of *Hobart*). Of course, this Court is obliged to follow binding precedent. *See id.* ("Because a panel of this Court may not overturn a prior panel's reported decision, we need not, and will not, revisit any of the above arguments, which we have already rejected in *Hobart*. . . . only the full court, sitting en banc, would have power to reverse *Hobart*'s holding.").[2]

Under *Hobart* and *ITT*, the decisions about what is time-barred and what is not depends on the particular agreement that triggered the costs. So the Court analyzes the agreements in turn.

a. The 1990 AOC and the 2007 Order by Consent

Defendants cursorily argue that the 1990 AOC by itself constitutes an "administrative settlement" as recently described by the Sixth Circuit in *Hobart*. "Under § 113(f)(3)(B) and this circuit's case law, the defining feature of an 'administrative settlement' is that the agreement 'resolve[s] [the PRP's] liability to the United States or a State for some or all of a response action or for some or all of the costs of such action. . . ." *Hobart*, 758 F.3d at 768 (citing CERCLA § 113(f)(3)(B); *ITT Indus.*, 506 F.3d at 459). In so doing, Defendants concede that the liability- focused

[2] The Court notes that another panel of the Sixth Circuit heard oral argument on August 4, 2015, in *Florida Power Corp v First Energy Corporation*, Case No. 14-4126, on the same issue.

language of the 1990 AOC is simply not as robust as that found in the later agreements.

The Court finds that the 1990 AOC does not satisfy *Hobart's* four-part test, and so is not an "administrative settlement" for purposes of triggering the section 113 three-year statute of limitations. Unlike the agreement in *Hobart*, this agreement was titled an Administrative Order on Consent, not an *Administrative Settlement* Agreement and Order on Consent. In this way, the agreement was much more similar to one found by the Sixth Circuit *not* to constitute an administrative settlement—indeed, the "AOC" title of this agreement mirrors the one before the Sixth Circuit in *ITT Industries*. *See ITT Indus., Inc. v. BorgWarner, Inc.*, 506 F.3d 452, 460 (6th Cir. 2007) ("Moreover . . . the AOC must constitute an 'administrative or judicially approved settlement' within the meaning of § 113(f)(3)(B). . . . we find that the AOC does not fall within the [CERCLA] settlements as required by the statute of limitations as enumerated under § 113(g)."). The 1990 AOC did not provide Georgia Pacific with broad resolution of their CERCLA liability to the United States, nor did it contain a broad covenant by the EPA not to sue Georgia Pacific under sections 106 or 107. *See Hobart*, 758 F.3d at 770 (observing that the government's covenant not to sue in the *Hobart* ASAOC was much broader and expansive than in the *ITT* AOC). The 1990 AOC also did not reference section 113 in the same way as did the agreement in *Hobart*, another distinction that the *Hobart* court found to be critical in distinguishing the facts in *Hobart* from the facts in *ITT Industries*. *See id.*

Defendants further argue that even if the 1990 AOC does not itself constitute an "administrative settlement," the 2007 Order by Consent "replaced entirely" the 1990 AOC. (docket no. 739, Def. Br. at 22.) If this is so, then it would be appropriate for this Court to examine language in the later 2007 agreements rather than the language in the 1990 AOC in order to determine whether Georgia Pacific entered into an "administrative settlement" relating to these costs. But the 2007 Order by Consent is simply not as expansive as would be required for Defendants' "replaced entirely" argument to hold true. Defendants are correct that paragraph three of the 2007 Order by Consent states that "it is appropriate to terminate the State 1990 AOC," and that paragraph seven again states that the 1990 AOC "is terminated." (docket no. 741-10, 2007 Order by Consent at 3–4, PageID # 22128–29). But the Defendants fail to reconcile the following paragraph in light of the Sixth Circuit's admonition that an "administrative settlement" must resolve liability for some or all of a response action:

> 9. Other Claims. Nothing in this Order shall constitute or be construed as a release or covenant not to sue regarding any claim, cause of action, or demand in law or equity against any person, firm, trust, trustee, joint venture, partnership, corporation, or other entity, for any liability it may have arising out of or relating, in any way, to the generation, storage, treatment, handling, transportation, release, or disposal of any hazardous substances, hazardous wastes, pollutants, or contaminants found at, taken to , or taken from the Site. This Order shall not estop

> or limit any legal or equitable claims of the State against the Respondents, their agents, contractors, or assigns, including, but not limited to, claims related to the releases of hazardous substances or other pollutants or contaminants. Respondents further waive all other statutory and common law claims against the State for costs of conducting the RI/FS, including the OU1 RI Report, and any contribution or counterclaims for such costs. Respondents agree to withhold any judicial challenge relating to or arising out of the performance of this Order until the issuance of the final Record of Decision for Operable Unit 1.

(docket no. 741-10, 2007 Order by Consent at 3–4, PageID # 22131). The Court finds that the language in the 1990 AOC is the relevant language to examine to ascertain whether Georgia Pacific entered into an administrative settlement with respect to these costs. The Court further finds that Defendants have not successfully established that Georgia Pacific entered into an "administrative settlement" with respect to costs associated with the 1990 AOC, and accordingly, finds that the three-year statute of limitations was not triggered on the effective date of the 1990 AOC, nor on the effective date of any 2007 agreement (at least with respect to these costs).

Instead, the Court agrees with Georgia Pacific that its section 107 claim for costs incurred under the 1990 AOC for removal actions in Operating Unit Five, Operating Unit Two, and Operating Unit Six is timely under section 113(g)(2), which indicates that an action to recover costs incurred in a removal action must be commenced "within 3 years after completion of the removal action." Accordingly, the Court **DENIES** the

Defendants' motion for summary judgment as to the costs under the 1990 AOC, except with respect to Operable Unit Three. Georgia Pacific concedes that the Operable Unit Three expenses are time barred under section 113(g)(2). (docket no. 761, Pl. Resp. Br. at 23 & n.8.)

b. The 2006 ASAOC, the 2007 ASAOC for RI/FS, and the 2007 ASAOC for Plainwell

Defendants argue that these agreements are "administrative orders" under which Georgia Pacific "resolved its liability" to the state or federal government for some or all of the response action or costs of such action. In so doing, Defendants argue that *Hobart* controls the outcome of this case. *See Hobart*, 758 F.3d at 770. Defendants note that each of these agreements contain the *exact same language* as the agreements that the Sixth Circuit examined in *Hobart*: the EPA indicated that Georgia Pacific had resolved its liability to the federal government, that Georgia Pacific was entitled to protection from contribution actions under CERCLA sections 113(f)(2) and 122(h)(4), and that the agreements constituted "administrative settlements" for purposes of CERCLA section 113. *See id.* at 768–69. Even the titles of the documents—"Administrative Settlement Agreement and Order on Consent"—are the *exact same language* as the titles of the agreements in *Hobart*. *See id.*

Georgia Pacific contests whether *Hobart* is controlling, but concedes that if it is, the statute of limitations has run and the costs arising under these agreements are time barred. A recent Sixth Circuit panel reached the same conclusion, rejecting the contention that the statute of limitations runs from

completion of the removal action rather than from the effective date of a settlement agreement such as this one. *See LWD PRP Group*, 600 F. App'x at 365–66.

The Court concludes that *Hobart* is controlling and that there is no daylight between the ASAOC agreements in *Hobart* and the ASAOC agreements here. Deference to the authority of the Sixth Circuit requires that this Court determine that these agreements are "administrative orders" that constitute section 113 statutory triggers, dismiss Georgia Pacific's section 107 claims in their entirety, rule that the three-year statute of limitations has run on these section 113 claims, and **GRANT** summary judgment as to these costs to the Defendants.

c. The 2009 ASAOC and the 2009 Consent Decree

Apart from their argument that all of Georgia Pacific's costs are time-barred due to the *KRSG* litigation, Defendants do not contend that Georgia Pacific's claim for costs relating to any of the post-2007 orders is untimely, as Georgia Pacific's action was filed within three years of the effective date of those agreements. Therefore, under any theory of the statute of limitations, these costs are not time-barred. Accordingly, Defendants' motion for summary judgment as to costs associated with these agreements is **DENIED**.

IV. CONCLUSION

For the reasons stated above, the Court holds as follows:

1. Defendant International Paper's motion for partial summary judgment regarding Equitable

Responsibility for the Battle Creek Mills (docket no. 732) is **DENIED**.

2. Defendant Weyerhaeuser's motion for partial summary judgment on Statute of Limitations (docket no. 735), and Defendants International Paper and NCR Corporation's Joint Motion for Summary Judgment on Statute of Limitations (docket no. 738), are **GRANTED IN PART AND DENIED IN PART** as follows:

(a) Summary judgment as to costs associated with the 1990 AOC is **DENIED**, except with respect to Operable Unit Three costs that Georgia Pacific concedes are time barred.

(b) Summary judgment as to costs associated with the 2006 and 2007 ASAOCs is **GRANTED**.

(c) Summary judgment as to costs associated with the 2009 ASAOC and the 2009 Consent Decree is **DENIED**.

IT IS SO ORDERED.

Dated: August 12, 2015

/s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GEORGIA-PACIFIC CONSUMER PRODUCTS LP, FORT JAMES CORP., and GEORGIA-PACIFIC LLC,

Plaintiffs,

v.

NCR CORPORATION, INTERNATIONAL PAPER CO., and WEYERHAEUSER CO.,

Defendants. /

CASE NO. 1:11-CV-483

HON. ROBERT J. JONKER

OPINION AND ORDER

Georgia Pacific ("GP") claims that NCR Corporation ("NCR"), International Paper Company ("IP"), and Weyerhaeuser Company ("Weyerhaeuser") are liable under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, for the costs of investigating and cleaning up polychlorinated biphenyl ("PCB") contamination at the Kalamazoo River Superfund Site ("the Site"). Weyerhaeuser has admitted liability but reserves the right to contest all remedial issues, including divisibility of harm and allocation; NCR and IP have denied liability. The question presently before the Court is whether NCR and IP are, in fact,

liable under CERCLA for any of the response costs at the Site.

