



1 of 2 DOCUMENTS

**3000 E. IMPERIAL, LLC, Plaintiff, v. ROBERTSHAW CONTROLS
Defendants.**

No. CV 08-3985 PA (Ex)

**UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF
CALIFORNIA**

2010 U.S. Dist. LEXIS 138661

December 29, 2010, Decided

December 29, 2010, Filed

COUNSEL: [*1] For 3000 E. Imperial LLC, Plaintiff: Bruce Gen Iwasaki, LEAD ATTORNEY, Lim Ruger and Kim, Los Angeles, CA; Keith Brenton Walker, LEAD ATTORNEY, Cox Castle and Nicholson LLP, Los Angeles, CA; Preston W Brooks, LEAD ATTORNEY, Cox Castle & Nicholson, Los Angeles, CA.

For Whittaker Corporation, Defendant: Caroline Elizabeth Siefert, Ian P Culver, LEAD ATTORNEYS, Dongell Lawrence Finney LLP, Los Angeles, CA; Michael E Gallagher, Jr, Richard Alan Dongell, LEAD ATTORNEYS, Matthew Clark Bures, Dongell Lawrence Finney, Los Angeles, CA.

For Krystal Koach, Inc., a California corporation, Cross Defendant: Michel F Mills, LEAD ATTORNEY, Michel F Mills Law Offices, Westminster, CA; Caroline Elizabeth Siefert, Dongell Lawrence Finney LLP, Los Angeles, CA.

For Whittaker Corporation, a Delaware corporation, Whittaker Controls, Inc., a California corporation, Cross Claimants, Counter Claimants, Counter Defendants: Ian P Culver, LEAD ATTORNEY, Dongell Lawrence Finney LLP, Los Angeles, CA.

For 3000 E. Imperial LLC, a California limited liability corporation, Counter Defendant, Cross Claimant: Bruce Gen Iwasaki, LEAD ATTORNEY, Lim Ruger and Kim, Los Angeles, CA; Preston W Brooks, LEAD ATTORNEY, Cox Castle [*2] & Nicholson, Los Angeles, CA.

JUDGES: Percy Anderson, UNITED STATES DISTRICT JUDGE.

OPINION BY: Percy Anderson

OPINION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A court trial was held on March 25-26, 2010 and March 30, 2010. On April 13, 2010 Plaintiff and Defendant each filed their proposed Post-Trial Findings of Fact and Conclusions of Law, and on April 20, 2010 each party filed responses. After considering the evidence, briefs, and arguments of counsel, the Court makes the following findings of fact and conclusions of law.¹

1 The Court has elected to issue its findings in narrative form. Any finding of fact that also constitutes a conclusion of law is hereby adopted as a conclusion of law, and any conclusion of law that also constitutes a finding of fact is hereby adopted as a finding of fact.

I. PROCEDURAL AND FACTUAL BACKGROUND

Plaintiff 3000 E. Imperial, LLC ("Plaintiff") filed its initial complaint on June 18, 2008. Defendants Whittaker Corporation ("Defendant") and Whittaker Controls, Inc. filed its second amended answer and counterclaims on July 20, 2009.² Plaintiff filed its answer to Defendant's counterclaims on July 28, 2009. Plaintiff asserts the following causes of action against Defendant: (1) Cost recovery [*3] and declaratory relief under the Compre-

hensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.*; (2) Injunctive relief under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a); (3) Contribution under *California Health & Safety Code* § 25395.60, *et seq.*; (4) Nuisance; and (5) Trespass. Defendant asserts the following causes of action against Plaintiff: (1) Cost recovery, contribution, and declaratory relief under CERCLA; (2) indemnity/contribution under *California Health & Safety Code* § 25363(e); (3) declaratory relief; and (4) equitable indemnity.

2 The parties lodged a Proposed Pretrial Conference Order on February 19, 2010 dismissing Whittaker Controls, Inc. from this action on the condition that, for purposes of this action only, Whittaker Corporation agrees to be responsible for and assume all liability of Whittaker Controls, Inc. The parties also stipulated that any party may reference Whittaker Corporation as the owner and operator of the Property during the time period in question.

Plaintiff purchased the property located at 3000 E. Imperial Highway in Lynwood, California (the "Property") on November 30, 2006 and [*4] is the current owner. Wm. R. Whittaker Co. Ltd., a predecessor-in-interest to Defendant, owned the Property from June 30, 1955 to September 27, 1963. For several years, Defendant operated a plant which manufactured aircraft and missile valves on the Property. Prior to Defendant, the Property was owned by Robertshaw Controls Company ("Robertshaw").³ After Defendant left the Property it was used by various furniture manufacturers.

3 Robertshaw was also named as a defendant in this action, but it settled prior to trial.

Prior to purchasing the Property, Plaintiff learned that it was contaminated with various chemicals, although it did not know the nature and extent of the contamination. (Chae Decl. ¶ 5.) Plaintiff hired an environmental consulting firm to conduct an investigation, which included taking soil and water samples. These investigations continued after Plaintiff purchased the Property. The investigations revealed that the soil and groundwater on the Property are contaminated with several substances, including trichloroethylene ("TCE") and benzene, which are the primary chemicals of concern.

The Property is rectangular in shape and is located at the southwest corner of State Street [*5] and East Imperial Highway. (Ex. 56.) The Property consists of a vacant concrete lot, as all structures were demolished in 2007. (Ex. 241, § 2.1). Prior to demolition 90% of the Property was occupied by a manufacturing building on the eastern portion of the Property. (Id.) There was also a

lumber storage and hazardous materials storage shed on the westernmost portion of the Property, and a maintenance shed located between the manufacturing building and the storage sheds. (Ex. 56.) An underground storage tank ("UST") nest was located under the pavement between the maintenance shed and the storage sheds. (Id.) These structures existed on the Property in 1956 during Defendant's ownership. (Ex. 268.)

In September 2007, Plaintiff's environmental consultant prepared a report which summarized and compiled data from previous investigations of the Property. (Ex. 241.) The report describes two areas of contamination on the Property. One area is located at the southwestern portion of the Property ("Area 1"), and the other is located at the south-central portion of the Property ("Area 2"). (Id. § 3.1.6.2.) Area 2 encompasses the former site of the manufacturing building. Most of the contamination [*6] on the Property is located in Area 1, near the former UST nest. (Id. § 5.2.1.1.) Other contamination in Area 1 is located under the maintenance shed and under the hazardous materials storage shed on the westernmost portion of the Property. (Id.) Contamination from Area 1 appears to have spread to neighboring properties to the southwest of the Property, although the exact extent of any offsite contamination is still unknown. (Id., § 7.1.1.)

II. DEFENDANT'S LIABILITY UNDER CERCLA

CERCLA, 42 U.S.C. § 9607(a), allows private parties to recover costs incurred in cleaning up contaminated sites from certain parties enumerated by statute. To establish liability for cost recovery a plaintiff must prove, by a preponderance of the evidence, that (1) the property is a "facility" as defined by 42 U.S.C. § 9601(9); (2) the defendant falls into one of the four categories of persons subject to liability under 42 U.S.C. § 9607(a); (3) that a release or threatened release of a hazardous substance has occurred; and (4) that the release or threatened release has caused the plaintiff to incur necessary response costs consistent with the National Contingency Plan. *Carson Harbor Village v. County of Los Angeles*, 433 F.3d 1260, 1265 (9th Cir. 2006).

A. [*7] Facility

CERCLA defines a facility as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . ." 42 U.S.C. § 9601(9)(B). TCE and benzene are considered "hazardous substances" under CERCLA. See 42 U.S.C. §§ 9601(14), 9602(a); 40 C.F.R. § 302.4. It is undisputed that hazardous substances are located at the Property, and that it thus qualifies as a facility under CERCLA. (Proposed Pretrial Conference Order ("PPTCO"), Admitted Fact (a); Pl.'s Proposed Findings

of Fact and Conclusions of Law ("PFOFCOL") 36:4-5; Def.'s Response 36:4-5.)

B. Persons Liable Under CERCLA

CERCLA imposes strict liability on four categories of persons, typically referred to as "potentially responsible parties" or "PRPs." See *Burlington N. & Santa Fe Ry. Co. v. United States*, U.S. , 129 S. Ct. 1870, 1878, 173 L. Ed. 2d 812 (2009). One of those categories is former owners or operators of a facility, defined as "any person who at the time of disposal of any hazardous substance owned or operated any facility at which hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). For purposes of CERCLA, a corporation such as Defendant [*8] qualifies as a "person." 42 U.S.C. § 9601(21). TCE and benzene are considered "hazardous substances" under CERCLA. See 42 U.S.C. §§ 9601(14), 9602(a); 40 C.F.R. § 302.4. "Disposal" is defined as the "discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment" 42 U.S.C. §§ 9601(29); 6903(3). A plaintiff does not have to show that the defendant participated in the disposal, only that a disposal occurred during ownership. See *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 840 (4th Cir. 1992); *Servco Pacific Inc. v. Dods*, 193 F. Supp. 2d 1183, 1197 (D. Hawai'i 2002)(noting that the Ninth Circuit has "concluded (or strongly implied) that passive gradual 'leaking' such as that from an underground storage tank with a hole in it or from an abandoned barrel would constitute a 'disposal'" for purposes of finding past owner liability).

In order for Defendant to be a PRP Plaintiff must show that a disposal occurred on the Property during Defendant's ownership between 1955 and 1963. As discussed below, the [*9] evidence presented at trial shows that disposals from various sources occurred during this time period.

1. Disposal from the USTs

The USTs were installed in 1942 by Robertshaw. (PPTCO, Stipulated Fact (d); Pl.'s PFOFCOL 5:1; Def.'s Response 5:1.). Plaintiff arranged to have the contents of the USTs removed in 2007, and the USTs themselves were removed in 2009. (Crews Decl. ¶ 4, 10.) The parties agree that TCE was released from the USTs into the soil and groundwater. (PPTCO, Admitted Fact (l); Pl.'s PFOFCOL 5:10-12; Def.'s Response PFOFCOL 5:10-12.) The parties dispute when the USTs first began to leak. In order for Defendant to be a PRP Plaintiff must show that the USTs were leaking sometime during the 13 to 21 years after their installation (from 1955 to 1963).

Testimony of Plaintiff's Expert James Bushman

Plaintiff's expert James Bushman opined that it is highly likely that leaks began between 1952 and 1957 and that leaking likely occurred between 1955 and 1963. (Bushman Decl. ¶ 19.) Defendant argues that Bushman's testimony does not meet the requirements for an expert opinion under *Federal Rule of Evidence 702*, and moves to exclude the opinion.

Rule 702 states that expert testimony is [*10] admissible if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." *Fed. R. Evid. 702*. "This entails a[n] assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-93, 113 S. Ct. 2786, 2796, 125 L. Ed. 2d 469 (1993). Factors which may bear on the reliability of the expert's methods include: (1) whether the theory or technique can be, or has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; (4) the existence of standards and controls for application of the technique; and (5) general acceptance in the community. *Id.* at 593-95, 113 S. Ct. at 2797. These are not the only factors that a court may consider, and some factors may not apply in every case. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141-42, 119 S. Ct. 1167, 1171, 143 L. Ed. 2d 238 (1999). [*11] "[T]he trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Id.* at 152, 119 S. Ct. at 1176.

To reach his opinion Bushman reviewed the facts discussed further below, and then relied on his 47 years of experience evaluating UST corrosion. (Bushman Decl. ¶ 15.) During cross-examination Defendant's counsel pointed out that there is no known error rate for evaluations based on this method, nor has it ever been included on the list of testing programs for determining the life of a UST published by the Environmental Protection Agency. (Trial Transcript ("TT") 149:3-11). Expert testimony based on experience alone or in conjunction with other knowledge or training can be admissible. See *Fed. R. Evid. 702*, Advisory Committee Notes 2000. However, "[i]f the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." *Id.*

Bushman explained that his opinion was based on the thickness of the USTs and the resistivity [*12] of the soil. (Bushman Decl. ¶ 8.) Thicker tank walls result in slower corrosion, and lower soil resistivities result in faster corrosion. (Id.) Soil with a resistivity of 10,000 ohm-centimeters is considered corrosive to steel, and below 1000 ohm-centimeters the soil is considered extremely corrosive. (Id. at ¶ 8.) Bushman also considered the "Sohio" study, which looked at the corrosion rates of USTs made by a certain manufacturer in Ohio during the 1960's. (Id. at ¶ 18.) The study showed that 55% of the USTs leaked within the first 15 years of service and 70% of the USTs leaked within the first 20 years of service. (Id.)

In light of these principles, several facts indicated to Bushman that the USTs on the Property would have corroded faster than those in the Sohio study. First, the soil resistivity in the Sohio study was higher than that of the soil on the Property. (Id.) Samples taken from the area surrounding the USTs suggested that the soil was corrosive, with a resistivity of 970 ohm-centimeters at one location and 2,000 ohm-centimeters at another. (Id. at ¶ 9.) The USTs were made of 12-gauge steel which is .1046 inches thick, and 14-gauge steel which is .0747 inches thick. (Id. [*13] at ¶ 10.) Therefore the USTs on the Property were much thinner than typical USTs in production today, which are .25 inches thick, and would have corroded faster. (Id.) Finally, Bushman testified that the number and size of the perforations on the USTs were much greater than any he had observed during his career. (Id.) Comparing the conditions in the Sohio study to those at the Property, Bushman concluded that the USTs likely began to leak within 10 to 15 years of installation. (Id. at ¶ 19.)

Bushman later confirmed his opinion by using the Rossum Formula, which is used to predict the time to failure of a UST. (Id. at ¶ 16.) The Rossum Formula is accepted, well-recognized, and used by the U.S. Army Corps of Engineers in their work concerning USTs. (TT 152:11 - 153:7.) Using the Rossum formula, Bushman calculated that the time to first leak for the USTs was either 6 or 12.1 years, depending on which of the two soil resistivity levels was used. (Bushman Decl. ¶ 17.) One of the variables in the Rossum formula is the surface area of the tank. (TT 154:4-6.) Defendant's counsel criticized Bushman for using the combined surface area of the nine USTs in his calculations. (TT 153:25-154:3.) Bushman [*14] explained that using combined surface area was necessary because the USTs are tied together electrically and thus considered one single structure. (TT 155:2-7.) Defendant's expert Jose Villalobos⁴ later confirmed that if the USTs were electrically connected, it would be proper to use the combined surface area instead of the individual surface areas. (TT 391:7-9.) As such, it

does not appear that Bushman applied the Rossum formula unreliably to the facts of this case. Because Bushman's opinion was not based solely on his experience, but was also supported by the results of the Rossum formula, which is an accepted method for calculating the time to first leak, the Court cannot say that Bushman's opinion is so unreliable as to be inadmissible.

4 Jose Villalobos was retained by Robertshaw, not Defendant. However, the Court refers to Villalobos as Defendant's expert, since Defendant called Villalobos as a witness.

Defendant's counsel did, however, point out several weaknesses in Bushman's methods which would tend to lessen the weight of his opinion. For example, Bushman testified that the most important variables in determining the corrosion rate for the USTs are the thickness of the USTs [*15] and the soil resistivity levels. The soil samples that Bushman relied on were taken from one boring at 5 feet and another at 10 feet. (TT 164:3-5.) These samples were taken after the USTs had already been excavated and the soil backfilled into the ground. (TT 164:13-16.) Therefore it is likely that the soil samples were not taken from the soil immediately adjacent to the USTs when they were in the ground. Bushman also admitted that soil resistivity could vary widely over a short distance, and that the USTs were likely installed in an area spanning approximately 40 feet. (TT 164:10-12; 165:5-166:6.) Although Bushman also testified that there appeared to be little variability in the soil at the Property, it is likely that the actual resistivity levels of the soil immediately adjacent to the USTs were different from the levels in the soils samples. (TT 166:24-167:15.) Since Bushman's opinion relies heavily on the soil resistivity levels, his opinion is afforded less weight.

Defendant also argued that Bushman's opinion does not prove that the USTs leaked during its ownership unless Plaintiff can show that the USTs were full of TCE when Robertshaw left the Property. Defendant's counsel claimed [*16] in his opening statement that Robertshaw would have emptied the USTs prior to leaving the Property; however, there was no evidence to support such a claim. Nevertheless, assuming that Robertshaw had tried to empty the USTs when they left the Property it is still more likely than not that some TCE remained and leaked into the soil. Michael Crews, who was present when the USTs were excavated, observed that the suction pipe extending into the UST could not reach the bottom of the UST. (TT 119:21-120:7.) Pictures of the USTs upon excavation show that there were corrosion holes around the entire circumference of the USTs. (Ex. 310.) Therefore, even if Robertshaw had attempted to remove the contents of the USTs there would have still been some amount of

liquid left inside which could leak into the surrounding soil.

Testimony of Defendant's Expert Jose Villalobos

Villalobos testified that the average corrosion rate for buried steel in general soil conditions in southern California is 2 mils per year.⁵ (TT 403:23-25.) However, given the soil resistivity levels of the samples taken from the Property Villalobos estimated that the USTs had a higher average corrosion rate of 3 mils per year. (TT [*17] 383:17-24.) The 12-gauge USTs at the Property were 105 mils thick, and the 14-gauge USTs were 74 mils thick. By dividing the thickness of the tanks by the average corrosion rate of 3 mils per year, Villalobos calculated that the 12-gauge USTs would have started leaking 35 years after installation, and the 14-gauge USTs within 25 years of installation. (TT 387:11-16; 401:4-8.)

5 A "mil" is one-thousandth of an inch. (TT 396:9-10.)

However, Villalobos also explained that 3 mils per year is an average corrosion rate. A UST will corrode at a higher rate when first buried, and then the corrosion rate slows over time. (TT 394:1-21; 396:5-17.) He also testified that the parts of a UST do not corrode uniformly, and that in his experience he has seen a UST with an average corrosion rate of 3 mils per year corrode at a rate of 5, 8, or even 10 mils per year in some parts. (TT 396:24-397:16; 399:18-400:3.) This means that the average corrosion rate of a UST does not necessarily predict when a tank would start to leak. (TT 403:6-14.)

Using a higher corrosion rate of 5, 8, or 10 mils per year to calculate the time to first leak makes more sense than using the average corrosion rate in light of Villalobos' [*18] other testimony. If one was to calculate the time to first leak using southern California's average corrosion rate of 2 mils per year, then a 12-gauge tank would take more than 52 years to corrode. However, Villalobos testified that an average UST begins to corrode within 15 years of installation. (TT 393:21-25; 395:21-396:4.) Such a result is possible only if one uses a higher corrosion rate to account for the years when the UST is first installed. Indeed, using a corrosion rate of 7 mils per year on a 12-gauge tank yields a result of 15 years to the first leak.

The Court finds that a tank with an average corrosion rate of 3 mils per year would have had a higher corrosion rate of 5, 8, or even 10 mils per year during the years when Robertshaw and Defendant owned the Property. Villalobos testified that if part of a UST were to corrode at a rate of 10 mils per year, a leak would develop within 10 years for a 12-gauge tank, and within 7.5

years for a 14-gauge tank. (TT 401:9-25.) Even using a more conservative corrosion rate of 8 mils per year, this would mean that the USTs began to leak within approximately 13 years for a 12-gauge tank, and approximately 9 years for a 14-gauge tank.

The [*19] USTs Leaked During Defendant's Ownership of the Property

Depending on the method used, Bushman's testimony suggests that the USTs began leaking at the earliest within 6 years of installation in 1948 (calculated using the lower soil resistivity level in Rossum's formula) and at the latest within 15 years of installation in 1957 (Bushman's outer estimate of when the tanks first began to leak). Although Defendant offered Villalobos' testimony as evidence that the USTs did not leak until much later, Villalobos' testimony instead corroborates that the leaks likely began within this time frame, somewhere within 7.5 to 13 years after installation, between 1949 to 1955. Neither party has argued that the entire contents of the USTs leaked out immediately, and common sense suggests that once a corrosion hole developed the USTs would have leaked for some period of time. See *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 846 (4th Cir. 1992) (finding defendants liable due to a leaking UST when neither party could overcome "the presumption that the leaking that has occurred was not a sudden event, but the result of a gradual and progressive course of environmental contamination that included [*20] these defendants' period of ownership"). Given the time span for when the first leak occurred, the Court finds that the USTs were leaking at some point during Defendant's ownership from 1955 to 1963.

2. Maintenance Shed

TCE and PCE were found at shallow soil depths in area of the maintenance shed. (Morrison Decl. ¶ 48; Ex. 202.) The fact that the TCE was found in shallow soil indicates that contamination was due to surface spills, as opposed to underground leakage from the USTs. (Morrison Decl. ¶ 48; TT 237:14-20.) Defendant stored flammable chemicals needed for testing and cleaning valves in 55-gallon drums in the maintenance shed. (TT 291:16 - 292:19; Grund Decl. ¶ 26.) Used chemicals were also stored in 55-gallon drums until an outside company removed them from the Property. (TT 270:6-18.)

Defendant claims that TCE spills from the 55-gallon drums could not have occurred during its ownership because it never used TCE in its operations. To support this claim Defendant relies exclusively on the testimony of David Grund, who worked for Defendant at the Property as a maintenance mechanic from approximately 1957 to 1960. (Grund Decl. ¶¶ 3-12.) During the 1960s TCE was

frequently used to [*21] clean metal using vapor degreasers. (Morrison Decl. ¶ 29.) Degreasing was necessary during valve production. (TT 286:112-14.) Defendant was engaged in manufacturing valves for military aircraft and missiles. (PPTCO, Stipulated Fact (a); Ex. 275.) Military publications by the Secretary of the Air Force during the 1950's specify that TCE be used for overhauling the butterfly valves manufactured by Defendant. (Morrison Decl. ¶ 25; Exs. 270, 275.) Nevertheless, Grund testified that Defendant did not use TCE while on the Property, nor did it use a vapor degreaser which would have used TCE. (Grund Decl. ¶ 18, 22; TT 270:19-271:6.) Instead, any cleaning of valves at the Property was done using a water soluble boron-type material or toluene. (TT 271:7-22; Grund Decl. ¶ 24.) Furthermore, although it was not Grund's job to deal with defective valves, he testified that valves were never overhauled at the Property; rather, any defective valves were replaced with new ones. (TT 272:15-273:22.)

The Court does not find Grund's testimony to be credible or reliable, due to several inconsistent statements and the fact that Grund was testifying about events that occurred more than fifty years ago. Defendant [*22] had operations at several different locations during the years of Grund's employment, some of which used vapor degreasers with TCE. During trial Grund testified inconsistently about when and where Defendant had used vapor degreasers with TCE, leading the Court to conclude that Grund's testimony about the lack of TCE at the Property is likely inaccurate. For instance, when asked about Defendant's use of a vapor degreaser at its Van Nuys facility Grund initially testified that there was none. (TT 304:23-305:3.) Later, when faced with contradictory testimony from his deposition, Grund recalled that Defendant did indeed use a vapor degreaser with TCE at Van Nuys. (TT 304:23-307:1.) Moreover, in contrast with his earlier testimony, Grund later testified that he would occasionally see valves being overhauled at the Property. (TT 279:23-280:8.)

Grund also testified that prior to moving to the Property Defendant used a vapor degreaser in its operations at its Vernon facility and that Defendant used TCE in its vapor degreaser in North Hollywood after it moved off the Property. (TT 286:10 - 287:11; 270:23-271:1.) Throughout its time at these locations Defendant's operations were essentially the [*23] same, manufacturing valves. (TT 287:12 - 22; 298:7-11; 306:5-12.) Thus, the evidence shows that Defendant was using vapor degreasers with TCE in similar operations both before and after it occupied the Property, Defendant may have overhauled valves on the Property, and that the valves Defendant manufactured for the military would have been overhauled using TCE.

In light of such evidence the Court finds that Defendant used TCE while it was operating on the Property. Since Defendant stored the chemicals used in its operations in the maintenance shed area, the Court finds that a disposal of TCE occurred in that area while Defendant owned the Property. Due to releases in both the maintenance shed area and the UST nest area during 1955 to 1963 Defendant is a PRP under CERCLA.

C. Release and Incurrence of Necessary Response Costs

CERCLA defines a "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment" 42 U.S.C. § 9601(22). The parties do not dispute that a release of a hazardous substance occurred on the Property for purposes of CERCLA. (PPTCO, Admitted Fact (I); Pl.'s PFOFCOL [*24] 36:24-25; Def.'s Response 36:24-25.) The parties also agree that the release caused Plaintiff to incur necessary response costs consistent with the National Contingency Plan. (Pl.'s PFOFCOL 37:1-2; Def.'s Response, 37:1-2).

Since all four requirements have been met, the Court finds that Defendant is liable under CERCLA.

III. DIVISIBILITY OF HARM

Liability under CERCLA is generally joint and several unless the defendant meets its burden to prove that the harm is divisible and capable of apportionment. *Burlington N. & Santa Fe Ry. Co. v. United States*, U.S. , 129 S. Ct. 1870, 1881, 173 L. Ed. 2d 812 (2009). "[T]he universal starting point for divisibility of harm analyses in CERCLA cases is § 433A of the Restatement (Second) of Torts." Id. (quoting *United States v. Hercules, Inc.*, 247 F.3d 706, 717 (8th Cir. 2001)). Under that section of the Restatement "when two or more persons acting independently caus[e] a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused." Id. (quoting *Restatement (Second) of Torts*, § 433A (1976)). "Evidence [*25] supporting divisibility must be concrete and specific." *Hercules*, 247 F.3d at 718.

Harm can be divisible even if the contamination contributed by each defendant is commingled. *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 270 n.29 (3d Cir. 1992). For instance, "[a] site may be divisible if a defendant can establish that it consists of 'non-contiguous' areas of contamination." *Hercules*, 347 F.3d at 719. Even where contamination is commingled in a single area, the comments to the Restatement suggest the harm can be divisible in terms of degree:

The harm inflicted may be conveniently severable in point of time. Thus if two defendants, independently operating the same plant, pollute a stream over successive periods, it is clear that each has caused a separate amount of harm, limited in time, and that neither has any responsibility for the harm caused by the other . . .

Where two or more factories independently pollute a stream, the interference with the plaintiff's use of the water may be treated as divisible in terms of degree, and may be apportioned among the owners of the factories, on the basis of evidence of the respective quantities of pollution discharged into the stream.

Restatement (Second) of Torts, § 433A, Comments c., [*26] d.

A review of the Restatement and case law demonstrates that in order to treat contamination as divisible in terms of degree, the defendant must show two things. First, it must identify and prove some definite proportion which can be used to apportion liability. See *Chem-Nuclear Sys., Inc. v. Bush*, 292 F.3d 254, 260 (D.C. Cir. 2002) (holding that the harm was not divisible where there was insufficient evidence showing that the defendant sent only 80 drums of waste to the contaminated site); *O'Neil v. Picillo*, 883 F.2d 176, 182 (1st Cir. 1989) (holding that the harm was indivisible because, although only 10 barrels of waste could be positively attributed to defendant, there was no evidence that some of the 9,000 unidentified barrels were not also contributed by defendant); *Restatement*, § 433A, Comment d., Illustration 3 (noting that the harm caused by five dogs owned by A and B who killed ten sheep can be divisible when "[t]here is evidence that three of the dogs are owned by A and two by B.").

Next, the defendant must also provide evidence supporting a relationship between the proportion it has proposed and the amount of harm that is attributable to the defendant. See *Burlington*, 129 S. Ct. at 1882 n.9 [*27] (affirming the district court's use of certain figures to apportion damages because it "was properly rooted in evidence that provided a reasonable basis for identifying the portion of the harm attributable to the [defendants]"); *Bell*, 3 F.3d at 889 (noting that volume of waste contributed may sometimes be inadequate to apportion liability "where commingled wastes of unknown toxicity, migratory potential, and synergistic effect are present");

O'Neil, 883 F.2d at 183 n.11 (noting that apportionment based on the number of barrels attributable to the defendant would be unreasonable unless the defendant could show that the cost of removing each barrel "did not vary depending on [its] content"); *U.S. v. Monsanto Co.*, 858 F.2d 160, 172-73 (4th Cir. 1988) (discussing why volume of waste contributed does not always provide an adequate basis for divisibility, since "[c]ommon sense counsels that a million gallons of certain substances could be mixed together without significant consequences, whereas a few pints of others improperly mixed could result in disastrous consequences"); *Restatement*, § 433A, Comment d., Illustration 3 (stating that the harm caused by three dogs owned by A and two dogs [*28] owned by B could be apportioned using a 3:2 ratio assuming that "all of the dogs are of the same general size and ferocity"). In other words, although causation is not required to show liability under CERCLA, the burden Defendant must meet in order to reduce its liability under the doctrine of divisibility is essentially a burden to prove that it caused only some part of the contamination, and how much. See *U.S. v. Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2d Cir. 1993) ("[C]ausation is brought back into the case -- through the backdoor, after being denied entry at the frontdoor -- at the apportionment stage.").

Here Defendant has proposed using two figures to establish that the contamination is divisible in terms of degree: the relative sizes of Area 1 and Area 2, and the number of years which it owned the land. The Supreme Court's recent decision in *Burlington N. & Santa Fe Ry. Co. v. United States*, U.S. , 129 S. Ct. 1870, 173 L. Ed. 2d 812 (2009) found divisibility based on similar figures. However, *Burlington* did not relieve Defendant from supporting its divisibility arguments with evidence that these figures bear a relationship to amount of harm that it caused. In *Burlington* [*29] the facility consisted of two adjacent parcels of property, one owned by the two defendant railroads and one owned by a company engaged in agricultural chemical distribution. The company had leased the defendants' property for use in its operations for 13 of the 28 years it was in business. The Court found that it was reasonable to apportion the defendants' liability based on the proportion of the facility owned by the defendants (19%) and the length of time that the defendants' property had been leased for use in the company's operations (45%). *Id.* at 1882.

The facts and reasoning of *Burlington* demonstrate that the Court was concerned with finding evidence to support a relationship between these figures and the amount of harm caused by the defendants, although it did not seem to require the exact fit which some previous cases had held was necessary. For instance, apportioning liability by the proportion of land owned by the defen-

dants was reasonable in light of evidence that only a few of the spills contributing to the contamination occurred on the defendants' land as opposed to the remainder of the facility. *Id.* at 1883. As for the number of years of operation on the defendants' land, [*30] such apportionment was logical since all contamination was caused by spills of various chemicals which occurred continually over the course of 28 years of operation. *Id.* at 1876. There was no indication that the company's operations changed over the 28 years, and thus the amount of contamination released would have remained fairly constant each year.

Defendant proposes using the sizes of Area 1 and Area 2 as a basis for divisibility, which comprise 55% and 45% of the contaminated area respectively. Defendant argues that the Court should apportion its liability by 55% since there is no evidence that it used TCE or benzene in their operations in Area 2, and thus the only contamination that it could be responsible for was the leaking USTs located in Area 1. This argument necessarily relies on Grund's testimony that Defendant never used TCE in its operations on the Property, since Area 2 comprises the area underneath the former manufacturing building where degreasing and assembly of valves would have occurred. (TT 275:5-10.) As the Court has found that Defendant did use TCE in its operations, this argument fails to support divisibility based on the respective sizes of Areas 1 and 2. Furthermore, [*31] although Defendant argues that the furniture makers who later occupied the Property were also responsible for some of the contamination in Area 2, they have not provided any evidence which demonstrates how much contamination the furniture makers contributed. Unlike in Burlington, where the evidence showed that the defendant's use of the land only contributed to a small amount of the total contamination, here there is no evidence showing Defendant's relative contribution to the contamination in Area 2 as compared to the furniture makers.

Defendant also proposes using the number of years of its ownership as a basis for apportioning liability. Defendant notes that the USTs were installed in 1942 and removed in 2009, which means they were in the ground for 67 years. Defendant further notes that they owned the Property for eight years, which is 12% of the time the USTs were in the ground. Apportioning liability by 12% might be reasonable if there were some evidence that the USTs leaked steadily during the entire 67 years they were in the ground. Yet it is entirely possible that most, if not all, of the TCE leaked out of the USTs during Defendant's ownership. Indeed, Defendant itself argued [*32] that any release of TCE in Area 1 after 1963 was "de minimis." (Def.'s PFOFCOL 29:14-15.) In such a case Defendant's contribution to the harm caused by the leaking USTs would be much greater than 12%. Since

Defendant has not pointed to any evidence supporting use of the proportion it has proposed, it is not entitled to divisibility.

IV. PLAINTIFF'S STATUS AS A BONA FIDE PROSPECTIVE PURCHASER

Defendant has brought a counterclaim against Plaintiff for cost recovery/contribution under CERCLA, since Plaintiff, who is the current owner of a facility where a release has occurred, is also considered a PRP. See 42 U.S.C. § 9607(a)(1). Plaintiff claims that it is not subject to liability because it is a bona fide prospective purchaser who is not liable under CERCLA. See 42 U.S.C. § 9607(r) ("[A] bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the purchaser's being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.").

Plaintiff has been cooperating with the California Department [*33] of Toxic Substances ("DTSC") to coordinate a voluntary cleanup of the Property since May 2007. (Diaz Decl. ¶ 5.) The DTSC has already found Plaintiff to be a "bona fide purchaser" under *California Health & Safety Code* § 25395.69, which largely mirrors the definition of a bona fide prospective purchaser under CERCLA. (Ex. 221 § 3.3.) While both statutes require that a bona fide purchaser exercise "appropriate care" in dealing with the release of hazardous substances, the statutes differ somewhat in their definition of appropriate care. The California statute defines "appropriate care" as the performance of response actions directed by the DTSC. See *Cal. Health & Safety Code* § 25395.67. CERCLA, however, requires a bona fide prospective purchaser to take "reasonable steps to (i) stop any continuing release; (ii) prevent any threatened future release; and (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance." 42 U.S.C. § 9601(40)(D). Defendant challenges Plaintiff's status as a bona fide prospective purchaser by arguing that Plaintiff unreasonably delayed in waiting two years after it purchased the Property to excavate [*34] the USTs.

Plaintiff had the contents of the USTs sampled in May 2007. (Ex. 241 § 4.5.) In September 2007 Plaintiff's environmental consultant reported that the TCE was detected in those samples. (Ex. 241 § 4.5.1.) In October 2007 Plaintiff had the contents of the USTs removed and placed into twenty 55-gallon drums, which were then removed from the Property. (Crews Decl. ¶ 4.) TCE was later found to be present in an oily layer that floated on top of the liquid withdrawn from the USTs. (*Id.* ¶ 9.) Since Plaintiff had the USTs emptied soon after learning

that they contained a hazardous substance, the Court finds that the Plaintiff took reasonable steps to stop any continuing leak or to prevent any future leaks of TCE from the USTs. It was not unreasonable for Plaintiff to leave the USTs in the ground at that time, given that they were empty. Defendant contends that Plaintiff should have also excavated the USTs in 2007 to prevent the possibility of surface water infiltration, which could mix with any TCE left in the USTs and then leak into the ground. However, Defendant has not provided any evidence suggesting why Plaintiff would have had reason to believe that the USTs were not emptied [*35] of TCE in 2007. In fact, when the nine USTs were excavated in 2009 only one of them was observed to have an oily layer on top. (Id. ¶ 14.) Although some TCE was later detected inside that UST its contents consisted almost entirely of water, which suggests that very little TCE had been left inside since 2007. (Id. ¶ 17.) The Court finds that Plaintiff took reasonable steps to prevent further release of hazardous substances, thus entitling it to bona fide prospective purchaser status.

V. AMOUNT OF NECESSARY RESPONSE COSTS

Having found that Defendant is jointly and severally liable on Plaintiff's cost recovery claim under CERCLA, the Court must resolve the amount of Defendant's liability. The Court has already approved Plaintiff's settlement with Robertshaw, in which Robertshaw agreed to be responsible for all future onsite and offsite remediation efforts. The Court also approved Plaintiff's settlement with another defendant, Kold Industries, Inc., in the amount of \$7,000.00. Under CERCLA a settlement by one defendant "reduces the potential liability of the others by the amount of the settlement." 42 U.S.C. § 9613(f)(2). After accounting for Plaintiff's settlements with the other defendants, [*36] Defendant's liability is equal to the amount of necessary response costs that Plaintiff incurred prior to settlement, less \$7,000.00.

The only evidence in the record of Plaintiff's costs is the declaration of Plaintiff's principal Min Chae, who testified that Plaintiff has incurred \$1,713,343.44 in investigation and remediation expenses. Over Defendant's objection the Court allowed Chae's testimony on the amount of Plaintiff's expenses, as well as a spreadsheet attached to Chae's declaration summarizing invoices totaling \$1,713,343.44. After Chae was done testifying, and after Defendant declined to cross examine him, Defendant made a motion in limine seeking to exclude evidence of any damages which were not produced during the course of discovery. (TT 213:7-14.) Defendant argued that Plaintiff had produced invoices reflecting approximately \$700,000 of costs during discovery, and asserted that it had never received evidence of the remaining amount claimed. Plaintiff asserted that it had

invoices supporting Chae's testimony and that these had been produced to Defendant.

The Court did not rule on the motion, pointing out that Defendant had declined to cross examine Chae and that it was [*37] essentially asking for a "do-over." Nevertheless, the Court suggested it was not too late for Defendant to call Chae during its case if it wished to question the basis for his testimony concerning Plaintiff's expenses. After this exchange Plaintiff filed a trial brief voluntarily reducing the expenses sought to \$1,241,457.61 by excluding any invoices which were arguably not recoverable costs under CERCLA. On the last day of trial Defendant's counsel stated that he had since reviewed the invoices which Plaintiff claimed to have produced, but maintained that some of the invoices were not timely produced during discovery. The Court declined to resolve the issue during trial, instead directing Defendant to submit a post-trial brief if it disputed the timeliness of the document production. Despite this invitation, Defendant has not filed any brief on this issue. As such, the only evidence the Court has of the recoverable costs is Chae's testimony of the amount Plaintiff incurred, which was later voluntarily reduced to \$1,241,457.61. This amount, less the \$7,000.00 which Kold Industries, Inc. paid in settlement, results in Defendant's liability of \$1,234,457.61.

VI. DEFENDANT'S LIABILITY [*38] UNDER RCRA

Plaintiff has also brought a claim against Defendant under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6091, et seq. Defendant contends that Plaintiff's RCRA claim is moot since Robertshaw has entered into a settlement agreement to undertake all onsite and offsite remediation of the Property until the DTSC issues a certificate of completion. "RCRA's primary purpose . . . is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" *Meghriq v. KFC Western, Inc.*, 516 U.S. 479, 483, 116 S. Ct. 1251, 1254, 134 L. Ed. 2d 121 (1996) (quoting 42 U.S.C. § 6902(b)). Therefore, a court may not order restitution or damages under RCRA to a private citizen; a private citizen may only obtain injunctive relief. See *id.*; 42 U.S.C. § 6972(a)(1)(B). A court has broad powers to either restrain any person contributing to contamination, or "to order such person to take such other action as may be necessary, or both." 42 U.S.C. § 6972(a)(1)(B).

In order to obtain an injunction under RCRA where a third [*39] party has already agreed to undertake remediation, "plaintiff would have to identify some action that defendant could be ordered to take that is not already

in place thanks to the action of [the third party] and that would improve the situation in some way." 87th Street Owners Corp. v. Carnegie Hill - 87th Street Corp., 251 F. Supp. 2d 1215, 1220 (S.D.N.Y. 2002). Since Robertshaw has already agreed to undertake the entire remediation until completion, it is difficult to ascertain what else the Court might order Defendant to do to improve the situation. Plaintiff seeks an injunction ordering Defendant to abate the contamination in case Robertshaw does not fulfill its obligations under the settlement agreement. However, there is no evidence that Robertshaw does not plan to fulfill and complete its obligations under the settlement agreement. The mere possibility that Robertshaw might one day abandon its remediation efforts, or become incapable of fulfilling them, is insufficient to entitle Plaintiff to injunctive relief. See *id.* at 1221 (stating that an injunction ordering the defendant to undertake remediation in case the state agency abandoned its efforts to remediate was premature, [*40] since "[p]laintiff can bring an action when and if these events come to pass").

Plaintiff nevertheless claims that its RCRA claim is not moot because it has also requested an award of attorneys' fees pursuant to RCRA. RCRA states that a court may award attorneys' fees "to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate." 42 U.S.C. § 6972(e). In order to be considered a prevailing party a plaintiff must "receive at least some relief on the merits of his claim before he can be said to prevail." *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792, 109 S. Ct. 1486, 1493, 103 L. Ed. 2d 866 (1989). However, as just explained, due to Plaintiff's settlement with Robertshaw there is no relief that the Court can grant on the RCRA claim.⁶ Plaintiff is not a prevailing party and therefore cannot recover attorneys' fees under RCRA. Plaintiff's RCRA claim is moot, as is Plaintiff's request for attorneys' fees pursuant to RCRA.

6 Plaintiff cites *Pakootas v. Teck Cominco Metals, Ltd.* 452 F.3d 1066, 1071 n.10 (9th Cir. 2006) for the proposition that a request for attorneys' fees is not necessarily rendered moot by a previous [*41] settlement. *Pakootas*, which involved a claim under CERCLA and not RCRA, is inapposite. Although the settlement in *Pakootas* mooted the plaintiff's claim for injunctive relief, the plaintiff was still able to pursue a claim for civil penalties under CERCLA. *Id.* As such, it was not impossible for the *Pakootas* plaintiff to be considered a "prevailing party" for purposes of attorneys' fees since it might have received some relief in the form of civil penalties.

For the foregoing reasons, the Court finds Defendant jointly and severally liable under CERCLA. Plaintiff is found to be a bona fide prospective purchaser under CERCLA, and hence not liable under CERCLA. The Court thus awards Plaintiff \$1,241,457.61 as recovery of its costs under CERCLA. Plaintiff's RCRA claim is moot, as is Plaintiff's request for attorneys' fees pursuant to RCRA.

DATED: December 29, 2010

/s/ Percy Anderson

Percy Anderson

UNITED STATES DISTRICT JUDGE

JUDGMENT

In accordance with the Court's Order dated November 19, 2009 granting defendant Deskmakers, Inc.'s Motion for Summary Judgment; the Court's Order dated February 1, 2010 granting the Motion for Approval of Settlement and Issuance of Bar Order filed by defendants [*42] Robertshaw Controls Company, Kold Industries, Inc., Gold Realty Company, and Lynwood Imperial, LLC; the Court's Order dated March 29, 2010 granting defendant Robertshaw Controls Company's Motion for Certification of Final Judgment and accompanying Judgment; the Court's Order dated December 29, 2010 dismissing state law claims by plaintiff 3000 E. Imperial, LLC and defendant Whittaker Corporation; and the Court's Findings of Fact and Conclusions of Law dated December 29, 2010, there are no remaining claims pending in this action.

It is therefore now ORDERED, ADJUDGED, and DECREED that judgment is entered in this action as follows:

1. Judgment shall be entered in favor of plaintiff 3000 E. Imperial, LLC ("Plaintiff") on its claim under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.* against defendant Whittaker Corporation ("Whittaker") in the amount of \$1,234,457.61;

2. Plaintiff shall take nothing on its claim against Whittaker under the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a);

3. Whittaker shall take nothing on its claim under CERCLA against Plaintiff;

4. Defendant Deskmakers, Inc. shall have judgment in [*43] its favor against Plaintiff, Whittaker, Lynwood Imperial, LLC, Gold Realty Company, and Robertshaw Controls Company.

Conclusion

5. Plaintiff and Deskmakers, Inc. shall have their costs of suit.

The Clerk is ordered to enter this Judgment.

DATED: December 29, 2010

/s/ Percy Anderson

Percy Anderson

UNITED STATES DISTRICT JUDGE