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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 REPLY TO OPPOSITION TO ITS MOTION TO DISMISS AND MOTION TO STRIKE** DATE: February 20, 2025 TIME: 2:00 p.m. DEPT: Courtroom 6, Second Floor Case Filed: August 7, 2024

Defendant CITY OF FORT BRAGG ("The City") hereby submits its Reply to the Opposition of Plaintiffs SIERRA NORTHERN RAILWAY and MENDOCINO RAILWAY

(collectively "The Railways") to its Motion to Dismiss Pursuant to Fed. R. Civ. P. (12)b)(6), and Motion to Strike Pursuant to Fed. R. Civ. P12(f).

I. REPLY TO OPPOSITION TO THE CITY'S MOTION TO DISMISS

A. THE RAILWAYS CANNOT BRING BOTH A CERCLA 107 AND A CERCLA 113 ACTION

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.

B. THE RAILWAYS CANNOT BRING A CERCLA 113 ACTION AND THEIR FIRST CLAIM FOR RELIEF MUST BE DISMISSED

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, *supra*, 593 U.S. 310, 315 [emphasis added]. The Railways therefore cannot bring a CERCLA 113 action because they have not pleaded that they have entered into a settlement resolving their liability, nor does the DTSC Order, of which The Railways request the Court to take judicial notice, reflect any such settlement [a copy of the DTSC Order, which is attached as Exhibit A to The Railway's Request for Judicial Notice, is also attached as Exhibit A to this Reply; for the Court's convenience, portions of the DTSC Order referenced in this Reply are highlighted as indicated below]. The DTSC is a unilateral order, not signed by The Railways, and does not rise to the level of a settlement.

The Railway's Third Claim for Relief under CERCLA 113 must therefore be dismissed.

C. THE RAILWAYS ARE LIMITED TO A CERCLA 107 ACTION

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).

To survive a motion to dismiss under Rule 12(b)(6), the complaint must contain "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic v Twombly, 550 U.S. 544,

at 570 (2007). Unless the facts alleged show that The Railways' claim crosses "the line from conceivable to plausible, [the] complaint must be dismissed." *Id*. Although this standard does not require "detailed factual allegations," it does require more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Id*. at 555.

D. THE RAILWAYS' PLEADING OF A CERCLA 107 ACTION IS INADEQUATE AND MUST BE DISMISSED

¶ 34 of the Second Amended Complaint ("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 the use of the future tense 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.

In Chubb Custom Ins. Co. v Space Systems/Loral, Inc. 710 F.3d 946 at 961 (9th Cir. (2013) the Court explained that "necessary costs of response incurred," which are recoverable under CERCLA 107, means "the cleanup or removal of released hazardous substances from the environment," that "remedial action" means "those actions consistent with a 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," and that "response costs" are deemed "'necessary' when 'an actual and real threat to human health or the environment exists[s].'"

Since the Second Amendment to the DTSC Order, which adds SIERRA NORTHERN RAILWAY, was issued less than 60 days ago, and does not reference any action taken under the 1st Amendment, which added MENDOCINO RAILWAY, it is reasonable to conclude that The Railways have not yet taken any action to comply with the DTSC Order. And even if they have, the tasks required of them by the DTSC Order are not response costs.

The Railways have not pleaded that they have done anything that meets the definitions of response costs. Favorably construed, The Railways contend only that they have examined some

old technical reports, incurred litigation expenses (which, as noted above, are not recoverable under CERCLA 107), and will incur the costs of removal or remedial action (Second Amended Complaint, ¶ 34. The technical reports referenced in the SAC were issued in 2007, 2009, 2010, 2011, 2013, 2015, 2018 and 2020 (SAC ¶20 and DTSC Order, pages 48-50 (yellow highlights)), prior to the Railways being added to the DTSC Order. The DTSC Order was initially issued to Georgia-Pacific in 2007. The DTSC Order was amended in 2022 to add Mendocino Railway, and again on December 5, 2024 (some 6 weeks ago) to add Sierra Northern Railway. The Railways explicitly plead that Georgia-Pacific expended some $31 million in remediation cost, including these technical reports. The Railways did not pay for any of these technical reports. And Georgia-Pacific has settled with The City for these costs.

Mill Pond, which The Railways cite as the locus of continuing pollution by The City, was part of the settlement between The City and Georgia-Pacific. There is no allegation in the amendments to the DTSC Order that any contamination from The City was continuing in 2022 or 2024. In fact, the DTSC Order states that dioxins were found on the Site in 2006 (see DTSC Order, page 7, paragraph 2.4.4 (green highlight)).