GP says NCR is liable for arranging—either directly or through affiliates—the disposal of PCBs at the Site. Specifically, GP charges that scraps ("broke" or "broke and trim") from NCR's carbonless copy paper ("CCP") were a major source of PCBs; that, at the time it was manufacturing CCP, NCR knew the PCBs in CCP broke were hazardous and would be released in the recycling process; and that NCR arranged to have paper recycling mills, like the ones all along the Site, recycle CCP broke as a means of avoiding the costs of disposing of the PCBs in some other way (such as incineration). NCR denies liability, claiming, first, that GP cannot prove any CCP broke went to the paper mills at the Site, and, second, that CCP broke was not a waste, but a useful product, such that any release of PCBs in the recycling process cannot be the basis for arranger liability under CERCLA.

GP says IP is liable as the corporate successor to St. Regis Corporation ("St. Regis"), which owned or operated the Bryant Mill, and which allegedly recycled CCP broke and discharged PCBs at the Site. At a minimum, GP argues, even if St. Regis did not directly dispose of the PCBs through its own operations at the Bryant Mill, it held title to the Mill while another company operated the Mill in a way that caused the disposal of PCBs at the Site. IP denies liability because, it says, GP cannot prove that CCP broke reached the Bryant Mill before July 1, 1956, the date on which St. Regis stopped operating the Mill itself, and sold or leased Mill assets to a new company. IP further argues that, even if the Bryant Mill did

recycle CCP at some point after July 1, 1956, IP cannot be liable for the resulting PCB disposal as an owner because it continued to hold title to the Mill only to secure performance of a lease financing transaction with the new operator.

The Court conducted a two-week bench trial in this matter, featuring 25 expert and lay witnesses, and hundreds of exhibits. The trial record fills 50 binders and covers thousands of pages. This Opinion and Order constitutes the Court's Rule 52 findings of fact and conclusions of law based on the trial record. The Court concludes that NCR is directly liable as an arranger under CERCLA, 42 U.S.C. § 9607(a)(3). The Court's conclusion is based on its finding, as a matter of fact, that NCR understood, no later than 1969, that CCP broke was a waste, not a useful product, because no rational paper recycler, fully apprised of the facts as NCR was, would use CCP broke in its recycling process. Even after NCR knew hazardous waste disposal necessarily resulted from the process of recycling CCP broke, NCR continued to manufacture CCP and encourage recyclers—like those in the Kalamazoo River Valley—to use CCP broke in their recycling operations to avoid other, higher cost means of disposing of the CCP broke. That makes NCR an arranger under CERCLA. The Court further concludes that IP is liable under CERCLA as an owner at the time of disposal of PCBs from the Bryant Mill. This conclusion is based on the Court's finding, as a matter of fact, that IP's predecessor in interest, St. Regis, owned the Bryant Mill at a time when the Mill was recycling CCP and thereby disposing of PCBs at the Site. The Court does not find that GP has proven by a preponderance of the evidence that CCP

broke reached the Bryant Mill before July 1, 1966, while IP was both an owner and operator of the Mill. But the Court finds that GP has made the necessary showing that the Mill disposed of PCBs from CCP waste while IP remained an owner of the Mill, and the Court further finds that IP does not qualify for CERCLA's secured lender exception.

I. BACKGROUND

A. Overview of the Site

The Kalamazoo River and its tributary, Portage Creek, run through Southwestern Michigan. They are contaminated with PCBs, a hazardous substance under CERCLA. The PCBs in the Kalamazoo River and Portage Creek were discharged by paper mills in the Kalamazoo River Valley. The mills recycled wastepaper as a source of pulp. Some of the wastepaper recycled by the mills was NCR's CCP. From 1954 to 1971 ("the production period"), CCP was made using Aroclor 1242, a source of PCBs. In the course of the recycling process, some of the PCBs from the recycled CCP found their way into wastewater effluent, which the mills discharged into the Kalamazoo River and Portage Creek. Because of the PCB contamination, the area is now listed on the National Priorities List, a list of national priorities of known or threatened releases of hazardous substances. It has been labeled as the Allied Paper, Inc./Portage Creek/Kalamazoo River Superfund Site.

B. The Bryant Mill and Bryant Mill Pond

One of the paper mills located at the Site is the Bryant Mill ("the Mill"). The Mill was built in 1895 along Portage Creek. As part of the Mill's construction, Portage Creek was dammed. Damming

Portage Creek provided water and a power source for the Mill. It also created the Bryant Mill Pond ("the Pond"), which became an important part of the Mill's operations. The Mill coated, manufactured, and disposed of paper. It was not, however, equipped to produce pulp, the base component of paper. Because the Mill could not produce its own pulp, it relied on purchased wastepaper and externally-sourced pulp in its paper manufacturing. By 1953, recycled wastepaper accounted for over two-thirds of the fiber used at the Mill.

Workers at the Mill usually had to de-ink waste paper before they used it for paper manufacturing. During the de-inking process, ink, clay, and other residuals were removed from the desirable paper fibers through a combination of chemical washing, heat, and mechanical agitation. Until the 1950s, this mixture of ink, clay, and other residuals was discharged, untreated, directly into Portage Creek. Sometime during the early 1950s, IP's predecessor in interest, St. Regis, constructed a clarifier at the Mill to help settle out solid material from the effluent that was discharged into Portage Creek. Even with the clarifier, however, roughly 70% of the suspended solids in the Mill effluent made it into Portage Creek.

St. Regis acquired the Mill in 1946. Three years later, Panelyte—one of St. Regis's subsidiaries—acquired a property ("the Panelyte property") abutting the Pond and adjacent to the Mill, for use in producing injection-molded plastics. Part of the Panelyte property was inundated upon creation of the Pond. Panelyte's activities on the Panelyte property involved neither paper manufacture nor the purchase or use of recycled wastepaper. Panelyte and the Mill

did, however, have some facilities in common, and both made use of the Mill Pond.

From 1946 until July 1, 1956, St. Regis manufactured paper at the Mill using a combination of virgin pulp and wastepaper. On July 1, 1956, by virtue of an agreement ("the Agreement") with Allied Paper Corporation ("Allied"), St. Regis conveyed its paper business at the Mill to Allied, including executory customer and supply contracts, equipment, raw materials, works in process, and inventory. In a series of ancillary agreements, St. Regis and Allied also agreed that the Mill would continue to provide steam to the Panelyte facility as needed, and that Allied would have use of the effluent system constructed by St. Regis, which transported de-inking waste through the Panelyte property to the Mill's clarifier. St. Regis, continued to own and operate the Panelyte property after July 1, 1956, but did not continue operating the Mill itself. Allied took over Mill operations.

St. Regis, IP's predecessor, did, however, maintain ownership of the Mill even though Allied took over operations. This was accomplished with a lease provision in the Agreement. The Lease gave Allied the right to possess and use the Mill and equipment associated with it for 13 years. In return, Allied agreed to pay St. Regis $1.2 million during the first year of the Lease and $400,000 per year thereafter until the Lease expired. The Lease gave Allied an option to purchase the Mill for $675,000 after ten years, and again after the Lease's thirteenth year. Unless and until Allied exercised its purchase option, legal title to the Mill remained with St. Regis. Not only did St. Regis hold title to the Mill, but it was also

responsible for paying property taxes, insurance, and certain other expenses associated with the property. St. Regis also retained the right to inspect and make repairs to the Mill. Under the Lease, Allied was obligated to reimburse St. Regis for all these expenses, but the only way for it to own the property outright was to exercise its purchase option after ten or 13 years. In the meantime, the Lease obligated Allied to continue its monthly payments to St. Regis, regardless of whether the Mill was damaged or destroyed. Allied was allowed to terminate the Agreement—including the Lease—if St. Regis sold its interest in the Panelyte facility before 1966.

The Agreement took effect on July 1, 1956. From that date forward, Allied operated the Mill, while St. Regis continued to hold title to it. St. Regis also continued to own and operate the neighboring Panelyte property until early 1965. Ten years into the Lease, in 1966, Allied exercised its purchase option for the Mill. St. Regis thereupon conveyed to Allied legal title to the Mill and to the equipment covered by the Lease. Both before and after the Lease, the Mill was used exclusively, like many mills in the Kalamazoo River Valley,for recycling and manufacturing paper.

C. NCR's Manufacture of Carbonless Copy Paper

NCR started manufacturing CCP in the 1940s. CCP consisted of two overlain sheets, each with a special coating developed and sold by NCR. The top sheet, called "Coated Back" or "CB," was coated on its back side with a thin layer of emulsion containing microscopic capsules. The capsules contained colorless ink, oils, and a transfer solvent. The bottom

sheet, called "Coated Front" or "CF," was coated on its front side with a special clay-resin coating. When pressure was applied to the top of the CB sheet, the microcapsules in the coating would rupture, releasing the colorless ink. The colorless ink would then react with the coating on the front of the CF sheet, creating an identical image as on the CB sheet. From 1954 through April 1971 ("the production period"), NCR used Aroclor 1242 as a solvent in the microcapsules. Aroclor 1242 is a source of PCBs.

There were two steps in the production of CCP: (1) "coating" large base paper rolls with PCB emulsion and other substances to make raw materials for use in the different sorts of paper products for which CCP was used; and then (2) "converting" the base paper rolls by cutting, printing, and collating the components into final CCP form, such as receipts or airline tickets. NCR outsourced the coating process to several independent companies (the "coaters"), including Appleton Coated Paper Company ("ACPC"), Combined Paper Mills ("CPM"), and Mead Corporation ("Mead"). At the end of the coating process, the coaters would sell the coated paper back to NCR. NCR would then fill orders for CCP for its own customers, who converted the bulk CCP into smaller, end-use CCP products, which they then sold. In addition to filling orders for customers, NCR also supplied CCP to conversion facilities that it owned (the "NCR converters"). The NCR converters were collectively organized under the name "Systemedia." Systemedia operated conversion facilities all over the country, including in Viroqua, Wisconsin, in Washington Court House, Ohio, and in Dayton, Ohio.

Both the manufacturing and converting of CCP generated "broke." Broke consists of the paper that is not used in the finished paper product, either because it does not meet finished product specifications, is damaged in the manufacturing process, or is trim and cuttings produced during manufacture and conversion. Although CCP broke from manufacture and conversion was unsuitable for the production of finished business forms, paper recyclers used it as a raw material in the manufacture of new paper. The recyclers would take the broke, recover the paper fibers from it, dispose of waste products (including PCBs in the recycling process) and turn the recovered fiber into new paper. There was a well-established market for broke and other sources of recycled paper. The coaters and NCR converters spent time and money preparing their broke for sale, either to brokers or directly to paper recycling mills.

