

1 who had not already voted. All these votes are “illegal votes” under RCW 29A.68.020 and the
2 Washington Supreme Court’s decision in *Foulkes v. Hays*, 85 Wn.2d 629, 634 (1975) (defining
3 illegal votes as “votes cast by persons not privileged to vote and votes not entitled to be
4 counted because not cast in the manner provided by law”). They also constitute errors and
5 neglect under RCW 29A.68.011 and misconduct of elections officials under .020(1). To prove
6 that election officials counted illegal votes, Petitioners obtained and will submit, *inter alia*,
7 administrative records maintained by election officials as required by RCW 29A.08.125¹ and
8 labeled “Voter Files.”

9 WSDCC now asks this Court to exclude these Voter Files – required by statute to
10 include the last date a person voted – as evidence that any individual or number of individuals
11 voted in the November 2, 2004 general election, arguing that they are (1) irrelevant, (2)
12 prejudicial and confusing, and (3) not the “best (available) evidence” of whether a particular
13 voter voted. All three arguments fail because WSDCC misunderstands the relevancy and
14 prejudice analysis for a bench trial and relies on inapplicable case law under the inapposite
15 “best evidence” rule. The voter crediting records are competent evidence of the fact that a
16 person voted, and WSDCC is free to attack that evidence at trial and to argue that the court
17 should give it little weight. While Petitioners may also present other evidence that a person
18 voted (such as poll book signature pages and absentee ballot envelopes), there is no basis for
19 excluding the counties’ voter crediting records from this bench trial.

20 II. FACTS

21 Washington state law requires each county auditor to maintain a computer file
22 containing the records for all registered voters in the county, which file must contain, *inter alia*,

23
24 ¹ “Each county auditor shall maintain a computer file containing the records of all registered
25 voters within the county. ... The computer file must include, but not be limited to, each voter's
26 last name, first name, middle initial, date of birth, residence address, gender, date of
27 registration, applicable taxing district and precinct codes, and the last date on which the
individual voted. The county auditor shall subsequently record each consecutive date upon
which the individual has voted and retain at least the last five such consecutive dates.”

OPPOSITION TO WSDCC'S MOTION IN LIMINE
TO EXCLUDE VOTER CREDITING EVIDENCE - 2

1 the voter's name and address and the last date on which the person voted. RCW 29A.08.125.
2 The same statute requires the auditor to record each subsequent date on which the person voted.
3 *Id.* The process of recording the date on which a person voted is known as giving the person
4 "credit for voting." Other Washington statutes also require auditors to give credit for voting.
5 *E.g.*, RCW 29A.60.180. The Washington Administrative Code explicitly recognizes the role of
6 voter crediting to make sure that a voter does not cast more than one type of ballot (e.g., a
7 provisional ballot and a poll or absentee ballot). *See* WAC 434-240-250, WAC 434-240-260,
8 WAC 434-253-047(6) (as amended August 24, 2004). The process of crediting the Voter File
9 varies somewhat from county to county depending on the elections software used by each
10 county. In King County, for example, poll voters receive credit when a bar code next to their
11 signature in the poll book is scanned during the canvassing period between election day and
12 certification (in this case, between November 2 and November 17); absentee voters receive
13 credit as part of an automatic process when the bar code on their absentee envelope is scanned
14 and then verified (once scanned, the voter is credited unless affirmatively rejected in the
15 verification process). *See eg.*, Draft of Transcript of Deposition of Dean Logan at 69:16 -
16 70:17, attached as Ex. A to Declaration of Harry Korrell.

17 It is these records (used by counties to track who voted) that Petitioners may offer to
18 help establish that certain people voted in the election. Under Washington law, such public
19 records are presumed to be accurate. *See e.g.*, *State v. Monson*, 53 Wn.App. 854, 859-60
20 (1989). For the reasons set out below, the motion by the intervenor WSDCC to exclude this
21 evidence should be denied.

22 III. ARGUMENT

23 A. The Voter Crediting Files are Admissible Hearsay

24 WSDCC correctly does not dispute that the voter crediting files are admissible,
25 notwithstanding their hearsay status. They are admissible under both the public records and
26 reports and business records exceptions of ER 803.

27
OPPOSITION TO WSDCC'S MOTION IN LIMINE
TO EXCLUDE VOTER CREDITING EVIDENCE - 3

1 **1. The Voter Crediting Files Are Admissible as Public Records or**
2 **Reports**

3 The evidence rules contemplate that public records, such as the Voter Files at issue,
4 may be introduced into evidence. ER 803(a)(8)'s hearsay exception for public records refers to
5 RCW 5.44.040, which directs that "**all** records and documents on record or on file in the offices
6 of the various departments ... of this state ... **shall** be admitted in evidence in the courts of this
7 state" when duly certified. RCW 5.44.040 (emphasis added). The courts recognize the broad
8 reach of RCW 5.44.040, holding that public records are admissible under the statute so long as
9 they "(1) contain facts rather than conclusions that involve judgment, discretion or the
10 expression of opinion; (2) relate to facts that are of a public nature; (3) be retained for public
11 benefit; and (4) be authorized by statute." *State v. Chapman*, 98 Wn. App. 888, 891 (2000).

12 The Voter Files satisfy these requirements. They relate to facts that are of a public
13 nature, are retained for the public benefit, and are authorized by statute. *See, e.g.*, RCW
14 29A.08.125, 29A.60.180.

15 **2. The Voter Files Are Admissible as Business Records**

16 The Voter Files also are admissible as business records under another exception to the
17 hearsay rule. ER 803(a)(6)'s hearsay exception for business records refers to RCW 5.45, which
18 broadly defines "business" to include "every kind of business, profession, occupation, calling
19 or operation of institutions, whether carried on for profit or not." RCW 5.45.010. The
20 Washington courts have held that this broad definition encompasses governmental entities.
21 *See, e.g., State v. Plewak*, 46 Wn. App. 757, 764 (1987) (report of fire department admissible as
22 business record under RCW 5.45.020); *State v. Ecklund*, 30 Wn. App. 313, 319 (1981) (report
23 of FBI forensics expert admissible as business record under RCW 5.45.020). A business record
24 is admissible "if it was made in the regular course of business, at or near the time of the act ...
25 and if ... the sources of information, method and time of preparation were such as to justify its
26 admission." RCW 5.45.020. The Voting Files unquestionably fulfill these requirements.

1 **B. Voter Files Are Admissible Notwithstanding Allegations of Possible**
2 **Inaccuracies**

3 **1. The Voter Crediting Files Are Relevant**

4 WSDCC does not argue that the Voter Crediting Files are not relevant. On the contrary,
5 it admits that the files have at least some probative value, thereby tacitly conceding their
6 admissibility under the broad reach of ER 401, which allows the Court to admit evidence
7 having “*any* tendency to make the existence of *any* fact that is of consequence to the
8 determination of the action more probable or less probable than it would be without the
9 evidence.” (Emphasis added.) WSDCC instead argues for exclusion of the Voter Files under
10 ER 403, contending that their probative value is outweighed by the prejudice and potential
11 confusion that the files will create. Mot. at 9-11.

12 WSDCC’s reliance on ER 403 is misplaced. ER 403 “is designed primarily for jury
13 trials,” Karl B. Tegland, 5 Wash. Prac. Evid. § 403.2 (1999), and “has no logical application to
14 bench trials” such as this one. *Gulf States Util. Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th
15 Cir. 1981). In *Gulf States Utilities*, the Fifth Circuit held that the district judge erred in
16 excluding evidence under Fed. R. Evid. 403 in a bench trial, because excluding relevant
17 evidence on the basis of unfair prejudice is a “useless procedure” in a bench trial. *Id.* As the
18 Washington Court of Appeals has recognized, “[a] trial judge is presumed to be able to
19 disregard inadmissible evidence, thus avoiding any prejudice to the defendant. *State v. Melton*,
20 63 Wn. App. 63, 68 (1991). This is illustrated by *In re Harbert*, 85 Wn.2d 719 (1975), where
21 the Washington Supreme Court held that, in a bench trial, the trial judge properly did not
22 exclude inflammatory evidence, because “ a trial judge is presumed to know the rules of
23 evidence and is presumed to have considered *only* the evidence properly before the court and
24 for proper purposes.” *Id.* at 729.

25 The WSDCC apparently believes that this Court is unable to “exclude ... improper
26 inferences from [its] mind in reaching a decision.” *Gulf States Utils.*, 635 F.2d at 519.

27 Petitioners believe the Court can properly weigh the evidence before it. Even if the Voter Files

1 contain inaccuracies as alleged by WSDCC, they nonetheless remain admissible. Any
2 inaccuracies merely go to the weight to be accorded the Files, not their admissibility. *State v.*
3 *Ben-Neth*, 34 Wn. App. 600, 602 n.2 (1983).

4 **C. There Is No “Best Available Evidence” Rule Requiring Exclusion of the**
5 **Voter Files.**

6 In a last-ditch effort to exclude the Voter Files, WSDCC cites four cases that it claims
7 require exclusion of the Voter Files as “secondary evidence,” notwithstanding their otherwise
8 obvious admissibility. Mot. at 11-12. Its effort fails; none of the cases support excluding the
9 Voter Files.

10 Two of those cases, *Larson v. A.W. Larson Const. Co.*, 36 Wn.2d 271, 279 (1950), and
11 the dissent in *Minor v. United States*, 375 F.2d 170, 181 (8th Cir. 1967) (Heaney, J.,
12 dissenting), discuss the best evidence rule now codified in ER 1002 and 1003. Under ER 1002,
13 an original writing is required to prove the contents of that writing except under the
14 circumstances set forth in ER 1003. Those rules do not in any way support excluding the Voter
15 Files. They certainly do not require Petitioners to introduce something other than the Voter
16 Files to prove that illegal votes were cast.

17 Another case cited by WSDCC, *Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 418
18 (2002), has to do with proof of lost profits. At one time, a new business with no history of
19 profits could not recover lost profit damages. This rule was later changed to allow proof of lost
20 profits using “the best evidence available” even if there was no history of profits. As *Eagle*
21 *Group* notes, the rule is not one of admissibility. Rather, it “pertains to the substance of the
22 evidence, not its source.” “[T]he reliability of such evidence is for the trier of fact,” not the
23 judge as evidence gatekeeper, “to determine.” *Id.* at 418-19. This special rule of proof of lost
24 profits has no application to election contests.

25 The final case cited by WSDCC, *Pneumo Abex Corp. v. Bessemer and Lake Erie R.R.*
26 *Co., Inc.*, 936 F. Supp. 1250, 1258-59 (E.D. Va. 1996), addresses the admissibility under Fed.
27 R. Evid. 1006 of a summary of voluminous documents. Not surprisingly, the case held

OPPOSITION TO WSDCC'S MOTION IN LIMINE
TO EXCLUDE VOTER CREDITING EVIDENCE - 6

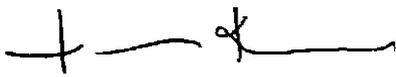
1 inadmissible a purported summary that contained "numerous inaccuracies and discrepancies."
2 *Id.* at 1258. The Voter Crediting Files are not a summary of voluminous documents, offered
3 under ER 1006, whose admissibility turns on their status as an accurate summary. Rather, they
4 are independently admissible public and business records. *Pneumo Abex* thus does not support
5 exclusion of the Voter Files.

6 **IV. CONCLUSION**

7 Counties are required to maintain voter crediting records by RCW 29A.08.125. These
8 records are used, among other purposes, to prevent voters from casting more than one ballot.
9 These records are competent evidence that a person voted. WSDCC is free to argue at trial that
10 certain counties' records are faulty, but that attack goes to the weight on the evidence, not its
11 admissibility. For the foregoing reasons, the Court should deny WSDCC's Motion in Limine
12 to Exclude Evidence of "Voter Crediting" and to Require Petitioners to Introduce the Best
13 Evidence of Voting.

14 DATED this 20th day of April, 2005.

15 Davis Wright Tremaine LLP
16 Attorneys for Petitioners

17
18 By 
19 Harry J. F. Korrell, WSBA #23173
20 Robert Maguire, WSBA #29909

1 Elections, and Licensing Services Division. As the final version of the transcript is not yet
2 available, Mr. Logan has not yet had the opportunity to review and make any changes to
3 his testimony.

4 I declare under penalty of perjury under the laws of the State of Washington that
5 the foregoing is true and correct.

6
7 Executed at Seattle, Washington, this 20th day of April, 2005.

8
9 

10 _____
11 HARRY KORRELL
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

TIMOTHY BORDERS, et al,)	
)	
Petitioners,)	No. 05-2-00027-3
v.)	
KING COUNTY, et al,)	
)	
Respondents,)	
and)	
Washington State Democratic Central)	
Committee,)	
)	
Intervenor Respondent,)	
and)	
Libertarian Party of Washington)	
State, et al,)	
)	
Intervenor Respondents.))	

DEPOSITION UPON ORAL EXAMINATION OF
DEAN LOGAN

Monday, April 18, 2005
9:00 a.m.
Davis Wright Tremaine
1501 Fourth Avenue, Suite 2600
Seattle, Washington

DRAFT * DRAFT * DRAFT * DRAFT

Laurie E. Heckel, CSR, RPR
Court Reporter
CSR License No. HE-CK-EL-E386DM

□
1
2
3
4
5

Monday, April 18, 2005
Seattle, Washington

A P P E A R A N C E S

For the Petitioners:	ROB MAGUIRE
	Attorney at Law
	Davis Wright Tremaine
	1501 Fourth Avenue
	Page 1

Suite 2600
Seattle, Washington 98101-1688

6

7 For the Respondents:

DON PORTER
JANINE JOLY
Senior Deputy Prosecuting Attorneys
E550 King County Courthouse
Seattle, Washington 98104-2312

8

9

10 For the Intervenor
Respondent Washington
11 State Democratic Central
Committee:

KEVIN J. HAMILTON
Attorney at Law
1201 Third Avenue, Suite 4800
Seattle, Washington 98101-3099

12

13 For Secretary of State:

JEFFREY T. EVEN
Assistant Attorney General
1125 Washington Street SE
P. O. Box 40100
Olympia, Washington 98504-0100

14

15

16 For Snohomish County:

MICHAEL HELD
Snohomish County Deputy
Prosecuting Attorney
3000 Rockerfeller, MS 500
Everett, Washington 98203

17

18

19 Also present:

PETER SCHALESTOCK
Rossi Campaign

20

21

MIKE SHERIDAN
Political Director
Washington State Republican Party

22

23

BRAD HENRY
Libertarian Party Representative

24

25

DAVID McDONALD
Washington State Democratic Central
Committee Representative

26

27

3

28

Monday, April 18, 2005
Seattle, Washington

29

I N D E X

30

31 Witness: DEAN LOGAN:

Page

32

33 Examination by Mr. Maguire

34

35

E X H I B I T S

36

37 No. Description

Marked/ID'd

38

39

20 in-house. In other words staff would sort those and put them
21 into batches associated by legislative district.

22 Q Is the same process followed for absentee ballots returned to
23 poll sites in the vote mobile?

24 A Yes. I mean, the absentee ballots returned to poll sites on
25 election day are handled similar to what we talked about with

□ 69

1 provisional ballots in terms of the voter is instructed to
2 put it in that secured side bin at the base of the unit of
3 the Accuvote voting machine, and then they are retained,
4 accounted for at the close of the poll, sealed into a secured
5 secured pouch or envelope, and brought back and retrieved
6 from those envelopes the same as provisional ballots are, and
7 once accounted for in the accounting process, those are
8 sealed up and sent to MBOS for in-house batching and
9 processing.

10 Q For ballots that you were go in-house batching, what records
11 are kept of the batch, the batches?

12 A I'm not sure I completely understand the question. I mean
13 there is a record that -- of when the batch was created how
14 many ballots are in the batch and there is a batch slip that
15 accompanies that batch throughout the process.

16 Q If a person votes absentee and their ballot is counted, in
17 what precinct -- hour they credited with voting or where are
18 they credited with voting?

19 A Their credited with voting in the voter registration and
20 election management system based on the up [lode|load] of
21 that batch. So when that batch is up loaded to begin the
22 signature verification process they're credited with voting.
23 That crediting is removed threw the use of challenge codes if
24 there is some reason why that ballot is pulled out of the

25 batch. For instance if the signature doesn't match or if the

□ 70

1 ballot is unsigned or signed by somebody other than the
2 registered voter that type of thing then they put in a
3 challenge code that then essentially removes the crediting of
4 that vote.

5 Q Okay. Let me make sure I understand it. For ballots that
6 are received in the mail their taken to a vendor who creates
7 a file and part of that file credits the person with voting
8 once it is up loaded to the election data base?

9 A That's my understanding of a -- of the technical process. So
10 the vendor is not crediting the voting. They're creating an
11 upload of data associated with the bar codes that are read on
12 those ballots and then when that is uploaded into our voter
13 registration and elections system, it credits that person
14 with having returned that absentee ballot, and that
15 maintains -- that stays with that voter's record to credit
16 them with voting unless a challenge code is entered to
17 indicate that that ballot has been challenged in some way

18 Q And the basis for -- what are the basis for challenging?

19 A If the signature doesn't match, if the ballot was unsigned,
20 if somebody else signed the ballot. And later in the process
21 if that -- if a challenge code has been put in to indicate
22 that that voter also voted a provisional ballot, as we
23 discussed before, that be another challenge code.

24 Q so if that happens an election worker must manually input a
25 challenge code into the data base?

□ 71

1 A If which happens?

2 Q If the signature doesn't match, or the ballot is unsigned or

23 already discussed from the November election?

24 A No not other than the ones we've already discussed.

25 Q Okay. Let's move onto an entirely [HRAO-E] different topic

0 200

1 Let's talk about people who are not US citizens who try to
2 vote. What safeguards if any to keep people who are not US
3 citizens from voting in King County?

4 A I don't know that there is a difference between King County
5 and any other jurisdiction in the state of Washington in that
6 regard from an election standpoint similar to our discussion
7 on the issue of felons we are compelled under state and
8 federal law to process voter registration voter applications
9 that are complete on their face. And that again the oath
10 includes a statement stating that these people are aware
11 [S-EFT]ing to the fact that they are citizens of the United
12 States and that they meet the other requirements to be
13 registered voters so there is not a process contemplated in
14 Washington state or federal voter registration laws for fair
15 [SRA-U] indication of citizenship beyond that
16 attestation by the applicant. If we were presented with
17 evidence that indicated to us that people were that none
18 citizens were registering and voting, we would present that
19 to the prosecuting attorneys office similar to our previous
20 discussion about felons, but beyond that our operation is
21 really designed around facilitating voter registration and
22 facilitating the voting process for those people who are
23 registered.

24 Q Do you know of any non citizens, non US citizens who voted
25 in the November general election in King County?

0 201

1 A I am aware of two non citizens who came in after the election
2 to our office identified the fact that they had cast a ballot
3 in the November election and filled out forms to have their
4 registrations cancelled. They asked for copies of those
5 cancellation forms so that they could provide them to
6 whatever the new agency is that used to be immigration and
7 naturalizaiton services. I did not speak to these two
8 individuals directly. My understanding from staff was that
9 there was not an indication -- or that there was an
10 indication that they were not -- that they did not understand
11 at the time that they registered that they were doing
12 something that they should not be doing. Since that time we
13 have forwarded copies of all of that information to the
14 prosecuting attorneys office for their review to determine if
15 there was any if there is any further action warranted.

16 Q Other than none citizens turning themselves in, is there any
17 other way that King County would know if a none sit [S-EPB]
18 voted in the November election?

19 A No, not that time aware of.

20 Q Now I'd like to talk a little bit more about crediting and
21 reconciliation process. Has King County attempted to
22 reconcile the number of ballots cast with the number of
23 voters credited with voting in the November election?

24 A Yes, we have.

25 Q Have you been able to reconcile the number of ballots cast

□ 202

1 with the number of voters credited with voting?

2 A We have been able to reconcile that down to a certain
3 number. We've not -- we have not got a one for one match
4 between ballots cast and voters credited for voting.

5 Q What is that certain number?



Davis Wright Tremaine LLP

ANCHORAGE BELLEVUE LOS ANGELES NEW YORK PORTLAND SAN FRANCISCO SEATTLE SHANGHAI WASHINGTON, D.C.

