UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GEORGIA-PACIFIC CONSUMER PRODUCTS LP, FORT JAMES CORPORATION, and GEORGIA-PACIFIC LLC, Plaintiffs, vs. NCR CORPORATION, INTERNATIONAL PAPER CO., and WEYERHAEUSER CO., Defendants.	Case No. 1:11-cv-00483 Hon. Robert J. Jonker

REPLY BRIEF IN SUPPORT OF MOTION TO ESTABLISH THE SCOPE OF PHASE II TRIAL

Defendant International Paper Company ("International Paper") respectfully submits this reply in support of its Motion to Establish the Scope of the Phase II Trial (Dkt # 450) ("Motion"). This Reply is necessary to alert the Court of International Paper's position that if the Court does not grant the Motion in full – limiting Phase II to actual costs incurred – NCR's compromise proposal, with certain modifications, is preferable to the Plaintiffs' "try-the-future-now" approach.

I. INTRODUCTION

The Motion asks the Court to establish that the Phase II trial will address only the apportionment and/or allocation of those "costs of response" that Plaintiffs have expended to date. The basis for limiting Phase II is a straightforward one—the United States Environmental Protection Agency ("EPA") has yet to select a remedy to address PCBs in any of the areas within

the 80 miles of the Kalamazoo River that constitutes the Site. Plaintiffs oppose the Motion, urging the Court to determine not only responsibility for the $100 million in costs Plaintiffs claim to have incurred to date, but also to allocate responsibility on a "rough justice" basis for future, unknown response costs related to yet-to-be-defined remedies. In Plaintiffs' Brief in Response to Motion to Establish the Scope of Phase II Trial (Dkt # 469) ("Opposition"), Plaintiffs rely on the fact that they expect to incur future response costs (an issue that is not substantively disputed) to claim that the Court is therefore required to allocate or apportion liability for future costs. Plaintiffs' position is that the Court is obligated to allocate or apportion future costs, even though it may lack information critical to doing so. Plaintiffs ignore the Court's right to exercise its discretion to limit the scope of any allocation/apportionment determination in Phase II.

Defendant NCR Corporation ("NCR"), on the other hand, agrees that the Court "cannot now determine responsibility for *all* future costs at the Site." *See* NCR's Memorandum In Response (Dkt # 470) ("NCR Response"), p. 2. NCR has, however, proposed an alternative framework for addressing future costs should the Court decide to address them in Phase II. International Paper believes strongly that the Court should not address future, hypothetical costs for as yet undefined remedies as part of Phase II. If the Court is inclined to do so, International Paper generally agrees with NCR's proposal that the Court do so based on discrete geographic units, with a "trigger" that would allow for the reopening of the apportionment or allocation under certain circumstances. International Paper believes those geographic units, however, should not include Operable Unit 1 ("OU 1"), which consists of the former Bryant Mill property and portions of the property on which a second mill, the Monarch Mill, was located. As Plaintiffs are not seeking to recover any costs related to OU 1, it has not been part of the claims

at issue in this case[1]. Further, EPA has not yet selected a remedy for OU 1, and the current owner of the property—a trust which holds more than $53 million to be used for the remediation of the property—is not a party to this action. In addition, given the uncertainty as to how and when EPA may select and implement remedies in any particular area, the parties should not be precluded from reopening an area simply because the arguments for reopening rely on previously-developed evidence.

II. PLAINTIFFS' OPPOSITION MISSES THE POINT

A. The Court Is Not Required To Determine Responsibility For Future Costs Now, As Plaintiffs Urge

Plaintiffs argue that because they will incur future response costs—even though the extent and nature of such costs are unknown and will not be known for years—a justiciable "case or controversy" exists and, as such, the Court "must" decide allocation and/or apportionment of *all* future response costs now. Plaintiffs' assertion that the Court "must" allocate or apportion all future response costs is simply wrong.

As a preliminary matter, Plaintiffs' Opposition relies on a misreading of the cost-recovery section of CERCLA, 42 U.S.C. § 9613(g)(2), which provides in pertinent part that "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." *See, e.g.*, Opposition, p. 1. The same statute, however, provides that "subsequent action or actions . . . for further response costs at the . . . facility . . . may be maintained at any time during the response action" as long as they are brought within "3 years . . . of all response action." 42

[1] International Paper has recently conferred with the parties regarding whether OU 1 specifically can be excluded from Phase II. NCR has stated that OU 1 may be excluded from Phase II. Weyerhaeuser has indicated that it is not taking a position. GP has stated that it believes OU 1 should be a part of Phase II.

