UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

KATHLEEN McHUGH and
DEANNA SCHNEIDER, Individually
and on behalf of all persons similarly
situated ,

Plaintiffs,

v.

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

Defendants,

--and--

MADISON-KIPP CORPORATION,

Case No. 11-cv-724-bbc

Cross-
Claimant,

v.

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

Cross-Claim Defendants,

--and--

CONTINENTAL CASUALTY COMPANY and
COLUMBIA CASUALTY COMPANY,

Cross-Claimants/Third-Party Plaintiffs,

v.

MADISON-KIPP CORPORATION,

Cross-Claim Defendant,

and

LUMBERMENS MUTUAL CASUALTY COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, and JOHN DOE INSURANCE COMPANIES 1-20,

Third-Party Defendants.

DEFENDANT MADISON-KIPP CORPORATION'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs' opposition is filled with platitudes and hyperbole, but lacks the specific, admissible facts necessary to withstand Madison-Kipp's summary judgment motion. Plaintiffs have brought a claim against Madison-Kipp under the Resource Conservation and Recovery Act of 1976 (RCRA); however, their opposition attempts to read the imminent and substantial endangerment requirement out of the statute. Indeed, Plaintiffs miss the crux of the issue: at this moment any environmental contamination in and around Madison-Kipp's Waubesa Street facility (the "Facility") does not present a threat to human health or the environment, and Plaintiffs have failed to show that it may do so. *See Avondale Fed. Sav. Bank v. Amoco Oil Co.*, 170 F.3d 692, 695 (7th Cir. 1999) ("Thus off-site contamination may very well present an imminent and substantial danger *at some time*, but it does not present such a danger *right now*.") (emphases added). Accordingly, Plaintiffs have failed to carry their burden of

presenting specific facts showing a genuine dispute of material fact about whether environmental contamination for which Madison-Kipp is even arguably responsible presents the threat of an imminent and substantial endangerment to health or the environment. As a result, Madison-Kipp's motion should be granted on Plaintiffs' RCRA claim.

With respect to Plaintiffs' common law claims, Plaintiffs again misunderstand their burden at summary judgment. Plaintiffs were required to come forward with specific, admissible facts to demonstrate that a reasonable fact finder could find for them on each element of each claim. *See Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805-06 (1999). As with their RCRA claim, Plaintiffs' generalities and promises of having more specific evidence for trial fail to satisfy their burden. Indeed, now is the time for them to come forward with any and all evidence necessary to establish that there are genuine disputes of material fact for a jury. *Eberts v. Goderstad*, 569 F.3d 757, 766-67 (7th Cir. 2009); *see also* Court's Preliminary Pretrial Conference Order, dkt. #14 ¶ 3 ("Parties are to undertake discovery in a manner that allows them to make or respond to dispositive motions within the scheduled deadlines."). This is the very purpose of the summary judgment procedure. Therefore, Madison-Kipp's summary judgment motion on Plaintiffs' common law claims should be granted as well.

PROCEDURAL ISSUES

I. SUMMARY JUDGMENT STANDARD

Plaintiffs' suggestions about what Madison-Kipp was required to provide in filing its summary judgment motion demonstrate their fundamental misunderstanding of the summary judgment standard. As this Court has explained:

> "[s]ummary judgment is not a dress rehearsal or practice run; it is the . . . [moment] when a party must show what evidence it has that would convince a trier of fact to accept its version of the events." Thus, plaintiff cannot simply say that all will be made clear at trial. He was required to show that his evidence was sufficient to permit a reasonable factfinder to render a verdict in his favor.

Felton v. Teel Plastics, Inc., 724 F. Supp. 2d 941, 958 (W.D. Wis. 2010) (quoting *Schacht v. Wis. Dep't of Corrections*, 175 F.3d 497, 504 (7th Cir. 1999)). Thus, a mere scintilla of evidence by the non-moving party is insufficient to defeat summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

The non-moving party must provide evidence sufficient to establish a genuine dispute of material fact. Fed. R. Civ. P. 56(a). A material fact is one that might affect the outcome of the suit under governing law. *Anderson*, 477 U.S. at 248. The existence of irrelevant or unnecessary facts does not preclude summary judgment even if they are in dispute. *Id.* Also, a genuine dispute requires "more than simply showing that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*, 475 U.S. 574, 586 (1986). "Conclusory allegations, unsupported by specific facts, will not suffice" in creating a genuine dispute of material fact. *Payne v. Pauley*, 337 F.3d 767, 773 (7th Cir. 2003) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990)).

Simply put, "[t]he non-moving party must point to specific facts showing that there is a genuine issue for trial, and inferences relying on mere speculation or conjecture will not suffice." *Stephens v. Erickson*, 569 F.3d 779, 786 (7th Cir. 2009). Thus, "[t]he mere existence of an alleged factual dispute will not defeat a summary judgment motion; instead, the nonmovant must present definite, competent evidence in rebuttal." *Butts v. Aurora health Care, Inc.*, 387 F.3d 921, 924 (7th Cir. 2004).

Additionally, as a defendant, Madison-Kipp is not required to negate Plaintiffs' claims. *Fitzpatrick v. Catholic Bishop*, 916 F.2d 1254, 1256 (7th Cir. 1990). Instead, as the party that will bear the burden of persuasion at trial, Plaintiffs' failure to establish the existence of any element essential to a claim entitles Madison-Kipp to have summary judgment entered in its favor on that claim. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). Accordingly, a failure of proof concerning an essential element of Plaintiffs' claim necessarily renders all other facts immaterial. *Id.* at 323. Applying the above standards to the motion before the Court will establish that Plaintiffs have failed to meet their burden and that Madison-Kipp is entitled to summary judgment on all Plaintiffs' claims.

II. INADMISSIBLE FACTS

> When as in the present case a defendant moves for summary judgment on the ground that the plaintiff lacks evidence of an essential element of his claim, the plaintiff is required by Fed. R. Civ. P. 56, if he wants to ward off the grant of the motion, to present evidence of evidentiary quality—either admissible documents or attested testimony, such as that found in depositions or in affidavits—demonstrating the existence of a genuine issue of material fact.

Winskunas v. Birnbaum, 23 F.3d 1264, 1267 (7th Cir. 1994). Many of Plaintiffs' supplemental proposed facts or responses to Madison-Kipp's proposed facts are based on inadmissible facts and thus, cannot be relied upon to create a genuine dispute of material fact.

A. The Portions Of James Lenz's Deposition Testimony Plaintiffs Seek To Use To Ward Off Summary Judgment Are Inadmissible Because Either He Lacks Personal Knowledge Or The Statement Was Hearsay.

James Lenz is a former employee of Madison-Kipp, meaning anything he currently says about Madison-Kipp is not an admission by Madison-Kipp under the Federal Rules of Evidence. *See* Fed. R. Evid. 801(d)(2). Further, none of Mr. Lenz's testimony about the alleged historic disposal and spilling of various chemicals, including PCE, at Madison-Kipp was based on his own personal knowledge as required under Federal Rule of Evidence 602. Though Plaintiffs rely upon Mr. Lenz to establish the alleged chemical dumping prior to 1980, Mr. Lenz did not even start working at Madison-Kipp until 1980.

