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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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CITY OF WEST SACRAMENTO,
CALIFORNIA; and PEOPLE OF THE
STATE OF CALIFORNIA,

Plaintiffs,

v.

R AND L BUSINESS MANAGEMENT, a
California corporation, f/k/a
STOCKTON PLATING, INC., d/b/a
CAPITOL PLATING INC., a/k/a
CAPITOL PLATING, a/k/a CAPITAL
PLATING; CAPITOL PLATING, INC.,
a dissolved California
corporation; et al.,

Defendants.

No. 2:18-cv-00900 WBS EFB

MEMORANDUM AND ORDER RE:
THIRD-PARTY DEFENDANT YOLO
COUNTY'S MOTION FOR SUMMARY
JUDGMENT

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Plaintiffs City of West Sacramento, California and the
People of the State of California (collectively, "the City")
brought this action to address toxic levels of soil and
groundwater resulting from the release of hazardous substances at

1 a property once occupied by a metal plating facility at 319 3rd
2 Street, West Sacramento, California. (See Third Am. Compl.
3 ("TAC") (Docket No. 45).) The City sued a number of defendants
4 under the Comprehensive Environmental Response, Compensation, and
5 Liability Act ("CERCLA") section 107(a), 42 U.S.C. § 9607(a), as
6 well as other state and federal statutes, to recover the response
7 costs associated with cleaning up the hazardous substances. (See
8 generally id.)

9 Two of the defendants, R and L Business Management and
10 John Clark (collectively, "R&L"), have brought a single third-
11 party claim against the County of Yolo ("Yolo County") for
12 contribution under CERCLA § 113(f)(1). (See Am. Third-Party
13 Compl. ("Am. Third-Party Compl.") (Docket No. 116).) Yolo County
14 has filed a motion for summary judgment on that third-party
15 claim. (See Cty. of Yolo's Mem. P. & A. ("County's MPA") (Docket
16 No. 207-1).)

17 The parties' dispute centers around the presence and
18 source of lead contamination at 319 3rd Street. (See id.; see
19 Defs.' Opp'n to Cty. of Yolo's Mot. Summ. J. ("Defs.' Opp'n")
20 (Docket No. 213).) Yolo County argues that no genuine issue of
21 material fact exists because R&L cannot produce evidence showing
22 that Yolo County ever disposed of any lead and, even if it could,
23 lead is not a contaminant for which the City is seeking recovery
24 under CERCLA in its underlying action against R&L. (See County's
25 MPA; Cty. of Yolo's Reply at 5-8.) R&L argues that evidence in
26 the record could allow a reasonable trier of fact to conclude
27 that lead that was released by Yolo County was deposited or
28 migrated onto 319 3rd Street and that this lead will cause R&L to

1 incur response costs in its underlying action with the City.

2 (See Defs.' Opp'n.)

3 I. Factual and Procedural Background

4 The parcel that forms the basis of the City's lawsuit
5 against R&L is located at 319 3rd Street in West Sacramento,
6 California. (See TAC ¶ 4.) The City's TAC alleges that R&L owns
7 the property at 319 3rd Street and formerly operated the
8 electroplating business that operated there between 1973 and
9 1985. (TAC ¶¶ 14, 18.) The TAC alleges that contaminants
10 including nickel, copper, zinc, chromium, and volatile organic
11 compounds including 1,2 DCA that originated from the
12 electroplating business on the parcel have migrated and are
13 migrating in the soil and groundwater to areas beyond the
14 property line, creating "an ever-growing plume of contamination"
15 (the "319 Site"). (See TAC ¶¶ 14, 18, 57-58.) The TAC seeks to
16 hold the third-party plaintiffs liable for necessary response
17 costs and cleanup of this contamination. (See id.)

18 Yolo County has never owned 319 3rd Street or been
19 involved in operations there. (See Decl. of J. Hartman King
20 ("Hartman King Decl."), Ex. A, B, C, (Docket No. 207-5).) From
21 at least 1914 until 1987, Yolo County owned two parcels North of
22 319 3rd Street: 305 3rd Street, which sits at the corner of 3rd
23 Street and C Street, and a single parcel spanning two street
24 addresses on C Street, 221/225 C Street (collectively, the
25 "Former County Properties"). (Id.) In 1987, Yolo County
26 conveyed the Former County Properties to the Redevelopment Agency
27 of the City of West Sacramento via quitclaim deed. (Hartman King
28 Decl., Ex. B.)

1 Yolo County constructed three buildings on the Former
2 County Properties during its period of ownership: a town hall in
3 1915, an office building in 1956, and a jail in 1957. (See Decl.
4 of Ryan Matthews ("Matthews Decl."), Exs. A, B, C (Docket No.
5 213-3, 213-4, 213-5, 213-6).) Contracts signed by Yolo County
6 for the construction of all three of these buildings called for
7 the use of lead paint. (See id.) These three buildings have all
8 been demolished, and the Former County Properties are currently
9 used by the City of West Sacramento as a public parking lot.
10 (See Hartman King Decl., Ex. C, Expert Rebuttal Report of Joseph
11 Turner at 9 ("Turner Report") (Docket No. 207-5).)

12 Another parcel, 317 3rd Street ("the Firehouse
13 Property"), lies between the Former County Properties and 319 3rd
14 Street. (See Turner Report at Ex. 2.) The Firehouse Property
15 houses the "Washington Firehouse" building and was owned by local
16 fire districts until 1987. (See Hartman King Decl. ¶6; Am.
17 Third-Party Compl. ¶ 12.) The Washington Firehouse still stands
18 on the property, which is currently owned by ECO Green, LLC.
19 (Id.)

20 Over the past several decades, a number of
21 environmental consultants and the California Department of Toxic
22 Substances Control ("DTSC") have conducted investigations of the
23 319 Site and surrounding properties. (See Matthews Decl., Ex. D,
24 Expert Report of Dr. Adam Love at 12-13 ("Love Report") (Docket
25 No. 213-8).) One such investigation was conducted by Wallace and
26 Kuhl Associates ("WKA") in 2007. (See Hartman King Decl., Ex. D,
27 Wallace & Kuhl Assocs. Report (2007) ("WKA Report") (Docket No.
28 207-5).) WKA collected 75 soil samples at 25 locations at the

1 Former County Properties and the Firehouse Property, and found
2 that 23 of the samples exceeded regulatory criteria for lead.
3 (Id.) WKA's report notes that a prior investigation, conducted
4 by URS Corporation in 2004, had also detected a high
5 concentration of lead in a composite sample taken "on the
6 northeast portion" of the properties. (See id. at 14.) WKA also
7 found ceramic shards, brick, nails, and bone material beneath the
8 asphalt paving on portions of the properties, "possibly
9 suggesting that fill material is present onsite." (See id.)

10 Based largely on information in the WKA Report, on July
11 22, 2019, the third-party plaintiffs filed a third-party
12 complaint against Yolo County and ECO Green, LLC, for
13 contribution pursuant to 42 U.S.C. § 9613(f)(1), equitable
14 indemnify, equitable contribution, and declaratory relief. (See
15 Third-Party Complaint ("Third-Party Compl.") (Docket No. 90).)
16 The Third-Party Complaint alleged that "lead and other toxic
17 chemicals were discharged" from 305 3rd Street and 317 3rd Street
18 "onto and into the soil" beneath those parcels. (See id. at
19 ¶ 23.) On October 28, 2019, the court dismissed all four of
20 R&L's claims without prejudice because R&L did not seek to hold
21 Yolo County liable for the contamination at issue in the City's
22 TAC.¹ (See Docket No. 115.)

23
24 ¹ Specifically, the court dismissed R&L's claim for
25 contribution under CERCLA section 113(f)(1) because R&L's claim
26 stemmed only from alleged lead contamination at 305 3rd Street,
27 whereas the City's underlying TAC sought damages for the release
28 of nickel, copper, zinc, chromium, and 1,2 DCA at 319 3rd Street.
(See Docket No. 115.) Because R&L did not seek to hold Yolo
County liable for the contamination at issue in the City's TAC,
the court held that the third-party plaintiffs could not maintain
their contribution claim against Yolo County. (See id.)

