

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KATHLEEN McHUGH and DEANNA)
SCHNEIDER, individually and on behalf of all)
Persons similarly situated,)

Plaintiffs,)

v.)

MADISON-KIPP CORPORTION,)
CONTINENTAL CASUALTY COMPANY,)
COLUMBIA CASUALTY COMPANY,)
UNITED STATES FIRE INSURANCE)
COMPANY and ABC INSURANCE)
COMPANIES 1-50,)

Defendants,)

and)

MADISON-KIPP CORPORATION,)
Cross-Claimant,)

v.)

CONTINENTAL CASUALTY COMPANY,)
COLUMBIA CASUALTY COMPANY, and)
UNITED STATES FIRE INSURANCE)
COMPANY,)

Cross-Claim Defendant,)

and)

CONTINENTAL CASUALTY COMPANY, and)
COLUMBIA CASUALTY COMPANY,)
Cross-Claimants/)
Third-Party Plaintiffs,)

v.)

MADISON-KIPP CORPORATION,)
Cross-Claim Defendants,)
and)
LUMBERMENS MUTUAL CASUALTY)
COMPANY, AMERICAN MOTORISTS)

Case No.: 11-cv-724

Hon. Barbara B. Crabb, Judge

Hon. Stephen L. Crocker,
Magistrate Judge

INSURANCE COMPANY, and JOHN DOE)
INSURANCE COMPANIES 1-20,)
Third-Party Defendants.)

**DEFENDANT MADISON-KIPP CORPORATION'S RESPONSE TO
CONTINENTAL CASUALTY COMPANY'S AND COLUMBIA CASUALTY
COMPANY'S PROPOSED FINDINGS OF FACT**

Defendant Madison-Kipp Corporation ("Defendant") by its attorneys, Michael Best & Friedrich LLP, respectfully submits the following responses to Continental Casualty Company's and Columbia Casualty Company's Proposed Findings of Fact:

RELEVANT PARTIES

1. Madison-Kipp Corporation ("Madison-Kipp") is a Delaware corporation with its principal place of business in Madison, Wisconsin. (First Amended Complaint, ECF No. 15, at p. 3, ¶ 5; Answer of Madison-Kipp, ECF No. 24, at p. 1, ¶ 5).

RESPONSE: No dispute.

2. Madison-Kipp owns and operates a facility which is located at 201 Waubesa Street, Madison, Wisconsin (the "Madison-Kipp Facility"). (First Amended Complaint, ECF No. 15, at p.3, ¶ 5; Answer of Madison-Kipp, ECF No. 24, at p. 1, ¶ 5).

RESPONSE: No dispute.

3. Continental is an insurance company organized under the laws of Illinois with its principal place of business in Illinois. (Answer of Continental and Columbia, ECF No. 48, at pp. 3-4, ¶ 6).

RESPONSE: No dispute.

4. Columbia is an insurance company organized under the laws of Illinois with its principal place of business in Illinois. (Answer of Continental and Columbia, ECF No. 48, at p. 4, ¶ 7).

RESPONSE: No dispute.

JURISDICTION

5. On January 20, 2012, Plaintiffs Kathleen McHugh and Deanna Schneider, individually, and on behalf of all others similarly situated (the "Plaintiffs"), filed the First Amended Complaint - Class Action (the "Amended Complaint"). (ECF No. 15, at p. 1)

RESPONSE: No dispute.

6. The Amended Complaint alleged claims against Madison-Kipp under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6921, *et seq.*, and state common law claims for negligence, private nuisance, trespass, and willful and wanton misconduct. (ECF No. 15, at pp. 7-13, ¶¶ 29-56).

RESPONSE: No dispute.

7. The Amended Complaint alleged direct action claims against Continental, Columbia, and United States Fire Insurance Company ("U.S. Fire") under the terms of Wis. Stat. § 632.24. (ECF No. 15, at p. 14, ¶ F).

RESPONSE: No dispute.

8. The Amended Complaint alleged that that this Court has subject matter jurisdiction over the Plaintiffs' RCRA claim pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction over the Plaintiffs' common law claims under the terms of 28 U.S.C. § 1367. (ECF No. 15, at p. 4, ¶ 12).

RESPONSE: No dispute.

9. On February 3, 2012, Madison-Kipp filed its Answer to First Amended Complaint - Class Action (the "Answer"). (ECF No. 24, at p. 1).

RESPONSE: No dispute.

10. Madison-Kipp's Answer included cross-claims against Continental, Columbia and U.S. Fire. (ECF No. 24, at pp. 5-9, ¶¶1-21).

RESPONSE: No dispute.

11. On September 20, 2012, this Court ruled that it had subject matter jurisdiction over the insurance coverage claims, including the Plaintiffs' direct action claim against Continental, Columbia and U.S. Fire as well as Madison-Kipp's cross-claims (the "September 20, 2012 Order"). (ECF No. 108, at p. 3).

RESPONSE: No dispute.

12. The September 20, 2012 Order held that the insurance coverage disputes mentioned above present a real case and controversy and have a factual relationship to the underlying claims sufficient to satisfy supplemental jurisdiction under 28 U.S.C. § 1367. (ECF No. 108, at p. 3).

RESPONSE: No dispute.