Plaintiffs wholly ignore that Mr. Lenz never saw any PCE being spilled or dumped, and never saw the removal of spent PCE from the vapor degreaser. (Lenz Dep., dkt. #187, at 44:9-12, 46:17-18, 52:9-13, 56:8-10, 58:4-7 & 67:11-18.)[1] Mr. Lenz never saw any oils spread on the ground around Madison-Kipp's facility and he did not know what chemicals would have been in those oils even if they had been so spread. (*Id.* 71:17-22 & 72:4-19.) Mr. Lenz admitted that any dumping, spilling or spreading

[1] In citing depositions, Madison-Kipp's citation is to the actual deposition page and line numbers, not the pages numbers provided upon docketing the transcript.

occurred before he ever started working for Madison-Kipp, making it impossible for him to have any personal knowledge of such events. (*Id.* 55:5-11 & 73:10-14.) Having not been there to see any alleged dumping or to even experience the "attitude at the time" regarding the disposal of chemicals before he began work in 1980, Mr. Lenz's cannot reliably address Madison-Kipp's procedures for handling and disposing chemicals, like PCE, because such testimony would be improperly based on speculation and rumors. *Payne*, 337 F.3d at 772. Consequently, it is not disputed that Mr. Lenz has absolutely no first-hand knowledge of, and thus cannot testify about, the alleged dumping and spilling of PCE and other chemicals at Madison-Kipp.

Instead of seeking to depose Madison-Kipp employees with first-hand knowledge regarding Madison-Kipp's handling of chemicals prior to 1980, Plaintiffs asked Mr. Lenz about his second- and third-hand knowledge. (Lenz Dep. dkt. #187, at 58:7-9.) Mr. Lenz referred to two sources: (1) "general" conversations around Madison-Kipp's facility; and (2) three former Madison-Kipp maintenance employees George Schluter, Wally Largen and Marv Jellings (*Id.* at 45:2-23, 48:4 – 49:7, 53:4-22, 58:14 – 60:25 & 72:13 – 73:19.) All such statements are inadmissible hearsay under Rule 801(c) as they are statements from non-testifying declarants, *i.e.*, people other than Mr. Lenz, and are being offered for the truth of the matter asserted, *i.e.*, that Madison-Kipp spilled and dumped chemicals as stated. Fed. R. Evid. 801(c).

Plaintiffs summarily contend that Mr. Lenz's statements constitute a party admission pursuant to Rule 801(d)(2)(D). (Dkt. #198, at 55-56.)[2] Plaintiffs, however, fail to establish that the admission by party opponent exception applies to Mr. Lenz's statements. Mr. Lenz's statements about dumping are based entirely on rumors he claims to have overheard from unnamed people at Madison-Kipp's facility. (Lenz Dep., dkt. #187, at 46:19 – 49:7 ("Q: How did you learn that this was going on? A: When the whole PCE contamination thing came up people were talking, you know." 48:9-11).) This type of testimony is "rank hearsay" and inadmissible. *Wendler & Ezra, P.C. v. Am. Int'l Group, Inc.*, 521 F.3d 790, 792 (7th Cir. 2008).

In contrast, Mr. Lenz specifically clarified that the three maintenance employees he referenced did not inform him of any dumping. (Lenz Dep., dkt. #187, at 60:15-22.) Such generalized and vague statements make it impossible to know if the "general understanding" that--prior to Mr. Lenz's arrival at Madison-Kipp--used PCE was dumped on the ground was an understanding provided by people who satisfy Rule 801(d)(2)(D)'s requirement that the statement be made within the scope of the employees' relationship with Madison-Kipp. *See Wendler & Ezra, P.C.*, 521 F.3d at 792.

Having deposed Mr. Lenz back in September 2012, Plaintiffs have had more than enough time to depose other former employees who had first-hand, personal knowledge about Madison-Kipp's past chemical handling procedures, especially those specifically named by Mr. Lenz. *Id.* Indeed, Madison-Kipp provided affidavits from

[2] Madison-Kipp cites herein to the actual page numbers in Plaintiffs' opposition brief and not the page numbers provided upon docketing the brief.

two of those former employees with such first-hand knowledge, both of whom unequivocally state that they never saw or heard about any dumping or spilling of PCE or other chemicals outside of the Facility. (*See* dkt. #148, ¶ 10; dkt. #149, ¶ 19-20.)[3] Regardless of the affidavits, Plaintiffs' strategic decision to only depose Mr. Lenz – and no other Madison-Kipp employees or former employees – though he admitted he had no first-hand knowledge of any of the conduct alleged, leaves Plaintiffs with no admissible facts from which a reasonable jury could find that Madison-Kipp dumped chemicals or had the general attitude Plaintiffs' propose regarding the disposal of chemicals.

With respect to the three specific former maintenance employees to which Mr. Lenz referred, their alleged out-of-court statements to him are inadmissible hearsay as well. First, Mr. Lenz made clear that these former maintenance employees only spoke to him about minimal spilling of PCE out of buckets used to transport PCE from the holding tank to the facility. (Lenz Dep., dkt. #187, at 61:1-8 ("Q: What PCE spills, the regular PCE that these three maintenance workers described for you, tell me more

[3] Plaintiffs object to these affidavits because Madison-Kipp did not include their names in its initial Rule 26(a) disclosures. (*See* dkt. #198 at 56 n.6.) Madison-Kipp did not need to supplement its Rule 26(a) disclosures after Mr. Lenz identified these individuals at his deposition in September, 2012. Plaintiffs were then aware of those former employees and the potential information they had in plenty of time to seek to depose them before the dispositive motion deadline. The advisory committee's note to the 1993 Amendments to Rule 26 addresses this exact circumstance: "There is, however, no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, as when a witness not previously disclosed is identified during the taking of a deposition[.]" *See Coleman v. Keebler Co.*, 997 F. Supp. 1102, 1107 (N.D. Ill. 1998) ("both the Advisory Committee and leading commentators indicate that the incidental discovery, particularly during a deposition, of information ordinarily subject to supplementation satisfied the Rule 26(e)(1) duty as sufficiently as a formal filing"). Accordingly, the affidavits are perfectly admissible.

specifically -- A: You're carrying a bucket and it sloshes and spills some on the floor.").) Second, even though Mr. Lenz provided names and positions for these former employees, it is entirely unclear that these three former employees had the authority to make the alleged admissions Mr. Lenz testified about. *See Stephens*, 569 F.3d at 793 (noting that to be admissible as admission by party opponent "the subject matter of the admission must match the subject matter of the employee's job description") (internal quotation omitted). Mr. Lenz noted that the three former employees were maintenance employees, but he did not identify them as operators of the vapor degreaser, so their involvement with the transfer of PCE is vague at best in light of his testimony.

