FRED M. BLUM, ESQ. (SBN 101586)
fblum@eghblaw.com
WILLIAM NOEL EDLIN, ESQ. (SBN 107796)
nedlin@eghblaw.com
MARYLIN JENKINS, ESQ. (SBN 89832)
mjenkins@eghblaw.com
EDLIN GALLAGHER HUIE + BLUM
601 Montgomery Street, Suite 1100
San Francisco, CA 94111
Telephone: (415) 397-9006
Facsimile: (415) 397-1339

KRISTA MACNEVIN JEE, ESQ. (SBN 198650)
kmj@jones-mayer.com
JONES MAYER
3777 N. Harbor Blvd.
Fullerton, CA 92835
Telephone: (714) 446-1400
Facsimile: (714) 446-1448

Attorneys for Defendants CITY OF FORT BRAGG

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – OAKLAND DIVISION

SIERRA NORTHERN RAILWAY, a California corporation, and MENDOCINO RAILWAY, a California corporation, Plaintiffs, vs. CITY OF FORT BRAGG, et al., Defendants.	Case No.: 4:24-cv-04810-JST **DEFENDANT CITY OF FORT BRAGG'S NOTICE OF MOTION AND MOTION TO DISMISS FIRST THROUGH THIRD CLAIMS FOR RELIEF PURSUANT TO Fed. R. Civ. P. (12)b)(6), AND MOTION TO STRIKE PURSUANT TO Fed. R. Civ. P12(f)** DATE: February 20, 2025 TIME: 2:00 p.m. DEPT: Courtroom 6, Second Floor Case Filed: August 7, 2024

PLEASE TAKE NOTICE that on February 20, 2025, at 2:00 p.m. in Courtroom 6 of the above entitled Court located at the Ronald V. Dellums Federal Building & United States Courthouse, 1301 Clay Street, Oakland, CA 94610, Defendant CITY OF FORT BRAGG (hereinafter "The City") will move this Court for an Order dismissing the First through Third

Claims for Relief of the Second Amended Complaint ("SAC") of Plaintiffs SIERRA NORTHERN RAILWAY and MENDOCINO RAILWAY (hereinafter collectively "The Railways). The City's Defendant's motion to dismiss is made in accordance with Federal Rule of Civil Procedure 12(b)(6) on the grounds that the First through Third Claims for Relief of the Second Amended Complaint fail to state causes of action under CERCLA on which relief may be granted.

The City will also move the Court for an Order striking Paragraph 37 of the SAC, on the grounds that a prayer for the imposition of joint and several liability in a contribution action is not permitted by a plaintiff which is itself a Potentially Responsible Party ("PRP").

Defendant's motion to dismiss and motion to strike shall be based on this Notice, the attached Memorandum of Points and Authorities, The Railways' Second Amended Complaint, the complete files and records of this action, and such other and further oral and written evidence as may be presented at the hearing of this Motion.

Date: January 3, 2025

EDLIN GALLAGHER HUIE + BLUM

By_____
MARYLIN JENKINS
Attorneys for Defendan
CITY OF FORT BRAGG

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

MEMIRANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Railways have filed a SAC against the City alleging liability under 42 U.S.C. Section 9607(a)(4)(B) (hereinafter "CERCLA 107") and for contribution under 42 U.S.C. Section 9613(f)(1). The City moves to dismiss the SAC under Fed. R. Civ. P. 12(b)(6), and further moves to strike paragraph 37 of the SAC.

II. STATEMENT OF FACTS

According to the SAC, Sierra Northern Railway owns a plot of land in Fort Bragg, California, ("the Site"). The Site was previously owned and is currently operated by Mendocino Railway. The Site was owned by Georgia Pacific from 1972 until 2002, when Georgia-Pacific apparently ceased operations. Georgia-Pacific investigated "environmental concerns" at the Site and expended approximately $31 million in response costs through 2011. Georgia-Pacific dismissed the lawsuit it filed against the City in October of 2014. The Railways allege that The City has been polluting a pond on the Site ("the Pond") with stormwater runoff containing hazardous substances, and that the situation "requires response actions per the California Department of Toxic Substances Control (DTSC) through an Order that names the Railways."