THE CONTINENTAL AND COLUMBIA POLICIES

The Continental Primary Policies

13. Continental issued Policy Number CCP 007 41 49 91 to Madison-Kipp for the policy period January 1, 1981 through January 1, 1982. (Cross-claims of Continental and Columbia, ECF No. 49, at p. 19, ¶ 14; Madison-Kipp's Answer to Continental's and Columbia's Cross-claims, ECF No. 64, at p. 4, ¶ 14).

RESPONSE: No dispute.

14. Continental issued Policy Number CCP 06 912 56 60 to Madison-Kipp for the policy period January 1, 1982 through January 1, 1983. (Cross-claims of Continental and Columbia, ECF No. 49, at p. 19, ¶ 14; Madison-Kipp's Answer to Continental's and Columbia's Cross-claims, ECF No. 64, at p. 4, ¶ 14).

RESPONSE: No dispute.

15. Continental issued Policy Number CCP 07 207 93 93 to Madison-Kipp for the policy period January 1, 1983 through January 1, 1984. (Cross-claims of Continental and Columbia, ECF No. 49, at p. 19, ¶ 14; Madison-Kipp's Answer to Continental's and Columbia's Cross-claims, ECF No. 64, at p. 4, ¶ 14).

RESPONSE: No dispute.

16. Continental issued Policy Number CCP 07 207 93 93 to Madison-Kipp for the policy period January 1, 1984 through January 1, 1985. (Cross-claims of Continental and Columbia, ECF No. 49, at p. 19, ¶ 14; Madison-Kipp's Answer to Continental's and Columbia's Cross-claims, ECF No. 64, at p. 4, ¶ 14).

RESPONSE: No dispute.

17. Continental issued Policy Number CCP 70 207 93 93 to Madison-Kipp for the policy period January 1, 1985 through January 1, 1986. (Cross-claims of Continental and Columbia, ECF No. 49, at p. 19, ¶ 14; Madison-Kipp's Answer to Continental's and Columbia's Cross-claims, ECF No. 64, at p. 4, ¶ 14).

RESPONSE: No dispute.

18. Continental issued Policy Number 7 02079393 to Madison-Kipp for the policy period January 1, 1986 through January 1, 1987 (the “1986-87 Primary Policy”). (Cross-claims of Continental and Columbia, ECF No. 49, at p. 19, ¶ 14; Madison-Kipp’s Answer to Continental’s and Columbia’s Cross-claims, ECF No. 64, at p. 4, ¶ 14).

RESPONSE: No dispute.

The 1986-87 Primary Policy

19. A copy of the 1986-87 Primary Policy is attached to the Affidavit of Gina Macari. (The Affidavit of Gina Macari is attached to this Statement of Proposed Findings of Fact as Exhibit A). (Macari Aff., ¶ 3 & Exhibit 1).

RESPONSE: No dispute.

20. The 1986-87 Primary Policy provides coverage for “bodily injury” or “property damage.” (Macari Aff., ¶ 3 & Exhibit 1, at CCC 0106, Comprehensive General Liability Insurance, Section I: Coverage A – Bodily Injury Liability; Coverage B – Property Damage Liability).

RESPONSE: No dispute.

21. The 1986-87 Primary Policy defines “bodily injury” as follows:

“**bodily injury**” means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom;

(Macari Aff., ¶ 3 & Exhibit 1, at CCC 0104, Definitions).

RESPONSE: No dispute.

22. The 1986-87 Primary Policy defines “property damage” as follows:

“**property damage**” means (1) physical injury to or destruction of tangible property which occurs during the policy period including the loss of use thereof at any time resulting therefrom or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an **occurrence** during the policy period;

(Macari Aff., ¶ 3 & Exhibit 1, at CCC 0105, Definitions).

RESPONSE: No dispute.

23. The 1986-87 Primary Policy defines an occurrence as follows:

“**occurrence**” means an accident, including continuous or repeated exposure to conditions which results in **bodily injury** or **property damage** neither expected nor intended from the standpoint of the insured;

(Macari Aff., ¶ 3 & Exhibit 1, at CCC 0105, Definitions).

RESPONSE: No dispute.

24. The 1986-87 Primary Policy contains an endorsement with the following exclusion:

[This insurance does not apply to:]

(1) to **bodily injury** or **property damage** arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:

(a) at or from premises owned, rented or occupied by the **named insured**;

* * *

(2) to any loss, cost or expense arising out of any governmental direction or request that the **named insured** test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

(Macari Aff., ¶ 3 & Exhibit 1, at CCC 0112, Pollution Exclusion Endorsement (Form No. IL 09 28 06 85)).

RESPONSE: No dispute.

25. The 1986-87 Primary Policy contains a Broad Form Comprehensive General Liability Endorsement that provides coverage for “personal injury.” (Macari Aff., ¶ 3 & Exhibit 1, at CCC 0117, Broad Form Comprehensive General Liability

Endorsement (Form No. GL 04 04 (Ed. 05 81)), Section II(A): Personal Injury and Advertising Injury Liability Coverage).

RESPONSE: No dispute.

26. The insuring agreement of the “personal injury” provision of the Broad Form Comprehensive General Liability Endorsement states as follows:

II. Personal Injury And Advertising Injury Liability Coverage

(A) The company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of personal injury or advertising injury to which this insurance applies, sustained by any person or organization and arising out of the conduct of the named Insured’s business, within the policy territory, and the company shall have the right and duty to defend any suit against the Insured seeking damages on account of such injury, [] if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company’s liability has been exhausted by payment of judgments or settlements.

