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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA

8 Plaintiff,

9 v.

10 MULTISTAR INDUSTRIES, INC.,

11 Defendant.

NO. 2:21-CV-0262-TOR

ORDER DENYING DEFENDANT'S
MOTION TO DISMISS AND
DENYING DEFENDANT'S MOTION
TO STRIKE

12
13 BEFORE THE COURT are Defendant's Motion to Dismiss (ECF No. 5)
14 and Defendant's Motion to Strike (ECF No. 19). These matters were submitted for
15 consideration with telephonic oral argument on January 27, 2022. David L. Dain
16 appeared on behalf of Plaintiff. Michael Davidson appeared on behalf of
17 Defendant. The Court has reviewed the record and files herein, considered the
18 parties' oral arguments, and is fully informed. For the reasons discussed below,
19 Defendant's Motion to Dismiss (ECF No. 5) is DENIED and Defendant's Motion
20 to Strike (ECF No. 19) is DENIED.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND
DENYING DEFENDANT'S MOTION TO STRIKE ~ 1

1 **FACTS**

2 This matter arises from the transport of a regulated hazardous substances,
3 trimethylamine (“TMA”), via railcar to a transloading facility in Othello,
4 Washington. The following facts are drawn from Plaintiff’s Complaint and
5 construed in the light most favorable to Plaintiff. *Schwarz v. United States*, 234
6 F.3d 428, 436 (9th Cir. 2000).

7 TMA is shipped by railcar and/or truck to Defendant’s facility in Othello,
8 Washington. ECF No. 1 at 10, ¶¶ 33–34. After the railcars are delivered to
9 Defendant’s facility, the motive power (the engine car) is disconnected from the
10 railcars. *Id.* at 12, ¶ 44. Defendant then uses a transloader, its associated transfer
11 hoses, and other related equipment to transfer the TMA to trucks. *Id.* at ¶ 45. The
12 TMA is then delivered to third parties. *Id.* Between the arrival at Defendant’s
13 facility and the subsequent delivery to third parties, the railcars are stored for at
14 least some time at Defendant’s facility and are not under active shipping papers.
15 *Id.* at 13, ¶¶ 48, 50.

16 Plaintiff Environmental Protection Agency (“EPA”) alleges Defendant is
17 subject to the Clean Air Act (“CAA”) and the Emergency Planning and
18 Community Right-to-Know Act (“EPCRA”), and their accompanying regulations,
19 due to the nature and quantities of the TMA present at Defendant’s facility, and the
20 manner in which the TMA is stored before delivery. *Id.* at 12–16, ¶¶ 43–65.

1 Plaintiff further alleges Defendant violated the regulations by failing to develop
2 and implement a risk management program. *Id.* at 16–31, ¶¶ 66–114.

3 Additionally, Defendant violated the EPCRA by failing to prepare and maintain
4 annually a safety data sheet and an emergency and hazardous chemical inventory
5 sheet, which are to be delivered to the appropriate local emergency response
6 entities. *Id.* at 31–33, ¶¶ 115–125.

7 Defendant denies the transloading of the TMA is subject to CAA and
8 EPCRA oversight because the TMA is not stored in a manner that would trigger
9 the regulations. ECF No. 5 at 7, ¶ 11. Defendant further denies it owns the
10 railcars, claiming the railcars and TMA are owned by a third-party shipper. *Id.* at
11 2–3, ¶ 4. Defendant moves for dismissal of the Complaint on the grounds that
12 Plaintiff’s claims fail as a matter of law. ECF No. 5.

13 DISCUSSION

14 I. Legal Standard

15 A motion to dismiss for failure to state a claim under Rule 12(b)(6) “tests the
16 legal sufficiency” of the plaintiff’s claims. *Navarro v. Block*, 250 F.3d 729, 732
17 (9th Cir. 2001); Fed. R. Civ. P. 12(b)(6). To withstand dismissal, a complaint must
18 contain “enough facts to state a claim to relief that is plausible on its face.” *Bell*
19 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility
20 when the plaintiff pleads factual content that allows the court to draw the

1 reasonable inference that the defendant is liable for the misconduct alleged.”
2 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). This requires the
3 plaintiff to provide “more than labels and conclusions, and a formulaic recitation of
4 the elements.” *Twombly*, 550 U.S. at 555. While a plaintiff need not establish a
5 probability of success on the merits, he or she must demonstrate “more than a sheer
6 possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678.