The SAC purports to state claims against The City for recovery of The Railways' response costs under 42 U.S.C. Section 9607(a)(4)(B) (hereinafter "CERCLA 107" [First Claim for Relief],), for contribution under 42 U.S.C. Section 9613(f)(1) (hereinafter "CERCLA 113") [Third Claim for Relief], and for declaratory relief under CERCLA 113 [Second Claim for Relief]. The SAC also alleges that The City is liable for "taking" under 42 U.S.C. § 1983, and under state law claims for nuisance, contribution and indemnity, inverse condemnation, negligence, trespass, and declaratory relief.

III. ARGUMENT

First, the Complaint fails to state a claim for cost recovery under CERCLA 107 because The Railways have not adequately pleaded that they incurred necessary response costs consistent with the National Contingency Plan at the Site. In fact, it appears that no shovel has yet touched the ground.

Second, The Railways have failed to state a claim for contribution under CERCLA 113 because no person has yet filed a civil action against them and the Railways have not resolved liability to the United States or a State. Further, the SAC does not provide sufficient information to determine whether The Railways are Potentially Responsible Parties ("PRPs") who are permitted to bring a contribution action, or even to determine if the statute of limitations has been exceeded. Finally, The Railways' claim for a declaratory judgment also must be dismissed because they have no underlying claim to support such a judgment. The Railways have failed to meet the basic pleadings requirements of CERCLA 107 or CERCLA 113.

A. STANDARD FOR MOTION TO DISMISS UNDER FED. R. CIV. P. 12(B)(6)

An Fed. R. Civ. P. 12(b)(6) motion to dismiss is a challenge to the sufficiency of the pleadings set forth in the complaint. "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheurer v. Rhodes, 416 U.S. 232, 236 (1974); Gilligan v. Jamco Development Corp., 108 F.3d 246, 249 (9th Cir. 1997). F.R.Civ.P. 12(b)(6) dismissal is "proper when the complaint does not make out a cognizable legal theory or does not allege sufficient facts to support a cognizable legal theory." Whittaker Corp v United States, 825 F.3d 100, 10-06 (9th Cir. 20160, citing Chubb Custom Ins. Co. v. Space Sys./Loral, Inc., 710 F.3d 946, 956 (9th Cir. 2013).

In resolving a Fed. R. Civ. P. 12(b)(6) motion, the court must: (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-338 (9th Cir. 1996). "However, conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir. 1998). A court need not permit an attempt to amend a complaint if "it determines that the pleading could not possibly be cured by allegation of other

facts." Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 247 (9th Cir. 1990).

B. CERCLA 107 AND 113 CAUSES OF ACTION

28 U.S.C. §§ 9601-9675 includes two provisions that allow parties that incur cleanup costs to recoup all or part of their costs from PRPs: cost-recovery actions under CERCLA 107 and contribution actions under CERCLA 113.

CERCLA 107 allows any person to sue a PRP to recover "any other necessary costs of response" that person has incurred. These lawsuits are known as "cost-recovery" actions.

CERCLA 113 allows a PRP that has been required to pay response costs to someone else to assert a contribution claim against other PRPs in court to compel those PRPs to bear an equitable share of those costs. CERCLA 113 provides that:

> A person that has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in [Section 113(f)(2)].

A party that **may** bring a CERCLA 113 contribution action **must** proceed under that section and is barred from proceeding with a cost-recovery action under CERCLA 107. Territory of Guam v. United States, 593 U.S. 310, 310 (2021.) A party may not bring an action under both sections. The Railways, however, have pleaded both.

The Ninth Circuit explained the distinction between CERCLA 107 and CERCLA 113 as follows: "a party uses contribution [under CERCLA 113] to get reimbursed for being made to pay more than its fair share to someone else, and uses cost recovery [under CERCLA 107] to get reimbursed for its own voluntary cleanup costs". Whittaker Corp. v. United States, 825 F.3d 1002, 1007 (9th Cir. 2016). And the US Supreme Court has ruled that a party can bring a CERCLA 113 action **only if it has entered into a settlement that resolves its CERCLA-specific liability**. Territory Of Guam v. United States, 593 U.S. 310, 315 (2021) [emphasis added].

