UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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| CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL and the TOXIC SUBSTANCES CONTROL ACCOUNT,<br><br>Plaintiffs,<br><br>v.<br><br>JIM DOBBAS, INC., a California corporation; CONTINENTAL RAIL, INC., a Delaware corporation; DAVID VAN OVER, individually; PACIFIC WOOD PRESERVING, a dissolved California corporation; and WEST COAST WOOD PRESERVING, LLC, a Nevada limited liability company,<br><br>Defendants,<br><br>AND RELATED COUNTERCLAIMS AND CROSS-CLAIMS. | CIV. NO. 2:14-595 WBS EFB<br><br>MEMORANDUM AND ORDER RE: MOTION TO DISMISS COUNTERCLAIMS AND MOTION TO STRIKE |

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Plaintiffs California Department of Toxic Substances Control ("DTSC") and the Toxic Substances Control Account

("TSCA") brought this action under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601 et seq., to recover cleanup costs from defendants Jim Dobbas, Inc. ("Dobbas"), Continental Rail, Inc., Pacific Wood Preserving, West Coast Wood Preserving, LLC ("WCWP"), and David van Over. Dobbas, van Over, and WCWP answered the Complaint. Dobbas's Answer includes counterclaims alleging that plaintiffs are liable to it for mismanaging the cleanup. Plaintiffs now move to dismiss Dobbas's counterclaims pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief can be granted and to strike several portions of the Answer filed by Dobbas pursuant to Rule 12(f).

## I. Factual and Procedural History

In 1972, Pacific Wood Preserving began conducting wood preserving operations at a facility in Elmira, California (the "Elmira facility"). (Compl. ¶¶ 13-14.) In 1979, Pacific Wood Preserving dissolved and was allegedly succeeded by WCWP, which relocated its wood preserving operations to Bakersfield, California. (Id.) From 1979 to 1982, Collins & Aikman Products Company ("CAPCO"), a successor to the Wickes Corporation, conducted wood preserving operations at the Elmira facility. (Id. ¶ 15.) In 1997, CAPCO sold the Elmira facility to Dobbas and Continental Rail, which in turn sold it to van Over in 2011 for two dollars. (Id. ¶¶ 19, 26.)

Plaintiffs allege that the operators of the Elmira facility released numerous hazardous substances, including arsenic, chromium, copper, and other constituents of wood

preserving chemicals. (Id. ¶ 16.) Between 1980 and 2005, CAPCO took a number of remedial actions under the oversight of DTSC, including excavating soil, installing an asphalt cap over contaminated soils, constructing a drainage system over contaminated areas of the site, monitoring groundwater, and installing a groundwater extraction and treatment system. (Id. ¶ 17.) In 2005, CAPCO declared bankruptcy and ceased remediation efforts. (Id. ¶ 21.)

In 2006, DTSC allegedly requested that Dobbas and Continental Rail resume remediation efforts at the Elmira facility. (Id. ¶ 22.) Plaintiffs allege that, while Dobbas agreed to perform certain remedial actions, both Dobbas and Continental Rail "failed and refused to perform most of the actions formerly conducted by [CAPCO] to address contamination at, around, and/or beneath the site." (Id. ¶ 23.) After Dobbas and Continental Rail sold the Elmira facility to van Over in 2011, DTSC issued an Imminent or Substantial Endangerment Determination Order and Remedial Action Order requiring Dobbas, Continental Rail, and van Over to conduct additional remediation activities. (Id. ¶ 27.) All three of those defendants allegedly failed to comply with these orders. (Id. ¶ 28.) As a result, plaintiffs have taken "response" actions from November 2005 to present at the Elmira facility, including efforts to repair and restart the groundwater extraction and treatment system, groundwater monitoring, investigation of soils, and implementation of the Removal Action Workplan. (Id. ¶ 29.) Plaintiffs allege they have incurred over $2.2 million in response costs as a result of defendants' failure to comply with

their orders. (Id. ¶¶ 29-31.)

