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HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

IRON PARTNERS, LLC,

Plaintiff,

v.

MARITIME ADMINISTRATION, UNITED
STATE DEPARTMENT OF
TRANSPORTATION; KAISER VENTURES,
LLC; KSC RECOVERY, INC.; KAISER
STEEL CORPORATION; and KAISER
COMPANY, INC.

Defendants.

Case No. 3:08-CV-05217-RBL

ORDER DENYING PLAINTIFF’S
MOTION FOR PARTIAL SUMMARY
JUDGMENT
[Dkt. #89]

I. INTRODUCTION

THIS MATTER comes before the Court upon Plaintiff Iron Partners’ Motion for Partial Summary Judgment against Kaiser only. [Dkt. #89]. Iron Partners seeks a ruling as a matter of law that: Kaiser is liable under Washington’s Model Toxics Control Act (MTCA); that the cleanup of the Property was the substantial equivalent of an Ecology-conducted cleanup; and that Kaiser is therefore liable to Iron Partners for the entire cost of that cleanup.

While it effectively concedes the first point (as it must), Kaiser argues that Iron Partners’ cleanup was far more expensive than an Ecology-conducted or -supervised cleanup would have

1 been, and that it was done for business reasons. It denies that it is liable for that cost, much less
2 that it can be so found on Summary Judgment.

3 For the reasons that follow, Iron Partners' Motion is DENIED.

4 **II. BACKGROUND**

5 This lawsuit concerns the investigation and environmental cleanup of the following three
6 adjacent parcels of real property located in the Columbia Business Center in Vancouver,
7 Washington: (1) Plaintiff's 2.75-acre parcel; (2) the 11.64-acre Marine Park and Boat Launch
8 Facility owned by the City of Vancouver; and (3) a 3.13-acre parcel owned by L & L Land
9 Company. In the 1940s, Defendant Kaiser Company owned the properties and buried a
10 significant amount of waste accumulated from its shipbuilding operations. Plaintiff now seeks
11 Kaiser's contribution under the Model Toxics Control Act for the remediation performed on its
12 parcel.

13 **A. Acquisition of the Iron Partners Parcel**

14 Iron Partners, an Oregon general partnership (Iron Partners), purchased the property
15 related to this dispute in December 1991. [Brandt-Erichsen Dec., Dkt. #104-6, at 13]. Defendant
16 Kaiser's expert maintains that a 1991 Dames & Moore Site Assessment identified contamination
17 of the property "consisting of copper, zinc, lead, and chromium in black sand on the surface of
18 the property," but that Iron Partners never had the soil analyzed to determine the mobility of the
19 contaminants as recommended in the assessment. [Jewett Dec., Dkt. #104, at 4-5]. A copy of this
20 assessment is not included in the record.

21 In 2006, subsurface investigation of the parcel was performed by Brady Environmental,
22 Inc. (BEI), which included background information about the property. [Hoffman Dec., Dkt.
23 #90-1, at 4]. According to this report, Iron Partners did in fact contract with Dames & Moore to
24 complete a Phase I environmental site assessment (ESA) because it had previously conducted a
25 Phase I ESA on other properties within the Columbia Business Center. *Id.* Dames & Moore
26 decided that a Phase II ESA would be necessary to address the environmental concerns on the
27 property. *Id.* The report claims that the Phase II ESA led to the removal of an underground
28 storage tank and associated contaminated soils located in the northern portion of the property. *Id.*

1 The Phase II ESA apparently did not discover the buried landfill that is the subject of this
2 motion. *Id.* After the Phase II ESA was completed, Iron Partners purchased the property. *Id.*

3 Plaintiff Iron Partners, LLC acquired the property from Iron Partners in January 2007.
4 [Brandt-Erichsen Dec., Dkt. #104-6, at 16]. Prior to this acquisition, the buried landfill had
5 already been discovered, and the first soil samples were taken in June 2006.

6 **B. Discovery of the Buried Debris**

7 In Spring 2005, Iron Partners discovered buried debris on the southern portion of its
8 property during an excavation project to install new footings for a crane rail system. In June
9 2006, Plaintiff hired BEI as a consultant to determine when the waste had been dumped and
10 whether any of the surrounding soil posed a threat to human health or the environment.

11 [Hoffman Dec., Dkt. #90-1]. During BEI's first subsurface investigation, it determined that the
12 debris dated back to the 1940s, that contaminants were present in the soil, and that the landfill
13 likely spilled over onto adjacent properties.¹ [*Id.* at 6]. The report also recommended that Iron
14 Partners not use the bridge crane over the buried debris area. *Id.*

15 Iron Partners began investigating previous owners of the property to determine who
16 dumped the waste in order to provide all potentially liable parties with notice of the
17 contamination. It discovered that during World War II, Defendant Kaiser used the property to
18 build U.S. Navy and merchant ships pursuant to a contract with the United States Maritime
19 Administration. BEI investigated the property on two more occasions and determined that the
20 buried debris located on the southern portion of Iron Partners' property was approximately 8,500
21 tons. [Hoffman Dec., Dkt. #90-10, at 4]. Subsequent investigations continued to indicate that
22 soils were contaminated above levels established by the MTCA and therefore would likely
23 require remedial action. [Hoffman Dec., Dkt. #90-4, #90-10]. BEI never took any groundwater
24 samples to confirm whether the contaminants were migrating or leaching. *Id.*

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27 ¹ Kaiser alleges in its response that Iron Partners also "accepted the recommendation of its consultant, who told them
28 that he could find a way to have others pay for removing the non-structural fill and restoring full use of the crane
through pursuit of contribution claims under the CERCLA and MTCA." [Def. Resp., Dkt. #104, at 2].

1 In January 2007, Iron Partners notified Kaiser, the United States, and the Washington
2 Department of Ecology (Ecology) of the contamination. [Hoffman Dec., Dkt. #90-2, at 2]. The
3 buried debris extended towards the south, encroaching on the Marina Park and Boat Launch
4 Facility owned by the City of Vancouver and extended towards the east, encroaching on L & L
5 Land Company's parcel. [Hoffman Dec., Dkt. #91, at 14]. But the operational area of Kaiser's
6 WWII dump and its incinerator had been located on Iron Partners' property. [Hoffman Dec., Dkt.
7 #92-1, at 11]. Ultimately, 8,312 square feet of the City's 11.64 acre property and 18,932 square
8 feet of Iron Partners' 2.75 acre property were deemed a "dangerous waste area." [Hoffman Dec.,
9 Dkt. #91, at 21].

10 In April 2008, Iron Partners filed a complaint against Kaiser and the United States. It
11 continued to discuss potential remedial actions with the other parties. In Fall 2008, BEI dug
12 additional soil test pits at Kaiser's request and a third-party environmental consultant and
13 archaeologist representing Kaiser were present. [Hoffman Dec., Dkt. #90-10, at 3]. The soil
14 samples of this subsurface investigation confirmed that groundwater had not yet been impacted
15 by the buried debris, but the report also concluded that groundwater was "believed to be close to
16 the bottom of the buried landfill" and that monitoring wells would likely be a necessary
17 condition. *Id.* The archaeologist confirmed that the debris was from the 1940s, and he
18 recommended that the buried landfill be preserved as a historic archaeological site. [Hoffman
19 Dec., Dkt. #90-20, at 14].

20 Eventually, both Iron Partners and the City entered Ecology's voluntary cleanup
21 program. Through the Fall of 2009, the parties continued to discuss the most appropriate
22 remedial action with cost-sharing plans proposed and rejected. Iron Partners suggested the
23 construction of a concrete environmental cap, installation of monitoring wells, and two years of
24 groundwater monitoring. [Hoffman Dec., Dkt. #90-14, at 2]. Iron Partners also asked for either
25 an indemnity agreement or an insurance policy paid by Kaiser to cover the uncertainty of
26 potential groundwater contamination. *Id.* Kaiser rejected this proposal. *Id.*

27 In November 2009, the City of Vancouver hired a consultant, Pacific Groundwater
28 Group, Inc. (PGG), to complete a site-wide remedial investigation, feasibility study, and

1 disproportionate cost analysis (RI/FS/DCA) on all three properties. The samples PGG took
2 confirmed the presence of hazardous substances in the debris, including lead, cadmium, and
3 petroleum hydrocarbons. [Hoffman Dec., Dkt. #91, at 14]. The nature and extent of the soil
4 contamination indicated that “much of the debris exceed[ed] soil cleanup levels.” [*Id.* at 20].
5 PGG’s groundwater monitoring showed no signs of contamination downgradient from the Site,
6 and it found no indication that the hazardous substances were leaching into groundwater. [*Id.* at
7 22]. PGG concluded that because the debris had been buried since the 1940s, “site conditions are
8 not expected to change and cause leaching or transport of contaminants from the debris.” [*Id.* at
9 23]. However, PGG never installed monitoring wells on or near the portion of the property that it
10 designated as a dangerous waste area. [*See id.* at 21].

11 In the RI/FS/DCA, PGG selected three remedies to analyze that could be implemented so
12 that the properties would be protective of human health and environment: (1) No action; (2)
13 Contain the waste and implement institutional controls, including long-term monitoring and a
14 restrictive covenant; and (3) Excavation of the debris and contaminated soils, off-site disposal of
15 contaminated soils, and clean backfill. PGG quickly dismissed the first alternative, stating that it
16 “is unlikely to achieve the goal of protecting human health and the environment.” *Id.* Alternative
17 2 (Containment and Controls) and Alternative 3 (Excavation, Off-Site Disposal, and Backfill)
18 were both considered viable alternatives. [*Id.* at 27]. Although Alternative 3 achieved the highest
19 benefit score by providing for both immediate and long-term protection, PGG found Alternative
20 2 to be the Site’s preferred remedy based on its disproportionate cost analysis. [*Id.* at 28].
21 According to PGG’s analysis, both Alternative 2 and 3 received similar benefits scores, but the
22 cost of implementing excavation and off-site disposal would exceed \$3.7 million. *Id.*
23 Containment and control, on the other hand, had an estimated cost of \$137,800. *Id.*

24 Iron Partners apparently wished to avoid implementing a remedial action that would
25 burden its property with a restrictive covenant prohibiting, among other things, “drilling,
26 digging, placement of any objects or use of equipment which deforms or stresses the surface
27 beyond its load bearing capability, piercing the surface with a rod, spike, or similar item,
28 bulldozing, or earthwork.” [Hoffman Dec., Dkt. #92-4, at 4]. Iron Partners alleges that it used its

1 property for fabrication and storage, and included a permanently installed bridge crane, and that
2 the containment and control alternative would have been significantly burdensome on its future
3 business operations. Thus, it commissioned BEI to began a supplemental analysis of other
4 alternatives that PGG did not consider, including partial excavation, waste segregation, or waste
5 stabilization. BEI was concerned that PGG's analysis underestimated the cost of Alternative 2
6 and overestimated the cost of Alternative 3, and BEI believed that there was another cost-
7 effective alternative that would be more protective than simply containing and controlling the
8 waste on site. [Hoffman Dec., Dkt. #9-21, at 3-5]. Kaiser alleges (and supports with evidence)
9 that Iron Partners intended to do a more thorough cleanup for business reasons, and asked BEI to
10 justify that choice after PPG suggested that Alternative 2 was more efficient.

11 BEI concluded that the most cost-effective remedial action was to segregate and stabilize
12 the waste on site, which reduced the cost of off-site disposal because the uncontaminated soil
13 was placed back into the excavation area as backfill. This alternative would also allow Iron
14 Partners to preserve some of the waste for archaeological preservation. Kaiser rejected this
15 proposal in late 2009. [Hoffman Dec., Dkt. #91-6, at 4]. Nevertheless, Iron Partners sought
16 Ecology's approval for the plan, which was granted in February 2010. Shortly after, BEI began
17 the remedial excavation. Since then, Ecology has issued a No Further Action letter to Iron
18 Partners.² The cost of BEI's remediation action was \$784,545, which included the excavation of
19 unexpected gasoline-soaked soil. Nevertheless, the costs proved to be less than the \$3.7 million
20 estimated by PGG.³

21 Iron Partners now moves for partial summary judgment against Kaiser, seeking a finding
22 that (1) Kaiser is liable under the MTCA; (2) its remedial action was the substantial equivalent of
23 an Ecology-conducted or -supervised cleanup; and (3) Kaiser is liable for all of its remediation
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26 ² Ecology has also issued a No Further Action determination with respect to the Containment and Control remedy
27 implemented on the City's parcel.

28 ³ It is not clear whether PGG's estimate of the Containment and Control remedy on the City's parcel proved to be
accurate.

1 costs and reasonable attorney fees. Kaiser does not dispute that it is a liable party under the
2 MTCA.⁴

3 III. DISCUSSION

4 A. Standard of Review

5 Summary judgment is appropriate when the record shows that there is no genuine issue of
6 fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c);
7 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party has the initial
8 burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477
9 U.S. 317, 323 (1986); *U.S. v. Carter*, 906 F.2d 1375, 1376 (9th Cir. 1990). When a properly
10 supported motion for summary judgment is made, the burden then shifts, and the opposing party
11 must set forth specific facts showing that there is a genuine issue for trial. *Anderson*, 477 U.S. at
12 250. Put another way, summary judgment should be granted when the nonmoving party fails to
13 offer evidence from which a reasonable jury could return a verdict in its favor. *Id.* at 252. When
14 viewing the evidence at this stage, all justifiable inferences are drawn in favor of the nonmoving
15 party. *Id.* at 255.

16 B. Liability under the Model Toxics Control Act (MTCA) is strict, joint, and several.

17 MTCA recognizes that every person has a “fundamental and inalienable right” to a
18 healthy environment. RCW 70.105D.010. MTCA also acknowledges the public’s interest “to
19 efficiently use our finite land base, to integrate our land use planning policies with our cleanup
20 policies, and to clean up and reuse contaminated industrial properties in order to minimize
21 industrial development pressures on undeveloped land and to make clean land available for
22 future social use.” RCW 70.105D.010(4). In order to effectuate these purposes, MTCA imposes
23 strict, joint, and several liability for “all remedial action costs” on current and past owners and
24 operators of the facility at the time of either the release or disposal of hazardous substances.
25 RCW 70.105D.040(2).

26 A private right of action to recover the costs of a remediation from a potentially liable

27 ⁴ A party is strictly liable under the MTCA if it is (1) the owner or operator of the facility; (2) the owner or operator
28 of the facility at the time of disposal or release of hazardous substances, (3) any person who facilitated the disposal
of hazardous substances, or (4) any person who transported hazardous substances to the facility. RCW
70.105D.040(1). Accordingly, both Kaiser and Iron Partners are liable parties under the MTCA.

1 party is allowable if the remedial action is the substantial equivalent of an Ecology-conducted or
2 -supervised cleanup.⁵ RCW 70.105D.080. The court shall base the amount of recovery on
3 equitable factors that it deems appropriate, and the prevailing party shall recover reasonable
4 attorneys' fees and costs. *Id.* To determine whether a remediation is the substantial equivalent of
5 an Ecology-supervised cleanup, the court should evaluate the MTCA guidelines as a whole.
6 WAC 173-340-454(1). A claim should "not be disallowed due to omissions that do not diminish
7 the overall effectiveness of the remedial action." *Id.*

8
9 **C. Iron Partners seeks judgment as a matter of law that its "Alternative 3" cleanup
10 was the substantial equivalent of an Ecology-conducted or -supervised cleanup.**

11 Iron Partners claims that it is entitled to full recovery costs from Kaiser for the
12 excavation, segregation, and disposal of the hazardous soils located on its parcel because this
13 remedial action was the substantial equivalent of an Ecology-conducted or -supervised cleanup.
14 Ecology has promulgated a series of regulations to assist the courts in making such a
15 determination.

16 1. Guidelines for Courts in Evaluating Whether an Independent Remediation is the
17 Substantial Equivalent to an Ecology-supervised or -conducted cleanup

18 Ecology considers any independent remedial action that includes the following elements
19 to be the substantial equivalent of a department-conducted or -supervised clean up: (1)
20 Information on the site and the conducted remedial action were properly reported to Ecology; (2)
21 Ecology has not objected to the remediation being conducted; (3) Advance public notice was
22 provided; (4) The remediation was conducted substantially equivalent with Ecology's technical
23 standards and evaluation criteria; and (5) Where facilities have disposed of hazardous waste as
24 part of the remedial action, proper documentation has been provided to Ecology. WAC 173-340-
25 545(2)(c). However, the Washington Court of Appeals has held that these elements are merely
26 guidelines to assist private parties rather than absolute requirements. *Taliesen Corp. v. Razore*

27 ⁵ "Remedial action means any action or expenditure consistent with the purposes of this chapter to identify,
28 eliminate, or minimize any threat or potential threat posed by hazardous substances to human health or the
environment including any investigative and monitoring activities with respect to any release or threatened release
of a hazardous substance..." RCW 70.105D.020(26).

1 *Land Co.*, 135 Wn. App. 106, 120 (2006). Instead, courts should look at the “overall
2 effectiveness” of the remediation to determine whether it was the substantial equivalent of an
3 Ecology-supervised cleanup. *Id.*

4 In this case, Iron Partners reported the contamination to Ecology soon after its discovery
5 and submitted a report to the department once the remediation was completed. [Hoffman Dec.,
6 Dkt. #90-2, at 2]. BEI discussed Iron Partners’ selected cleanup with Ecology prior to its
7 implementation. [Hoffman Dec., Dkt. #91-7]. The department approved the plan and, once the
8 remediation was completed, issued a No Further Action determination for Iron Partners’ parcel.
9 [Hoffman Dec., Dkt. #90-3]. Iron Partners gave notice to all potentially liable parties three years
10 before commencing the remediation, and it also complied with the public notice requirements
11 established by Ecology. [See, e.g., Hoffman Dec., Dkt. #91-5]. Finally, Iron Partners properly
12 notified the department of the location of the disposed hazardous waste. [Hoffman Dec., Dkt.
13 #92-1].

14 Kaiser argues that Iron Partners did not comply with the technical standards and
15 evaluation criteria as set forth in the regulations. In particular, it claims that because the
16 containment and control remedy would have met the substantial equivalent standard, then any
17 costs that went “beyond the scope of that remedy are not ‘necessary’ response costs recoverable
18 under RCW 70.105D.080.” [Def. Resp., Dkt. #104, at 16].

19 Kaiser’s position relies on the federal Comprehensive Environmental Response,
20 Compensation, and Liability Act (CERCLA). Kaiser argues that a more expensive yet more
21 permanent remedial action cannot be considered the substantial equivalent (particularly not on
22 summary judgment) because it was not necessary to protect human health or the environment.
23 Although CERCLA requires the response costs to be ‘necessary’ to address the threat to human
24 health or the environment, this language is absent from MTCA.

25
26 2. MTCA does not expressly require that the chosen method of cleanup be “necessary”
to protect the environment or human health.

27 When evaluating compliance with the technical standards and evaluation criteria to
28 determine substantial equivalence, “it should be recognized that there are often many alternative

1 methods for cleanup of a facility that would comply with [the] provisions” set forth in the MTCA
2 regulations. Kaiser argues that notwithstanding compliance with MTCA regulations, the
3 remediation costs must still be necessary to qualify as the substantial equivalent of an Ecology-
4 conducted cleanup. It argues, persuasively, that “[t]he notion that response costs must be
5 ‘necessary’ in order to be recoverable is more precisely articulated under CERCLA, but no less
6 applicable under MTCA.” [Def. Resp. Dkt. #104, at 16].

7 MTCA was modeled after CERCLA, and in many sections, the language was copied
8 exactly. Where similar language is used, federal cases interpreting CERCLA may be used as
9 persuasive authority when interpreting the MTCA. In this case, CERCLA states that recovery is
10 limited to “necessary costs of response incurred by any other person consistent with the national
11 contingency plan.” 42 U.S.C. § 9607(a)(4)(A)(B). MTCA drafters did not include this language
12 in the state statute. Iron Partners asks the Court to presume that the language was deliberately
13 omitted. Although CERCLA also requires the remediation be cost-effective, 42 U.S.C. §
14 9621(a), there is no such requirement under the MTCA.

15 Instead, the MTCA specifies only the minimum requirements for a remediation, which do
16 not include any language that might suggest only the necessary costs for the least expensive
17 cleanup may be recovered. Under the MTCA, the selected cleanup action shall (1) protect the
18 environment and human health; (2) comply with cleanup standards; (3) comply with applicable
19 state and federal laws; and (4) provide compliance monitoring. WAC 173-340-360(2)(a). When
20 selecting from among remedial alternatives that all meet these threshold requirements, “the
21 selected action shall use permanent solutions to the maximum extent practicable.” WAC 173-
22 340-360(2)(b)(i). Iron Partners points out that, during public comment for the 2001 amendments
23 to the MTCA, Ecology explained that “[i]n addition to meeting each of the minimum
24 requirements specified in WAC 173-340-360, cleanup actions shall not rely primarily on
25 institutional controls and monitoring where it is technically possible to implement a more
26 permanent cleanup action for all or a portion of the site.” [Moore Dec., Dkt. #106-1, at 2-3].

27 Iron Partners selected a cost-effective, permanent remedial action that excavated,
28 segregated, and disposed of contaminated soils located on its property. It received a No Further

1 Action decision from the Department of Ecology, which stated that the remediation was
2 protective of human health and the environment and that it complemented the City's less
3 permanent containment and control remedy. [Hoffman Dec., Dkt. #92-3, at 5]. Iron Partners
4 complied with all applicable regulations even though omissions on its part would still have
5 allowed a claim under the MTCA as long as "the overall effectiveness of the remedial action"
6 was not diminished. *See* WAC 173-340-545(1); *Talisen*, 135 Wn. App. at 120.

7 From this, Iron Partners asks the court to find and conclude as a matter of law that,
8 because these minimum requirements were met, Iron Partners' remediation was the substantial
9 equivalent of an Ecology-conducted or -supervised cleanup as a matter of law.

10 Kaiser argues that under MTCA, a party's recovery "shall be based on such equitable
11 factors as the court determines are appropriate." [Citing RCW 70.105D.080.] Recovery of
12 remedial action costs shall be limited to those remedial actions that, when evaluated as a whole,
13 are the substantial equivalent of a department-conducted or department-supervised remedial
14 action. Substantial equivalence shall be determined by the court with reference to the rules
15 adopted by the department under this chapter. *Id.*

16 Kaiser is correct. Iron Partners claims that MTCA permits full recovery, without regard
17 to the economic efficiency or ecological necessity of the cleanup. This position finds no legal or
18 logical support in the authorities it cites, and is not good policy. This is particularly true where,
19 as here, there is evidence that Iron Partners chose the cleanup it did for business reasons.

20 For these reasons, the court cannot rule as a matter of law that the Iron Partners' clean up
21 was the substantial equivalent of an Ecology – conducted or – supervised cleanup, and that
22 Kaiser is required to pay the full cost of it. The Motion for Summary Judgment is DENIED.

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24 3. A cleanup undertaken for business reasons is not subject to full contribution.

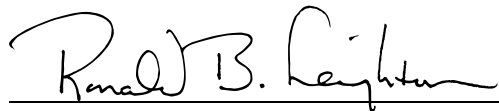
25 Kaiser argues that *Talisen* stands for the proposition that liable parties may not be asked
26 to pay for another liable party's past business decisions. There, the court determined that
27 *Talisen's* remediation was the substantial equivalent of an Ecology-conducted cleanup because it
28 had removed all soils that had any detectable levels of contamination. *Talisen*, 135 Wn. App. at

1 122. The cleanup was protective of human health and the environment even though it was not
2 cost-effective, and because of the cleanup's overall effectiveness, the court held that it met the
3 standard of substantial equivalence. *Id.* Nevertheless, the court limited Talisen's recovery and
4 allocated almost half of the allowable costs of cleanup to the prevailing party. *Id.* at 140.

5 Though the facts of *Talisen* were more egregious than those alleged by Kaiser here, there
6 is, at the very least, a question of fact as to whether Iron Partners remediated its property to a
7 higher standard than an equivalent Ecology – conducted or –supervised cleanup for business
8 reasons. For this reason as well, the Plaintiff's Motion for Summary Judgment is DENIED.

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10 **IT IS SO ORDERED.**

11 Dated this 28th day of September, 2011.

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14 RONALD B. LEIGHTON
15 UNITED STATES DISTRICT JUDGE
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