By some estimates, more than 110 million pounds of CCP broke were sold and distributed through the wastepaper market during the production period. Paper recycling mills competed to obtain the broke and viewed it as an essential part of their business. Still, broke had to be processed before it was suitable as pulp for new paper. Mills recycling broke would break it down into fiber (useful) and an effluent (waste) containing everything else from the broke (e.g., ink). The recycling mills took the useful fiber and made it into new paper for commercial sale. They discharged the waste as part of their effluent—sometimes after treating it, sometimes without treating it. The effluent included PCBs when the base wastepaper included CCP.

In most respects, the process of recycling CCP broke was identical to the process for recycling ordinary paper broke, so it was nothing new in the paper industry. One unique problem with recycling CCP broke, however, was that, during the recycling process, the dyes in the coating emulsion would oxidize or react with clays in the paper and become visible (a process known as "blueing"). This hampered recyclers' efforts to create usable, white paper fibers. NCR spent considerable time and money researching a way to solve the blueing problem, so that coaters and converters would be willing to participate in manufacturing CCP products, and so that recyclers would be willing to purchase CCP broke. Ultimately NCR developed a de-inking process whereby the microcapsules in the CCP broke were chemically broken up and the dyes they contained were adsorbed onto clay suspended in water. Once the dyes had attached to the clay molecules in the water, the recyclers discharged the effluent into the environment. The effluent included PCBs from the CCP wastepaper.

D. The Litigation

Between 1972 and 1989, the Michigan Department of Natural Resources ("MDNR") conducted several studies that revealed the Site was contaminated with PCBs. In 1990, the United States Environmental Protection Agency placed the Site on the National Priority List under 42 U.S.C. § 9605, and the MDNR listed it as an environmental contamination site under the Michigan Environmental Response Act, M.C.L. § 299.601 *et seq*. GP, whose subsidiaries own property at the Site, says it has spent millions of dollars dealing with the PCB contamination there. In

2010, it brought this CERCLA action seeking contribution from IP, NCR, and Weyerhaeuser in footing the bill for the cleanup activities.

II. CERCLA LIABILITY

Congress enacted CERCLA "to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009) (internal quotation marks omitted). CERCLA accomplishes this, in part, by allowing private parties to sue other parties who may be responsible for polluting a particular site. To establish a prima facie case for contribution under CERCLA, a plaintiff must prove four elements: (1) a release of hazardous substances occurred; (2) the release occurred at a facility; (3) the release caused the plaintiff to incur response costs; and (4) the defendant falls within one of the four categories of potentially responsible parties ("PRPs") set out in 42 U.S.C. § 9607(a). *Kalamazoo River Study Grp. v. Menasha Corp.*, 228 F.3d 648, 653 (6th Cir. 2000). A "facility" is "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . . ." 42 U.S.C. § 9601(9)(B). A defendant is a PRP under § 9607(a) if it is:

> (1) the owner and operator of a vessel or a facility,
>
> (2) [a] person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

> (3) [a] person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substance, [or]
>
> (4) [a] person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance . . . .

Id. at § 9607(a).

Liability for all categories of PRPs under CERCLA is strict. *United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1232 (6th Cir. 1996). It attaches to any party responsible for any part—even the tiniest fraction—of the contamination at a given site. *See Kalamazoo River Study Grp.*, 228 F.3d at 660 (a single discharge of contaminants suffices to support liability under CERCLA); *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 131 (2d Cir. 2010) ("[E]ven a minimal amount of hazardous waste brings a party under the purview of [CERCLA] as a PRP."); *United States v. Monsanto Co.*, 858 F.2d 160, 168 (4th Cir. 1988) ("The plain language of [§ 9607(a)(2)] extends liability to owners of waste facilities regardless of their degree of participation in the subsequent disposal of hazardous waste."). Where a

plaintiff makes out a prima facie case for liability, the defendant will be liable for contribution, regardless of actual fault or knowledge, unless it can prove one of the very limited defenses recognized under 42 U.S.C. § 9607(b). *See United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1508 (6th Cir. 1989) ("We agree . . . that CERCLA contemplates strict liability for landowners, who, absent a defense recognized under section 9607(b), are deemed responsible for some of the harm."). None of the Defendants here assert a § 9607(b) defense.

To prevail in a CERCLA contribution action, a plaintiff must establish by a preponderance of the evidence that it is entitled to reimbursement from the defendant. *Kalamazoo River Study Grp. v. Rockwell Int'l Corp.*, 355 F.3d 574, 589–90 (6th Cir. 2004). The plaintiff may carry its burden with or without "direct" documentary evidence. *See Tosco Corp. v. Koch Indus., Inc.* 216 F.3d 886, 892 (10th Cir. 2000) ("CERCLA liability may be inferred from the totality of the circumstances; it need not be proven by direct evidence."). Indeed, the timing of CERCLA actions—which frequently occur decades after the underlying contamination took place—oftentimes makes direct evidence difficult or impossible to obtain. *See, e.g.*, *Niagara Mohawk Power Corp.*, 596 F.3d at 131 ("[T]he type of evidence, be it direct or circumstantial, and its quality, is to some degree impeded by the passage of time . . . ."). Thus, "there is nothing objectionable in basing findings [of CERCLA liability] solely on circumstantial evidence, especially where the passage of time has made direct evidence difficult or impossible to obtain." *Franklin Cty. Convention*

Facilities Auth. v. Am. Premier Underwriters, Inc. 240 F.3d 534, 547 (6th Cir. 2001).

A. Owner or Operator Liability Under § 9607(a)(2)

Holding legal title to a facility generally suffices to make an entity liable as an owner under CERCLA for disposal occurring during the ownership. 42 U.S.C. § 9601(20)(A)(ii) (defining "owner or operator" to include "any person owning or operating such facility"). An exception to the general rule of owner liability, known as the "secured creditor exemption," provides that "[t]he term 'owner or operator' does not include a person that is a lender that, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect the security interest of the person in the vessel or facility." *Id.* at § 9601(20)(E)(i). The term "lender" covers not just financial institutions and other commercial lenders, but also "any person (including a successor or assignee of any such person) that makes a bona fide extension of credit to or takes or acquires a security interest from a nonaffiliated person . . . ." *Id.* at § 9601(20)(G)(iv)(V). "The term 'extension of credit' includes a lease finance transaction in which the lessor does not initially select the leased vessel or facility and does not during the term of the lease control the daily operations or maintenance of the vessel or facility . . . ." *Id.* at § 9601(20)(G)(i)(I). And "[t]he term 'security interest' includes a right under a . . . lease and any other right accruing to the person to secure the repayment of money, the performance of a duty, or any other obligation by a nonaffiliated person." *Id.* at § 9601(G)(vi).

B. Arranger Liability Under § 9607(a)(3)

In addition to owners and operators of facilities, CERCLA also imposes liability on "arrangers." An entity is liable as an arranger if:

> [B]y contract, agreement, or otherwise [it] arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.

Id. at § 9607(a)(3). The mere sale of a useful product—even one that ultimately proves hazardous—does not constitute "arranging for disposal" under CERCLA. *AM Int'l, Inc. v. Int'l Forging Equip. Corp.*, 982 F.2d 989, 999 (6th Cir. 1993). In other words, "no arrangement for disposal of hazardous wastes has taken place where there has been a conveyance of a useful, albeit dangerous product, to serve a particular intended purpose." *Id.* (internal quotation marks omitted). A party is liable as an arranger only if it has "taken an affirmative act to dispose of a hazardous substance . . . as opposed to convey[ing] a useful substance for a useful purpose." *Id.* (internal quotation marks omitted). Absent a contract or agreement, a court must look to the totality of the circumstances, including any "affirmative acts to dispose," to determine liability. *Cello-Foil*, 100 F.3d at 1232.

Arranger liability exists on a spectrum, since the term "arrange" is subject to many interpretations.

> It is plain from the language of the statute that CERCLA liability would attach under § 9607(a)(3) if an entity were to enter into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance. It is similarly clear that an entity could not be held liable as an arranger merely for selling a new and useful product if the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination. Less clear is the liability attaching to the many permutations of "arrangements" that fall between these two extremes—cases in which the seller has some knowledge of the buyers' planned disposal or whose motives for the "sale" of a hazardous substance are less than clear. In such cases, courts have concluded that the determination whether an entity is an arranger requires a fact-intensive inquiry that looks beyond the parties' characterization of the transaction as a "disposal" or "sale" and seeks to discern whether the arrangement was one Congress intended to fall within the scope of CERCLA's strict-liability provisions.

Burlington N. & Santa Fe Ry., 556 U.S. at 609–10; *see also Penumo Abex Corp. v. High Point, Thomasville & Denton R. Co.*, 142 F.3d 769, 775 (4th Cir. 1998) ("[T]here is no bright line between a sale and a disposal under CERCLA. A party's responsibility . . . must necessarily turn on a fact-specific inquiry into the nature of the transaction."). This is one of those in-between cases.

"[A]n entity may qualify as an arranger under § 9607(a)(3) when it takes intentional steps to dispose of a hazardous substance." *Burlington N. & Santa Fe Ry.*, 556 U.S. at 611. Specific intent to dispose of a hazardous substance is an element of arranger liability because, "in commonplace parlance, the word 'arrange' implies action directed to a specific purpose." *Id.*; *see also Cello-Foil Prods.*, 100 F.3d at 1231 ("[I]t would be error for us not to recognize the indispensable role that state of mind must place in determining whether a party has 'otherwise arranged for disposal . . . of hazardous substances.'"). Thus,

> While it is true that in some instances an entity's knowledge that its product will be leaked, spilled, dumped, or otherwise discarded may provide evidence of the entity's intent to dispose of its hazardous wastes, knowledge alone is insufficient to prove that an entity "planned for" the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product.

