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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

BORGE DEVELOPMENT, INC., a	)	No. 2:06-CV-02228 JAM GGH
California corporation,	)	
	)	ORDER GRANTING BALDWIN
Plaintiff,	)	CONTRACTING COMPANY'S MOTION
	)	FOR SUMMARY JUDGMENT
v.	)	
	)	
CITY OF CHICO, CALIFORNIA; BUTTE	)	
COUNTY, CALIFORNIA; and BALDWIN	)	
CONTRACTING COMPANY, INC., a	)	
California corporation,	)	
	)	
Defendants.	)	

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Borge Development, Inc. ("Borge") brought this action against the City of Chico, California ("Chico"), Butte County, California ("Butte County"), and Baldwin Contracting Company ("Baldwin") for cost recovery under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607, contribution under CERCLA, 42 U.S.C. § 9613, and other state law violations. Baldwin filed a Motion for Summary Judgment or, in the Alternative, Summary Adjudication. Borge opposed the Motion. Both Chico and Butte County partially joined in the Motion. For the reasons stated below, Baldwin's Motion for Summary Judgment is

1 GRANTED.<sup>1</sup>

2 BACKGROUND

3 Borge owns two parcels of land, Butte County Assessor parcel  
4 numbers 002-180-084 and 002-180-086 ("Borge Property"). Borge  
5 alleges that the Borge Property was contaminated by the operation  
6 of the Chico Burn Dump by Chico and Butte County over 70 years.  
7 Borge was ordered by a state regulatory agency to clean up the  
8 contamination. The cost to remediate the Borge Property was more  
9 than \$490,000.00.

10 Borge further alleges that in 1987, as part of a project to  
11 extend Bruce Road ("Bruce Road Project"), Chico hired Baldwin to  
12 assist in the removal and disposal of excavated waste material.  
13 Borge alleges that as part of the Bruce Road Project, Baldwin  
14 transported hazardous waste to the Borge Property, which is located  
15 directly to the east of Bruce Road. Baldwin denies that it ever  
16 transported or disposed of any hazardous waste on the Borge  
17 Property.

18 OPINION

19 Summary judgment is appropriate if "the pleadings, the  
20 discovery and disclosure materials on file, and any affidavits show  
21 that there is no genuine issue as to any material fact and that the  
22 movant is entitled to judgment as a matter of law." Fed.R.Civ.P.  
23 56(c). The moving party bears the initial burden of demonstrating  
24 the absence of a genuine issue of material fact. See Celotex Corp.  
25 v. Catrett, 477 U.S. 317, 323 (1986). Where the nonmoving party  
26 will have the burden of proof on an issue at trial, the movant's

27 \_\_\_\_\_  
28 <sup>1</sup> This motion was determined to be suitable for decision  
without oral argument. E.D. Cal. L.R. 78-230(h).

1 burden may be discharged by pointing out to the district court that  
2 there is an absence of evidence to support the nonmoving party's  
3 case. See id. at 325. Summary judgment for a defendant is  
4 appropriate when the plaintiff fails to make a showing sufficient  
5 to establish the existence of an element essential to its case, and  
6 on which [he] will bear the burden of proof at trial. Id. at 322.

7 If the moving party sustains its burden, the burden then  
8 shifts to the nonmoving party to go beyond the pleadings and by his  
9 or her own affidavits, or by the depositions, answers to  
10 interrogatories, and admissions on file, designate specific facts  
11 showing that there is a genuine issue for trial. See Celotex, 477  
12 U.S. at 324 (citing Fed.R.Civ.P. 56(e)). "If the nonmoving party  
13 fails to produce enough evidence to create a genuine issue of  
14 material fact, the moving party wins the motion for summary  
15 judgment." Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.,  
16 210 F.3d 1099, 1103 (9th Cir. 2000). Summary judgment is  
17 appropriate if, viewing the evidence and the inferences therefrom  
18 in the light most favorable to the nonmoving party, there are no  
19 genuine issues of material fact in dispute and the moving party is  
20 entitled to judgment as a matter of law. Valandingham v.  
21 Bojorquez, 866 F.2d 1135, 1137 (9th Cir. 1989).

