

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Westinghouse Electric Company, LLC,)	
)	
Plaintiff,)	
v.)	No. 4:03CV000861-SNL
)	
United States of America, et al.)	
)	
Defendants.)	

**REPLY OF NON-GOVERNMENTAL DEFENDANTS
TO WESTINGHOUSE'S OPPOSITION TO MOTION
FOR SUMMARY JUDGMENT ON COUNTS I AND IV**

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The Non-Governmental Defendants¹ have moved for summary judgment on Counts I and IV of Westinghouse's Second Amended Complaint. Westinghouse filed its opposition on March 1, 2005. Pursuant to the amended briefing schedule entered by the Court on March 8, 2005, both Westinghouse and the United States each are filing additional briefs. The Non-Governmental Defendants hereby respectfully submit this reply.

COUNTER-STATEMENT OF FACTUAL BACKGROUND

At the outset, it is important to clarify the factual background of this case. Among the basic facts that are either missing entirely from Westinghouse's brief, or are selectively presented, are those pertaining to: (1) the operating history of the Hematite facility; (2) Westinghouse's acquisition of the Hematite facility; (3) the contamination at the Hematite facility; and (4) the cleanup of the Hematite facility. We address each of these in turn.

Hematite Operating History

Westinghouse focuses primarily on the period from 1956, when the Hematite facility was constructed, through May 1, 1974, after which the Non-Governmental Defendants were no longer present at Hematite. Westinghouse is virtually silent about the 26-year period from May 1, 1974, when Combustion Engineering, Inc. ("CE") purchased the site, through 1990, when Asea Brown Boveri, Inc. ("ABB Inc.") purchased CE outright, to 2000, when Westinghouse acquired Hematite. During that period, the Hematite site processed hundreds of tons of uranium into fuel for nuclear reactors, and used chlorinated solvents to do so.

Judging by Westinghouse's silence, one might think that this quarter-century of operations at Hematite was somehow disconnected from any environmental contamination.

¹ Mallinckrodt Inc., United Nuclear Corporation, Chevron U.S.A. Inc., and Valley Pines Associates.

Nothing could be farther from the truth. CE built at least seven new buildings at Hematite, installed new equipment, and began running new processes that released uranium and other hazardous substances into the environment. *See* pages 36-37 & n. 40 *infra*.

In order to decommission the facility to meet U.S. Nuclear Regulatory Commission (“NRC”) requirements, Westinghouse will remove radioactive contamination from the newer (post-1974) buildings and equipment at Hematite. 10 C.F.R. § 70.38; *Evaluation for the Building Demolition* at 2 (Dec. 2004), *transmitted by* Letter from K. Craig, Westinghouse, to A. Kouhestani, NRC, dated Dec. 22, 2004 (Attachment 13). None of that work, and none of that cost, is related to the activities of the Non-Governmental Defendants, who were not at the site after May 1974. In fact, as shown below, CE’s releases of hazardous substances are attributable to Westinghouse, not to any of the Non-Governmental Defendants. *See* pages 34-37 *infra*.

Westinghouse’s Acquisition of Hematite

Westinghouse is equally close-mouthed about its acquisition of Hematite. For all that appears in Westinghouse’s brief, one might think that Westinghouse acquired Hematite with no reason to anticipate any contamination, no knowledge of any actual contamination, and no expectation of an expensive cleanup. Again, nothing could be farther from the truth.

Before acquiring the site, Westinghouse retained an experienced consultant, Dames & Moore, to perform an environmental audit. The resulting 1999 audit report, excerpts from which were attached as Attachment 9 to Non-Governmental Defendants’ Motion for Summary Judgment, described known environmental contamination at Hematite and discussed the need for decommissioning and other cleanup activities that would cost millions of dollars.

As part of the 1999 purchase agreement, ABB provided Westinghouse’s parent, BNFL, with a sliding-scale indemnity that limited Westinghouse’s total financial exposure for

environmental costs at Hematite. *See ABB-BNFL Purchase Agreement*² § 10.2(v), p. 75 (Attachment 14).³ In other words, the parties knew that it would cost millions to clean up Hematite, but they went ahead with the transaction because it suited their business purposes.

In June 2000, Westinghouse notified the NRC that it intended to terminate principal operations at Hematite.⁴ This unilateral action triggered the legal obligation to submit a Decommissioning Plan (“DP”).⁵ Westinghouse also assured the NRC that Westinghouse would assume the financial obligations associated with the SNM-33 license, including “full liability for all decontamination and decommissioning activities at the Hematite site.”⁶ Based on the Dames & Moore report, Westinghouse knew that this “full liability” was likely to be at least \$20 million and could be much more.⁷

² Purchase Agreement between ABB Handels-Und Verwaltungs AG (“ABB”) and British Nuclear Fuels plc (“BNFL”) dated Dec. 21, 1999, attached to ABB Ltd.’s Annual Report to the U.S. Securities and Exchange Commission (Form 20-F) as Exhibit 4.2 (June 27, 2000).

³ Westinghouse has never explained why it believes it is entitled to double recovery, once under the ABB indemnity and once under this CERCLA lawsuit.

⁴ *See* Letter from R. Sharkey, CENP, to NRC Document Control Desk, dated June 7, 2000 (Attachment 15).

⁵ 10 C.F.R. § 70.38(d)(2); *see Hematite Decommissioning Plan*, Rev. 0 (Apr. 2004) (Attachment 16).

⁶ *See Application for Transfer and Amendment of Materials License SNM-33* at 6, attached to Letter from R. Bell, Jr., CENP General Counsel, to NRC Document Control Desk dated February 16, 2001 (emphasis supplied) (“Westinghouse . . . agrees to assume full liability for all decontamination and decommissioning activities at the Hematite Site”), (Attachment 17). No license may be transferred without NRC approval, which is conditioned upon the transferee’s agreement to assume the transferor’s obligations under the license, including decommissioning. *See* 42 U.S.C. § 2234; *see also* 10 C.F.R. § 70.36. The obligation to decommission an NRC-licensed facility runs with the license, *see generally Safety Light Corp.* (Bloomsburg Site Decommissioning and License Renewal Denials), LBP-95-9, 41 NRC 412 (1995), and is binding only upon the entity that is licensee at the time of license termination. *See* 10 C.F.R. § 70.38(d).

⁷ Motion, Attachment 9.

Contamination at Hematite

On the very first page of its brief, Westinghouse makes a remarkable statement:

“Defendants do not deny that they caused the contamination that has required the expensive cleanup effort at the Hematite site.” Westinghouse’s Memorandum in Opposition (“Opp.”) at 1. Not surprisingly, Westinghouse cites nothing in support of this claim.

For the record, the Non-Governmental Defendants do emphatically deny that they are liable for the contamination at Hematite. Each of the Non-Governmental Defendants believes it operated the Hematite facility in accordance with applicable laws and regulations during the time of their involvement, from the late 1950s through the early 1970s.⁸ Although the Court need not decide this question in order to resolve the pending motion for summary judgment, neither should the Court be deceived by Westinghouse’s finger-pointing.

In particular, Westinghouse makes the unsupported claim that “[t]he most significant and expensive contamination was caused by Defendants’ dumping of untreated chemical and radiological wastes into forty or more large unlined pits during the 1960s.” Opp. at 4. Passing over the fact that “onsite burial was a formally authorized activity,” DP at 14; *see note 7 supra*, Westinghouse’s filings with the NRC suggest that the pits are not the dominant problem at Hematite. For example, Westinghouse’s April 2004 Decommissioning Plan projected a total

⁸ Westinghouse claims that “Defendants [*sic*] historical waste disposal was not conducted in compliance with any federal permits.” Opp. at 26 n.6. This claim is both unsupported and untrue. Waste disposal at Hematite was closely regulated since the facility began operations, first by the U.S. Atomic Energy Commission and then by its successor, the NRC. Moreover, the Non-Governmental Defendants conducted their activities in accordance with applicable laws and regulations, including the terms of the SNM-33 license. For this reason, virtually all of the releases that occurred prior to 1974 were “federally permitted releases” because they were “in compliance with a legally enforceable “license, permit, regulation, or order issued pursuant to the Atomic Energy Act of 1954.” 42 U.S.C. § 9601(10)(K).

budget of \$63.5 million to decommission the Hematite site. DP at 84. Of that amount, just 15%—or \$10 million—is allotted to “Burial Pit Excavation and Disposal.”

Oversight of Cleanup at Hematite

When it comes to the actual cleanup at Hematite, Westinghouse again tells only part of the story. From reading Westinghouse’s brief, one might think that the cleanup is being run by the Missouri Department of Natural Resources (“MDNR”) and that Westinghouse is performing the cleanup as a good Samaritan.⁹ Again, nothing could be farther from the truth.

First, the NRC has primary responsibility for the Hematite facility. Both the U.S. Environmental Protection Agency and the MDNR have previously acknowledged what Westinghouse fails to tell this Court, i.e., Hematite is under the primary jurisdiction of the NRC.¹⁰ In fact, under the Atomic Energy Act, MDNR has no jurisdiction over the radioactive materials that are the subject of Westinghouse’s investigation and clean-up.¹¹

⁹ Westinghouse likens itself to a “corporate citizen that steps forward to address an environmental problem” Opp. at 24. Of course, Westinghouse is simply fulfilling its legal obligation as the licensee, just as it promised the NRC it would do. *See* pages 2-3 *supra*.

¹⁰ “MDNR recognizes that the [NRC] has authority regarding licensing and decommissioning.” Motion, Attachment 11 at 3; MDNR “does not regulate these radioactive materials because of the federal preemption in the U.S. Atomic Energy Act.” Letter from G.T. Mehan, III, Dir. MDNR, to M. Dodson, dated Jan. 8, 1992 (Attachment 18); EPA “Deferred to NRC” *CERCLIS Database Report; Hematite Status*, at <http://cfpub.epa.gov/supercpad/cursites/csitinfo.cfm?id=0702268> (last visited on March 23, 2005).

¹¹ A State may be granted limited authority to regulate radioactive materials under Section 274 of the Atomic Energy Act, 42 U.S.C. § 2021, but the NRC has not granted Missouri such authority. *See, e.g.*, Map of NRC “Agreement States,” <http://www.hsr.d.ornl.gov/nrc/rulemaking.htm> (last visited on March 23, 2005). *See generally* *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004) (state may not regulate proposed storage facility for spent nuclear fuel); *United States v. Kentucky*, 252 F.3d 816 (6th Cir. 2001) (state may not regulate amount of mixed radioactive and hazardous waste that may be placed in landfill).

Second, Hematite is not a CERCLA site, and Westinghouse's efforts to portray it as one must fail. Major cleanup decisions have already been made and implemented without benefit of any Record of Decision, as would be required at a CERCLA site. *See* 40 C.F.R. § 300.430(f)(5). Even if MDNR some day issues a Record of Decision for certain non-radiological contamination at Hematite, CERCLA would still be nothing more than the "tail" here, rather than the "dog."

Third, the CERCLA Remedial Investigation and Feasibility Study ("RI/FS") that Westinghouse is currently performing is a purely voluntary action, not the performance of a legal obligation.¹² The NRC does not require an RI/FS for sites undergoing decontamination and decommissioning. *See generally* 10 C.F.R. § 70.38. Nor did MDNR order Westinghouse to perform an RI/FS. For all that appears, Westinghouse chose to perform an RI/FS—at a cost of several million dollars—presumably in the hope of strengthening its legal case.

Fourth, and last, although this case is approaching its second anniversary, Westinghouse has yet to identify which costs it seeks to recover in this litigation. It appears that Westinghouse is seeking far more than just the investigation and future remediation costs it is voluntarily performing for the MDNR. Westinghouse evidently seeks to recover the cost of decontaminating and decommissioning the Hematite site pursuant to its SNM-33 license.

Against this backdrop, the Non-Governmental Defendants reply to the various legal arguments raised in Westinghouse's brief.

¹² Westinghouse has acknowledged that "the Hematite Site is not listed or proposed for listing on the National Priorities List, and the [U.S. EPA] is not actively involved in overseeing activities at the Site." Attachment 16 at x.

SUMMARY OF ARGUMENT

The pending motion for summary judgment challenges Westinghouse's attempt to use the federal Superfund law for its own financial benefit at a non-Superfund site. Westinghouse, and only Westinghouse, is legally obligated to decommission the Hematite nuclear fuel facility under NRC regulations and its SNM-33 license. Westinghouse has fashioned a Superfund proceeding here solely to shift its decommissioning costs to others, including the Non-Governmental Defendants, who have not been involved at Hematite for more than 30 years.

In its third attempt to plead a Superfund claim, Westinghouse invokes three separate provisions of CERCLA: sections 113(f)(1), 113(f)(3)(B), and 107. None of these three provisions is available to Westinghouse.

Westinghouse had no section 113 claim when it filed its Second Amended Complaint. Missouri's short-lived 2003 lawsuit for natural resource damages imposed no liability and so it triggered no right of contribution under section 113(f)(1). Nor did the March 2002 letter from the Missouri Department of Natural Resources ("MDNR") trigger a right of contribution under section 113(f)(3)(B).

The civil action filed last month by the Missouri Attorney General ("the 2005 Complaint") does not give rise to a contribution claim. It presents no genuine case or controversy because it seeks only relief that Westinghouse already agreed to provide to MDNR back in 2002. Even if the case were justiciable, Westinghouse has not satisfied the essential elements of a contribution claim. Finally, even if Westinghouse had a valid claim, it would be limited to the costs incurred by MDNR and reimbursed by Westinghouse as a result of the 2005 Complaint, and would not include any costs incurred by Westinghouse in the first instance, such as decommissioning costs.

Nor does Westinghouse have a claim under section 107. The 8th Circuit, like every other court of appeals that has considered the question, strictly limits section 107 to innocent parties. *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525 (8th Cir. 2003). *Dico* remains the law in this Circuit, and Westinghouse is not an innocent party.

Moreover, Westinghouse is ineligible for the third-party defense to liability. Most fundamentally, the Non-Governmental Defendants are not even “third parties” due to their indirect contractual relationship with Westinghouse. That relationship alone, which includes the chain of title, the transfer of the SNM-33 license, and the allocation of liabilities in the 1999 ABB-BNFL Purchase Agreement, defeats the third-party defense.

Finally, even if the Non-Governmental Defendants were “third parties,” the defense would still be unavailable here due to the documented releases of uranium and other hazardous substances during Westinghouse’s tenure and that of its predecessor and wholly-owned subsidiary, CE Nuclear Power, LLC (“CENP”). Westinghouse does not deny that CENP is Westinghouse for purposes of the third-party defense, but it disputes the significance of specific releases. Although Westinghouse’s objections are unfounded, many other releases occurred between 1974 and 2000, including many accidents, and these are also attributable to Westinghouse. Thus, Westinghouse cannot proceed under section 107.

ARGUMENT

I. WESTINGHOUSE HAD NO SECTION 113 CLAIM WHEN IT FILED ITS SECOND AMENDED COMPLAINT.

On December 13, 2004, the Supreme Court ruled that a party seeking to maintain a section 113(f) contribution claim may do so only “during or following” a civil action under section 106 or 107 of CERCLA. *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S. Ct. 577 (2004) (hereafter “Cooper Industries”). The Supreme Court also discussed the separate contribution

mechanism provided in section 113(f)(3)(B) for parties that have reached certain types of administrative settlements under CERCLA.

Cooper Industries prompted extensive motions practice in CERCLA cases around the country. One week after the decision in *Cooper Industries*, Westinghouse filed its Second Amended Complaint, which invoked both section 113(f)(1) and section 113(f)(3)(B). But Westinghouse still had no valid claim under either of these provisions.¹³

A. *Cooper Industries Announced No New Canon of Statutory Construction.*

At the outset, Westinghouse reads into *Cooper Industries* a new rule that CERCLA should be construed solely by reference to its “plain language” without any resort to legislative history, Congressional purpose, or even the common-law background against which Congress legislated. Opp. at 7-8. Yet nowhere in *Cooper Industries* is such a rule found.

In truth, *Cooper Industries* did no more than reiterate the familiar canon that courts must “if possible, construe a statute to give every word some operative effect,” 125 S. Ct. at 584, and observe that “given the clear meaning of the text” of section 113(f)(1), the Court saw no need to “consult the purpose of CERCLA” to answer the particular question presented in that case. *Id.* These statements do not remotely curtail the traditional judicial resort to such tools as legislative history and Congressional purpose. On the contrary, the pertinent portion of *Cooper Industries* cited to three recent Supreme Court opinions, each of which considered the legislative history

¹³ Westinghouse claims that the issues addressed here in Section I of Defendants’ Memorandum are “moot” due to the Missouri Attorney General’s recent filing of an action against Westinghouse (“the 2005 Complaint”). But Westinghouse continues to argue that both the 2003 Complaint and the 2002 Letter of Agreement provide it with a contribution claim against Defendants, and so the issues in Section I remain live. Additionally, we address the 2005 Complaint below in Section II of this Reply and show that it does not “moot” any of the issues pertaining to this motion for summary judgment.

and/or the statutory purpose of the legislative enactment being interpreted. *See Hibbs v. Winn*, 124 S. Ct. 2276, 2286, 2288 (2004) (considering both legislative history and statutory purpose); *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992) (same); *Oncale v. Sundowner Offshore Service, Inc.*, 523 U.S. 75 (1998) (statutory purpose). Westinghouse’s distorted reading of *Cooper Industries* must be rejected.