(Macari Aff., ¶ 3 & Exhibit 1, at CCC 0117, Broad Form Comprehensive General Liability Endorsement (Form No. GL 04 04 (Ed. 05 81)), Section II(A): Personal Injury and Advertising Injury Liability Coverage).

RESPONSE: No dispute.

27. The Broad Form Comprehensive General Liability Endorsement defines “personal injury” as:

“**Personal Injury**” means injury arising out of one or more of the following offenses committed during the policy period:

* * *

2. Wrongful entry or eviction or other invasion of the right of private occupancy....

(Macari Aff., ¶ 3 & Exhibit 1, at CCC 0117, Broad Form Comprehensive General Liability Endorsement (Form No. GL 04 04 (Ed. 05 81)), Section II(D): Personal Injury and Advertising Injury Liability Coverage, Additional Definitions).

RESPONSE: No dispute.

The Columbia Umbrella Policies

28. Columbia issued an umbrella policy, Policy Number UMB 689 07 13, to Madison-Kipp for the policy period January 1, 1980 through January 1, 1981, a copy of which is attached as Exhibit 1 to the Stipulation Concerning the Terms and Conditions of the Columbia Casualty Company Umbrella Policies (the "Stipulation"), dated February 19, 2013, between Columbia and Madison-Kipp. (The Stipulation is filed contemporaneously with this Statement of Proposed Findings of Fact). (Stipulation, ¶ 2 & Exhibit 1).

RESPONSE: No dispute.

29. Columbia issued an umbrella policy, Policy Number UMB 689 10 26, to Madison-Kipp for the policy period January 1, 1981 through January 1, 1982, a copy of which is attached as Exhibit 2 to the Stipulation. (Stipulation, ¶ 2 & Exhibit 2).

RESPONSE: No dispute.

30. Columbia issued an umbrella policy, Policy Number UMB 689 12 16, to Madison-Kipp for the policy period January 1, 1982 through January 1, 1983, a copy of which is attached as Exhibit 3 to the Stipulation. (Stipulation, ¶ 2 & Exhibit 3).

RESPONSE: No dispute.

31. Columbia issued an umbrella policy, Policy Number UMB 689 13 05, to Madison-Kipp for the policy period January 1, 1983 through January 1, 1984, a copy of which is attached as Exhibit 4 to the Stipulation. (Stipulation, ¶ 2 & Exhibit 4).

RESPONSE: No dispute.

32. Columbia and Madison-Kipp have stipulated that each of the four Columbia policies (the "Columbia Policies") contained the same policy form. (Stipulation, ¶ 2).

RESPONSE: No dispute.

33. The insuring agreement for each of the Columbia Policies states:

The company will indemnify the insured for **loss** in excess of the total applicable limits of liability of **underlying insurance** stated in the schedule. The provisions of the **immediate underlying policy** are, with respect to Coverage A, incorporated as part of this policy, except for any obligation to investigate and defend and pay for costs and expenses incident to any of the same, the amounts of the limits of liability, an 'other insurance' provision and any other provisions therein which are inconsistent with this policy. . . .¹

(Stipulation, ¶ 2 & Exhibits 1-4, Commercial Umbrella Liability Policy at p. 1, Section I: Coverage A – Excess Liability Indemnity).

RESPONSE: No dispute.

34. The Columbia Policies contain the following condition of coverage:

MAINTENANCE OF UNDERLYING INSURANCE –
Coverage A: The insured agrees that the policies listed in the schedule of underlying insurance and renewals and replacements thereof not more restrictive thereof shall be maintained without alteration of terms or conditions in full effect during the currency of this policy except for any reduction or exhaustion of the aggregate limits of liability in the **underlying insurance** provided such reduction or exhaustion is solely the result of injury or destruction occurring during this policy period, and not before.

Failure of the insured to comply with this condition shall not invalidate this policy, but, in the event of such failure, the company shall only be liable under Coverage A and only to the same extent as if the insured had complied with this condition.

(Stipulation, ¶ 2 & Exhibits 1-4, Commercial Umbrella Liability Policy at p. 6, Conditions, Paragraph 2: Maintenance of Underlying Insurance).

RESPONSE: No dispute.

35. The underlying insurance for the 1980-81 Columbia policy is a primary policy issued by Lumbermens Mutual Casualty Company or American Motorists

¹ The terms in bold are defined in the policies.

Insurance Company. (Stipulation, ¶ 2 & Exhibit 1, at CCC 0005, Endorsement No. 8, Supplemental Schedule of Underlying Insurance).

RESPONSE: No dispute that one of the Kemper Insurance Companies, which include Lumbermans Mutual Casualty Company and American Motorists Insurance Company, issued a 1/1/1980 through 1/1/1981 general liability primary policy to Madison-Kipp with a policy number of OYM 398803.

36. The underlying insurance for the three later Columbia policies is provided by primary policies issued by Continental. (Stipulation, ¶ 2 & Exhibit 2, at CCC 0014, Declarations; Exhibit 3, at CCC 0042, Endorsement No. 10; Exhibit 4, at CCC 0069, Endorsement No. 10).

RESPONSE: No dispute.

The Continental Excess Policy

37. Continental issued an excess policy, Policy Number RDX 02 207 93 87, to Madison-Kipp for the policy period January 1, 1983 through January 1, 1984. (Cross-claims of Continental and Columbia, ECF No. 49, at p. 20, ¶ 18; Madison-Kipp's Answer to Continental's and Columbia's Cross-claims, ECF No. 64, at p. 4, ¶ 18).

RESPONSE: No dispute.

FACTUAL BACKGROUND

The Responsible Party Letter

38. On July 18, 1994, the Wisconsin Department of Natural Resources (the "DNR") issued a letter to Jack Schroeder of Madison-Kipp (the "Responsible Party Letter"). (Responsible Party Letter, at p. 1). The responsible party letter is Exhibit 4 to the Deposition of R. Michael Schmoller, ECF No. 117, at p. 59 & Exhibit 4, an excerpt of which is attached to this Statement of Proposed Findings of Fact as Exhibit B.

RESPONSE: Disputed as incomplete. Madison-Kipp gave Continental and Columbia notice of the Responsible Party Letter in 2003, pursuant to the then newly decided case of *Johnson Controls, Inc. v. Employers Insurance of Wausau*, 2003 WI 108, 264 Wis. 2d 60, 665 N.W.2d 257. Continental and Columbia did not respond to this 2003

notification and never communicated with Madison-Kipp regarding the DNR's ongoing investigation until 2011. (Macari Aff., ¶ 4, Ex. 2, Dkt. # 165-2; Macari Aff., ¶ 6, Dkt. # 165; Macari Aff., ¶ 8 & Ex. 5, Dkt. # 165-5.)

39. The Responsible Party Letter alleged that Madison-Kipp was responsible for groundwater concentrations of tetrachloroethene ("PCE") that exceeded enforcement standards listed in the Wisconsin Administrative Code. (Responsible Party Letter, at p.1).

RESPONSE: Disputed as incomplete. Madison-Kipp gave Continental and Columbia notice of the Responsible Party Letter in 2003, pursuant to the then newly decided case of *Johnson Controls, Inc. v. Employers Insurance of Wausau*, 2003 WI 108, 264 Wis. 2d 60, 665 N.W.2d 257. Continental and Columbia did not respond to this 2003 notification and never communicated with Madison-Kipp regarding the DNR's ongoing investigation until 2011. (Macari Aff., ¶ 4, Ex. 2, Dkt. # 165-2; Macari Aff., ¶ 6, Dkt. # 165; Macari Aff., ¶ 8 & Ex. 5, Dkt. # 165-5.)

40. The Responsible Party Letter alleged that Madison-Kipp is the owner of property where a "hazardous substance discharge has occurred." (Responsible Party Letter, at p. 1).

RESPONSE: Disputed as incomplete. Madison-Kipp gave Continental and Columbia notice of the Responsible Party Letter in 2003, pursuant to the then newly decided case of *Johnson Controls, Inc. v. Employers Insurance of Wausau*, 2003 WI 108, 264 Wis. 2d 60, 665 N.W.2d 257. Continental and Columbia did not respond to this 2003 notification and never communicated with Madison-Kipp regarding the DNR's ongoing investigation until 2011. (Macari Aff., ¶ 4, Ex. 2, Dkt. # 165-2; Macari Aff., ¶ 6, Dkt. # 165; Macari Aff., ¶ 8 & Ex. 5, Dkt. # 165-5.)

41. The Responsible Party Letter required Madison-Kipp to hire an environmental consultant to investigate the extent of the contamination. (Responsible Party Letter, at p. 1-2).

RESPONSE: Disputed as incomplete. Madison-Kipp gave Continental and Columbia notice of the Responsible Party Letter in 2003, pursuant to the then newly decided case of *Johnson Controls, Inc. v. Employers Insurance of Wausau*, 2003 WI 108 , 264 Wis. 2d 60, 665 N.W.2d 257. Continental and Columbia did not respond to this 2003 notification and never communicated with Madison-Kipp regarding the DNR's ongoing investigation until 2011. (Macari Aff., ¶ 4, Ex. 2, Dkt. # 165-2; Macari Aff., ¶ 6, Dkt. # 165; Macari Aff., ¶ 8 & Ex. 5, Dkt. # 165-5.)

42. The Responsible Party Letter required Madison-Kipp to submit written verification that it hired an environmental consultant. (Responsible Party Letter, at p. 2).

RESPONSE: Disputed as incomplete. Madison-Kipp gave Continental and Columbia notice of the Responsible Party Letter in 2003, pursuant to the then newly decided case of *Johnson Controls, Inc. v. Employers Insurance of Wausau*, 2003 WI 108 , 264 Wis. 2d 60, 665 N.W.2d 257. Continental and Columbia did not respond to this 2003 notification and never communicated with Madison-Kipp regarding the DNR's ongoing investigation until 2011. (Macari Aff., ¶ 4, Ex. 2, Dkt. # 165-2; Macari Aff., ¶ 6, Dkt. # 165; Macari Aff., ¶ 8 & Ex. 5, Dkt. # 165-5.)

43. The Responsible Party Letter required Madison-Kipp to submit an investigation workplan explaining what work was to be performed to identify the extent of the contamination and to provide documentation of previous work related to the contamination. (Responsible Party Letter, at p. 2).