Plaintiffs brought this action seeking cost recovery under CERCLA, 42 U.S.C. § 9607, declaratory relief under CERCLA, 42 U.S.C. § 9613(g), and damages, injunctive relief, and civil penalties under the Hazardous Substance Account Act ("HSAA"), Cal. Health & Safety Code §§ 25300 et seq. Dobbas and van Over timely answered the Complaint, demanded a jury trial and attorney's fees, and asserted numerous affirmative defenses. (Docket Nos. 23, 24.) In addition, Dobbas filed a counterclaim against DTSC alleging that it mismanaged cleanup efforts at the Elmira facility and seeking cost recovery and contribution under CERCLA, contribution and indemnity under HSAA, and declaratory relief under CERCLA and the Declaratory Judgment Act, 28 U.S.C. § 2201. (Docket No. 23.) Plaintiffs now move to dismiss Dobbas's counterclaim pursuant to Rule 12(b)(6) for failure to state a claim on which relief can be granted and to strike portions of Dobbas's Answer pursuant to Rule 12(f). (Docket No. 27.)

II. Motion to Dismiss

When considering a motion to dismiss a counterclaim under Rule 12(b)(6), the court uses an identical standard as that for dismissal of a claim. 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 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).

A. Dobbas's CERCLA Counterclaims

Dobbas's first and second counterclaims seek cost recovery and contribution from DTSC pursuant to §§ 9607 and 9613 of CERCLA. In order to assert such a claim, Dobbas 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 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). Dobbas asserts its counterclaims on the theory that DTSC mismanaged cleanup efforts at the remediation sites and is therefore liable as an "operator" under § 9607(a)(2). (Dobbas's Countercl. at 2-4.)

In light of the tautological definition provided by Congress,[1] the Supreme Court gave CERCLA's use of the term "operator" an expansive meaning: "someone who directs the workings of, manages, or conducts the affairs of a facility."

[1] The phrase "owner or operator" is defined as "any person owning or operating" a facility. 42 U.S.C. § 9601(20)(A)(ii).

United States v. Bestfoods, 524 U.S. 51, 66 (1998). In the context of CERCLA, the Court stated that "an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." Id. Several courts have found that government entities may fall within the scope of this language. See United States v. Township of Brighton, 153 F.3d 307, 315 (6th Cir. 1998) ("[A] government entity, by regulating the operation of a facility actively and extensively enough, can itself become an operator."); FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833, 840 (3rd Cir. 1994) (en banc) ("[T]he government can be liable when it engages in regulatory activities extensive enough to make it an operator of a facility . . . .").

Whether a government entity's involvement in remediation efforts subsequent to the emission of hazardous substances at a facility renders it an "operator" of the facility thus depends on whether it managed, directed, or conducted operations there.[2] Courts have struggled with the level of control necessary to support operator liability, some settling on a narrower "actual control" standard, see Brighton, 153 F.3d at 313-14 (requiring "affirmative acts" from a purported operator), while others have adopted a broader "authority to control"

[2] DTSC suggests in passing that it enjoys sovereign immunity from Dobbas's CERCLA counterclaims because it is an agency of the State of California. As the Ninth Circuit has made clear, however, CERCLA includes a "waiver of sovereign immunity [that] is coextensive with the scope of liability imposed by 42 U.S.C. § 9607." United States v. Shell Oil Co., 294 F.3d 1045, 1053 (9th Cir. 2002).

standard, see Nurad Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 842 (4th Cir. 1992) (requiring only the existence of authority to act). The Ninth Circuit has yet to crystalize the scope of post-Bestfoods operator liability, but it has noted the expansive reach of the term. See City of Los Angeles v. San Pedro Boat Works, 635 F.3d 440, 444 (9th Cir. 2011).

DTSC points to several cases employing a narrow definition of "operator," including Long Beach Unified Sch. Dist. V. Dorothy B. Godwin Cal. Living Trust, 32 F.3d 1364, 1367 (9th Cir. 1994) (requiring an operator to "play an active role in running the facility, typically involving hands-on, day-to-day participation") and United States v. Dart Indus., Inc., 847 F.2d 144, 146 (4th Cir. 1988) (requiring "hands-on" activities). These stricter constructions would help DTSC's contention that it falls outside the scope of operator liability. However, all these cases predate the Supreme Court's more-recent formulation in Bestfoods--the formulation this court must follow.

