

1 **\*\* E-filed May 20, 2011 \*\***

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11 **NOT FOR CITATION**

12 **IN THE UNITED STATES DISTRICT COURT**

13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

14 **SAN JOSE DIVISION**

11 SISTERS OF NOTRE DAME DE NAMUR,  
CALIFORNIA PROVINCE,

No. C10-01807 HRL

12 Plaintiff,

13 v.

14 MRS. OWEN J. GARNETT-MURRAY, et  
al.,

15 Defendants.

**ORDER (1) GRANTING  
TECHNICHEM'S MOTION TO  
DISMISS SECOND CAUSE OF  
ACTION IN FIRST AMENDED  
THIRD PARTY COMPLAINT, (2)  
GRANTING IN PART AND DENYING  
IN PART TABATABAI AND  
FESAhati'S MOTION TO DISMISS  
SECOND AND THIRD CAUSES OF  
ACTION IN FIRST AMENDED  
THIRD PARTY COMPLAINT, AND  
(3) DENYING TABATABAI AND  
FESAhati'S MOTION TO DISMISS  
CROSS-CLAIMS**

16 \_\_\_\_\_  
17 MRS. OWEN J. GARNETT-MURRAY, et  
al.

18 Third Party Plaintiff and  
19 Cross-Claimant,

20 v.

21 MANLEI CHIAO, et al.,

22 Third Party Defendants and  
23 Cross-Defendant  
\_\_\_\_\_ /

**[Re: Docket Nos. 57, 58, 59, 62, 68]**

24 **BACKGROUND**

25 This action involves the alleged contamination and resulting clean-up of land. Plaintiff  
26 Sisters of Notre Dame de Namur, California Province (the "Sisters") own property located at 1330  
27 Saratoga-Sunnyvale Road in Sunnyvale, California (the "Mardesich Property"). Together,  
28 defendants Mrs. Owen J. Garnett-Murray ("Garnett-Murray") and Fremont Corners, Inc. ("Fremont

1 Corners”) own the Fremont Corners shopping center adjacent to the Mardesich Property (the  
2 “Fremont Corners Property”), and defendant Manlei Chiao (“Chaio”) has owned and operated  
3 Angela’s Dry Cleaning, located on the Fremont Corners Property, since October 2003.

4 The Sisters allege that chlorinated solvents, including perchloroethylene (“PCE”), have been  
5 released by Angela’s Dry Cleaning since at least November 2006 and that these releases have  
6 contaminated the soil and possibly the groundwater on the Mardesich Property. In 2007, the Sisters  
7 collected soil vapor samples on their property, which revealed concentrations of PCE about 15 times  
8 greater than the level considered presumptively acceptable for residential use. Clean-up efforts have  
9 begun.

10 The Sisters filed suit against Garnett-Murray, Fremont Corners, and Chaio for violations of  
11 the Resource Conservation and Recovery Act (“RCRA”), 42, U.S.C. §§ 6901 et seq., and for state  
12 law continuing nuisance and trespass violations. Docket No. 17.

13 Garnett-Murray and Fremont Corners then cross-claimed against Chiao and also sued third  
14 party defendants Technichem, Inc. (“Technichem”), Mohsen Tabatabai (“Tabatabai”), and Shahin  
15 Fesahati (“Fesahati”) for, among other things, the necessary clean-up costs, contribution, and  
16 declaratory relief under three provisions of the Comprehensive Environmental Response,  
17 Compensation, and Liability Act of 1980 (“CERCLA”), 42 U.S.C. § 9607 §§ 9607(a), 9613(f),  
18 9613(g). Docket No. 53. Tabatabai and Fesahati are alleged to have owned and operated Angela’s  
19 Dry Cleaning prior to Chaio, and Technichem is alleged to have provided containers to Chiao for  
20 storing PCE and to have removed and transported PCE from Angela’s Dry Cleaning to disposal  
21 sites.

22 After that, Chiao cross-claimed against Garnett-Murray, Fremont Corners, Tabatabai, and  
23 Fesahati for equitable indemnity, contribution, rescission, negligent misrepresentation, and  
24 declaratory relief. Docket No. 60. She alleges that it was Tabatabai and Fesahati who released the  
25 chlorinated solvents, that Garnett-Murray and Fremont Corners knew about it, but that none of them  
26 did anything about it or told her about it before she took over Angela’s Dry Cleaning.

27 Now, Technichem, Tabatabai, and Fesahati have moved to dismiss certain causes of action  
28 in Garnett-Murray and Fremont Corners’ First Amended Third Party Complaint, and Tabatabai and

1 Fesahati have moved to dismiss Chiao’s cross-claims. Pursuant to Civil Local Rule 7-1(b), the Court  
2 finds the matter suitable for determination without oral argument, and the May 24, 2011 hearing is  
3 vacated.<sup>1</sup>

4 **DISCUSSION**

5 A. Third Party Defendant Technichem’s Motion to Dismiss Second Cause of Action in First  
6 Amended Third Party Complaint

7 Technichem moved to dismiss the second cause of action in Garnett-Murray and Fremont  
8 Corners’ First Amended Third Party Complaint for contribution under CERCLA. Docket No. 57.  
9 Private parties may seek contribution from other “potentially responsible parties” under CERCLA,  
10 but only if they have been first been sued under CERCLA §§ 106 or 107(a). 42 U.S.C. § 113(f)(1);  
11 United States v. Atlantic Research Corp., 551 U.S. 128, 131 n.1 (2007). Here, neither Garnett-  
12 Murray nor Fremont Corners have been sued under those sections. See Docket Nos. 17, 60.

13 Garnett-Murray and Fremont Corners also failed to oppose Technichem’s motion.<sup>2</sup> “The  
14 failure to file an opposition to a motion to dismiss in a manner consistent with the court’s rules is  
15 grounds for granting the motion.” Wiley v. Macy’s, No. C10-1188 SBA, 2010 WL 2636029, at \*1  
16 n.1 (N.D. Cal. June 30, 2010) (citing Ghazali v. Moran, 46 F.3d 52, 54 (9th Cir. 1995) (holding that  
17 a pro se litigant’s failure to follow a court’s local rules and file a timely opposition to a motion to  
18 dismiss is proper grounds for dismissal)).

19 Accordingly, Technichem’s motion is GRANTED. The second cause of action in Garnett-  
20 Murray and Fremont Corners’ First Amended Third Party Complaint is dismissed without prejudice  
21 as to all defendants.<sup>3</sup>

22 \_\_\_\_\_  
23 <sup>1</sup> Pursuant to 28 U.S.C. § 636(c) and Federal Rule of Civil Procedure 73, all parties have expressly  
24 consented that all proceedings in this matter may be heard and finally adjudicated by the  
undersigned. In addition, Garnett-Murray and Fremont Corners’ administrative motion to appear at  
the hearing (Docket No. 68) is DENIED AS MOOT.

25 <sup>2</sup> According to correspondence provided by Technichem, it appears that Garnett-Murray and  
26 Fremont Corners informed Technichem that they did not oppose its motion. Docket No. 65-1, Ex.  
A. They did not, however, inform the Court of this, as they should have. See Civ. L.R. 7-3(b).

27 <sup>3</sup> “A District Court may properly on its own motion dismiss an action as to defendants who have not  
28 moved to dismiss where such defendants are in a position similar to that of moving defendants or  
where claims against such defendants are integrally related.” Silverton v. Dep’t of Treasury, 644  
F.2d 1341, 1345 (9th Cir. 1981), cert. denied, 454 U.S. 895, 102 S.Ct. 393, 70 L.Ed.2d 210 (1981)

1 B. Third Party Defendants Mohsen Tababatai’s and Shahin Fesahati’s Motion to Dismiss First  
2 Amended Third Party Complaint

3 Like Technichem, Tabatabai and Fesahati moved to dismiss the second cause of action in  
4 Garnett-Murray and Fremont Corners’ First Amended Third Party Complaint. Docket No. 59. For  
5 the reasons explained above, their motion is GRANTED in this respect.

