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United States District Court  
For the Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PALMTREE ACQUISITION CORPORATION, a Delaware corporation

No. C 08-3168 MHP

Plaintiff,

**MEMORANDUM & ORDER**

v.

**Re: Motion to Dismiss Second Amended Third-Party Complaint against Melinda Ellis Evers, Successor Trustee of the Harold A. Ellis, Jr. Revocable Inter Vivos Trust Dated July 13, 2000**

MICHAEL R. NEELY, an individual, et al.

Defendants,

\_\_\_\_\_  
THE KIRRBURG CORPORATION, formerly known as MULTIMATIC CORPORATION, a New Jersey Corporation; and STARK INVESTMENT COMPANY, L.P., a California limited partnership,

Third-Party Plaintiffs,

v.

MELINDA ELLIS EVERS, Successor Trustee of the Harold A. Ellis, Jr. Revocable Inter Vivos Trust Dated July 13, 2000, et al.

Third-Party Defendants,  
\_\_\_\_\_

Defendants/third-party plaintiffs The Kirrberg Corporation and Stark Investment Company filed a third-party complaint for CERCLA contribution, declaratory relief and equitable indemnity against Melinda Ellis Evers ("Trustee Evers"), Successor Trustee of the Harold A. Ellis, Jr. Revocable Inter Vivos Trust Dated July 13, 2000 ("Revocable Family Trust") as well as several other third-party defendants. Now before the court is Trustee Evers' motion to dismiss the Second Amended Third-Party Complaint ("SATC"), in which she argues that Harold A. Ellis, Jr. was not

1 personally liable under CERCLA prior to his death because as a fiduciary he is protected from  
2 liability beyond the assets of the trust. Having considered the arguments of the parties and for the  
3 reasons stated below, the court enters the following memorandum and order.

4  
5 BACKGROUND

6 As set forth in the October 4, 2010 Memorandum and Order dismissing the third-party  
7 plaintiffs' First Amended Complaint ("FAC"), Docket No. 107, this action concerns the allocation of  
8 costs to remediate perchloroethene ("PCE") contamination in the soil and groundwater in the vicinity  
9 of the Livermore Arcade Shopping Center ("LASC") and Millers Outpost Shopping Center  
10 ("MOSC") in Livermore, California. The parties include present and former owners of LASC and  
11 MOSC, the operators of the dry cleaning businesses alleged to have released a significant quantity of  
12 PCE, the manufacturer of the equipment used by the dry cleaning businesses, and several related  
13 individuals.

14 Defendant Grubb & Ellis Realty Income Trust, Liquidating Trust ("GERIT") owned and  
15 operated LASC from 1989 through 1996. Docket No. 1 (Compl.) ¶ 13 (incorporated by reference  
16 into SATC ¶ 1). On February 2, 1993, GERIT brought an action under CERCLA related to the PCE  
17 contamination against many of the parties to the present action, including third-party plaintiffs.  
18 Docket No. 110 (SATC) ¶ 18. On or about February 7, 1994, the parties to the earlier action entered  
19 into a settlement agreement. *Id.* ¶ 20. Paragraph 9 of the settlement agreement contained a "Re-  
20 opener" clause, which provided that "actions by governmental agencies requiring cleanup of PCE  
21 contamination. . . of the deeper aquifer as defined in Paragraph 5 of the SCO [Site Cleanup  
22 Order]. . ." were excepted from the releases otherwise contained in the settlement. *Id.* ¶¶ 20-21. As  
23 part of the 1994 settlement, the settling parties appointed Ellis Partners, Inc. ("EPI") as the Project  
24 Manager to oversee the remediation efforts. SATC ¶ 22. GERIT had previously appointed EPI as its  
25 Liquidating Agent. *Id.* ¶ 19. Harold A. Ellis, Jr. was a co-trustee of GERIT and a managing partner  
26 of EPI. *Id.* ¶¶ 12, 19.

