

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WALNUT CREEK MANOR, LLC,
Plaintiff,
v.
MAYHEW CENTER, LLC; and DEAN DUNIVAN,
Defendants.

MAYHEW CENTER, LLC; and DEAN DUNIVAN,
Cross-Claimants,
v.
WALNUT CREEK MANOR, LLC,
Cross-Defendant.
_____ /

No. C 07-05664 CW
ORDER GRANTING IN PART WALNUT CREEK MANOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING IN PART MAYHEW CENTER'S AND DUNIVAN'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This case presents competing claims under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Plaintiff Walnut Creek Manor (WCM) filed a motion for partial summary judgment. Defendants Mayhew Center (MC) and Dean Dunivan oppose the motion and filed a cross-motion for partial summary judgment. The motions were heard on March 19, 2009. Having considered all of the parties' papers and argument on the motions,

1 the Court hereby grants Plaintiff's motion in part and grants
2 Defendants' motion in part.

3 BACKGROUND

4 This case involves a dispute between two adjacent landowners,
5 Walnut Creek Manor (WCM) and Mayhew Center (MC), over the source of
6 soil and groundwater contaminated by tetrachlorethylene (PCE). In
7 operation since 1964, WCM is a seniors-only residential apartment
8 complex with approximately 420 units. Eberle Decl. ¶¶ 4-5. Before
9 that time, the site was a walnut orchard. Id. Bordering WCM to
10 the east, lies MC, which was first developed in the 1970s as part
11 of an industrial development district and has since been occupied
12 by a variety of known and unknown commercial and light industrial
13 entities. Kelly Decl., Exh. L at 10-11. In the 1970s and 1980s,
14 at least one tenant at MC, Etch-Tek, was in a business involving
15 the manufacturing of printed circuit or wiring boards and plating.
16 Id. During the time Etch-Tek operated at MC, solvent use,
17 including PCE, was prevalent in the printed circuit board
18 manufacturing industry. Kelly Decl., Exh. K at 2. Kenneth Beard,
19 an owner of Etch-Tek, stated that it did not use PCE or any
20 solvents in its operation. K. Beard Dep. at 166:1-6.

21 In 1993, Dean Dunivan purchased the MC property out of
22 foreclosure from the San Francisco Federal Bank. Dunivan Dep. at
23 25:4-12. Before Dunivan purchased the property, the bank
24 commissioned an investigation of the site. The purpose of the
25 report was to determine "whether asbestos containing materials are
26 present in the building and to indirectly assess the potential for
27 other environmental concerns." Kelly Decl., Exh. H. The report
28 concluded that asbestos was located in all buildings. Id. The

1 report also noted that limited quantities of hazardous materials
2 were present at the property, including: toners for copier
3 machines; chemical developers for photography; lubricants and
4 petroleum-based solvents stored at a print shop at 3321 Vincent;
5 and adhesives stored on the roof. Id. "Direct evidence of
6 hazardous materials release was not observed during our work." Id.
7 The report contained the following caveat, "This inspection and
8 report is limited in scope to the visual observations existing at
9 the time of the inspection. No special tests were conducted on any
10 building element with the exception of the asbestos sampling and no
11 building elements were removed to reveal any suspected conditions
12 that may be existing." Id. Before the purchase, Dunivan did not
13 perform any soil or groundwater tests or hire any professionals,
14 other than termite inspectors, to inspect the property. Id. at
15 34:1-15; 39:17-40:2.

16 In 2004, Dunivan sought to refinance the MC property. Before
17 committing to the refinance, the bank required a Phase I
18 environmental review, which was performed by National Assessment
19 Corporation (NAC). NAC noted that between 1973 and 1981, Etch-Tek
20 received numerous violation notices from the city fire department
21 regarding the improper storage of hazardous materials. Kelly
22 Decl., Exh. I at 27. "However, there is no evidence that releases
23 to soil or groundwater resulted from this storage. Additionally,
24 specific reference to chlorinated solvents were not identified in
25 Fire Department Records." Id. NAC recommended that "additional
26 soil and groundwater data would be required in order to determine
27 if former Property activities have contributed to soil and
28 groundwater contamination at the Property and in the immediate

1 vicinity." Id.

2 Dunivan then hired an environmental engineering company,
3 Allwest Assoc., to review the NAC's conclusion that further testing
4 was required. Dunivan Dep. at 122:11-15. Allwest reviewed the NAC
5 report and environmental reports for the former Union Pacific
6 Railroad Hookston Station site located to the northeast and east of
7 MC. Allwest's report sought "to identify potential environmental
8 impacts to the subject Mayhew Center property from off-site
9 sources, and to determine whether past or present occupants of the
10 Mayhew Center property may have environmentally impacted off-site
11 properties." Kelly Decl., Exh. J at 1. The Allwest report
12 concluded that "the potential source of PCE contamination of the
13 groundwater would in all likelihood be the [sic] located well north
14 of the Mayhew Center property, where the highest concentrations of
15 PCE were detected." Id. at 5. The report made no mention of WCM,
16 MC's neighbor to the west. The report ultimately concluded that
17 further "subsurface investigation at the subject property is not
18 warranted." Id.

19 In December, 2004, the California Regional Water Quality
20 Control Board (Regional Board) ordered MC and WCM to submit a
21 technical report proposing a site investigation work plan to assess
22 the soil and groundwater quality at their respective properties and
23 a time schedule to perform the investigation. Kelly Decl., Ex. V.
24 To date, MC has not obtained any soil or groundwater samples
25 pursuant to a work plan approved by the Regional Board. Dunivan
26 Dep. at 144:9-14.