HARRY KORRELL
DIRECT (206) 628-7680
harrykorrell@dwt.com

2600 CENTURY SQUARE
1501 FOURTH AVENUE
SEATTLE, WA 98101-1688

TEL (206) 622-3150
FAX (206) 628-7699
www.dwt.com

April 20, 2005

Hon. John Bridges
Chelan County Superior Court
Department No. 3
401 Washington Street
Wenatchee, WA 98807

Re: Borders v. King County *et al.*,
Chelan County Superior Court Cause No. 05-2-00027-3

Dear Judge Bridges:

Pursuant to LR 5(d)(5), enclosed please find out-of-state authorities referred to by Petitioners in their Opposition to WSDCC's Motion in Limine to Exclude Evidence of "Voter Crediting" and to Require Petitioners to Introduce the Best Evidence of Voting.

Very truly yours,

Davis Wright Tremaine LLP

A handwritten signature in black ink, appearing to be 'Harry Korrell', written over a horizontal line.

Harry Korrell

Enclosures

▷

United States Court of Appeals,
Fifth Circuit.
Unit A
GULF STATES UTILITIES COMPANY, Plaintiff-
Appellant,
v.
ECODYNE CORPORATION et al., Defendants-
Appellees.
No. 79-3342.
Jan. 30, 1981.

Action was brought to recover damages for defective design and faulty selection of materials in connection with two cross-flow induced draft cooling towers for which defendant had supplied design services and materials and had supervised construction pursuant to a contract with plaintiff. The United States District Court for the Western District of Louisiana, Edwin F. Hunter, Jr., J., rendered judgment for defendant, and plaintiff appealed. The Court of Appeals, Charles Clark, Circuit Judge, held that: (1) provision of evidence rule governing weighing of probative value of evidence against prejudice has no logical application to bench trials; (2) in instant bench trial it was reversible error to exclude evidence that similar towers built by defendant had experienced similar structural failures, with plaintiff also offering a copy of complaint filed by defendant against supplier of redwood used in such towers; (3) district court properly looked to Louisiana law to determine question of prescription; (4) instant contract was not a "sale" subject to a redhibitory action; and (5) although by contract, plaintiff's remedies were limited to repairing defective work within eighteen months after delivery of materials, such limitation was not effective to constitute a waiver of Louisiana statutory warranties applicable to a building.

Vacated and remanded.

West Headnotes

[1] Evidence  146

157k146 Most Cited Cases

Provision of evidence rule governing exclusion of relevant evidence based on a weighing of probative value against prejudice has no logical application to bench trials; excluding relevant evidence in a bench trial because it is cumulative or a waste of time is

clearly a proper exercise of the judge's power, but excluding relevant evidence on the basis of "unfair prejudice" is a useless procedure. Fed.Rules Evid. Rule 403, 28 U.S.C.A.

[2] Federal Courts  901.1
170Bk901.1 Most Cited Cases
(Formerly 170Bk901)

[2] Negligence  1635
272k1635 Most Cited Cases
(Formerly 272k125)

In bench tried actions seeking damages for defective design and faulty selection of materials used in constructing two cooling towers it was reversible error to exclude, on ground that probative value was outweighed by possibility of prejudice, plaintiff owner's evidence regarding failures and material defects related to similar design work and material procurement by defendant, with plaintiff attempting to prove that similar towers built by defendant had experienced similar structural failures and offering copy of complaint filed by defendant against supplier of redwood used in such towers. Fed.Rules Evid. Rules 401, 403, 28 U.S.C.A.

[3] Federal Courts  891
170Bk891 Most Cited Cases

Major policy underlying the harmless error rule is to preserve judgments and avoid waste of time.

[4] Federal Courts  423
170Bk423 Most Cited Cases

In diversity action seeking damages for defective design and faulty selection of materials used in cooling towers the district court properly looked to the Louisiana law to determine the question of prescription, although prescription in civil law does not necessarily correlate to limitations in common law. LSA-C.C. arts. 1764, 2520, 2534, 2762.

[5] Sales  130(.5)
343k130(.5) Most Cited Cases
(Formerly 343k130)

To be a redhibitory action under Louisiana law, the underlying transaction must be a sale. LSA-C.C. arts. 2520, 2534.

[6] Sales  130(.5)
343k130(.5) Most Cited Cases

(Formerly 343k130)

Contract whereby defendants supplied design services and materials and supervised construction of two cross flow induced draft cooling towers for plaintiff, seeking damages for alleged defective design and faulty selection of materials, did not constitute a "sale" which could be the subject of a redhibitory action under Louisiana law. LSA-C.C. arts. 2520, 2534.

[7] Contracts  **108(2)**
95k108(2) Most Cited Cases

It is not against Louisiana public policy for parties to a contract to waive the statutory warranty in regard to a building. LSA-C.C. art. 2762.

[8] Contracts  **205.35(4)**
95k205.35(4) Most Cited Cases

(Formerly 95k205)

Although contract whereby defendant agreed to supply design services and materials and supervise construction of cooling towers for plaintiff stated that warranty was for 12 months after startup but not to exceed 18 months after delivery of material, such was not effective under Louisiana law to constitute waiver of statutory warranty applicable to a building. LSA-C.C. art. 2762.

*518 Stockwell, Sievert, Viccellio, Clements & Shaddock, Robert W. Clements, Lake Charles, La., for plaintiff-appellant.

Scofield, Bergstedt & Gerard, Lake Charles, La., for Ecodyne Corp.

Faris, Ellis, Cutrone, Gilmore & Lautenschlaeger, Clarence A. Frost, New Orleans, La., for Lloyd's of London.

Appeal from the United States District Court for the Western District of Louisiana.

Before COLEMAN, Chief Judge, CHARLES CLARK and REAVLEY, Circuit Judges.

CHARLES CLARK, Circuit Judge:

In this action tried to the court seeking damages for defective design and faulty selection of materials, the district court excluded evidence regarding failures and material defects related to similar design work and material procurement by the defendant. We vacate the judgment of the district court.

*519 Pursuant to a contract, Ecodyne Corporation,

supplied design services and materials and supervised construction of two cross-flow induced draft cooling towers for Gulf States Utilities Company. The towers were completed and placed in commercial operation in July 1970. One of the towers (Tower A) suffered two structural failures in November 1973. The other tower (Tower B) was taken out of operation shortly thereafter. Gulf States brought suit against Ecodyne claiming that Ecodyne had negligently designed the towers and had negligently selected the materials used in constructing the towers, which acts of negligence were claimed to have been the cause of the failure of Tower A. The district judge held that Gulf States had failed to carry its burden of proof regarding the cause of the structural failure. Judgment was accordingly rendered for Ecodyne.

During the course of the bench trial, Gulf States attempted to prove that similar towers built by Ecodyne had experienced similar structural failures. Gulf States also offered a copy of a complaint filed by Ecodyne in the Superior Court of California, against the California Redwood Association, et al., Ecodyne's supplier of redwood. That complaint alleged that the redwood supplied to Ecodyne was inferior in quality and that misrepresentations were made to Ecodyne regarding the quality of the redwood. The allegations strongly implied that the cause of failures of several towers built by Ecodyne, including Tower A built for Gulf States, was the failure of the wood to meet specifications. Gulf States makes the same allegations against Ecodyne in the instant case.

As the district judge recognized, this evidence was relevant under Fed.R.Evid. 401. See Ramos v. Liberty Mutual Insurance Co., 615 F.2d 334, 338-339 (5th Cir. 1980). The district judge refused to admit the proof of other failures and the California complaint into evidence on the ground that, although relevant, the evidence was inadmissible under Fed.R.Evid. 403. The district judge reasoned that the evidence would be prejudicial to a jury and that since he would not let a jury hear the evidence, he should not hear it in a bench trial.[FN1]

FN1. Gulf States' brief seems to imply that the trial judge may have excluded this evidence thinking that he had a jury present. We reject this notion completely.

[1][2][3] The exclusion of this evidence under Rule 403's weighing of probative value against prejudice was improper. This portion of Rule 403 has no

logical application to bench trials.[FN2] Excluding relevant evidence in a bench trial because it is cumulative or a waste of time is clearly a proper exercise of the judge's power, but excluding relevant evidence on the basis of "unfair prejudice" is a useless procedure. Rule 403 assumes a trial judge is able to discern and weigh the improper inferences that a jury might draw from certain evidence, and then balance those improprieties against probative value and necessity. Certainly, in a bench trial, the same judge can also exclude those improper inferences from his mind in reaching a decision. The significant question is whether the trial judge's action here produces an error or defect that affected substantial rights of Gulf States. 28 U.S.C. s 2111; Fed.R.Civ.P. 61.[FN3] The judge heard the offer of proof but said he would not consider this evidence in making his factual determinations. We have no choice but to believe him. He is trained to recognize and to exclude those matters which the rules of evidence require be discarded. Indeed, in this very case the trial judge acknowledged the possibility that this court might disagree with his ruling and direct him to consider this evidence. That possibility has now materialized. The major policy underlying *520 the harmless error rule is to preserve judgments and avoid waste of time. Discarding a jury verdict is extremely wasteful. Requiring a district judge to examine more evidence and re-evaluate his decision is not nearly so prodigal.

[FN2. Counsel for Ecodyne point us to many of our cases holding that a trial judge has broad discretion under Rule 403 to exclude or admit relevant evidence. These cases, involving civil and criminal jury trials, are not on point. See, e. g., King v. Ford Motor Co., 597 F.2d 436, 445 (5th Cir. 1979); U. S. v. Frick, 588 F.2d 531, 537 (5th Cir. 1979); U. S. v. McDaniel, 574 F.2d 1224, 1227 (5th Cir. 1978); U. S. v. Tidwell, 559 F.2d 262, 267 (5th Cir. 1977).

[FN3. See also 11 Wright and Miller, Federal Practice and Procedure, Civil ss 2881-83, 2885 (1973).

Gulf States also claims that the district court erred in articulating and applying the burden of proof. Their argument is bolstered by the statement of the district judge that "no one is able to pinpoint the precise cause" of the tower's failure. Reading the ruling as a whole, however, we are convinced that the district judge correctly applied the proper test. He noted from Lombard v. Sewerage and Water Board of New

Orleans, 284 So.2d 905, 913 (La.1973), that to be actionable a cause must be a substantial cause in fact, but it need not be the sole cause. The district court then found that design overload was a relatively minor cause and that Gulf States' theory was no more plausible than other theories of the mechanics of collapse which would not lead to Ecodyne's liability. This led to the conclusion that Gulf States had not carried the plaintiff's burden of proving that its theory was more likely true than not. We agree. Under the evidence admitted, Gulf States did not carry its burden. We express no opinion as to whether Gulf States will carry its burden when the evidence erroneously excluded is considered. That is for the district court to determine anew.

Gulf States also challenges the alternate ruling of the district court that should Gulf States prevail on appeal on the liability issue, their recovery would not include any damages for Tower B, which was voluntarily taken out of operation. In the opinion of the district court, Tower B might still be operating today had it not been dismantled. The district court held there was no proof that the materials used in Tower B were the same as those used in Tower A, even though Ecodyne's Supervisor of Quality Assurance testified that all material for both towers came through the Santa Rosa yard. Since new considerations on remand could also affect the district court's view on this matter, we vacate this alternate ruling.

Our disposition of this appeal requires that we address two other issues. Ecodyne moved the district court for summary judgment, claiming that this action had prescribed under the applicable Louisiana statute and that the warranty provisions of the contract provided Gulf States' sole remedy.

[4] The district court properly looked to Louisiana law to determine the question of prescription. Though prescription in civil law does not precisely correlate to limitations in common law, it is sufficiently equivalent to require us, in this diversity suit, to consult Louisiana law. Guaranty Trust Co. of New York v. York, 326 U.S. 99, 109, 65 S.Ct. 1464, 1470, 89 L.Ed.2d 2079, 2086 (1945).

[5][6] Ecodyne argued that the one-year prescription found in Article 2534, La.Civ.Code Ann. (West 1952), applied to this action. That article provides: "The redhibitory action must be instituted within a year, at the farthest, commencing from the date of sale." Redhibition is defined in Article 2520:

Redhibition is the avoidance of a sale on account of

some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it, had he known of the vice.

Thus, to be a redhibitory action the underlying transaction must be a sale. See Yeargain v. Blum, 144 So.2d 756 (La.App.1962). The district court held Article 2534 inapplicable because it concluded that the contract between Gulf States and Ecodyne was not a contract of sale. This conclusion was based upon Ecodyne's duties to supply materials, to design the towers, to supervise the erection, installation, and preliminary operation, and to verify the design performance of the towers. The district court noted that a contrary characterization was made, on similar facts, in FMC Corp. v. Continental Grain Co., 355 So.2d 953 (La.App.1977), but correctly distinguished FMC from the instant case. The issue before the FMC court was not prescription but the applicability of *521 the statutory warranty for buildings. The court held that the warranty was inapplicable to sales contracts and, alternatively, that it had been waived. While the first alternative holding might point us to a similar characterization of this contract, that holding is accompanied by so much undermining language that we would hesitate to rely on it. See id. at 957. Further, the same Louisiana Court of Appeals that decided FMC had previously decided Yeargain v. Blum, *supra*, and specifically refused to apply the redhibitory prescription period to defective performance under a building and installation contract. 144 So.2d at 758. The district court's denial of Ecodyne's motion for summary judgment on the ground of prescription was correct. Since Ecodyne presses for no other limitation provision, we need not determine exactly which prescriptive article would apply to this cause.

[7][8] Finally, Ecodyne argues that the sole remedy of Gulf States is that found in the contract: "The Seller agrees ... that the Seller shall replace, repair or make good, without cost to the Purchaser, any defects or faults arising within one year after date of acceptance of articles furnished hereunder ... resulting from imperfect or defective work done or materials furnished by the Seller." This provision in the original "purchase order" was modified by the parties by adding this language: "With regard to Terms and Conditions, Item # 5, Guarantee, we understand (Ecodyne's) Warranty will be for a period of twelve (12) months after startup, but not to exceed eighteen (18) months after delivery of material to jobsite."

Article 2762, La.Civ.Code Ann. (West 1952), provides a statutory warranty [FN4] that all parties agree is applicable unless it has been waived. [FN5] Ecodyne again cites FMC and asserts that FMC held that the language in the contract at issue there was sufficient to supplant the statutory warranty. The warranty provision in FMC's contract contained a crucial sentence not found in Ecodyne's contract: "The foregoing is in lieu of all other warranties (including that of merchantability), whether express or implied." FMC, 355 So.2d at 956. FMC is distinguishable on this account alone.

FN4. Article 2762 reads:

If a building, which an architect or other workman has undertaken to make by the job, should fall to ruin either in whole or in part, on account of the badness of the workmanship, the architect or undertaker shall bear the loss if the building falls to ruin in the course of ten years, if it be a stone or brick building, and of five years if it be built in wood or with frames filled with bricks.

FN5. It is not against Louisiana's public policy for parties to a contract to waive the statutory warranty. See Freeman v. Department of Highways, 253 La. 105, 217 So.2d 166 (1968).

Even construing the language in the Ecodyne-Gulf States contract so as to resolve any ambiguity against Gulf States, [FN6] as Ecodyne urges us to do, that language does not exclude, modify, or limit the statutory warranty. The language, quoted above, does not even hint that it is intended to supply the sole warranty or to limit or exclude other warranties. We think the principle that the warranty of fitness implied by Article 1764, La.Civ.Code Ann. (West 1952), may be waived only by explicit language [FN7] would be applied to this construction contract by Louisiana courts.

FN6. The contract form was supplied by Gulf States' agent, Stone & Webster Engineering Corporation.

FN7. See Guillory v. Morein Motor Co., Inc., 322 So.2d 375 (La.App.1975).

Because the district court correctly denied Ecodyne's motion for summary judgment on the ground of the exclusive remedy in the contract's warranty clause, we need not address the district court's alternative ground for denial, that the contract's warranty

provisions do not apply to design defects.

We vacate the judgment of the district court and remand the case for further proceedings, leaving to the district court's discretion determination of what further hearings or proceedings are necessary upon remand.

VACATED and REMANDED.

635 F.2d 517, 7 Fed. R. Evid. Serv. 876

END OF DOCUMENT

H

United States Court of Appeals Eighth Circuit.
Asa Hurrial MINOR, Jr., Appellant,
v.
UNITED STATES of America, Appellee.
No. 18408.

March 13, 1967, Rehearing Denied April 21, 1967.

Defendant was convicted on verdict in the United States District Court for the Eastern District of Arkansas, Gordon E. Young, J., of interstate transportation of a stolen automobile, and he appealed. The Court of Appeals, Van Oosterhout, Circuit Judge, held that where none of errors asserted in Court of Appeals was raised in trial court nothing was before court for review absent plain error, and that no plain error was shown.

Affirmed.

Heaney, Circuit Judge, dissented.

West Headnotes

[1] Criminal Law  **1030(1)**

110k1030(1) Most Cited Cases

Where none of errors asserted in Court of Appeals was raised in trial court nothing was before court for review absent plain error.

[2] Criminal Law  **641.4(2)**

110k641.4(2) Most Cited Cases

Right to counsel may be waived as long as waiver is knowingly and intelligently made.

[3] Criminal Law  **641.10(1)**

110k641.10(1) Most Cited Cases

The Constitution does not force an unwanted attorney upon a defendant.

[4] Criminal Law  **641.4(1)**

110k641.4(1) Most Cited Cases

Accused may before trial elect to conduct his own defense.

[5] Criminal Law  **641.4(5)**

110k641.4(5) Most Cited Cases

Once accused has properly waived right to counsel effects flowing from decision must be accepted by

him together with benefits which he presumably sought to obtain therefrom; accused who elects to waive constitutionally guaranteed right of counsel does so at his own risk and must accept consequences of his action.

[6] Criminal Law  **1028**

110k1028 Most Cited Cases

Defendant who has knowingly and intelligently elected to waive counsel and has deliberately chosen to act as his own attorney is afforded all protection to which he is justly entitled in event trial results in clear miscarriage of justice by plain error rule. Fed.Rules Crim.Proc. rule 52(b). 18 U.S.C.A.

[7] Criminal Law  **1028**

110k1028 Most Cited Cases

Resort to plain error rule is appropriate only in exceptional cases where such course is necessary to prevent clear miscarriage of justice. Fed.Rules Crim.Proc. rule 52(b). 18 U.S.C.A.

[8] Automobiles  **355(12)**

48Ak355(12) Most Cited Cases

Evidence sustained conviction for interstate transportation of stolen automobile. 18 U.S.C.A. § 2312.

[9] Receiving Stolen Goods  **8(4)**

324k8(4) Most Cited Cases

Possession of property recently stolen, if not satisfactorily explained, is ordinarily circumstance from which jury may reasonably draw inference and find in light of surrounding circumstances shown by evidence in case that person in possession knew property had been stolen.

[10] Automobiles  **355(12)**

48Ak355(12) Most Cited Cases

Jury was not compelled to accept defendant's uncorroborated explanation of his possession of stolen automobile in prosecution for interstate transportation of stolen automobile. 18 U.S.C.A. § 2312.

[11] Criminal Law  **1035(2)**

110k1035(2) Most Cited Cases

Reception of evidence with respect to first count of two-count indictment for interstate transportation of

stolen automobiles, which count was dismissed by court on its own motion, was not plain error where no request for severance was made, transactions involved in each of the counts were closely related, and both vehicles were discovered at the same place and at the same time. Fed.Rules Crim.Proc. rules 8, 14, 18 U.S.C.A.; 18 U.S.C.A. § 2312.

[12] Criminal Law  **1036.5**

110k1036.5 Most Cited Cases

(Formerly 110k1036(5))

Admission of hearsay testimony in prosecution for interstate transportation of stolen automobiles was not plain error where testimony was merely cumulative. 18 U.S.C.A. § 2312.

[13] Jury  **33(1.1)**

230k33(1.1) Most Cited Cases

(Formerly 230k33(1))

Evidence did not support claim that jury panel was not selected in constitutional manner and that panel did not represent fair cross section of community.

*171 John W. Walker, Little Rock, Ark., for appellant and filed brief.