RESPONSE: Disputed as incomplete. Madison-Kipp gave Continental and Columbia notice of the Responsible Party Letter in 2003, pursuant to the then newly

decided case of *Johnson Controls, Inc. v. Employers Insurance of Wausau*, 2003 WI 108 , 264 Wis. 2d 60, 665 N.W.2d 257. Continental and Columbia did not respond to this 2003 notification and never communicated with Madison-Kipp regarding the DNR's ongoing investigation until 2011. (Macari Aff., ¶ 4, Ex. 2, Dkt. # 165-2; Macari Aff., ¶ 6, Dkt. # 165; Macari Aff., ¶ 8 & Ex. 5, Dkt. # 165-5.)

44. The Responsible Party Letter required Madison-Kipp to submit an investigation report defining the degree and extent of any soil and groundwater contamination. (Responsible Party Letter, at p. 2).

RESPONSE: Disputed as incomplete. Madison-Kipp gave Continental and Columbia notice of the Responsible Party Letter in 2003, pursuant to the then newly decided case of *Johnson Controls, Inc. v. Employers Insurance of Wausau*, 2003 WI 108 , 264 Wis. 2d 60, 665 N.W.2d 257. Continental and Columbia did not respond to this 2003 notification and never communicated with Madison-Kipp regarding the DNR's ongoing investigation until 2011. (Macari Aff., ¶ 4, Ex. 2, Dkt. # 165-2; Macari Aff., ¶ 6, Dkt. # 165; Macari Aff., ¶ 8 & Ex. 5, Dkt. # 165-5.)

45. The Responsible Party Letter required Madison-Kipp to provide a remedial action plan outlining the remedy selected for remedial efforts. (Responsible Party Letter, at p. 2).

RESPONSE: Disputed as incomplete. Madison-Kipp gave Continental and Columbia notice of the Responsible Party Letter in 2003, pursuant to the then newly decided case of *Johnson Controls, Inc. v. Employers Insurance of Wausau*, 2003 WI 108 , 264 Wis. 2d 60, 665 N.W.2d 257. Continental and Columbia did not respond to this 2003 notification and never communicated with Madison-Kipp regarding the DNR's ongoing

investigation until 2011. (Macari Aff., ¶ 4, Ex. 2, Dkt. # 165-2; Macari Aff., ¶ 6, Dkt. # 165; Macari Aff., ¶ 8 & Ex. 5, Dkt. # 165-5.)

46. The Responsible Party Letter required Madison-Kipp to provide a remedial action report with data supporting its consultant's conclusions and recommendations for future work or site closure. (Responsible Party Letter, at p. 2).

RESPONSE: Disputed as incomplete. Madison-Kipp gave Continental and Columbia notice of the Responsible Party Letter in 2003, pursuant to the then newly decided case of *Johnson Controls, Inc. v. Employers Insurance of Wausau*, 2003 WI 108 , 264 Wis. 2d 60, 665 N.W.2d 257. Continental and Columbia did not respond to this 2003 notification and never communicated with Madison-Kipp regarding the DNR's ongoing investigation until 2011. (Macari Aff., ¶ 4, Ex. 2, Dkt. # 165-2; Macari Aff., ¶ 6, Dkt. # 165; Macari Aff., ¶ 8 & Ex. 5, Dkt. # 165-5.)

Relevant Correspondence, Investigation and Remediation

47. Madison-Kipp first provided notice to Continental and Columbia of environmental issues at its Waubesa Street facility in an August 1, 2003 letter (the "2003 Notice Letter") from Michael Best & Friedrich LLP ("Michael Best"). A copy of the 2003 notice letter is included in Exhibit 2 to the Affidavit of Gina Macari. (Macari Aff., ¶ 4 & Exhibit 2, 2003 Notice Letter, at CCC00252 – CCC00255).

RESPONSE: No dispute.

48. The 2003 Notice Letter demanded defense and indemnity from Continental and Columbia, citing a change in law due to the Wisconsin Supreme Court's decision to overturn *City of Edgerton v. General Casualty Company of Wisconsin*, 184 Wis.2d 750 (Wis. 1994), in *Johnson Controls, Inc. v. Employers Insurance of Wausau*, 2003 WI 108, ¶ 1-5, 264 Wis.2d 60. (Macari Aff., ¶ 4 & Exhibit 2, 2003 Notice Letter, at CCC 00255).

RESPONSE: No dispute.

49. The 2003 Notice Letter cited to the change in law in *Johnson Controls, Inc. v. Employers Insurance of Wausau*, 2003 WI 108, ¶¶ 1-5, 264 Wis.2d 60, and quoted the following passage from that opinion:

An insured's costs of restoring and remediating damaged property, whether the costs are based on remediation efforts by a third-party (including the government) or are incurred directly by the insured, are covered damages under applicable CGL policies, provided that other policy exclusions do not apply. We also conclude that receipt of a potentially responsible party ("PRP") letter from the EPA or an equivalent state agency, in the CERCLA context, marks the beginning of adversarial administrative legal proceedings that seek to impose liability upon an insured. A PRP letter significantly affects the legal interests of the insured. Therefore, reasonable insure[d]s would expect this letter to trigger its CGL insurers['] duty to defend.

(Macari Aff., ¶ 4 & Exhibit 2, 2003 Notice Letter, at CCC00255).

RESPONSE: No dispute.

50. The 2003 Notice Letter describes the investigation and remedial actions undertaken by Madison-Kipp and its consultant "Dames & Moore, n.k.a. URS" ("URS") at the Madison-Kipp Facility. (Macari Aff., ¶ 4 & Exhibit 2, 2003 Notice Letter, at CCC00253).

