UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

AMERIPRIDE SERVICES, INC., A Delaware corporation,

Plaintiff,

v.

VALLEY INDUSTRIAL SERVICE, INC., a former California corporation, et al.,

Defendants.

_____/

AND CONSOLIDATED ACTION AND CROSS- AND COUNTER-CLAIMS.

_____/

NO. CIV. S-00-113 LKK/JFM

O R D E R

Pending before the court are the following motions brought by Defendant Texas Eastern Overseas, Inc. ("TEO"), both of which are opposed by Plaintiff AmeriPride: (1) a renewed motion for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50(B); and (2) a motion to amend or alter the judgment, pursuant to Fed. R. Civ. P. 59(E). See Def's Mots., ECF Nos. 923, 924.

Also pending before the court is Plaintiff's motion for an

order directing Defendant TEO to assign to AmeriPride causes of action and rights to payment owned by TEO, brought pursuant to Cal. Civ. Proc. § 708.510. See Pl's Mot, ECF No. 928. Defendant TEO opposes Plaintiff's motion.

For the reasons provided herein, the court: (1) denies Defendant's renewed motion for a judgment as a matter of law; (2) denies Defendant's motion to amend or alter the judgment; and (3) grants Plaintiff's motion for an order assigning TEO's causes of action against its insurers, and resulting rights to payment.

I. TEO's Fed. R. Civ. P. 50(B) Renewed Motion for Judgment as a Matter of Law

To "preserve its right to appeal the issue," Defendant TEO brings this renewed motion for a judgment as a matter of law, pursuant to Federal Rule of Civil Procedure 50(b). Def's Mot., ECF No. 923. Defendant TEO argues that, contrary to the requirements of Section 113 of CERCLA, Plaintiff AmeriPride failed to show: (1) what portion, if any, of the settlements that it paid to Cal-Am and Huhtamaki were for reimbursement of monies paid by Huhtamaki or Cal-Am to supply replacement water; and (2) that the replacement water was needed to protect human health or the environment. Thus, TEO seeks reversal of the court's ruling that AmeriPride was entitled to contribution from TEO for the $10.25 million that AmeriPride paid in settlement to Huhtamaki and Cal-Am Water, Co.

Federal Rule of Civil Procedure 50 applies to cases tried before a jury and is, therefore, not applicable to this case. See Fed. R. Civ. P. 50. Although a party may move for judgment as

a matter of law during a bench trial, pursuant to Federal Rule of Civil Procedure 52(c), Rule 52(c) motions are properly brought before the close of evidence.[1] Evidence has closed in this case. Because Defendant TEO lacks a procedural basis for bringing this motion, Defendant's motion is denied.

II. TEO's Fed. R. Civ. P. 59(E) Motion to Amend or Alter the Judgment

Defendant TEO brings this motion to amend or alter the judgment, pursuant to Federal Rule of Civil Procedure 59(e). Def's Mot., ECF No. 924. Defendant argues that the court incorrectly credited the settlement monies received by AmeriPride, from Chromalloy and Petrolane, by subtracting the settlement amount received ($3.25 million) from the total costs to be apportioned between TEO and AmeriPride and, as a result, AmeriPride will pay only 41% of the clean up costs, as opposed to the 50% of clean up costs for which the court determined AmeriPride was responsible. TEO requests that the court amend the judgment to apply the $3.25 million settlement credit after, instead of before, apportioning liability.

Under Federal Rule of Civil Procedure 59(e), a party may move to have the court amend its judgment within twenty-eight days after

---

[1] Federal Rule of Civil Procedure 52(c), entitled, "Judgment on Partial Findings," provides: "If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of evidence."

entry of the judgment. Fed.R.Civ.P. 59(e). Although a district court "enjoys considerable discretion in granting or denying the motion," amending a judgment after its entry is "an extraordinary remedy which should be used sparingly." Allstate Ins. Co. v. Herron, 634 F.3d 1101, 1111 (9th Cir. 2011) (citing McDowell v. Calderon, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999) (en banc) (per curiam)). A Rule 59(e) amendment may be appropriate where the amendment is necessary to correct manifest errors of law or fact upon which the judgment rests. Id.

In its prior order, the court calculated the total amount subject to equitable apportionment by adding the following costs:

- the $7,570,921 incurred by AmeriPride for investigation and remediation costs through August 2010;
- the $474,730 incurred by AmeriPride for regulatory oversight costs through September 2010;
- the $8,250,000 that AmeriPride paid to Huhtamaki to settle all claims Huhtamaki had against AmeriPride;
- the $2,000,000 that AmeriPride paid to Cal-Am Water to settle all claims that Cal-Am Water Co. had against AmeriPride;
- the $446,656.84 paid by AmeriPride for investigation and remediation at the AmeriPride site since August 2010; and
- the $16,604.52 paid by AmeriPride for regulatory oversight of the AmeriPride site since January 2011.