27 In contrast, on May 20, 2005, WCM submitted to the Regional
28 Board a report that evaluated multiple soil and groundwater samples

1 obtained from eight boreholes drilled to sixty foot depths below
2 the ground surface on the WCM property and three boreholes drilled
3 to sixty foot depths below the ground surface on the MC property
4 near the boundary line between the properties. Eberle Decl., Exh.
5 F at 10-11. The eight boreholes drilled on WCM property revealed
6 no detectable concentration of PCE. Id. at 10-12. The samples
7 obtained from all three boreholes drilled on the MC property
8 contained detectable PCE contamination. Id. On July, 29, 2005,
9 the Regional Board requested a follow-up subsurface investigation
10 of the WCM property. Eberle Decl. ¶ 25. On December 16, 2005, WCM
11 submitted a report that noted detectible PCE concentrations in the
12 soil immediately adjacent to the WCM boudary with MC, but at
13 concentrations lower on the WCM side of the property line than the
14 concentrations found on the MC property. Id., Ex. I at 4, 6-7.
15 The report concluded that "analytical data from April and November
16 2005 soil samples suggest that the potential source is located near
17 boring B7 on Mayhew Center." Id. at 6. The report also stated
18 that the "soil data evaluated for their report suggest that Walnut
19 Creek Manor is not a source of PCE contamination." Id.

20 On December 14, 2006, the Regional Board requested that WCM
21 provide further site history information and a work plan to perform
22 a third soil and groundwater investigation. Eberle Decl. ¶¶ 30-31.
23 On January 26, 2007, WCM submitted a site history and work plan,
24 but the Regional Board rejected it. Eberle Decl., Exh. N. WCM is
25 currently appealing that decision.

26 On April 3, 2008, WCM served a Rule 34 request to enter MC's
27 property to conduct soil and groundwater testing to obtain further
28 data. The testing found two sources of PCE on the MC property in

1 shallow soil, "including a substantial source area located
2 approximately 11 feet from the western property boundary with
3 Walnut Creek Manor." Eberle Decl., Exh. O at 13. The report,
4 written by WCM's environmental expert Scott Warner, concluded that
5 "this PCE-source area has substantially impacted the Walnut Creek
6 Manor property." Id.

7 WCM has sued MC for (1) CERCLA cost recovery, (2) CERCLA
8 contribution, (3) federal declaratory relief, (4) private nuisance,
9 (5) public nuisance, (6) trespass, (7) negligence, (8) negligence
10 per se, (9) strict liability, (10) indemnity pursuant to the
11 Hazardous Substances Control Account Act, (11) indemnity under the
12 Porter-Cologne Act and (12) equitable indemnity. MC has filed a
13 cross claim for (1) CERCLA cost recovery, (2) CERCLA contribution,
14 (3) federal declaratory relief, (4) public nuisance, (5) private
15 nuisance, (6) negligence, (7) waste, (8) indemnity pursuant to the
16 Hazardous Substance Control Account Act, (9) indemnity under the
17 Porter-Cologne Act, (10) equitable indemnity and (11) attorneys'
18 fees.

19 LEGAL STANDARD

20 Summary judgment is properly granted when no genuine and
21 disputed issues of material fact remain, and when, viewing the
22 evidence most favorably to the non-moving party, the movant is
23 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
24 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
25 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
26 1987).

27 The moving party bears the burden of showing that there is no
28 material factual dispute. Therefore, the Court must regard as true

1 the opposing party's evidence, if supported by affidavits or other
2 evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815
3 F.2d at 1289. The Court must draw all reasonable inferences in
4 favor of the party against whom summary judgment is sought.
5 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
6 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d
7 1551, 1558 (9th Cir. 1991).

8 Material facts which would preclude entry of summary judgment
9 are those which, under applicable substantive law, may affect the
10 outcome of the case. The substantive law will identify which facts
11 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
12 (1986).

13 Where the moving party does not bear the burden of proof on an
14 issue at trial, the moving party may discharge its burden of
15 production by either of two methods:

16 The moving party may produce evidence negating an
17 essential element of the nonmoving party's case, or,
18 after suitable discovery, the moving party may show that
19 the nonmoving party does not have enough evidence of an
20 essential element of its claim or defense to carry its
21 ultimate burden of persuasion at trial.

22 Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d
23 1099, 1106 (9th Cir. 2000).

24 If the moving party discharges its burden by showing an
25 absence of evidence to support an essential element of a claim or
26 defense, it is not required to produce evidence showing the absence
27 of a material fact on such issues, or to support its motion with
28 evidence negating the non-moving party's claim. Id.; see also
Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990); Bhan v.
NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If the

1 moving party shows an absence of evidence to support the non-moving
2 party's case, the burden then shifts to the non-moving party to
3 produce "specific evidence, through affidavits or admissible
4 discovery material, to show that the dispute exists." Bhan, 929
5 F.2d at 1409.

6 If the moving party discharges its burden by negating an
7 essential element of the non-moving party's claim or defense, it
8 must produce affirmative evidence of such negation. Nissan, 210
9 F.3d at 1105. If the moving party produces such evidence, the
10 burden then shifts to the non-moving party to produce specific
11 evidence to show that a dispute of material fact exists. Id.

12 If the moving party does not meet its initial burden of
13 production by either method, the non-moving party is under no
14 obligation to offer any evidence in support of its opposition. Id.
15 This is true even though the non-moving party bears the ultimate
16 burden of persuasion at trial. Id. at 1107.

17 Where the moving party bears the burden of proof on an issue
18 at trial, it must, in order to discharge its burden of showing that
19 no genuine issue of material fact remains, make a prima facie
20 showing in support of its position on that issue. UA Local 343 v.
21 Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1471 (9th Cir. 1994). That
22 is, the moving party must present evidence that, if uncontroverted
23 at trial, would entitle it to prevail on that issue. Id. Once it
24 has done so, the non-moving party must set forth specific facts
25 controverting the moving party's prima facie case. UA Local 343,
26 48 F.3d at 1471. The non-moving party's "burden of contradicting
27 [the moving party's] evidence is not negligible." Id. This
28 standard does not change merely because resolution of the relevant

1 issue is "highly fact specific." Id.