This may be compared to the content of the First Amendment to the DTSC Order, which provides a detailed list of environmental concerns that have been undertaken or issued a NFA (No Further Action) notice, and those which remain to be addressed (see DTSC Order, pages 48-50 (blue highlights)). The First Amendment to the DTSC Order mandates that MENDOCINO RAILWAY continue the monitoring and associated activities of the non-yet-remediated portions of the Site (see DTSC Order, pages 49-50 and 57-59 (pink highlights)). There is, however, no indication in the Second Amendment to the DTSC Order that the tasks allotted to plaintiff MENDOCINO RAILWAY in the prior amendment to the Order were response costs or that it made any headway on the tasks listed in the First Amendment.

The Railway's Third Claim For Relief must also be dismissed. This Claim cannot be further amended since The Railways have no response costs to support it.

E. THE RAILWAYS' SECOND CLAIM FOR DECLARATORY RELIEF MUST BE DISMISSED

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).

Since The Railways have not stated viable claims under either CERCLA 107 or CERCLA 113, their Second Claim for Relief must also be dismissed.

II. REPLY TO THE OPPOSITION TO THE CITY'S MOTION TO STRIKE THE RAILWAY'S CLAIM OF JOINT AND SEVERAL LIABILITY

Pinal Creek Grp. v. Newmont Min. Corp., 118 F.3d 1298, 1301 (9th Cir. 1997), while overruled in other respects, still stands for the proposition that a PRP cannot impose joint and several liability on another PRP in a CERCLA 107 case. Kotrous v. Goss–Jewett Co. of N. Cal., Inc., 523 F.3d 924, 933 (9th Cir.2008) recognized Pinal Creek's holding that a PRP cannot maintain an action under § 107(a) for joint and several liability. And with respect to the Railways' argument that Pinal Creek was overruled, the subsequent opinion in City of Colton v American Promotional Events, 614 F.3d 998 (9th Cir. 2010) explicitly states what was overruled in Pinal Creek. In City of Colton, the Supreme Court clarified that

> §§ 107(a) and 113(f) provide two clearly distinct remedies, the former for recovery of clean-up costs incurred by a private party, and the latter for contribution "upon an inequitable distribution of common liability among liable parties," [citing United States v. Atl. Research Corp., 551 U.S. 128, 138–39, 127 S.Ct. 2331, 168 L.Ed.2d 28 (2007) (internal quotation marks omitted)]. Accordingly, we overruled Pinal Creek's holding that an action between PRPs is necessarily for contribution. Kotrous v. Goss–Jewett Co. of N. Cal., Inc., 523 F.3d 924, 933 (9th Cir.2008). We explained that "[u]nder Atlantic Research, a PRP ... that incurs costs voluntarily, without having been subject to an action under § 106 or § 107, may bring a suit for recovery of its costs under § 107(a)." *Id.*

There is no mention whatsoever that joint and several liability has been reinstated for purposes of a CERCLA 107 case.

III. CONCLUSION

The Railways did not buy a pig in a poke. They knew (or certainly should have known) that the Site was contaminated. They do not claim in the SAC that they are an innocent party which purchased the site without notice of its state. It can reasonably inferred that The Railways paid a price for the Site that reflected its contaminated state.

The Railways cannot bring a CERCLA 113 action for contribution because they have not settled their CERCLA liability.

The Railways cannot bring a CERCLA 107 action for recovery of response costs because they have not pleaded the expenditure of any response costs.

It appears that Georgia-Pacific completed a number of the tasks it was given under the original DTSC Order. The First Amendment to the DTSC Order listed tasks to be undertaken by MENDOCINO RAILWAY. It appears from the Second Amendment to the DTSC Order that MENDOCINO RAILWAY completed none of these tasks. And since the Second Amendment to the DTSC Order, adding SIERRA PACIFIC RAILWAY, was only issued on December 5, 2024, some 90 days AFTER the original Complaint in this case was filed, it is doubtful that The Railways have incurred any response costs at all.

And since The Railways cannot sustain either a CERCLA 107 action or a CERCLA 113 action, their request for declaratory judgment must also fail.

The City respectfully reiterates its request that The Railway's First through Third Claims for Relief be dismissed, and that The Railways' claim for imposition of joint and several liability on The City be stricken.

DATED: January 24, 2025

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