Order, ECF No. 915, at 8, 11. The sum of these amounts is

$18,758,912.36.

Before apportioning liability, the court subtracted the $3,250,000 that AmeriPride received in settlements from Chromalloy and Petrolane because "[b]oth settlements related to the pollution at issue in the instant case" and "defendants are entitled to a credit for those sums." Id. Thus, the court found that the total amount subject to equitable apportionment was $15,508,911.52. Id. at 11.[2] The court further determined that, given the facts as the court found them, "the fairest apportionment [wa]s to divide responsibility equally" between the parties and, therefore, each party was responsible for $7,754,456.18 of the costs expended thus far, excluding the interest on these past costs, for which the court found TEO additionally responsible. Id. at 14.

If, as Defendant TEO suggests, the court applies the $3.25 million settlement credit after, as opposed to before, apportioning liability, the calculation proceeds as follows:

- The initial amount calculated subject to equitable apportionment is $18,758,912.36. When divided equally between the parties, each party becomes initially liable for $9,379,456.18.
- Because the court found that each party is responsible for 50% of the damages, the $3.25 million that AmeriPride received in settlements from Chromalloy and

[2] Upon recalculation, the court notes that it made a minor calculation error in this regard; this number should properly be $15,508,912.36--a difference of 84 cents.

Petrolane is split in half, such that each party receives the benefit of one-half of the $3.25 million received by AmeriPride.[3] Half of $3.25 million is $1,625,000.

- Diminishing each parties initial liability of $9,379,456.18 by $1,625,000 results in each party being ultimately liable for $7,754,456.18, exclusive of interest. Because AmeriPride's costs have already been expended, the result of this calculation is that TEO is liable to AmeriPride for $7,754,456.18, not including interest.

That is, the court reaches the same number when taking the $3.25 million settlement received by AmeriPride into account both before and after apportioning liability.

Defendant TEO's alternative calculation appears to be premised on the assumption it should be credited 100% of the benefits received by AmeriPride from its settlement with Chromalloy and Petrolane. That is, from the initial $9,379,456.18 allocation of costs between the parties, TEO requests that the court reduce TEO's portion by the full $3.25 million, which would result in TEO being allocated a "$6,129,456.18 share of incurred costs." Def's Mot., ECF No. 924, at 3. Defendant argues that, if "AmeriPride receives

[3] This 50% allocation of the benefit AmeriPride received through settlement is fair and proper, given that the amounts that AmeriPride paid in settlements to Huhtamaki and Cal-Am Water Co. were included in the initial costs, the burden of which was also be split equally between the parties.

a credit for half the $3.25 million for which it was already reimbursed," such an allocation would constitute "double reimbursement because AmeriPride already received the full benefit of these settlement monies." Id. at 6. Defendant appears to be arguing that, instead of AmeriPride receiving half the benefit of the original $3.25 million settlement, TEO should receive the full benefit of those settlement monies, despite the court's equal allocation of responsibility between the parties.

TEO's reference to Boeing Co. v. Cascade Corp., 207 F.3d 1177, 1190 (9th Cir. 2000), works against TEO's own argument. In Boeing, the Ninth Circuit determined that the district court incorrectly "double counted" settlement monies received by plaintiff when the district court deducted the settlement from plaintiff's total expenditure before applying the 70:30 allocation of responsibility between the parties, because the district court's calculation failed to split the settlement monies received according to the 70:30 allocation as well. See id. ("[T]here was a failure to count once the $2.5 million [collected by plaintiff in settlement], because the district court did not split that portion of the response costs 70:30."). Here, however, the court has split the $3.25 million received by AmeriPride in settlement according to the court's determined equal allocation of responsibility between the parties and, thus, neither party receives more of a benefit from AmeriPride's settlement with Chromalloy and Petrolane than the other.

The court considers its allocation of settlement monies

received by AmeriPride, from Chromalloy and Petrolane, to be a fair and equitable apportionment between the parties. Thus, Defendant's Rule 59(e) motion to amend or alter the judgment, ECF No. 924, is denied.

III. AmeriPride's Cal. Civ. Proc. § 708.510 Motion for TEO's Assignment of Causes of Action and Rights to Payment

In Plaintiff AmeriPride's motion, brought pursuant to California Civil Procedure Code § 708.510, Plaintiff requests that the court issue an order directing Defendant TEO to assign to AmeriPride: (1) TEO's cause of action, and resulting right to payment, against Central National for breach of contract under the insurance policy issued by Central National Insurance Company ("Central National"); (2) TEO's cause of action, and resulting right to payment, against Central National for breach of the covenant of good faith and fair dealing; (3) TEO's cause of action, and resulting right to payment, against Granite State Insurance Company ("Granite State") for breach of contract under one or more excess comprehensive general liability policies; and (4) TEO's cause of action, and resulting right to payment, against Granite State for breach of the covenant of good faith and fair dealing. Pl's Mot., ECF No. 928.