C. THE RAILWAYS HAVE NOT STATED ANY CAUSE OF ACTION UNDER CERCLA

1. The Railways Have Not Adequately Pleaded a Cost Recovery Claim Under CERCLA 107.

The Railways' First Claim for Relief alleges that The Railways are entitled to recover costs under CERCLA 107 because they "have faced and will face additional, currently incalculable costs for future investigation, remediation, and contamination clean-up for which the City is strictly liable. These costs have been estimated to range from $10 million to $50 million dollars, depending on the manner and method of remediation, to be proven at trial" [SAC ¶ 27], as well as legal fees [SAC ¶ 28],

For purposes of this Motion, in order to recover under a CERCLA 107 cause of action, The Railways must demonstrate that they have incurred response costs." ' Ascon Properties v. Mobil Oil Co., 866 F.2d 1149, 1152-53 (9th Cir. 1989). Under CERCLA, "response" is defined as "remove, removal, remedy, and remedial action," including "enforcement activities related thereto." 42 U.S.C. § 9601(25). CERCLA defines the terms "remove" or "removal" as

> the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release . . . . 42 U.S.C. § 9601(23)).

"[R]emedy" or "remedial action" means:

> those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances and

> associated contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment. . . . 42 U.S.C. § 9601(24).

Pursuant to these definitions, in order to state a *prima facie* claim for cost recovery under CERCLA 107, the Railways must have incurred "necessary costs of response" as defined above.

Bare-bones allegations are insufficient to withstand The City's motion to dismiss. In Ashcroft v. Iqbal, 556 U.S. 662 (2009) the Supreme Court held that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. at 678. "The pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Id.

Paragraph 34 of the SAC describes The Railways' response costs as "costs of analysis, litigation expenses, and such removal or remedial action as Plaintiffs take or authorities may dictate" Not only does this reveal that The Railways have not yet begun any remedial action, but this kind of conclusory pleading does not contain sufficient factual matter, even when accepted as true, to "state a claim to relief that is plausible on its face." A claim must allege "enough factual matter (taken as true) to suggest that" the response costs were "necessary." Here, The Railways do not plead enough facts, or any facts, to suggest that the response costs are necessary or that they comply with CERCLA requirements.[1]

The Railways' recitation does not allege that the response costs were "necessary," but merely presents "a pleading that offers 'labels and conclusions' or 'a formulaic recitation of the

[1] The Railways state that their response costs were incurred in activities in compliance with the National Contingency Plan ("NCP"), but their reference to 40 CFR §§ 300.64 and 300.66 in this respect is puzzling, as these regulations relate to fishing activities.

elements of a cause of action [, which] will not do." Id. The only specific cost stated is that of attorney fees, which are not recoverable under CERCLA 107 unless they are "closely tied to the actual cleanup." Key Tronic Corp. v. United States, 511 U.S. 809, 819 (1994). Since it appears that the actual cleanup has not begun, it seems likely that the attorney fees pleaded are not recoverable ones.

Even assuming that the Railways have already incurred costs of response, they have failed to provide any factual allegations in support of the statement, and failed to explain–even briefly–why they were necessary. In a similar factual situation in Texas, a motion to dismiss was granted where the Plaintiff alleged that it "incurred costs to investigate and monitor the contamination of its Property," and that it "expended response costs consistent with the National Contingency Plan…including costs to monitor, assess, and evaluate the release or threat of release of hazardous substances into the environment." Gen. Cable Indus., Inc. v. Zurn Pex, Inc., 561 F. Supp. 2d 653, 658 (E.D. Tex. 2006) The Eastern District of Texas granted the motion to dismiss plaintiffs' claim on the grounds that they failed to allege what response costs they incurred in containing the release, noting that

> plaintiffs have not alleged that they have expended any monies which would be considered necessary costs of response to the conditions at the landfill ... [and therefore] the plaintiffs have failed to state a claim …that would entitle them to maintain an action under Section 107 of CERCLA,, citing McGregor v. Indus. Excess Landfill, Inc., 856 F.2d 39, 42 (6th Cir. 1988)

The Zurn Pex Court added that "when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist," quoting O'Brien v. DiGrazia, 544 F.2d 543, 546 n. 3 (1st Cir.1976).

