8:19-cv-02370-JVS-KES
California Department of Toxic Substances Control and the Toxic Substances Control Account v. The FHL Financial Group

TENTATIVE Order Regarding Plaintiffs' Motion for Partial Summary Judgment [90]

Plaintiffs the Department of Toxic Substances Control and the Toxic Substances Control Account (collectively, "DTSC") move for partial summary judgment as to the recovery of DTSC's response costs. (Mot., Dkt. No. 90.) Defendant The FHL Financial Group ("FHL") opposed the motion through improper procedures. (Reply, Ex. A, Dkt. No. 94 ("Opp'n").)[1] DTSC filed a Reply. (Reply, Dkt. No. 94.)

For the following reasons, the Court **GRANTS** the motion.

I. BACKGROUND

The following facts are taken from DTSC's statement of uncontroverted facts ("SUF"). (SUF, Dkt. No. 90-5.) Because FHL did not oppose any of these facts in its opposition, all facts are deemed undisputed. (See Opp'n, generally.)

This case involves a Site located at 7047 and 7051 North Figueroa Street, Los Angeles, California, identified by Assessor's Parcel Number 5480-012-016 (the "Site"). (SUF ¶ 1.) Spence Cleaners operated the Site as a dry cleaner from the 1940s to the 1970s. (Id. ¶ 2.) During this time, Spence Cleaners released hazardous substances, as defined within section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42

[1] On June 4, 2025, FHL filed the wrong document in opposition to this motion. (Dkt. No. 91.) The Court struck this document and ordered that FHL follow the Court's procedures should it wish to oppose the motion. (Dkt. No. 93.) FHL did not file a renewed opposition. However, DTSC claims to have received FHL's opposition via U.S. Mail on June 9, 2025. (Reply, Dkt. No. 94.) Although FHL did not properly file this document, which burdened the Court in its review of this motion, it appears that FHL intended to oppose the motion. Thus, the Court considers this opposition, filed as Exhibit A of DTSC's Reply, as FHL's opposition to the motion.

U.S.C. § 9601(14), into the soil and groundwater. (Id.) Beginning in 2006,[2] DTSC conducted response actions to deal with releases and potential releases of hazardous substances at the Site, and incurred costs as a result. (Id. ¶ 6–7.) DTSC's efforts were meant to temporarily reduce the threats to public health and the environment, but were not permanent remedies for contamination at the Site. (Id. ¶ 8.)

FHL obtained ownership of the Site on January 16, 2008, through non-judicial foreclosure, and still owns the Site today. (Id. ¶ 3.) In the trial and liability phase of this lawsuit, the Court found that "FHL is jointly and severally liable under CERCLA for all unreimbursed response costs incurred by DTSC responding to releases and/or threatened releases of hazardous substances at the Site . . ." (Order, Dkt. No. 87, 3.)

Jason Xiao ("Xiao"), DTSC's Accounting Administrator I, supervised the review of the underlying costs records for the Site, including the preparation of DTSC's Summary of Activity Report ("SBA"). (SUF ¶ 9.) Xiao and his staff accounted for and reconciled $2,104,281.27 in "direct costs" incurred by DTSC for response activities at the Site, which includes $318,942.44 in payroll and $1,785,338.83 in contract costs. (Id. ¶ 10, 14.) Xiao further calculated $1,752.55 in "other direct costs," $24.28 in "other" travel related costs, and $547,249.62 in "indirect costs" incurred by DTSC at the Site. (Id.) Xiao also accounted for $2,236.75 in adjustments to DTSC's total response costs. (Id. ¶ 11.) Finally, Xiao accounted for $5,500 in settlement payments made by Dianna C. Hyland ("Hyland") in the total response costs. (Id. ¶ 12.)

Xiao claims that "DTSC's indirect rate and allocation process are reasonable and based on generally acceptable accounting practices." (Id. ¶ 13.) Further, "DTSC's indirect cost rates were developed in accordance with the State Administrative Manual sections 8652 through 8757, using the cost principles established in the U.S. Office of Management and Budget Circular A-87 and the implementing instructions contained in the cost guide for state and local agencies published by the U.S. Department of Health and Human Services." (Id.) After adjustments, Xiao calculated that DTSC incurred unreimbursed costs of

[2] Hazardous substances have been found in the soil and groundwater at the Site since at least 2005. (SUF ¶ 4.)

$2,645,570.97 in connection with the Site through September 30, 2024. (Id. ¶ 16.)

Additionally, Lan Nguyen ("Nguyen"), a Senior Accounting Supervisor in the Department of Justice ("DOJ"), provided an accounting of the costs incurred by DOJ for cost recovery at the Site. (Id. ¶ 17.) Nguyen and her team calculated that DOJ incurred $277,194.95 in enforcement costs for its work representing DTSC in Site-related cost recovery efforts. (Id. ¶ 19.)

From May 26, 2016, through August 20, 2024, DTSC issued written demands for payment to FHL. (Id. ¶ 20.) However, FHL has not paid any of the outstanding invoices it received from DTSC. (Id. at 20, 25) The total prejudgment interest on these unpaid costs is $204,585.48. (Id. ¶ 22.) Thus, DTSC claims that the State's total unreimbursed response costs for the Site, including interest, total $3,127,351.40. (Id. ¶ 23.)

DTSC anticipates incurring additional future costs in response to releases of hazardous substances at the Site. (Id. ¶ 24.)

II. LEGAL STANDARD

Summary judgment is appropriate where the record, read in the light most favorable to the nonmovant, indicates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986). Summary adjudication, or partial summary judgment "upon all or any part of [a] claim," is appropriate where there is no genuine dispute as to any material fact regarding that portion of the claim. Fed. R. Civ. P. 56(a); see also Lies v. Farrell Lines, Inc., 641 F.2d 765, 769 n.3 (9th Cir. 1981) ("Rule 56 authorizes a summary adjudication that will often fall short of a final determination, even of a single claim . . . ." (citation omitted)).

Facts are "material" if they are necessary to the proof or defense of a claim, and are determined by referring to substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To determine if a dispute about a material fact is "genuine," the trial court must not weigh the evidence and instead must draw all reasonable inferences in the nonmoving party's favor. Tolan v. Cotton, 572 U.S. 650, 655–59 (2014) (per curiam). The nonmoving party cannot manufacture a

"genuine dispute" by relying on allegations in the pleadings. Anderson, 477 U.S. at 251; Oracle Am., Inc. v. Hewlett Packard Enter. Co., 971 F.3d 1042, 1049 (9th Cir. 2020).

A trial court may not resolve issues of credibility to determine whether a fact is "genuinely disputed." See Tolan, 572 U.S. at 658–59. To do so is to improperly weigh the evidence. Id. A court may discount uncorroborated, self-serving testimony where "it states only conclusions and not facts." Nigro v. Sears, Roebuck & Co., 784 F.3d 495, 497–98 (9th Cir. 2015). However, a court may not discount "self-serving" testimony that includes contrary factual assertions and requires the observation of a witness's demeanor to assess credibility. See Manley v. Rowley, 847 F.3d 705, 711 (9th Cir. 2017). Furthermore, an undisputed fact may support several reasonable inferences, but a trial judge must resolve those differing inferences in favor of the nonmoving party. See Tolan, 572 U.S. at 660. In deciding a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 255.[3]

The moving party has the initial burden of establishing the absence of a material fact for trial. Id. at 256. "If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact . . ., the court may . . . consider the fact undisputed." Fed. R. Civ. P. 56(e)(2). Furthermore, "Rule 56[(a)][4] 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 Corp., 477 U.S. at 322. To defeat summary judgment, the nonmoving party who bears the burden at trial must present more than a "mere scintilla" of

[3] "In determining any motion for summary judgment or partial summary judgment, the Court may assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the 'Statement of Genuine Disputes' and (b) controverted by declaration or other written evidence filed in opposition to the motion." L.R. 56-4.

[4] Rule 56 was amended in 2010. Subdivision (a), as amended, "carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word — genuine 'issue' becomes genuine 'dispute.'" Fed. R. Civ. P. 56, Notes of Advisory Committee on 2010 amendments.

"affirmative evidence." Galen v. Cnty. of L.A., 477 F.3d 652, 658 (9th Cir. 2007) (citations omitted). Furthermore, the nonmoving party "must direct [the court's] attention to specific, triable facts. General references without pages or line numbers are not sufficiently specific." S. Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885, 889 (9th Cir. 2003) (citations omitted).[5] Therefore, if the nonmovant does not make a sufficient showing to establish the elements of its claims, the Court must grant the motion.

III. DISCUSSION

DTSC moves for partial summary judgment on the recoverability of DTSC's response costs incurred at the Site under CERCLA. 42 U.S.C. § 9607(a). (Mot. at 2.) Specifically, DTSC asks for an order finding that: (1) DTSC incurred unreimbursed response costs in the amount of $3,127,351.40,[6] and (2) DTSC is entitled to judgment against FHL in the amount of $3,127,351.40. (Id.)

In the trial and liability phase of this lawsuit, the Court found that "FHL is jointly and severally liable under CERCLA for all unreimbursed response costs incurred by DTSC responding to releases and/or threatened releases of hazardous substances at the Site pursuant to section 107(a) of CERCLA, 42 U.S.C. § 9607(a), the amount of which is to be determined in a later phase of this case." (Order, at 3.) Further, in its finding of facts and conclusions of law, this Court stated: "I specifically find on the basis of the testimony here that FHL has been the owner of the property at all relevant times with respect to CERCLA liability and HSAA liability." (Dkt. No. 85, 38:5-8.) Thus, the Court held that "DTSC is entitled to a 'declaratory judgment on liability for response costs or damages that

[5] Each fact in the Statement of Uncontroverted Facts, the Statement of Genuine Disputes, and the Response to Statement of Genuine Dispute of Material Fact "must be numbered and must be supported by pinpoint citations (including page and line numbers, if available) to evidence in the record." L.R. 56-1, 2, 3. "The Court is not obligated to look any further in the record for supporting evidence other than what is actually and specifically referenced in the Statement of Uncontroverted Facts, the Statement of Genuine Disputes, and the Response to Statement of Genuine Disputes." L.R. 56-4.

[6] This number includes all costs that DTSC alleges FHL is liable for as of September 30, 2024. (Mem. in Supp., at 1.) The number does not include "costs DTSC incurred after September 30, 2024, nor litigation fees and costs the Attorney General billed to DTSC after September 30, 2024," which DTSC reserves the right to seek at a later time. (Id.)

will be binding on any subsequent action or actions to recover further response costs or damages.' 42 U.S.C. § 9613(g)(2)," and that "FHL is a 'responsible party' and a 'liable person' under California Health and Safety Code section 25323.5(a)." (Order, at 3; see also Mot., Mem. in Supp., Dkt. No. 90-1, 1.)

The Ninth Circuit has previously allowed DTSC to recover costs related to response actions under CERCLA. See California ex rel. California Dep't of Toxic Substances Control v. Neville Chem. Co., 358 F.3d 661 (9th Cir. 2004); 42 U.S.C. § 9607(a). Whether a party may recover costs under 42 U.S.C. § 9607 depends on whether or not the costs are consistent with the National Contingency Plan ("NCP"). 42 U.S.C. § 9607(a)(4)(A); see id. at 673. The NCP provides that:

> During all phases of response, the lead agency shall complete and maintain documentation to support all actions taken under the NCP and to form the basis for cost recovery. In general, documentation shall be sufficient to provide . . . the response action taken, accurate accounting of federal, state, or private party costs incurred for response actions, and impacts and potential impacts to the public health and welfare and the environment.

40 C.F.R. § 300.160(a)(1). "When a state is seeking recovery of response costs, consistency with the national contingency plan is presumed." Neville Chem. Co., 358 F.3d at 673. The burden is on the defendant to demonstrate that DTSC's actions were inconsistent with the NCP. Id. To meet this burden, the defendant must show that DTSC "acted in an arbitrary and capricious manner in choosing a particular response action." Id. (citing Washington State Dep't of Transp. v. Washington Nat. Gas Co., Pacificorp, 59 F.3d 793, 802 (9th Cir. 1995)).

1. *DTSC's Response Costs are Recoverable Under CERCLA*

First, DTSC argues that its costs are recoverable under CERCLA. (Mem. in Supp., at 7.) Under CERCLA, a party may recover "all costs of removal or remedial action incurred . . . not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A). This includes:

> costs related to actions necessary to effectuate cleanup or removal from the environment of released hazardous substances, actions taken in the event of the threat of release of hazardous substances, actions to monitor, assess and

> evaluate the release or threatened release of hazardous substances, the disposal of removed material, and actions consistent with a permanent remedy.

California ex rel. California Dep't of Toxic Servs. v. Neville Chem. Co., 213 F.Supp.2d 1134, 1137 (C.D. Cal. 2002), aff'd sub nom., 358 F.3d 661 (9th Cir. 2004); see 42 U.S.C. § 9601(23)–(24). Recoverable costs also include "oversight costs incurred by a government agency in an effort to ensure that a site is being adequately investigated and remediated by responsible parties," and "reasonable attorneys' fees for bringing cost-recovery litigation, as well as indirect costs, or overhead." Id.; see United States v. Chapman, 146 F.3d 1166, 1173, 1175 (9th Cir. 1998) (finding that the government is also entitled "to recover costs for all of its investigation and activities, including legal work," and reasonable attorneys fees under section 107(a)(4)(A) of CERCLA). CERCLA also allows for the recovery of pre-judgment interest. 42 U.S.C. § 9607(a)(4).

The Court agrees with DTSC that the costs it seeks are recoverable under CERCLA. (Mem. in Supp., at 8.) Specifically, DTSC seeks reimbursement of its direct and indirect labor, contract, travel, and legal costs associated with the Site. (Id. at 6–7.) Further, FHL does not dispute that these costs are recoverable. (See Opp'n, generally). See Conservation Force v. Salazar, 677 F. Supp. 2d 1203, 1211 (N.D. Cal. 2009) ("Where plaintiffs fail to provide a defense for a claim in opposition, the claim is deemed waived.") (citing Personal Elec. Transps., Inc. v. Office of U.S. Tr., 313 Fed. App'x 51, 52 (9th Cir. 2009)). Thus, DTSC properly seeks recovery of its response costs.

2. *DTSC Properly Documented and Calculated its Costs*

Second, DTSC claims that its costs are "[a]dequately [d]ocumented, [c]alculated, and [p]resented." (Mem. in Supp., at 9.) In relation to direct costs, DTSC provided the Court with Xiao's declaration and supporting SBAs. (Id.) Xiao "oversaw the staff's compilation of supporting documents," and certified that these documents "were generated in the ordinary course of business by DTSC employees working on the Site." (Id.; SUF ¶ 15.) "Xiao also oversaw the generation of the SBAs; and the reconciliation of supporting documents with the SBAs." (Id. at 10; SUF ¶ 9.)

Additionally, Xiao's declaration and SBAs account for indirect costs. (Id.; SUF ¶ 10.) According to Xiao, "DTSC's indirect cost rates were developed in accordance with the State Administrative Manual sections 8652 through 8757, using the cost principles established in the U.S. Office of Management and Budget Circular A-87 and the implementing instructions contained in the cost guide for state and local agencies published by the U.S. Department of Health and Human Services." (Xiao Decl., Dkt. No. 90-4, ¶ 20; SUF ¶ 13.) Similarly, Xiao calculated prejudgment interest by utilizing "the interest rates supplied by EPA and the dates on which DTSC sent invoices to [FHL]." (Mem. in Supp., at 10; SUF ¶ 22; Xiao Decl. ¶ 26.) Finally, DTSC claims it has been billed "$277,194.95 between December 1, 2018 and September 30, 2024 by the Attorney General's Office to represent it in this CERCLA enforcement action." (Id. at 11; SUF ¶ 19.) DTSC states that these costs are "reasonable compared to the results achieved." (Id.)

The Court agrees that DTSC adequately documented and calculated its costs. Further, FHL does not dispute the accuracy of these costs. (See Opp'n, generally.) Thus, the Court presumes that the costs DTSC seeks are accurate and reasonable.

3. *FHL Has Failed to Demonstrate Non-Compliance with the NCP*

Finally, DTSC correctly points out that, once it has established its costs under CERCLA, the burden shifts to FHL to demonstrate that DTSC's actions were "arbitrary and capricious" and, thus, inconsistent with the NCP. See Neville Chem. Co., 358 F.3d at 673. (Mem. in Supp., at 12.)

FHL only makes one primary argument in opposition to the motion for summary judgment: that FHL did not release any toxic substances on the Site, or conduct any operations on the Site. (Opp'n at 1–2.) Rather, FHL claims that the Site was owned by Spense Dry Cleaners at the relevant times of the contamination. (Id.) However, because this Court previously determined that "FHL is jointly and severally liable under CERCLA for all unreimbursed response costs incurred by DTSC" in relation to the Site, (Order, at 3), FHL does not have grounds to re-litigate this defense. (See Reply, at 1–2.) Thus, because FHL makes no argument regarding DTSC's compliance with the NCP, it has failed to carry its burden of proof. Consequently, the Court presumes that DTSC's recovery costs are

consistent with the NCP. See Neville Chem Co. 213 F.Supp.2d at 1136, 1142 (granting summary judgment in favor of DTSC, and awarding DTSC response costs, where the Court had previously held the defendant was liable for all response costs not inconsistent with the NCP, and the defendant failed to demonstrate the DTSC's costs were arbitrary and capricious).

FHL makes one final argument that Hyland made settlement payments of $5,500 to DTSC. (Opp'n at 2.)[7] However, as evidenced by DTSC's detailed calculations, DTSC already subtracted these settlement payments from the amount owed. (See SUF ¶ 16.) Thus, FHL has failed to demonstrate any issue with the costs DTSC seeks to recover.

Consequently, DTSC has properly established that it is entitled to summary judgment as to its response costs incurred through September 30, 2024.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the motion for partial summary judgment. DTSC is awarded judgment in the amount of $3,127,351.40 for its response costs incurred through September 30, 2024.

DTSC shall file a proposed judgment with the Court to this effect.

IT IS SO ORDERED.

[7] FHL may be attempting to argue that, because DTSC accepted a settlement payment from "another respondent," it cannot recover anything from FHL. (Opp'n at 2.) However, FHL provides no authority to support this contention, and this Court is unfamiliar with any such authority. Thus, the Court does not find that the $5,500 settlement payments from Hyland absolves FHL of financial responsibility.