UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

NORFOLK SOUTHERN CORPORATION, et al.,

Plaintiffs,

vs.

Case No. 3:00-cv-366-J-32MMH

CHEVRON U.S.A., INC., et al.

Defendants.

ORDER

I. Status

This case is before the Court on defendant Shell Oil Company's Motion in Limine to Exclude the Opinion Testimony of Mr. Wayne Grip, Dr. Paul Chrostowski and Dr. Marwan Sadat (Doc. 114) and supporting memorandum (Doc. 115) and plaintiffs' response thereto (Doc. 136); defendant Shell Oil Company's Motion for Summary Judgment (Doc.116) and plaintiffs' response thereto (Doc. 135); defendant Chevron U.S.A., Inc.'s Motion for Summary Judgment (Doc. 118) and plaintiffs' response thereto (Doc. 137); defendant Chevron U.S.A., Inc.'s Motion for Summary Judgment on Crossclaim of Defendant Shell (Doc. 125) and supporting memorandum (Doc. 126) and Shell's response thereto (Doc. 134). The parties filed supporting materials (Docs. 119-24, 138).[1] On January 24, 2003, the Court conducted a hearing on all pending motions,

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[1] Doc. 119 is Defendant Chevron U.S.A., Inc.'s Notice of Filing in Support of Motion for Summary Judgment. These documents are contained in two boxes. Future reference to these documents will be to "Chevron Exhibit" followed by the applicable Bates Stamp number and any other pertinent information.

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the transcript of which has now been filed (Doc. 142).[2] The Court permitted the parties to file post-hearing supplemental memoranda which they have now done (Docs. 143-45). Plaintiffs attached expert verifications to their post-hearing memorandum (Doc. 144, Exhibits 2, 4-5). Defendant Shell Oil Company then filed a Motion to Strike the Plaintiffs' Late-Filed Expert Verification (Doc. 146) to which plaintiffs filed a response (Doc. 147).

II. Standard of Review

Summary judgment is appropriate only where "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 the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The movant bears the burden of demonstrating the absence of all genuine issues of material fact. See id. This burden "may be discharged by 'showing' . . . that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party discharges that burden, the burden shifts to the nonmoving party to set forth specific facts showing a genuine triable issue. See Fed. R. Civ. P. 56(e). To

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Doc. 120 is deposition testimony of Wayne Grip; Docs. 121 and 122 are deposition testimony of A. Gayle Jordan; Doc. 123 is deposition testimony of Floyd L. Mathews, Jr.; and Doc. 124 is deposition testimony of Richard Henrichsen Sollner.

Doc. 138 is an Appendix of Joint Exhibits to Plaintiffs' Memorandum of Law in Opposition to Chevron's Motion for Summary Judgment, Plaintiffs' Memorandum of Law in Opposition to Shell Oil Company's Motion for Summary Judgment and Plaintiffs' Memorandum of Law in Opposition to Shell Oil Company's Motion in Limine. These documents fill two boxes. Future references to these documents will be to "Plaintiffs' Joint Exhibit" followed by the applicable exhibit number and any other pertinent information.

[2] References herein to specific transcript pages are denoted as "Tr." followed by the page number.

create a genuine issue of material fact, the nonmovant must do more than present some evidence on a disputed issue. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986) (citations omitted).

III. Background

Plaintiff Norfolk Southern Corporation ("NSC") is the parent corporation of Norfolk Southern Railway Company ("NSRC") which, in turn, is the parent corporation of plaintiff Georgia Southern and Florida Railway Company ("GS&F") (collectively referred to as "the plaintiffs"). Plaintiff GS&F is successor in interest to St. Johns River Terminal Company ("SJRTC").[3] Defendants Chevron U.S.A., Inc., ("Chevron") and Shell Oil Company ("Shell") are petroleum corporations. Chevron is successor in interest to Gulf Oil Corporation and Gulf Refining Company (collectively, "Gulf"), which were also petroleum corporations.[4]

Plaintiffs have filed a multi-count complaint against defendants Chevron and Shell (Doc. 57). Plaintiffs' claims are based on alleged contamination of property described as the "Site" and an adjacent salt marsh described as the "Adjacent Property" (hereinafter

[3] On December 31, 1993, SJRTC merged into GS&F.

[4] On August 12, 1985, Gulf changed its name to Chevron U.S.A., Inc.

referred to as the "salt marsh").[5] See Doc. 57. The Site is located on the south bank of Long Branch Creek, a tributary of the St. Johns River, in Jacksonville, Florida. SJRTC (GS&F's predecessor) leased the Site to Gulf from 1906 until 1961.[6] Gulf operated a bulk oil storage and distribution facility on the Site. See Plaintiffs' Joint Exhibit 29 (hereinafter "Pretrial Stipulation"). Since Gulf vacated the property at the end of its lease in 1961, the Site has not been used as an oil distribution terminal. See id.[7]

On the opposite bank of Long Branch Creek, Shell operated a similar type of oil distribution terminal from the 1930s until 1991. See Doc. 116 at 3. The Court has attached to the Order as Appendix A an aerial photograph depicting both properties.[8] As the photograph shows, the mouth of the Creek separating the Gulf and Shell properties is rather wide and there is also an isthmus of land which separates the Creek into two

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[5] The property has been referred to by different names in various documents – i.e. "Tallyrand Terminal Property," "Occidental/Gulf Oil Site" or "PCS Phosphate Site." The parties have submitted numerous aerial photographs and diagrams of the site, see e.g., Plaintiffs' Joint Exhibit 10 (Wayne Grip's Expert Report); Doc. 116, Exhibit A (Shell's Motion for Summary Judgment), and the Court has attached to this Order as Appendix A an aerial photograph of the subject location.

The Court recognizes that the parties dispute who owns the salt marsh and whether it was part of the leased premises. The Court's discussion of this issue is at pages 18-19, infra.

[6] SJRTC and Gulf entered into their first lease agreement on December 1, 1906 and subsequently renewed or entered into numerous other lease agreements until the parties finally terminated the lease on December 31, 1961. The lease renewals and lease agreements are attached as Exhibits 2(a)- (h) to the Second Amended Complaint (Doc. 57).

[7] PCS Phosphate Whitesprings has operated at this site since 1972. See Exhibit 27 (Metroplex Letter to RESD and FDEP dated January 14, 2000) to Plaintiff's Joint Exhibit 18 (Tiffany Shaw Deposition).

[8] The Court has labeled the map with relevant information – i.e. the Gulf facility, Shell facility, salt marsh and the general location where the pipeline crosses Long Branch Creek.

branches.[9]

During World War II, the United States government took possession of Shell's terminal and in 1943 constructed two pipelines (6" and 8" inch in diameter) under the Creek surface connecting the Gulf terminal to the Shell terminal. See Exhibit 3 to Plaintiffs' Joint Exhibit 7 (Shell Oil Company's Supplementary Answer to Plaintiff's First Set of Interrogatories) & Plaintiffs' Joint Exhibit 33 (Lease Agreement between Shell and Defense Plant Corporation, December 3, 1942). Collectively, these two pipelines are referred to as the Florida Emergency Pipeline (hereinafter the "pipeline"). See Exhibit 3 to Plaintiffs' Joint Exhibit 7. After the war, the government sold its interest in the pipeline to Samson Tool and Machinery Company, which then sold the pipeline to Gulf and Shell. See Plaintiffs' Joint Exhibit 35 (Letter from Reconstruction Finance Corporation to Shell, May 1, 1946); Plaintiffs' Joint Exhibit 36 (Conveyance from Sampson Machinery & Supply Company to Gulf and Shell, February 10, 1948); Exhibit 3 to Plaintiffs' Joint Exhibit 7(Shell Oil Company's Answer to Plaintiffs' First Set of Interrogatories). Gulf agreed to fifty percent ownership of the pipeline. See Joint Exhibit 37 (Letter from Shell to Gulf, January 27, 1948).[10] For about a year and a half, from 1946 through 1947 or

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[9] The record is unclear as to the width of Long Branch Creek. Clarence Knapper, former superintendant of the Shell facility, testified that Shell used about 4,500 feet of pipeline to pump petroleum products across the Creek from the Gulf facility to the Shell facility. See Clarence Knapper deposition (Plaintiffs' Joint Exhibit 7) at 135. However, it is unknown how much of the pipeline ran under the Creek and how much ran on the two properties.

[10] Shell contends that it subsequently sold its rights to the pipeline to Gulf in November 1953. See Exhibit 5 to Plaintiffs' Joint Exhibit 3 (Shell Oil Company's Answer to Plaintiff's First Set of Interrogatories). In response to Interrogatory Question 5(c), Shell stated that there is a May 26, 1954 Base Lease or Fee Data Notice that provides:

1948, while Shell constructed a dock on its own property, Gulf allowed Shell to operate two additional pipelines (10" and 12" in diameter) on the Site connecting Gulf's loading dock to the pipeline crossing Long Branch Creek. See Plaintiffs' Joint Exhibit 38 (License Agreement between Gulf and Shell, July 1946).[11] This enabled Shell to receive oil products by ship or barge at the Gulf dock and then have them transferred to Shell via the pipelines on the Site and the pipeline running under Long Branch Creek. The pipeline running under Long Branch Creek was abandoned by the parties and reported to be "rusted out" by 1957. Doc. 143, Exhibit A.[12]

In August 1977, the United States Coast Guard notified SJRTC that oil was seeping from the Site into Long Branch Creek. See Pretrial Stipulation at 6. SJRTC was cited for a violation of the Clean Water Act and fined $100. See id. SJRTC took various corrective measures to prevent further oil seepage into Long Branch Creek. In November 1978, SJRTC filed a lawsuit against Gulf alleging that during the term of its lease, Gulf had spilled

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> This digest issued to cancel old Notice No. B-768 dated 6-11-48 which covered one 6" and one 8" pipeline at Jacksonville Marine Terminal, owned jointly by Shell and Gulf Oil Corp. In February 1953, these items were written off and Shell sold its interest to Gulf in November, 1953.

The Court has not seen this document.

[11] The record is unclear as to the precise date Shell stopped using the Gulf facility. In a letter dated September 2, 1947, Shell advised Gulf that it was canceling the license agreement effective March 2, 1948. See Exhibit 39 to Plaintiffs' Joint Exhibit 7. However, Shell noted that if construction of its dock was completed before March 2, 1948, it would cease using Gulf's facility at an earlier date. See id.

[12] In an internal Shell memorandum dated February 11, 1957, J.C. Morris (a member of Shell's Real Estate and Development Department) described the pipeline as "abandoned and completely rusted out." Doc. 143, Exhibit A.

petroleum products on the Site and had permitted them to seep into the subsurface of the Site damaging the property and causing the ultimate release of oil into Long Branch Creek (hereinafter the "first action"). See Doc. 123, Exhibit 1 at ¶¶ 5-8.[13] SJRTC alleged that Gulf had breached the terms of the lease by refusing to indemnify SJRTC and for failing to return the Site in is as good condition as it had been in prior to Gulf's use. See id. at 4-10, 11-13. In April 1984, after almost five years of litigation, the parties settled the first action. See Chevron's Exhibit #R01456-57.[14]

Plaintiffs have continued to undertake efforts to prevent further releases of oil from the Site into Long Branch Creek. See Plaintiffs' Joint Exhibit 17 (Bryan Salley Deposition) at 23-24.[15] In December 1998, while installing a water wall to stop seepage into the Creek, plaintiffs discovered six (6) buried 55-gallon drums on the Site. See id. at 144-45 and Exhibits 13, 14, 15, 19. Further investigations have uncovered inter alia thirty (30) more drums buried at the site; buried metal ring foundations and substantial petroleum contamination in the salt marsh. See id. Plaintiffs recently rediscovered the pipeline running under Long Branch Creek which is broken on the Gulf side. See

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[13] The Complaint from the first action is located in several places in the record. It is attached as Exhibit 1 to Floyd Matthews, Jr.'s Deposition (Doc. 123). Future references to this complaint will be to "C." followed by the applicable page and/or paragraph number.

[14] The Court will discuss the first action in greater detail in Part IV– "Chevron's Motion for Summary Judgment."

[15] Bryan Salley is an engineer in environmental operations for Norfolk Southern. See Plaintiffs' Joint Exhibit 17 (Bryan Salley Deposition) at 7. During 1998 and 1999, Mr. Salley worked at the Site and was responsible for installing a water wall to prevent further oil seepage into Long Branch Creek. See id. at 9-10.

Plaintiffs' Joint Exhibit 18 (Tiffany Shaw Depo) at 76-77 & Exhibits 29-32. Plaintiffs also excavated a large concrete structure beneath the ground surface on the Site identified as OW-8.[16]

On April 3, 2000, plaintiffs filed this action based on the newly discovered contamination on the Site and in the salt marsh.[17] The original complaint (Doc. 1) and the first amended complaint (Doc. 20) were brought solely against defendant Chevron. Plaintiffs subsequently filed a second amended complaint (Doc. 57) adding Shell as a defendant after rediscovering the pipeline in the salt marsh. Count One (Breach of Contract) is brought solely against Chevron. Count Two (Trespass), Count Three (Nuisance), Count Four (Negligence), Count Five (Common Law Contribution), Count Six (Statutory Contribution),

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[16] In June 2001, plaintiffs' contractor Metroplex Industries, Inc., supervised the excavation and removal of a large concrete structure located beneath the ground surface on the Site. The structure was previously identified as anomaly OW-8 during an electromagnetic survey in 1999. Metroplex described OW-8 as follows:

> The reinforced concrete floor was 40 feet in diameter and six inches thick, with a reinforced concrete wall three feet high and six inches thick. A four foot by four foot precast concrete sump was present in the center of the floor. In the northwest corner of the structure, two pipes were imbedded into the wall. Both pipes extended towards the marsh. The lowermost pipe passed through a bulkhead at the border of the salt marsh. On the salt marsh side of the bulkhead, the pipe had a valve and was broken beyond the valve. The uppermost pipe extended two feet from the wall towards the marsh and was broken off at that point. Water and petroleum sludge were observed by the field team to be flowing from the pipes.

Plaintiffs' Joint Exhibit 12 at 11.

[17] To date, no governmental agency has actually ordered remediation of the salt marsh. Tr. 45-46.

Count Seven (Indemnification), Count Eight (CERCLA §107), Count Nine (CERCLA §113), Count Ten (Violation of the Florida Pollutant Discharge Prevention and Removal Statutes, Florida Statute § 376 et seq.), and Count Eleven (Violation of Florida Statute §403.727) are brought against both Chevron and Shell. Chevron and Shell cross-claimed against each other (Docs. 63 & 69) and Shell counterclaimed against plaintiffs (Doc. 63).

Shell has now filed a Motion for Summary Judgment (Doc. 116) and a related Motion in Limine to Strike expert opinion testimony of Mr. Wayne Grip, Dr. Paul Chrostowski and Dr. Marwan Sadat (Doc. 114) and a Motion to Strike Late-Filed Expert Verifications (Doc. 146). Chevron has filed a Motion for Summary Judgment (Doc. 118) and a Motion for Summary Judgment on Shell's Cross-Claim (Doc. 125). The Court is now prepared to issue its ruling on these motions.

IV. Chevron's Motion for Summary Judgment

There appears to be little dispute that plaintiffs have discovered contamination on the Site and adjacent salt marsh. Both logic and the record evidence strongly suggest triable issues concerning Chevron's liability for the contamination because of the activity of its predecessor, Gulf, on the premises between 1906 and 1961. Indeed, Chevron does not argue that it is entitled to summary judgment because there are no material issues of fact regarding the contamination and Chevron's responsibility for it. Rather, Chevron raises several legal arguments, focusing primarily on its contention that the current litigation is barred by res judicata based on the previously filed first action. Tr. 12. Whether plaintiffs' action is barred by res judicata is a legal determination properly decided by the Court on a motion for summary judgment. See Israel Discount Bank, Ltd.

v. Entin, 951 F.2d 311, 314 (11th Cir. 1992).

As discussed supra, in November 1978, SJRTC filed the first action, a two-count complaint against Gulf in state court, based on the 1977 citation by the Coast Guard and SJRTC's subsequent clean up efforts. Gulf removed to this Court. In its complaint, SJRTC alleged that Gulf had spilled petroleum products on the Site and permitted them to seep into the subsurface of the leased property damaging the property and ultimately causing the release of oil into Long Branch Creek. See C. at ¶¶ 5-8. SJRTC alleged that Gulf had breached its obligations under the lease agreements by (1) refusing to indemnify and hold SJRTC wholly harmless from the consequences of Gulf's actions (see id. at ¶10); and (2) failing to surrender possession of the premises to SJRTC in as good a condition as the premises were prior to Gulf's use. See id. at ¶¶ 11-14. SJRTC sought damages against Gulf for costs and expenses already incurred, or to be incurred, in the restoration of the property or judgment requiring Gulf to restore the property to pre-lease condition. See id. at 3-4.

After almost five years of litigation, the parties settled the first action. On January 13, 1984, Gulf submitted a proposed release to SJRTC. This proposed release, entitled "RELEASE IN FULL OF ALL CLAIMS," released Gulf from any claims for "damage, loss or injury" sustained by SJRTC "in consequences of the occupation and use by" Gulf of the Site and "all those matters alleged" in the first action. See Plaintiffs' Joint Exhibit 15 (Affidavit of A. Gayle Jordan) & Exhibit 1 thereto. The proposed release also required SJRTC to indemnify Gulf for any claims brought based on Gulf's use of the Site. See id. SJRTC rejected the proposed release and the parties ultimately executed a release

tailored more toward the specific allegations of the complaint in the first action (hereinafter the "Release"). See Plaintiffs' Joint Exhibit 15 (Affidavit of Gayle Jordan) at ¶¶15-16 & Exhibit 3. The Release provides:

> In consideration of the payment of ONE HUNDRED SIXTY-THREE THOUSAND TWENTY-EIGHT and 26/100 DOLLARS ($163,028.26) to St. Johns River Terminal Company, in hand paid by Gulf Oil Corporation, St. Johns River Termianl [sic] Company does hereby release and forever discharge said Gulf Oil Company, its successors and assigns, from any and all actions, causes of action, claims and demands for, upon or by reason of any damage, loss or injury, which heretofore has been or which hereafter may be sustained by St. Johns River Terminal Company arising out of any contamination by oil of the Talleyrand Terminal property in Jacksonville, Florida, which is alleged to have occurred during Gulf Oil Corporation's use and occupancy of said property and all those matters alleged in St. Johns River Terminal Company, a Florida corporation vs. Gulf Oil Corporation, a Pennsylvania corporation, in the United States District Court, Middle District of Florida, Jacksonville Division, Case No. 79-10-Civ-J-16.
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> This release extends and applies to, and also covers and includes, all unknown, unforeseen, unanticipated and unsuspected injuries, damages, loss and liability, and the consequences thereof, arising out of said alleged oil contamination, as well as those now disclosed and known to exist. The provisions of any state, federal, local or territorial law or statute providing in substance that releases shall not extend to claims, demands, injuries or damages which are unknown or unsuspected to exist at the time, to the person executing such release, are hereby expressly waived.
>
> It is further agreed and understood that said payment is not to be construed as an admission of any liability.

Doc. 57, Exhibit 3.

SJRTC and Gulf then filed a stipulation of dismissal. See Chevron Exhibit #R01456-57. On May 4, 1984, this Court approved the stipulation and entered an Order dismissing the first action with prejudice pursuant to Rule 41, Fed.R.Civ.P. See id. The Court's Order did not expressly incorporate the release executed by the parties.

Under res judicata, which is also known as "claim preclusion," a final judgment on the merits bars the parties to a prior action from re-litigating a cause of action that was or could have been raised in that action. See Davila v. Delta Air Lines Inc., 326 F.3d 1183, 1187 (11th Cir. 2003); In re: Piper Aircraft Corp., 244 F.3d 1289, 1296 (11th Cir. 2001)(citation omitted). Claim preclusion acts as a bar "not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same operative nucleus of fact." Pleming v. Universal-Rundle Corp., 142 F.3d 1354, 1356-57 (11th Cir. 1998) (citation omitted).

In the Eleventh Circuit, a party seeking to invoke res judicata must satisfy four elements: (1) the prior decision must have been rendered by a court of competent jurisdiction; (2) there must have been a final judgment on the merits; (3) both cases must involve the same parties or their privies; and (4) both cases must involve the same causes of action. See Davila, 326 F.3d at 1187; Piper, 244 F.3d at 1296.[18] The burden is on the party asserting res judicata to show that the later-filed suit is barred. See Piper, 244 F.3d at 1296.

As an initial matter, the parties dispute the res judicata effect of the judgment entered in the first action. Plaintiffs contend that because a consent judgment[19] resolved

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[18] The Eleventh Circuit recently made clear that "federal preclusion principles apply to prior federal decisions, whether previously decided in diversity or federal question jurisdiction." CSX Transp., Inc., v. Brotherhood of Maintenance of Way Employees , 327 F.3d 1309, 1316 (11th Cir. 2003).

[19] Consent judgments are entered upon settlement by the parties and assume forms that range from simple orders of dismissal with or without prejudice to detailed decrees. See 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §4443 at 255-56

the first action, the Court cannot automatically apply claim preclusion; rather, the Court must consider the parties' intent in settling the first action. See Doc. 137 at 4-7. Chevron argues that a consent judgment is like any other final judgment and the parties' intent is irrelevant to the claim preclusion analysis. See Doc. 145 at 1-2.

Plaintiffs rely on Kaspar Wire Works, Inc. v. LECO Engineering & Machine, Inc., 575 F.2d 530 (5th Cir. 1978)[20] to support their contention that "when construing the res judicata effect of a consent decree entered into as a result of the voluntary resolution of claims, the court should look to the intent of the parties to determine which claims were resolved as a result of the settlement and consent order." Doc. 144 at 5. However, Kaspar was decided in the unique context of considering the preclusive effect of a previous declaratory judgment action in a later patent infringement suit and is therefore distinguishable. Moreover, the Court does not completely agree with plaintiffs' reading of Kaspar. In Kaspar, the Fifth Circuit discussed claim preclusion and issue preclusion in the context of consent decrees. Kaspar, 575 F.2d at 537-40. The Fifth Circuit noted that consent decrees are normally "given the finality accorded under the rules of claim preclusion." Id. at 538. However, the Fifth Circuit explained that different rules apply to issue preclusion (sometimes called collateral estoppel) because the purpose of a consent decree is typically to avoid the litigation of any issue. See id. at 539. The Fifth

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(1981). Regardless of form, consent judgments share the common characteristic that the court has not actually resolved the substance of the issues presented. See id.

[20] Kaspar is binding on this court pursuant to Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981)(en banc), in which the Eleventh Circuit adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

Circuit concluded, in the context of issue preclusion, that "when determining the effect to be given a decree entered by consent of the parties, consideration is to be given to their intention with respect to the finality to be accorded the decree as reflected by the record and the words of their agreement." Id. at 540. Contrary to plaintiffs' contention, the Fifth Circuit did not hold that the Court must consider the parties' intent for purposes of claim preclusion (res judicata). See Citibank v. DataLease Fin. Corp., 904 F.2d 1498, 1504 (11th Cir. 1990)(citing Kaspar, distinguishing between the preclusive effect of a consent judgment "depending upon whether res judicata (claim preclusion) or collateral estoppel (issue preclusion) is involved").

However, the Court does not agree with Chevron that intent is never relevant. Courts have recognized that, because consent judgments are contractual, the parties may alter the preclusive effects of a judgment by the terms of the consent decree. See 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §4443 at 262 (1981); Young-Henderson v. Spartanburg Area Mental Health Center, 945 F.2d 770, 774-75 (4th Cir. 1991); May v. Parker-Abbott Transfer and Storage, Inc., 899 F.2d 1007, 1010 (10th Cir. 1990). Plaintiffs cite several cases in which courts have limited the claim preclusion effect of a judgment based on an express manifestation of such an intent in the consent judgment. See e.g.,Young-Henderson, 945 F.2d at 775 (finding that language of Consent Order which provided "[i]t is further agreed that this Order of Dismissal only terminates the claims raised in the complaint in the above-entitled action and does not in any way affect any other charges or claims filed by the Plaintiff subsequent to the commencement of this within [sic] action," limited claim preclusion to

those claims actually raised in the complaint in the first action); Cf., May, 899 F.2d at 1010-11(refusing to alter preclusive effects of consent judgment where parties did not expressly reserve the right for subsequent litigation).

Here, SJRTC did not expressly reserve the right to bring a later lawsuit arising out of Gulf's lease of the Site. Indeed, the Release, stipulation of dismissal and Order dismissing the case with prejudice in the first action are silent as to the settlement's intended claim preclusion effects. Nevertheless, plaintiffs argue that the language of the Release and the facts surrounding its execution demonstrate that the parties only intended to release claims related to "oil" contamination on the Site and not non-oil contamination on the Site and in the salt marsh. See Doc. 137 at 7. Plaintiffs have cited no case (and the Court has found none) in which a court inferred such a reservation of right absent a clear expression of this intention by the parties.[21] If SJRTC negotiated a right to bring a later lawsuit arising out of Gulf's lease of the property, it should have made sure that the Release clearly stated it. The Court is "not willing to supply by inference what the parties have failed to expressly provide," especially in light of the strong policy in favor of claim preclusion. May, 899 F.2d at 1011. Accordingly, the Court will apply the traditional four-part claim preclusion analysis outlined above.

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[21]Likewise, the Court is unpersuaded by plaintiffs' related argument that, by agreeing to a narrower Release than originally proposed, Gulf essentially agreed to split the claims, thereby waiving any preclusive effect beyond the express terms of the Release. This case is distinguishable from those cited by plaintiffs in support of this contention because Gulf did not expressly consent to split the claim into two suits. See Simmons v. New. Pub. Sch. Dist. No. 8, 251 F.3d 1210, 1214 (8th Cir., 2001); Young-Henderson, 945 F.2d at 775 (4th Cir. 1991); 6000 S. Corp. v. Kelly Energy Sys., Inc., 1996 WL 590606 at *3 (N.D. Cal. Sept. 24, 1996).

There is no dispute as to the first three elements. The Court in the first action had proper jurisdiction based on diversity of citizenship. See Pretrial Stipulation at ¶1. Second, there was a final judgment on the merits in the first action. The parties reached a settlement agreement, executed a stipulation of dismissal with prejudice and this Court entered an Order dismissing the case with prejudice. See Ragsdale v. Rubbermaid, Inc., 193 F.3d 1235, 1238 (11th Cir. 1999); Citibank, 904 F.2d at 1501-02.[22] Third, NSC and GS&F (plaintiffs in this action) are in privity with SJRTC (plaintiff in the first action) and Chevron (defendant in this action) is in privity with Gulf (defendant in the first action).

However, the parties do dispute the final element – i.e., whether the claims in the first action and the claims in the present litigation are the same "cause of action." In the Eleventh Circuit, "the principal test for determining whether the causes of action are the same is whether the primary right and duty are the same in each case. In determining whether the causes of action are the same, a court must compare the substance of the actions, not their form." Ragsdale, 193 F.3d at 1239 (quoting Citibank, 904 F.2d at 1503). It is generally said,"that if a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, that the two cases are really the same 'claim' or 'cause of action' for purposes of res judicata." Id. "Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes." Id. (quoting

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[22] At the hearing, plaintiffs agreed that there was a final judgment on the merits in the first action. Tr. 40-41.

RESTATEMENT (SECOND) OF JUDGMENTS §24(2) cmt. b (1980)). Thus, the Court must "look to the factual issues to be resolved [in the first action] and compare them with the issues explored in" this current litigation. Id. In so doing, the Court asks whether "the plaintiff could, or rather should, have brought the second claim with the first lawsuit." Trustmark Insur. Co. v. ESLU, Inc., 299 F.3d 1265,1270 (11th Cir. 2002). For claim preclusion purposes, "claims that 'could have been brought' are claims in existence at the time the original complaint is filed." Pleming, 142 F.3d at 1357 (quoting Manning v. City of Auburn, 953 F.2d 1355 (11th Cir. 1992).

