UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

EXXONMOBIL OIL CORP., **Plaintiff,** **v.** **NICOLETTI OIL, INC., et al.** **Defendants.**	**1:09-cv-01498-OWW-DLB** **MEMORANDUM DECISION ON DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT (Doc. 36)**

I. INTRODUCTION

Plaintiff Exxonmobil Oil Corp. ("Plaintiff") is proceeding with an action pursuant to the Resource Conservation and Recovery Act (42 U.S.C. § 6972(a)(1)(B)) against Defendants Nicoletti Oil, Inc., Dino J. Nicoletti, and John A. Nicoletti. In addition to asserting federal claims against Defendants, Plaintiff asserts several state law causes of action.

On May 18, 2010, the court issued a memorandum decision explaining pleading deficiencies which required certain of Plaintiff's claims to be dismissed; these claims were dismissed without prejudice on May 27, 2010. (Docs. 30, 32).

Plaintiff filed a second amended complaint ("SAC") on June 7, 2010. (Doc. 34). Defendants filed a motion to dismiss ("motion to dismiss") the SAC on June 22, 2010. (Doc. 36). Plaintiff filed

opposition ("opposition") to Defendant's motion to dismiss on August 30, 2010. (Doc. 40). Defendant's filed a reply on September 7, 2010. (Doc. 43).

II. FACTUAL BACKGROUND.

Plaintiff is a New York corporation in the business of producing, distributing, and selling petroleum products. (SAC at 3). Plaintiff's predecessor, General Petroleum Corporation, purchased 2801 Blossom Street in Dos Palos, California in January 1946. (SAC at 4).

From 1946 to 1950, Dino J. Nicoletti operated a fuel distribution plant at 2801 Blossom street as a distributor for General Petroleum Corportation. (SAC at 4-5). From 1950 to 1980, Dino Nicoletti operated 2801 Blossom Street as a cosignee of General Petroleum Corporation and then Mobil Oil Corporation. (SAC at 5). Mobil Oil Corporation was also Plainitff's predecessor. (SAC at 5). On or about August 25, 1980, Dino Nicoletti and his wife Floretta Nicoletti purchased 2801 Blossom Street from Mobil Oil Corporation. (SAC at 5). On or about December 5, 1996, ownership of 2801 Blossom Street was transferred to Dino Nicoletti and Floretta Nicoletti as Trustees under the Dino J. Nicoletti and Florretta A. Nicoletti Revocable Living Trust. (SAC at 5).

Defendants have operated and continue to operate a gasoline and diesel sales and distribution facility at 2801 Blossom Street. (SAC at 5). Nicoletti Oil, Inc. ("Nicoletti Oil") was incorporated in California on or about January 1, 1982. (SAC at 6). Dino Nicoletti served as an officer of Nicoletti Oil throughout the 1980's and currently serves as the company's Vice President. (SAC at 6). John A. Nicoletti currently serves as the President of

Nicoletti Oil, a position he has held since as early at 1990. (SAC at 6). Cindy Nicoletti serves as the Secretary-Treasurer of Nicoletti Oil. (SAC at 6). The FAC alleges that 100% of the capital stock of Nicoletti Oil is owed by John A. Nicoletti and Cindy Nicoletti. (SAC at 6).

In or about 1998, Defendants purchased a lot adjacent to 2801 Blossom Street from Suburban Propane and installed new diesel dispensers on the parcel; the SAC alleges that Nicoletti Oil, Inc., is the owner of the former Suburban Propane property. (SAC at 5-6). Together, 2801 Blossom Street and the adjacent lot purchased by Defendants in 1998 form the property at issue in this action ("Property"). (SAC at 5). The Property is located directly across the street from a residential area. (SAC at 6).

Following the sale of 2801 Blossom Street in 1980, Plaintiff or its predecessors entered into a series of wholesale distributor contracts ("Contracts") with Nicoletti Oil, Inc., pursuant to which Nicoletti Oil agreed to purchase a certain quantity of gasoline, diesel fuel, and lubricant products. (SAC at 7). Such contracts include, but are not limited to, a Wholesale Distributor Agreement for Motor Fuels, dated May 6, 1985 ("1985 Agreement") and a Wholesale Distributor Agreement (Lubricants, Distillates and other Non-Motor Fuels) dated March 1, 1989 ("1989 Agreement"). (SAC at 7). The parties to the Contracts intended the Contracts to bind Plaintiff (or its predecessors) and Nicoletti Oil. (SAC at 7).

