UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL, et al., Plaintiffs, v. JIM DOBBAS, INC., a California corporation, et al., Defendants.	No. 2:14-cv-00595 WBS EFB MEMORANDUM AND ORDER RE: MOTION TO DISMISS COUNTERCLAIMS AND MOTION TO STRIKE

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Plaintiffs Department of Toxic Substances Control and the Toxic Substances Control Account (collectively "DTSC") seek recovery of costs and declaratory relief under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq., in connection with the cleanup of a wood preserving operation in Elmira, California. (First Am. Compl. ("FAC") ¶ 19 (Docket No. 77).) Intervenors Century Indemnity Company, The Continental Insurance Company, Allianz Underwriters Insurance, Chicago Insurance Company, and

Fireman's Fund Insurance Company (collectively, "Intervenors"), acting behalf of their insured, C&A Products, LLC ("C&A"),[1] have filed an answer in intervention and counterclaims against DTSC. (Docket No. 271.) Specifically, Intervenors filed counterclaims for cost recovery under CERCLA § 107, 42 U.S.C. § 9607; contribution under CERCLA § 113(f); declaratory relief under CERLCA § 113(g), 42 U.S.C. § 9613(g); and contribution and indemnity under the California Hazardous Substance Account Act ("HSAA"), California Health and Safety Code § 25300, et seq. (Docket No. 271.) Intervenors also included certain affirmative defenses within their answer and have requested a jury trial.

DTSC has moved to dismiss the counterclaims, strike Intervenors' affirmative defense for contributory and comparative negligence, and strike the jury demand. (Docket No. 279.) The court held a hearing on the motion on July 24, 2023.

I. Motion to Dismiss Counterclaims

When considering a motion to dismiss a counterclaim under Federal Rule of Civil Procedure 12(b)(6), the court uses an identical standard as that for dismissal of a claim. See, e.g., AirWair Int'l Ltd. v. Schultz, 84 F. Supp. 3d 943, 949 (N.D. Cal. 2015). The court must accept the allegations in the claim as true and draw all reasonable inferences in favor of the claimant. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). To survive a motion to dismiss, a claimant must plead "only enough facts to state a claim to

[1] C&A Products is the successor to Wickes Corporation, one of the former owners and operators of the site.

relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). This "plausibility standard," however, "asks for more than a sheer possibility that a defendant has acted unlawfully," and where a counterclaim pleads facts that are "merely consistent with a defendant's liability," it "stops short of the line between possibility and plausibility." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 557).

The Intervenors' first and second counterclaims seek cost recovery and contribution from DTSC pursuant to CERCLA §§ 107 and 113. In order to assert such claims, the Intervenors must allege that DTSC was (1) "the owner and operator of a vessel or a facility," (2) a "person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of," (3) a "person who . . . arranged for disposal or treatment . . . of hazardous substances," or (4) a "person who accepts or accepted any hazardous substances for transport . . . ." 42 U.S.C. § 9607(a). The Intervenors assert their counterclaims on the theory that DTSC mismanaged cleanup efforts at the remediation site and is liable as an "operator" under § 9607(a)(2). (Intervenors Countercls. ¶¶ 7-34.)

This court previously addressed similar counterclaims brought by defendant Jim Dobbas, Inc. ("Dobbas") in deciding a similar motion to dismiss brought by DTSC. (Docket No. 43 at 5-12.) The court noted that while a government entity may be considered an operator under CERCLA, there was some dispute among courts about the level of control necessary to support operator

liability. Specifically, some courts have applied a narrower "actual control standard," requiring affirmative acts from a purported operator to support liability, with other courts applying a broader "authority to control" standard. (Docket No. 43 at 6-7 (citations omitted).)

This court recognized that cases from the Ninth and Fourth Circuits had applied the narrower actual control definition, requiring that the entity "play an active role in running the facility, typically involving hands-on, day-to-day participation in the facility's management." See Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Tr., 32 F.3d 1364, 1367 (9th Cir. 1994); see also United States v. Dart Indus., Inc., 847 F.2d 144, 146 (4th Cir. 1988). The court further noted that several courts had dismissed claims against state agencies where there were no allegations that the state agency had any involvement with the facility other than remedial cleanup efforts. (Docket No. 43 at 7 (citing Dart Indus., 847 F.2d at 146 (requiring "hands on" activities that contributed to the release of hazardous waste); Stilloe v. Almy Bros., 782 F. Supp. 731, 735-36 (N.D.N.Y. 1992); United States v. W. Processing Co., 761 F. Supp. 725, 730-31 (W.D. Wash. 1991).)