22 Baldwin argues that it is entitled to summary judgment for the  
23 following reasons:

24 1. Baldwin has never been an owner or operator of the  
25 facility that is the subject of the litigation;

26 2. Baldwin never arranged, transported, or was otherwise  
27 responsible for the disposal of hazardous waste on the Borge  
28 Property; and

1           3. Borge is a suspended corporation and therefore does not  
2 have standing to bring this suit.<sup>2</sup>

3           Baldwin's first contention is irrelevant as Borge does not  
4 allege that Baldwin ever owned the property in question. Borge  
5 claims that Baldwin is liable in this case because Baldwin was an  
6 "arranger and transporter of hazardous waste within the meaning of  
7 CERCLA section 107(3)." Borge Opposition to Motion for Summary  
8 Judgment, p.9 (Docket at #57). This contention and consequently  
9 Baldwin's liability, if any, is dependent on Borge being able to  
10 prove that Baldwin arranged, transported and disposed of unsuitable  
11 material onto Borge's property. As further discussed below, Borge  
12 has failed to produce sufficient evidence to create a genuine issue  
13 of material fact on this issue.

14           The principle question before the Court is whether a genuine  
15 issue of material fact exists as to whether Baldwin arranged,  
16 transported, or was otherwise responsible for the disposal of  
17 hazardous waste on the Borge Property.

18           CERCLA imposes liability on, amongst others:

19           [A]ny person who accepts or accepted any hazardous substances  
20 for transport to disposal or treatment facilities,  
21 incineration vessels or sites selected by such person, from  
22 which there is a release, or a threatened release which causes  
the incurrence of response costs, of a hazardous substance.

23           42 U.S.C. § 9607(a)(4). Baldwin argues that there is insufficient  
24 proof that it ever transported hazardous material and placed it on

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25           <sup>2</sup> Chico joined Baldwin in the third issue. (Docket at #51.)  
26 Butte County joined Baldwin in both the second and third issues.  
27 (Docket at #53.) Baldwin's third contention has been sufficiently  
28 rebutted. See Poiré Decl. Ex. 10. (Docket at #60.) Baldwin also  
does not address this contention in its Reply Brief and apparently  
has abandoned this argument.

1 the Borge Property during the Bruce Road Project. Baldwin further  
2 contends that none of the experts deposed in this matter attribute  
3 any liability to Baldwin. The Court finds Baldwin's arguments to  
4 be persuasive.

5 Borge has failed to produce sufficient evidence to create a  
6 genuine issue of material fact as to whether Baldwin transported  
7 hazardous material or disposed of waste or arranged for the  
8 disposal of waste on Borge property. Borge relies on four  
9 documents in an attempt to demonstrate that Baldwin disposed of  
10 hazardous waste on its property. First, Borge produced a City of  
11 Chico Inter-Office Memorandum which notes in part, "Some areas of  
12 alignment for Bruce Road have unsuitable material (garbage dump)."  
13 Poiré Decl., Ex. 2. Borge also produced a document entitled  
14 "Proposal" from Baldwin regarding the Bruce Road Project which  
15 Borge claims demonstrates that Baldwin apparently agreed that,  
16 "Surplus excavated material including unsuitable material shall be  
17 spread with scrapers on adjacent property to the east." Id. Ex. 3.

18 Borge next relies on a map produced in discovery by the City  
19 of Chico indicating that the Borge Property, which is located  
20 directly east of the Bruce Road Project, was contaminated with  
21 waste and ash. Id. Ex. 4. Finally, Borge submits a Cleanup and  
22 Abatement Order ("CAO") which indicates that Baldwin transported  
23 hazardous materials during the Bruce Road Project and dumped it on  
24 a parcel of land not owned by Borge. Id. Ex. 5.

25 Baldwin has objected to each of these four documents on the  
26 grounds that they are inadmissible hearsay (FRE 802), have not been  
27 properly authenticated (FRE 901), and are an improper basis for an  
28 opinion (FRE 701, 702, 703). Baldwin argues that "no party or

1 expert testified, based upon first hand knowledge that the  
2 documents demonstrate that Baldwin actually disposed of waste or  
3 arranged for disposal of waste on the Borge property." Baldwin  
4 Reply Brief at p. 2, n. 1 (Docket at #74). This Court sustains  
5 Baldwin's objections to these four documents. Thus, Borge has  
6 failed to produce any admissible or relevant evidence sufficient to  
7 raise a genuine issue of material fact.