Lindsey J. Fairley, Asst. U.S. Atty., Little Rock, Ark., for appellee and filed brief with Robert D. Smith, Jr., U.S. Atty., Little Rock, Ark.

Before VAN OOSTERHOUT, GIBSON and HEANEY, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

This is an appeal by the defendant Asa Hurrial Minor, Jr., from his conviction by a jury on Count II of an indictment charging him with the transportation of a specifically described Chevrolet automobile in interstate commerce from Indiana to Arkansas, knowing said motor vehicle *172 to have been stolen in violation of 18 U.S.C.A. § 2312. Defendant was sentenced to two years imprisonment. The court on its own motion dismissed Court I of the indictment which charged interstate transportation of another automobile upon the ground that proof that such automobile was stolen was insufficient.

Defendant represented himself in the trial court. His right to counsel, including right to court-appointed counsel without expense to him, was fully explained. Defendant persistently declined counsel and insisted upon representing himself. The court just prior to the opening of the trial again offered to provide counsel. Defendant has not, either in the trial or here, raised

the issue that he has been deprived of his constitutional right to be represented by counsel. He is represented on this appeal by competent counsel and raises no brief point that his waiver of counsel in the trial court was not knowingly and intelligently made, nor does he in any way intimate or suggest that he has been wrongly deprived of his constitutional right to counsel. Hence, the issue of denial to defendant of his right of counsel is not now before us.

Defendant urges he is entitled to a reversal for the following reasons: (1) Insufficiency of the evidence to support the guilty verdict. (2) Admission of prejudicial evidence and failure to give instruction limiting the consideration of such evidence. (3) The jury was unconstitutionally selected.

[1] None of the errors here asserted was raised in the trial court. No motion for acquittal was made; no objection was made to any evidence offered; no exception to or request for instructions was made and there was no challenge to the jury panel. Thus absent a plain error situation, there is nothing before us for review. 'A trial judge ordinarily should not be held to have erred in not deciding correctly a question that he was never asked to decide.' Page v. United States, 8 Cir., 282 F.2d 807, 810; Petschl v. United States, 8 Cir., 369 F.2d 769.

[2] Defendant attempts to excuse his failure to preserve errors here asserted by a contention that he is unskilled and unknowledgeable in the law. It is well settled that the right to counsel may be waived as long as the waiver is knowingly and intelligently made. Moore v. State of Michigan, 355 U.S. 155, 161, 78 S.Ct. 191, 2 L.Ed.2d 167; Carter v. People of State of Illinois, 329 U.S. 173, 177, 67 S.Ct. 216, 91 L.Ed.172; Johnson v. Zerbst, 304 U.S. 458, 463, 58 S.Ct. 1019, 82 L.Ed. 1461.

[3][4][5] The Constitution does not S.Ct. 216, 91 L.Ed. 172; Johnson v. Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268; United States v. Washington, 3 Cir., 341 F.2d 277, 285. The accused may before trial elect to conduct his own defense. Price v. Johnston, 334 U.S. 266, 285, 68 S.Ct. 1049, 92 L.Ed. 1356; United States ex rel. Maldonado v. Denno, 2 Cir., 348 F.2d 12, 15; Johnson v. United States, 8 Cir., 318 F.2d 855, 856; Butler v. United States, 8 Cir., 317 F.2d 249, 258. However, as aptly stated by the Court of Appeals for the Fifth Circuit: 'Once it is found * * * that such an accused has properly waived his right to counsel, the effects flowing from that decision must be accepted by him, together with the benefits which

he presumably sought to obtain therefrom.' Smith v. United States, 5 Cir., 216 F.2d 724, 727. Thus, when accused elects to waive his constitutionally guaranteed right of counsel, he does so at his own risk and must accept the consequences of his action. United States v. Redifield, D.C.Nev., 197 F.Supp. 559, 572, affirmed on the basis of the trial court's opinion, 9 Cir., 295 F.2d 249.

Sound policies of judicial administration as prescribed by the Rules of Criminal Procedure should apply to all trials whether conducted by counsel or by a defendant. Otherwise, defendant would in practical effect be given two trials, one in which he conducts his own defense and if unsuccessful, another trial with representation by counsel.

*173 [6] In the event the trial results in a clear miscarriage of justice, the 52(b) plain error rule affords a defendant representing himself all of the protection to which he is justly entitled when he has knowingly and intelligently elected to waive counsel and has deliberately chosen to act as his own attorney.

A careful examination of the record shows that no plain error has been committed and that defendant has had in all respects a fair trial. Defendant by representing himself secured many advantages that would not have been available to him had he been represented by counsel. Defendant was permitted to testify in narrative form and was permitted to say everything that he desired to without restriction. He made his own opening statement to the jury, his own closing argument, and he was allowed to supplement his argument after the court had instructed the jury. Defendant cross-examined the witnesses and was given much more freedom than would have been afforded counsel. As heretofore pointed out, the court on its own motion at the close of the Government's case dismissed Count I and advised the defendant that he would not have to meet such charge. On several occasions, the court restricted the Government's testimony on its own motion. The instructions given are simple, easily understood and fair.

[7] Resort to the plain error rule is appropriate only in exceptional cases where such course is necessary to prevent a clear miscarriage of justice. Petschl v. United States, supra; Page v. United States, supra; Johnson v. United States, 8 Cir., 362 F.2d 43, 46; West v. United States, 8 Cir., 359 F.2d 50, 53; Gendron v. United States, 8 Cir., 295 F.2d 897, 902.

We find no plain error requiring a reversal has been committed and affirm the conviction.

[8] The evidence is clearly sufficient to support the guilty verdict. Title 18 U.S.C.A. 2312 reads: 'Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, Knowing the same to have been stolen, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.'

There is direct proof from the owner that the precise car involved in this offense was stolen from the Placke Chevrolet Company in St. Louis, Missouri, on September 24, 1964, and was reported stolen to the police at 7:30 p.m. on that date. The invoice of the manufacturer to the Placke Chevrolet Company showing ownership of the car in such company was introduced. After the car was recovered by the authorities, it was returned to such owner. Such evidence is not contradicted. Defendant himself stated to the jury, 'I believe this vehicle was stolen on the 24th of September. I came into acquisition of it about one month later.'

Defendant specifically admitted that he transported the car from Indiana to Arkansas where it was recovered. Thus the only element of the offense with respect to which any dispute exists is whether defendant knew the automobile was stolen at the time he transported it to Arkansas.

[9] The court in an instruction to the jury, not excepted to and not asserted to be error upon this appeal, told the jury:

'Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew that the property had been stolen, * * *'

The foregoing instruction contains a proper statement of the applicable law. Lee v. United States, 8 Cir., 363 F.2d 469, 474; Cloud v. United States, 8 Cir., 361 F.2d 627, 629; Harding v. United States, 8 Cir., 337 F.2d 254, 257.

As we point out in Harding, supra, the instruction here given differs materially from the supplemental instruction in Bollenbach v. United States, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350, relied upon by the defendant.

*174 [10] Defendant's defense is based upon his testimony that he was holding the car as security for a loan to Ellsworth Turner. He said that he had a chattel mortgage on the car but produced no evidence to prove that he did. The jury was not compelled to accept defendant's uncorroborated explanation of his possession of the car.

[11] Defendant's contention that plain error was committed in receiving certain evidence, not objected to, is without merit. Defendant went to trial on a two-count indictment charging two transportation offenses involving separate stolen automobiles. Such counts were properly joined in the same indictment under Rule 8, Fed.R.Crim.P., and no Rule 14 request for severance was made. Trial upon all counts of indictments such as this is the usual procedure. While Count I was before the jury, some evidence was introduced with respect to the stealing of the car there involved and the registration and transportation thereof. The transactions involved in each of the counts were closely related. Both cars were discovered at the same place and at the same time. The evidence offered was competent to support Count I at the time it was offered. Count I was subsequently dismissed by the court on its own motion. The defendant has failed to demonstrate that any prejudicial error was committed in the reception of such evidence.

[12] There is some hearsay testimony as to reports received by officers that the cars were stolen and that the license number and registration certificate on the Chevrolet did not pertain to the car involved in Count II but was issued for a 1950 Chevrolet owned by the defendant. No plain error was demonstrated. Such evidence is merely cumulative. The theft is shown by the direct testimony of the owner and the registration is shown by the license bureau officer's testimony. Complaint is also made of receiving evidence as to registration from the registration official without the introduction of the exhibits. The exhibits were in court. If objection had been made, the exhibits could have been readily identified and introduced. defendant could also have introduced the exhibits.

The Government made out a prima facie case by showing defendant's admitted possession of recently stolen property. The registration evidence was not essential to the Government's case. In any event, such evidence was not prejudicial.

[13] Defendant's final contention that the jury was

not selected in a constitutional manner, in that the panel does not represent a fair cross section of the community, is not supported by the record. No challenge was made nor was any evidence offered in support thereof in the trial court. All we have before us is an attachment to defendant's brief showing a list of jurors called to serve on October 17, 1966, and purporting to list the occupations of most of such jurors. This is not the jury that tried the defendant. He was tried on April 5, 1966.

We are satisfied that there is no record support for defendant's contention. Even if the list submitted on appeal is considered, it falls far short of meeting the burden resting upon the defendant to show that the jury which convicted him was improperly constituted.

We hold that none of the errors asserted upon this appeal were properly raised in the trial court and that none of the errors urged constitute plain error under Rule 52(b). The defendant has had in all respects a fair trial.

The judgment of conviction is affirmed.

HEANEY, Circuit Judge (dissenting).

Defendant Asa Minor, Jr., was charged by indictment February 14, 1966, in two counts. Count I charged that on or about October 1, 1964, he transported in interstate commerce a stolen 1964 Thunderbird automobile from Gary, Indiana, to Grady, Arkansas. Count II charged that on or about January 1, 1965, the defendant transported in interstate commerce a *175 stolen 1964 Chevrolet from Gary, Indiana, to Pine Bluff, Arkansas. Each count alleged the defendant knew that the automobiles were stolen.

The defendant, who represented himself, was tried by jury April 5, 1966, and was found guilty on the second count.

The trial judge permitted extensive hearsay testimony to be introduced which tended to establish that the Thunderbird automobile had also been stolen, and that the defendant had come into possession of the automobile a short time after the theft. At the close of the Government's case, the trial judge dismissed this count on the ground that no competent evidence had been introduced to show that the Thunderbird, in fact, had been stolen.

The court imposed a two-year sentence on the

defendant who appeals to this Court urging a reversal for the following reasons: (1) Insufficiency of the evidence to support the guilty verdict. (2) Admission of prejudicial evidence and failure to give instruction limiting the consideration of such evidence. (3) The jury was unconstitutionally selected. I concur with the majority opinion insofar as it relates to defendant's contentions that the jury was unconstitutionally selected. I respectfully dissent, however, on the grounds that the defendant did not voluntarily waive his constitutional rights to be represented by counsel, and that incompetent testimony, highly prejudicial to defendant, was received in evidence.

While no specific contention is made upon this appeal that the counsel was not knowingly and intelligently waived, [FN1] the defendant asserts that he ought to be excused for his failure to preserve errors in the trial court on the ground that he is unskilled and unknowledgeable in the law. While my colleagues hold that the issue of waiver is not now before us, thus preserving defendant's right in this regard, they point out that the defendant cannot be excused for failing to preserve errors as he was advised of and waived his right to counsel. Under these circumstances and in view of the fact that the defendant has the right to raise the issue in a subsequent habeas corpus petition or in a proceeding under *176 28 U.S.C.A. § 2255, [FN2] I feel that the issue should be resolved in this proceeding.

FN1. The Sixth Amendment of the Constitution provides that 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.' See also Rule 44, Federal Rules of Criminal Procedure; Johnson v. Zerbst, 304 U.S. 458, 462-463, 58 S.Ct. 1019, (1938), where the Court stated: '* * * The Sixth Amendment guarantees that 'In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.' This is one of the safeguards of the Sixth Amendment deemed necessary to insure

fundamental human rights of life and liberty. Omitted from the Constitution as originally adopted, provisions of this and other Amendments were submitted by the first Congress convened under that Constitution as essential barriers against arbitrary or unjust deprivation of human rights. The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer-- to the untrained laymen-- may appear intricate, complex and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to '* * * the humane policy of the modern criminal law * * * which now provides that a defendant * * * if he be poor, * * * may have counsel furnished him by the state * * * not infrequently * * * more able than the attorney for the state.'

FN2. 'Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with his constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence. If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the court-- as the Sixth Amendment requires-- by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life

or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. * * * Johnson v. Zerbst, supra, at 467, 58 S.Ct. at 1024.

The Court, in Johnson, specifically held that even though this issue was not raised at trial, it could be raised in a habeas corpus proceeding.

The following colloquy was recorded with reference to the defendant's right to counsel and his waiver thereof:

'The Court: Are you ready, Mr. Minor?

'The Defendant: Yes, sir.

'The Court: All right. Now, Mr. Minor, come around to that speaker please. (The defendant came close to the Bench.) No, you have no lawyer?

'The Defendant: That's right. I have no lawyer.

'The Court: You indicated that you did not wish to have a lawyer?

'The Defendant: True.

'The Court: And the Court offered to appoint you one, is that right?

'The Defendant: Yes, sir.

'The Court: Will you sign another waiver, please, Mr. Minor?

(The Defendant executed the document waiving his rights to have counsel.)

* * * Now, I previously, in chambers, discussed with Mr. Minor and the Clerk and the United States Attorney about-- I explained particularly to Mr. Minor-- about his right to challenge jurors, certain jurors. Ascertain from him, Mr. Cole, if he has any jurors he wishes to challenge.

(The Clerk conferred with Mr. Minor.)

'The Clerk: Your Honor, he doesn't desire to strike.

(At this time, a jury was empaneled to try the case.)

'The Court: Now, Members of the Jury, as in the last case, the defendant does not have a lawyer. He

desires to represent himself. He has a right to do it. There are always some problems about that because the defendant is not learned in the law, but the Court, as well as the United States Attorney, will see to it that his rights are protected. We want him to have just as fair and complete a trial as if he had a lawyer.

* * * [FN3]

FN3. Before the defendant took the stand, the court advised him of his right no to testify against himself.

The above record indicates that the trial court did little more than offer to appoint counsel and to accept a waiver. The Supreme Court, in Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948), held a similar procedure to be insufficient to establish a meaningful waiver. It then defined the responsibilities of the trial court:

'The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused-- whose life or liberty is at stake-- is without counsel. This protecting duty imposes the *177 serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.' To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.' Id. at 723, 68 S.Ct. at 323.

See also Kercheval v. United States, 274 U.S. 220, 223, 47 S.Ct. 582, 71 L.Ed. 839 (1927); United States v. Washington, 341, F.2d 277 (3rd Cir. 1965); United States v. Cariola, 323 F.2d 180, 186 (3rd Cir. 1963); United States v. Lester, 247 F.2d 496, 499-500 (2nd Cir. 1957); Snell v. United States, 174 F.2d 580 (10th Cir. 1949); People v. Kemp, 55 Cal.2d 458, 11

Cal.Rptr. 361, 359 P.2d 913 (1961); Commonwealth ex rel. McCray v. Rundle, 415 Pa. 65, 202 A.2d 303 (1964); State ex rel. Burnett v. Burke, 22 Wis.2d 486, 126 N.W.2d 91 (1964); People v. Chesser, 29 Cal.2d 815, 823, 178 P.2d 761, 765 (1947).

The Supreme Court has repeatedly pointed out that it will indulge every reasonable presumption against waiver of fundamental constitutional rights; and while the accused may waive his right to counsel, the trial court should determine whether there is a proper waiver, and that determination should appear in the record. Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962); Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1938). See Annot., 9 L.Ed.2d 1260 (1963); Annot., 2 L.Ed.2d 1644 (1958); Annot., 93 L.Ed. 137 (1950); 4 Barron, Federal Practice and Procedure, Rules Edition, § 2461 (1951); Note, 49 Minn.L.Rev. 1133 (1965).

Notwithstanding Von Moltke, the 7th Circuit Court of Appeals, in United States v. McGee, 242 F.2d 520 (7th Cir. 1957), found a voluntary waiver in a case similar to the instant one. There the trial court had advised the defendant, before a plea of guilty, of his right to counsel and had informed him that the court would appoint counsel in the event he could not obtain counsel. The court, subsequently, asked if he desired counsel, and he answered unequivocally, 'No, sir.'

The defendant was a thirty-three year old individual, of average age and intelligence, who obtained a high school diploma while in the Army. The defendant contended, on appeal to the 7th Circuit, that his waiver of counsel was not made voluntarily and with full appreciation of the nature of the crime with which he was charged. In denying the defendant's request, the Circuit Court stated:

'Defendant's contention in this regard, stripped of its gloss, is simply that he did not know and was not advised of the 'independent contractor' defense.' Id. at 524.

The Court went on to state:

'But it is not the duty of the trial court judge to explain or enumerate for the accused the possible defenses he might raise to the charge against him. * * * This would mean a layman could not plead guilty unless he had the opinion of a lawyer on such questions of law as might arise if he did not admit his guilt.' Ibid.

The United States Supreme Court reversed per curiam, ordering a further *178 hearing on all issues. McGee v. United States, 355 U.S. 17, 78 S.Ct. 64, 2 L.Ed.2d 23 (1958).

The Supreme Court's decision in McGee was followed by the 6th Circuit in Vellky v. United States, 279 F.2d 697, 669 (6th Cir. 1960). Cf. United States v. Kniess, 264 F.2d 353 (7th Cir. 1959); United States v. Wantland, 199 F.2d 237 (7th Cir. 1952). In Vellky, the defendant, forty years of age, had a lengthy criminal record and had served one term in a penitentiary from 1941 to 1945 for a bad check and another term of three years in Atlanta for the same offense involving a government money order. The trial court, before accepting a guilty plea, asked the defendant:

'I see that you do not have a lawyer. Do you wish one assigned to represent you?' Id. 279 F.2d at 698.

The defendant answered, 'No, I do not,' and then entered a plea of guilty. Subsequently, the defendant filed a motion to vacate the judgment under § 2255, Title 28 U.S.C., alleging that he had never knowingly or intentionally waived his right to counsel. The District Court's decision, denying relief, was reversed by the 7th Circuit on the basis of the Von Moltke and McGee cases. The Court, in making its decision, stated:

'* * * a defendant, even though he waives assistance of counsel, is entitled to more explanation and discussion of the charge against him and the facts affecting a decision to enter a plea of guilty, than was given in the present case.' Id. at 699.

The 7th Circuit, in McGee, relied heavily on Michener v. United States, 181 F.2d 911 (8th Cir. 1950).

Michener is clearly distinguishable on its facts. There the defendant contended on appeal that he did not realize the results of his pleading guilty to any and all of the charges that were laid in the indictment. The trial court specifically found that the defendant knew what he was doing and, in fact, wanted the longest federal sentence he could get. This Court sustained the trial court's finding and said:

'Appellant also contends that Heisey informed him that 'he (appellant) would have to plead (guilty) to the indictment as whole', which information was gross misrepresentation and false legal advice by virtue of the case of Von Moltke v. Gillies, 332 U.S. 708, 68

S.Ct. 316, 325, 92 L.Ed. 309. The contention is inconsistent with what appellant said he wanted at the time of arraignment and sentence. * * * He told Heisey, in fact, that he was not concerned about how much time he got, providing he was sent to a federal penitentiary.' He was not concerned about the number of the counts to which he pleaded. * * * Appellant himself states that he desired a long federal sentence, hoping thereby to diminish the length of his Wisconsin sentence and his present contention that he was led by misrepresentation to plead guilty to both counts is obviously a mere afterthought. His hope of diminishing the Wisconsin imprisonment motivated his action and as shown by the record, his imprisonment in that state was cut down about twenty seven years. The Von Moltke case, cited by appellant, affords no support for appellant's position here.' *Id.* at 915.

This Court further distinguished Von Moltke saying:

'In the Von Moltke case there was a remand to the trial court to determine the question whether 'petitioner did not competently, intelligently, and with full understanding of the implications, waive her constitutional right to counsel.' And if she did not so waive, an order should be entered releasing her from custody. In the instant case, on that precise question of waiver of counsel, there was a finding by the trial court that appellant 'intelligently, competently and intentionally waived his right of assistance of counsel' and that finding was affirmed, *supra*, (*Michener v. Johnson*, 9 Cir.) 146 F.2d 129, 130.' *Id.* at 917, n. 2.