RESPONSE: No dispute.

51. Madison-Kipp retained URS in response to the DNR demands presented in the Responsible Party Letter. (Macari Aff., ¶ 4 & Exhibit 2, 2003 Notice Letter, at CCC00253).

RESPONSE: No dispute.

52. Madison-Kipp claimed that the URS activities included the installation of soil borings, groundwater monitoring wells, soil and groundwater sample analysis and research into the history of the Madison-Kipp Facility. (Macari Aff., ¶ 4 & Exhibit 2, 2003 Notice Letter, at CCC00253).

RESPONSE: No dispute.

53. Madison-Kipp claimed that URS also implemented an in-situ injection remedial technology known as the BiOx Process to address the impacted soil at the Madison-Kipp Facility. (Macari Aff., ¶ 4 & Exhibit 2, 2003 Notice Letter, at CCC00253).

RESPONSE: No dispute.

54. Madison-Kipp tendered the 2003 Notice Letter to Continental and Columbia in order to obtain insurance coverage for the past and future defense costs, investigation costs and remediation costs associated with responding to DNR demands. (Macari Aff., ¶ 4 & Exhibit 2, 2003 Notice Letter, at CCC00255).

RESPONSE: No dispute.

55. In the 2003 Notice Letter, Madison-Kipp demanded both a defense and indemnity from Continental and Columbia:

Therefore, we hereby place your company on notice of a claim for defense and indemnity obligations stemming from liabilities that have been and will be incurred by your insured in response to and as a result of WDNR's demands with respect to this site. We request that your company analyze this matter and accept duties of defense and indemnity owned [sic] under the CGL and/or umbrella policies.

(Macari Aff., ¶ 4 & Exhibit 2, 2003 Notice Letter, at CCC00255).

RESPONSE: No dispute.

56. Neither Continental nor Columbia paid defense costs, investigation costs or remediation costs associated with responding to DNR demands at any time between August 1, 2003 and July 25, 2011. (Macari Aff., ¶ 5 & Exhibit 3).

RESPONSE: No dispute.

57. There were no communications exchanged between Madison-Kipp and Continental or Columbia between the 2003 Notice Letter and July 25, 2011. (Macari Aff., ¶ 6).

RESPONSE: No dispute.

58. On July 25, 2011, Michael Best, on behalf of Madison-Kipp, provided Continental and Columbia with a further notice letter (the "July 2011 Notice Letter"). A copy of the July 2011 Notice Letter is attached as Exhibit 2 to the Affidavit of Gina Macari. (Macari Aff., ¶ 4 & Exhibit 2, at CCC00248 - CCC00251).

RESPONSE: No dispute.

59. The July 2011 Notice Letter provided notice of potential claims for defense and indemnity costs arising from the DNR's demands and from a July 19, 2011 notice of

intent to file legal action by neighboring residents alleging property damage, health risks and diminished home values. (Macari Aff., ¶ 4 & Exhibit 2, at CCC00248).

RESPONSE: No dispute.

60. The July 2011 Notice Letter stated as follows:

In 2006, MKC also installed vapor probes on the off-site residential properties to determine whether PCE vapors were migrating through sub-surface soils and towards homes.

(Macari Aff., ¶ 4 & Exhibit 2, at CCC00249).

RESPONSE: No dispute.

61. The July 2011 Notice Letter stated as follows:

In 2010, samples from beneath the off-site residential properties found elevated PCE vapors.

(Macari Aff., ¶ 4 & Exhibit 2, at CCC00249).

RESPONSE: No dispute.

62. The July 2011 Notice Letter stated as follows:

In April 2011, MKC installed a sub-slab vapor migration system in each of the off-site residential properties . . . In May 2011, MKC installed vapor migration systems in two more homes as a precautionary measure.

(Macari Aff., ¶ 4 & Exhibit 2, at CCC00249).

RESPONSE: No dispute.

63. The July 2011 Notice Letter stated as follows:

The activities now required by WDNR include excavating soils, expanding the installation of vapor recovery systems to new locations and performing additional testing.

(Macari Aff., ¶ 4 & Exhibit 2, at CCC00249).

RESPONSE: No dispute.

64. Michael Best submitted another letter to Continental and Columbia on August 26, 2011 (the "August 2011 Notice Letter") providing notice of the claims arising from the notice of intent to sue filed by residents living near the Madison-Kipp Facility. A copy of the August 2011 Notice Letter is attached as Exhibit 4 to the Affidavit of Gina Macari. (Macari Aff., ¶ 7 & Exhibit 4).

RESPONSE: No dispute. The August 26, 2011 letter also states "To date, we have not received a response from you." (Macari Aff., ¶ 7 & Exhibit 4).

65. Resolute Management Inc. ("Resolute") responded to Madison-Kipp's correspondence on behalf of Continental and Columbia in a letter dated September 28, 2011 (the "Resolute Response Letter"). A copy of the Resolute Response Letter is attached as Exhibit 5 to the Affidavit of Gina Macari. (Macari Aff., ¶ 8 & Exhibit 5).

RESPONSE: No dispute.

66. The Resolute Response Letter acknowledged receipt of the prior correspondence from Madison-Kipp, discussed Continental and Columbia's understanding of the ongoing investigation and remediation at the Madison-Kipp Facility and requested additional information. (Macari Aff., ¶ 8 & Exhibit 5, Resolute Response Letter, at CCC00239 - CCC0242).