7 When analyzing whether a claim has been stated, the Court may consider the
8 “complaint, materials incorporated into the complaint by reference, and matters of
9 which the court may take judicial notice.” *Metzler Inv. GMBH v. Corinthian*
10 *Colleges, Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008) (citing *Tellabs, Inc. v. Makor*
11 *Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). A complaint must contain “a
12 short and plain statement of the claim showing that the pleader is entitled to relief.”
13 Fed. R. Civ. P. 8(a)(2). A plaintiff’s “allegations of material fact are taken as true
14 and construed in the light most favorable to the plaintiff[,]” however “conclusory
15 allegations of law and unwarranted inferences are insufficient to defeat a motion to
16 dismiss for failure to state a claim.” *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399,
17 1403 (9th Cir. 1996) (citation and brackets omitted).

18 In assessing whether Rule 8(a)(2) has been satisfied, a court must first
19 identify the elements of the plaintiff’s claim(s) and then determine whether those
20 elements could be proven on the facts pled. The court may disregard allegations

1 that are contradicted by matters properly subject to judicial notice or by exhibit.
2 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). The court
3 may also disregard conclusory allegations and arguments which are not supported
4 by reasonable deductions and inferences. *Id.* A claim may be dismissed only if “it
5 appears beyond doubt that the plaintiff can prove no set of facts in support of his
6 claim which would entitle him to relief.” *Navarro*, 250 F.3d at 732.

7 **A. Consideration of Supporting Materials**

8 In support of their briefing on the pending motion to dismiss, both sides
9 submitted several supporting exhibits. ECF Nos. 5-1–5-6, 8, 8-1, 11-1, 15-1–15-5.
10 Defendant develops no argument as to why the Court should consider their
11 supporting exhibits at this stage in the proceeding. Plaintiff’s supporting materials
12 appear to be offered only as response to Defendant’s materials.

13 “Review [of a motion to dismiss] is limited to the complaint.” *Cervantes v.*
14 *City of San Diego*, 5 F.3d 1273, 1274 (9th Cir. 1993). “Generally, district courts
15 may not consider material outside the pleadings when assessing” a Rule 12(b)(6)
16 motion. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018).
17 “When ruling on a Rule 12(b)(6) motion to dismiss, if a district court considers
18 evidence outside the pleadings, it must normally convert the 12(b)(6) motion into a
19 Rule 56 motion for summary judgment, and it must give the nonmoving party an
20 opportunity to respond.” *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir.

1 2003).

2 However, in considering a motion to dismiss, the Court may consider the
3 “complaint, materials incorporated into the complaint by reference, and matters of
4 which the court may take judicial notice.” *Metzler Inv.*, 540 F.3d at 1061 (*citing*
5 *Tellabs*, 551 U.S. at 322). The Court may take judicial notice of “matters of public
6 record.” *Lee v. City of Los Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001) (quoting
7 *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986)). This
8 includes “records and reports of administrative bodies.” *Ritchie*, 342 F.3d at 909
9 (quoting *Interstate Nat. Gas Co. v. S. Cal. Gas Co.*, 209 F.2d 380, 385 (9th Cir.
10 1953)).

11 While the Court has discretion to take notice of certain materials, “the
12 unscrupulous use of extrinsic documents to resolve competing theories against the
13 complaint risks premature dismissals of plausible claims that may turn out to be
14 valid after discovery.” *Khoja*, 899 F.3d at 998. “Submitting documents not
15 mentioned in the complaint to create a defense is nothing more than another way of
16 disputing the factual allegations in the complaint.” *Id.* at 1003.

17 Here, Defendant submits one document that appears subject to judicial
18 notice, which appears to be a “frequently asked questions” page from the EPA’s
19 website. ECF No. 5-2. The document is readily accessible by the public via the
20 agency’s website. Accordingly, the information contained in the document is

1 subject to judicial notice. As to Defendant's remaining documents, they seem to
2 be offered generally to challenge Plaintiff's factual allegations. Similarly,
3 Plaintiff's single document submitted with its responsive pleading appears to be
4 offered solely to dispute Defendant's challenges. ECF No. 11-1. Consideration of
5 these documents would take the Court's evaluation of the motion to dismiss away
6 from the face of the Complaint and would conflict with the Court's obligation at
7 this stage to construe Plaintiff's factual allegations in the light most favorable to
8 Plaintiff. *Cervantes*, 5 F.3d at 1274; *Lee*, 250 F.3d at 688. Accordingly, the Court
9 declines to take judicial notice or consideration of the remaining supporting
10 exhibits at this stage in the proceedings.

