

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

APPLETON PAPERS, INC., and
NCR CORPORATION,

Plaintiffs, Motion

-vs-

Case No. 08-CV-16

GEORGE A. WHITING PAPER
COMPANY, et al.,

Defendants.

HONORABLE WILLIAM C. GRIESBACH
Federal Judge Presiding

November 10, 2009

APPEARANCES:

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1 THE COURT: The clerk may call the case.
 2 THE CLERK: The court calls case 08-CV-16,
 3 Appleton Papers, Inc., et al., versus George A. Whiting
 4 Paper Company for a motion hearing.
 5 THE COURT: Okay. We're not going to do
 6 appearances for the obvious reason that we would like
 7 to get through a hearing today. But the clerk has
 8 taken roll, and so we have your appearances, and
 9 they'll be entered into the record. Those who are
 10 in-house counsel and here as observers, I don't think
 11 she has your appearances. But if it doesn't matter to
 12 you, don't bother. Otherwise, you can come up if
 13 you're uncertain and check with the clerk after the
 14 hearing to be sure your appearance is noted.
 15 I think the best way to proceed-- These are
 16 Appleton Papers' motions. The motions that I've asked
 17 for a hearing on are the motion to amend or file an
 18 eighth amended complaint and the motion to modify the
 19 case management order. And those are the two that I
 20 really wanted to hear, and it really raises the same
 21 issue. So why don't we start with Appleton Papers on
 22 that issue.
 23 Counsel who speaks should come to the podium. I'm
 24 assuming that as you've done in the past there are, you
 25 know, limited spokespersons on behalf of all of the

1 defendants, someone who's specialized in this issue,
 2 but I don't really want to cut anyone off, so let's
 3 proceed.
 4 MS. ROACH: Your Honor, Mr. Hermes and I
 5 have divided up the argument between the motion to
 6 amend the complaint and motion to modify the case
 7 management order. And if it pleases the court, I will
 8 start and address the motion to amend the complaint.
 9 THE COURT: Okay. And this is Ms. Roach?
 10 MS. ROACH: Yes.
 11 THE COURT: Just so the record-- And as
 12 you know, we're on a digital recording system, so just
 13 identify yourself for the record before you--before you
 14 speak.
 15 Go ahead, Ms. Roach.
 16 MS. ROACH: Thank you, your Honor.
 17 I start with Rule 15, your Honor, which provides
 18 that leave to amend should be freely granted when
 19 justice so requires.
 20 The Supreme Court's decision in Burlington
 21 Northern dramatically changed the legal landscape
 22 affecting this case. In light of this decision,
 23 justice clearly requires that plaintiff's motion for
 24 leave to amend be granted.
 25 When this court ruled on the motion to dismiss,

1 the court held that actions under section 113 can only
2 be brought if plaintiffs and defendants share a common
3 liability and that a party cannot bring claims under
4 section 113--or, if it cannot bring claims under
5 section 113, it should be entitled to bring claims
6 under section 107 if injustice is to be avoided.

7 The operative principle identified by the court is
8 that section 107 is available when but only when
9 section 113 is not. Prior to Burlington Northern, the
10 understanding of the courts, commentators, and parties
11 was that it was the exceptional case when the PRP could
12 successfully assert that the harm at a side was
13 divisible.

14 THE COURT: Let me ask-- Let me interrupt
15 here because there was some things-- And certainly
16 Rule 15, I'm familiar with that. And it appears your
17 argument is that Burlington Northern has really changed
18 drastically the law in the area or at least highlighted
19 an issue and made it very clear. And now Appleton
20 Papers and NCR have realized, if they didn't before,
21 that they have a very strong argument, one, that
22 they're not arrangers and, two, that this injury to the
23 river is divisible. And your original complaint, as is
24 your subsequent complaints, have sought different kinds
25 of relief contribution or 107 relief, but also you're

1 asking for declaratory relief. You want the court to
2 determine the shares--the allocable shares of all of
3 the different defendants that you've brought into this
4 case. And now what's really key here is you want me to
5 make a determination that this damage to the river is
6 divisible and therefore there would be no joint and
7 several liability. There would be--liability would be
8 based upon the divisible share of each parties'
9 responsibility, correct?

10 MS. ROACH: That's what we have pled or
11 are seeking to plead in the alternative. We do believe
12 there is a reasonable basis to plead and prove that the
13 harm is divisible, but we have also pled a section 113
14 claim in the alternative.

15 THE COURT: But, of course, as the
16 government points out, it has a strong interest in the
17 question of whether this is divisible or it's not
18 divisible. It has a strong interest in the question of
19 whether the liability of your clients is joint and
20 certainly with all of the defendants or whether it's
21 simply severable. Or several. And yet you never named
22 the government as a party to this action.

23 MS. ROACH: We actually did name the
24 government as a party to the action.

25 THE COURT: In your original complaint?

1 MS. ROACH: I'm not sure if it was the
2 original complaint.

3 MR. HERMES: It's in a separate action in
4 Westerfield for NCR. It's in a separate action filed
5 against Kimberly-Clark (Indiscernible) and that's
6 consolidated with this one.

7 THE COURT: So you've now named the
8 government, and that action is consolidated. So you
9 can see the government has a very strong interest in
10 that question.

11 MS. ROACH: Yes.

12 THE COURT: Now, tell me about the
13 background action or the government has brought
14 enforcement actions, but what is the status of-- I
15 know this river is being cleaned up.

16 MS. ROACH: Yes.

17 THE COURT: There certainly is a great
18 deal of effort being used now and expenses. Is your
19 client-- Are your clients really liable? Have they
20 conceded liability at least to the government? And so
21 what is the status of the government's enforcement
22 actions? Are there more enforcement actions that are
23 yet to come?

24 MS. ROACH: Your Honor, the government
25 issued a 106 order requiring plaintiffs and certain

1 defendants to clean up the river. Plaintiffs, NCR and
2 Appleton Papers, are the only parties that are
3 complying with that order. We are proceeding to clean
4 up the river right now. GP has made some financial
5 contribution. The other defendants have not and are
6 not complying with the order. Plaintiffs--

7 THE COURT: When you say we're complying
8 with the order, are you actually hiring the
9 contractors, spending the money, and cleaning up the
10 river, or you're paying for EPA or DNR to do all of
11 this?

12 MS. ROACH: There is, as I understand it,
13 a limited partnership that contracted with a company
14 called Tetra Tech, but the limited partnership is
15 composed of the plaintiffs or affiliates of plaintiffs
16 and is directing the cleanup.

17 And to answer your question, your Honor, we have
18 not conceded liability. Liability has never been
19 adjudicated, but we are proceeding to comply with the
20 order and proceed with the cleanup, which is ahead of
21 schedule at this point. We're doing so voluntarily in
22 response to the 106 order.

23 THE COURT: If you decided to discontinue
24 your cleanup efforts, what would happen?

25 MS. ROACH: We are subject to fines of

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1 \$37,500 a day, plus treble damages to the government
2 for the cost of pursuing enforcement.
3 THE COURT: In the event you are
4 ultimately found liable?
5 MR. WESTERFIELD: Yes, your Honor. Adam
6 Westerfield for plaintiffs. If we refuse to--if NCR,
7 Appleton Papers refuses to comply with the order
8 they're subject to the penalties Ms. Roach identified
9 unless there's sufficient cause for refusing to comply.
10 THE COURT: And sufficient cause would
11 certainly be that you've already paid more than your
12 fair share, wouldn't it? And that the injury is
13 divisible?
14 MR. WESTERFIELD: I don't know if that
15 issue has ever been established.
16 THE COURT: Isn't sufficient cause that
17 you're not liable? That would obviously be such cause,
18 wouldn't it, and that's what you're really arguing
19 here, isn't it, that you are not liable for this entire
20 cleanup?
21 MS. ROACH: That is what we are arguing.
22 THE COURT: And that's an issue that
23 really you have primarily, I suppose, with the
24 government, correct?
25 MS. ROACH: Yes.

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1 THE COURT: But you've chosen not to fight
2 that in the enforcement action. You brought a separate
3 action, this action, in which to have that issue
4 determined?
5 MS. ROACH: The United States has not
6 brought an enforcement action per se. There's the 106
7 order that's been issued, but we're not in litigation
8 with the government over the enforcement because we are
9 proceeding to comply by cleaning up the river.
10 THE COURT: Uh-huh. Okay. Go ahead.
11 Continue.
12 MS. ROACH: So, your Honor, in light of
13 Burlington Northern, which really caused a dramatic
14 change in the way that everybody, courts, commentators,
15 and parties, viewed the circumstances in which a PRP
16 could successfully assert that the harm was divisible
17 at a particular site, we now believe we have a good
18 faith basis for asserting that the harm here is
19 divisible and that we do not share a common liability
20 with defendants for most of the harms at the river.
21 And if that's the case, your Honor, as we allege
22 in our proposed amended complaint, and we are not
23 jointly and severally liable with defendants for those
24 harms, we cannot recover under section 113 for the
25 costs that are associated with the cleanup for that

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1 portion of the harm for which we have no liability.
2 Our only mechanism for doing so is through section 107.
3 THE COURT: So your position is that 113
4 is not available in any case in which the harm is
5 divisible?
6 MS. ROACH: Section 113 is not available
7 for those portions of the harm for which we are not
8 liable, and there's three examples I can provide the
9 court to put this in concrete terms.
10 First, the respective geographically distinct
11 portions of the river. As the court's aware, the
12 river's been divided into certain operable units. One
13 of the operable units, OU1, is upriver from where
14 plaintiffs' predecessor's facilities are located.
15 Plaintiffs' only arguable liability for OU1 is as
16 arrangers. And as the court mentioned a minute ago,
17 Burlington Northern also clarified the law regarding
18 arranger liability requiring proof that a party
19 intended to dispose of hazardous waste by virtue of a
20 sale such as the sale of the (Indiscernible) which is
21 what defendants argue give rise to arranger liability.
22 Under the new arranger liability standard
23 enunciated in Burlington Northern, plaintiffs are not
24 arrangers in OU1, have no liability for the cleanup in
25 OU1. However, we have already paid \$10 million, which

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1 has been used to clean up OU1. We can't recover that
2 under section 113 because we are not jointly and
3 severally liable, we allege, or would like to allege,
4 for the harms in OU1. So there's no mechanism for us
5 to recover that other than through section 107. That's
6 one example.
7 A second example moving down to OUs 2 through 5 is
8 looking at AROCLOR 1242, which was the type of PCB in
9 carbonless copy paper versus non-1242 AROCLORS. It's
10 quite clear from a number of different sources that--
11 And we go through this in the (Indiscernible) support
12 of the CMO motion that a large portion of the PCBs in
13 this river are from non-1242.
14 It's undisputed that the non-1242 did not come
15 from carbonless copy paper. It came from someplace
16 else. But it's in the river, and we are now cleaning
17 it up along with the 1242 that came from NCR paper and
18 1242 which came from other sources as well.
19 But our allegation is that plaintiffs have no
20 liability for the harms to the river resulting from the
21 discharge of the non-1242. We believe we can identify
22 the amount of the non-1242 in the river. We're
23 cleaning it up, and our only mechanism for recovering
24 the cost of doing so is through 107. We have no joint
25 and several liability for the harm to the river caused

1 by the discharge of non-1242, and so we don't have a
2 right to recover our payments for that portion of the
3 harm under section 113. Our only avenue for relief,
4 again, if our alternative pleading is accepted is under
5 107.

6 THE COURT: In the previous decision
7 addressing this issue, we really found the procedural
8 posture of the case as the key distinction or the key
9 element in deciding whether 106 or 113 was available,
10 and that seemed to be what most courts were saying.

11 Is it your position that Burlington Northern has
12 really undermined that or that these situations, the
13 situation faced here, was never--has never surfaced or
14 been presented?

15 MS. ROACH: I think looking at your
16 Honor's opinion and in trying to make sense of, I
17 think, what the court acknowledges is a fairly murky
18 area of the law, the--and with indulgence I'll quote
19 the court back to you--"the operative principle appears
20 to be that section 107(a) is available to recover
21 payments only in cases where section 113(f) is not."
22 That's exactly what we're alleging with our alternative
23 theory here to be the case.

24 THE COURT: Is there any case where a
25 party has paid under an enforcement order or--and has

1 not been able to use 113? Has anyone ever defended a
2 113 action on the theory that the harm is either
3 divisible or you aren't liable in the first place?

4 MS. ROACH: I don't know that situation
5 has occurred. I would point out that as commentators
6 have pointed out in the wake of Burlington Northern,
7 that it was very few cases where courts were willing to
8 find a harm that was divisible and where parties
9 advanced a section 107 claim or a 107 argument that the
10 harm was divisible.

11 It was not successful very often, and Burlington
12 Northern, as the commentators have acknowledged, has
13 put that to the point where commentators are now saying
14 it's the rare case where a PRP would not have a claim
15 that the harm is--the harm is not divisible. I may
16 have gotten caught up in a double negative there.