Other Courts have held that investigative response costs must result in an actual cleanup effort to be "necessary" and hence recoverable under CERCLA. *See, e.g.,* Young v. United States, 394 F.3d 858, 862-865 (10th Cir. 2005) (recognizing that "costs cannot be deemed 'necessary' to the containment and cleanup of hazardous releases absent some nexus between the alleged response cost and an actual effort to respond to environmental contamination," and that "some of the costs [p]laintiffs expended [were] 'classic examples' of preliminary steps taken in response to

the discovery of the release or threatened release of hazardous substances, such as site investigation, soil sampling, and risk assessment." *Id.* at 864.); Ellis v. Gallatin Steel Co., 390 F.3d 461, 482 (6th Cir. 2004) ("only 'work that is closely tied to the actual cleanup ... may constitute a necessary cost of response.' "); Black Horse Lane Assoc., L.P. v. Dow Chemical Corp., 228 F.3d 275, 294-299 (3d Cir. 2000) (same). In a similar vein, costs that are the product of or related to litigation are not "response costs." Krygoski Construction Co., Inc. v. City of Menominee, 431 F. Supp. 2d 755, 765 (W.D. Mich. 2006) ("investigative activities that are litigation-related costs are not compensable under CERCLA.").

Again, The Railways have not cited any costs of response in their First Claim for Relief which amount to any actual cleanup. Just as in the cited cases, the mere allegation that response costs were incurred is insufficient to support a CERCLA 107 pleading. If The Railways had in fact incurred costs in doing actual containment or cleanup, it is fair to think that they would have included them in the SAC.

It is evident from the SAC that the Railways have not begun any actual cleanup, or, indeed, any remedial plan. Since they have not incurred any response costs, they cannot state a claim under CERCLA 107, and their First Claim for Relief should be dismissed.

2. The Railways Have Not Stated a Contribution Claim Under CERCLA 113.

Fatally, the SAC contains no facts which suggest that The Railways have been sued by anyone with respect to the pollution they state is present at The Site. The enabling clause that establishes the CERCLA right of contribution, provides that "[a]ny person *may* seek contribution ... *during or following* any civil action under section 9606 of this title or under section 9607(a) of this title," 42 U.S.C. § 9113(f)(1) [emphasis in original]." "The natural meaning of this sentence is that contribution may only be sought subject to the specified conditions, namely, "during or following" a specified civil action. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 166 (2004).

There is no civil action alleged in the SAC. The most that the Railways contend is that "Georgia-Pacific and the City entered into a settlement agreement in October of 2014," and that the 2024 situation "requires response actions per the California Department of Toxic Substances Control (DTSC) through an Order that names the Railways." The SAC does not allege that the DTSC has actually issued an order that names the Railways, but only implies that the situation requires that DTSC do so. The Railways were not a party to the 2014 settlement agreement, or they would have said so. And if the DTSC had actually issued an order, one would suppose that the terms, date, or number of the order would have been stated, and that some actual work at the Site would have begun.

Moreover, even if there is an extant DTSC Order naming The Railroads, a contribution action under CERCLA 113 requires that a party seeking contribution must have "resolved its liability…in a judicial or administratively approved settlement." Here there is no statement at all in the SAC that The Railways have resolved their liability through an action or settlement with DTSC.

Finally, there are no facts set out in the SAC which claim that the Railways, as owners/operators of the Site are not also PRPs. As PRPs themselves The Railways may be able to state a [a properly pleaded] CERCLA 107 cost recovery action only, but may not bring a contribution action under CERCLA 113. United States v. Atl. Rsch. Corp., 551 U.S. 128, 141-42 (2007).

3. Declaratory Relief Under CERCLA Is Not Available to the Railways

In their Second Claim for relief, The Railways seek a declaratory judgment under CERCLA 113(g) against The City. SAC Paragraphs 39-41. CERCLA section 113(g)(2) authorizes courts to "enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover *further* response costs." 42 U.S.C. § 9613(g)(2) (emphasis added). Thus, the right to pursue a declaratory judgment under section 113(g)(2) depends on establishing the existence of a valid underlying cause of action under CERCLA. *See* Colton v. Am. Promotional Events, Inc.-West, 614 F.3d 998, 1006-07 (9th Cir.