11 **B. Motion to Strike**

12 After Defendant filed its Reply, Plaintiff filed a document styled as
13 "Document Submitted Under Seal Re Motion to Dismiss." ECF No. 17. Plaintiff
14 offers no legal or procedural basis for submitting the document. Defendant moves
15 to strike the document on the grounds that it is improperly filed, untimely, and
16 prejudicial. ECF No. 19. Additionally, Defendant has filed its own supplemental
17 responsive documents. Defendant also does not present a legal or procedural basis
18 for the documents but instead claims "[D]efendant has no option but to address the
19 errors and fallacies" in Plaintiff's supplemental filing. ECF No. 19 at 3.

20 Generally, under this Court's scheduling orders, no supplemental response

1 or supplemental replies to any motion may be filed unless the Court grants a
2 motion to file such documents. However, no scheduling order has been issued in
3 this case. The Court reminds the parties to review Local Civil Rule 7, which
4 provides for one response memorandum for each motion.

5 The Court finds it unnecessary to strike either party's supplemental filings
6 because the Court's review of the motion to dismiss is limited to the Complaint,
7 documents incorporated into the Complaint by reference, and judicial notice.
8 *Metzler Inv. GMBH*, 540 F.3d at 1061. To the extent either party raises new
9 allegations in their supplemental filings, the material is not dispositive to the
10 current Order. The Court denies Defendant's Motion to Strike.

11 **C. Clean Air Act and Emergency Planning and Community Right-
12 to-Know Act**

13 The CAA, 42 U.S.C. § 7412(r), imposes a duty on owners and operators of
14 stationary sources that store more than a threshold quantity of a regulated
15 substance to identify hazards that might result from release of the substance and to
16 take steps to mitigate the accidental release of the regulated substance. 42 U.S.C. §
17 7412(r). The EPRCA, 42 U.S.C. § 11047, also imposes a duty on owners and
18 operators of facilities that handle hazardous materials to prepare and submit
19 inventory forms that report the type and quantity of certain hazardous materials in
20 order to aid local emergency response entities in the event of a hazardous material

1 release. 42 U.S.C. § 11047. Explicitly exempt from regulation are hazardous
2 substances that are stored incident to transportation. 42 U.S.C. § 11047; 40 C.F.R.
3 § 68.3.

4 Defendant argues Plaintiff’s claims fail as a matter of law because the TMA
5 is not stored in stationary sources as defined by the regulations, and because
6 Defendant does not own or operate the railcars that Plaintiff alleges are used as
7 stationary sources under the regulations. ECF No. 5 at 7, ¶¶ 11–12.

8 *1. “Stationary Source”*

9 The regulations implementing the CAA define “stationary sources” as:

10 [A]ny buildings, structures, equipment, installations, or substance
11 emitting stationary activities which belong to the same industrial
12 group, which are located on one or more contiguous properties, which
13 are under the control of the same person (or persons under common
14 control), and from which an accidental release may occur. . . . A
stationary source includes transportation containers used for storage
not incident to transportation and transportation containers connected
to equipment at a stationary source for loading or unloading.

15 40 C.F.R. § 68.3. The regulations carve out an exception for containers used as
16 storage incident to transportation. *Id.* In other words, a container used to transport
17 regulated materials will not be subject to the EPA regulations so long as the
18 container is still considered to be in transportation, even if that container is
19 incidentally used as a storage container during the transportation process. The
20 regulations do not define what constitutes storage incident to transportation.

The Complaint alleges the railcars carrying TMA fall within the definition of

1 “stationary sources” for “at least some time” while at Defendant’s transloading
2 facility. ECF No. 1 at 13, ¶¶ 48–49 (quoting 49 C.F.R. § 68.3). Plaintiff alleges
3 the railcars convert to stationary sources once they are disconnected from their
4 motive power. *Id.* at 12, ¶ 44. The Complaint does not indicate how long the
5 railcars remain stationary sources, and Plaintiff has indicated it was unable to
6 provide such information because Defendant has claimed all documents relating to
7 TMA are confidential business information. ECF No. 11 at 7 n.3.

8 Defendant argues the railcars are not stationary sources but are used as
9 “storage incident to transportation,” which is exempt from the regulations. ECF
10 No. 5 at 3–4, ¶¶ 6–7. In support of its argument, Defendant relies on the
11 Department of Transportation (“DOT”) regulations regarding the transport of
12 hazardous materials, which defines “storage incidental to movement” as “[s]torage
13 at the destination shown on a shipping document, including storage at a
14 transloading facility, provided the original shipping documentation identifies the
15 shipment as a through-shipment and identifies the final destination or destinations
16 of the hazardous material.” *Id.* at 6, ¶ 9 (citing 49 C.F.R. § 171.1(c)(4)(i)(A)).
17 Defendant asserts the railcars containing TMA are temporarily staged on the rail
18 tracks until the TMA is transloaded to a cargo tank motor vehicle for transportation
19 to the final destination listed on shipping papers. *Id.* at 3, ¶ 4. Defendant does not
20 indicate how long the railcars are “temporarily staged” before being transloaded.

1 Defendant further argues the railcars cannot be considered stationary sources
2 because the TMA in the railcars is subject to active shipping papers at all times.
3 *Id.* at 22, ¶ 43.

4 Notably, the EPA attempted to address the issues raised by Defendant in
5 1998 when it amended certain aspects of its regulatory scheme for hazardous
6 substances. *See* List of Regulated Substances and Thresholds for Accidental
7 Release Prevention; Amendments, 63 Fed. Reg. 640-01, 642–43 (Jan. 6, 1998). To
8 clarify confusion and overlap between the DOT and EPA regulations that cover
9 transport and storage of hazardous materials, the EPA, in consultation with DOT,
10 amended the definition of “stationary sources” under the CAA. *See id.* In its
11 assessment of the definition, the EPA specifically stated that it believed railroad
12 tank cars could be considered stationary sources if they remained at one location
13 “for a long period of time.” *Id.* at 643. The EPA did not elaborate on what it
14 considered a “long period of time.” Conversely, the EPA noted a container would
15 be considered in transportation “so long as it is attached to the motive power that
16 delivered it to the site.” *Id.*

17 The EPA also addressed the consideration of shipping papers when
18 assessing whether a container was a stationary source. The EPA found that
19 shipping papers were an unsuitable criterion in the determination of what
20 constituted stationary sources because shipping papers were not always generated

1 and were not required under DOT regulations. *Id.* Consequently, the EPA
2 removed references to shipping papers from the definition of stationary sources.
3 *Id.* Defendant’s argument that the presence of shipping papers is, thus, not
4 dispositive to the issue of whether the railcars are stationary sources.

5 The Court finds Plaintiff’s allegations that the railcars are stationary sources
6 for at least sometime while at Defendant’s transloading facility are at least
7 plausible on their face. Whether the railcars are, in fact, stationary sources subject
8 to EPA regulation is an issue better resolved on a motion for summary judgment or
9 at trial.

10 2. “*Owner or operator*”

11 Defendant argues it is not subject to the CAA and EPCRA because it is not
12 the owner or operator of the railcars used to transport the TMA. ECF No. 5 at 7, ¶
13 12. Under the CAA, an “owner or operator” is defined as “any person who owns,
14 leases, operates, controls, or supervises a stationary source.” 42 U.S.C. §
15 7412(a)(9); 40 C.F.R. § 68.3. Similarly, the EPCRA applies to owners or operators
16 of facilities that store threshold levels of hazardous materials. 40 C.F.R. § 370.66.
17 Clearly the definitions contemplate persons other than merely owners and
18 operators; they also incorporate those who supervise or control stationary sources.
19 Thus, if the railcars are, in fact, stationary sources for at least some time while at
20 Defendant’s facility, logically, the railcars would be under Defendant’s supervision

1 and control, which would trigger Defendant's duties under the CAA and EPCRA.
2 Because the Court finds Plaintiff has sufficiently alleged plausible facts regarding
3 the use of the railcars as stationary sources, the Court also finds the Complaint
4 alleges sufficient facts regarding Defendant's control and supervision of the
5 railcars while they are stored at Defendant's facility. The determination of whether
6 Defendant is, in fact, an owner or operator as defined by the regulations is better
7 evaluated on a motion for summary judgment or at trial.

8 The Court concludes Plaintiff's claims presently survive dismissal, as the
9 pleadings allege sufficient facts that could plausibly lead to the relief Plaintiff
10 seeks.

11 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 12 1. Defendant's Motion to Dismiss (ECF No. 5) is DENIED.
13 2. Defendant's Motion to Strike (ECF No. 19) is DENIED.

14 The District Court Executive is directed to enter this Order and furnish
15 copies to counsel.

16 DATED January 27, 2022.



Thomas O. Rice
THOMAS O. RICE
United States District Judge