Moreover, affidavits from two of the former employees to whom Mr. Lenz referred disclaim that they witnessed the alleged conduct. Finally, it is possible that these former employees' statements create an additional layer of hearsay as it is ambiguous whether some of their alleged statements were based on personal experience or what they too had been told through an unreliable rumor. (*Id.* at 58:8-11 & 148:21-15 ("A: Nobody could remember an actual spill.").) Plaintiffs simply cannot meet their burden of proving admissibility for these out-of-court statements.

In trying to overcome the clear hearsay problem, Plaintiffs must rely upon a thirty-year old case from outside the Seventh Circuit, but even that case does not establish that statements from former employees should be considered non-hearsay as the facts there are not comparable to the present case. *See Pillsbury Co. v. Cleaver-Brooks Division of Aqua-Chem, Inc.*, 646 F.2d 1216 (8th Cir. 1981). In *Pillsbury*, the plaintiff objected to the admission of a written report of one of defendant's employees that had

been created as part of the defendant's internal investigation of a boiler accident. *Id.* at 1217. The district court had overruled the objection and the appellate court affirmed, explaining that the writer of the report had testified at his deposition that the report accurately reflected his conversations with the employees he interviewed, all three declarants had been questioned about the report and one of the employees quoted in the report had signed each page and had further confirmed the reports accuracy. *Id.* at 1218. The level of reliability in the affirmation of the out-of-court statements in *Pillsbury* is wholly absent here.

Mr. Lenz's deposition testimony is nowhere even close to the written and signed report in *Pillsbury*. Mr. Lenz obviously did not write up any report. (Lenz Dep., dkt. #187, at 146:13-16.) Instead, he testified from memory on information he claims to have heard more than fifteen-years ago regarding activities that the declarants had allegedly witnessed or heard about more than thirty-years ago. Mr. Lenz could not even remember if he spoke with the three former maintenance employees separately or together and could not even be sure what the date or time period was when he spoke with them. (*Id.* at 146:9-12 & 151:14-20.) Although at one point Mr. Lenz recalls also speaking with a maintenance supervisor, Bob Keenan, Mr. Lenz noted that while he had spoken with a bunch of people, he could not recall names. (*Id.* at 152:12-21.) Indeed, Mr. Keenan may have been retired when Mr. Lenz spoke with him. (*Id.* at 153:15-18.) The information on which Mr. Lenz testified is nothing like the written report at issue in *Pillsbury*; it has absolutely none of the assurances of reliability that surrounded the

written report there. Moreover, Plaintiffs could have deposed witnesses with direct recall (such as the affiants offered by Madison-Kipp), but chose not to do so.

Thus, Mr. Lenz's testimony regarding what he was told generally and by the former maintenance employees he references in his deposition is inadmissible hearsay. The barebones background Mr. Lenz provided about the sources of his information fail to establish that the statements by these former employees should be accepted as admissions by a party opponent under Rule 801(d)(2)(D). *See Stephens*, 569 F.3d at 793 ("not everything that relates to one's job falls within the scope of one's agency or employment") (internal quotation omitted); *see also Hill v. Spiegel, Inc.*, 708 F.2d 233, 237 (6th Cir. 1983) ("But it is necessary, we repeat, to show, to support admissibility, that the content of the declarant's statement concerned a matter within the scope of his agency."). Plaintiffs have failed to satisfy their burden of establishing that the statements should be admissible and, therefore, the Court should not consider those statements in ruling on Madison-Kipp's summary judgment motion.

B. Additional Inadmissible Hearsay Statements.

Plaintiffs further attempt to combat Madison-Kipp's summary judgment motion by relying upon other statements that also are inadmissible hearsay under Rule 802. For example, Plaintiffs rely upon out-of-court statements by some unknown public health official, but these statements are clearly inadmissible hearsay. (*See, e.g.*, M-K Resp. to PPFOF, ¶¶ 117 & 126.)[4] Indeed, one statement is double-hearsay in that it is

[4] Madison-Kipp cites to its response to Plaintiffs' additional proposed findings of fact as "M-K Resp. PPFOF ¶ __."

based on what an unnamed health official told one Class Member who then shared it with the Class Member being deposed. (*See* Bott Dep., dkt. #119, at 35:20 – 36:6.) Plaintiffs rely upon other similar statements, but they are also inadmissible hearsay. (*See, e.g.*, M-K Resp. to PPFOF, ¶¶ 57 & 121.) Accordingly, all such statements should not be considered by the Court in ruling on Madison-Kipp's summary judgment motion.

C. Plaintiffs' Proposed Real Estate Damages Expert John Kilpatrick's Declaration Is Inadmissible.

In an attempt to create some evidence of actual damages suffered, Plaintiffs submit the declaration of Mr. John Kilpatrick. (*See* dkt. #194.) Mr. Kilpatrick provides an unreasoned, conclusory statement that environmental contamination in and around Madison-Kipp's Facility has "had an economically material and indeed significant impact on the value of the properties, to a reasonable degree of appraisal certainty." (*Id.* ¶ 8.) Mr. Kilpatrick provides no explanation of the methods he used or even the specific facts he considered in reaching this opinion. There is no support offered for his opinion, no methodology explained and his declaration is wholly conclusory. Additionally, even though one would assume that the "significant impact" Mr. Kilpatrick references is a negative impact, his declaration does not state as much.

The Seventh Circuit has explained that "an expert's *ipse dixit* is inadmissible. 'An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.'" *Wendler & Ezra, P.C.*, 521 F.3d at 791 (quoting *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989)); *see also State Farm Fire & Cas. Co.*

v. Summerfield, Nos. 90-1331, 90-1433, 1991 U.S. App. LEXIS 6044, at *16 (7th Cir. Apr. 11, 1991) (unpublished) ("Summary judgment cannot be avoided simply by presenting the factually unsupported musings of an expert."). There are no facts in the record to support that any Class Member has been caused any quantifiable amount of damage by the alleged environmental contamination. Mr. Kilpatrick does not provide a bottom-line quantification of damages let alone a reference to specific facts relied upon for his opinions, such as actual appraisals, comparisons with other properties in the market, taking other economic factors in consideration, etc. Therefore, his conclusory musing about the impact of the alleged contamination on Plaintiffs' property values should be excluded. *See Real Estate Value Co. v. USAir, Inc.*, 979 F. Supp. 731, 744 (N.D. Ill. 1997) ("Dr. Olley's opinions regarding lost profits on supermarket promotions will not assist the trier of fact because they are based on unsupported facts.").