1 The third-party plaintiffs proceeded to file an amended
2 third-party complaint seeking only contribution under CERCLA
3 section 113(f) against Yolo County and ECO Green, LLC.² (See Am.
4 Third-Party Compl.) The Amended Third-Party Complaint added
5 allegations that Yolo County owned the property "generally
6 located" at 305 3rd Street, that other toxic chemicals, including
7 zinc, cadmium, and chromium, "were discharged onto and into the
8 soil" at the County property and the Firehouse Property, and that
9 "historic fill material" containing "heavy metals . . . including
10 . . . zinc, cadmium, chromium, and lead" was imported, dumped,
11 released, and/or spread from the County property and the
12 Firehouse Property onto other properties, including 319 3rd
13 Street. (See Am. Third-Party Compl. ¶¶ 38, 44.) The Amended
14 Third-Party Complaint also alleges that releases of fill material
15 from the County property and the Firehouse Property contained
16 contaminants that had commingled with contaminants at 319 3rd
17 Street. (See id.) Subsequently, the court denied Yolo County's
18 Motion to Dismiss, holding that R&L's additional allegations had
19 remedied the issues that led the court to dismiss their third-
20 party complaint. (See Docket No. 136.)

21 After the third-party plaintiffs filed their Amended
22

23 ² Shortly thereafter, ECO Green, LLC and the City reached
24 an agreement for the settlement of all claims and disputes
25 between them in this matter on or about June 22, 2020. (Order re
26 Mot. for Determination of Good Faith Settlement at 2 (Docket No.
27 174).) The court approved the parties' settlement, finding it to
28 be "procedurally and substantively fair, reasonable, and
consistent with CERCLA's objectives," and dismissed R&L's Amended
Third-Party Complaint as to ECO Green, LLC with prejudice. (See
id.)

1 Third-Party Complaint, the court granted the City's Motion for
2 Summary Judgment against R&L, holding that R&L is liable for the
3 contamination at the 319 Site under CERCLA section 107(a). (See
4 Docket No. 125.) The court then denied R&L's request for
5 divisibility, holding that it is jointly and severally liability
6 for the CERCLA violations that have occurred at the 319 Site.
7 (See Mem. & Order re Defs.' Divisibility Defense at 28
8 ("Divisibility Order") (Docket No. 203).)

9 II. Legal Standard

10 Summary judgment is proper "if the movant shows that
11 there is no genuine dispute as to any material fact and the
12 movant is entitled to judgment as a matter of law." Fed. R. Civ.
13 P. 56(a). "By its very terms, this standard provides that the
14 mere existence of some alleged factual dispute between the
15 parties will not defeat an otherwise properly supported motion
16 for summary judgment; the requirement is that there be no genuine
17 issue of material fact. Anderson v. Liberty Lobby, Inc., 477
18 U.S. 242, 248 (1986) (emphasis in original). A "material" fact
19 is "one that might affect the outcome of the suit under the
20 governing law," while a "genuine" issue is one where the
21 "evidence is such that a reasonable jury could return a verdict
22 for the nonmoving party." Id.

23 The party moving for summary judgment bears the initial
24 burden of establishing the absence of a genuine issue of material
25 fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The
26 moving party can satisfy this burden by (1) presenting evidence
27 that negates an essential element of the non-moving party's case
28 or (2) demonstrating that the non-moving party cannot provide

1 evidence to support an essential element upon which it will bear
2 the burden of proof at trial. Id. at 322-23. If the movant can
3 satisfy this initial burden, the burden then shifts to the non-
4 moving party to produce specific facts beyond the pleadings to
5 show the existence of genuine disputes of material fact.

6 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
7 586-87 (1986). Any inferences drawn from the underlying facts
8 must be viewed in the light most favorable to the party opposing
9 the motion. Id. at 587.

10 III. Discussion

11 CERCLA Section 113(f) (1) allows a party to "seek
12 contribution from any other person who is liable or potentially
13 liable under Section 107(a), during or following any civil action
14 under section 106 of this title or under section 107(a) of this
15 title." 42 U.S.C. § 9613(f) (1). A party may assert a
16 contribution claim only "during or following" a civil action
17 under CERCLA section 106 or 107(a) to which they are a party.
18 Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 168
19 (2004). If a private party has not been sued, the party cannot
20 obtain contribution under section 113(f) (1). Id.