2 DISCUSSION

3 WCM seeks partial summary judgment against MC as to liability
4 under CERCLA and as to its affirmative defenses, but does not move
5 for summary judgment on MC's liability for the non-CERCLA causes of
6 action. WCM also seeks summary judgment on MC's entire cross-
7 claim. MC opposes WCM's motion and moves for partial summary
8 judgment on all of the non-CERCLA causes of action in WCM's first
9 amended complaint. MC does not move for summary judgment on its
10 cross claims.

11 I. WCM's Claims Against MC

12 A. CERCLA

13 CERCLA "generally imposes strict liability on owners and
14 operators of facilities at which hazardous substances were
15 disposed." 3550 Stevens Creek Assocs. v. Barclays Bank, 915 F.2d
16 1355, 1357 (9th Cir. 1990). To that end, CERCLA "authorizes
17 private parties to institute civil actions to recover the costs
18 involved in the cleanup of hazardous wastes from those responsible
19 for their creation." Id.

20 To prevail in a private cost recovery action, a
21 plaintiff must establish that (1) the site on which
22 the hazardous substances are contained is a "facility"
23 under CERCLA's definition of that term, Section
24 101(9), 42 U.S.C. § 9601(9); (2) a "release" or
25 "threatened release" of any "hazardous substance" from
26 the facility has occurred, 42 U.S.C. § 9607(a)(4);
27 (3) such "release" or "threatened release" has caused
28 the plaintiff to incur response costs that were
"necessary" and "consistent with the national
contingency plan," 42 U.S.C. §§ 9607(a)(4) and
(a)(4)(B); and (4) the defendant is within one of four
classes of persons subject to the liability provisions
of Section 107(a).

Stevens Creek, 915 F.2d at 1358. Title 42 U.S.C. § 9607(a) defines

1 those four categories of potentially responsible parties (PRPs) as
2 follows:

- 3 (1) the owner and operator of a vessel or a facility,
4 (2) any person who at the time of disposal of any
5 hazardous substance owned or operated any facility at
6 which such hazardous substances were disposed of,
7 (3) any person who by contract, agreement, or otherwise
8 arranged for disposal or treatment, or arranged with a
9 transporter for transport for disposal or treatment, of
10 hazardous substances owned or possessed by such person,
11 by any other party or entity, at any facility or
12 incineration vessel owned or operated by another party
13 or entity and containing such hazardous substances, and
14 (4) any person who accepts or accepted any hazardous
15 substances for transport to disposal or treatment
16 facilities, incineration vessels or sites selected by
17 such person, from which there is a release, or a
18 threatened release which causes the incurrence of
19 response costs, of a hazardous substance

20 The parties do not dispute that (1) MC is a facility as
21 defined in § 9601(9)(B), (2) MC is a PRP because it owns and
22 operate the MC property, 42 U.S.C. § 9607(a)(1) and (3) PCE exists
23 on both the MC and WCM properties. However, the parties dispute
24 the source of the release of PCE and whether that release caused
25 either party to incur response costs that were necessary and
26 consistent with the national contingency plan.

27 CERCLA defines a "release" as "any spilling, leaking, pumping,
28 pouring, emitting, emptying, discharging, injecting, escaping,
leaching, dumping, or disposing into the environment." 42 U.S.C.
§ 9601(22). WMC argues that the mere presence of a hazardous
substance at MC's facility constitutes a "release" from that
facility. United States v. Honeywell Intern., Inc., 542 F. Supp.
2d 1188, 1198 (E.D. Cal. 2008); United States v. Domenic Lombardi
Realty, Inc., 204 F. Supp. 2d 318, 330 (D.R.I. 2002) ("a number of
courts have held that the presence of hazardous material at a site
is sufficient to constitute a 'release' for purposes of triggering

1 CERCLA liability"); Foster v. United States, 992 F. Supp. 642, 651
2 (D.D.C. 1996). The Ninth Circuit has not adopted this broad
3 position. Further, none of the cases WCM cites concern adjacent
4 landowners who each assert that the other party was the source of
5 the release.

6 WCM also argues that a release of PCE must have originated
7 from MC because greater concentrations of PCE exist at the higher
8 elevation MC property compared to the lower elevation WCM property.
9 Eberle Decl., Ex. O. And WCM argues that MC caused a release when,
10 without WCM's permission, it drilled a slant boring from MC
11 property onto WMC property. WCM's expert, Scott Warner, opined
12 that performing an "angled boring from MC to WCM through an area
13 with PCE . . . provides a continuing preferential pathway for
14 contaminants, including PCE, to be transported from the higher
15 elevation MC property to the lower elevation WCM property." Kelly
16 Decl., Exh. L at 20. This evidence, independently and together, is
17 sufficient to raise a dispute of fact as to the occurrence of a
18 "release" as defined by § 9601(22). Warner's reports show that PCE
19 has at least "escaped" or "leached" from MC property onto WCM
20 property.

21 MC counters that none of this evidence should be considered by
22 the Court because it consists of unreliable and irrelevant
23 scientific conclusions. MC argues that Warner's conclusions
24 regarding MC as a possible source of PCE contamination were
25 "premised on nothing more than his assumptions without any
26 objective scientific support." Opposition at 10.

27 The test for admissibility of expert testimony under Daubert
28 v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), and Kumho Tire

1 Co., Ltd. v. Carmichael, 526 U.S. 137 (1999), is whether the
2 opinion the expert seeks to offer is relevant and reliable. This
3 determination "entails a preliminary assessment of whether the
4 reasoning or methodology underlying the testimony is scientifically
5 valid and of whether that reasoning or methodology properly can be
6 applied to the facts in issue." Daubert, 509 U.S. at 592. MC
7 argues that Warner improperly used the process-of-elimination
8 method to determine that the PCE present on the WCM property came
9 from the MC property. Specifically, MC asserts that Warner
10 improperly excluded WCM as a source of the contamination. MC
11 claims it is just as likely that WCM was the source because (1) the
12 asphalt at WCM was not impermeable to PCE, (2) many household
13 ingredients which may have been used at WCM contain PCE and (3)
14 vehicles were occasionally repaired on the WCM property and some
15 products used in vehicle repair contain PCE. MC also faults Warner
16 for making his conclusions without evidence that any of MC's former
17 tenants used PCE.

18 The Court has reviewed Warner's expert reports and concludes
19 that they are grounded in a defensible scientific methodology and
20 based on extensive factual support. MC is correct that Warner's
21 reports did not explicitly discuss the speculative factors
22 mentioned above and why they did not compel the conclusion that PCE
23 flowed from WCM to MC. However, Warner need not mention every
24 speculative theory when describing his methodology. As Warner
25 described, "the mere possibility or speculation that PCE may have
26 been contained in unknown products and in unknown concentrations
27 [on WCM property] is irrelevant when the subsurface data obtained
28 and evaluated in conformance with professional standards does not

1 support a PCE source from the Walnut Creek Manor property." Warner
2 Reply Decl. ¶ 9.

3 Warner performed extensive subsurface testing on both the MC
4 and WCM properties, reviewed photographs of the areas, considered
5 historical information for both MC and WCM properties that
6 describes site use and assessed information provided in deposition
7 testimony and previous environmental reports. The extensive soil
8 testing uncovered evidence that (1) PCE has only been detected in
9 the WCM soil along the MC property line, (2) PCE concentrations on
10 the MC property are far greater than those on the WCM property in
11 adjacent areas and (3) the WCM property is at a lower elevation
12 than the MC property, but PCE in the soil at the MC property exists
13 at elevations at and even above the ground surface level of the WCM
14 property. Warner has demonstrated, with scientifically sound
15 methodology, that a pathway existed for the movement of PCE from MC
16 to WCM.¹

17 MC also asks the Court to exclude Warner's testimony because
18 he has submitted contradictory testimony. MC argues that in
19 Warner's deposition, he testified that PCE contamination moved
20 laterally over the surface of MC's land "into the unpaved area" and
21 onto the WCM property; but in a later declaration, he stated that
22 PCE moved through "the soil column and vadose zone pore space."
23 Warner Decl. ¶ 7. These two statements are not contradictory.

24
25 ¹MC also argues that the opinions of WCM's expert Joseph
26 Odenchantz are inadmissible because (1) WCM did not provide MC with
27 his expert report as required under Federal Rule of Civil Procedure
28 26 and (2) WCM claimed that Odenchantz's work product was
privileged, refused to allow MC to depose him, but now offers his
testimony. WCM does not contest these points in its reply brief.
At the hearing on these motions, the parties agreed not to rely on
Odenchantz's expert opinions.

1 When analyzed in context, the two statements complement each other.
2 There is nothing in the evidence to suggest that PCE cannot travel
3 both horizontally across the surface of MC's land and through the
4 soil.

5 MC argues that even if Warner's testimony is admissible, WCM
6 has not established that a release of PCE came from MC and migrated
7 to WCM. In Castaic Lake Water Agency v. Whittaker Corp., 272 F.
8 Supp. 2d 1053, 1066 (C.D. Cal. 2003), the court stated that

9 in a two-site CERCLA case, the plaintiff meets its
10 burden on summary judgment if it (a) identifies
11 contaminant at its site, (b) identifies the same (or
12 perhaps a chemically similar) contaminant at the
13 defendant's site, and (c) provides evidence of a
14 plausible migration pathway by which the contaminant
could have traveled from the defendant's facility to
the plaintiff's site. If the plaintiff meets this
burden, the defendant must proffer evidence sufficient
to create a genuine issue of fact as to its ability to
disprove causation.

15 MC argues that there is a material factual dispute as to whether
16 anyone at MC ever possessed PCE. Neither party has come forward
17 with direct evidence that persons on MC's property used PCE. The
18 circumstantial evidence of PCE use on MC's property consists of
19 (1) WCM's environmental studies and (2) the fact that a company
20 once located on MC's property, Etch-Tek, was in a business that
21 typically used PCE, although the owner of Etch-Tek testified that
22 he never used PCE.

23 Moreover, MC presents expert testimony that the source of PCE
24 is WCM, not MC. MC's expert, Jan Schutze, states that "PCE
25 concentrations consistently increased with depth, suggesting
26 contamination from a lateral source or sources. Based on the
27 currently available evidence, these up-gradient sources are on the
28 WCM property." Schutze Decl., Exh. 1. MC argues that the PCE

1 traveled through the groundwater along a down-gradient pathway.
2 Opposition at 20. Schutze noted that maintenance shops and storage
3 areas formerly located near where PCE was discovered on WCM's
4 property could be the source of the contaminant. Id. Schutze also
5 estimated that the quantity of PCE present in the soil amounts to
6 one to two gallons, which "is typical for residential applications
7 such as carpet or fabric cleaning, automotive parts cleaning and
8 HVAC equipment servicing." Id.

9 WCM counters that Schutze's conclusions are not supported by
10 specific facts and moves to exclude his testimony under Daubert.
11 MC presents no evidence that the groundwater beneath WMC is
12 contaminated with PCE, let alone at concentrations significant
13 enough to result in the substantially higher soil and groundwater
14 contamination present on the MC property. However, the fact that
15 the groundwater has not been tested on WCM's property does not mean
16 that Schutze should not be heard to opine that the contamination
17 travelled from WCM property via groundwater. Schutze reviewed soil
18 and groundwater samples taken from the MC property and noted that
19 the fact that PCE has been detected in the soil of the up-gradient
20 WCM property as far as twenty feet west of the property line
21 strongly suggests that the contaminant has reached the groundwater
22 below and traveled to MC property. Schutze Reply Decl. ¶ 6.
23 Schutze relied on the same facts as those relied upon by WCM's
24 expert, Warner. It also appears that they use similar
25 methodologies. The difference between them is their conclusions.
26 The Court concludes that neither expert is excluded under Daubert.
27 Both offer relevant and reliable opinions based on sound scientific
28

1 methodologies.² Therefore, a triable issue of fact exists as to
2 the source of the PCE contaminant.³

3 B. Recoverable Remedial Costs

4 To prevail on its summary judgment motion on its CERCLA
5 claims, WCM has the burden to prove that its response cost is both
6 necessary and consistent with the national contingency plan. 42
7 U.S.C. § 9607(a)(4)(B); Carson Harbor Village, Ltd. v. Unocal
8 Corp., 287 F. Supp. 2d 1118, 1153-54 (C.D. Cal. 2003). MC argues
9 that WCM fails to establish that it has any recoverable remedial
10 costs because all of its costs are litigation costs.

11 MC relies primarily on Key Tronic Corp. v. United States, 511
12 U.S. 809 (1994), and Young v. United States, 394 F.3d 858 (10th
13 Cir. 2005). In Key Tronic, the Supreme Court considered the extent
14 to which private corporations that incurred cleanup costs under
15 CERCLA could collect litigation-related attorneys' fees. The Court
16 held that "some lawyers' work that is closely tied to the actual
17 cleanup may constitute a necessary cost of response in and of
18 itself." As an example, the Court noted that "tracking down other
19 responsible solvent polluters" would be recoverable because such

20 _____
21 ²In WCM's reply brief, it moves to exclude Christopher Vais's
22 expert opinions because he testified that he is not an expert in
23 issues concerning vertical or lateral movements of contaminants in
24 soil. Vais Dep. at 43. MC does not dispute this and notes that
25 Vais will not offer his opinions on this issue. Supp. Vais. Decl.
26 ¶ 2. WCM also argues that Vais's opinions are unsupported by any
27 credible evidence. However, like Schutze and Warner, Vais grounded
28 his opinions in test data from both the MC and WCM properties.
Vais's testimony about the source of PCE contamination is relevant
and reliable and is admissible under Daubert.

³To the extent the Court relied upon evidence to which MC
objected, the objections are overruled. To the extent the Court
did not rely on such evidence, MC's objections are overruled as
moot.

1 efforts "significantly benefitted the entire cleanup effort and
2 served a statutory purpose apart from the reallocation of costs."
3 Key Tronic, 511 U.S. at 820. However, pure litigation expenses,
4 such as "legal services performed in connection with negotiations
5 between Key Tronic and the EPA that culminated in the consent
6 decree" are not recoverable because they "do not constitute
7 'necessary costs of response'." Id.

8 MC asserts that both of the experts WCM hired performed work
9 solely to identify MC as the source of PCE for this litigation and
10 not as part of any plan to clean up the contamination. However, as
11 the Supreme Court explained, studies conducted in an effort to
12 "track[] down other responsible solvent polluters" are recoverable
13 under CERCLA. WCM's costs are preliminary efforts to investigate
14 the site and the extent to which the site is polluted in order to
15 make recommendations for future remediation action. That these
16 studies also further WCM's current litigation is irrelevant.

17 In Young, the plaintiffs purchased property "at a
18 substantially reduced price, adjacent to a superfund site." 394
19 F.3d at 860. They subsequently discovered hazardous substances on
20 their property, but instead of taking action to contain or clean up
21 those substances, they sued the federal government and the city
22 government under CERCLA. Id. The court held that the plaintiffs'
23 costs were not necessary to the containment and cleanup of
24 hazardous releases on their property. Id. The court noted,
25 "Recognized costs cannot be deemed 'necessary' to the containment
26 and cleanup of hazardous releases absent some nexus between the
27 alleged response cost and an actual effort to respond to
28 environmental contamination." The court held that the plaintiffs'

1 alleged response costs were not "'necessary' to the containment or
2 cleanup of hazardous releases because the costs were not tied in
3 any manner to the actual cleanup of hazardous releases." The
4 plaintiffs repeatedly testified that they did not intend to spend
5 any money to clean up the contamination on their property.

6 Unlike the plaintiffs in Young, WCM has not testified that it
7 does not intend to spend any money to clean up the contamination on
8 its property. It seeks to recover response costs for work
9 performed in order to assist with and help plan the eventual
10 remediation and cleanup efforts. First Amended Complaint ¶ 33;
11 Eberle Decl. ¶¶ 20, 21, 25, 29, 31-39; Warner Decl. ¶¶ 2-5. WCM
12 has expressed no intention to abandon its property like the
13 plaintiffs did in Young. Eberle Decl. ¶ 5-8. The Court concludes
14 that the cost of the studies performed by WCM is a necessary
15 response cost.

16 MC also argues that WCM's response costs are inconsistent with
17 the national contingency plan (NCP) because (1) WCM's actions have
18 not resulted in a CERCLA-quality cleanup, and (2) WCM's site
19 investigation is insufficient.

20 The NCP provides that a private cleanup effort will be
21 "considered 'consistent with the NCP' if the action, when evaluated
22 as a whole, is in substantial compliance with the applicable
23 requirements [in 40 C.F.R. § 300.700(c)(5)-(6)],⁴ and results in a

24
25 ⁴These sections provide,
26 (5) The following provisions of this Part are potentially
27 applicable to private party response actions:
28 (i) Section 300.150 (on worker health and safety);
(ii) Section 300.160 (on documentation and cost
recovery);

(continued...)

1 CERCLA-quality cleanup." 40 C.F.R. § 300.700(c)(3)(I). A CERCLA-
2 quality cleanup is (1) "protective of human health and the
3 environment," (2) utilizes "permanent solutions and alternative
4 treatment technologies or resource recovery technologies," (3) is
5 cost-effective, and (4) is selected after "meaningful public

6
7 ⁴(...continued)

8 (iii) Section 300.400(c)(1), (4), (5), and (7) (on
9 determining the need for a Fund-financed action); (e) (on
10 permit requirements) except that the permit waiver does
11 not apply to private party response actions; and (g) (on
12 identification of ARARs) except that applicable
13 requirements of federal or state law may not be waived by
14 a private party;

15 (iv) Section 300.405(b), (c), and (d) (on reports of
16 releases to the NRC);

17 (v) Section 300.410 (on removal site evaluation)
18 except paragraphs (f)(5) and (6);

19 (vi) Section 300.415 (on removal actions) except
20 paragraphs (a)(2), (b)(2)(vii), (b)(5), and (g); and
21 including § 300.415(j) with regard to meeting ARARs where
22 practicable except that private party removal actions
23 must always comply with the requirements of applicable
24 law;

25 (vii) Section 300.420 (on remedial site evaluation);

26 (viii) Section 300.430 (on RI/FS and selection of
27 remedy) except paragraph (f)(1)(ii)(C)(6) and that
28 applicable requirements of federal or state law may not
be waived by a private party; and

(ix) Section 300.435 (on RD/RA and operation and
maintenance).

(6) Private parties undertaking response actions should
provide an opportunity for public comment concerning the
selection of the response action based on the provisions
set out below, or based on substantially equivalent state
and local requirements. The following provisions of this
part regarding public participation are potentially
applicable to private party response actions, with the
exception of administrative record and information
repository requirements stated therein:

(i) Section 300.155 (on public information and
community relations);

(ii) Section 300.415(n) (on community relations
during removal actions);

(iii) Section 300.430(c) (on community relations
during RI/FS) except paragraph (c)(5);

(iv) Section 300.430(f)(2), (3), and (6) (on
community relations during selection of remedy); and

(v) Section 300.435(c) (on community relations
during RD/RA and operation and maintenance).

1 participation." 55 Fed. Reg. 8793. "Immaterial or insubstantial
2 deviations" from the NCP will not preclude a cost-recovery action.
3 40 C.F.R. § 300.700(c)(4).

4 WCM does not claim that it has performed a CERCLA-quality
5 cleanup or that its site investigation is sufficient as is.
6 Rather, WCM argues that it does not have to perform these
7 activities to be "consistent" with the NCP because all of its
8 efforts thus far "will undoubtedly play a significant role in the
9 election of a remediation effort."⁵ Reply at 11. The clear
10 language of the NCP reveals that a plaintiff cannot collect costs
11 when it has performed some of the NCP requirements. By merely
12 performing a few investigations of a hazardous site, WCM has not
13 "substantially complied" with the entirety of the NCP. Moreover,
14 because a CERCLA-quality cleanup has not even begun, WCM cannot
15 carry its burden to show that its efforts have "result[ed] in a
16 CERCLA-quality cleanup." WCM's response costs are not "consistent"
17 with the NCP. However, the Court notes that these costs may be
18 recoverable when the cleanup is completed and WCM shows that it
19 substantially complied with the NCP.

20 C. MC's Affirmative Defenses under CERCLA

21 WCM moves for summary judgment on MC's claim that it is
22 protected from liability under CERCLA by the third party defense.
23 Section 9607(b)(3) states, "There shall be no liability" for a
24 "person otherwise liable who can establish by a preponderance of
25 the evidence that the release or threatened release and the damages
26

27 ⁵WCM does not cite any Ninth Circuit cases to support this
28 argument, and the out-of-circuit district court cases that WCM
relies on are inapposite.

1 resulting therefrom were caused solely by . . . an act or omission
2 of a third party . . . if the defendant establishes by a
3 preponderance of the evidence that (a) he exercised due care with
4 respect to the hazardous substance concerned . . . and (b) he took
5 precautions against foreseeable acts or omissions of any such third
6 party and the consequences that could foreseeably result from such
7 acts or omissions." To invoke the defense, MC must also show that,
8 at the time it acquired the property, it "did not know and had no
9 reason to know that any hazardous substance" was disposed of on, in
10 or at the facility. 42 U.S.C. § 9601(35)(A)(ii). To establish
11 that it had no reason to know of the hazardous substance, MC must
12 be able to show that before it purchased the facility it "carried
13 out all appropriate inquiries . . . into the previous ownership and
14 uses of the facility in accordance with generally accepted good
15 commercial and customary standards and practices." Id.
16 § 9601(35)(B)(i). MC must also have taken "reasonable steps to
17 stop any continuing release; prevent any threatened future release;
18 and prevent or limit any human, environmental, or natural resource
19 exposure to any previously released hazardous substance." Id.

20 According to MC, the third party is WCM. As noted above, a
21 triable issue of fact exists as to the source of the PCE release;
22 therefore a triable issue of fact exists as to whether WCM is the
23 "sole" cause of PCE contamination.

24 WCM asserts that MC does not have any evidence that MC took
25 reasonable steps to stop any continuing release, prevent any
26 threatened future release, or prevent or limit exposure of
27 previously released PCE to carry its ultimate burden of persuasion
28 at trial. The Court agrees.

1 Dunivan testified that he took no effort in this regard:

2 Question: You are aware that there is PCE in the soil and in
3 the groundwater beneath Mayhew Center property; is
that correct?

4 Dunivan: That's correct.

5 Question: Have you taken any actions to cease or abate any
6 movement of that PCE associated with its presence?

7 Dunivan: Other than working with the [Regional] board? No.

8 Question: What have you done working with the board to see
9 that PCE no longer has migrated through soil or
groundwater?

10 Dunivan: Nothing.

11 Question: Have you taken any steps to prevent or limit any
12 human or environmental exposure to the PCE that's
13 been detected at the Mayhew Center cite?

