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SOUTHERN DISTRICT OF IA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

DICO, INC.,	)	
	)	
Plaintiff,	)	
	)	CIVIL NO. 4-97-10130
vs.	)	
	)	
AMOCO OIL CO., *et al.*,	)	
	)	ORDER
Defendant.	)	

THE COURT HAS BEFORE IT the combined defendants' motion for summary judgment, filed April 16, 2001. Plaintiff Dico, Inc. ("Dico") resisted the motion on May 29, 2001 and defendants filed a reply on June 8, 2001. The Court held a telephonic hearing on February 28, 2002. The motion is fully submitted.

I. BACKGROUND

A. The Des Moines TCE Site

The following facts either are not in dispute or are viewed in a light most favorable to Dico. Beginning in the 1950s, affiliates of the present Dico operated various businesses on a multi-acre tract of land known locally as 200 S.W. 16th Street, Des Moines, Iowa (the "Site"). Included among the operations were metal manufacturing and the resale of chemicals and dairy equipment. In addition, an entity known as Dico Company, Ltd. operated a pesticide formulation business on the Site from 1952 until 1962.

In 1962, Dico Company, Ltd. transferred its pesticide formulation operation to Di-Chem, Inc., which continued to operate the formulation business at the site until 1970-71. The Site was

owned during much of this time period by DIC Corporation.

Meanwhile, in February 1967, Dico Company, Ltd. converted from a limited partnership to a corporation known as Dico Company, Inc. Dico Company, Inc. acquired title to the Site from Dico Corporation (previously "DIC Corporation") on January 3, 1969. The entity known as "Dico," the plaintiff in the present action, admits that it is the corporate successor to Dico Company, Inc., and the current owner of the Site.

In 1974, trichloroethylene ("TCE") was found in the Des Moines Water Works ("DMWW") public drinking water supply. The Environmental Protection Agency ("EPA") traced the source of the contamination to a nearby 200 acre tract of land, which included Dico's property. In 1983, the EPA placed the Des Moines TCE site on the national priority list.

The EPA initiated a remedial investigation and divided the response activities at the TCE site into four Operable Units ("OUs"), distinguished primarily by the type of contamination found and remediation proposed for the unit. Operable Unit 2 ("OU-2"), one of the two operable units at issue in the present case, called for remedial action to mitigate the release of TCE and other volatile organic compounds ("VOCs") into the ground water. During the course of the OU-2 remedial investigation, portions of the TCE Site were found to be contaminated with pesticides and herbicides. The area contaminated with pesticides and herbicides was separated from the OU-2 study and designated as Operable Unit ("OU-4"). It is undisputed that OU-2 and OU-4 both involved property presently owned by Dico.

There have been three removal actions at OU-2 and OU-4. Dico conducted two of these removal actions in 1994, pursuant to two separate Unilateral Administrative Orders issued by the EPA. The third removal action was conducted pursuant to an Administrative Order on Consent

by the defendants to the present action, (the "Customer Group"), all of whom were once customers of Di-Chem.

B. Present Complaint, EPA Settlement and Entry of Consent Decree

Dico filed the present three-count complaint against the Customer Group in 1997. In Count I, Dico seeks to recover all of its past response costs attributable to the investigation and clean-up of pesticide and herbicide contamination from the Customer Group under CERCLA § 107, 42 U.S.C. § 107(a). Complaint at ¶ 97. In Count II, Dico seeks contribution from defendants pursuant to CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1), for "response costs, damages, or injunctive or other relief which has been or may be imposed on Dico under CERCLA." Complaint at ¶ 101. In Count III, Dico seeks a declaratory judgment pursuant to CERCLA § 113(g)(2), 42 U.S.C. § 9613(g)(2), that defendants "are strictly, jointly, and severally liable to Dico under §§ 107(a) and 113(f)(1) of CERCLA for future response costs incurred by Dico at the Site resulting from the release or threatened release of hazardous substances at the Site." Complaint at ¶ 103.

Meanwhile, the EPA signed a Record of Decision regarding OU-2 and OU-4 in 1996, which affirmed the clean-up work conducted under the three removal actions and determined that the only remaining response actions for the Site are long-term Operations and Maintenance ("O&M") of the removals, and institutional controls to ensure the property is not used for residential purposes.

Shortly thereafter, the Customer Group entered into negotiations with the United States for the OU-2 and and OU-4 costs. In April 1998, the EPA issued a Special Notice Letter to Dico and the Customer Group, informing them of their potential liability for the OU-2 and OU-4 costs.

A proposed Consent Decree accompanied the letter. The proposed Consent Decree indicated that defendants who reached a settlement with the EPA would be protected from liability in the contribution action filed by Dico. Dico did not respond to the Special Notice Letter, and did not participate in the ensuing settlement negotiations.[1]

On November 29, 1999, the United States filed an action in this Court against the Customer Group, simultaneously lodging the Consent Decree. The Court subsequently allowed Dico to intervene in the action.

On March 10, 2000, following the statutory notice and comment period, the United States formally moved to enter the Consent Decree. Dico moved for an evidentiary hearing, arguing such a hearing was necessary to ensure the record was fair and complete. Dico also claimed it had a vested property interest in its contribution action against the Customer Group, which could not be "taken" without due process and just compensation.

In an Order entered September 29, 2000, this Court denied Dico's motion for an evidentiary hearing, thereby rejecting its constitutional argument, and entered the Consent Decree. The Eighth Circuit affirmed this Order on January 24, 2002. *United States v. BP Amoco Oil PLC*, 277 F.3d 1012, 1017 (8th Cir. 2002).

In their present motion for summary judgment, defendants argue that as a potentially responsible party ("PRP") under CERCLA § 107(a)(1), Dico may not seek direct recovery of its

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[1] Dico claims it did not respond to the Special Notice Letter because: 1) the EPA had already forced Dico to incur 90 percent of the clean-up costs, and thus, the EPA had no legitimate claims remaining against Dico for which settlement could be negotiated; and 2) Dico had no reason to negotiate a settlement agreement outside of its pending contribution claim, because the only purpose for such negotiations would be to "bargain away Dico's contribution rights." Dico's arguments were rejected both by this Court and the Eighth Circuit in the related litigation.

past or future response costs under CERCLA § 107(a)(4)(B) or impose joint and several liability on any other party. Defendants further argue that although a PRP generally may seek contribution from other PRPs under CERCLA § 113(f)(1), Dico's ability to do so was foreclosed by the entry of the Consent Decree. Accordingly, the Customer Group claims summary judgment is warranted on all three counts of the complaint.

II. APPLICABLE LAW AND DISCUSSION

A. Summary Judgment Standard

Summary judgment is properly granted when the record, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Walsh v. United States*, 31 F.3d 696, 698 (8th Cir. 1994). The moving party must establish its right to judgment with such clarity there is no room for controversy. *Jewson v. Mayo Clinic*, 691 F.2d 405, 408 (8th Cir. 1982). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). An issue is "genuine," if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *Id.* at 248. "As to materiality, the substantive law will identify which facts are material . . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

B. Whether Dico Has Standing Under CERCLA § 107(a)

In Count I of its Complaint, Dico seeks to recover from the Customer Group all of the past response costs attributable to pesticide contamination pursuant to CERCLA § 107(a). Count III requests a declaratory judgment that defendants "are strictly, jointly, and severally liable to Dico under §§ 107(a) and 113(f)(1) of CERCLA for future response costs incurred by Dico at the Site resulting from the release or threatened release of hazardous substances at the Site." Complaint at ¶ 103. As noted by defendants, a declaratory judgment regarding future response costs is available under CERCLA only in a direct cost recovery action under CERCLA § (107)(a). *See, e.g., Raytheon Co. v. McGraw-Edison Co., Inc.*, 989 F. Supp. 858, 865 n.8 (E.D. Wis. 1997). It follows that if, by virtue of its PRP status, Dico lacks standing to bring an action for direct recovery of its response costs under Count I, it also lacks standing to seek a declaratory judgment regarding future costs under Count III. The Court therefore will address Counts I and III simultaneously.

Although the Eighth Circuit has yet to rule on whether a PRP may maintain a § 107(a) cost recovery action against another PRP, all other circuits have determined that a PRP seeking contribution from other PRPs is limited to a § 113(f) action for contribution. *See, e.g., Bedford Affiliates v.* Sills, 156 F.3d 416, 423 (2d Cir. 1998); *Centerior Svc. Co. V. Acme Scrap Iron*, 153 F.3d 344, 356 (6th Cir. 1998); *Pnuemo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769 (4th Cir. 1998); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1120 (3d Cir. 1997); *Redwing Carriers, Inc. v. Saraland* Apts., 94 F.3d 1489, 1496 (11th Cir. 1996). *United States v. Colorado & E.R.R. Co.*, 50 F.3d 1530, 1539 (10th Cir. 1995); United *Tech v. Browning-*

Ferris Indus., 33 F.3d 96, 98-103 (1st Cir. 1994); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 764-65 (7th Cir. 1994); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989). Dico does not dispute that as current owner of the Site, it qualifies as a PRP under the statute. *See* 42 U.S.C. § 9607(a)(1).