*179 In the instant case, it was essential that the defendant understand the presumption which is applicable to possession of recently stolen automobiles. In my judgment, McGee is directly in point and the failure to advise the defendant of the existence of the presumption is a sufficient basis, standing alone, on which to find that the defendant did not knowingly and intelligently, and with a full understanding of the implications, waive his right to counsel. [FN4]

FN4. The jury was instructed with respect to it as follows:

'Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew that the property

had been stolen, * * *'

In addition, however, there is no indication that the court explained the range of allowable punishment, or possible defenses to the charges.

Nor is there any testimony to indicate that the defendant, because of his experience, background or conduct, understood the operation of the presumption, the range of allowable punishment, or possible defenses to the charges without an explanation. [FN5] Nor is there any indication that he was consciously 'playing it smart,' or that he had a feeling he could represent himself more competently than an attorney.

FN5. Compare *Adams v. United States ex rel. McCann*, 317 U.S. 269, 63 S.Ct. 236 (1942); *United States v. Redfield*, 197 F.Supp. 559, 572 (D.C.Nev.1961), *aff'd*, 295 F.2d 249; *Burstein v. United States*, 178 F.2d 665 (9th Cir. 1949).

He made no objections during the course of the trial, even though highly prejudicial and incompetent testimony was offered and received into evidence. He took the stand in his own behalf and testified freely when and how the automobile in question came into his possession. [FN6] His cross-examination was inept and frequently did more to confuse than to clarify.

FN6. As if to cinch the case against himself, he asked and was given permission to make an additional statement to the jury after it was instructed. He then proceeded to clarify otherwise vague testimony as to when the car came into his possession by fixing the date as about October 24, 1964.

In my judgment, the defendant did not knowingly, intelligently and with a full understanding of the implications, waive his constitutional rights to counsel. The defendant is, therefore, entitled to a new trial. [FN7]

FN7. In a concurring opinion in *Chapman v. State of California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, Justice Stewart wrote: 'When a defendant has been denied counsel at trial, we have refused to consider claims that this constitutional error might have been harmless. 'The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations

as to the amount of prejudice arising from its denial.' Glasser v. United States, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680. That, indeed, was the whole point of Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, overruling Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595. Even before trial, when counsel has not been provided at a critical stage, 'we do not stop to determine whether prejudice resulted.' Hamilton v. State of Alabama, 368 U.S. 52, 55, 82 S.Ct. 157, 7 L.Ed.2d 114; White v. State of Maryland, 373 U.S. 59, 60, 83 S.Ct. 1050, 10 L.Ed.2d 193.' Chapman v. State of California, 87 S.Ct. 824 (U.S. February 21, 1967).

PLAIN ERROR WAS COMMITTED IN RECEIVING CERTAIN HEARSAY EVIDENCE AND IN PERMITTING TESTIMONY AS TO THE CONTENT OF CERTAIN RECORDS.

There is competent testimony to establish that the Chevrolet was stolen September 24, 1964. The defendant freely admits that he came into possession of the car about a month later, and that he transported it from Indiana to Arkansas in late December, 1964. To establish that the defendant was guilty of a violation of 18 U.S.C.A. § 2312, however, *180 it was also necessary to show that the defendant knew the car was stolen.

The defendant denied such knowledge and testified that he came into possession of the car when he made a loan to Ellsworth Turner and accepted the car as collateral. There is no direct testimony indicating that the defendant knew the car was stolen until it was taken from him by the police on March 6, 1965. The defendant did not attempt to conceal [FN8] or change the appearance of the car. Neither the motor serial number nor the body serial number was altered. [FN9] The defendant did not attempt to sell the car during the time it was in his possession.

[FN8]. Defendant's testimony that he used the car frequently during the two months it was in Indiana was undisputed, as was testimony that the car broke down while he was driving it from Gary, Indiana, to Grady, Arkansas, and that he asked the police of a small town near Chicago to leave the car with them. It is also undisputed that on being refused, he towed the car the remainder of the way, receiving a traffic ticket from the state police.

[FN9]. It is interesting to compare the defendant's conduct in the present case, and the condition of the car when found, with that of other defendants in similar cases. In McCloud v. United States, 75 F.2d 576 (6th Cir. 1935), the appellant told three versions of how he came into possession of the car. When the stolen car was found in his possession, the motor numbers had been changed. In United States v. Wheeler, 219 F.2d 773 (7th Cir. 1955), the serial numbers on the auto body had been filed off.

As the testimony showed that the defendant came into possession of the car within a month of when it was stolen, the trial court properly instructed the jury as follows:

'Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew that the property had been stolen. * * *' [FN10]

[FN10]. The record does not disclose why the defendant was not indicted until February 14, 1966.

In view of this presumption and defendant's explanation, the defendant's guilt or innocence turned largely on whether he was believed by the jury. His credibility became the crucial issue, thus evidence casting doubt on that credibility was critical to the ultimate jury determination.

1. Harry Thomas, of the Arkansas State Police, and John Moore, a Special Agent of the Federal Bureau of Investigation, testified at length regarding information they received that the vehicle registrations were false and that the cars had been stolen. Thomas in part, testified:

'A. * * * I sent off for registration information on the '65 Indiana tag, which I got off of the Ford Thunderbird. I also sent off for information on the '64 Indiana tag bearing 45-R Roberts 1690, which was displayed on the '64 Chevrolet. I received information back by radio that these two tags were issued to cars other than the two that I had there.

'Q. Did you ask for any registration certificate for this Chevrolet?

'A. No, sir-- well, I asked for it. I asked what she had and she stated 'nothing'. [FN11] After getting the registration information back by radio from Indiana, I realized that I needed to go more thoroughly into the cars, and I probably needed some assistance and I asked Agent John Moore, of the F.B.I., who is stationed at Pine Bluff, to come into the area and assist me, and we examined the cars, and through information that he was able to obtain through his office and through out radio, we did determine that the cars--*181 one, the Chevrolet-- had been reported stolen in St. Louis, Missouri, on September 24, 1964, and the Thunderbird had been reported stolen on September 30, 1964, in Chicago, Illinois. I have a copy of the police report from those two cities.

[FN11]. Thomas here refers to a conversation he had with the defendant's sister. Elsewhere in the record, he was permitted to testify at length as to the conversations which were not held in the defendant's presence. The conversations tended to cast doubt on the defendant's testimony and were thus prejudicial.

'Q. You learned this through your inquiry because of your official connection with Arkansas State Police?

'A. Yes, I did.'

And, Moore was permitted to testify as follows:

'A. The '64 Chevrolet, and I also examined the-- I examined the Chevrolet at the Grady City Hall, and I examined the Thunderbird at Mrs. Trotter's residence.

'Q. Upon examination of these cars, did you attempt to ascertain the ownership of them?

'A. Yes, I did.

'Q. What did you learn upon that attempt?

'A. On March 16th, we received information through our official offices in Indianapolis, Indiana, that the 1964 Chevrolet vehicle, identification number 41467S299311, which is the vehicle that was at the Grady City Hall, was stolen September 24, 1964, from this Chevrolet place in St. Louis, Missouri. This check, by the way came from the National Automobile Theft Bureau.

'A. * * * I also learned that the '64 Thunderbird

vehicle, identification number 4Y87Z186012, which is the car I looked at in Mrs. Trotter's front yard, was stolen September 30, 1964, from the Yates Motor Company, in Chicago, Illinois. This vehicle had been left there for servicing and when the owner called for it, it couldn't be found.'

Much of the above testimony was hearsay. Queen v. Hepburn, 7 Cranch 290, 291, 3 L.Ed. 348 (1813); Peppard v. United States, 314 F.2d 623, 627 (8th Cir. 1963); In re Sawyer's Petition, 229 F.2d 805, 809 (7th Cir. 1956); Landstrom v. Thorpe, 189 F.2d 46, 53, 26 A.L.R.2d 1170 (8th Cir. 1951); Kercheval v. United States, 12 F.2d 904, 908 (8th Cir. 1926); 5 Wigmore, Evidence 1362 (3d ed. 1940); Model Code of Evidence rule 502 (1942). It did not fall within exceptions to the rule. See 28 U.S.C.A. § 1732.

While the hearsay testimony with respect to the Chevrolet was in part cumulative, it tended to discredit the defendant's statements that he was rightfully in possession of the car.

The hearsay testimony with respect to the Thunderbird was highly prejudicial as, without it, there would have been no testimony indicating that the defendant may have transported other stolen vehicles in interstate commerce to his sister's home in Arkansas.

To reiterate, the defendant's credibility was a crucial issue. Thus, hearsay evidence which had the effect of attacking that credibility was prejudicial and its admission was error.

2. The record is filled with numerous references to registration forms, license plates and official reports. Although it appears that the documents were available, and probably in the hands of a testifying witness, the only documentary evidence offered or received was a copy of an invoice on the stolen 1964 Chevrolet from the General Motors Corporation to the St. Louis, Missouri, garage. [FN12]

[FN12]. If an original document has been destroyed or is difficult to obtain, a copy, of course, is preferable to oral testimony which might well be admissible. See Riggs v. Tayloe, 9 Wheat. 483, 486, 6 L.Ed. 140, (1824) (Original contract destroyed, oral testimony permitted.)

It is the established rule that the best evidence extant and obtainable must be used in a trial, and that secondary evidence of a fact may not be offered so

long as primary evidence is extant and obtainable. Renner v. Bank of Columbia, 9 Wheat. 581, 595, 6 L.Ed. 166 (1824); Williamson v. United States, 272 F.2d 495 (5th Cir. 1960); *182 United States v. Manton, 107 F.2d 834, 845 (2d Cir. 1938); McDonald v. United States, 89 F.2d 128, 137 (8th Cir. 1937), cert. denied, 301 U.S. 697, 57 S.Ct. 925, 81 L.Ed. 1352 (1937); Billington v. United States, 15 F.2d 359, 360 (6th Cir. 1926); see McCormick, Evidence § 197 (1954); 4 Wigmore, Evidence § 1185 (3d ed. 1940); 22A C.J.S.Criminal Law § 692, 693 (1961). In this case, the rule was not followed and the defendant was prejudiced as a result of the failure to follow it.

For example, Patrolman Thomas testified that at the outset of his investigation, the defendant's sister produced a document purporting to be an 'owner's copy' or the registration certificate on the 1964 Thunderbird. This certificate also purported to be issued by the Indiana Motor Vehicle Department. Without requiring production of the document, the court permitted Thomas to state that the serial numbers on the car and the registration certificate were the same, but that the license number appearing on the certificate and that on the automobile was different. [FN13] As Thomas was testifying to the contents of the registration certificate, its production should have been required.

[FN13]. Patrolman Thomas testified, at one point in the trial, that the 1964 Chevrolet bore license plate #45 R 3307. At another, he stated the license number was #45 R 1690. His testimony regarding checking of registration certificates given him by Mrs. Trotter is ambiguous as to the 1964 Chevrolet.

The best evidence rule was again violated during the direct examination of the Chief Clerk of the Indiana Motor Vehicle Department. He testified he had checked the license plate numbers provided him by the investigation officers with the automobile registration certificates on file in his office. He stated that license plate #45 R 1690 was issued to Rose Pritchett (defendant's common law wife) on a 1950 Chevrolet on April 3, 1964. He further stated that license plate #45 R 3307 was issued to defendant on the same 1950 Chevrolet on October 22, 1964.

The failure to require the production of the documents in question was more than a harmless error as it tended to establish (a) that a dual or false registration had been made on the 1950 Chevrolet,

(2) that the date of defendant's admitted possession of the stolen automobile and the date the registration certificate on the 1950 Chevrolet coincided with one another, (3) that the license number and plate registered to the 1950 Chevrolet was found on the stolen automobile. These statements helped weave the web of circumstantial evidence necessary to convince the jury that the defendant knew the car was stolen and impaired his credibility.

In conclusion, it is to be noted that the trial court, in advising the defendant that it and the United States Attorney would fully protect his rights, expressed that responsibility which is owed to any defendant, who, in a criminal case, decides to proceed pro se. The United States Attorney was under an obligation to avoid offering evidence he knew to be incompetent and the trial court under an equally heavy burden to avoid receiving such evidence. [FN14] Both were under an obligation to insure the defendant a fair trial.

[FN14]. In Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935), Justice Sutherland wrote: 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.' See generally Canon No. 5, Canons of Professional Ethics, American Bar Association.

I would reverse and remand for a new trial.

375 F.2d 170

END OF DOCUMENT

▷

Motions, Pleadings and Filings

United States District Court,
 E.D. Virginia,

Norfolk Division.

PNEUMO ABEX CORPORATION, et al., Plaintiffs,
 v.
 BESSEMER AND LAKE ERIE RAILROAD
 COMPANY, INC., et al., Defendants.
Civil Action No. 2:94cv716.

Sept. 12, 1996.

Successor of railroad parts foundry operators and city brought Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) action against sellers of scrap journal bearings to foundry and others, seeking to recover response costs. The District Court, Jackson, J., held that: (1) harm at site was indivisible; (2) rational basis existed for apportionment of liability; (3) oversight costs were recoverable; (4) city could recover indirect costs for site-related work performed by employees upon proper proof; (5) costs associated with medical monitoring were recoverable; and (6) plaintiffs and defendants would equally bear costs of cleanup.

So ordered.

West Headnotes

[1] Environmental Law  **445(3)**
149Ek445(3) Most Cited Cases
 (Formerly 199k25.5(5.5) Health and Environment)

[1] Environmental Law  **447**
149Ek447 Most Cited Cases
 (Formerly 199k25.5(5.5) Health and Environment)

[1] Environmental Law  **464**
149Ek464 Most Cited Cases
 (Formerly 199k25.5(5.5) Health and Environment)

Nonsettling defendants in CERCLA response cost action bore burden of either establishing that harm at site was divisible or that there existed reasonable basis for apportionment, based upon contribution of each defendant, of liability for single harm. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107, as amended, 42 U.S.C.A. § 9607.

[2] Environmental Law  **445(3)**
149Ek445(3) Most Cited Cases
 (Formerly 199k25.5(5.5) Health and Environment)

Despite presentation of evidence indicating several sources of lead contamination at CERCLA site and that contaminated sand from railroad parts foundry remained in certain portions of site, defendants who sold scrap journal bearings to foundry failed to provide district court with way to separate harms or costs of cleanup; harm was indivisible. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107, as amended, 42 U.S.C.A. § 9607.

[3] Evidence  **555.9**
157k555.9 Most Cited Cases

Expert's methodology in calculating poundage of worn journal bearings that CERCLA defendants delivered to railroad parts foundry was reasonable approach for estimating defendants' contributions to lead contamination at site, despite claims that expert relied upon records from only few of years at issue and that estimates assumed consistent usage of foundry by defendants as opposed to use of competing operations or use of one of operator's other foundries in other parts of country. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107, as amended, 42 U.S.C.A. § 9607.

[4] Environmental Law  **464**
149Ek464 Most Cited Cases
 (Formerly 199k25.15(5.1) Health and Environment)

Plaintiffs in CERCLA response cost action bore burden of proving that their response costs were consistent with national contingency plan (NCP). Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(4)(B), as amended, 42 U.S.C.A. § 9607(a)(4)(B).

[5] Environmental Law  **671**

149Ek671 Most Cited Cases

(Formerly 199k25.15(5) Health and Environment)

Statute of limitations did not begin to run in CERCLA response cost action brought by successor of railroad parts foundry operators and city until Environmental Protection Agency (EPA) issued record of decision (ROD). Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § § 107, 113(g)(2)(A), as amended, 42 U.S.C.A. § § 9607, 9613(g)(2)(A).

[6] Environmental Law  **446**

149Ek446 Most Cited Cases

(Formerly 199k25.5(5.5) Health and Environment)

Costs of oversight of CERCLA cleanup activities by Environmental Protection Agency (EPA) and Virginia Department of Waste Management (VDWM) were necessary costs of response consistent with national contingency plan (NCP). Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(4)(B), as amended, 42 U.S.C.A. § 9607(a)(4)(B); 40 C.F.R. § 300.700(c)(3).

[7] Environmental Law  **720(2)**

149Ek720(2) Most Cited Cases

(Formerly 199k25.5(5.5) Health and Environment)

District court could not reasonably conclude that law firm providing legal assistance to CERCLA response cost plaintiff performed work in connection with actual cleanup as opposed to protecting plaintiff's interest in its attempt to limit its liability or to avoid listing on national priorities list (NPL) based on voluminous billing invoices and testimony that one of firm's functions was "to protect the corporate interest" and that separation of firm services into those that protected corporate interest generally and those associated with cleanup was not distinction that made sense. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(4)(B), as amended, 42 U.S.C.A. § 9607(a)(4)(B).

[8] Environmental Law  **446**

149Ek446 Most Cited Cases

(Formerly 199k25.5(5.5) Health and Environment)

Upon proper proof of costs, city and city redevelopment and housing authority could recover

from CERCLA response cost defendants for employees' time spent in responding to contamination for which defendants were partially responsible, despite claim that lost time was form of economic loss not recoverable under CERCLA. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(4)(B), as amended, 42 U.S.C.A. § 9607(a)(4)(B).

[9] Environmental Law  **446**

149Ek446 Most Cited Cases

(Formerly 199k25.5(5.5) Health and Environment)

Deficiencies in city and city redevelopment and housing authority's proof regarding amount of time employees spent in responding to contamination at site for which CERCLA response cost defendants were partially responsible precluded recovery for most claims for recovery of employees' salaries; to calculate costs for employee time, plaintiffs referred to calendars of personnel involved and estimated, based on entries in calendars, how many hours employees spent dealing with site, many entries were illegible, entries did not include when activities ended, estimates were not contemporaneous with occurrence of meeting or activity, plaintiffs did not present testimony from individuals who made time estimates, and plaintiffs made little or no showing that activities and associated costs were necessary response costs consistent with national contingency plan (NCP). Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(4)(B), as amended, 42 U.S.C.A. § 9607(a)(4)(B).

[10] Environmental Law  **446**

149Ek446 Most Cited Cases

(Formerly 199k25.5(5.5) Health and Environment)

To extent that city and city redevelopment and housing authority sought to recover from CERCLA response cost defendants the cost of medical testing and screening conducted to assess effect of release or discharge on public health or to identify potential public health problems presented by release, they presented cognizable CERCLA claim. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(4)(B), as amended, 42 U.S.C.A. § 9607(a)(4)(B).

[11] Environmental Law  **446**

149Ek446 Most Cited Cases

(Formerly 199k25.5(5.5) Health and Environment)

CERCLA response cost plaintiffs could recover from defendants costs of technical services company's services where company reviewed work plan submitted to Environmental Protection Agency (EPA), company designed curbing, fencing, capping, and storm water runoff which was constructed at site, company hired contractors to do excavation, sampling, construction, and testing required, and company conducted treatability studies concerning other means of treating material rather than disposing of it. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(4)(B), as amended, 42 U.S.C.A. § 9607(a)(4)(B).

[12] Environmental Law  **446**

149Ek446 Most Cited Cases

(Formerly 199k25.5(5.5) Health and Environment)

District court would disallow much of CERCLA response cost plaintiff's claimed costs for engineering services rendered in area partially within Superfund site in absence of methodology for delineating which costs were associated within site versus those outside site. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(4)(B), as amended, 42 U.S.C.A. § 9607(a)(4)(B).

[13] Environmental Law  **447**

149Ek447 Most Cited Cases

(Formerly 199k25.5(5.5) Health and Environment)

In allocating CERCLA response costs, district court considers several equitable factors including degree of involvement by parties in generation, transportation, treatment, storage, or disposal of hazardous substances. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107, as amended, 42 U.S.C.A. § 9607.