21 Here, the third-party plaintiffs are parties to an
22 action brought against them by the City under CERCLA section
23 107(a). (See generally TAC; Def. John Clark's Answer to TAC
24 (Docket No. 48); Def. R&L's Answer to TAC (Docket No. 49).) They
25 are therefore authorized under CERCLA section 113(f) (1) to seek
26 contribution from "any other person who is liable or potentially
27 liable under section 107(a)." 42 U.S.C. § 9613(f) (1).

28 To establish Yolo County's liability or potential

1 liability under CERCLA section 107(a), the third-party plaintiffs
2 must satisfy four elements: "(1) the site on which the hazardous
3 substances are contained is a 'facility' under CERCLA's
4 definition of that term; (2) a 'release' or 'threatened release'
5 of any 'hazardous substance' from the facility has occurred; (3)
6 such 'release' or 'threatened release' has caused the plaintiff
7 to incur response costs that were 'necessary' and 'consistent
8 with the national contingency plan,'; and (4) the defendant is
9 within one of four classes of persons subject to the liability
10 provisions of Section 107(a)." Carson Harbor Vill., Ltd. v.
11 Unocal Corp., 270 F.3d 863, 870-71 (9th Cir. 2001) (internal
12 citations omitted) (quoting 3550 Sevens Creek Assocs. v. Barclays
13 Bank of Cal., 915 F.2d 1355, 1358 (9th Cir. 1990)). Here, the
14 third-party plaintiffs seek to hold Yolo County liable as the
15 second "class[] of person" set out in section 107(a): "any person
16 who owned or operated a facility at the time the hazardous
17 substances were disposed of." 42 U.S.C. § 9607(a).

18 The Supreme Court has made clear that a contribution
19 action under section 113(f)(1) may only follow from an action
20 under section 107(a). See Aviall, 543 U.S. at 168. The third
21 element set out in Carson Harbor therefore requires the third-
22 party plaintiffs to show that the release or threatened release
23 of hazardous materials by Yolo County for which they seek
24 contribution must be one that will "cause[] [them] to incur
25 response costs" in the underlying section 107(a) action brought
26 against the them by the City. See id.; Carson Harbor, 270 F.3d
27 at 870-71.

28 Yolo County does not appear to dispute that the Former

1 County Properties or the buildings formerly on them fall under
2 CERCLA's broad definition of "facility." See 42 U.S.C. § 9601(9)
3 (defining facility as "any building, structure, installation . .
4 . or any site or area where a hazardous substance has been
5 deposited, stored, disposed of, or placed"). Therefore,
6 only the second, third, and fourth Carson Harbor elements are at
7 issue. See Carson Harbor, 270 F.3d at 870-71.

8 Yolo County first argues that the third-party
9 plaintiffs cannot carry their burden of showing that a genuine
10 issue of material fact exists under the second and fourth
11 elements set out in Carson Harbor: whether a "release" or
12 "threatened release" of any "hazardous substance" occurred from
13 the Former County Properties during Yolo County's ownership.
14 (See County's MPA at 9-11.) Second, Yolo County argues that,
15 even assuming the existence of such releases, the third-party
16 plaintiffs cannot establish a genuine issue of material fact as
17 to the third element set out in Carson Harbor: whether those
18 releases of hazardous substances will cause the third-party
19 plaintiffs to incur response costs in the underlying section
20 107(a) action brought against them by the City. (See County's
21 MPA at 11-14.)

22 For the reasons that follow, the court rejects Yolo
23 County's arguments and finds that R&L has met its burden of
24 establishing genuine issues of material fact as to each element
25 of CERCLA section 107(a) liability and thus for its claim for
26 contribution under CERCLA section 113(f) (1). See Aviall, 543
27 U.S. at 168.