U.S.C. § 9613(g)(2). If, as Plaintiffs argue, a court "must" issue a declaratory relief order as to allocation/apportionment for *all* future costs if any future costs are anticipated (which is often the case in CERCLA cases), why would the second provision of this statute—allowing for subsequent actions—be necessary? Further, the statutory provision on which Plaintiffs reply relates to "liability"—not allocation or apportionment. "Liability" under CERCLA has already been determined by this Court in Phase I.

In addition, the policy reason behind requiring that the Court determine *liability* is clear, since "given that the probability of subsequent activity in such instances is more likely than remote, it would waste State, corporate and judicial resources, and add immensely to the already 'elephantine carcass of . . . CERCLA litigation' to require relitigation of *liability* whenever such subsequent response action is taken." *Kelley v. E.I. DuPont de Nemours & Co.,* 17 F.3d 836, 845 (6th Cir. 1994) (quoting *United States v. R.W. Meyer, Inc*., 932 F.2d 568, 573 (6th Cir.1991)) (emphasis added). The issue of allocation and/or apportionment, in contrast, may depend on what actual remedy or further investigation is required in a particular geographic unit and the "liable" party's or parties' relationship or responsibility for the PCBs addressed by the remedy implemented in that particular geographic unit and/or remedy. At a large, complex site, such as this Site , it would be difficult—if not impossible—to "equitably" allocate or apportion responsibility for future, response costs until further investigation is completed and the remedies are at least selected.[2]

Even after a remedy is selected, it may be premature to allocate or apportion future

[2] While a court may—under the appropriate circumstances—enter a judgment apportioning and/or allocating shares of future costs, there is nothing in the statute or the case law that requires such a judgment. This Court has discretion to refrain from attempting to apportion and/or allocate unknown, future costs, and given the complexity of the Site and the myriad uncertainties surrounding the future investigation and remedial activities at the Site, it should do so in this case.

response costs. In fact, the authority that Plaintiffs cite for the proposition that the Second Circuit rejected "precisely the approach that International Paper advocates here" (Opposition, pg. 7, citing to *New York v. Solvent Chem. Co*., 664 F.3d 22, 27 (2nd Cir. 2011)), actually supports International Paper's position. In *Solvent Chem.*, the Record of Decision (ROD)—selecting a final remedy for a former solvent recycling facility—had been issued years earlier, but the district court declined to enter a declaratory judgment as to future costs. The Second Circuit held that the district court erred in not granting any declaratory relief, and found that the district court should have issued declaratory judgment as to *liability*, but could provide that future costs would be allocated as such costs were incurred. *See, e.g., Solvent Chem* at 26 (distinguishing between declaratory judgment for "liability" vs. "allocation" and noting that even with a ROD in place, the regulatory agency may "impose different remedies to clean up" certain contaminants at the site.). In short, even where a remedy had been selected years before, the Second Circuit concluded that the district court should leave for the future "the need to fix the amount of contribution and affording the court flexibility with respect to the time and manner for doing so." *Id*. at 27.

Finally, Plaintiffs' curious focus on the issue of whether or not they are likely to incur future response costs—and thus have a "case or controversy—ignores the Court's obligation to determine whether the allocation of such future costs is now *ripe* for review. More specifically, even assuming *arguendo* that a justiciable "case or controversy" does exist, a finding of ripeness also requires that the "court exercise its discretion to determine if judicial resolution would be desirable under all of the circumstances." *Brown v. Ferro Corp*., 763 F.2d 798, 801 (6th Cir. 1985), cert. denied, 474 U.S. 947 (1985). Among other factors, the exercise of that discretion requires that the court consider "whether the factual record of [the] case is sufficiently developed

to produce a fair and complete hearing as to the prospective claims." *United Steelworkers of Am., Local 2116 v. Cyclops Corp*., 860 F.2d 189, 194 (6th Cir. 1988). Here, the factual record is not so developed.