2010); Trimble v. Asarco, Inc., 232 F.3d 946, 958 (8th Cir. 2000), *overruled on other grounds by Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005); Gussack Realty Co. v. Xerox Corp., 224 F.3d 85, 92 (2d Cir. 2000); United States Occidental Chem. Corp., 200 F.3d 143, 153054 (3d Cir. 1999); *see also Hobart*, 923 F. Supp. 2d at1096–97 ("[T]he viability of the declaratory judgment claim hinges on the viability of the substantive CERCLA claims."); *Union Station Assocs. LLC v. Puget Sound Energy, Inc.*, 238 F. Supp. 2d 1226, 1230 (W.D. Wash. 2002) (dismissal of underlying CERCLA claims mandated dismissal of claim for declaratory judgment under CERCLA section 113(g)(2)).

4. The Railways Cannot Impose Joint and Several Liability On the City.

A private party that is itself a PRP may not pursue a CERCLA 107 action against other PRPs for joint and several liability. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 169, (2004), citing, among others, Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301–1306 (9th Cir. 1997). There is nothing in the SAC that asserts that The Railways are not PRPs. It is fair to conclude, therefore, that as the current owners/operators of the Site[2], the Railways are also PRPs, and the imposition of joint and several liability against The City is not available to them. The Railways' prayer for joint and several liability in Paragraph 37 of the SAC should be stricken as immaterial under F.R.Civ.Pro. 12(f). "Immaterial" means that the matter has *no bearing* on the controversy before the court. In re 2TheMart.com, Inc. Securities Litigation, 114 F.Supp.2d 955, 965 (C.D. Cal. 2000) [emphasis in original].

[2] Under 42 U.S. Code § 9607, owners and operators of a facility are PRPs.

IV. CONCLUSION

The Railways have not stated cognizable claims for relief in the SAC under either CERCLA 107 or 113. Without either of those causes of action, The Railways cannot state a viable cause of action for declaratory relief under CERCLA. The CITY respectfully requests that the Court order the First, Second, and Third Claims for Relief of the SAC be dismissed. And as The Railways are already on their third attempt to state these causes of action, The City further suggests that further amendments would be futile. The requirements of CERCLA are clear: if the Railways had the facts to meet those requirements, they would have done so by now.

The City also requests that the Railways' demand for the imposition of joint and several liability be stricken. This demand is immaterial to this case, as the Railways, as PRPs, cannot ask for joint and several liability against the City.

Respectfully submitted,

Date: January 3, 2025

EDLIN GALLAGHER HUIE + BLUM

By. _____
MARYLIN JENKINS
Attorneys for Defendant CITY OF FORT BRAGG

FRED M. BLUM, ESQ. (SBN 101586)
fblum@eghblaw.com
WILLIAM NOEL EDLIN, ESQ. (SBN 107796)
nedlin@eghblaw.com
MARYLIN JENKINS, ESQ. (SBN 89832)
mjenkins@eghblaw.com
EDLIN GALLAGHER HUIE + BLUM
601 Montgomery Street, Suite 1101
San Francisco, CA 94111
Telephone: (415)397-9006
Facsimile: (415)397-1339

KRISTA MACNEVIN JEE, ESQ. (SBN 198650)
kmj@jones-mayer.com
JONES MAYER
3777 N. Harbor Blvd.
Fullerton, CA 92835
Telephone: (714) 446-1400
Facsimile: (714) 446-1448

Attorneys for Defendants CITY OF FORT BRAGG

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – OAKLAND DIVISION

SIERRA NORTHERN RAILWAY, a California corporation, and MENDOCINO RAILWAY, a California corporation,

Plaintiff,

vs.

CITY OF FORT BRAGG, et al.,

Defendants.

Case No.: 4:24-cv-04810-JST

[PROPOSED] ORDER ON DEFENDANT'S MOTION TO DISMISS FIRST THROUGH THIRD CLAIMS FOR RELIEF PURSUANT TO Fed. R. Civ. P. (12)b)(6), AND MOTION TO STRIKE PURSUANT TO Fed. R. Civ P12(f)

DATE: February 20, 2025
TIME: 2:00 p.m.
DEPT: Courtroom 6, Second Floor

Case Filed: August 7, 2024

This matter came before the Court on February 20, 2025, on Defendant's Motion to Dismiss, pursuant to Fed.R.Civ.P (12(b)(6) and Defendant's Motion to Strike, pursuant to Fed.R.Civ.P (12(f). Having considered the papers submitted in support of and in opposition to the Motions, the arguments of counsel, and the applicable law, the Court hereby GRANTS Defendant's Motion to Dismiss Claims for Relief One through Three of the Second Amended Complaint, and Defendant's Motion to Strike that portion of Paragraph 37 of the Second Amended Complaint requesting joint and several liability.

1. According to the Second Amended Complaint ("SAC"), Plaintiffs own or operate a plot of land in Fort Bragg, California, ("the Site"). The Site was previously owned and is currently operated by Mendocino Railway. The Site was owned by Georgia Pacific from 1972 until 2002, when Georgia-Pacific apparently ceased operations. Georgia-Pacific investigated "environmental concerns" at the Site and expended approximately $31 million in response costs through 2011. Georgia-Pacific dismissed the lawsuit it filed against the Defendant in October of 2014.
2. Plaintiffs allege that Defendant has been polluting a pond on the Site with stormwater runoff containing hazardous substances, and that the situation "requires response actions per the California Department of Toxic Substances Control (DTSC).
3. The SAC sets out claims against Defendant for recovery of Plaintiffs' response costs under 42 U.S.C. Section 9607(a)(4)(B) (hereinafter "CERCLA 107" [First Claim for Relief],), for contribution under 42 U.S.C. Section 9613(f)(1) (hereinafter "CERCLA 113") [Third Claim for Relief], and for declaratory relief under CERCLA 113 [Second Claim for Relief]. The SAC also alleges that Defendant is liable for "taking" under 42 U.S.C. § 1983, and under state law claims for nuisance, contribution and indemnity, inverse condemnation, negligence, trespass, and declaratory relief.
4. Plaintiffs' First Claim for Relief fails to state a claim for cost recovery under CERCLA 107 because Plaintiffs have not adequately pleaded that they incurred necessary response costs consistent with the National Contingency Plan at the Site. In order to state a *prima facie* claim for cost recovery under CERCLA 107, Plaintiffs must have

incurred "necessary costs of response" as defined in 42 U.S.C. § 9601(23) and 42 U.S.C. § 9601(23). The costs which Plaintiffs state as support for their CERCLA 107 claim do not rise to the level required as they do not constitute any action to actually clean up or abate the alleged pollution on the Site.

5. Plaintiffs' Third Claim for Relief fails to state a claim for contribution under CERCLA 113 because no person has yet filed a civil action against them and Plaintiffs have not resolved liability to the United States or a State, as required by 42 U.S.C. § 9113(f)(1).

6. Plaintiffs' Second Claim for Relief, for declaratory judgment under CERCLA 113, also must be dismissed because they have no underlying claim to support such a judgment. CERCLA section 113(g)(2) authorizes courts to "enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover *further* response costs." 42 U.S.C. § 9613(g)(2) (emphasis added). Thus, the right to pursue a declaratory judgment under section 113(g)(2) depends on establishing the existence of a valid underlying cause of action under CERCLA. Plaintiffs have failed to meet the basic pleadings requirements of CERCLA 107 or CERCLA 113, and therefore cannot state a claim for declaratory relief under CERCLA 113.

7. Plaintiffs' request that joint and several liability be imposed on Defendant, as set out in Paragraph 37 of the SAC, must be stricken because Plaintiffs are owners/operators of the Site, and therefore qualify as PRPs under §40 CFR § 304.12(m). A private party that is itself a PRP may not pursue a CERCLA 107 action against other PRPs for joint and several liability. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 169, (2004),

The Court therefore GRANTS Defendant's Motion for to Dismiss the First, Second and Third Claims for Relief in the SAC, and GRANTS Defendant's Motion to Strike the claim for joint and several liability in Paragraph 37 of the SAC. as to Bayer's sTwelfth Affirmative Defense. As Plaintiffs

have already amended their pleadings twice, the Court considers it unlikely that they have additional as-yet-unpleaded facts to add, and therefore this order of dismissal is without leave to further amend.

IT IS SO ORDERED.

Dated:

_____
Hon. Jon S. Tigar
United States District Judge