Burlington N. & Santa Fe Ry., 556 U.S. at 612. Moreover, simply divesting itself of a hazardous substance—however intentionally—does not automatically make a party liable as an arranger, because arranger liability requires that the party have "the intention that at least a portion of the product be disposed of . . . by one or more of the methods described in § 6903(3). *Id.* 42 U.S.C. § 6903(3) defines "disposal" as,

> the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so

> that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

Ultimately, then, the central, fact-intensive question in determining arranger liability is whether there is evidence to support a reasonable conclusion that the alleged arranger "planned for the disposal" of a hazardous substance. *Burlington N. & Santa Fe Ry. Co.* 556 U.S. at 612. In this case, the question is whether and when NCR's sale of CCP broke—a waste in the production of CCP—moved from the sale of a useful product to paper recyclers to an arrangement for disposal of PCB-contaminated waste that no fully informed paper recycler would ever use. For reasons detailed below, the Court concludes this occurred no later than 1969, when NCR understood this but continued to unload the broke and trim to recyclers who did not understand. In short, not later than 1969, NCR understood the CCP broke and trim was no longer anything but waste and was no longer useful to any paper recycler who understood the true facts as NCR did.

Like owners and operators, arrangers are strictly liable under CERCLA. *Id.* at 610. Thus, common law rules of causation, such as proximate cause, do not apply in the CERCLA context. *See, e.g.*, *AlliedSignal, Inc. v. Amcast Int'l Corp.*, 177 F. Supp. 2d 713, 749 (S.D. Ohio 2001) (citing *Boeing v. Cascade Corp.*, 207 F.3d 1177 (9th Cir. 2000), and *Tosco Corp.*, 216 F.3d 886). Assuming the requisite intent to dispose is established, the plaintiff in an arranger liability action need only show that the alleged arranger's waste actually reached the site in question. This

"causal nexus" requirement is satisfied if the plaintiff shows that the waste for which the defendant arranged disposal was deposited at the site. *See, e.g., United States v. Distler*, 803 F. Supp. 46, 51 (W.D. Ky. 1992).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

GP alleges that NCR is liable under CERCLA as an arranger and that IP is liable under CERCLA as an owner or operator. The Court agrees on both counts. NCR is liable because it planned the disposal of CCP broke at a time when it knew broke could no longer be useful to a fully informed recycler and because at least some of that broke reached the Site. IP is liable because it owned the Bryant Mill at a time when the Mill was recycling PCB-laden CCP broke.

A. NCR's Liability

NCR agrees that GP has established the first three elements of a prima facie case of CERCLA liability. Specifically, NCR does not dispute that: (1) a release of hazardous substances (i.e., PCBs) occurred; (2) the release occurred at a facility (i.e., the Site); and (3) the release caused GP to incur response costs. The only dispute between GP and NCR, then, is whether NCR qualifies as an arranger under 42 U.S.C. § 9607(a)(3). The Court finds that GP has carried this burden by proving by a preponderance of the evidence that no later than 1969, NCR knew that recycling CCP broke in the paper mills created a hazardous waste stream; that NCR continued to sell CCP broke to brokers and recyclers even though it understood no rational recycler would want the CCP broke anymore if it

understood what NCR did; and that CCP broke reached the Kalamazoo River Valley Site.

1. NCR learned CCP broke was hazardous during the production period

At trial, GP presented considerable evidence that NCR understood, at various points in the production period, that the CCP broke they were selling to brokers and recycling mills generated a hazardous PCB waste as part of the normal recycling process. An internal NCR memo, for example, acknowledges that "[i]n the late 1960's accumulative evidence began to show that PCB's may have adverse effects on certain forms of animal life." (Trial Ex. 1612 at 916.) The deposition testimony of Dan McIntosh, manager of NCR's Technical Services Group, backs that up. McIntosh testified that, in the "late 60's," he had conversations with NCR's Manager of Carbonless Paper Research, J.E. Gordon Taylor, about the need to replace the PCBs in CCP because of the environmental effects of those PCBs. (Trial Ex. 84 at 79:3–80:24.)

Memoranda and follow-ups to NCR internal meetings further support the conclusion that NCR knew, during the production period, of the dangers of recycling CCP. At a March 27, 1969 meeting with Monsanto personnel, several NCR leaders were given an article linking dispersal of PCBs with health problems in San Francisco-area wildlife. (Trial Ex. 1509 at 385.) Because the article "could play into the hands of [NCR's leading competitor in the paper market]," the NCR personnel elected to "take no action unless a second article appeared specifically

naming their paper as a source of pollution." (Trial Ex. 1509 at 385–86.) A memo written one month after that meeting expressed NCR's continued nervousness about the possibility that "the second shoe would drop" with respect to publicizing the PCBs in CCP. (Trial Ex. 1511.) In a December 16, 1969 meeting, Monsanto's scientists told NCR's Manager of Carbonless Paper Research, J.E. Gordon Taylor, that the sorts of PCBs used in CCP "will be toxic to Benthic plankton and bottom feeders." (Trial Ex. 1526, at 928–29.) Based on this and similar evidence from the record—largely produced and maintained by NCR—the Court finds by a preponderance of the evidence that, by at least March of 1969, NCR knew CCP broke generated a toxic, hazardous by-product in normal recycling.

The evidence also shows that, by mid-1970, knowledge of the PCB problem with CCP broke had spread outside NCR, to companies like ACPC and CPM. Indeed, the record shows that these companies understood CCP broke as potentially posing a legal risk for anyone selling it. For example, a memo from September 3, 1970 reports that ACPC's Vice President of Research, Thomas Busch, requested "a 'Hold-Harmless' statement from [NCR for] all liability connected with Aroclor." (Trial Ex. 1791, at 687.) Likewise, a September 15, 1970 letter to NCR from J.F. Whalen, a technical director at CPM's Combined Locks Mill, enclosed an article on PCB contamination in Appleton, Wisconsin, along with a statement that "studies [were] underway on [the] occurrence & prevalence of PCB's and recommends studies of their potential effect [on] aquatic creatures including fishbeds." (Trial Ex. 1791, at 687.) This evidence also

supports the Court's finding that NCR was aware of the environmental hazards posed by CCP broke.

None of the evidence, moreover, suggests that NCR genuinely believed that treating the effluent from recycled CCP broke would keep PCBs from flooding into the environment through the recycling process. At trial, Dr. James Kittrell testified persuasively that the technical personnel at NCR—as well as at ACPC and CPM—would have understood that waste water treatment in paper recycling operations would do little, if anything, to remove PCBs from the effluent that was ultimately deposited into the environment. (Trial Tr., doc. # 399, at 465–66 (Kittrell testimony that PCBs would "go with the sludge from the wastewater treatment system, or . . . go with the water."). Dr. James Farrand, an expert in de-inking procedures, also said that the paper professionals and chemists at NCR throughout the production period would have known that, whatever treatment protocols were in place, a substantial quantity of PCBs would be discharged into the environment. (Trial. Tr., doc. # 397, at 120.) By contrast, not a single witness suggested that anyone at NCR believed that treatment protocols at paper recycling mills effectively removed PCBs from the effluent discharged by those mills. Indeed, by January 26, 1970, the problem of "PCB residue" in the effluent had become so bad that NCR, Monsanto, and NCR's European licensee, Wiggins Teape, had to meet in London to discuss non-treatment options to prevent PCBs from recycled CCP from entering the environment. The meeting adjourned with the members concluding that there was "no effective method for controlling the disposal of used paper."

(Trial Ex. 1539, at 881.) For example, NCR proposed incinerating CCP broke, but the cost of doing so, coupled with the fact that the PCBs in CCP paper underwent little decomposition when burnt, derailed that option. (Trial Ex. 1543, at 427.) Instead of ordering the cessation of broke sales, however, NCR's representatives at the meeting asked only that Monsanto not "identify NCR paper as a major outlet for Aroclor at [Monsanto's] forthcoming meeting with the Ministry of Agriculture." (Trial Ex. 1539, at 880. From this, the Court further finds that, during the production period, NCR knew CCP broke was not useful for a fully informed buyer, but a worthless waste product at best, and a serious environmental hazard at worst. Indeed, the Court finds by a preponderance of the evidence that, no later than March of 1969, NCR itself viewed the disposal of broke as a major problem for the company. (See Trial Tr., doc. # 402, at 1022–23 (testimony of NCR's expert, Bradford Cornell, that, after the September 1970 meeting with Monsanto, NCR viewed broke as a waste).)

2. NCR continued to sell CCP broke to brokers and recyclers after discovering it to be a legal and environmental liability

NCR continued to manufacture and sell CCP—and CCP broke—after learning of these problems. Not until May 25, 1971—years after discovering that recycling CCP broke led to disposal of toxic PCBs in the environment—did NCR stop shipping its PCB-laden CCP emulsion to ACPC, CPM, and Mead. The result was that, in 1971 alone, more than 3,850,000 reams of CCP were manufactured (Trial Ex. 1174),

notwithstanding that NCR knew continued CCP production posed a serious environmental hazard.The Court therefore finds, by a preponderance of the evidence, that, during the production period, NCR arranged for disposal of CCP broke that it knew to be an environmental and economic liability. Alhough the arrangement was in the form of a sale to paper recyclers, the preponderance of the evidence precludes treatment of the arrangement as the sale of a useful product from 1969 through the end of the production period.

NCR's principal argument at trial was that, throughout the production period, it saw the CCP broke as a useful product, not as a hazardous substance. The record from trial belies that characterization. First, the evidence clearly establishes that, from the late 1960s through the end of the production period, NCR was scrambling to find alternative ways of disposing of the CCP broke, rather than selling it to paper recyclers. (*See, e.g.*, Trial Ex. 1296, at 532–35 (detailing NCR's efforts to pay Monsanto to "dispose of" CCP broke and emulsion in Monsanto's hazardous waste incinerator); *see also* Trial Ex. 85, at 122:17–123:6 (explaining that the discussion with Monsanto occurred because NCR "wanted the paper with Aroclor capsules on it disposed of").) Moreover, the record demonstrates that NCR actively attempted to conceal the hazards associated with CCP broke—from recyclers, the public, and even governmental entities. When news outlets first began reporting on the problems associated with PCB accumulation in the environment, NCR was careful not to reveal that its CCP emulsion was loaded with PCBs. (*See* Trial Ex.

1509, at 385–86.) Indeed, it expressed hope that the story would not get traction. (Trial Ex. 1511 (NCR Manager of Carbonless Paper Manufacturing, J.E. Gordon Taylor, expressing concern about "the possibility that the second shoe would drop").) And when the British government began investigating PCB contamination, NCR expressly instructed Monsanto, with whom it had been working to resolve the PCB problem, not to say anything about the presence of PCBs in CCP broke. (Trial Ex. 1539, at 880; Trial Ex. 26, at 36:10–37:13.).

Collectively, the evidence paints a clear and unequivocal picture that, at least by the late 1960s, NCR knew the CCP broke it was facilitating was a hazardous substance, the disposal of which created the possibility of substantial legal liability. Under those circumstances, the Court finds that no one with NCR's knowledge of the situation could have believed that CCP broke was a useful product. For that reason, the Court concludes, NCR's continued attempts to move CCP broke near the end of the production period were not attempts to sell a genuinely useful product, but rather attempts to divest itself of a product that it knew to be hazardous and a legal liability. The fact that brokers and paper recyclers were, at the time, willing to pay for CCP broke is not evidence to the contrary, since NCR had deliberately attempted to conceal from them—and everyone else—the toxic nature of CCP broke. To the recyclers and brokers, CCP broke remained a safe, viable source of pulp. But, as the Court has found, NCR was fully aware of the truth no later than March of 1969. Because NCR knew by that time that CCP broke was a legal liability, not a useful product, its continued sale of

CCP broke for years after that time is not covered by any "useful product" exemption to arranger liability. Rather, the Court concludes as a matter of law that NCR arranged for the disposal of CCP broke as a means of getting rid of a substance it knew to be hazardous.

3. CCP broke from ACPC, CPM, Mead, and the Systemedia entities reached the Site

That still leaves the question whether, as a matter of fact, CCP broke actually reached the Kalamazoo River Valley Site. The Court finds, by a preponderance of the evidence, that it did. The Court's finding in this respect is based on both direct and circumstantial evidence. Gene Edgerton, a truck driver for GP, testified to transporting shipments labeled as CCP broke to the Kalamazoo River Valley in the "latter part of '70 into '71," and "later, too." (Trial Ex. 40, at 24:20–25:10.) Edgerton recalled the broke was CCP broke because it was "something new" to him. (*Id.* at 94:18–95:17.) On one haul from NCR's Washington Court House facility, Edgerton described the rolls of paper he was hauling: "[H]e could take these two sheets and run [his] fingernail across it and look, there would be another like an ink line there. It would go through. They would have a copy on it." (*Id.* at 152:7–153:19.) That is a description of CCP.

Transport records from the late 1960s substantiate Edgerton's testimony. Two entries from 1968, for example, record delivery to a Kalamazoo River Valley mill of material specifically identified as "NCR Broke" and "NCR Stock." (Trial Ex. 1833, at 494, 524.) Another 1968 entry in the same set of records details

the delivery to the same mill of "colored broke" (CCP broke was sometimes referred to as "colored ledger"). (*Id.* at 470.) What is more, NCR acknowledges that these records come from a source, National Fiber, that brokered CCP broke from ACPC and CPM during the production period. Also persuasive is a 1965 letter from Bud Heinritz detailing the shipment of "limited quantities" of ACPC's CB broke to "Allied Paper Company, Kalamazoo Michigan." (Trial Ex. 1240, at 20.) Mr. Heinritz worked for ACPC at the time he wrote the letter.

Circumstantial evidence at trial buttressed the direct evidence that CCP broke made its way to the Kalamazoo River Valley Site. For example, several witnesses at trial confirmed that Kalamazoo-area paper recycling mills purchased broke from suppliers known to use CCP broke. One of GP's business experts, Dr. Robert Dolan of Harvard University, persuasively testified that, given the heavy demand for paper fiber in the Kalamazoo River Valley, the relative proximity of NCR's Ohio and Wisconsin facilities to the Kalamazoo River Valley, and the availability of affordable transport, truck, and rail transport would likely have led a considerable amount of CCP broke from NCR sources in Wisconsin and Ohio to end up in the Kalamazoo River Valley. Dr. Dolan's views were confirmed by a study from Franklin Associates entitled "Use of Waste NCR Papers in the East North Central Region and Fox River Mills, 1969." (Trial Ex. 1772, 245.) Taking the record as a whole, the Court finds, by a preponderance of the evidence, that CCP broke reached the Site during the production period.

Having already concluded that NCR arranged for the disposal of the broke after learning it to be a hazardous waste product, the Court finds that NCR is liable as an arranger for contamination at the Site. The Court's finding should not be read to suggest that NCR's sole purpose in making and selling CCP and CCP broke during the entire production period was to dispose of the PCBs in its CCP emulsion, or the PCBs in the CCP itself. This is exactly the sort of mixed-motive case that the *Burlington Northern* court said required "a fact-intensive inquiry . . . to discern whether the arrangement was one Congress intended to fall within the scope of CERCLA's strict-liability provisions." *Burlington N. & Santa Fe*, 556 U.S. at 610. After conducting such an inquiry, the Court has found only that, at some point in the production period, NCR stopped viewing the sale of CCP broke as the sale of a useful product, and necessarily started to recognize it as the disposal of a chemical-laden waste to which considerable legal liability might attach. Under those circumstances, NCR is liable under CERCLA as an arranger.

4. The preclusive effect of the *Whiting* decision

Throughout this case, NCR has argued that principles of issue preclusion require a judgment in its favor in this matter. Specifically, NCR claims that the United States District Court for the Eastern District of Wisconsin's decision in *Appleton Papers Inc. v. George A. Whiting Paper Co.*, No. 08-C-16, 2012 WL 2704920 (E.D. Wis. July 3, 2012), effectively settled the question of whether NCR or any of its affiliates had the requisite intent to dispose of the PCBs in CCP broke. As the Court explained in one of its summary

judgment orders in this case (doc. # 346), the preclusive effect of the *Whiting* decision extended only to the issue of whether *ACPC* had the requisite intent to dispose of PCBs from the Fox River Valley. Importantly, Judge Griesbach's decision in *Whiting* made no specific findings of fact as to NCR. (*See* Op. & Order Denying Mot. for Summ. J., doc. # 346, at 14–18.) The Court's decision in this case, by contrast, rests not on any findings as to ACPC's culpability or mindset during the production period, but entirely on NCR's knowledge and intent to dispose of what it well understood to be a hazardous, toxic substance. Unlike the question of ACPC's mindset, the question of whether NCR intended to dispose of PCBs in manufacturing and marketing CCP and CCP broke was never resolved, as a matter of fact, by the *Whiting* Court. Consequently, this Court's decision in this case does not upset or contradict any of the formal factual findings that Judge Griesbach made in *Whiting*.

B. IP's Liability

Like NCR, IP agrees that GP has established the first three elements of a prima facie case of CERCLA liability. In other words, IP does not dispute that: (1) a release of hazardous substances (i.e., PCBs) occurred; (2) the release occurred at a facility (i.e., the Site); and (3) the release caused GP to incur response costs. The only points of contention between GP and IP involve whether IP qualifies as either an owner or operator under 42 U.S.C. § 9607(a)(1)–(2). To establish that IP qualifies as an owner or operator under CERCLA, GP must prove: (1) that IP "owned or operated" a "facility" at the Site; and (2) that "hazardous substances were disposed of" at that

"facility" during IP's ownership or operation. *See* 42 U.S.C. § 9607(a)(1)–(2).

1. Disposal of Hazardous Substances at the Bryant Mill Before July 1, 1956

In addressing IP's liability as the owner or operator of the Bryant Mill, the Court must first determine when hazardous materials were disposed of at the Mill. In particular, the parties dispute whether disposal of PCBs from CCP occurred at Bryant Mill before July 1, 1956, the last day IP's predecessor actually operated the Mill. IP's predecessor was the sole owner and operator of the Mill from 1946 to June 30, 1956. Thus, the parties recognize that IP would be liable as an owner or operator of a CERCLA "facility" if the Court finds, by a preponderance of the evidence, that PCBs were disposed of at the Mill between 1946 and June 30, 1956. Potential liability for any disposal on or after July 1, 1956, implicates other issues.

The Court finds that GP has not established by a preponderance of the evidence that PCBs from CCP were disposed of at the Mill between 1946 and June 30, 1956. At the outset, there was no direct evidence presented at trial of specific shipments of CCP wastepaper that made it to the Bryant Mill before July 1, 1956. (Trial Tr., doc. # 401, at 868:25–869:2.) Of course, lack of direct evidence is not dispositive in a CERCLA case, but given the existence of other shipment records in this case, the fact that no records of any CCP shipments to the Mill have been shown to exist at least weighs against a finding of liability for the period in question. That view is supported by the paucity of indirect or circumstantial evidence in the

record. In the first place, several witnesses affirmed that, between 1946 and 1956, CCP broke and trim represented less than .001% of the total wastepaper consumed in the United States. *(See, e.g.*, Trial Tr., doc. # 403, at 1199:10–24; Trial Ex. 5254, at 2 (table detailing "Consumption of Waste Fibrous Materials by U.S. Mills").) Given the general consensus among witnesses for both parties that CCP broke was exceedingly rare compared to other types of broke prior to July 1, 1956, it is correspondingly unlikely that any CCP broke would have made its way to the Bryant Mill in particular. Indeed, the only recorded shipment of CCP broke to the Kalamazoo Valley was a 1955 shipment from Mead to Dreyfuss Paper Stock Company, a Kalamazoo wastepaper broker that worked closely GP's Kalamazoo Paper Company, but did not have any relationship with the Bryant Mill. (Trial Ex. 1755 (1955 Mead shipments to Dreyfuss); Trial Tr. at 878:10–879:2 (Dolan testimony about Dreyfuss shipment).) GP's own expert testified that, given the business relationship between Dreyfuss and Kalamazoo Paper Company, the most likely endpoint for the Mead CCP broke was the Kalamazoo Paper Company, not the Bryant Mill. (Trial Tr., doc. # 401, at 879:6–18; 883:5–13.)

