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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

BNSF RAILWAY COMPANY and UNION  
PACIFIC RAILROAD COMPANY,

No. 2:08-CV-02225-JAM-JFM

Plaintiffs,

v.

STATE OF CALIFORNIA, CALIFORNIA  
DEPARTMENT OF TRANSPORTATION,

Defendant.

THE REDEVELOPMENT AGENCY OF THE  
CITY OF STOCKTON, a public  
body, corporate and politic,

No. 2:05-CV-02087-JAM-JFM

Plaintiff,

v.

Order Granting  
Plaintiff/Counter-defendant's  
Motion for Partial Summary  
Judgment

BURLINGTON NORTHERN AND SANTA  
FE RAILWAY CORPORATION, UNION  
PACIFIC RAILROAD COMPANY, and  
DOES 1 THROUGH 100,

Defendants.

And RELATED CROSS-ACTIONS

1 This matter comes before the Court on Plaintiff/Counter-  
2 defendant the Redevelopment Agency of the City of Stockton's  
3 ("RAS") motion for partial summary judgment pursuant to Rule  
4 56(c) of the Federal Rules of Civil Procedure.  
5  
6 Defendants/Counter-claimants Burlington Northern and Santa Fe  
7 Railway Corporation and Union Pacific Railroad Company  
8 (collectively "Railroads") oppose the motion. For the reasons  
9 set forth below<sup>1</sup>, Plaintiff/Counter-defendant RAS's motion is  
10 GRANTED.  
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12 I. FACTUAL AND PROCEDURAL BACKGROUND

13 The factual background underlying this case is more fully  
14 outlined in the Court's previous Memorandum of Opinion and Order  
15 on the parties' cross-motions for summary judgment, filed June  
16 19, 2007. Docket ("Doc.") # 89. The present motion focuses on  
17 two of Railroads' counterclaims for 1) contribution under the  
18 Comprehensive Environmental Response, Compensation, and  
19 Liability Act ("CERCLA") pursuant to Section 107(a) of CERCLA,  
20 42 U.S.C. § 9607(a) and 2) for contribution under the Carpenter-  
21 Presley-Tanner Hazardous Substance Account Act ("HSAA"),  
22 California Health & Safety Code § 25363(e). Railroads assert  
23 they are entitled to recover \$23,579.50 in attorney's fees from  
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27 <sup>1</sup> Because oral argument will not be of material assistance,  
28 the Court orders this matter submitted on the briefs. E.D. Cal.  
L.R. 78-230(h).

1 RAS because the fees were incurred to identify potentially  
2 responsible parties ("PRPs") and are therefore recoverable as a  
3 response cost under CERCLA pursuant to the United States Supreme  
4 Court's decision in Key Tronic Corp. v. United States, 114 S.Ct.  
5 1960 (1994). In the present motion, RAS moves this Court for  
6 partial summary judgment as to Railroads' two counterclaims for  
7 contribution under CERCLA and HSAA. Railroads opposes the  
8 motion.  
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## 11 II. OPINION

### 12 A. Legal Standard

13 Summary judgment is proper "if the pleadings, depositions,  
14 answers to interrogatories, and admissions on file, together  
15 with affidavits, if any, show that there is no genuine issue of  
16 material fact and that the moving party is entitled to judgment  
17 as a matter of law." Fed. R. Civ. P. 56(c). The purpose of  
18 summary judgment "is to isolate and dispose of factually  
19 unsupported claims and defenses." Cleotex v. Catrett, 477 U.S.  
20 317, 323-324 (1986).  
21

22 The moving party bears the initial burden of demonstrating  
23 the absence of a genuine issue of material fact for trial.

24 Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 248-49 (1986).