D. Plaintiffs Cannot Backdoor Evidence Through Their Experts.

As Madison-Kipp noted in its initial brief and now evidenced by the motions filed concurrently with this reply brief, it seeks the exclude the opinions of both Dr. Ozonoff and Dr. Everett. However, regardless of how the Court rules on those motions, Plaintiffs cannot rely on expert statements regarding underlying facts to establish those underlying facts. As the Seventh Circuit has reasoned, "[t]he fact that inadmissible evidence is the (permissible) premise of the expert's opinion does not make that evidence admissible for other purposes, purposes independent of the opinion." *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992). Thus, judges are

required to "make sure that the expert isn't being used as a vehicle for circumventing the rules of evidence." *Id.*

In application, the Seventh Circuit's reasoning means that while Dr. Everett can rely on a document that cannot be authenticated or hearsay testimony in reaching his opinions (so long as it is the type reasonably relied upon in his field of expertise), Plaintiffs cannot cite his opinions to establish that the underlying facts do actually exist. For example, Plaintiffs' supplemental proposed finding of fact number 121 is based on a hearsay statement made by someone at the City of Madison to Dr. Everett. (*See* dkt. #188, at 41:21 – 42:15 ("A: I identified this item, sir, as a document that we put together, and we put it together in concert with personal phone calls with folks from the Madison Water Utility . . . Further in discussions with the Madison Water Utility, we know that there was high concern based on the old numbers that we had for PCE. . . . They're not turning on the well because of the risk with this new data.").) Thus, while presumably Dr. Everett is permitted to rely on that hearsay in reaching his opinions, the underlying asserted fact, *i.e.*, that the Madison Water Utility is not using the well in light of a risk based on new data, is not admissible and thus, cannot be considered in ruling on Madison-Kipp's summary judgment motion.

ARGUMENT

I. PLAINTIFFS FAIL TO SUBMIT EVIDENCE FROM WHICH A REASONABLE FACT FINDER COULD CONCLUDE THAT WASTE AT MADISON-KIPP'S SITE MAY PRESENT AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO HEALTH OR THE ENVIRONMENT.

Plaintiffs' arguments attempt to water down RCRA's "imminent and substantial endangerment" requirement to the point where the language is rendered meaningless. Indeed, if Plaintiffs' "any-level-and-any-threat" argument were accepted there would be no difference between RCRA and various other environmental statutes, including The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[5] As the Supreme Court noted, "RCRA is not principally designed to effectuate the cleanup of toxic waste sites . . . ." *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996). Instead, RCRA's purpose "is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" *Id.* (quoting 42 U.S.C. § 6902(b)). However, if Plaintiffs' arguments were accepted, any time there is environmental contamination of any amount there would necessarily be a RCRA claim. Such application of RCRA does not

[5] With regards to interplay between RCRA and CERCLA, Madison-Kipp recognizes that RCRA and CERCLA are not mutually exclusive causes of action, meaning a party may have a claim under both RCRA and CERCLA at the same time. However, while both statutes serve to address concerns raised by hazardous wastes, they each serve a separate and unique purpose. *South Carolina Dep't of Health & Envtl. Control v. Commerce & Indus. Ins. Co.*, 372 F.3d 245, 256 (4th Cir. 2004). Put simply, "RCRA is preventative; CERCLA is curative." *Id.* (citing *Westfarm Assocs. Ltd. P'ship v. Wash. Suburban Sanitary Comm'n*, 66 F.3d 669, 679 (4th Cir. 1995) (internal citation omitted)). More specifically, because CERCLA "serves goals that are remedial and curative rather than preventative[,] . . . 'CERCLA establishes a cleanup program for hazardous waste which has already been disposed of improperly.'" *South Carolina Dep't of Health & Envtl. Control*, 372 F.3d at 256 (quoting *Envtl. Tech. Council v. Sierra Club*, 98 F.3d 774, 779 (4th Cir. 1996)).

comport with the statute's purpose. Accordingly, a successful RCRA claim must establish a near-term serious threat. *See Me. People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 296 (1st Cir. 2006).

A. There Is No Near-term Serious Threat From PCE Vapor Intrusion.

Plaintiffs try to make much out of the fact that Madison-Kipp's motion focused on the absence of any near-term threat of vapor intrusion on Plaintiffs' properties. Although Plaintiffs appear surprised by this focus, their feigned surprise is a red-herring lest Plaintiffs have forgotten that their complaint focuses on vapor intrusion. (*See* First Am. Compl., dkt. #15, ¶¶ 1-4, 17-21, 38-41, 43-46, 48-51, & 56.) Indeed, Plaintiffs begin their complaint by stating:

> This is a class action lawsuit brought by and on behalf of residents of Madison, Wisconsin who live in an area that has a very serious vapor intrusion problem caused by contamination emanating from a nearby manufacturing facility (the "Facility") owned and operated by MKC.

(*Id.* ¶ 1.) Regardless of the focus on vapor issues, Madison-Kipp also addressed the absence of any near-term threat of harm from soil or groundwater contamination. (Dkt. #160, at 19-22.)

Plaintiffs change their focus from vapor intrusion to groundwater and soil because they need to draw attention away from the undisputed fact that there is no risk of threatened harm from vapor intrusion present now for any of the Plaintiffs. It is undisputed that as of December 2012, none of Plaintiffs' homes exceed the DNR's current conservative risk screening standards governing levels of VOCs in indoor air or

sub-slabs. (M-K Reply PFOF ¶¶ 240, 244.)[6] Indeed, it is undisputed that the DNR chose to measure levels at Plaintiffs' homes using "a 10-fold factor of safety to the current 2012 screening levels, which are already very protective of human health" and that there are no exceedances of those levels. (M-K Reply PFOF ¶ 241.)

Plaintiffs provide no case law supporting the position that vapor levels below such conservative state standards are sufficient to establish the required imminent and substantial endangerment finding. Indeed, Plaintiff's own case notes that compliance with governmental environmental standards can preclude a finding of imminent and substantial endangerment as a matter of law. *Raymond K. Hoxsie Real Estate Trust v. Exxon Educ. Found.*, 81 F. Supp. 2d 359, 366 (D.R.I. 2000).

Moreover, Plaintiffs have not provided evidence from which a reasonable fact finder could conclude that such low vapor levels present a near-term threat to health or the environment. The fact that the DNR has agreed to provide vapor mitigation units in Plaintiffs' homes when requested does not establish a near-term threat. Like the fan in *Tilot Oil*, the mitigation systems remove any threat of vapor intrusion in Plaintiffs' homes. *See Tilot Oil . LLC v. BP Prods. N. Am., Inc.*, No. 09-CV-210, 2012 U.S. Dist. LEXIS 5365, at *26 (E.D. Wis. Jan. 17, 2012). Also, there is no dispute that the DNR's decision to put mitigation systems in homes was not based on the need to reduce a threat, but as a conservative (and in some instances seemingly unnecessary) measure to provide even greater protection. (M-K Reply PFOF, ¶¶ 577, 579 & 580.)

[6] Madison-Kipp cites to its reply to Plaintiffs' responses to its proposed findings of fact as "M-K Reply PFOF ¶ __."

Dr. Ozonoff's opinion that *any* amount of PCE vapor intrusion in Plaintiffs' homes creates an immediate and substantial endangerment to Plaintiffs' health is not an admissible fact. As more fully set forth in Madison-Kipp's motion to exclude Dr. Ozonoff's opinion, Dr. Ozonoff provides a conclusory opinion that cannot serve to defeat Madison-Kipp's summary judgment motion. *See, e.g.*, *State Farm Fire & Cas. Co.*, 1991 U.S. App. LEXIS 6044, at *16 ("Summary judgment cannot be avoided simply by presenting the factually unsupported musings of an expert.").

Dr. Ozonoff's report is long on the general history of the study of PCE, how to understand the scientific method as applied in the legal realm and non-vapor studies regarding some effects of PCE on people and animals; indeed, those portions of his report span 136 pages of his 139 page report. (*See generally* dkts. ## 186 & 186-1.) However, his opinion lacks any discussion of the specific levels of vapor intrusion in Plaintiffs' homes and the current threat and seriousness of the threat those specific levels create. (*See* dkt. #186 at 2 & dkt. #186-1 at 138-39.) While Dr. Ozonoff's opinion, at best, may show some possible, *de minimis* impact of harm sometime in the distant future (although he does not explain how the impact is any greater than that posed by wearing dry-cleaned clothes or inhaling other chemicals regularly found in homes), no reasonable fact finder could conclude that the general threat is near-term or serious, as required by RCRA. Thus, Dr. Ozonoff's blanket conclusion about the effect of PCE vapors on Plaintiffs without having done a risk analysis based on the specific levels discovered at each home does not get Plaintiffs past summary judgment. *See City of Fresno v. United States*, 709 F. Supp. 2d 888, 928 (E.D. Cal. 2010).

B. There Is No Near-term Serious Threat From Soil Contamination.

Turning to soil, Plaintiffs are mistaken that Madison-Kipp does not contest that it has contributed to the handling or disposal of waste found in the soil at Madison-Kipp's facility and on Plaintiffs' properties. While in this motion Madison-Kipp has not challenged Plaintiffs' allegations that the handling and disposal of PCE and PCBs at its Facility in the past, although in compliance with the applicable standard of care at the time, resulted in PCE and PCBs migrating into some of the surrounding soil, it specifically challenged that the PAHs located in the soil on Plaintiffs' properties are from Madison-Kipp. (Dkt. #160 at 19 ("The initial problem Plaintiffs have regarding any alleged threat from PAH contamination is that Plaintiffs present no evidence that PAHs located on Class Members' properties are anything more than background levels nor that those PAHs are from Madison-Kipp.").) In their response, Plaintiffs fail to come forward with admissible evidence from which a reasonable jury could find that Madison-Kipp contributed to the PAHs in the soils on Plaintiffs' properties.

Although Dr. Everett opined that there were analytical methods that can be used to differentiate between various PAH sources, he did not engage in any such methods to determine the sources of the PAHs found on Plaintiffs' properties. (*See* dkt. #185 at 52 ("If one wanted to identify the source of the PAHs, there are well known forensic techniques such as hydrocarbon fingerprinting which could have provided insight into the source of the PAHs.").) In stark contrast, it is undisputed that Madison-Kipp's expert did consider and examine the source of PAHs on Plaintiffs' properties and found that the PAHs found in the soil at Plaintiffs' properties is not of the same type as that

found at Madison-Kipp's facility. (M-K Reply PFOF ¶¶ 632-635.) Indeed, while Madison-Kipp provided detailed expert reports addressing not only the source of PAHs found in soils in and around the Facility but also the absence of any threat created by the levels of PAHs discovered, Plaintiffs provided only conclusory statements about PAHs generally. (*Id.* ¶¶ 591-592 & 596.) In short, the only admissible evidence in the record shows that Madison-Kipp is not the source of PAHs in Plaintiffs' soil and thus, is not even responsible under RCRA for any threat the PAHs in the soil have even arguably created.

Even if the Court were to find that Madison-Kipp was the source of PAH contamination in Plaintiffs' soil, there is no evidence that such contamination presents any serious, near-term threat to human health or the environment. It is undisputed that the levels detected in Plaintiffs' soil are less than the normal background concentrations of PAHs found in Madison and other urban areas in the United States as Plaintiffs have no admissible evidence to rebut such a fact. (M-K Reply PFOF ¶¶ 631 & 635.) Accordingly, no reasonable fact finder could find that the concentration of PAHs in the soil satisfies the imminent and substantial endangerment standard.

With respect to PCE and PCBs in the soil, Dr. Beck provides the undisputed opinion that there is no threat to human health from ingestion of or dermal contact with the soil. (*See* M-K Reply PFOF ¶¶ 591-592, 606-609 & 612.) Indeed, Plaintiffs offered no admissible evidence regarding any harm to health arising from contact with the soil at the Facility or on Plaintiffs' properties. Dr. Ozonoff's report does not address any risk from contact with the soil and he admitted that his opinion is limited to *only* the alleged

effects on health resulting from the inhalation of chemicals, including PCE. (Ozonoff Dep., dkt. #142, at 11:21-24.) Simply put, there is no evidence that the levels of contamination in the soil create an imminent and substantial endangerment.

Furthermore, any *de minimis* threat resulting from the concentration of PCBs in the soil on or around Madison-Kipp's Facility, including Plaintiffs' properties, cannot be near-term in light of Madison-Kipp's ongoing remediation efforts. Any threat still posed by PCBs in the soil is not serious as there are approved remediation plans in place to remove the PCBs. (*See* M-K Reply PFOF ¶¶ 323-327 & 329.) Plaintiffs have failed to provide evidence that any risk of harm, to human health or the environment, resulting from PCB contaminated soil is based on anything other than speculation. At best there is some evidence that there are levels of PCBs in the soil that exceed some regulatory levels, but standing alone such evidence provides only a speculative prospect of a hypothetically serious harm, which is insufficient for the RCRA claim to survive summary judgment. *See Lewis v. FMC Corp.*, 786 F. Supp. 2d 690, 710 (W.D.N.Y. 2011) ("Without any evidence linking the cited standards to potential imminent and substantial risks to human health or wildlife, reliance on the standards alone presents merely a speculative prospect of future harm, the seriousness of which is equally hypothetical."). Thus, Plaintiffs have not met their burden to avoid summary judgment.

C. There Is No Near-term Serious Threat From Groundwater Contamination.

Plaintiffs also mention the contamination of deep groundwater as being sufficient evidence to create a genuine dispute of material fact regarding the presence of a threat of an imminent and substantial danger. However, the contamination of the groundwater does not establish a near term threat to health or the environment. "[C]ourts routinely dismiss RCRA claims where, notwithstanding the existence of hazardous substances in a water supply, the specific factual circumstances at issue prevent humans from actually drinking contaminated water." *Scotchtown Holdings LLC v. Town of Goshen*, No. 08-CV-4720, 2009 U.S. Dist. LEXIS 1656, at *8 (S.D.N.Y. 2009). It is undisputed that any contamination in the groundwater has not reached any water that is or will be actually used for drinking. (*See* M-K Reply PFOF ¶ 507, 517 & 519-520.) Further, City Well #8, which is the closest city well, is closely monitored for even minimal signs of contamination from any source, not just Madison-Kipp, and can be shut down before any contamination would reach improper levels in actual drinking water. (*Id.* ¶¶ 521-523.)