28 A. Whether a Genuine Issue of Fact Exists as to the Second

1 and Fourth Elements of Section 107(a) Liability

2 To establish the second and fourth elements of section
3 107(a) liability, R&L must show that a "release" or "threatened
4 release" of a "hazardous substance" occurred from the Former
5 County Properties or buildings on those properties during the
6 period of Yolo County's ownership. See Carson Harbor, 270 F.3d
7 at 870-71. CERCLA defines the term "release" broadly, as any
8 "spilling, leaking, pumping, pouring, emitting, emptying,
9 discharging, injecting, escaping, leaching, dumping, or disposing
10 into the environment." 42 U.S.C. § 9601(22).

11 The only "hazardous substance" that R&L argues has been
12 released onto or from the Former County Properties is lead. (See
13 Defs.' Opp'n at 4-5.) See 40 C.F.R. § 302.4 (listing lead as a
14 "hazardous substance" under CERCLA). Record evidence reveals
15 that lead has been detected in soil at the Former County
16 Properties during prior investigations by environmental
17 consultants. (See Matthews Decl., Ex. D, Expert Report of Dr.
18 Adam Love at 10-11 ("Love Report") (Docket No. 213-8).) In 2007,
19 WKA detected lead in concentrations that exceeded regulatory
20 criteria in 23 soil samples taken at the Firehouse Property and
21 the Former County Properties. (See WKA Report at 14.) WKA noted
22 in its report that previous investigations had revealed high
23 concentrations of lead in a composite sample taken "on the
24 northeast portion" of the sampling area, which would be on or
25 near 221/225 C Street, the northeastern-most Former County
26 Property. (See id.)

27 Yolo County does not dispute that prior investigations
28

1 have revealed the presence of lead "on the eastern edge of
2 221/225 C Street," one of the Former County Properties. (See
3 County's Statement of Uncontroverted Facts ¶ 15 ("SUF") (Docket
4 No. 207-2).) Rather, Yolo County argues that there is no
5 evidence in the record that shows that any of this lead was
6 released onto or from the Former County Properties during the
7 period of Yolo County's ownership. (See County's MPA at 9.)
8 Yolo County cites the report of its rebuttal expert, Joseph
9 Turner, which concludes that the record "does not contain any
10 evidence that Yolo County placed any lead-impacted soil on any of
11 the [F]ormer County [P]roperties or that any other disposal of
12 hazardous substances occurred on these properties" while Yolo
13 County was the owner. (See Turner Report at 10-11.) Yolo County
14 also points to deposition testimony of the City's expert, Dr.
15 Anne Farr, R&L's expert, Dr. Adam Love, and R&L's Rule 30(b)(6)
16 witnesses, Richard Leland and John Clark, all of whom testified
17 that they were not aware of any instances in which Yolo County
18 had placed hazardous substances or fill material containing lead
19 on any of the Former County Properties. (See Hartman King Decl.,
20 Ex. G, Farr Dep. 174:17-176:9; Ex. H, Love Dep. 237:1-17, 247:1-
21 21 (Docket No. 207-5); Decl. of Alanna C. Lungren ("Lungren
22 Decl."), Ex. A, Clark Dep. 62:4-19; Ex. B, Leland Dep. 33:12-16
23 (Docket No. 207-6).)

24 However, Yolo County's evidence merely shows that there
25 is no direct evidence in the record of specific or discreet
26 releases of hazardous substances onto or from the Former County
27 Properties during the period of Yolo County's ownership. "CERCLA
28 liability may be inferred from the totality of the circumstances;

1 it need not be proven by direct evidence.” Tosco Co. v. Koch
2 Indus., Inc., 216 F.3d 886, 892 (10th Cir. 2000) (citing United
3 States v. Cello-Foil Prods., Inc., 100 F.3d 1227, 1231-32 (6th
4 Cir. 1996)). Here, the third-party plaintiffs have produced
5 sufficient circumstantial evidence, discussed below, to create a
6 genuine issue of material fact as to whether releases of lead
7 occurred from the Former County Properties during Yolo County’s
8 ownership. See Anderson, 477 U.S. at 248.