B. The 2003 Complaint Triggered No Section 113(f)(1) Claim for Contribution.

The Non-Governmental Defendants previously showed that the Complaint filed by the Missouri Attorney General in September of 2003, and dismissed by this Court in March of 2004, triggered no section 113(f)(1) right of contribution. Memorandum in Support of Non-Governmental Defendants’ Motion for Summary Judgment on Counts I and IV of the Second Amended Complaint at 17-21 (“Memorandum”). In response, Westinghouse invokes its new-found “plain language” rule to argue that once an action under section 107 is “commenced,” it triggers a right of contribution, even if the action ends without any liability being imposed upon the would-be contribution plaintiff. Opp. at 13. This simply makes no sense.

Westinghouse relies on the word “during” in section 113(f)(1) as evidence that a plaintiff need not have been held liable in order to bring a contribution claim. Opp. at 14. But the word “during” is not relevant here, because the 2003 Complaint was dismissed more than a year ago. Obviously, Westinghouse is not seeking contribution “during” that civil action.

Nor may Westinghouse seek contribution “following” that civil action. This conclusion flows from the very meaning of the word “contribution,” which “is a standard legal term that enjoys a stable, well-known denotation.” *United Technols. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 99 (1st Cir. 1994), *cited with approval in Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525, 529 (8th Cir. 2003) (“Dico”). As the First Circuit concluded:

Taken in the aggregate, this impressive collection of signposts—canons of construction, other CERCLA language, the statute’s structure, the state of the case law antedating SARA’s passage, and SARA’s legislative history—point squarely to a conclusion that Congress used the word “contribution” in the conventional sense, and fully intended courts to give the word its customary meaning.

33 F.3d at 101 (emphasis supplied).

Moreover, the “right of contribution” exists only “when two or more persons become liable in tort to the same person for the same harm.” Restatement (Second) of Torts § 886A(1) (1979) (emphasis added).¹⁴ In this case, that would require that both Westinghouse and each of the Non-Governmental Defendants be jointly liable to MDNR for natural resource damages. Westinghouse cannot satisfy this most basic requirement, however, because neither Westinghouse nor any of the Non-Governmental Defendants has been found liable to MDNR for any natural resource damages.

Additionally, a right of contribution exists “only” where one tortfeasor “has discharged the entire claim for the harm by paying more than his equitable share.” Restatement (Second) of Torts § 886A(2) (1979) (emphasis supplied). This would require that Westinghouse have “discharged” MDNR’s “entire claim,” so that MDNR would no longer have any remaining claim against the Non-Governmental Defendants. Westinghouse cannot satisfy this requirement, because it has not “discharged” any of MDNR’s claim in the 2003 Complaint for natural resource damages, much less “discharged the entire claim.” United States’ Response in Support

¹⁴ From its inception, federal courts have understood CERCLA’s liability provisions to sound in tort and restitution. *In Re Acushnet River & New Bedford Harbor*, 712 F.Supp. 994, 1000 (D. Mass. 1989); *United States v. Nicolet*, 17 Env’tl. L. Rep. 21,085 (E.D. Pa. 1986). See also *Trinity Indus., Inc. v. Dixie Carriers*, 1992 WL 161123, at *7 n.2 (E.D. La. June 24, 1992) (“An action for contribution under CERCLA sounds in tort or equity”). Thus, federal courts have not hesitated to look to the Restatement of Torts (both Second and Third) for guidance and (continued)

of Non-Governmental Defendants’ Motion for Summary Judgment at 22-24 (“U.S. Resp.”). Because the 2003 Complaint was dismissed (and is now barred by the statute of limitations), Westinghouse did not incur and never will incur any liability pursuant to the claims in the 2003 Complaint. Hence, there is nothing arising from the 2003 Complaint for the Non-Governmental Defendants to contribute to.

Westinghouse does not attempt to distinguish any of the cases that the Non-Governmental Defendants previously cited on this point. Nor does Westinghouse dispute that it seeks to recover response costs that are entirely different from the natural resource damages that Missouri sought in the 2003 Complaint. Instead, Westinghouse essentially argues that any claim under section 107, whatever its scope and whatever its outcome, triggers a right of contribution for any CERCLA costs whatsoever. This theory ignores the well-established concept that contribution allows recovery only of those costs that were established in the underlying action. *See* Restatement (Third) of Torts § 23, cmt. b (2000) (“A person seeking contribution must extinguish the liability of the person against whom contribution is sought for that portion of liability, either by settlement with the plaintiff or by satisfaction of judgment.”) (emphasis supplied). Because the 2003 Complaint involved only natural resource damages, it cannot support Westinghouse’s section 113(f)(1) claim for response costs.

C. The 2002 Letter of Agreement Triggered No Contribution Claim Under Section 113(f)(3)(B).

The Non-Governmental Defendants previously showed that the brief letter sent to Westinghouse by the State of Missouri in April 2002 triggered no section 113(f)(3)(B) right of contribution because, inter alia, it does not “resolve” any liability and it is not an administrative

analysis on the pleading of CERCLA liability and the scope of CERCLA contribution claims.

settlement. Memorandum at 21-24; *see* U.S. Resp. at 25-27. In response, Westinghouse admits that the letter is terminable at will, but claims that it has paid “in excess of \$500,000” to the MDNR and that at least that amount is “permanently settled.” Opp. at 18. Westinghouse misses the point entirely. Only CERCLA settlements can trigger CERCLA contribution rights, and the 2002 letter is not a CERCLA settlement.

A highly instructive case here is the recent decision in *Pharmacia Corp v. Clayton Chemical Acquisition LLC*, 2005 WL 615755 (S.D. Ill. March 8, 2005), which considered a lengthy, detailed Administrative Order on Consent (“AOC”) entered into by the U.S. EPA and the plaintiffs. The AOC required the plaintiffs to perform various investigations and studies at a contaminated site. Plaintiffs had incurred almost \$2 million performing work under the AOC. They sought contribution from defendants, arguing that the AOC was an administrative settlement that satisfied section 113(f)(3)(b). *Id.* at *4.

The district court rejected these arguments and dismissed the contribution claim in its entirety, ruling that the AOC was not a CERCLA settlement at all. *Id.* at *10. Even the AOC’s many references to CERCLA were insufficient to save it. Although the AOC recited that it was “issued pursuant to the authority vested in the President of the United States by Sections 104, 106(a), 107, and 122 of [CERCLA]”, and section 122 does address settlements, the court found that the order was not intended to be, and did not constitute, a CERCLA settlement. *Id.* at *11.

If a detailed AOC issued by the EPA under CERCLA is not an administrative settlement that satisfies section 113(f)(b)(3), then it is hard to see how the 2002 Letter could be such an administrative settlement. The letter does not even mention CERCLA (other than to use the interest rate established under CERCLA). Second, it is terminable at will, which is not typical of settlements. Third, the letter ends by suggesting that Westinghouse and Missouri might someday

replace the letter with a more formal administrative order on consent. Such an order would, of course, be similar to the AOC that the district court in *Pharmacia* held was not a CERCLA settlement. At present, of course, the 2002 Letter itself is far less than an AOC.

Finally, the best evidence that the 2002 Letter is not a CERCLA settlement is the fact that Missouri sued Westinghouse in 2005 in federal district court (discussed below). The essence of any settlement is “a legally enforceable agreement in which a claimant agrees not to seek recovery outside the agreement for specified injuries or claims from some or all of the persons who might be liable for those injuries or claims.” Restatement (Third) of Torts § 24(a) (2000) (emphasis supplied). Yet Missouri’s 2005 Complaint seeks to recover its past and future response costs at Hematite; the very costs that Westinghouse claims here were already “settled” by the 2002 Letter. Opp. at 19 (letter “expressly contemplates reimbursement for [MDNR’s] ‘future response costs’”). Plainly, the 2002 Letter is not a “settlement” at all, much less a CERCLA settlement that would satisfy section 113(f)(3)(B). In sum, Westinghouse had no section 113 claim at all when it filed its Second Amended Complaint.

We turn next to the Missouri Attorney General’s recent filing of a CERCLA cost recovery action against Westinghouse.