1 After the remediation commenced, in April 1996 the San Francisco Bay Regional Water  
2 Quality Control Board (“RWQCB”) issued an order, Order No. 96-052, establishing a Containment  
3 Zone. SATC ¶ 29; Compl. Exh. 2. The order also required further groundwater monitoring and set  
4 trigger levels of PCE for outside the Containment Zone, which could prompt further investigation  
5 and/or remediation. *Id.* In April 1996, the RWQCB sent GERIT a letter stating that “no further  
6 action related to the PCE pollution site is required, provided the site remains in compliance with  
7 Order No. 96-052[.]” SATC ¶ 32; Docket No. 66, Exh. D. GERIT’s 10-Q for September 30, 1997,  
8 which was signed by Harold A. Ellis, Jr., reported that GERIT had received a No Further Action  
9 Letter from the RWQCB indicating that clean-up requirements had been satisfied and that a  
10 monitoring program was required for a period of approximately 24 months. SATC ¶ 33; Docket No.  
11 66, Exh. C at 7. GERIT sold LASC to third-party defendants The Anderson Marital Trust and  
12 Anderson Tax Deferral Trust in 1996, and in December 1997, GERIT’s assets were distributed in  
13 their entirety. SATC ¶ 35-37 & Docket No. 66, Exh. C at 6, 9.

14 On or about March 17, 2008, the RWQCB informed the parties subject to Order No. 96-052  
15 that the Containment Zone had been breached and ordered a technical report to address the presence  
16 of PCE in the deeper aquifer. SATC ¶ 38 & Exh. 1. This RWQCB letter triggered the Re-opener  
17 provision of the 1994 settlement agreement. *Id.* After informal negotiations among the settling  
18 parties failed, on July 1, 2008 plaintiff Palmtree Acquisition Corporation brought this action to  
19 recover cleanup costs and damages under CERCLA. Compl. ¶ 22.

20 Harold A. Ellis, Jr. passed away on January 6, 2009. SATC ¶ 7. On January 5, 2010, third-  
21 party plaintiffs filed the Third-Party Complaint, naming the “Estate of Harold A. Ellis, Jr.” as a third-  
22 party defendant. Docket No. 26 (Compl.). On March 12, 2010, the Estate filed a motion to dismiss,  
23 contending that the Estate was not a proper party and that Ellis had no personal liability under  
24 CERCLA. Docket No. 36 (Mot.). The parties stipulated for leave to file the First Amended Third-  
25 Party Complaint (“FATC”), Docket No. 63, which was filed on May 24, 2010. The FATC replaced  
26 the Estate with “Melinda Ellis Evers, Successor Trustee of the Harold A. Ellis, Jr. Revocable Inter  
27 Vivos Trust Dated July 13, 2003” as third-party defendant. FATC ¶ 7. No probate was ever opened,  
28

1 and third-party plaintiffs allege that they never received a notice of administration or creditor's  
2 claim. Opp. at 4. All of Ellis's assets were instead held in trust. *Id.* at 5.

3 On October 4, 2010, the FATC was dismissed without prejudice, Docket No. 107. This court  
4 determined that the FATC set forth no theory or set of facts under which Ellis could be held  
5 personally liable for recovery costs for CERCLA violations, and thus granted trustee Evers' motion  
6 to dismiss under Federal Rule of Civil Procedure 12(b)(6). Specifically, this court held that: (1) the  
7 FATC was timely under Federal Rule of Civil Procedure 15(c)(3) because the claims against Trustee  
8 Evers "related back" to those claims originally filed against the "Estate of Harold A. Ellis, Jr.;" (2)  
9 the FATC failed to demonstrate how Ellis acted in a capacity other than that of a fiduciary that would  
10 give rise to personal liability for a CERCLA violation; (3) the FATC failed to allege particular  
11 actions by Ellis that negligently contributed to the release of PCE that would give rise to fiduciary  
12 CERCLA liability. Third-party plaintiffs timely filed their Second Amended Third-Party Complaint  
13 ("SATC") on October 27, 2010, Docket No. 110, and Trustee Evers filed the instant motion to  
14 dismiss for failure to state a claim on November 24, 2010, Docket No. 112.