9 Specifically, documentary evidence shows that lead
10 paint was used in the construction of three buildings on the
11 Former County Properties during the period of Yolo County’s
12 ownership. See Matthews Decl., Ex. A (“The exterior of said town
13 hall shall be painted with two coats of white lead mixed with
14 boiled linseed oil.”); Ex. B (“Primer coat [for the office
15 building] . . . shall be mixed in the proportions of 60% pigment
16 to 40% vehicle The pigment shall be composed of 80% white
17 lead and 20% zinc oxide The finish coat . . . shall be
18 mixed in the proportions of 66% pigment and 34% vehicle
19 Pigment shall be composed of 35% titanium oxide, 45% white lead,
20 and 20% zin oxide.”); Ex. C (“Interior work [for jail building]:
21 Wood and Metal: Apply one coat of lead and oil based primer
22 followed by two coats of 100% pure prepared, highest grade
23 exterior paint as manufactured by W.P Fuller, Pittsburg, National
24 Lead”).)

25 Based on these records, R&L’s expert, Dr. Love, states
26 that “lead-based paint from the County-owned building [sic]
27 represents the only documented source of lead to soil in the
28 vicinity to [319 3rd Street] that could have resulted in the

1 observed soil concentrations above the commercial/industrial soil
2 screening levels for lead of 320 milligram per kilogram soil.”
3 (See Decl. of Dr. Adam Love ¶ 7 (“Love Decl.”) (Docket No. 213-
4 7).) As Dr. Love explains in his declaration, environmental
5 impacts “are typically greater in the spatial extent near to the
6 source of contamination.” Id. ¶ 8. Because the observed lead
7 impacts to soil from prior investigations “have greater spatial
8 extent on the County owned-properties [sic] compared to” 319 3rd
9 Street, Dr. Love concludes that the three County buildings
10 constructed during Yolo County’s ownership represent the only
11 known source that could explain the levels of lead observed at
12 the 319 Site. (See id. ¶¶ 7-10.)

13 Based on this evidence--that Yolo County used lead-
14 based paint in three separate construction projects at the Former
15 County Properties while it owned them, and that lead-based paint
16 is the only documented source of lead in the vicinity of the
17 Former County Properties that could have resulted in the observed
18 concentrations of lead on or near the properties--a jury could
19 reasonably infer that lead was “discharged,” “escaped,”
20 “leached,” was “dumped,” or was “disposed” from the Former County
21 Properties or the buildings on them during construction or during
22 the several decades that Yolo County owned the properties. See
23 Carson Harbor, 270 F.3d at 870-71; Matsushita, 475 U.S. at 586-87
24 (“on summary judgment the inferences to be drawn from the
25 underlying facts . . . must be viewed in the light most favorable
26 to the party opposing the motion”). The court therefore finds
27 that a genuine issue of material fact exists as to the second and
28 fourth elements of section 107(a) liability. See Matsushita, 475

1 U.S. at 586-87.

2 B. Whether a Genuine Issue of Fact Exists as to the Third
3 Element of Section 107(a) Liability

4 To establish the third element of section 107(a)
5 liability, R&L must show that the release of hazardous materials
6 by Yolo County for which R&L seeks contribution must be one that
7 will "cause[] [it] to incur response costs" in the underlying
8 section 107(a) action brought against R&L by the City. See
9 Aviall, 543 U.S. at 168; Carson Harbor, 270 F.3d at 870-71.

10 Yolo County argues that, because R&L only offers
11 evidence related to releases of lead, and no other hazardous
12 substance, its claim for contribution must fail as a matter of
13 law. (See Cty. of Yolo's Reply at 5-8.) Yolo County contends
14 that the court dismissed R&L's original third-party complaint
15 because it concerned only lead. (See id.) Though the Amended
16 Third-Party Complaint survived Yolo County's Motion to Dismiss,
17 Yolo County argues it was only because the Amended Third-Party
18 Complaint added allegations that other metals contained in the
19 City's TAC were released from the Former County Properties.
20 Under Yolo County's theory, summary judgment is now appropriate
21 because the third-party plaintiffs do not offer any evidence of
22 such releases. (See id.)

23 The inquiry under the third element of section 107(a)
24 liability in a contribution action, however, is not whether the
25 third-party plaintiffs seek contribution strictly for releases of
26 the same contaminants as the City's TAC--it is whether the third-
27 party plaintiffs seek contribution for releases that will cause
28 them to incur response costs in the City's section 107 action.

1 See Aviall, 543 U.S. at 168. As the court observed when it
2 denied Yolo County's Motion to Dismiss the Amended Third-Party
3 Complaint, because the Amended Third-Party Complaint alleges that
4 contaminants originating from the Former County Properties are
5 commingled at the 319 Site, "on a purely practical level, the
6 court cannot infer that the City will clean only the
7 contamination that originated at 319 Third Street." (See Order
8 re Mot. to Dismiss Am. Third-Party Compl. (Docket No. 136).)

9 That observation applies with even more force now,
10 given that the court has subsequently found that R&L's
11 contributions to the pollution present at the 319 Site are not
12 divisible from the total harm present at the Site, including harm
13 caused by elevated levels of lead. (See Divisibility Order at
14 18-19, 27.) Because the third-party plaintiffs allege--and
15 provide evidence--that the Former County Properties are a source
16 of the lead currently found at the 319 Site, "if the City is
17 successful, R&L will undoubtedly have to reimburse the City for
18 the cost of cleaning whatever hazardous contamination is
19 currently at the 319 property, not just that which originated
20 there." (See Order re Mot. to Dismiss Amended Third-Party
21 Complaint at 6.)

22 Based on the evidence the parties have presented, the
23 court finds that a genuine issue of material fact exists as to
24 whether Yolo County's releases of lead will cause the third-party
25 plaintiffs to incur response costs. See Matsushita, 475 U.S. at
26 586-87. In their expert reports, both Dr. Love and Dr. Farr
27 conclude that lead is present at the 319 Site at concentrations
28 that will require remediation, and that it is commingled with

1 other contaminants in the soil. (See Love Report at 23; Hartman-
2 King Decl., Ex. E, Rebuttal Expert Report of Dr. Anne Farr at 3-4
3 ("Farr Rebuttal Report") (Docket No. 207-5).) In his report, Dr.
4 Love further concludes that source of lead at the 319 Site is a
5 layer of historic fill material upon which the Site was
6 developed. (See Love Report at 20.) Similar fill material has
7 been documented in prior investigations of the Former County
8 Properties and the Firehouse Property. (Love Report at 10-11;
9 WKA Report at 14.)

10 Dr. Love explains that historic fill, which is
11 generally imported to a site to raise topographic elevation, may
12 include construction debris. (See Love Report at 10.)
13 Consistent with his explanation, prior investigations of the
14 Former County Properties and the Firehouse Property discovered
15 ceramic shards, brick, and nails in the shallow soil. (See WKA
16 Report at 14.)

17 Citing records associated with Yolo County's
18 construction of the town hall, jail, and office building on the
19 Former County Properties, as well as soil samples that show lead
20 impacts with greater "spatial extent" closer to the Former County
21 Properties, Dr. Love concludes in his declaration that "lead-
22 based paint from the County-owned building [sic] represents the
23 only documented source of lead to soil in the vicinity to [319
24 3rd Street] that could have resulted in the observed soil
25 concentrations above the commercial/industrial soil screening
26 levels for lead of 320 milligram per kilogram soil."

27 Yolo County's rebuttal expert, Joseph Turner, disputes
28 this conclusion, asserting in his report that the highest

1 reported lead concentrations in soil are located at the 319 Site
2 and that the use of lead anodes in chromium plating solution by
3 the third-party plaintiffs represents the most likely source of
4 lead contamination at the 319 Site. (See Turner Report at 6.)
5 Dr. Farr also concludes that the highest concentration of lead
6 was detected in the southern portion of the 319 Site, but she
7 acknowledges that elevated lead concentrations detected by WKA
8 represent another "primary" source area of lead at the 319 Site.
9 (See Farr Report at 3-4.) At the summary judgment stage, it is
10 not the court's task to weigh the credibility of each party's
11 expert in order to resolve conflicting testimony or evidence.
12 See Celotex, 477 U.S. at 323-24. Rather, the presence of
13 conflicting expert testimony as to the source of lead observed at
14 the 319 Site suggests there is a disputed issue of material fact.
15 See id.

16 Yolo County also argues that the court previously
17 rejected Dr. Love's conclusion in its order denying R&L's
18 divisibility defense. Yolo County quotes a portion of the order
19 where the court states "Dr. Love's assumption that all lead at
20 the [319 Site] must originate with fill material is not based on
21 site-specific data." (See County of Yolo's Reply at 8.)
22 However, Yolo County's reliance on the court's divisibility order
23 is misplaced for two reasons. First, the conclusions in Dr.
24 Love's declaration appear to be based in part on evidence that he
25 did not consider in his expert report and that were not before
26 the court in the divisibility hearing, namely the records
27 associated with past construction at the Former County
28 Properties. (See Love Decl. ¶¶ 3-4.)

1 Second, in the divisibility order, the court's finding
2 that Dr. Love fell short of proving that all lead at the 319 Site
3 must have originated from fill material was made in the context
4 of determining whether R&L's contributions to the pollution at
5 the 319 Site could be divided from the total harm done to the 319
6 Site. (See Divisibility Order at 8.) The bar to establish a
7 divisibility defense is much higher than the bar to establish a
8 triable issue of material fact. See Pakootas, 905 F.3d at 598
9 (describing the burden of proof in a divisibility claim as
10 "'substantial' because the divisibility analysis is 'intensely
11 factual'"). The court's divisibility order therefore does not
12 prevent it from concluding that Dr. Love's conclusions are based
13 on adequate data to establish a genuine dispute of material fact
14 at the summary judgment stage. See Celotex, 477 U.S. at 323-24.³

15 Because Dr. Love concludes that fill material was the
16 source of the elevated lead concentrations observed at the 319
17 Site, that similar fill material is present at the Former County
18 properties and the Firehouse Property, that the spatial extent of
19 lead impacts increase as sampling gets closer to the Former
20 County Properties, and that the lead-based paint used on the

21 ³ Yolo County also cites to testimony from Dr. Love's
22 deposition where he testified that he was not aware of when fill
23 material was placed on the 319 Site or who did it, and that there
24 was no other basis for concluding that lead was released onto the
25 319 Site other than fill material. (See County's Reply at 4.)
26 However, in that testimony, Dr. Love stated he was not aware of
27 how fill material got there because he had not been asked to look
28 into that at the time. (Id.) Dr. Love's declaration now states
that the documents associated with construction at the Former
County Properties indicate that the lead paint used on the
buildings is the only documented source of lead near the 319 Site
that could account for the levels observed there. (See Love
Decl. ¶ 7.)

1 three County buildings is the only documented source of lead that
2 could have resulted in the elevated lead concentrations observed
3 at the 319 Site, a reasonable trier of fact could conclude that
4 releases of lead from the Former County Properties during or
5 after construction contaminated fill material at the Former
6 County Properties, and later migrated to or was moved to the 319
7 Site. See Matsushita, 475 U.S. at 586-87 (“on summary judgment
8 the inferences to be drawn from the underlying facts . . . must
9 be viewed in the light most favorable to the party opposing the
10 motion”). Additionally, because at least one of the three County
11 buildings was built before the 319 Site was developed for use as
12 an electroplating facility in 1949, a reasonable trier of fact
13 could conclude that the fill material containing lead was
14 deposited at the 319 Site during Yolo County’s ownership. See
15 id.

16 Accordingly, a genuine issue of material fact exists as
17 to whether Yolo County’s releases of lead will cause the third-
18 party plaintiffs to incur response costs under CERCLA section
19 107(a). See Celotex, 477 U.S. at 323-24. Because Yolo County
20 has failed to meet its burden of proving no genuine dispute of
21 material fact exists as to any of the elements of CERCLA section
22 107(a) liability, summary judgment is not warranted. See id.;
23 Aviall, 543 U.S. at 168.

24 IT IS THEREFORE ORDERED that Yolo County’s Motion for
25 Summary Judgment (Docket No. 207) be, and the same hereby is,
26 DENIED.

27 Dated: November 17, 2020



28 **WILLIAM B. SHUBB**
UNITED STATES DISTRICT JUDGE