RESPONSE: No dispute.

67. On December 12, 2011, Continental reiterated its request for information, but agreed to participate in Madison-Kipp's defense under a full reservation of rights (the "Continental ROR Letter"). A copy of the Continental ROR Letter is attached as Exhibit 6 to the Affidavit of Gina Macari. (Macari Aff., ¶ 9 & Exhibit 6, at CCC00180 - CCC00181).

RESPONSE: No dispute.

68. The DNR's involvement in directing Madison-Kipp's remediation is ongoing. (Madison-Kipp's Cross-claims, ECF No. 24, at p. 7, ¶ 12; Continental and Columbia's Answer to Madison-Kipp's Cross-claims, ECF No. 49, at p. 6, ¶ 12).

RESPONSE: No dispute.

The Plaintiffs' Claims

69. Plaintiffs Kathleen McHugh, Eric Fuller, Kenneth Hennrick, Jr., Deanna Schneider, Doris Yang Berge, Prentice Berge, Peter Uttech, Sharon Helmus, Carla Mills,

Brandi Rogers, and Chad Gooblis initially filed suit against Madison-Kipp and ABC Insurance Companies 1-50 on October 20, 2011 (the "Complaint"). (ECF No. 1, at p. 1).

RESPONSE: No dispute.

70. On January 20, 2012, Plaintiffs Kathleen McHugh and Deanna Schneider, individually, and on behalf of all others similarly situated (the "Plaintiffs"), filed the First Amended Complaint – Class Action (the "Amended Complaint"). (ECF No. 15, at p. 1).

RESPONSE: No dispute.

71. The Amended Complaint named Continental, Columbia and U.S. Fire as defendants. (ECF No. 15, at pp. 3-4, ¶¶ 6-8).

RESPONSE: No dispute.

72. The Amended Complaint alleged that "MKC has conducted manufacturing operations at the Facility for many decades dating back at least until 1967" and Madison-Kipp admitted this allegation. (ECF No. 15, at p. 5, ¶ 14); (ECF No. 24, at p. 2, ¶ 14).

RESPONSE: No dispute.

73. The Amended Complaint alleged as follows:

Various hazardous substances, including tetrachloroethylene ("PCE") and trichloroethylene ("TCE"), known human carcinogens, were used at the Facility during MKC ownership and operation of the [Site]. Upon their disposal by MKC, PCE and TCE became hazardous wastes within the meaning of RCRA and regulations adopted thereunder. MKC used PCE and TCE at the Facility over the course of several decades, including throughout most of the 1980's.

(ECF No. 15, at p. 5, ¶ 15).

RESPONSE: No dispute.

74. The Amended Complaint alleged as follows:

MKC stored on site, disposed of and released various hazardous substances and hazardous wastes, including PCE and TCE, into the environment at the Facility. MKC

disposed of PCE and TCE into the environment at the Facility over the course of several decades, including throughout most of the 1980's.

(ECF No. 15, at p. 5, ¶ 16).

RESPONSE: No dispute.

75. The Amended Complaint alleged as follows:

The hazardous substances and hazardous wastes, including PCE and TCE, released by MKC at the Facility have migrated and continue to migrate in vapor form onto or immediately adjacent to all properties in the Class Area. PCE and TCE vapors are present beneath, inside or adjacent to homes throughout the Class Area, threatening the health of all residents in the Class Area. Plaintiffs and members of the Class first learned in 2010 that properties in the Class Area were impacted and/or threatened by vapor intrusion of contamination emanating from the Facility.

(ECF No. 15, at p. 5, ¶ 17).

RESPONSE: No dispute.

76. The Amended Complaint alleged as follows:

As a result of MKC's contamination, the value of properties in the Class Area has been severely diminished. Further, Plaintiffs and other members of the Class have been forced to live in homes impacted and/or threatened by vapor intrusion contamination, resulting in the loss of the reasonable use and enjoyment of their property, and aggravation and annoyance.

(ECF No. 15, at p. 6, ¶ 18).

RESPONSE: No dispute.

77. The Amended Complaint alleged that "MKC has failed to adequately investigate and remediate the vapor intrusion contamination caused by its unlawful hazardous waste handling practices, which continues to migrate into and throughout the Class Area." (ECF No. 15, at p. 6, ¶ 19).

RESPONSE: No dispute.

78. The Amended Complaint alleged that “MKC has failed to adequately investigate and delineate the geographical scope of the vapor contamination emanating from the Facility.” (ECF No. 15, at p. 6, ¶ 20).

RESPONSE: No dispute.

79. The Amended Complaint alleged that “MKC has taken insufficient steps to remediate the vapor intrusion contamination known to exist on and adjacent to properties throughout the Class Area.” (ECF No. 15, at p. 6, ¶ 21).

RESPONSE: No dispute.

80. The Amended Complaint alleged an “invasion of Class Area properties.” (ECF No. 15, at p. 12, ¶ 51).

RESPONSE: No dispute.

Madison-Kipp’s Cross-Claims

81. On February 3, 2012, Madison-Kipp filed its Answer to the Amended Complaint. (ECF No. 24, at p.1).

RESPONSE: No dispute.

82. Madison-Kipp’s Answer included cross-claims against Continental, Columbia and U.S. Fire. (ECF No. 24, at pp. 5-9, ¶¶ 1-21).