Moreover, Madison-Kipp is in the process of remediating contaminated groundwater, using the proven In-Situ Chemical Oxidation (ISCO) technique. (M-K Reply PFOF ¶¶ 330-335, 342-344, 508 & 511-513.) Plaintiffs have failed to show that the contaminated groundwater threatens to harm health or the environment. Instead, there is no contamination of water used for drinking and the remediation process of chemical destruction of the contaminants where they are found will ensure the contamination

will never reach City Well #8. Accordingly, the mere fact that the groundwater is contaminated, even above state standards, does not rescue Plaintiffs' RCRA claim. *See City of Fresno v. United States*, 709 F. Supp. 2d 934, 942-44 (E.D. Cal. 2010) (mere exceedence of government standard not sufficient to establish imminent and substantial endangerment to health or environment).

D. RCRA Cases, Like This One, Are Amenable To Resolution At Summary Judgment.

Madison-Kipp agrees that "whether sufficient endangerment exists under RCRA is fact-specific." *Tilot Oil, LLC*, 2012 U.S. Dist. LEXIS 5365, at *31. However, this does not mean that summary judgment cannot or should not be granted under the proper factual circumstances. When the facts demonstrate that there simply is no serious, present threat of harm to health or the environment, courts take the time to reach that conclusion and grant summary judgment. *See id.* at *34; *Lewis*, 786 F. Supp. 2d at 693-94; *City of Fresno*, 709 F. Supp. 2d at 943-44; *Sierra Club v. Gates*, No. 2:07-cv-0101-LJM-WGH, 2008 U.S. Dist. LEXIS 71860, at *114-15 (S.D. Ind. Sept. 22, 2008). Indeed, a plaintiff's RCRA claim can be dismissed at the pleadings stage if it is clear that the waste will never present a danger. *See Scotchtown Holdings LLC*, 2009 U.S. Dist. LEXIS 1656, at *8-9 (citing various other cases).

This case is readily distinguishable from *Grace Christian Fellowship v. KJG Investments Inc.*, No. 07-C-0348, 2012 U.S. Dist. LEXIS 43421 (E.D. Wis. Mar. 29, 2012). The most serious and glaring difference is the fact that the building in *Grace* had to be evacuated because of gasoline odors in the basement and remained evacuated for

several days. *Id.* at *12-13. Here, there has been no evacuation of any of Plaintiffs' homes because of the alleged vapor intrusion. Also, in *Grace*, testing of the soil underneath the plaintiff's school building established that exceedances of the DNR standards existed. *Id.* at *50. Here, no sub-slab vapor exceedances at Plaintiffs' properties have been established by admissible evidence. Accordingly, the more serious issues in *Grace* that likely persuaded the judge to deny summary judgment are not present here.

E. No Matter The Type Of Contamination At Issue, There Is No Admissible Evidence Of A Near-term, Non-speculative Serious Risk Of Harm To Health Or The Environment Requiring The Court To Step In And Enter An Injunction To Prevent The Threat Of Future Harm.

On the current record of admissible facts before the Court, and drawing all reasonable inferences in favor of Plaintiffs, there is no evidence from which a fact finder could conclude that the Court needs to either enjoin Madison-Kipp from continued waste disposal or compel it to act in an effort to remedy contamination that poses a near-term and ongoing serious threat to human health or the environment. Plaintiffs' arguments simply overlook the fact that RCRA serves a preventative, as opposed to curative, purpose and that there is nothing that needs to be "prevented" at this time. Plaintiffs are not entitled to any relief under § 6972(a)(1)(B) regardless of the type of contamination at issue, that is, vapor, soil or groundwater, because for each type, the admissible facts establish that "the risk of harm is remote in time, completely speculative in nature, or *de minimis* in degree." *See Me. People's Alliance*, 471 F.3d at 289

(citation omitted); *see also Scotchtown Holdings LLC*, 2009 U.S. Dist. LEXIS 1656, at *6-7 and *Sierra Club*, 2008 U.S. Dist. LEXIS 71860, at *109.

With respect to a possible RCRA injunction addressing PCE vapor intrusion or PCE soil and shallow groundwater contamination, Plaintiffs have no evidence to support such relief, other than an inadmissible conclusory opinion that exposure to any level of PCE, including *de minimis* levels, poses some level of risk to health. Conversely, Madison-Kipp has proffered specific evidence from a toxicologist establishing the absence of any threat to each class member household based on the minimal, if any, PCE levels found in sub-slab and indoor air as well as soil and shallow groundwater and given the existence of in-home mitigation systems, like the fan in *Tilot Oil*. *See Tilot Oil*, 2012 U.S. Dist. LEXIS 5365, at *26. Thus, unless the Court accepts Dr. Ozonoff's zero-tolerance standard, there is no vapor, soil or shallow groundwater contamination that presents a serious, near-term threat to health or the environment for the Court to remedy.

In considering PAH soil contamination, other than a DNR letter of inquiry providing conclusory statements about the possible source of PAHs, Plaintiffs have provided no evidence that Madison-Kipp is the source of PAHs on Plaintiffs' properties or that the PAHs create a present and ongoing risk of substantial harm. On the other hand, Madison-Kipp has submitted unrebutted expert analysis and opinion that Madison-Kipp is not the source of PAHs on Plaintiffs' properties and that the PAH levels in the soil is nothing more than background levels found in similar urban environments. (M-K Reply PFOF ¶¶ 631-635.) As for PCB soil contamination on

Plaintiffs' properties, although there are some elevated levels, contaminated soil is being remediated; regardless, there is no admissible evidence that the elevated levels, which is all Plaintiffs offer, present an imminent and substantial endangerment to health or the environment. Moreover, Plaintiffs fail to submit any admissible evidence to dispute the fact that there is no threat to human health from the ingestion of or dermal contact with any contaminated soil. (*See id.* ¶¶ 591-592, 606-609 & 612.)

Finally, any deep groundwater contamination creates, at best, a speculative risk of harm, as there is no evidence from which a fact finder could conclude that in the near-term water will ever be used in a manner that could cause substantial harm to health or the environment. Also, Madison-Kipp is actively remediating the contamination, including using ISCO to chemically destroy the contaminants where they are found. (M-K Reply PFOF ¶¶ 511-513.) Thus, the groundwater contamination does not present an immediate and substantial threat to health or the environment requiring Court intervention.

Despite the lack of evidence in the record to establish the need for Court intervention under RCRA to alleviate a serious, near-term threat of harm from environmental contamination, Plaintiffs seek to obfuscate the core issues under RCRA by misdirecting the Court's attention to Plaintiffs' editorialized and hyperbolic version of Madison-Kipp's past actions, including its disposal of chemicals and its work with DNR, and to the time and level of progress that has elapsed since the DNR first directed Madison-Kipp to begin investigating and remediating contamination around its facility. Those circumstances are, however, immaterial to resolution of Plaintiffs' RCRA claim

(they are nonetheless helpful for context and material to the analysis of Plaintiffs' common law claims). Simply put, what matters under RCRA is not Madison-Kipp's past actions but whether those actions created a serious, present and ongoing threat to either health or the environment.