GP attempted to address the timing problem with expert testimony from Dr. Kenneth Jenkins, who employed Cesium-137 dating at Lake Allegan (which is downstream from the Bryant Mill and several other mills at the Site) to identify the date when PCBs were first discharged at the Site. Jenkins' studies suggested that PCBs were present at the Site by 1954. But Jenkins' testimony did not suggest which of the several recycling mills at the Site was actually

responsible for the PCBs he identified. (Trial Tr., doc. # 398, at 373:1–17.) Nor did Jenkins's study account for how long it would have taken PCBs from the Mill—which is roughly 37 miles upstream from Lake Allegan—to travel to Lake Allegan and become embedded in the sediment. (*Id.* at 296:3–19; 372:21–25.) Jenkins attempted to tie his findings to photographs of the Bryant Mill and the Mill's historic residual dewatering lagoon ("HRDL"), but he was unable to testify about the rate at which the HRDL filled with effluent and sediment, or the extent to which the sediment in the HRDL was disturbed (or stirred up) by subsequent discharges or human digging in the HRDL. (*Id.* at 324:12–325:18; 326:8–14.) Dr. Jenkins's testimony is interesting but not persuasive to the Court on the timing issue.

On balance, the Court finds that GP has simply not presented enough evidence to carry its burden with respect to proving that PCBs from CCP were discharged at the Mill before July 1, 1956. What limited evidence GP has presented on the subject either does not tie PCBs to the Mill itself, or is insufficiently reliable to establish liability. By contrast, unrebutted circumstantial evidence of the paucity of CCP broke in circulation by July 1, 1956 makes it highly unlikely that any such broke reached the Mill before that date. Consequently, the Court finds GP has not proven, by a preponderance of the evidence, that the Bryant Mill discharged PCBs at the Site before July 1, 1956.

2. St. Regis's Status as an Owner or Operator of the Bryant Mill after July 1, 1956

There is no question, by contrast, that GP has met its burden of proving PCBs were discharged at the Mill between July 1, 1956 and 1966. (See Stipulation, doc. # 377, at ¶ 31.) During that period, Allied Paper operated the Mill under the Lease from St. Regis. The only liability question that remains, then, is whether St. Regis remained an "owner or operator" under CERCLA at this time. By its terms, CERCLA imposes liability on "any person owning or operating" a facility at which hazardous substances are dispersed. *See* 42 U.S.C. § 9601(20)(A)(ii). There is no dispute that St. Regis held legal title to the Bryant Mill between July 1, 1956 and 1966. GP says that should end of the matter. IP argues, however, that St. Regis retained title after July 1, 1956 principally to protect a security interest in the Mill. In other words, according to St. Regis, the Lease was just part of a seller-financed sale of the Mill and the Mill's operations that should fall within CERCLA's secured creditor exemption for the period between July 1, 1956 and 1966, when it finally sold the Mill outright to Allied. *See* 42 U.S.C. § 9601(20)(E)(i) ("owner or operator" liability under CERCLA does not extend to "a person that is a lender that, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect the security interest of the person in the . . . facility.").[1] As the Court noted at summary

[1] 42 U.S.C. § 9601(20)(A)(iii) contains a highly similar, though not formally identical, provision. A finding that IP did

judgment, St. Regis' motivation in retaining title to the Mill during the Lease period is fundamentally a question of fact. In this case, the Court finds, by a preponderance of the evidence, that St. Regis did not hold title to the Mill primarily to protect a security interest in the Mill and so the secured creditor exemption does not apply.

In the first place, the transactional documents and all related contemporaneous records treat the property transaction as a lease, not a sale. The introduction to the June 22, 1956 Agreement between St. Regis and Thor Corporation, Allied's parent company, describes the transaction as one "to hire the paper mill of St. Regis at Kalamazoo, Michigan, under a lease to contain options to purchase the Mill . . . ." (Trial Ex. 5149, at 963.) The Agreement, itself, expressly contrasts the purpose of the Lease—to hire the paper Mill for the term of the Lease—with the "options to purchase the Mill." (*Id.*) Thus, by its own terms, the Agreement specifies a traditional lease, not a sale—whether seller-financed or otherwise. GP presented dozens of exhibits from the transactional time period, moreover, expressly describing the transaction as a "lease." (*See, e.g.*, Trial Ex. 2029, at 343 (St. Regis memo describing "Lease to Thor Corporation of St. Regis Paper Mill and Fixtures at Kalamazoo, Michigan"); Trial Ex. 2030, at 514–15 (resolution at St. Regis board meeting authorizing St. Regis's officers to prepare and execute an agreement to lease the Bryant Mill to Thor with an option to purchase); Trial Ex. 2045 (communication between

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not hold title primarily to protect a security interest is disqualifying under either version of the exemption.

counsel for St. Regis and Thor, describing transaction as a lease); Trial Ex. 2092 (St. Regis press release announcing that it was "leasing the facilities of its paper Mill at Kalamazoo, Michigan, to Allied Paper Division of Thor Corporation, of Chicago, Illinois. The lease, which is on a long-term basis, becomes effective on June 30 and includes a purchase option.").) In contrast, IP produced no contemporaneous record describing the transaction as a sale, or as anything but a genuine lease. In addition, the parties accounted for the transaction as a lease, too, and paid taxes accordingly. At trial, Stephen Bromberg testified that, based on his experience practicing real estate law at the time of the Lease, there were, in 1956, two generally-used, widely-understood means of accomplishing a seller-financed sale of real estate, neither of which the parties used. (Trial Tr., doc. # 404, at 1346–48.) Bromberg testified, based on his experience, that there was no credible reason for using a lease to effectuate a sale of the property, rather than the more common methods generally employed in the industry. (*Id.*)

The commercial relationship between the Mill and the Panelyte property offers further support for the conclusion that St. Regis did not retain title to the Mill primarily as a security interest. At trial, GP presented considerable evidence of the continued interaction between the Mill and the Panelyte property, which St. Regis continued to operate after July 1, 1956. For example, on June 29, 1956, St. Regis and Thor entered into an agreement setting the terms by which St. Regis could appropriate steam generated at the Mill for its use at the Panelyte property. (Trial Ex. 5159, at 196–97.) Also on June 29, 1956, St. Regis

and Thor entered into a Facilities Agreement whereby St. Regis agreed to give Thor the use of an effluent line running through the Panelyte property. (Trial Ex. 2122, at 429–30.) Finally, the Filter House at the Mill was completely surrounded by the Panelyte facility, so that the Facilities Agreement expressly provided for joint use of amenities like "the fire protection system, water supply from Portage Creek, fuel oil piping, effluent lines, chlorine supply line, air supply line and energy lines for the Mill and the Panelyte plant . . . ." (Trial Ex. 2122, at 425.) The relationship between operations at the Mill and operations at the Panelyte property made it more likely that St. Regis merely leased the Mill to Thor, rather than selling it outright in 1956, because St. Regis had obvious and ongoing interest in controlling what happened to the property.

Finally, the fact that St. Regis retained a supervisory role in the Mill during the term of the Lease supports the conclusion that the Lease was not really a sale. Among other things, the Lease included a provision requiring St. Regis to acquire, at Thor's expense, various forms of insurance. (Trial Ex. 2116, at 840–43.) It also authorized St. Regis to enter the Mill at all times during regular business hours to inspect the premises and to perform repairs and other necessary work. (*Id.* at 848.) And the Lease required St. Regis to give its approval to any changes or alterations to the Mill exceeding $25,000. (*Id.* at 859–60.) Those sorts of requirements are much more consistent with a standard lessor-lessee relationship than with a buyer-seller relationship.

IP's best evidence that the Lease was actually a seller-financed sale of the Mill comes from Allied's 1960 Annual Report, which for the first time recorded

Mill expenses as part of the purchase cost of the Mill. (*See* Trial Ex. 2062, at 702.) This was a change in the way Allied had originally accounted for the transaction. GP's expert, Dr. Timothy Riddiough, suggested at trial that the change in accounting meant that Allied entered into the transaction as a sale, not as a lease. But the language of the Report suggests otherwise. Indeed, it expressly notes that the decision to account for Mill expenditures as part of the purchase cost was made only "[i]n view of the substantial expenditures involved in these improvements, [and] with the approach of the time for exercising the option, among other circumstances . . . ." (*Id.*) As GP's expert in real estate economics, Dr. Richard Voith, persuasively testified, the explanatory language in the Annual Report is most plausibly read to suggest that Allied's decision to account for the Mill as a purchase agreement only came about because of the investments made years *after* it first agreed to the Lease. (Trial Tr., doc. # 404, at 1374–76.) Seen in that light, the change in accounting in the Annual Report actually shows that, when it entered the Lease and for several years thereafter, Allied did not see the Lease as a sales agreement, otherwise it would have accounted for it as a sale from the beginning.

The Court finds the result fully consistent with the overall CERCLA liability provisions for owners of facilities at the time of disposal, and with the narrow carve-out for certain secured lenders who may be "owners" primarily to protect their investments. IP's predecessor was not some stranger to the Bryant Mill with nothing but capital to loan to an unrelated third party. To the contrary, IP's predecessor operated the

Bryant Mill itself for a decade. By its own admission, St. Regis was very eager to dissociate itself from operations at the Bryant Mill in 1956. It was willing to facilitate a transaction with Allied in any reasonable business form—even a Lease transaction—because it wanted to separate itself from operational responsibility for the Mill. So even assuming for purposes of argument that the Lease transaction was a creative form of seller financing, the Court would still find by a preponderance of the evidence that IP's primary purpose in the transaction was not to protect a security interest, but rather to facilitate a series of transactions that would ultimately rid it of both operational and ownership responsibility for a Mill it no longer wanted. A party, like IP, that both owned and operated a facility, cannot—and should not—easily wash itself of potential CERCLA liability simply by facilitating a transaction with seller financing. The secured lender exemption from ownership liability is properly limited to those persons whose connection to a facility is simply as an arms-length provider of capital otherwise free of entanglements to the Site.

Because Thor and St. Regis denominated and described the Lease Agreement as a lease, because the Lease provided that St. Regis would retain both a commercial interest and an oversight role in the Bryant Mill, because the financing structure underlying the Lease is more consistent with a true lease than with a seller-financed sale, and because St. Regis was not simply a disinterested provider of capital free of other entanglements to the site, the Court finds, by a preponderance of the evidence, that St. Regis did not enter into the Lease primarily to

protect a security interest in the Mill. Accordingly, the Court finds that IP is not eligible for CERCLA's secured creditor exemption in this case. Because IP was the owner of the Mill, for purposes of CERCLA, at a time when it is acknowledged that PCBs were disposed of at the Mill, IP is liable under CERLCA as an "owner or operator" of a facility at which hazardous materials were disposed of.[2] *See* 42 U.S.C. § 9607(a)(2).

ACCORDINGLY, IT IS ORDERED that Defendants NCR Corporation and International Paper Company are found liable parties under CERCLA. The Court will convene a status conference to address a schedule for litigation of remaining issues in the case.

Dated: September 26, 2013

/s/ Robert J. Jonker
ROBERT J. JONKER
UNITED STATES
DISTRICT JUDGE

[2] Having concluded that IP is liable as a § 9607(a)(2) owner, there is no need, at this point in the proceedings, to address GP's remaining argument that IP is also liable because it owned the Panelyte property. To the extent that issue matters for purposes of allocation, it can be addressed at those proceedings.

APPENDIX E

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 22a0154p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GEORGIA-PACIFIC CONSUMER PRODUCTS LP; FORT JAMES CORPORATION; GEORGIA-PACIFIC LLC, *Plaintiffs-Appellees*, *v.* NCR CORPORATION, *Defendant*, WEYERHAEUSER COMPANY, *Defendant-Appellee*, INTERNATIONAL PAPER COMPANY, *Defendant-Appellant*.	No. 18-1806

On Petition for Rehearing En Banc.
United States District Court for the Western District of Michigan at Grand Rapids;
No. 1:11-cv-00483—Robert J. Jonker, District Judge.

Decided and Filed: July 14, 2022

Before: MOORE, KETHLEDGE, and DONALD, Circuit Judges.

COUNSEL

ON PETITION FOR REHEARING EN BANC: Michael R. Shebelskie, Douglas M. Garrou, George P. Sibley, III, J. Pierce Lamberson, HUNTON ANDREWS KURTH LLP, Richmond, Virginia, Peter A. Smit, VARNUM LLP, Grand Rapids, Michigan, for Georgia-Pacific Appellees. **ON RESPONSE:** Mark W. Schneider, Kathleen M. O'Sullivan, Margaret C. Hupp, PERKINS COIE LLP, Seattle, Washington, Scott M. Watson, WARNER NORCROSS & JUDD LLP, Grand Rapids, Michigan, for Appellee Weyerhaeuser Company. John D. Parker, BAKER & HOSTETLER LLP, Cleveland, Ohio, Ryan D. Fischbach, BAKER & HOSTETLER LLP, Los Angeles, California, John F. Cermak, Jr., Sonja A. Inglin, CERMAK & INGLIN LLP, Los Angeles, California, David W. Centner, CLARK HILL PLC, Grand Rapids, Michigan, for Appellant International Paper Company.

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing, has addressed the issues therein in an Appendix to the original panel opinion, and has concluded that rehearing is unnecessary. Upon circulation of the petition and the Appendix to the full court, no judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

APPENDIX ON PETITION FOR REHEARING

GP has petitioned for rehearing en banc on one issue and panel rehearing on another. We **DENY** the petition and add the following as an Appendix to the original opinion.

I. Weyerhaeuser Should Have Cross-Appealed, But GP Forfeited the Argument

In its petition for rehearing en banc, GP argues that Weyerhaeuser should have cross-appealed in order to benefit from our ruling against GP on the statute-of-limitations issue. GP Pet. at 3–11. Weyerhaeuser developed a substantial argument in its appellee brief explaining that the statute of limitations barred GP's claim against Weyerhaeuser as well as against IP and also adopted by reference the stretch of IP's brief that involved the statute of limitations. Weyerhaeuser Br. at 37–43. But to secure affirmative relief, Weyerhaeuser should have filed a cross-appeal. Absent a cross-appeal, an appellee "may not 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.'" *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 479 (1999) (quoting *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924)); *see also Jennings v. Stephens*, 574 U.S. 271, 276 (2015); *United States v. Burch*, 781 F.3d 342, 344 (6th Cir. 2015) (Order). Because Weyerhaeuser asked this court to "apply [a favorable] statute-of-limitations ruling to" provide relief beyond the district court's determination, Weyerhaeuser Br. at 41, Weyerhaeuser sought to enlarge its own rights, and a cross-appeal should have been taken.

Weyerhaeuser's failure to cross-appeal does not end our analysis, however. Generally, an argument not raised in an appellate brief or at oral argument is forfeited, and may not be raised for the first time in a petition for rehearing. *United States v. Huntington Nat'l Bank*, 574 F.3d 329, 331 (6th Cir. 2009); *Costo v. United States*, 922 F.2d 302, 302–03 (6th Cir. 1990) (Order). That is what happened here: GP did not object to Weyerhaeuser's argument in an appellate brief[1] or at oral argument. The specter of forfeiture thus haunts GP's petition for rehearing en banc.

GP's failure to raise earlier in the proceedings this issue of the asserted need for a cross-appeal will not matter, however, if we conclude that Federal Rule of Appellate Procedure 4(a)(3), which governs cross-appeals, imposes a jurisdictional requirement. "Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). One such alteration: objections to a court's subject-matter jurisdiction "may be raised at any time." *Id.* For decades, this circuit has held that the cross-appeal requirement is jurisdictional. *United States v.*

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[1] GP notes that it could not have addressed Weyerhaeuser's argument in GP's appellee brief because GP and Weyerhaeuser submitted their appellee briefs on the same day. GP Pet. at 10. Fair enough. But GP could have moved for permission to file a supplemental brief or raised the issue at oral argument. Weyerhaeuser's brief presented only two arguments, one of which aligned with GP's position on appeal. GP therefore could not have failed to notice Weyerhaeuser's statute-of-limitations argument—it was not hidden away in a footnote, or nestled in among eight other claims, but rather constituted the second argument, spanning pages 37–43 of Weyerhaeuser's brief.

Archibald, 685 F.3d 553, 556 (6th Cir. 2012); *Bennett v. Krakowski*, 671 F.3d 553, 558 (6th Cir. 2011); *Francis v. Clark Equip. Co.,* 993 F.2d 545, 552–53 (6th Cir. 1993); *Ford Motor Credit Co. v. Aetna Cas. & Sur. Co.,* 717 F.2d 959, 962–63 (6th Cir. 1983).

But times have changed. "Over the last twenty years, one Supreme Court decision after another instructs the lower courts to be more judicious about labeling deadlines jurisdictional." *Gunter v. Bemis Co.*, 906 F.3d 484, 492–93 (6th Cir. 2018). This is because the Supreme Court has recognized that "Only Congress may determine a lower federal court's subject-matter jurisdiction." *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 452 (2004)). As a result, "a provision governing the time to appeal in a civil action qualifies as jurisdictional only if Congress sets the time." *Id.* "[R]ules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times" qualify as mandatory claim-processing rules, and although they "promote the orderly progress of litigation," they may be forfeited if no party raises them. *Henderson*, 562 U.S. at 435; *see id.* at 434. Thus, "When Congress passes a statute that unambiguously restricts the adjudicatory authority of the federal courts, the restriction will be treated as jurisdictional. . . . Otherwise, the restriction will be treated as mandatory but not jurisdictional." *Maxwell v. Dodd*, 662 F.3d 418, 421 (6th Cir. 2011).

Our court recently applied this new regime to the cross-appeal rule. In *Gunter v. Bemis Co.*, we evaluated whether Federal Rule of Appellate Procedure 4(a)(3)'s timing requirements on cross-

appeals were jurisdictional, or merely claim-processing rules. 906 F.3d at 492–93. An earlier panel denied jurisdictional status to requirements imposed by "federal rules . . . promulgated in accordance with the Rules Enabling Act, which does not by itself give the rules jurisdictional effect." *Maxwell*, 662 F.3d at 421. We then concluded in *Gunter* that "[b]ecause Congress has not clearly required a timely notice of cross-appeal for a court to exercise jurisdiction over it, Federal Appellate Rule 4(a)(3) establishes only a mandatory claim-processing rule, not a limit on our jurisdiction." 906 F.3d at 492–93; *see also Mathias v. Superintendent Frackville SCI*, 876 F.3d 462, 470 (3d Cir. 2017) (concluding that Rule 4(a)(3) is not jurisdictional because it "is not a creature of statute, but a court-promulgated rule"); 16A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3950.7 (5th ed. 2022).

Gunter and the Supreme Court's recent case law convince us that the narrowing of the term "jurisdictional" has abrogated our court's earlier cases holding that the cross-appeal requirement goes to our jurisdiction. *See Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009). These earlier decisions improperly "held jurisdictional a [requirement] specified in a rule, not in a statute." *Hamer*, 138 S. Ct. at 17. As a result, we hold that compliance with Rule 4(a)(3)'s cross-appeal requirement, although mandatory, is not jurisdictional. *See* 16A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3904 (5th ed. 2022) (embracing this approach); *Mathias*, 876 F.3d at 471–72.

There is one distinction between our case and *Gunter* worth noting. In *Gunter*, a party cross-

appealed outside of 28 U.S.C. § 2107's window for filing a notice of appeal; here, Weyerhaeuser filed no notice or motion for cross-appeal at all.[2] But this distinction carries with it no difference. As discussed above, we decide whether a requirement qualifies as jurisdictional by considering whether Congress has imposed the relevant limit on the court's jurisdiction. *Hamer*, 138 S. Ct. at 17. And no statute speaks of a cross-appeal requirement. *Mathias*, 876 F.3d at 470. As evidence of this, many courts of appeals have long considered the cross-appeal rule to be a non-jurisdictional "rule of practice," not a statutory command. *See, e.g.*, *id.* at 472; *In re IPR Licensing, Inc.,* 942 F.3d 1363, 1370–71 (Fed. Cir. 2019); *Mendocino Env't Ctr. v. Mendocino County*, 192 F.3d 1283, 1298 & nn.27, 28 (9th Cir. 1999) (collecting cases). Additionally, *Gunter* does not limit its holding to Rule 4(a)(3)'s 14-day deadline, instead referring to the rule *in toto* as nonjurisdictional. 906 F.3d at 493.[3]

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[2] That is not to say that Weyerhaeuser never expressed an intent to pursue its claims on appeal. Weyerhaeuser, just like IP, appealed the district-court decision evaluated in this opinion. *See Georgia-Pacific Consumer Prods. v. NCR Corp.*, No. 18-1858. In 2021, after countless rounds of mediation, Weyerhaeuser dismissed its appeal, noting that its dismissal "does not affect Weyerhaeuser's rights or interests in" the instant matter. A.R. 60, *Georgia-Pacific Consumer Prods. v. NCR Corp.*, No. 18-1858. Although this is not a complete substitute for filing a cross-appeal, it was yet another data point that should have given GP notice of Weyerhaeuser's efforts to pursue its "rights or interests" as an Appellee in this case.

[3] Indeed, another court of appeals cited *Gunter* for the same conclusion we reach today: that the requirement of filing a cross-appeal is a claim-processing rule that can be forfeited. *In re IPR Licensing, Inc.*, 942 F.3d at 1370–71.

True, the Supreme Court has repeatedly discussed the importance of the cross-appeal requirement, often in the loftiest of terms. *Greenlaw v. United States*, 554 U.S. 237, 244–45 (2008) ("This Court, from its earliest years, has recognized that it takes a cross-appeal to justify a remedy in favor of an appellee."); *El Paso Nat. Gas*, 526 U.S. at 480 ("[I]n more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of [the Supreme Court's holdings] has ever recognized an exception to the [cross-appeal] rule."). But although the Court has defined the requirement in such terms, it has also taken pains, time and time again, to make clear that it has not viewed the requirement as jurisdictional. *Greenlaw*, 554 U.S. at 245; *El Paso Nat. Gas*, 526 U.S. at 480. To the contrary, the Court in *Greenlaw* acknowledged that some of its precedent support interpreting the requirement as non-jurisdictional. 554 U.S. at 245 (citing *Langnes v. Green*, 282 U.S. 531, 538 (1931)).

The Supreme Court's decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), also does not change our analysis. There, the Court explained that Rules 3 and 4 comprised "a single jurisdictional threshold," and instructed lower courts that they "may not waive the jurisdictional requirements of Rules 3 and 4." *Id.* at 315, 317. But like our holdings in *Ford Motor Credit Co.*, 717 F.2d at 962–63, and *Francis v. Clark Equipment*, 993 F.2d at 552–53, this statement predates the Supreme Court's modern project of reining in the use of the word "jurisdictional." *Torres*, which concerned the filing of an initial notice of appeal and not a notice of cross-appeal, based its jurisdictional conclusion on "the mandatory nature of the time limits contained in Rule

4" and the Advisory Committee Note accompanying Rule 3. 487 U.S. at 315. We adhere today to subsequent Supreme Court decisions clarifying that "mandatory . . . time limit[s]" in the Federal Rules create jurisdictional requirements only where those limits derive from acts of Congress. *Hamer,* 138 S. Ct. at 16–17.

GP cites *Burch,* 781 F.3d at 344–45, for the proposition that "cross-appeals are indistinguishable from appeals . . . for purposes of the jurisdictional analysis." GP Pet. at 5 n.7. GP argues that because the Supreme Court has held that a notice of appeal is jurisdictionally required under Rule 4 and 28 U.S.C. § 2107, *Bowles v. Russell*, 551 U.S. 205, 209–10 (2007), notices of cross-appeal must be similarly required to provide a court's jurisdiction. But *Bowles* concerned a requirement imposed by statute—the 30-day requirement for a party to file a notice of appeal, *see* 28 U.S.C. § 2107(a), which the district court can extend for up to 14 days under 28 U.S.C. § 2107(c). *Bowles*, 551 U.S. at 213. *Bowles* did not address cross-appeals, and as discussed *supra*, § 2107 does not reference cross-appeals. *Burch* is also crucially distinguishable from this case because in *Burch*, the failure to cross-appeal was presented to the court, and so the argument was not forfeited. Resp. to Mot. to Dismiss at 2, *United States v. Burch*, 781 F.3d 342 (6th Cir. 2015) (No. 14-6232). As a result, when *Burch* described the cross-appeal requirement as "mandatory and consistently followed," it meant that

courts enforce the requirement whenever raised. 781 F.3d at 345.[4]

Finally, we recognize that two recent unpublished panel opinions in our circuit have cited our older caselaw calling the cross-appeal requirement jurisdictional. *Portnoy v. Nat'l Credit Sys., Inc.*, 837 F. App'x 364, 372–73 (6th Cir. 2020); *Wiggins v. Ocwen Loan Servicing, LLC*, 722 F. App'x 415, 419 (6th Cir. 2018). These unpublished opinions do not bind us, and, as explained *supra*, we believe that intervening Supreme Court precedent has overruled the determinations on which they rely.

The cross-appeal requirement is not jurisdictional, making it a claim-processing rule forfeitable when no party raises it. GP did not raise Weyerhaeuser's failure to file a cross-appeal at the proper time, and we will not consider the argument now. *See United States v. Montgomery*, 969 F.3d 582, 583 (6th Cir. 2020) (Order on panel rehearing). "Because Weyerhaeuser is in the same factual position as IP for purposes of the statute-of-limitations issue," *Georgia-Pacific Consumer Prods. LP v. NCR Corp.*, 32 F.4th 534, 547 (6th Cir. 2022), and because GP was on notice that Weyerhaeuser sought to benefit from a ruling benefitting IP, we granted Weyerhaeuser relief to "coherent[ly] dispos[e] of [the] entire case." 16A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3904 (5th ed. 2022).

As a final note, we do not denigrate or dispute the cross-appeal requirement's utility, importance, or

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[4] *Hamer* similarly uses the phrase "mandatory claim-processing rules" when discussing rules the application of which can be forfeited. 138 S. Ct. at 17.

mandatory nature (when properly invoked). This case presents unusual circumstances: "Th[e] distinction between jurisdictional and mandatory rules will not matter in many cases. After all, a court generally must enforce a mandatory rule (just as much as a jurisdictional one) when a party properly invokes it." *Saleh v. Barr*, 795 F. App'x 410, 424 (6th Cir. 2019) (Murphy, J., concurring); *see also Cuevas-Nuno v. Barr*, 969 F.3d 331, 334 n.2 (6th Cir. 2020). All GP had to do was object that Weyerhaeuser had not preserved a cross-appeal prior to the panel issuing its decision, either in a supplemental brief or at oral argument,[5] and we would have likely enforced the claim-processing rule.

II. We Adhere to Our Decision Not to Rule on the Secured Creditor Defense

GP also faults the panel's original opinion for failing to address IP's argument that IP fell within CERCLA's secured-creditor exception, and seeks panel rehearing on the issue. GP Pet. at 11–15. We deny the motion for panel rehearing. IP's brief presented the secured-creditor issue as an "Alternative[]" avenue through which to reverse the district court's decision. IP Br. at 64. GP never, in its

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[5] We recognize that precedents of our court indicate that arguments "raised for the first time at oral argument" can be forfeited. *Resurrection Sch. v. Hertel*, 35 F.4th 524, 530 (6th Cir. 2022) (en banc) (addressing argument raised by amicus for the first time at en banc oral argument). But "exceptions abound" to that rule. *Huntington Nat'l Bank*, 574 F.3d at 331. Had GP objected at oral argument to Weyerhaeuser's failure to file a cross-appeal, the fact that GP and Weyerhaeuser submitted their briefs on the same day would have counseled in favor of excusing GP's failure to present the issue in a brief.

briefing or at oral argument, disputed IP's presentation of the issue as an alternative one. As a result, we adhere to our conclusion in the panel opinion that, having resolved one of the alternative bases for reversal, we need not consider the other.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX F

42 U.S.C. § 9607
Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(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,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

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

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

* * *

42 U.S.C. § 9613
Civil proceedings

* * *

(f) Contribution

(1) Contribution

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 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

(3) Persons not party to settlement

(A) If the United States or a State has obtained less than complete relief from a person who has resolved its liability to the United States or the State in an administrative or judicially approved settlement, the United States or the State may bring an action against any person who has not so resolved its liability.

(B) A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

(C) In any action under this paragraph, the rights of any person who has resolved its liability to the United States or a State shall be subordinate to the rights of the United States or the State. Any contribution action brought under this paragraph shall be governed by Federal law.

(g) Period in which action may be brought

(1) Actions for natural resource damages

Except as provided in paragraphs (3) and (4), no action may be commenced for damages (as defined in section 9601(6) of this title) under this chapter, unless that action is commenced within 3 years after the later of the following:

(A) The date of the discovery of the loss and its connection with the release in question.

(B) The date on which regulations are promulgated under section 9651(c) of this title.

With respect to any facility listed on the National Priorities List (NPL), any Federal facility identified under section 9620 of this title (relating to Federal facilities), or any vessel or facility at which a remedial action under this chapter is otherwise scheduled, an action for damages under this chapter must be commenced within 3 years after the completion of the remedial action (excluding operation and maintenance activities) in lieu of the dates referred to in subparagraph (A) or (B). In no event may an action for damages under this chapter with respect to such a vessel or facility be commenced (i) prior to 60 days after the Federal or State natural resource trustee provides to the President and the potentially responsible party a notice of intent to file suit, or (ii) before selection of the remedial action if the President is diligently proceeding with a remedial investigation and feasibility study under section 9604(b) of this title or section 9620 of this title (relating to Federal facilities). The limitation in the preceding sentence on commencing an action before giving notice or before selection of the remedial action does not apply to actions filed on or before October 17, 1986.

(2) Actions for recovery of costs

An initial action for recovery of the costs referred to in section 9607 of this title must be commenced—

(A) for a removal action, within 3 years after completion of the removal action, except that such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 9604(c)(1)(C) of this title for continued response action; and

(B) for a remedial action, within 6 years after initiation of physical on-site construction of the remedial action, except that, if the remedial action is initiated within 3 years after the completion of the removal action, costs incurred in the removal action may be recovered in the cost recovery action brought under this subparagraph.

In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. A subsequent action or actions under section 9607 of this title for further response costs at the vessel or facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action. Except as otherwise provided in this paragraph, an action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.

(3) Contribution

No action for contribution for any response costs or damages may be commenced more than 3 years after—

(A) the date of judgment in any action under this chapter for recovery of such costs or damages, or

(B) the date of an administrative order under section 9622(g) of this title (relating to de minimis settlements) or 9622(h) of this title (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

* * *