II. WESTINGHOUSE HAS NO SECTION 113 CLAIM TODAY.

Westinghouse argues that Missouri’s recent filing of a CERCLA § 107 cost recovery case against it (“the 2005 Complaint”) independently triggers a contribution claim under section 113(f)(1). Opp. 12-13. Once again, Westinghouse is incorrect.

The 2005 Complaint cannot trigger any contribution rights under section 113(f)(1) of CERCLA, because it does not present a live “case or controversy.” Moreover, even if it did,

Westinghouse has not satisfied the essential elements of a contribution claim. Finally, even if Westinghouse had a valid claim, the 2005 Complaint could only trigger contribution rights for costs incurred by MDNR and then reimbursed by Westinghouse as a result of the 2005 Complaint, not for any costs incurred by Westinghouse in the first instance, such as decommissioning costs.

A. The 2005 Complaint Presents No Live “Case or Controversy.”

Westinghouse makes no attempt to hide the fact that it procured the 2005 Complaint. According to Westinghouse, Missouri filed the suit in order “to cure any doubt that Westinghouse . . . has a cause of action against the parties causing the contamination.” Opp. at 6. Westinghouse’s candor in this regard only serves to highlight the fundamental defect in the 2005 Complaint: because it presents no live case or controversy, it cannot possibly serve as a statutory trigger for any contribution rights.¹⁵

Every case brought before a federal court must rise to the level of a genuine “case or controversy.” U.S. Const. Art. III, § 2. This requirement “limit[s] the business of the federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.” *Flast v. Cohen*, 392 U.S. 83, 95 (1968); *see National Right to Life Political Action Comm. v. Connor*, 323 F.3d 684, 689 (8th Cir. 2003) (“federal courts ‘may adjudicate only actual, ongoing cases or controversies’”) (*quoting Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990)); *see also Marine Equip. Mgt. Co. v. United States*, 4 F.3d 643, 646 (8th Cir. 1993) (case or controversy requirement applies equally to

¹⁵ Because the Non-Governmental Defendants are not named as parties in the 2005 Complaint, they cannot move to dismiss it for lack of jurisdiction. Westinghouse is the only party that could make such a motion, and Westinghouse will not do so. But the Court may, *sua sponte*, inquire whether jurisdiction exists over the 2005 Complaint.

request for declaratory judgment). Because the 2005 Complaint presents no live case or controversy, it cannot be a “civil action” triggering contribution under section 113(f)(1).

Ordinarily, a district court reviewing a CERCLA contribution claim would have no reason to inquire into the justiciability of the section 107 action that is presented as the triggering event for that claim. But this is no ordinary case. Even a cursory review of the 2005 Complaint reveals that it asks this Court to address issues that are undisputed between Missouri (the only plaintiff) and Westinghouse (the only defendant). The only CERCLA claim in the 2005 Complaint is set out in Count I, which seeks cost recovery under section 107 of CERCLA.¹⁶ 2005 Complaint ¶ 37. And the only relief sought in Count I is recovery of Missouri’s past and future response costs related to the Hematite site.¹⁷

This claim presents no case or controversy, as shown by Westinghouse’s prior statements to this Court. According to Westinghouse, the 2002 Letter of Agreement “requires reimbursement [by Westinghouse] . . . for ‘those reasonable and necessary [response] costs incurred [by Missouri] not inconsistent with the [NCP].’ Likewise, the Letter of Agreement expressly contemplates reimbursement [by Westinghouse] for ‘future response costs [incurred by

¹⁶ Counts II and III assert claims under Missouri law. Not only do these state-law claims fail to trigger contribution rights under CERCLA § 113(f)(1), but they are also federally preempted in whole or in part. *See, e.g., United States v. Kentucky*, 252 F.3d 816 (6th Cir. 2001). If Westinghouse argues in its surreply brief that these state-law claims trigger CERCLA contribution rights, then the Non-Governmental Defendants may seek leave to respond.

¹⁷ Elsewhere, the 2005 Complaint states that Missouri seeks “injunctive relief requiring [Westinghouse] to perform [the RI/FS]” for Hematite. Complaint ¶ 1. But CERCLA § 107 authorizes only cost recovery, and not injunctive relief. *See, e.g., Cadillac Fairview v. Dow Chem. Co.*, 840 F.2d 691, 696 (9th Cir. 1988) (“There is no mention of a right to injunctive relief in section 107(a)”). Thus, even apart from the fact that Westinghouse is already performing the RI/FS, obviating any need for an injunction, the only CERCLA claim found in the 2005 Complaint does not authorize injunctive relief.

Missouri].” Opp. at 19. Indeed, Westinghouse represents that it has already paid Missouri some \$500,000 in oversight costs pursuant to the 2002 Letter.

If the 2002 Letter already committed Westinghouse to reimburse Missouri’s past and future response costs, as Westinghouse says, then there can be no live “case or controversy” in Missouri’s section 107 cost recovery action against Westinghouse. Accordingly, the 2005 Complaint cannot trigger any contribution claim under section 113(f)(1).

Muskrat v. United States, 219 U.S. 346 (1911), illustrates why a collusive lawsuit cannot be an Article III “case or controversy.” In *Muskrat*, the Government wanted to obtain an early judgment on the constitutionality of certain land allotments. Congress passed a law specifying which members of the Cherokee Nation were to serve as plaintiffs challenging the allotments, directing the Attorney General to appear as a defendant, instructing the court of claims to determine the fees to be paid to the attorneys for all parties, and providing that all attorney’s fees and expenses would be paid from the U.S. Treasury. *Id.* at 350-51. The Supreme Court found that no “case or controversy” existed.

This case is similar to *Muskrat* in several respects. Westinghouse wants an early determination of its rights against the Non-Governmental Defendants. Westinghouse invited MDNR to sue it for funds it has already voluntarily committed to pay, and to require it to perform an RI/FS which it wants to perform and is already performing, all in the hope that MDNR’s suit would satisfy the “civil action” requirement of *Cooper Industries* and section 113(f)(1). Just as the 2002 Letter appears to commit Westinghouse to paying the “enforcement costs” incurred by MDNR’s lawyers in suing Westinghouse, so the United States agreed to pay David Muskrat to sue it. And just as in *Muskrat*, there is no “actual controversy arising between

adverse litigants” in the 2005 Complaint.¹⁸ Without an actual controversy, there can be no “civil action” triggering contribution under *Cooper Industries* and section 113(f)(1).¹⁹

B. Westinghouse Has Not Satisfied the Elements of a Contribution Claim.

Even if the 2005 Complaint were found to satisfy the “civil action” threshold required by *Cooper Industries* and section 113(f)(1) of CERCLA, Westinghouse still has no contribution claim, because it has not satisfied the elements of such a claim. Under section 113(f) of CERCLA, a “contribution action still must have all the indicia of a common law contribution action.” and the plaintiff “must still meet all the usual preconditions of a contribution action.” *E.I. DuPont De Nemours and Company v. United States*, 297 F. Supp. 2d 740, 749-50 (D.N.J. 2003), *appeal pending*, No. 04-2096 (3d Cir.) (emphasis in original).²⁰

One of those “usual preconditions” is that the contribution plaintiff has “been compelled” to make the payment for which it seeks contribution. In *DuPont*, the plaintiff sought contribution for cleanup costs incurred pursuant to a hazardous waste permit it obtained from a Kentucky environmental agency. But the district court rejected plaintiff’s claim, observing that a “permit program is not compulsion in any normative sense,” because plaintiff had voluntarily sought the permit in question and thus not been “compelled” to incur the cleanup costs. *Id.* at 752. Just as the plaintiff in *DuPont* could not seek contribution in that case, so Westinghouse

¹⁸ By analogy, 28 U.S.C. § 1359 prohibits federal courts from taking jurisdiction over civil actions where a party has been collusively or improperly joined to invoke jurisdiction.

¹⁹ Under the circumstances, Missouri has no reason to prosecute the 2005 Complaint. Instead, Missouri and Westinghouse are likely to present the Court with a “settlement” purporting to resolve Missouri’s undisputed “claim” for the relief that Westinghouse has already agreed to. The Non-Governmental Defendants will likely challenge any such settlement.

²⁰ The *DuPont* court was describing contribution actions brought under CERCLA § 113(f)(1)’s “savings clause,” rather than directly under § 113(f)(1), but the same common-law principles codified in the Restatement of Torts are applicable to both. *See* n.14 *supra*.

cannot seek contribution for decommissioning costs incurred pursuant to the SNM-33 license; a license it voluntarily sought. Those decommissioning costs were expressly assumed by Westinghouse as part and parcel of its business decision to buy the Hematite facility after reviewing the Dames & Moore report. *See* pages 2-3 & nn. 2-6 *supra*. The acquisition of Hematite cannot qualify as “compulsion.”

A second “usual precondition” of a contribution claim is that “two or more persons become liable in tort to the same person for the same harm.” Restatement (Second) of Torts § 886A(1) (1979) (emphasis supplied). In this case, that would require that both Westinghouse and each of the Non-Governmental Defendants be jointly liable to MDNR for the costs of decommissioning the Hematite facility. Westinghouse cannot satisfy this basic requirement, because the Non-Governmental Defendants have no liability to MDNR for any of the estimated \$63.5 million in decommissioning costs, inasmuch as MDNR does not claim, and does not have, any legal authority over the decommissioning.

A third “usual precondition” of a traditional contribution claim “requires the discharge of the primary plaintiff’s entire claim.” *DuPont*, 297 F. Supp. 2d at 753 (emphasis in original); *see* Restatement (Second) of Torts § 886A(2) (1979). Whether “entire claim” means literally every dollar of the cleanup costs, or simply every dollar of the amount for which contribution is being sought, the plaintiff must shoulder this burden. The district court in *DuPont* found this element lacking because DuPont was still performing cleanup work “in conformity with its permit duties” and therefore it could not show that “Kentucky’s (or anyone else’s) entire claim has been (or will be) discharged.” 297 F. Supp. 2d at 753 (emphasis in original). The same is true for Westinghouse, which has neither paid all of MDNR’s costs, nor even paid all of the costs for

which it seeks contribution. Here, just as in *DuPont*, “the preconditions for a contribution action have not and, indeed, cannot be met.” *Id.*

In sum, even if the 2005 Complaint were a legitimate trigger for the assertion of a contribution claim, Westinghouse has not established the elements of such a claim, making summary judgment appropriate on Count I.

C. At Most, the 2005 Complaint Could Trigger a Contribution Claim for MDNR’s Costs, Not for Westinghouse’s Own Costs.

Finally, even if Westinghouse satisfies at some future date the elements of a contribution claim, any claim arising at that time would be limited to the costs paid to MDNR by Westinghouse as a result of the 2005 Complaint. It would not reach back to Westinghouse’s long-standing obligations to the NRC to decommission the Hematite facility under SNM-33. Thus, even if Westinghouse were to discharge MDNR’s entire claim at some time, its contribution claim still would be limited to response costs incurred by MDNR and then reimbursed by Westinghouse after February 2005. In the event that the Court does not grant summary judgment on all of Count I, we respectfully request that it address the scope of any surviving contribution claim so that the parties may efficiently frame discovery and motions practice tailored to the magnitude of such claim.

III. WESTINGHOUSE HAS NO SECTION 107 CLAIM.

The Non-Governmental Defendants previously showed that Westinghouse cannot maintain a claim under section 107 of CERCLA because it is, *inter alia*, the current owner and operator of the site and its claim is therefore barred by *Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525 (8th Cir. 2003). Moreover, Westinghouse cannot carry its burden to qualify for the “third-party” defense in section 107(b)(3) because: (a) the acts or omissions of the Non-Governmental

Defendants occurred in connection with an indirect contractual relationship with Westinghouse; and (b) Westinghouse itself released uranium and other hazardous substances at Hematite. Memorandum at 6-16.

In response, Westinghouse admits that it is the current owner of the site, and thus a liable party,²¹ but claims it nevertheless can proceed under section 107.²² It suggests that *Dico* is no longer “good law” following *Cooper Industries*. Opp. at 21. It invokes the third-party defense despite its contractual relationship with the Non-Governmental Defendants and despite its own documented releases of uranium and tons of hydrofluoric acid at Hematite. *Id.* at 26, 29, 30. And it cites an “innocent owner” doctrine recognized only in the Seventh Circuit. *Id.* at 31. As we show below, each of these arguments lacks merit and should be rejected. We deal first with the purely legal arguments, and then go on to address those arguments that are fact-based.

A. *Dico* Remains the Law in the Eighth Circuit.

Grasping at straws, Westinghouse argues that in *Dico*, the Eighth Circuit “ignored the plain text of Section 107(a),” so that the decision is no longer good law after *Cooper Industries*. Opp. at 21. In reality, however, *Dico* is unaffected by *Cooper Industries*.

Westinghouse seizes on Justice Thomas’s use of the word “open” and claims that the Court “expressly recognized that . . . the question of the ability of a PRP to assert a claim under Section 107 is now an ‘open’ one”. Opp. at 23. In fact, the Court in *Cooper Industries* expressly “declin[ed] to address the issue,” stating that

²¹ Westinghouse Response to Non-Governmental Defendants’ Statement of Uncontroverted Material Facts, ¶¶ 8, 10.

²² Westinghouse suggests that the issues pertaining to its § 107 claim are “moot,” but it has not withdrawn its § 107 claim. Accordingly, the Non-Governmental Defendants have no choice but to treat it as a live claim.

To hold here that Aviall may pursue a § 107 action, we would have to consider whether these [circuit court] decisions are correct, . . . We think it more prudent to withhold judgment on these matters.

125 S. Ct. at 585 (emphasis supplied).

Only after it declined to speak to the question did the Court comment that its ruling left “open” on remand the issue of whether Aviall could seek recovery under section 107. *Id.* at 586. Thus, the Supreme Court did not say—or even hint—that the circuit rulings uniformly denying section 107 claims were problematic. Rather, the Court said that it would not decide the issue. Westinghouse seeks to put words in the Court’s mouth by declaring that *Cooper Industries* effectively did what the Court expressly said it would not do.

Every court of appeals that considered the issue of whether a PRP can bring a claim under section 107—and there are ten of them—answered that question in the negative. *See* U.S. Response at 15 & n.7. And *Cooper Industries* did nothing to upset these decisions.

This precise issue was recently decided by the Southern District of New York, which squarely rejected the argument that *Cooper Industries* undermined circuit precedent barring PRPs from filing section 107 claims. *See Elementis Chemicals Inc. v. T.H. Agriculture and Nutrition LLC*, 2005 WL 236488 (S.D.N.Y. Jan. 31, 2005).

In *Elementis*, the plaintiff argued that the Second Circuit’s equivalent of *Dico* was no longer good law post-*Cooper Industries*. *Id.* at *10 (referring to *Bedford Affiliates v. Sills*, 156 F.3d 416 (2d Cir. 1998)). The arguments raised there were very similar to those advanced here by Westinghouse:

1. *Cooper Industries* “calls into question” cases such as *Bedford Affiliates*, which held that PRPs cannot sue under section 107;
2. *Bedford* was decided at a time when a plaintiff could proceed with an action under 113(f), and the Second Circuit would, as a result, decide the case differently today;

3. The reasoning in *Bedford* is otherwise unsound post-*Cooper Industries* because it leaves a PRP without a method of recovery.

In *Elementis*, the district court rejected each of these arguments. First, the Supreme Court did not “call into question” the uniform line of cases in the courts of appeals; it “explicitly ‘withheld judgment’” regarding those cases. *Id.* “[T]he Supreme Court will not be held to have implicitly expressed an opinion on a question which it explicitly declines to address, so as to overrule Circuit precedent” *Id.* at *11.

Second, the new limitations on section 113(f) do not mean that section 107 would necessarily become available to PRPs. “There are at least two reasons why the Second Circuit, even if it were to reconsider the appropriateness of the *Bedford Affiliates* rule in light of *Cooper Industries*, might well decide to leave that rule in place.” *Id.* at *10.

Finally, the fact that some PRPs might be unable to pursue contribution does not mean that *Bedford* is unsound. “[T]he predicament in which PRPs barred from § 113(f)(1) by *Cooper Industries* would find themselves if they continued to be barred from § 107(a) relief by *Bedford Affiliates* could be justified as a matter of policy.” *Id.* at *13.

For all of these reasons, *Dico* remains good law in the wake of *Cooper Industries*.²³

²³ The four cases cited by Westinghouse, *Opp.* at 22, do not remotely justify discarding *Dico* based on *Cooper Industries*. Three of them involved Supreme Court decisions that actually ruled on legal issues previously addressed by the Eighth Circuit. *See Young v. Hayes*, 218 F.3d 850 (8th Cir. 2000); *Patterson v. Tenet Healthcare Inc.*, 113 F.3d 832 (1997); and *Coe v. Melahn*, 958 F.2d 223, 225 (8th Cir. 1992). The fourth case, *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554 (8th Cir. 1993) involved Supreme Court dicta that specifically undermined a legal test previously applied in the Eighth Circuit and elsewhere. As shown above, *Cooper Industries* did neither of these, and did not undermine *Dico* at all.

B. The “Innocent Landowner” Doctrine is Unavailable in the Eighth Circuit.

Westinghouse seeks to salvage a section 107 claim by invoking the “innocent landowner” doctrine²⁴ created by the Seventh Circuit in 1994. Opp. at 31. *See generally Akzo Coatings Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir. 1994). The “established case law” that Westinghouse cites to support this doctrine is, not surprisingly, entirely limited to the 7th Circuit.

This doctrine is not recognized in the 8th Circuit and is therefore unavailable to Westinghouse. In fact, the Eighth Circuit in *Dico* was asked to embrace this doctrine, and declined to do so:

Dico, however, does not contend it qualifies for any of the enumerated [statutory] defenses. Instead, it argues we should adopt a judicially created “innocent landowner” exception recognized in a line of Seventh Circuit and various district court cases.

Section 107(a) imposes liability on PRPs “[n]otwithstanding any other provision or rule of law, and subject *only* to the defenses set forth in subsection (b) of this section . . .” (emphasis added). Thus, the plain language of the statute militates against Dico’s argument.

340 F.3d at 532 (emphasis supplied, internal citations omitted).

Moreover, as we showed in our opening brief, and we discuss below, numerous releases of hazardous substances at Hematite are attributable to Westinghouse. Thus, as a factual matter, Westinghouse, like Dico, would not qualify for this “innocent landowner” doctrine even if it were available in the Eighth Circuit.

²⁴ This “doctrine” should not be confused with the statutory innocent landowner “defense” which is only available under §§ 107(b)(3) and 101(35). Westinghouse has not argued that it is eligible for that defense, nor could it, because Westinghouse was aware of contamination when it acquired Hematite. *See Motion, Attachment 9.*

C. Defendants' Acts or Omissions Occurred in Connection with a Contractual Relationship With Westinghouse.

The Non-Governmental Defendants previously showed that Westinghouse has a contractual relationship with them by virtue of being in the chain of title at Hematite.²⁵ In response, Westinghouse suggests that although CERCLA's definition of "contractual relationship" includes deeds and other instruments that transfer title or possession, it may not extend beyond one's immediate grantor. Opp. at 30 n.9. This argument must fail, as Westinghouse is connected to the Non-Governmental Defendants not only by the chain of title, but also by the SNM-33 license and by the 1999 purchase agreement that specifically addressed liability for decommissioning costs at Hematite.

To begin with, Westinghouse overlooks the plain language of section 107(b), which precludes the third-party defense in cases where the acts or omissions of the supposed "third party" occurred "in connection with a contractual relationship, existing indirectly or directly, with the defendant." 42 U.S.C. § 9607(b)(3) (emphasis added). Because "courts must presume that a legislature says in a statute what it means and means in a statute what it says there," *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992), Congress's use of the word "indirectly" refutes Westinghouse's position. As the current owner, Westinghouse has both a direct contractual relationship with its immediate grantor, as well as an indirect contractual relationship with each of the previous owners.²⁶

²⁵ Westinghouse complains that the Defendants did not file with the Court the deeds and contracts documenting the Hematite chain of title. Opp. at 30. Although we saw no need to do so, because Westinghouse admits that it is the current owner and alleges that each of the Non-Governmental Defendants is a prior owner, we would be pleased to file the pertinent documents if they would assist the Court.

²⁶ U.S. Resp. at 9. Any other reading would do violence to CERCLA's definition of (continued)

Westinghouse goes on to argue, based on *Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp.*, 964 F.2d 85 (2d Cir. 1992) (“*Westwood*”), that the acts or omissions of the Non-Governmental Defendants did not occur “in connection with” the contractual relationship. This argument lacks merit, both because *Westwood* was wrongly decided and also because the minimal “connection” it requires is easily satisfied here.

In *Westwood*, a former landowner invoked the third-party defense, arguing that the releases were caused solely by the current landowner. The sale to the current owner was completed before the contamination allegedly occurred. The Second Circuit ruled that the mere existence of the land sales contract did not automatically preclude the third-party defense. *Id.* at 89. But it held that a landowner is precluded from raising the third-party defense if the contract between the landowner and the third party either “somehow is connected with the handling of hazardous substances,” or else “allow[s] the landowner to exert some element of control over the third party’s activities.” *Id.* (emphasis supplied).

The United States has adequately briefed the reasons why *Westwood* was incorrectly decided, so there is no need for the Non-Governmental Defendants to further burden the record.²⁷ But the United States did not address whether the acts or omissions of the Non-Governmental Defendants were “in connection” with Westinghouse’s contractual relationship. As we show below, they clearly were.

Even the cases following *Westwood* have typically required only a minimal connection between the acts or omissions and the contractual relationship. *See, e.g., Emerson Enterprises v.*

“contractual relationship,” which is not limited to immediate predecessors or successors in the chain of title. 42 U.S.C. § 9601(35).

²⁷ U.S. Resp. at 10-12.

Kenneth Crosby Acquisition Corp., 2004 U.S. Dist. LEXIS 12245, at *20 (W.D.N.Y. June 23, 2004) (“regardless of the type of contract, the issue is whether the contract relates to hazardous substances”) (emphasis supplied). *See also New York v. Shore Realty Corp.*, 759 F.2d 1032, 1049 n.23 (2d Cir. 1985) (preceding *Westwood*) (defendant “appears to have a contractual relationship with the previous owners . . . [because the] purchase agreement includes a provision by which [it] assumed at least some of the environmental liability of the previous owners”).

Thus, Westinghouse cannot invoke the third-party defense even under *Westwood*, because its indirect contractual relationship with each of the Non-Governmental Defendants “somehow is connected with” the handling and releases of hazardous substances at Hematite. One obvious example is the unbroken chain of holders of the NRC license (SNM-33) for the Hematite site. The NRC (or its predecessor, the Atomic Energy Commission) transferred SNM-33 from Mallinckrodt to UNC in 1961; to Gulf United Nuclear Fuels Corporation (“GUNFC”) in 1971; to Combustion Engineering (“CE”) in 1974; to ABB Combustion Engineering Nuclear Power, Inc. in 1999; to CENP in 2000; and finally to Westinghouse in 2001.

Each of the Non-Governmental Defendants that Westinghouse now seeks to treat as a “third party” is connected back to Westinghouse through the very license that authorized the nuclear work at Hematite. That the NRC requires decontamination and decommissioning prior to terminating an SNM license demonstrates that releases of hazardous substances were expected under the SNM-33 operations. *See* 10 C.F.R. § 70.38. In this regard, the SNM-33 license is analogous to a lease authorizing an activity that involves hazardous substances. Even courts following *Westwood* have rejected the third-party defense under these circumstances. *See, e.g., United States v. 175 Inwood Assoc. LLP*, 330 F. Supp.2d 213, 228 (E.D.N.Y. 2004); *Emerson Enterprises*, 2004 U.S. Dist. LEXIS 12245, at *20.

Further proof that Westinghouse’s indirect contractual relationship with the Non-Governmental Defendants “somehow is connected with” the handling and releases of hazardous substances at Hematite resides in the 1999 purchase agreement, through which (as Westinghouse admits²⁸) Westinghouse acquired Hematite in early 2000. In the 1999 agreement, ABB indemnified BNFL (Westinghouse’s parent) for “any Hematite Legacy Liabilities,” subject to a \$30 million deductible, after which ABB would pay 75% of losses between \$30 million and \$75 million, and 100% of losses greater than \$75 million.²⁹

ABB has specifically acknowledged that its indemnification for “primary environmental liabilities” at Hematite “relate[s] to the costs of remediating radiological contamination upon decommissioning the facilit[y].”³⁰ Westinghouse admits that although it was not a party to the ABB-BNFL agreement, this ABB indemnity “applies to Westinghouse.”³¹

In short, the 1999 ABB-BNFL agreement satisfies *Westwood* by showing that the indirect contractual relationship between Westinghouse and the prior owners “somehow is connected with” the handling and releases of hazardous substances at Hematite. The Agreement identifies the need to decommission the Hematite site due to radiological contamination. It clearly contemplates that BNFL (through a subsidiary) will perform that decommissioning, thereby addressing the disposal practices and other acts or omissions of the former owners. It earmarks a

²⁸ Westinghouse Electric Company LLC’s Response to Chevron’s First Request for Admissions and First Request for Interrogatories, at 7 (Answer to Request for Admission No. 3).

²⁹ Attachment 14, § 10.2(v), p. 75 (“Additional Indemnification by ABB”).

³⁰ *ABB Group Annual Report 2000* at 102, n. 16 (“Contingencies related to former nuclear business”) (March 31, 2001) (available through www.gsonline.com). The cover and relevant pages are included as Attachment 19.