B. FRCP Rule 60 Is Not An Adequate Remedy

Plaintiffs also argue that any need to modify a declaratory judgment would be available under FRCP Rule 60(b). Opposition, p. 9. In the circumstances here, Rule 60(b) does not provide any meaningful opportunity to modify any declaratory relief without knowledge of the facts. Rule 60(b) allows for relief from a final judgment under certain, limited circumstances only. For example, Rule 60(b)(2) allows for modification based on "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial." But, Rule 60 is no answer to the problems created by engaging in "rough justice" by allocating future costs now. Under Rule 60(c)(1), all motions for relief from a judgment under Rule 60(b) must be brought within *one year* of the final judgment. Given that the remedy selection process and implementation of selected remedies will continue for decades, the one-year limit on Rule 60(b) challenges renders such a "remedy" in the context of this action meaningless. Despite this, Plaintiffs claim their approach is "an eminently more equitable way to proceed." Opposition, p. 9. International Paper respectfully disagrees.

III. SHOULD THE COURT DECIDE THAT ANY FUTURE COSTS WILL BE ADDRESSED IN PHASE II, IT SHOULD ADOPT NCR'S PROPOSED APPROACH WITH MODIFICATIONS TO ELIMINATE OU 1 FROM THE SCOPE OF THE PHASE II TRIAL AND ALLOW USE OF ALL RELEVANT EVIDENCE IF ALLOCATION OR APPORTIONMENT DETERMINATIONS ARE RE-OPENED

NCR agrees with and supports the Motion. NCR Response, p. 2. NCR, however, indicates that if the Court is inclined to determine future allocation and/or apportionment during Phase II, certain conditions should be placed on that determination. *Id.* NCR's conditions are

that (1) allocations/apportionment determinations should be made based on "discrete geography units," such as operable units ("OUs") and areas within OUs ("Areas"), and (2) the Court's declaratory judgment should permit the parties to seek modification of allocations/apportionments for a "particular work area based on presently unknown remedial actions or requirements," but "forecloses" a party from seeking modification "based on evidence relating to events occurring prior to an appropriate cut-off date no later than the close of fact discovery in Phase II." NCR Response, p. 2-3.

International Paper agrees that if the Court is inclined to address some or all of the potential future costs at the Site at the Phase II trial, determination of responsibility for such future costs should be based on the "discrete geographic units" identified by NCR. These geographic units track the OUs and Areas as defined by EPA. The Court could then decide whether, as to each of these specific geographic units, there is a basis for making an apportionment or allocation during Phase II.[3]

One geographic area—OU 1—however, should be treated as being outside the scope of Phase II. OU 1 is the former Bryant Mill property and portions of the adjacent Monarch Mill property. Title to a large portion of the property was transferred by St. Regis Paper Company ("St. Regis") to Allied Paper, Inc. as part of the July 1, 1956 transaction and International Paper is not a CERCLA former "owner" of that portion of the property. Moreover, International Paper is also not a CERCLA former "owner" of the adjacent Monarch Mill, which St. Regis never owned. In addition to International Paper and NCR, the "potentially responsible parties" as to OU 1 include Le Petomane XXIII, Inc. ("Trust"), an environmental custodial trust that was

[3] The Court would retain the discretion to conclude that there is not sufficient information available or that it would be premature to impose an allocation or apportionment as to any particular geographic area or areas.

created during the bankruptcy of the former owner and operator of OU 1 to hold title to the real property and $53 million in funds available for the remediation of the trust property.[4] Plaintiffs are not making any cost claims related to OU 1. Further, EPA has not selected a remedy for OU 1[5] and, in addition, the Trust would be a necessary and indispensable party to any determination of responsibility for OU 1.

IV. CONCLUSION

For the foregoing reasons, International Paper respectfully requests that this Court enter an order establishing that the scope of the Phase II trial be limited to those costs that have already been expended. If, however, the Court is inclined to address unknown, future costs in Phase II, International Paper respectfully requests that the Court condition any such order as set forth above.

[4] *See*, e.g., *In re Lyondell Chemical Company, et. al.*, United States Bankruptcy Court, Southern District of New York, Case No. 09-10023 in which the bankruptcy court entered an order dated April 23, 2010 [Dkt. # 4417], approving a settlement agreement [Dkt. # 4082 at Exhibit A] creating an environmental custodial trust to which the real property within OU 1 was transferred, together with a total of $53,671,850 in funds to be used for the remediation of such property.

[5] In January 2014, EPA issued a Feasibility Study identifying potential remedial options ranging in cost from about $40 million to nearly $190 million, but it has not yet issued a "proposed plan" that identifies for public comment the remedy that it proposes to select.

Dated: August 5, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2014 I electronically filed the foregoing using the ECF system, which will send notification of such filing by operation of the Court's electronic systems. Parties may access this filing via the Court's electronic system.

/s/ John D. Parker
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