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

CARLTON A. SULLINS, et al.,

Plaintiffs,

v.

EXXON/MOBIL CORPORATION,

Defendant.

No. 08-04927 CW

ORDER DENYING
DEFENDANT'S RULE
50 MOTION AND ITS
MOTION FOR A
HEARING; FINDINGS
OF FACTS AND
CONCLUSIONS OF
LAW AFTER BENCH
TRIAL

Plaintiffs Carlton A. Sullins, Rita Sullins and Don-Sul, Inc. (collectively, the Sullinses) initiated this action seeking to recover damages, cleanup costs and a cleanup injunction resulting from environmental contamination on their property allegedly caused by Defendant Exxon/Mobil Corporation (Exxon Mobil). The matter proceeded to a jury trial on Plaintiffs' nuisance claim. The jury found that Defendant had caused contamination on Plaintiffs' property but that the contamination did not substantially and unreasonably interfere with Plaintiffs' use and enjoyment of the property. Thus, the jury returned a verdict in favor of Defendant. Thereafter, a bench trial was held on Plaintiffs' remaining two equitable claims for violation of 42 U.S.C. § 6972(a)(1)(B), the Resource Conservation and Recovery Act (RCRA), and equitable contribution under California Civil Code § 1432. After the close of Plaintiffs' evidence at the bench trial, Defendant made a motion

1 under Rule 50 of the Federal Rules of Civil Procedure for judgment
2 as a matter of law on the RCRA and equitable contribution claims.
3 At the end of the bench trial, the Court ordered the parties to
4 submit closing arguments in writing. The Court noted that the
5 significant issue on the RCRA claim was whether the contamination
6 on the property posed a substantial and imminent endangerment to
7 health or the environment. Reporter's Transcript (RT) at 832. The
8 Court also noted that the significant issues on the equitable
9 contribution claim was whether the cleanup orders issued by the
10 Alameda County Department of Environmental Health (ACEH) addressed
11 to Defendant and Plaintiffs are orders having the force of law, and
12 create a joint obligation upon the parties, as required for an
13 equitable contribution claim. If so, Defendant's fair share of the
14 cleanup costs would be at issue. RT at 805-06, 832.

15 The parties have submitted their briefs. Defendant has moved
16 for oral argument on these matters. Having considered all the
17 papers submitted by the parties, the Court denies Defendant's Rule
18 50 motion and motion for a hearing. The Court finds and concludes
19 that Plaintiffs have not proved by a preponderance of the evidence
20 that the contamination on their property poses a substantial and
21 imminent endangerment to health or the environment. The Court also
22 finds and concludes that the cleanup orders create a joint
23 obligation upon the parties but that Plaintiffs have failed to
24 prove by a preponderance of the evidence that they have paid more
25 than their fair share of that obligation.

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FINDINGS OF FACT

1
2 Carleton and Rita Sullins, through their corporation Don-Sul,
3 Inc., are the owners of the real property located at 187 North L.
4 Street, Livermore, California. Plaintiffs purchased the property
5 in 1972 and operated an equipment rental business, Arrow Rentals,
6 on it from 1972 to 2009. Sometime prior to 1972, a Mobil-branded
7 gas station was operated on the property. During that time, five
8 underground storage tanks (USTs) were installed and operated on the
9 property: three 1,500 gallon tanks, one 4,000 gallon tank and one
10 6,000 tank, and the associated underground piping.

11 Plaintiffs removed the three 1,500 gallon tanks shortly before
12 closing on their purchase of the property. In 1984, they removed
13 the two remaining tanks and installed one new 1,000 gallon tank for
14 use in their business. Plaintiffs removed this tank in 1993.

15 The soil and the groundwater on the property is contaminated
16 with gasoline-type petroleum hydrocarbons which emanated from two
17 sources: (1) releases from the USTs and the connecting pipelines
18 and (2) a spill, in 1985, by Plaintiffs' contractor, Pitcock
19 Petroleum, when it mistakenly delivered 600 gallons of gasoline
20 into a monitoring well instead of into a UST. RT at 439 (testimony
21 of Plaintiffs' expert, Dr. Raymond Kablanow).

22 Sometime after Plaintiffs purchased the property, the City of
23 Livermore and the ACEH concluded that the soil and groundwater on
24 the property contained hazardous materials and ordered Plaintiffs
25 and Defendant, as responsible parties, to develop and implement a
26 remediation plan. Plaintiffs have hired several consultants to
27 investigate the contamination on the property, to report to the
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1 governmental agencies and to prepare a remediation plan.
2 Plaintiffs have applied to the State Water Resources Control
3 Board's Underground Storage Tank Fund (UST Fund) for reimbursement
4 of the fees they have paid to consultants. The parties agree that
5 the UST Fund has paid for approximately eighty-five percent of the
6 remediation costs. Defendant has made no effort to investigate or
7 remediate the property and has not contributed to Plaintiffs'
8 efforts to comply with the regulatory agencies' cleanup orders.

9 CONCLUSIONS OF LAW

10 I. Rule 50 Motion

11 Federal Rule of Civil Procedure 50(a) provides:

12 (1) If a party has been fully heard on an issue during a
13 jury trial and the court finds that a reasonable jury
14 would not have a legally sufficient evidentiary basis to
15 find for the party on that issue, the court may:

16 (A) resolve the issue against the party; and

17 (B) grant a motion for judgment as a matter of law
18 against the party on a claim or defense that, under the
19 controlling law, can be maintained or defeated only with
20 a favorable finding on that issue.

21 Because the claims at issue here are equitable and have been
22 tried to the Court in a bench trial, Rule 50, which applies to jury
23 trials, is not applicable. Therefore, Defendant's Rule 50 motion
24 is denied.

25 II. RCRA Claim

26 RCRA subsection B provides that any person may commence a
27 civil action

28 (B) against any person, . . . including any past or
present generator, past or present transporter, or past
or present owner or operator of a treatment, storage, or
disposal facility, who has contributed or who is
contributing to the past or present handling, storage,

1 treatment, transportation, or disposal of any solid or
2 hazardous waste which may present an imminent and
substantial endangerment to health or the environment
. . .

3 42 U.S.C. § 6972(a)(1)(B).

4 A. Generator, Transporter, Owner or Operator Who Contributed
5 to Past Handling, Storage, Treatment, Transportation or
6 Disposal of Hazardous Waste

7 Defendant argues that Plaintiffs have failed to set forth
8 evidence that it owned or operated the USTs on the property or
9 contributed to the contamination. Defendant points out that the
10 only evidence of ownership of the property prior to 1972 is that it
11 was owned by Mona Holm, an unrelated third party. RT at 279:11-13.
12 Defendant argues that, although Plaintiffs may have established
13 that there was a Mobil-branded gas station on the property prior to
14 1972, they have not established that Mobil owned or operated that
15 gas station. Defendant posits that many service stations are
16 operated by independent dealers who sell gasoline branded by a
17 particular oil company and the service station on Plaintiffs'
18 property might have been of that ilk. Defendant contends that
19 supplying gasoline to the operator of a gas station would not
20 create RCRA liability because it does not meet the requirement that
21 a defendant has contributed to the handling, storage, treatment,
22 transportation or disposal of any hazardous waste.

23 The phrase "contributed to" in RCRA requires some degree of
24 causation of the contamination by the party to be held liable.
25 Hinds Investments, L.P. v. Team Ents., Inc., 201 WL 922416, *10
26 (E.D. Cal.); California Dep't of Toxic Substances Control v.
27 Interstate Non-Ferrous Corp., 298 F. Supp. 2d 930, 979 (E.D. Cal.)