³¹ Westinghouse Electric Company LLC’s Response to Chevron U.S.A. Inc.’s First Request for Admissions and First Request for Interrogatories, at 7 (Answer to Interrogatory No. 5).

scaled indemnity by ABB to help defray those costs. Thus, Westinghouse cannot invoke the third-party defense here due to its contractual relationship with the putative “third parties.”

D. Defendants Are Not the Sole Cause of the Contamination.

Even if Westinghouse had no contractual relationship with the Non-Governmental Defendants, it still could not establish the third-party defense because it cannot prove that the contamination at Hematite was caused “solely” by the Non-Governmental Defendants. CERCLA § 107(b)(3). We previously showed that both Westinghouse and CENP—Westinghouse’s predecessor and wholly-owned subsidiary—released uranium and tons of hydrofluoric acid at Hematite, *see* Motion, Attachments 4, 5, 7, & 8, making it impossible for Westinghouse to claim that Defendants are the sole cause of contamination at Hematite. *Memorandum* at 8-13.

In response, Westinghouse does not dispute that any of these releases occurred. Nor does it dispute that CENP’s releases of hazardous substances are attributable to Westinghouse for purposes of the third-party defense. Instead, Westinghouse argues that these releases are somehow legally insufficient, either because they were allegedly authorized by various environmental permits or because they were somehow “divisible.”

Westinghouse’s objections necessitate an in-depth response, but they cannot salvage Westinghouse’s section 107 claim. To begin with, as we show in subsections (1) through (3) below, none of Westinghouse’s legal objections can alter the fact that these releases of hazardous substances at Hematite are attributable to Westinghouse, so that the contamination at Hematite was not “caused solely” by Defendants. Moreover, as we show in subsection (4) below, other releases are also attributable to Westinghouse, including some that were clearly not authorized

by any environmental permit and that contaminated areas currently being investigated or cleaned up by Westinghouse.

1. Even Federally Permitted Releases Bar the Third-Party Defense.

Westinghouse argues that a site owner may pollute its own property and yet, if the releases are “federally permitted release,” under CERCLA section 107(j), then the owner can still claim that the contamination was “caused solely” by third parties. This argument fails, both on the facts and on the law.

With regard to the facts, Westinghouse asserts that various permits and licenses authorized the releases identified in our opening brief, but Westinghouse fails to identify these permits and licenses. Nor does Westinghouse identify which provisions or specific language in these permits and licenses authorized the releases. Indeed, Westinghouse does not even specify which of the eleven categories of federally permitted releases in section 101(10) of CERCLA it has in mind. 42 U.S.C. § 9601(10). This bare-bones assertion cannot defeat summary judgment.

As for the law, Westinghouse cites no authority for its position. It points to no case holding that federally permitted releases are even relevant to the third-party defense. The three cases Westinghouse does cite—from district courts in New Mexico, Idaho, and Massachusetts—do not discuss the federally permitted release in the context of section 107(b)(3).

As a matter of plain language, section 107(j) cannot be used as Westinghouse suggests. Congress could have explicitly stated that federally permitted releases are excluded from the releases mentioned in section 107(b), thereby allowing polluting owners to qualify for the third-party defense. Or it could have excluded federally permitted releases from the definition of “release,” as it did for the normal application of fertilizer, and the exhaust from a pipeline pumping station engine. 42 U.S.C § 9601(22). But Congress did neither of these things.

Instead, Congress simply provided that “recovery by any person . . . for response costs . . . resulting from a federally permitted release shall be pursuant to existing law in lieu of this section [107].” 42 U.S.C. § 9607(j) (emphasis added). Of course Defendants, in moving for summary judgment on Count I, seek no “recovery” from Westinghouse for Westinghouse’s releases. As a result, section 107(j) cannot salvage Westinghouse’s invocation of the third-party defense. Alternatively, as we show below, Westinghouse is responsible for numerous other releases that clearly are not federally permitted.

2. Westinghouse’s Divisibility Argument is Misplaced.

Westinghouse also seeks to dismiss the significance of its releases by claiming that they are “divisible” from the releases allegedly attributable to the Non-Governmental Defendants, Opp. at 29-30 (citing *United States v. Hercules*, 247 F.3d 706 (8th Cir. 2001)). This argument must fail.

Divisibility of harm is not a defense to CERCLA liability. *See Dico*, 340 F.3d at 530-31. Rather, divisibility allows a defendant to avoid joint and several liability in certain circumstances and to have its liability apportioned instead. This is fundamentally inconsistent with the third-party defense, which operates as a complete defense to liability. Moreover, because Westinghouse has not been held jointly and severally liable to anyone for anything, the relevance of divisibility here remains obscure.

Nor does *Hercules* discuss divisibility with respect to the third-party defense. Defendants agree with the United States that *Hercules* does not support Westinghouse’s position. U.S. Resp. at 14. The United States has adequately briefed this issue, so there is no need for Defendants to repeat those arguments here.

3. Causation of Particular Response Costs is Immaterial.

Westinghouse argues next that it also can avail itself of the third-party defense, despite its own releases of uranium and hydrogen fluoride, because its releases supposedly did not cause the same contamination it is now addressing.³² Once again, Westinghouse's argument fails both as a matter of fact and as a matter of law.

With regard to the facts, suffice it to say that the two affidavits attached to Westinghouse's opposition cannot possibly create a triable issue of fact here. Neither Mr. Hayes nor Mr. Sepp has been proffered or qualified as an expert witness, and neither one advances any expert opinions in his affidavit. In short, they are both fact witnesses. Yet their affidavits are not limited to facts within their personal knowledge. Instead, their affidavits offer quasi-scientific conclusions purportedly based, in whole or in part, upon various unidentified documents pertaining to the ongoing environmental investigation at the Hematite site. Because Mr. Hayes and Mr. Sepp are fact witnesses, they are simply incompetent³³ to testify about any conclusions they may have drawn from reading these unidentified documents.³⁴

With respect to the law, Westinghouse again fails to cite any legal authority to support its position, and Defendants have found none. In fairness, CERCLA's third-party defense does mention causation, but not at all in the way that Westinghouse suggests. Section 107(b) states that there shall be no liability if the "release . . . of a hazardous substances and the damages

³² Opp. at 28 ("Defendants have failed to produce a record sufficient to resolve essential questions about causation and divisibility.").

³³ The Non-Governmental Defendants may move to strike both affidavits.

³⁴ Moreover, the Non-Governmental Defendants have had no opportunity to review these documents. Despite this Court's case management order dated March 23, 2004, and despite requests from counsel, Westinghouse has declined to produce any of its voluminous documents relating to the results of its ongoing environmental investigation and cleanup at Hematite.

resulting therefrom were caused solely by” a third party. Westinghouse does not dispute that it released hazardous substances at Hematite, or that its predecessor’s releases are attributable to it for this purpose. Accordingly, it fails to meet the explicit causation requirement in section 107(b), and it has no third-party defense.

4. Westinghouse is Responsible for Other Releases.

Finally, even if the releases described in our opening brief could somehow be dismissed based on Westinghouse’s arguments, the fact remains that Westinghouse is also responsible for other releases of hazardous substances at Hematite over a period of many years. As a result, Westinghouse cannot possibly prove that it “played no part in the release” of hazardous substances at Hematite, and so its third-party defense must fail. *United States v. Findett Corp.*, 75 F. Supp. 2d 982, 989 (E.D. Mo. 1999).

In our motion for summary judgment, the Non-Governmental Defendants explained:

This discussion of Westinghouse’s corporate predecessors is not intended to be exhaustive. For example, on April 28, 2000, Westinghouse acquired the stock of ABB C-E Nuclear Power Inc., *see* Westinghouse Interrogatory Responses, at 4 (Answer to Interrog. No. 3), and with it that company’s CERCLA liability as owner and operator of the Hematite site from June 1999 to April 2000. If Westinghouse denies that it is responsible for any releases of hazardous substances at Hematite, then Defendants reserve the right to demonstrate why Westinghouse is also responsible for the releases of ABB C-E Nuclear Power Inc. and its other corporate predecessors.

Memorandum at 9 n.1 (emphasis supplied). Because Westinghouse has raised several issues regarding these releases, we show below that many other releases of hazardous substances during the ownership of CE are also attributable to Westinghouse for purposes of the third-party defense. Additionally, although CERCLA does not require it, we show below that some of these releases were not federally permitted and are contributing to cleanup costs at Hematite.

a. Westinghouse is Responsible for the Releases of Combustion Engineering, Inc.

We begin by showing that the releases of Combustion Engineering, Inc. (“CE”) are attributable to Westinghouse. This is readily apparent from the series of corporate transfers, which are well-documented in governmental filings and other public sources:

1. CE acquired the SNM-33 license and ownership of the Hematite Site on May 1, 1974. *Second Amended Complaint* ¶ 13.
2. In 1990, CE became a wholly-owned subsidiary of Asea Brown Boveri Inc. (“ABB Inc.”), but CE continued to hold the SNM-33 license and own the site. *See* Attachment 20, at 5.
3. In June 1999, CE (still a subsidiary of ABB, Inc.) transferred all assets, liabilities, and obligations related to NRC licensing activities at Hematite—including real estate and the SNM-33 license—to ABB Combustion Engineering Nuclear Power, Inc. *Id.* at 6.
4. On or about December 16, 1999, ABB Combustion Engineering Nuclear Power Inc. changed its name to ABB C-E Nuclear Power Inc. (“ABBCENP”).³⁵
5. On April 28, 2000, ABBCENP merged into CENP—the wholly-owned subsidiary of Westinghouse—and ceased to exist.³⁶ Accordingly, CENP is the “legal successor to all the rights and obligations of [ABBCENP] concerning the facility.”³⁷
6. In turn, CENP ceased to exist when it was merged into its parent, Westinghouse, on April 2, 2001.³⁸

In sum, through this 27-year chain of transactions, the Hematite assets and liabilities of CE came to rest with Westinghouse. To put it another way, CE is Westinghouse for purposes of the third-party defense. Accordingly, the releases of hazardous substances that occurred at

³⁵ Westinghouse Interrog. Responses to Chevron, at 4-5 (Answer to Interrogatory No. 4).

³⁶ *Id.* (Answer to Interrogatory Nos. 3 and 4). This occurred pursuant to the ABB-BNFL Agreement. *See* Motion, Attachment 6 at 3 (“the Hematite facility and the rest of ABB’s nuclear business were sold to British Nuclear Fuels plc on April 28, 2000”).

³⁷ Motion, Attachment 6 at 4.

³⁸ Westinghouse Interrogatory Responses, at 4 (Answer to Interrogatory No. 3).

Hematite after May 1, 1974 are attributable to Westinghouse for purposes of the third-party defense. We turn now to examples of those releases.

b. Releases Occurred After May 1, 1974 That Were Not Federally Permitted.

Among the releases of hazardous substances at Hematite after May 1, 1974 were a number of accidents and exceedances that clearly were not federally permitted, including the following:

- January 14, 1980 – uranium loss four times greater than the permissible limit. Attachment 22.
- June 2, 1980 – “release of excessive amounts of [hydrofluoric acid] – 1045 lbs” in one week. Attachment 23.
- October 31, 1984 – “the month started with the cleanup of a major release of [uranium dioxide].” Attachment 24, at 1.
- April 5, 1988 – release of corrosive potassium hydroxide (KOH) solution to a storm drain. Attachment 25, at 1.
- August 26, 1988 – accidental release onto the ground of acid insolubles containing uranium. Attachment 26 (dated Sept. 1, 1988).
- August 29, 1989 – accidental release of uranium. Attachment 27. The NRC issued a Confirmatory Action Letter to CE prohibiting restart of certain equipment, and sent an inspection team to the site. Attachment 28.
- December 18, 1990 – accidental release of UF₆ formed a smoky cloud in the air. Personnel used water to “knock down the smoke.” The accident report states that it was not until twenty-minutes later that the “drain for the dock sump was plugged to prevent further water from leaving the dock area.” Attachment 29.
- Mid-1995 – multiple accidental releases to the on-site creek of radioactive semi-treated solids from the on-site sanitary sewer. Attachment 30 (dated July 12, 1996).

c. Releases Occurred After May 1, 1974 That Contributed to the Cost of Decommissioning the Hematite Facility.

Although the releases already discussed are more than sufficient to defeat the third-party defense, we show below that releases attributable to Westinghouse, including some that were not federally permitted, are contributing to the cost of decommissioning the Hematite facility.

Westinghouse reported to the NRC last year that it expected to spend a total of \$63.5 million to satisfy its legal obligations under the SNM-33 license to decontaminate and decommission the Hematite facility. According to Westinghouse, these costs include an estimated \$33.5 million to decontaminate, dismantle, and demolish buildings and equipment at the Hematite site. DP at 84.³⁹

Westinghouse expects to demolish 16 buildings at the Hematite site. *See* Attachment 13 at 2. According to Westinghouse, seven of these buildings were constructed after 1974. *Id.*⁴⁰ Accordingly, any radiation present inside these buildings is obviously not attributable to Defendants, but instead occurred after May 1, 1974, and thus is attributable to Westinghouse. Similarly, the costs to decontaminate and dismantle equipment installed at the site after May 1, 1974—regardless of when the building it was placed in was constructed—are wholly attributable to Westinghouse.

³⁹ Specifically, Westinghouse reported to the NRC that it had already spent \$10 million on Facility Cleanout and \$3 million on Building Preparation, and that it expected to spend an additional \$8.5 million on equipment removal and disposal, and an additional \$12 million on building demolition and disposal.

⁴⁰ These 7 buildings are: Bldg. 115 – Generator/Fire Pump (1990); Bldg. 230 – Offices/Former Rod Loading Plant (1992); Bldg. 231 – Warehouse (1992); Bldg. 253 – Offices, Storage, and Boiler and Cooling Water Pump Room (1989); Bldg. 254 – Pellet Plant (1989); Bldg. 256 – Pellet Drying 256-2 Workhouse (1986); and Bldg. 291 – Limestone Building (1992).

Thus, a substantial portion of the estimated \$33.5 million that Westinghouse will spend on buildings and infrastructure is attributable not to Defendants, but to Westinghouse. This alone defeats any attempt by Westinghouse to invoke the third-party defense. Similar facts exist for other areas at the Hematite facility, such as the evaporation ponds, the former leach field, the surface water features, and the limestone piles. *See* Supplemental Statement of Facts ¶¶ 51-59.

In sum, Westinghouse is a liable party that is not eligible for the third-party defense. Accordingly, Westinghouse has no section 107 claim against any of the Non-Governmental Defendants.

IV. WESTINGHOUSE HAS NO CLAIM FOR DECLARATORY RELIEF.

The Non-Governmental Defendants showed in their opening brief that the failure of Westinghouse's substantive claims in Counts I, II, and III also dooms Count IV, which is purely procedural. Memorandum at 24-25. Westinghouse does not dispute that declaratory judgments under CERCLA, the Declaratory Judgment Act, and Missouri law are purely procedural remedies and create no substantive claims.

Westinghouse argues that Count IV is somehow viable because "MDNR has already asserted multiple claims for future costs against Westinghouse," citing the April 2002 Letter and the 2005 Complaint. *Opp.* at 33. But if this Court grants the Non-Governmental Defendants' pending motions for summary judgment on Count I and to dismiss Counts II and III, then Westinghouse will have no substantive claims against Defendants for those costs. Count IV simply cannot stand once Westinghouse's underlying substantive claim falls. *See, e.g., W. Cas. and Sur. Co. v. Herman*, 405 F.2d 121, 124 (8th Cir. 1968) ("The Declaratory Judgment Act . . . does not create any new substantive rights but rather creates a procedure for adjudicating existing

rights.”). Because Westinghouse has no “existing rights” against the Non-Governmental Defendants, Count IV of the Second Amended Complaint cannot survive this motion.

R.A. Caldwell v. Gurley Refining Co., 755 F.2d 645 (8th Cir. 1985), the only case cited by Westinghouse, does nothing to resuscitate Count IV. In that case, the EPA informed a lessor and a lessee that one or both of them would be required under the Clean Water Act to pay for the cost of cleaning up a spill. One of the parties sued the other for a declaratory judgment to determine (a) its rights and obligations under the lease and (b) the lessee’s right of indemnity against the lessor. *Id.* at 647. On appeal after trial, the lessor complained that there was no case or controversy.

The facts in *R.A. Caldwell* are immediately distinguishable from the instant case because the jury found that the lessee, in fact, had viable substantive claims against the lessor. *See id.* at 648. Here, in contrast, if the Court grants both of the pending motions, then Westinghouse will have no remaining substantive claim that could support declaratory relief under any of the statutes listed in Count IV. Thus, the Non-Governmental Defendants are entitled to summary judgment on Count IV.

CONCLUSION

For the reasons set forth above, and those presented in the opening memorandum, this Court should grant summary judgment in favor of the Non-Governmental Defendants on Counts I and IV of the Second Amended Complaint.

Respectfully submitted,

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