8 Even if this Court had not sustained Baldwin's objections to  
9 Borge's evidence, it would have still reached the same conclusion  
10 that this documentary evidence is insufficient to defeat Baldwin's  
11 motion herein. The first document, the Inter-Office Memorandum,  
12 concerns a meeting wherein six matters were apparently discussed.  
13 The only item regarding alleged contamination is item No. 6, which  
14 states, "Some areas of alignment for Bruce Road have unsuitable  
15 material (garbage dump)." Nothing in this document mentions  
16 Baldwin or the placement of contaminated waste on Borge's property  
17 by Baldwin.

18 The second document, the Proposal, is a prospective cost  
19 estimate for anticipated performance of construction work for the  
20 Bruce Road Extension project. The Baldwin cost estimate, which  
21 contemplates the scope of work for the Bruce Road Project, does not  
22 specify exactly where "unsuitable material" would be spread or in  
23 what amount, if any. The paragraph cited by Borge states, "Surplus  
24 excavated material including unsuitable material shall be spread  
25 with scrapers on adjacent property to the east. Compaction of this  
26 material will be paid for on a force account basis, if required."  
27 The reference in the document does not state that Baldwin would  
28 place contaminated waste on the Borge Property.

1           The third document is a map included in a City of Chico's  
2 consultant's report that very roughly approximates the location of  
3 various wastes within the larger Humboldt Road Burn Dump area.  
4 Given its crude features and lack of any authentication or  
5 interpretation by an expert or anyone else, the map lacks probative  
6 value. The map does not display or otherwise indicate any action  
7 taken by Baldwin to spread waste on the Borge Property.

8           The cited portion of the fourth document, the CAO, undercuts  
9 Borge's argument in that it notes that Baldwin allegedly deposited  
10 contaminated material onto property not owned by Borge, i.e. Parcel  
11 No. 011-780-14. Nothing in the CAO indicates contaminated soil was  
12 place on the Borge Property by Baldwin.

13           Furthermore, as Baldwin argues, the undisputed evidence in  
14 this case reveals that none of the experts retained in this matter,  
15 including Borge's expert, have opined that Baldwin is responsible  
16 for the contamination. Each stated that they had no opinion on  
17 Baldwin's responsibility. "The mere existence of a scintilla of  
18 evidence in support of the plaintiff's position will be  
19 insufficient; there must be evidence on which the jury could  
20 reasonably find for the plaintiff." Anderson v. Liberty Lobby,  
21 Inc., 477 U.S. 242, 252 (1986). Borge has not produced sufficient  
22 documentary or expert evidence to support its claim under CERCLA  
23 Section 107.

24           With respect to Borge's claim under 42 U.S.C. § 9613, Baldwin  
25 also argues that Borge cannot seek contribution under this statute  
26 because it is not a responsible party within the meaning of section  
27 107 of CERCLA. Given that the Court has ruled in Baldwin's favor  
28 on the CERCLA Section 107 claim, summary judgment is granted in

1 Baldwin's favor on Borge's CERCLA Section 113 claim.

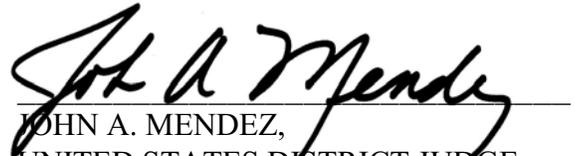
2 Finally, each of Borge's state law claims rely on the fact  
3 that Baldwin transported hazardous material onto Borge Property.  
4 Because there is no genuine issue of material fact as to whether  
5 this occurred, summary judgment in Baldwin's favor on Borge's state  
6 law claims is appropriate.

7  
8 ORDER

9 For the reasons stated above, Baldwin's Motion for Summary  
10 Judgment is GRANTED.

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12 IT IS SO ORDERED.

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14 Dated: April 20, 2009

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17 JOHN A. MENDEZ,  
18 UNITED STATES DISTRICT JUDGE  
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