15  
16 LEGAL STANDARD

17 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed against a  
18 defendant for failure to state a claim upon which relief can be granted against that defendant. A  
19 motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of a claim." *Navarro v. Block*, 250  
20 F.3d 729, 732 (9th Cir. 2001). Dismissal may be based on the lack of a cognizable legal theory or  
21 the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police*  
22 *Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). A motion to dismiss should be granted if a plaintiff fails to  
23 plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*,  
24 550 U.S. 544, 569 (2007). "The plausibility standard is not akin to a 'probability requirement,' but it  
25 asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, ---  
26 U.S. ----, ----, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 556).

1 Allegations of material fact are taken as true and construed in the light most favorable to the  
2 non-moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The court  
3 need not, however, accept as true pleadings that are no more than legal conclusions or the “formulaic  
4 recitation of the elements” of a cause of action. *Iqbal*, 129 S.Ct. at 1950; *see also Sprewell v. Golden*  
5 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Clegg v. Cult Awareness Network*, 18 F.3d 752,  
6 754-55 (9th Cir. 1994). “Determining whether a complaint states a plausible claim for relief. . . [is] a  
7 context-specific task that requires the reviewing court to draw on its judicial experience and common  
8 sense.” *Iqbal*, 129 S.Ct. at 1950.

9  
10 DISCUSSION

11 I. Ellis’ Personal Liability Under CERCLA

12 CERCLA imposes liability upon “any person who at the time of disposal of any hazardous  
13 substance owned or operated any facility at which such hazardous substances were disposed of.” 42  
14 U.S.C. 9607(a)(2). An “owner” is determined by state law at the time of release. *See Am. Int’l*  
15 *Specialty Lines Ins. Co. v. United States*, No. CV 09-01734 AHM, 2010 WL 2635768, at \*21 (C.D.  
16 Cal. June 30, 2010). In California, legal property owned by a trust is held by the trustee. *See*  
17 *Stoltenberg v. Newman*, 179 Cal. App. 4th 287, 293 (2009). Because LASC was at one time owned  
18 by GERIT, Harold A. Ellis, Jr., as co-trustee of GERIT, held legal title to LASC under California  
19 law. *See also* SATC ¶ 12 (noting that GERIT’s Liquidating Trust Agreement provided that “the  
20 whole title to all the Liquidating Trust Estate shall be vested in the Trustees”). The Revocable  
21 Family Trust, however, never had an ownership interest in LASC. In order to reach Ellis’ assets held  
22 by the Revocable Family Trust, third-party plaintiffs therefore need to establish some basis for  
23 holding Ellis personally liable for the PCE investigation and remediation costs.

24 In 1996, Congress amended CERCLA to explicitly protect fiduciaries from personal liability  
25 stemming from environmental cleanup costs. *See* Asset Conservation Act, Pub. L. No. 104-208,  
26 Div. A., Title II, Subtitle E, § 2502, 110 Stat. 3009, 3009-462 (1996). Section 107 of CERCLA now

1 provides:

2 (n) Liability of fiduciaries

3 (1) In general

4 The liability of a fiduciary under any provision of this chapter for the release  
5 or threatened release of a hazardous substance at, from, or in connection with  
6 a vessel of facility held in a fiduciary capacity shall not exceed the assets held  
7 in the fiduciary capacity.

8 42 U.S.C. § 9607(n)(1). “In general, the amendment limits the liability of fiduciaries to the  
9 assets held in a fiduciary capacity. That is, fiduciaries, even those who might otherwise be  
10 deemed ‘owners’ under 107(a), generally cannot be held personally liable under CERCLA.”  
11 *Canadyne-Georgia Corp. v. Nationsbank, N.A. (South)*, 183 F.3d 1269, 1274 (11th Cir.  
12 1999). A “fiduciary” is specifically defined to include a person acting as a “trustee.” 42  
13 U.S.C. § 9607(n)(5)(A)(i)(I). Ellis was a trustee who owned trust property, and the Asset  
14 Conservation Act therefore protects him from personal liability for CERCLA violation costs  
15 even though he might otherwise be deemed an owner. In order for Ellis to be held personally  
16 liable for environmental cleanup costs, he must fall into a statutory exception to the fiduciary  
17 exemption from personal liability.

18 Third-party plaintiffs allege no action by Ellis that would create liability under  
19 CERCLA independent of his role as an owner and trustee of a contaminated site. They  
20 contend, however, that two exceptions to the fiduciary exemption render Ellis liable in his  
21 personal capacity. Although the court notes a relative dearth of case law addressing fiduciary  
22 liability under CERCLA, third-party plaintiffs have not plausibly alleged that either exception  
23 applies.

24 II. Fiduciary Acting in a Capacity Other than a Fiduciary Exception

25 Under the first potentially relevant exception, the Asset Conservation Act does not  
26 limit fiduciary liability if a person (1) “acts in a capacity other than that of a fiduciary” and  
27 (2) “in that capacity, directly or indirectly benefits from a trust or fiduciary relationship.” 42  
28 U.S.C. § 9607(n)(7)(A)(i), (ii); *Canadyne-Georgia*, 183 F.3d at 1274 n.9. CERCLA defines

1 “fiduciary capacity” as “the capacity of a person in holding title to a vessel or facility, or  
2 otherwise having control of or an interest in the vessel or facility, pursuant to the exercise of  
3 responsibilities of the person as a fiduciary.” 42 U.S.C. § 9607(n)(5)(B).

4 Third-party plaintiffs have amended their complaint to allege that Ellis acted outside  
5 his fiduciary capacity in two ways: by acting as the chairman of EPI, and by engaging in  
6 conduct that breached his fiduciary duty to the GERIT beneficiaries. The SATC contends  
7 that Ellis benefitted from his position as co-trustee of GERIT by selecting EPI—a company  
8 he founded and managed—to serve as GERIT’s Liquidating Agent and by maneuvering for  
9 EPI to serve as project manager for the PCE remediation efforts. SATC ¶¶ 47-50; Opp. at 6.  
10 Although these allegations may be sufficient to show that Ellis benefitted from his fiduciary  
11 role for purposes of section 9607(n)(7)(A)(ii), the SATC fails to demonstrate how Ellis  
12 “act[ed] in a capacity other than of a fiduciary” for purposes of subsection (A)(i). Even if  
13 these alleged activities might be characterized as self-serving, third-party plaintiffs do not  
14 show any actions taken by Ellis with respect to the contaminated site that were not pursuant  
15 to his responsibilities as co-trustee of GERIT.<sup>1</sup>

16 Ellis is not automatically liable through this exception merely by virtue of serving in a  
17 dual role as co-trustee of GERIT and chairman of EPI. *See Canadyne-Georgia*, 183 F.3d at  
18 1274 n.9 (“Although Canadyne alleges in its complaint that the Bank’s dual role as fiduciary  
19 and as the primary lender . . . , by itself, brings the Bank under this exception, we are  
20 confident Congress did not intend for the mere existence of a lending relationship to be  
21 enough to bring a fiduciary under this exception.”). Similarly, the mere existence of the  
22 liquidating agent relationship between GERIT and EPI is not enough to bring Ellis under the  
23 section 9607(n)(7)(A) exception. Third-party plaintiffs allege no set of facts indicating that  
24 Ellis’ acts as chairman of EPI were nothing but consistent with, if not in furtherance of, his  
25 fiduciary duty to GERIT. Serving the trust in a dual capacity is not enough to show that he  
26 was acting outside his fiduciary capacity in such a way as to impose personal liability under  
27 CERCLA.

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1 Third-party plaintiffs also amended their complaint to allege that Ellis acted in a  
2 capacity other than that of a fiduciary by breaching his fiduciary duties to GERIT. While  
3 they contend that Ellis breached his fiduciary duty by: (1) distributing the trust proceeds to  
4 the beneficiaries in 1997, SATC ¶ 37; (2) failing to “restore” or “reserve” any assets of the  
5 trust to pay for response costs the RWQCB required in 2008, SATC ¶¶ 49, 53; and (3) by  
6 making a “knowing[] and intentional[] misrepresentation to the SEC” regarding the status of  
7 the Site, SATC ¶ 48, these facts do not constitute a breach of fiduciary duty as a matter of  
8 law. A fiduciary is under a duty to “act for the benefit of another person on all matters within  
9 the scope of their relationship,” *see* BLACK’S LAW DICTIONARY (West 2009), and Ellis was  
10 under a further contractual duty to make timely distributions of the trust proceeds to the  
11 beneficiaries (Trust Agreement, Exh. A to SATC § 5.2). Any wrongdoing by Ellis that third-  
12 party plaintiffs have alleged is to the detriment of GERIT’s ostensible creditors, not to its  
13 beneficiaries; no facts demonstrate acts constituting a potential breach of fiduciary duty.

14 The SATC alleges that Ellis breached his fiduciary duty to GERIT beneficiaries by  
15 distributing the trust proceeds and terminating the trust “because not all of GERIT’s  
16 obligations had been discharged.” SATC ¶ 37. They further contend that Ellis breached his  
17 fiduciary duty when he failed to reserve money in the trust for future liabilities and, once the  
18 re-opener provision of the settlement agreement was triggered, when he failed to “restore the  
19 improper distributions to the beneficiaries.” SATC ¶ 49. Neither of these allegations are  
20 sufficient to plausibly suggest that Ellis breached his fiduciary duty to GERIT. The actions of  
21 a trustee are presumed to be in good faith, and the burden is on the party challenging the  
22 action to show otherwise. *Young v. McCoy*, 147 Cal. App. 4th 1078, 1087. Under the  
23 provisions of the trust agreement, the trustees retained discretion in determining how to  
24 provide for future liabilities and obligations and when those liabilities had been discharged.<sup>2</sup>  
25 (Trust Agreement, Exh. A to SATC §§ 5.4, 5.7). Third-party plaintiffs must therefore allege  
26 facts that suggest Ellis used his discretion with respect to administering the trust in a manner  
27 that harmed the beneficiaries.



1           The facts alleged in the SATC demonstrate that Ellis used his discretion as a trustee to  
2 act in ways that benefitted the GERIT beneficiaries and therefore do not constitute a breach  
3 of fiduciary duty as a matter of law. On April 29, 1996, the RWQCB finalized Order No. 96-  
4 052, stating that the risk of contamination of the deeper aquifer was “negligible” and that  
5 “adequate source removal has been accomplished.” (Exh. E to SATC at 9). Further, in  
6 March 1996, GERIT and third-party plaintiffs had contracted with a consultant company to  
7 carry out all activities required to clean up the Site pursuant to Order No. 96-052 for a firm  
8 fixed price. (Exh. F to SATC at 2). Ellis therefore had a good faith reason to believe that  
9 GERIT’s environmental obligations had been paid for and that there was little possibility of  
10 future cleanup costs, and was within his duties as a trustee in determining that the trust’s  
11 liability for the contamination had been discharged.

12           Having determined that the trust’s obligations had been discharged, Ellis was under a  
13 fiduciary duty, as stated in the Trust Agreement, to distribute the assets of the trust to the  
14 beneficiaries “expeditiously.” (Trust Agreement, Exh. A to SATC § 5.7). He distributed the  
15 proceeds of the sale of the property and terminated GERIT in December 1997, SATC ¶ 37,  
16 over a year and a half after the letter from the RWQCB stating that “no further action. . . is  
17 required.” (April 29, 1996 RWQCB Letter, Exh. G to SATC). Neither Ellis’ distribution of  
18 the trust assets nor his failure to keep a reserve or restore the trust has resulted in any  
19 apparent harm to the beneficiaries of GERIT; indeed, the beneficiaries have only benefitted  
20 from receiving and retaining the entirety of the trust proceeds.

21           Further, third-party plaintiffs allege that Ellis breached his fiduciary duty by  
22 incorrectly using a “term of art” in an SEC filing when he called Order No. 96-052 a “No  
23 Further Action Letter.” SATC ¶¶ 33, 34, 48. The SATC claims that this conduct was  
24 designed to obtain “intentionally misrepresented environmental clearances” that purportedly  
25 helped Ellis rush the sale of the property. SATC ¶ 49. It does not state what “environmental  
26 clearances” Ellis fraudulently obtained by incorrectly calling the RWQCB letter a “No  
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1 Further Action Letter,” nor why such a misrepresentation “also constituted a breach of Ellis’  
2 fiduciary duties to GERIT.” SATC ¶¶ 48-49, *see also* Opp. at 7.

3 The documents incorporated by reference to the SATC show that third-party  
4 plaintiffs’ allegations do not constitute a plausible breach of fiduciary duty by Ellis when he  
5 called Order No. 96-052 a “No Further Action Letter.” The letter in fact states that “no  
6 further action. . . is required,” (April 29, 1996 RWQCB Letter, Exh. G to SATC), and while  
7 third-party plaintiffs allege that this “term of art” generally means that a site is closed, Ellis’  
8 statement to the SEC in GERIT’s 10-Q filing does not qualitatively misrepresent the status of  
9 the Site. (Exh. H to SATC). Even if the “No Further Action Letter” is a “term of art” with a  
10 specific meaning, which third-party plaintiffs have failed to establish in the first place, Ellis  
11 provided other information in the 10-Q that makes clear he intended no misrepresentation by  
12 his use of the term. Further, third-party plaintiffs have not made clear how such an alleged  
13 misrepresentation to the SEC regarding the status of the Site harmed the beneficiaries of  
14 GERIT. For the foregoing reasons, third-party plaintiffs fail to allege that Ellis ever acted in  
15 a capacity other than that of a fiduciary and fail to allege facts sufficient to establish the  
16 potential for personal liability under 42 U.S.C. § 9607(n)(7)(A).

17 Third-party plaintiffs also ignore the safe harbor provision of 42 U.S.C.  
18 § 9607(n)(4)(C), which states that “a fiduciary shall not be liable in its personal capacity  
19 under this chapter for. . . terminating the fiduciary relationship.” The SATC alleges that Ellis  
20 “positioned GERIT so that he could liquidate and terminate it as quickly as possible,” SATC  
21 ¶ 48, and that he did so in December 1997, SATC ¶ 49. Further, third-party plaintiffs allege  
22 that

23 “Ellis’ termination of GERIT was a breach of his fiduciary duties because not  
24 all of GERIT’s obligations had been discharged. Further, Ellis benefitted from  
25 this personally because he was no longer saddled with having legal title to a  
contaminated property or being trustee of an entity responsible to the RWQCB  
for ongoing environmental obligations.”

26 SATC ¶ 37. This alleges no more than Ellis terminating the fiduciary relationship, no matter  
27 the ostensible reason. The safe harbor provision, to the extent third-party plaintiffs rely on

1 Ellis' liquidating the trust as an act in breach of his fiduciary duty, protects Ellis from  
2 personal liability.

3  
4 III. Fiduciary Negligence Exception

5 Under the second exception proffered by third-party plaintiffs, "if negligence of a  
6 fiduciary causes or contributed to the release or threatened release" of hazardous substances,  
7 the fiduciary may be personally liable. 42 U.S.C. § 9607(n)(3). According to the Eleventh  
8 Circuit, "[t]o gain the benefit of the negligence exception, [third-party plaintiffs] must present  
9 evidence that [Ellis] took particular negligent actions that caused or contributed to the release  
10 of hazardous substances." *Canadyne-Georgia*, 183 F.3d at 1275. The court further  
11 explained that CERCLA imposes no duty to prevent others from releasing hazardous  
12 substances, and it held that the defendant "could not have been negligent in failing to prevent  
13 others from polluting."

14 Paragraph 51 of the SATC states,

15 "Ellis, through his company, EPI, failed to adequately address the shallow  
16 groundwater contamination, which led to the migration of the plume outside  
17 of the Containment Zone and PCE release and contamination of the deep  
18 aquifer. The deep aquifer contamination is a result of the shallow  
19 groundwater contamination that was not properly taken care of by EPI  
20 pursuant to the 1994 settlement."

