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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.

**ORDER**

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

Defendants.

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This is an action brought by Plaintiffs pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, et seq., seeking, *inter alia*, the recovery of response costs related to the release of hazardous substances from the Lava Cap Mine Superfund Site. On September 25, 2009, Defendants Stephen P. Elder and Elder Development, Inc. filed their Answer, Counterclaim and Request for Jury Trial in response to Plaintiffs' Complaint.

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1 Presently before the Court are Motions to Dismiss the  
2 Counterclaim asserted by the Elder Defendants Stephen P. Elder  
3 and Elder Development Inc. The dismissal requests are brought on  
4 behalf of both Plaintiff United States and Plaintiff California  
5 Department of Toxics Substance Control ("California") pursuant to  
6 Federal Rule of Civil Procedure 12(b)(6) and 12(b)(1).  
7 California also moves to strike certain affirmative defenses pled  
8 within the Elder Defendants' Answer on grounds that the  
9 affirmative defenses are either unavailable under CERCLA or  
10 inadequately stated. Finally, the United States asks that the  
11 Answer of Defendant Elder Development, Inc. be stricken in its  
12 entirety because a corporation cannot be represented by a non-  
13 attorney under Eastern District Local Rule 183(a). As set forth  
14 below, Plaintiffs' Motions will be granted in part and denied in  
15 part.<sup>1</sup>

16 First, with respect to Elder Development Inc.'s  
17 representation in this matter, it is clear that Stephen P. Elder  
18 cannot represent the corporation in pro se, as he purports to do  
19 in his September 25, 2009 response. Mr. Elder's attempt in that  
20 regard violates the clear provisions of Rule 183(a), which states  
21 unequivocally that "[a] corporation or other entity may appear  
22 only by an attorney." E.D. Local Rule 183(a); see also Rowland v.  
23 California Men's Colony, 506 U.S. 194, 201-202 (1993) (artificial  
24 entities like corporations, partnerships and associations may  
25 appear in federal court only through licensed counsel).

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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.  
Local Rule 230(g).

1 Consequently, the document filed by Stephen P. Elder on  
2 September 25, 2009 is stricken insofar as it attempts to answer  
3 on behalf of Elder Development, Inc. or to assert any claims on  
4 the corporation's behalf.

5 With respect to the Motions to Dismiss filed by both  
6 Plaintiffs as to the remaining Counterclaim asserted by  
7 Stephen P. Elder as an individual, Mr. Elder's Opposition makes  
8 no attempt to actually oppose Plaintiffs' challenge to the  
9 Counterclaim and instead focuses only on whether two of the four  
10 affirmative defenses targeted as inadequate are in fact properly  
11 stated. The Court will construe that failure to offer any  
12 substantive opposition to the Motions to Dismiss as non-  
13 opposition.

14 Stephen Elder's lack of opposition is not surprising given  
15 the Court's finding, following its own review, that the Elder  
16 Counterclaim fails. While governmental entities waive their  
17 sovereign immunity under the Eleventh Amendment for compulsory  
18 counterclaims under Federal Rule of Civil Procedure 13(a), they  
19 do not do so for permissive claims under Rule 13(b). See  
20 Competitive Tech. v. Fujitsu Ltd., 286 F. Supp. 1118, 1129 (N.D.  
21 Cal. 2003). The allegations of property damage and emotional  
22 distress asserted by Elder in his counterclaim relate not to the  
23 contamination itself targeted by this CERCLA action, but rather  
24 pertain to later cleanup efforts. Courts have found that such  
25 permissive claims qualify for immunity.

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1 See. e.g., United States v. Iron Mountain Mines, Inc. 881 F.  
2 Supp. 1432, 1454, 1456 (E.D. Cal. 1995) (although CERCLA waives  
3 sovereign immunity for contribution claims brought against  
4 governmental agencies, it does not do so with respect to other  
5 federal statutory and common law schemes under which such  
6 governmental agencies are otherwise immune); see also United  
7 States v. Placer Mining Corp., 2007 W.L. 1576559 at \*2-3 (D.  
8 Idaho 2007) (claims of property damage incurred during the  
9 cleanup of hazardous substances were deemed too attenuated to  
10 qualify as a compulsory counterclaim under CERCLA).

11       Moreover, to the extent Defendant Elder's Counterclaim  
12 attempts to assert claims sounding in tort, Plaintiff's failure  
13 to comply with administrative tort claim requirements required  
14 both by California's Tort Claims Act and the Federal Tort Claims  
15 Act also bars the counterclaim.

16       In light of both Defendant Elder's non-opposition and the  
17 flaws of Elder's Counterclaim itself, Plaintiffs' Motion to  
18 Dismiss said Counterclaim is well taken and will be granted.  
19 Because the Court does not believe that the defects of the  
20 Counterclaim can be cured through amendment, and because Elder  
21 has not requested permission to file an amended pleading, no  
22 leave to amend will be afforded.

23       Turning now to Defendant Elder's Answer itself, Mr. Elder  
24 does not oppose California's request that the first two  
25 affirmative defenses be stricken on grounds that neither  
26 affirmative defense is permitted under 42 U.S.C. § 9607(b).

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1 Because neither defense is among the affirmative defenses  
2 authorized by that statute, and because "the statutory defenses  
3 are the only ones available" (Calif. ex rel. Dept. of Toxic  
4 Substances Control v. Neville Chem. Co., 358 F.3d 661, 672 (9th  
5 Cir. 2004)), the First and Second Affirmative Defenses contained  
6 in Elder's Answer are hereby stricken.

7 California concedes, however, that the Third and Fourth  
8 Affirmative Defenses, for an Act of God and for fault of others,  
9 are permitted under CERCLA. California nonetheless alleges that  
10 the defenses are not adequately supported by any facts showing  
11 that they are applicable. Plaintiffs counter that they need not  
12 offer any further factual support than they have already done at  
13 this juncture. The Court agrees, and finds that upon review of  
14 the entire answer in conjunction with the affirmative defenses,  
15 Plaintiffs have been given "fair notice" of the defenses being  
16 advanced. Wyshak v. City Nat'l Bank, 607 F.2d 824, 827 (9th Cir.  
17 1979). The Court consequently rejects any claim that the  
18 affirmative defenses must be stated with more specificity at this  
19 time.

20 Finally, with respect to the California's claim that Elder's  
21 demand for jury trial must be stricken as improper, Elder also  
22 does not oppose the Government's Motion to Strike in that regard,  
23 and it is clear that no right to jury trial attaches to a CERCLA  
24 cost recovery action. See, e.g., Calif. Dept of Toxic Substances  
25 v. Alco Pacific, Inc., 217 F. Supp. 2d 1028, 1046-47 (C.D. Cal.  
26 2002).

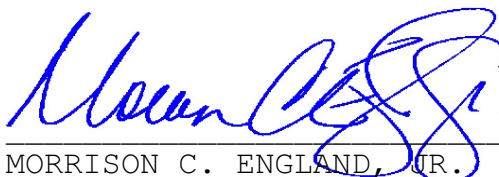
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1 In sum, then, Plaintiff United States' Motion to Dismiss  
2 (Docket No. 53) and Motion to Strike Defendant Stephen Elder's  
3 Answer and Counterclaim on behalf of Elder Development, Inc.  
4 (Docket No. 56) are GRANTED. California's jointly-filed Motion  
5 to Dismiss Counterclaim and Motion to Strike Affirmative Defenses  
6 and Request for Jury Trial (Docket No. 45) is GRANTED in part and  
7 DENIED in part as set forth above.

8 IT IS SO ORDERED.

9 Dated: February 22, 2010

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12 MORRISON C. ENGLAND, JR.  
13 UNITED STATES DISTRICT JUDGE  
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