RESPONSE: No dispute.

83. The cross-claims presented in the Answer requested an order declaring the rights and obligations of Madison-Kipp, Continental, Columbia and U.S. Fire under the relevant insurance policies issued by Continental, Columbia and U.S. Fire with regard to liabilities arising from the Plaintiffs’ and the DNR’s claims. (ECF No. 24, at p. 9).

RESPONSE: No dispute.

84. The cross-claims presented in the Answer also requested an order declaring that Madison-Kipp is entitled to recover from Continental, Columbia and U.S. Fire for the past and future costs incurred by Madison-Kipp in responding to and/or complying with the claims/demands of the DNR and/or the Plaintiffs. (ECF No. 24, at p. 9).

RESPONSE: No dispute.

85. Finally, the cross-claims presented in the Answer requested reasonable attorney's fees and other relief. (ECF No. 24, at p. 9).

RESPONSE: No dispute.

86. Madison-Kipp alleged as follows in the cross-claims presented in its Answer:

The Plaintiffs in this action have brought claims against Madison-Kipp that, as set forth in detail in the Plaintiffs' First Amended Complaint – Class Action, seek to recover damages against Madison-Kipp for various forms of property damage that the Plaintiffs have allegedly sustained.

(ECF No. 24, at p. 7, ¶ 10).

RESPONSE: No dispute.

87. Madison-Kipp's cross-claims alleged that: "The damages allegedly sustained by the Plaintiffs in this action constitute "property damage" as that term is used in the Continental, Columbia, and U.S. Fire Policies." (ECF No. 24, at p. 7, ¶ 11).

RESPONSE: No dispute.

88. Madison-Kipp alleged as follows in the cross-claims presented in its Answer:

In addition to the Plaintiffs claims in this action, Madison-Kipp is also facing claims/demands from the WDNR that Madison-Kipp undertake certain actions to investigate and remediate alleged environmental contamination at and emanating from the Site. Madison-Kipp has incurred past costs in responding to the WDNR's demands/claims, and will continue to incur costs in the future in responding to the WDNR's demands/claims.

(ECF No. 24, at p. 7, ¶ 12).

RESPONSE: No dispute.

89. Madison-Kipp alleged as follows in the cross-claims presented in its Answer: "The investigative and remedial actions being required of Madison-Kipp by

the WDNR in regards to the Sire involve “property damage” as that term is used in the Continental, Columbia, and U.S. Fire Policies.” (ECF No. 24, at p. 8, ¶ 13).

RESPONSE: No dispute.

90. Madison-Kipp alleged as follows in the cross-claims presented in its Answer:

The property damage alleged by the Plaintiffs in this action, and by the WDNR in its proceedings against Madison-Kipp, result from an “occurrence” as that term is used in the Continental, Columbia, and U.S. Fire Policies. The alleged property damage results from accidental and unexpected and unintended releases of certain contaminants into the environment, which is alleged to have damaged the environment in and around the Site.

(ECF No. 24, at p. 8, ¶ 14).

RESPONSE: No dispute.

Continental’s Discovery Requests

91. Continental propounded its First Sets of Interrogatories and Requests for Production of Documents to Madison-Kipp on September 18, 2012. Copies of Continental’s First Sets of Interrogatories and Requests for Production of Documents to Madison-Kipp are attached as Exhibits 1 and 2 to the Affidavit of Christopher White. (The Affidavit of Christopher White is attached to this Statement of Proposed Findings of Fact as Exhibit C). (White Aff., ¶¶ 2-3 & Exhibits 1 & 2).

RESPONSE: No dispute.

92. Continental propounded the following interrogatory to Madison-Kipp:

Are you seeking insurance coverage from Continental or [Columbia] for any defense costs, or remediation costs associated with the Site that were incurred prior to July 25, 2011? If Your response is other than an unqualified “no”, please identify all defense, investigation, and remediation costs for which You are seeking coverage, including the amount of all such costs, the dates on which those costs were incurred, and a detailed description of all such costs.

(White Aff., ¶ 2 & Exhibit 1, at p. 3, Interrogatory No. 1).

RESPONSE: No dispute.

93. Madison-Kipp provided the following response to Continental's interrogatory:

RESPONSE: Yes. . . .Subject to said objection, and without waiving the same, Madison-Kipp responds that the answer to this interrogatory may be ascertained from Madison-Kipp's business records, and that the burden of deriving or ascertaining the answer from Madison-Kipp's business records is substantially the same for Continental as it is for Madison-Kipp. Madison-Kipp refers Continental to documents MK023104 through MK023280.

A copy of Defendant Madison-Kipp Corporation's Response to Continental Casualty Company's First Set of Interrogatories and Request for Production of Documents is attached as Exhibit 3 to the Affidavit of Christopher White. (White Aff., ¶ 4 & Exhibit 3 at p. 4-5, Madison-Kipp's Response to Interrogatory No. 1).

RESPONSE: No dispute.

94. In response to Continental's Request for Production of Documents, Madison-Kipp produced documents labeled MK023104 through MK023280, which consist of invoices and payment records from 2004 through 2011. Copies of the documents produced by Madison-Kipp in response to Continental Casualty Company's First Set of Requests for Production of Documents are attached as Exhibit 4 to the Affidavit of Christopher White. (White Aff., ¶ 5 & Exhibit 4).

RESPONSE: No dispute.