Several courts have dismissed claims against state agencies when there were no allegations that the state agency had any involvement with the facility other than remedial cleanup efforts. See, e.g., Dart Indus., 847 F.2d at 146; Stilloe v. Almy Bros., 782 F. Supp. 731, 736 (N.D.N.Y. 1992); United States v. W. Processing Co., 761 F. Supp. 725, 731 (W.D. Wash. 1991). But, again, these cases rest on the pre-Bestfoods understanding of the term "operator." See Dart Indus., 847 F.2d at 146 (requiring "hands on" activities that contributed to the release of hazardous waste); Stilloe, 782 F. Supp. at 735-36 (relying on pre-Bestfoods cases); W. Processing Co., 761 F. Supp. at 730-31

(relying on pre-Bestfoods cases). Accordingly, these cases lack persuasive force here.

Dobbas alleges sufficient facts to survive a motion to dismiss under Bestfoods. It claims that DTSC and its predecessor agency, the California Department of Health Services ("DHS"), have been involved in cleanup efforts at the Elmira facility for over three decades. (Countercl. ¶ 6.) During that time, Dobbas states that DTSC and DHS issued multiple remedial action plans that selected and implemented response actions at the Elmira facility. (Countercl. ¶¶ 7, 9.) Such actions could plausibly constitute management or direction of operations there.

Dobbas supports this contention with two exhibits, (Countercl. Exs. A-B), attached to its counterclaim and incorporated by reference. See Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001) (holding that courts may consider documents attached to a complaint in resolving a motion to dismiss). The first exhibit consists of a settlement agreement between the DHS and Wickes Forest Industries dated February 26, 1984. (Docket No. 23-2.) It sets forth various remedial obligations to be implemented by Wickes with respect to cleanup at the Elmira facility, and it specifically includes DHS's approval of plans for "stormwater management, the ground water treatment and contaminated soils removal and containment elements of the Plan." (See id.) The second exhibit consists of an Operation and Maintenance Agreement between DTSC and the Collins and Aikman Products Company ("CAPCO") dated March 12, 1996. (Docket No. 23-3.) That exhibit details some of DTSC's involvement in remedial action, including reviewing and approving

"Sampling Analysis Procedures," "Health & Safety Protections," "Removal/Disposal Procedures," and a "Remedial Action Plan." (Id.) While the second exhibit also states that DTSC did not "actually perform the Remedial Action," (id.), this does not preclude the document from supporting Dobbas's counterclaim. 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." Bestfoods, 524 U.S. at 66. These documents give rise to a plausible claim that DTSC's actions meet this standard, and Dobbas should have an opportunity to develop it further.

In its supporting memorandum, Dobbas also points to portions of DTSC's Complaint suggesting that, from November 2005 to the present, DTSC has 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." (See Compl. ¶¶ 21-29.) These factual allegations raise an inference that DTSC acted as an "operator" under § 9607(a)(2). Dobbas similarly supports its allegations of negligence, gross negligence, and/or intentional misconduct, (Countercl. ¶¶ 17, 26), and cognizable response costs, (Countercl. ¶¶ 21-22), with factual allegations from DTSC's complaint. (Dobbas's Opp'n at 11-13.)

Taken as a whole, the pleadings contain sufficient

facts to support Dobbas's counterclaims. See Twombly, 550 U.S. at 570 (requiring that a party plead "only enough facts to state a claim to relief that is plausible on its face"). The court must therefore deny DTSC's motion to dismiss Dobbas's first two counterclaims.

B. Dobbas's HSAA Counterclaim

The HSAA provides that "[a]ny person who has incurred removal or remedial action costs in accordance with this chapter or [CERCLA] may seek contribution or indemnity from any person who is liable pursuant to this chapter . . . ." Cal. Health & Safety Code § 25363(e). Under the HSAA, a "responsible party" or "liable person" refers to those individuals who are liable for cleanup costs under 42 U.S.C. § 9607(a). Id. § 25323.5(a)(1); see also Coppola v. Smith, 935 F. Supp. 2d 993, 1011 (E.D. Cal. 2013) (Ishii, J.) ("Although the HSAA is not identical to CERCLA, the HSAA expressly incorporates the same liability standards, defenses, and classes of responsible persons as those set forth in CERCLA." (citations omitted)); Castaic Lake Water Agency v. Whittaker Corp., 272 F. Supp. 2d 1053, 1084 n.40 (C.D. Cal. 2003) ("HSAA creates a scheme that is identical to CERCLA with respect to who is liable." (citations and internal quotation marks omitted)). As explained above, Dobbas has stated a claim under CERCLA. Because the HSAA mirrors CERCLA's scope of liability, the court must also deny DTSC's motion to dismiss Dobbas's HSAA counterclaim.

C. Dobbas's Claim for Declaratory Relief

Dobbas seeks declaratory relief under CERCLA's declaratory judgment provision, 42 U.S.C. § 9613(g)(2)--a

provision that is entirely derivative of its claim under § 9607 for response costs. See Coppola v. Smith, --- F. Supp. 2d ----, ----, Civ. No. 1:11-1257 AWI BAM, 2014 WL 1922400, at *11 (E.D. Cal. May 14, 2014) ("A claim for declaratory relief under . . . § 9613(g) is dependent upon a valid § 9607 claim."). Because Dobbas has stated a claim for cost recovery against DTSC under § 9607, it may also seek declaratory relief under CERCLA.

Dobbas likewise seeks declaratory relief under the Declaratory Judgment Act ("DJA") with respect to its § 9613(f) claim for contribution.[3] CERCLA does not address the availability of declaratory relief for a contribution claim, see 42 U.S.C. § 9613(g), but the Ninth Circuit permits such relief in order to support the policy considerations animating it. See Boeing Co. v. Cascade Corp., 207 F.3d 1177, 1191 (9th Cir. 2000) (allowing declaratory relief on a contribution claim as "consistent with the broader purposes of CERCLA"). The DJA authorizes a court to grant declaratory relief where there is "a

[3] DTSC argues that all declaratory relief under CERCLA must be funneled through § 9613(g), not the DJA. (Pls.'s Mem. at 10-11.) The court does not find this argument persuasive. DTSC fails to support its proposition with a case addressing declaratory relief on a contribution claim under § 9613(f). The case it cites addresses only cost recovery claims under §9607(a). See City of Colton v. Am. Promotional Events, Inc.-W., 614 F.3d 998, 1007 (9th Cir. 2010) (holding that declaratory relief for cost recovery under CERLCA § 107(a) must be asserted through CERCLA's "more detailed declaratory judgment provision"). Moreover, the Ninth Circuit appears to have analyzed declaratory judgment relating to a contribution claim under the standard of the DJA before. See Boeing Co. v. Cascade Corp., 207 F.3d 1177, 1192 (9th Cir. 2000) (using the "substantial controversy" language of DJA analysis). Other circuits have also permitted declaratory relief under the DJA for a CERCLA contribution claim. See, e.g., New York v. Solvent Chem. Co., 664 F.3d 22, 25 (2d Cir. 2011).

case of actual controversy within its jurisdiction," subject to certain exceptions. 28 U.S.C. § 2201(a). The court may "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Id. Because Dobbas has stated a claim for contribution under § 9613(f), it may pursue declaratory relief allocating future contribution. See Boeing, 207 F.3d at 1191-92. Accordingly, the court must deny DTSC's motion to dismiss these counterclaims.

III. Motion to Strike

Rule 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).

A. Dobbas's Jury Trial Demand

DTSC asks the court to strike Dobbas's demand for a jury trial. 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). In determining whether a party is entitled to a jury trial on a particular claim, a court must determine whether the claim resembles one historically tried to juries before the

merger of law and equity and, more importantly, whether the relief sought is equitable or legal in nature. Id. at 418; see also Chauffeurs, Teamsters, & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565 (2002) (noting that "[t]he second inquiry is the more important in our analysis" (citation omitted)). "In close cases, a court should err on the side of preserving the right to a jury trial." Granite Rock Co. v. Int'l Bhd. of Teamsters, 649 F.3d 1067, 1069 (9th Cir. 2011) (citation omitted).

Plaintiffs' first two claims seek cost recovery and declaratory relief under CERCLA. "Substantial case law supports the conclusion that CERCLA cost recovery actions are equitable in nature and thus that no jury trial is available." Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc., 217 F. Supp. 2d 1028, 1046 (C.D. Cal. 2002) (citing cases). Dobbas does not dispute this, although some question has arisen over the soundness of this assumption. See AMW Materials Testing, Inc. v. Town of Babylon, 584 F.3d 436, 452 (2d Cir. 2009) (citing Great-W. Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 212 (2002)) (explaining 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").[4] Instead, Dobbas points to its

[4] Because § 9607(a) cost-recovery actions seek to restore parties who incur cleanup costs to the position they previously occupied, "courts have characterized CERCLA claims as 'restitution' and have viewed them as actions in equity." Wehner v. Syntex Corp., 682 F. Supp. 39, 40 (N.D. Cal. 1987). In AMW, however, the Second Circuit rejected the hard-and-fast conclusion that, because § 9607(a) provides "restitution," it must be considered equitable for Seventh Amendment purposes. AMW, 584 F.3d at 451-52. The court pointed to the Supreme Court's

§ 9613(f) contribution counterclaim and the "split" among courts as to whether a right to jury trial exists for such claims. See Hatco Corp. v. W.R. Grace & Co. Conn., 59 F.3d 400, 412 n.9 (3d Cir. 1995) (collecting cases). In light of the uncertainty over whether the right to a jury exists under CERCLA, and the need to err on the side of preserving that right, see Granite Rock, 649 F.3d at 1069, the court finds disposal of Dobbas's jury demand for these claims inappropriate on a motion to strike.

Plaintiffs also assert a claim under the HSAA, which includes a request for civil penalties. Whether or not this claim requires a jury trial turns on whether civil penalties under the HSAA are legal or equitable in nature. For instance, the Supreme Court has held that civil penalties under the Clean Water Act ("CWA") require a jury trial because those penalties were traditionally only available in actions at law and were designed to punish and deter pollution, rather than to force them to disgorge their profits or to make victims of pollution whole. Tull, 481 U.S. at 422-24. By contrast, civil penalties available under other statutes do not require a jury trial because those penalties constitute equitable relief that is incidental to the enforcement of the statutory scheme at issue. See, e.g., DiPirro v. Bondo Corp., 153 Cal. App. 4th 150, 182-84 (1st Dist. 2007) (no right to jury trial in action seeking civil penalties under

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discussion of restitution in Great-West, in which it cautioned that "not all relief falling under the rubric of restitution is equity." 532 U.S. at 212. Ultimately, the AMW court eschewed adopting a legal, rather than equitable, conception of cost recovery because the court concluded that the plaintiff was entitled to judgment as a matter of law, rendering the issue moot. AMW, 584 F.3d at 452.

Proposition 65); Shabaz v. Polo Ralph Lauren Corp., 586 F. Supp. 2d 1205, 1211-12 (C.D. Cal. 2008) (no right to jury trial in action seeking civil penalties under Song-Beverly Credit Card Act).

As in Tull, the civil penalties authorized by HSAA are essentially legal in nature. Like the CWA, the HSAA "does not direct that the 'civil penalty' be imposed solely on the basis of equitable determinations." Tull, 481 U.S. at 422. Instead, it simply authorizes a maximum penalty of $25,000 per day, Cal. Health & Safety Code § 25359.2, which suggests that the penalty is of a legal character, see Tull, 481 U.S. at 422 (holding civil penalty was legal in part because the CWA "simply imposes a maximum penalty of $10,000 per day of violation").

The civil penalties available under the HSAA are also legal in nature because they go beyond restitution; instead, they serve as "penalty provisions designed to coerce cooperation and compliance." Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co., 65 Cal. Rptr. 2d 127, 132 (2d Dist. 1997), rev'd on other grounds, 18 Cal. 4th 857 (1998). In fact, the structure of the HSAA contains a separate provision that allows DTSC to recover up to three times the amount of any costs it incurs "as a result of the failure to take proper action," Cal. Health & Safety Code § 25359(a), suggesting that its civil penalty provision is designed to provide an additional measure of retribution and deterrence and is not itself an equitable remedy. See Tull, 481 U.S. at 425 (holding that the civil penalty provision authorized legal relief because it was a "separate and distinct statutory provision" from those authorizing equitable relief).

Accordingly, because the relief plaintiffs seek under the HSAA is legal in nature, see id. at 418, the court must also deny plaintiffs' motion to strike Dobbas's jury demand with respect to the HSAA claim.

B. Prayer for Attorney's Fees

CERCLA "does not provide for the award of private litigants' attorney's fees associated with bringing a cost recovery action." Key Tronic Corp. v. United States, 511 U.S. 809, 819 (1994); see also Alco, 217 F. Supp. 2d at 1046 (noting that CERCLA does not "permit an award of attorney's fees by a prevailing defendant in a CERCLA cost recovery action" and striking prayer for attorney's fees). Nor does the HSAA provide for an award of attorney's fees to a prevailing defendant or otherwise displace the longstanding rule that, "[i]n the absence of some special agreement, statutory provision, or exceptional circumstances, attorney's fees are to be paid by the party employing the attorney." Prentice v. N. Am. Title Guar. Corp., 59 Cal. 2d 618, 620 (1963) (citations omitted). Accordingly, the court must grant plaintiffs' motion to strike defendants' prayers for attorney's fees.

C. Dobbas's Affirmative Defenses

Affirmative defenses can be challenged as a matter of pleading or as a matter of law. See Dodson v. Strategic Restaurants Acquisition Co. II, LLC, 289 F.R.D. 595, 603 (E.D. Cal. 2013) (Karlton, J.). An affirmative defense fails as a matter of pleading if it does not give "fair notice of what the [affirmative defense] is and the grounds upon which it rests."

Id. (quoting Twombly, 550 U.S. at 555).[5] An affirmative defense fails as a matter of law if it "lacks merit under any set of facts the defendant might allege." Id. (citation and quotation marks omitted). "[W]hen the affirmative defense is purely a question of law, an early adjudication of that question of law will expedite the litigation and facilitate the administration of justice . . . ." Grason Elec. Co. v. Sacramento Mun. Utility Dist., 526 F. Supp. 276, 281 (E.D. Cal. 1981) (Ramirez, J.).

Plaintiffs assert three causes of action: (1) recovery of response costs under § 107(a) of CERCLA, 42 U.S.C. § 9607(a), (2) declaratory relief under § 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), and (3) failure to comply with imminent or substantial determination order and remedial action order under HSAA, Cal. Health & Safety Code §§ 25355.5, 25358.3, 25359, 25359.2, 25367. Dobbas initially responded with forty-four affirmative defenses. (See Dobbas's Answer at 10-18.) Dobbas now concedes that many of its affirmative defenses are inappropriate, but it argues that nine of them[6] should not be

[5] The court acknowledges the disagreement among district courts in the Ninth Circuit--including between different judges within this district--over whether affirmative defenses must meet the plausibility pleading standard of Bell Atlantic Corporation v. Twombly, 550 U.S. 554 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009). The court need not reach this question here, as DTSC contests only the legal sufficiency of Dobbas's defenses. (Pls.' Mem. at 13-21.) And in any case, affirmative defenses that are insufficiently pled would fail to satisfy either standard.

[6] These defenses include Dobbas's third ("PLAINTIFFS are Responsible Parties"), sixth ("Acts or Omissions of PLAINTIFFS"), sixteenth ("Failure to Mitigate"), seventeenth ("Lack of Causation"), twenty-seventh ("Aggravation of Harm"), twenty-ninth ("No Liability for Others' Releases"), thirty-sixth ("Reliance"), thirty-seventh ("Independent, Intervening, and/or Superseding Claims"), and thirty-ninth ("Undue Delay") affirmative defenses.

stricken because either (1) plaintiff asserts claims outside of § 9607(b)'s constraints--and thus, Dobbas's may raise additional defenses to these claims--or (2) Dobbas's defenses fit within the constraints of § 9607(b). (Dobbas's Opp'n at 17.)

1. Subsection 9607(b)'s Restrictions Apply to All Plaintiffs' Claims

Subsection 9607(b) governs defenses to liability in cost recovery actions under CERCLA. That subsection provides that no liability attaches if the release or threatened release of a hazardous substance was caused solely by: (1) "an act of God," (2) "an act of war," (3) "an act or omission of a third party other than an employee or agent of the defendant" if the defendant sufficiently establishes that "(a) he exercised due care . . . and (b) he took precautions against foreseeable acts or omissions of any such third party." 42 U.S.C. § 9607(b).

The Ninth Circuit has emphasized that these "statutory defenses are exclusive" and "that the three statutory defenses are the only ones available" in cost recovery actions under CERCLA. Cal. ex rel. Cal. Dep't of Toxic Substances Control v. Neville Chem. Co., 358 F.3d 661, 672 (9th Cir. 2004); see also Levin Metals Corp. v. Parr-Richmond Terminal Co., 799 F.2d 1312, 1317 (9th Cir. 1986) ("[I]n order to state a claim for a declaration of nonliability [under CERCLA], the declaratory judgment plaintiff must base its claim of nonliability on one or more of the statutory affirmative defenses."). The exclusivity of these defenses reflects the unique nature of CERCLA's statutory scheme, under which "[l]iability is strict, without regard to fault, and is imposed jointly and severally unless a

defendant can demonstrate that the harm is 'divisible.'" Alco Pacific, 217 F. Supp. 2d at 1034.

To be clear, the court in Neville concluded that this limitation did not extend to suits for contribution under § 133(f) of CERCLA, 42 U.S.C. § 9613(f)(1), because that provision explicitly states that "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." Neville, 358 F.3d at 672 (quoting 42 U.S.C. § 9613(f)(1) (quotation marks omitted)). But plaintiffs have not asserted a contribution claim under § 113(f). Plaintiffs assert only two CERCLA causes of action: a cost recovery action under § 107(a) and a claim for declaratory relief under § 113(g). Because declaratory relief claims are derivative of cost recovery, the Neville court treated them identically. See id. at 672 ("The provisions of CERCLA governing suits for recovery of costs, 42 U.S.C. §§ 9607(a) and 9613(g)(2), make no such reference to equitable factors."). According, the limitations of § 9607(b) prevent Dobbas from asserting any affirmative defense not listed within that section against plaintiffs' first two claims.

Dobbas nonetheless argues that it may assert additional affirmative defenses against plaintiffs' third cause of action for civil penalties under the HSAA, (See Compl. at 9-11), because § 9607(b) does not apply to the HSAA. Although the HSAA is not identical to CERCLA, "California's HSAA . . . expressly incorporates CERCLA's liability standards and defenses." Adobe Lumber, Inc. v. Hellman, 658 F. Supp. 2d 1188, 1192 (E.D. Cal.

2009); see also Coppola, 935 F. Supp. 2d at 1011 ("[T]he HSAA expressly incorporates the same liability standards, defenses, and classes of responsible persons as those set forth in CERCLA.") (emphasis added). Dobbas's attempt to assert additional defenses here contradicts HSAA's statutory language, which explicitly restricts available defenses to those available under CERCLA, 42 U.S.C. § 9607(b). See Cal. Health & Safety Code § 25323.5(b) ("For purposes of this chapter, the defenses available to a responsible party or liable person shall be those defenses specified in Sections 101(35) and 107(b) of the federal act (42 U.S.C. Secs. 9601(35) and 9607(b))."). This provision makes no reference to a distinction between cost recovery claims and any other kind of claims. It mandates the restrictions of § 9607(b), regardless of the claim. Accordingly, Dobbas cannot assert defenses to the HSAA that it cannot assert under § 107(a) of CERCLA.

2. Affirmative Defenses Fitting Within § 9607(b)

Dobbas argues that several of its challenged affirmative defenses fit within the scope of § 9607(b). (See Dobbas's Opp'n at 17-18.) For some defenses, this may be true. Dobbas asserts several defenses related to causation: (1) that none of its acts or omissions "is the cause in fact or proximate cause of any costs or damages alleged in the Complaint," (Dobbas's Answer at 13), (2) that it "is not liable for any costs that were not incurred as a direct result of [its] hazardous substance releases," (id. at 15), and (3) that any of plaintiffs' injuries "were the result of independent, intervening, or superseding forces and/or actions or omissions of third parties

over which [it] had no control . . . ," (id. at 17).

Although these defenses do not precisely track the statutory defenses set forth in § 9607(b), this court has previously suggested that defenses of this nature are applicable in CERCLA cost recovery actions because they relate to whether the release of hazardous substances was "caused solely" by the act or omission of a third party under § 9607(b)(3). See Adobe Lumber, 658 F. Supp. 2d at 1204 ("If the defendant's release was not foreseeable, and if its conduct--including acts as well as omissions--was 'so indirect and insubstantial' in the chain of events leading to the release, then the defendant's conduct was not the proximate cause of the release and the third party defense may be available . . . ."); Whittaker Corp., 272 F. Supp. 2d at 1082 (quoting Lincoln Props., Ltd. v. Higgins, 823 F. Supp. 1528, 1542 (E.D. Cal. 1992) (Levi, J.) (noting that CERCLA's statutory defenses "incorporate[] the concept of proximate or legal cause")). Accordingly, because these defenses relate to whether Dobbas's conduct was the proximate cause of any release of hazardous substances, the court will deny plaintiffs' motion to strike these affirmative defenses.

The remaining defenses go beyond the scope of § 9607(b). They can be dealt with in three groups. First, Dobbas asserts two defenses that are essentially equitable in nature: (1) that it acted in reliance on DTSC's directions, (Dobbas's Answer at 17), and (2) that any relief would be "inappropriate and inequitable" in light of DTSC's delay in initiating remedial actions, (id.). But as numerous courts have made clear, "traditional equitable defenses" of the sort Dobbas

asserts are unavailable under CERCLA. Neville, 358 F.3d at 672; see also Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1078 n.18 (9th Cir. 2006); Alco Pacific, 217 F. Supp. 2d at 1040 ("[T]raditional equitable defenses to liability are not available to defendants in CERCLA cost recovery actions under § 9607."). The court will therefore grant plaintiffs' motion to strike these defenses.

Second, Dobbas raises a failure-to-mitigate defense. (Dobbas's Answer at 13.) But because CERCLA does not permit defendants to avoid liability by "challeng[ing] . . . the reasonableness of the government's clean-up activities," CERCLA does not authorize a failure-to-mitigate defense. Alco Pacific, 217 F. Supp. 2d at 1041. Moreover, while Dobbas cites United States v. Iron Mountain Mines, Inc. in support of the proposition that such a defense is available, the court actually held the exact opposite: that this defense is unavailable because "CERCLA does not impose a duty upon the government to mitigate response costs.'" 812 F. Supp. 1528, 1543 (E.D. Cal. 1992) (Schwartz, J.) (quoting United States v. Kramer, 757 F. Supp. 397, 407 (D.N.J. 1991)). The court will also grant plaintiffs' motion to strike this defense.

Third, Dobbas asserts that plaintiffs' claims against Dobbas "are barred or should be reduced in proportion to [plaintiffs'] own liability," (Dobbas's Answer at 10), that "[a]ny release or threatened release of a hazardous substance, any damages allegedly resulting therefrom, and any response costs or expenditures allegedly incurred as a result thereof, were caused in whole or in part by acts and/or omissions by

[plaintiffs]," (id. at 11), and that plaintiffs' actions "caused" or "aggravated" the release of hazardous substances and that "any recovery . . . under the complaint should be barred or reduced accordingly," (id. at 14-15). But courts have consistently "rejected negligence on the part of the government as a defense to liability in CERCLA actions." Alco Pacific, 217 F. Supp. 2d at 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 negligence defenses. Accordingly, the court will grant plaintiffs' motion to strike these affirmative defenses.

IT IS THEREFORE ORDERED that:

(1) DTSC's motion to dismiss be, and the same hereby is, DENIED;

(2) plaintiffs' motion to strike the jury demand of defendant Jim Dobbas, Inc., be, and the same hereby is, DENIED;

(3) plaintiffs' motion to strike the prayer for attorney's fees of defendant Jim Dobbas, Inc., be, and the same hereby is, GRANTED;

(4) plaintiffs' motion to strike Jim Dobbas, Inc.'s affirmative defenses is DENIED with respect to the seventeenth, twenty-ninth, and thirty-seventh affirmative defenses and GRANTED in all other respects;

Jim Dobbas, Inc., has twenty days from the date this

Order is signed to file an amended answer or counterclaim, if it can do so consistent with this Order.

Dated: September 16, 2014

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE