UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

GENERAL ELECTRIC COMPANY,	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION NO. 00-30164-MAP,**
	)	
BERKSHIRE GAS COMPANY	)	
Defendant.	)	

MEMORANDUM REGARDING PLAINTIFF'S MOTION TO RECOVER CERTAIN ATTORNEY'S FEES AND COSTS
(Docket No. 26)

August 9, 2002

PONSOR, D.J.

I. INTRODUCTION

Plaintiff General Electric Company ("GE" or "plaintiff") has brought a motion pursuant to Fed. R. Civ. P. 11 against Berkshire Gas Company ("Berkshire Gas" or "defendant") to recover certain attorney's fees and costs associated with its motion for partial summary judgment as to liability. The lawsuit seeks contribution and reimbursement from Berkshire Gas for costs incurred as a result of an environmental clean-up. GE maintains that defendant violated Rule 11 when it denied its liability, forced plaintiff to prepare and file a motion for partial summary judgment, and then failed to oppose that motion. For the reasons discussed below, plaintiff's motion will be denied.

II. FACTUAL AND PROCEDURAL BACKGROUND

From 1902 until 1973, defendant owned a parcel of land in Pittsfield, Massachusetts that has come to be called "East Street Area 2" or "ESA2." (Docket 19 at 2). From 1902 until 1955, Berkshire Gas operated a gas manufacturing facility on ESA2. Id. at 2-3. During that period, defendant's facility released hazardous materials into the environment, including coal and oil tars, iron oxide chips, heavy sludges, and cinders. Id. at 3. It is undisputed that a substantial portion of defendant's releases constituted "hazardous substances," or "hazardous materials," as defined by the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601(14), and Section 2 of the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, Mass. Gen. Laws ch. 21E (2000)("Chapter 21E"). Id. at 6. These releases contaminated ESA2, surrounding areas, and the Housatonic River in the vicinity of ESA2. Id.

Plaintiff purchased ESA2 from defendant in 1973. (Docket 30 at 2). As early as 1988, ESA2 captured the attention of the Environmental Protection Agency ("EPA"); in 1990, the Massachusetts Department of Environmental Protection ("DEP") also showed interest. (Docket 19 at 8). In 1990, DEP sent defendant a notice of responsibility pursuant to Chapter 21E for hazardous

releases at and from ESA2. Id. The same year, plaintiff and DEP entered into an Administrative Consent Order which required plaintiff, among other actions, to remove hazardous materials from the groundwater at ESA2 and to undertake soil and ground-water investigations. Id. at 9. Plaintiff's investigations uncovered other substantial pollutants and environmental damage at and from ESA2. Id. at 10.

In 1999, plaintiff, EPA, and DEP entered into a Consent Decree pursuant to CERCLA, which provided for an extensive investigation and clean-up of ESA2 and other areas controlled by plaintiff. Id. at 10-11. The court approved the Consent Decree in 2000. Id. at 11. Plaintiff's investigation and remediation costs to date have allegedly totaled over three million dollars. Id. at 12.

Before this suit was filed, defendant had contributed somewhat to the investigation and clean-up effort. (Docket 31, Exhibit A at 8). For example, defendant paid for one-half of the cost of the 1990 groundwater treatment study at ESA2. Id. However, defendant has allegedly been less than eager to help pay the costs of investigation and remediation.

On November 29, 1993, plaintiff served a notice on defendant pursuant to Section 4A of Chapter 21E, formally requesting contribution from defendant. Id. at 12. The parties discussed

the request in several meetings and letters in 1994, but were unable to reach agreement. Id. Another Section 4A request, related to further costs, was sent on August 4, 1999, but defendant allegedly did not respond until plaintiff sent defendant a letter on November 2, 1999, stating in part that defendant had violated Section 4A by failing to respond. Id. at 13-14. Plaintiff found defendant's subsequent verbal offer insufficient. Id. at 14. Finally, on February 11, 2000, plaintiff served formal notice on defendant under Section 4A of Chapter 21E, seeking reimbursement for all past, present, and future costs related to hazardous releases from defendant's former operations. Id. The parties discussed this request several times, but plaintiff alleges that defendant ultimately failed to respond within forty-five days, as required by Section 4A of Chapter 21E. Id. at 15.

Plaintiff filed suit against defendant on September 19, 2000, seeking reimbursement and contribution of costs for releases from ESA2 and a related defendant facility downstream from plaintiff's Pittsfield facility. Plaintiff sought contribution under CERCLA in Count I, reimbursement or contribution under Chapter 21E in Count II, and declaratory relief in Count III. Id. at 16-20.

It is now clear that there should have been no dispute about

whether defendant was liable for contribution or reimbursement costs under CERCLA and Chapter 21E. To summarize, both CERCLA and Chapter 21E impose contribution or reimbursement liability upon a defendant who has owned or operated a facility when hazardous materials were disposed of or released there, and when another party such as GE has as a result incurred response costs that were necessary and consistent with the National Contingency Plan under CERCLA, or were "necessary and appropriate" under Chapter 21E. 42 U.S.C. §§ 9613(f) and 9607(a); Mass. Gen. Laws. ch. 21E, §§ 4 and 5. Defendant obviously owned ESA2 when hazardous materials were disposed of or released there, and plaintiff obviously incurred response costs that were necessary and consistent with the National Contingency Plan under CERCLA, and were necessary and appropriate under Chapter 21E. The only question for this litigation should have been the amount of Berkshire Gas' liability under CERCLA and Chapter 21E.