A. Standard for § 708.510 Motion Assigning Causes of Action and Resulting Rights to Payment

Whether Plaintiff is entitled to an assignment order is governed by Federal Rule of Civil Procedure 69(a)(1), which in turn makes California law applicable. Fed.R.Civ.P. 69(a)(1).

California Code of Civil Procedure § 708.510 is the relevant state law articulating the requirements for obtaining an assignment of rights. It provides, in relevant part:

> Except as otherwise provided by law, upon application of the judgment creditor on noticed motion, the court may order the judgment debtor to assign to the judgment creditor . . . all or part of a right to payment due or to become due, whether or not the right is conditioned on future developments, including but not limited to the following types of payments:
> (1) Wages due from the federal government that are not subject to withholding under an earnings withholding order.
> (2) Rents.
> (3) Commissions.
> (4) Royalties.
> (5) Payments due from a patent or copyright.
> (6) Insurance policy loan value.

Cal.Civ.Proc. § 708.510.

Although the court may take into consideration all relevant factors in determining whether to grant a motion for assignment, the sole constraints placed on the court are that the right to payment be assigned only to the extent necessary to satisfy the creditor's money judgment and that, where part of the payments are exempt, the amount of payments assigned should not exceed the difference between the gross amount of the payments and the exempt amount. Passport Health Inc. v. Travel Med, Inc., No. 2:09-cv-01753, 2012 WL 1292473, at *3 (E.D. Cal. April 16, 2012) (citing Sleepy Hollow Inv. Co. No. 2 v. Prototek, Inc., No. 03-cv-4792, 2006 WL 279349, at *2 (N.D. Cal. Feb. 3, 2006); Cal. Civ. Proc. § 708.510(d)). The California Legislature explained in creating § 708.510 that it "provides a new procedure for reaching certain

forms of property that cannot be reached by levy under writ of execution . . . . It also provides an optional procedure for reaching assignable forms of property that are subject to levy . . . . This remedy may be used alone or in conjunction with other remedies provided in this title for reaching rights to payment. . . . " UMG Recordings, Inc. v. BCD Music Group, Inc., No. 07-cv-5808, 2009 WL 2213678, at *2 (C.D. Cal. July 9, 2009) (citing Legislative Committee Comment to Cal. Civ. Proc. § 708.510).

The plain language of § 780.510 contemplates that an assignment order can be based on contingent rights. Greenbaum v. Islamic Republic of Iran, 782 F.Supp.2d 893, 896 (C.D. Cal. 2008). As set forth below, California law indicates that these contingent rights include causes of action, the success of which remain undetermined.

In California, a "chose in action," also known as a "thing in action," is statutorily defined as "a right to recover money or other personal property by a judicial proceeding." Baum v. Duckor, Spradling & Metzger, 72 Cal.App.4th 54, 64 (Cal.Ct.App. 1999) (citing Cal. Civ. Code § 953). Underlying California case law is the basic rule that assignability of "things in action" is the rule; nonassignability is the exception, and is confined to wrongs done to the person, the reputation, or the feelings of the injured party, and to contracts of a purely personal nature, like promises of marriage. Id. at 65 (citing Goodley v. Wank & Wank, Inc., 62 Cal.App.3d 389 (Cal.Ct.App. 1976)). Put another way, causes of action against an insurer of a non-personal nature, as well as

damages arising therefrom of a non-personal nature (e.g., not arising from personal torts) are considered assignable in California. See Essex Ins. Co. v. Five Star Dye House, Inc., 38 Cal.4th 1252, at 1261, 1263 (Cal. 2006).

Indeed, California statutes provide that "all property of a judgment debtor is subject to enforcement of a money judgment," Cal. Civ. Proc. Code § 695.010; "'[p]roperty' includes . . . personal property and any interest therein," Cal. Civ. Proc. Code § 680.310; "'[p]ersonal property' includes . . . intangible personal property," Cal. Civ. Proc. Code § 680.290; and "'[g]eneral intangible' . . . includ[es] things in action," Cal. Civ. Proc. Code § 680.210; Cal. Com. Code § 9102(42); see also Cal. Civ. Proc. Code § 17(b)(3) ("The words 'personal property' include . . . things in action").

The granting of an assignment order functions as, essentially, a placeholder for a judgment creditor; when the judgment creditor seeks to actually enforce his rights against an obligor, an obligor may then raise any relevant defenses against such enforcement. Greenbaum, 782 F.Supp.2d at 895.

Detailed evidentiary support is not required under section 708.510, but some evidentiary support is still needed; section 708.510 refers to a "payment due or to become due," which suggests some degree of concreteness to the expected payment is required. Legal Additions LLC v. Kowalski, No. 08-cv-2754, 2011 WL 3156724, at *2 (N.D. Cal. July 26, 2011). Certainly, there needs to be more than just speculation before the remedy of an assignment can be

provided. Id.

B. Analysis

Judgment was entered for Plaintiff AmeriPride, and against Defendant TEO, on April 20, 2012. Order, ECF No. 915. Plaintiff has submitted a declaration and evidence indicating that Plaintiff demanded payment of the judgment on June 28, 2012, and that neither Defendant TEO nor its liability insurers have paid monies to AmeriPride toward satisfaction of the judgment. Zagon Decl., ECF No. 928, Att. 2.

The notice of motion was served on Defendant TEO by electronic filing and by email. See Proof of Service, ECF No. 928, Att. 4. Although § 708.510(b) requires that notice of the motion be served on the judgment debtor "personally or by mail," TEO has opposed Plaintiff's motion and has not contested the propriety of service. The court finds that the motion and related papers were properly served.

Additionally, the court determines Defendant TEO has claims against its liability insurers that are more than merely speculative. The court need not opine on the merits of those claims for purposes of this motion. See Greenbaum, 782 F.Supp.2d at 895. Because non-personal causes of action are assignable under California law, and neither TEO's causes of action against its liability insurers, nor any damages arising from those causes of action, are personal in nature, the court grants Plaintiff

////

////

AmeriPride's motion for assignment.[4]

IV. Conclusion

Accordingly, the court: (1) DENIES Defendant's renewed motion for a judgment as a matter of law, ECF No. 923; (2) DENIES Defendant's motion to amend or alter the judgment, ECF No. 924; and (3) GRANTS Plaintiff's motion for an order assigning TEO's causes of action against its insurers, and resulting rights to payment, ECF No. 928.

---

[4] Defendant TEO cites a number of cases which the court distinguishes from the situation here presented for the reasons provided below.

Quaestor Investments, Inc. v. State of Chiapas, No. 95-6723, 1997 WL 34618203 (C.D. Cal. Sept. 2, 1997) addressed the question of whether, under California law, the plaintiff could be assigned rights to payment from the State of Chiapas's account with a Mexican bank having a branch in California. In determining that such a right was not assignable under § 708.510, the court in Quaestor was particularly concerned by plaintiff's failure to show that any tangible asset of the defendant was "in" the United States. Id. at *7. The case at hand does not address the question of whether the property of a foreign state has assets sufficiently located within the United States to be levied upon. That is, Defendant's causes of action against its insurers are not protected by the "barrier of foreign sovereign immunity" at issue in Quaestor. Moreover, subsequent to Quaestor, the California Supreme Court indicated that non-personal causes of action against insurers, and non-personal damages arising therefrom, are generally assignable. See Essex Ins. Co., 38 Cal.4th at 1263. Thus, the court declines to apply the rules provided by Quaestor to the motion here presented.

The court's determination, in Chooljian Bros. Packing Co., Inc. v. Tilson, No. 1:08-cv-42, 2009 WL 111909 (E.D. Cal. 2009), that the plaintiffs could not gain title to trademarks for the plaintiff's own use, is also inapposite. The rule in Chooljian coheres with a longstanding tenet of California patent law that carves an exception from the general assignability of rights of action for the "fruits of a man's own invention." See, e.g., Pacific Bank v. Robinson, 7 P.C.L.J. 392, 57 Cal. 520, 524 (Cal. 1881) (internal citations omitted). No such fruits are at issue here and Defendant's reliance on Chooljian is, therefore, misplaced.

The following rights are assigned by TEO to AmeriPride:

- TEO's cause of action, and resulting right to payment, against Central National for breach of contract under the insurance policy issued by Central National Insurance Company ("Central National"), policy number GLA 751305;
- TEO's cause of action,and resulting right to payment, against Central National for breach of the covenant of good faith and fair dealing;
- TEO's cause of action, and resulting right to payment, against Granite State Insurance Company, and AIG affiliated company, ("Granite State") for breach of contract under one or more excess comprehensive general liability policies, policy nos. 6178-0360 (June 2, 1978-June 2, 1979); 6179-1308 (June 2, 1979–June 2, 1980); 6180-2185 (June 2, 1980-June 2, 1981); 6181-3019 (June 2, 1981-June 2, 1982); and 6182-3654 (June 2, 1982-June 2, 1983) issued by Granite State (the "Granite State Policies"); and,
- TEO's cause of action, and resulting right to payment, against Granite State for breach of the covenant of good faith and fair dealing.

The assignment is only to the extent necessary to satisfy Plaintiff's money judgment and interest accrued thereunder.

IT IS SO ORDERED.

DATED: September 6, 2012.

LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT