10/23/00

Richard:

Enclosed please find a copy of the 10/17/2000 letter, signed by Chris Bisgaard, with attached order of the court ruling on various motions and cross-motions for summary judgement on this case.

If I can be of further assistance, please contact me at (916) 322-4797.

Sincerely,

Stephen Hsu

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October 17, 2000

OUR FILE NO.
23889-002

VIA FEDERAL EXPRESS

Michael Lumbard, Esq.
Senior Counsel
State of California
Department of Health Services
Radiologic Health Branch
601 North 7th Street, MS-178
Sacramento, California 95814

Re: Cease and Desist Order
170 West Providencia Street, Burbank, CA

Dear Mr. Bailey:

Pursuant to our request, I am enclosing herewith a copy of the Order of the court ruling on various motions and cross-motions for summary judgment in the Thomson v. ICN Pharmaceuticals, et al. litigation and which was filed on July 7, 2000. If I can be of further assistance to you, please feel free to call.

Very truly yours,

CHRISTOPHER P. BISGAARD of
LEWIS, D'AMATO, BRISBOIS & BISGAARD LLP

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Enclosure

LA2000:88741.1

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOSEPH A. THOMSON; VIRGINIA THOMSON, trustees, Plaintiffs, v. ICN PHARMACEUTICALS, INC., a Delaware corp.; NUCOR CORP., INC., a Delaware corp.; RHONE-POULENC, INC., a New York Corp., Defendants, and related cross and counter claims.	Case No. EDCV 00-00318-VAP(AJWx) **ORDER (1) DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST ICN PHARMACEUTICALS, INC.; (2) DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST NUCOR CORP., INC.; (3) DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AGAINST RHONE-POULENC, INC.; (4) GRANTING NUCOR CORP., INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST PLAINTIFFS; (5) DENYING NUCOR CORP., INC.'S. CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST ICN PHARMACEUTICALS, INC.; AND (6) DENYING ICN PHARMACEUTICALS, INC.'S MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT, AGAINST NUCOR CORP., INC.**

Six related motions seeking either summary judgment or partial summary judgment came before the Court for hearing on June 12, 2000. After reviewing and considering the materials filed by all parties and the arguments of counsel in support of and in opposition to the motions, the Court issues the following Order, and rules that:

Plaintiffs' Motion for Partial Summary Judgment against Defendant ICN Pharmaceuticals, Inc. is DENIED.

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7/7/00

2. Plaintiffs' Motion for Partial Summary Judgment against Defendant Nucor Corporation, Inc. is DENIED;

3. Plaintiffs' Motion for Summary Judgment against Defendant Rhone-Poulenc, Inc. is DENIED;

4. Defendant Nucor Corporation, Inc.'s Motion for Partial Summary Judgment against Plaintiffs is GRANTED;

5. Defendant/Cross-claimant Nucor Corporation, Inc.'s Motion for Partial Summary Judgment against Defendant/Cross-defendant ICN Pharmaceuticals, Inc. is DENIED; and

6. Defendant/Cross-claimant ICN Pharmaceuticals, Inc.'s Motion for Summary Judgment or in the Alternative Summary Adjudication against Defendant/Cross-defendant Nucor Corporation, Inc. is DENIED.

I. INTRODUCTION

This case involves Plaintiffs' claims under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9675, arising from purported radioactive contamination of their real property located at 170 West Providencia Street in Burbank, California. The parties to the motions are listed below:

(1) Plaintiffs Joseph and Virginia Thomson have owned the property since 1966, and sue as trustees of the Thomson Family Trust.

///

(2) Defendant ICN Pharmaceuticals, Inc. is the successor-in-interest to U.S. Nuclear Corporation, which attempted to decontaminate the property in 1961. The parties dispute whether U.S. Nuclear Corporation's efforts were sufficient or successful.

(3) Defendant Nucor Corporation, Inc. is the successor-in-interest to Nuclear Corporation of America, two of whose divisions conducted operations on the property in the 1950's and 1960's that involved the manufacture, processing, and disposal of radioactive and "rare earth" materials. These divisions were named Isotopes Specialty Company and Research Chemicals Corporation.

(4) Defendant Rhone-Poulenc, Inc. is alleged by Plaintiffs to be the successor-in-interest to Research Chemicals Corporation.

II. BACKGROUND

Before 1956, 170 West Providencia Street ("the Property") was used for agriculture and warehousing Styrofoam products. [Plaintiffs' Motion for Partial Summary Judgment against ICN Pharmaceuticals, Inc. ("Pls.' Mot. v. ICN") at 1.] In the mid-1950's, Mr. Elwood Richardson acquired the Property and leased it to Nuclear Corporation of America ("NUCOR"). [Pls.' Mot. v. ICN at 1.] From 1956 through 1962, Isotopes Specialty Company ("ISC") engaged in radioactive source manufacture, research and waste storage at the

Property, under license from the Atomic Energy Commission ("AEC"). [Pls.' Mot. v. ICN at 1; Defendant ICN Pharmaceuticals, Inc.'s Opposition to Plaintiffs' Motion for Partial Summary Judgment ("ICN Opp'n to Pls.' Mot.") at 4.] In 1958, ISC was purchased by NUCOR and for some time operated as NUCOR's subsidiary; later, NUCOR dissolved ISC, and operated it as a division until December 30, 1960. [ICN Opp'n to Pls.' Mot. at 4.]

In the late 1950's, several employees left ISC and formed U.S. Nuclear Corporation ("U.S. Nuclear"). [Pls.' Mot. v. ICN at 2.] On December 30, 1960, U.S. Nuclear entered into an Asset Purchase Agreement whereby it would acquire the assets and goodwill of NUCOR's ISC division in exchange for $23,000 and U.S. Nuclear's commitment to decontaminate the Property within six months so that it could be released to others without prior approval from state health authorities and the AEC. [Pls.' Mot. v. ICN at 2; ICN Opp'n to Pls.' Mot. at 4.] The Asset Purchase Agreement also contained an indemnity provision providing that U.S. Nuclear would assume none of ISC's liabilities accrued or contingent on December 31, 1960, or arising as a result of completing ISC orders prior to January 15, 1961. [ICN Opp'n to Pls.' Mot. at 4-5.] The operation of this provision remains disputed. [See ICN Pharmaceuticals, Inc.'s Motion for Summary Judgment or in the Alternative Summary Adjudication against Nucor Corp., Inc. ("ICN Mot. v. Nucor") at 10-14; Nucor Corp., Inc.'s Opposition to ICN Pharmaceuticals, Inc.'s Motion for Summary Judgment or in the Alternative Summary Adjudication ("Nucor Opp'n to ICN Mot.") at 10-14.] In early 1961, U.S. Nuclear undertook to decontaminate the Property pursuant to site-specific criteria

previously established by the AEC for another NUCOR site in Burbank. [ICN Opp'n to Pls.' Mot. at 5-7.] In September 1962, U.S. Nuclear obtained a release from the AEC stating that the Property was free of harmful radioactive contamination and could be released to others. [ICN Opp'n to Pls.' Mot. at 7.] Nevertheless, whether U.S. Nuclear's efforts were successful or comported with the terms of the Asset Purchase Agreement remains disputed. [See ICN Mot. v. Nucor at 14-15; Nucor Opp'n to ICN Mot. at 4-8.]

From 1956 through the early 1960's, Research Chemicals Corporation ("RCC") also leased the Property, and conducted rare earth materials processing and research under license from the AEC. [ICN Opp'n to Pls.' Mot. at 4; Plaintiffs' Motion for Partial Summary Judgment against Nucor Corp., Inc. ("Pls.' Mot. v. Nucor") at 2; Plaintiffs' Motion for Summary Judgment against Defendant Rhone-Poulenc, Inc. ("Pls.' Mot. v. R-P") at 1-2; Rhone-Poulenc, Inc.'s Opposition to Plaintiffs' Motion for Summary Judgment ("R-P Opp'n") at 3.] RCC's work was conducted in a single room, and was "separate and distinct" from ISC's activities. [R-P Opp'n at 3.] RCC relocated from the Property to Phoenix, Arizona in 1961. [R-P Opp'n at 6.] ISC and RCC were the only entities to conduct such activities on the Property. [Pls.' Mot. v. ICN at 1.]

In 1966, Plaintiffs Joseph and Virginia Thomson purchased the Property from Mr. Richardson. [Pls.' Mot. v. ICN at 2.] They operated Fiber Resin Corporation on the Property, which was engaged in the manufacture of epoxy resins for commercial aircraft and defense-related industries, until 1988. [Pls.' Mot. v. ICN at 2.]

In 1988, Plaintiffs sold Fiber Resin to H.B. Filler Company; H.B. Filler operated the business until 1996, when it relocated to the Midwest. [Pls.' Mot. v. ICN at 2; ICN Opp'n to Pls.' Mot. at 8.] Plaintiffs owned the Property at all times.

In September 1988, Nucor Corp., Inc. ("Nucor")[1] spun off its RCC division into a subsidiary corporation named Research Chemicals ("RC"). [R-P Opp'n at 6.] On September 24, 1988, Nucor concluded an agreement with RC to exchange the assets of RCC for all outstanding shares of RC stock. [R-P Opp'n at 6.] The agreement addressed RC's assumption of RCC's liabilities, but the parties dispute whether RC assumed all of Nucor's liabilities relating to its RCC operation. [See R-P Opp'n at 6; Pls.' Reply to R-P Opp'n at 5.] RC and Nucor also executed an "Assumption of Liabilities Agreement" addressing which of Nucor's liabilities for the activities of RCC would be assumed by RC.

As of September 30, 1988, all RC stock was held by Paris Corporation ("Paris"), a subsidiary of Nucor. [R-P Opp'n at 6.] Records of a stock transfer from Nucor to Paris are unavailable, and it is unclear whether this transaction transferred any of RC's liabilities from Nucor to Paris. [R-P Opp'n at 7; Pls.' Reply to R-P Opp'n at 7.]

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[1] In 1972, NUCOR changed its name to Nucor Corp., Inc. [See Plaintiffs' Proposed Statement of Uncontroverted Facts in Support of its Motion for Summary Judgment against Defendant Nucor Corp., Inc. at 4.]

On September 30, 1988, Paris sold its entire interest in RC to Rhone-Poulenc, Inc. ("Rhone-Poulenc"). [R-P Opp'n at 7; Pls.' Reply to R-P Opp'n at 7.] Rhone-Poulenc contends this sale did not expressly transfer all environmental liabilities, and "did not include indemnification for certain environmental liabilities;" accordingly, "the liability allocation scheme contemplated by the parties is ambiguous." [R-P Opp'n at 7.] Plaintiffs assert that Rhone-Poulenc does not contest that it assumed all liabilities of RC when it acquired RCC's stock; rather, "Rhone Poulenc's argument is that [RC] did not assume CERCLA liabilities from RCC." [Pls.' Reply to R-P Opp'n at 7.]

In February 1996, the Oakridge National Laboratory performed a review of over 16,000 terminated licenses issued by the AEC and the Nuclear Regulatory Commission ("NRC"), including those issued to ISC and RCC. [ICN Opp'n to Pls.' Mot. at 8.] The NRC inspected the Property and conducted a radiological survey, which detected residual radiation that exceeded present NRC limits for the unrestricted release of the Property. [Pls.' Mot. v. ICN at 2; ICN Opp'n to Pls.' Mot. at 8.] On February 23, 1996, the California Department of Health Services ("California DHS") also conducted a site survey which reported radiation levels in excess of currently acceptable limits. [ICN Opp'n to Pls.' Mot. at 8.] In January 1997, Joseph Takahashi conducted a similar survey, which likewise detected radioactivity above current NRC limits. [Pls.' Mot. v. ICN at 2; ICN Opp'n to Pls.' Mot. at 8.] Plaintiffs have been unable to re-lease or sell the Property since the NRC's survey identified excess levels of surface and subsurface radiation. [Pls.' Mot. v. ICN at 2.]

In October 1997, Plaintiffs retained ChemRisk to conduct a radioactive dose assessment survey of the Property based on the NRC and California DHS results. [ICN Opp'n to Pls.' Mot. at 9.] In September 1999, Rogers & Associates conducted another radiological survey and prepared a comprehensive report based on over 5,000 surface measurements, and did not record any radioactivity in excess of levels permissible in 1961 . [ICN Opp'n to Pls.' Mot. at 9.]

III. PROCEDURAL HISTORY

A. The Complaint And Related Cross-Motions

On July 18, 1997, Plaintiffs filed this action against ICN, asserting federal claims for costs of response, contribution and declaratory relief under CERCLA, in addition to several related state tort law claims. Plaintiffs filed a (Revised) First Amended Complaint on May 18, 1998, adding Nucor and Rhone-Poulenc as defendants.

On June 1, 1998, ICN filed a cross-claim for express and implied indemnity against Nucor. On June 22, 1998, Nucor filed a cross-claim against ICN alleging it either failed to decontaminate the Property or that its efforts were inadequate and incomplete.

On June 7, 2000, the Court granted Plaintiffs' Motion for Leave to Amend their Complaint to reflect their change in capacity from individuals to trustees of the Thomson Family Trust, and to assert new facts concerning the historical site operations and relationships between prior tenants on the Property and Defendants. [See June 7,

2000 Order of Hon. Virginia A. Phillips.] The Court denied Plaintiffs' Motion for Leave to Amend the Complaint to add a claim under the Resource Conservation and Recovery Act. [See June 7, 2000 Order of Hon. Virginia A. Phillips.]

B. Plaintiffs' Three Motions For Summary Judgment

1. ICN

On April 14, 2000, Plaintiffs filed a Motion for Partial Summary Judgment against ICN. The Motion asserts that ICN, as the successor-in-interest to U.S. Nuclear, is responsible for all of U.S. Nuclear's liabilities. [Pls.' Mot. v. ICN at 6.] Plaintiffs argue they are entitled to summary adjudication on the issue of ICN's liability under CERCLA because all the elements required to establish a prima facie case are satisfied. Plaintiffs do not seek to resolve the issue of damages in advance of trial. [Pls.' Mot. v. ICN at 6-7.]

On May 3, 2000, ICN filed Opposition, arguing that U.S. Nuclear decontaminated the Property in accordance with applicable 1961 criteria, [ICN Opp'n to Pls.' Mot. at 10-13], any residual radioactive contamination is classified as a "federally permitted release" exempt from CERCLA liability, [ICN Opp'n to Pls.' Mot. at 13-14], and Plaintiffs' theory that U.S. Nuclear "spread and exacerbated" the radioactive contamination at the Property is both speculative and unsupported by the evidence of record. [ICN Opp'n to Pls.' Mot. at 14-16.]

On May 15, 2000, Plaintiffs filed a Reply ("Pls.' Reply to ICN Opp'n").

2. Nucor

On April 14, 2000, Plaintiffs filed a Motion for Summary Judgment against Nucor, asserting Nucor is liable under CERCLA, and for Plaintiffs' trespass and nuisance claims. [Pls.' Mot. v. Nucor at 1.] Plaintiffs argue that they can prove Nucor's liability under CERCLA by establishing a prima facie case, but do not seek adjudication of damages in advance of trial. [Pls.' Mot. v. Nucor at 8-12.]

On May 3, 2000, Nucor filed Opposition, arguing that Plaintiffs fail to satisfy one of the elements of CERCLA liability because they have not established through competent evidence that they incurred response costs which were both necessary and consistent with the National Contingency Plan ("NCP") promulgated by the Environmental Protection Agency, which sets forth procedures and standards for responding to the release of hazardous substances. [Nucor Opp'n to Pls.' Mot. at 3-9.]

Nucor asserts Plaintiffs cannot prevail on their nuisance and trespass claims because: (1) they have not established that these alleged torts are "continuing" (thus warranting injunctive relief) rather than "permanent" in nature; (2) they have not specified whether their Motion encompasses their claims for public or private nuisance; and (3) they fail to demonstrate irreparable harm. [Nucor Opp'n to Pls.' Mot. at 9-12.]

On May 15, 2000, Plaintiffs filed a Reply ("Pls.' Reply to Nucor Opp'n").

3. Rhone-Poulenc

On April 14, 2000, Plaintiffs filed a Motion for Summary Judgment against Rhone-Poulenc, Inc. They argue that Rhone-Poulenc is liable as the ultimate successor-in-interest to RCC, against which Plaintiffs can establish the elements of prima facie CERCLA liability. [Pls.' Mot. v. R-P at 1, 6-10.] Plaintiffs do not seek to resolve the issue of damages before trial. [Pls.' Mot. v. R-P at 1.] Plaintiffs assert that Rhone-Poulenc, as the successor-in-interest to RC, is responsible for all its liabilities, including CERCLA liability. [Pls.' Mot. v. R-P at 6.]

On May 8, 2000, Rhone-Poulenc filed Opposition, arguing the liability allocation scheme governing the transactions among RCC, RC, Nucor, Paris and Rhone-Poulenc was "ambiguous," and that Plaintiffs cannot prove the aforementioned entities "negotiated for and agreed that [Rhone-Poulenc] would assume the environmental liabilities associated with the site." [R-P Opp'n at 7, 9-12.] Rhone-Poulenc also contends Plaintiffs cannot show that RCC, as a mere division, not a subsidiary of NUCOR, was capable of acquiring and transferring liability. [R-P Opp'n at 9-10, 18.] Even if RCC was legally capable of incurring CERCLA liability, Rhone-Poulenc insists, triable fact issues persist regarding whether, under CERCLA, RCC was an "operator" of the Property, whether RCC disposed of thorium at the Property, and whether any response costs stem from RCC's activities there. [R-P Opp'n at 11-18.]

On May 15, 2000, Plaintiffs filed a Reply ("Pls.' Reply to R-P Opp'n").

C. Nucor's Motion For Partial Summary Judgment Against Plaintiffs

On April 17, 2000, Nucor filed a Motion for Partial Summary Judgment on its counter-claim that Plaintiffs are "potentially responsible parties" ("PRP's") liable for the release or threatened release of hazardous substances under CERCLA, 42 U.S.C. § 9607(a). Nucor argues that Plaintiffs are not sheltered by the "third-party defense" to CERCLA liability as "innocent purchasers" of contaminated real property, because Plaintiffs purchased the Property despite knowledge that hazardous materials were present, and failed to exercise due care in verifying whether dangerous radioactivity existed. [Nucor Corp., Inc.'s Motion for Partial Summary Judgment against Plaintiffs ("Nucor Mot. v. Pls.") at 3, 8-12.] As a result, Nucor argues, Plaintiffs are not entitled to hold all Defendants jointly and severally liable under 42 U.S.C. § 9607(a)(4)(B), but merely may seek contribution under a several-only liability theory under § 9613(f)(1). [Nucor Mot. v. Pls. at 3.]

On May 3, 2000, Plaintiffs filed Opposition, arguing that The Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298 (9th Cir. 1997), provides for an equitable exemption for PRP's who have not polluted the subject property in any way. [Plaintiffs' Opposition to Nucor Corp. Inc.'s Motion for Summary Judgment ("Pls.' Opp'n to Nucor Mot.") at 6.] Plaintiffs contend they are "innocent landowners" covered by the third-party defense, because: (1) the release of hazardous materials was caused solely by third parties, (2) they exercised due care with respect to hazardous substances, and (3) they took precautions against foreseeable acts by third parties. [Pls.' Opp'n to Nucor Mot. at 7-13.] Plaintiffs argue that numerous triable

issues of fact also persist regarding whether they are "innocent landowners" entitled to employ the third-party defense. [Pls.' Opp'n to Nucor Mot. at 13-22.]

On May 15, 2000, Nucor filed a Reply ("Nucor Reply to Pls.' Opp'n").

D. Nucor's Motion For Partial Summary Judgment Against ICN

On April 17, 2000, Nucor filed a Motion for Partial Summary Judgment against ICN on Nucor's cross-claim, seeking an order determining that ICN is a liable person under CERCLA, 42 U.S.C. § 9607(a)(2) and (4), for the alleged release or threatened release of hazardous materials at the Property. Nucor asserts that U.S. Nuclear, ICN's predecessor in interest, improperly buried radioactive material when it filled the cobalt containment pool at the Property with contaminated dirt and capped the pool with concrete. [Nucor Corp., Inc.'s Motion for Partial Summary Judgment against ICN Pharmaceuticals, Inc. ("Nucor Mot. v. ICN") at 3-7.] This, Nucor contends, renders ICN a liable party as both a prior owner/operator of the site and a transporter of hazardous materials. [Nucor Mot. v. ICN at 7-9.]

On May 3, 2000, ICN filed Opposition, arguing that it is not a liable person within the meaning of CERCLA because: (1) U.S. Nuclear decontaminated the Property in accordance with 1961 clean-up criteria; (2) any residual radioactive contamination constituted a "federally permitted release" exempt from CERCLA liability because the Property was certified for release by the AEC; and (3) Nucor

offers no competent evidence that U.S. Nuclear created additional contamination during its operations at the Property. [ICN Pharmaceuticals, Inc.'s Opposition to Nucor Corp., Inc.'s Motion for Partial Summary Judgment ("ICN Opp'n to Nucor Mot.") at 10-17.]

On May 15, 2000, Nucor filed a Reply ("Nucor Reply to ICN Opp'n").

E. ICN's Motion For Summary Judgment Or Summary Adjudication Against Nucor

On April 17, 2000, ICN filed a Motion for Summary Judgment or in the Alternative Summary Adjudication against Nucor, seeking enforcement of an indemnity clause contained in the Asset Purchase Agreement executed by U.S. Nuclear and NUCOR in 1960. ICN alleges this provision requires Nucor to indemnify and defend ICN in Plaintiffs' action. [ICN Pharmaceuticals, Inc.'s Motion for Summary Judgment or in the Alternative Summary Adjudication against Nucor Corp., Inc. ("ICN Mot. v. Nucor") at 1.] Specifically, ICN seeks summary adjudication on its second and third cross-claims for indemnity, and, consequently, dismissal of Nucor's cross-claim against ICN. [ICN Mot. v. Nucor at 1.] ICN asserts that its predecessor-in-interest, U.S. Nuclear, satisfactorily decontaminated the Property, as evidenced by the sworn deposition testimony of Richard Donelson, an employee of U.S. Nuclear who oversaw and participated in the decontamination efforts, and Raymond Fish, a radiation safety specialist then working for the AEC, who conducted a survey of the Property before approving it for release. [ICN Mot. v. Nucor at 15-21.]

On May 3, 2000, Nucor filed Opposition, arguing that U.S. Nuclear buried "significant quantities" of radioactive materials at the Property, in breach of its contractual obligation to decontaminate the premises, thus negating the indemnity provision. [Nucor Corp., Inc.'s Opposition to ICN Pharmaceuticals, Inc.'s Motion for Summary Judgment or in the Alternative Summary Adjudication (Nucor Opp'n to ICN Mot.") at 2, 3.] ICN allegedly has not offered competent evidence that the AEC actually released the Property. [Nucor Opp'n to ICN Mot. at 8, 10.] Furthermore, Nucor asserts, the indemnity provision did not cover environmental liabilities; even if it did, Nucor is obligated to indemnify ICN only for ISC's own independent activities, not U.S. Nuclear's or ICN's activities, upon which Plaintiffs' claims are predicated. [Nucor Opp'n v. to ICN Mot. at 10-15.] Additionally, Nucor contends, triable fact issues remain as to whether the claims asserted against ICN were "accrued or contingent" on December 31, 1960, as contemplated by the indemnity provision. [Nucor Opp'n to ICN Mot. at 13-15.] Finally, Nucor asserts that ICN may not seek indemnity for its own unlawful actions under California Civil Code § 2773, and due to its own "unclean hands" under common law principles. [Nucor Opp'n to ICN Mot. at 15.]

On May 15, 2000, ICN filed a Reply ("ICN Reply to Nucor Opp'n").

F. Evidentiary Objections

On May 15, 2000, Plaintiffs filed Evidentiary Objections to the following: (1) Evidence in ICN's Opposition to Plaintiffs' Motion for Partial Summary Judgment; (2) Evidence in Nucor's Opposition to Plaintiffs' Motion for Partial Summary Judgment; (3) Evidence in

Rhone-Poulenc's Opposition to Plaintiffs' Motion for Summary Judgment; and (4) Evidence in Nucor's Motion for Partial Summary Judgment against Plaintiffs. The Court rules on the evidentiary objections as follows:

Plaintiffs' Objections to Evidence in ICN's Opposition to Plaintiffs' Motion for Partial Summary Judgment are overruled. These "objections" do not state a legal basis for objection; they are merely argument regarding the value and nature of the evidence.

Plaintiffs' Objections to Evidence in Nucor's Opposition to Plaintiffs' Motion for Partial Summary Judgment are also overruled in their entirety as argument.

Plaintiffs' Objections to Evidence In Support of Rhone-Poulenc's Opposition to Plaintiff's Motion for Summary Judgment are overruled as to Rhone-Poulenc's request for judicial notice, and as to Rhone-Poulenc's responses to Alleged Undisputed Fact Nos. 3, 23, 26, 30, and 32. These constitute argument. The Court also overrules as argument Plaintiff's Objections to Rhone-Poulenc's Alleged Undisputed Fact Nos. 1, 2, 3, 4, 5, 6, both of the alleged undisputed facts numbered "7," 8, 9, 16, 17 and 18.

Plaintiffs' Objections to Evidence in Nucor's Motion for Partial Summary Judgment against Plaintiffs are overruled as to Nucor's Undisputed Facts Nos. 30 and 35. These constitute argument. The Court sustains Plaintiffs' objection to Nucor's Undisputed Fact No. 34, regarding Mr. Donelson's testimony that the Rogers & Associates

Report reported surface radiation "well above background" because the testimony is hearsay and the report itself is the best evidence of its contents.

IV. LEGAL STANDARDS

A. Legal Standard For Summary Judgment And Partial Summary Judgment

Partial summary judgment (i.e., summary adjudication) "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). These standards are the same as for a motion for summary judgment. See State of California v. Campbell, 138 F.3d 772, 780 (9th Cir. 1998); Castlerock Estates, Inc. v. Estate of Markham, 871 F. Supp. 360, 363 (N.D. Cal. 1994).

A motion for summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2509-10, 91 L. Ed. 2d. 202 (1986). The moving party must show that "under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson, 477 U.S. at 250, 106 S. Ct. at 2510.

Generally, the burden is on the moving party to demonstrate that it is entitled to summary judgment. Margolis v. Ryan, 140 F.3d 850,

852 (9th Cir. 1998); Retail Clerks Union Local 648 v. Hubb Pharmacy, Inc., 707 F.2d 1030, 1033 (9th Cir. 1983). The moving party bears the initial burden of identifying the elements of the claim or defense and evidence that it believes demonstrates the absence of an issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986).

When a nonmoving party has the burden of proof at trial, however, the moving party need not produce evidence negating or disproving every essential element of the opposing party's case. Celotex, 477 U.S. at 325, 106 S. Ct. at 2554; Anderson, 477 U.S. at 252, 106 S. Ct. at 2512. Instead, the moving party's burden is met by pointing out that there is an absence of evidence supporting the nonmoving party's case. Celotex, 477 U.S. at 325, 106 S. Ct. at 2554.

The burden then shifts to the nonmoving party to show that there is a genuine issue of material fact that must be resolved at trial. Fed. R. Civ. P. 56(e); Celotex Corp., 477 U.S. at 324, 106 S. Ct. at 2553; Anderson, 477 U.S. at 256, 106 S. Ct. at 2514. The nonmoving party must make an affirmative showing on all matters placed in issue by the motion as to which it has the burden of proof at trial. Celotex Corp., 477 U.S. at 322, 106 S. Ct. at 2552; Anderson, 477 U.S. at 252, 106 S. Ct. at 2512; see William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, Federal Civil Procedure Before Trial § 14:144.

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More than a "metaphysical" doubt is required to establish a genuine issue of material fact. Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). The nonmoving party must go beyond the pleadings and by affidavits or other admissible evidence designate "specific facts showing that there is a genuine issue for trial." Celotex, 477 U.S. at 322-23, 106 S. Ct. at 2552-53; see Matsushita, 475 U.S. at 587, 106 S. Ct. at 1354; Anderson, 477 U.S. at 256, 106 S. Ct. at 2514; see also Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989) ("A summary judgment motion can not be defeated by relying solely on conclusory allegations unsupported by factual data.").

In considering a motion for summary judgment, the court draws all justifiable inferences, "including questions of credibility and of the weight to be accorded particular evidence," in the light most favorable to the nonmoving party. Masson v. New Yorker Magazine, 501 U.S. 496, 520, 111 S. Ct. 2419, 2434, 115 L. Ed. 2d 447 (1991); Barlow v. Ground, 943 F.2d 1132, 1135 (9th Cir. 1991). To withstand a motion for summary judgment, the non-movant must "present evidence from which a jury might return a verdict in his favor. If [they] do so, there is a genuine issue of fact that requires a trial." Anderson, 477 U.S. at 257, 106 S. Ct. at 2514.

B. **Prima Facie Liability Under CERCLA**

CERCLA "expressly creates a private cause of action." 3550 Stevens Creek Associates v. Barclays Bank of California, 916 F.2d 1355, 1357 (9th Cir. 1990) (citing Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 890 (9th Cir. 1986)); see 42 U.S.C. §

9607(a)(2)(B). It authorizes civil actions by private parties to recover the costs involved in the cleanup of hazardous wastes from those responsible for their creation. 42 U.S.C. § 9607(a)(1-4); 3550 Stevens Creek Associates, 915 F.2d at 1357 (citing cases). A private party may recover its "response costs" for cleanup of hazardous wastes from a liable party. 42 U.S.C. § 9607(a); 3550 Stevens Creek Associates, 915 F.2d at 1357. CERCLA imposes strict liability. Catellus Development Corp. v. United States, 34 F.3d 748, 751 (9th Cir. 1994); Long Beach Unified School District v. Dorothy B. Goldwin California Living Trust, 32 F.3d 1364, 1366 (9th Cir. 1994).

To prevail in a private cost recovery action, a plaintiff must establish that: (1) the site where the hazardous substances are located is a "facility" under CERCLA's definition of that term, 42 U.S.C. § 9601(9); (2) a "release" or "threatened release" of any "hazardous substance" from the facility has occurred, 42 U.S.C. § 9607(a)(4); (3) such "release" or "threatened release" has caused the plaintiff to incur response costs that were "necessary" and "consistent with the national contingency plan," 42 U.S.C. § 9607(a)(4) and (a)(4)(B); and (4) the defendant is within one of four classes of persons subject to CERCLA's liability provisions, 42 U.S.C. § 9607(a)(1)-(4). Long Beach Unified School District, 32 F.3d at 1366; 3550 Stevens Creek Associates, 916 F.2d at 1357; Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1152 (9th Cir. 1989). The four classes of person subject to liability under the statute are: (1) present owners and operators of a hazardous waste facility; (2) past owners or operators of such a facility; (3) those who arranged for hazardous waste disposal; and (4) transporters of

such waste. 42 U.S.C. §§ 9607(a)(1)-(4); Long Beach Unified School District, 32 F.3d at 1367; Ascon Properties, Inc., 886 F.2d at 1153.

If a plaintiff can satisfy each of the prima facie elements by undisputed evidence, then the plaintiff is entitled to summary judgment on the issue of liability. B.F. Goodrich v. Betkoski, 99 F.3d 505, 514 (2nd Cir. 1996) (citing United States v. Alcan Aluminum Corp., 990 F.2d 711, 719 (2nd Cir. 1993)); Amoco Oil v. Borden, 889 F.2d 664, 667 (5th Cir. 1989). This is true even when there remains a genuine issue as to damages. Borden, 889 F.2d at 667 (quoting United States v. Mottolo, 695 F. Supp. 615, 619 (D.N.H. 1988)). Once the plaintiff makes a prima facie showing, the defendant may avoid liability only by establishing by a preponderance of the evidence that the release or threatened release of hazardous materials was caused by an act of God, an act of war, certain acts or omissions of third parties other than those with whom the defendant has a contractual relationship (i.e., the "third-party defense"), or a combination of these reasons. 42 U.S.C. § 9607(b); Betkoski, 99 F.3d at 514; Borden, 889 F.2d at 667 n.3.

V. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST ICN

A. Plaintiffs Cannot Establish Prima Facie Liability

1. CERCLA Facility

CERCLA defines "facility" for purposes of its liability provisions as, inter alia, "any building, structure, installation, equipment, pipe or pipeline," or "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). Courts have broadly construed this term "such that 'in order to show that an area is a "facility," the plaintiff need only show that a hazardous substance under CERCLA is placed there or has otherwise come to be located there.'" 3550 Stevens Creek Associates, 915 F.2d at 1360 n.10 (quoting United States v. Metate Asbestos Associates, 584 F. Supp. 1143, 1148 (D. Ariz. 1984)). Plaintiffs and ICN do not dispute that, for several years, ISC and RCC received, used, handled, stored, and disposed of radioactive materials on the Property under license from the AEC. [See ICN's Statement of Genuine Issues ("ICN Stmt.") at 3; Pls.' Mot. v. ICN at 7.] The Property is clearly an "area" where hazardous radioactive substances are located, and Plaintiffs satisfy this element of prima facie CERCLA liability.

2. Responsible Person

Plaintiffs argue that ICN, as the legal successor-in-interest to U.S. Nuclear, is liable under 42 U.S.C. § 9607(a)(2) as a "prior operator" for the residual radioactive contamination at the Property because the premises were within U.S. Nuclear's control during its decontamination efforts. [Pls.' Mot. v. ICN at 8.] Allegedly, ICN's predecessor-in-interest spread and exacerbated the contamination at the Property by mopping, scrubbing and sanding certain surfaces, and filling in storage areas and waste pits that formerly contained radioactive material. [Pls.' Mot. v. ICN at 8.] Plaintiffs also allege ICN is liable under 42 U.S.C. § 9607(a)(4) as a transporter of hazardous materials because it is "likely" that U.S. Nuclear moved radioactive materials from contaminated to uncontaminated areas within the bounds of the Property. [Pls.' Reply to ICN Opp'n at 7.]

ICN contends there is no evidence to support the conclusion that U.S. Nuclear "spread and exacerbated" any contamination on the property. [ICN Opp'n to Pls.' Mot. at 14-16.]

a. Operator Liability

The Supreme Court recently stated that, under CERCLA, "an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." United States v. Bestfoods, 524 U.S. 51, 66-67, 118 S. Ct. 1876, 1887, 141 L. Ed. 2d 43 (1998).

Within the Ninth Circuit, "to be an operator of a hazardous waste facility, a party must do more than stand by and fail to prevent the contamination." Long Beach Unified School District, 32 F.3d at 1366. "Operator liability" attaches to persons who "play[ed] an active role in running the facility, typically involving hands-on, day-to-day participation in the facility's management," Long Beach Unified School District, 32 F.3d at 1367, or those who "had authority to control the cause of the contamination at the time the hazardous substances were released into the environment." Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp., 976 F.2d 1338, 1341 (9th Cir. 1992) (citing Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 842 (4th Cir. 1992)); United States v. Iron Mountain Mines, Inc., 987 F. Supp. 1277, 1283 (E.D. Cal. 1997).

Contractors whose activities produce additional contamination of a CERCLA facility are liable as operators under 42 U.S.C. § 9607(a)(2). In Kaiser Aluminum, the court reversed the dismissal of a CERCLA claim against a third party contractor, Ferry, where the district court concluded Ferry was not a person who could be held liable under section 9706(a). The court found Ferry was an "operator" under CERCLA because it performed excavation and grading work during the construction of a housing development site; Ferry also excavated tainted soil, moved it away from the excavation site, and spread it over uncontaminated portions of the subject property. Kaiser Aluminum, 976 F.2d at 1342.

Plaintiffs marshal some evidence regarding U.S. Nuclear's decontamination activity, and suggest that U.S. Nuclear handled radioactive material at the Property, but they do not provide "undisputed" evidence that U.S. Nuclear's operations on the Property worsened the existing contamination, or that it was involved in the management of the site. See Betkoski, 99 F.3d at 514 (citing Alcan Aluminum, 990 F.2d at 719); Borden, 889 F.2d at 667; Kaiser Aluminum, 976 F.2d at 1342. See also United States v. Iron Mountain Mines, 881 F. Supp. 1432, 1449-51 (E.D. Cal. 1995) (U.S. government's regulatory encouragement of metals mining operation did not subject it to operator liability where complaint bereft of allegations that government was involved in daily operation of mine; distinguished from FMC Corp. v. United States Dep't of Commerce, 29 F.3d 833 (3rd Cir. 1994), where government installed equipment, built adjacent factory and distributed raw materials to determine operating level of high tenacity rayon production facility during World War II).

Plaintiffs argue only that U.S. Nuclear's decontamination methods consisted of scrubbing surface areas with brooms, mops and sand paper, cleaning certain containment vats and pools with household cleaning products, and that certain containment vessels were filled with soil. [Pls.' Mot. v. ICN at 4; Plaintiffs' Proposed Statement of Undisputed Facts ("Pls.' Stmt.") at 5-6, 146, 148.] ICN disputes these facts, [see ICN Stmt. at 11], but only to the extent that the decontamination also included "taking many measurements, many instrument readings and many samples of the floor, walls and equipment." [ICN Stmt. at 11.] Even taken as true, Plaintiffs' evidence does not reflect the degree of control required of an "operator," and moreover, nowhere suggests that U.S. Nuclear's activities worsened the condition of the Property. Plaintiffs' assertion that U.S. Nuclear "spread contamination" by scrubbing surface areas is unsupported, and their insistence that radioactive materials were buried in the cobalt pool when it was filled with dirt and capped with concrete is pure speculation. [See Pls.' Mot. v. ICN at 8; Pls.' Reply to ICN Opp'n at 6.]

Moreover, Kaiser Aluminum ruled merely that a plaintiff's claim survived a motion to dismiss, where all inferences were drawn in the plaintiff's favor. Here, however, Plaintiffs' evidence is insufficient to carry its burden on summary judgment, especially in light of the requirement that prima facie CERCLA liability be established by "undisputed evidence." See Betkoski, 99 F.3d at 514 (citing Alcan Aluminum, 990 F.2d at 719); Borden, 889 F.2d at 667.

Thus, Plaintiffs fail to establish U.S. Nuclear's (and thus, ICN's) liability as an "operator" under 42 U.S.C. § 9607(a)(2).

b. Transporter Liability

Plaintiffs first discuss transporter liability in their Reply, where they offer only the suggestion that "[b]ecause it is likely that U.S. Nuclear filled the Cobalt-60 pool with radioactive dirt and/or buried a radioactive source in this area, U.S. Nuclear moved materials from a contaminated portion of the Property to a previously clear portion of the Property," and is thus a "transporter" under 42 U.S.C. § 9607(a)(1).

It is improper to raise in a reply new grounds for summary judgment that were not included in the original motion for summary judgment because it deprives the nonmoving party of an opportunity to address them. See, e.g., Katz v. Children's Hospital, 28 F.3d 1520, 1534 (9th Cir. 1994) (noting that the moving party bears the burden of placing the nonmoving party on proper notice). Furthermore, the moving party should demonstrate that exceptional circumstances warrant consideration of the new grounds. See, e.g., Greenhow v. Secretary of Health & Human Serv., 863 F.2d 633, 638-39 (9th Cir. 1988). (district court acted within its discretion in declining to consider new ground for summary judgment raised for first time in objections to report and recommendation).

In any event, Plaintiffs' evidence that U.S. Nuclear was a "transporter" is purely speculative, and fails to establish U.S. Nuclear's (and thus, ICN's) liability under 42 U.S.C. § 9607(a).(4).

Plaintiffs offer only that it is "likely" that U.S. Nuclear filled the cobalt pool with contaminated earth before capping it, which, they deduce, necessitated moving materials "from a contaminated portion of the property to a previously clear portion of the Property." [Pls.' Reply to ICN Opp'n at 7.] In contrast to Kaiser Aluminum, this is not "undisputed evidence" that U.S. Nuclear was a "transporter" as defined by CERCLA. See Betkoski, 99 F.3d at 514 (citing Alcan Aluminum, 990 F.2d at 719); Kaiser Aluminum Corp., 976 F.2d at 1343; Borden, 889 F.2d at 667.

Thus, Plaintiffs have not established U.S. Nuclear's status as a person subject to CERCLA liability under sections 9706(a)(2) and (a)(4); neither does ICN qualify as a person subject to liability under sections (a)(1) (present owner and/or operator) or (a)(3) (person who contractually arranged for disposal by another party). See Iron Mountain Mines, 881 F. Supp. at 1451 (citing cases).

3. Release or Threatened Release

CERCLA defines "release" as "spilling, leaking, pumping, pouring, emitting, employing, discharging, injecting, leaching, dumping or disposing" hazardous substances into the environment. 42 U.S.C. § 9601(22). Hazardous substances include radioactive isotopes. 42 U.S.C. § 9706(14). The terms "release" and "threatened release" are broadly construed. Borden, 889 F.2d at 669; Amland Properties Corp. v. Aluminum Company of America, 711 F. Supp. 784, 793 (D.N.J. 1989). Some courts have held that the mere presence of hazardous substances in the soil, surface water, or groundwater of a site is indicative of a "release." Lincoln Properties, Inc. v.

Higgins, 1993 WL 217429 *18 (E.D. Cal.) (citing U.S. v. Hardage, 761 F. Supp. 1501, 1510 (W.D. Okla. 1990)); Mottolo, 695 F. Supp. at 623.

A plaintiff need not allege the particular manner in which a release or threatened release has occurred to make a prima facie case for CERCLA liability. Ascon Properties, 886 F.2d at 1153. The release of hazardous wastes at a facility is sufficient to trigger § 9607 liability for costs, and CERCLA imposes no requirement that off-site pollution occur. United States v. Iron Mountain Mines, 812 F. Supp. 1528, 1537 (citing Mottolo, 695 F. Supp. at 623).

Plaintiffs do not provide the "undisputed" evidence required to meet the prima facie elements of CERCLA liability. They argue that the mere presence of residual radioactive contamination shows that U.S. Nuclear released radioactive material on the site, and that the broad reading of CERCLA's "release" and "threatened release" language permits the Court to characterize the mopping, sanding, scrubbing and filling conducted by U.S. Nuclear as "necessarily moving and dispersing, and therefore releasing, radioactive materials." [Pls.' Mot. v. ICN at 9; Pls.' Reply to ICN Opp'n at 7-8.]

Despite courts' liberal treatment of the release requirement of CERCLA liability, Plaintiffs have not proven this element. It is undisputed that U.S. Nuclear did not cause the original irradiation of the Property, and was only retained as an independent contractor to decontaminate the site. For this reason Mottolo and Higgins are distinguishable. In Mottolo, the court found that soil, surface and groundwater contamination resulting from hazardous chemical

discharges created conditions that constituted a "release" of hazardous materials under CERCLA, even though the pollutants never spread beyond the subject premises. Mottolo, 695 F. Supp. at 623. The release was attributed to the site's owner, who contracted to dispose of chemical waste despite having no license to do so. Mottolo, 695 F. Supp. at 619. In Higgins, the plaintiff established by uncontroverted evidence that several dry cleaners had released hazardous chemicals at their sites of operation, and that the presence of such substances in the soil, surface water and ground water constituted releases. Higgins, 1993 WL 217429 at *18.

Plaintiffs nowhere contend that U.S. Nuclear was responsible for the original contamination, and have not provided undisputed evidence that U.S. Nuclear's activities constituted a new release or an exacerbation or spreading of preexisting contaminants, as required to prove an element of CERCLA liability on summary judgment. See Betkoski, 99 F.3d at 514 (citing Alcan Aluminum, 990 F.2d at 719); Borden, 889 F.2d at 667. Although the contamination need not spread beyond the subject property for liability to attach, Iron Mountain Mines, 812 F. Supp. at 1537 (citing Mottolo, 695 F. Supp. at 623), this point is immaterial if Plaintiffs cannot establish that U.S. Nuclear caused a legally cognizable release in the first instance.

4. **Response Costs**

The fourth element of prima facie CERCLA liability is satisfied when a plaintiff demonstrates that the release of hazardous substances at a facility has caused it to incur response costs which are necessary and consistent with the National Contingency Plan

("NCP").[2] 42 U.S.C. §§ 9607(a)(4)(B); Ascon Properties, 966 F.2d at 1152-53; Wickland Oil Terminals v. Asarco, Inc., 792 F.2d 887, 891 (9th Cir. 1986). A CERCLA claim may not be maintained absent allegations of "at least one type of response cost cognizable under CERCLA in order to make out a prima facie case." Ascon Properties, 866 F.2d at 1153-54; Romeo v. General Chemical Corp, 922 F. Supp. 287, 289 (N.D. Cal. 1994) (citing Ascon Properties, 866 F.2d at 1153-54).

CERCLA defines the term "response" as a removal action or a remedial action, and in turn defines removal and remedy. 42 U.S.C. §§ 9601 (23), (24), (25). The "costs of response" must be necessary to the containment and cleanup of hazardous releases. Daigle v. Shell Oil Co., 972 F.2d 1527, 1535-37 (10th Cir. 1992).

A removal action "is a more limited, narrower response to a less drastic environmental problem [which does] not contemplate lengthy, extensive cures; rather, by definition, removal actions are prescriptive in what they encompass . . . . [R]emoval actions are taken in response to an immediate threat since they are more limited in scope; the purpose of a removal action is to address quickly a short-term problem." Public Service Company of Colorado v. Gates Rubber Co., 22 F. Supp. 2d 1180, 1187 (D. Colo. 1997) (quoting Rhodes v. County of Darlington, S.C., 833 F. Supp. 1163, 1182 (D.S.C. 1992)). Remedial actions, in contrast, effect more permanent,

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[2] "The NCP is a series of regulations promulgated by the EPA defining standards for hazardous waste site abatement actions." Yellow Freight System, Inc. v. AFC Industries, Inc. 909 F. Supp. 1290, 1300 (E.D. Mo. 1995).

long-term solutions. Gates Rubber, 22 F. Supp. 2d at 1187 (citing Exxon Corp. v. Hunt, 475 U.S. 355, 359, 106 S. Ct. 1103, 1108, 89 L. Ed. 2d 364 (1986); Bancamerica Commercial Corp. v. Mother Steel of Kansas, 100 F.3d 792, 797 (10th Cir. 1996); Daigle, 972 F.2d at 1534).

Plaintiffs' investigatory and analytical efforts have initiated a remedial action. [Pls.' Reply to ICN Opp'n at 8.] Their efforts are aimed not at the immediate amelioration of an acute short term problem, but rather the permanent cleansing of the Property of radioactive contamination. Plaintiffs contend they incurred "over $500,000 in assessing the extent of residual radioactive contamination of the Property," including over $100,000 for their role in preparing the Rogers & Associates Sampling and Analysis Plan. [Pls.' Mot. v. ICN at 10; Pls.' Reply to ICN Opp'n at 10.] According to Plaintiffs, "[t]he work completed on the Property to date constitutes the first step in the NCP procedures, the remedial investigation," which is intended to develop site specific cleanup criteria and risk assessments, and whose results will aid in implementing "the balance of the requirements under the NCP." [Pls.' Mot. v. ICN at 11.] They point to the surface survey conducted by Mr. Takahashi, the health risk assessment performed by ChemRisk, a remedial assessment performed by PWN Environmental, and implementation of the Sampling and Analysis Plan prepared by Rogers & Associates, as sources of their response costs. [Pls.' Mot. v. ICN at 10; Pls.' Reply to ICN Opp'n at 9.]