Despite all this, defendant for some time refused to admit its liability. Plaintiff points to three such refusals. First, defendant declined to admit its liability in its Answer. (Docket 28, Exhibit C). In Paragraph 34, for example, defendant responded that "it has agreed to pay for certain expenses incurred by GE without admitting any responsibility for such expenses and reserving all such rights." Id. In response to the

those paragraphs in the Complaint alleging liability specifically, defendant generally replied "[t]his paragraph sets forth a statement of law to which no response is required." Id.

Second, defendant withheld an admission of its liability in the Joint Scheduling Statement. (Docket 9). In that statement, defendant declared that it "denies that it is liable for costs incurred by GE in response to releases and/or threats of releases of oil and hazardous substances in and/or to ESA2 and the Housatonic River." Id. at 4.

Finally, defendant refused again to admit its liability at the July 23, 2001, scheduling conference before the court. In that conference, plaintiff made it clear that it believed defendant was denying liability. (Docket 12 at 8-9). In light of defendant's denial, plaintiff stated its desire to file an initial motion for partial summary judgment as to liability only, and to thereafter undertake a resolution of the issue of how the costs should be allocated. Id. Defendant's response to that proposal was the following:

> **[T]here are events that have occurred on the site that are not the responsibility of Berkshire Gas, and notwithstanding the fact that yes, it did operate a site there, that there is divisible harm here and that I believe we would prevail on a motion for summary judgment on liability, we don't for a moment pretend that ultimately in the course of the cleanup of East Street Area 2, that Berkshire Gas will not incur costs. We've incurred costs to date. We'll reimburse GE for their costs. We've incurred our own costs for fifteen years of monitoring the site and consulting with our experts. But in**

> terms of summary judgment on liability, I don't believe it would be that easy for GE.

Id. at 16. Given defendant's statement, the court set a date for plaintiff to file its motion for partial summary judgment as to liability only.

Plaintiff contends that it undertook a near-Herculean effort to prepare the motion for partial summary judgment. Counsel for plaintiff allegedly reviewed thousands of pages of information, and ultimately found that forty-seven boxes of documents were relevant to defendant's liability to plaintiff. (Docket 27 at 4). Plaintiff ultimately produced a forty-two exhibit summary judgment record, a sixteen-page statement of facts, a motion for summary judgment, and a supporting memorandum. Id. According to plaintiff, this effort cost $152,203 in attorney's fees and related expenses. Id.

Much to the surprise of plaintiff and the court, and despite defendant's earlier confident statement, defendant filed no opposition to the motion for partial summary judgment. As a result, on December, 11, 2001, the court endorsed plaintiff's proposed order on its motion for summary judgment, holding that,

> [A]s a matter of law, defendant Berkshire Gas Company is liable to General Electric Company under Section 113(f) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9613(f), and Section 4 of the Massachusetts Oil and Hazardous Materials Release Prevention and Response Act, M.G.L. c. 21E § 4, for contribution to, and reimbursement of, costs that GE has incurred, and will

> **incur, in response to releases of hazardous material from Berkshire Gas Company's former gas manufacturing facility in East Street Are 2 of the GE Pittsfield Facility to the Housatonic River, its banks and sediment, and soil and groundwater in East Street Area 2.**

(Docket 20). Defendant explained its failure to file an opposition in a later status conference,

> **Part of the reason that no opposition was filed is that certainly our view is that the complaint and answer made it clear it was unnecessary. The issue of whether or not Berkshire Gas Company operated a manufacturing gas plant on the East Street site was admitted. There was no question but that we admitted there was a release of hazardous materials there. The order says nothing more than what the law provides.**

(Docket 29 at 5-6). Plaintiff obviously took a different view, and moved for Rule 11 sanctions against defendant in the form of attorney's fees and costs associated with filing the motion for partial summary judgment.

III. DISCUSSION

A. Rule 11

The question presented for purposes of this motion is whether defendant's conduct entitles plaintiff to Rule 11 sanctions in the form of attorney's fees and costs associated with the motion for partial summary judgment. Rule 11(b) provides in full:

> **By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --**

> **(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;**
>
> **(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;**
>
> **(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and**
>
> **(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.**

Fed.R.Civ.P. 11(b). Rule 11's threshold requirement that the non-moving party make a "presentation to the court" is met here. Both defendant's Answer and defendant's submission in the Joint Scheduling Statement were "pleadings" or "other papers," and were presented to the court. Bodenhamer Building Corp. v. Architectural Research Corp., 989 F.2d 213, 217 (6th Cir. 1993) (holding that an answer is a "pleading," or at least would qualify as "other papers," for purposes of Rule 11).

