Not Reported in F.Supp., 1993 WL 382047 (D.Kan.), 38 ERC 1022, 25 Envtl. L. Rep. 21,454
(Cite as: 1993 WL 382047 (D.Kan.))

United States District Court, D. Kansas.
BARTON SOLVENTS, INC., Plaintiff,
v.
SOUTHWEST PETRO-CHEM, INC., Defendant,
v.
AGCO CORP. OF DELAWARE, et al., Third-Party Defendants.
Civ. A. No. 91-2382-GTV.

Sept. 14, 1993.

James T. Price, Mark A. Thornhill, J. Bradley Leitch, Teresa A. Woody, Spencer, Fane, Britt & Browne, Kansas City, MO, David C. Linder, Zelle & Larson, Minneapolis, MN, for Southwest Petro-Chem, Inc.

William F. Bradley, Jr., Hinkle, Eberhart & Elkouri, Wichita, KS, for Universal Lubricants Inc.

Christopher M. McDonald, Shook, Hardy & Bacon, Kansas City, MO, David Overlock Stewart, J. Daniel Berry, Thomas B. Smith, Ropes & Gray, Washington, DC, for Rubbermaid-Winfield, Inc.

Lester C. Arvin, Arvin & Arvin, Wichita, KS, Brian E. Gardner, Stanley A. Reigel, Patricia A. Rosa, Morrison & Hecker, Kansas City, MO, Mark D. Hinderks, Roger D. Stanton, Stinson, Mag & Fizzell, Overland Park, KS, David R. Tripp, Richard L. Green, Stephen J. Owens, Stinson, Mag & Fizzell, Kansas City, MO, for Barton Solvents.

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Eric C. Sexton, Beckett, Lolli, Bartunek & Beckett, Kansas City, MO, William T. Session, Brian Jones, The Session Law Firm, Kansas City, MO, for Ameron Inc.

Douglas P. McLeod, Blackwell, Sanders, Matheny, Weary & Lombardi, Kansas City, MO, David R. Erickson, Blackwell, Sanders, Matheny, Weary & Lombardi, Overland Park, KS, for Beech Aircraft Corp.

Robert F. Rowe, Jr., McAnany, Van Cleave & Phillips, P.A., Lenexa, KS, Lester C. Arvin, Arvin & Arvin, Wichita, KS, Brian E. Gardner, Stanley A. Reigel, Patricia A. Rosa, Morrison & Hecker, Kansas City, MO, Rosemary Podrebarac, McAnany, Van Cleave & Phillips, P.A., Kansas City, KS, for Oliver Elliott and Nat. Spencer Inc.

Robert F. Rowe, Jr., McAnany, Van Cleave & Phillips, P.A., Lenexa, KS, Lester C. Arvin, Arvin & Arvin, Whichita, KS, Rosemaary Podrebarac, McAnany, Van Cleave & Phillips, P.A., Kansas City, KS, for Ronald Coleman.

Martin R. Ufford, Redmond, Redmond & Nazar, Wichita, KS, for Wichita Wire Inc.

Eric C. Sexton, Beckett, Lolli, Bartunek & Beckett, Kansas City, MO, George A. Phair, Conoco, Inc., Houston, TX, William T. Session, Brian Jones, The Session Law Firm, Kansas City, MO, for Continental Oil Co. and E.I. DuPont De Nemours and Co. and Goodyear Tire and Rubber Co.

William J. Denton, William F. Ford, William F. Ford, Jr., Michael J. Abrams, Gage & Tucker, Kansas City, MO, for General Motors Co.

Jeffrey L. Kennedy, Martin, Pringle, Oliver, Wallace & Swartz, Wichita, KS, for Glickman Inc.

James R. Fleetwood, Bradley E. Haddock, Thomas A. Loftus, III, Koch Industries, Inc., Wichita, KS, for Kock Industries Inc.

Richard W. Hird, **James P. Zakoura**, William F. Watkins, **Smithyman & Zakoura, Chtd.,** Overland Park, KS, for Moline Paint Mfg. Co.

Charles P. Efflandt, Foulston & Siefkin, Wichita, KS, for New Coleman Holdings Inc. and Boeing Co.

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William J. Denton, William F. Ford, William F. Ford, Jr., Michael J. Abrmas, Gage & Tucker, Kansas City, MO, Peter B. Freeman, Ellen L. Partridge, Jenner & Block, Chicago, IL, for Tenneco Oil Co.

Robert P. Riordan, Husch & Eppenberger, Kansas City, MO, Kathleen M. Whitby, St. Louis, MO, for Texaco, Inc.

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Jennifer S. Graham, Lathrop & Norquist, Overland Park, KS, Philip J. Donnellan, Jonathan R. Haden, Gary D. Justis, Lathrop & Norquist, Kansas City, MO, for Union Pacific Resources.

William F. Bradley, Jr., Hinkle, Eberhart & Elkouri, Wichita, KS, for Universal Motor Oil Co. Inc.

Thomas J. Lasater, Thomas D. Kitch, Scott D. Jensen, Fleeson, Gooing, Coulson & Kitch, Wichita, KS, for Wilko Paint Inc.

Martin R. Ufford, Redmond, Redmond & Nazar, Wichita, KS, for Wichita Wire Inc.

Christopher M. McDonald, Shook, Hardy & Bacon Kansas City, MO, David Overlock Stewart, J. Daniel Berry, Thomas B. Smith, Ropes & Gray, Washington, DC, for Rubbermaid-Winfield, Inc.

Jack L. Lively Hall, Levy, Lively, DeVore & Bell, Coffeyville, KS, for Cliftco Inc and Getrude M. Clift.

James C Burwell, pro se.

John W. Cowden, Baker, Sterchi & Cowden, Kansas City, MO, Kathleen M. Whitby, St. Louis, MO, for Texaco Refining and Marketing Inc.

MEMORANDUM AND ORDER

VAN BEBBER, District Judge.

***1** This case comes before the court on the following motions:

Defendant Southwest Petro-Chem's Motion for Partial Summary Judgment (Doc. 27) on plaintiff's claims against it;

Third-Party Defendant Tenneco Oil's Motion to Dismiss Southwest Petro-Chem's Third-Party Complaint (Doc. 121);

Third-Party Defendant Tenneco Oil's Motion to Dismiss Third-Party Defendant Texaco's Cross Claim and Other Cross Claims (Doc. 235);

Third-Party Defendant Tenneco Oil's Motion to Dismiss Third-Party Defendant Moline's Cross Claim and Other Cross Claims (Doc. 282);

Defendant **Southwest Petro-Chem's** Alternative Motions to Dismiss, For Partial Summary Judgment, and for Declaration of the Extent of **Southwest Petro-Chem's** Potential Liability (Doc. 549).

For the reasons set forth in this memorandum and order, the motions are denied.

This is an action for cost recovery and contribution brought by plaintiff **Barton Solvents** under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq., in which plaintiff seeks to recover from defendant **Southwest Petro-Chem** costs it has incurred and will incur in cleaning up the site owned by plaintiff in Valley Center, Kansas. **Southwest Petro-Chem** has filed third-party complaints for contribution against 12 other parties alleged to have contributed to the contamination of the site.

*I. **SOUTHWEST PETRO-CHEM'S** MOTIONS FOR SUMMARY JUDGMENT*

A. SUMMARY JUDGMENT STANDARDS

In deciding a motion for summary judgment, the court must examine any evidence tending to show triable issues in the light most favorable to the nonmoving party. *Bee v. Greaves*, 744 F.2d 1387, 13396 (10th Cir.1984), *cert. denied*, 469 U.S. 1214 (1985). A

moving party is entitled to summary judgment only if the evidence indicates "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A genuine factual issue is one that "can reasonably be resolved only be a finder of fact because [it] may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. This burden may be discharged by "showing" that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party, who "may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. Thus, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Id.*

B. FACTUAL BACKGROUND

The pertinent uncontroverted facts established by the parties in accordance with D.Kan.Rule 206(c) are as follows: [FN1]

***2** Plaintiff **Barton Solvents** is the present owner of the site located at 201 South Cedar, Valley Center, Kansas. **Barton Solvents** has owned the site since 1979. On April 16, 1991, **Barton Solvents** entered into a consent agreement with the Kansas Department of Health and Environment (KDHE) concerning the cleanup of hazardous wastes at the site. **Barton Solvents** stated in the agreement that it knew the identities of 13 persons or entities who were responsible for damage to the site.

On October 13, 1991, **Barton Solvents** filed this action under CERCLA sections 107 and 113 naming **Southwest Petro-Chem** as the only defendant.

C. DISCUSSION

In its motion for summary judgment, defendant **Southwest Petro-Chem** argues that plaintiff **Barton Solvents** cannot seek to recover all of its cleanup costs from one defendant. Defendant contends that it can be held liable only for its equitable share of the recoverable cleanup costs under the federal common law of contribution, and cannot be held jointly and severally liable for all costs incurred by Barton Solvents during the cleanup of the site. At the heart of defendant's contentions is the issue of whether one potentially responsible private party can bring a cost recovery claim under CERCLA section 107, 42 U.S.C. § 9607(a), which would result in joint and several liability being imposed upon those sued, or, whether the only type of action which may be pursued by a potentially responsible private party is an action for pure contribution under CERCLA section 113, 42 U.S.C. § 9613(f).

In the present case, plaintiff Barton Solvents has alleged two causes of action, a "cost recovery" claim under section 107(a) of CERCLA, and a "contribution" claim under section 113(f) of CERCLA. Plaintiff is the present owner of the site at issue in this case and has entered into a consent order concerning the cleanup of that site with the KDHE. In turn, plaintiff brought these claims against defendant Southwest Petro-Chem. Defendant contends that what plaintiff has defined as two distinct claims is actually one claim for contribution. Defendant argues that plaintiff's only permissible claim against it is one in the nature of contribution and that defendant's liability is not joint and several. Instead, defendant's liability would be only for its equitable share of the cleanup cost.[FN2]

Plaintiff, on the other hand, argues that its claims against Southwest Petro-Chem are not solely in the nature of contribution. Plaintiff contends that one of its claims in this action is a claim for cost recovery under CERCLA section 107(a) which may result in joint and several liability for defendant Southwest Petro-Chem.

This court, as well as many other courts, have recognized that liability in private cost recovery actions under CERCLA 107(a) is joint and several. *See Idarado Mining Co.*, 916 F.2d 1486, 1489 (10th Cir.1990) (citing *O'Neill v. Picillo*, 883 F.2d 176, 178-79, *cert. denied*, *American Cyanamid v. Picillo*, 493 U.S. 1071 (1990)), *cert. denied*, 111 S.Ct. 1584 (1991)); *Bancamerica Commercial Corp. v. Mosher Steel of Kan-*

sas, Inc., 1992 U.S.Dist. LEXIS 4318 (D.Kan. March 12, 1992). Defendant argues that *Bancamerica* and the other cases cited are not applicable to the present case because they involved cost recovery actions by innocent owners, while the case at hand does not involve an innocent owner. Defendant contends that Barton Solvents shares responsibility for cleanup costs at the site and that therefore its claim against Southwest Petro-Chem can only be in the nature of one for contribution.

***3** In *Bancamerica*, the plaintiff became the owner of the site at issue as a result of foreclosure on a delinquent loan and had no responsibility for the damage to the site. Defendant contends that *Bancamerica* must be interpreted to read that because the plaintiff shared no responsibility for the damage, its claim was not for contribution, but was instead a pure cost-recovery action under CERCLA section 107, 42 U.S.C. § 9607. Accordingly, defendant argues that limiting the *Bancamerica* plaintiff's recovery would have been inequitable, and the appropriate standard of liability of the defendants in that case was joint and several. A similar result in the present case would not be appropriate, defendant contends.

Further, in its reply brief in support of its motion for summary judgment, defendant states: "If Barton Solvents establishes that it bears no responsibility for the cleanup based on the innocent landowner defense, Southwest Petro-Chem would concede that Barton Solvents states a claim for cost recovery." Defendant goes on to argue, however, that there are no cases where an innocent landowner defense has been sustained where the landowner acquired the site through a commercial transaction.

Plaintiff Barton Solvents contends that it has not disposed of any hazardous waste on the property nor has it allowed anyone else to do so. Plaintiff argues that the issue of its liability is to be resolved during the liability phase of the case at hand. Plaintiff contends, therefore, that because it has stated two distinct claims for cost recovery and contribution that there is no basis for this court to rule as a matter of law that its only action is in the nature of contribution.

The court agrees. CERCLA section 107(a) clearly indicates that the government is not the only entity that can bring any action for cost recovery. Specifically, a private party may bring such an action, 42 U.S.C. § 9607(a)(4)(B) ("any other person"). In *City of Philadelphia v. Stepan Chemical Co.*, 544 F.Supp. 1135, 1142 (E.D.Pa.1982), the court rejected the argument that the term "any other person" as used in section 107(a)(4)(B) does not include a party which itself is subject to liability under CERCLA. *See Sand Springs Home v. Interplastic Corp.*, 670 F.Supp. 913, 916 (N.D.Okla.1987) ("The Court finds that under 42 U.S.C. § 9607(A)(4)(B), a private party, even though a responsible party under CERCLA, who voluntarily pays CERCLA response costs may bring an action in its own behalf to collect cleanup costs against the parties allegedly responsible for the production and dumping of hazardous wastes.") Thus, this court concludes that it has been established by other courts that a potentially responsible party may bring a cost recovery action against other responsible parties under CERCLA section 107.

Because the court concludes there is no basis to preclude a potentially responsible party from bringing a private cost recovery action under CERCLA section 107, the court must address whether such a cost recovery action will result in joint and several liability for those sued. As stated above, both this court and the Court of Appeals for the Tenth Circuit have held that liability is joint and several in private cost recovery actions. Defendant argues that a different result is warranted in private cost recovery actions brought by potentially responsible parties, and that recovery from a defendant should only be for that defendant's equitable share of the cleanup costs pursuant to the federal common law of contribution. *See* Rest. (Second) of Torts § 886A(2) ("No tortfeaser can be required to make contribution beyond his own equitable share of liability."). The court agrees that if this action were solely in the nature of one for contribution, plaintiff's recovery from defendant Southwest Petro-Chem could only be for its equitable share of the cleanup costs pursuant to CERCLA section 113(f)(1), 42 U.S.C. § 9613(f)(1). In this case, however, plaintiff has alleged claims for *both* cost recovery and contribution against defendant Southwest Petro-Chem.

***4** The court is unable to conclude that simply because Congress has provided for a contribution action to be brought by a responsible party who pays more than its fair share, that an action in the nature of contribution is the *only* type of action such a party can bring, or that if such a plaintiff brings a claim for cost recovery that

liability will still only be for the defendant's equitable share. Defendant suggests in its brief in support of its motion for summary judgment that plaintiff's claim for cost recovery under section 107 and its claim for contribution under section 113 are merely alternative ways of stating the same thing. The court disagrees with this argument.

In *Allied Corp. v. Acme Solvents Reclaiming, Inc.*, 691 F.Supp. 1100 (N.D.Ill.1988), the District Court was faced with the exact issue present in this case. The defendants in *Allied* argued to the court that all cost recovery claims between potentially responsible parties are essentially contribution claims, and are thus claims resulting in several liability only. *Id.* at 1117. In concluding that the defendants' argument should fail, the court stated that: "Policies underlying CERCLA support the notion that claims between [potentially responsible parties] are not always, and should not always be, in the nature of contribution.... A blanket prohibition against joint and several liability in claims between responsible parties would discourage a willing [potentially responsible party] from cleaning up on its own." *Id.* at 1118.

The *Allied* court went on to suggest a method of analysis for cases involving claims by one potentially responsible party against another based upon a line of cases holding that joint and several liability should be the result in CERCLA cost recovery actions unless a defendant can establish that the harm to the site at issue is divisible. *Id.* The Tenth Circuit has also indicated with approval that liability under CERCLA may not be joint and several where harm is divisible. *County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1516 n. 11 (10th Cir.1991). The *Allied* court wrote:

> First, the defendants would have the burden of establishing that the harm is divisible. To carry their burden, the defendants would have to prove their contribution. If they were successful, their liability would be several. If, however, the court determines that the harm is indivisible, then the court would have the option to impose or not impose joint and several liability. The court's decision on this matter would rest upon its consideration of [the factors set forth in *United States v. A & F Materials Co.*, 578 F.Supp. 1249 (S.D.Ill.1984)].
>
> 691 F.Supp. at 1118.

This court finds the analysis set forth by the *Allied* court persuasive and in line with the current law of the Tenth Circuit.

Defendant has cited the cases of *Transtech Indust., Inc. v. A & Z Septic Clean*, 1992 WL 186072 (D.N.J. July 30, 1992), and *United States v. Conservation Chemical Co.*, 619 F.Supp. 162 (W.D.Mo.1985), as authority for the premise that liability between two potentially responsible parties will not be joint and several. The court finds both cases inapposite to the case now before the court. In *Transtech*, the District Court discussed whether a settlement with the government would bar a cost recovery claim under section 107(a) as well as a contribution claim under section 113. The court stated that both claims would be barred by a settlement with the government pursuant to CERCLA section 113(f)(1), 42 U.S.C. § 9613. The court did not expressly hold that one potentially responsible party could not maintain an action for cost recovery resulting in joint and several liability. Rather, the court simply held that alleging a claim under section 107 would not allow a plaintiff to get around section 113(f)(1)'s bar against suing parties who had settled with the government. This court does not read *Transtech* as broadly as defendant suggests. To do so would fly in the face of other, well-established authority.[FN3]

***5** The *Conservation Chemical* case cited by defendant is also unpersuasive. In that case, the District Court held that an action by one responsible party against another must be governed by the general principles of contribution. 619 F.Supp. at 229. However, the opinion was written before CERCLA was amended in 1986 to specifically allow contribution actions under section 113 and cites no authority for its conclusion other than general contribution principles. Further, a later decision in the Western District of Missouri has implicitly overruled *Conservation Chemical*, expressly holding that non-settling defendants may be liable for more than their equitable share of liability because liability under CERCLA is joint and several. *See Central Illinois Public Serv. Co. v. Industrial Oil Tank & Line Cleaning Serv., Inc.*, 730 F.Supp. 1498, 1505 (W.D.Mo.1990). This court finds that the *Central Illinois* case is more in line with the weight of case law holding that liability under CERCLA is joint and several, even in the context of an action by one private party against another.

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In summary, the court concludes that defendant's motion for summary judgment must be denied. The weight of authority establishes that liability under CERCLA is joint and several. Such liability extends to actions for cost recovery brought by private parties under CERCLA section 107, even actions by private parties who are potentially responsible parties. Thus, an action for contribution is not the only type of recovery available to a potentially responsible party under CERCLA.

To hold otherwise would be to defeat CERCLA's goal of encouraging settlements with the government. In *Allied*, the court recognized that a "blanket prohibition against joint and several liability in claims between responsible parties would discourage a willing [party] from cleaning up on its own." 691 F.Supp. at 1118. The court went on to note that a responsible party which was amenable to cleaning up a site might be discouraged from doing so if it knew that its only recourse was in the nature of contribution and it might be left "holding the bag" for insolvent responsible parties. *Id.* It seems appropriate that the burden of identifying and suing all potentially responsible parties should fall on a non-settling party such as **Southwest Petro-Chem** rather than settling plaintiff **Barton Solvents**.[FN4]

In light of this court's denial of defendant's motion for summary judgment, the court notes that defendant **Southwest Petro-Chem** will now have the burden of establishing that the harm at the **Barton Solvents** site is divisible. If this can be established, defendant's liability will be several. *See County Line Inv. Co.*, 933 F.2d at 1515 n. 11; *Allied*, 691 F.Supp. at 1118. If divisible harm cannot be established, liability will be joint and several.