14 Dunivan: No, I don't believe so.

15 Instead, MC bases its third party defense on the fact that,
16 before Dunivan purchased the MC property out of foreclosure from
17 the San Francisco Federal Bank, the bank commissioned an
18 environmental assessment to determine the presence of any
19 environmental contaminants. The assessment report noted the
20 presence of asbestos in all of the buildings on the property, but
21 did not mention PCE. However, the report stated that it did not
22 purport to be a complete environmental review and did not even
23 completely examine the current uses of the property, let alone any
24 past uses of the property. Moreover, Dunivan knew of the
25 limitations of the report, but did not take any action to fill
26 those gaps. Therefore, the Court concludes that MC has failed to
27 set forth evidence to support the elements of a third party
28 defense. The Court grants summary adjudication for WCM on MC's
affirmative defense under 42 U.S.C. § 9607(b)(3).

29 D. WCM's Motion for Summary Judgment on MC's claims

30 WCM moves for summary judgment on MC's cross-claims. With
31 respect to MC's CERCLA cross-claims, a triable issue of fact exists
32 as to the source of the PCE contamination, as noted above.

1 Notwithstanding this fact, WCM argues that MC's CERCLA cross-claims
2 must be dismissed because MC has not produced any specific evidence
3 that its response costs are necessary and consistent with the NCP.
4 However, as the parties agreed at the hearing on these motions, the
5 issues regarding response costs will be determined at a later date.
6 The CERCLA issue currently before the Court is the source of PCE
7 contamination. Therefore, the Court denies WCM summary judgment on
8 MC's CERCLA cross-claims.

9 WCM also argues in the alternative that it is protected by the
10 third party defense. WCM asserts that the presence of PCE on its
11 property was caused solely by a third party, MC. See 42 U.S.C. §
12 9607(b)(3). However, a triable issue of fact exists as to whether
13 MC is the "sole" cause of PCE contamination. Therefore, the Court
14 denies summary adjudication for WCM on its affirmative defense.

15 With respect to MC's state law cross-claims, WCM tersely
16 argues that none of them survive summary judgment because MC
17 "provided no credible evidence that the PCE has migrated from the
18 [WMC] property to the MC property." Reply at 19. WCM argues that
19 without such evidence, MC cannot establish the causation or damages
20 elements on its state law cross-claims. However, as noted above,
21 MC has created a triable issue of fact as to the source of the PCE.
22 Therefore, the Court denies WCM's motion for summary judgment on
23 all of MC's state law cross-claims.⁶

24 E. MC's Motion for Summary Judgment on WCM's State Law
25 Claims

26 MC similarly argues that none of WCM's state law claims

27 ⁶At the hearing, the parties agreed to dismiss their
28 respective causes of action for contribution under the Porter-
Cologne Act.

1 survive summary judgment because WCM cannot prove causation for any
2 of the claims. Because there is a triable issue of fact on this
3 issue, the Court denies MC's summary judgment motion on this
4 ground.

5 MC argues that WCM's claims for public and private nuisance
6 and trespass do not survive summary judgment for additional
7 reasons. Nuisance is defined as "anything which is injurious to
8 health . . . or is indecent or offensive to the senses, or an
9 obstruction to the free use of property, so as to interfere with
10 the comfortable enjoyment of life or property." Cal. Civ. Code
11 § 3479.

12 Although the central idea of nuisance is the
13 unreasonable invasion of this interest [in the use and
14 enjoyment of property] and not the particular type of
15 conduct subjecting the actor to liability, liability
16 nevertheless depends on some sort of conduct that
17 either directly and unreasonably interferes with it or
18 creates a condition that does so. The invasion may be
19 intentional and unreasonable. It may be unintentional
20 but caused by negligent or reckless conduct; or it may
21 result from an abnormally dangerous activity for which
22 there is strict liability. On any of these bases the
23 defendant may be liable. On the other hand, the
24 invasion may be intentional but reasonable; or it may
25 be entirely accidental and not fall within any of the
26 categories mentioned above. In these cases there is no
27 liability.

28 Gdowski v. Louie, 84 Cal. App. 4th 1395, 1408 (2000). "The essence
of the cause of action for trespass is an 'unauthorized entry' onto
the land of another. Such invasions are characterized as
intentional torts, regardless of the actor's motivation." Civic
Western Corp. v. Zila Industries, Inc., 66 Cal. App.3d 1, 16
(1977).

MC argues that it cannot be held liable for these causes of
action absent a showing that it was an active participant in

1 causing the PCE contamination. Resolution Trust Corp. v. Rossmoor
2 Corp., 34 Cal. App. 4th 93, 99-100 (1995). WCM has presented
3 evidence that MC drilled a slant boring from the MC property to the
4 WCM's property, which may have created a pathway for the migration
5 of PCE onto WCM's property. The evidence of this action is
6 sufficient to create a material dispute as to MC's liability for
7 nuisance and trespass.

8 MC additionally asserts that WCM has plead only a continuing
9 nuisance, not a permanent one. An important difference between the
10 two is in the allowable damages. In a permanent nuisance case,
11 "the law considers the wrong to be completed at the time of entry
12 and allows recovery of damages for past, present, and future harm
13 in a single action, generally the diminution in the property's
14 value." Starrh and Starrh Cotton Growers v. Aera Energy, LLC, 153
15 Cal. App. 4th 583, 592 (2007). In a continuing nuisance case,
16 "damages are assessed for present and past damages only;
17 prospective damages are not awarded because the trespass may be
18 discontinued or abated at some time, ending the harm." Id. Though
19 WCM does not use the term "permanent nuisance" in its complaint, it
20 seeks damages for "a decrease and diminution in the value" of WCM's
21 property and damages "due to the stigma caused by the contamination
22 of the surface and subsurface soil." FAC ¶ 50. Therefore, the
23 Court finds that MC was on notice that WCM plead both continuing
24 and permanent nuisance theories of liability.