25 If the moving party meets its burden, the burden of production  
26 then shifts so that "the non-moving party must set forth, by  
27 affidavit or as otherwise provided in Rule 56, 'specific facts  
28

1 showing that there is a genuine issue for trial.'" T.W. Elec.  
2 Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626,  
3 630 (9th Cir. 1987) (quoting Fed. R. Civ. P. 56(e) and citing  
4 Celotex, 477 U.S. at 323). The Court must view the facts and  
5 draw inferences in the manner most favorable to the non-moving  
6 party. United States v. Diebold, Inc., 369 U.S. 654, 655  
7 (1962).  
8

9 The mere existence of a scintilla of evidence in support of  
10 the non-moving party's position is insufficient: "There must be  
11 evidence on which the jury could reasonably find for [the non-  
12 moving party]." Anderson, 477 U.S. at 252. This Court thus  
13 applies to either a defendant's or plaintiff's motion for  
14 summary judgment the same standard as for a motion for directed  
15 verdict, which is "whether the evidence presents a sufficient  
16 disagreement to require submission to a jury or whether it is so  
17 one-sided that one party must prevail as a matter of law." Id.  
18

#### 19 B. Contribution Under CERCLA

20  
21 Railroads claim they are entitled to recover PRP-  
22 identification costs as response costs under CERCLA pursuant to  
23 the Supreme Court's decision in Key Tronic. RAS argues that  
24 Railroads requested \$23,579.50 award for attorney's fees was not  
25 a "necessary" response cost under CERCLA. CERCLA permits  
26 recovery of "any . . . necessary costs of response incurred . .  
27 . consistent with the national contingency plan." 42 U.S.C. §  
28

1 9607(a)(4)(B). In determining the types of necessary costs  
2 recoverable under CERCLA, the Key Tronic Court held that costs  
3 which are "closely tied to the actual cleanup may constitute a  
4 necessary cost of response in and of itself under the terms of §  
5 107(a)(4)(B)." Key Tronic, 511 U.S. at 820. The Court noted  
6 that such costs may include "work performed in identifying other  
7 PRPs," or work "performed by engineers, chemists, private  
8 investigators, or other professionals who are not lawyers,"  
9 because "tracking down other responsible solvent polluters  
10 increases the probability that a cleanup will be effective and  
11 get paid for" which "significantly benefited [sic] the entire  
12 cleanup effort and served a statutory purpose . . ." Id.

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15 In contrast, the Supreme Court instructed that fees  
16 incurred as "litigation expenses" or "in pursuing litigation"  
17 are not properly included in recoverable CERCLA costs. Id. For  
18 example, recoverable costs did not include "legal services  
19 performed in connection with the negotiations between Key Tronic  
20 and the EPA that culminated in the consent decree," or  
21 "[s]tudies that Key Tronic's counsel prepared or supervised  
22 during those negotiations" because such work "protect[ed] Key  
23 Tronic's interests as a defendant in the proceedings that  
24 established the extent of its liability." Id. at 820. "As  
25 such, these services do not constitute 'necessary costs of  
26 response' and are not recoverable under CERCLA." Id.

1           In the present motion, Railroads provided the Court with a  
2 comprehensive summary and explanation of the work performed that  
3 Railroads asserts reflects the recoverable CERCLA response costs  
4 for their identification of PRPs. See Gracco Decl., Exh. 10 at  
5 Doc. # 166. After carefully considering Railroads' requested  
6 fees, the Court cannot distinguish Railroads' efforts expended  
7 in searching for PRPs from their own litigation expenses. The  
8 declaration provided by Railroads demonstrates that the fees  
9 Railroads claim as "necessary costs of response" are in fact,  
10 litigation-related and not closely tied to an actual cleanup as  
11 required by the Supreme Court's decision in Key Tronic. For  
12 example, Railroads supporting declaration claims that compiling  
13 and reviewing information about the french drain and conducting  
14 research regarding the Stockton property, construction of the  
15 drainage pipe, and railroad right of way are necessary response  
16 costs recoverable under CERCLA. However, these costs do not  
17 fall within the recoverable response costs identified in the Key  
18 Tronic decision.