21 In order to state a plausible claim for relief, a plaintiff must plead "factual content that allows  
22 the court to draw the reasonable inference that the defendant is liable for the misconduct  
23 alleged." *Iqbal*, 129 S.Ct. at 1949. While this allegation is indeed more detailed than the  
24 bald statement of liability under section 9607(n)(3) contained in the FATC,<sup>3</sup> it fails to  
25 sufficiently allege that Ellis was negligent as described in that section.

26 The SATC states only a conclusory allegation of a failure to act (i.e., "EPI[] failed to  
27 adequately address the . . . contamination. . . that was not properly taken care of by EPI"), not  
28 "particular negligent actions that caused or contributed to the release of hazardous  
substances." *See Canadyne-Georgia*, 183 F.3d at 1275. Further, even if this allegation were  
sufficiently particular as to affirmative actions contributing to the release of hazardous

1 substances, it fails to allege that Ellis was in any way personally involved in mismanagement  
2 of the Site by EPI. The Asset Conservation Act requires the *direct* negligence of a fiduciary  
3 that causes or contributes to contamination under CERCLA; vicarious liability or imputed  
4 negligence is not enough to impose personal liability on a fiduciary. *See id.*, n.10.

5 “Just because under state partnership law a partnership and its partners may be  
6 vicariously liable for the negligence of any one partner or employee of the  
7 partnership does not mean every partner herself negligently caused the  
8 accident. ‘Vicarious liability,’ or ‘imputed negligence,’ is not the same as  
9 saying ‘negligence of a fiduciary cause[d] or contribute[d] to the release,’ as  
10 required under the Asset Conservation Act.”

11 *Id.* Alleging that the EPI partnership, Ellis among the partners, was negligent in causing or  
12 contributing to the release of hazardous substances is not the same as alleging that Ellis was  
13 negligent as a fiduciary. Since the SATC fails to allege any individual negligence by Ellis  
14 that caused or contributed to the release of hazardous substances, Ellis is not personally liable  
15 for the CERCLA recovery costs under section 9607(n)(3).

16 Because Ellis involvement in the PCE contamination, investigation and remediation  
17 was limited to his role as co-trustee of GERIT, he is not personally liable for recovery costs  
18 under CERCLA. The SATC has not plausibly alleged that any of the exceptions to  
19 CERCLA’s fiduciary exemption from personal liability apply, and accordingly third-party  
20 plaintiffs have not established that Ellis’s personal assets can be reached through the  
21 Revocable Family Trust. All of third-party plaintiffs’ claims flow from Ellis’ CERCLA  
22 liability, and the court dismisses the third-party complaint, in its entirety, with prejudice.

23 CONCLUSION

24 For the foregoing reasons, Trustee Evers’ motion to dismiss the SATC is GRANTED with  
25 prejudice.

26 IT IS SO ORDERED.

27 Dated: February 11, 2011

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MARILYN HALL PATEL  
United States District Court Judge

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**ENDNOTES**

1. Ellis' actions cannot be characterized as directly benefitting him. Ellis was never a beneficiary of GERIT, and even if he were, such status was specifically permitted under the Trust Agreement. ("A Trustee may be a Beneficiary to the same extent as if he were not a Trustee hereunder.") (Trust Agreement, Exh. A to SATC § 3.4)
2. "The Trustees may, in their discretion, make reasonable provision by reserve or otherwise. . . for such amount as the Trustees in good faith may reasonably determine to be necessary to meet present or future claims and liabilities of the trust." (Trust Agreement, Exh. A to SATC § 5.4); "If the trustees determine that all claims, debts, liabilities, and obligations of the Liquidating Trust have been paid or discharged. . . or if the existence of the Liquidating Trust shall terminate[,]. . . the Trustees shall, as expeditiously as is consistent with the conservation and protection of the Liquidating Trust Estate, distribute [the estate] to the Beneficiaries." (Trust Agreement, Exh. A to SATC § 5.7)
3. Paragraph 36 of the FATC states, "Harold A. Ellis, Jr. is also personally liable under 42 U.S.C. § 9607(n)(3) for his negligence which caused or contributed to the release or threatened release of PCE." The FATC nowhere alleges any particular actions taken by Ellis that led to the release of PCE.