[14] Environmental Law  **447**

149Ek447 Most Cited Cases

(Formerly 199k25.5(5.5) Health and Environment)

Plaintiffs in CERCLA response cost action, including successor of railroad parts foundry operators and city, and defendants, including sellers of scrap journal bearings to foundry, would be required to equally bear costs of cleanup of lead contamination at site, given that parties were fully involved in transport, disposal, or treatment of hazardous substances, that

parties were only able to roughly distinguish contributions to site contamination, that some defendants indicated recalcitrance to cooperate with government officials, that nonsettling defendants had not performed or financed performance of any response activities, that parties profited from foundry arrangement, and that nothing in record suggested that any of parties were unable to pay share of cleanup costs. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107, as amended, 42 U.S.C.A. § 9607.

*1253 James A. Gorry, III, Taylor & Walker, P.C., Norfolk, VA, Joseph G. Homsy, John W. Roberts, Lea D. Leadbeater, Albert J. Birkbeck, Zevnik Horton Guibord & McGovern, P.C., Chicago, IL, for Pneumo Abex Corporation, Whitman Corporation.

Nancy Bennett Cherry, George Manuel Willson, City Attorney's Office, Portsmouth, VA, for City of Portsmouth, Virginia.

Joseph Price Massey, Susan Taylor Hansen, Katherine Susan Cross, Cooper, Spong & Davis, Portsmouth, VA, for Portsmouth Redevelopment and Housing Authority.

Michael Henry Wojcik, Weinberg & Stein, Norfolk, VA, Louis A. Naugle, James Mizgala, Reed Smith Shaw & McClay, Pittsburgh, PA, Jennifer Sarah Blank, Reed Smith Shaw & McClay, Washington, DC, for Bessemer and Lake Erie Railroad Company, Inc., Union Railroad Co., Inc.

Thomas Scott McGraw, Faggert & Frieden, P.C., Chesapeake, VA, David Charles Bowen, Willcox & Savage, Norfolk, VA, Rodney B. Griffith, Consolidated Rail Corporation, Philadelphia, PA, for Consolidated Rail Corporation.

Robert H. Cox, Kevin A. Gaynor, George C. Hopkins, Vinson & Elkins, L.L.P., Washington, DC, for CSX Transportation, Inc., Fruit Growers Express Company, Inc.

Michael Dale Beverly, Joseph Marvin Spivey, III, Hunton & Williams, Richmond, VA, Frederick Blair Wimbish, Norfolk Southern Corporation, Law Department, Norfolk, VA, for Norfolk Southern Railway Co., Norfolk & Western Railway Co.

Mary Metil Grove, Christian, Barton, Epps, Brent and Chappell, Richmond, VA, Richard A. Porach, Pittsburgh, PA, for Pittsburgh & Lake Erie Railroad Company, Inc.

Channing Joseph Martin, William Rutherford Mauck, Jr., Heidi Abbott, Williams, Mullen, Christian & Dobbins, Richmond, VA, for Richmond, Fredericksburg & Potomac Railroad Co., Inc.

MEMORANDUM OPINION AND ORDER

JACKSON, District Judge.

INTRODUCTION

Plaintiffs initiated this action in 1994 pursuant to sections 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § § 9607, 9613 (1994), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA" or "the Act"), and the Declaratory Judgment Act, 28 U.S.C. § 2201(a) (1994). Plaintiffs seek recovery of costs allegedly incurred in responding to releases or threatened releases of hazardous substances at or from the Pncumo Abex Superfund Site ("Site") in Portsmouth, Virginia. Plaintiffs also seek a declaratory judgment that Defendants are liable for the costs of implementing the permanent remedy at the Site. The Site, designated by the United States Environmental Protection Agency (the "EPA") as Operable Unit 1 ("OU1"), is the area within a radius of 700 feet of Pneumo Abex Corporation's ("Pneumo Abex") former foundry, and is divided into four quadrants.

By order filed March 25, 1996, the Court found the Railroad Defendants remaining in the litigation and Consolidated Rail Corporation liable as generators under § 107(a) of CERCLA. The Court also dismissed Plaintiffs' claims under § 113 of CERCLA as unnecessary because the Court had ruled that they could proceed under § 107 even though they are potentially responsible parties ("PRPs"). The Court held a six-day bench trial to determine the allocation of liability among the parties. The parties filed post-trial briefs, as directed, on June 12, 1996. This matter is now ripe for judicial determination.

I. FACTUAL BACKGROUND

Plaintiffs Pneumo Abex, the City of Portsmouth (the "City"), and the Portsmouth Redevelopment and Housing Authority (the "PRHA") own property within the Site. Plaintiff Whitman Corporation is the former parent company of Abex Corporation, the predecessor of Pneumo Abex. Whitman Corporation has been reimbursing Pneumo Abex for its environmental liability since *1254 Whitman Corporation sold Pneumo Abex in 1988. (R. at 230-31.) Most of the Defendants in this case were

customers of Pneumo Abex's foundry in Portsmouth, Virginia ("Defendants I") and sent worn journal bearings to the foundry to be "converted" into new journal bearings. (See March 25, 1996 Memorandum Opinion and Order, 921 F.Supp. 336 for further explanation.) Plaintiffs also sued Defendants Holland Investment and Manufacturing Company, Inc., John C. Holland, Jr., and Runnymede Corporation (collectively known as "the Landowner Defendants") as landowners within the Site.

According to the EPA, response activity began at the Site in 1986 when the EPA identified high lead concentrations. (Record of Decision Amendment, prepared by the United States Environmental Protection Agency, August 1994 [hereinafter ROD Amend.] at 2.) Pursuant to the Consent Order of August, 1986, Pneumo Abex excavated and removed contaminated soil at the Site. (*Id.*) In October of 1989, Pneumo Abex entered into an administrative order on consent with the Virginia Department of Waste Management ("VDWM") to perform the Remedial Investigation/Feasibility Study ("RI/FS") under the VDWM's supervision. (Stip. ¶ 23.) Pneumo Abex completed the RI/FS and submitted the final report to the VDWM in February of 1992. (Stip. ¶ 24.) Pursuant to the EPA's unilateral administrative order of March, 1992, Pneumo Abex excavated and removed additional contaminated soil. (ROD Amend. at 2.) However, Pncumo Abex did not complete the excavation and removal of contaminated surface soil because some residents wished to remain in place for the long-term remediation. In September of 1992, the EPA and the Commonwealth of Virginia published a Record of Decision ("1992 ROD") with the final remedy. (*Id.*) On October 19, 1993, Pneumo Abex submitted proposed changes to the 1992 ROD based upon new information from the City on proposed plans for zoning and land-use, as well as new institutional controls on future excavation within the Site. (*Id.* at 2- 3.) The EPA subsequently amended the 1992 ROD and published in August of 1994 the Record of Decision Amendment ("Amended ROD"). In December of 1995, the EPA issued the Explanation of Significant Differences ("ESD") which again revised the permanent remedy. (Pls.' Br. at 10.)

In January, 1993 and December, 1994, during these removal activities, the EPA notified, *inter alia*, Defendants I and Plaintiffs that they were PRPs under § 107(a), (Stip. ¶ ¶ 29, 30), and invited them to negotiate a consent decree. [FN1] Plaintiffs were the only parties to negotiate a consent decree with the United States. In a separate action, the United States

and Plaintiffs herein lodged the Consent Decree with the Court on March 4, 1996, and the Court entered it on April 25, 1996. *United States v. Pneumo Abex Corp.*, Civ.A. No. 2:96cv27 (E.D.Va.).

FN1. Defendants remaining in the litigation adduced testimony to suggest that the EPA never "invited" them to enter into a consent decree. (R. at 504-07.) As the Court explains below in its discussion of Plaintiffs' Share and Defendants' Share, the explanation proffered for Defendants' failure to enter into a consent decree is unpersuasive.

On May 6, 1996, the EPA issued a unilateral administrative order pursuant to § 106(a) of CERCLA to Defendants I. (Pls.' Ex. 446; R. at 508-09, 533- 34.) The order requires Defendants I to contribute to the permanent remedy at the Site. Section 106(a) of CERCLA allows for the issuance of an order when "there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." CERCLA § 106(a). The Court has jurisdiction to grant relief "as the public interest and the equities of the case may require." *Id.* Furthermore, § 106 provides that

any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order ... under subsection (a) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than \$25,000 for each day in which such violation occurs or such failure to comply continues.

*1255 CERCLA § 106(b)(1). To date, the EPA has not petitioned the Court to enforce the order.

Subsequent to the Court's ruling of March 25, 1996 concerning liability, Plaintiffs and a number of

1) Oversight by the EPA--	\$1,740,195.71
2) The City's costs--	112,034.00
3) The PRHA's costs--	93,405.85
4) Services related directly to excavation and removal at the Site--	5,334,509.00

TOTAL	\$7,280,144.56.

Of the total amount, Pneumo Abex allegedly has incurred and paid \$7,074,704.00.

Defendants entered into settlement negotiations. Defendants remaining at the conclusion of the trial were CSX Transportation, Inc., Fruit Growers Express Company, Inc., Norfolk Southern Railway Company, Norfolk and Western Railway Company, and High Point, Thomasville and Denton Railroad Company ("Remaining Defendants"). Norfolk Southern Railway Company is a subsidiary of Norfolk Southern Corporation. Norfolk and Western Railway Company is a subsidiary of Norfolk Southern Railway Company. Finally, High Point, Thomasville & Denton Railroad Company is an affiliate of Norfolk and Western Railway Company. The Court refers to these related entities simply as "Norfolk Southern," unless otherwise indicated. CSX Transportation, Inc. and Fruit Growers Express Company, Inc. are subsidiaries and/or affiliates of CSX Corporation. The Court refers to these entities separately, although witnesses may have referred to them simply as "CSX." All other Defendants settled with Plaintiffs ("Settling Defendants"), and the Court dismissed Settling Defendants in orders filed May 9, 1996 and September 12, 1996.

II. DISCUSSION

The parties stipulated that the 1992 ROD estimated the cost of the clean-up remedy at the Pneumo Abex site to be \$31,962,923.00. The Amended ROD estimated the cost of the remedy to be \$31,507,670.00. Finally, the ESD estimated the cost to be \$21,000,000.00. (Stip. ¶ 31.) The parties also stipulated that Pneumo Abex has incurred response costs at the Site and that Defendants have not. (Stip. ¶¶ 34, 35.) Thus, the questions remaining are 1) which of the costs Plaintiffs allegedly have incurred in connection with the Site are recoverable as response costs and 2) what portion of those costs Remaining Defendants must pay.

Plaintiffs presented proof of their alleged costs as follows:

A. Divisibility of the Harm

[1] The United States Court of Appeals for the Fourth

Circuit has held that "[w]hile CERCLA does not mandate the imposition of joint and several liability, it permits it in cases of indivisible harm." United States v. Monsanto Co., 858 F.2d 160, 171 (4th Cir.1988), cert. denied, 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989). In this case, Remaining Defendants bear the burden of either establishing that the harm is divisible or that there exists a reasonable basis for apportionment, based upon the contribution of each Defendant, of liability for a single harm. *Id.* at 171-72. In their post-trial brief, Remaining Defendants argue that they have established that "the area of environmental harm at the Site attributable to Foundry manufacturing activities is clearly divisible from the area of environmental harm not related to the Foundry." (Defs.' Br. at 3.) Although faced with the possibility that the Court could find the harm indivisible, in their post-trial briefs Remaining Defendants do not present the alternative argument that there exists a rational basis for apportionment of liability.

1. Sources of Contamination

One of Plaintiffs' experts, John Rhodes, of GEO Engineering, who managed the Site from the beginning of the cleanup activities, testified that his firm tried to identify several sources of lead contamination. The firm considered air emissions and sand from the foundry, lead paint, automobile emissions, ash from an incinerator, and dredge fill material. (R. at 33.) However, the firm was unable to identify reliably sources other than foundry-related ones through the use of its chosen method: canonical analysis. (R. at 33-34.) Canonical analysis is a statistical procedure used to create a "fingerprint" of *1256 known contaminants. (R. at 37.) GEO Engineering gathered soil and dust samples throughout the Site to try to match those samples to the fingerprints, samples of previously identified contaminants. GEO Engineering analyzed the samples for lead content and other metals. (*Id.*; 1994 ROD at 17.) However, GEO Engineering was ultimately unable to fingerprint non-foundry-related sources of lead.

Remaining Defendants also presented the expert testimony of Dr. Swiatoslav Vladmir Kaczmar [FN2] in an attempt to establish that there existed several sources of contamination in addition to the sand from the foundry. (R. at 629- 776.) Dr. Kaczmar drew most of his conclusions from his review of the work performed and reports generated by GEO Engineering (*see, e.g.*, R. at 686, 716); Dr. Kaczmar nor his firm collected any soil samples from the Site. (R. at 727.) In general, Remaining Defendants tried to establish that ash from the City's incinerator, dredge spoils, demolition waste, and miscellaneous fill contributed to the contamination of the Site. [FN3] For example, Dr. Kaczmar used several

demonstrative exhibits to establish the pattern of development and demolition within the Site from 1889 to 1964. (R. at 647- 661.) He testified that demolition occurred in all four quadrants of the Site, (R. at 661), and that the demolition left residuals of lead. (R. at 635.) Similarly, on cross-examination, a witness from the PRHA testified that demolition had occurred in quadrants II and IV. (R. at 893-97.) Dr. Kaczmar also testified that there existed *no* basis for linking air emissions to the residuals of lead detected at the Site outside of the foundry-area, (R. at 676), yet later testified that the releases from the foundry were only insignificant sources of contamination. (R. at 716.)

[FN2. Dr. Kaczmar has a bachelor's degree in chemistry, biology, and water science from Northern Michigan University. (R. at 629.) He holds a master's degree from Northern Michigan University in chemical limnology, the study of the "fate and transport" of chemicals in aquatic systems. (*Id.*) He also has a doctorate degree from Michigan State University in environmental toxicology which includes analytical chemistry, human toxicology, and fate and transport. (R. at 630.) He has performed approximately ten (10) Remedial Investigations and Feasibility Studies as a project manager and supervised approximately 100.

[FN3. Plaintiffs objected to much of the testimony or opinions offered by Dr. Kaczmar on two separate grounds. First Plaintiffs objected to the nature and scope of his proposed testimony because Dr. Kaczmar was not a geologist or an engineer, having held himself out previously as a toxicologist. (R. at 633-40.) The Court allowed Dr. Kaczmar to testify and indicated that it would give the testimony due weight, recognizing the witness's limitations. (R. at 640.) Second, Plaintiffs objected on the basis that Dr. Kaczmar did not disclose the offered opinions or bases thereof in his written report made pursuant to Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure. Upon reviewing Dr. Kaczmar's report, the Court sustained many of these objections. (*E.g.*, R. at 670-75, 699- 700, 701, 704-07, 708-09, 735-36.)

The focal point of Dr. Kaczmar's testimony was that the use of canonical analysis, as a method for identifying materials from the foundry outside of Pncumo Abex's lot, could not be supported by the information in the Remedial Investigation report. (R. at 663.) He emphasized the portion of the Remedial Investigation report which explained the "opportunity for false

positives" and the problem of relying upon "single observations" of foundry-related lead contamination without a sufficient number of neighboring samples also being classified as foundry-related. (R. at 686.) Dr. Kaczmar testified that GEO Engineering did not have enough reference points or fingerprints of known contaminants, thus leaving great opportunities for misclassification of samples. (R. at 687.) He testified that GEO Engineering would have needed "hundreds" of reference points to make canonical analysis an appropriate methodology at the Site. (R. at 690.) In response to questions from the Court, however, Dr. Kaczmar testified that for the last classification or canonical analysis he performed for polychlorinated biphenyls (PCBs), he used only six (6) reference points. (R. at 767.) He also testified that GEO Engineering used four to six reference points in this case. (R. at 768, 776.) Dr. Kaczmar also testified to examples within the RI/FS of misclassifications within the reference groups such as a known sample of auto emissions being classified as paint, miscellaneous fill, and sand from the foundry. (R. at 697.) He further testified that the misclassifications *1257 were "a very strong basis for just throwing the canonical analysis right out, at least the application here." (*Id.*)

2. Containment of Sand and Air Emissions from the Foundry

At trial, Plaintiffs presented the first evidence to suggest divisibility of harm. John Rhodes testified that he made the argument to the EPA that portions of Quadrant II did not indicate foundry-related contamination and that Quadrant III did not show any indication of foundry-related contamination. (R. at 42-43.) Thus he argued "that at least a portion of quadrants II and III could be carved out of the site as not related to the foundry." The EPA rejected this argument within the 700-foot circle, (R. at 44), and found that "it is reasonable to assume the foundry contributed, either through disposal of waste sand or through air deposition, to lead contamination found in these areas." (Pls.' Ex. 322, 1992 ROD at 101.)

Remaining Defendants also presented testimony from Mr. Elmer Oakes, [FN4] a former employee and plant manager of Pneumo Abex, that to the best of his recollection, he only saw sand removed from the back lot twice, "a couple of pick-up loads to use for fill." (R. at 942, 955.) However, he also testified that there was no fence around the back lot. (R. at 942.) Mr. Rhodes testified that one mechanism for moving the contaminated sand "that was of concern throughout the study [the RI/FS] and remains a concern is wind blowing of foundry sand." (R. at 221.) Pneumo Abex's lot is within the 700-foot circle designated as the Site, but the Site includes

more than Pneumo Abex's lot. Remaining Defendants thus argue that they are not liable for costs associated with the cleanup of the entire Site, but merely the cleanup within the Pneumo Abex's lot.

FN4. Mr. Oakes was employed at the Site from 1946 until its closing in 1978. (R. at 930-31.)

Dr. Kaczmar also concluded that there existed "no likelihood of foundry sand being outside the foundry areas." (R. at 706.) He reached this conclusion based upon the following:

- 1) the information in the Remedial Investigation report that the foundry's used sand was exclusively disposed of, by wheelbarrow, within the north lot of the foundry, (R. at 706-07),
- 2) his analysis of aerial photographs which depicted two major thoroughfares on either side of the foundry that, in his opinion, would have precluded anyone from taking a wheelbarrow full of material to one of the residential areas, (R. at 707,) and
- 3) GEO Engineering's estimate that over the fifty years of the foundry's operation, the foundry would have generated 140,000 cubic feet of waste sand and that amount "could fit very easily" within the foundry's lot. (R. at 708.)

Dr. Kaczmar also testified about "grain size analysis," which involves taking soil samples and sifting the samples through a series of sieves with each sieve having progressively smaller openings so that the particles or grains separate by size. (R. at 702.) According to Dr. Kaczmar, one then weighs the amount of material that passes through each of the sieves to determine the size of the particles in any given sample. (*Id.*) He also testified that grain size analysis is a "visual" analysis: "You collect a sample and its got some big pieces, small pieces, and some really tiny pieces in it, you can differentiate one from the other." (R. at 703-04.) Based upon GEO Engineering's testing, Dr. Kaczmar concluded that the grain size of the soil samples for quadrants II and III did not match the grain size of the samples from the foundry's lot. (R. at 705.)

[2] Despite presentation of evidence indicating several sources of contamination and that the sand remained in certain portions of the Site, Remaining Defendants failed to provide the Court with a way to separate the harms or the costs of cleanup. *Cf. Northwestern Mutual Life Ins. Co. v. Atlantic Research Corp.*, 847 F.Supp. 389, 401 (E.D.Va.1994) ("Although it is reasonably clear that several sources, including the lime pit and the Hot Lab, contributed to the release of hazardous materials at the facility, there is no way to separate out these harms."). The EPA found that the contamination at the Site is foundry-related. While *1258 the EPA's determination is

not dispositive, the Court finds it more persuasive than Remaining Defendants' proof which fails to provide the Court with a feasible alternative. Thus, the Court finds that the harm at the Site is indivisible.

B. Apportionment of Liability

Remaining Defendants bear the burden, in the case of indivisible harm, of providing the Court with a rational basis for apportionment of liability. In their post-trial brief, however, Remaining Defendants argue that the burden somehow rests with Plaintiffs: "The spotty data produced by Abex makes extrapolation of generators' shares from the few documents highly speculative.... Abex, not the Railroad Defendants should bear the consequences of its unexplained failure to produce complete records of shipments to the Foundry for 46 of the Foundry's 51 years of operation." (Defs.' Br. at 20.) The Court recognizes that the parties produced few records to document the activity at the foundry. The foundry operated from 1927 until 1978; however, the parties produced "relatively complete" records for five non-consecutive years and some additional information for a few Defendants who produced their own records. (R. at 436.) The parties also had the benefit of information provided by Mr. Elmer Oakes, who was employed at the foundry for approximately twenty-two (22) years. Despite the paucity of documents, in order to avoid joint and several liability, Remaining Defendants had the burden of providing the Court a rationale for apportionment. Cf. Chesapeake & Potomac Tele. Co. v. Peck Iron & Metal Co., 814 F.Supp. 1269, 1279-80 (E.D.Va.1992) (finding that it could not "reasonably divvy up the environmental harm" for a site with six years of incomplete records for company which operated for fifteen years). As the Court explains below, Remaining Defendants failed to carry this burden; however, the Court has been able to fashion from all the evidence a reasonable basis for apportionment.

In this instance, Remaining Defendants are liable for contamination caused by disposal and/or treatment of worn journal bearings. Remaining Defendants attempted to establish the volume of waste, in the form of worn journal bearings, each party contributed to the Site. They offered the testimony and compilation [FN5] of data of Matthew Low, an engineer and attorney, whose firm developed a database of shipments of lead bearing materials into the foundry. Mr. Low testified that for the years for which he had data, Defendants I shipped approximately 90% of the non-virgin lead-bearing materials to the Site. (R. at 590.) He also testified that CSX Transportation, Inc. and its related entities, Fruit Growers Express Company, Inc., and Norfolk Southern Railway Company and its related entities shipped

approximately 66.85% of the lead-bearing material into the Site. (See R. at 569, 614-15.) Remaining Defendants presented and the Court admitted most, if not all, of the records used by Mr. Low's firm to create the database. (R. at 624 (admitting Defendants' Exhibits 40-124, 153-55).) However, after cross-examination of Mr. Low, the Court sustained Plaintiffs' objection to the admission of Remaining Defendants' compilation as an exhibit. (R. at 618-20 (Defendants' Exhibit 39 refused).) Cross-examination of Mr. Low indicated numerous inaccuracies and discrepancies between the compilation and the underlying documents. (R. at 575-615.) For example, on cross-examination, Mr. Low admitted that in at least four instances, his firm erred in interpreting the entries in the foundry's records for pounds of worn journal bearings shipped to the foundry. His firm attributed poundage to non-existent entities when the entries were actually for parties to this litigation. Plaintiffs' counsel also pointed out approximately six other discrepancies in Remaining Defendants' compilation. In rejecting the compilation, the Court ruled that although it could accept a summary chart pursuant to Rule 1006 of the Federal Rules of Evidence, Remaining Defendants' compilation did not fairly represent the evidence before the Court: the underlying records. *1259 United States v. Bakker, 925 F.2d 728 (4th Cir.1991); United States v. Strissel, 920 F.2d 1162 (4th Cir.1990); United States v. Porter, 821 F.2d 968 (4th Cir.1987).

FN5. Rule 1006 of the Federal Rules of Evidence provides that "[t]he contents of voluminous writings ... which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." Fed.R.Evid. 1006.

Plaintiffs retained Dr. Kenneth Wise [FN6] to estimate, *inter alia*, the poundage of worn journal bearings that each Defendant sent to the foundry. Dr. Wise used documents from the foundry that indicated the amount of metal received by the foundry, (Pls.' Exs. 1-27), bills of lading to railroads or from truck drivers, invoices for conversions of worn journal bearings into new journal bearings, and credit letters. (Pls.' Exs. 28-234.) Dr. Wise testified that he had relatively complete information for the years 1961, 1962, 1964, 1967, and 1968. (R. at 436.) Dr. Wise also relied upon the deposition of Elmer Oakes and several other employees of Pneumo Abex, as well as the affidavit of Mr. Oakes. Dr. Wise used Moody's Reports to develop estimates of the amount of material sent by conversion customers. (R. at 430, Pls.' Ex. 244.) Dr. Wise testified that in making his estimate, he considered the possible bias against companies that were not consistent users of the foundry over time. (R. at 437.) From Moody's Reports, he obtained information on the

"ton miles[,] or the number of freight miles[,] or [the] number of gondola cars ... to extrapolate for certain companies into years where Elmer Oakes suggested they would have been customers of the foundry but which were not covered by the documents." (R. at 437.) Dr. Wise testified that according to his calculations, which exclude the contributions of Pittsburgh and Lake Erie Railroad Company, [FN7] Remaining Defendants "Fruit Growers Express along with CSX and Norfolk Southern" delivered 80.1% of the worn journal bearings to the foundry. (R. at 477.) Plaintiffs did not offer as an exhibit a summary of Dr. Wise's projections.

FN6. Dr. Wise holds a bachelor's degree in physics from Harvey White College and a doctorate in economics from Massachusetts Institute of Technology. (R. at 420.) He has experience in the lead industry and other metals markets. (R. at 420-22.)

FN7. Counsel for Defendant Pittsburgh and Lake Erie Railroad Company indicated that his client had filed for relief under Chapter 11 of the Bankruptcy Code. The Court released counsel from the trial pursuant to the automatic stay of Chapter 11. 11 U.S.C. § 362 (1994).

Remaining Defendants objected to Dr. Wise's projections because he relied upon records from only a few of the years at issue. Dr. Wise also testified that he did not include Third-Party Defendant, Illinois Central Railroad Company in the calculations. (R. at 472.) Furthermore, Remaining Defendants questioned many of the assumptions upon which Dr. Wise based his conclusions, such as suggesting that the estimates assumed consistent usage of the foundry by Defendants as opposed to use of competing operations, (R. at 469), or use of one of Pneumo Abex's foundries in other parts of the country. (R. at 470.) However, Dr. Wise testified that when he made the estimate, he took into account indications that a railroad was not using the foundry in Portsmouth at a particular time. (R. at 470.) He also testified that he made adjustments according to Mr. Oakes's testimony about how long a railroad was a customer of the foundry. (R. at 474.)

[3] The Court finds Dr. Wise's methodology to be a reasonable approach for estimating the contributions of Defendants and that it reflects more accurately the available records than does Remaining Defendants' compilation as presented by Mr. Low. Furthermore, having rejected Remaining Defendants' compilation as unrepresentative of the underlying records, use of Dr. Wise's calculations is the only way for the Court to avoid assigning Remaining Defendants with 100% of

Defendants' Share of the liability (minus the amounts of settlements). Accordingly, the Court assigns Remaining Defendants 80.1% of Defendants' Share as discussed below in section III.D.

C. Recoverable Costs/Costs Consistent with the NCP

[4] Section 107(a)(4)(B) provides that Remaining Defendants are liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." Plaintiffs, however, bear the burden of proving that their response costs are consistent with the national contingency *1260 plan (the "NCP"). United States v. Northeastern Pharmaceutical & Chem. Co., Inc., 810 F.2d 726, 747 (8th Cir.1986); United States v. J.M. Taylor, 909 F.Supp. 355, 362 n. 8 (M.D.N.C.1995). Remaining Defendants contend that Plaintiffs have not established that many of their costs are either necessary or consistent with the NCP. Remaining Defendants also argue that the applicable statute of limitations bars some of Plaintiffs' claims. More specifically, Remaining Defendants challenge Plaintiffs' claims for the costs of oversight by the EPA and the VDWM, attorneys' fees, the lost time of the employees of the City and the PRHA, and medical monitoring. Remaining Defendants also charge that Plaintiffs are attempting to win "multiple recovery" by presenting more than one bill for a single expense.

The Court begins its analysis with the recognition that CERCLA does not define the phrase "costs of response." CERCLA does, however, define "response." The statute defines "response" as "remove, removal, remedy, and remedial action; ... all such terms ... include enforcement activities related thereto." CERCLA § 101(25). CERCLA further defines remove and removal in § 101(23) and remedy and remedial action in § 101(24). Thus, it appears that the costs of removal and remedial actions are costs of response. Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1154 (9th Cir.1989).

The Court now turns to the requirement that the costs of response be consistent with the NCP. The purpose of the NCP "is to provide the organizational structure and procedures for preparing for and responding to ... releases of hazardous substances...." 40 C.F.R. § 300.1 (1995). "The NCP provides ... for [p]rocedures for undertaking response actions pursuant to CERCLA...." 40 C.F.R. § 300.3(b)(4) (1995). The regulations further provide as follows:

For the purpose of cost recovery under section 107(a)(4)(B) of CERCLA:

(i) A private party response action will be considered "consistent with the NCP" if the action, when evaluated as a whole, is in *substantial compliance* with the

applicable requirements in paragraphs (5) and (6) of this section, and results in a CERCLA-quality cleanup; and

(ii) Any response action carried out in compliance with the terms of ... a consent decree entered into pursuant to section 122 of CERCLA will be considered "consistent with the NCP."

40 C.F.R. § 300.700(c)(3) (1995) (emphasis added). Most of Plaintiffs' claimed costs are for the services rendered by the vendors, contractors, and subcontractors who conducted the actual work at the Site; "the main thrust of the remedy is to excavate soil containing lead." (R. at 49.) Plaintiffs have conducted this work under the direction of the EPA and the VDWM, consistent with various administrative orders and consent decrees. (E.g., R. at 48-52; 250-55.) The Court thus finds that the majority of the claimed costs are recoverable.

1. Statutes of Limitations

Section 113(g)(2)(A) of CERCLA provides in relevant part that actions for the recovery of costs referred to in § 107 for a removal action "must be commenced ... within 3 years after the completion of the removal action." Remaining Defendants argue that the action for recovery of the costs associated with the Consent Order of 1986 is time-barred. Remaining Defendants rely upon the EPA's statement in the administrative order of March, 1992, issued pursuant to § 106(a) of CERCLA, that the removal action under the 1986 Consent Order was completed "on or about February of 1988." (Pls.' Ex. 314, at 3.) Plaintiffs filed their complaint in July of 1994. Remaining Defendants do not cite any cases for the proposition that a statement from the EPA in a unilateral administrative order is dispositive of the issue of when the statute of limitations tolls. [FN8] Plaintiffs counter that for purposes of the statutes of limitations, all activity up to and including issuance of a record of decision constitutes the removal action.

FN8. Defendants do, however, cite *Kelley v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 840 (6th Cir.1994) and *One Wheeler Rd. Assocs. v. Foxboro Co.*, 843 F.Supp. 792 (D.Mass.1994), which held that the removal actions were not complete until the last removal action concluded.

*1261 In *Kelley v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 840 (6th Cir.1994), the United States Court of Appeals for the Sixth Circuit affirmed the district court's ruling that "surface removal activity and the RI/FS comprise a single removal action for statute of limitations purposes." In that case, the defendants argued that the surface removal activity was an emergency physical removal under § 104(a) of CERCLA and the RI/FS was

conducted pursuant to § 104(b). Thus, they argued that because different subsections of the Act governed the activities, the activities were distinct, with two different dates of completions. In finding that both activities comprised one removal action, the Sixth Circuit found that the two subsections were interrelated and implied Congress's expectation that both types of activities would be taken in tandem. *Id.* at 840-41.

[5] Several district courts have held that the statute of limitations does not begin to run until the EPA issues the record of decision. *E.g., United States v. Davis*, 882 F.Supp. 1217, 1225-27 (D.R.I.1995) (citing cases); *California v. Celtor Chem. Corp.*, 901 F.Supp. 1481, 1487-89 (N.D.Cal.1995). Citing *Kelley v. E.I. DuPont de Nemours & Co.*, the district court in *Celtor Chem. Corp.* found that the first phase of the cleanup was the removal action which ended when the EPA signed the ROD and that "[a]ll of the cleanup activities which took place within this time period, including the Remedial Investigations and Feasibility Studies, constitute a single 'removal action' under CERCLA." 901 F.Supp. at 1488. The Court finds persuasive the reasoning of these cases. Plaintiffs have been engaged in this cleanup for some time; however, their efforts have been continuous and the EPA did not issue the ROD until 1992 and the Amended ROD until 1994. Thus, the Court finds the statute of limitations bars none of Plaintiffs' claims presented to the Court.

2. Costs of Oversight

Plaintiffs petition the Court for recovery of the costs they reimbursed the EPA for oversight of the cleanup activities. Pursuant to the Consent Decree, Plaintiffs have reimbursed the EPA \$1,170,131.37, and the Court received testimony that subsequent to the Consent Decree, Plaintiffs have paid the EPA an additional sum of \$570,064.34 for a total of \$1,740,195.71 (R. at 377-78, Pls.' Exs. 259, 363.) Plaintiffs argue that because the Consent Decree required them to reimburse the EPA for its costs of oversight, they should be able to recover Remaining Defendants' proportional share. As for the involvement of the VDWM, Plaintiffs conducted the RI/FS under the supervision of VDWM. Also, the EPA and the Commonwealth of Virginia jointly published the 1992 ROD and the Amended ROD. Remaining Defendants argue that only the EPA's costs associated with the Remedial Investigation/Feasibility Study ("RI/FS") conducted pursuant to the consent order of 1989 are recoverable. They further argue that the RI/FS terminated with the final document in February, 1992. Remaining Defendants make no mention of costs associated with the oversight of VDWM.

[6] The United States Court of Appeals for the Fourth Circuit has not addressed the recovery of costs for agencies' oversight. In support of their position, Remaining Defendants cite United States v. Rohm & Haas Co., 2 F.3d 1265, 1278 (3d Cir.1993), which drew a distinction between the government's role in performing cleanups and the government's role in supervising cleanups by private parties. Cf. United States v. Lowe, 864 F.Supp. 628, 632 (S.D.Tex.1994) (holding that Rohm & Haas leads "to the incongruous result that the EPA could recover the costs of overseeing its own contractors but not the costs of overseeing those hired by the potentially responsible parties"). Discussing § 104(b) of CERCLA, the United States Court of Appeals for the Third Circuit held that an RI/FS is one type of investigation contemplated by § 104(b) and is thus a removal action. Rohm & Haas, 2 F.3d at 1277. However, the Third Circuit held that "if what the government is monitoring is not the release or hazard itself, but rather the performance of a private party, the costs involved are non-recoverable oversight costs." *Id.* at 1279. Plaintiffs cite a number of cases which have not similarly restricted recovery of the costs of oversight. E.g., *1262 United States v. R.W. Meyer, Inc., 889 F.2d 1497 (6th Cir.1989); California v. Celcor Chem. Corp., 901 F.Supp. 1481 (N.D.Cal.1995); United States v. Lowe, 864 F.Supp. 628 (S.D.Tex.1994). In R.W. Meyer, Inc., the United States Court of Appeals for the Sixth Circuit held that § 107(a) authorized the recovery of indirect costs. 889 F.2d at 1504. In rejecting the defendant's arguments, the Sixth Circuit explained as follows:

[T]o the extent cleanup actions are necessary, we are persuaded that the statute contemplates that those responsible for hazardous waste at each site must bear the full cost of cleanup actions and that those costs necessarily include both direct costs and a proportionate share of indirect costs attributable to each site. In essence then, the allocation of indirect costs to specific cleanup sites effectively renders those costs direct costs attributable to a particular site.

Id. This Court is most persuaded by the reasoning of the Sixth Circuit. In this instance, the cleanup would not occur without the oversight of the EPA and the VDWM. Thus, the Court finds that these costs of oversight by the EPA and the VDWM are necessary costs of response consistent with the NCP. The Court notes that Plaintiffs have not submitted a claim for the costs of oversight by VDWM. The Court accordingly finds that Plaintiffs may recover the costs of oversight by the EPA that they have already incurred, and pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a) (1994), Plaintiffs may recover any future costs of oversight by the EPA and the VDWM that are consistent with the NCP and this memorandum opinion and order.

3. Attorneys' Fees

In Key Tronic Corp. v. United States, 511 U.S. 809, ----, 114 S.Ct. 1960, 1967, 128 L.Ed.2d 797 (1994), the United States Supreme Court held that "some lawyers' work that is closely tied to the actual cleanup may constitute a necessary cost of response in and of itself under the terms of § 107(a)(4)(B)" and is thus recoverable. In that instance, the Supreme Court considered whether the plaintiff-petitioner could recover the costs associated with pursuing an action for recovery of costs, the cost of the attorneys' efforts to identify potentially responsible parties ("PRPs"), and the costs of the negotiations between the plaintiff-petitioner and the EPA which culminated in a consent decree. The Supreme Court placed the costs at issue into two broad categories: 1) traditional expenses of litigation and those incurred to protect Key Tronic's interest as a defendant in proceedings that established the extent of its liability and 2) expenses which increase the probability that cleanup will be effective and paid for and that serve a statutory purpose other than the reallocation of costs. See *id.* at ----, ----, 114 S.Ct. at 1967-68. The Supreme Court held that the plaintiff-petitioner could recover only the attorneys' costs for identifying PRPs. *Id.* at ----, 114 S.Ct. at 1967.

Corporate Counsel for Whitman Corporation testified that one law firm, Winston and Strawn, assisted Pneumo Abex in its dealings with the EPA in a number of ways. (R. at 239.) He further testified that the law firm 1) assisted in the discussions of the appropriate remedy, 2) participated in various activities involving cleanup, and 3) assisted in identifying PRPs. (*Id.*) Although this witness testified that he did not know if the invoices involved negotiating the consent decree in 1986, (R. at 245), the Court's review of the invoices indicate that they cover the period from 1991 to 1994. The witness also testified that the invoices covered a period too early in time to be associated with the latest consent decree which the Court entered in 1996. (*Id.*)

The Court's review, however, also uncovered some deficiencies in Plaintiffs' proof of its recoverable costs. For example, many of the invoices contain entries for conferences among attorneys within the firm. Although the entries indicate that the conferences were held to discuss the Site, the Court is unable to discern whether the conferences concerned Plaintiffs' liability, consent decrees or administrative orders, or the technicalities of the cleanup. For example, one of the invoices from Winston and Strawn lists one hour of billable time for "Status and strategy conference with J. Homsy." (Pls.' Ex. 258 Moore 1.) This conference could have involved *1263 the technicalities of the cleanup, the recovery of costs from other PRPs, or any number of matters for which Plaintiffs

may or may not be entitled to recover; Plaintiffs simply did not illuminate the nature of such expenses. Another invoice contains an entry for eleven (11) hours for "Preparation for meeting with U.S. EPA." (Pls.' Ex. 258 Moore 1.) The Court does not know if the meeting involved negotiations for a consent decree for which costs would not be recoverable or if it involved some compliance issue for which costs may be recoverable. The invoices also contain numerous entries for "Photocopy Miscellaneous Environmental Documents." Plaintiffs did not offer testimony of how or if the firm segregated photocopying charges related to the cleanup from those that were not. Similarly, the Court could not discern whether the long distance telephone charges were related to the cleanup. Also, throughout the invoices, portions of the descriptions of the billed for activities have been blacked-out and the total number of hours associated with the activities have been adjusted, presumably downward, by handwritten notations. Plaintiffs offered no testimony to establish how they or the law firm adjusted the hours. Furthermore, the manner in which the adjustments are indicated in the records suggests to the Court that these adjustments were made long after Plaintiffs incurred the costs, when memories may have been inaccurate or incomplete.

[7] Corporate Counsel for Pneumo Abex [FN9] testified that another law firm, Bingham, Dana & Gould provided legal assistance through legal research, identifying actions the EPA had taken at other sites contaminated with lead, addressing legal issues in formulating work plans, addressing issues of compliance and issues that arose during the response activities, and assisting with the contracts of vendors and contractors. (R. at 376-77.) These invoices covered the period from 1986 to 1990. This witness further testified that one of the law firm's functions was "to protect the corporate interest." (R. at 388.) When asked on cross-examination in a series of questions whether he could separate the services of the law firm into those that protected the corporate interest generally and those associated with the cleanup, (R. at 388- 91), the witness answered that such a separation was "not a distinction that makes sense" to him. (R. at 391.) One of the invoices from Bingham, Dana & Gould lists "Prep for, attend meeting at Abex re strategy on remedial issues and NPL listing" for \$1,182.50. (Pls.' Ex. 258 Kenfield 1.) Another example is "Telephone conference with Rhodes and Lee" for \$60.00. (*Id.*) Without further explanation, the Court cannot reasonably conclude that the firm performed this work in connection with the actual cleanup as opposed to protecting Pneumo Abex's interest in its attempt to limit its liability or avoid listing on the NPL.

[FN9]. For clarification, the Court understands that

the witness was employed by Abcx Corporation in 1986 and is currently employed by McAndrews & Forbes, a holding company. Pneumo Abex went through a series of changes in its corporate structure, and McAndrews and Forbes now manages this case for Pneumo Abex. However, the Court is primarily concerned with the witness's involvement as a past and present legal representative for Pneumo Abex. (R. at 365-67.)

Although Plaintiffs presented two witnesses to lay a foundation for the admission of the invoices from the two law firms, the Court, through its examination of the exhibits, is unable to discern whether many of the expenses incurred are "closely tied to the actual cleanup." [FN10] Unlike the plaintiff-petitioner in *Key Tronic*, Plaintiffs did not provide the Court with a categorization of its attorneys' fees. Rather, Plaintiffs provided the Court with two sets of invoices, totalling more than 500 pages, with the only assistance to the Court being the total cost for each law firm. The Court thoroughly reviewed the exhibits and has found that a portion of Pneumo Abex and Whitman Corporation's claimed attorneys' fees are closely tied to the actual cleanup and are recoverable.

[FN10]. The Court notes that Plaintiffs merely "dumped" voluminous invoices in the record without sufficient explanation of the presumably relevant information within the exhibits. The Court questioned whether this practice could create any difficulties, and Remaining Defendants indicated that they would be challenging specific items. (*E.g.*, R. at 244- 46, 403, 407, 424.)

*1264 Regarding the City's claim for the services of its outside legal counsel, Hogan and Hartson, L.L.P., the Court examined the invoices and allowed only those portions that the Court could reasonably attribute directly to the cleanup. The Court similarly allows the costs for the services of the PRHA's outside legal counsel, Cooper Spong & Davis. Also, the Court notes that portions of several of the entries for Hogan and Hartson, L.L.P. were redacted, but the corresponding hours for those activities had not been adjusted. (Pls.' Ex. 279.) Furthermore, the City's and the PRHA's proof suffered from many of the same deficiencies that Pneumo Abex's and Whitman Corporation's proof did.

4. *The Lost Time of the Employees of the City and the PRHA*

Plaintiffs presented evidence of the time spent by employees of the City and the PRHA in dealing with the

Site. They calculated the portion of each employee's salary that could be attributed to the time spent on the Site. Remaining Defendants argue that the lost time is a form of economic loss that is not recoverable under CERCLA. Plaintiffs respond that the use of the employees of the City and the PRHA rather than consultants does not render the costs of such work unrecoverable. Plaintiffs cite *T & E Indus., Inc. v. Safety Light Corp.*, 680 F.Supp. 696 (D.N.J.1988), in support of their position that the time spent by the employees of the City and PRHA are recoverable because the activities performed by these employees were required by the NCP. In *T & E Indus.*, the district court found that the plaintiff could recover for the time spent by its president if it could adduce sufficient facts to demonstrate that he was personally involved in monitoring, evaluating, and minimizing the contamination. 680 F.Supp. at 707. Cf. *Hateco Corp. v. W.R. Grace & Co.*, 849 F.Supp. 931, 971-72 (D.N.J.1994) (holding that salaries of management and personnel are recoverable as indirect costs associated with general operation of response action). In so holding, the court rejected the defendants' argument that it should draw a distinction between costs recoverable by the government and those recoverable by private parties. *Id.* at 706. Remaining Defendants cite *Juniper Dev. Group v. Kahn (In re Hemingway Transp., Inc.)*, 126 B.R. 656, 663 (D.Mass.1991), *aff'd in part, rev'd in part on other grounds*, 993 F.2d 915 (1st Cir.1993), in support of their position that the lost time is not recoverable.

In finding that the value of the time of the plaintiff's employees was not recoverable, the bankruptcy court explained as follows:

Nothing in the statutory language of CERCLA indicates that employee time should be considered a cost of response. Rather, employees must be paid whether or not they have to spend their time addressing waste cleanup efforts; these costs are not made necessary by the improper disposal of wastes. To interpret CERCLA to require reimbursement of employee time and effort would, in effect, compensate CERCLA plaintiffs for lost employee productivity. But CERCLA was never intended to provide for the recovery of business losses.

Id. The bankruptcy court relied upon *Artesian Water Co. v. Government of New Castle County*, 659 F.Supp. 1269, 1287 (D.Del.1987), *aff'd*, 851 F.2d 643 (3d Cir.1988), which held that losses resulting from idling property and equipment were not recoverable because they were economic losses. The Court finds Remaining Defendants' reliance upon this line of cases unpersuasive, particularly because the losses discussed in *Artesian Water Co.* were those associated with the business previously conducted upon the contaminated site, not with the losses and/or costs associated with the actions taken in

response to the contamination.

[8] As a result of responding to the contamination for which Defendants' are partially responsible, the City and the PRHA presumably faced one or more of three scenarios because they did not hire outside consultants to handle the situation: 1) existing personnel diverting their time from other governmental affairs to attend to the Site and other matters remained unaddressed, 2) hiring of new personnel, temporary or permanent, to compensate for the increased work load, or 3) existing personnel working overtime. Regardless of which scenario occurred, the *1265 Court finds that CERCLA provides for all liable parties to share in the costs. The Court now turns to Plaintiffs' proof of these indirect costs.

To calculate the costs for the time of the employees of the City and the PRHA, Plaintiffs referred to the calendars of the personnel involved and estimated, based upon entries in the calendars, how many hours the employees spent dealing with the Site. The City presented calendars for several employees. The Court found this documentation to be problematic for several reasons. First, many of the entries in the calendars are illegible because of poor quality photocopies. (*E.g.*, Pls.' Ex. 266.) Second, although the activities described may be directly related to cleanup and the entries provide the times at which the activities presumably began, the entries do not include when the activities ended. (*E.g.*, Pls.' Ex. 269.) Also, these estimates of time are not contemporaneous with the occurrence of the meeting or activity but have been made after the fact for meetings dating back to as early as 1991. (*See, e.g.*, Pls.' Ex. 269.) For example, the Director of Operations for the PRHA testified as follows about how the PRHA calculated its employees' hours:

We had my secretary, who also serves as the secretary of the Executive Director and at the time served as secretary to the Director of Housing, she went through and compiled meeting dates from our calendars. She saves our calendars going back a number of years. Whenever we had a meeting scheduled with CSX or Abex, or related to Abex, she would know the meeting related to Abex and what topic. She went back and computed those over the pas[t] three or four years.

(R. at 883.) One example of such a computation is an entry in the PRHA's proof for work from 1992 to 1995 by six (6) employees for sixty-nine (69) hours. The Court is unable to verify such claims. The witness further testified that "[t]he secretary went through the calendar, and where we had a meeting noted--for example, if we had a 1:00 meeting noted for Abex and then we had a 2:00 meeting for something totally unrelated, she would put an hour down and assign it to the Abex category." (R. at 884.) Although a meeting may have appeared on an individual's calendar, the Court cannot be certain that the

individual actually attended the meeting nor can the Court be certain that the individual remained at the meeting until the next appointment on his/her calendar. The witness was asked if he thought the calendared time or uncalendared time would be greater for the employees and he replied:

Well, certainly my experience has been that we do not keep time the way attorneys do. So if I had a meeting with two other people in the office to discuss something that came through on Abex or something from EPA or whatever, we might discuss it for an hour or two hours, but I don't run in and mark that on my calendar, so I would say that the time that my secretary was able to document for meetings would be the tip of the iceberg in terms of the amount of time that's spent dealing with Abex over the years....

(R. at 886.) Although the City and the PRHA may have spent much more time on the Site than they have claimed, the Court must still question the reliability or accuracy of the claims presented. This uncertainty is largely insurmountable, particularly because Plaintiffs did not present testimony from any of the individuals who actually made the estimates of time.

Furthermore, Plaintiffs made little or no showing that these activities and associated costs were "necessary response costs consistent with the NCP." On several occasions, the Court cautioned Plaintiffs to provide specific testimony about the exhibits, but Plaintiffs continued to cursorily offer voluminous pages into evidence without attempting to clarify many issues on re-direct examination. (E.g., R. at 245-46, 407, 424.) Also, many of the witnesses through whom the exhibits were offered were for the most part custodians of the records and did not have direct knowledge of why the costs were incurred. (E.g., R. at 244, 412.) The lack of "direct knowledge" testimony is particularly problematic when the Court attempts to discern the meaning of entries such as "EPA" for one hour or "Fisher Funeral Home Issues" for four (4) hours. (Pls.' Ex. 265.)

*1266 [9] Although the Court finds that as a matter of law indirect costs for the work performed by employees of PRPs may be recoverable, the deficiencies of Plaintiffs' proof in this case prevent recovery for most of their claims for the salaries of the employees of the City and the PRHA.

5. Medical Monitoring/Department of Health's Costs

Remaining Defendants also contend that the City and the PRHA may not recover costs associated with "medical monitoring." They cite Price v. United States Navy, 39 F.3d 1011, 1017 (9th Cir.1994) and Daigle v. Shell Oil Co., 972 F.2d 1527 (10th Cir.1992) in support of their

position. However, Remaining Defendants provide no discussion of the facts or reasoning of these cases or how they apply to the case at hand. Plaintiffs seek recovery of costs for tests for the level of lead in the blood of the residents of the Site, clinic visits, and a survey. (Pls.' Ex. 273; R. at 404.) Having reviewed the cases Remaining Defendants cite, the Court does not find that these costs are of the type considered in those cases.

[10] The United States Court of Appeals for the Ninth Circuit in Price followed Daigle in holding that an individual homeowner could not recover "the cost of medical monitoring to detect the onset of any latent disease caused by exposure to hazardous waste." 39 F.3d at 1014, 1015-17. In Daigle, the United States Court of Appeals for the Tenth Circuit upheld a denial of the plaintiffs' claim for the establishment of a fund to finance long term medical monitoring or surveillance to detect the onset of latent disease. However, the Ninth Circuit has clarified its position in Price to explain that it held "that private party medical monitoring activities, initiated and coordinated independently of ongoing CERCLA cleanup efforts, were not § 9601 removal or remedial actions.... [However,] [t]he reasoning in Durfey [v. E.I. DuPont De Nemours & Co., 59 F.3d 121 (9th Cir.1995)] and Price does not apply to health assessment and surveillance actions engaged in by a governmental agency pursuant to explicit CERCLA provisions. Hanford Downwinders Coalition, Inc. v. Dowdle, 71 F.3d 1469 (9th Cir.1995) (emphasis added). In Hanford Downwinders Coalition, the Ninth Circuit considered costs incurred by the Agency for Toxic Substances and Disease Registry ("ATSDR"), established by CERCLA § 104(i) which is not at issue in the instant case. However, in this case, the VDWM, one of the lead agencies at the Site, asked the City's Health Department to conduct the screening to help VDWM determine the necessity of immediate soil removal. (Pls.' Ex. 274.) Each of these cases discusses recovery of costs for personal injuries or diseases as being inconsistent with the legislative history and distinguished such costs from the examples of removal actions provided in § 101(23) of CERCLA. This Court finds that in the instant case "[t]o the extent that plaintiffs seek to recover the cost of medical testing and screening conducted to assess the effect of the release or discharge on public health or to identify potential public health problems presented by the release, however, they present a cognizable claim under section 9607(a)." Brewer v. Ravan, 680 F.Supp. 1176, 1179 (M.D.Tenn.1988). The blood tests in this case do not appear to be the result of the residents' personal concerns but a result of the VDWM's attempt to assess the effects of the release or threatened release upon the residents of the Site and the rapidity with which Plaintiffs needed to respond to the release or threatened release. Accordingly, the Court finds that these medical costs are

recoverable.

6. JSG Technical Services

[11] Remaining Defendants also argue that JSG Technical Services ("JSG") did not perform response activities and, thus, Plaintiffs may not recover the cost of JSG's services. JSG became involved with the Site after issuance of the consent decree in 1986. Remaining Defendants focus on some of the descriptions of work in JSG's invoices such as "professional services" "management services," and "environmental management services." (Pls.' Ex. 258 Bassano 10.) Although the Court recognizes that these are rather vague descriptions, Plaintiffs offered testimony *1267 to clarify the services provided. The president of JSG testified as follows:

[JSG] reviewed a work plan that was submitted to the EPA, designed curbing, fencing, capping and storm water runoff that was constructed at the site; hired contractors to do the excavation, sampling, construction, and testing required; and I reviewed invoices for those contractors to ensure that the work was done that was invoiced for, and the invoices were accurate, and I approved invoices for that work.

(R. at 338-39.) He also testified that he worked on "treatability studies ... working toward other means of treating the material rather than disposing of it..." (R. at 339-40.) The Court finds this testimony credible and sufficient evidence to establish that JSG assisted in the cleanup and removal of hazardous substances and took actions consistent with a permanent remedy. JSG provided services "to prevent, minimize, or mitigate damage to public health or welfare or to the environment ... [including] security fencing or other measures to limit access," CERCLA § 101(23), and performed or oversaw the performance of such tasks as collection of runoff and excavation. CERCLA § 101(24). Accordingly, the Court finds that Plaintiffs may recover the costs of these services as well as those of contractors and vendors listed in Plaintiffs' Exhibit 259.

7. Multiple Recovery

In their post-trial brief Remaining Defendants provide the Court one example of Plaintiffs allegedly seeking to recover twice for one invoice. The Court received testimony that Pneumo Abex sent many of the invoices for work at the Site to its counsel, Winston and Strawn. (R. at 288.) Winston and Strawn then paid the vendors and subcontractors and, according to Remaining Defendants, billed Pneumo Abex for "expert consulting fees." At trial Plaintiffs submitted the bills from Winston and Strawn as well as invoices from their vendors and subcontractors. Based upon this information and this one example, Defendants argue that "at the least all of

Winston's entries labeled 'expert consultation fees' [should] be removed from the total response costs figure." (Def's.' Br. at 28.)

The Court makes several observations in addressing Remaining Defendants' concern. First, Remaining Defendants have provided the Court with one invoice number to be found in Plaintiffs' Exhibit Dunnell 1. More than 500 loose pages comprise Plaintiffs' Exhibit Dunnell 1. Remaining Defendants also direct the Court's attention to Plaintiffs' Exhibit 258 Moore 1, the invoices from the law firm of Winston and Strawn. In reviewing the law firm's invoices, the Court has not included in Plaintiffs' recoverable costs the entries for "expert consultation fees." Furthermore, testimony suggests that these entries were offered as proof that the invoices from vendors, contractors, and subcontractors listed separately in Plaintiffs' Exhibit 259 and provided in Plaintiffs' Exhibits Dunnell 1 and Dunnell 2 were paid on behalf of Pneumo Abex by its counsel. Remaining Defendants have simply failed to adduce sufficient proof for the Court to find that Plaintiffs are attempting to exact double recovery. Furthermore, the Court's independent review of the documentation does not suggest such difficulties.

8. Total Recoverable Costs

[12] The Court conducted an extensive review of Plaintiffs' documentation of costs. With the exception of the documentation for technical services by vendors, contractors, and subcontractors, Plaintiffs' proof suffered from a lack of direct testimony by individuals with personal knowledge of how or why Plaintiffs incurred the costs. Plaintiffs also failed to separate from the total cost those costs closely tied to the cleanup. For example, many of the costs were associated with consent decrees, particularly attorneys' fees.

a. The City's Costs

The Court disallows much of the City's claimed costs for the services of SCS Engineers because the invoices are for services rendered in the area known as Southside or Portcentre Commerce Park ("Portcentre"). (Pls.' Ex. 275.) Although Portcentre overlaps the Site to a large degree, Plaintiffs offered the Court no method for delineating *1268 which costs were associated within the Site versus those outside of the 700-foot circle. (See R. at 415-16, 876-77.) The Court has no rationale for apportioning those costs. Also, the City submitted costs for long distance telephone bills, (Pls.' Ex. 270), and costs to send one of the resident families to a meeting with the EPA in Washington, D.C. (Pls.' Ex. 271.) Plaintiffs offered no evidence that these costs were necessary and consistent with the NCP. The Court previously has discussed the unreliability of the records upon which Plaintiffs base

their claim for the lost time of employees of the City.

b. *The PRHA's Costs*

The documentation for PRHA's costs suffers from many deficiencies. For example, one entry for employee time for \$43.54 simply indicated "Gordon Wheatley meeting with Mrs. Bailey." (Pls.' Ex. 261.) The Court does not know the nature of the meeting and Plaintiffs offered no testimony to explain the entry in the record. Another example is "Meeting in PA (STH) Abex" for \$1,000.00. Nothing in the record suggests to the Court the nature of

this meeting, other than the blanket statement that these are "amounts paid by PRHA relating to Abex Superfund Site." (R. at 882.)

As the Court has discussed above, Plaintiffs bore the burden of establishing that the costs were necessary and consistent with the NCP. Having reviewed Plaintiffs' claims, the Court finds that the following amounts were necessary response costs consistent with the NCP:

1) Oversight by the EPA--	\$1,740,195.71
2) The City's costs--	14,072.67
3) The PRHA's costs--	15,590.64
4) Attorneys' Fees--Whitman Corporation and Pneumo Abex	44,818.50
5) Services related directly to excavation and removal at the Site--Whitman Corporation and Pneumo Abex	5,014,888.74

TOTAL	\$6,829,566.26.

D. Plaintiffs' Share and Defendants' Share

[13] As the Court indicated in its order of March 25, 1996, the Court will determine Plaintiffs' Share and Defendants' Share. CERCLA specifically provides for the Court to use equitable factors in an action for contribution pursuant to § 113(f)(1). Although the instant action is not one for contribution, the Court will use these factors to ensure that the responsible parties bear their fair share of liability. In making this determination, the Court considers several equitable factors. One factor is "the degree of involvement by parties in the generation, transportation, treatment, storage, or disposal of hazardous substances." United States v. Monsanto Co., 858 F.2d 160, 168 n. 13 (4th Cir.1988). The district court in Weyerhaeuser Co. v. Koppers Co., 771 F.Supp. 1420, 1426 (D.Md.1991), listed the following as factors which courts have considered in allocating response costs:

- 1) the ability of the parties to distinguish their contribution to the discharge, release, or disposal of hazardous waste;
- 2) the amount of hazardous waste involved;
- 3) the degree of toxicity of the hazardous waste involved;
- 4) the degree of care exercised by the parties with respect to the hazardous waste concerned;
- 5) the degree of cooperation by the parties with government officials to prevent any harm to the public or the environment;
- 6) the benefits received by the parties from the contaminating activities; and
- 7) the knowledge and/or acquiescence of the parties in

the contaminating activities.

Id. Other courts have also considered the financial resources of the parties involved. *E.g.*, Central Maine Power Co. v. F.J. O'Connor Co., 838 F.Supp. 641, 645 (D.Me.1993).

[14] In their post-trial brief, Remaining Defendants argue that as owners and operators of the Site, Plaintiffs should bear most of the costs of cleanup. They argue that the relevant equitable factors are control, culpability, and benefit. (Defs.' Br. at 13-16.) Remaining Defendants also try to rebut the inferences Plaintiffs attempted to raise at trial concerning Remaining Defendants' alleged recalcitrance and ability to pay. (*Id.* at 17- 19.) Plaintiffs' post-trial brief similarly focused upon Remaining Defendants' refusal *1269 to contribute to the response action, the EPA's issuance of § 106 unilateral administrative orders, and Remaining Defendants' financial resources. (Pls.' Br. at 16-18.) The Court's consideration of many of these factors, as discussed below, suggests that Plaintiffs and Defendants should equally bear the costs of cleanup.

1. Degree of Involvement, Degree of Care, and Knowledge and/or Acquiescence

Pneumo Abex is the most obvious PRP at the Site. It owned and operated the foundry which used worn journal bearings and other materials to cast new journal bearings. As the Court explained in its memorandum opinion and order of March 25, 1996, Pneumo Abex placed the bearings in a furnace to melt them down for re-casting. Pneumo Abex added other metals to the molten scrap to

comply with the Association of American Railroads' specifications. The furnaces used were vented to the outside and produced emissions of fine particulate material. Pneumo Abex poured the molten material into sand molds to form the backs of journal bearings. After the backs hardened and Pneumo Abex machined them, Pneumo Abex lined the backs with the scrap lining metal (babbitts) that it had separated from the scrap journal bearings initially. Pneumo Abex reused the sand until the sand lost its capacity to form molds. After washing the sand to reclaim bits of brass, Pneumo Abex placed the sand in a nearby creek from approximately 1946 to 1961. After 1961, it placed the sand on the back lot of its property. (R. at 940-41.) However, there is no evidence to suggest that Pneumo Abex knew that it would be subject to liability for its disposal of the sand. (See R. at 942.)

Defendants I, however, displayed greater involvement in the treatment and/or disposal of the hazardous substances than many other generators of hazardous substances. For example, Defendants I shipped worn journal bearings to the foundry in their own rail cars. (R. at 939.) They also had company representatives visit the foundry on a regular basis to inspect the new journal bearings and the operation in general. (R. at 937-38.) Mr. Oakes testified that the contracts between the foundry and Defendants I required access to the foundry per the Association of American Railroads' specifications for lined journal bearings as follows:

The inspector representing the purchaser shall have free entry, at all times, while the work on the contract of the purchaser is being performed, to all parts of the manufacturer's works which concern the manufacture of the material ordered. The manufacturer shall afford the inspector, that the material is being furnished in accordance with these specifications. Tests and inspection shall be made at place of manufacture prior to shipment unless otherwise specified.
(Pls.' Ex. 362 at 3, R. at 937.)

Landowner Defendant Holland Investment and Manufacturing, Inc. purchased the foundry in 1984 and conducted vehicle maintenance and repairs on the lot. (Stip. ¶ 16.) Holland Investment and Manufacturing, Inc. moved its operation from the Site in late 1987 or 1988. (R. at 218.) Mr. Rhodes of GEO Engineering testified that as for the contamination of the property owned by Landowner Defendant Runnymede Corporation, "Clearly the very high levels of lead in that area are the result of the foundry operation." (R. at 214.)

The Court's consideration of these factors suggests that Plaintiffs should bear more of the costs of response than Defendants; however, the differences here are only slight.

Defendants I were fully involved in the transport of the hazardous substances and were also involved in the treatment and/or disposal of the substances. Plaintiffs were fully involved in the disposal and/or treatment of the hazardous substances. Cf. Central Maine Power Co., 838 F.Supp. at 646 (considering two parties' full involvement in generating and arranging for the disposal of waste and other party's full involvement in treatment and disposal of wastes).

2. The Ability of the Parties to Distinguish Their Contributions

As the discussion above concerning divisibility indicates, the parties are only able to roughly distinguish their contributions to the contamination of the Site. The parties have *1270 produced few records of shipment of worn journal bearings which indicate Defendant I's contributions. Pneumo Abex also contributed scrap metal purchased on the scrap metal market, to the Site. (R. at 787-88.) The Court has used some of Plaintiffs' volumetric analysis to determine Plaintiffs' Share and Defendants' Share; however, the testimony of Plaintiffs' expert, Dr. Wise, did not include the contribution of lead-bearing materials by Pneumo Abex or Defendants I, individually. The Court has before it no complete volumetric analysis because it refused admission of Remaining Defendants' compilation and Plaintiffs' did not offer theirs. However, Remaining Defendants' expert, Matthew Low, testified that Pneumo Abex contributed approximately 0.9% of the lead-bearing materials at the Site. (See R. at 570-71.)

3. Degree of Cooperation with Government Officials

Response activity at the Site began in 1986. Pneumo Abex has entered into two Consent Decrees, one in 1986 and one in 1996, with the EPA and has been the respondent of one unilateral administrative order issued in 1992 pursuant to § 106(a) of CERCLA. The EPA notified Defendants I on several occasions of their status as PRPs. Finally, on May 6, 1996, approximately two weeks before the trial, the EPA issued to Defendants I a unilateral order pursuant to § 106(a) of CERCLA. Remaining Defendants offered testimony to rebut Plaintiffs' claim that Remaining Defendants had been recalcitrant. Corporate counsel for Norfolk Southern testified that although the EPA sent at least three notices (R. at 488, 490, 491), and a copy of a model consent decree, he viewed the EPA's notifications as "an indication of the agency's jurisdiction under Section 122(a) of CERCLA by which it was renotifying us of the previous special notice waiving the procedures involved in such notice, but inviting further discussion as to our responsibility as EPA has determined it under CERCLA."

(R. at 504.) The Court finds that Defendants I's responses to the EPA demonstrate recalcitrance, particularly when considered within the context of the notifications. After identifying Plaintiffs and Defendants I as PRPs and notifying the parties several times of its position, the EPA wrote the following: "By this letter, EPA notifies you of your potential liability with regard to this matter and encourages you to perform or to finance voluntarily those response activities that EPA determines to be necessary at the Site." (Pls.' Ex. 360 at 3.) To date, Remaining Defendants have not performed or financed the performance of any response activities. The letter also included the following: "To further encourage settlement, the EPA is enclosing with this letter a site-specific draft of EPA's model consent decree." (Pls.' Ex. 360 at 4; R. at 504.) Referring to the preceding sentence from the EPA's letter, the corporate counsel testified that he viewed it "as an invitation to negotiate with EPA as to whether and to what extent it deemed or it felt my company might be responsible for the site." (R. at 504-05.) The EPA extended this "invitation" in December of 1994. Norfolk Southern met with the EPA in January of 1995 to discuss the special re-notification. However, the counsel testified that Norfolk Southern did not enter into a consent decree because the "EPA has never otherwise asked us to sign a consent decree." (R. at 507.) The next communication from the EPA to Norfolk Southern was the unilateral administrative order of May 6, 1996. (R. at 508.) Norfolk Southern and CSX Transportation, Inc. met with the EPA on May 17, 1996 to discuss the unilateral administrative order. (R. at 508.) When asked if the parties discussed the consent decree at the meeting of May 17, 1996, the counsel testified as follows: "we focused primarily on the need for additional time to respond to their request. We unequivocally indicated our willingness to comply with the order by Tuesday, May 21, one day after the trial was scheduled to begin, and I believe the subject of a consent decree may have come up, but we asked that those matters be deferred pending completion of the actual trial phase of this case." (R. at 509.) He further testified that he was shocked that the EPA issued the order because he had not heard from the EPA in over a year and he thought that if the EPA were going to issue such an order, it would have provided the parties with an opportunity to discuss their *1271 concerns as it had in the past. (R. at 509.) During this time, Remaining Defendants did nothing to try to resolve its difficulties with the EPA. (R. at 538.) The Court finds Remaining Defendants' rationale wanting. Remaining Defendants knew that the EPA considered them PRPs as early as January of 1993, (R. at 488), approximately three and one-half years ago. Plaintiffs served them with the complaint initiating this action in 1994, approximately two years ago. The Court ruled that Remaining Defendants were liable as generators

approximately two months before the trial. Most of the parties found liable in that order have settled with Plaintiffs. Yet, Remaining Defendants persist in their refusal to assist in the cleanup of the Site.

4. Benefits Received From the Contaminating Activities

Dr. Wise, Plaintiffs' expert, testified that the railroads derived substantial economic benefits from their use of the foundry. (R. at 431.) He further testified that "for the few years in which I can make a direct comparison, the railroads derived a greater benefit from the operation of the foundry than did the foundry.... [I]t was a factor of almost three or four times the benefit to the foundry." (*Id.*) Dr. Wise testified that the railroads benefited from using the foundry because they received a greater credit from their scrap journal bearings than they could have received as payment if they sold the bearings on the scrap market. (R. at 431-32.) He calculated that for the years 1961, 1962, 1964, and 1967 the benefit for the railroads ranged from two (2) cents a pound of scrap journal bearings to nine (9) cents a pound. (R. at 432.) He also calculated that the profit for the foundry was two (2) cents per pound in 1961 and two and one-quarter (2 1/4) cents per pound in 1962. (R. at 433.) In order to make these calculations, Dr. Wise used the credit price the foundry paid its customer per pound of scrap metal, the amount per pound the foundry paid on the scrap metal market, and information from the American Metal Market to derive a forecasting equation to estimate what the price on the scrap metal market would have been for months for which he did not have data. (R. at 432.) On cross-examination, Dr. Wise admitted that the foundry derived from its system of conversion the benefit of largely avoiding the scrap metal market. (R. at 460.) However, he testified that the benefit "nets out in their ultimate profits. That would be one reason they would be willing to pay more for this scrap than the scrap dealer...." (*Id.*)

Remaining Defendants presented testimony from Lewis Perl, an economic consultant, to rebut Dr. Wise's testimony about the benefits received by the parties. Mr. Perl testified that he did not think that Dr. Wise's approach made "economic sense." (R. at 840.) In essence, he testified that the profits did not change from year to year because a change in the credit price would always accompany a change in the price of a new journal bearing, with the difference between the two prices remaining constant. (R. at 841.) However, Mr. Perl did not testify to specific instances in the years for which Dr. Wise had data that the changes in the two prices always moved proportionally. He provided hypothetical examples but did not point out specifics in the record. (*See* R. at 842-46.) He also criticized Dr. Wise for comparing the scrap market metal price to the conversion

price because the scrap metal market represents cash payments and the conversion represents a credit that is not realized until the new journal bearings are purchased. (R. at 847-48.) In effect, Mr. Perl argued, the railroads lent the foundry the value of the scrap bearings without receiving interest. He also testified that Pneumo Abex avoided the volatility of the scrap market which reduced their price of capital, (R. at 848); Dr. Wise similarly testified. (R. at 460.) The Court notes that the railroads would have also enjoyed the benefits of avoiding the volatile scrap market. Mr. Perl also testified that "Dr. Wise makes no allowance for the differential quality of the product, which would all flow to the benefit of Abex and certainly not to the railroads." (R. at 848.) Some of Mr. Perl's testimony supported that of Dr. Wise. For example, Mr. Perl testified that

The reason the scrap price was as low as it was throughout this period is because *1272 Abex chose a high transfer price, which made the scrap market uninteresting. Therefore, the railroads didn't go to the scrap market; they went directly to Abex. Therefore, there was not or at least a lesser demand for the scrap metal. Abex doesn't need to go to them. They can go to the railroads directly.

(R. at 849.) Although the thrust of Mr. Perl's testimony was to give an opinion that the railroads did not receive as great a benefit as Dr. Wise had testified, Mr. Perl himself testified that Pneumo Abex presented the most economically attractive option for the railroads. In response to the Court's questions, Mr. Perl testified that the railroads were "neutral" or indifferent to whether they sold their scrap metal on the market or received a credit from the foundry. (R. at 864.) The Court, however, finds this position incredulous. The railroads maintained this relationship for a significant period of time and the Court finds it unlikely that they were "neutral." Mr. Perl further testified that profits from journal bearings accounted for two and one-half percent of the foundry's profits and that it accounted for six-tenths of a percent of the railroads' profits. (R. at 851.) He reached the figures for the railroads by computing the proportion of the railroads' assets that were represented by the value of the journal bearings. (*Id.*) He reached the figure for the foundry by dividing the profits of the foundry at Portsmouth, as calculated by Dr. Wise, by the total profits for Pneumo Abex. (*Id.*) Mr. Perl only calculated the profits for "five or six railroads," (*id.*), and he did not indicate in his testimony which railroads those were. (*See id.*)

Having reviewed the testimony of the parties' experts and the exhibits, the Court concludes that the benefits received do not sharply distinguish the liability of Plaintiffs versus Defendants. The Court's analysis of the information suggests that both parties profited from the

arrangement. They both had an alternative--the scrap metal market--but chose to remain in this relationship for many years. Consequently, the Court finds that this equitable factor militates in favor of finding Plaintiffs and Defendants equally liable for the costs of cleanup.

5. Financial Resources of the Parties

Plaintiffs argue that Remaining Defendants are capable of contributing to the cleanup: "CSX and Norfolk Southern are enormous, billion-dollar companies. Indeed, by every financial measure they have far more resources than Whitman Corporation, not to mention the City and PRHA." (Pls.' Br. at 18.) Citing United States v. Atlas Minerals & Chems., Inc., 41 Env't Rep. Cas. (BNA) 1417, 1480, 1995 WL 510304 (E.D.Pa.1995), Remaining Defendants argue that the financial resources of the parties are relevant if a PRP is insolvent or unable to absorb a significant portion of the costs. Remaining Defendants also argue that unless a party introduces evidence from which the Court can assess the parties' financial positions, the Court should allocate the shares without regard for financial considerations.

The Court admitted form 10-Ks that Whitman Corporation, CSX Transportation, Inc., and Norfolk Southern Railway Company submitted to the Securities and Exchange Commission for the year ending December, 1995. (Pls.' Exs. 246-48.) Whitman Corporation reported assets of \$2,363.3 million. (Pls.' Ex. 246.) CSX Transportation reported assets of \$10,629 million. (Pls.' Ex. 247.) Norfolk Southern Railway Company reported assets of \$10,752.3 million. (Pls.' Ex. 248.) According to the Court's own research, Remaining Defendant Norfolk Southern is a Fortune 500 company and Remaining Defendants CSX Transportation, Inc. and Fruit Growers Express Company, Inc. are subsidiaries or affiliates of CSX Corporation, a Fortune 500 company. Plaintiff Whitman Corporation is also a Fortune 500 company. Plaintiff Pneumo Abex has experienced a number of changes in its corporate structure and affiliations during the last few years. (R. at 365-67.) Thus, the Court is unable to find a measure of its financial health. However, the Court notes that Plaintiffs do not argue that Remaining Defendants' resources are greater than Plaintiff Pneumo Abex's. The Court recognizes that the City and the PRHA have the financial resources characteristic of municipalities; however, Plaintiffs have not suggested that the City or the PRHA is unable to meet its obligations at the *1273 Site. Nothing in the record suggests that any of the parties are unable to pay a share of the costs of cleanup. Thus, this factor also counsels in favor of Plaintiffs and Defendants sharing the liability equally.

Considering these equitable factors, the Court concludes that Plaintiffs' Share of the response costs should be 50% and Defendants' Share should be 50%. As the Court indicated in a separate memorandum opinion and order, the principles of the Uniform Comparative Fault Act govern the effect of settlements and bar of future claims for contribution. Having found that Remaining Defendants are responsible for 80.1% of Defendants' Share, Remaining Defendants are liable for 80.1% of half of the response costs incurred or to be incurred by Plaintiffs for the cleanup of OU1, or approximately 40.1% of the total response costs for OU1.

E. Prejudgment Interest

Plaintiffs also petition the Court for an award of prejudgment interest. Section 107(a) of CERCLA provides for the recovery of interest as follows:

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

CERCLA § 107(a). The Hazardous Substance Superfund ("Superfund") provides that the interest rate for repayment of advances to the Superfund shall be "equal to the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the anticipated period during which the advance will be outstanding and shall be compounded annually." 26 U.S.C. § 9507(d)(3)(c) (1994). Furthermore, the Secretary of the Treasury must invest any portion of the Superfund not required to meet existing obligations and "[s]uch investments may be made only in interest-bearing obligations of the United States." 26 U.S.C. § 9602(b)(1) (1994). The district court in American Color & Chem. Corp. v. Tenneco Polymers, Inc., 918 F.Supp. 945, 960 (D.S.C.1995), calculated the interest rate "by averaging the auction average annual rate of six (6) month treasury bills and the average annual rate of composite long term government securities" for the years in question. Apparently using this method, Plaintiffs claim that the interest accrued through July 1, 1996 is in excess of \$700,000.00. (Pls.' Br. at 22, n. 12.) Plaintiffs, however,

do not provide the Court with an affidavit of an accountant or similar expert outlining how they calculated this figure. Cf. American Color & Chem. Corp., 918 F.Supp. at 960.

The Court finds that Plaintiffs are entitled to prejudgment interest and **DIRECTS** Plaintiffs to file the following information with the Court within fifteen (15) days of the date of this memorandum opinion and order:

- 1) the amount of prejudgment interest claimed based upon the amount of the Court's award in this memorandum opinion and order,
- 2) the date(s) from which they are calculating the interest,
- 3) the derivation of the interest rate(s) used, and
- 4) the per diem rate(s) of interest.

CONCLUSION

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

- 1) the harm at the Site is indivisible,
- 2) there exists a rational basis for apportionment of the liability, assigning Remaining Defendants 80.1% of Defendants' Share of 50%, or approximately 40.1% of the total response costs, those incurred and to be incurred,
- *1274 3) recoverable response costs to date equal \$6,829,566.24, and
- 4) Plaintiffs are entitled to recover from Remaining Defendants prejudgment interest, in an amount to be determined, which continues to accrue until payment.

Plaintiffs are **DIRECTED** to file with the Court the requested information concerning prejudgment interest within fifteen (15) days of the date of this memorandum opinion and order.

The Clerk is **DIRECTED** to send a copy of this order to counsel for Plaintiffs and counsel for Defendants.

It is so **ORDERED**.

936 F.Supp. 1250, 27 Env'tl. L. Rep. 20,230

Motions, Pleadings and Filings (Back to top)

• 2:94CV00716 (Docket)
(Jul. 15, 1994)

END OF DOCUMENT

1 3. On April 20, 2005, I caused the documents listed below:

2 **Petitioners' Opposition to WSDCC's Motion in Limine to Exclude**
3 **Evidence of "Voter Crediting" and to Require Petitioners to Introduce**
4 **the Best Evidence of Voting**

5 **Declaration of Harry Korrell**

6 **LR 5 Letter to the Honorable John Bridges with attachments of out-of-**
7 **state authorities**

8 to be filed with the Clerk of Chelan County Superior Court via Electronic Filing Legal
9 Services (E-Filing.com) which sent notification of such filing to the following persons,
10 with this Certificate to follow:

11 **Kevin Hamilton, Esq.**
12 Perkins Coie LLP
13 Attorneys for Washington State Democratic
14 Central Committee
15 1201 Third Avenue, Suite 4800
16 Seattle, WA 98101

17 **Thomas Ahearne**
18 For: Secretary of State Sam Reed
19 Foster Pepper & Shefelman
20 1111 Third Avenue, Suite 3400
21 Seattle WA 98101

22 **Russell J. Speidel**
23 Speidel Law Firm
24 7 North Wenatchee Avenue, Suite 600
25 Wenatchee, WA 98807

26 **Richard Shepard**
27 **John S. Mills**
28 For: Libertarians
29 Shepard Law Office, Inc.
30 818 S. Yakima Avenue, #200
31 Tacoma, WA 98405

32 **Dale M. Foreman**
33 Foreman, Arch, Dodge, Volyn &
34 Zimmerman P.S.
35 124 North Wenatchee Avenue, Suite A
36 P.O. Box 3125
37 Wenatchee WA 98807-3125

38 **Tim O'Neill**
39 Klickitat County Prosecuting Attorney
40 205 South Columbus Ave., MS-CH18
41 Goldendale WA 98620

42 **Gary Riesen**
43 Chelan County Prosecuting Attorney
44 PO Box 2596
45 Wenatchee WA 98807-2596

46 **L. Michael Golden**
47 Lewis County Senior Deputy Prosecuting
48 Attorney
49 345 West Main Street
50 Chehalis WA 98532

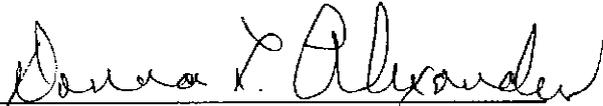
51 **Barnett N. Kalikow, Esq.**
52 For: Klickitat County Auditor
53 Kalikow & Gusa PLLC
54 1405 Harrison Avenue NW, Suite 207
55 Olympia WA 98502

56 **Jeffrey T. Even, Asst. Attorney General**
57 For: Secretary of State Sam Reed
58 Attorney General's Office
59 PO Box 40100
60 Olympia WA 98504-0100

1 **Gorden Sivley**
2 **Michael C. Held**
3 Snohomish County Deputy Prosecuting
4 Attorneys
5 2918 Colby Avenue, Suite 203
6 Everett WA 98201-4011

7 I certify under penalty of perjury under the laws of the State of Washington that the
8 foregoing is true and correct.

9 DATED this 20th day of April, 2005, at Seattle, Washington.

10 
11 _____
12 Donna L. Alexander
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27