1 2003). "Contributed to" means that some affirmative action is
2 required on the part of the defendant, rather than merely passive
3 conduct. Sycamore Indus. Park Assocs. v. Ericsson, Inc., 546 F.3d
4 847, 854 (7th Cir. 2008).

5 Plaintiffs point to the following evidence which, they argue,
6 establishes that Defendant operated the Mobil gas station on the
7 property and contributed to the contamination. Mr. Sullins
8 testified that, from 1961 to 1965, he was employed by Mobil Oil
9 Company as a fuel truck dispatcher and, in that role, he dispatched
10 fuel to a Mobil station on the property. RT 241:12-18, 242:6-9.
11 Mr. Sullins testified that, when he and his former business partner
12 acquired the property in 1972, he removed the existing fuel pumps,
13 which were red--Mobil's trademark color. RT 255:15-25; 256:1. Mr.
14 Sullins also testified that, when he took possession of the
15 property in 1972, he found a plaque on the office wall, dated 1961,
16 which stated, "John Bowersox, we are pleased you have completed ten
17 years as a Mobil dealer. . . ." and was signed by a Division
18 Manager of Mobil Oil Company. RT at 258:20-260:3; Exh. 5.

19 Plaintiffs point to a June 5, 2006 letter from Hany Fangary,
20 Defendant's counsel, regarding "Former Mobil LIV, 187 North L
21 Street, Livermore, California." Exh. 205. In this letter, Mr.
22 Fangary summarized his research of the past ownership of the
23 property. Id. He stated that, based on his review of the grant
24 deeds and title to the property, he found that it was originally
25 owned by S.C. and K.O. Buck, who, in 1948, sold it to Leslie Holm.
26 In 1960, Leslie Holm sold it to Mona Holm. Mona Holm owned the
27 property from 1960 to 1972, when it was purchased by G.R. Donnelly,
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1 Mr. Sullins' business partner. Id. Mr. Fangary wrote, "The
2 Property operated as a Mobil service station from 1951 to 1969. . .
3 . Five USTs were located onsite during the former Mobil station
4 operations: three 1,500 gallon, one 4,000 gallon, and one 6,000
5 gallon." Id.

6 Finally, Plaintiffs point to the testimony of Albert Ridley,
7 an engineering geologist, who was retained by the City of Livermore
8 to evaluate the property and the entire city block on which it is
9 located. RT 158:8-15. Mr. Ridley testified that, as part of his
10 investigation of the property, he went to the City of Livermore's
11 Building Department and found a record of a 1960 building permit by
12 Socony Mobil to install an underground storage tank on the property
13 and a fee paid for the permit. RT 231:7-25.

14 The Court finds as a matter of fact that this evidence shows
15 that Defendant operated a Mobil gas station on the property between
16 1951 and 1969 and, during that time, utilized the five USTs that
17 are at issue here. The fact that Mobil obtained the building
18 permit for one of the USTs can only mean it was responsible for
19 installing and operating it. Furthermore, Defendant submits no
20 evidence in support of its theory that it merely supplied gasoline
21 to an independent dealer.

22 The Court finds, as did the jury, that Plaintiffs established
23 by a preponderance of the evidence that the contamination on the
24 property was caused, in part, by leaking USTs.

25 B. Substantial and Imminent Endangerment

26 In Meghriq v. K.C. Western, Inc., 516 U.S. 479, 480 (1996),
27 the Supreme Court determined that "an endangerment can only be

1 'imminent' if it threatens to occur immediately . . . This language
2 implies that there must be a threat which is present now, although
3 the impact of the threat may not be felt until later." (emphasis
4 in original).

