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6 **UNITED STATES DISTRICT COURT**

7 **DISTRICT OF NEVADA**

8 PETER J. VOGGENTHALER et al.,)

9 Plaintiffs,)

10 v.)

11 MARYLAND SQUARE LLC, et al.,)

12 Defendants.)

2:08-cv-1618-RCJ-GWF

13 **ORDER**

14
15 Currently before the Court is NDEP's Motion for Correction of Judgment (#980).

16 **BACKGROUND**

17 **I. Complaint**

18 On May 4, 2009, the Nevada Division of Environmental Protection ("NDEP") filed a
19 complaint against Maryland Square Shopping Center, LLC; Irwin Kishner, Jerry Engel and
20 Bank of America N.A., as co-trustees of the Herman Kishner Trust; Maryland Square LLC;
21 Melvin Shapiro and Philip Shapiro, individually and doing business individually and/or as a
22 general partner of "Al Phillips the Cleaner" or "Al Phillips the Cleaner, Inc."; estate of Philip
23 Shapiro; Shapiro Bros. Investment Corporation; Al Phillips the Cleaners, Inc., dissolved
24 corporation no. 745-1965; and Al Phillips the Cleaners, Inc., dissolved corporation no. 11-71
25 (collectively "Defendants"). (Compl. (NDEP #1) at 1).¹ NDEP filed the complaint for cost
26 recovery and injunctive relief as a result of perchloroethylene ("PCE") to soil and groundwater
27 from the former site of an Al Phillips the Cleaner dry cleaning business located at 3661 South
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¹ This case was originally filed under docket number 3:09-cv-231-RCJ-GWF. All docket entry citations in this case will use "NDEP #____."

1 Maryland Parkway, Las Vegas, Nevada. (*Id.* at 2). As of January 2009, NDEP had incurred
2 costs of \$265,623.50 in responding to the potential human exposure to PCE resulting from the
3 former Al Phillips' property. (*Id.* at 7).

4 NDEP alleged four causes of action. (*Id.* at 7-10). In the first cause of action, NDEP
5 sought cost recovery under the Comprehensive Environmental Response Compensation and
6 Liability Act ("CERCLA"), 42 U.S.C. § 9607(a)(4), for the response costs associated with the
7 releases and threatened release of PCE into the environment by the former Al Phillips'
8 property. (*Id.* at 7-8). In the second cause of action, NDEP sought declaratory relief that
9 Defendants were jointly and severally liable for any further costs of response incurred in
10 response to the release or threatened releases of PCE and other hazardous substances at
11 the Al Phillips' site, pursuant to CERCLA, 42 U.S.C. § 9613(g)(2). (*Id.* at 8). In the third cause
12 of action, NDEP sought cost recovery under NRS § 459.537. (*Id.* at 8-9). In the fourth cause
13 of action, NDEP sought injunctive relief requiring Defendants to complete an assessment of
14 the extent and magnitude of the contamination resulting from releases from the former dry
15 cleaner property that would be approved by NDEP, monitor groundwater, submit timely
16 reports, submit a corrective action plan for soil and groundwater, and implement the corrective
17 action plan approved by NDEP or as approved by NDEP with modification, pursuant to NRS
18 § 445A.695. (*Id.* at 9-10).

19 On July 22, 2010, this Court granted a motion to consolidate this case with
20 *Voggenthaler v. Maryland Square, LLC et al.*, case no. 2:08-cv-1618-RCJ-GWF. (Order
21 (NDEP #76) at 15).

22 **II. Summary Judgment**

23 In December 2011, NDEP filed a motion for summary judgment on all four causes of
24 action. (Mot. for Summ. J. (#833)). On May 17, 2012, the Court granted NDEP summary
25 judgment on all substantive claims against Maryland Square LLC, the Kishner Defendants,
26 and the Shapiro Defendants. (Order (#937) at 23). Under the second cause of action, this
27 Court found that because NDEP had successfully established liability for response costs
28 sought in the initial cost-recovery action, NDEP was entitled to declaratory judgment on

1 present liability that would be binding on future cost-recovery actions. (*Id.* at 17-18). Under
2 the third cause of action for cost recovery under the Nevada Revised Statutes, NDEP argued
3 that it had “expended \$347,478.55 from the Hazardous Waste Fund for installation and
4 evaluation of the SSD systems to mitigate the indoor air exposure pathway and for a
5 preliminary groundwater clean up evaluation” and “\$45,477.48 in indirect costs in mitigating
6 the exposure pathway including staff time and overhead and attorneys’ fees² in the amount
7 of \$11,328.41.” (*Id.* at 18). The Court granted NDEP summary judgment on this claim but did
8 not indicate a cost recovery amount. (*See id.* at 20, 23). The Court also granted NDEP
9 reasonable attorneys’ fees, but denied the motion for a specific amount of fees at that time.
10 (*Id.* at 23). The Court directed NDEP to file a motion for attorneys’ fees based on the rates
11 of \$200/hour and \$175/hour and permitted the Kishner Defendants to respond. (*Id.*). The
12 Shapiro Defendants and Maryland Square, LLC filed notices of appeal on the summary
13 judgment order. (Notices of Appeal (#942, 944)).

14 NDEP filed a motion for attorneys’ fees and costs. (Mot. for Atty Fees (#938)). On
15 November 26, 2012, this Court awarded NDEP in the amount of \$217,880.00 for attorneys’
16 fees, \$1,077.94 in travel costs, and \$425.04 in transcription costs. (Order (#977) at 8). The
17 following day, the Clerk of the Court entered a judgment for attorney fees in the amount
18 ordered by the Court. (J. for Atty Fees (#978) at 1).

19 The pending motion now follows.

20 **DISCUSSION**

21 On December 20, 2012, NDEP filed a motion for correction to judgment pursuant to
22 Federal Rule of Civil Procedure 60(a) to correct the judgment entered by this Court on
23 November 27, 2012, or alternatively pursuant to Federal Rule of Civil Procedure 59(e) to alter
24 or amend the judgment. (Mot. to Correct (#980) at 1-2). NDEP asserts that, although this
25 Court reduced Defendants’ liability for attorneys’ fees and litigation costs to judgment, it has
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27 ² NDEP asserted that if the Court awarded attorneys’ fees under CERCLA, then it
28 would not seek an additional \$11,328.41 in attorneys’ fees because that amount would be
subsumed within the fees sought under CERCLA. (Order (#937) at 18 n.15).

1 not reduced the environmental response costs that NDEP expended to judgment. (*Id.* at 3).
2 NDEP seeks to alter or amend the judgment to include those costs and points out that this
3 Court recognized that none of the Defendants had proffered any evidence that contradicted
4 NDEP's expenditures or demonstrated that they were inconsistent with the National
5 Contingency Plan. (*Id.* at 4). NDEP asserts that it appears that the omission of NDEP's
6 environmental response costs was a mere clerical mistake, oversight, or omission based on
7 this Court's order granting summary judgment in favor of NDEP for its past response costs and
8 declaratory relief as to future costs. (*Id.*).

9 In response, the Kishner Defendants oppose the motion because NDEP's response
10 costs did not arise from the underlying motion which is the subject of the judgment it now
11 seeks to amend. (Opp'n to Mot. to Correct (#981) at 2). The Kishner Defendants assert that
12 the judgment NDEP seeks to amend addressed NDEP's motion for attorneys' fees and costs
13 and that the environmental response costs were requested in NDEP's motion for summary
14 judgment. (*Id.*). The Kishner Defendants assert that NDEP's motion must be denied because
15 an appeal to the order on the motion for summary judgment has been docketed and NDEP
16 must seek leave of the appellate court first. (*Id.* at 3-4). The Kishner Defendants also argue
17 that there is no evidence of a clerical mistake, oversight, or omission regarding response costs
18 in the attorneys' fees judgment because response costs were never discussed in that motion.
19 (*Id.* at 4).

20 NDEP filed an errata to the motion for correction to judgment and included a breakdown
21 of the costs sought. (Errata to Mot. to Correct (#982) at 2). NDEP sought \$347,478.55 in
22 direct response costs, \$25,575.25 for indirect response costs for fiscal year 2011, and
23 \$37,480.21 for indirect costs for fiscal year 2012 for a total of \$410,534.01. (*Id.*). NDEP
24 asserts that a corrected judgment should be issued in the amount of \$629,916.99 to reflect
25 attorneys' fees, litigation costs, and response costs. (*Id.* at 3).

26 In response to the errata, the Kishner Defendants argue that if the Court does amend
27 the judgment, it should exclude the \$37,480.21 for indirect costs for fiscal year 2012 because
28 those costs were first claimed in the motion for summary judgment reply brief and were not

1 identified in the order for summary judgment as recoverable damages. (Resp. to Errata (#983)
2 at 2).

3 In reply, NDEP asserts that it does not seek to change the original summary judgment
4 order but instead seeks to have the final judgment include the response costs that were
5 already awarded to NDEP. (Reply to Errata (#984) at 3). NDEP argues that no party has
6 taken an appeal from the entry of final judgment in this case and, thus, no permission from the
7 appellate court is necessary. (*Id.* at 4). NDEP contends that all of the response costs
8 presented should be included in the judgment because none of the Defendants contested
9 them. (*Id.* at 6). NDEP asserts that, at the time it filed the original motion for summary
10 judgment, it had only included a portion of the 2012 indirect costs. (*Id.*). NDEP argues that
11 if the Court only awards the amounts listed in the summary judgment order, NDEP will have
12 to bring another motion to seek the remainder of the costs incurred in fiscal year 2012. (*Id.*).
13 NDEP asserts that the Court can award the costs incurred in fiscal year 2012 because it
14 granted summary judgment on NDEP's claim for declaratory relief as to future response costs
15 and fiscal year 2012 costs were future response costs. (*Id.* at 7).

16 Federal Rule of Civil Procedure 60(a) provides:

17 The court may correct a clerical mistake or a mistake arising from oversight or
18 omission whenever one is found in a judgment, order, or other part of the record.
19 The court may do so on motion or on its own, with or without notice. But after an
appeal has been docketed in the appellate court and while it is pending, such
a mistake may be corrected only with the appellate court's leave.

20 Fed. R. Civ. P. 60(a). Federal Rule of Civil Procedure 59(e) provides that a "motion to alter
21 or amend a judgment must be filed no later than 28 days after the entry of the judgment." Fed.
22 R. Civ. P. 59(e).

23 After a review of the record, the Court finds that the Kishner Defendants are correct that
24 NDEP's motion for correction to judgment is more aptly directed toward this Court's May 17,
25 2012 summary judgment order rather than the "judgment for attorneys fees" entered on
26 November 27, 2012. The Court notes that the Clerk of the Court entered the "judgment for
27 attorneys fees" in direct response to this Court's order addressing NDEP's motion for
28 attorneys' fees and related costs. The Court further notes that NDEP's motion for attorneys'

1 fees and subsequent order never addressed response costs. As such, neither Rule 60(a) nor
2 Rule 59(e) would apply to the “judgment for attorneys fees.”

3 Nevertheless, the Court interprets NDEP’s motion as a Rule 60(a) motion to correct
4 clerical mistakes, oversights, and omissions in this Court’s May 17, 2012 summary judgment
5 order. Based on this Court’s order granting summary judgment to NDEP on both cost-
6 recovery and future cost-recovery, the Court finds that it should have specifically entered an
7 amount for cost-recovery in that summary judgment order but failed to do so. The Court notes
8 that NDEP briefed the amount of cost-recovery in its motion for summary judgment and that
9 none of the defendants had contested the proffered amount. As such, the Court is inclined
10 to correct its order to award NDEP direct response costs in the amount of \$347,478.55,
11 indirect response costs for fiscal year 2011 in the amount of \$25,575.25, and indirect response
12 costs for fiscal year 2012 in the amount of \$37,480.21. However, the Court finds that it may
13 not correct its summary judgment order at this time because the Shapiro Defendants and
14 Maryland Square, LLC have appealed that order. This Court may not correct its mistake
15 absent leave from the Ninth Circuit. Therefore, this Court denies NDEP’s motion at this time.

16 However, upon receiving leave from the Ninth Circuit, NDEP is directed to re-file the
17 Rule 60(a) motion. At that time, this Court will correct its May 17, 2012 summary judgment
18 order and award NDEP direct response costs in the amount of \$347,478.55, indirect response
19 costs for fiscal year 2011 in the amount of \$25,575.25, and indirect response costs for fiscal
20 year 2012 in the amount of \$37,480.21.

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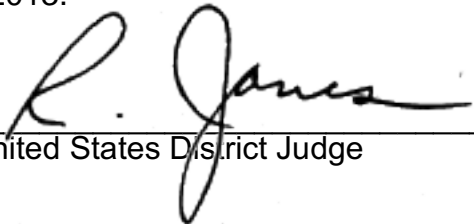
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1 **CONCLUSION**

2 For the foregoing reasons, IT IS ORDERED that NDEP's Motion for Correction to
3 Judgment (#980) is DENIED at this time.

4 IT IS FURTHER ORDERED that NDEP shall seek leave from the U.S. Court of Appeals
5 for the Ninth Circuit for this Court to correct its May 17, 2012 order pursuant to Federal Rule
6 of Civil Procedure 60(a).

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8 DATED: This 7th day of March , 2013.

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11 United States District Judge
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