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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
and CALIFORNIA DEPARTMENT
OF TOXIC SUBSTANCES CONTROL,

No. 2:08-cv-02556-MCE-JFM

Plaintiffs,

v.

MEMORANDUM AND ORDER

STERLING CENTRECORP INC.,
STEPHEN P. ELDER and ELDER
DEVELOPMENT, INC.,

Defendants.

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Both the United States and the California Department of Toxic Substances (hereinafter collectively referred to as "Plaintiffs" or "government" unless otherwise specified) have designated the former Lava Cap Mine, located in Nevada County, California, as a Superfund site polluted by elevated levels of arsenic that were disseminated through tailings and waste materials generated by mine operations. Plaintiffs have undertaken cleanup efforts designed to remediate that arsenic contamination.

1 The present action seeks contribution for the costs of those
2 activities both from former owners of the site and operators
3 responsible for its mining. Presently before the Court is
4 Plaintiffs' Motion for partial summary judgment, which seeks a
5 determination that certain prerequisites for the recovery of
6 response costs from Defendants under CERCLA have been established
7 as a matter of law. As set forth below, that motion will be
8 granted.¹

9
10 **BACKGROUND**

11
12 Mining operations at the Lava Cap Mine commenced in 1861.
13 Between 1934 and 1943, mining was conducted at the site by the
14 Lava Cap Gold Mining Corporation ("LCGMC"). During that time
15 period, the Lava Cap Mine was one of the leading gold and silver
16 producers in California, and among the top twenty-five gold
17 producers in the nation. Plaintiffs' Statement of Undisputed
18 Fact ("SUF") No. 4. In 1938, LCGMC built a tailings dam on
19 Greenhorn Creek (now known as Lost Lake Dam) to stop mine
20 tailings from polluting the waters of the Bear River. SUF
21 Nos. 9, 10. Waste products included within the mine-generated
22 tailings contained elevated concentrations of naturally occurring
23 arsenic, a hazardous substance pursuant to the Comprehensive
24 Environmental Response, Compensation and Liability Act of 1980,
25 42 U.S.C. §§ 9601, et seq. ("CERCLA"). SUF No. 80-81.

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¹ Because oral argument was not of material assistance, the
28 Court ordered this matter submitted on the briefs. E.D. Cal.
Local Rule 230(h).

1 No active mining occurred at Lava Cap after 1943, when its
2 operations were shut down by the United States government during
3 the Second World War. SUF No. 12. In 1950, LCGMC decided to
4 sell, lease, or exchange all the property and assets of the
5 company. In 1952, LCGMC's directors recommended a sales
6 transaction between LCGMC and New Goldvue, Mines, Ltd, a Canadian
7 company developing a gold mine in Quebec and looking to upgrade
8 its equipment. A purchase and sale agreement was subsequently
9 executed between the two companies. Pursuant to that agreement,
10 New Goldvue, having "been advised as to the . . . assets and
11 liabilities of [LCGMC]," agreed to purchase "all the assets of
12 [LCGMC], subject to the liabilities of [LCGMC], which liabilities
13 [New Goldvue] agreed to assume and cause to be paid promptly."
14 SUF No. 19. The sales agreement further specified that LCGMC's
15 assets would be transferred to Keystone Copper Corporation
16 ("Keystone"), a wholly-owned subsidiary of LCGMC, before Keystone
17 was itself conveyed to New Goldvue. Keystone, which had
18 previously operated a copper mine while a LCGMC subsidiary, thus
19 became a wholly-owned subsidiary of New Goldvue.² SUF No. 33.

20 The sales transaction between New Goldvue and LCGMC was
21 financed by a transfer of New Goldvue stock. SUF No. 19. After
22 the LCGMC purchase was consummated, New Goldvue expanded its
23 board from five to seven and appointed two individuals previously
24 associated with LCGMC to the New Goldvue Board of Directors. See
25 SUF No. 20. LCGMC was subsequently dissolved. SUF No. 35.

26
27 ² Keystone was a California corporation and remained a
28 Sterling subsidiary until it became inactive after selling the
Lava Cap Mine in 1989 (Keystone was ultimately suspended by the
California Secretary of State in 1991).

1 New Goldvue, which was originally incorporated in Ontario,
2 Canada, as Goldvue Mines Ltd in 1944, changed its name several
3 times over the years before becoming Sterling in 2001.³ Until
4 1985, the company now known as Sterling was primarily a natural
5 resources company with investments in mining and oil and gas
6 production. Sterling, through its subsidiary Keystone, owned the
7 Lava Cap Mine for some 37 years (aside from a brief, ultimately
8 unsuccessful attempt to transfer ownership to another company).
9 No mining occurred during that period.

10 In 1979, a partial log dam collapse led to a release of mine
11 tailings which, in turn, caused downstream neighbors to complain
12 about pollution from the resulting silt. In response to those
13 complaints, the California Regional Water Quality Control Board
14 issued a Cleanup and Abatement Order to Keystone on October 25,
15 1979. See SUF No. 82.

16 Following an ultimately unsuccessful attempt to sell the
17 Lava Cap Mine to another company, Keystone sold, in 1989, the
18 property to Banner Mountain Properties, Ltd., an entity
19 controlled by Defendant Stephen Elder, who currently owns four of
20 the seven parcels comprising the former mine site. SUF Nos. 77,
21 120-23. The remaining three parcels are owned by another Elder
22 business interest, Defendant Elder Development, Inc.

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26 ³ New Goldvue changed its names several times over the years
27 before becoming Sterling Centrecorp Inc. in 2001. New Goldvue
28 and the subsequent names by which the corporation was known will
be simply referred to as "Sterling" throughout the remainder of
this Memorandum and Order unless otherwise noted.

1 Elder had an engineering firm prepare a Preacquisition Site
2 Assessment before his purchase of the mine site that revealed
3 hazardous substance contamination, primarily arsenic. SUF
4 No. 127.

5 The United States Environmental Protection Agency ("EPA")
6 completed a Preliminary Assessment on the mine site in April of
7 1993, after Banner Mountain's purchase of the mine site. See SUF
8 86. Sediment and soil samples revealed elevated concentrations
9 of both arsenic and lead.

10 Heavy rainstorms in 1993 washed mine wastes downstream into
11 Little Clipper Creek and a former mine tailings pond now known as
12 Lost Lake. SUF No. 88. The EPA began cleanup operations in late
13 1997 and the site was officially designed a Superfund site in
14 January of 1999. SUF Nos. 89-90. Those operations included the
15 removal and relocation of tailings, reinforcement of the log dam,
16 and diversion of Little Clipper Creek around the tailings pile.
17 Id. Future remedial work contemplated by the EPA for the site
18 will include actions to address the polluted groundwater. The
19 EPA estimates that it spent at least \$20 million in response
20 costs at the site as of April 30, 2008. SUF No. 100. The State
21 of California Department of Toxic Substances alleges that its own
22 response costs as of December 2010 are another \$1,000,000. There
23 is no dispute that the release of hazardous substances at the
24 mine site is responsible for the response costs that have been
25 incurred by Plaintiffs. See SUF No. 102.

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1 As indicated above, Plaintiffs now seek partial summary
2 judgment to establish, as a matter of law, that certain
3 prerequisites for the recovery of response costs against all
4 Defendants in this matter have been satisfied. No opposition to
5 Plaintiffs' Motion has been made.

6
7 **STANDARD**
8

9 The Federal Rules of Civil Procedure provide for summary
10 judgment when "the pleadings, depositions, answers to
11 interrogatories, and admissions on file, together with
12 affidavits, if any, show that there is no genuine issue as to any
13 material fact and that the moving party is entitled to a judgment
14 as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v.
15 Catrett, 477 U.S. 317, 322 (1986). One of the principal purposes
16 of Rule 56 is to dispose of factually unsupported claims or
17 defenses. Celotex Corp. v. Catrett, 477 U.S. at 325.

18 Rule 56 also allows a court to grant summary adjudication on
19 part of a claim or defense. See Fed. R. Civ. P. 56(a) ("A party
20 may move for summary judgment, identifying . . . the part of each
21 claim or defense . . . on which summary judgment is sought.");
22 see, also, Allstate Ins. Co. v. Madan, 889 F. Supp. 374, 378-79
23 (C.D. Cal. 1995); France Stone Co., Inc. v. Charter Twp. of
24 Monroe, 790 F. Supp. 707, 710 (E.D. Mich. 1992).

25 The standard that applies to a motion for summary
26 adjudication is the same as that which applies to a motion for
27 summary judgment. See Fed. R. Civ. P. 56(a), 56(c); Mora v.
28 ChemTronics, 16 F. Supp. 2d. 1192, 1200 (S.D. Cal. 1998).

1 Under summary judgment practice, the moving party
2 always bears the initial responsibility of informing
3 the district court of the basis for its motion, and
4 identifying those portions of 'the pleadings,
5 depositions, answers to interrogatories, and admissions
6 on file together with the affidavits, if any,' which it
7 believes demonstrate the absence of a genuine issue of
8 material fact.

9
10 Celotex Corp., 477 U.S. at 323 (quoting Fed. R. Civ. P. 56(c)).

11 If the moving party meets its initial responsibility, the
12 burden then shifts to the opposing party to establish that a
13 genuine issue as to any material fact actually does exist.

14 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
15 585-87 (1986); First Nat'l Bank v. Cities Serv. Co., 391 U.S.
16 253, 288-89 (1968).

17 In attempting to establish the existence of this factual
18 dispute, the opposing party must tender evidence of specific
19 facts in the form of affidavits, and/or admissible discovery
20 material, in support of its contention that the dispute exists.
21 Fed. R. Civ. P. 56(e). The opposing party must demonstrate that
22 the fact in contention is material, i.e., a fact that might
23 affect the outcome of the suit under the governing law, and that
24 the dispute is genuine, i.e., the evidence is such that a
25 reasonable jury could return a verdict for the nonmoving party.

26 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 251-52
27 (1986); Owens v. Local No. 169, Assoc. of W. Pulp and Paper
28 Workers, 971 F.2d 347, 355 (9th Cir. 1987).

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1 Stated another way, "before the evidence is left to the jury,
2 there is a preliminary question for the judge, not whether there
3 is literally no evidence, but whether there is any upon which a
4 jury could properly proceed to find a verdict for the party
5 producing it, upon whom the onus of proof is imposed." Anderson,
6 477 U.S. at 251 (quoting Improvement Co. v. Munson, 81 U.S. 442,
7 448 (1871)). As the Supreme Court explained, "[w]hen the moving
8 party has carried its burden under Rule 56(c), its opponent must
9 do more than simply show that there is some metaphysical doubt as
10 to the material facts Where the record taken as a whole
11 could not lead a rational trier of fact to find for the nonmoving
12 party, there is no 'genuine issue for trial.'" Matsushita,
13 475 U.S. at 586-87.

14 In resolving a summary judgment motion, the evidence of the
15 opposing party is to be believed, and all reasonable inferences
16 that may be drawn from the facts placed before the court must be
17 drawn in favor of the opposing party. Anderson, 477 U.S. at 255.
18 Nevertheless, inferences are not drawn out of the air, and it is
19 the opposing party's obligation to produce a factual predicate
20 from which the inference may be drawn. Richards v. Nielsen
21 Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985),
22 aff'd, 810 F.2d 898 (9th Cir. 1987).

24 ANALYSIS

25
26 In order to establish Defendants' liability for response
27 costs under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a),
28 Plaintiffs must make a four-part showing.

1 First, Plaintiffs must prove that the Lava Cap Mine Superfund
2 Site is a "facility" as defined by CERCLA. Second, they must
3 show that a "release" or "threatened release" of a hazardous
4 substance from the facility has occurred. Third, Plaintiffs are
5 required to establish that the release or threatened release
6 caused Plaintiffs to incur response costs. Fourth and finally,
7 in order to incur liability Defendants must fall within one of
8 the four classes of covered persons described in Section 9607(a).
9 Cose v. Getty Oil, 4 F.3d 700, 703-04 (9th Cir. 1993); 3550
10 Stevens Creek Assocs. v. Barclays Bank of California, 915 F.2d
11 1355, 1358 (9th Cir. 1990). If Plaintiffs are successful in
12 establishing these four elements of liability, they are entitled
13 to summary judgment unless Defendants are able to invoke one of
14 the limited statutorily-permitted defenses to CERCLA liability.
15 Courts to routinely grant summary judgment as to CERCLA liability
16 provided the requisite showing has been made. See, e.g., United
17 States v. Shell Oil Co., 841 F. Supp. 962, 968 (C.D. Cal. 1993).

18 The present motion seeks to summarily adjudicate three out
19 of the four requirements to establishing CERCLA liability. In
20 response to Plaintiffs' Motion, Defendant Sterling states plainly
21 that it "does not dispute that Plaintiffs have established that
22 the Lava Cap Mine Site is a facility; that arsenic, a CERCLA
23 hazardous substance, was released into the environment at the
24 Site; and that Plaintiffs have incurred certain costs responding
25 to the release of arsenic from the facility." Defendant
26 Sterling's Response, 1:22-25. Defendant Stephen P. Elder has
27 filed no opposition to Plaintiffs' Motion.

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1 Default judgment as to the liability of the remaining Defendant,
2 Elder Development, Inc., has already been granted by Order filed
3 September 20, 2011. Consequently, for all intents and purposes,
4 the instant motion is unopposed.

5 That lack of opposition is not surprising given the
6 straightforward nature of the three liability elements as to
7 which Plaintiffs request summary adjudication. With respect to
8 the first question of whether the Lava Cap Mine Superfund Site is
9 a "facility" for purposes of CERCLA, the statute defines
10 "facility" as including "any building, structure, installation,
11 equipment . . . well, pit pond, lagoon, impoundment, ditch
12 landfill, storage container, . . . or any site or area where a
13 hazardous substance has been deposited, stored, disposed of, or
14 place, or otherwise come to be located." 42 U.S.C. § 9601(9).
15 Given this expansive definition, a "facility" includes virtually
16 every conceivable place where hazardous substances can be found,
17 criteria which certainly would encompass the Lava Cap site.
18 Moreover, it is undisputed that arsenic was found at the site,
19 and arsenic qualifies as a "hazardous substance" as a matter of
20 law because it is listed in 40 C.F.R. § 302.4, which delineates a
21 consolidated list of hazardous substances under CERCLA.
22 Consequently Plaintiffs are entitled to summary adjudication as
23 to the "facility" component for CERCLA liability.

24 The second element required to establish liability, the
25 requirement that there have been releases or threatened releases
26 of a hazardous substance from the Lava Cap facility, is equally
27 plain.

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1 CERCLA Section 101(22), 46 U.S.C. § 9601(22), defines "release"
2 broad as including "any spilling, leaking, pumping, pouring,
3 emitting, emptying, discharging, injecting, escaping, leaching,
4 dumping, or disposing into the environment." The term "release"
5 is liberally construed, any the amount of a hazardous substance
6 released into the environment is irrelevant to liability. See,
7 e.g., Stewman v. Mid-South Wood Products of Mena, Inc., 993 F.2d
8 646, 649 (8th Cir. 1993). Here, while the ultimate
9 responsibility for such releases may well be at issue, it is
10 clear that mine tailings placed directly onto the soil at the
11 Lava Cap site contained arsenic and that surface water drainage
12 at the site has also produced arsenic contamination. The fact
13 that a "release" has occurred for purposes of CERCLA liability
14 cannot be reasonably controverted, and Plaintiffs are entitled to
15 summary adjudication as to that liability prerequisite as well.

16 Finally, with respect to the third and last liability
17 component Plaintiffs seek to establish through this motion, it
18 has been unequivocally established that both the EPA and the
19 California Department of Toxic Substances Control has incurred
20 response costs in remediating pollutants present at the Lava Cap
21 site.

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1 **CONCLUSION**

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3 As demonstrated above, Plaintiffs are entitled to summary
4 adjudication as to the first three components of CERCLA
5 liability; namely, that the Lava Cap mine site is a "facility"
6 for purposes of the statute, that releases of a hazardous
7 substance have occurred from that facility, and finally that
8 Plaintiffs have incurred response costs as a result of said
9 release. Plaintiffs' Motion for Partial Summary Judgment of
10 Elements of CERCLA liability common to all Defendants (ECF
11 No. 108) is accordingly GRANTED. Whether Plaintiffs can
12 establish the fourth and final element that would establish
13 Defendants' liability as a matter of law (to wit, whether either
14 Defendant Sterling or Defendant Stephen Elder qualifies as a
15 "covered person" for purposes of the statute), as well as whether
16 either remaining Defendant may properly assert any affirmative
17 defenses to CERCLA liability, will be assessed by three other
18 motions concurrently filed by Plaintiffs as to those issues.

19 IT IS SO ORDERED.

20 Dated: December 8, 2011

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22 _____
23 MORRISON C. ENGLAND, JR.
24 UNITED STATES DISTRICT JUDGE