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a. "Necessity" of Response

Plaintiffs, as the party seeking cost recovery, may only recover "necessary costs of response." 42 U.S.C. §9607(a)(4)(B); Louisiana-Pacific Corp. v. Baezer Materials & Services, Inc., 811 F. Supp. 1421, 1424 (E.D. Cal. 1993) (citing United States v. Hardage, 982 F.2d 1436, 1442 (10th Cir. 1992)). Without the statutory limitation to "necessary" costs of clean-up, "there would be no check on the temptation to improve one's property and charge the expense of improvement to someone else." G.J. Leasing Co., Inc. v. Union Electric Co., 54 F.3d 379, 386 (7th Cir. 1995). To show that their response costs were necessary under CERCLA, Plaintiffs must demonstrate that they were (1) incurred in response to a threat to human health or the environment that existed prior to initiation of the response action, and (2) that the costs were necessary to address that threat. Southfund Partners III v. Sears, Roebuck & Co., 57 F. Supp. 2d 1369, 1380 (N.D. Ga. 1999) (quoting Foster v. United States, 922 F. Supp. 642, 652 (D.D.C. 1996)); see also Yellow Freight System, Inc. v. AFC Industries, Inc. 909 F. Supp. 1290, 1299 (E.D. Mo. 1995) (where conditions at a site do not pose plausible threat to human health or environment, response cannot be deemed necessary and recovery must be denied).

In Southfund Partners, the plaintiff failed to meet CERCLA's necessity requirement, producing "absolutely no evidence" to suggest that the contaminated groundwater or soil posed any threat to the environment or public health. Southfund Partners, 57 F. Supp. 2d at 1378. The plaintiff undertook remedial clean-up efforts to cleanse soil and groundwater of solvent contaminants merely in order to

enhance the marketability of its property and to avoid it being listed on the Hazardous Site Inventory compiled by the Georgia Department of Natural Resources. Southfund Partners, 57 F. Supp. 2d at 1372. Likewise, in Yellow Freight Systems, the plaintiff "had business reasons for undertaking the investigation, sampling and abatement actions;" to the extent such actions were taken for purposes other than responding to public health threats, the plaintiff could not establish that its expenses were necessary under CERCLA. Yellow Freight Systems, 909 F. Supp at 1299.

Here, Plaintiffs have not established that their response was "necessary" to protect the environment or human safety. They state in their moving papers that, since residual radiation was detected on the Property in February 1996, "the Thomsons have been unable to re-lease the Property for its highest and best use, and have been unable to close escrow on the sale of the property." [Pls.' Mot. v. ICN at 2.] Plaintiffs state that the NRC found radiation levels at the Property to be "unacceptable," [Pls.' Mot. v. ICN at 2], but do not state whether the NRC specified that such levels were unacceptable because dangerous to human health and the environment. Plaintiffs ask the Court to draw the inference that the NRC deemed the heightened radiation at the property to be dangerous to people and the environment, but on summary judgment, all inferences are drawn in favor of the non-moving party. Masson, 501 U.S. at 520, 111 S. Ct. at 2434; Barlow, 943 F.2d at 1135. Therefore, the Court declines to draw the inference requested by Plaintiffs.

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Although Plaintiffs elsewhere contend that the results of testing already performed will be used to meet NCP requirements, beginning with analysis to determine any threat to human safety and the environment, [Pls.' Mot. v. ICN at 11], this is merely a bald assertion. It is belied by Plaintiffs' previous statement regarding their inability to re-lease or sell the Property, and the lack of evidence showing that the radiation detected by the NRC and California DHS, although in excess of levels acceptable for the release of the Property, posed a threat to human health or the environment.

b. Consistency with the National Contingency Plan

A plaintiff's response costs must also be consistent with the NCP. 42 U.S.C. §9607(a)(4)(B); Louisiana Pacific, 811 F. Supp at 1423. Under Cadillac Fairview/California, Inc. v. Dow Chemical Co., 840 F.2d 691 (9th Cir. 1988), consistency with the NCP is not an element of liability; thus, inconsistency is not a basis for denying summary judgment on the liability question. See Cadillac Fairview, 840 F.2d at 695. A claim of inconsistency with the NCP is not, therefore, a defense to liability under CERCLA, but goes only to the issue of damages. G.J. Leasing, Inc. v. Union Electric Co., 825 F. Supp. 1363, 1379 (S.D. Ill. 1993), vacated in part on other grounds on denial of reconsideration, 839 F. Supp. 21 (S.D. Ill. 1993); Louisiana Pacific, 811 F. Supp at 1423; Mid Valley Bank v. North Valley Bank, 764 F. Supp. 1377, 1389 (E.D. Cal. 1991); see Cadillac Fairview, 840 F.2d at 695.

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Since Plaintiffs have not demonstrated the necessity of their response costs, the Court need not reach the question whether their response actions were consistent with the NCP. If Plaintiffs had made such a showing, it would be premature to evaluate whether Plaintiffs' response actions were consistent with the NCP. See Cadillac Fairview, 840 F.2d at 695; G.J. Leasing, 825 F. Supp. at 1379; Louisiana Pacific, 811 F. Supp. at 1423. Nevertheless, Plaintiffs' inability to satisfy the second and third elements of CERCLA liability would prove fatal to their Motion.

C. "Federally Permitted Release"

ICN argues that U.S. Nuclear decontaminated the Property consistent with criteria established in 1961 by the AEC, [ICN Opp'n to Pls.' Mot. at 10-13], and that, "to the extent the residual contamination constitutes a 'release,' it is a federally permitted release" exempting ICN from CERCLA liability under 42 U.S.C. § 9607(j). [Opp'n to Pls.' Mot. at 13-14.] Plaintiffs contend that federally permitted releases are relevant only on the issue of damages, but they are incorrect. The exception for a federally permitted release of hazardous material states an affirmative defense to a CERCLA violation. United States v. Freter, 31 F.3d 783, 788 (9th Cir. 1994).

Even if the issue is proper now, Plaintiffs argue, the purportedly federally permissible release is not a "divisible" harm. Under CERCLA, costs of responding to a federally permitted release may not be recovered unless releases which were not federally permitted contributed to the natural injury. Iron Mountain Mines,

812 F. Supp. at 1440 (citing In re Acushnet River & New Bedford Harbor, 722 F. Supp. 893, 897 (D. Mass. 1989)). While plaintiffs must prove that non-permitted releases contributed to the harm, defendants have the burden to prove that the injury is divisible, so that the award of response costs may be reduced to reflect the unrecoverable portion attributable to a permitted release. Iron Mountain Mines, 812 F. Supp. at 1540 (citing In re Acushnet at 897 n.9). Even where releases may have been permitted, response costs may be recovered for any releases that (1) were not expressly permitted, (2) exceeded the limitations of the permit, or (3) occurred at a time when there was no permit. Iron Mountain Mines, 812 F. Supp. at 1540 (citing Idaho v. Bunker Hill, 635 F. Supp. 665, 673-74 (D. Idaho 1986)).

The Court need not reach the question whether ICN has shown the purported release in this case was federally permitted, because Plaintiffs have failed to meet three of the elements necessary to establish prima facie CERCLA liability.

D. Conclusion As To Plaintiffs' Motion For Partial Summary Judgment Against ICN

Plaintiffs have failed to present undisputed evidence establishing three of the four elements of prima facie liability under CERCLA. Accordingly, the Court does not address the applicability of CERCLA's statutory defenses. Plaintiffs have not shown that they are entitled to judgment as a matter of law, and ICN is thus relieved of its burden of raising a genuine issue of material

fact in order to defeat the Motion. Accordingly, Plaintiffs' Motion for Partial Summary Judgment against ICN is denied.

VI. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST NUCOR

A. Plaintiffs Cannot Establish Prima Facie CERCLA Liability

1. The Property at Issue is a CERCLA Facility

As Plaintiffs point out, Nucor's Opposition does not contest that the Property is a "facility" as defined in 42 U.S.C. § 9601(9). [Reply at 4.] The parties do not dispute that radioactive materials were handled and stored on the Property. [See Defendant Nucor Corp., Inc.'s Statement of Genuine Issues ("Nucor Stmt.") at 3-5; Pls.' Mot. v. Nucor at 9.] The premises are clearly an "area" where hazardous radioactive substances are located, and thus Plaintiffs satisfy this element of prima facie CERCLA liability. See 3550 Stevens Creek Associates, 915 F.2d at 1360 n.10 (quoting Metate Asbestos Associates, 584 F. Supp. at 1148).

2. Responsible Person

Nucor also does not dispute that it is a "covered person" subject to CERCLA liability under 42 U.S.C. §9607(a). NUCOR changed its name to Nucor Corporation, Inc. in 1972, and thus Nucor is NUCOR's successor-in-interest. [Pls.' Mot. v. Nucor at 7; Plaintiffs' Separate Statement of Undisputed Facts ("Pls.' Stmt.") at 2, 4.] During the late 1950's and early 1960's, NUCOR leased the Property from Mr. Richardson, and its ISC and RCC divisions manufactured, handled, stored and disposed of radioactive materials during the course of their normal business operations. [Pls.' Mot.

v. Nucor at 9; Pls.' Stmt. at 2-4; Nucor Stmt. at 2-5.] Nucor is thus the successor-in-interest to an operator at the Property which played an active role in running the facility, and had the authority to control the cause of the contamination at the time the hazardous materials were released. See Long Beach Unified School District, 32 F.3d at 1167; Kaiser Aluminum, 976 F.2d at 1341 (citing Nurad, 966 F.2d at 842; Iron Mountain Mines, 987 F. Supp. at 1283). Accordingly, Nucor is a person subject to CERCLA liability under section 9607(a)(1). See Iron Mountain Mines, 881 F. Supp. at 1451.

3. Release or Threatened Release

As with the first two elements of CERCLA liability, Nucor Corp.'s Opposition does not address whether a "release or threatened release" of hazardous materials occurred on the Property as defined at 42 U.S.C. § 9601(22). Here, Plaintiffs provide ample evidence of the release or threatened release of radioactive matter through the testimony of John Vaden, ISC's former Radiological Health Officer, Raymond Fish, a former AEC inspector and radiation safety specialist, Richard Dickey, ISC's former radiation safety manager, Richard Donelson, the former Chief Engineer at ISC, and Karl Amlauer, a former ISC chemist. [See Pls.' Mot. v. Nucor at 3-5, 9-10.] The evidence that most strongly demonstrates that releases cognizable under CERCLA occurred at the Property includes: (1) Mr. Vaden's testimony that contamination is to be expected in a restricted area where hazardous materials operations are ongoing, [Pls.' Stmt. at 285, Ex. 27 (Deposition of John Vaden)]; (2) Mr. Dickey's recollection that multiple minor spills of radioactive material took place during operations conducted at the Property, [Pls.' Stmt. at

301, Ex. 30 (Deposition of Richard Dickey)]; (3) Mr. Donelson's statement that, in ISC's ordinary course of business of handling radioactive isotopes, some radiation would have been emitted into the environment at the Property, [Pls.' Stmt. at 315-16, Ex. 35 (Deposition of Richard Donelson)]; (4) Mr. Amlauer's recollection that ISC experienced at least one accident or spill which required notifying the Atomic Energy Commission, [Pls.' Stmt. at 135-36, Ex. 33 (Deposition of Karl Amlauer)]; and (5) Mr. Amlauer's statement that raw "source" materials were spilled on the floor, and that some contaminated fluids were poured down the drains, [Pls.' Stmt. at 318, 320, Exs. 36, 37 (Deposition of Karl Amlauer).] Accordingly, Plaintiffs have satisfied the third element of CERCLA liability by demonstrating that a statutorily cognizable "release or threatened release" of radioactive isotopes took place during ISC's operations at the Property. See Borden, 889 F.2d at 669; Amland Properties, 711 F. Supp at 793 (terms "release" and "threatened release" broadly construed).

4. Response Costs

For the same reasons discussed regarding Plaintiffs' Motion for Summary Judgment against ICN, Plaintiffs have not demonstrated that the costs incurred at the investigative stages of their remedial response were necessary and consistent with the NCP. 42 U.S.C. §§ 9607(a)(4)(B); Ascon Properties, 966 F.2d at 1152-53; Wickland Oil Terminals, 792 F.2d at 891 (9th Cir. 1986). Because Plaintiffs appear to have undertaken their remedial efforts to enhance the property's marketability, and have offered no evidence that their efforts are motivated by threats to human health or the environment,

the costs imposed by testing and investigation performed thus far are not properly deemed "necessary." [Pls.' Mot. v. ICN at 2.] 42 U.S.C. § 9607(a)(4)(B); Southfund Partners, 57 F. Supp. 2d at 1380 (quoting Foster, 922 F. Supp. at 652); Yellow Freight System, 909 F. Supp. at 1299; Louisiana-Pacific, 811 F. Supp. at 1424 (citing Hardage, 982 F.2d at 1442).

Since Plaintiffs have not demonstrated that their response costs were necessary, they have not met this element of prima facie CERCLA liability, and the Court need not reach the question whether such costs were consistent with the NCP.

5. Preliminary Conclusion As To Prima Facie Liability

For the reasons described above, Plaintiffs have not proffered undisputed evidence of Nucor's prima facie CERCLA liability, and their Motion for Summary Judgment fails as to this claim.

B. Plaintiffs Cannot Prevail On Their State Tort Claims

Plaintiffs seek summary judgment on their state law claims for (1) continuing trespass, (2) continuing public nuisance, and (3) continuing private nuisance. [Pls.' Reply to Nucor Opp'n at 8.]

1. Trespass

Trespass is unlawful interference with the right of another to sole possession of that person's land and may be committed by an act which is intentional, reckless or negligent, or the result of ultrahazardous activity. Capogeannis v. Superior Court, 12 Cal. App. 4th 668, 674, 15 Cal. Rptr. 796, 799 (1993); Lussier v. San Lorenzo

Valley Water District, 206 Cal. App. 3d 92, 107, 253 Cal. Rptr. 470, 478 (1989). Damage to the plaintiff's property must be proven.

Plaintiffs' trespass theory is ill-founded. Plaintiffs assert their undisputed possession of the Property, and contend that the releases of radioactive material by Nucor are the "type of tortious conduct giving rise to a claim of trespass" because the presence of residual radiation interferes with their ownership interest in the Property. [Pls.' Mot. v. Nucor at 12; Pls.' Reply to Nucor Opp'n at 9.] Capogeannis rejected a similar trespass theory against a prior owner who contaminated the subject property. Noting that "'[t]he cause of action for trespass is designed to protect possessory – not necessarily ownership – interests in land from unlawful interference,'" the Court of Appeal reasoned that a previous holder of a possessory interest could not later be held liable for trespass, because "[m]anifestly one cannot commit an actionable interference with one's own possessory right." Capogeannis, 12 Cal. App. 4th at 674, 15 Cal. Rptr. 2d at 798 (quoting Smith v. Cap Concrete, Inc., 133 Cal. App. 3d 769, 774, 184 Cal. Rptr. 308, 310 (1982), and citing Wellesley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93, 99 (D. Mass. 1990)).

While Nucor is not the successor to a previous owner, it is the successor to NUCOR, which held a leasehold interest in the Property; accordingly, it appears impossible for Plaintiffs here, as it was for the plaintiff in Capogeannis, to assert a claim for trespass because "[n]othing implicit in the . . . contamination of one's own land . . . necessarily identifies a particular plaintiff or connotes the

kind of qualitatively different injury that would subject the actor to tort liability." Capogeannis, 12 Cal. App. 4th at 674, 15 Cal. Rptr. 2d at 798.

Even if Plaintiffs could pursue a continuing trespass theory, they have provided no evidence of irreparable harm to support their demand for injunctive relief. Plaintiffs unpersuasively assert that, because the amount of compensation required to make them whole is unknown, "damages are not an adequate remedy and [they] show irreparable harm." [Pls.' Reply to Nucor Opp'n at 2, 14-15.] Irreparable harm, however, requires that no adequate remedy at law be available or ascertainable, not merely that the amount required to render a party whole remains to be calculated or is uncertain pending further inquiry. Cf. Berkeley Lawn Bowling Club v. City of Berkeley, 42 Cal. App. 3d 280, 290, 116 Cal. Rptr. 762, 769 (1974) (monetary damages inadequate and injunctive relief appropriate to compensate lawn bowling club attempting to prevent city from interfering with use of certain lawn bowling greens, and whose membership would have been substantially reduced if city had been allowed to carry out proposal to convert one of the greens into a park); Keeler v. Haky, 160 Cal. App. 2d 471, 479, 325 P.2d 648, 653 (1958) (citing Mendelson v. McCabe, 144 Cal. 230, 232, 77 P. 915, 915 (1904)) (where each day of continuous trespass against easement caused insignificant damage, remedy of successive actions at law was inadequate, and injunction appropriate).

Neither does Plaintiffs' difficulty in selling or leasing the Property, or their inability to afford the costs of required site

assessment and remedial tasks, constitute irreparable harm. [Pls.' Reply to Nucor Opp'n at 12-13.] An equitable remedy was expressly rejected under such circumstances in Mangini v. Aerojet-General Corp., 230 Cal. App. 3d 1125, 281 Cal. Rptr. 827 (1991). There, the plaintiffs sought to recover the diminution in the market value of their property through an injunction that the defendant purchase their property at its market value, as if unaffected by contamination. The court found such relief "incompatible" with a claim based on injuries giving rise to injunctive relief.[3] Mangini, 230 Cal. App. 3d at 1145, 281 Cal. Rptr. at 839 (citing Spaulding v. Cameron, 38 Cal.2d 265, 269-270, 239 P.2d 625, 628-29 (1952)); Plonley v. Reser 178 Cal. App. 2d Supp. 935, 937, 3 Cal. Rptr. 551, 552-53 (1960)). Since Plaintiffs have not proffered sufficient evidence of irreparable harm, and because the relief they request is inappropriate under relevant California authority, they are not entitled to judgment as a matter of law on their continuing trespass claim.

2. Continuing Private Nuisance

The California Civil Code defines nuisance to include anything that is "injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . ." Cal. Civ. Code § 3479. A private nuisance action can be brought only by those who have property rights to the use and

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[3] Although the Mangini court was addressing a claim for continuing nuisance its reasoning also applies to Plaintiffs' trespass claim because, in both cases, the plaintiff's inability to prove irreparable harm defeats the claim.

enjoyment of land. Trinkle v. California State Lottery, 71 Cal. App. 4th 1198, 1204, 84 Cal. Rptr. 2d 496, 500 (1999) (citing Koll-Irvine Center Property Owners Assn. v. County of Orange, 24 Cal. App. 4th 1036, 1041, 29 Cal. Rptr. 2d 664, 667 (1994)). Plaintiffs have met the statutory requirements for asserting a claim for private nuisance against Nucor; their use and enjoyment of the Property obviously are hampered by their inability to lease or complete a sale of the premises due to the radiation detected there. [Pls.' Mot. v. Nucor at 13; Pls.' Reply to Nucor Opp'n at 11.] Although the evidence cited by Plaintiffs in support of this contention is weak, [see Pls.' Stmt. at 229-237, Exs. 22, 23 (Deposition of Joe Thomson)], Nucor does not dispute that Plaintiffs have been unable to re-lease or sell the Property. [See generally Nucor Corp. Stmt.]

Plaintiffs characterize the nuisance as "continuing" for purposes of this Motion, [Pls.' Reply to Nucor Opp'n at 13], and accordingly seek an injunction "requiring Nucor . . . to further investigate and remediate [sic.] the residual contamination on the Property." [Pls.' Reply to Nucor Opp'n at 16.] Nucor retorts that any remedy should be limited to money damages because Plaintiffs have argued only that they cannot afford to perform the necessary analysis to establish appropriate clean-up criteria, and in any event, Plaintiffs have submitted no evidence regarding their asserted inability to fund additional analysis. [Nucor Opp'n to Pls.' Mot. at 11.] Plaintiffs' Reply does not defeat this argument.

The cases cited by Plaintiffs do not support their argument that environmental injury by its very nature cannot be adequately remedied

by money damages, and will be deemed irreparable. Amoco Production Co. v. People of the Village of Gambell, 480 U.S. 531, 546, 107 S. Ct. 1396, 1404, 94 L. Ed. 2d 542 (1987), Sierra Club v. Marsh, 816 F.2d 1376, 1386 (9th Cir. 1987), and United States v. Glenn-Colusa Irrigation Dist., 788 F. Supp. 1126, 1132 (E.D. Cal. 1992) all raise this proposition with regard to violations of federal law in the context of issuing a preliminary injunction; none pertain to state law claims demanding a mandatory injunction compelling a party to underwrite environmental assessment and clean-up efforts.

Moreover, as explained regarding Plaintiffs' trespass claim, Plaintiffs have provided no evidence of irreparable harm, and to the extent they allege that legally cognizable harm did result from residual radiation, such harm is best remedied with money damages. Accordingly, Plaintiffs are not entitled to judgment as a matter of law on their continuing private nuisance claim.

3. Continuing Public Nuisance

A private person cannot recover damages for a public nuisance unless it also constitutes a private nuisance. Trinkle, 71 Cal. App. 4th at 1204, 84 Cal. Rptr. 2d at 500; Venuto v. Owens-Corning Fiberglas Corp., 22 Cal. App. 3d 116, 124-125, 99 Cal. Rptr. 350, 355-56 (1971). Although Plaintiffs have not shown that injunctive relief is appropriate to remedy the private nuisance they allege, they have established the prima facie elements of a private nuisance and thus may attempt to recover for a public nuisance.

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A nuisance is "public" when it affects "an entire community or neighborhood," even if the extent of the annoyance or damage felt by individuals varies. Cal. Civ. Code § 3480. "In determining whether something is a public nuisance, the focus must be upon whether an entire neighborhood or community or at least a considerable number of persons are affected in the manner and by the factors that make the thing a nuisance under Civil Code section 3479." Beck Development Co., Inc. v. Southern Pacific Transportation Co., 44 Cal. App. 4th 1160, 1208, 52 Cal. Rptr. 2d 518, 551 (1996). A public nuisance is not created merely because the public may be said to be affected "in some tangential manner." Beck Development, 44 Cal. App. 4th at 1208, 52 Cal. Rptr. 2d at 551. In Beck Development, the court found that oil-related contamination confined to areas beneath a land owner's property did not constitute a public nuisance where there was no evidence of a specific injurious impact on surrounding lands, or risk to health through personal proximity if the contaminants were left undisturbed. Moreover, it was not shown that public water supplies had been affected, or that the contaminants would likely invade local ground water. Beck Development, 44 Cal. App. 4th at 1210-1213, 52 Cal. Rptr. 2d at 552-554.

Likewise, Plaintiffs have not provided any evidence of the effects of the alleged radioactive contamination on the surrounding area. They merely contend that residual radiation on the Property "interferes with the Thomsons' personal use and enjoyment," and that diagnosing the extent of the contamination has caused them to incur various costs. [Pls.' Reply to Nucor Opp'n at 11.] Plaintiffs provide no evidentiary support for their argument that the alleged

nuisance interferes with "rights that are common to members of the general public," [Pls.' Reply to Nucor Opp'n at 10]; in fact, the case Plaintiffs cite for this proposition, Resolution Trust v. Rossmoor Corp., only supports the contention that a landlord cannot be held liable for trespass or nuisance absent active participation causing the offensive condition. Resolution Trust, 34 Cal. App. 4th 93, 100, 40 Cal. Rptr. 2d 428, 431 (1995). See also The Newhall Land and Farming Co. v. Superior Court, 19 Cal. App. 4th 334, 341, 23 Cal. Rptr, 377, 380 (1993) (quoting Venuto, 22 Cal. App. 3d at 124, 99 Cal. Rptr. at 355) ("[A] private nuisance is a civil wrong based on disturbance of rights in land while a public nuisance is not dependent upon a disturbance of rights in land but upon an interference with the rights of the community at large").

Accordingly, Plaintiffs have not shown they are entitled to judgment as a matter of law on their continuing public nuisance claim. Given the language in California Civil Code § 3481, stating that "every nuisance not included in the definition [of public nuisance] is private," Plaintiffs have not even satisfied the statutory definition of public nuisance. See Cal. Civ. Code § 3481. Accordingly, they are not entitled to judgment as a matter of law on their public nuisance claim.

C. Conclusion As To Plaintiffs' Motion For Partial Summary Judgment Against Nucor

Plaintiffs have failed to establish Nucor's prima facie liability under CERCLA by undisputed evidence. Accordingly, the Court need not address CERCLA's statutory defenses. Likewise,

Plaintiffs have not demonstrated that they are entitled to judgment as a matter of law on their state claims for trespass, and continuing private and public nuisance. Nucor thus is relieved of its burden of setting forth a genuine issue of material fact; and Plaintiffs' Motion for Summary Judgment against Nucor is denied.

VII. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AGAINST RHONE-POULENC

A. Corporate Succession And Transfer Of CERCLA Liability

1. Legal Standard for Transfer of Liability

Generally, "when one company sells or transfers all of its assets to another, the successor company does not embrace the liabilities of the predecessor simply because it succeeded to the predecessor's assets." Aluminum Corp. of America v. Beazer East, Inc., 124 F.3d 551, 556 (3rd Cir. 1997). This rule is subject to four exceptions. The successor entity will assume the liabilities of the predecessor entity where: (1) the purchaser of assets expressly or impliedly assumes the liabilities of the transferor; (2) the transaction amounts to a de facto merger; (3) the purchasing entity is merely a continuation of the transferor; or (4) the transaction is fraudulently intended to escape liability. Aluminum Corp. of America, 124 F.3d at 556. This general rule applies in the context of CERCLA liability. Aluminum Corp. of America, 124 F.3d at 556. The CERCLA subsection addressing transfer of liability[4] has

[4] "No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this subsection, to any other person the liability imposed under this section. Nothing (continued...)

been construed to mean that "agreements to indemnify or hold harmless are enforceable between the parties, but not against the government." Beazer East, Inc. v. The Mead Corp., 34 F.3d 206, 210 (3rd Cir. 1994). Although federal law governs issues relating to the validity of a release of a federal cause of action, courts have chosen to "give content" to that federal law by incorporating state rules of release and contract law. Fisher Development Co. v. Boise Cascade Corp., 37 F.3d 104, 109 (3rd Cir. 1997) (citing cases).

2. RCC's Liabilities Were Transferred to RC

Plaintiffs offer the integrated Assignment and Bill of Sale executed by Nucor and RC in 1988 as evidence that RC assumed RCC's environmental liabilities; RC thereby agreed to "observe, pay, perform and discharge, and to assume all of the liabilities restrictions and obligations of Nucor relating to the [transferred] Assets or incurred or incurrable by Nucor in connection with its operation of the [RCC] Division." [Pls.' Reply to R-P Opp'n at 5; Plaintiffs' Proposed Separate Statement of Undisputed Facts ("Pls.' Stmt.") at 171, 175, Ex. 17 (Assignment and Bill of Sale).]

Plaintiffs also offer the separate Assumption of Liabilities Agreement concluded by Nucor and RC, which provided that "as partial consideration for the transfer of assets by Nucor, Nucor hereby assigns to Research Chemicals, and Research Chemicals hereby accepts assignment from Nucor of, all the liabilities, restrictions and

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[4](...continued)
in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section." 42 U.S.C. § 9607(e)(1).

obligations of Nucor relating to the Assets or incurred or incurrable by Nucor in connection with its operation of the [RCC] Division." [Pls.' Reply to Nucor Opp'n at 5; Pls.' Stmt. at 178, Ex. 18 (Assumption of Liabilities).]

Although neither of these provisions explicitly provided for the transfer of CERCLA liability, they are sufficiently broad to effect an express assumption by RC of all RCC's liabilities. As express assumptions of liability, the agreements are thus covered by the first exception to the rule of successor non-liability.

In The Aluminum Co. of America, an agreement to assume "'all of the liabilities and obligations of [the predecessor] of whatsoever nature'" was held to be clear and unambiguous, and "sufficiently broad to encompass assumption of CERCLA liabilities." The Aluminum Co. of America, 124 F.3d at 566. Numerous other courts have similarly held. See, e.g., White Consolidated Industries, Inc. v. Westinghouse Elec. Corp., 179 F.3d 403, 409 (6th Cir. 1999) (applying state law, if language of assumption agreement is broad enough to indicate intent to include all liabilities, it will include environmental liabilities even without specific reference to environmental statutes such as CERCLA. "A broad assumption of liabilities provision therefore transfers CERCLA liability to the purchaser of a business who agrees to the broad assumption"); GNB Battery v. Gould, Inc., 65 F.3d 615, 622-23 (7th Cir. 1995) (applying state law, plain language of assumption agreement unambiguously transferred all of seller's liabilities, with specific exceptions, and this was sufficient for transfer of CERCLA liability); Olin Corp.

v. Consolidated Aluminum Corp., 5 F.3d 10, 14 (2nd Cir. 1993) (under state law, indemnity and release provisions of agreements executed in connection with purchase of site were sufficiently broad to encompass CERCLA liability, even absent specific references to environmental liabilities); United States v. Iron Mountain Mines, Inc., 987 F. Supp. 1233, 1241 (E.D. Cal. 1997).

Rhone-Poulenc cites The Southland Corporation v. Ashland Oil, Inc., 696 F. Supp. 994 (D.N.J. 1988) and Mobay Corp. v. Allied-Signal, Inc., 761 F. Supp. 345 (D.N.J. 1991), arguing that CERCLA liability can only be transferred, and thus could only have been assumed by RC, pursuant to an agreement whose language specifically addresses CERCLA or other environmental liability. [R-P Opp'n at 10.] Southland and Mobay are distinguishable from the case before this Court. Here, two separate agreements governed by Delaware law reflect the assumption by RC of "all of the liabilities" incurred by Nucor "in connection with the operations of the [RCC] Division." [Pls.' Stmt. at 171, 178, Exs. 17, 18 (Assignment and Bill of Sale, Assumption of Liabilities).] The Southland court, in contrast, applied New Jersey law to determine whether environmental liability had been transferred from the predecessor to the successor company; the court concluded that the agreement before it did not effect such a transfer because it was "completely lacking in any language" constituting an express release from future environmental liabilities. Southland, 696 F. Supp. at 1000. Here, in contrast, sufficient language exists to effect the transfer of liabilities.

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The Mobay court noted that some cases involving assumption agreements required "an express statement in the contract in order to transfer CERCLA liability," but observed that other courts "have found that very broad contractual provisions releasing a seller from a wide variety of claims have included waivers of CERCLA liability." Mobay, 761 F. Supp. at 355, 356. The court ruled that there must be "a clear provision" allocating the risk of CERCLA liability to the transferee, and found no such provision in the assumption agreement before it, which did not even mention that one party would assume "environmental-type liabilities." Mobay, 761 F. Supp. at 357. Thus, Mobay provides little support for Rhone-Poulenc's position, both because it acknowledged that broad assumption agreements can transfer CERCLA liability, and because the agreement under consideration was much narrower than the provisions upon which Plaintiffs rely.

Plaintiffs also argue that the Stock Purchase Agreement ("SPA") between Paris and Rhone-Poulenc indirectly suggests that RC assumed all liabilities from Nucor's RCC division. [Pls.' Reply to R-P Opp'n at 8.]

The SPA provided, in relevant part:

> [Paris] will retain and be responsible for the following liabilities of Research Chemicals or its predecessors: all fines, penalties, and interest thereon with respect to the presence, storage, treatment, disposal, discharge or release of liquid wastes, solid wastes, pollutants, by-products or hazardous substances up to Closing with respect to Research

> Chemicals or its predecessor (the "Fines"), whether assessed before the Closing or within a period of four (4) years following the Closing; provided, however, that [RCC] will be responsible for Fines assessed after such period.