Plaintiff must also prove, however, that defendant violated a specific subsection of Rule 11(b) in order to prevail on its motion for attorney's fees and costs. Plaintiff alleges that defendant violated subsections (1) and (4). These provisions, however, are a poor fit for defendant's conduct. Subsection (4)

governs "the denials of factual contentions." However, plaintiff has pointed to no fact that defendant improperly denied. The syllogistic nature of CERCLA and Chapter 21E liability may have made it seem to plaintiff as if defendant was denying a "factual contention." Plaintiff may have assumed that if defendant was denying liability, defendant also must have been -- by necessity -- denying some crucial fact, such as that a "release" occurred. However, defendant correctly points out that it did not deny that it owned and operated ESA2, that releases of hazardous materials occurred there during the relevant time, or that plaintiff had incurred costs. Defendant simply denied the ultimate conclusion of liability. Thus, defendant's conduct cannot properly be characterized as a "denial of a factual contention," and cannot constitute a violation of Rule 11(b)(4).

Subsection (1) similarly misses the mark. As noted, subsection (1) governs presentations "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Defendant's refusal to admit liability obviously caused an "unnecessary delay" and "needless[ly] increase[d] the cost" of this litigation. As noted, defendant's liability was apparent, and a timely and clear admission of liability could have focused the litigation on the true controversy at the heart of this case: the proper allocation

of investigation and remediation costs. Thus, the result of defendant's conduct is a perfect fit for subsection (b)(1).

Plaintiff points to no evidence, however, suggesting that defendant possessed an "improper purpose," as required by subsection (1). Fed.R.Civ.P. 11(b)(1). Indeed, defendant's comments at the scheduling conference, while opaque at the time, indicate in hindsight that defendant saw the issue of "liability" as being inextricable from the issue of allocation. Defendant's counsel stated at that conference that "I believe [Berkshire Gas] would prevail on a motion for summary judgment on liability," and then immediately noted, "we don't for a moment pretend that ultimately in the course of the cleanup of East Street Area 2, that Berkshire Gas will not incur costs." These seemingly contradictory statements become less troubling if defendant's counsel envisioned "a motion for summary judgment on liability" as encompassing the issue of allocation. Indeed, defendant contends in its opposition to the motion for attorney's fees and costs that all that it ever contested were "the specific response action costs demanded and the amounts demanded by GE." (Docket 30 at 6). While defendant's conduct was inconsistent and balky, the court is not persuaded that defendant had an "improper purpose" when it refused to concede liability. Defendant's refusal to admit liability, therefore, did not violate Rule 11(b)(1) any

more than Rule 11(b)(4).[1]

For these reasons, the extraordinary waste of time, needless increase in the cost of the litigation, and unnecessary delay caused by defendant's conduct does not appear to support an award of attorney's fees and costs against defendant under Rule 11. Nevertheless, it should be noted that plaintiff has other means of recouping its attorney's fees and costs. For example, Chapter 21E, Section 4A provides that,

> [T]he court shall award the plaintiff its litigation costs and reasonable attorneys' fees if the plaintiff shows, and the court finds, that the person against whom the civil action is brought is liable and:
>
> (1) failed without reasonable basis to make a timely response to notification pursuant to this section, or
>
> (2) did not participate in negotiations or dispute resolution in good faith, or
>
> (3) failed without reasonable basis to enter into or carry out an agreement to perform or participate in the performance of the response action on an equitable basis or pay its equitable share of the costs of such response action or of other liability pursuant to the provisions of this chapter, where its liability was clear.

Mass. Gen. Laws. ch. 21E, § 4A(d). In its complaint, plaintiff alleges that defendant violated its responsibilities under subsections (2) and (3), and that plaintiff is therefore entitled

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[1]Subsection (b)(2), governing "legal contentions," is perhaps the closest fit under Rule 11 for defendant's flat denial of liability. Plaintiff's decision to not ask for sanctions under this subsection is understandable, however, given that attorney's fees are "monetary sanctions" under Rule 11, and "[m]onetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2)." Fed. R. Civ. P. 11(c)(2)(A).

to reasonable attorney's fees and costs. Thus, assuming plaintiff can prove this allegation, plaintiff has another, and more appropriate, method of recouping its reasonable attorney's fees and litigation costs associated with the motion for partial summary judgment. The court will take up this issue, if necessary, at the conclusion of the litigation.

IV. CONCLUSION

For the reasons set forth above, plaintiff's motion to recover certain attorney's fees and costs under Fed.R.Civ.P. 11 is hereby DENIED.

A separate Order will issue.

MICHAEL A. PONSOR
U. S. District Judge

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ORDER

August 9, 2002

PONSOR, D.J.

For the reasons stated in the accompanying Memorandum, plaintiff's motion to recover certain attorney's fees and costs under Fed. R. Civ. P. 11 (Docket No. 26) is hereby DENIED. Counsel will appear, per the court's June 12, 2002 order, on February 25, 2003 at 3:00 p.m. for the final pretrial conference.

It is So Ordered.

MICHAEL A. PONSOR
U. S. District Judge