25 MC next argues that WCM's continuing nuisance cause of action
26 fails because WCM cannot prove damages for this claim. MC relies
27 on Mangini v. Aerojet Corp., 12 Cal. 4th 1087 (1996). In that
28 case, the court discussed the type of damages evidence a plaintiff

1 must proffer to demonstrate that a nuisance is continuing and thus
2 not subject to the three year statute of limitations applicable to
3 permanent nuisances. The court held that, because the "plaintiffs
4 had failed to present any substantial evidence that the
5 contamination of their land as a result of defendant['s] . . .
6 practice of dumping and burning a toxic solvent was capable of
7 being abated at a reasonable cost, the nuisance must be deemed
8 permanent." Id. at 1090 (emphasis in original). Therefore, the
9 court applied the three year statute of limitations reserved for a
10 permanent nuisance and concluded that the plaintiff's nuisance
11 claim was time-barred. Id. MC asserts that Mangini stands for the
12 proposition that, to survive summary judgment, WCM must support its
13 continuing nuisance claim with evidence that the contamination on
14 WCM's site is reasonably abatable. However, the holding of Mangini
15 does not apply outside of the statute of limitations context. The
16 court specifically noted,

17 We emphasize, however, that our ruling in this case is
18 confined to the statute of limitations issue before us.
19 We express no opinion on the question whether a
20 plaintiff who has filed a timely nuisance action is
21 required to prove that abatement can be accomplished at
22 a 'reasonable cost' in order to be entitled to an
23 injunction requiring the wrongdoing party to remedy the
24 damage to the property.

21 Id. Because MC does not challenge the timeliness of WCM's nuisance
22 action, WCM need not prove that abatement can be accomplished at a
23 reasonable cost in order to pursue its continuing nuisance claim.

24 MC also argues that WCM's negligence claims fail because MC
25 did not owe any duty to WCM. "No person is permitted by law to use
26 his property in such a manner that damage to his neighbor is a
27 foreseeable result." Booska v. Patel, 24 Cal. App. 4th 1786, 1791
28

1 (1994). Whatever rights MC has in the management of its own land,
2 those rights are tempered by its duty to act reasonably. Id.
3 Here, MC had a duty not to act in a way that would potentially
4 release PCE onto WCM's property. Proffering evidence that MC
5 drilled a slant boring from the MC property to the WCM property is
6 one way WCM can prove a breach of that duty.

7 MC argues in the alternative that WCM's negligence claims fail
8 because its damages are speculative. "Whatever the proper measure
9 of damages may be, in a given case, the recovery therefor is still
10 subject to the fundamental rule that damages which are speculative,
11 remote, imaginary, contingent, or merely possible cannot serve as a
12 legal basis for recovery." Frustuck v. City of Fairfax, 212 Cal.
13 App. 2d 345, 367-68 (1963). MC asserts that WCM has admitted that
14 it cannot prove its damages. Warner Dep. 238:18-140:4. However,
15 the deposition testimony on which MC relies does not state as much.
16 In that testimony, WCM's expert stated that he could not determine
17 exactly how much the PCE levels in the soil and groundwater have
18 increased over time. He was only able to test current PCE levels.
19 These statements do not show that WCM will not be able to prove its
20 damages. Therefore, even though WCM has not specified the exact
21 amount of damages it seeks, it has clearly established the fact of
22 damages and has carried its burden to show that its damages are not
23 speculative.

24 MC argues that WCM's claim for strict liability fails because
25 no admissible evidence suggests that MC engaged in any reckless or
26 ultrahazardous activities. MC relies on Lussier v. San Lorenzo
27 Valley Water Dist., 206 Cal. App. 3d 92 (1988). In that case,
28 after a large storm, water overflowed from a creek on the

1 plaintiff's land and damaged his house. Id. at 98. The plaintiff
2 sued the local water district based on strict liability, claiming
3 that the flooding was caused by the district's failure to clear
4 debris out of the creek. The court held that the defendant could
5 not be strictly liable for damages that arose when a natural
6 condition of the defendant's land interfered with the plaintiff's
7 free use and enjoyment of his property. Id. at 101. The court
8 noted, "Obviously, owning land and letting nature take its course
9 thereon is not reckless or ultrahazardous activity." Id. at 103
10 n.7. The facts of the present case are starkly different. PCE
11 does not naturally occur on anybody's land. Further, WCM has
12 presented evidence that MC released PCE onto WCM's property through
13 slant boring. Therefore, MC has failed to meet its summary
14 judgment burden on WCM's strict liability claim.

15 MC moves for summary judgment on WCM's equitable indemnity
16 claim because "most courts that have considered this issue have
17 concluded that CERCLA provides an adequate remedy at law." Reg'l
18 Airport Auth. of Louisville v. LFG, LLC, 460 F.3d 697, 711-12 (6th
19 Cir. 2006). The Ninth Circuit is not among the "most courts" cited
20 in Reg'l Airport Auth.

21 Section 9652(d) of CERCLA provides, "Nothing in this chapter
22 shall affect or modify in any way the obligations or liabilities of
23 any person under other Federal or State law, including common law,
24 with respect to releases of hazardous substances or other
25 pollutants or contaminants." MC does not present the Court with
26 any state law that would bar an action for equitable indemnity
27 under these circumstances. WCM only seeks equitable indemnity to
28 the extent that equitable relief under CERCLA is not available.

1 Therefore, the Court denies MC's summary judgment motion on this
2 claim.

3 CONCLUSION

4 For the foregoing reasons, the Court grants in part WCM's
5 motion for partial summary judgment (Docket No. 30), thereby
6 adjudicating MC's third party affirmative defense under
7 § 9601(b)(3) and its claim for contribution under the Porter-
8 Cologne Act. The Court grants in part MC's motion for partial
9 summary judgment (Docket No. 63), thereby adjudicating WCM's claim
10 for contribution under the Porter-Cologne Act. All other claims
11 survive these summary judgment motions.

12 IT IS SO ORDERED.

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14 Dated: 4/16/09



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CLAUDIA WILKEN
United States District Judge