5 In Price v. United States Navy, the Ninth Circuit clarified
6 the meaning of subsection B's "imminent and substantial
7 endangerment" requirement:

8 A finding of "imminency" does not require a showing that
9 actual harm will occur immediately so long as the risk of
10 threatened harm is present. "An imminent hazard may be
11 declared at any point in a chain of events which may
12 ultimately result in harm to the public." Imminence
13 refers "to the nature of the threat rather than
14 identification of the time when the endangerment
15 initially arose." Moreover, a finding that an activity
16 may present an imminent and substantial harm does not
17 require actual harm. Courts have also consistently held
18 that endangerment means a threatened or potential harm
19 and does not require proof of actual harm.

20 39 F.3d 1011, 1019 (9th Cir. 1994). The endangerment must be
21 substantial or serious, and "there must be some necessity for the
22 action." Id.

23 Following Price, district courts in the Ninth Circuit have
24 interpreted "imminent and substantial endangerment" liberally.
25 "Because the word 'may' precedes the standard of liability,
26 Congress included expansive language intended to confer upon the
27 courts the authority to grant affirmative equitable relief to the
28 extent necessary to eliminate any risk posed by toxic wastes."
29 California Dep't of Toxic Substances Control v. Interstate Non-
30 Ferrous Corp., 298 F. Supp. 2d 930, 980 (E.D. Cal. 2003).

31 Moreover, "substantial" does not require quantification of the
32 endangerment. Id. "Endangerment is substantial if there is some

1 reasonable cause for concern that someone or something may be
2 exposed to a risk of harm by a release or a threatened release of a
3 hazardous substance if remedial action is not taken." Id.

4 However, "there is a limit to how far the tentativeness of the
5 word may can carry a plaintiff." Crandall v. City and County of
6 Denver, Colorado, 594 F.3d 1231, 1238 (10th Cir. 2010) (emphasis in
7 original). Thus, the endangerment cannot be merely possible, but
8 must "threaten to occur immediately." Id. (citing Meghriq, 516
9 U.S. at 485). And, there is no endangerment unless the present or
10 imminent situation can be shown to present a risk of later harm.
11 Id. Thus, although the harm may be in the future, the endangerment
12 must be imminent. Id. It is not enough that, in the future,
13 someone may do something with hazardous waste that, absent
14 protective measures, can injure human beings. Id. at 1239.
15 Furthermore, a showing of soil and groundwater pollution by itself
16 does not constitute an imminent and substantial endangerment. Two
17 Rivers Terminal, L.P. v. Chevron USA, Inc., 96 F. Supp. 2d 432, 446
18 (M.D. Pa. 2000); Davies v. National Cooperative Refinery Ass'n, 963
19 F. Supp. 990, 999-1000 (D. Kan. 1997) (although evidence showed
20 resulting threat from high levels of contamination would be
21 substantial, it did not establish likelihood that any person would
22 actually be exposed to it).

23 Plaintiffs cite trial evidence to argue that substantial and
24 imminent endangerment to health or the environment will result from
25 the contamination on the property. They cite testimony from Dr.
26 Raynold Kablanow, their expert, and Barbara Mickelson, Defendant's
27 expert. Specifically, Dr. Kablanow testified that there is a high
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1 concentration core of contamination on the property, RT at 499:3-5,
2 that there is free product, basically pure gasoline, floating on
3 top of the groundwater, RT at 525:17-526:20, and that "when the
4 concentrations of dissolved gasoline gets greater than what water
5 would--would put into solution, then a separate phase develops. A
6 free-product phase develops," as was observed on the property, RT
7 at 539:5-23. Dr. Kablanow also testified that there "must have
8 been a lot [of contaminant] . . . to form a separate phase and to
9 form a big groundwater contamination plume." RT at 569:2-6; 8-10.

10 Ms. Mickelson testified that more than 500 milligrams of
11 contaminant per kilogram was detected on the property and this
12 level of contamination would "not be allowed to be left in place
13 without some kind of screening risk assessment" by the regulatory
14 authorities. RT at 673:14-674:1; 644:13-19 (highest concentration
15 measured at boring G is 12,000 milligrams per kilogram).