Once the analysis is properly focused on material issues, it becomes clear that Plaintiffs failed to come forward with admissible evidence that groundwater, soil or vapor contamination has created a present and ongoing threat of harm to health or the environment. Based on the admissible facts before the Court, no near-term threats exist. The extent of contamination has been fully investigated, both on and off site, and remediation, which has been ongoing, will continue under governmental supervision. Thus, any chance for an imminent and substantial endangerment to rise in the future has also been resolved. At most, the only evidence that the Plaintiffs have mustered is speculation that should Madison-Kipp completely stop its current and ongoing remediation efforts some future threat may arise. *See Tilot Oil, LLC*, 2012 U.S. Dist. LEXIS 5365, at *26 ("while there may still be *some* threat of harm, through the possibility of the fan being shut off or losing power, that harm is not substantial or serious in that it necessitates action; it is simply too remote") (emphasis in original). That is not enough to survive summary judgment. Accordingly, Plaintiffs have failed to carry their summary judgment burden of providing sufficient evidence from which a reasonable fact finder could rule in favor of Plaintiffs on their RCRA claim and the Court should, in turn, grant Madison-Kipp's summary judgment motion.

II. PLAINTIFFS FAIL TO SUBMIT EVIDENCE FROM WHICH A REASONABLE JURY COULD FIND IN ITS FAVOR ON THEIR STATE LAW CLAIMS.

Plaintiffs agree that to establish the standard of care, expert testimony is needed. (Dkt. #198 at 57.) Thus, if the Court grants Madison-Kipp's motion to exclude Dr. Everett's opinions regarding the various standards of care, Plaintiffs' state law claims all necessary fail for lack of an established standard of care.

Even if Dr. Everett's conclusory opinions on the standard of care are not excluded, there is no admissible evidence from which a jury could find that Madison-Kipp failed to comply with the applicable standards. Regarding the handling and disposal of hazardous wastes, Plaintiffs rely solely on hearsay testimony from Mr. Lenz. As already presented, such evidence is inadmissible. Therefore, Plaintiffs are left with no evidence from which a reasonable jury could find that Madison-Kipp breached any duty to properly handle and dispose of hazardous waste. Indeed, the only evidence in the record is affidavits from former employees with first-hand knowledge that Madison-Kipp properly handled and disposed of its hazardous waste. (M-K Reply PFOF ¶¶ 643-645.)

Regarding the alleged failure to warn, again any testimony from Mr. Lenz about dumping near off-site properties is inadmissible hearsay. Moreover, although in their brief Plaintiffs contend that PCE was dumped feet from Plaintiffs' homes, there is no proposed fact to support that statement. The remaining facts in the record establish that Madison-Kipp properly informed Plaintiffs of any possible contamination as soon as it discovered and became aware of such contamination. (*See* M-K Reply PFOF ¶¶ 45-46,

73, 77, 89, 106, 114-120, 128, 132, 245 & 361.) In their brief Plaintiffs also reference Dr. Everett's opinion about Madison-Kipp's alleged delay in testing the class area for contamination as evidencing a breach of the duty to warn; however, such action (which has not been established) would fall under Plaintiffs' claim for a failure to properly respond and abate any contamination, not a failure to warn. Accordingly, there is no evidence of a breach of any duty to warn.

With respect to any alleged failure to properly respond and abate any contamination, the record is replete with evidence showing Madison-Kipp's investigation and remediation efforts. (*See, e.g.*, M-K Reply PFOF ¶¶ 18, 22, 25-26, 33, 35, 37, 41-43, 55, 59-60, 64, 72, 80, 102, 104, 108, 118. 125-126 & 131.) Additionally, Madison-Kipp worked with DNR in preparing and submitting required reports of site investigation and remediation efforts, routine status reports and attending regular meetings, not to mention various correspondence, and telephone communications with the DNR project manager and other agency representatives. (*See* M-K Reply PFOF ¶¶ 14-135; 143; 238-253; 259; 261-266; 268-269; 271-284; 289-292; 295-299; 302; 305; 311; 314; 317; 320; 322; 326; 329-330; 334; 340.) Besides conclusory statements that Madison-Kipp failed to properly and timely respond, there is no evidence to even suggest what a proper timing for the response would have been. Indeed, the only reasonable inference to draw from the fact that there was no lawsuit filed against Madison-Kipp by the DNR for over 18 years from when the initial letter requesting Madison-Kipp to investigate potential contamination is that Madison-Kipp responded properly to and proceeded correctly in its abatement of any contamination.

Finally, even assuming that there are genuine disputes of material fact regarding the various standards of care and whether Madison-Kipp complied with those standards, the record is completely void of evidence from which a reasonable jury could find that any breach of any duty caused each Class Member actual, quantifiable damages. Plaintiffs' contentions decrying having to present evidence at summary judgment to support some actual, quantifiable damages all fail. First, it is not Madison-Kipp's burden to demonstrate that "property values have not declined due to contamination." (Dkt. #198 at 60.) There is no presumption of damages under any of the state law claims Plaintiffs assert. Instead, it is Plaintiffs' burden to establish that the values have declined to prove that each Class Member suffered actual property damage. *See Pleasure Time, Inc. v. Kuss*, 78 Wis. 2d 373, 387, 254 N.W.2d 463 (1977).

Second, although Plaintiffs recognize that they are legally required to come forward with "evidence upon which a reasonable jury could award damages *in an amount* supported by the evidence," they fail to offer any such amount for each Plaintiff. (Dkt. #198 at 59 (emphasis added).) *See also AccuWeb, Inc. v. Foley & Lardner*, 2008 WI 24, ¶ 19 n.8, 308 Wis. 2d 258, 746 N.W.2d 447. Indeed, four Class Members (114 S. Marquette, 237 Waubesa, 261 Waubesa and 269 Waubesa) failed to provide *any* discovery responses whatsoever and thus, there is no evidence that they suffered any damages. (*See* M-K Reply PFOF ¶¶ 345-347.) With respect to the other 29 Class Members, they all fail to put forth specific facts demonstrating that each one has suffered actual damage as a result of the alleged breaches by Madison-Kipp of the various asserted duties.

While Plaintiffs allege they have suffered property damage, there is no admissible evidence from which a reasonable jury could find as much. In *Cunningham v. Masterwear Corp.*, 569 F.3d 673, 675-76 (7th Cir. 2009), the Seventh Circuit addressed a circumstance very similar to that presented here. In *Cunningham*, the plaintiffs were suing a previous owner of a property they had purchased because after the purchase they had discovered that the building had been contaminated with PCE vapors. *Id.* at 674. One plaintiff attempted to testify that the value of the property had fallen from $135,000 to $105,000 as a result of the PCE contamination. *Id.* at 675. The Seventh Circuit found that he could not testify to the change in value because he had no personal knowledge of the value but instead was attempting to repeat what his realtor had told him. *Id.* at 676. The Seventh Circuit went on to explain that the other fatal flaw in the plaintiff's testimony was that "he could not offer a responsible opinion about the *cause* of the change in the value of his property. Even if he knew its value at time x and at time $x + y$, he had no basis for testifying to what caused its value to fall. That would depend, at a minimum, on whether the prices of comparable properties had fallen by a comparable amount." *Id.* The Seventh Circuit further reasoned that while it was "highly likely" that the contamination would lower the market value of the property, that fact was "not certain because real estate prices might be rising." *Id.* The appellate court affirmed the grant of summary judgment in favor of the defendant because "[t]he plaintiffs needed evidence by a real estate agent or real estate appraiser to establish the effect of the contamination on the value of their property." *Id.* The critical question

there, as it is here, was the amount of diminution, if any, that was actually caused by any alleged contamination.

Like the plaintiff in *Cunningham*, Plaintiffs here failed to provide admissible evidence to prove that they suffered any property damages. First, unlike the plaintiff in *Cunningham* who attempted to put in evidence of the actual change in value of the property, Plaintiffs did not even attempt to provide a concrete personal estimate by each Class Member regarding the change in value of their properties as a result of the alleged breaches except to speculate that the properties are completely valueless. (M-K Reply PFOF ¶ 346.) Regardless of such speculation, Plaintiffs' contention that the mere fact that there is contamination on a property provides a reasonable jury with sufficient evidence from which to find that the value of the property has decreased as a result of the contamination is simply wrong as explained by the Seventh Circuit in *Cunningham*, 569 F.3d at 676. Thus, on the current record, a reasonable jury would not have sufficient evidence from which to find that any Class Member suffered any property damage as a result of Madison-Kipp's actions. Second, as already presented, the declaration of Plaintiffs' damages expert, Mr. Kilpatrick, must be excluded as his statements regarding the effect of the alleged contamination on the Class Members' properties is conclusory and supported solely by his say-so. *See Wendler & Ezra, P.C.*, 521 F.3d at 791. Also, Mr. Kilpatrick's opinion is far too vague to be reliable in that it fails to even say whether the "significant impact" to which he refers is a negative impact. (*See* dkt. #194, ¶ 8.) Moreover, it fails to even provide an attempt to quantify any damages.

Additionally, Plaintiffs' contention that it did not need to provide all the evidence necessary to support its damages claim at this time because its damages expert report is not due until the end of April is incorrect. Plaintiffs pushed for a fast case schedule, including asking that damages experts be disclosed in October 2012. (*See* dkt. #93 at 3.) However, now they contend that they need more time for presenting their damages evidence. The Court's preliminary pretrial conference order is clear that parties need to proceed through discovery in a manner that allows each party to make or respond to a dispositive motion within the scheduled deadlines. (Dkt. #14 at 3.) Moreover, at a minimum, Plaintiffs were free to provide the evidence that would underlie their damages expert's report, such as property appraisals, market analyses, or attempts to sell, to establish that the contamination caused actual damage to their properties. Accordingly, under the appellate court's reasoning in *Cunningham*, Plaintiffs' state law claims for property damages fail because they have failed to establish facts from which a reasonable jury could find that the value of their properties have been negatively impacted.

Without elaboration or even an explanation, Plaintiffs drop a footnote to a case for the proposition that their assertion of damages for inconvenience, aggravation and annoyance presents recoverable damages under Wisconsin law. (*See* dkt. #198 at 58 n.7.) This undeveloped argument, however, fails to get Plaintiffs past summary judgment. Although Plaintiffs' argument suggests that such damages are recoverable under all their state law claims, they ignore that even assuming such damages are recoverable, those damages are only recoverable under the private nuisance claim. *See*

Krueger v. Mitchell, 112 Wis. 2d 88, 106-08, 332 N.W.2d 733 (1983). In other words, reference to such potential damages fails to rescue Plaintiffs' negligence or trespass claims for want of evidence of or an actual showing regarding actual damages under those claims. Moreover, Plaintiffs have failed to even attempt to quantify those types of damages which by definition make them speculative and thus not recoverable.

Furthermore, as raised in Madison-Kipp's initial brief, Plaintiffs may only recover on their claim for private nuisance if the "interference with the use and enjoyment of the land is unreasonable and substantial." *Id.* at 108. Thus, at summary judgment, it is Plaintiffs' burden to provide evidence from which a reasonable jury could find that each Class member suffered an unreasonable and substantial interference with their use and enjoyment of their properties caused by Madison-Kipp. However, Plaintiffs have failed to provide such evidence for any Class Member. Indeed, the evidence in the record demonstrates that many Class Members' use of their properties has not truly changed (*see* M-K Reply PFOF ¶¶ 351, 357, 376, 405-406, 410, 443 & 465) and those that have offered some changes fail to provide specific facts establishing that the change in use is unreasonable and substantial or a result of Madison-Kipp's activities. (*See* M-K Reply PFOF ¶¶ 370, 379, 388, 398 & 417.) Therefore, there are no specific facts upon which a reasonable jury could rely to provide any Class Member an amount of damages caused by any unreasonable and substantial inconvenience, annoyance or discomfort under their private nuisance cause of action.

In the end, Plaintiffs fail to establish an element essential to all of their common law claims: damages. Plaintiffs fail to carry their summary judgment burden in

providing specific facts from which a reasonable jury could find that an alleged breach of the various duties asserted by Plaintiffs, including private nuisance or trespass, caused each Class member any actual damages. There is no admissible evidence regarding any effect the alleged contamination has had on Plaintiffs' properties and, as the Seventh Circuit has explained, the mere fact of contamination is not sufficient to establish damages to the value of property. *Cunningham*, 569 F.3d at 676. Accordingly, Madison-Kipp is entitled to summary judgment on Plaintiffs' state law claims.

III. PLAINTIFFS FAIL TO SUBMIT EVIDENCE FROM WHICH A REASONABLE JURY COULD FIND THAT MADISON-KIPP ACTED WITH WILLFUL AND WANTON MISCONDUCT.

Plaintiffs contend that they have provided evidence of "gross and large scale dumping of toxic cancer-causing chemicals by MKC just feet away from homes occupied by families with children." (Dkt. #198 at 61.) There is no such admissible evidence in the record. Any testimony from Mr. Lenz regarding the "dumping" of chemicals is inadmissible hearsay. Also, Plaintiffs undertook no effort to secure testimony of witnesses with any first-hand knowledge despite having months to do so. Further, Plaintiffs failed to submit any proposed finding of fact that establishes that chemicals were dumped within feet of homes with children and this case presents no allegation of bodily injury whatsoever. Instead, the record is void of evidence from which a reasonably jury could find that Madison-Kipp acted with the necessary purpose or substantial certainty about disregarding Plaintiffs' rights to find that Plaintiffs would be entitled to punitive damages. Accordingly, Madison-Kipp is entitled to summary judgment on Plaintiffs' claim for punitive damages.

CONCLUSION

Based upon the foregoing, Madison-Kipp asks this Court to grant Madison-Kipp summary judgment on Plaintiffs' RCRA and common law claims and to grant Madison-Kipp's attorneys' fees.

Dated this 4th day of April, 2013.

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