17 THE COURT: I know, yeah. It's a problem
18 in this law. Okay. Go ahead.

19 MS. ROACH: And I'll just give a third
20 example, your Honor, of--in our argument as far as why
21 the harm is at least arguably divisible here. And
22 that's-- I talked about OU1 versus OUs 2 through 5. I
23 talked about 1242 versus non-1242. But even with
24 respect to the 1242 and OUs 2 through 5, we believe we
25 can establish a reasonable basis for dividing that harm

1 as well based on such objective causation factors as
2 the volume of discharge. And the government has
3 estimated in the past that more than half of the PCBs
4 discharged to the river were discharged by defendants,
5 not by plaintiffs. But also issues such as geography,
6 where the various facilities were located, time frames,
7 what happened to the PCBs once they were discharged.

8 And, again, if we can prove that, which we believe
9 we can, our only avenue for recovery is through section
10 107. We don't have a right-- As a number of the cases
11 in this area have indicated, a party who is not jointly
12 and severally liable for harms cannot pursue a claim
13 under section 113. A party which is not jointly and
14 severally liable is not entitled to contribution.

15 So in our view, justice requires that we be
16 permitted to pursue the 107 claim. Otherwise, we are
17 foreclosed from recovering the payments that we are
18 making to clean up the river in divisible or divisible
19 portions for which we are not responsible.

20 Defendants make several arguments in opposition to
21 our motion, none of which in our view have any merit.

22 First, they argue that the lack of a common
23 liability can only be raised as a defense. Now, it's
24 certainly true that the lack of a common liability can
25 be raised as a defense, but there's nothing that

1 suggests that it can only be raised as a defense. And,
2 in fact, it's clear that private parties have a private
3 cause of action under section 107. Atlantic Research
4 makes that clear. And the factual predicate for any
5 such claim is that the party incurred costs for which
6 it has no legal liability.

7 That's precisely the operative principle
8 identified by this court in its ruling on the motion to
9 dismiss. The lack of a common liability establishes
10 that factual predicate for a section 107 claim. In
11 arguing otherwise, defendants rely primarily on the
12 Akzo case from the Seventh Circuit. But in this case
13 the Seventh Circuit found that the plaintiff was a
14 jointly and severally liable party with defendants, and
15 that is the reason why it was limited to a section 113
16 claim. Nothing in the court's holding in Akzo suggests
17 that a party which is not jointly and severally liable
18 is barred from proceeding under section 107.

19 Second, defendants argue that plaintiffs should
20 have litigated the issue of no common liability when
21 the 106 order was issued. But defendants cite nothing
22 that imposes any such legal requirement that a party
23 has to litigate the government's assertion of common
24 liability when the UAO was issued.

25 We objected at the time, but the only way to

1 actually litigate this issue with the U.S. is to refuse
2 to comply. We then face an enforcement action as well
3 as a substantial fines, \$37,500 a day, plus treble
4 damages for costs incurred by the agencies.

5 And finally, your Honor, and very importantly,
6 requiring parties to refuse to comply with the order in
7 order to preserve their rights to challenge the
8 assertion of common liability makes absolutely no sense
9 from the public policy perspective.

10 Right now we are cleaning up this river, and the
11 suggestion that we shouldn't be doing that and we lost
12 our rights by proceeding to comply with the order and
13 to clean up this river just makes no sense from a
14 policy perspective.

15 Defendants also argue that plaintiffs will not be
16 able to make the required showing that we have no
17 liability, no common liability for these harms.
18 They're wrong and the three examples I just discussed
19 are three different ways in which we believe we can
20 succeed and do have a reasonable basis for apportioning
21 liability here.

22 More fundamentally, that argument is beside the
23 point where we are on a motion for leave to amend the
24 complaint to bring the claim in the first instance.
25 The standard is not whether we will ultimately be

1 successful as long as the amendment would not be wholly
2 futile as a matter of law, and it's certainly not here.
3 We have a reasonable basis for proceeding with the
4 claim.

5 Defendants also argue that Burlington Northern
6 does not constitute sufficient good cause, but a
7 Supreme Court decision certainly does constitute good
8 cause when it changes the law and commentators across
9 the board, including counsel for defendants, as we
10 pointed out in our papers, have indicated how the
11 Burlington Northern decision has really reversed the
12 understanding in the environmental law field regarding
13 the circumstances in which a PRP can bring an
14 apportionment claim.

15 Defendants also argue that permitting the--the
16 amendment would prejudice the defendants, but we
17 dispute that. We don't believe there's any prejudice
18 to defendants in bringing a 107 claim, will not result
19 in any additional discovery over and above what's
20 already relevant for the section 113 claim. And, in
21 fact, quite to the contrary that it would prejudice
22 defendants, it would cause substantial prejudice to
23 plaintiffs to deny the amendment and potentially
24 preclude us from recovering our payments for harms for
25 which we have no liability.

1 The United States argues that permitting the
2 amendment would prejudice the United States, but it
3 would not affect the United States' ability to defend
4 itself in the consolidated case, which is the only
5 relevant criterion under the case law. They're already
6 involved in the litigation. They don't need to take
7 any actions to enforce the order, since we are cleaning
8 up the river. And it's already the case at the point
9 where the United States answers the complaint that it's
10 likely to have to bring as a compulsory counterclaim.

11 Its argument that the plaintiffs are jointly and
12 severally liable and at that point we would assert 107
13 lack of common liability as a defense anyway. And to
14 that point, your Honor, this very issue as to whether
15 or not the harm in this river is divisible is already
16 in this case. It's already been raised by at least
17 three of the defendants who have argued in their
18 answers have pled claims that the harm is divisible and
19 that there's a lack of common liability. Allowing
20 plaintiffs to make the same claim doesn't add any issue
21 to the case. That issue is already in the case.

22 And for all those reasons in our view of justice
23 clearly requires that leave to amend the complaint to
24 bring this alternative claim be granted.

25 THE COURT: All right. Thank you,

1 Ms. Roach. Now, you said Mr. Hermes--

2 MS. ROACH: Mr. Hermes was going to argue
3 the motion to amend the--or, modify the case management
4 order.

5 THE COURT: Okay. Mr. Hermes?

6 MR. HERMES: Good morning.

7 THE COURT: Good morning.

8 MR. HERMES: I'm going to start by getting
9 to the story in the middle. Your Honor, it seems that
10 you have a concern here that what plaintiffs may be
11 attempting to do through our motions is to somehow
12 circumvent an issue with the government. That is not
13 the point. The point is to follow what has recently
14 been decided by the Burlington Northern case as a
15 fundamental shift in the law, and it was decided during
16 the course of this process. And to echo Attorney
17 Roach's point, what we have are the purposes of CERCLA.

18 One, to promote timely cleanup at hazardous waste
19 sites. And that is being done, and the plaintiffs are
20 the only parties who are doing that right now.

21 But the second purpose is to ensure those costs
22 are borne by the responsible parties and--

23 THE COURT: Now, I'm not--I mean, I
24 certainly--the government has expressed a concern that
25 this relief you're seeking would affect it. It was a

1 party to the original case, but we can move on. Let's
2 say the--let's say you are allowed to amend your
3 complaint. I assume that will have a very significant
4 effect on the case management order. Tell me what you
5 think that would be.

6 MR. HERMES: Yes, your Honor. Certainly,
7 it would have a significant effect on the case
8 management order, but I think the effect is there
9 regardless. The reason we filed two separate motions
10 although they are somewhat linked, I think you can
11 grant one and deny the other. But particularly you
12 should grant the CMO motion. You should grant them
13 both. But either way, Burlington Northern has a
14 significant impact on how this case should be decided.

15 The fundamental principle of the case management
16 order, as reading your Honor's opinion, was that this
17 was the most efficient and cost effective way to
18 proceed in this case and that it might encourage some
19 settlement. But that was based on a few things.

20 It was based on, number one, some premise that
21 liability here was joint and several. Burlington
22 Northern eliminated that from contention. It says
23 liability in CERCLA actions is not automatically joint
24 and several and, in fact, can be several, which is what
25 we're arguing here.

1 Number two, the liability issue has not been
2 decided. The government in its filing in response to
3 one of the summary judgment motions says that in fact
4 correct although we have issued a 106 order, it is not
5 binding on the court.

6 Point three is that liability is a two-step
7 process. The defendants concede that in one of their
8 filings with respect to summary judgment, and they
9 suggest that the one thing this court must do is decide
10 the issue of liability. Who is liable and on what
11 basis? And once we make that determination, then the
12 court will have a road map for how this case is to
13 proceed.

14 If the harm is divisible, if liability is several
15 only--and Attorney Roach has adequately pointed out at
16 least three possible bases for divisibility--then we
17 look under 107 to objective causational factors to
18 determine the appropriate shares of the parties.

19 If, on the other hand, the harm is not divisible,
20 you proceed with an equitable allocation--

21 THE COURT: Wouldn't I--wouldn't I
22 consider those same factors under 113 in deciding an
23 equitable apportionment? It's just I would also have
24 the obligation and the ability to consider additional
25 factors that perhaps you wouldn't want me to consider.

1 I mean, isn't that what we're talking about here?

2 MR. HERMES: That is correct, your Honor.

3 THE COURT: So the key question is whether
4 113 is applicable under the circumstances of this case.

5 MR. HERMES: And at this point we don't
6 know. That is the entire point of our motions, your
7 Honor. We have skipped a step. We have put the cart
8 before the horse. Use whatever cliché you want, but we
9 haven't--

10 THE COURT: Well, I think nobody really
11 thought we were doing that at the time we did.

12 MR. HERMES: And that's exactly correct,
13 and that's why the motion came at the time it did. It
14 took Burlington Northern, number one, to set the stage
15 for, you know, you need to decide liability based on
16 evolving and established principles of common law
17 first, and then it took Burlington Northern's decision
18 on arranger second to say, hey, you need to have some
19 intent for disposal of the hazardous waste here,
20 neither of which has been--

21 THE COURT: So it sounds like all of these
22 113 cases and all of these 107 cases for the past, what
23 is it, 29 years CERCLA have all been done wrong.

24 MR. HERMES: No, they were done following
25 the law in effect at the time.

1 THE COURT: But Burlington Northern really
2 doesn't espouse to create new law. I guess it would be
3 when Sarah went into effect. Since then they've been
4 confused about that. Is that really where we are? Do
5 you think Burlington Northern-- Do you think
6 Burlington Northern really changed the law or basically
7 highlighted features that no one had really given
8 careful consideration to before?

9 MR. HERMES: I think it refined some of
10 the things that had been out there. I think the trend
11 in the law was to narrow the focus and to presume joint
12 and several liability, and I think Burlington Northern
13 took a step back and said, hey, wait a minute. This
14 isn't right. You end up with a situation kind of like
15 we're in right now where you have these mixed elements
16 and we don't know--and there are, you know, but what
17 Burlington Northern did, although it may not have
18 changed the law, it changed the legal standard to
19 review divisibility.

20 I think the court's focused on the precision with
21 which you need to prove the divisibility case.

22 THE COURT: Well, Burlington Northern
23 really said the district court didn't err in finding it
24 divisible.

25 MR. HERMES: That is correct. It said

1 that there was a rational basis on which to find it and
 2 that was okay. But I don't think the courts before
 3 that had taken that bold step. I think this was a
 4 different view of how to do it, and the precision that
 5 is required now, the standard Burlington Northern set,
 6 has decreased that precision. And as long as you can
 7 establish that divisibility, number one, is feasible
 8 and the court can do that as a matter of law, then the
 9 facts back it up, you created a sufficient record to do
 10 that.

11 And all we're asking is the opportunity to do that
 12 here. Phase one doesn't allow us to do that. Phase
 13 one focusses on one narrow factor. It does not allow
 14 us to create that record we need to establish whether
 15 the harm is divisible factually and to then determine
 16 divisibility based on--

17 THE COURT: What's needed? What's needed
 18 to allow you-- I mean, what facts have not been
 19 unearthed so far that are necessary in order to make
 20 that determination of whether or not the harm is
 21 divisible and also, for that matter, whether or not
 22 your clients would be considered arrangers or not--

23 MR. HERMES: Yes.

24 THE COURT: --or would have direct
 25 liability under CERCLA?

1 MR. HERMES: What phase one focused on is
 2 particularly just the knowledge that any party had with
 3 respect to recycling NCR brand paper. Now, there are
 4 many defendants in this case who were not recyclers.
 5 Okay? We only have a few who actually recycled.

6 The plaintiffs literally took the phase one order
 7 to say we need to focus on recycling of paper, and that
 8 is exactly how we took the focus. The issues that
 9 would be necessary, though, your Honor, would be things
 10 like the volume of discharge, the type of PCBs
 11 discharged, the amount of PCBs that were discharged,
 12 and the time of that discharge. Those are all
 13 important factors to consider in dividing the harm.

14 THE COURT: And as in the course of the
 15 discovery that's been taken so far, those issues remain
 16 undecided or undetermined?