Plaintiff alleges that during Nicoletti Oil's ownership of the Property and operation of its businesses, releases of petroleum and petroleum substances, including methyl tertiary butyl ether ("MTBE"), have occurred on and migrated off of the Property. (SAC

at 7-8). The SAC states that Nicoletti Oil detected a release of petroleum hydrocarbons at the property in 1988. (SAC at 7-8). On or about May 17, 1991, in response to the 1988 release, the Merced County Department of Public Health issued a Notice and Order to Nicoletti Oil and Mobil Oil Corporation that required investigation of soil and groundwater contamination at the Property. (SAC at 8).

On or about August 24, 1992, Mobil Oil Corporation and Nicoletti Oil entered into a Cost Sharing Agreement wherein the parties agreed that Nicoletti Oil would contract directly with the contractors performing the investigative work required by the Merced County Department of Public Health. (SAC at 8-9). The Cost Sharing Agreement provided that, unless terminated beforehand, it remained in effect until Nicoletti Oil's contractor submitted the Site Contamination Workplan ("SCW"), Preliminary Investigation and Evaluation Report ("PIER") and, if needed, a Problem Assessment Report ("PAR") in final form to the Merced County Department of Public Health. (SAC at 9). The Cost Sharing Agreement provided that Mobil Oil Corporation and Nicoletti Oil would each pay 50% of the costs for the preparation of the SCW, the PIER, and, if needed, the PAR. (SAC at 9). The Merced County Department of Public health required submission of a PAR in 1993, however, Nicoletti Oil's contractors failed to complete or submit a PAR. (SAC at 9).

In 2001, Plaintiff learned of Nicoletti Oil's failure to comply with outstanding directives from the Merced County Department of health and began conducting investigation at the Property as requested by overseeing agencies. (SAC at 9). Plaintiff's investigation included onsite and offsite borings, soil and groundwater analysis, installing monitoring wells, and

monitoring analytical data, among other tasks. (SAC at 9).

On or about February 3, 2005, the Regional Board issued Cleanup and Abatement Order No. R5-2005-0701, naming both Nicoletti Oil and Plaintiff jointly as the "Discharger," without attempting to allocate their relative liability for the contamination or assigning responsibility for cleanup at or around the Property ("2005 CAO"). (SAC at 9-10). The 2005 CAO required the development and implementation of an interim remedial action plan, further site assessment of soil vapor migration, and submission of a full corrective action plan, including a human health risk assessment. (SAC at 10). Plaintiff complied with the 2005 CAO in December 2005. (SAC at 10). At the direction of the Regional Board, Plaintiff issued precautionary notices to the residents near the Property warning against on-site excavation or the digging of holes greater than a few feet deep on their properties and against the consumption and distribution of produce grown in the neighborhood. (SAC at 10). Plaintiff also distributed air filtration units, free of charge, to those residents who chose to use them as a precaution against vapor intrusions from the subsurface plume. (SAC at 10).

The Regional Board rescinded the 2005 CAO and issued a new CAO in July 2006. (SAC at 10-11). Plaintiff continues to operate and maintain the remedial system at the Property pursuant to the terms of the 2006 CAO. (SAC at 11). Nicoletti Oil continues to operate its business and benefit from the remediation operated and maintained by Plaintiff, but does not contribute to or participate in the remedial effort. (SAC at 11). Plaintiff alleges that Nicoletti Oil's ongoing operation of the plant at the Property has

resulted in further unauthorized releases of contaminants, which undermine and threaten to prolong Plaintiff's remedial efforts under the 2006 CAO. (SAC at 11).

Plaintiff alleges that its consultants, who visit the Property on a regular basis in order to maintain the remedial system, have repeatedly observed and documented surface releases of petroleum in the area of Nicoletti Oil's fuel dispensers. (SAC at 11). Since 2006, Plaintiff has requested integrity testing of Nicoletti's fuel system, but Nicoletti refuses to perform such testing or to allow Plaintiff to perform testing. (SAC at 12).

In March 2008, Plaintiff's consultants detected a new release of diesel fuel at the Property when the on-site remedial system was overwhelmed by a substantial volume of fresh red-dye diesel product; Plaintiff alleges that this new release could have been prevented had Defendants conducted adequate testing to assure the integrity of its fuels system. (SAC at 12). Plaintiff further alleges that Nicoletti's own personnel and physical leak detection systems failed to detect the release. (SAC at 12).

At Plaintiff's insistence, the Regional Board requested that Plaintiff propose a scope of work for more comprehensive testing of the entire fuel system, and Plaintiff submitted such a scope, which it proposed to be completed (at Plaintiff's expense) by a third party contractor acceptable to Nicoletti and the Regional Board. (SAC at 13). The Regional Board approved Plaintiff's scope of work. (SAC at 13). Nicoletti declined to allow the further testing of the fuel system proposed by Plainitff and approved by the Regional Board. (SAC at 13). Instead, Nicoletti Oil subsequently submitted its own less complete fuels system testing

scope of work, dated April 24, 2009, which it proposed to conduct using its own contractors, and which the Regional Board subsequently approved. (SAC at 13).

Nicoletti's contractors and/or subcontractors commenced fuel system tightness testing, per Nicoletti Oil's scope of work, on June 1, 2009. (SAC at 13). However, Nicoletti could not proceed with portions of the system testing because some or all of the components on both the gasoline and diesel systems were in such a state as to be incapable of retaining liquid, and therefore could not be tested for tightness. (SAC at 13).

Nicoletti subsequently completed fuel system upgrades and/or replacements and performed fuel system testing. (SAC at 14). The SAC alleges that during the upgrading of Nicoletti Oil's systems, stained soil was observed on the former Suburban Propane property. (SAC at 14).

Plaintiff alleges that the releases of petroleum product from Defendant's operation are contrary to applicable regulations and industry standards of operation for petroleum facilities, and that there is a continuing risk of new releases of petroleum product from Nicoletti's operations. (SAC at 14). Plaintiff contends that Nicoletti's releases from the Property may present an imminent and substantial endangerment to health or the environment, and that the majority, if not all, of the contamination being remediated at or near the Property is of a fuel type and in a location that cannot be attributed to any ownership or conduct of Plaintiff. (SAC at 15).

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III. LEGAL STANDARD

Dismissal under Rule 12(b)(6) is appropriate where the complaint lacks sufficient facts to support a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.1990). To sufficiently state a claim to relief and survive a 12(b) (6) motion, the pleading "does not need detailed factual allegations" but the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Mere "labels and conclusions" or a "formulaic recitation of the elements of a cause of action will not do." *Id.* Rather, there must be "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. In other words, the "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal quotation marks omitted).

The Ninth Circuit has summarized the governing standard, in light of *Twombly* and *Iqbal*, as follows: "In sum, for a complaint to survive a motion to dismiss, the nonconclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir.2009) (internal quotation marks omitted). Apart from factual insufficiency, a complaint is also subject to dismissal under Rule 12(b)(6) where it lacks a cognizable legal theory, *Balistreri*, 901 F.2d at 699, or where the allegations on their face "show that relief is barred" for some legal reason, *Jones v. Bock*, 549 U.S. 199, 215, 127 S.Ct.

910, 166 L.Ed.2d 798 (2007).

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In deciding whether to grant a motion to dismiss, the court must accept as true all "well-pleaded factual allegations" in the pleading under attack. *Iqbal*, 129 S.Ct. at 1950. A court is not, however, "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.2001). "When ruling on a Rule 12(b)(6) motion to dismiss, if a district court considers evidence outside the pleadings, it must normally convert the 12(b)(6) motion into a Rule 56 motion for summary judgment, and it must give the nonmoving party an opportunity to respond." *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir.2003). "A court may, however, consider certain materials-documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice-without converting the motion to dismiss into a motion for summary judgment." *Id.* at 908.

IV. DISCUSSION

A. Plaintiff's Claim for Express Contractual Indemnity

To state a cause of action for breach of contract, a party must plead the existence of a contract, his or her performance of the contract or excuse for nonperformance, the defendant's breach, and resulting damage. *E.g. Harris v. Rudin, Richman & Appel*, 74 Cal. App. 4th 299, 307 (Cal. Ct. App. 1999). In order to satisfy federal pleading standards,

> a plaintiff must describe the alleged terms of the contract in a sufficiently specific manner to give the defendant notice of the nature of the claim. For example,

> a claim on a written contract must either (1) quote relevant contractual language; (2) include a copy of the contract as an attachment; or (3) summarize the contract's purported legal effect.

Kirbyson v. Tesoro Ref. & Mktg. Co., 2010 U.S. Dist. LEXIS 18174 * 26 (N.D. Cal. 2010) (citing *Am. Realty Trust, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 362 F. Supp. 2d 744 (N.D. Tex. 2005)).

The SAC is sufficient to plead breach of contract claims regarding the indemnity provisions of the Wholesale Distributor Agreement for Motor Fuels dated May 6, 1985 and the Wholesale Distributor Agreement for Lubricants, Distillates, and other Non-Motor Fuels dated March 1, 1989. Although the SAC also contains sufficient factual information to state a claim for breach of the cost-sharing agreement entered into on or about August 24, 1992, this agreement is not mentioned in the section setting forth Plaintiff's breach of contract cause of action. (SAC at 21-24). Accordingly, the SAC fails to give Defendants fair notice of whether Plaintiff seeks to assert a breach of the 1992 cost-sharing agreement. To the extent Plaintiffs seek to assert claims for breach of contracts other than the May 6, 1985 and March 1, 1989 agreements, the SAC fails to give Defendants fair notice of such claims. Defendants' motion to dismiss Plaintiff's breach of contract claims is DENIED as to the May 6, 1985 and March 1, 1989 agreements and is GRANTED to any other contractual claims. Plaintiff will be given one more opportunity to properly plead additional claims.

B. Plaintiff's Negligence Claim

Generally, there is no duty to prevent economic loss to third parties in negligence actions at common law. *Greystone Homes, Inc.*

v. Midtec, Inc., 168 Cal. App. 4th 1194 , 1216 (Cal. Ct. App. 2008) (citing *Ratcliff Architects v. Vanir Construction Management, Inc.*, 88 Cal. App. 4th 595, 605 (Cal. Ct. App. 2001)). However, a special relationship between two parties may impose on each a duty to exercise ordinary care in the avoidance of economic injury to the other. *See, e.g., Ott v. Alfa-Laval Agri, Inc.*, 31 Cal. App. 4th 1439, 1448-49 (Cal. Ct. App. 1995). Existence of a special relationship depends on "(1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct and (6) the policy of preventing future harm." *E.g. J'Aire Corp. v. Gregory,* 24 Cal. 3d 799, 804 (Cal. 1979). Plaintiff contends that the CAO orders imposed a special relationship between Plaintiff and Defendants.

The intent factor entailed by the *J'Aire* test does not require an intent to injure. *See Ales-Peratis Foods Internat. v. Am. Can Co.*, 164 Cal. App. 3d 277, 289-290 (Cal. Ct. App. 1985). In *Ales-Peratis Foods,* the Court of Appeal reasoned:

> The contract between Gencan and American Can was for supplying cans necessary to the execution of Ales-Peratis contract. The performance of the contract directly affected appellant's ability to fully and timely perform its contract with its customer, and AP alleged both Gencan and American knew this. The record of the conversation between the agents for Gencan and American Can shows they both knew AP needed and had requested a specific type of can suitable for packing a certain type of seafood. Furthermore, American Can's practice of supplying dealers should have alerted it to the fact any breach on its part could foreseeably lead to a lost business opportunity and thereby lost profits on the part of AP. Thus American Can's performance was intended to, and did directly affect Ales-Peratis.

Id. Here, Defendants were aware that past operations on the Property had resulted in contamination, and that continued operations could result in more contamination absent appropriate measures. Defendants were also aware that Plaintiff and Defendants shared an obligation under the CAO's to remediate contamination at the Property, and that further contamination of the Property would impede compliance with the CAO's. As in *Ales-Peratis*, Defendants' alleged conduct directly affected Plaintiff's ability to perform legal obligations that Defendants were fully aware of. The allegations contained in the SAC satisfy the intent and forseeability elements under the *J'Aire* test.

The third factor under the *J'Aire* test– the degree of certainty that Plaintiff has suffered injury– is sufficiently pled in the SAC. To the extent Defendants have caused additional contamination of the Property, Plaintiff has been injured, because the CAO's obligate Plaintiff to remediate contamination at the Property. The moral blame factor under *J'Aire* also weighs in favor of imposing a special relationship between the parties. According to the facts alleged in the SAC, at a minimum, Defendants negligently allowed contamination to occur with knowledge that such contamination would harm both Plaintiff and the community surrounding the property. Finally, it is axiomatic that the policy of preventing future harm also weighs in favor of imposing a special relationship under the circumstances.

The SAC is sufficient to allege the existence of a special relationship between Plaintiff and Defendants under the *J'Aire* test. The SAC also sufficiently alleges that Defendants breached

the duty entailed by their special relationship with Plaintiff, and that Plaintiff was injured as a result of Defendants' breach of duty. Defendants' motion to dismiss Plaintiff's negligence claim is DENIED.

V. CONCLUSION

For the reasons stated, IT IS ORDERED:

1) Defendants' motion to dismiss Plaintiff's breach of contract claim is DENIED as to the Wholesale Distributor Agreement for Motor Fuels dated May 6, 1985 and the Wholesale Distributor Agreement for Lubricants, Distillates, and other Non-Motor Fuels dated March 1, 1989, and is GRANTED without prejudice as to all other contract claims;

2) Defendants' motion to dismiss Plaintiff's negligence claim is DENIED; and

3) Plaintiff shall lodge a formal order consistent with this decision within five (5) days following electronic service of this decision by the clerk. Plaintiff shall file an amended complaint within fifteen (15) days of the filing of the order. Defendant shall file a response within fifteen (15) days of receipt of the amended complaint.

IT IS SO ORDERED.

Dated: September 22, 2010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE