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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

EAST DISTRICT

CALMAT CO. dba VULCAN MATERIAL COMPANY, WESTERN DIVISION, a Delaware corporation, Plaintiff, vs. SAN GABRIEL VALLEY GUN CLUB, a non-profit California corporation; and DOES 1-1000, inclusive, Defendants.	CASE NO: KC062582J **NOTICE OF LODGING FEDERAL AUTHORITY CITED IN DEFENDANT SAN GABRIEL VALLEY GUN CLUB'S DEMURRER TO PLAINTIFF'S COMPLAINT AND MOTION TO STRIKE PORTIONS OF PLAINTIFF'S COMPLAINT** Hon. Dan T. Oki, presiding Date: March 8, 2012 Time: 8:30 a.m. Dept.: J Action Filed: November 22, 2011 Trial Date: None

NOTICE IS HEREBY GIVEN that Defendants are hereby lodging the following federal authority cited in the Demurrer to Plaintiff's Complaint and Motion to Strike Portions of Plaintiff's Complaint:

1. *Indust. Risk Insurers v. Creole Prod. Servs., Inc.*, 746 F.2d 526 (9th Cir. 1964) ..... Exhibit A
2. *SPPI-Somersville, Inc. v. TRC Cos., Inc.*, Nos. C 04-2648SI, 07-5825 SI, 2009 WL 2390347 at *7-11 (N.D. Cal. Aug. 3, 2009) ..... Exhibit B
3. *Gregory Vill. Partners, L.P. v. Chevron U.S.A., Inc.*, C 11-1597 PJH, 2011 WL 3359928 (N.D. Cal. Aug. 2, 2011) ..... Exhibit C

4. *Bjorklund v. N. Am. Cos. for Life & Health Ins.*,
72 Fed. App. 550, 551 (9th Cir. 2003) ..... Exhibit D

5. *Mortkowitz v. Texaco*,
842 F. Supp. 1232, 1236 (N.D. Cal. 1994) ..... Exhibit E

Dated: January 26, 2012

MICHEL & ASSOCIATES, P.C.

Thomas Maciejewski
Attorneys Defendant San Gabriel Valley Gun Club

EXHIBIT "A"

746 F.2d 526
United States Court of Appeals,
Ninth Circuit.

INDUSTRIAL RISK INSURERS, et al., Plaintiffs,
v.
CREOLE PRODUCTION
SERVICES, INC., et al., Defendants.
HARBOR INSURANCE CO.,
Third-Party Plaintiff/Appellant.
v.
FLUOR CORPORATION, a Delaware Corporation;
Fluor Alaska, Inc.; and Fluor Engineers
and Constructors, Inc., its wholly owned
subsidiaries, Third-Party Defendants/Appellees.

No. 83-4011. | Argued and Submitted
April 3, 1984. | Decided Oct. 30, 1984.

Insurers of Trans-Alaska Pipeline System, after paying owners over $5 million after explosion and fire destroyed pump station on pipeline, sued pipeline consultant, which impleaded construction firm that designed pump station. The United States District Court for the District of Alaska, James A. von der Heydt, J., 568 F.Supp. 1323, ruled that consultant's insurer could not recover against construction firm in implied indemnity, and appeal was taken. The Court of Appeals, Lynch, District Judge, sitting by designation, held that consultant's insurer could not recover from construction firm in implied indemnity since consultant was either a concurrent tort-feasor or a mere insurer or guarantor.

Affirmed.

West Headnotes (5)

1 **Indemnity**
Voluntary Payment by Indemnitee; Necessity of Compulsory Payment

Persons who volunteer payments are not entitled to indemnification under general law of indemnity.

2 **Indemnity**
Joint Tortfeasors or Parties in Pari Delicto in General

Alaska law prevents concurrent tort-feasors from recovering anything in implied indemnity.

4 Cases that cite this headnote

3 **Indemnity**
Contractors, Subcontractors, or Owners

Insurer for oil pipeline consultant, which contracted to be in charge of start-up of pipeline pump stations and which had contractual undertaking to pay pipeline for certain losses that went beyond tort liability, could not recover implied indemnity, from construction firm which designed pump station that exploded since consultant was either a concurrent tort-feasor or a mere insurer or guarantor and thus was not entitled to implied indemnity under Alaska law.

1 Cases that cite this headnote

4 **Insurance**
Recovery of Payments by Insurer

Implied indemnity is not intended for persons such as an insurer which is obliged to pay based on its contract and which presumably received consideration for agreeing to bear the risk.

1 Cases that cite this headnote

5 **Products Liability**
Services as Distinguished from Products

Alaska does not impose strict liability upon mere sellers of services.

Attorneys and Law Firms

*526 Thomas S. Felker, James B. McCabe, Foulds, Felker, Burns & Johnson, Seattle, Wash., for Industrial Risk Insurer.
John A. Treptow, Atkinson, Conway, Bell & Gagnon, Anchorage, Alaska, for Harbor Ins.
Mark A. Sanberg, Henry J. Camarot, Camarot, Sandberg & Hunter, Anchorage, Alaska, for Flouor.

Appeal from the United States District Court for the District of Alaska.

Before BROWNING and CANBY, Circuit Judges, and LYNCH, * District Judge.

Opinion

*527 LYNCH, District Judge:

This matter is before the court on the appeal of the Harbor Insurance Company ("Harbor") from the district court's granting of summary judgment for the third-party defendants. The district court ruled that Harbor could not recover against the third-party defendants in implied indemnity. We agree, and we affirm the judgment for the reasons stated below. The opinion of the district court can be found at 568 F.Supp. 1323 (D.Alaska 1983).

FACTS

The Alyeska Pipeline Service Company ("Alyeska") is the agent for the owners of the Trans-Alaska Pipeline System ("TAPS"). Industrial Risk Insurers is an insurer of the owners of TAPS; all TAPS insurers will be referred to collectively as "IRI." Creole Production Services, Inc. ("Creole") is an oil pipeline consultant that contracted with Alyeska to be in charge of the start-up of Alyeska's pump stations. The Harbor Insurance Company is Creole's insurer. The Fluor Corporation is a construction and engineering firm that contracted with Alyeska to design (and, for purposes of the motion for summary judgment, construct and test) the pump stations and terminal facilities; Fluor and its wholly owned subsidiaries will be referred to collectively as "Fluor."

On July 8, 1977, only six days after the commencement of pumping, an explosion and fire destroyed a pump station on the pipeline. One life was lost. Thereafter, IRI paid Alyeska, its insured, over $5,000,000. IRI then sued Creole in federal court under the court's diversity jurisdiction; IRI did not sue Fluor. IRI's initial complaint was based both on negligence and on an indemnity provision in Creole's contract with Alyeska, but IRI later filed an amended complaint that included only the contract claim. Creole impleaded Fluor. Creole then settled with IRI (for an amount not apparent) and assigned its rights against Fluor to its insurer Harbor.

The third-party complaint alleges that Fluor is liable to indemnify Creole for either the entire amount of Creole's liability or pro rata on the basis of proportionate fault. On a motion for summary judgment, the district court found against Harbor as to each of five broad theories of liability that the court found were suggested by the facts alleged in the third-party complaint. These theories included contribution, breach of warranty, partial indemnity, indemnity, and liability for economic loss due to Fluor's negligence. Only the indemnity claim is before the court on appeal.

DISCUSSION

Harbor's claim for implied indemnity sounds in quasi-contract. Essentially, Harbor asserts that the court should imply a promise by Fluor to indemnify Creole/Harbor because Fluor would otherwise be unjustly enriched. Fluor has raised four arguments, any one of which, if correct, would allow it to prevail. Although all of these arguments were made in the district court, that court reached only the argument that Creole/Harbor has no right to indemnity because it was either a concurrent tortfeasor or a volunteer.

1 2 3 We agree with the district court's holding that persons who volunteer payments are not entitled to indemnification under the general law of indemnity. *See* Restatement of Restitution § 76 (1937); *Fulton Ins. Co. v. White Motor Corp.,* 261 Or. 206, 208-10, 493 P.2d 138, 140-41 (1972). We also agree with the district court's conclusion that Alaska law prevents concurrent tortfeasors from recovering anything in implied indemnity. *Vertecs Corp. v. Reichhold Chemicals, Inc.,* 661 P.2d 619 (Alaska 1983). Notwithstanding our agreement with these rulings of the district court, we choose to affirm the judgment on another ground. [1] We hold that *528 Harbor cannot recover from Fluor in implied indemnity because it was either a concurrent tortfeasor or a mere insurer or guarantor. This argument was presented to the district court, and we prefer to rest our affirmance on this ground because it does not involve the difficult issues of contract interpretation comprehended by the argument accepted by the district court.

The court is aware of no Alaska cases on the question of whether an insurer or guarantor may recover in implied indemnity. We believe, however, that, if given the opportunity, the Alaska Supreme Court would follow the general rule that implied indemnity is not available to one "who guarantees or insures another against a payment for which the guarantor or insurer is not himself liable since the duty of indemnity and the right to subrogation of such persons are wholly dependent upon the contract or agreement with the other." Restatement of Restitution § 76 comment b (1937).

A simple illustration of this rule is provided by *Great American Ins. Co. v. United States,* 575 F.2d 1031 (2d Cir.1978), in which an insurance company sought implied

indemnity from the United States for a payment that the company made to an assured building owner. The owner's property was allegedly damaged by the negligence of U.S. marshals. Although the insurer was subrogated to the landlord's straight negligence claim, this cause of action accrued when the damage occurred and was barred by the statute of limitations; thus, it was necessary for the insurer to rely on an implied indemnity theory, which cause of action would have accrued upon payment to the assured. The court held that no claim for implied indemnity existed and that the insurer's only action was the subrogated claim for negligence, which was of course barred. *Great American* has recently been followed by the Seventh Circuit and by the Supreme Court of Rhode Island. *Rock Island Bank v. Aetna Casualty & Surety Co.*, 692 F.2d 1100 (7th Cir.1982); *Silva v. Home Indemnity Co.*, 416 A.2d 664 (R.I.1980).

4 The *Great American* result squares with the authorities, and it is a just result. The entity against whom indemnity is sought should not be stripped of its defenses to the subrogated claim by the unilateral act of the insurer in paying the injured party. In *Great American,* that defense was the statute of limitations; in this case it is Alyeska's comparative negligence, which Fluor could assert against any subrogated claim acquired by Creole when it settled with IRI, but which Fluor cannot assert in this action by Creole/Harbor for implied indemnity.[2] Moreover, since the insurer's obligation to pay is due solely to its contract, it presumably received consideration for agreeing to bear the risk; allowing indemnity gives the insurer a windfall. Implied indemnity is not intended for such persons. As a general rule, "[t]he right to indemnity inures to a person who, without active fault on his part, is compelled by reason of legal obligation or relationship to pay damages which have been caused by the acts of another." *Pearson Ford Co. v. Ford Motor Co.*, 273 Cal.App.2d 269, 272, 78 Cal.Rptr. 279, 282 (1969).

The question then becomes whether Creole was merely one who guaranteed or insured another against a payment for which it was not itself liable. The claim that Creole settled with IRI was brought under Creole's contractual undertaking to pay Alyeska and the owners of TAPS for certain losses. That undertaking reads as follows:

> CONSULTANT [Creole] shall defend, indemnify and save ALYESKA and OWNERS harmless from all liability, cost and expenses for loss of or damage to property or for injury to or death of persons, including but not limited to, the property and employees of CONSULTANT, ALYESKA, AND OWNERS when arising ***529** or resulting from CONSULTANT'S performance of the SERVICES described herein regardless of any negligence on the part of ALYESKA or OWNERS, or third parties except such loss, damage, injury or death which may result from the sole negligence or willful misconduct of ALYESKA, OWNERS, or their agents or servants, or any independent contractors who are directly responsible to ALYESKA or OWNERS, or solely from the joint or concurrent negligence of some third party or parties and OWNERS and/or ALYESKA.

In agreeing to pay for losses "arising or resulting from" Creole's performance of services regardless of the negligence of Alyeska, or the owners, or third parties, Creole agreed to contractual liability going well beyond any tort liability that could be imposed upon it.[3] Harbor attempts to distinguish *Great American* by arguing that "[u]nlike an insurer or guarantor, Creole's indemnity agreement *was* bottomed on Creole's liability-Creole was liable to pay only if the loss sustained arose or resulted from Creole's performance of services under the contract." Appellant's Reply Brief at 12. This argument has two fatal flaws.

5 First, Creole *could not* be held liable in tort for losses that simply *arose* or *resulted from* its performance of services. The "arising or resulting from" standard is essentially the standard of strict liability. Alaska does not impose strict liability upon mere sellers of services. *Swenson Trucking and Excavating, Inc. v. Truckweld Equipment Co.*, 604 P.2d 1113, 1116-17 (Alaska 1980); *Pepsi-Cola Bottling Co. of Anchorage v. Superior Burner Service,* 427 P.2d 833, 839 & n. 21 (Alaska 1967). In addressing the volunteer/concurrent tortfeasor rationale used by the district court, the parties have argued over whether Fluor, as a *construction company* and not a mere provider of *engineering services,* could be held strictly liable under Alaska law. The answer to this question, whatever that answer might be, does not affect our conclusion that Creole could not be held strictly liable. Creole was a mere provider of engineering services. Creole's contractual duties are listed in the district court's opinion at 568 F.Supp. 1323, 1325 n. 1.

The second flaw in Harbor's argument is this: to the extent that Creole's indemnity agreement with Alyeska *was* bottomed on Creole's liability in tort, Creole would be a tortfeasor and would be unable to get indemnification under *Vertecs Corp. v. Reichhold Chemicals, Inc.*, 661 P.2d 619 (Alaska 1983). It is irrelevant whether the *Vertecs* rule applies where the tort liability in question is strict liability because Creole could not be held strictly liable.

Thus, Creole's contractual obligation to pay applies in only two situations. First, Creole could have a contractual obligation to pay for losses for which it would, in any event, be liable in tort; *Vertecs* would preclude indemnification of Creole in such a case. Second, Creole could have a contractual obligation to pay for losses for which it would not otherwise be liable; *Great American* would preclude indemnification of Creole in this case. Creole was either an insurer or a tortfeasor; neither is entitled to implied indemnity.[4]

*530 CONCLUSION

For the foregoing reasons, we find that the district court properly held that Harbor was not entitled to recover anything in implied indemnity. Accordingly, the judgment is AFFIRMED.

Footnotes

* The Honorable Eugene F. Lynch, United States District Judge for the Northern District of California, sitting by designation.

1 It is well settled that the judgment of the district court may be affirmed on grounds other than those relied on by the district court. *California Bankers Ass'n v. Shultz,* 416 U.S. 21, 71, 94 S.Ct. 1494, 1522, 39 L.Ed.2d 812 (1974); *Riley Co. v. Commissioner,* 311 U.S. 55, 59, 61 S.Ct. 95, 97, 85 L.Ed. 36 (1940); *Keniston v. Roberts,* 717 F.2d 1295, 1300 (9th Cir.1983).

2 We take no position on whether Fluor's hypothetical comparative negligence defense would have any merit. Harbor did not assert in the court below any subrogated claims acquired from IRI.

3 It is true that the contract exempts Creole from liability for losses "which may result from the sole negligence or willful misconduct of ALYESKA, OWNERS, or their agents or servants, or any independent contractors who are directly responsible to ALYESKA or OWNERS, or solely from the joint or concurrent negligence of some third party or parties and OWNERS and/or ALYESKA." However, the central point remains that Creole has agreed to pay for some losses for which it would not otherwise be liable. The exclusion for the sole negligence or willful misconduct of Alyeska or others is not different from an exclusion in an ordinary contract of insurance. In any event, Harbor does not and cannot contend that the exclusion was applicable in this case.

4 It is theoretically possible for Creole to have been contractually liable to pay for losses for which it was otherwise liable under some *non-tort* theory such as a no-fault safety statute. In such a case, Creole might be neither an insurer nor a tortfeasor; however, Harbor has suggested no such basis for liability.

End of Document

EXHIBIT "B"

2009 WL 2390347
Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

SPPI-SOMERSVILLE, INC., et al., Plaintiffs,
v.
TRC COMPANIES, INC., et al., Defendants.
and Related Cross- and Counter-Claims.

Nos. C 04-2648 SI, 07-5824 SI. | Aug. 3, 2009.

West KeySummary

1 **Limitation of Actions**
Agreements as to Period of Limitation
Under California law, that three-year limitations period on landowner's state law claims for nuisance, trespass, and negligence regarding solid waste contamination on real property had run by time that tolling agreement was executed by landowner and prior landowner did not preclude tolling claims under the agreement. The agreement provided that the statute of limitations was tolled beginning with date of discovery of the contamination. Parties did not explicitly state their intent not to revive expired claims.

Attorneys and Law Firms

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Opinion

ORDER GRANTING IN PART AND DENYING IN PART DOCKET NOS. 298 AND 314; DENYING DOCKET NO. 302; GRANTING DOCKET NO. 292; AND DENYING DOCKET NO. 327

SUSAN ILLSTON, District Judge.

*1 On July 31, 2009, the Court heard argument on several motions for summary judgment. For the reasons set forth below, with respect to the motions raising a statute of limitations defense to plaintiffs' state law tort claims as they relate to solid waste contamination, the Court GRANTS in part and DENIES in part the motion filed by defendants TRC Companies Inc. and GBF Holdings LLC (and joined by CCWS), and DENIES the joinder/motion filed by Chevron. With respect to the cross-motions regarding the indemnity provision in the 1957 lease between the City of Antioch and Standard Oil, the Court GRANTS Antioch's motion and DENIES Chevron's motion.

BACKGROUND

This case is about four parcels of real property, totaling approximately 24 acres, located on both sides of Markley Creek in Antioch, California. The parcels are Assessor Parcel Numbers 076-010-030, 031, and 032, located north of Markley Creek and owned by plaintiff SPPI-Somersville, Inc. ("SPPI"), and Assessor Parcel Number 076-010-034, located south of Markley Creek and owned by plaintiff Somersville-Gentry, Inc. ("SGI") [1] Both SPPI and SGI are owned and/or controlled by the same principal, Albert Seeno, Jr.

Plaintiffs filed this case on June 30, 2004. Plaintiffs claim property damage on the Subject Property due to, *inter alia,* solid waste historically placed on and near the property. Plaintiffs purchased the Subject Property on November 21, 2003 from the Tom Gentry California Company ("TGCC"). TGCC, in turn, had purchased the Subject Property in 1996 from Standard Oil Company of California, predecessor in interest to defendant Chevron. Standard Oil leased Parcel 34 to defendant Antioch in December 1957 for the disposal of waste by the sanitary landfill method; Antioch operated a landfill on the parcel for one year under the lease. Plaintiffs

allege that Standard Oil failed to disclose to TGCC the presence of the landfill on Parcel 34.

Plaintiffs' master complaint alleges that "[a]t some point in July 2001, the Tom Gentry California Corporation discovered that municipal solid waste had spilled from one or more of the adjacent landfills [2] or otherwise been deposited onto the Property, contaminating at least the surface of the parcel APN 076-010-034." Master Compl. ¶ 65. Plaintiffs also allege that municipal solid waste deposited into and around Markley Creek in the vicinity of the Subject Property has contaminated the property. *Id.* The complaint alleges a number of claims based on solid waste contamination on the Subject Property, including private continuing nuisance (Claim No. 5), continuing trespass (Claim No. 6), negligence (Claim No. 7), negligence per se (Claim No. 8), ultrahazardous activity (Claim No. 9), inverse condemnation (Claim No. 10), and state law declaratory relief (Claim No. 12).

LEGAL STANDARD

Summary adjudication is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

***2** In a motion for summary judgment, "[if] the moving party for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issues of material fact, the burden of production then shifts so that the non-moving party must set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial." *See T.W. Elec. Service, Inc., v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In judging evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence, and draws all inferences in the light most favorable to the non-moving party. *See T.W. Electric,* 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)); *Ting v. United States,* 927 F.2d 1504, 1509 (9th Cir.1991). The evidence presented by the parties must be admissible. Fed.R.Civ.P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill Publ'g Co., Inc. v. GTE Corp.,* 594 F.2d 730, 738 (9th Cir.1979).

DISCUSSION

I. Statute of limitations on plaintiffs' state law tort claims for solid waste contamination

A. TRC Companies, GBF Holdings LLC, and joinder by CCWS

Defendants TRC Companies, Inc. and GBF Holdings, LLC have moved for summary judgment on plaintiffs' state law tort claims for solid waste contamination. Defendants' motion does not address these claims to the extent they seek relief for contaminated groundwater and vapor in the soil. Defendants contend that these claims are barred by the three year statute of limitations because the claims accrued no later than June 18, 2001 when the then-owner of the property, Tom Gentry, had actual notice of probable solid waste contamination on Parcel 34.

The parties agree that the statute of limitations is three years for the claims at issue, and they also agree that once the statute of limitations begins to run against one property owner, it runs against all future property owners. *See CAMSI IV v. Hunter Technology Corp.,* 230 Cal.App.3d 1525, 1534-35, 282 Cal.Rptr. 80 (1991). The dispute centers on the interpretation of several pieces of evidence from June 2001 regarding a joint venture between TGCC and Sermar, LLC in an attempt to develop the Subject Property. [3] The first piece of evidence is a fax dated June 4, 2001 from Sermar to TGCC regarding environmental diligence that had been conducted on the Property by TGCC and Sermar's jointly-retained consultant. The first paragraph of the fax states: "Enclosed is a copy of the report we received from Environmental Service concerning the adjacent landfill and its affects [sic] on the property we seek to acquire." Broderick Decl. Ex. 16 (GEN000094). [4] The attached consultant's report includes the following section:

> ***3 Is There Any Evidence of Pollution Contributed by the Waste Disposed on the Property?**
>
> There is no suggestion in the Listed Documents that the waste limits extend north of Markley Creek. Logs of soil boring logs for wells drilled on the Property noted general soil types and none of the soil types of conditions described in the logs could be considered as evidence of solid waste disposal on the Property. In contrast, for example, the log of soil boring for well MW-22, [5]

located south of Markley Creek near the north edge of the landfill, noted fill and debris in the upper 5 feet.

Though the logs show no evidence of solid or liquid waste disposal or staining from liquid wastes, the logs themselves are not a sufficient basis to rule out the possibility of past disposal on the Property. Hypothetically, disposal of liquids, sludge, or solids could have occurred along Somersville Road or an unnamed dirt road that appears on the 1990 aerial base map used in the Amended Supplemental Remedial Investigation Report (see Figure S2-1).

My review of the Listed Documents found abundant chemical test laboratory results for ground water samples collected from wells installed on the Property, and also found creek sediment test results and soil gas test results. My review of the Listed Documents did not find chemical test laboratory results for soil samples collected on the Property.

Review of aerial photographs, in conjunction with the logs of soil borings, could provide a sufficient basis for assessing whether there is likelihood of past use of the Property for disposal. To make this finding, aerial photographs should be viewed at 5 year intervals for the period 1940 to 1974. Apparently, based upon the available documents, the landfills were operated from 1946 to 1974, and later. After 1974, operation of the liquid hazardous waste ponds was terminated, but use of the landfills under the name "Contra Costa Sanitary Landfill" by Contra Costa Waste Service, Inc., for disposal of municipal non-hazardous waste, was continued until 1992. See Attachment A, Review of Aerial Photographs.

Id. at GEN000096.

The next piece of evidence is an email dated June 18, 2001 from Joe Fadrowsky, the current president of TGCC,[6] to Mark Vorsatz, regarding the TGCC-Sermar joint venture and the Subject Property. That email states,

CONFIDENTIAL ATTORNEY CLIENT PRIVILEGED COMMUNICATION[7]

Mark-You appear to understand the proposal correctly. One issue we expect Sermar to raise at some point is the valuation of the rear 4-acres that is somewhat land-locked by Markley's Creek. Sermar's environmental research appears to allude to the fact that some landfill may have occurred on this portion of the land. In addition, TRC called Dawn [Suyenaga][8] last week to inform us that when they made the first grading pass to level the staging area on this 4-acre parcel, they uncovered some land fill type material which they immediately covered up.[9] They will send us a map showing the area. In turn, we will be obligated to disclose this to Sermar. Even if Sermar suggests a lower value for this 4-acre site or even if it is excluded, this does not change our view of the desirability of moving forward with Sermar on the other 20 acres. Aloha, Joe. F.

*4 Broderick Decl. Ex. 24.

Defendants contend that the June 4, 2001 fax and the June 18, 2001 email demonstrate that TGCC had actual notice of solid waste contamination on Parcel 34, and thus that plaintiffs' state law tort claims based on solid waste contamination are untimely because they were filed over three years later on June 30, 2004. The parties dispute whether the Court should apply federal or state law for determining the proper time for commencement of the statute of limitations. "Under California law, a plaintiff discovers a claim when the plaintiff 'suspects or should suspect that her injury was caused by wrongdoing.' By its terms, [CERCLA] sets a later date for commencement of the limitations period, tolling the start of the period for filing claims beyond the date that a plaintiff suspects the cause of injury until the time that he or she knows or reasonably should have known of that cause." *O'Connor v. Boeing North American, Inc.*, 311 F.3d 1139, 1147-48 (9th Cir.2002). *O'Connor* holds that CERCLA's delayed discovery rule preempts California's discovery rule, and thus the Court agrees with plaintiffs that the federal standard applies here. *Id.* at 1147.

The Court finds that even under the more generous federal standard, the evidence shows that TGCC knew about the injury giving rise to the claims at issue because TGCC was notified twice in June 2001 by two third parties about solid waste on Parcel 34. Plaintiffs assert that TGCC only had a "skeletal" understanding of the contamination in June 2001, and that the statute of limitations did not begin to run until December 2001 when a large section of the bank along Markley Creek collapsed and revealed the presence of extensive waste and garbage.[10] Plaintiffs contend that the June 2001 documents did not put TGCC on notice of the full scope of the contamination, nor did TGCC know of the "cause" of the solid waste contamination.

Plaintiffs' argument is not supported by the facts or the law. Under CERCLA's delayed discovery rule, the Court must engage in a two-part analysis to determine whether plaintiffs reasonably should have known of their claim.

> The goal of this analysis is to evaluate when a reasonable person would have connected his or her symptoms to their alleged cause. First, we consider whether a reasonable person in Plaintiffs' situation would have been expected to inquire about the cause of his or her injury. Second, if the plaintiff was on inquiry notice, we must next determine whether [an inquiry] would have disclosed the nature and cause of plaintiff's injury so as to put him on notice of his claim. The plaintiff will be charged with knowledge of facts that he would have discovered through inquiry.

O'Connor, 311 F.3d at 1150 (internal citations and quotations omitted). Here, a reasonable person in TGCC's position would have been expected to make a further investigation about the solid waste contamination after being notified twice in June 2001, by two different parties, that solid waste was present on Parcel 34. The Environmental Science report states that "the log of soil boring for well MW-22, located south of Markley Creek near the north edge of the landfill, noted fill and debris in the upper 5 feet." Broderick Decl. Ex. 16 at GEN000096. That same report described the steps that could be taken to investigate the issue further: "Review of aerial photographs, in conjunction with the logs of soil borings, could provide a sufficient basis for assessing whether there is a likelihood of past use of the Property for disposal." *Id.* A reasonable person in TGCC's position would have been expected to investigate the solid waste discovered on Parcel 34, and inquire whether the "cause" was one of the two adjacent landfills. Indeed, Mr. Fadrowsky's June 18, 2001 email shows that TGCC was aware that the solid waste on Parcel 34 was "land fill type material" and that "some landfill may have occurred on this portion of the land." Broderick Dec. Ex. 24.[11] *Cf. O'Connor,* 311 F.3d at 1151 (summary judgment improper where plaintiffs had cancer and "evidence was susceptible to more than one inference regarding whether Plaintiffs were aware of more than one potential cause of their illnesses. Factual disputes remain regarding whether Plaintiffs should have inquired about whether the contamination from the Rocketdyne facilities, rather than any other source, was connected to their illnesses."); *Dubose v. Kansas City Southern Ry.,* 729 F.2d 1026, 1031 (5th Cir.1984) ("When a plaintiff may be charged with awareness that his injury is connected to some cause should depend on factors including how many possible causes exist[.]"). The Court finds that plaintiffs' state law tort claims based on solid waste contamination on Parcel 34 are time-barred, and thus GRANTS defendants' motion in this regard.[12]

*5 However, the Court finds that because the record is more equivocal with regard to notice to TGCC of solid waste on the 20 acres north of Markley Creek, summary judgment is not appropriate on plaintiffs' claims regarding the rest of the Subject Property. Defendants argue that once contamination was discovered on Parcel 34, a reasonable property owner would investigate the remainder of the property. Plaintiffs emphasize the language in the Environmental Science report stating that there was no evidence of solid waste disposal on the 20 acres north of Markley Creek. Broderick Decl. Ex. 16 ("Logs of soil boring logs for wells drilled on the property noted general soil types and none of the soil types or conditions described in the logs could be considered as evidence of solid waste disposal on the Property."). Defendants rely on *CAMSI IV v. Hunter Technology Corporation,* 230 Cal.App.3d 1525, 282 Cal.Rptr. 80 (1991), in which the court rejected the claim that discovery of contamination on a "new and different area of the Subject Property" affected the statute of limitations. "Given notice of the presence of [contamination] anywhere on the property, the owner could properly be expected, in the exercise of reasonable diligence, to conduct an adequate investigation of all parts of its property and particularly of former manufacturing sites." *Id.* at 1537-38, 282 Cal.Rptr. 80. However, *CAMSI IV* is distinguishable because here the environmental report providing the notice of injury expressly stated that no solid waste was found on the 20 acres north of Markley Creek .[13] Because there is a triable issue of fact on this question, the Court DENIES defendants' motion with respect to the other parcels in the Subject Property.

B. Chevron

Defendant and third party claimant Chevron U.S.A. Inc. ("Chevron") joined in defendants' motion, and contends that for the same reasons discussed above, plaintiffs' state law claims for solid waste contamination are untimely. Plaintiffs contend that even if their claims are untimely as against the other defendants, plaintiffs' claims against Chevron are not barred, because there is a tolling agreement which expressly precludes Chevron from raising a statute of limitations defense. The tolling agreement was entered into between TGCC and Chevron, and was signed by Mr. Fadrowsky on behalf of Gentry on November 20, 2003, and by Chevron's representative on June 29, 2004. Fadrowsky

Decl. Ex. 3. Under the tolling agreement, TGCC and Chevron agreed to "toll any applicable statute of limitations period or laches defense from the date of discovery of the Debris/Contamination until November 15, 2007, (hereinafter "Tolling Period")," and agreed "not to assert the defense of laches, statute of limitations or any other defense based upon the failure to file timely an action during the Tolling Period of this Agreement with regard to the alleged Debris/ Contamination at the Property." Fadrowsky Decl. Ex. 3 ¶¶ 2, 3.

Chevron contends that the tolling agreement does not toll the statute on plaintiffs' claims because as of June 29, 2004, when the agreement was executed, (1) TGCC no longer possessed those claims, having previously assigned them to SPPI when SPPI purchased the Subject Property from TGCC, and (2) plaintiffs' state law claims had already expired. The Court is not persuaded by Chevron's arguments. The Tolling Agreement expressly permits Gentry to assign the tolling agreement: "This Agreement may be assigned by Gentry to an entity that purchases the Property, in which event Gentry shall provide Chevron with the notice of the person or entity to which Notice must be sent pursuant to Paragraph 6, above," *Id.* ¶ 7, 282 Cal.Rptr. 80, and the assignment was made after Gentry signed the tolling agreement. Further, the Court is persuaded that because claims run with the land, defenses to those same claims-such as a statute of limitations defense-also run with the land. *Cf. CAMSI IV,* 230 Cal.App.3d at 1535, 282 Cal.Rptr. 80.

***6** The Court is also not persuaded by Chevron's argument that the tolling agreement is irrelevant because the statute of limitations had already expired by the time the tolling agreement was executed. This argument ignores the language of the tolling agreement, which provides in relevant part,

> The parties agree to toll any applicable statute of limitations period or laches defense *from the date of discovery of the Debris/Contamination* until November 15, 2007, (hereinafter the "Tolling Period"), which date the parties agree is within the four years of the date of expiration of the time limited for the commencement of any action tolled hereby.

Id. ¶ 2, 282 Cal.Rptr. 80 (emphasis added). Here, the "date of discovery of the Debris/Contamination" was June 18, 2001 at the latest (and arguably earlier), and thus under the terms of the tolling agreement, the statute of limitations was tolled beginning on that date until November 15, 2007. Thus, under the tolling agreement, plaintiffs' claims filed on June 30, 2004 were not time-barred.

Chevron cites several cases for the general proposition that "[t]olling can only suspend the running of a statute that still has time to run; it cannot revive a statute which has already run out." *Forman v. Chicago Title Ins. Co.,* 32 Cal.App.4th 998, 1005, 38 Cal.Rptr.2d 790 (1995). However, none of these cases address a situation where the parties entered a tolling agreement that, by its terms, tolls the statute of limitations beginning on the date that the statute would normally start to run, here the "date of discovery of the Debris/Contamination." Chevron also cites cases where courts held that tolling agreements made after the statute of limitations had run did not toll the statutes. However, those cases are distinguishable because they involve tolling agreements that tolled claims on dates certain which post-dated the expiration of the statute of limitations. For example, in *Bachman v. Bear Stearns & Company,* 57 F.Supp.2d 556, 561 (N.D.Ill.1999), the claims expired on January 28, 1994, and the tolling agreement was made on November 29 1995, and tolled all claims beginning November 29, 1995. Similarly, in *Porwick v. Fortis Benefits Insurance Company,* the court found a 1997 tolling agreement did not toll claims that had expired in 1993:

> The parties entered into a written tolling agreement which, according to plaintiff, tolled all statutes of limitations from August 26, 1997 through July 2, 1997. (Pl.'s Mem. Opp'n Mot. to Dismiss at 18 n. 18). This agreement was executed four years after the applicable statutes of limitations had expired, and hence the agreement is of no consequence. In fact, the tolling agreement itself specifically provides that "[c]laims, if any, that would be barred under applicable statutes of limitations as of August 25, 1997 are not intended to be revived by this Tolling Agreement." (Am. Compl. Ex. D ¶ 2).

No. 99 CV 10122, 2004 WL 2793186, at *7 n. 4 (S.D.N.Y. Dec.6, 2004). [14]

***7** Here, instead of tolling all claims from the date the tolling agreement was executed (June 29, 2004), the tolling agreement tolls all claims "from the date of discovery of the Debris/Contamination," through November 15, 2007. Chevron does not address this language in the tolling agreement, and instead asserts that "there is nothing in the tolling agreement indicating the parties intended to revive any claims whose limitations period had lapsed." Chevron's reply at 4 n. 3. Chevron argues that the tolling agreement's

language that "Chevron and Gentry wish at this time to avoid litigation and preserve their respective rights and claims concerning Gentry's claim for damages .... " indicates that the parties did not intend to revive expired claims. The Court finds no such intent in the language of the tolling agreement; unlike the agreement in *Porwick,* here the parties did not explicitly state their intent not to revive expired claims. To the contrary, the parties' agreement to toll all claims "from the date of discovery"-as opposed to a specific date-indicates that the parties intended to do simply that: "toll all applicable statutes of limitations period or laches defense from the date of discovery of the Debris/Contamination until November 15, 2007."

Accordingly, the Court DENIES Chevron's motion for summary judgment.

II. Indemnification under 1957 City of Antioch/Standard Oil Lease

In December 1957, the City of Antioch and Standard Oil entered into a year-long lease which authorized Antioch to use Parcel 34 for the disposal of garbage and refuse. *See* Decl. of Matthew G. Dudley ("Dudley Decl."), Docket No. 293, Ex. A. The lease states,

> Said land shall be used exclusively for the disposal of garbage and refuse, it being understood, however, that there shall be no burning on said land, but that disposal shall be conducted by the sanitary land filling method which consists of compaction and daily sealing of the cell by depositing approximately six inches of earth on the top and the open end of said cell; provided, however, that such filling, including the earth covering, shall not exceed two feet above ground level existing as of the date hereof.

Id. ¶ 2. In addition to placing certain conditions on Antioch's disposal of garbage and refuse, the lease contained the following indemnity provision:

> Lessee agrees to hold Lessor and its present and future subsidiaries harmless from and to indemnify them against any and all damage to or loss of any buildings, structures or other property, or injury to or death of person, that directly or indirectly may be caused by or arise or result from Lessee's occupancy or use of said premises, or the enjoyment of any of the rights herein, or the breach by Lessee of any of Lessee's obligations hereunder, irrespective of any negligence of Lessor. Lessee also agrees to hold Lessor and its present and future subsidiaries harmless from and to indemnify them against any claim for damage to or loss of any buildings, structures, improvements or other property of Lessee in, on, and about said premises, or injury to or death of any person on said premises on behalf of or at the invitation of Lessee, whether such claim arises out of the negligence of Lessor or its present or future subsidiaries, or otherwise.

8 *Id.* ¶ 10. Chevron filed a third-party complaint against Antioch after Antioch refused to indemnify Chevron for plaintiffs' claims. Both Chevron and Antioch have moved for summary judgment on the indemnity issue.

The parties agree that California law applies to the interpretation of the lease. "The interpretation of a written instrument ... is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect." *Parsons v. Bristol Development Co.,* 62 Cal.2d 861, 865, 44 Cal.Rptr. 767, 402 P.2d 839 (1965). The California Civil Code sets forth numerous guidelines under which a contract must be interpreted. "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Cal. Civ.Code § 1636. When interpreting a contract, California courts begin their analysis with the language itself. "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." *Id.* at § 1638. "[T]he intention of the parties is to be ascertained from the writing alone, if possible ...." *Id.* at § 1639. "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." *Id.* at § 1641.

Antioch contends that "or other property" in the phrase "buildings, structures or other property" does not include the land itself, and instead should be interpreted to mean property similar to "buildings" and "structures." Antioch argues that throughout the lease and in the indemnity provision in particular, the lease distinguishes between "buildings, structures or other property," on the one hand, and "said land," "said premises," and "demised premises" on the other. For example, the lease states that "[s]aid land shall be used for the disposal of garbage and refuse," "Lessee, at Lessee's own cost and expense, shall at all times keep the demised premises and any buildings or structures placed thereon in good order and repair," "Lessee covenants and agrees to fully pay for all materials joined or affixed to the demised premises, for all labor performed thereon, and all charges against any buildings, structures or other property or improvements upon said land ...." Antioch argues that because the lease

uses the language "buildings, structures or other property or improvements *upon said land,"* and uses the terms "said land" and "said premises" interchangeably, "other property" in this context does not include the land. Antioch also argues that because the lease declares that the land would be used for the disposal of waste, the presence of the landfilled waste was anticipated and intended by both parties to the agreement and therefore could not have been intended by the parties to constitute "damage to or loss of any buildings, structures or other property."

***9** In addition, the lease contains a maintenance obligation, which states:

> Lessee, at Lessee's own cost and expense, shall at all times keep the *demised premises and any buildings or structures placed thereon* in good order and repair, in a neat, safe, sanitary condition, free from waste and damage.

Dudley Decl., Ex. A at ¶ 8 (emphasis added). In light of the fact that "demised premises" is followed by the conjunctive "and," which precedes "any buildings and structures placed thereon," the clause distinguishes between land on the one hand and buildings and structures on the other. *See Pico Citizens Bank v. Tafco, Inc.,* 165 Cal.App.2d 739, 332 P.2d 739 (1958) (every provision of a contract must be construed so to give force and effect not only to every clause but to every word in it, so that no clause or word may become redundant). Similarly, the subsequent paragraph of the lease draws a distinction between "said land" and "any buildings, structures, or other property":

> Lessee covenants and agrees to fully pay for all materials joined or affixed to the demised premises, for all labor performed thereon, and all charges against *any buildings, structures or other property or improvements upon said land,* at Lessee's instance or request, and not to permit or suffer any lien of any kind or nature to be imposed or enforced against said premises for any work done or material furnished thereon.

Id. at ¶ 9, 332 P.2d 739 (emphasis added). Here, the lease distinguishes between "demised premises" and "said land," and things or other property "joined or affixed" or "upon" the demised premises or said land. Considering the recurring and relatively uniform use of the terms within the phrase "buildings, structures or other property" throughout the lease to refer to things other than the subject land, the parties intended to apply a similar distinction when using these terms in the indemnity provision. *See People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.,* 107 Cal.App.4th 516, 526, 132 Cal.Rptr.2d 151 (2004) (in the absence of something suggesting otherwise, identical terms in a contract should be given the same meaning throughout). Because the lease can be interpreted from within the four corners of the lease, there is no need to consult extrinsic sources such as dictionaries. *See AIU Ins. Co.,* 51 Cal.3d 807, 274 Cal.Rptr. 820, 799 P.2d 1253 (the mutual intent of the parties "is to be inferred, if possible, solely from the written provisions of the contract"); Cal. Civ.Code § 1639.

Chevron contends that the phrase "or other property" in the indemnification clause should be interpreted broadly to cover damage to *all* forms of property, including the land itself. Chevron argues that the lease does not specifically define "property" or "other property" or give either term any special or limited meaning within the lease, and Chevron cites several dictionary definitions of "property" which include both personal property and real property. Chevron also relies on *Jones-Hamilton Co. v. Beazer Materials & Services, Inc.,* 973 F.2d 688 (9th Cir.1992), in which the Ninth Circuit broadly interpreted following indemnity provision:

> ***10** [Jones-Hamilton ("J-H")] agrees to comply with all applicable Federal, State and Local laws, ordinances, codes, rules and regulations and to indemnify WTCC against all losses, damages and costs resulting from any failure of J-H or any of its employees, agents or contractors to do so.

Id. at 691. In *Jones-Hamiltion,* J-H had argued that the phrase "all applicable Federal, State and Local laws, ordinances, codes, rules and regulations" should be limited to "workman's compensation laws, overtime laws, labor laws, and industrial health and safety laws." *Id.* The Ninth Circuit rejected this argument, stating that "had the parties chosen to limit the scope of the indemnification clause in the manner J-H suggests, they would surely have made this clear in the Agreement." *Id.* (citing *Blumenfeld v. R.H. Macy & Co.,* 92 Cal.App.3d 38, 45, 154 Cal.Rptr. 652 (1979) (refusing to admit extrinsic evidence suggesting on particular cause of action was not assigned, where agreement explicitly assigned "all claims against third parties")).

Jones-Hamilton is distinguishable, however, because there was nothing in the language of the *Jones-Hamilton* indemnity clause suggesting that the parties intended to limit or narrow the "applicable Federal, State, and local laws, ordinances, codes, rules and regulations," and to the contrary, the parties' use of "all" showed that the parties intended a broad construction. Here, the indemnity clause (and the entire lease) draws a distinction between "buildings, structures, or other

property" and "said premises," indicating that the parties considered "or other property" to be different from "said premises."

Chevron also argues that the indemnity provision is similar to the clause at issue in *Ryan Mercantile Co. v. Great Northern Railway Company,* 294 F.2d 629 (9th Cir.1961). In that case, the indemnity provision stated:

> Ryan shall indemnify and save Great Northern harmless from any and all personal injuries, damages, claims, suits, costs and recoveries of every name and nature which may in any manner arise or grow out of the business conducted by Ryan on the leased premises, or the use or occupancy thereof by Ryan, or by other persons at Ryan's instance or with Ryan's consent or knowledge during the term of this lease, whether due to the negligence of Great Northern, its contractors, officers, agents, and employees....

Id. at 631. The court found the indemnity provision applied to his use of the railroad right of way on which a car accident occurred because it grew " 'out of business conducted by Ryan on the leased premises' and 'out of the use and occupancy thereof by Ryan.' " *Id.* at 633. The Court finds Chevron's reliance on *Ryan Mercantile* unpersuasive. As with *Jones-Hamilton,* the language in the *Ryan Mercantile* indemnity provision is significantly broader (*"any and all* personal injuries, damages, claims, suits, costs and recoveries of *every name and nature* which may in *any manner* arise or grow out of the business conducted by Ryan on the leased premises, *or* the use *or* occupancy thereof by Ryan ...") than the language found in the present lease, which applies to damage *arising from* occupancy or use of the land, not damage to the land itself.

***11** The parties devote much of the briefing to discussing the differences between "personal property" and "real property," despite the fact that the lease does not use these terms. Even if the Court interprets "property" to include real property for the purpose of the lease, the indemnity provision still draws a meaningful distinction between "buildings, structures or other property" on the one hand and "said premises" on the other. Therefore, adopting Chevron's interpretation of "property" to include both real and personal property does not address the further distinction between "buildings, structures or other property" and "said premises" or "said land" that appears throughout the lease. *See IBEW-NECA Pension Trust Fund v. Flores,* 519 F.3d 1045, 1047 (9th Cir.2008) ("We interpret written terms in the context of the entire agreement's language, structure, and stated purpose.").

After review of the lease as a whole and the specific language of the indemnity provision, the Court concludes that "or other property" in the indemnity clause does not cover damage to the land. The Court is persuaded that because the lease repeatedly uses the terms "buildings" and "structures" in particular instances and "premises" and "land" in others, and because the lease's explicitly stated purpose was that the land be used for landfilled waste, the parties did not intend for Antioch to indemnify Standard Oil against damages to the subject land as alleged in the complaint.

CONCLUSION

For the reasons stated above, the Court GRANTS IN PART and DENIES IN PART the motion for summary judgment filed by defendants TRC Companies and GBF Holdings LLC, as well as the joinder filed by CCWS. (Docket Nos. 298 and 314). The Court DENIES Chevron's motion for summary judgment. (Docket No. 302). The Court GRANTS Antioch's motion for partial summary judgment (Docket No. 292) and DENIES Chevron's motion for partial summary judgment. (Docket No. 327).

IT IS SO ORDERED.

Footnotes

1 The parties refer to the properties individually by their parcel numbers (e.g, "Parcel 34"), and collectively as the "Subject Property."

2 The adjacent landfills are the Old Antioch Landfill operated by the City of Antioch, and the Contra Costa Sanitary Landfill (the "CCSL"). The CCSL is comprised of the former GBF Landfill, the former Pittsburg Landfill operated by the City of Pittsburg, and a solid waste landfill operated as the Contra Costa Sanitary Landfill. Master Compl. ¶ 1.

3 Defendants also contend that Tom Gentry had constructive knowledge of solid waste contamination prior to 2001 because (1) the history of the neighboring landfills was well-known; (2) an Environmental Impact Report from 1980 noted "large deposits of refuse" on the property; (3) the City of Antioch required a soils study identifying any possible site "contamination from the adjacent Garaventa dump site" as a condition of development; and (4) the Gentry Companies gave permission for CCSL's consultants to conduct environmental testing on the property in 1988, and the fact sheet accompanying the testing stated that its purpose was to "detect presence of organic compounds in soil and ground water." Plaintiffs contend that none of this evidence put Gentry on constructive notice, and they argue that at the most there are triable issues of fact as to whether Gentry reasonably should have

known about the solid waste contamination prior to 2001. The Court agrees with plaintiffs that the pre-2001 evidence is susceptible to different interpretations, and thus DENIES defendants' motion on this ground.

4 Plaintiffs object to Exhibits 16 and 24 to the Broderick Declaration on hearsay grounds. The Court OVERRULES these objections and finds that both documents are not offered for the truth of the matter asserted, but to show notice. *See Los Angeles News Service v. CBS Broadcasting, Inc.*, 305 F.3d 924, 935, *as amended by* 313 F.3d 1093 (9th Cir.2002). In addition, these documents, as well as Exhibit 21 (cited *infra*), are business records. The Court also OVERRULES plaintiffs' authenticity objections to the deposition testimony submitted by defendants. This order does not rely on any of the other exhibits to which plaintiffs object, and thus the Court need not rule on plaintiffs' other objections.

5 MW-22 is a groundwater monitoring well that was previously drilled on Parcel 34. Broderick Decl. ¶¶ 17, 18, Ex. 17, 18.

6 Mr. Fadrowsky states that he has held the position of President of TGCC for approximately five years, and that from 1996 to the present he has been "responsible for acquisitions of new projects, major dispositions, major sales and/or leases, purchase and sale, development, entitlement transactions, and strategic planning." Fadrowsky Decl. ¶¶ 2, 3. It is unclear what Mr. Fadrowsky's title was at the time of the June 18, 2001 email, but that is irrelevant to these motions.

7 Although at one point in this litigation TGCC asserted that the June 18, 2001 email was privileged, that claim was apparently abandoned during Mr. Fadrowsky's deposition when counsel for Chevron introduced the June 18, 2001 email without objection and questioned Mr. Fadrowsky about it.

8 Dawn Suyenaga is the Vice President, Chief Operating Officer and General Counsel of TGCC.

9 On June 4, 2001, TRC received permission from TGCC to grade or level the surface of Parcel 34; this work was in connection with work required under the settlement in *GBF/Pittsburg Landfill(s) Respondents' Group et al., v. Contra Costa Waste Service, et al.*, C 96-3147 SI. Broderick Decl. Ex. 21 (email from Dawn Suyenaga to Deems Padgett confirming that GBF Holdings could do leveling work on the parcel).

10 As defendants correctly note, plaintiffs' assertion of the December 2001 triggering event is at odds with their allegation in the master complaint that "[a]t some point in July 2001, the Tom Gentry California Corporation discovered that municipal waste had spilled from one or more of the adjacent landfills or otherwise been deposited onto the Property, contaminating at least the surface of the parcel APN 076-010-034." Master Compl. ¶ 65.

11 Mr. Fadrowsky's declaration in opposition to defendants' motion for summary judgment states, "Prior to 2001, to the best of my knowledge and belief, I had no knowledge of landfilled waste or debris in Markley Creek or on Parcel 034." Fadrowsky Decl. ¶ 8. Mr. Fadrowsky's declaration does not discuss the Environmental Science report or attempt to explain the contrary statements in his June 18, 2001 email. Plaintiffs cannot create a genuine issue of fact by submitting this declaration testimony that is squarely at odds with Mr. Fadrowsky's own pre-litigation statements showing that TGCC in fact had notice in June 2001 that solid waste was present on Parcel 34.

12 Plaintiffs assert that even if their claims are untimely, to the extent that the twelfth claim for declaratory relief arises from their claims for continuing private nuisance and continuing trespass (neither of which are untimely), the twelfth claim should survive. Defendants do not respond to this contention. The Court agrees with plaintiffs that the twelfth claim for relief, insofar as it is derivative of the continuing private nuisance and continuing trespass claims, survives summary judgment.

13 Of course, as defendants note, the same report stated that "the logs themselves are not a sufficient basis to rule out the possibility of past disposal on the Property."

14 Chevron also cites *Pacific Harbor Capital, Inc. v. Barnett Bank, N.A.*, 252 F.3d 1246, 1251 (11th Cir.2001), in which the Eleventh Circuit affirmed a summary judgment based on the statute of limitations and held that the parties' tolling agreement was "irrelevant because the statute would have run by the time it was made." There is no information in *Pacific Harbor* about the beginning date of the tolling agreement, and thus that case does not assist Chevron.

End of Document

EXHIBIT "C"

2011 WL 3359928
Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

GREGORY VILLAGE PARTNERS, L.P., Plaintiff,
v.
CHEVRON U.S.A., INC., et al., Defendants.

No. C 11–1597 PJH. | Aug. 2, 2011.

Synopsis

Background: Real property owner brought action against company that owned neighboring property and local sanitary district, alleging claims under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Resources Conservation and Recovery Act (RCRA), California's Hazardous Substance Account Act (HSAA), and other California–law claims related to PCE (tetrachlorethene) and TCE (trichloroethylene) contamination from former dry cleaning facility on neighboring property, presence of petroleum hydrocarbons stemming from gas service station, and faulty installation of sewer line. Defendants moved to dismiss certain claims, for more definite statement, and to strike certain pleadings.

Holdings: The District Court, Phyllis J. Hamilton, J., held that:
1 complaint did not adequately allege CERCLA and HSAA claims;
2 court had subject matter jurisdiction over RCRA claims; and
3 owner did not clearly allege existence of any legal duty, precluding negligence claim.

Motions granted in part and denied in part.

West Headnotes (26)

1 **Federal Courts**
Limited Jurisdiction; Dependent on Constitution or Statutes
Federal Courts
Power and Duty of Court
District courts, as courts of limited jurisdiction, are under a continuing duty to dismiss an action whenever it appears that the courts lack jurisdiction. U.S.C.A. Const. Art. 3, § 1 et seq.

2 **Federal Courts**
Presumptions and Burden of Proof
Burden of establishing that a cause lies within the district court's limited jurisdiction rests upon the party asserting jurisdiction. U.S.C.A. Const. Art. 3, § 1 et seq.

3 **Federal Courts**
Presumptions and Burden of Proof
In evaluating a facial attack on the district court's jurisdiction, the court must accept the factual allegations in plaintiff's complaint as true. U.S.C.A. Const. Art. 3, § 1 et seq.; Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

4 **Federal Courts**
Affidavits and Evidence in General
Federal Courts
Presumptions and Burden of Proof
On a "speaking motion" to dismiss for lack of subject matter jurisdiction, the defendant actually challenges the existence of subject matter jurisdiction; in such a case, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims, and the plaintiff, who bears the burden of proof that jurisdiction does in fact exist, must establish jurisdiction with evidence from other sources. Fed.Rules Civ.Proc.Rule 12(b)(1), 28 U.S.C.A.

5 **Federal Civil Procedure**
Pleading, Defects In, in General
Federal Civil Procedure
Matters Considered in General
Motion to dismiss for failure to state a claim tests for the legal sufficiency of the claims alleged in the complaint, and review is limited to the contents of the complaint. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

6 **Federal Civil Procedure**

Claim for Relief in General

Specific facts are unnecessary under the minimal notice pleading requirements, and the statement need only give the defendant fair notice of the claim and the grounds upon which it rests. Fed.Rules Civ.Proc.Rule 8(a)(2), 28 U.S.C.A.

7 **Federal Civil Procedure**

Matters Considered in General

When resolving a motion to dismiss for failure to state a claim, the court may not generally consider materials outside the pleadings, although the court may consider a matter that is properly the subject of judicial notice, exhibits attached to the complaint, and documents referenced by the complaint and accepted by all parties as authentic. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

8 **Federal Civil Procedure**

Nature and Purpose in General

Federal Civil Procedure

Grounds in General

Motion for a more definite statement attacks intelligibility, not simply lack of detail, and thus such a motion fails where the complaint is specific enough to apprise the defendant of the substance of the claim being asserted. Fed.Rules Civ.Proc.Rule 12(e), 28 U.S.C.A.

9 **Federal Civil Procedure**

Motion Not Favored

Federal Civil Procedure

Immaterial, Irrelevant or Unresponsive Matter

Motions to strike pleadings are not favored and should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation. Fed.Rules Civ.Proc.Rule 12(f), 28 U.S.C.A.

10 **Federal Civil Procedure**

Immaterial, Irrelevant or Unresponsive Matter

Federal Civil Procedure

Determination of Motion

When a court considers a motion to strike, it must view the pleading in a light most favorable to the pleading party; the court must deny the motion to strike if there is any doubt whether the allegations in the pleadings might be relevant in the action. Fed.Rules Civ.Proc.Rule 12(f), 28 U.S.C.A.

11 **Federal Civil Procedure**

Insufficient Allegations in General

Motion to strike pleadings is proper when a defense is insufficient as a matter of law. Fed.Rules Civ.Proc.Rule 12(f), 28 U.S.C.A.

12 **Environmental Law**

Persons Responsible

Real property owner did not adequately allege that company that owned neighboring property was owner/operator of dry cleaning facility or gas service station on that property during relevant time period, precluding owner's claims under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and California's Hazardous Substance Account Act (HSAA); owner did not clearly allege that any release of PCE (tetrachlorethene) or TCE (trichloroethylene) occurred on northern parcel during time company owned that parcel or that any PCE or TCE released on that parcel actually affected owner's property or surrounding area, complaint alleged that PCE and TCE releases from southern parcel occurred before company purchased property, and complaint did not allege that company operated dry cleaner facility or gas service station on property, but only that company subleased or leased to third–party operators. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(2), 42 U.S.C.A. § 9607(a)(2); West's Ann.Cal.Health & Safety Code § 25300 et seq.

13 **Environmental Law**

Elements in General

Plaintiff seeking to recover costs under Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) must establish four elements: (1) the site is a "facility" under CERCLA; (2) a release or threatened release of a hazardous substance from the facility has occurred; (3) the release or threatened release caused the plaintiff to incur response costs that were necessary and consistent with the national contingency plan; and (4) the defendant is within one of four classes of persons subject to liability. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a), 42 U.S.C.A. § 9607(a).

14 **Environmental Law**

Elements in General

Claims under California's Hazardous Substance Account act (HSAA) have the same elements as claims under federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA): (1) the site is a "facility" under HSAA; (2) a release or threatened release of a hazardous substance from the facility has occurred; (3) the release or threatened release caused the plaintiff to incur response costs that were necessary and consistent with the national contingency plan; and (4) the defendant is within one of four classes of persons subject to liability. West's Ann.Cal.Health & Safety Code § 25300 et seq.

15 **Environmental Law**

Hazardous, Dangerous, or Toxic Waste

To state a claim predicated on Resources Conservation and Recovery Act (RCRA) liability for contributing to the disposal of hazardous waste, a plaintiff must allege that the defendant had a measure of control over the waste at the time of its disposal or was otherwise actively involved in the waste disposal process. Resource Conservation and Recovery Act of 1976, § 2(b)(2)(A, F), 42 U.S.C.A. § 6972(b)(2)(A, F).

16 **Environmental Law**

Notice Requirements

District court had subject matter jurisdiction over real property owner's claims against owners of neighboring properties for violation of Resources Conservation and Recovery Act (RCRA), where owner complied with pre–suit notice requirements by providing notice to Environmental Protection Agency (EPA) administrator and regional administrator, relevant California state agencies, and neighboring property owners. Resource Conservation and Recovery Act of 1976, § 2(b)(2)(A, F), 42 U.S.C.A. § 6972(b)(2)(A, F).

17 **Environmental Law**

Notice Requirements

Giving pre–suit notice is a mandatory condition precedent to commencing suit under the Resources Conservation and Recovery Act (RCRA) citizen suit provision. Resource Conservation and Recovery Act of 1976, § 2(b)(2)(A), 42 U.S.C.A. § 6972(b)(2)(A).

18 **Environmental Law**

Notice Requirements

Real property owner's failure to strictly comply with notice requirements of Environmental Protection Agency's (EPA) regulations that implemented Resources Conservation and Recovery Act (RCRA) did not deprive district court of jurisdiction over owner's RCRA claims against neighboring property owners with regard to hazardous waste handling on neighboring property; although owner did not provide its own address and telephone number or precise dates of violation or exact activities involved as required by regulations, RCRA did not expressly direct EPA to promulgate regulations related to notice requirements. Resource Conservation and Recovery Act of 1976, § 2(b)(2)(A, F), 42 U.S.C.A. § 6972(b)(2)(A, F); 40 C.F.R. § 254.3(a).

19 **Nuisance**

Nature and Elements of Public Nuisance in General

To state a cause of action for public nuisance under California law, a plaintiff must allege that a defendant created, or had active involvement in creating, a condition that was harmful to health or interfered with the comfortable enjoyment of life or property, that the condition affected a substantial number of people at the same time, that an ordinary person would be reasonably annoyed or disturbed by the condition, that the seriousness of the harm outweighs the social utility of the defendant's conduct, that the plaintiff did not consent to the conduct, that the plaintiff suffered harm that was different from the type of harm suffered by the general public, and that the defendant's conduct was a substantial factor in causing the plaintiff's harm. West's Ann.Cal.Civ.Code §§ 3479, 3493.

20 **Trespass**

Trespass to Real Property

Under California law, "trespass" is an invasion of the interest in the exclusive possession of land, as by entry upon it.

21 **Trespass**

Necessity and Effect in General

Plaintiff asserting a claim for trespass under California law must have a possessory interest in the land at issue; mere ownership is not sufficient.

22 **Trespass**

Entry

Essence of the cause of action for trespass is an unauthorized entry onto the land of another, which may include either wrongful entry or invasion by pollutants.

23 **Limitation of Actions**

Injuries to Property in General

Waste

Proceedings

Under California law, claims for waste are subject to a three–year statute of limitations, tied to the real property such that it is not renewed when a new owner acquires the land and discovers the injury. West's Ann.Cal.C.C.P. § 338(b).

24 **Adjoining Landowners**

Negligence as to Premises Affecting Adjoining Land

Real property owner did not clearly allege existence of legal duty owed to owner by owners of neighboring property or facts showing breach of any such legal duty, precluding negligence claim under California law, as related to environmental contamination of owner's property.

25 **Limitation of Actions**

Injuries to Property

Negligence

Premises Liability

Under California law, claims for negligent injury to real property are subject to a three–year statute of limitations, tied to the real property such that it is not renewed when a new owner acquires the land and discovers the injury. West's Ann.Cal.C.C.P. § 338(b).

26 **Negligence**

Elements in General

Elements of a cause of action for negligence under California law are duty, breach of duty, causation, and damages.

Attorneys and Law Firms

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Opinion

ORDER RE MOTIONS TO DISMISS, MOTIONS FOR A MORE DEFINITE STATEMENT, AND MOTIONS TO STRIKE

PHYLLIS J. HAMILTON, District Judge.

*1 Defendants' motions to dismiss certain claims asserted in the complaint, motions for a more definite statement, and motions to strike, came on for hearing before this court on July 27, 2011. Plaintiff Gregory Village Partners, L.P. ("Gregory Village") appeared by its counsel Jordan Stanzler; defendant Chevron U.S.A., Inc. ("Chevron") appeared by its counsel D. Kevin Shipp and Robert Goodman; defendant M B Enterprises appeared by its counsel Jack Provine; and defendant Central Contra Costa Sanitary District ("CCCSD" or "the District") appeared by its counsel Kenton Alm and Sabrina Wolfson.

Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS the motions in part and DENIES them in part, as follows and for the reasons stated at the hearing.

BACKGROUND

Gregory Village owns real property located at 1601–1609 Contra Costa Boulevard in Pleasant Hill, California, known as the Gregory Village Shopping Center ("the Gregory Village property"). Gregory Village purchased the property approximately 10 years ago.

P & K Cleaners operated a dry cleaning plant on what is now the Gregory Village property, from the mid–1960s through approximately 1991. As required by the Regional Water Quality Control Board, Gregory Village has been investigating soil and groundwater contamination that allegedly resulted from P & K Cleaners' use and disposal of solvents.

Gregory Village asserts that chlorinated solvents, including PCE (tetrachlorethene) and TCE (trichloroethylene) and their breakdown products, as well as petroleum hydrocarbons and related materials and their breakdown products, have been detected in groundwater and soil vapor on or near the Gregory Village property.

The Gregory Village property is located downhill from real property located at 1705–1709 Contra Costa Boulevard ("the Chevron property") which is currently owned by M B Enterprises. The Chevron property was originally two parcels ("the Northern parcel" and "the Southern parcel").

From approximately 1950 until 1986, Chevron (through Standard Oil) leased the Northern parcel from the owner. There was a service station on the parcel, and in 1971, Chevron removed the existing service station and constructed a new service station with an auto repair facility. Standard Oil/Chevron sub-leased the Northern Parcel to a third party, which operated the service station.

A dry cleaner was allegedly in operation on the Southern Parcel from at least 1981 until 1986. It is not clear from the complaint who the owner of the Southern Parcel was. According to Gregory Village, Chevron states that all dry cleaning equipment was removed from the Southern Parcel by December 1, 1986.

In December 1986, Chevron purchased both the Northern parcel and the Southern parcel. At that point, or shortly thereafter, Chevron combined the two parcels into a single parcel, which it sold to M B Enterprises in March 2003.

*2 There is currently a Chevron service station located on the Chevron property. The service station is operated by M B Enterprises. Gregory Village asserts that chlorinated solvents and hydrocarbons and related products have been detected in groundwater and soil vapor on or near the Chevron property.

Gregory Village also alleges that pollution from the former dry cleaner (chlorinated solvents) has been found in the groundwater on the Chevron property by Chevron's consultants, and that Chevron was aware of this pollution in 1986 when it purchased the two parcels, and that as of 1988, it was aware of chlorinated solvents in the soil vapor in the Chevron property.

Gregory Village asserts that Chevron began groundwater remediation for petroleum-related compounds in 1991, and that the remediation system was shut down in 1996.

Nevertheless, according to Gregory Village, chlorinated solvents continued to be detected both on and off the Chevron property.

In December 2009, Gregory Village's consultant conducted an investigation of the groundwater and found high concentrations of chlorinated solvents, and also found petroleum hydrocarbons. On April 1, 2010, representatives from Gregory Village met with representatives from Chevron. At that time Gregory Village allegedly provided Chevron with information demonstrating the extent of the pollution.

The Chevron property connects with a sewer line that runs northward and downstream past the Gregory Village property, and into the residential neighborhood that lies to the north of the Gregory Village property ("the Neighborhood"). This sewer line was allegedly installed, and is owned and/or operated by, CCCSD. Gregory Village asserts that chlorinated solvents have been detected in groundwater and soil vapor in the Neighborhood, located north and west of the Gregory Village property. Gregory Village alleges that based on available data, the above-described sewer line is a source of these various off-site detections of pollution.

Gregory Village alleges that between 2005 and 2008, CCCSD performed a closed circuit television inspection of the sewer line between the Chevron property and the Neighborhood. This inspection showed that the sewer line had sags, root penetration, and at least one separated joint—all of which (according to Gregory Village) are areas in which leaks will continue to occur. Gregory Village also asserts that a key portion of the sewer line (near the Neighborhood) was never inspected. Gregory Village claims that CCCSD knew that dry cleaners and service stations were using the sewers to discharge hazardous substances, and failed to use due care to ensure that hazardous substances were not released into the environment.

Gregory Village also alleges that as the owner and operator of a service station on the Chevron property, M B Enterprises has contributed to the contamination of the Gregory Village property and the Neighborhood by discharging petroleum products into the subsurface of the Chevron property through the normal course of its operation of a service station. Gregory Village claims that M B Enterprises has failed to make any effort to stop the migration of the PCE and TCE from the Chevron property into the Neighborhood.

***3** Gregory Village filed this action on April 1, 2011, alleging 11 causes of action—(1) a claim under CERCLA § 107(a)(1–4)(B), 42 U.S.C. § 9607(a), against all defendants; (2) a claim under the Resources Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B), against all defendants; (3) a claim for declaratory relief under federal law, against all defendants; (4) a claim seeking response costs under the Carpenter–Presley–Tanner Hazardous Substance Account Act ("HSAA"), California Health & Safety Code § 25300, et seq., against M B Enterprises and Chevron; (5) a claim of comparable equitable indemnity under state law, against all defendants; (6) a claim of declaratory relief under state law, against all defendants; (7) a claim for attorneys' fees under California Code of Civil Procedure § 1021.5, against all defendants; and (8)-(11) common law claims of public nuisance; trespass; waste; and negligence, against all defendants.

All three defendants have filed motions to dismiss. Chevron argues that the CERCLA/HSAA, RCRA, nuisance, trespass, waste, and negligence causes of action should be dismissed for failure to state a claim, or, in the alternative, that the court should order Gregory Village to provide a more definite statement. Chevron also contends that the cause of action for attorney's fees should be stricken because Civil Procedure Code § 1021.5 does not create an independent cause of action; and that the prayer for attorney's fees and costs should also be stricken because fees and costs are not recoverable in actions brought under CERCLA and HSAA, and because the common law causes of action do not provide for recovery of attorney's fees.

M B Enterprises filed a joinder in Chevron's motion, and a motion seeking dismissal of all eleven causes of action asserted against M B Enterprises and Chevron (even though Chevron seeks dismissal of only eight of the eleven causes of action), or, in the alternative, a more definite statement, plus an order striking the prayer for attorney's fees and costs.

CCCSD seeks a more definite statement as to the CERCLA cause of action, and argues that the court lacks subject matter jurisdiction over the RCRA cause of action because Gregory Village did not comply with the 90–day notice requirement. CCCSD also contends that the RCRA cause of action fails to state a claim.

In addition, CCCSD argues that the trespass and waste claims are barred because CCCSD is immune under California Government Code § 815; that the nuisance, trespass, waste, and equitable indemnity causes of action fail because they are not pled with particularity as required under the California Tort Claims Act; that the equitable indemnity claim is

premature because Gregory Village has not been served with a complaint giving rise to such a claim; that the nuisance and waste claims should be dismissed because they are inadequately pled; and that the nuisance claim also fails because it is untimely and seeks damages beyond the one-year period allowed under the California Government Code.

DISCUSSION

A. Legal Standards

1. Motions to Dismiss (Rule 12(b)(1))

*4 1 Federal courts are courts of limited jurisdiction, possessing only that power authorized by Article III of the United States Constitution and statutes enacted by Congress pursuant thereto. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986). Thus, federal courts have no power to consider claims for which they lack subject-matter jurisdiction. *See Chen–Cheng Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1415 (9th Cir.1992). The court is under a continuing duty to dismiss an action whenever it appears that the court lacks jurisdiction. *Id.; see also Spencer Enters., Inc. v. United States,* 345 F.3d 683, 687 (9th Cir.2003); *Attorneys Trust v. Videotape Computer Prods., Inc.*, 93 F.3d 593, 594–95 (9th Cir.1996).

2 The burden of establishing that a cause lies within this limited jurisdiction rests upon the party asserting jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). Thus, in the present action, petitioners bear the burden of demonstrating that subject matter jurisdiction exists over this complaint. *See, e.g., Tosco Corp. v. Communities for a Better Env't,* 236 F.3d 495, 499 (9th Cir.2001).

3 On a motion to dismiss pursuant to Rule 12(b)(1), the applicable standard turns on the nature of the jurisdictional challenge. A defendant may either challenge jurisdiction on the face of the complaint or provide extrinsic evidence demonstrating lack of jurisdiction on the facts of the case. *White v. Lee,* 227 F.3d 1214, 1242 (9th Cir.2000). In evaluating a facial attack on jurisdiction, the court must accept the factual allegations in plaintiff's complaint as true. *See Miranda v. Reno,* 238 F.3d 1156, 1157 n. 1 (9th Cir.2001).

4 A motion to dismiss for lack of subject matter jurisdiction may also be a "speaking motion" in which the defendant actually challenges the existence of subject matter jurisdiction. In such a case, "[n]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Thornhill Publ'g v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir.1979). Moreover, the plaintiff, who bears the burden of proof that jurisdiction does in fact exist, must establish jurisdiction with evidence from other sources. *See* Schwarzer, Tashima & Wagstaffe, *Federal Civil Procedure Before Trial* (2011) § 9:86.

2. Motions to Dismiss (Rule 12(b)(6))

5 A motion to dismiss under Rule 12(b)(6) tests for the legal sufficiency of the claims alleged in the complaint. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199–1200 (9th Cir.2003). Review is limited to the contents of the complaint. *Allarcom Pay Television, Ltd. v. Gen. Instrument Corp.*, 69 F.3d 381, 385 (9th Cir.1995). To survive a motion to dismiss for failure to state a claim, a complaint generally must satisfy only the minimal notice pleading requirements of Federal Rule of Civil Procedure 8.

*5 6 Rule 8(a)(2) requires only that the complaint include a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). Specific facts are unnecessary—the statement need only give the defendant "fair notice of the claim and the grounds upon which it rests." *Erickson v. Pardus,* 551 U.S. 89, 93, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

All allegations of material fact are taken as true. *Id.* at 94, 127 S.Ct. 2197. However, legally conclusory statements, not supported by actual factual allegations, need not be accepted. *See Ashcroft v. Iqbal,* 556 U.S. ——, 129 S.Ct. 1937, 1949–50, 173 L.Ed.2d 868 (2009). A plaintiff's obligation to provide the grounds of his entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555, 127 S.Ct. 1955 (citations and quotations omitted). Rather, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." *Id.*

A motion to dismiss should be granted if the complaint does not proffer enough facts to state a claim for relief that is plausible on its face. *See id.* at 558–59, 127 S.Ct. 1955. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the

pleader is entitled to relief.' " *Iqbal,* 556 U.S. ——, 129 S.Ct. at 1950.

7 In addition, when resolving a motion to dismiss for failure to state a claim, the court may not generally consider materials outside the pleadings, although the court may consider a matter that is properly the subject of judicial notice. *Lee v. City of Los Angeles,* 250 F.3d 668, 688–89 (9th Cir.2001); *see also Mack v. South Bay Beer Distributors, Inc.,* 798 F.2d 1279, 1282 (9th Cir.1986) (on a motion to dismiss, a court may properly look beyond the complaint to matters of public record and doing so does not convert a Rule 12(b)(6) motion to one for summary judgment). Additionally, the court may consider exhibits attached to the complaint, *see Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.,* 896 F.2d 1542, 1555 n. 19 (9th Cir.1989), and documents referenced by the complaint and accepted by all parties as authentic. *See Van Buskirk v. Cable News Network, Inc.,* 284 F.3d 977, 980 (9th Cir.2002).

3. Motions for a More Definite Statement (Rule 12(e))

Under Rule 12(e), "[a] party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." Fed.R.Civ.P. 12(e). "A Rule 12(e) motion is proper only where the complaint is so indefinite that the defendant cannot ascertain the nature of the claim being asserted" and therefore "cannot reasonably be expected to frame a proper response." Schwarzer, Tashima & Wagstaffe, *Federal Civil Procedure Before* Trial (2008 ed.) § 9:347 (citing *Cellars v. Pacific Coast Packaging, Inc.,* 189 F.R.D. 575, 578 (N.D.Cal.1999); *Famolare, Inc. v. Edison Bros. Stores, Inc.,* 525 F.Supp. 940, 949 (E.D.Cal.1981)).

*6 8 A motion for a more definite statement attacks intelligibility, not simply lack of detail. For this reason, the motion fails where the complaint is specific enough to apprise the defendant of the substance of the claim being asserted. *Bureerong v. Uvawas,* 922 F.Supp. 1450, 1461 (C.D.Cal.1996); *see also Hubbs v. County of San Bernardino, CA,* 538 F.Supp.2d 1254, 1262 (C.D.Cal.2008).

4. Motions to Strike (Rule 12(f))

Federal Rule of Civil Procedure 12(f) provides that the court "may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed.R.Civ.P. 12(f). "The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial ...." *Whittlestone, Inc. v. Handi-Craft Co.,* 618 F.3d 970, 973 (9th Cir.2010) (quotation and citation omitted). In order to determine whether to grant a motion to strike under Rule 12(f), the court must determine whether the matter the moving party seeks to have stricken is (1) an insufficient defense; (2) redundant; (3) immaterial; (4) impertinent; or (5) scandalous. *Id.* at 973–74.

9 10 11 Motions to strike are not favored and "should not be granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation." *Colaprico v. Sun Microsystems, Inc.,* 758 F.Supp. 1335, 1339 (N.D.Cal.1991). When a court considers a motion to strike, it "must view the pleading in a light most favorable to the pleading party." *In re 2TheMart.com, Inc. Sec. Lit.,* 114 F Supp.2d 955, 965 (C.D.Cal.2000). A court must deny the motion to strike if there is any doubt whether the allegations in the pleadings might be relevant in the action. *Id.* However, a motion to strike is proper when a defense is insufficient as a matter of law. *Chiron Corp. v. Abbott Labs.,* 156 F.R.D. 219, 220 (N.D.Cal.1994)

1. CERCLA/HSAA claims

12 Chevron and MB Enterprises argue that the CERCLA/HSAA claim should be dismissed because the complaint does not adequately allege that Chevron was an owner/operator of the Chevron property during the relevant time period. CCCSD seeks a more definite statement as to the CERCLA claim, arguing that it is unable to tell whether the claim is based on the allegation that pollutants were discharged into the District's sewer system from the Gregory Village property.

13 14 CERCLA imposes strict liability for environmental contamination upon specified entities. A plaintiff seeking to recover costs under CERCLA § 107 must establish four elements—(1) the site is a "facility;" (2) a "release" or "threatened release" of a hazardous substance from the facility has occurred; (3) the "release" or "threatened release" caused the plaintiff to incur response costs that were "necessary" and "consistent with the national contingency plan;" and (4) the defendant is within one of four classes of persons subject to liability. *3550 Stevens Creek Assocs. v. Barclays Bank of Cal.,* 915 F.2d 1355, 1358 (9th Cir.1990). A claim under the HSAA has the same elements as a claim under CERCLA. *Adobe Lumber, Inc. v. Hellman,* 658 F.Supp.2d 1188, 1192–93 (E.D.Cal.2009).

*7 In the complaint, Gregory Village alleges that Chevron "leased, controlled and/or owned all or portions of the Chevron Property between 1950 and 2003." Cplt ¶ 8. Gregory Village asserts that Chevron is liable under § 107(a)(2), "as a former owner/operator of a Facility, the Chevron Property, at the time of the Releases." Cplt ¶ 61. Liability under § 107 may be imposed on, among others, "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). Chevron contends that the complaint fails to allege facts supporting the conclusory allegation that Chevron owned or operated the Chevron property at the time that hazardous substances were disposed there.

The complaint alleges that Chevron "is responsible for these Releases as a former owner/operator of a Facility, the Chevron Property, at the time of the Releases, pursuant to 42 U.S.C. § 9607(a)(2)." Cplt ¶ 61. This is a legal conclusion, which is not entitled to a presumption of truth. *See Iqbal,* 129 S.Ct. at 1950–51. Moreover, the complaint alleges that Chevron did not own the Southern and Northern parcels until December 1986. Cplt ¶¶ 12–13.

The complaint does not clearly allege that a release of PCE or TCE occurred on the Northern Parcel between 1986 and 2003, the only period when Chevron owned that parcel—or that any PCE and TCE which may have been released on the Northern Parcel actually affected the Gregory Village Property or the Neighborhood—but only that PCE and TCE migrated from the "Chevron property" and entered the leaking sewer from the "Chevron property." Cplt ¶¶ 9, 29–30. Similarly, the releases of PCE and TCE from the Southern Parcel are alleged to have occurred before Chevron purchased that property, during the operation of the former dry cleaner. Cplt ¶¶ 11, 15.

Finally, the complaint does not allege that Chevron ever operated the gasoline service station on the Chevron property, but only that Chevron subleased or leased the Northern Parcel "to third party operator(s) who operated the service station/auto repair facility." Cplt ¶ 8. Nor does the complaint allege that Chevron operated the former dry cleaner that was removed from the Southern Parcel before Chevron purchased that parcel. Cplt ¶ 10.

As stated at the hearing, the motions are GRANTED, with leave to amend. The amended complaint must allege facts showing that Chevron was an owner or operator of the Chevron property during the relevant time period, and clarifying whether the claim against CCCSD is based on the alleged discharge of pollutants into the District's sewer system from the Gregory Village property.

2. RCRA claim

Chevron and M B Enterprises contend that the RCRA cause of action must be dismissed because the complaint fails to sufficiently allege that Gregory Village provided the pre-filing notices required under 42 U.S.C. § 6972(b)(2)(A) and (F), and because it fails to provide sufficient facts to support the claim asserted against Chevron and M B Enterprises. CCCSD argues that the court lacks subject matter jurisdiction over the RCRA claim because the notice letters did not include the information required to be included, and because Gregory Village failed to serve a copy of the complaint on the Administrator of the United States Environmental Protection Agency ("EPA") and on the United States Attorney General. The motions are GRANTED in part and DENIED in part.

*8 As an initial matter, the court finds, for purposes of the present Rule 12(b)(6) motion, that the complaint does not allege sufficient facts to state a claim under RCRA. In *Hinds Investments, L.P. v. Angioli,* ——F.3d ——, 2011 WL 3250461 (9th Cir., Aug. 1, 2011), the Ninth Circuit noted that " 'RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste,' " and that its primary purpose is " 'to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of waste' " in order to minimize the threat to human health and the environment. *Id.,* at ——, 2011 WL 3250461 at *2 (quoting *Meghrig v. KFC W., Inc.,* 516 U.S. 479, 483, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996)).

15 The court noted further that "contribute" commonly means "lend assistance or aid to a common purpose," "have a share in any act or effect," "be an important factor in," or "help to cause." *Id.,* at ——, 2011 WL 3250461 at *3. The court determined that the "contributed/contributing" language in RCRA requires that a defendant be actively involved in or have some degree of control over the waste disposal process to be liable under the statute. *Id.* In particular, "to state a claim predicated on RCRA liability for 'contributing to' the disposal of hazardous waste, a plaintiff must allege that the defendant had a measure of control over the waste at the time of its disposal or was otherwise actively involved in the waste disposal process." *Id.,* at ——, 2011 WL 3250461 at *4.

The court finds that the Ninth Circuit's construction of "contributing to," taken together with the Supreme Court's

admonition in *Twombly* and *Iqbal* that a pleading that offers "a formulaic recitation of the elements of a cause of action will not do," *Twombly,* 550 U.S. at 555, 127 S.Ct. 1955, *quoted in Iqbal,* 129 S.Ct. at 1949, mandates that Gregory Village plead the RCRA claim with sufficient facts in order to state a claim that is plausible on its face. [1]

16 **17** With regard to whether the court has subject matter jurisdiction over the RCRA claim, the court finds that Gregory Village has adequately complied with the statutory notice requirements. Under § 6972(b)(2)(A),

> [n]o action may be commenced under subsection (a)(1)(B) [provision authorizing citizen suits against contributor] prior to ninety days after the plaintiff has given notice of the endangerment to—
>
> (i) the Administrator;
>
> (ii) the State in which the alleged endangerment may occur;
>
> (iii) any person alleged to have contributed to or be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in subsection (a)(1)(B) of this section ...

42 U.S.C. § 6972(b)(2)(A). The law is settled that giving pre-suit notice is a "mandatory condition[ ] precedent to commencing suit under the RCRA citizen suit provision." *Hallstrom v. Tillamook County,* 493 U.S. 20, 31, 110 S.Ct. 304, 107 L.Ed.2d 237 (1989); *see also Covington v. Jefferson County,* 358 F.3d 626, 636–39 (9th Cir.2004).

***9** Gregory Village asserts that it served the notices of intent to file suit required by RCRA, and attaches to its opposition papers copies of notices of intent to file suit against Chevron dated September 8, 2010, and November 17, 2010, copies of notices of intent to file suit against M B Enterprises dated October 8, 2010, and November 30, 2010, and copies of notices of intent to file suit against CCCSD dated September 14, 2010 and November 29, 2010. The notices reflect that copies were also sent to the EPA Administrator, and the Regional Administrator of Region IX of the EPA, as well as to California agencies, including the California Environmental Protection Agency, the California State Water Resources Control Board, the California Integrated Waste Management Board, and the California Natural Resources Agency. All the notices were sent well before the statutory deadline (90 days prior to filing suit), and the complaint alleges that Gregory Village timely served the required RCRA notices. *See* Cplt ¶¶ 40–43

Under § 6972(b)(2)(F), "[w]henever any action is brought under subsection (a)(1)(B) of this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General of the United States and with the Administrator." 42 U.S.C. § 6972(b)(2)(F). The court agrees with Gregory Village that it would have been impossible to allege in the complaint that the complaint had been served on the EPA Administrator and the U.S. Attorney General, before the complaint had even been filed. Moreover, the statute does not provide that service of the complaint on the EPA Administrator and the Attorney General is a precondition to suit, just that a copy of the complaint "shall be served." While it is true that Gregory Village delayed the required service on the EPA Administrator and the Attorney General until after the present motions had been filed, it is also true that RCRA does not specify a particular time by which the service must be completed.

18 Finally, the court finds that while Gregory Village did not strictly comply with certain provisions set forth in the regulations implementing the RCRA notice requirements, which appear at 40 C.F.R. part 254, that failure does not deprive the court of subject matter jurisdiction. For example, under 40 C.F.R. § 254.3, the notice

> shall include sufficient information to permit the recipient to identify the specific permit, standard, regulation, condition, requirement, or order which has allegedly been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the date or dates of the violation, and the full name, address, and telephone number of the person giving notice.

40 C.F.R. § 254.3(a). The notices did not provide Gregory Village's address and telephone number—just the address and telephone number of its counsel—and also did not provide precise "dates of the violation," or the exact "activity alleged to constitute a violation." Defendants contend that just as compliance with the statutory notice requirements is a prerequisite to filing suit under RCRA, so is compliance with the implementing regulations. As there appears to be no Circuit or Supreme Court authority on this question, defendants rely on cases interpreting the Clean Water Act and what defendants claim are almost identical notice requirements.

***10** The citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365, provides that no action may be brought prior

to sixty days after the plaintiff has provided notice of the alleged violation to the EPA Administrator, the state in which the alleged violation occurred, and the alleged violator. 33 U.S.C. § 1365(b)(1). The statute adds that "[n]otice under this subsection [subsection (b)] *shall be given* in such manner as the Administrator shall prescribe by regulation." 33 U.S.C. § 1365(b) (emphasis added). The regulations promulgated by the Administrator appear at 40 C.F.R. § 135.3, and include language regarding the content of the notices that is almost identical to the language in 40 C.F.R. § 254.3.

By contrast, in enacting RCRA, Congress did not expressly direct the EPA to promulgate regulations relating to the notice requirements of 42 U.S.C. § 6972(b)(2)(A).[2] Instead, the EPA promulgated regulations pursuant to § 6972 generally, in which it outlined "the procedures to be followed" and prescribed "the information to be contained in the notices." 42 FR 37214 (July 20, 1977); *see also* 42 FR 56114 (Oct. 21, 1977). Thus, while Ninth Circuit cases such as *Center for Biological Diversity v. Marina Point Dev. Co.*, 566 F.3d 794 (9th Cir.2009), and *Washington Trout v. McCain Foods, Inc.*, 45 F.3d 1351 (1995), have found that strict compliance with the CWA regulations is a prerequisite to suit, this court finds no indication by Congress that it intended that the applicable RCRA regulations apply with the same force. The court agrees with the courts that have concluded that strict compliance with the RCRA notice requirements is not a jurisdictional prerequisite, and finds that the notices served by Gregory Village included sufficient information regarding Gregory Village's intent to sue.

3. Equitable indemnity claim

CCCSD argues that the claim for equitable indemnity should be dismissed as to the District, as premature under California Government Code § 901, because Gregory Village has not been served with a complaint giving rise to such a claim. The motion is GRANTED, based on the concession by counsel for Gregory Village at the hearing, that the claim is unripe and should be dismissed without prejudice, as to the District.

4. Attorney's fees

Chevron and M B Enterprises seek an order striking the cause of action for attorney's fees, and the prayer for attorney's fees. For the reasons stated at the hearing, the motion is GRANTED as to the cause of action for attorney's fees, and is DENIED as to the prayer for attorney's fees.

5. Public nuisance claim

Chevron and M B Enterprises argue that the cause of action for nuisance should be dismissed for failure to state a claim. In general, Chevron and M B Enterprises assert that this claim is not pled in accordance with the requirements of Rule 8, because the complaint makes broad allegations regarding the "Chevron property," but fails to allege facts supporting the elements of the claim.

***11** CCCSD contends that the cause of action for nuisance fails because it is not pled with particularity as required under the California Tort Claims Act, *see Shields v. County of San Diego,* 155 Cal.App.3d 103, 113, 202 Cal.Rptr. 30 (1984), and also because it is untimely and seeks damages beyond the one-year period allowed under California Government Code § 911(a).

Under California law, a nuisance is defined as "[a]nything which is injurious to health, ... or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." Cal. Civ.Code § 3479. "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." *Id.* § 3480. The complaint must allege damages "specially injurious to [plaintiff], but not otherwise." Cal. Civ.Code § 3493; *see also Ileto,* 349 F.3d at 1213 n. 28.

19 Thus, to state a cause of action for public nuisance, a plaintiff must allege that a defendant created (or had active involvement in creating) a condition that was harmful to health or interfered with the comfortable enjoyment of life or property; that the condition affected a substantial number of people at the same time; that an ordinary person would be reasonably annoyed or disturbed by the condition; that the seriousness of the harm outweighs the social utility of the defendant's' conduct; that the plaintiff did not consent to the conduct; that the plaintiff suffered harm that was different from the type of harm suffered by the general public; and that the defendant's conduct was a substantial factor in causing the plaintiff's harm. *See Birke v. Oakwood Worldwide,* 169 Cal.App.4th 1540, 1548, 87 Cal.Rptr.3d 602 (2009) (citing Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 2020); *see also City of Modesto Redev. Agency v. Superior Court,* 119 Cal.App.4th 28, 40–43, 13 Cal.Rptr.3d 865.

The motion to dismiss for failure to state a claim is GRANTED, with leave to amend to plead facts supporting the elements of the claim, as to each defendant, and plead the

facts with particularity as to the District, and also to allege compliance with the Tort Claims Act as to the District. In addition, however, while counsel indicated at the hearing that Gregory Village did not contest that damages were limited to one year prior to the date the complaint was filed, the court disagrees that this is a pleading issue.

6. Trespass claim

Chevron and M B Enterprises argue that the cause of action for trespass should be dismissed for failure to state a claim. In general, Chevron and M B Enterprises assert that this claim is not pled in accordance with the requirements of Rule 8, because the complaint fails to allege facts sufficient to support the claim.

CCCSD contends that the cause of action for trespass fails because it is not pled with particularity as required under the California Tort Claims Act, and because the District is immune under Government Code § 815. Gregory Village does not oppose CCCSD's motion.

***12** **20** **21** Under California law, "[a] trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it." *Wilson v. Interlake Steel Co.*, 32 Cal.3d 229, 233, 185 Cal.Rptr. 280, 649 P.2d 922 (1982) (citation omitted). A plaintiff asserting a claim for trespass must have a possessory interest in the land at issue; mere ownership is not sufficient. *Dieterich Int'l Truck Sales, Inc. v. J.S. & J. Servs., Inc.*, 3 Cal.App.4th 1601, 1608–10, 5 Cal.Rptr.2d 388 (1992).

22 "The essence of the cause of action for trespass is an 'unauthorized entry' onto the land of another." *Cassinos v. Union Oil Co.*, 14 Cal.App.4th 1770, 1778, 18 Cal.Rptr.2d 574 (1993) (citation omitted) (trespass where wastewater was injected from defendant's property to plaintiff's, interfering with plaintiff's mineral estate). A trespass "may include wrongful entry or invasion by pollutants." *Martin Marietta Corp. v. Insurance Co. of North America*, 40 Cal.App.4th 1113, 1132, 47 Cal.Rptr.2d 670 (1995).

The motion is GRANTED as to the trespass claim against Chevron and M B Enterprises. The dismissal is with leave to amend, to allege facts supporting the elements of the claim (unauthorized entry onto the land of one with a possessory interest in the land). The motion is also GRANTED as to the trespass claim asserted against the District, with prejudice, based on Gregory Village's lack of opposition.

7. Waste claim

23 Chevron and M B Enterprises argue that the cause of action for waste should be dismissed because it is time-barred. Claims for waste are subject to a three-year statute of limitations. Cal. Civ. P. Code § 338(b) (damage to real property). The statute of limitations is tied to the real property and is not renewed when a new owner acquires the land and discovers the injury. *Beck Dev. Co. v. Southern Pac. Transp. Co.*, 44 Cal.App.4th 1160, 1216, 52 Cal.Rptr.2d 518 (1996). Plaintiff responds that the running of the statute of limitations was tolled by operation of the discovery rule.

CCCSD contends that the cause of action for waste fails because it is not pled with particularity as required under the California Tort Claims Act, and because the District is immune under California Government Code § 815. Gregory Village does not oppose CCCSD's motion.

The motion is GRANTED as to the trespass claim against Chevron and M B Enterprises. The dismissal is with leave to amend, to allege facts supporting the elements of the claim, and to plead facts showing the time and manner of discovery, and the inability to have made earlier discovery despite reasonable diligence. *See Fox v. Ethicon Endo–Surgery, Inc.*, 35 Cal.4th 797, 808, 27 Cal.Rptr.3d 661, 110 P.3d 914 (2005), *quoted in Fodor v. AOL Time Warner, Inc.*, 217 Fed.Appx. 622–24 (9th Cir.2007); *see also Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1120 (9th Cir.1994). The motion is also GRANTED as to the trespass claim asserted against the District, with prejudice, based on Gregory Village's lack of opposition.

8. Negligence claim

24 Chevron and M B Enterprises argue that the cause of action for negligence should be dismissed because it is time-barred, and also because the complaint fails to allege that Chevron or M B Enterprises breached a legal duty owed to Gregory Village.

***13** **25** Claims for negligent injury to real property are also subject to a three-year statute of limitations. Cal.Code Civ. P. § 338(b) (damage to real property). The statute of limitations is tied to the real property and is not renewed when a new owner acquires the land and discovers the injury. *Beck*, 44 Cal.App.4th at 1216, 52 Cal.Rptr.2d 518. Gregory Village responds that the running of the statute of limitations was tolled by operation of the discovery rule.

26 The elements of a cause of action for negligence are duty, breach of duty, causation, and damages. *Potter v. Firestone*

Tire & Rubber Co., 6 Cal.4th 965, 984–85, 25 Cal.Rptr.2d 550, 863 P.2d 795 (1993). The complaint does not clearly allege the existence of a legal duty owed by Chevron and M B Enterprises to Gregory Village, or facts showing the breach of any such legal duty.

The motion is GRANTED. The dismissal is with leave to amend, to allege facts supporting the elements of the claim, and showing the time and manner of discovery, and the inability to have made earlier discovery despite reasonable diligence. *See Fox,* 35 Cal.4th at 808, 27 Cal.Rptr.3d 661, 110 P.3d 914, *quoted in Fodor,* 217 Fed.Appx. at 624; *see also Hopkins,* 33 F.3d at 1120.

CONCLUSION

In accordance with the foregoing, the motions are GRANTED in part and DENIED in part.

The motions by Chevron and M B Enterprises to dismiss the first (CERCLA) and fourth (HSAA) causes of action are GRANTED, as is the motion of CCCSD for a more definite statement as to the first (CERCLA) cause of action. The motions to dismiss the second (RCRA) cause of action are GRANTED in part and DENIED in part. The motion to dismiss the fifth (equitable indemnity) cause of action is GRANTED, without prejudice. The motions to dismiss/strike the seventh (attorney's fees) cause of action are GRANTED, without leave to amend, and the motion to strike the prayer for attorney's fees is DENIED. The motions to dismiss the claims for public nuisance, trespass, waste, and negligence are GRANTED, with leave to amend as stated above.

The amended complaint shall be filed no later than August 24, 2011. Any responsive pleading shall be filed no later than 28 days after the filing of the amended complaint. If the pleadings are not settled by the September 22, 2011 date presently set for the initial case management conference, the parties shall submit a stipulation to continue the date of the CMC.

Finally, Chevron's objections to Gregory Village's late-filed requests for judicial notice are SUSTAINED on all grounds argued by Chevron.

IT IS SO ORDERED.

Footnotes

1 In addition, the court questions whether Gregory Village, if it prevails, will be entitled to an injunction to pay for future clean-up costs, but finds that that question is not appropriate for decision at this stage of the litigation.

2 Under § 6972(c), which provides that no action may be commenced under subsection (a)(2) (citizen suit against EPA Administrator), "[n]otice under this subsection [subsection (c)] shall be given in such manner as the Administrator shall prescribe by regulation." However, there is no similar provision governing actions under subsection (b).

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EXHIBIT "D"

72 Fed.Appx. 550
This case was not selected for
publication in the Federal Reporter.
Not for Publication in West's Federal Reporter
See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. See also Ninth
Circuit Rule 36-3. (Find CTA9 Rule 36-3)
United States Court of Appeals,
Ninth Circuit.

James R. BJORKLUND, an individual,
Plaintiff-counter-defendant-Appellant,
v.
NORTH AMERICAN COMPANIES FOR LIFE AND HEALTH INSURANCE, an Illinois Corporation, esa North American Company for Life and Health Insurance, Defendant-counter-claimant-Appellee.

No. 02-56382. | D.C. No. CV-01-00500-AHS. | Argued and Submitted June 3, 2003. | Decided July 23, 2003.

Insured sued life and health insurer for alleged breach of contract, breach of implied covenant of good faith and fair dealing, and unfair competition. The United States District Court for the Central District of California, Alicemarie H. Stotler, J., granted summary judgment for insurer. Insured appealed. The Court of Appeals held that: (1) insured's claims did not accrue until insurer refused to tender amount demanded by insured upon surrendering policy, and (2) insurer's anticipatory repudiation of contract did not trigger statute of limitations under California law.

Affirmed in part, reversed in part, and remanded.

West Headnotes (2)

1 **Limitation of Actions**
Breach of contract in general

Limitation of Actions
Liabilities Created by Statute

Life and health insurer was not alleged to have breached contract until it refused to tender amount demanded by insured upon surrendering policy, and therefore insured's claims for breach of contract, breach of implied covenant of good faith and fair dealing, and unfair business practices did not accrue until that time until California law, for purposes of statute of limitations. West's Ann.Cal.C.C.P. §§ 337, 339(1); West's Ann.Cal.Bus. & Prof.Code § 17208.

2 **Insurance**
Anticipatory breach

Limitation of Actions
Breach of contract in general

Annual statements sent by life and health insurer to policyholder, which contained value assessments inconsistent with amounts that policyholder claimed were owed upon his surrender of policy, constituted anticipatory repudiation of insurance contract under California law, and did not trigger running of statute of limitations on claim for breach.

*550 Appeal from the United States District Court for the Central District of California, Alicemarie H. Stotler, District Judge, Presiding.

Before REINHARDT, O'SCANNLAIN, and FISHER, Circuit Judges.

Opinion

***551 MEMORANDUM** *

James Bjorklund appeals from the district court's order granting summary judgment in favor of North American Companies for Life and Health Insurance ("North American") on Bjorklund's claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair competition. [1] The facts are known to the parties and will not be repeated herein except as necessary.

1 The district court granted summary judgment to North American because it found that Bjorklund's claims for breach of an insurance contract were barred by the applicable statutes of limitations. [2] *See* Cal.Code Civ. Pro. §§ 337, 339(1); Cal. Bus. & Prof.Code § 17208. We disagree.

In California, a cause of action for breach of contract accrues at the time of breach, which then starts the limitations period

running. *Cochran v. Cochran,* 56 Cal.App.4th 1115, 1120, 66 Cal.Rptr.2d 337 (1997). Pursuant to the contract at issue here, Bjorklund could surrender the policy at any time prior to its maturation, at which time North American was called upon to tender the cash value of the policy as of that date. Bjorklund attempted to surrender the policy in a letter dated July 29, 1999, demanding payment in the amount of approximately $834,000.00. North American refused to pay that amount, and it is that refusal that constitutes the alleged breach.

2 North American points to the annual statements Bjorklund received, and the value assessments in those statements that are inconsistent with the amount he claims he was owed. Those statements are best viewed as an anticipatory repudiation of the contract, however, and under California law, anticipatory repudiation does not trigger the statute of limitations for breach. As explained by the California Supreme Court in *Romano v. Rockwell Int'l, Inc.,* 14 Cal.4th 479, 59 Cal.Rptr.2d 20, 926 P.2d 1114 (1996), when a party to a contract repudiates his or her obligations prior to the time for performance, the counter-party may either disregard the repudiation and wait until the time for performance, or he or she may treat the repudiation as an anticipatory breach and seek damages immediately. *See id.* at 489, 59 Cal.Rptr.2d 20, 926 P.2d 1114. "Most significantly, ... in the event the plaintiff disregards the repudiation, the statute of limitations does not begin to run until the time set by the contract for performance." *Id.*

*552 Applying these principles to the case at hand, North American is not alleged to have breached the contract until 1999 or 2000, when it refused to surrender the amount Bjorklund demanded. The causes of action for breach of contract, breach of implied covenant of good faith and fair dealing, and unfair business practices, did not accrue until that time, and Bjorklund's claims, therefore, are not barred by the applicable statutes of limitations. Because a triable issue of fact exists as to whether North American breached the agreement, we reverse and remand to the district court for further proceedings not inconsistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

Parallel Citations

2003 WL 21751605 (C.A.9 (Cal.))

Footnotes

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

1 In addition to the district court's decision to grant summary judgment in favor of North American, Bjorklund also appeals from orders of the district court (1) denying in part his motion to compel an answer to special interrogatory no. 8; and (2) denying his motion to change venue. Finding no error in the record, we affirm the district court's rulings with respect to those motions.

2 Applying the "discovery rule", the district court found that Bjorklund was on notice of the alleged discrepancy in the contract in 1990, and therefore his claim, brought in California Superior Court in 2001, was time barred. The discovery rule modifies the common law rule that an action accrues on the date of injury. *See El Pollo Loco. Inc. v. Hashim,* 316 F.3d 1032, 1038-39 (9th Cir.2003); *Jolly v. Eli Lilly & Co.,* 44 Cal.3d 1103, 1109, 245 Cal.Rptr. 658, 751 P.2d 923 (1988). The clock begins to run on the date of injury, or on the date a plaintiff knows or should know of such injury, whichever is later. *El Pollo Loco, Inc.,* 316 F.3d at 1038-40. In this case, the district court does not appear to have considered when the date of injury-the alleged breach of contract-occurred.

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EXHIBIT "E"

842 F.Supp. 1232
United States District Court,
N.D. California.

Michael MORTKOWITZ and
Maria Mortkowitz, Plaintiffs,
v.
TEXACO INC., a Delaware Corporation, Defendant.

Civ. No. C92-20213 EAI. | Jan. 19, 1994.

Property owners filed breach of contract and various tort claims against former tenant who had operated service station on property which allegedly caused contamination of soil. Service station operator filed motion for summary judgment. The District Court, Infante, United States Magistrate Judge, held that: (1) discovery rule under California law did not toll statute of limitations governing permanent nuisance and trespass claims, in light of owners' knowledge of age of underground tank system and statutory duty to investigate property to determine extent of any contamination, and (2) genuine issues of material fact existed, precluding summary judgment, on whether service station operator installed pipe which caused soil contamination, and whether operator concealed material information about probability of storage tank leakage with requisite intent to defraud property owners.

Motion for summary judgment granted in part and denied in part.

West Headnotes (12)

1 **Limitation of Actions**
- Breach of Contract in General

Under California law, cause of action for breach of contract generally accrues at time of breach and statute of limitations begins to run at that time. West's Ann.Cal.C.C.P. § 337.

4 Cases that cite this headnote

2 **Limitation of Actions**
- Breach of Contract in General

Property owners' breach of implied contract claim against service station operator for surrendering leased premises in polluted condition accrued at time of expiration of lease which occurred approximately seven years before suit was filed and, thus, claim was barred by four-year statute of limitations for contract actions under California law. West's Ann.Cal.C.C.P. § 337.

3 Cases that cite this headnote

3 **Federal Civil Procedure**
- Hearing and Determination

Property owners could not pursue new theory for relief first asserted in papers filed in opposition to service station operator's motion for summary judgment; new theory had not been included in property owner's complaint, nor could it be inferred from allegations in complaint.

4 Cases that cite this headnote

4 **Limitation of Actions**
- Injuries to Property in General

Under California law, statute of limitations governing injury to real property runs from date of act causing immediate and permanent injury to property.

1 Cases that cite this headnote

5 **Limitation of Actions**
- Injuries to Property in General

Under California law, statute of limitations governing injury to real property from series of acts by defendant runs from date of last act.

1 Cases that cite this headnote

6 **Limitation of Actions**
- In General; What Constitutes Discovery

"Discovery rule" under California law postpones commencement of limitations period until either plaintiff actually discovers his injury and its negligent cause, or could have discovered injury and cause through exercise of reasonable diligence.

7 **Limitation of Actions**
- Want of Diligence by One Entitled to Sue

Discovery rule under California law imposes duty to investigate further if plaintiff becomes aware of facts which would make reasonably prudent person suspicious, and charges plaintiff with knowledge of matters which would have been revealed by such investigation.

8 **Limitation of Actions**

Ignorance, Trust, Fraud, and Concealment of Cause of Action

Plaintiff intending to rely on discovery rule under California law must specifically plead facts showing time and manner of discovery and inability to have made earlier discovery despite reasonable diligence; mere conclusory assertions that delay in discovery was reasonable are insufficient.

1 Cases that cite this headnote

9 **Limitation of Actions**

Injuries to Property

Discovery rule under California law did not toll statute of limitations that otherwise barred property owners' tort claims against service station operator concerning soil contamination, in light of owners' knowledge of age of underground tank system, and in light of owners' statutory duty to conduct reasonable investigation of property to determine extent of any contamination and its source. West's Ann.Cal.Health & Safety Code § 25292(a); West's Ann.C.C.P. § 338.

10 **Federal Civil Procedure**

Tort Cases in General

Genuine issues of material fact existed, precluding summary judgment for service station operator, on whether service station operator installed pipe which caused soil contamination of property for purposes property owners' claims for continuing nuisance, public nuisance and continuing trespass.

11 **Nuisance**

Defenses

Nuisance

Actions for Damages

Trespass

Consent or License

Service station operator failed to establish consent as affirmative defense to continuing nuisance, public nuisance and continuing trespass claims brought by property owners, despite prior property owners' consent to use of leased property as service station; no evidence indicated that prior owners specifically consented to use of leaking pipe.

12 **Federal Civil Procedure**

Tort Cases in General

Genuine issues of material fact existed, precluding summary judgment for service station operator, on whether operator concealed material information about probability of storage tank leakage with requisite intent to defraud property owners by inducing them to purchase tanks from operator upon expiration of operator's lease, and whether any such fraud warranted award of punitive damages. West's Ann.Cal.Civ.Code §§ 1709, 1710, 3294.

Attorneys and Law Firms

*1234 Dana McRae, of McCutchen, Doyle, Brown & Enersen, San Jose, CA, for defendant Texaco.

Henry Mariani, San Jose, CA, for plaintiffs Michael and Maria Mortkowitz.

Opinion

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

INFANTE, United States Magistrate Judge.

I. INTRODUCTION

In this action property owners Michael and Maria Mortkowitz allege that their former tenant, Texaco, Inc. caused

serious gasoline fuel contamination to their property while maintaining and operating a gasoline station on the property. Defendant seeks partial summary judgment as to seven of Plaintiffs' nine claims primarily on the grounds that the claims are barred by the applicable statutes of limitations. [1]

The motion was heard on December 13, 1993. Having considered the motion, opposition, and reply papers, and the comments of counsel, Defendant's motion for partial summary judgment is GRANTED IN PART and DENIED IN PART as set forth below.

II. BACKGROUND

The property which is the subject of this action is located at 1990 Los Gatos-Almaden Blvd., San Jose, California. It was leased to Texaco by the former property owners, Mario and Grace Canavero from July 1, 1956 through April of 1983. The lease, drafted and prepared by Texaco, provided in relevant part that the Canaveros would build a gasoline service station on the property for Texaco's use. The lease also provided that Texaco would furnish and retain title to, and the Canaveros would install gasoline pumps, two 4,000 gallon underground tanks, one 2,000 gallon underground tank, one 550 gallon waste oil tank, gallon lubricating outfits, and waste oil tanks. On May 1, 1967, Texaco and the Canaveros entered into a modification of the lease which provided that the Canaveros would modernize the service station, replace some but not all of the underground tanks, and install two additional tanks and associated piping.

In 1977, Plaintiffs purchased the property from the Canaveros subject to the Texaco lease. Thereafter, Texaco continued to operate a gasoline station on the property. Prior to the expiration of the lease, Texaco notified Plaintiffs of its intention to exercise its option to purchase the property. However, Texaco did not purchase the property and instead sold its equipment on the property to Plaintiffs on May 17, 1983. The Bill of Sale for the tanks provided in pertinent part:

> Texaco Inc., in the execution of this Bill of Sale, does not represent that said tanks are in repair or in good condition and these tanks are sold in the condition which they are in at the present time with-out any representation as to what that condition may be ... Those items described above as "used" are sold "as is." THERE ARE NO WARRANTIES WHICH EXTEND BEYOND THE FOREGOING DESCRIPTION OF THE PROPERTY.

For the next six years Plaintiffs leased the property to various tenants who also operated the gasoline service station.

On July 1, 1983, more than a month after Plaintiffs purchased the underground tanks, the Hazardous Materials Storage Ordinance, San Jose Municipal Code, Title 17, chapter 17.68 (the "HMSO"), became effective, and required owners of underground "storage facilities," defined to include tanks and "pipes," to outfit the facility with a monitoring system capable of detecting unauthorized releases of any hazardous substances, including gasoline, stored in the facility. In 1983, the California Legislature enacted a similar law requiring ***1235** owners to outfit their underground tank systems, including "connecting piping," with a monitoring system capable of detecting unauthorized releases of any hazardous substances stored in the tank by July 1, 1985. California Health and Safety Code § 25292(a).

On November 1, 1988, Plaintiffs received a bona fide offer to purchase the property from Village Properties. During the buyer's investigation of the premises, Plaintiffs became aware of the existence and requirements of the San Jose HMSO. The buyer withdrew from the sale after testing disclosed that one of the underground storage tanks was in failure mode.

Plaintiffs later hired an engineering contractor to remove the underground fuel tanks. On April 11, 1989, five drained and emptied underground fuel tanks were removed from the property. Captain John Castro, Jr. of the San Jose Fire Department was present at the removal of the tanks, and testified at his deposition that he examined the tanks and did not find any evidence of any holes or cracks in the tanks or any evidence that there had been any leakage from the tanks. However, it was discovered that a loose pipe union in the piping system leading to the tanks had been leaking. As a result of the fuel leak, the Santa Clara Valley Water District (the "SCVWD"), the local agency in charge of investigation and remediation at fuel leak sites, required Plaintiffs to clean up the contamination on the property at their own cost and expense.

By letter dated March 29, 1990, Plaintiffs informed Texaco of the contamination on the property. Having received no response, Plaintiffs filed an action against Texaco regarding the contamination on the property on April 13, 1990.

During the course of discovery, Texaco produced documents to Plaintiffs which indicated that one of Texaco's station operators, Yaghaub Halelouyan, did not maintain gasoline inventory records from at least July 30, 1980 through April

8, 1983. Texaco also produced documents indicating that on July 11, 1980, a Texaco corrosion engineer/consultant named Warren Rogers prepared a report on the condition of Texaco's Cathodic protection system on the property.[2] Texaco also produced documents indicating that in 1982, Mr. Rogers also prepared, at Texaco's request, a report on the condition of the underground tank system and the probabilities that the tanks were leaking.

On October 5, 1992, the parties stipulated to the filing of Plaintiffs' First Amended Complaint. The Amended Complaint contains nine claims for relief: breach of contract; negligence; public nuisance; private nuisance; trespass; strict liability for an ultrahazardous activity; indemnification and declaratory relief; declaratory relief under federal law regarding liability; and fraud. Defendant asserts that it is entitled to summary judgment as to all of Plaintiffs' claims for relief except those for indemnification and declaratory relief.

III. SUMMARY JUDGMENT STANDARD

Rule 56(c), Fed.R.Civ.P., provides that summary judgment shall be entered against the non-moving party if:

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The test to determine whether a motion for summary judgment should be granted "mirrors" that applied to a motion for a directed verdict:

> The trial judge must direct the verdict if, under governing law, there can be but one reasonable conclusion as to the verdict.

Id. at 250. Accordingly, in reversing a denial of summary judgment, the Supreme Court ruled:

> Where the record taken as a whole could not lead a rational trier of fact to find for ***1236** the non-moving party, there is no "genuine issue for trial" under Rule 56(c).

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

The burden of establishing the nonexistence of a "genuine issue as to any material fact" is initially on the party moving for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The moving party's burden of demonstrating that it is entitled to judgment as a matter of law may be satisfied by showing that there is an absence of evidence to support the nonmoving party's case. *Celotex, supra.*

Once the moving party properly supports its motion showing that it is entitled to judgment as a matter of law, the party opposing the motion must present affirmative evidence to establish a genuine dispute of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Rule 56 mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex, supra; Lake Nacimiento Ranch Co. v. San Luis Obispo*, 841 F.2d 872 (9th Cir.1987). Furthermore, sufficient evidence must be produced upon which the jury could reasonably find for the nonmoving party based on the applicable evidentiary standards. *Anderson, supra.*

IV. DISCUSSION

A. Plaintiffs' First Claim for Relief: Breach of Contract

Defendant asserts that Plaintiffs' first cause of action for breach of contract is barred by the four year statute of limitations for breach of contract claims provided by Code of Civil Procedure § 337.[3] Plaintiffs allege in their complaint that "Texaco impliedly covenanted to restore the premises to Mortkowitz unimpaired beyond ordinary wear and tear," and that Texaco breached that covenant when it surrendered the premises in a polluted condition and incapable of full use for any purpose. (Complaint, ¶¶ 15, 16).

1 **2** In general, a cause of action for breach of contract accrues at the time of breach, and the statute of limitations begins to run at that time. *Donahue v. United Artists Corporation*, 2 Cal.App.3d 794, 83 Cal.Rptr. 131 (1969); *See also, Witkin, Cal.Procedure*, § 375, at 402 (3rd ed. 1985). If Texaco breached the implied covenant, the alleged breach would have occurred when Texaco's lease expired in April of 1983. *Donahue, supra.* Thus, the limitation period began to run in April of 1983, and expired by April of 1987, approximately three years before Plaintiffs filed suit on April 13, 1990.

3 In their opposition, Plaintiffs appear to have completely abandoned their original breach of contract theory, raising for the first time a new breach of contract theory. They assert that the lease agreement contained an express provision to

"indemnify and save the lessor harmless from and against all liability, damages and judgments arising from injury during the term herein to person or property occasioned by the acts or omissions of lessee," (the "indemnification provision"), and that Texaco breached this indemnification provision in April of 1990 when Texaco refused to accept responsibility for the clean-up costs imposed upon Plaintiffs by the SCVWD. Plaintiffs reason that their action for breach of the lease agreement is timely because it was brought within one year of Texaco's breach and within one year of notification by the SCVWD that Plaintiffs would be responsible for the clean-up costs.

Plaintiffs' new theory is not properly before the Court. It is not a part of the complaint nor can it be inferred from the allegations in the complaint. Moreover, at no time prior to the filing of the opposition papers to the motion for summary judgment did Plaintiffs indicate that this new theory was to be pursued. *See,* ***1237** *Tucson Elec. Power v. Westinghouse Elec.,* 597 F.Supp. 1102 (D.Ariz.1984).

New allegations asserted in opposition to a motion for summary judgment may, in some circumstances, be treated as a motion to amend the complaint pursuant to Rule 15(a), Fed.R.Civ.P. *William Inglis, Etc. v. ITT Continental Baking Co.,* 668 F.2d 1014, 1053, fn. 68 (9th Cir.1981), *citing, Sherman v. Hallbauer,* 455 F.2d 1236, 1242 (5th Cir.1972). Rule 15(a) provides that leave to amend shall be freely given when justice so requires, and several factors are relevant to determine whether leave to amend should be granted, including "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposition party by virtue of the allowance of the amendment, [and] futility of amendment." *Schlacter-Jones v. General Telephone,* 936 F.2d 435 (9th Cir.1991). However, these issues are not addressed by either party in their motion papers. Therefore, the Court declines to treat Plaintiffs' new allegations as a motion to amend.

Since Plaintiffs' contract claim as alleged in their first amended complaint accrued in April of 1983 when Texaco vacated the property and the four year statute of limitation expired in April of 1987, Plaintiffs' claim is time barred. Accordingly, Defendant is entitled to summary judgment as to Plaintiffs' contract claim.

B. Plaintiffs' Second, Third, Fourth, Fifth & Sixth Claims for Relief

Defendant asserts that Plaintiffs' claims for negligence, permanent nuisance, and permanent trespass are barred by the three year statute of limitations provided by Code of Civil Procedure § 338 for actions for trespass upon or injury to real property.[4] Defendant also asserts that even if the claims are not time barred, there is no evidence to support Plaintiffs' claims for negligence, public nuisance, continuing nuisance, continuing trespass, and strict liability for an ultrahazardous activity. Defendant also asserts that the doctrine of strict liability for an ultrahazardous activity is not applicable to the maintenance and use of an underground gasoline storage system.

1. Statute of Limitations Provided by C.C.P. § 338

4 5 Whether Plaintiffs' claims for negligence, permanent nuisance, permanent trespass, and strict liability for an ultrahazardous activity are time-barred depends on when the cause of action accrued.[5] *Leaf v. City of San Mateo,* 104 Cal.App.3d 398, 163 Cal.Rptr. 711 (1980). The question of when a cause of action accrues is a mixed question of law and fact. *Id.* The traditional rule in tort cases is that the applicable limitation period will run from accrual of the action "upon the occurrence of the last element essential to the cause of action." *CAMSI IV v. Hunter Technology Corp.,* 230 Cal.App.3d 1525, 1534, 282 Cal.Rptr. 80 (1991). In the case of injury to real property, the statute of limitations runs from the date of the act causing "immediate" and "permanent" injury. *Id.* For purposes of the statute of limitations, "the harm implicit in a tortious injury to property is harm to the property itself." *CAMSI IV,* 230 Cal.App.3d at 1535, 282 Cal.Rptr. 80. If the injury to the property is caused by a series of acts by the defendant, the general rule is that the statute of limitations runs from the date of the last act. *Id.*

Plaintiffs allege that the pollution was caused during the 27 years that the property was leased to Texaco (Complaint, ¶ 11), and thus, implicitly allege that the polluting continued until the lease expired and Texaco vacated the property in April of 1983. Under the traditional rule, the three year statute of limitations commenced no later than April of 1983 and expired by April of 1986, ***1238** almost four years before Plaintiffs filed suit on April 13, 1990. *Id.*

6 7 Plaintiffs, however, assert that they may invoke the so-called "discovery rule" to delay commencement of the limitation period until 1989, when they first became aware of the contamination on the property. The "discovery rule"

postpones the commencement of the limitation period until "the plaintiff discovers or should have discovered all facts essential to his cause of action [citations]." *CAMSI IV,* 230 Cal.App.3d at 1536, 282 Cal.Rptr. 80. More specifically, commencement of the limitation period is postponed until either (1) the plaintiff actually discovers his injury and its negligent cause; or (2) could have discovered injury and cause through the exercise of reasonable diligence. *Id.* Subjective suspicion is not required. *Mangini v. Aerojet-General Corp.,* 230 Cal.App.3d 1125, 1150, 281 Cal.Rptr. 827 (1991). If a person becomes aware of facts which would make a reasonably prudent person suspicious, he or she has a duty to investigate further and is charged with knowledge of matters which would have been revealed by such an investigation. *Id.*

The "discovery rule" is meant to ameliorate the harshness of the traditional application of the statute of limitations where it would be "manifestly unjust to deprive a plaintiff of a cause of action before he is aware he has been injured." *Mangini,* 230 Cal.App.3d at 1150, 281 Cal.Rptr. 827, *citing Leaf, supra.* Thus, the rule protects the plaintiff who is 'blamelessly ignorant' of his cause of action. [Citations]" *Leaf,* 104 Cal.App.3d at 408, 163 Cal.Rptr. 711. The rule is "based on the notion that statutes of limitations are intended to run against those who fail to exercise reasonable care in the protection and enforcement of their rights; therefore, those statutes should not be interpreted so as to bar a victim of wrongful conduct from asserting a cause of action before he could reasonably be expected to discover its existence. [Citations]" *CAMSI IV,* 230 Cal.App.3d at 1536, 282 Cal.Rptr. 80. The rule has been applied in various tort actions, including those involving nonobvious or latent injuries to real property. *See e.g., CAMSI IV, supra; Allen v. Sundean,* 137 Cal.App.3d 216, 186 Cal.Rptr. 863 (1982); *Leaf v. City of San Mateo,* 104 Cal.App.3d 398, 163 Cal.Rptr. 711 (1980).

8 A plaintiff who intends to rely on the "discovery rule" must specifically plead facts which show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence. *CAMSI IV, supra.* Mere conclusory assertions that delay in discovery was reasonable are insufficient. *Id.* Defendant asserts that the allegations in Plaintiffs' complaint are insufficient to establish the applicability of the "discovery rule." However, at the summary judgment stage, the sufficiency of Plaintiffs' allegations are no longer reviewed in the abstract, but are tested in light of the evidence submitted by the parties.

9 It is undisputed that Plaintiff did not have actual knowledge of the leaking pipe union or contamination until April of 1989. Thus, the only issue is whether Plaintiffs should have discovered, through the exercise of reasonable diligence, the contamination on the property and its cause any earlier. Defendant asserts that the exercise of reasonable diligence would have led to the discovery of contamination on the property by at least 1985, when Plaintiffs should have complied with California Health and Safety Code § 25292(a).

In *Mangini, supra,* the Court of Appeals faced a similar issue. In that case, the plaintiffs, landowners, alleged that a former lessee had contaminated the property with waste rocket fuel and other hazardous substances during the leasehold. The Court of Appeals for the Third District held as a matter of law that a combination of three facts was sufficient to put the plaintiffs on notice of the possibility that defendant had dumped hazardous waste on their land: (1) a recorded lease gave notice that the defendant had engaged in activities of a potentially hazardous nature on their land; (2) the Department of Justice investigated defendant's practices regarding disposal of hazardous waste in the area; and (3) the defendant asked plaintiffs for permission to inspect their property. *Mangini,* 230 Cal.App.3d at 1152, 281 Cal.Rptr. 827. The Court also stated, "Whether ***1239** any of these three facts in isolation would be sufficient to impart notice is open to dispute." *Id.*

Similarly, in *CAMSI IV, supra,* the Court of Appeals for the Sixth District held that the plaintiff was not entitled to the benefit of the "discovery rule" because (1) a Regional Board order was issued which "mandated investigation of the groundwater and soil" of the property; and (2) the plaintiff was aware of contamination on certain portions of their property. The Court reasoned, "Given notice of the present of TCE [trichloroethene] or other VOCs [volatile organic chemicals] anywhere on the property, the owner could properly be expected, in the exercise of reasonable diligence, to conduct an adequate investigation of all parts of its property and particularly of former manufacturing sites." *CAMSI IV,* 230 Cal.App.3d at 1537-38, 282 Cal.Rptr. 80.

In the present case, the exercise of reasonable diligence by the Plaintiffs would have led to the discovery of contamination on the property no later than July 1, 1985. In 1983, the year Texaco vacated the property, the California Legislature enacted strict requirements for the underground storage of hazardous substances, including gasoline. Health and Safety Code § 25280 *et seq.,* Chapter 6.7. The Legislature's intent

in enacting the new statutory scheme was set forth in great detail:

> (1) Substances hazardous to the public health and safety and to the environment are stored prior to use or disposal in thousands of underground locations in the state.
>
> (2) Underground tanks used for the storage of hazardous substances and wastes are potential sources of contamination of the ground and underlying aquifers, and may pose other dangers to public health and the environment.
>
> (3) In several known cases, underground storage of hazardous substances, including, but not limited to, industrial solvents, petroleum products, and other materials, has resulted in undetected and uncontrolled releases of hazardous substances into the ground. These releases have contaminated public drinking water supplies and created a potential threat to the public health and to the waters of the state.
>
> . . . . .
>
> (5) The protection of the public from releases of hazardous substances is an issue of statewide concern ...
>
> (b) The Legislature therefore declares that it is in the public interest to establish a continuing program for the purpose of preventing contamination from, and improper storage of, hazardous substances stored underground. It is the intent of the Legislature, in enacting this chapter to establish orderly procedures that will ensure that newly constructed underground storage tanks meet appropriate standards and that existing tanks be properly maintained, inspected, tested, and upgraded so that the health, property, and resources of the people of the state will be protected.

Health and Safety Code § 25280 (current version). The new legislation required owners and operators of an "underground storage tank"-defined to include pipes connected to the tanks-to obtain a permit to own or operate an underground storage tank from the local agency. Health and Safety Code § 25283 (amended 1984, 1989, and 1992; current version at § 25284). Plaintiffs were also specifically required to meet the following conditions:

> For every underground storage tank installed on or before January 1, 1984, and used for the storage of hazardous substances, the following actions shall be taken:
>
> (a) On or before *July 1, 1985,* the owner shall outfit the facility with a monitoring system capable of detecting unauthorized releases of any hazardous substances stored in the facility ...
>
> (b) Provide a means for visual inspection of the tank, wherever practical, for the purpose of the monitoring required by subdivision (a).

Health and Safety Code § 25284.1 (amended 1984, 1986, 1987, and 1989; current version at § 25292). As owners of the underground tank system, Plaintiffs were further required to (1) provide a copy of the permit to the gas station operator (Plaintiffs' lessee), (2) enter ***1240** into a written contract with the gas station operator requiring the gas station operator to monitor the tank system, and (3) notify the gas station operator in writing of the civil and criminal penalties for noncompliance. Health and Safety Code § 25284.2 (amended 1984 and 1989; current version at § 25293). The legislation also imposed civil penalties of not less than five hundred dollars ($500) or more than five thousand dollars ($5,000) per day upon owners who failed to comply with all statutory requirements for owning and operating underground storage tanks. Health and Safety Code § 25287 (amended 1984, 1986, 1988, 1991; current version at § 25299).

Thus, by 1985, Plaintiffs were subject to a statutorily defined duty of inquiry imposed by the Health and Safety Code, which was similar in nature to the duty of inquiry imposed upon the plaintiffs in *Mangini* by the Department of Justice. *See also CAMSI IV, supra* (Regional Board ordered plaintiff to investigate the groundwater and soil of the property). Plaintiffs could properly be expected to have exercised reasonable diligence by conducting an investigation of their property to determine the extent of any contamination on the property and the source of the contamination as required by law.[6] A plaintiff who fails to comply with an explicit statutory mandate enacted to discover precisely the type of harm which the plaintiff alleges is not "blamelessly ignorant" of his cause of action, and cannot claim the benefit of an equitable rule designed to ameliorate the harshness of the traditional application of the statute of limitations.[7]

Furthermore, when Texaco vacated the property and sold the underground tanks to Plaintiffs, Plaintiffs were aware that the property had been utilized as a gasoline station continuously for twenty-seven years, and that some of the original underground tanks and piping, installed in 1956, were still being utilized. The knowledge that the property

had been utilized as a gasoline station for over twenty-seven years with some of the original tanks and piping should have put Plaintiffs on inquiry about possible soil contamination notwithstanding the duty of inquiry imposed upon them by law.

The combination of Plaintiffs' knowledge of the age of the underground tank system along with the statutory duty of inquiry imposed upon all owners and operators of underground tanks establishes as a matter of law that Plaintiffs should have been on notice of the possibility that their property may have been contaminated and that Texaco may have caused some or all of the contamination. *See e.g. Mangini, supra.* Therefore, the statute of limitations on Plaintiffs' claims for negligence, permanent nuisance, permanent trespass, and strict liability began to run no later than July 1985, and expired in July 1988, nearly two years before Plaintiffs ***1241** filed suit in April 1990. [8]

2. Continuing Nuisance & Continuing Trespass

While Plaintiffs' claims for permanent nuisance and permanent trespass are time barred, Plaintiffs' claims for *continuing* public and private nuisance and *continuing* trespass are not time barred. *Mangini, supra; CAMSI IV, supra; Wilshire Westwood Associates, supra.*

However, Texaco asserts that there is no evidence to support Plaintiffs' claims for continuing nuisance, public nuisance, and continuing trespass. The crux of Defendant's argument is that Plaintiffs have no evidence that Texaco installed the leaking pipeline. In support of its position, Texaco has submitted a copy of a building permit from the Santa Clara County Building Inspection Department dated May 28, 1956 which indicates that a contractor named Oscar Liebert built the service station.

Texaco also denies installing any replacement tanks and piping as part of the modernization of the gasoline station in 1967. Texaco has submitted a letter from Oscar Liebert to Texaco dated May 1, 1965 which sets forth the total cost of the service station construction and equipment. Texaco has also submitted a letter from Texaco to the Canaveros dated May 14, 1968 indicating that Texaco accepts the "work of rehabilitation of the service station facilities" as complete. However, neither of the documents conclusively establishes that the Canaveros were responsible for the installation of tanks and piping. Furthermore, Texaco admits that it has been unable to locate any documents indicating who installed the new tanks and pipes.

Plaintiffs assert several arguments in rebuttal, and in particular, point to the declaration of former property owner Grace Canavero which states:

> During all of the time that Mario A. Canavero and/or I leased the aforesaid premises to Texaco, it exercised sole and exclusive control over the furnishing, installation, replacement, maintenance and repair of the several underground fuel tanks located on the premises. At all times, Texaco exercised sole control in removing and/or replacing such fuel tanks as were removed or replaced during the time that Mario A. Canavero and/or I leased the aforesaid premises to Texaco.

Plaintiffs also propounded interrogatories upon Texaco during the course of discovery, specifically asking what repairs, reconstructions or upgrades were furnished by Texaco for the product storage and delivery systems at the subject property between the years 1956 and May 1983. Texaco responded stating that it "installed pipes and fittings, installed vapor recovery system, installed submerged pumps, installed dispensers, installed pumps, installed two underground tanks and rehabilitated station." Furthermore, it is significant that Texaco did not object to a previous order by the Honorable Robert F. Peckham, United States District Judge, filed September 28, 1990 in which the Court found, that Texaco "furnished, installed, and replaced certain underground fuel tanks," and that "[d]uring the term of the Lease, Texaco exercised sole control over the furnishing, installation, maintenance, and repair of the underground fuel tanks."

10 Plaintiffs have successfully raised genuine issues as to whether the Canaveros or Texaco installed the original underground tanks and piping; whether the Canaveros or Texaco installed the replacement tanks in 1967; and whether the piping was replaced at all in 1967. Plaintiffs' evidence provides a sufficient basis upon which a jury could reasonably find that Texaco was responsible for the installation of the leaking pipeline.

11 However, Defendant also asserts as an affirmative defense that the Canaveros ***1242** consented to Texaco's use of the property as a service station. As a general rule, consent is a defense to claims of trespass and nuisance. *Mangini, supra.* In this case, however, there is no evidence that the Canaveros specifically consented to Texaco's use of the leaking pipeline, despite their general consent to the use of the property as a service station. Accordingly, Plaintiffs may pursue their claims for continuing nuisance, public nuisance

and continuing trespass, but their recovery is limited to those damages sustained within the three years prior to the commencement of this action in April 13, 1990. *Mangini, supra; Torrance Redevelopment Agency v. Solvent Coating,* 781 F.Supp. 650 (C.D.Cal.1991).

C. Plaintiffs' Ninth Claim for Relief: Fraud

12 Plaintiffs must prove the following elements to maintain their fraud claim: (1) willful concealment of a known fact by one bound to disclose it; (2) intent to induce reliance; (3) justifiable reliance; and (4) resulting damage. Civil Code §§ 1709, 1710; *Continental Airlines Inc. v. McDonnell Douglas Corp.,* 216 Cal.App.3d 388, 404, 264 Cal.Rptr. 779 (1989).

Texaco asserts that it is entitled to summary judgment as to Plaintiffs' claim for relief because (a) there is no evidence that Texaco knew of any leaks in the underground tanks or the pipe union before they were sold to Plaintiffs; (b) Texaco did not induce Plaintiffs to purchase the tanks, but instead notified Plaintiffs of its intent to exercise the option to purchase the property as provided for in the lease; and (c) since the tanks were found to be intact on removal and could not have been the cause of contamination, Plaintiffs cannot prove causation.

Texaco relies primarily on a number of letters exchanged between Texaco and Mr. Mortkowitz from February 24, 1982 to August 12, 1982 which indicate that Texaco notified Plaintiffs of its intent to exercise the option to purchase the property under the lease, and that Mr. Mortkowitz opposed the proposed purchase. However, the sale of the underground tanks was not completed until May of 1983. Thus, Texaco's letters, sent approximately nine months prior to the completion of the sale, do not necessarily negate Texaco's intent to defraud Plaintiffs.

In contrast, Plaintiffs have described in detail Texaco's failure to disclose four material facts which would have affected their desire to go forward with the purchase of the tanks: (1) that Texaco's station operator Yaghaub Halelouyan had refused to provide Texaco with quarterly inventory reconciliation records within the year preceding Plaintiffs' purchase; (2) that the anodes in the Cathodic protection system on the site had deteriorated and had a short life left; (3) that the cathodic protection system was probably not effective because it was installed on "already corroded tanks" [9] ; and (4) that a study of the corrosion life of the tanks commissioned by Texaco in 1982 indicated that the tanks on the premises had a "probability of leaking" of 0.9360, and that one year later, the probability increased to 0.9856. Plaintiffs assert that all of this information was available to Texaco prior to the completion of the sale on May 17, 1983. In particular, Plaintiffs have presented evidence that the analysis of the field test data for the 1982 study was completed on March 23, 1983, and therefore available to Texaco prior to the completion of the sale.

Plaintiffs have presented sufficient evidence upon which a jury could find that Texaco concealed material information with the requisite intent to induce Plaintiffs to purchase the tanks from Texaco. Furthermore, Plaintiffs contend that if the information had been disclosed, it would have materially affected (1) their decision to preclude Texaco from exercising its option to purchase the property for $120,000 as provided in the modification to the lease; and (2) their decision to purchase the underground tanks from Texaco for $20,000. Accordingly, Defendant's ***1243** motion for summary judgment as to Plaintiffs' claim for fraud is denied.

D. Plaintiffs' Request for Punitive Damages

Civil Code Section 3294 provides that "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff ... may recover damages for the sake of example and by way of punishing the defendant." As discussed immediately above, there is sufficient evidence upon which a jury could find that Texaco fraudulently induced Plaintiffs to purchase the tanks. Accordingly, Defendant's motion for summary judgment as to Plaintiffs' claim for punitive damages is denied.

V. CONCLUSION

Texaco's motion for summary judgment is granted in part and denied in part. Texaco is entitled to summary judgment as to Plaintiffs' claims for negligence, permanent nuisance, permanent trespass, and strict liability for an ultrahazardous activity on the grounds that such claims are barred by the statute of limitations provided by Code of Civil Procedure Section 338.

However, Plaintiffs have successfully established genuine issues of material fact which preclude the entry of summary judgment on their claims for continuing nuisance, public nuisance, continuing trespass, fraud and punitive damages.

IT IS SO ORDERED.

Footnotes

1 The parties have consented that all proceedings in the above entitled case may be heard and finally adjudicated by the assigned magistrate judge pursuant to Rule 73, Fed.R.Civ.P. and 28 U.S.C. Section 636(c).

2 A "Cathodic protection system" uses anodes to attract corrosion away from the tanks, thereby increasing tank life.

3 All statutory references are to the California Code of Civil Procedure unless otherwise specified.

4 Defendant does not argue, however, that Plaintiffs' claims for *continuing* nuisance and *continuing* trespass are barred by the statute of limitations.

5 Although not asserted by Defendant, Plaintiffs' sixth claim for strict liability for an ultrahazardous activity is subject to the same three-year statute of limitations provided by Section 338 for actions for injury to real property. *Wilshire Westwood Associates v. Atlantic Richfield Co.*, 20 Cal.App.4th 732, 24 Cal.Rptr.2d 562 (1993).

6 Defendant also asserts that the exercise of reasonable diligence would have led to the discovery of contamination on the property if plaintiffs had complied with the San Jose HMSO. However, it is questionable whether Plaintiffs had reason to know that the Ordinance applied to their property. Plaintiffs have submitted a letter dated November 22, 1988 from Clifford A. Young, Inspector, Hazardous Materials Division, San Jose Fire Department to Village Properties stating in relevant part:

> Our office has researched our database in response to your Public Information Request (PIR # 344). The initial site address referenced in your request was not found in our database. The site address you listed initially is in an area bordering San Jose, Los Gatos, and Santa Clara County. Our Hazmat database covers only businesses located within the San Jose city limits. It was concluded the business was, therefore, in Los Gatos or Santa Clara County jurisdiction.
>
> On Thursday, November 17, 1988, you phoned with new site address information. The new site address you gave was 1990 Los Gatos. I reexamined our database as you requested and located the Arco Station you were seeking information about in our files. The file folder indicated the station is there, but no hazardous materials information is stored. Based upon the information in the file, the Arco Station was at one point in the jurisdiction of the Town of Los Gatos. It now appears the area has been annexed to the City of San Jose, but has not been included in our Hazmat database.
>
> Thank you for making our Department aware of the over sight. The situation is now in the process of being corrected. The owner/ operator of the Arco Station will be contacted about compliance with the San Jose Hazardous Materials Storage Ordinance.

7 *See,* page 1238, *supra,* for discussion of the application of the discovery rule.

8 Defendant asserts as an alternative ground for summary judgment that Plaintiffs' claims are barred by the ten year statute of limitations provided by Section 337.15 for claims based on latent defects in construction of real property. Since Plaintiffs' four claims are time barred by Section 338, the Court need not consider the applicability of Section 337.15. The Court also need not consider the sufficiency of evidence supporting Plaintiffs' claims, nor consider whether the operation of a gasoline service station with underground storage tanks constitutes and ultrahazardous activity for purposes of the tort of strict liability.

9 Plaintiffs rely on the expert opinion of George Nekoksa that (1) the anodes in the cathodic protection system installed on the property had deteriorated and had a short life left, and (2) that the cathodic protection system was probably not effective because it was installed on already corroded tanks. Defendant objects to these opinions on the grounds that they lack foundation.

End of Document

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I, Christina Sanchez, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 E. Ocean Boulevard, Suite 200, Long Beach, California 90802.

On January 26, 2012, I served the foregoing document(s) described as

NOTICE OF LODGING FEDERAL AUTHORITY CITED IN DEFENDANT SAN GABRIEL VALLEY GUN CLUB'S DEMURRER TO PLAINTIFF'S COMPLAINT

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

Kenneth A. Ehrlich
Paul A. Kroger
JEFFER, MANGELS, BUTLER & MITCHEL, LLP
1900 Avenue of the Stars, 7th Floor
Los Angeles, CA 90067

X (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.
Executed on January 26, 2012, at Long Beach, California.

___ (VIA OVERNIGHT MAIL As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for overnight delivery by UPS/FED-EX. Under the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for receipt on the same day in the ordinary course of business. Such envelope was sealed and placed for collection and delivery by UPS/FED-EX with delivery fees paid or provided for in accordance with ordinary business practices.
Executed on January 26, 2012, at Long Beach, California.

___ (PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.
Executed on January 26, 2012, at Long Beach, California.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

___ (FEDERAL) I declare that I am employed in the office of the member of the bar of this court at whose direction the service was made.

Christina Sanchez
CHRISTINA SANCHEZ