Admittedly, in each of the above-cited cases, it was clear the plaintiff PRP had contributed to the contamination in some manner, or was liable under a consent decree for site cleanup. *See Wolf, Inc. v. L & W. Service Center, Inc.*, No. 4:CV96-3099, 1997 WL 141685 at *6 (D. Neb. Mar. 27, 1997). In *Rumpke of Indiana, Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1236-3742 (7th Cir 1997), the Seventh Circuit was faced with a § 107(a) suit brought by an owner-PRP that had not been subjected to an administrative clean-up order, had not been party to a § 106 or § 107(a) action, and claimed it had purchased the contaminated site without knowledge of prior disposals and without contributing to the contamination in any way. The court noted that although claims by one PRP against other PRPs generally must be brought as contribution claims under § 113(f), its earlier decision in *Akzo Coatings, Inc.* had carved out an exception for landowners "who allege that they did not pollute the site in *any way*." *Id.* at 1240-41 (citing *Akzo*, 30 F.3d at 764) (emphasis added). Because the *Rumpke* plaintiff appeared to qualify under this exception, alleging it was not responsible for *any* of the waste at the site, the court allowed its § 107(a) action to proceed. *Id.* at 1240-41. As reasoned by the court:

> [O]ne of two outcomes would follow from a landowner suit under § 107(a): either the facts would establish that the landowner was truly blameless, in which case the other PRPs would be entitled to bring a suit under § 113(f) within three years of the judgment to establish their liability among themselves, or the facts would show that the landowner was also partially responsible, in which case it would not be entitled to recover under its § 107(a) theory and only the § 113(f) claim would go forward.

Id. at 1240. Two federal district courts within this circuit have reached similar conclusions. *See Laidlaw Waste Systems, Inc. v. Mallinckrodt, Inc.*, 925 F. Supp. 624, 631 (E.D. Mo. 1996) (PRP who entered consent decree with state and had not been formally adjudicated liable not prohibited from bringing a § 107(a) claim); *Wolf*, 1997 WL 141685 at * 7 (relying on *Rumpke*, concluded that plaintiffs who alleged they did not contribute to contamination, and were not the subject of administrative clean-up order or civil actions under CERCLA §§ 106 or 107 could continue with § 107(a) claim).

In resisting the present motion, Dico understandably attempts to align itself with *Rumpke, Laidlaw* and *Wolf*. Although this Court agrees with the *Rumpke* reasoning in theory, and is confident the Eighth Circuit would follow a similar analysis, the facts in the present case prevent Dico from claiming "innocent party" status as a matter of law. First, no matter how complex the Site's operational history may seem, Dico admits that a direct predecessor, Dico Company, Inc., owned the Site for at least one year (1969) during which the agricultural chemical formulation business was in operation. *Compare Rumpke*, 107 F.3d at 1241-42 (PRP allegedly acquired ownership of site without knowledge of environmental hazards); *but see Soo Line R. Co. v. Tang Indus., Inc.*, 998 F. Supp. 889, (N.D. Ill. 1998) (issue of fact as to whether landowner knew tenants were disposing of hazardous substances on its property).

In addition, unlike the plaintiffs in *Rumpke* or *Wolf*, Dico's clean-up efforts on the Site were prompted by two separate Unilateral Administrative Orders issued by the EPA. *Rumpke*, 107 F.3d at 1239; *Wolf*, 1997 WL 141685 at *8 (court noted in both cases that plaintiff not subject to administrative order). This is not a case where permitting a § 107(a) claim "comports with CERCLA's goal of encouraging parties to initiate cleanup operations promptly and

voluntarily." *Bethlehem Iron Works, Inc. v. Lewis Indus., Inc.*, 891 F. Supp. 221, 225 (E.D. Pa. 1995) (court allowed property owners to pursue § 107(a) claim where plaintiffs had cleaned-up property voluntarily, and none of the parties involved had been subject to judgment, consent decree or other agreement involving liability).

Finally, and most importantly, Dico has been found in this Court to have contributed at least in part to the overall contamination at the Site, and to OU-2 in particular, by enabling TCE to escape a degreasing vat and contaminate the soil and groundwater. *See United States v. Dico, Inc.*, No. 4-95-CV-10289 (S.D. Iowa), slip op. at 2-3, *aff'd, United States v. Dico*, 266 F.3d 864 (8th Cir. 2001).[2] It therefore cannot fit into the *Akzo/Rumpke* exception for "landowners who allege that they did not pollute the Site in any way." *Rumpke*, 107 F.3d at 1240; *see also Laidlaw*, 925 F. Supp. at 630 (addressing whether PRP "which has not formally admitted liability or been formally adjudicated liable is limited to a contribution action under § 113").

Although this Court's prior adjudication did not involve pesticide contamination, the Court agrees with defendants that Congress did not intend a PRP clearly responsible for at least one contaminant to ignore that liability in subsequent § 107(a) litigation simply by focusing on different contaminants. *See Rumpke*, 107 F.3d at 1240 (when party who has "injured the property" seeks recovery from another PRP, "the statute directs [it] to § 113(f) *and only to § 113(f).*") (emphasis added). Summary judgment is therefore granted on Counts I and III of

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[2] On April 16, 2001, defendants filed a request for judicial notice of certain "adjudicative facts" in support of their motion for summary judgment. Defendants' request is granted. *See* FED. R. EVID. 201(d) (requiring a court to take judicial notice of certain adjudicative facts "if requested by a party and supplied with the necessary information"); *see also United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994) (defining "adjudicative facts" for purposes of Rule 201 to include court files).

Dico's Complaint.

C. Whether Contribution Bar In Consent Decree Bars Claim For Contribution

Alternatively, Count II of Dico's Complaint seeks contribution from defendants for the remediation costs at issue under CERCLA § 113, 42 U.S.C. § 9613(f)(1). As noted by defendants in their present motion, however, Dico's § 113 action is effectively barred by Paragraph 22 of the Consent Decree. This paragraph provides:

> The parties agree, and by entering this Consent Decree the Court finds, that the Settling Defendants are entitled, as of the effective date of this Consent Decree, to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for "matters addressed" in this Consent Decree. "Matters addressed" are past response costs and future response costs in connection with Operable Units No. 2 and 4 whether incurred by the United States or any other person.

Defendants' Appendix in Support of Motion for Summary Judgment, ("Defendants' App.") at 478.[3]

Dico has not produced evidence suggesting there is a material issue of fact regarding this issue. It does not dispute the intended legal effect of paragraph 22, nor does it dispute that it had notice of the presence of the contribution bar in the Consent Decree as early as April 1998. Rather, Dico's sole argument in resisting summary judgment on this count is that the Consent Decree, and presumably, 42 U.S.C. § 9613(f)(2), is unfair and unconstitutional. Accordingly,

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[3] 42 U.S.C. § 9613(f)(2) provides:

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

Dico previously had urged this Court to stay its ruling in this case pending the outcome of the Eighth Circuit appeal.

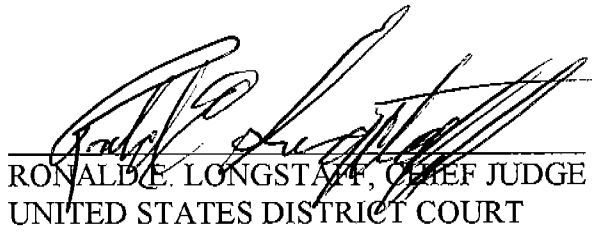
As set forth above, on January 24, 2002, the Eighth Circuit affirmed this Court's entry of the Consent Decree. *United States v. BP Amoco Oil PLC*, 277 F.3d 1012 (8th Cir. 2002). Writing for the panel, Judge McMillian expressly rejected Dico's constitutional argument, agreeing with this Court that because Dico did not have a right to contribution at the time the government sought entry of the decree, Dico never had a vested property interest that could be "taken" in violation of the Fifth Amendment. *Id.* at 1017. Absent a genuine issue of material fact as to whether entry of the Consent Decree served as an absolute bar to Dico's claim for contribution under § 113, or any other issue challenging the validity of paragraph 22 of the Consent Decree, Count II of Dico's Complaint is appropriately dismissed.

III. CONCLUSION

For the reasons outlined above, defendants' April 16, 2001 motion for summary judgment [Clerk No. 119] is granted on all counts. Defendants' April 16, 2001 request for judicial notice [Clerk No. 124] is granted. The Clerk of Court is directed to enter judgment in favor of defendants and against Dico, Inc.

IT IS SO ORDERED.

Dated this 13th day of March, 2002.



RONALD E. LONGSTAFF, CHIEF JUDGE
UNITED STATES DISTRICT COURT