However, this court also noted that those cases pre-dated the Supreme Court's decision in United States v. Bestfoods, 524 U.S. 51, 66 (1998), and held they were not persuasive. The court explained that "Bestfoods does not require an operator to play an active role. It requires only that an entity 'manage, direct, or conduct . . . operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance

with environmental regulations.'" (Docket 43 at 9 (quoting Bestfoods, 524 U.S. at 66-67).)

The court also noted, among things, (1) agreements between DTSC or its predecessor agency and C&A or its predecessor, which set forth the agencies' approval of remedial action at the Elmira site and which were attached to Dobbas' counterclaims; and (2) the allegations of the complaint that DTSC performed "response actions" at the facility, including "efforts to repair and restart the groundwater extraction and treatment system, completion of a remedial investigation for site soils, preparation of the Removal Action Workplan, implementation of the Removal Action Workplan in October and November 2011, groundwater monitoring, and other tasks." (Docket No. 43 at 8-9 (citing Compl. ¶¶ 21-29; Exs. A & B (Docket No. 1).)[2] Ultimately, the court determined that the pleadings sufficiently pled DTSC's liability as an operator under CERCLA, and the court denied DTSC's motion to dismiss Dobbas' counterclaims for cost recovery and contribution. (Docket No. 43 at 9-10.)

Here, Intervenors' allegations regarding operator liability are similar to those asserted by Dobbas. Nevertheless, notwithstanding the court's prior ruling, DTSC argues that Intervenors have not sufficiently alleged its liability as an

[2] DTSC filed an amended complaint in December 2014, after the court issued its order regarding Dobbas' counterclaims. (Docket No. 77.) DTSC amended the complaint to add C&A Products as a defendant after investigation revealed that C&A might have insurance coverage which could be a source of funds to reimburse DTSC's response costs. (Docket No. 68-1 at 3.) The amended complaint's allegations regarding DTSC's response actions are identical, and the amended complaint also attaches the same documents as the original complaint, in addition to others.

operator. Specifically, DTSC argues that the Ninth Circuit's recent decision in United States v. Sterling Centrecorp Inc., 977 F.3d 750 (9th Cir. 2020), decided after this court's order ruling on plaintiff's motion to dismiss Dobbas's counterclaims, now requires allegations that a party play an active role to held liable as an operator, and there are no such allegations here.

In Sterling, the Ninth Circuit examined whether the United States could be held liable as an operator because of its issuance of an order during World War II shutting down gold mines, including the mine at issue in the case. The panel explained that Bestfoods "clarifies that actual participation in decisions related to pollution is necessary for a finding of operator liability," and noted that it had previously stated in Long Beach, 32 F.3d at 1367, that "[t]o be an operator of a hazardous waste facility, a party must do more than stand by and fail to prevent the contamination. It must play an active role in running the facility, typically involving hands-on, day-to-day participation in the facility's management." 977 F.3d at 758.

The panel continued, explaining that "[t]he Bestfoods standard confirms that operator status has a nexus requirement. That is, it requires that an operator's relationship to the facility at issue must, at least in part, focus on 'operations specifically related to pollution.'" Id. (quoting Bestfoods, 524 U.S. at 66). The panel reiterated that "operator liability requires something more than general control over an industry or facility. It requires some level of direction, management, or control over the facility's polluting activities." Id.

In light of the additional guidance provided by the

Ninth Circuit in Sterling, the court determines that Intervenors have not sufficiently alleged that DTSC was an operator under CERCLA. While this court previously expressed doubt about whether the Ninth Circuit's narrower definition of an operator in Long Beach applied after the Supreme Court's decision in Best Foods, the Ninth Circuit has once again after Best Foods noted in Sterling that a party "must play an active role in running the facility, typically involving hands-on, day-to-day participation in the facility's management."

Here, Intervenors' allegations repeat the First Amended Complaint's allegations regarding DTSC's response actions and add additional allegations that "DTSC actively operated the groundwater extraction and treatment system despite its 2001 report stating the 'ground water pump and treat system would likely be unsuccessful in meeting the remedial action objections'" and "[a] Site inspection in 2010 also revealed there were 'numerous cracks in the asphalt cap' that DTSC contracted to maintain in 2007." (Counterclaims at 16 (citations omitted).) However, a vague allegation that DTSC "actively operated" a groundwater system and DTSC's alleged knowledge of its contractor's failure to maintain a remedial structure on the site do not sufficiently allege that DTSC's involvement with the site rose to the level of active control with hands-on, day-to-day participation in managing the Elvira site. Accordingly, the court will dismiss the first and second counterclaims based on the failure to properly allege DTSC was an operator under CERCLA.