[Pls.' Stmt. at 185-86, Ex. 19 (Stock Purchase Agreement).] According to Plaintiffs, "if [RC] did not assume the liabilities of RCC for the environmental conditions arising from RCC's operations, then this provision of the SPA would be unnecessary." Paris and Rhone-Poulenc included this provision because they "recognized that [RC] had assumed all of the liabilities arising out of RCC's operations." [Pls.' Reply to R-P Opp'n at 8.] Plaintiffs' argument is persuasive; no provisions for transferring environmental liability from Paris to Rhone-Poulenc would be necessary unless such liability had already been transferred from RCC to RC.

Accordingly, the three documents proffered by Plaintiffs reflect a broad assumption of RCC's liabilities by RC, and further reflect that CERCLA liability was transferred as part of this assumption.

3. A Triable Issue of Fact Remains Regarding Transfer of Liability to Rhone-Poulenc

Although the SPA suggests the transfer of liability from RCC to RC, it does not reflect a wholesale transfer of environmental liabilities from Paris to Rhone-Poulenc. The relevant portions of the SPA pertain only to "fines" incurred with respect to industrial waste and hazardous materials, and liabilities stemming from group worker compensation, federal, state, local and foreign income tax, and sales and use taxes. [Pls.' Stmt. at 186-87, Ex. 19 (Stock

Purchase Agreement).] It nowhere addresses environmental liability in legal actions instituted under state or federal law, or CERCLA liability in particular. Although Plaintiffs contend Rhone-Poulenc does not contest that it acquired all liabilities of RC through the acquisition of its stock, Rhone-Poulenc asserts that "[t]he mere fact [Rhone-Poulenc] and Paris Corporation entered into an agreement regarding [RC] is not in itself probative of Rhone-Poulenc's liability under CERCLA." [Rhone-Poulenc's Statement of Genuine Issues ("Rhone-Poulenc Stmt.") at 8.]

Rhone-Poulenc also points out that Plaintiffs provide no evidence or argument regarding the legal effect of the fact that, as of September 30, 1988, all RC stock was controlled by Paris, a wholly owned subsidiary of Nucor. Although the stock was apparently transferred from Nucor to Paris, "[Rhone-Poulenc] has been unable to locate any record" of such transfer, leaving doubts about "whether any environmental liability whatsoever was transferred from Nucor to Paris corporation." [R-P Opp'n at 7.]

If environmental and CERCLA liability was not assumed by Paris when it acquired all shares of RC stock from Nucor, then Rhone-Poulenc is not the successor-in-interest to those liabilities. Neither Plaintiffs nor Rhone-Poulenc provide adequate evidence regarding what liabilities, if any, were assumed pursuant to the stock transfer between Nucor and Paris, and therefore a triable issue of fact remains regarding whether such liability passed between these two entities, and subsequently, to Rhone-Poulenc. For this reason, and because the assumption provisions of the SPA are specific, and

do not appear to transfer environmental or CERCLA liability to Rhone-Poulenc, a triable issue of fact remains regarding whether Rhone-Poulenc is the proper successor-in-interest to RCC's liabilities. Accordingly, denial of Plaintiffs' Motion for Summary Judgment against Rhone-Poulenc is proper.

D. Prima Facie Liability Under CERCLA

Even if Plaintiffs could demonstrate that Rhone-Poulenc has succeeded to RCC's CERCLA liability, they are not entitled to summary judgment because they cannot prove a prima facie case of CERCLA liability against RCC.

1. CERCLA Facility

As set forth with respect to Plaintiffs' motions against ICN and Nucor, the Property is a "facility" as defined in CERCLA. See 42 U.S.C. § 9601(9); 3550 Stevens Creek Associates, 915 F.2d at 1360 n. 10 (quoting Metate Asbestos Associates, 584 F. Supp. at 1148).

2. Responsible Person

RCC, Rhone-Poulenc's purported predecessor-in-interest, was an operator within CERCLA's definition of that term. See 42 U.S.C. § 9607(a)(2). Rhone-Poulenc asserts that RCC did not own the Property at the relevant time, and that its then-parent company, NUCOR, merely leased the site while its RCC division conducted a "small pilot operation" at the northeast corner of the Property. [R-P Opp'n at 14.] This argument fails, because any person who operates a polluting facility is directly liable for the costs of cleaning up the pollution, "regardless of whether that person is the facility's

owner, the owner's parent corporation or business partner, or even a saboteur who sneaks into the facility at night to discharge its poisons out of malice. If any such act of operating a corporate subsidiary's facility is done on behalf of a parent corporation, the existence of the parent-subsidiary relationship under state corporate law is simply irrelevant to the issue of direct liability." Bestfoods, 524 U.S. at 65, 118 S. Ct. at 1886.

Rhone-Poulenc acknowledges that RCC conducted an independent operation at the Property, and that Plaintiffs' testimonial evidence, if admitted, would show that RCC disposed of waste into the facility's sanitary sewers. [R-P Opp'n at 14.] Plaintiffs also offer evidence suggesting that RCC's operations involved handling at least some radioactive material, and generated certain amounts of radioactive waste. [Pls.' Stmt. at 273-74, Ex. 26 (Deposition of John Vaden).] RCC was also cited by the AEC for disposing of "significant quantities of thorium into the sanitary sewer" without recording such disposals. [Pls.' Stmt. at 288, Ex. 32 (AEC SAN Compliance Report).] Such evidence shows that RCC was an "operator" under CERCLA, because it maintained control over its "pilot" operation, engaged in activities involving radioactive material, and made decisions about how best to dispose of waste and by-products generated by such activities.

3. Release or Threatened Release

Plaintiffs have not satisfied this element of CERCLA liability; although RCC clearly handled radioactive materials, Plaintiffs' evidence establishes at most that such materials were stored and

disposed of at the Property, but not that they were released "into the environment" as stated in CERCLA's operative language. Plaintiffs' assertion that the mere presence of hazardous substances on a property constitutes a "release or threatened release," [Pls.' Reply to R-P Opp'n at 10], is inaccurate. Plaintiffs cite HRW Systems, Inc. v. Washington Gas Light Co., 823 F. Supp. 318 (D. Md. 1993), for this proposition, but the case states only that the presence of certain chemicals at a particular site were indicia that a "release" cognizable under CERCLA had taken place, not that the mere presence of hazardous materials inherently constituted such a release. HRW Systems, 823 F. Supp. at 339. There, no question existed that toxic materials had "entered the environment as defined by the statute, and that their presence indicate[d] a 'disposal' pursuant to the statute." HRW Systems, 823 F. Supp. at 339. Here, Plaintiffs have not made such a showing. See also Lincoln Properties, 1993 WL 217429 *18 (citing Hardage, 761 F. Supp. at 1510); Mottolo, 695 F. Supp. at 623.

Plaintiffs contend that, because RCC was licensed to use significant amounts of thorium source material, "RCC would have to dispose of the by-products of the materials: thorium and uranium." [Pls.' Reply to R-P Opp'n at 11.] They further contend that such products were stored at the Property, and subsequently, residual thorium and uranium was detected both on the surface and beneath the surface of the Property. [Pls.' Reply to R-P Opp'n at 11.] Such facts do not constitute undisputed evidence that a release or threatened release occurred; they merely show that some radioactive material was present on the Property. Plaintiffs' conjecture that

RCC would have had to dispose of hazardous waste materials does not, without more, establish that a release cognizable under CERCLA occurred.

In fact, Plaintiffs' only evidence that the disposal of thorium into the sanitary sewer constituted a "release or threatened release" is an excerpt from the Site Characterization Report stating that "sufficient access to the sewer was not obtained to make definite measurements to determine whether there is significant contamination in the sewer." [Pls.' Reply to R-P Opp'n at 12 (quoting Site Characterization Report.] This evidence does not even indicate that waste products were disposed improperly.

Plaintiffs have not demonstrated by undisputed evidence that a release or threatened release of hazardous materials took place at the Property, and thus fail to meet this element of CERCLA liability.

4. Response Costs

For the same reasons discussed above, regarding Plaintiffs' Motions for Summary Judgment against ICN and Nucor, Plaintiffs have not demonstrated that the costs incurred at the investigative stages of their remedial response were necessary and consistent with the NCP. See 42 U.S.C. §§ 9607(a)(4)(B); Ascon Properties, 966 F.2d at 1152-53; Wickland Oil Terminals, 792 F.2d at 891 (9th Cir. 1986). Plaintiffs provide no evidence that their efforts are motivated by threats to human health or the environment, and thus the costs imposed by testing and investigation performed thus far are not properly deemed "necessary." Southfund Partners, 57 F. Supp. 2d at

1380 (quoting Foster, 922 F. Supp. at 652); Yellow Freight System, 909 F. Supp. at 1299.

Since Plaintiffs have not demonstrated that their response costs were necessary, the Court need not reach the question whether such costs were consistent with the NCP.

E. Conclusion As To Plaintiffs' Motion Against Rhone-Poulenc

Plaintiffs have failed to show that Rhone-Poulenc assumed RCC's liabilities. Even if they had, Plaintiffs nonetheless have not met two of the factors required to show RCC's prima facie CERCLA liability. Because of this shortcoming, the Court need not address CERCLA's statutory defenses. Accordingly, Plaintiffs have not shown that they are entitled to judgment as a matter of law, and Rhone-Poulenc is relieved of its burden of raising a genuine issue of material fact in order to defeat the Motion. Plaintiffs' Motion for Partial Summary Judgment against Rhone-Poulenc is denied.

VIII. NUCOR'S MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFFS

A. Group Liability Under CERCLA

A party who is partially liable for the cleanup of hazardous waste as set forth in 42 U.S.C. § 9607(a) is not entitled to recover all the costs associated with such efforts, and may not seek to impose joint and several liability on other defendants for the entire amount. The Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301-03 (9th Cir. 1997). Under CERCLA, 42 U.S.C. §§ 9607(a) and 9613(f), such a party may only assert a claim for contribution

from other potentially responsible parties on a theory of several-only liability. The Pinal Creek Group, 118 F.3d at 1301-03. While "an innocent private party is entitled to bring suit under § 9607(a), the reality is that the vast majority of private parties will be limited to suing for contribution under § 9613(f) . . . because CERCLA imposes liability on virtually every private party who would have a reason to recoup cleanup costs. Therefore, a CERCLA plaintiff, other than the government, will rarely be 'innocent' and thus permitted to sue under § 9607(a)." Kaufman and Broad — South Bay v. Unisys Corp., 868 F. Supp. 1212, 1216 (N.D. Cal. 1994).

Thus, Plaintiffs will be relegated to pursuing a contribution claim unless able to establish their innocence under § 9607(a) using one of the defenses enumerated at 42 U.S.C. § 9607(b)(1)-(3), which defeat liability if the release of hazardous substances was caused solely by an act of God, an act of war, or certain acts of third parties. Only the "third-party defense" is at issue here. It requires that: (1) the release in question was caused solely by a third party who was not the defendant's[5] employee or agent, and whose actions did not occur in connection with a contractual relationship existing directly or indirectly with the defendant; (2) the defendant exercised due care with respect to the hazardous substances at issue; and (3) the defendant took precautions against foreseeable acts or omissions of the third party and the consequences that could foreseeably result from such acts or omissions. 42 U.S.C. § 9607(b)(3); United States v. Iron Mountain Mines, Inc., 987 F. Supp.

[5] "Defendant," as used in this context, refers to the potentially responsible party — here, Plaintiffs.

1263, 1273 (E.D. Cal. 1997); United States v. Poly-Carb, Inc., 951 F. Supp. 1518, 1530 (D. Nev. 1996).

Under § 9607(35)(A), the definition of the term "contractual relationship," for the purposes of the third-party defense includes "land contracts, deeds or other instruments transferring title or possession," unless the purchaser of the Property can establish that he or she is entitled to the "innocent landowner" exception. See Goe Engineering Co., Inc. v. Physicians Formula Cosmetics, Inc., 1997 WL 889278, *10 (C.D. Cal.).

If Plaintiffs' lease and subsequent acquisition of the Property falls within the statutory definition of "contractual relationship," they will not be entitled to assert the third-party defense unless they are sheltered by the innocent landowner exception. Under this exception, the transfer of title or possession will not be deemed a contractual relationship precluding the third-party defense if: (1) the real property on which the facility is located was acquired by the defendant after the disposal of the hazardous substance at the facility; and (2) the defendant can establish by a preponderance of the evidence that, at the time the defendant acquired the facility, it did not know or had no reason to know that any hazardous substance was disposed of at the facility. 42 U.S.C. §§ 9601(35)(A), (A)(i), 9607(b); Kaufman and Broad, 868 F. Supp. at 1216 (citing In re Hemingway Transport, 993 F.2d 915, 932 (1st Cir. 1993)); Goe Engineering, 1997 WL 889278 at *10.[6] In addition to meeting these

[6] The innocent landowner exception also applies where (1) the (continued...)

requirements, the defendant must establish that it has satisfied the requirements of § 9706(b)(3)(a) and (b). 42 U.S.C. §§ 9601(35)(A).

B. Plaintiffs Are "Responsible Persons" Under CERCLA

Nucor argues, and Plaintiffs do not contest, that Plaintiffs are "liable under Section 107(a) of CERCLA as 'owner/operators' of the 'facility,' i.e., the Providencia Property." [Nucor Mot. v. Pls. at 9.] See 42 U.S.C. §§ 9607(a)(1)-(4); Long Beach Unified School District, 32 F.3d at 1367; Ascon Properties, 886 F.2d at 1153. Plaintiffs openly state that Mr. Thomson leased and then purchased the Property. [See Plaintiffs' Statement of Genuine Issues ("Pls.' Stmt.") at 19, 20.] As the current owners of the Property, Plaintiffs are potentially responsible parties under CERCLA. 42 U.S.C. § 9607(a)(1); Kaufman and Broad, 868 F. Supp. at 1216.

C. No Equitable Exemption Protects Plaintiff

Plaintiffs argue as a threshold matter that the Ninth Circuit in Pinal Greek Group recognized an "equitable exemption" to the rule that potentially responsible parties may only bring a contribution action; under this exemption, a partially responsible party may bring a recovery action if it has not polluted the site in any way. [Pls.' Opp'n to Nucor Mot. at 6.] In Pinal Creek Group, the court merely stated in dicta that the Seventh Circuit had recognized such an exemption in Rumpke of Indiana, Inc. v. Cummins Engineering Co., 107

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[6](...continued)
defendant is a government entity that acquired the land through escheat or other involuntary transfer, or inverse condemnation, or (2) where the defendant acquired the facility by inheritance or bequest. 42 U.S.C. § 9601(35)(A)(ii), (iii).

F.3d 1235, 1241 (7th Cir. 1997). The Pinal Creek Group court did not adopt this exemption, explicitly stating that "[b]ecause the Pinal Group consists of parties who are admittedly partly responsible for the contamination at issue here, that exception would not apply to this case. We, therefore, do not reach that issue." The Pinal Creek Group, 118 F.3d at 1303 n.5. Plaintiffs offer no other authority to suggest that any courts within the Ninth Circuit have since embraced Rumpke's equitable exemption.

To the contrary, cases adhering to the rule ultimately set forth in Pinal Creek Group are legion. See, e.g., United States v. Hunter, 70 F. Supp. 2d 1100, 1103-04 (C.D. Cal. 1999) (affirming the rule in Pinal Creek Group, but also holding that the government may seek joint and several liability even if government agencies were themselves potentially responsible parties); Boyce v. Bumb, 944 F. Supp. 807, 812 (N.D. Cal. 1996) (decided before Pinal Creek Group, and holding that potentially responsible parties could pursue joint and several liability only by meeting innocent landowner exception); Catellus Development Corp. v. L.D. McFarland Co., 910 F. Supp. 1509, 1514-15 (D. Or. 1995) (decided before Pinal Creek Group, and holding that potentially responsible parties may not receive complete indemnity under § 9607(a), but rather must seek contribution under § 9613(f) because the two types of actions are distinct and do not overlap); T H Agriculture & Nutrition Co., Inc. v. Aceto Chemical Co., 884 F. Supp. 357, 362 (E.D. Cal. 1995) (weight of pre-Pinal Creek Group authority supported the argument that action by CERCLA-liable party against other potentially responsible parties is

for contribution). Thus Plaintiffs are not entitled to an "equitable exemption."

D. Plaintiffs Need Not Prove They Were Innocent Landowners

Plaintiffs' lease and purchase contracts obviate the requirement that they prove they are innocent landowners before invoking the third-party defense. Plaintiffs hear Nucor to argue that "the Thomsons are not entitled to the third-party defense as they entered into a 'contractual relationship' with NUCOR – the 1962 sublease between the Thomsons and NUCOR." [Pls.' Opp'n to Nucor Mot. at 8-9.] Under this reasoning, Plaintiffs would have to prove that they are innocent landowners before asserting the third-party defense. Nucor does not respond to this contention in its Reply.

Plaintiffs correctly assert that the innocent landowner requirement will be interposed between a defendant and a proper assertion of the third-party defense "'only if the contract between the landowner and the third party somehow is connected with the handling of hazardous substances.'" Lincoln Properties, Ltd. v. Higgins, 823 F. Supp. 1528, 1543 (E.D. Cal. 1992) (quoting Westwood Pharmaceuticals v. National Fuel Gas Distribution Corp., 964 F.2d 85, 89 (2nd Cir. 1992)). See also State of New York v. Lashins Arcade Co., 91 F.3d 353, 360-61 (2nd Cir. 1996) (for landowner to be barred from raising third-party defense, contract between landowner and third party must either relate to hazardous substances or allow landowner to exert some element of control over third party's activities); Westwood Pharmaceuticals, 964 F.2d at 89-91 (landowner precluded from raising third-party defense only if contract between

landowner and third party "somehow is connected with the handling of hazardous substances"); Iron Mountain Mines, 987 F. Supp. at 1275 (United States not barred from asserting third-party defense because acts or omissions of third party did not occur in connection with a contractual relationship with the United States); Poly-Carb, 951 F. Supp. at 1530-31 (release of hazardous materials must occur in connection with contractual relationship).[7] [Pls.' Opp'n to Nucor Mot. at 8-9.] Accordingly, Plaintiffs need not prove they were innocent landowners in order to avail themselves to the third-party defense.

The parties' arguments regarding whether Plaintiffs conducted an "appropriate inquiry" pursuant to factors set forth at 42 U.S.C. § 9601(35)(B) are irrelevant. [See Pls.' Opp'n to Nucor Mot. at 17-22; Nucor Reply to Pls.' Opp'n at 5-6.] These factors are only intended "to establish that the defendant had no reason to know [of any hazardous substance at a CERCLA facility], as provided in clause (i) of subparagraph (A)" of 42 U.S.C. § 9601(35), for purposes of ascertaining whether a party was an "innocent landowner." 42 U.S.C. § 9601(35)(B). Since Plaintiffs need not establish that they were

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[7] In Goe Engineering, the Hon. William D. Keller disagreed with the Second Circuit's decisions in Westwood Pharmaceuticals and Lashins Arcade, opining that "it makes no sense" to hold that a landowner is precluded from raising the third-party defense only if the contract at issue is somehow connected to handling hazardous materials because it "moots the section 9601(35)(A) requirement that the landowner demonstrate the exercise of due diligence when purchasing the Property, and it dramatically limits the scope of CERCLA liability from what Congress clearly intended . . . ." Goe Engineering, 1997 WL 889278 at *10 n.7. Nevertheless, this Court is guided by the reported opinion in Lincoln Properties, 823 F. Supp. at 1543, which approvingly quoted Westwood Pharmaceuticals, and by Lashins Arcade.

"innocent landowners" in order to assert the third-party defense, the Court need not determine whether an appropriate inquiry was made based on specialized knowledge of the purchaser, the relationship of the purchase price to the value of the Property, commonly known or reasonably ascertainable information, the obviousness of the contamination, and the ability to detect it. 42 U.S.C. § 9601(35)(B).

E. Third-Party Defense

1. Third Party Acts Were the Sole Cause of the Release

Plaintiffs argue, and Nucor does not dispute, that the release of radioactive matter was caused solely by third parties — ICN and RCC.[8] [Pls.' Opp'n to Nucor Mot. at 8.] Nucor acknowledges that, prior to the time Joseph Thomson first leased the Property, "it had been used for some operations dealing with radioactive materials." [Nucor's Statement of Uncontroverted Facts and Conclusions of Law ("Nucor Stmt.") at 2.] Furthermore, Nucor does not contend that Plaintiffs contributed in any way to the radioactive contamination at the Property.

In contrast, Plaintiffs specifically contend that they "did not contribute in any way to the radioactive contamination on the property," and offer evidence in support of this contention. [Pls.' Opp'n to Nucor Mot. at 1; Pls.' Stmt. at 2-5.] Plaintiffs thus satisfy the first requirement of the third-party defense.

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[8] Even though Plaintiffs did not show a "release or threatened release" by RCC in their Motion for Partial Summary Judgment against Rhone-Poulenc, they did make such a showing regarding ISC in their Motion for Summary Judgment against Nucor.

2. Plaintiffs Did Not Exercise the Required Due Care

A party seeking to assert the third-party defense "'must demonstrate that he took all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances.'" Iron Mountain Mines, 987 F. Supp. at 1276 (quoting Lashins Arcade, 91 F.3d at 361). The question whether a party seeking to assert the third-party defense has exercised due care is appropriate for resolution on summary judgment. See Lincoln Properties, 823 F. Supp. at 1543.

Nucor urges that, under United States v. Pacific Hide & Fur Depot, Inc., 716 F. Supp. 1341 (D. Idaho 1989), the lease and sale of the Property to Plaintiffs must be scrutinized under the strictest standard of due diligence because it was an arm's length transaction. [Nucor Mot. v. Pls. at 10.] Nucor is correct, to the extent that Pacific Hide notes that commercial transactions are held to a higher standard of due care than "private transactions [which] are given a little more leniency, and inheritances and bequests are treated the most leniently of these three situations." Pacific Hide, 716 F. Supp. at 1348. There, the least strict standard of due care was imposed because the Property at issue was acquired "by familial gift and [the owners acquired their] ultimate interest by a corporate event beyond their control." Pacific Hide, 716 F. Supp. at 1348.

In contrast, Plaintiffs acquired the Property though a sublease from NUCOR in 1962, and then purchased the Property from Mr. Richardson in 1966. [Pls.' Opp'n to Nucor Mot. at. 4.] The lease

from NUCOR clearly was executed at arm's length, and the purchase from Richardson, despite the fact that he and Thomson were friends, was a private transaction demanding only a marginally lower standard of due care than a commercial transaction. See Pacific Hide, 716 F. Supp. at 1348.

Plaintiffs argue that the sublease from NUCOR was silent about ISC's or RCC's activities on the Property, and about any contamination, waste or by-products that might have lingered there. [Pls.' Opp'n to Nucor Mot. at 4.] Plaintiffs stress that Thomson and Richardson knew each other for several years, served together on the Verdugo Hills Council of the Boy Scouts, and worked at the Glendale Theater together. [Pls.' Opp'n to Nucor Mot. at 4.] Furthermore, Thomson knew that Richardson was a Bishop in the Mormon Church, "knew that a Bishop is the highest position for the area church, and knew that Bishops have a high reputation in Mormon society. Thomson had previously done business with Mormons, and had a high regard for Richardson." [Pls.' Opp'n to Nucor Mot. at 3, 4-5.] Plaintiffs argue these circumstances made it reasonable for Thomson to place heavy reliance on Richardson's representations that "there were no problems with the property" and that it "had been cleaned up entirely." [Pls.' Opp'n to Nucor Mot. at 3, 5.] As a result, Plaintiffs argue, they did not know and could not reasonably have known about radioactive contamination at the Property.

As further evidence of due care, Plaintiffs offer the declaration of William D. Feldman, a commercial real estate services specialist, who states that Thomson's lease and purchase of the

Property "was consistent with good commercial and customary practices in the 1960's," because, at that time, buyers "did not inspect property or conduct surface or subsurface investigations to determine if there was environmental contamination . . . ." [Declaration of William D. Feldman at 3.]

Plaintiffs' arguments are wholly unpersuasive. Regardless of whether Thomson was friendly with Richardson, the "due care" requirement of the third-party defense to CERCLA liability demands more of a purchaser than accepting a seller's representations because he occupies a position of religious prominence, or because he is a personal friend. Richardson's social and religious affiliations did not assure the reliability of his representations about the condition of the Property.

Although Plaintiffs point out that Raymond Fish, a radiation safety specialist employed by the AEC, surveyed the Property and determined that it had been decontaminated to acceptable release criteria, [Pls.' Opp'n to Nucor Mot. at 16], the actual condition of the Property did not relieve Thomson of his obligation to exercise due care in purchasing it. Plaintiffs acknowledge that Thomson never inquired with government agencies about the Property's condition; thus the Court finds unpersuasive their argument that, "if Thomson had checked with the government before his purchase of the Property, Mr. Fish would have told Thomson that the property had been released and could be used for any purpose." [Pls.' Opp'n to Nucor Mot. at 5.]

Plaintiffs' contention that the due care requirement of 42 U.S.C. § 9607(b) arises only after hazardous substances are discovered on the Property is irrelevant, [Pls.' Opp'n to Nucor Mot. at 10], as Nucor points to considerable evidence demonstrating that Thomson knew radioactive contaminants existed on the Property when he bought it, and that he was lax in his investigation of the Property. When asked what investigation he undertook, besides speaking with Richardson, to learn whether the Property was contaminated, Thomson replied either "Not much" or "I took none." [Nucor Mot. v. Pls., Ex. B at 36, 67 (Deposition of Joseph Thomson ("Thomson Depo.")).] Nonetheless, Thomson was aware that nuclear research had been conducted on the Property. [Nucor Mot. v. Pls., Ex. B at 22, 26, 49, 52 (Thomson Depo.).] In fact, he assumed that Richardson's description of previous clean-up efforts at the Property pertained to radioactive material. [Nucor Mot. v. Pls., Ex. B at 57 (Thomson Depo.).]

Thomson did not receive any federal government documentation regarding past radioactive operations at the Property because he "took Mr. Richardson's word," despite having no prior business dealings with him, and despite Richardson's failure to disclose from which federal agency he received information verifying that the Property was safe. [Nucor Mot. v. Pls., Ex. B at 28 (Thomson Depo.).] Thomson spoke to no one having prior business dealings with Richardson, and did not attempt to question any previous occupants of the Property. [Nucor Mot. v. Pls., Ex. B at 33, 34, 37, 38 (Thomson Depo.).]

When Thomson took possession of the Property, he was either already aware or noticed right away that several features of the premises were potentially contaminated. Thomson testified that he was aware of a small area enclosed by a fence that was contaminated by radiation. [Nucor Mot. v. Pls., Ex. B at 53-57 (Thomson Depo.).] He recalls that his conversation with Richardson "certainly suggested" that the cleanup required in that area related to "nuclear contamination;" Thomson assumed Richardson "was talking about radioactive material." [Nucor Mot. v. Pls., Ex. B at 57 (Thomson Depo.).] Thomson also noticed several open sumps on the premises, two of which had been filled with concrete. He found the presence of such features "odd." [Nucor Mot. v. Pls., Ex. B at 44, 47 (Thomson Depo.).]

The evidence marshaled by Nucor demonstrates convincingly that Thomson both knew radioactive materials were present on the Property before he purchased it, and that the Property might still be contaminated after he took possession. Plaintiffs' arguments that relying on Richardson's informal assurances that the Property was uncontaminated, and that such practices constituted acceptable pre-purchase investigations in the 1960's, are unconvincing. Plaintiffs failed to exercise the due care with regard to contamination at the Property that is required to assert the third-party defense.

3. Plaintiffs Did Not Take Precautions Against Foreseeable Third Party Acts or Consequences Thereof

Plaintiffs must show that they took "precautions against foreseeable acts or omissions of any . . . third party and the

consequences that could foreseeably result from such acts or omissions." 42 U.S.C. § 9607(b)(3). Plaintiffs must show they took all precautions with respect to foreseeable acts that a "similarly reasonable and prudent person would have taken in light of all relevant facts and circumstances." Lashins Arcade, 91 F.3d at 361; Poly-Carb, 951 F. Supp. at 1531. Although the third party actions Plaintiffs allege – releases of radioactive material by ISC and RCC – occurred in the early 1960's, CERCLA obligates them to take precautions against any foreseeable consequences from those actions.

Plaintiffs allege they first discovered the Property was contaminated when the NRC inspected it in 1996, and thereafter, obtained a health risk assessment, conducted a comprehensive site characterization to determine the extent of the contamination, and then secured all "areas of concern." [Pls.' Opp'n to Nucor Mot. at 12.] While such actions might qualify as reasonable precautions if Plaintiffs' first notice of residual radioactivity on the Property was the 1996 NRC survey, Mr. Thomson knew over thirty years earlier that hazardous substances were located at the Property.

In light of the relevant facts and circumstances, Plaintiffs cannot meet this prerequisite to asserting the third-party defense because, having learned of the contamination in the 1960's, they have delayed over thirty years before taking precautionary action in response to radioactive contaminants present at the Property.

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F. Conclusion As To Nucor's Motion For Partial Summary Judgment Against Plaintiffs

Nucor has shown that it is entitled to judgment as a matter of law. Plaintiffs are liable persons within the meaning of 42 U.S.C. § 9607 (a)(1), and are not entitled to invoke the third-party defense because of the obvious failings in their due diligence. They are not entitled to pursue a cost recovery action based on a theory of joint and several liability against Defendants ICN, Nucor and Rhone-Poulenc under 42 U.S.C. § 9607(a), and are relegated to a contribution action where all parties are subject to several-only liability under 42 U.S.C. § 9601(f). The Pinal Creek Group, 118 F.3d at 1301-03. Accordingly, the Court shall grant Nucor's Motion for Partial Summary Judgment.

IX. NUCOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST ICN

A. ICN Is Not A "Responsible Person" Under CERCLA

Nucor argues that ICN, as the successor-in-interest to U.S. Nuclear, is liable under 42 U.S.C. § 9607(a)(2) and (4) as a "prior operator" and as a "transporter" for the residual radioactive contamination at the Property because the Property was within U.S. Nuclear's control during its decontamination efforts. [Nucor Mot. v. ICN at 7, 9.]

Nucor argues that the presence of radioactivity, even after the Property was certified for release by the AEC, demonstrates that U.S. Nuclear exacerbated the conditions there. Mr. Fish's final survey of the Property reflected that the open cobalt pool, where certain

radioactive materials had once been stored, was decontaminated. [Nucor Mot. v. ICN at 6, 59-61 (Deposition of Raymond Fish ("Fish Depo.").] Mr. Donelson testified that, after the pool had been decontaminated, U.S. Nuclear filled it with earth and placed a concrete cap over it. [Nucor Mot. v. ICN at 6, 42-45 (Deposition of Richard Donelson ("Donelson Depo.").] Over thirty years later, the Report furnished by Rogers & Associates "states that radiation monitoring conducted in a borehead drilled into the area of the former cobalt pool yielded" results indicating a high level of radioactivity in that area. [Nucor Mot. v. ICN at 6-7, 35-36 (Excerpts from Rogers & Associates Report).] The "only possible explanation" for this increased level of radioactivity, according to Nucor, is that U.S. Nuclear buried radioactive material along with the fill material placed into the cobalt pool. [Nucor Mot. v. ICN at 7.]

ICN vigorously contests this reasoning, characterizing it as "rank speculation" unsupported by competent evidence. [ICN Opp'n to Nucor Mot. at 15, 16.] ICN emphasizes that Mr. Fish noted that the precise location of the borehole was unclear, and offers that "the more likely source of [radiation] is ISC's [past] activities and continued migration [of radioactive material in the soil] over the past 40 years." [ICN Opp'n to Nucor Mot. at 16.]

1. Operator Liability

Contractors conducting activity that produces additional contamination of a CERCLA facility are liable as operators under 42 U.S.C. § 9607(a)(2); Kaiser Aluminum, 976 F.2d at 1342.

Nucor marshals no evidence to permit the inference that U.S. Nuclear buried radioactive materials among the earth used to fill the cobalt pool; thus, ICN cannot be liable as an "operator's" successor-in-interest. Even taking as true that the cobalt pool was properly decontaminated when Mr. Fish inspected it, that U.S. Nuclear filled the pool with earth and capped it with concrete, and that recent measurements show increases in radioactivity, Nucor has proffered no evidence even suggesting that the reason for the heightened measurements is that U.S. Nuclear buried radioactive materials in the cobalt pool. Nucor certainly does not provide the "undisputed" evidence required to prove an element of CERCLA liability on summary judgment. See Betkoski, 99 F.3d at 514 (citing Alcan Aluminum, 990 F.2d at 719); Borden, 889 F.2d at 667. Given that all reasonable inferences are to be drawn in favor of the non-moving party on summary judgment, Masson, 501 U.S. at 520, 111 S. Ct. at 2434, the Court shall not accept as proven Nucor's speculative contentions regarding the source of the recently-detected contaminants.

Although U.S. Nuclear conducted some operations at the Property, the evidence proffered by Nucor is insufficient to meet its burden on summary judgment, especially in light of the requirement that prima facie CERCLA liability be established by "undisputed" evidence. See Iron Mountain Mines, 881 F. Supp. at 1432.

2. Transporter Liability

Nucor likewise fails to establish U.S. Nuclear's and ICN's transporter liability under 42 U.S.C. § 9607(a)(4); Kaiser Aluminum Corp., 976 F.2d at 1343. Nucor offers the same unpersuasive chain

of inferences described above to prove U.S. Nuclear's liability as a "transporter." [Nucor Mot. v. ICN at 9.] Because of the serious weaknesses in Nucor's evidence, these arguments are no more persuasive with respect to transporter liability than they are regarding operator liability.

Nucor has not established that ICN, as successor-in-interest to U.S. Nuclear, is subject to CERCLA liability under 42 U.S.C. § 9607, sub-sections (a)(2) and (a)(4); neither does ICN qualify as a person subject to liability under sub-sections (a)(1) (present owner and/or operator) or (a)(3) (person who contractually arranged for disposal by another party). See Iron Mountain Mines, 881 F. Supp. at 1451 (citing cases).

B. "Federally Permitted Release"

ICN argues that U.S. Nuclear decontaminated the Property consistent with 1961 AEC criteria, [ICN Opp'n to Nucor Mot. at 10-13], and that, "to the extent the residual contamination constitutes a 'release,' it is a federally permitted release" exempting ICN from CERCLA liability under 42 U.S.C. § 9607(j). [ICN Opp'n to Nucor Mot. at 13-14.] The exception for a federally permitted release of hazardous material is an affirmative defense to a CERCLA violation. United States v. Freter, 31 F.3d 783, 788 (9th Cir. 1994).

The Court need not reach the question whether any release by U.S. Nuclear was "federally permitted," because Nucor has failed to demonstrate that ICN is a responsible person for purposes of CERCLA liability.

C. Conclusion As To Nucor's Motion For Partial Summary Judgment

Nucor has failed to establish by uncontroverted evidence that ICN is a "responsible person" subject to liability under CERCLA. Accordingly, Nucor has not shown it is entitled to judgment as a matter of law, and ICN is relieved of its burden of setting forth a genuine issue of material fact in order to defeat the Motion. For the reasons set forth herein, Nucor's Motion for Summary Judgment is denied.

X. ICN'S MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION AGAINST NUCOR

A. Nucor Retains ICN's Liabilities

In the present case, ICN argues that U.S. Nuclear expressly bargained to be free under the terms of the Asset Purchase Agreement from all of ISC's liabilities, which were retained by ISC and later assumed by Nucor as ISC's successor-in-interest.

The indemnity provision provided in full:

> It is also recognized and NUCOR[9] hereby agrees that U.S. [Nuclear] by entering into this agreement does not in any way assume any liabilities of Isotope Specialties Company [ISC] accrued or contingent on December 31, 1960, or arising as the result of the completion of orders by Isotope Specialties Company [ISC] prior to January 15, 1961, and NUCOR hereby indemnifies and holds U.S. [Nuclear] harmless with respect to any such liabilities.

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[9] I.e., Nuclear Corporation of America.

[ICN Mot. v. Nucor at 159, Ex. 4 (Asset Purchase Agreement appended to ICN's Answer to Cross-Claim by Nucor Corp).]

1. Applicable Law

ICN argues, and Nucor does not dispute, the general proposition that a sufficiently broad indemnity provision will include future unknown environmental liabilities, including CERCLA liabilities, even if the agreement was concluded before CERCLA was enacted. Aluminum Co. of America, 124 F.3d at 556. See also, White Consolidated Industries, 179 F.3d at 409; SmithKline Beecham, 89 F.3d at 158 (citing Beazer East, 34 F.3d at 211); GNB Battery Technologies, 65 at 622-23; Olin, 5 F.3d at 14; Iron Mountain Mines, 987 F. at 1241.

2. The Indemnity Provision Covers Environmental Liability

Nucor contends the Asset Purchase Agreement must be construed as a whole, and that, accordingly, it would have been illogical for the parties to agree for U.S. Nuclear to decontaminate the Property, but leave Nucor to shoulder potential liabilities arising from U.S. Nuclear's failure to "properly perform" that assignment. [Nucor Opp'n to ICN Mot. at 11.]

a. California Law Applies to the Provision

Since this Court must apply state law to interpret the contract, it must first determine which state's laws apply. In California, absent an effective choice of law by the parties, rights and obligations are determined by the law of the state which, with respect to the particular issue, has the most significant relationship to the transaction and the parties. The Restatement

(Second) of Conflict of Laws provides that the rights of the parties are determined by the law of the state with the most significant relationship to the transaction and the parties. Absent an effective choice of law, the contacts to be taken into account include: the place of contracting, the place of negotiation, the place of performance, the location of the subject matter of the contract, and the domicile, and places of residence, business, and incorporation[10] of the parties. "If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied." Restatement (Second) of Conflict of Laws (1969) § 188. Under this test, California law applies because, with the exception of NUCOR's status as a Delaware corporation, all the factors listed in the Restatement favor it.

b. Application of California Law to the Provision

Here, Nucor contends questions of fact remain regarding: (1) whether the indemnity provision was intended to cover environmental claims; (2) whether it was intended to cover ISC's actions or ICN's actions; and (3) whether it relates only to liabilities existing or contingent as of December 31, 1960. [Nucor Opp'n to ICN Mot. at 11-15.] Applying California law, the Ninth Circuit has characterized similar disputes as relating to whether the contract was ambiguous. See Jones-Hamilton Co. v. Beazer Materials & Services, Inc., 973 F.2d 688, 692 (9th Cir. 1992). Under California law, contract ambiguity is a question of law. Jones-Hamilton, 973 F.2d at 962 (citing Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866, 871 (9th

[10] NUCOR was a Delaware corporation, and U.S. Nuclear was a California corporation.

Cir. 1979)). Even when the document is unambiguous on its face, a judge is required to give "'at least a preliminary consideration [to] all credible evidence offered to prove the intention of the parties.'" Jones-Hamilton, 973 F.2d at 692 (quoting Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 69 Cal.2d 33, 39-40, 69 Cal. Rptr. 561, 565 (1968)). After considering the evidence, however, the court may exclude it if it "tend[s] to prove a meaning of which the language [of the contract] is not reasonably susceptible." Jones-Hamilton, 973 F.2d at 692 (quoting Thomas Drayage, 69 Cal.2d. at 40 n.7, 69 Cal. Rptr. at 565 n.7). If the language of the contract is not "reasonably susceptible" to the suggested interpretation, and the court excludes the evidence, "[t]he case may then be disposed of by summary judgment." Jones-Hamilton, 973 F.2d at 693 (quoting Brobeck, Phleger & Harrison, 602 F.2d at 871).

The preliminary question here is whether the indemnity provision is reasonably susceptible to the interpretation that it pertained to all liabilities, including environmental and CERCLA liabilities. In light of the clear language of the provision, which applies to "any liabilities" of ISC, and holds U.S. Nuclear harmless "with respect to any such liabilities," as well as the lack of evidence extrinsic to the contract indicative of the parties' intentions, it is apparent that the provision was intended to apply to environmental, as well as other liabilities. Jones-Hamilton and authority from outside the Ninth Circuit support this interpretation. Jones-Hamilton, 973 F.2d at 692; White Consolidated Industries, 179 F.3d at 409; Aluminum Co.

of America, 124 F.3d at 556; SmithKline Beecham, 89 F.3d at 158; GNB Battery Technologies, 65 F.3d at 622-23; Olin, 5 F.3d at 14.

3. The Indemnity Provision Does Not Apply to ICN

Although the indemnity provision applied to environmental liabilities, Nucor is correct to assert the provision only indemnified U.S. Nuclear for liabilities incurred by ISC for its own actions, and thus does not indemnify U.S. Nuclear's successor-in-interest, ICN, for liabilities arising out of ICN's own behavior. In Jones-Hamilton, the plaintiff, Jones-Hamilton ("J-H"), agreed to indemnify Wood Treating Chemicals Company ("WTTC") for all losses arising out of any failure by J-H to comply with local, state and federal law and regulations. J-H brought a CERCLA action against WTTC's successor-in-interest, Beazer Materials ("Beazer"), and Beazer cross-complained for indemnity under the assumption agreement concluded between J-H and WTTC. The Ninth Circuit ruled that the indemnity provision only provided "that J-H indemnify [WTTC, and thus, its successor-in-interest] Beazer only for damages Beazer incurs as a result of J-H's violation of laws, not Beazer's violation of laws." Jones-Hamilton, 973 F.2d at 692.

Likewise, Nucor argues, the indemnity provision here provides that Nucor will indemnify U.S. Nuclear, and thus also its successor-in-interest, ICN, but only for damages incurred as a result of ISC's activities as a division of Nucor. The indemnity provision does not shield ICN from liabilities incurred as the result of its own activities, but here, Plaintiffs seek to hold ICN liable for the

failures of its predecessor interest, U.S. Nuclear, not for the failures of ISC and/or Nucor.

The parties in this case occupy the same positions relative to each other as the parties in Jones-Hamilton. Accordingly, the indemnity provision operates only to shield U.S. Nuclear, and thus ICN, from the liabilities incurred by ISC. ICN argues only that the provision operated to "indemnify ICN from all liabilities arising from ISC's activities . . . ." [ICN Mot. v. Nucor at 13.] Nucor correctly points out that Plaintiffs only seek recovery for damage caused by U.S. Nuclear's decontamination efforts, and not for activities conducted by ISC, which are the only activities covered by the indemnity provision. [See Pls.' Mot. v. ICN at 2; Revised First Amended Complaint at 7-9.] Thus, the provision is not applicable to ICN, and does not require Nucor to indemnify ICN for any liabilities incurred by U.S. Nuclear.

4. The Indemnity Provision Did Not Apply to Future Liabilities

Nucor also argues that a triable issue of fact remains as to whether any liabilities covered by the indemnity agreement were "accrued or contingent on December 31, 1960," because Plaintiffs did not lease the Property until 1962, they did not purchase it until 1966, and there was neither a release of hazardous materials nor a governmental directive to decontaminate the Property as of December 31, 1960. [Nucor Opp'n to ICN Mot. at 14.] ICN retorts that the indemnity provision applies to Plaintiffs' current claims, even though such claims had not arisen by December 31, 1960; they contend

its language refers to all accrued or contingent liabilities and thus includes a "future but unknown claim such as [Plaintiffs'] based on ISC's operations prior to closing . . . ." [ICN Reply to Nucor Opp'n at 4.]

The indemnity provision was sufficiently limited and specific to circumscribe the liability retained by NUCOR, thus excluding liabilities not accrued or contingent as of December 31, 1960 (or resulting from orders completed by ISC prior to January 15, 1961). For future liabilities to have been covered, the provision would have had either to (1) provide specifically that future liabilities were retained by NUCOR, or (2) be so sweeping as to cover any and all liabilities whatsoever, without limitation.

In White Consolidated Industries, a purchase agreement "allocated to [Plaintiff] WCI the risk of CERCLA losses after the expiration of the one-year indemnification period" where it contained an assumption agreement whereby WCI assumed "[a]ll obligations and liabilities of the Business, contingent, or otherwise, which are not disclosed or known to [Defendant] Westinghouse on the Closing Date and are not discovered by WCI within a period of one year from the Closing." White Consolidated Industries, 179 F.3d at 409-10. There, the provision was specific enough to indicate that WCI agreed to assume future liabilities after the one-year grace period.

Likewise, in Olin, an assumption agreement pertaining to "all liabilities (absolute or contingent), obligations and indebtedness of Olin related to the Aluminum Assets or the Aluminum Affiliates or

the Aluminum Subsidiaries as they exist on the Effective Time or arise thereafter with respect to actions or failures to act occurring prior to the Effective Time" applied to future liabilities. Olin, 5 F.3d at 12-13, 14-15. As in White Consolidated Industries, the assumption provision was specific enough to cover future liabilities.

In SmithKline Beecham, an indemnity provision which provided that the purchaser assume "all losses, liabilities and deficiencies" manifested the parties' intent to allocate all present and future environmental liabilities to the purchaser. SmithKline Beecham, 89 F.3d at 159-60. There, the provision was broad enough to cover liabilities accruing in the future.

The indemnity provision at issue here is neither specific enough to cover future liabilities per se, nor broad enough to cover any and all liabilities whatsoever. Hence, the provision does not apply to any liabilities incurred or contingent after the operative date of December 30, 1960.

B. Whether U.S. Nuclear Performed Under the Asset Purchase Agreement

Nucor also argues that the indemnity provision may not apply because U.S. Nuclear breached its contractual obligation under the Asset Purchase Agreement to decontaminate the Property when it buried radioactive contaminants in the cobalt pool before capping it with concrete. [Nucor Opp'n to ICN Mot. at 3, 4-9.] As stated previously herein, Nucor presents no competent evidence, and relies too heavily

on speculation and inference in concluding, that U.S. Nuclear buried such materials. This argument is therefore unpersuasive.

C. Arguments In Equity

Because the indemnity provision does not apply to the claims at issue, and furthermore does not apply to ICN, it is not necessary for the Court to reach Nucor's arguments regarding ICN's inability to seek indemnity due to its own illegal acts or as a result of its "unclean hands."

D. Conclusion As To ICN's Motion For Summary Judgment Or In The Alternative Summary Adjudication

ICN has failed to establish by uncontroverted evidence that Nucor is obligated to indemnify it against Plaintiffs' claims in this action. Thus, ICN's Motion for Summary Judgment or in the Alternative Summary Adjudication is denied.

XI. CONCLUSION

For the reasons set forth herein:

1. Plaintiffs' Motion for Partial Summary Judgment against Defendant ICN Pharmaceuticals, Inc. is DENIED;

2. Plaintiffs' Motion for Partial Summary Judgment against Defendant Nucor Corporation, Inc. is DENIED;

3. Plaintiffs' Motion for Summary Judgment against Defendant Rhone-Poulenc, Inc. is DENIED;

4. Defendant Nucor Corporation, Inc.'s Motion for Partial Summary Judgment against Plaintiffs is GRANTED;

5. Defendant/Cross-claimant Nucor Corporation, Inc.'s Motion for Partial Summary Judgment against Defendant/Cross-defendant ICN Pharmaceuticals, Inc. is DENIED; and

6. Defendant/Cross-claimant ICN Pharmaceuticals, Inc.'s Motion for Summary Judgment or in the Alternative Summary Adjudication against Defendant/Cross-defendant Nucor Corporation, Inc. is DENIED.

IT IS SO ORDERED.

Dated: July 22, 2000

VIRGINIA A. PHILLIPS
United States District Judge