The similarities between the two lawsuits are clear. Both cases rely on the same historical nucleus of operative facts – i.e. Gulf's activities on the Site from 1906 until 1961 while operating a petroleum storage and distribution facility. In the first action, SJRTC alleged that Gulf spilled "oil and other petroleum products" on the Site which damaged the Site and ultimately seeped into Long Branch Creek. See C. at ¶¶5-8. SJRTC sought damages for Gulf's refusal to hold harmless SJRTC from the consequences of Gulf's actions on the Site. See id. at ¶ 10. SJRTC also sought damages for Gulf's failure to return the leased premises in the same condition as they were prior to Gulf's lease of the Site. See id. at ¶¶11-14.

In this action, plaintiffs allege that while Gulf was operating the same petroleum storage and distribution facility on the Site from 1906-1961, Gulf contaminated the Site and adjacent salt marsh with "pollutants and contaminants, including but not limited to, petroleum products; black sludge-like materials; black solids; black liquids; tank

bottoms;[23] drums; paint and painting related substances; yellow, grease-like substances; abrasive blast material; metal; hazardous substances; wastes; contaminants; and debris; as well as with oil." Doc.57 at ¶1. Plaintiffs inter alia seek recovery of all costs associated with the cleanup of contamination on the Site and salt marsh and costs incurred in restoring the Site and salt marsh, including the subsurface, to as good a condition as it was prior to the contamination by Gulf. See id. at 26-29.

Plaintiffs contend that the first action and the current action are different in two primary ways. Plaintiffs argue that the first action was about contamination by "oil" and this action is about contamination by things "other than oil." However, in the first action, SJRTC alleged that Gulf spilled "oil and other petroleum products" on the Site. Moreover, SJRTC sought recovery for Gulf's failure to return the leased premises in as good a condition as it was prior to Gulf's lease of the Site. This is certainly broad enough to encompass other types of contamination.

Plaintiffs also argue that the current action is different because it focuses primarily (though not exclusively) on the salt marsh rather than the Site. Plaintiffs argue that the salt marsh (which is contiguous to the Site, between the Site and Long Branch Creek) is geographically distinct from the Site and is actually owned by the State of Florida. See Doc. 144 at 3-4. Plaintiffs point to the original lease agreements which plaintiffs contend show that the salt marsh was excluded from the leased premises. See id. Plaintiffs also contend that aerial photography shows a fence line between the salt marsh and the rest

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[23] Tank bottoms are the waste products cleaned from the bottom of petroleum storage tanks.

of the Site. See id. While there is strong contrary evidence that the salt marsh indeed was part of the leased premises and that the parties in the first action assumed that any contamination of the salt marsh at the low water mark (as well as in Long Branch Creek) was part of the first action, the Court need not resolve this issue directly, for plaintiffs' argument is belied by their primary theory as to how Gulf contaminated the salt marsh. Plaintiffs contend that Gulf (Chevron's predecessor) disposed of petroleum wastes in the disposal pit at OW-8 (located on the Site) and that some of these waste products were then pumped into the salt marsh. See Plaintiffs' Joint Exhibit 13 (Chrostowski Expert Report) at 4; Plaintiffs' Joint Exhibit 12 (Sadat Expert Report) at 12. Thus, while the petroleum waste products may have ended up in the salt marsh, plaintiffs' suit is clearly focused on the source of that contamination – Gulf's contamination activities from 1906 to 1961 on the Site, the same contamination activities which were or should have been part of the first action.[24] Indeed, at the hearing, plaintiffs' counsel explained that Gulf is responsible for the contamination in the salt marsh because, "[i]t's not the property where the contamination is. It's the property where the contamination originated." Tr. 56. This is consistent with SJRTC's theory in the first action: that Gulf's activities on the Site led to contamination of Long Branch Creek.

Thus, the first action and this action share common elements of "time, space, origin, [and] motivation" and would unquestionably "form a convenient unit for trial purposes," with "substantial overlap" in witnesses and other evidence between the two

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[24] Likewise, plaintiffs' other theory that the pipeline which connected the Shell and Gulf facilities across Long Branch Creek leaked in the salt marsh is based on Gulf's (and Shell's) alleged activities on the Site.

actions. Ragsdale, 193 F.3d at 1239 (quoting RESTATEMENT (SECOND) OF JUDGMENTS §24(2), cmt. b (1980)). Plaintiffs' attempts to say that this suit is not about the Site, but about the salt marsh, and not about oil contamination, but about other types of waste, are artificial distinctions which cannot be utilized to avoid the preclusive effect of the first action.

Plaintiffs argue that they could not have raised these new claims in the first action because they are based on recently discovered contamination on the Site and in the salt marsh. While traditional principles of preclusion allow additional litigation if some new wrong occurs after the first action is filed, see Supporters to Oppose Pollution, Inc. v. Heritage Group, 973 F.2d 1320, 1326 (7th Cir. 1992); Pleming, 142 F.3d at 1357, plaintiffs have not alleged any such new wrongful conduct. Gulf vacated the Site in 1961 or 1962; thus, any wrongful conduct by Gulf on the Site occurred well before the first action was filed in 1978.[25] That plaintiffs now better understand the extent of the contamination arising from Gulf's actions on the Site does not allow plaintiffs to avoid the res judicata effect of the first action. See United States v. Hurley, 43 F.3d 1188, 1196 (8th Cir. 1995) (noting that a "'claim' should be determined not by the actions of a plaintiff vindicating its rights but by the conduct or alleged conduct of a defendant breaching those rights"); Supporters to Oppose Pollution, 973 F.2d at 1326 (noting that "new evidence of injury differs from a new wrong"). Thus, for claim preclusion purposes, plaintiffs' current claims "could have been brought" in the first action because they were

[25] As such, this case is distinguishable from Pleming and related cases, in which the courts permitted a second action to go forward where new wrongs occurred during the pendency of the first action.

in existence at the time the original complaint was filed.[26]

Moreover, this is not a case in which SJRTC had no means of knowing the extent of the contamination. There was evidence in the first action that Gulf disposed of its petroleum waste products in pits on the Site. See Chevron Exhibit #RO2415-RO2486 (Claudius Jefferson Hansard Deposition, December 18, 1979); Chevron Exhibit #RO1263-RO1331 (Charlie Edward Arnold Deposition, April 28, 1980) at 21-24, 40-43, 45-56; Chevron Exhibit #RO2014-RP2130 (Henry Blanchard Wyche, Jr. Deposition) at 44-46. There was also evidence that underground pipelines from the former Gulf Oil terminal were present at the Site and extended into Long Branch Creek. See Chevron Exhibit #RO1140-RO1214 (Lake Ray, Jr. Deposition, July 25, 1980) at 25-28; Chevron Exhibit #RO2014-RP2130 (Henry Blanchard Wyche, Jr. Deposition) at 47-48. There was also testimony about the existence of the Florida Emergency Pipeline running underneath Long Branch Creek. See Chevron Exhibit #R00159-R00204 (Claude Belcher Deposition) at 26. In this action, plaintiffs' own expert, Wayne Grip, has identified burial pits located near the salt marsh in aerial photographs dating from 1942. See Plaintiffs' Joint Exhibit 10 (Grip Expert Report) at 4. Grip has also identified a ditch or buried pipe trench located directly to the south of the salt marsh and lined up with the pipeline to the salt marsh in a photograph dating from 1949. See id. at 13. Accordingly,

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[26] Plaintiffs argue that they could not have brought this action until 1999 because they had not incurred any recoverable costs associated with the salt marsh. See Doc. 137 at 15. Plaintiffs cite cases for the proposition that a cost recovery action cannot be brought under CERCLA until recoverable costs are incurred. See e.g., United States v. Union Scrap Iron & Metal, 123 B.R. 831 (D. Minn. 1990); United States v. Outboard Marine Corp., 104 F.R.D. 405 (N.D. Ill. 1984). However, as plaintiffs have pointed out, CERCLA did not exist when the first action was filed.

this is more akin to a "situation in which the plaintiff failed to investigate its claims in a timely manner in order to present them in the first litigation." Trustmark Insur. Co., 299 F.3d at 1272.

Plaintiffs argue that their claims under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") cannot be barred on claim preclusion grounds because CERCLA was not in existence at the time the first action was filed.[27] While this argument has some initial appeal, the "[m]ere adoption of new statutory provisions does not defeat claim preclusion . . . if a single closed transaction is involved". See 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, §4411 at 265-66 (1981). This is consistent with Eleventh Circuit cases holding that the claim preclusion analysis turns on the facts of the case, rather than the remedy sought. See e.g., Piper, 244 F.3d at 1295 (claim preclusion "turns primarily on the commonality of the facts of the prior and subsequent actions, not on the nature of the remedies sought"); Pleming, 142 F.3d at 1356-57 (claim preclusion acts as a bar, "'not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same operative nucleus of fact'") (quoting NAACP v. Hunt, 891 F.2d 1555, 1561 (11th Cir. 1990)).[28]

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[27] Counts Eight and Nine of the Second Amended Complaint are brought under CERCLA. In Count Eight, plaintiffs seek all past, present, and future "response costs" and "removal costs" incurred by the plaintiffs at the Site and in the salt marsh pursuant to CERCLA §107(a). In Count Nine, plaintiffs seek contribution for response costs incurred by plaintiffs at the site and salt marsh pursuant to CERCLA §113(f).

[28] In Morningside-Lenox Park Ass'n, Inc. v. Volpe, 334 F.Supp. 132 (N.D. Ga. 1971), the court held that plaintiff was not barred by res judicata from litigating its claim with regard to the National Environmental Policy Act of 1969 because the law did not exist at the time of