Defendant's Motion for Summary Judgment (Doc. 27) is therefore denied. Defendant's Alternative Motions to Dismiss, For Partial Summary Judgment, and for Declaration of the Extent of Southwest Petro-Chem's Potential Liability (Doc. 549) reiterates the same arguments contained in Document 27 and is also denied.

II. MOTIONS BY THIRD-PARTY DEFENDANT TO DISMISS SOUTHWEST PETRO-CHEM'S THIRD-PARTY COMPLAINT AND RELATED CROSS-CLAIMS

***6** Third-Party Defendant Tenneco Oil has filed a motion to dismiss the third-party complaint of Southwest Petro-Chem under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief may be granted (Doc. 121). Tenneco Oil has also filed motions to dismiss the cross-claims of Third-Party Defendant Texaco, Inc. (Doc. 235) and Moline Paint Manufacturing Company (Doc. 282), alleging that the cross-claims fail to state a claim upon which relief can be granted because they are based entirely on the insufficient allegations contained in Southwest Petro-Chem's third-party complaint. Because all three of Tenneco Oil's motions concern the allegations in Southwest Petro-Chem's third-party complaint, they will be considered together in this memorandum and order.

A. STANDARDS FOR A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

The court may not dismiss a cause of action for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). "All well-pleaded facts, as distinguished from conclusory allegations, must be taken as true." *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir.1984). The court must view all reasonable inferences in favor of the plaintiff and the pleadings must be liberally construed. *Id.;* Fed.R.Civ.P. 8(f). The issue in reviewing the sufficiency of a complaint is not whether the plaintiff will prevail, but whether he is entitled to offer evidence to support his claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

B. DISCUSSION

Tenneco Oil has moved to dismiss Southwest Petro-Chem's Third-Party Complaint and the cross-claims based upon it because (1) the third-party complaint fails to allege a factual basis for the claim against Tenneco Oil, and (2) the third-party complaint does not specifically identify any hazardous substances allegedly delivered by Tenneco Oil to the Barton Solvents site. Tenneco Oil argues that the application of Fed.R.Civ.P. 8(a)(2)'s requirement that pleadings contain a "short and plain statement of the claim showing that the pleader is entitled to relief" in a

complex CERCLA case such as the present one requires that Southwest Petro-Chem's conclusory recitation of the statutory elements of CERCLA be deemed so deficient that Tenneco Oil cannot reasonably be expected to respond.

Specifically, Tenneco Oil contends that the third-party complaint fails to allege that Tenneco Oil's transactions involving allegedly hazardous substances were in any way connected with a release of any such substances from the Barton Solvents site. Tenneco Oil further argues that, even assuming that Tenneco Oil did deliver or send drums to the site, the complaint contains no allegation identifying the particular substances attributable to Tenneco Oil.

Southwest Petro-Chem argues, on the other hand, that the allegations in its third-party complaint meet the liberal notice requirements of Fed.R.Civ.P. 8(a)(2) and provide clear notice of the Southwest Petro-Chem's claims for cost recovery and contribution under CERCLA, for comparative implied indemnity under Kansas law, and for declaratory judgments. Southwest Petro-Chem argues that the third-party complaint meets the statutory requirements to allege a cause of action under CERCLA. In order to state a prima facie claim under CERCLA, a complaint must allege that:

***7** (1) there was a release or threatened release of any hazardous substance from the site;

(2) the site is a "facility" under CERCLA section 101(9);

(3) such release or threatened release caused the plaintiff to incur response costs;

(4) such response costs are consistent with the national contingency plan; and

(5) the defendant falls within one of the four classes of persons subject to CERCLA liability.

Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1152 (9th Cir.1989).

The Court of Appeals for the Tenth Circuit has not spoken on the issue of whether or not a complaint alleging a cause of action under CERCLA must identify the specific types of hazardous wastes dumped at the site or identify facts specifically linking the defendant to the activities at the site. However, in *Lone Star Indus., Inc. v. Horman Family Trust,* the Tenth Circuit stated that the general "notice pleading" rules apply in CERCLA cases. 960 F.2d 917, 920-22 (10th Cir.1992) (citing Fed.R.Civ.P. 8(a)(2); *Conley v. Gibson*, 355 U.S. 41, 47 (1957); 2A Moore's Federal Practice ¶ 8.13 at 8-57 to 8-84 (2d ed. 1991)). Based upon the *Lone Star* case, this court concludes that any argument by Tenneco Oil that CERCLA cases require a higher level of pleading is without merit. Because CERCLA actions do not require a level of pleading beyond that of "notice pleading," the issue for this court is whether the allegations in Southwest Petro-Chem's third-party complaint comport with the requirements of Fed.R.Civ.P. 8(a)(2).

In *Ascon*, 866 F.2d at 1153, the Court of Appeals for the Ninth Circuit held that a plaintiff need not allege the particular manner in which a release or threatened release has occurred in order to make out a prima facie claim under CERCLA section 107(a). The court held that its conclusion was supported by the structure of CERCLA as well as the policies underlying notice pleading. *Id.* The court stated that "[t]he allegation that there is a release or threatened release of hazardous substances from a particular 'facility' provides such general notice." *Id.*

The *Ascon* court went on to discuss the requirements of notice pleading and concluded that the allegations of facts which accompanied plaintiff's recitation of the elements of a CERCLA claim in the complaint were sufficient to withstand a Fed.R.Civ.P. 12(b)(6) motion to dismiss. *Id.* at 1156. Specifically, the court noted that Ascon had specified the location and size of the property at issue, the history of ownership and use of the property, as well as the kinds of toxic wastes located on the property. *Id.* Ascon also alleged that the property had been declared a hazardous waste site by the State of California, that defendants knew their waste was hazardous, and alleged various facts about the corporate entities being sued. Additionally, the court noted that the fact that Ascon had alleged with specificity the various dates on which the defendants had allegedly deposited hazardous waste onto the property "clearly provided" notice of the CERCLA claim. *Id.*

***8** Although the third-party complaint in the present case does not contain as many factual details as the complaint in *Ascon*, the court concludes that Southwest Petro-Chem's third-party complaint sets out sufficient facts to comport with the liberal notice pleading requirements of Fed.R.Civ.P. 8(a)(2) as applied in the Tenth Circuit. The third-party complaint sets out the location and street address of the **Barton Solvents** site at issue, and it identifies the parties and their domiciles, including the predecessor of **Southwest Petro-Chem**. The complaint also indicates that **Barton Solvents** had entered into a consent order with the KDHE with regard to the site at issue and that **Southwest Petro-Chem** had been sued by **Barton Solvents** under CERCLA, 42 U.S.C. § 9601 et seq.

Most importantly, the third-party complaint alleges that Tenneco Oil contracted or arranged with a transporter to deliver or sent drums containing hazardous substances to the **Barton Solvents** site for treatment and disposal. Although the third-party complaint does not state the dates the drums were allegedly sent or name the specific types of hazardous wastes allegedly sent, the court concludes that the allegation concerning the method of contamination in third-party complaint gives sufficient notice to Third-Party Defendant Tenneco Oil to enable Tenneco Oil to formulate a response to the third-party complaint.

The complaint in *Ascon* may have set out more information than the third-party complaint in the present case, but that case does not purport to prescribe a minimum standard for CERCLA complaints. Further, the issue before this court differs from that in the *Ascon* case in that it is a third-party complaint at issue rather than a regular complaint. The third-party complaint in the present case clearly sets forth the necessary statutory requirements, as well as a minimal degree of facts. It is the court's view that requiring a third-party plaintiff to plead all the factual details of a CERCLA claim in a third-party complaint would be unrealistic. Even the court in *Cash Energy, Inc. v. Weiner*-a case which differs from the law of the Tenth Circuit in that it held that CERCLA cases require a higher degree of specificity than mere notice pleading-recognized that " '[w]here there are multiple defendants ... and where the plaintiff was not directly involved in the alleged transaction, the burden on the plaintiff to know exactly [the factual basis of an alleged claim] ... is not realistic.' " 768 F.Supp. 892, 900 (D.Mass.1991) (quoting *New England Data Servs., Inc. v. Becher*, 829 F.2d 286, 291 (1st Cir.1987)). In the present case, Southwest Petro-Chem is not the primary plaintiff and is not the current occupier of the site at issue. Thus, it seems unfair to require that Southwest Petro-Chem identify all factual details in its third-party complaints. Because the third-party complaint is identified as such, the third-party defendants such as Tenneco Oil have the same access to factual details included in the primary complaint as Southwest Petro-Chem does. Detailed factual information may be uncovered during the discovery process.

***9** As an additional note, the court notes that the majority of the other third-party defendants sued by Southwest Petro-Chem have managed to prepare answers to virtually identical third-party complaints. This provides the court with an additional basis for concluding that Southwest Petro-Chem's third-party complaint meets the liberal notice pleading requirements of Fed.R.Civ.P. 8(a)(2) and provides a short and plain statement of the claim which has enabled other third-party defendants to answer. For the foregoing reasons, the Motion to Dismiss of Third-Party Defendant Tenneco Oil (Doc. 121) is denied.[FN5] Tenneco Oil's Motion to Dismiss Cross Claims (Docs. 235 and 282) are denied for the same reasons.

IT IS, THEREFORE, BY THE COURT ORDERED that Defendant Southwest Petro-Chem's Motion for Partial Summary Judgment (Doc. 27) is denied.

IT IS FURTHER ORDERED that Third-Party Defendant Tenneco Oil's Motion to Dismiss Southwest Petro-Chem's Third-Party Complaint (Doc. 121) is denied.

IT IS FURTHER ORDERED that Third-Party Defendant Tenneco Oil's Motion to Dismiss Third-Party Defendant Texaco's Cross Claim and Other Cross Claims (Doc. 235) is denied.

IT IS FURTHER ORDERED that Third-Party Defendant Tenneco Oil's Motion to Dismiss Third-Party Defendant Moline's Cross Claim and Other Cross Claims (Doc. 282) is denied.

IT IS FURTHER ORDERED that Defendant South-

west Petro-Chem's Alternative Motions to Dismiss, For Partial Summary Judgment, and for Declaration of the Extent of Southwest Petro-Chem's Potential Liability (Doc. 549) is denied.

Copies of this order shall be mailed to counsel of record for the parties.

IT IS SO ORDERED.

FN1. Defendant has listed four items in the statement of uncontroverted facts included in its memorandum in support of its motion. Plaintiff apparently did not notice this statement of uncontroverted facts because plaintiff contends in its response that defendant has not listed any such facts. The court takes the facts as uncontroverted pursuant to D.Kan.Rule 206(c).

FN2. A party's equitable share in a CERCLA contribution action is determined by the court pursuant to CERCLA section 113(f)(1), 42 U.S.C. § 9613(f)(1).

FN3. In fact, the *Transtech* court set out its discussion of the settlement defense in CERCLA section 113 in an alternative manner, apparently to avoid assuming that cost recovery actions could not be maintained by a potentially responsible party. 1992 WL 186072 at *5.

FN4. Further, as discussed earlier in this memorandum and order, it has not been established that Barton Solvents is a responsible party under CERCLA section 107. Therefore, even if the court were to hold that an action by a responsible party against another such party could only be in the nature of contribution, defendant's motion for summary judgment could not be granted as there have been no uncontroverted facts presented to the court from which it could find that Barton Solvents was or was not a responsible party.

FN5. The court also notes but does not decide Tenneco Oil's arguments concerning the applicability of the CERCLA petroleum exclusion, 42 U.S.C. § 9601(14), to their alleged activities. The court considers the applicability of the petroleum exclusion to be an appropriate subject for a summary judgment motion.

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Barton Solvents, Inc. v. Southwest Petro-Chem, Inc.
Not Reported in F.Supp., 1993 WL 382047 (D.Kan.), 38 ERC 1022, 25 Envtl. L. Rep. 21,454

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