16 Plaintiffs point to Dr. Kablanow's statement, "Gasoline is not
17 normal in the environment," to show that the environment is
18 endangered. Plaintiffs also cite Exhibit 187, a September 4, 2008
19 letter from ACEH to Plaintiffs and Defendant stating that the
20 property

21 is located within the Livermore-Amador Groundwater Basin
22 where groundwater is currently used as a source of
23 drinking water. We do not believe that the requisite
24 level of drinking water quality will be attained within a
25 reasonable time period at your site. Although
26 unauthorized releases occurred at the site more than 20
27 years ago, highly elevated concentrations of petroleum
28 hydrocarbons still remain in soil and groundwater beneath
the site. Restoration of water quality to the requisite
drinking water quality by natural attenuation processes
is likely to require several additional decades or
longer. Given the potential for groundwater use within
the Livermore-Amador Groundwater Basin, we do not believe

1 this long-term degradation of water quality in this area
2 of the basin is justified. Therefore, your case cannot
be closed at this time.

3 Ex. 187 at 2.¹

4 Defendant argues that Plaintiffs' evidence fails to prove
5 there is a substantial likelihood of endangerment from
6 contamination and points out that neither Dr. Kablanow nor any
7 other witness testified to health or environmental risk. Defendant
8 cites Dr. Kablanow's testimony that the contaminant plume is
9 shrinking due to natural processes. RT at 445:23-446:4; 498:2-
10 499:5 (through natural attenuation the original large plume of
11 contamination has shrunk to the high concentration core).
12 Defendant also cites the testimony of Eric Uranga, Assistant
13 Director of Community Development for the City of Livermore, that
14 the property is not specifically mentioned in the City of
15 Livermore's five year development plan and that properties in
16 downtown Livermore do not pump their own drinking water. RT at
17 842:11-843:15, 844:16-18.

18 Plaintiffs have failed to prove by a preponderance of the
19 evidence that the contamination on the property may present an
20 imminent and substantial endangerment to health or the environment.

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22 ¹Defendant objects on hearsay grounds to the admission of
23 Exhibit 187 and all letters from ACEH and the City of Livermore.
24 At trial, the Court admitted these letters as proof that they were
25 sent and received, not as proof of the matters asserted therein.
26 RT 797:20-22; 798:21-25. Plaintiffs argue that the letters are
27 admissible under Rules 803(8) and 807 of the Federal Rules of
Evidence, which provide a hearsay exception for public records and
reports and a residual hearsay exception. The Court admits Exhibit
187 and the other regulatory letters under both hearsay exceptions.
However, as explained below, Plaintiffs mischaracterize the meaning
of Exhibit 187; it does not aid Plaintiffs in establishing imminent
and substantial endangerment to health or the environment.

1 At most their evidence shows that there is substantial
2 contamination on the property and that the level of the
3 contamination warrants some kind of screening risk assessment by
4 the regulatory agencies. However, Plaintiffs fail to point to any
5 testimony that someone or something may be exposed to a risk of
6 harm by the contamination if remedial action is not taken. Dr.
7 Kablanow's brief statement that any presence of gasoline is not
8 normal to the environment does nothing to establish that
9 endangerment is caused by the particular contamination found on
10 Plaintiffs' property. Furthermore, Exhibit 187 fails to specify if
11 the groundwater on the property ties into the Livermore-Amador
12 Groundwater Basin's groundwater supply or the probability that
13 groundwater from the property would be used.

14 Plaintiffs interpret this letter to establish that the
15 groundwater on the property will definitely be used for drinking
16 water and this means that, without remediation, someone or
17 something will be harmed. However, the letter merely speculates
18 that at some unknown time in the future there is a possibility that
19 groundwater from the property might be tied into groundwater in the
20 Basin that may be used as drinking water. To establish the level
21 of groundwater on the property and whether any of the water under
22 the property is or will be used for drinking water would require
23 expert testimony, which Plaintiffs failed to produce at trial.

24 This case is similar to several cases where the plaintiffs
25 proved that there was substantial contamination on their property,
26 but failed to prove that the contamination was likely to cause harm
27 to someone or something. For instance, in Two-Rivers Terminal, the

1 plaintiff's consultant opined that, because there was a water
2 supply on the plaintiff's contaminated property and the state
3 department of environmental protection had deemed the supply
4 usable, a person could be harmed by drinking it. 96 F. Supp. 2d at
5 445. The court held that, even though the state regulatory agency
6 might consider the water drinkable, on a RCRA claim, federal law,
7 not state law, is relevant, and the fact that no one was drinking
8 the water eliminated it as a threat to health or the environment.
9 Id. at 446. The court concluded that the plaintiff had merely
10 shown that substantial contamination existed on its property and
11 this was insufficient to establish liability under RCRA. Id. at
12 446-47. In Cordiano v. Metacon Gun Club, Inc., the court reviewed
13 the plaintiff's evidence, an expert report that stated, "[T]he
14 presence of firing-range-related contaminants on the site,
15 primarily total lead, represents a potential exposure to risk to
16 both humans and wildlife. A risk assessment utilizing the data
17 obtained during this investigation would be necessary to evaluate
18 the degree of risk to humans and wildlife." 575 F.3d 199, 211 (2nd
19 Cir. 2009). The court held that this evidence was "insufficient to
20 permit a factfinder to assess the magnitude of the possible risk
21 identified in the . . . report. . . . There is thus insufficient
22 evidence for a jury to find that the alleged contamination presents
23 a reasonable prospect of future harm, and hence that it may present
24 an imminent and substantial endangerment to the health or the
25 environment." Id. Additionally, to establish that the lead
26 contamination on the site presented a potentially serious risk, the
27 plaintiff relied solely on the evidence that the contamination

1 exceeded the state's thresholds for lead contamination on similar
2 residential sites. Id. at 212. The court explained that state
3 environmental standards do not define a party's federal liability
4 under RCRA. Id. Further, the plaintiff had provided no evidence
5 that anyone was subject to long-term exposure to lead contamination
6 at the site, or that realistic pathways of exposure were there.
7 Id. at 213. Thus, the court held that the plaintiff had failed to
8 prove that the potential harm at issue rose to the level of serious
9 endangerment. Id. at 214.

10 In Newark Group, Inc. v. Dopaco, Inc., 2010 WL 1342268, *5, 6
11 (E.D. Cal.), the court held that the plaintiff's evidence that the
12 contamination in the soil and groundwater on its property far
13 exceeded the environmental cleanup standards set by state and
14 federal regulatory agencies, together with the state agency's
15 statement that it considered all groundwater in the Central Valley
16 Region to be a potential source of municipal or domestic water
17 supply, was insufficient to show that the risk of endangerment from
18 the contamination was imminent. The court explained that the
19 plaintiff had merely shown that the endangerment was possible, but
20 was required to show that the endangerment was imminent by showing
21 that it threatened to occur immediately. Id. at 7. The court held
22 that evidence that certain samples from the property exceeded
23 government standards did not provide an adequate basis for a jury
24 to conclude that federal law under RCRA has been violated. Id.

25 Similarly, Plaintiffs here have merely shown that the
26 contamination on the property exceeds state regulatory standards
27 and that the groundwater on the property potentially may be, at

1 some unknown time in the future, a source of drinking water. The
2 Court finds and concludes that this is insufficient to show, by a
3 preponderance of the evidence, either the imminence of harm to
4 health or the environment or the substantial nature of the future
5 harm. Judgment shall enter for Defendant on the RCRA claim.

6 III. Equitable Contribution

7 California Civil Code § 1432 provides, in relevant part:

8 a party to a joint, or joint and several obligation, who
9 satisfies more than his share of the claim against all,
may require a proportionate contribution from all the
parties joined with him.

10 Equitable contribution is the right to recover, not from the
11 party primarily liable for a loss, but from a co-obligor who shares
12 such liability with the party seeking contribution. Morgan Creek
13 Residential v. Kemp, 153 Cal. App. 4th 675, 684 (2007). The right
14 of contribution, although related to some former transaction or
15 obligation, exists as a separate contract implied by law. Id.
16 Where two or more parties are jointly liable on an obligation and
17 one of them makes payment of more than its share, the one paying
18 has a claim against the others for their proportion of what it has
19 paid for them. Id. The purpose of this rule of equity is to
20 accomplish substantial justice by equalizing the common burden
21 shared by co-obligors and preventing one obligor from profiting at
22 the expense of others. Id. The right of contribution arises as
23 soon as a party pays more than its share of the obligation, but not
24 until then. Jackson v. Lacy, 37 Cal. App. 2d 551, 559 (1940).

25 A. Joint Obligation

26 Plaintiffs argue that the cleanup orders from the state
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1 regulatory agencies create a joint obligation, pointing out that
2 these orders, all of which are addressed to both parties, state:

3 If it appears as though significant delays are occurring
4 or reports are not submitted as requested, we will
5 consider referring your case to the Regional Board or
6 other appropriate agency, including the County District
7 Attorney, for possible enforcement actions. California
8 Health and Safety Code, Section 25299.76 authorizes
9 enforcement including administrative action or monetary
10 penalties of up to \$10,000 per day for each day of
11 violation.

12 Plaintiffs also cite Health and Safety Code § 25299.70, which
13 provides that an owner or operator who has not complied with any
14 corrective action order shall be liable for the full costs incurred
15 in cleaning up the site, and § 25299.73, which provides that the
16 standard for the obligation to pay any costs of corrective action
17 is strict liability. Plaintiffs argue that, because the cleanup
18 orders are enforceable under the California Health and Safety Code,
19 they create a joint obligation in that "they are addressed to both
20 the Sullins and ExxonMobil as parties who are jointly responsible
21 for the remediation of the Property."

22 Under California Civil Code § 1427, an obligation is defined
23 as "a legal duty, by which a person is bound to do or not to do a
24 certain thing." Under California Civil Code § 1428, an obligation
25 arises either from a contract between the parties or the operation
26 of law, which may be enforced in the manner provided by law, or by
27 civil action or proceeding.

28 California Health and Safety Code §§ 25280 et seq. govern the
operation of USTs in California. Section 25296.10 provides the
corrective action requirements in response to unauthorized releases
from USTs. Section 25296.10(c)(1) provides that, when a local

1 agency requires a responsible party to undertake corrective action
2 pursuant to an oral or written order, that party shall prepare a
3 work plan that details the corrective action that party shall take
4 to comply. Section 25296.10(f)(1) provides that, if the
5 responsible party does not comply with the order, the local
6 regulatory agency may undertake the corrective action. Section
7 25299(d)(1) and (2) provides that any person who violates any
8 corrective action requirement established pursuant to § 25296.10 is
9 liable for a civil penalty of up to \$10,000 for each UST for each
10 day of violation and the penalty may be imposed in a civil action
11 or administratively by the regulatory agency.

12 The Court concludes that these statutes governing the
13 operation of USTs establish that the cleanup orders are orders that
14 carry the force of law and create the joint obligation necessary
15 for an equitable contribution claim. The fact that the statutes
16 use the word "shall" when indicating how a responsible party is to
17 respond to a cleanup order shows that the party does not have a
18 choice; it must comply with the order. Further, if a party fails
19 to comply with a cleanup order, the state agency has the authority
20 to impose a civil penalty administratively or to file a civil
21 action to impose the penalty. This meets the definition of
22 obligation under Civil Code § 1427: a legal duty that the party is
23 bound to do or not do a certain thing and that may be enforced in a
24 manner prescribed by law or in a civil proceeding.

25 This issue is decided in Plaintiffs' favor.

26 B. Proportionate Share of Cleanup Costs

27 To establish a right to equitable contribution, Plaintiffs

1 also must show that they have paid more than their fair share of
2 the obligation, that is, the cleanup costs. The evidence shows
3 that Plaintiffs have paid all of the cleanup costs and Defendant
4 has paid nothing. However, eighty-five percent of the costs
5 Plaintiffs incurred have been reimbursed by the UST Fund. The
6 parties stipulated that Plaintiffs have spent \$42,237.95 which has
7 not been reimbursed by the UST Fund.

8 Plaintiffs argue that Defendant should pay the entire
9 \$42,237.95, and all future costs, as its equitable contribution
10 because the jury concluded that Defendant contaminated the
11 property, and Defendant has done nothing to comply with any cleanup
12 orders. Defendant responds that, even if it was responsible for
13 some of the contamination, it could only be responsible for leakage
14 from USTs, and there is no evidence that this amounts to more than
15 eighty-five percent of the expense, which has been reimbursed by
16 the UST Fund. Defendant also argues that no evidence has been
17 submitted to prove that Plaintiffs are responsible for less than
18 fifteen percent of the contamination, which would be another way to
19 prove that Plaintiffs have paid more than their fair share of the
20 cleanup costs. Plaintiffs reply that they are not responsible for
21 the Pitcock Release and, thus, are not responsible for any
22 contamination on the property. Plaintiffs lament that, although
23 they are not responsible for any contamination, they have paid 100
24 percent of the cleanup costs over the past twenty years. They
25 argue that "the only possible conclusion the Court can reach is
26 that Sullins have paid more than their fair share. Any amount
27 above \$0.00 is more than Sullins' fair share." Thus, they conclude
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1 that Defendant should pay all of the \$42,237 and any additional
2 future costs that may be unreimbursed by the UST Fund.

3 Although Plaintiffs may not have caused the Pitcock Release,
4 neither did Defendant. It occurred while Plaintiffs owned and
5 operated the business on the property that required the gasoline
6 that Pitcock delivered to the property. Furthermore, Plaintiffs
7 settled their claims against Pitcock and were reimbursed for the
8 damages caused by the Pitcock Release. Thus, Plaintiffs, and not
9 Defendant, are responsible for the contamination caused by the
10 Pitcock Release.

11 Because the UST Fund reimbursed Plaintiffs for cleaning up the
12 contamination caused by the USTs, which the parties agree is
13 eighty-five percent of the amount Plaintiffs have spent, to prevail
14 on this issue, Plaintiffs must show that the contamination from the
15 USTs was more than eighty-five percent of the total contamination
16 on the property. Plaintiffs have failed to do so. Plaintiffs
17 concede that no evidence of percentage contributions was presented
18 at trial. RT at 710-3-12.

19 Because Plaintiffs have failed to establish by a preponderance
20 of the evidence that the contamination on the property was more
21 than eighty-five percent attributable to the USTs, their claim for
22 equitable contribution fails. Judgment on this claim shall enter
23 in favor of Defendant.

24 CONCLUSION

25 For the foregoing reasons, Defendant's Rule 50 motion and
26 motion for a hearing are denied. The Court finds and concludes
27 that Plaintiffs failed to show by a preponderance of the evidence

1 that the contamination on the property poses a substantial and
2 imminent endangerment to health or the environment. The Court
3 further finds and concludes that Plaintiffs have failed to show by
4 a preponderance of the evidence that they have paid more than their
5 fair share of the joint obligation to clean up the contamination on
6 the property.

7 Judgment shall enter in favor of Defendant on the RCRA and
8 equitable contribution claims. All parties shall bear their own
9 costs of suit.

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11 IT IS SO ORDERED.

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13 Dated: 1/26/2011

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CLAUDIA WILKEN
United States District Judge

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