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22           Here, although Railroads, while litigating the issue of  
23 liability for the french drain, may have identified other  
24 parties with a possible connection to either the release of  
25 petroleum or installation of the french drain, their work does  
26 not amount to non-litigation nor does it meet the Key Tronic  
27 requirement of being closely tied to an actual cleanup.  
28

1 Railroads' work in identifying potentially responsible parties  
2 was not a necessary cost of response because it did not arise  
3 during, nor does it appear to benefit, any cleanup process. See  
4 Fireman's Fund Ins. Co. v. City of Lodi, California, 302 F.3d  
5 928, 953 (9th Cir. 2002) (noting that the ability to recover  
6 litigation-related attorney's fees does not necessarily advance  
7 the pace of the cleanup because it may encourage ambitious  
8 litigation). Railroads expended significant attorney's fees in  
9 an attempt to avoid liability for the contamination released  
10 from the french drain. These efforts were expended to protect  
11 Railroads' interests as a defendant and have not advanced the  
12 cleanup of the Stockton cite. Thus, the fees were incurred as  
13 "litigation expenses" or "in pursuing litigation" and therefore,  
14 are not properly included in recoverable CERCLA costs. Key  
15 Tronic, 511 U.S. at 820.

19 Because this Court has carefully examined the work  
20 performed by Railroads and concludes the work is litigation-  
21 related, the Court finds as a matter of law that Railroads' work  
22 is not a recoverable "response cost" under CERCLA. Accordingly,  
23 RAS's motion for partial summary judgment on Railroads' claim  
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1 for contribution under Section 107(a) of CERCLA, 42 U.S.C. §  
2 9607(a) is GRANTED.<sup>2</sup>

3 C. Contribution Under HSAA

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5 Railroads claim they are entitled to contribution under the  
6 Hazardous Substance Account Act, Cal. Health & Safety Code §  
7 25300, *et seq.*, the California version of CERCLA. It is well-  
8 established that the HSAA is interpreted consistent with CERCLA.  
9 See Nixon-Egli Equip. Co. v. John A. Alexander Co., 949 F. Supp.  
10 1435, 1441 n.5 (C.D. Cal. 1996). The HSAA explicitly refers to  
11 CERCLA for the definition of recoverable "response costs", and  
12 provides that CERCLA's definitions shall apply "unless the  
13 context requires otherwise . . ." Cal. Health & Safety Code §§  
14 25310, 25323.3.

15  
16 Here, in interpreting HSAA "response costs" consistent with  
17 CERCLA response costs, this Court finds that Railroads' attorney  
18 fees, like under CERCLA, are not recoverable response costs  
19 under HSAA. As stated above, Railroads' work in identifying  
20 PRPs was not a necessary cost of response because the fees were  
21 incurred as "litigation expenses" or "in pursuing litigation"  
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25 <sup>2</sup> Because the Court finds that Railroads have not incurred  
26 any "necessary costs of response" under CERCLA, the Court does  
27 not need to reach the issue of whether RAS is a responsible  
28 party or can meet CERCLA's "innocent landowner" defense.  
Regardless of whether RAS is labeled a responsible party under  
CERCLA, Railroads would not be entitled to recover their  
attorney's fees from RAS because the fees were not incurred as a  
necessary response cost.



1 and have not advanced the cleanup of the Stockton cite.  
2 Accordingly, Railroads' attorney's fees are not properly  
3 included in recoverable CERCLA or recoverable HSAA costs.  
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5 III. ORDER

6 For the reasons set forth above, RAS's motion for partial  
7 summary judgment on Railroads' counterclaims for contribution  
8 under CERCLA § 107(a) and HSAA § 25363(e) is GRANTED.

9 IT IS SO ORDERED.

10 Dated: January 6, 2009

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12 JOHN A. MENDEZ,  
13 UNITED STATES DISTRICT JUDGE  
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