17 MR. HERMES: Correct. You've seen some of
 18 them through summary judgment, and you've seen some of
 19 them creep in through the consent decree case. But in
 20 terms of the record for this case, the discovery that's
 21 been done, there's been a tremendous amount of
 22 discovery. No one's going to, you know, lie to you
 23 there. There have been a hundred and thirty
 24 depositions and millions of pages of documents.

25 The amount necessary to accomplish this is

1 incrementally larger, not orders of magnitude larger.
 2 We would need to do some more discovery, yes, but in
 3 order to build that complete record that I think your
 4 Honor needs, whether this is a 113 case or a 107 case,
 5 the time to do that is now. The time is not to do that
 6 after we have a trial starting in January, we go
 7 through it, and then plaintiffs are back here again
 8 regardless of the outcome saying, okay, now we decided
 9 the knowledge question, that's great, but we need to
 10 decide whether the harm is divisible. We need to
 11 decide other factors that the court must consider in
 12 order to properly allocate if we are a 113.

13 And so if a trial's going to take eight to
 14 12 weeks on just this one issue, we don't want to do
 15 this a year and a half later on another issue and a
 16 year and a half later on another issue. Although we're
 17 getting to know each other, we have other things we can
 18 do with our time, as does your Honor.

19 And so what we're suggesting to the court is that
 20 the appropriate time to make that step and set that
 21 record straight is now before we engage in this trial.

22 Defendants have contended that this is--we're
 23 trying a do-over and that we discard all that evidence.
 24 We wouldn't. It is there. It's preserved. It's in
 25 the can, so to speak. We will trot that out at trial,

1 just as they will. It will be a trial about other
 2 issues that are relevant to either divisibility or to
 3 allocation under 113. But the time to do that is now
 4 before we expend that money and go to that trial and
 5 undertake findings which in the end, if the case is
 6 truly a 107 case and the harm is divisible, may be
 7 entirely irrelevant.

8 So we haven't crossed that bridge yet, but by the
 9 time we get, you know, down the road here, by the time
 10 we get to the pretrial, we'll have started. And by the
 11 time we show up on January 4th, it will be too late to
 12 turn back on a process that may entirely be irrelevant
 13 in the end. And so we're--we've--that's why we're
 14 raising the issue now.

15 THE COURT: Okay. Good. Thank you.
 16 Let's here from Mr. Mandelbaum.

17 MR. MANDELBAUM: Thank you, your Honor.
 18 David Mandelbaum for the PH Glatfelter Company, and I
 19 will be making the presentation--the principal
 20 presentation for the defendants.

21 (Indiscernible) begin because I just sort of
 22 disagree with everything the guy said.

23 THE COURT: They even quote you, I think,
 24 don't they?

25 MR. MANDELBAUM: I will observe that I

1 changed law firms (Indiscernible).
2 All right, since they quote me, I'll address that
3 right now, though it's out of order of my presentation.
4 I think your Honor said it aptly when you said
5 that what Burlington Northern decided was that the
6 district judge didn't err. Prior cases had held that
7 the district judges who made attempts to apportion had
8 erred, and in effect what the Supreme Court decided is
9 run a (Indiscernible) Do you watch much football? You
10 live in Green Bay.

11 THE COURT: I'm stuck with it, yeah.

12 MR. MANDELBAUM: They changed the amount
13 of the video replay evidence that it takes to reverse
14 the district court, which means that in negotiations
15 with the government, many more PRPs have something to
16 say about joint and several liability. That's the
17 practice point.

18 The litigation point is that there's no difference
19 in the law under Burlington Northern as to what
20 constitutes a claim. Any claim that the plaintiffs
21 could make that there was no joint and several
22 liability on the day after Burlington Northern they
23 could have made on the day before Burlington Northern.
24 And I think I have, okay? Many people have in many
25 cases.

1 The question is what's the standard that that
2 (Indiscernible) think they're going to be subject to on
3 (Indiscernible). That's what Burlington Northern is
4 about. It doesn't change which claims are liable.

5 Now, divisibility or apportionment, non-joint and
6 several liability is a defense. Defenses are for
7 defendants. No one to my to my knowledge in the
8 history of Superfund has walked into court and said I'm
9 not jointly and severally liable and I'm not going to
10 have that litigation with the government. I'm going to
11 have it with some other guy. That's what's going on
12 here.

13 They sued the United States not in its capacity as
14 an enforcer, but because the Corps of Engineers dredged
15 the river and therefore is arguably liable for some of
16 the--of the vibration of PCBs around the bed of the
17 river. That's the theory against the United States.

18 They bring the United States-- The United States
19 doesn't have to bring its enforcement counterclaim. So
20 they're litigating with the United States of whether or
21 not there's joint and several liability. They want to
22 litigate with the defendants over that.

23 Now, none of the defendants is trying to defend
24 this case by saying, oh, please, you're trying to
25 recover \$1.5 billion, whatever the number is, and

1 you're not really liable for all the 1.5, so you don't
2 get to bring that claim. That's not what any defendant
3 is arguing here. The many defendants that are arguing
4 that of that 1.5 some defendant is liable for part of
5 that, but there's no one who says but there's no group
6 113 claim by the plaintiffs because the plaintiffs are
7 not liable for that.

8 And that's because 113 becomes available as soon
9 as there is some government enforcement action under
10 the government enforcement action in this case.
11 Indeed, that's what your Honor said when you decided
12 this issue the first time on motion to dismiss.

13 So there's been a governmental enforcement action.
14 113 is available, and 113 calls for the application of
15 such equitable factors as the court deems are
16 appropriate. Now, what does that mean? That means
17 that you should do fairness. That's all the defendants
18 want you to do, do fairness.

19 THE COURT: Part of what the plaintiffs
20 are asking me to do is not just order some of the
21 defendants to repay them or to give contribution for
22 what they've already paid, but they're seeking
23 declaratory relief.

24 MR. MANDELBAUM: Uh-huh.

25 THE COURT: And the declaratory relief

1 looks forward and it asks me to determine their share
2 based upon this argument that at least now the argument
3 that the harm is divisible and not joint and several.

4 Does that change the analysis at all, the fact
5 that it's declaratory relief as well as contribution?

6 MR. MANDELBAUM: Not in this case, your
7 Honor. That is-- I think that in this case this is a
8 case brought by two parties subject to an order issued
9 by the United States whose claim is some of the money
10 that they expect to spend in the future should be paid
11 by somebody else.

12 If their complaint is that they're not responsible
13 for that money in the first place, the defendants
14 aren't the right party for that. That's a defense.
15 They should work it out with the United States.

16 Now, that doesn't necessarily have to mean bring a
17 lawsuit against the United States. There are many ways
18 to work things out with the United States. But that's
19 a dispute they have with the United States in its
20 enforcement function. It's not a dispute that they
21 have with the defendants.

22 And probably if you held a settlement conference
23 in chambers, you could get every private party and
24 municipalities in this case to all agree to stipulate
25 that every single one of them is liable for ten cents

1 and then the United States would be (Indiscernible) for
2 the rest. Everybody would agree that nobody should pay
3 anything.

4 That's a ridiculous lawsuit. The lawsuit has to
5 be between the government in its enforcement capacity
6 and the plaintiffs where they assert their defense.

7 Now--

8 THE COURT: Now, they say the government
9 is a party here, but you're saying they're not a party
10 in the role--in their role as an enforcement agency?

11 MR. MANDELBAUM: That's right. They have
12 brought enforcement actions. Most of the principal
13 parties here are the subject of a consent decree to do
14 some work on the river. Those are all enforcement
15 actions under section 106 and 107 of CERCLA. And in
16 addition, the United States has issued a unilateral
17 order to eight of the parties here to require them to
18 implement the remedy in (Indiscernible) five.

19 THE COURT: Doesn't the plaintiffs' method
20 of proceeding, though, achieve as they said-- I mean,
21 doesn't it favor public interest in immediately
22 cleaning up the river, in having this work done, and
23 then fighting about it in the course of this action
24 really who owes what? Doesn't that further CERCLA's
25 overall intent?

1 MR. MANDELBAUM: I think to the contrary,
2 your Honor.

3 THE COURT: And assuming the government is
4 properly represented and has an adequate opportunity to
5 assert its interests in a determination of joint and
6 several liability.

7 MR. MANDELBAUM: Well, I think Mr. Stone's
8 going to want to address the United States' particular
9 interest.

10 THE COURT: Uh-huh.

11 MR. MANDELBAUM: But I think the way
12 CERCLA has operated before the suggestion by these
13 plaintiffs has been the following:

14 When you're issued an order by the United States,
15 you have a choice. You can either comply, spend money,
16 and then go pursue other responsible parties. The
17 vehicle for doing that is section 113, where the court
18 allocates the costs among those parties based on
19 fairness.

20 THE COURT: Uh-huh. And your view is 113
21 is not limited to cases in which the liability is joint
22 and several. It's-- It applies in any case where
23 someone makes a claim that they have paid more than
24 their fair share.

25 MR. MANDELBAUM: I think it applies in

1 every case where the United States claims that the
2 liability is joint and several because the 113 claim
3 can be brought, if you will, as soon as there's an
4 underlying enforcement case.

5 THE COURT: That isn't the traditional
6 understanding of a contribution, though, is it? Aren't
7 you arguing that 113 has kind of a unique statutory
8 role here that it takes it beyond--

9 MR. MANDELBAUM: --your Honor, but I think
10 you don't have--you don't typically have tort
11 defendants, for example, agreeing to pay 100 percent of
12 the--of an underlying plaintiff's claim before trial or
13 before the lawsuit's brought and then turning around
14 and suing somebody else on a theory that isn't
15 contribution.

16 In other words, if you elect to pay, then
17 effectively you're choosing to allocate the amounts
18 that you're paying among other people using
19 contribution theories. If you elect not to pay, then
20 your litigation's with the underlying plaintiff, in
21 this case, the United States, and you can litigate all
22 your issues there.

23 THE COURT: Well, what was your--would
24 your response be to the plaintiffs' argument that
25 the--the harsh penalties that apply if you dare to

1 litigate against the United States and do not
2 completely prevail basically prevent that as an option?

3 MR. MANDELBAUM: I have two responses.
4 One's practical and one's legal.

5 The practical response is that the penalties--
6 And they cite two only, one of which I think is likely
7 to be available in this case. One is daily penalties,
8 and Ms. Roach correctly stated what they were. The
9 other is treble damages, which are only available if
10 the United States does the work and fronts it from the
11 hazardous substance response Superfund. That's not
12 available to the government right now because this site
13 is not included on the national priorities list, so
14 they can't spend that money. So there can't be treble
15 damages yet. All right?

16 If there-- If the United States would come to
17 court--and presumably it would be this court--the
18 assessment of penalties is discretionary with the court
19 in its equitable judgment. So that should you decide
20 that the defense of divisibility, even though it didn't
21 prevail-- I mean, if it prevailed, then there would be
22 no--then there would be no issue, right? So it would
23 have to not prevail, but there was a good faith
24 defense. You would then be in a position not to impose
25 draconian penalties.

1 Now, that argument that there's this option and
2 there isn't no people in the plaintiffs' position or,
3 for that matter, in my client's position are not put to
4 an impossible choice and must comply. Okay? That
5 argument was raised in a case brought in the District
6 of Columbia by General Electric. General Electric in
7 that case is represented by Sidley Austin that
8 represents NCR here and (Indiscernible) from Harvard
9 Law School, so they got some heavy hitters out.

10 THE COURT: Uh-huh.

11 MR. MANDELBAUM: And that in effect did
12 not succeed. The district court decided that the--that
13 the penalty provisions do not leave an ordered party
14 without options. There's no constitutional problem
15 with (Indiscernible) either works on its face or as it
16 has been applied by pattern and practice.

17 So the answer is that it's not an impossible
18 choice. And if they chose not to comply because the
19 order's wrong for some reason and they have a good
20 faith argument even if it does not prevail or it does
21 not prevail in whole, they will--they will--they should
22 prevail in this court on penalty.

23 THE COURT: So your view is that to the
24 extent they argue that they've already paid \$10 million
25 in cleaning up OU1, which they have no liability for

1 because they're not an arranger, it's too bad
2 their--their claim--their recovery has to be under 113
3 at this point. You don't go back to 106.

4 MR. MANDELBAUM: 107, your Honor.

5 THE COURT: Or 107, excuse me.

6 MR. MANDELBAUM: In general, if they've
7 paid it, you got to 113 and use equitable factors, and
8 I think every factor that they would want to use under
9 107 they could use under 113.

10 THE COURT: And some they don't want to
11 use.

12 MR. MANDELBAUM: And some they don't want
13 to use. But it's not fair to use the ones that don't
14 want to use you won't use them.

15 THE COURT: Uh-huh.

16 MR. MANDELBAUM: So they want something
17 different than fairness.

18 THE COURT: Well, their argument is a
19 legal argument, and their argument is really based upon
20 the traditional notion of contribution, which seems to
21 be what the court kind of adopted in Atlantic Research,
22 didn't it?

23 MR. MANDELBAUM: Yes. But Atlantic
24 Research isn't new on the day of--of your decision in
25 the motion to dismiss. That Atlantic Research opinion,

1 you got it right then. Everybody agreed with Atlantic
2 Research. There's no reason to change it now based on
3 Burlington Northern, which doesn't address anything
4 under Atlantic Research.

5 Let me provide another suggestion to you, and then
6 I want to come back to the other point because I think
7 it illustrates a lot of--of what's going on here.

8 A conventional defense in private contribution
9 cases under CERCLA is that the costs that are incurred
10 by the contribution plaintiff, NCR and Appleton Papers
11 here, are not recoverable under the statute either
12 because the remedy's wrong or because they just
13 squandered the money somehow. That's a typical
14 defense. If fact, it's prevailed from time to time.

15 If the remedy is wrong in this case, then
16 presumably there's a defense to liability to the remedy
17 for the remedy. All right? Why aren't they litigating
18 that defense? Why aren't they litigating with these
19 defendants here that it's crazy to dredge this river?
20 Right? The answer is because the defendants here are
21 the wrong party for that.

22 So too are--they have wrong party to defend or to
23 attack the United States' determination that the work
24 to be done is to be done by these parties and not some
25 other parties and by all these parties. Right? The

1 plaintiffs can't attack the United States'
2 determination by suing other ordered parties. That's
3 not--that's not the way it works.

4 Now--

5 THE COURT: Now, they're cleaning up the
6 river pursuant to this order.

7 MR. MANDELBAUM: Uh-huh.

8 THE COURT: Do they have-- Do they still
9 have the ability to challenge that order, or have they
10 entered into an agreement with the government where
11 they're not going to challenge it?

12 MR. MANDELBAUM: They have not entered
13 into any agreement with the government. They do have
14 the ability to challenge the order. There are two
15 vehicles for them to challenge the order.

16 The first would be to stop compliance. The United
17 States would bring an enforcement action. They could
18 challenge it in that enforcement action. Indeed, the
19 enforcement action itself may turn into a compulsory
20 counterclaim in their case, in which case they could
21 litigate then.

22 Or they can complete the remedy and sue for their
23 money back under section 106(b)(2) of the statutes.

24 Let me also address with you just for a minute
25 this OU1 claim. Recognize that OU1 was cleaned up by

1 my client, the Glatfelter Company, WTM I with a little
2 bit help from Menasha Corporation. What the plaintiffs
3 did was the plaintiffs settled a different claim. They
4 put \$41 million plus into an account so that they could
5 buy some forbearance on litigation by the government, I
6 believe, for natural resource damages claims and an
7 agreement that there would be no--that there would be a
8 mediation of natural resource damages claims, which
9 they alone participated in.

10 The United States got this fund and could use it
11 for something. They took \$10 million and used it in
12 OU1. All right? They are entitled under the OU1
13 consent decree to which they are not a party. My
14 client and WTM I have agreed to give them credit for
15 that \$10 million towards the OU1 remedy.

16 Now, that's a set of facts. That \$10 million is
17 what it is. OU1's all specced. You will be in a
18 position of allocating the costs in this case.
19 \$10 million is way beyond the realm of fair. It's a
20 small potatoes issue. We are not doing phase one here
21 till we address \$10 million issues. If \$10 million is
22 what separated the parties, we'd settle the case. This
23 is a case which the government says is 1.5 billion. So
24 we have to have more zeros.

25 When you allocate this case, that \$10 million is

1 an equitable issue. It will decide where that
2 \$10 million goes. Did they overpay on OU1? Did they
3 underpay on OU1? Did they get what they bargained for
4 with the \$41 million?

5 And so whatever the government did with it is what
6 the government did with it. You'll figure that out.
7 That's not a phase one issue, but that will be an
8 equitable factor. That's an example of how everything
9 comes in under 113 to make this fair.

10 Now, let's go to the question of is 113 available.
11 Is this claim that somehow we're--they're going to be
12 precluded from bringing--from bringing the one--excuse
13 me--a 113 claim because sometime later there's going to
14 be a determination that this site is divisible and they
15 won't be able to bring the 113--they won't be able to
16 recover on their 113 claim.

17 They quote the court's opinion from last year on
18 page 4 of their brief, and the quote is they say,
19 Indeed, the court emphasized that, quote, parties who
20 do not have access to section 113(a) either because
21 they are completely innocent and do not share common
22 liability with any PRP, ellipses, must be allowed to
23 recover under section 107(a) if injustice is to be
24 avoided.

25 That's their quotation. What goes into the

1 ellipses? What goes into the ellipses is what the
2 Supreme Court said in Atlantic Research and what you
3 correctly repeated here, which is "or because the
4 government has not brought enforcement action."

5 But the government has brought an enforcement
6 action. They may sue under 113(f). No one disagrees
7 with that. And so because they may sue, no one is
8 claiming that they can't recover because they're not
9 liable. There may be a claim later that they can't
10 recover because the costs are not consistent with the
11 statute. I don't know whether that will prevail, but
12 there's no claim that they can't recover because
13 they're not liable and it's a 113 claim. No one has
14 asserted that defense. All right?

15 And you had it right last year. That's what the
16 Supreme Court said. That's what you should decide
17 again. There's no reason to change it.

18 Now, let's talk a minute about the case management
19 order, if you will, your Honor. We've all worked
20 pretty hard since that case management order was
21 entered. The objective of many of us, if not all of
22 us, was to pick one big issue that separates the
23 parties by a good bit. Get that resolved and see
24 whether this case is settleable. It may be the case
25 that we will hit a home run and this case will be

1 resolved on this issue. If that doesn't occur, we
2 nevertheless want to be productive with this issue. We
3 want to have something which doesn't address
4 \$10 million but addresses lots of money or a big
5 proportion of what separates the parties, that that
6 should be resolved first so that we can have a leg up
7 on settling.

8 It is absolutely true, as Mr. Hermes suggests,
9 that if we have to decide every issue, we'll be back a
10 number of times. We hope not to do that, and we hope
11 to pick the big one first.

12 Now, why is this the big one? Ms. Roach says the
13 government estimates that 50 percent of the PCBs
14 discharged in this case were discharged by defendants.
15 In point of fact, it may be more than that because the
16 discharge from the plaintiffs pass-through POTWs, so at
17 some point it went through everybody's pipe.

18 But that puts the rabbit in the hat, your Honor.
19 What we're litigating is who's responsible for the PCBs
20 that were discharged from recycling those pipes--or,
21 from recycling those through the treatment plant's
22 pipes, the (Indiscernible) pipes. Is it the recycling
23 mills who didn't know PCBs were there, or is it
24 plaintiffs, who did and nevertheless in order to make a
25 few bucks--and by a few, I mean a few--recycled their

1 production scrap? Okay.
 2 So that is the big issue because if they're
 3 responsible for that, then responsibility on a fairness
 4 basis of each of the--of each of the defendants or even
 5 on their hypothesized volumetric allocation
 6 apportionment basis is really very small.
 7 If on the other hand they're not responsible for
 8 it on a fairness basis, then maybe the settlement
 9 position should be different.
 10 Now, they're going to jump up and say, oh,
 11 Burlington Northern addressed arranger liability. That
 12 I disagree with them that Burlington Northern has
 13 anything relevant to say in this case on arranger
 14 liability. But put that aside. That's something
 15 they're going to want to argue.
 16 When you are talking about section 113, you are to
 17 consider what's fair. So we're not asking complete
 18 strangers to the site to bear liability for selling
 19 that broke and putting it into the recycle mills
 20 (Indiscernible) stream and then out the pipe. We are
 21 asking somebody who is--actually NCR Corporation, which
 22 made NCR paper and set this whole system up, is the
 23 only one who knew that there were PCBs in the paper, to
 24 be responsible for that. So if it's fair, it's fair.
 25 If it's not fair, it's not fair.

1 So this is the big issue. And if we can resolve
 2 the big issue, hopefully we can settle the case.
 3 I think I just--
 4 THE COURT: Of course--of course if
 5 they're correct that--that--that 113 even if it
 6 hasn't--Burlington Northern asserted as a defense is
 7 not the proper vehicle at this stage of the
 8 proceedings, then it's hard to argue that--that this
 9 case management order needs to be changed in order to
 10 prevent a waste of time, don't we?
 11 MR. MANDELBAUM: Your Honor, I don't
 12 think-- Let me reiterate something I said before, and
 13 let me try to say it more clearly.
 14 If their contention is that they're not liable,
 15 then what they're saying is there are costs that are
 16 not part of this case. They can't bring a case which
 17 has the following form: I'm not liable for this cost.
 18 You are. All right? They can bring a claim-- They
 19 can bring that argument against the United States.
 20 They could bring the fairness argument against us.
 21 But this case is their case they decided to bring.
 22 It is at a maximum about the costs for which NCR is
 23 liable. NCR can sue for the cost it incurs that it's
 24 liable for, and the defendants can counterclaim against
 25 NCR for the costs for which NCR is liable. It is not

1 about costs that somebody else is liable for.
 2 I mean, to take a ridiculous example, could NCR
 3 sue the Glatfelter Company to establish the proposition
 4 that General Electric is responsible for the lower
 5 Hudson river? It's a nonsense argument. If they have
 6 a beef, if they have a problem with the--with the
 7 unilateral order, their dispute's with the United
 8 States, not with these defendants.
 9 So you should not-- You should not modify the
 10 case management order. If the case management order--
 11 The case management order covers this whole case. If
 12 this whole case is less than \$1.5 billion, then it is.
 13 You know, half of \$1.5 billion is a lot of money.
 14 Right?
 15 I also just-- I just want to comment--
 16 THE COURT: So your argument really isn't
 17 it doesn't matter how I interpret contributions that
 18 may affect, they brought an action for contribution,
 19 and really they don't have the right, as I understand
 20 your statement, in asking me to essentially enter a
 21 declaratory judgment saying they are not liable for,
 22 you know, essentially they're asking that I make--enter
 23 a declaratory judgment saying that this--this damage is
 24 divisible and they are--have no arranger liability and
 25 then apportion the liability based upon those

1 determinations and then the additional determinations
 2 of volume and timing and all those things. That's what
 3 they're asking. And you're saying they are not
 4 entitled to that relief in this action.
 5 MR. MANDELBAUM: Because they're a
 6 plaintiff here.
 7 THE COURT: Plaintiffs can bring
 8 declaratory judgment actions.
 9 MR. MANDELBAUM: That's true, but they
 10 can't-- And they can bring a declaratory judgment
 11 action for the proposition that a fair share, an
 12 equitable allocation between NCR and the defendants is
 13 whatever it is.
 14 THE COURT: Can't they bring-- Can't they
 15 bring a declaratory action judgment action seeking a
 16 determination not of equitable shares, but of legal
 17 shares? I mean, under 107, you know, and this is--of
 18 course, we have yet to hear from the government,
 19 but--and it is, you know, if that's what they were
 20 doing from the beginning, it seems the government
 21 should have been the principal party because the
 22 government, not just EPA, but DNR, whoever the
 23 interested party certainly would want to be had a role
 24 in deciding whether or not this--the liability here is
 25 joint and several.

1 But in any event, now that--if EPA is in the case,
2 if the proper parties are in the case, what is the--the
3 doctrine or the rule that precludes them from seeking
4 declaratory relief on that other aspect?

5 MR. MANDELBAUM: They're suing for
6 declaratory relief on their claim against the
7 defendants, not on their claim against EPA.

8 Let me give you an example. Let's use the facts
9 of Burlington Northern, if you will, your Honor, just
10 to contrast that case with this case. In Burlington
11 Northern, to simplify it a little bit, there were three
12 sets of responsible parties. There was, if you will,
13 the bad guy, Brown & Bryant, which ran a
14 (Indiscernible) product warehouse.

15 THE COURT: Right.

16 MR. MANDELBAUM: And then the
17 (Indiscernible) which delivered the pesticide, and
18 there are the railroads that leased a little piece of
19 the property to Brown & Bryant.

20 Brown & Bryant's gone, and the litigation is over
21 whether Shell and the railroads who were sort of
22 tangential parties here, have to pay the whole amount
23 to the United States or less than the whole amount.
24 That's what that case is about.

25 That's not this case. This case is not about a

1 litigation with the government over whether these
2 parties have to pay a hundred percent or less than a
3 hundred percent. This is a case that's brought by one
4 party that has said we intend to spend a hundred
5 percent and we want to allocate or apportion or
6 something that hundred percent among all these other
7 parties, none of whom is the government.

8 THE COURT: Weren't there two actions in
9 Burlington Northern? Wasn't it consolidated with an
10 action by one of the PRPs as well?

11 MR. MANDELBAUM: Yes, but I don't think
12 the theory in that PRP action was divisibility, your
13 Honor. That is, it was not Shell suing the railroads
14 for a determination that they were together responsible
15 for 17 percent. That would be a funny case, right?

16 What would happen, your Honor, if the proof--the
17 proof in this case was on plaintiffs' claim that it's
18 divisible, yes, it is, it is divisible. Plaintiff's
19 get ten percent, defendants get ten percent. That
20 would be a funny case, right?

21 THE COURT: I don't think the government
22 would appreciate that.

23 MR. MANDELBAUM: That's correct.

24 THE COURT: And I think that
25 that's--that's the--that's why-- Okay, so their

1 original case was flawed. Their original complaint was
2 flawed. But what about now they're trying to amend the
3 complaint. They want the government in here. Let's
4 say they want the government to take its role and to
5 argue against divisibility. They want declaratory
6 relief without facing these draconian penalties,
7 without short circuiting the remedial work that's going
8 on now, and being able to assert they want to be able
9 to assert defenses and to avoid, you know,
10 consideration of factors that frankly CERCLA by its
11 terms under 107, you know, doesn't bring in to bear on
12 liability. What is the doctrine that precludes them
13 from seeking that relief? It's really a whole
14 different kind of case than we started out with.

15 MR. MANDELBAUM: That's correct, your
16 Honor. There would be two doctrines. One is all of
17 the cases under Atlantic Research and Cooper Industries
18 and all the ones cited in the briefs that say in a
19 private case--

20 THE COURT: Uh-huh.

21 MR. MANDELBAUM: --a party that's alleged
22 to be responsible and has 113 available has 113 and not
23 107. Okay? So when the claims (Indiscernible) NCR and
24 Appleton Papers versus the responsible party
25 defendants, they can't bring that claim. They either

1 have to bring a 113 claim or nothing.

2 With respect to the United States, there is a bar
3 on pre-enforcement review of the government's
4 decisions. So the United States has to be the
5 plaintiff in that action.

6 THE COURT: Okay.

7 MR. MANDELBAUM: Okay?

8 THE COURT: And I'm anxious to get to the
9 United States' argument. I hope they're ready to
10 proceed. But I didn't mean to cut you off,
11 Mr. Mandelbaum.

12 MR. MANDELBAUM: I just want to make one
13 comment.

14 THE COURT: Sure.

15 MR. MANDELBAUM: Ms. Roach correctly says
16 the issue is whether her amendment would be futile.

17 THE COURT: Yes. I really think that's
18 the issue. I don't think-- I mean, I think if it's
19 not futile, then I think Rule 15 says, look, we should
20 probably grant this.

21 MR. MANDELBAUM: I think it's futile
22 because they are not entitled to bring a 107 claim.

23 THE COURT: Uh-huh.

24 MR. MANDELBAUM: I think as a practical
25 matter the likelihood that NCR as opposed to any of the

1 other parties in this case is going to make a credible
2 divisibility argument in this case--

3 THE COURT: Uh-huh.

4 MR. MANDELBAUM: --is really low.

5 THE COURT: Okay.

6 MR. MANDELBAUM: Okay?

7 THE COURT: Well, that-- And that-- You
8 know, that's another way of doing it. I could grant
9 leave to amend and then consider the divisibility
10 argument. And if their chances of meeting it are as
11 low as we say, we'd be back here except later.

12 MR. MANDELBAUM: Well, your Honor, the
13 facts that they want to assert on divisibility are all
14 the facts, right? We came in here a year ago and said,
15 you know, we don't want to litigate all of the detail
16 of who did what to whom when because that will take us
17 forever to prepare and will take us--will take us
18 forever to try.

19 If you'll indulge me one minute--

20 THE COURT: Sure.

21 MR. MANDELBAUM: --let me take one simple
22 fact.

23 THE COURT: I just looked at what we've
24 had, what I thought was a narrow issue, and I can
25 imagine if we open it up, we're--it's attrition.

1 MR. MANDELBAUM: Right. Let me take one
2 simple fact, though it's a big one, which is how
3 much--how much--how many PCBs--how many pounds of PCBs
4 went into the wastewater that exit the Appleton Coating
5 plant, which is an NCR facility?

6 THE COURT: Sure.

7 MR. MANDELBAUM: And went out to the
8 Appleton super treatment plant. All right? Now,
9 recognize, your Honor, there are no PCB sampling
10 results prior to 1973 pretty much, so that everything
11 we're talking about during the production period is
12 based upon reconstruction of what happened. We don't
13 have the ability to take samples of wastewater and
14 calculate massive PCBs.

15 Now, at one point in the nineties, plaintiffs
16 prepared an expert report for remediation by an outfit
17 called RMT that estimated that the--that the loss rate
18 for this kind of operation was 1.4 percent.
19 1.4 percent of everything that came in ended up in the
20 waste plant. All right?

21 Defendants in this case so far have an expert who
22 says I've been around coating operations since the
23 beginning of time. I know coating operations. I've
24 never seen anybody who loses less than two percent.
25 Most people worse than that.

1 Plaintiffs have an expert who says, well, I looked
2 at the RMT report and, you know, RMT was too high.
3 It's half a percent.

4 Now, imagine--imagine the trial we're talking
5 about. We're trying to get old-timers to remember
6 whether it was a half, whether half is wrong or 1.4 is
7 wrong or two is wrong. And you say what difference
8 could that possibly make? That facility received 30
9 million pounds of PCBs. One pound is 300,000 pounds--
10 One percent of 30 million is 300,000 pounds.

11 So it's highly consequential which one of those
12 numbers is right. If we replay that over and over and
13 over again with guys in their seventies and eighties
14 trying to remember how the industrial process worked
15 exactly and how many days--how many truckloads came in
16 each week, it's--that's a huge enterprise. It's a huge
17 enterprise, and it's uncertain and it's--every fact in
18 this case is going to go into that divisibility
19 argument that plaintiff's now want to make.

20 And I don't believe that volume is going to be a
21 basis for divisibility in this case. They disagree
22 with me. But if volume were the basis for divisibility
23 or a reasonable basis for apportionment, it would be
24 every single factor, every single little fact. We'll
25 be here forever. And that's what we want to avoid

1 because we don't want to try every single fact. We
2 want to resolve something big and see if we can settle.

3 THE COURT: All right. Thank you.

4 MR. MANDELBAUM: Thank you.

5 THE COURT: Mr. Stone?

6 MR. STONE: Good morning, your Honor.

7 THE COURT: Good morning.

8 MR. STONE: My name is Randall Stone. I'm
9 with the environmental enforcement section of the U.S.
10 Department of Justice. I'm joined today by
11 Mr. Richmond of the U.S. attorney's office and
12 Mr. Levin of the environmental defense section and some
13 other colleagues from the defense section, and we're
14 representing the Army Corps and EPA in its defensive
15 capacity in this case.

16 After nine years on this case and sitting across
17 the table from many of these lawyers, I never thought
18 that I would come to Green Bay to court and say that I
19 agree with most of what David Mandelbaum said, but I'm
20 here to do that today, your Honor.

21 THE COURT: He's changed firms, I
22 understand.

23 MR. STONE: Your Honor, in your colloquy
24 with plaintiffs' counsel and Mr. Mandelbaum, I heard at
25 least four questions that I want to help answer today.

1 One is the declaratory judgment question you posed,
2 second is the sufficient cause question you posed,
3 third is the difference between contribution under
4 section 113 and traditional common law notions of
5 contribution. And four, whether Burlington Northern
6 really changed the law that governs this case or other
7 cases under Superfund.

8 I'd certainly be happy to answer any other
9 questions, but I think in the course of my presentation
10 today I can touch on each of those.

11 THE COURT: Great.

12 MR. STONE: What I'd also like to do to
13 facilitate my argument today is I have a short handout,
14 and I have given copies of this to Ms. Roach,
15 Mr. Hermes, and Mr. Mandelbaum. It's seven pages and
16 it is just excerpts of the statute, excerpts of cases
17 cited in our brief, and excerpts of their complaint.

18 THE COURT: And we'll have this--we'll
19 docket this or perhaps you could so that everyone has a
20 copy of it then.

21 MR. STONE: Okay, thank you, your Honor.

22 THE COURT: Uh-huh. Why don't we just
23 call it demonstrative Exhibit 1 for purposes of this
24 hearing, and it will appear on the docket then.

25 MR. STONE: Your Honor, there's absolutely

1 no need for you to hit the reset button and start this
2 case all over again. There was discussion earlier
3 today about the important public interest implicated
4 here, the importance of cleaning up the river, and we
5 certainly agree that that is paramount. But none of
6 those public interests are implicated if we--or,
7 they're certainly not impaired if we--you allow the
8 river cleanup to continue and this case to continue as
9 a section 113 contribution action.

10 The parties' responsibility for paying for the
11 final bill will all come out in the wash during the
12 course of this contribution case. Your Honor got that
13 exactly right in its--in your 2008 ruling in
14 August 2008, when it ruled API and NCR need to pursue
15 their claims here under section 113 rather than under
16 section 107, and Burlington Northern doesn't change
17 that at all.

18 So I have three main points to make today. Point
19 one, is that the Supreme Court's decision in Cooper
20 Industries versus (Indiscernible) confirms that these
21 plaintiffs can sue for contribution under
22 section 113(f).

23 Point two is that the Supreme Court's Atlantic
24 Research decision tells us that these plaintiffs can't
25 sue for cost recovery under section 107. And taken

1 together those two points help show that contribution
2 under section 113 is actually slightly different than
3 traditional common law notions of contribution, and
4 I'll get into that later.

5 Point three is that Burlington Northern changes
6 none of that. And in the course of my Burlington
7 Northern discussion I will then touch on the sufficient
8 cause question you posed and the declaratory judgment
9 question and whether Burlington Northern really changed
10 the law at all.

11 So first to my point one. To decide whether the
12 plaintiff in the Cooper Industries case could sue for
13 contribution under section 113(f), the Supreme Court
14 looked at the plain language of the statute, and it
15 emphasized that it was looking at the plain language of
16 the statute.

17 In that case, there was no claim for the plaintiff
18 under section 113(f) for two reasons, and both derive
19 from the language of the statute itself. And that's on
20 page 1 of my handout.

21 First, as stated in section 113(f)(1), the claims
22 were not brought, quote, during or following an action
23 under section 106 or section 107 as stated here in
24 section 113(f)(1).

25 Second reason, the plaintiff couldn't proceed in

1 this case under section 113(f)(3)(B) the claims in that
2 case were not brought after the plaintiff's entry into
3 a settlement with the United States or the state as
4 stated in this provision.

5 Now, the exact opposite is true here, your Honor.
6 As you noted in your August 2008 decision, both these
7 plaintiffs have been sued by the United States and the
8 state, and both of them have entered into partial
9 settlements with the United States and the state.

10 There's nothing in this plain language of the statute
11 that tells us that there needs to be a threshold
12 finding of joint and several liability to the
13 government before parties like API and NCR can sue
14 under 113.

15 In fact, there are two important textual
16 indications that this is not required. The first is
17 again in section 113(f)--excuse me--(f)(1), where the
18 statute says that contribution claims can be brought
19 against any person who is liable or potentially liable.

20 And it also says that claims can be brought during
21 or following a primary action under section 106 or 107.

22 So a contribution case under this statute can be
23 brought before entry of any judgment addressing joint
24 and several liability to the government.

25 The second important textual indication is in

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1 section 113(f)(3)(B). It allows contribution suits by
2 parties that have settled with the government. But
3 CERCLA settlements rarely involve or include an
4 admission of liability. And, in fact, the settlements
5 that API and NCR did here did not include an admission
6 of liability.
7 There's actually a different and specific
8 provision of the Superfund statute. It's
9 section 122(d)(1) codified at 42 USC 9622 DO1 that says
10 that CERCLA cleanup agreements--explicitly says CERCLA
11 cleanup agreements are not to be construed as
12 admissions of liability.
13 Now, where congress has so clearly said that
14 parties can sue after having settled and not admitted
15 liability, again, it's a clear indication that there's
16 no threshold requirement that a party be adjudged or
17 admit joint and several liability before they can
18 proceed with an action under this provision of the
19 statute.
20 That brings me to my second point. Point two:
21 Atlantic Research confirms that these plaintiffs can't
22 sue for cost recovery under section 107.
23 Now, as shown on page 2 of my handout, the
24 Atlantic Research court affirmed the Eighth Circuit's
25 determination that PRPs that had been subject to

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1 section 106 or 107 enforcement actions are still
2 required to use section 113, thereby insuring its
3 continued viability. And this court recognized and
4 applied this rule in its August 2008 decision in this
5 case.
6 If API's and NCR's proposed 107 claims are viable
7 here, then plaintiffs will never again sue under
8 section 113. And that fact is perfectly illustrated by
9 Ms. Roach's first example for the (Indiscernible) claim
10 that they need to pursue under section 107. That's the
11 \$10 million that these plaintiffs paid to the
12 government that was then spent in operable unit one up
13 in Little Lake Butte Des Morts.
14 That \$10 million certainly was not response cost
15 that these parties incurred on their own doing cleanup
16 work voluntarily, as was at issue in the Atlantic
17 Research case. It was money that they paid to the
18 government after the government had sued them under 106
19 and 107, and it was money that they paid the government
20 under a 2001 consent decree in this case.
21 Thus, that money is recoverable or they can sue in
22 contribution to seek to have others pay toward that,
23 you know, offset some of that money that they paid
24 under either 113(f)(1) having been sued by the
25 government under 106 and 107 or under 113(f)(3)(B)

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1 because it's money they paid under a settlement.
2 There's no clear claim for contribution than the claim
3 for that money that cannot be a claim under 107.
4 Now, plaintiffs make much of the common liability
5 discussion in the Atlantic Research case, and it's also
6 referenced in this court's case.
7 The Atlantic Research-- But that discussion is
8 really a red herring, and I'll explain why. The
9 Atlantic Research court referred to the dictionary
10 definition of contribution and the terms traditional
11 usage to help explain why section 113(f) didn't cover
12 things like voluntary self-incurred cleanup costs that
13 were at issue in that case.
14 But this is a case where the costs are covered by
15 the plain language of section 113. Justice Thomas
16 wrote both the Cooper Industries case and the Atlantic
17 Research case, and it emphasized the importance of the
18 plain language under section 113.
19 The only way to reconcile those issues is that
20 common law notions are helpful to some degree in
21 understanding what might fit this 107. But when it
22 comes to 113, it's absolutely clear 107--it's actually
23 an implied cause of action for plaintiffs, and so some
24 reference to sources--of interpretive sources other
25 than the language of the statute itself is necessary.

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1 But the common liability discussions, really dictum in
2 Atlantic Research, what's more relevant is the plain
3 language analysis in the Cooper Industries case.
4 And as Mr. Mandelbaum pointed out, none of the
5 plaintiffs here are disputing that these-- Excuse me.
6 None of the defendants are disputing that these
7 plaintiffs have valid claims that they can assert under
8 section 113. If plaintiffs have valid contribution
9 claims under 113 but can just plead their way out of
10 113 and back into a better cause of action that they'd
11 like to have under 107 just by saying there's no common
12 liability, then that will happen in every single case.
13 It's typically easy for a party like Appleton or
14 NCR to say that another PRP contributed to the harm and
15 that the harms are going to be able to be separated out
16 later, and that's exactly the sort of argument they're
17 making with their 1242 versus non-1242 argument,
18 AROCLOR 1242, that, oh, that's not my molecule. This
19 may be my molecule, but that's not my molecule.
20 So when I scoop up a shovel full of sediment, I'm
21 getting other people's molecules, and I'm going to be
22 able to prove down the road that all the harm at this
23 site is divisible.
24 It's easy to say that. And as I said, 113 would
25 banish from the face of the earth as a cause of action

1 that plaintiffs assert if that were sufficient at the
2 pleading stage in a case like this.

3 Now, even if we take the common liability concept
4 at face value, nothing in Atlantic Research requires
5 that contribution under 113 is only available if the
6 shared liability overlap perfectly and exactly.

7 I think of this as like a (Indiscernible) diagram
8 where you have two circles with some degree of overlap.
9 There may be marginal areas on the sides where there
10 isn't overlap, but there's a huge area of overlap.

11 There's a common liability, and some of it is
12 absolutely indisputable here. Mr. Mandelbaum
13 referenced the fact that the PCBs that came from the
14 Appleton Coating facility that these plaintiffs'
15 predecessors owned passed through the city of Appleton
16 sewer system and through its publicly owned treatment
17 works and then were discharged to the river.

18 There is indisputably a common liability for that
19 discharge. It's the same PCBs that give rise to
20 liability for three parties, Appleton Papers, NCR, and
21 the city of Appleton, and the only way of sort of
22 separating out who's ultimately going to bear
23 responsibility for what share of that common liability
24 is in an equitable apportionment proceeding under
25 section 113, where you consider plaintiffs' causation

1 knowledge and any other things that your Honor deems
2 relevant.

3 Similarly, the United States at least believes
4 that there are huge areas at this site that are simply
5 indivisible. The vast majority of the mess at this
6 site is in the last seven miles of the river below the
7 DePere dam and out in the bay of Green Bay, and all of
8 the major parties that received the government's
9 unilateral order are responsible for that, we believe.
10 We think that's a common liability, and there's going
11 to be to no way to separate that out among the PRPs
12 other than an equitable allocation process.

13 Which leads me to my point three. Burlington
14 Northern changes none of that. There's no real change
15 in the law dictated or that Burlington Northern made.
16 The Burlington Northern decision talks about the
17 divisibility doctrine having been established by Judge
18 Rubin or at least recognized by Judge Rubin in the
19 Chem-Dyne decision in 1983. The government lost the
20 divisibility doctrine case in the Bell Petroleum matter
21 in 1993.

22 Both of those cases and many others are cited in
23 what the Supreme Court says is a doctrine that's been
24 well embraced by all courts of appeals that have heard
25 it since 1983.

1 As Mr. Mandelbaum mentioned, what was really at
2 issue in Burlington Northern is whether the district
3 judge's fact findings, 500 plus fact findings and
4 conclusions of law after a 16--excuse me--a six-week
5 bench trial pass muster under the clear error standard.

6 THE COURT: And how long after that trial
7 did he issue that decision?

8 MR. STONE: It was years later.

9 THE COURT: Go ahead.

10 MR. STONE: At this point there doesn't
11 seem to be any dispute about this. What plaintiffs
12 seem to be seeking here is some sort of apportionment
13 determination under the divisibility doctrine applied
14 in Burlington Northern. And that's clear from page 3
15 of my handout to begin with, wherein in paragraph 73 of
16 their proposed eighth amended complain in the Whiting
17 case. And as Mr. Westerfield pointed out, there's a
18 parallel complaint in the NCR v. Kimberly-Clark case
19 that repeats this language virtually verbatim where
20 they say, you know, Burlington Northern is here and
21 there is--we want the court to find that there's a
22 reasonable basis for apportioning the harm at the site
23 based on several factors.

24 Now, I'd actually like to make a brief but
25 important detour at this point. If your Honor looks at

1 the preceding paragraph, 72, there's a reference to
2 CERCLA section 107(a)(4)(C). That is the provision of
3 the statute that allows government recovery of natural
4 resource damages.

5 This is part and parcel of plaintiffs' thinly
6 veiled attempt yet again to recoup natural resource
7 damage payments that they made to the United States
8 through some sort of section 107 action despite this
9 court's prior ruling on that issue and its ruling that
10 they could, however, proceed to seek recoupment through
11 an action for contribution under section 113.

12 Now, the language in 107 itself and all the cases
13 are quite clear that private parties just can't sue for
14 natural resource damages under section 107. And I
15 specifically invite the plaintiffs to explain to us
16 here today how they think Burlington Northern changed
17 that. That's a sticky issue that they've studiously
18 avoided in their briefs, and I can't conceive of an
19 answer to that one that makes sense.

20 Now, back to what their complaint says. Page 4 of
21 my handout again reinforces the sort of relief that
22 they're seeking. They're asking the court to determine
23 that the harms and the costs associated with the lower
24 Fox River contamination are capable of apportionment.
25 But as explained in our brief here, United States--the

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1 divisibility doctrine is a partial defense to joint and
2 several liability to the government. It doesn't
3 provide an independent basis for a 107 claim against
4 other liable parties.
5 That's absolutely clear from the Burlington
6 Northern case itself and from all of the other
7 decisions--divisibility decisions that the Burlington
8 Northern case cited.
9 As your Honor recognized, Burlington Northern had
10 claims among private parties that were consolidated
11 with claims by the government. But what the case
12 really decided, what the judge really decided was
13 divisibility--to what extent is this a valid partial
14 defense to the claims of the United States?
15 The Burlington Northern court in its divisibility
16 discussion cited with approval to 11 lower court
17 decisions. Nine of those decisions were just like
18 Burlington Northern. They were enforcement actions
19 brought by the United States against liable parties
20 where those liable parties were raising divisibility as
21 a partial defense to the government's claim.
22 One other case is a sufficient cause case. That's
23 the Chem-Nuclear decision. That's a case that was a
24 special proceeding under section 106(b) of the statute,
25 which allows a party that has performed under a

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1 unilateral order to later petition to get reimbursed
2 from the hazardous substance Superfund based on an
3 argument that they had sufficient cause not to have to
4 incur those costs.
5 It's actually-- I'd have to look back at the
6 language. There's a sufficient cause defense and
7 there's a separate cost reimbursement provision. This
8 was a cost reimbursement provision that the court
9 decided the sufficient cause defense.
10 The sufficient cause defense says I don't believe
11 I have to comply with the order. I'm going to stop
12 complying. And if the government brings its action
13 against me to enforce compliance with its
14 administrative order, I'm going to say I have
15 sufficient cause. I run the risk of statutory
16 penalties, yes, but I don't think I have to clean up
17 that mess there.
18 That's an option that is theoretically available
19 to these plaintiffs. I'm not encouraging them to do
20 that. It's a difficult burden for them to bear, and
21 congress meant it to be a difficult burden for them to
22 bear to ensure that sites like this get cleaned up.
23 A parallel provision of section 106 is what was at
24 issue in Chem-Nuclear. It's a provision that allows a
25 party that receives a unilateral order to do the work,

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1 pay for it, finish it, and then petition EPA and seek
2 judicial review, if appropriate, saying I was forced to
3 pay money that I shouldn't have had to have paid at
4 this site. And one of the arguments that a party in
5 that position can make is that the harm was divisible
6 and that the government shouldn't have required that
7 party to do that full cleanup.
8 That's what was at issue in the Chem-Nuclear case.
9 Again, it's essentially a special--special sort of case
10 where the defense to joint and several liability to the
11 government can be raised. In the Chem-Nuclear case, it
12 was--it can only be done after very concrete findings
13 by the agency.
14 In Chem-Nuclear, there was a petition that was
15 submitted, and there was a formal finding by EPA's
16 Environmental Appeals Board, which hears these sorts of
17 cases at the first level, that the parties were, in
18 fact, jointly and severally liable to the government.
19 And then what happened was it went to the district
20 court in the District of Columbia and to the D.C.
21 circuit seeking review of that EPA decision with the
22 plaintiffs in that case making arguments that they
23 should not have been held jointly and severally liable
24 to the government.
25 Now, that's ten of the 11 cases cited in

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1 Burlington Northern. The eleventh is highly
2 instructive. That is the Redwing Carriers v. Saraland
3 Departments case. And that pertinent portion of that
4 is reproduced on page 5 of my handout.
5 Redwing Carriers v. Saraland Department was the
6 only case the Supreme Court cited in that section of
7 its decision that was a contribution case under
8 section 113. And on the precise pages the Supreme
9 Court cited page 1513 of the lower court's decision.
10 That's reproduced in my handout.
11 And what the lower court said there is through its
12 reliance on Monsanto and other cases involving
13 governmental plaintiffs, the district court improperly
14 imported the divisibility defense to joint and several
15 liability under 107(a) into the analysis for equitable
16 allocation under 113(f).
17 Now, later on in this decision the Redwing court
18 went on to say that although the divisibility doctrine
19 is entirely inapplicable in a contribution case, courts
20 are free to consider causation and whether harms can be
21 distinguished to the site as part of its equitable
22 allocation process under section 113(f), along with any
23 other factors the court deems relevant.
24 And that brings us right back to where we started,
25 your Honor, with the language of 113(f), where the

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1 statute on page 1 of my handout says that in resolving
2 contribution claims, the court may allocate response
3 costs among liable parties using such equitable factors
4 as the court deems are appropriate. That's broad
5 enough to permit this court while the cleanup continues
6 at this site to allocate costs among these liable
7 parties using considerations that include knowledge and
8 culpability, the issues that are staged for phase one
9 in this case, as well as any causation related
10 considerations that may come in play.
11 The plaintiffs are not precluded from bringing any
12 claims despite the argument they're making today that
13 there are claims that they just can't bring unless they
14 have a 107 cause of action.
15 Now, I'd finally like to touch on the declaratory
16 judgment question, and that relates back to the points
17 I made concerning the Chem-Nuclear decision.
18 Congress established specific ways that parties in
19 API's and NCR's posture can raise divisibility
20 arguments. They can raise them in defense of an
21 enforcement action brought by the government, whether
22 it's a cost recovery action under section 107, whether
23 it's a natural resource damages action under 107, or
24 whether it's an action under 106 for an enforcement of
25 a unilateral order.

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1 Congress also allowed parties in their posture to
2 perform the work and sue for reimbursement from the
3 Superfund as the party did in Chem-Nuclear. Congress
4 did not create some new cause of action to seek an
5 apportionment determination, and it didn't suggest that
6 declaratory judgment actions of that nature are
7 appropriate either.
8 The declaratory judgment statute provides no
9 independent basis for jurisdiction or for any sort of
10 substantive review. It just says--gives the court
11 discretionary authority to hear certain kinds of
12 matters. But if courts--if parties were allowed to
13 just trump up some sort of argument that the United
14 States itself is a responsible party to the site
15 because EPA went out and took samples in an
16 inappropriate way and stirred up the mess at the site,
17 if that's all that's required to trump up something to
18 get the government into the case and then come up with
19 a declaratory action that's going to decide all kinds
20 of yet unfiled claims that the government has
21 explicitly reserved and has not yet brought, then EPA
22 will do nothing other than defend declaratory judgment
23 actions in court.
24 There's a whole line of early cases, I think at
25 least one of which is cited in our brief, the Voluntary

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1 Purchasing Group case, where courts state that's not
2 the sort of claim that can be brought. You can't test
3 defenses to government enforcement claims by bringing a
4 clever declaratory judgment action. That's contrary to
5 congress's intent that EPA focus first on getting the
6 cleanup done and litigate its claims when it's ready to
7 do.
8 So as I said at the outset, your Honor, there's no
9 need for you to hit the reset button and start this
10 case over again, and Burlington Northern changed
11 nothing that affects your August 2008 decision.
12 If there are any other questions, I'd be happy to
13 answer them.
14 THE COURT: No. Thank you, Mr. Stone.
15 MR. STONE: Thank you, your Honor.
16 THE COURT: Plaintiffs?
17 MR. HERMES: Your Honor, can we take just
18 a minute to--
19 THE COURT: Sure, let's take a short
20 recess.
21 MR. HERMES: --order how we're going to do
22 this for you?
23 THE COURT: Okay.
24 (Recess.)
25 THE COURT: Mr. Stone, let me ask you

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1 something just before we move on. What is left here?
2 I mean, does this case have the potential to resolve
3 outstanding issues, or is there--are there additional
4 matters that the government will proceed on in its
5 own--through the enforcement actions or things like
6 that? Or is it really up to the plaintiffs whether
7 they contest what the EPA has already done?
8 MR. STONE: I think it's likely that there
9 will be other government enforcement actions in the
10 future. If plaintiffs want to (Indiscernible) checks
11 now, then that might not happen. But the work--
12 Assuming the plaintiffs continue performing work under
13 the unilateral order, then the cleanup work in the
14 river that I saw when I was walking the river walk last
15 night will proceed and should proceed to completion.
16 But the United States has, I think, \$26 million in
17 unreimbursed costs of remedy selection costs, study
18 costs, sampling costs at this site, and natural
19 resource damage of assessment costs. And then there is
20 a very large yet unresolved claim for natural resource
21 damages for the--not just the assessment costs, but for
22 the damages themselves. And there's only one party
23 that has settled that claim, and that's
24 Georgia-Pacific. And that's addressed in a decision
25 that Judge Adelman rendered in this case.

1 But although Appleton and NCR have made sort of
2 partial down payments on that liability, both sides
3 reserved their rights under those partial settlements,
4 so there's a big claim that was estimated at hundreds
5 of millions of dollars that's yet on file.

6 THE COURT: Now, you indicate that the
7 government is--EPA would be prejudiced for--if this
8 court would address the divisibility issue or treat
9 that as an issue in this case. How is it prejudiced?

10 MR. STONE: Well, this case is currently
11 only a defensive matter for the United States. The
12 lawyers from our environmental defense section have
13 spent lots of time dealing with the Army Corps of
14 Engineers on historic dredging activities and dealing
15 with EPA and other agencies on paper recycling
16 activities.

17 To the extent anyone knows about the government's
18 enforcement claims, it's me and other lawyers in our
19 enforcement section and different EPA enforcement
20 lawyers. And the case law is quite explicit that the
21 government gets to pick and choose when it wants to
22 bring those claims so that it can focus its resources
23 on cleanup when it wants to pursue cleanup activities
24 and when that is--

25 THE COURT: Your argument is broader than

1 just this case. It's an institutional argument--

2 MR. STONE: Absolutely.

3 THE COURT: --about the proper arrangement
4 and the proper--

5 MR. STONE: We have a statute of
6 limitations that we need to live by, and we have our
7 eye on that statute of limitations. But congress gave
8 us the choice to pick and choose when we want to fight
9 our battles.

10 THE COURT: You originally appeared in
11 this case as amicus.

12 MR. STONE: Yes, your Honor.

13 THE COURT: Is that still your status, or
14 EPA is a party now so--

15 MR. STONE: EPA is a party and although
16 our environmental enforcement section and environmental
17 defense section are administratively distinct, my
18 office is about 75 yards from Mr. Levin's on the same
19 floor in our building. We coordinate very closely.
20 And when an issue like this one that really implicates
21 our core enforcement interest, when people are trying
22 to prelitigate defenses to our claim, then we work
23 closely together. And I worked with our defense
24 section on the briefs and also on the prior briefs on
25 the 107/113 issue when we were amicus in this case.

1 THE COURT: Thank you. Before we turn
2 back to plaintiffs, I take it Mr. Mandelbaum, Mr. Stone
3 have pretty well enunciated the position of the
4 defense. Anyone else that wanted to or felt the need
5 to add?

6 (No response.)

7 THE COURT: Thank you. Very well.

8 Go ahead, Ms. Roach.

9 MS. ROACH: Thank you, your Honor.
10 Kathleen Roach for NCR again.

11 Your Honor, we're not asking for a do-over. And
12 there was a lot of talk during the presentations by
13 Mr. Mandelbaum and by Mr. Stone for the government
14 about fairness, and that's what we are asking for is
15 fairness. We want to be able to have a legal mechanism
16 to recover payments that we are making to clean up this
17 river for which we are not liable.

18 And I think-- Let's talk about Atlantic Research
19 because I think both what Mr. Mandelbaum said and what
20 Mr. Stone said about the availability of section 113 to
21 plaintiffs here and the posture that we've asserted is
22 incorrect. And if we look at Atlantic Research-- And
23 it's not in the portion of the opinion that was
24 excerpted by Mr. Stone, but Atlantic Research talks
25 about contribution, what that means, how it's defined,

1 and contribution. And at this point I'm at 551 US at
2 page 138. Contribution is defined as the tort-feasor's
3 right to collect from others responsible for the same
4 tort after the tort-feasor has paid more than his or
5 her proportionate share.

6 And it goes on to say that section 113(f)(1)
7 permits suit before or after the establishment of
8 common liability. In either case, a PRP's right to
9 contribution under section 113 is contingent upon an
10 inequitable distribution of common liability among
11 liable parties.

12 And it's not enough to simply say, oh, it will all
13 come out in the wash, oh, Judge, you can look at this
14 as one of the equitable factors under 113. As a legal
15 matter if our--if we are correct and in what we've
16 alleged in the alternative in our proposed amendment,
17 that this harm is divisible and that we are proceeding
18 to clean up harms for which we are not liable, it can't
19 just come all out in the wash.

20 THE COURT: So you really take issue with
21 Mr. Stone's argument that 113 is broader than
22 traditional contribution. It's more of a hybrid type
23 of contribution type of claim.

24 MS. ROACH: It's as the Supreme Court
25 identified in Atlantic Research. And incidentally,

1 specifically in that case on those pages disagreeing
2 with the government's contention about what
3 contribution means, the Supreme Court said contribution
4 under 113 is contingent upon an inequitable
5 distribution of common liability among liable parties.

6 Atlantic Research also goes on to say that the
7 remedies available in section 107(a) and 113(f)
8 complement each other by providing causes of action to
9 persons in different procedural circumstances.

10 And there's a footnote, footnote six, to the
11 opinion. The Supreme Court talks about recognizing
12 that a PRP may sustain expenses pursuant to a consent
13 decree following a suit under 106 or 107(a). In such a
14 case, the PRP does not incur costs voluntary, but does
15 not reimburse the costs of another party. And the
16 court went on explicitly to say, "We do not decide
17 whether these compelled costs of response are
18 recoverable under 113(f), 107(a), or both."

19 So it is not correct to say that Atlantic Research
20 foreclosed plaintiffs' ability to proceed under 107.
21 The defendants keep asserting that's the case, the
22 government asserts that's the case, but there's no case
23 cited that says that's the case.

24 THE COURT: It doesn't foreclose your
25 ability to proceed under 113 either, though, or does

1 it? I suppose you're going back to the portion you
2 read earlier saying common--traditional contributions--

3 MS. ROACH: It depends on what the facts
4 show. And at this point all we are seeking is leave to
5 amend our complaint to bring this claim in the
6 alternative. We cannot say that it's futile as a
7 matter of law. And what we think makes by far the most
8 sense is for the court to grant our motion. Clearly,
9 that's what we're looking for here. But to proceed to
10 trial and--and for the court to consider all the facts
11 in light of both alternative causes of action and
12 decide based on the facts.

13 What fact pattern do we have here? Which legal
14 box does it fit in? Don't foreclose us from proceeding
15 in a legal box that may be our only remedy. To
16 prematurely deny us the ability to a pursue 107 claim
17 when that, in fact, may be our only avenue to recover
18 for certain of the costs would be highly prejudicial,
19 and it puts us in a position of either stopping the
20 cleanup, which I understand no one wants us to do, or
21 potentially risk not having an ability to recover those
22 costs because they're not recoverable under 113 if our
23 alternative argument is correct.

24 Now, Mr. Stone makes reference to the potential
25 for a petition and administrative review remedy after

1 the cleanup is done decades from now. We do not view
2 that as an adequate alternative remedy by any means.

3 So the, you know, the fundamental issue is what do
4 we do when we may not have a remedy under section 113?
5 That is why we have asked the court to grant us leave
6 to proceed in the alternative with the 107 claim given
7 that the facts certainly show at least a reasonable
8 basis to allege that that's the case at this point in
9 time, it is not futile as a matter of law to allege as
10 we have that there's a reasonable basis to apportion
11 the liability, and that there are harms which we are
12 currently incurring cost to clean up for which we, in
13 fact, may not be liable.

14 And I think with that I will turn the podium over
15 to Mr. Hermes.

16 THE COURT: All right. Mr. Hermes?

17 MR. HERMES: Your Honor, I'm going to
18 start with the fundamental principle that the
19 procedural posture of this case should not affect the
20 parties' substantive rights, and I think the defendants
21 and the government are both arguing that it should
22 because the plaintiffs are cleaning up the river and
23 because they're complying with the UAL and because they
24 want to seek contributions from other parties to do so,
25 to help defray the enormous costs that you've heard,

1 they have chosen to bring a claim, they have chosen to
2 bring this lawsuit.

3 What both the United States and the defendants are
4 suggesting is that we should sit back and do nothing
5 and then our rights are better because we may have a
6 107 claim at that point. We can argue divisibility.
7 That's just contrary to our principles of due process,
8 and it collides with the fundamental principles of
9 CERCLA.

10 One of the distinctions the U.S. tried to make was
11 using the Redwing case. And the Redwing case, number
12 one, is pre-Atlantic Research, and Attorney Roach did a
13 fabulous job outlining how Atlantic Research applies.

14 But, number two, that was a 113 case, and the
15 point of law made in Redwing is divisibility is not a
16 defense in a 113 case, and that's evident.

17 We are here today because we are trying to decide
18 whether this is a 113 or a 107 case. And so before we
19 get to that decision, we need to--we need to examine
20 the factors that we need to examine, and that's why we
21 need to both amend our complaint to plead in the
22 alternative in case we're right to protect our
23 interests and to allow for the record to be developed
24 to make the findings that your Honor needs to make in
25 order to set out that road map as to where we go.

1 Defendants have contended that they just want to
2 be fair. They just want to be fair, and to somehow say
3 we're not, I think that's just misguided.

4 And defendants' fairness, your Honor, defendants'
5 fairness is allow having plaintiffs bring the case but
6 then having defendants decide the one issue that you
7 should decide and if you decide it in a fair way
8 without hearing any other evidence whatsoever, that
9 that somehow resolves the case.

10 That's not fairness. Fairness is considering all
11 the evidence. Fairness is considering all the factors.
12 Fairness is building a record to allow us to establish
13 whether the defendants, who for years discharged solids
14 into the river, are somehow responsible for that
15 discharge.

16 They raise the argument that the wrong claim is
17 being made against the wrong party. And I take issue
18 with that for several reasons: Number one, the
19 defendants are here in court as part of phase one, as
20 you've seen from the summary judgment suggesting that
21 they are not at all liable. That's their argument.

22 Yet you heard the government say here in Attorney
23 Stone's presentation that the government considers all
24 of the defendants liable at least for OU4. It's the
25 same predicament you're in with the plaintiffs

1 suggesting that we're somehow not liable for all of the
2 harm.

3 The defendants are making the same argument. Yet
4 for them it's okay. For us, we can't raise it. That's
5 not fundamentally fair either.

6 It is the right time to bring this case because we
7 don't have the opportunity, although Attorney Stone
8 stands here and says there may be some enforcement
9 action in the future, it's not happening now. And the
10 very basis on which you're going to decide this case is
11 dependent upon whether it's a 107 claim a 113 claim or
12 some combination of both because under 107 it's
13 objective causation; under 113, it's equitable.

14 And the kicker here is I think Attorney Mandelbaum
15 suggesting that had he picked the big issue and that's
16 the one that should be decided. The issue of knowledge
17 is one small issue.

18 As you heard Attorney Mandelbaum discuss, your
19 Honor, with the volumetric analysis, that is one other
20 possible issue. There's a toxicity issue that we
21 haven't even gotten to yet. But the cases all suggest
22 that the totality of the circumstances, whether this is
23 under a 107 objective causation, whether it's even a
24 113 case, you need to focus on the totality of the
25 circumstances in order to determine how to properly

1 decide who pays for the harm. And until you hear all
2 the evidence, you don't know what the proper avenue is
3 to make the decision.

4 You could go out for a steak and you go to one
5 restaurant and you have a good steak. It may not be
6 the best steak in town, and you don't know that until
7 you go out and sample the steaks at the other
8 restaurants.

9 THE COURT: But I don't have enough money
10 to do that. And really, isn't that our problem here?
11 I mean, to uncover every conceivable fact that may bear
12 on liability, we're going to pay more than-- Well,
13 it's hard to imagine paying more than the cost of the
14 cleanup, but it's a huge diversion of resources and
15 effort from where it ought to go. And if there is an
16 issue that gives guidance, that's what we're looking
17 for.

18 MR. HERMES: And I think and I understand
19 your concern, and I think that's why we're here. We've
20 done a lot of discovery. I think the discovery should
21 show to you based on what you've seen in summary
22 judgment that this case isn't going to be decided on
23 the knowledge issue.

24 THE COURT: And that's another question.
25 We won't address that today, but I do think this has

1 been helpful on the issue that I certainly thought
2 plaintiffs were helpful in raising, and I thought the
3 argument is good. Here we are helping contributing to
4 the development of CERCLA law. I can't wait to add my
5 case. And keep in mind you have higher courts to
6 clarify though, but I expect to issue a decision on
7 this--on this motion probably not four years from now,
8 but maybe about next week I would hope I can get it
9 out.

10 Before we adjourn though--

11 MR. HERMES: May I sit, your Honor?

12 THE COURT: Yes. Thank you, Mr. Hermes.

13 Before I adjourn, I do want to do something else
14 that I hate to do, which is change a date on this. I
15 got stuck moving a medical malpractice tort claim case
16 where a cardiologist that can only testify by video
17 conference the very time when we're supposed to have
18 our pretrial conference. So what I want to do-- And
19 this is in Milwaukee, so for some of you that will
20 help. For some of you it might be easier to fly in
21 there.

22 And we had it set for the 17th, and that's what
23 I'm going to change it from. And I can either do the
24 week before or the week after. The week after, of
25 course, the end of that week is Christmas. Let me

1 throw out Monday the 21st. That's what I would like to
2 do. Plan to do it in Milwaukee on the 21st at 1:30.
3 So you would have in the afternoon a pretrial on this
4 case.

5 And then we're planning-- If you haven't heard,
6 we're going to be in Judge Adelman's courtroom for this
7 trial. I know, Mr. Hermes, you've had some contact
8 that the contact--those of you that have not-- And I
9 know, Mr. Mulligan, you've been involved in this too on
10 behalf of the defense.

11 And the deputy clerk in Milwaukee, Mike Williams,
12 wants to be kind of the point man for this matter. And
13 any questions about technology and what's available,
14 he'd be the person to answer.

15 I know there was an interest in putting this in an
16 electronic courtroom, and I was told that our
17 electronic courtrooms would probably not be the best
18 because the electronics they have continually break
19 down. They're almost obsolete, which tells you
20 something about the courts and technology.

21 It sounds like it's easier for you to bring your
22 own. And, you know, we're--the fact that it will be a
23 court trial, I think, will maybe give us more
24 flexibility in order to address those things.

25 In any event, the plan as I understand it, and

1 this seems to make the most sense, you know, we'll set
2 up counsel tables for-- And we've tried to-- You
3 ought to let the clerk know numbers, but we're going to
4 set up counsel tables. We'll probably remove the rail
5 and some of the benches in back.

6 This, of course, all assumes the trial goes, which
7 means that your motion isn't granted and summary
8 doesn't dispose, but that's the working assumption
9 right now.

10 In any event, we'll have a podium set up for the
11 attorney questioning the witness. There won't be 50 or
12 40 microphones that way. And, you know,
13 that's--essentially, we would run from Monday through
14 Thursday. Fridays I'm going to try to do sentencings
15 and other things to the extent I can. And that would
16 be the--the--what I have worked out at this point.

17 But certainly Judge Adelman has agreed that we
18 could use that beautiful courtroom in Milwaukee that
19 some of you or most of you might be familiar with,
20 which is very large. But I'm sorry to have to change
21 the date, but, you know, that other matter was hard to
22 avoid.

23 So Ms. Roach?

24 MS. ROACH: Yes, your Honor. And I
25 understand we have a pretrial and we can address a

1 number of logistical issues there. There are two, if
2 your Honor would indulge my asking, that would be very
3 helpful to know now rather than waiting till the 21st,
4 assuming that the trial's going to go forward on
5 January 4th.

6 One is whether the court's going to want opening
7 statements. And the other is for fact witnesses, the
8 parties have selectively subpoenaed dozens of fact
9 witnesses who are quite elderly. The question is, for
10 example, people who we call adversely in our case, is
11 the court going to want them to be re-called in the
12 defendants' case, or assuming that any examination that
13 will be done of that particular witness will be done
14 when that person is first called?

15 THE COURT: Yes, we don't want to keep
16 people longer than necessary. I don't think I'll need
17 opening statements in this case. I think-- I expect
18 I'll have a good idea of what--and I think we already
19 indicated we don't need trial briefs given what's
20 already occurred here.

21 Now, there may be issues that surface in the
22 course that you'll have resources. There was a
23 discussion of possibly doing--having contact with your
24 offices, a technology question. Somebody familiar with
25 this? Mr. Williams was telling me-- I don't think he

1 said Web casting but something along those lines.

2 MR. HANSEN: Yes, your Honor. Would you
3 like me to come up?

4 THE COURT: Sure.

5 MR. HANSEN: Scott Hansen.

6 THE COURT: Good morning, Mr. Hansen.

7 MR. HANSEN: The court reporter, John,
8 whose last name I don't know--

9 THE COURT: Schindhelm.

10 MR. HANSEN: Schindhelm. He has been in
11 touch with a company called Courtroom Connect that will
12 stream live Q and As over the Internet in a secure way
13 so that clients or lawyers outside the office can tap
14 into that. I think it would also permit inside the
15 courtroom to tap into it without having wires hooking
16 everybody up.

17 So that's the concept. And as I understand it, it
18 runs into a policy that the court would have to
19 consider, and that is there's a policy against cameras
20 in the courtroom, of course, because we don't want to
21 broadcast out of the courtroom. This isn't the same as
22 that, so there would have to be some consideration
23 given to that question.

24 THE COURT: And the benefits are it
25 allows-- Does it-- I mean, do you see it as

1 contributing to an efficient presentation of the
2 evidence?
3 MR. HANSEN: I believe so. And it's going
4 to be a long trial. There are going to be people
5 working outside the courtroom, and there are going to
6 be people who can't be in the courtroom every day who
7 may want to be able to follow what's going on so when
8 they come to court, they are fully up to speed. There
9 may be clients that may want to watch the proceedings.
10 THE COURT: Is it just the voice
11 transmission, or is it the video as well?
12 MR. HANSEN: It wouldn't be voice. It
13 would be--
14 THE COURT: Audio or--
15 MR. HANSEN: --transmission of the Qs and
16 As in written form.
17 THE COURT: Oh.
18 MR. HANSEN: It would not be voice.
19 THE COURT: Okay. So it wouldn't be
20 voice, it wouldn't be video.
21 MR. HANSEN: That's my understanding.
22 THE COURT: It would--
23 MR. HANSEN: It would just be the
24 (Indiscernible).
25 THE COURT: Does anybody have a problem

1 with that?
2 UNKNOWN ATTORNEY: No objection.
3 THE COURT: I would think-- Is there
4 anybody who doesn't think that would be helpful to the
5 extent they want to maintain contact with their
6 offices?
7 (No response.)
8 THE COURT: Yeah, I'll talk to the court
9 reporter about that. But I think I'd be inclined to go
10 along with that.
11 MR. MULLIGAN: Your Honor, if I may--
12 THE COURT: Uh-huh.
13 MR. MULLIGAN: --William Mulligan.
14 There's also a related issue that a number of
15 parties have very extensive databases on computers, and
16 there may be a limited amount of electrical power in
17 the courtroom, and it may be a preferable option to
18 have their databases located in their offices rather
19 than to attempt to have additional servers and things
20 in the courtroom to do that. And depending on what
21 electrical power constraints there may be, it may be
22 desirable for those in the courtroom, the attorneys, to
23 communicate back to the databases they have in their
24 offices transmitting out of the courtroom and receiving
25 back information from those databases.

1 THE COURT: Well, have you discussed that
2 at all with the IT people at the--
3 MR. MULLIGAN: We believe--
4 THE COURT: --clerk's office?
5 MR. MULLIGAN: --with Mr. Schindhelm and
6 Mr. Williams one of the things they raised is a similar
7 policy matter, whether it's the court's policy relating
8 to broadcasting and that type of thing would be
9 infringed if there were communications going out of the
10 courtroom.
11 THE COURT: I don't think that's the
12 problem. But, you know, there is IT staff there, and
13 Mr. Williams should put you in contact. Jeff Runge
14 would probably be the--he's of the head of the IT staff
15 at the court and would be the person that can answer
16 those questions, whatever questions you have.
17 As far as if it's necessary and to--for the
18 purposes that you've described because the databases
19 are elsewhere and you need to communicate in order to
20 have documents or information shared, I can lift any
21 local rule or policy that would prohibit that as long
22 as it doesn't, of course, interfere with the
23 presentation of evidence.
24 MR. MULLIGAN: Thank you, your Honor.
25 THE COURT: Yeah.

1 MR. LEVIN: Your Honor, briefly, this is
2 John Levin with the United States.
3 I had not heard of the Courtroom Connect option
4 prior to Mr. Hansen speaking. And while I don't have a
5 problem with it, as a general matter I would just ask
6 the parties and the court to perhaps think of the
7 obvious issues regarding the presence of or the ability
8 of fact witnesses to be in or have immediate access to
9 testimony. And sometimes that's not an issue to
10 parties and the court, but I think we should all be
11 aware of the fact that perhaps we should think about
12 that before the trial begins.
13 THE COURT: Is there a sequestration
14 request? Are we going to sequester witnesses here?
15 I'm not sure anything is secret anymore given the years
16 this has been going on, but--and people have been
17 deposed. But certainly if there's a sequestration
18 order, it would extend to prohibit witnesses from
19 having access to that kind of information. That would
20 defeat the whole purpose of it.
21 But typically those are, you know, the court upon
22 request of any party has to order sequestration of
23 witnesses, which I would do, and then we would rely
24 upon counsel and your obvious, you know, obligations to
25 make sure that you didn't allow access to any witness.

1 Okay.
2 I encourage if you have questions to do with the
3 technology and things like that, Mr. Williams is the
4 point person. If it's a technology question, ask him
5 to put you or ask to meet with him perhaps and the IT
6 person. The IT person, I think, is going to be the
7 more helpful one on those issues.

8 Yep?

9 MR. LEVIN: Your Honor, I'm sorry, my
10 co-counsel reminded me that the government is
11 interested as a relatively small player in this matter
12 to know what the court's intentions are with regard to
13 order of proof. It might be helpful to a sense, and
14 perhaps this will come out at the December 21st
15 trial--or, pretrial. I'd like to have a better idea of
16 what the sequence for parties being able to present
17 their cases will be.

18 THE COURT: We had some discussion of
19 this, I think, and I thought we indicated that the
20 plaintiff would be first, followed by the defendants.
21 And I guess the government's role, unless it
22 drastically changes, and that would probably require a
23 whole new case management order, in which case we would
24 cancel this trial. So we're talking presumably as if
25 the case continues as is and is not resolved by motion.

1 You know, I don't know. I think you should talk with
2 the other defendants in terms of getting an idea of
3 when your presentation would be and what you can
4 expect. And it seems that there's been good
5 cooperation. I think your problem is the government
6 hasn't been throughout the matter in perhaps with
7 everybody else.

8 Or if not, I think I'll rely upon the parties
9 to--to plan their respective cases and to work out
10 things. If there's difficulties, certainly I'll rule,
11 but so far it doesn't seem like those have been the
12 kinds of problems we have. We have those nice clean
13 legal issues that are going to contribute to the
14 development of the law in this area, and that's as it
15 should be.

16 All right. Okay, good. Thank you very much.

17 We'll see you on the 21st probably. Maybe.

18 Thank you.

19 (End of proceedings.)
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25

1 STATE OF WISCONSIN)
)SS.
2 COUNTY OF BROWN)
3

4 I, John W. Gales, Registered Merit Reporter and
5 Notary Public in and for the state of Wisconsin, do
6 hereby certify that I have carefully compared the
7 foregoing 99 pages with the audio recording, and that
8 the same is a true and correct transcript.

9 I further certify that I am not a relative or
10 employee or attorney or counsel of any of the parties,
11 or a relative or employee of such attorney or counsel,
12 or financially interested in said action.

13 Dated at Green Bay, Wisconsin, on this 12th day of
14 October 2009.
15

16 s/John W. Gales
17 John W. Gales
18 Registered Merit Reporter
19 Notary Public
20
21

22 My commission expires October 23, 2011.
23
24
25