Further, even assuming that DTSC's management of the site rose to the level that it could be considered an operator,

there is no plausible allegation that DTSC operated the Elvira site when any hazardous materials were "disposed", as defined by CERCLA. As stated above, Section 107(a)(2) provides for liability of "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of," (emphasis added). As explained by the Ninth Circuit in Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863, 874-87 (9th Circ. 2001), the gradual passive migration of contamination through soil during a former owner's ownership of a property was not a "disposal" under CERCLA. Yet that appears to be the Intervenors' allegation here -- that DTSC has not properly managed existing contamination as it passively migrates through the soil, due to inadequate remedial measures. While Intervenors assert the conclusory allegation that DTSC's actions "contributed to or caused the leakage or disposal of hazardous waste," (Countercls. ¶ 14), there is no allegation how anything DTSC did could be considered disposal under CERCLA § 107. Accordingly, Intervenors' failure to sufficiently allege disposal of hazardous materials during DTSC's alleged operation of the site is a second and independent ground for dismissal of the first and second counterclaims.

Because Intervenors have not properly alleged DTSC's liability as an operator or disposal under § 107 and § 113, the court will dismiss their counterclaims for cost recovery and contribution. Further, the court will also dismiss the § 113(g) counterclaim for declaratory relief and the counterclaim under the HSAA. See Coppola v. Smith, 19 F. Supp. 3d 960, 977 (E.D. Cal. 2014) (claim for declaratory relief under § 113(g)(2) is

dependent on a valid § 107 claim); Adobe Lumber, Inc. v. Hellman, 658 F. Supp. 2d 1188, 1192-93 (E.D. Cal. 2009). (California's HSAA provides for civil actions for indemnity and contribution and expressly incorporates CERCLA's liability standards and defenses).

II. Motion to Strike Affirmative Defense

Federal Rule of Civil Procedure 12(f) authorizes the court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "[T]he function of a [Rule] 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." Sidney-Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983).

DTSC moves to strike Intervenors' seventh affirmative defense for contributory and comparative negligence, which reads in part:

> Any and all injury or damage was caused, in whole or in part, by Plaintiffs' own negligence, carelessness, lack of due care and fault, or by the negligence, carelessness, lack of due care and fault of Plaintiffs' predecessors in interest, their agents, employees or tenants and/or third parties, excluding Collins & Aikman.

(Docket No. 271 at 12.)

This court previously addressed similar affirmative defenses asserted by defendant Dobbas. The court first noted that CERCLA § 107(b) provides an exclusive list of defenses available in cost recovery actions under CERCLA. (Docket No. 43 at 18-19 (citing, inter alia, Cal. ex rel. Cal. Dep't of Toxic Substances Control v. Neville Chem. Co., 358 F.3d 661, 672 (9th

Cir. 2004);[3] Levin Metals Corp. v. Parr-Richmond Terminal Co., 799 F.2d 1312, 1317 (9th Cir. 1986)).) The court further noted that while DTSC also asserted a claim for civil penalties under the HSAA, that statute "expressly incorporates CERCLA's liability standards and defenses," and thus Dobbas could not assert defenses to the HSAA that it could not assert under § 107(a) of CERCLA. (Docket No. 43 at 19-20 (citing, inter alia, Adobe Lumber, Inc. v. Hellman, 658 F. Supp. 2d 1188, 1192 (E.D. Cal. 2009); Coppola v. Smith, 935 F. Supp. 2d 993, 1011 (E.D. Cal. 2013).)

This court then looked to Dobbas's affirmative defenses that DTSC's claims were barred or should be reduced because DTSC's own actions caused or aggravated the release of hazardous substances. The court struck those defenses, explaining:

> [C]ourts have consistently "rejected negligence on the part of the government as a defense to liability in CERCLA actions." Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc., 217 F. Supp. 2d 1028, 1037 (striking contributory fault defense and citing cases); see also United States v. Shell Oil Co., Civ. No. 91-589, 1992 WL 144296, at *9 (C.D. Cal. Aug. 9, 1992) ("[C]omparative fault and contributory negligence are not defenses to CERCLA actions." (citations omitted)). Section 9607(b) requires a defendant to prove that damages were "solely caused" by a third party, 42 U.S.C. § 9607(b), preventing Dobbas from asserting these kinds of comparative

[3] As explained by this court previously, the Neville court held that this exclusive list of defenses did not apply to suits for contribution under § 113(f) of CERCLA, but DTSC has not asserted a CERCLA claim for contribution in this case – it only asserts CERCLA claims for cost recovery and declaratory relief, in additional to the HSAA claim, which is not asserted against C&A Products. (Docket No. 43 at 19 (citing Neville, 358 F.3d at 672).) Further, "because declaratory relief claims are derivative of cost recovery," see Neville, 358 F.3d at 672, § 107(b)'s limitation on defenses applies to DTSC's claim for declaratory relief as well. (Docket No. 43 at 19).

negligence defenses."

(Docket No. 43 at 23.)

Intervenors provide no authority calling into question this prior determination, but rather argue for a different interpretation of the authorities relied on the court. The court sees no reason to depart from its prior determination regarding the availability of comparative fault or contributory negligence affirmative defenses. Because negligence by the government is not a defense to CERCLA, and correspondingly not a defense under the HSAA, the court will strike Intervenors' seventh affirmative defense.[4]

III. Motion to Strike Jury Demand

The Seventh Amendment entitles a party to a jury trial in all "[s]uits at common law" in which the amount in controversy exceeds twenty dollars, U.S. Const. amend. VII, but does not require a jury trial for claims that are exclusively equitable in nature, see Tull v. United States, 481 U.S. 412, 417-18 (1987). DTSC requests to strike Intervenors' demand for a jury trial, arguing that its claims are exclusively equitable in nature.

The court previously denied DTSC's similar motion to

[4] At oral argument, intervenors stated that their main reason for opposing the motion to strike their contributory and comparative negligence affirmative defense was their desire to fully assert their theory that C&A was not the cause of the contamination at the Elvira site. However, as the court noted in its 2014 decision, CERCLA does not bar defenses related to whether a defendant's conduct was the proximate cause of any release of hazardous substances. (Docket No. 43 at 20-21 (citations omitted).) Moreover, DTSC has not moved to strike Intervenors' other affirmative defenses, most of which pertain to causation.

strike the jury trial demand asserted by defendant Jim Dobbas, Inc. (Docket No. 43 at 12-14.) The court explained that there was substantial authority that CERCLA cost recovery actions provided restitution and were thus equitable in nature because they seek to restore parties who incur cleanup costs to the position they previously occupied. Accordingly, these courts have held that there is no right to a jury trial in CERCLA cost recovery actions. (Docket No. 43 at 13 (citing Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc., 217 F. Supp. 2d 1028, 1046 (C.D. Cal. 2002) (collecting cases); Wehner v. Syntex Corp., 682 F. Supp. 39, 40 (N.D. Cal. 1987)).)

However, the court noted that those authorities were called into question by the Supreme Court's statement in Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204 (2002), in which it cautioned that "not all relief falling under the rubric of restitution is equity." Id. at 212. Moreover, the Second Circuit has held that "in light of [Great-West], it is by no means clear that the restitution provided by § 9607(a) is equitable, rather than legal, in nature."[5] AMW Materials Testing, Inc. v. Town of Babylon, 584 F.3d 436, 452 (2d Cir. 2009).

Given this uncertainty and the need to err on the side of preserving the right to a jury, see Granite Rock Co. v. International Brotherhood of Teamsters, 649 F.3d 1067, 1069 (9th

[5] This court also noted the split among courts whether there was a right to a jury trial for § 9613(f) contribution claims. (Docket No. 43 at 13-14 (citing Hatco Corp. v. W.R. Grace & Co. Conn., 59 F.3d 400, 412 n.9 (3d Cir. 1995)(collecting cases).)

Cir. 2011), the undersigned determined that disposing of Dobbas' jury demand as to the CERCLA claims was inappropriate on a motion to strike. The court also denied the motion to strike the jury demand as to DTSC' claim under the HSAA because the civil penalties authorized under the HSAA are essentially legal in nature, as they go beyond restitution. (Docket No. 43 at 14-15 (citations omitted).)

DTSC argues that Intervenors' jury demand should be stricken given the authorities finding that cost recovery actions are in fact equitable in nature. DTSC also seeks to distinguish this court's prior denial of the motion to strike Dobbas' jury demand by noting that while it asserted an HSAA claims against Dobbas, it has not asserted a claim under the HSAA against C&A Products. However, the court's 2014 order addressed DTSC's HSAA claim separately from the CERCLA cost recovery and declaratory relief claims when discussing whether Dobbas was entitled to a jury. In the court's view, the uncertainty raised by Great-West and ANW Materials Testing alone was sufficient to warrant denial of the motion to strike the jury demand. Moreover, DTSC has provided no authorities decided after Great-West and ANW Materials Testing establishing that CERCLA cost recovery actions are strictly equitable in nature.

Here, Intervenors are defending the same CERCLA claims for cost recovery asserted by DTSC against Dobbas, and they also assert a counterclaim for cost recovery similar to Dobbas'. In light of the continued uncertainty as to whether CERCLA cost recovery actions are equitable in nature, the court will deny DTSC's motion to strike Intervenors' jury demand.

IT IS THEREFORE ORDERED that DTSC's motion to dismiss and motion to strike (Docket No. 279) are GRANTED IN PART. Intervenors' counterclaims are DISMISSED. Intervenor's seventh affirmative defense for contributory and comparative negligence is hereby STRICKEN. DTSC's motion to strike Intervenors' jury demand is DENIED.

Intervenors have twenty days from the date of this Order is signed to file amended counterclaims, if they can do so consistent with this Order.

Dated: July 31, 2023

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE