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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PETER J. VOGGENTHALER, et al.,
Plaintiffs,
v.
MARYLAND SQUARE, LLC, et al.,
Defendants.

MARYLAND SQUARE, LLC, et al.,
Third Party Plaintiffs,
v.
GENERAL GROWTH MANAGEMENT, INC.,
a foreign corporation, et al.
Third Party Defendants.

2:08-CV-1618-RCJ-GWF
ORDER

This case stems from alleged PCE contamination from a dry cleaning facility that operated in a shopping center in Las Vegas, Nevada. On July 22, 2010, the Court entered an Order (#390) granting Plaintiffs summary judgment on their Resources Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B), claim. The Court entered a Permanent Injunction (#592) on the RCRA claim on December 27, 2010.¹

In addition to Plaintiffs' RCRA cause of action, there have been numerous cross-claims and third-party claims filed. Currently before the Court is Third Party Defendant Hoyt Corporation's

¹ The Court's order granting summary judgment on the RCRA cause of action and the entry of the permanent injunction are currently on appeal to the Ninth Circuit Court of Appeals. (See Amended Notice of Appeal (#602) and Notice of Appeal (#592)).

1 (“Hoyt”) Motion to Dismiss Third Party Complaint (#332) filed on June 2, 2010.² Hoyt filed a
2 Supplement to its Motion to Dismiss (#472) on September 28, 2010. Third Party Defendant Bowe
3 Permac, Inc. (“Bowe”) filed a Joinder (#463) to Hoyt’s Motion to Dismiss and a Joinder (#473) to
4 Hoyt’s Supplement. For the following reasons, the Court GRANTS the Motion to Dismiss (#390).

5 **I. Background**

6 On September 3, 2010, Maryland Square Shopping Center, LLC, The Herman Kishner Trust
7 DBA Maryland Square Shopping Center, Irwin Kishner, Jerry Engel, and Bank of America, as Trustees
8 for the Herman Kishner Trust (collectively referred to herein as the “Kishner Defendants”) filed a First
9 Amended Third Party Complaint (#447) in this action.³ The First Amended Third Party Complaint
10 primarily arises under the Comprehensive Environmental Response, Compensation and Liability Act
11 (“CERCLA”), 42 U.S.C. § 9607. The Kishner Defendants named, among others, Hoyt Corporation
12 (“Hoyt”) as a third-party defendant and identifies Hoyt as an “equipment supplier.” According to the
13 First Amended Third Party Complaint, Hoyt is a corporation “that supplied material and equipment to
14 Las Vegas, Nevada for the purposes of a dry cleaning operation.” (First Am. Third Party Compl. (#447)
15 at 5-6). The First Amended Third Party Complaint states that the Shapiro Defendants and successor
16 entities who operated the dry cleaners “used equipment specifically designed for the purposes of dry
17 cleaning operations.” *Id.* at 9. This equipment was provided by various entities including Hoyt and
18 Bowe. *Id.* In the First Amended Third Party Complaint, the Kishner Defendants state that the
19 equipment provided by Hoyt and other entities “did not operate properly.” *Id.* They also state that the
20 equipment “was designed improperly,” and that the entities that provided the equipment “did not take
21 reasonable care in designing the equipment to protect against spills and/or other accidental releases of
22 PCE or other hazardous materials.” *Id.* As a result of the foregoing, the Kishner Defendants state that
23 they have been harmed. *Id.* at 10. The First Amended Third Party Complaint asserts four causes of

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25 ² An identical motion was filed in Case No.: 3:09-cv-231-RCJ-GWF on June 25, 2010. That
case consolidated with this matter on July 22, 2010. (*See Minute Order (#77)*).

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27 ³ The First Amended Third Party Complaint supersedes and replaces the Third Party Complaint
previously filed. The allegations relating to Hoyt and Bowe in the First Amended Third Party Complaint
28 are identical to the initial Third Party Complaint, except that the Third Party Plaintiffs have added a
claim for negligence against all Third Party Defendants. Hoyt filed a Supplement to its Motion to
Dismiss addressing the new claim. Bowe filed a Joinder to Hoyt’s Supplement.

1 action against Hoyt and Bowe: (1) Recovery of Response Costs Pursuant to CERCLA § 107(a)(1-4)(B);
2 (2) Contribution Pursuant to CERCLA § 13(f); (3) Declaratory Relief; and (4) Negligence.

3 **II. Legal Standard**

4 When considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court must
5 accept as true all material allegations in the complaint as well as all reasonable inferences that may be
6 drawn from such allegations. LSO, Ltd. v. Stroh, 205 F.3d 1146, 1150 (9th Cir. 2000). Such allegations
7 must be construed in the light most favorable to the nonmoving party. Shwarz v. United States, 234 F.3d
8 428, 435 (9th Cir. 2000). In general, the court should only look to the contents of the complaint during
9 its review of a Rule 12(b)(6) motion to dismiss. The Ninth Circuit, however, has expanded the court's
10 view to allow it to consider documents attached to the complaint, documents incorporated by reference
11 in the complaint, or matters of judicial notice without converting the motion into a motion for summary
12 judgment. See Durning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987).

13 The analysis and purpose of a Rule 12(b)(6) motion to dismiss for failure to state a claim is to
14 test the legal sufficiency of a complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). The court
15 should exercise caution, however, and presume against dismissing an action for failure to state a claim.
16 See Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997). To avoid a Rule 12(b)(6)
17 dismissal, then, a complaint does not need detailed factual allegations; rather, it must plead "enough
18 facts to state a claim to relief that is plausible on its face." Clemens v. Daimler Chrysler Corp., 534 F.3d
19 1017, 1022 (9th Cir. 2008)(quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955,
20 1964 (2007); Ashcroft v. Iqbal, ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009)(stating that "a claim has
21 facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
22 inference that the defendant is liable for the misconduct alleged"). Even though "detailed factual
23 allegations" are not required for a complaint to pass muster under 12(b)(6) consideration, the factual
24 allegations "must be enough to raise a right to relief above the speculative level, on the assumption that
25 all the allegations in the complaint are true (even if doubtful in fact)." Twombly, 550 U.S. at 555. "A
26 pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of
27 action will not do." Iqbal, ___ U.S. ___, 129 S.Ct. 1937, 1949. "Nor does a complaint suffice if it
28 tenders 'naked assertion[s]' devoid of 'further factual enhancements.'" Id. (quoting Twombly, 550 U.S.

1 at 557, 127 S.Ct. 1955).

2 Hoyt has filed a motion to dismiss the claims asserted against it in the First Amended Third Party
3 Complaint on the grounds that the Kishner Defendants have failed to state a claim upon which relief can
4 be granted against Hoyt. (Mot. to Dismiss Third Party Compl. (#332-1) at 6). According to Hoyt, the
5 Kishner Defendants' claims "rest on the conclusory allegation that Hoyt is liable as an 'arranger'" under
6 CERCLA. Id. The First Amended Third Party Complaint claims that Hoyt is liable under CERCLA
7 because it manufactured and sold dry cleaning equipment that was used by dry cleaners on the Maryland
8 Square property. However, according to Hoyt, numerous courts have rejected imposing CERCLA
9 liability on a product manufacturer, such as Hoyt, which never owned, possessed or controlled the
10 hazardous substances which allegedly caused contamination. Id. In addition, because Hoyt alleges that
11 the Kishner Defendants' CERCLA claim fails, Hoyt argues the remaining claims for relief asserted
12 against Hoyt must also be dismissed because they are dependent on that claim.

13 In response, the Kishner Defendants concede that the basis of their claim against Hoyt is that
14 Hoyt provided equipment that was used in the dry cleaning facility located in the Maryland Square
15 property between 1968 and 2001. (Opp. to Mot. to Dismiss (#342) at 3). According to the Kishner
16 Defendants, they were harmed as a result of Hoyt's failure to properly design and operate the equipment.
17 Id. at 4. Because of this, the Kishner Defendants argue that Hoyt's motion should be denied as
18 premature: "Whether or not Hoyt is liable for CERCLA response costs as an arranger is a decision that
19 should be made after discovery is completed - not at the very first step of litigation." Id. at 5. The
20 Kishner Defendants state that it "is improper to cut short discovery and the required analysis simply
21 because the evidence is not available at this time." Id.

22 **III. Hoyt's Liability under CERCLA**

23 Congress enacted CERCLA to encourage the timely cleanup of hazardous waste sites by placing
24 cleanup cost liability on those responsible for creating or maintaining the condition. Basic Mgmt. Inc.
25 v. United States, 569 F.Supp.2d 1106, 1113 (D.Nev. 2008). Under CERCLA, the federal and state
26 governments may initiate cleanup of toxic areas and sue potentially responsible parties for
27 reimbursement. United States v. Burlington Northern & Santa Fe Ry. Co., 502 F.3d 781, 792 (9th Cir.
28 2007), reversed on other grounds, ___ U.S. ___, 129 S.Ct. 1870, 173 L.Ed.2d 812 (2009). A key

1 CERCLA purpose is to shift “the cost of cleaning up environmental harm from the taxpayers to the
2 parties who benefitted from the disposal of the wastes that caused the harm.” EPA v. Sequa Corp. (In
3 the Matter of Bell Petroleum Servs., Inc.), 3 F.3d 889, 897 (5th Cir. 1993). CERCLA is a “super-strict”
4 liability statute. Burlington Northern, 502 F.3d at 792. “[L]iability is joint and several when the harm
5 is indivisible.” Id.

6 Section 9607(a) identifies the following as “covered persons” subject to CERCLA contribution
7 claims:

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

20 In other words, there are four classes of potentially responsible parties (“PRPs”) subject to CERCLA
21 liability: (1) current owners and operators of the facility, (2) past owners and operators of the facility,
22 (3) arrangers, and (4) transporters. Basic Mgmt., 569 F.Supp.2d at 1116. Thus, to plead a prima facie
23 contribution case against Hoyt, the Kishner Defendants must assert factual allegations that Hoyt is
24 “within one of four classes of persons subject to CERCLA’s liability provisions.” California Dept. of
25 Toxic Substances Control v. Payless Cleaners, 368 F.Supp.2d 1069, 1076 (E.D.Cal. 2005). Here, the
26 Kishner Defendants seek to hold Hoyt liable as an “arranger” under CERCLA.

27 As noted in the foregoing, arranger liability under CERCLA arises when “any person who by
28 contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned
or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another
party or entity and containing such hazardous substances.” 42 U.S.C. § 9607(a)(3); see also Basic
Mgmt., 569 F.Supp.2d at 1116. “The term ‘arranged for’ is not defined in CERCLA. Basic Mgmt., 569
F.Supp.2d at 1116. The “issues involved in determining ‘arranger’ liability under CERCLA are distinct
from those involved in determining ‘owner’ or ‘operator’ liability.” Coeur D’Alene Tribe v. Asarco,

1 Inc., 280 F.Supp. 2d 1094, 1130-31 (D.Idaho 2003)(citing Cadillac Fairview/California, Inc. v. United
2 States, 41 F.3d 562, 564 (9th Cir. 1994)). Indeed, “arranger liability requires active involvement in the
3 arrangements of disposal of hazardous substances. However, control is not a necessary factor in every
4 arranger case. The Court must consider the totality of the circumstances . . . to determine whether the
5 facts fit within CERCLA’s remedial scheme [T]here must be a ‘nexus’ that allows one to be an
6 arranger.” Id. at 1131 (internal citations omitted).

7 There are two lines of cases in the area of direct arranger liability: (1) “traditional” arranger
8 liability cases in which “the sole purpose of the transaction is to arrange for the treatment or disposal of
9 the hazardous wastes,” United States v. Shell Oil Co., 294 F.3d 1045, 1054 (9th Cir. 2002)(citations
10 omitted), and (2) “broader” arranger liability, in which “control is a crucial element of the [fact-specific]
11 determination of whether a party is an arranger.” Id. at 1055.

12 This is not a traditional arranger liability case. There are no allegations in the First Amended
13 Third Party Complaint that Hoyt entered into any transaction for the sole purpose of discarding
14 hazardous waste. The First Amended Third Party Complaint merely alleges that Hoyt’s intent was to
15 supply material and equipment “for the purposes of a dry cleaning operation.” (First Am.Third Party
16 Compl. (#447) at 5). Thus, the First Amended Third Party Complaint appears to be seeking liability
17 under the “broader arranger” theory of liability.

18 In this case, Hoyt argues that the Kishner Defendants have failed to state a claim for broader
19 arranger liability because the allegation that Hoyt supplied dry cleaning equipment used by others is
20 insufficient to impose such liability. (Mot. to Dismiss (#332-1) at 11). In broader arranger cases, Hoyt
21 states that there are three “independent hurdles” a plaintiff must overcome “through well pleaded
22 allegations” to impose liability upon a product manufacturer: (1) that the product manufacturer intended
23 to dispose of hazardous substance through the sale of its product; (2) the useful product exception does
24 not apply; and (3) the product manufacturer exercised ownership, possession or control of hazardous
25 substances. Id. According to Hoyt, the Kishner Defendants have failed to overcome any of these
26 hurdles.

27 **A. Intentional Disposal**

28 Hoyt first argues that the Kishner Defendants “have failed to allege and cannot allege that Hoyt

1 intended to dispose of a hazardous substance through the sale of its products.” (Mot. to Dismiss (#332-
2 1) at 11). Not only does the First Amended Third Party Complaint fail to allege that the equipment
3 caused the contamination, but, according to Hoyt, nowhere do the Kishner Defendants allege that Hoyt’s
4 purpose in supplying its alleged equipment was to dispose of hazardous substances, or that Hoyt
5 intended or planned for the disposal of hazardous substances by selling its equipment. Id. at 11-12.

6 The United States Supreme Court recently explained that “under the plain language of the statute,
7 an entity may qualify as an arranger under § 9607(a)(3) when it takes intentional steps to dispose of a
8 hazardous substance.” Burlington Northern, ___ U.S. ___, 129 S.Ct. 1870, 1879 (2009). In Burlington
9 Northern, the Supreme Court held that pesticide manufacturer Shell Oil Company was not an arranger
10 despite its knowledge of pesticide spills during transfers and deliveries, due to equipment failures. The
11 Supreme Court explained:

12 While it is true that in some instances an entity’s knowledge that its product will be
13 leaked, spilled, dumped, or otherwise discarded may provide evidence of the entity’s
14 intent to dispose of its hazardous wastes, **knowledge alone is insufficient to prove that**
15 **an entity “planned for” the disposal**, particularly when the disposal occurs as a
16 peripheral result of the legitimate sale of an unused, useful product. In order to qualify
17 as an arranger, Shell must have entered into the sale of [its product] **with the intention**
18 that at least a portion of the product be disposed of during the transfer process by one or
19 more of the methods described in § 6903(3).
20 . . . Shell’s **mere knowledge** that spills and leaks continued to occur is insufficient
21 grounds for concluding that Shell ‘arranged for’ the disposal of [a hazardous] substance
22 within the meaning of § 9607(a)(3).

23 Burlington Northern, ___ U.S. ___, 129 S.Ct. at 1880.

24 Relying on Burlington Northern, the United States District Court for the Eastern District of
25 California recently ruled that Hoyt could not be subject to arranger liability under CERCLA based on
26 mere allegations that its equipment was used at a dry cleaning facility. Hinds Inv. v. Team Enter., 2010
27 WL 1663986 (E.D. Cal. 2010). In that case, the court dismissed the CERCLA claims asserted against
28 Hoyt by the plaintiff, an owner of property upon which a dry cleaning business operated. Id. In
addressing the intentional disposal element of arranger liability under CERCLA, the court held that
Hoyt’s alleged knowledge of its product’s operation was insufficient to establish that Hoyt intentionally
disposed of waste. Id.

Here, the First Amended Third Party Complaint alleges conclusions, without factual support, that
Hoyt’s equipment was designed improperly and operated improperly. The First Amended Third Party

1 Complaint does not allege Hoyt planned for the disposal or took intentional steps toward disposal of a
2 hazardous substance. In fact, the First Amended Third Party Complaint alleges that Hoyt's "purpose"
3 was to supply equipment for "dry cleaning operations." (First Am. Third Party Compl. (#447) at 5). The
4 conclusory allegations as to Hoyt's supply and design of its equipment are not enough to support a claim
5 that Hoyt took intentional steps to dispose of a hazardous substance. Thus, this claim is dismissed.
6 Moreover, as will be discussed below, the useful product defense defeats the Kishner Defendants'
7 CERCLA arranger claims as to Hoyt.⁴

8 **B. Useful Product Defense**

9 Hoyt claims that the useful product defense creates an "insurmountable barrier" to the Kishner
10 Defendants' CERCLA claims against Hoyt. According to Hoyt, this defense, recently adopted by the
11 Supreme Court in Burlington North, provides that an entity cannot be held liable as an arranger merely
12 for selling a new and useful product if the purchaser of that product later, and unbeknownst to the seller,
13 disposed of the product in a way that led to contamination. (Mot. to Dismiss (#332-1) at 14). In
14 response, the Kishner Defendants argue that this defense is premature because "[i]t is yet to be
15 determined whether Hoyt had involvement necessary and the authority appropriate to hold it liable for
16 otherwise arranging the disposal of PCE relevant to this case." (Opp. to Mot. to Dismiss (#342) at 6).

17 Under CERCLA litigation, a body of case law has developed distinguishing between the disposal
18 or treatment of "waste" and the sale of a "useful product." California Dept. of Toxic Substances Control
19 v. Alco Pacific, Inc., 508 F.3d 930, 934 (9th Cir. 2007)(citing Burlington, 479 F.3d at 1140-41; A & W
20 Smelter & Refiners, Inc. v. Clinton, 146 F.3d 1107, 1112 (9th Cir. 1998); Catellus Dev. Corp. v. United
21 States, 34 F.3d 748, 750 (9th Cir. 1994)). "A person may be held liable as an 'arranger' under §
22 9607(a)(3) only if the material in question constitutes 'waste' rather than a 'useful product.'" Id.
23 Application of this distinction has been referred to as the "useful product doctrine." Id.

24 The useful product doctrine "applies when the sale is of a new product, manufactured specifically
25 for the purpose of sale, or of a product that remains useful for its normal purpose in its existing state."
26 California v. Summer Del Caribe, Inc., 821 F.Supp. 574, 581 (N.D.Cal. 1993). "The vendor of a useful

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28 ⁴ The same analysis applies to Bowe who filed a Joinder to Hoyt's Motion to Dismiss and Supplement. As such, this claim is dismissed as to Bowe also.

1 product which through its normal course produces a hazardous substance, such as a battery, is not an
2 arranger under CERCLA.” Payless Cleaners, 368 F.Supp.2d at 1077 (citing Cadillac Fairview/Cal., Inc.
3 v. United States, 41 F.3d 562, 566 (9th Cir. 1994)). A manufacturer of PCE cannot be held liable “as
4 a CERCLA arranger where it has done nothing more than sell a useful chemical.” Id. “[T]he
5 manufacturer of dry cleaning equipment who does nothing more than provide the machines and
6 operating instructions is not an ‘arranger’ of waste disposal under CERCLA.” Adobe Lumber v.
7 Hellman, 415 F.Supp.2d 1070, 1081 (E.D.Cal. 2006), vacated on other grounds sub nom. Kotrous v.
8 Goss-Jewett Co., 523 F.3d 924, 934 (9th Cir. 2008).

9 The useful product defense arises out of CERCLA’s definition of “disposal” (section 9601(29))⁵
10 in that merely identifying a “hazardous substance” is insufficient to establish that its placement in a
11 facility constitutes “disposal of any hazardous substance” under CERCLA. See 3550 Stevens Creek
12 Assoc. v. Barclays Bank of Calif., 915 F.2d 1355, 1360-61 (9th Cir. 1990). For CERCLA purposes,
13 “disposal” is construed “as referring only to an affirmative act of discarding a substance as waste, and
14 not to the productive use of the substance.” Id.

15 In the CERCLA context, “hazardous substances are generally dealt with at the point when they
16 are about to, or have become, wastes.” 3550 Stevens Creek, 915 F.2d at 1362. Congress did not intend
17 CERCLA to target legitimate manufacturers or sellers of useful products but rather desired “to hold
18 liable those who would attempt to dispose of hazardous wastes or substances under various deceptive
19 guises in order to escape liability for their disposal.” Dayton Indep. School Dist. v. U.S. Mineral Prods.
20 Co., 906 F.2d 1059, 1065-66 (5th Cir. 1990).

21 Acknowledging its “expansive view of arranger liability,” the Ninth Circuit has “refused to hold
22 manufacturers liable as arrangers for selling a useful product containing or generating hazardous
23 substances that *later* were disposed of.” Burlington Northern, 502 F.3d at 808 (italics in original).
24 “Useful product” cases recognize that “liability cannot extend so far as to include *all* manufacturers of

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27 ⁵ CERCLA borrows the Solid Waste Disposal Act’s definition of “disposal” which “means the
28 discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste
into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may
enter the air or be emitted into the air or discharged into any waters, including ground waters.”
42 U.S.C. § 6903(3).

1 hazardous substances, on the theory that there will have to be disposal of the substance some time down
2 the line, *after* it is used as intended.” Id. (italics in original).

3 In a similar case pending against Hoyt in the Eastern District of California, the court found that
4 the useful product defense barred CERCLA claims against Hoyt. Hinds Inv., 2010 WL 1663986. The
5 plaintiff in that case alleged that CERCLA liability could be imposed on a dry cleaning equipment
6 manufacturer where the manufacturer designed its equipment to dispose of waste and provided the
7 operator with disposal guidelines. Id. Despite these allegations, the court found that plaintiff failed to
8 state a claim under CERCLA and dismissed the case in its entirety with prejudice. The court found that
9 the useful product defense barred the plaintiff’s CERCLA claims against Hoyt. The court found
10 significant that the manufacture and sale of Hoyt equipment was an event that neither produces nor
11 involves hazardous substances directly.

12 In this case, the Court also dismisses the CERCLA claims against Hoyt based on the useful
13 product defense. The allegations in the Kishner Defendants’ First Amended Third Party Complaint do
14 not allege that the Hoyt equipment is a hazardous substance, nor that the sale of the equipment was for
15 an arrangement for disposal of hazardous substances. The transaction at issue here is the sale of dry
16 cleaning equipment, an event which neither produces nor involves hazardous substances directly.⁶ The
17 First Amended Third Party Complaint fails to allege facts that the manufacture or sale of the dry cleaning
18 equipment by Hoyt constitutes an “arrangement for the ultimate disposal of a hazardous substance.”
19 Payless, 368 F.Supp.2d at 1077. Based on the foregoing, the useful product defense defeats the Kishner
20 Defendant’s arranger claims as to Hoyt and Bowe.

21 C. Ownership, Possession or Control of Hazardous Substances

22 Finally, Hoyt states that the CERCLA claims must be dismissed because the Kishner Defendants
23 fail to allege that Hoyt had ownership, possession or control of any hazardous substance. (Mot. to
24 Dismiss (#332-1) at 16). According to Hoyt, in order to state a valid claim for relief, the Kishner

26 ⁶ As noted by the Court in a similar case: The plaintiffs do not allege any facts to support a
27 finding that a substantial part of Maytag’s sale of dry cleaning machines involved the arrangement for
28 the disposal of waste water. Rather, Maytag’s transaction can be described only as the sale of a useful
good which, through its normal use, created a waste byproduct. Under these facts alone, Maytag may
not be held liable as a CERCLA arranger. Payless, 368 F.Supp.2d at 1078.

1 Defendants are required to allege or show that Hoyt owned or possessed the hazardous substances, or
2 had the authority to control the disposal practices or a duty to dispose of the hazardous substances at the
3 subject property. Id. Because the First Amended Third Party Complaint lacks such allegations, Hoyt
4 states the claims against it must be dismissed. The Kishner Defendants did not address this argument
5 in their Opposition.

6 “No court has imposed arranger liability on a party who never owned or possessed, and never
7 had any authority to control or duty to dispose of, the hazardous materials at issue.” Shell Oil, 294 F.3d
8 at 1058 (citing General Elec. Co. v. AAMCO Transmission, Inc., 962 F.2d 281, 286 (2d Cir.
9 1992)(stating “it is the *obligation* to exercise control over hazardous waste disposal, and not the mere
10 ability or opportunity to control the disposal of hazardous substances that makes an entity an arranger
11 under CERCLA’s liability provisions”)(emphasis in original)).

12 Here, not only did the Kishner Defendants fail to respond to Hoyt’s argument on this issue, but
13 the First Amended Third Party Complaint is completely devoid of any facts that Hoyt had any
14 ownership, possession or control over a hazardous substance. Because Hoyt is not subject to liability
15 in the absence of allegations of its ownership, possession or control of hazardous substances at disposal
16 or otherwise, the CERCLA claims must be dismissed for failure to state a claim.⁷

17 **IV. Declaratory Relief Claim**

18 Hoyt argues that the Kishner Defendants’ claim for declaratory relief must be dismissed. (Mot.
19 to Dismiss (#331-1) at 18). According to Hoyt, this claim is derivative to the CERCLA claims and must
20 fail in the absence of any predicate liability. In other words, if the First Amended Third Party
21 Complaint’s CERCLA claims against Hoyt are dismissed, then the declaratory relief claim must also be
22 dismissed.

23 In this matter, the Kishner Defendants’ declaratory relief claim is derivative of their CERCLA
24 claim. Thus, this claim is dismissed against Hoyt and Bowe.

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27 ⁷ The same analysis applies to the claims asserted against Bowe. Thus, the Court dismisses the
28 CERCLA claims pending against Bowe based on Bowe’s Joinder (#463) in Hoyt’s Motion to Dismiss.

1 **V. Negligence Claim**

2 In the First Amended Third Party Complaint, the Kishner Defendants assert a claim for
3 negligence against all Third Party Defendants. According to that claim, the Kishner Defendants assert
4 that “during the Third Party Defendants’ ownership and operation of various facilities, sudden and
5 accidental releases of PCE occurred that contributed to the PCE plume.” (First Am. Third Party Compl.
6 (#447) at 16). In addition, the claim asserts that the Kishner Defendants “had a duty to properly and
7 reasonably handle and dispose of PCE and other hazardous materials.” Id. The Kishner Defendants
8 asserts that the Third Party Defendants breached this duty “by negligently causing, permitting and/or
9 contributing to contamination resulting from their ownership and operations of various facilities.” Id.
10 at 17.

11 Hoyt moves to dismiss the negligence claim asserted against it on the grounds that the claim is
12 based on the ownership of a “facility,” as indicated in the First Amended Third Party Complaint. (Supp.
13 Mot. to Dismiss (#472) at 2). However, according to Hoyt, the “Kishner Parties did not allege, nor could
14 they, that Hoyt owned or operated any property that allegedly contributed to the contamination at issue.”
15 Id. at 2-3. Rather, the only facts alleged by the Kishner Defendants is that Hoyt manufactured dry
16 cleaning equipment that was used by others at a dry cleaning facility. Id. Because the First Amended
17 Third Party Complaint does not include any facts that Hoyt owned or operated a dry cleaning facility,
18 or any of the surrounding properties that the Kishner Defendants claimed contributed to the PCE plume,
19 Hoyt argues that the negligence claim must be dismissed.

20 The Court agrees. The negligence claim alleged in the First Amended Third Party Complaint
21 relates to parties that owned “facilities” upon which releases of PCE occurred. The First Amended Third
22 Party Complaint does not provide any factual basis that Hoyt owned such a facility. Rather, the
23 allegations against Hoyt are that it was an equipment supplier. In addition, any state law negligence
24 claim against Hoyt can be raised in the state court handling the related litigation. As noted at oral
25 argument by the parties, the state court previously granted Hoyt’s motion to dismiss and granted the
26 Kishner Defendants leave to amend. Because this Court has dismissed the federal causes of action
27 asserted against Hoyt, the state court is the proper forum for any amended negligence claim.

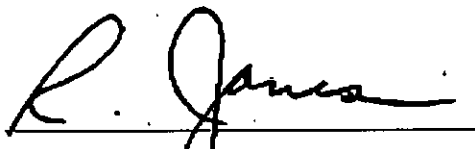
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1 **VI. Conclusion**

2 Based on the foregoing, the Court GRANTS Hoyt's Motion to Dismiss (#332), Supplement to
3 Motion to Dismiss (#472), and Bowe's Joinders (#463) and (#473). Hoyt and Bowe are terminated as
4 parties to this litigation.

5 IT IS SO ORDERED.

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7 Dated: February 4, 2011

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9 _____
10 UNITED STATES DISTRICT JUDGE

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