6 However, they also moved to dismiss the third cause of action for declaratory relief under  
7 CERCLA. Id. They argue that Garnett-Murray and Fremont Corners “are precluded from seeking  
8 any remedy under CERCLA because [Garnett-Murray and Fremont Corners] are not defending any  
9 causes of action under CERCLA nor [have they] incurred any costs of removal or remedial actions  
10 under [CERCLA § 107].” Id. at 3. But as Garnett-Murray and Fremont Corners correctly point out  
11 in their opposition brief, they have incurred clean-up costs and, regardless, this limitation does not  
12 apply to “any remedy under CERCLA”; rather, it only applies to claims for contribution. 42 U.S.C.  
13 § 113(f)(1); Atlantic Research Corp., 551 U.S. at 131 n.1. Tabatabai and Fesahati did not reply to  
14 Garnett-Murray and Fremont Corners’ argument.

15 Tabatabai and Fesahati’s argument fails, so their motion to dismiss the third cause of action  
16 in Garnett-Murray and Fremont Corners’ First Amended Third Party Complaint is DENIED.

17 C. Third Party Defendants Mohsen Tababatai’s and Shahin Fesahati’s Motion to Dismiss  
18 Chiao’s Cross-Claims

19 Tabatabai and Fesahati also moved to dismiss Chiao’s cross-claims against them. Docket  
20 No. 62. They argue that the Court lacks subject-matter jurisdiction because Chiao’s cross-claims are  
21 all based on California law, but this argument ignores that her cross-claims are related to the Sisters’  
22 federal law-based claims, so this Court has supplemental jurisdiction over them. They also argue  
23 that because Chiao alleged that “no contamination of ground water has been found or is reasonably  
24 likely given the depth to ground water at Fremont Corners” and because Chiao stated in a case

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26 (citing Rogers v. Fuller, 410 F.Supp. 187, 192 (M.D.N.C. 1976); Walner v. Friedman, 410 F.Supp.  
27 29, 34 (S.D.N.Y. 1975); Piemonte v. Chicago Board Options Exchange, Inc., 405 F.Supp. 711, 718  
28 (S.D.N.Y. 1975)). All four parties named as defendants in Garnett-Murray and Fremont Corners’  
First Amended Third Party Complaint are in similar positions with respect to the second cause of  
action. For this reason, Tabatabai and Fesahati’s motion to join Technichem’s motion (Docket No.  
58) is DENIED AS MOOT.

1 management statement that she “believes the impact of PCE, if any, on the Sisters’ property is de  
2 minimus,” she has failed to state a claim against them. But this case involves soil contamination as  
3 well as water contamination. Further, although Chiao contends that any contamination has been de  
4 minimus, other parties (including the Sisters) disagree.

5 Tabatabai and Fesahati’s motion to dismiss Chiao’s cross-claims is DENIED.

6 **CONCLUSION**

7 Based on the foregoing: (1) Technichem’s motion to dismiss the second cause of action in  
8 Garnett-Murray and Fremont Corners’ First Amended Third Party Complaint is GRANTED; (2)  
9 Tabatabai and Fesahati’s motion to dismiss the second and third causes of action in Garnett-Murray  
10 and Fremont Corners’ First Amended Third Party Complaint is GRANTED IN PART and DENIED  
11 IN PART; and (3) Tabatabai and Fesahati’s motion to dismiss Chiao’s cross-claims is DENIED.

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13 **IT IS SO ORDERED.**

14 Dated: May 20, 2011

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17 HOWARD R. LLOY  
18 UNITED STATES MAGISTRATE JUDGE

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**C10-01807 HRL Notice will be electronically mailed to:**

Christopher D. Jensen	cdj@bcltlaw.com, fmc@bcltlaw.com
Douglas A. Berry	DABLAW22@aol.com, amenusa@aol.com
Eleanor Wiley Knight	eleanor.knight@wilsonelser.com, James.Baker@wilsonelser.com
Kwi Yong Lee	kwioui@yahoo.com
Nicole Marie Martin	nmm@bcltlaw.com
Noel Edlin	nedlin@behblaw.com, cgill@behblaw.com, cpantel@behblaw.com, jkeefe@behblaw.com, lbiksa@behblaw.com
R. Morgan Gilhuly	rmg@bcltlaw.com
Ralph Wells Robinson	Ralph.Robinson@wilsonelser.com, Pamela.Moran@wilsonelser.com
Stephen W. Wilson	wswhome@aol.com
Thomas H. Clarke, Jr	tclarke@ropers.com, cbrown@rmkb.com, jdigiacom@ropers.com, mmcpherson@ropers.com, tdolan@rmkb.com
Timothy A. Dolan	tdolan@rmkb.com

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