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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	ED CV 09-1864 PSG (SSx)	Date	August 10, 2010
Title	City of Colton v. American Promotional Events, Inc.		

Present:	The Honorable Philip S. Gutierrez, United States District Judge	
Wendy K. Hernandez	Not Present	n/a
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings: **(In Chambers) Order Granting in Part and Denying in Part Defendants' Motions to Dismiss**

Pending before the Court are (1) a Motion to Dismiss the United States' Complaint filed by Defendants Goodrich Corporation, Pyro Spectaculars, Inc., Ken Thompson, Inc., and Rialto Concrete Products (CV 10-0824, Dkt. #18); (2) a Motion to Dismiss the United States' Counterclaims filed by Counter-Defendants Goodrich Corporation and Pyro Spectaculars, Inc. (CV 09-1864, Dkt. #321); (3) a Motion to Dismiss the United States' Complaint filed by Defendants Emhart Industries, Inc., Black & Decker, Inc., and Kwikset Locks, Inc. (CV 10-0824, Dkt. #60); and (4) a Motion to Dismiss the United States' Counterclaims filed by Emhart Industries, Inc. (CV 09-1864, Dkt. #408). A hearing on these motions was held on July 19, 2010. After considering the moving and opposing papers, and arguments presented at the hearing, the Court GRANTS in part and DENIES in part the motions to dismiss.

I. Background

The consolidated actions presently before the Court represent the latest in a long series of federal cases concerning the perchlorate and trichloroethylene contamination of the Rialto-Colton Groundwater Basin.[1] Litigation over this contamination dates back to early 2004. On

[1] The Court has consolidated the following cases: *City of Colton v. American Promotional Events, Inc. et al.*, Case No. 09-1864 PSG (SSx) (the "2009 Colton Action"); *United States v. Goodrich Corporation et al.*, Case No. 10-0824 PSG (SSx) (the "United States Action"); *City of Rialto et al. v. United States Department of Defense et al.*, Case No. 09-7501 PSG (SSx) (the "2009 Rialto Action"); *Goodrich Corporation v. Chung Ming Wong et al.*, Case No. 09-6630

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February 4, 2010, the United States filed a Complaint against, *inter alia*, Goodrich Corporation ("Goodrich"), Pyro Spectaculars, Inc. ("PSI"), Ken Thompson, Inc. ("KTI"), and Rialto Concrete Products ("RCP") (collectively, the "Goodrich Defendants").[2] The Complaint also names Emhart Industries, Inc. ("Emhart"), Black & Decker, Inc. ("Black & Decker"), Kwikset Locks, Inc. ("Kwikset") (together with Emhart and Black & Decker, "Emhart Defendants"), West Coast Loading Corporation, and Wong Chung Ming as defendants. In its Complaint, the United States—for the first time—asserts claims for (1) recovery of response costs under § 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a); (2) declaratory judgment regarding future costs pursuant to § 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2); and (3) injunctive relief pursuant to § 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973 (collectively, the "subject claims"). The United States also asserts the subject claims in counterclaims filed against Goodrich, PSI, and Emhart in the Consolidated Cases.

A. CERCLA and RCRA

Congress enacted CERCLA "to protect and preserve public health and the environment by facilitating the expeditious and efficient cleanup of hazardous waste sites." *Hanford Downwinders Coal., Inc. v. Dowdle*, 71 F.3d 1469, 1473-74 (9th Cir. 1995) (internal citations omitted). CERCLA vests the president with the authority to determine the appropriate response to environmental hazards, *see* 42 U.S.C. § 9604, and the president has delegated this authority to the Administrator of the Environmental Protection Agency ("EPA"), *see* Executive Order No. 12,580, 52 Fed. Reg. 2,923 (Jan. 23, 1987), as amended by Executive Order No. 12,777, 56 Fed. Reg. 54,757 (Oct. 18, 1991). Under CERCLA, the federal government may either respond to the hazard itself or order potentially responsible parties ("PRPs") to respond. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 160, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004).

If the EPA performs cleanup work itself, it may file an action under § 107(a) of CERCLA

(the "2009 Goodrich Action"); *County of San Bernardino et al. v. Tung Chun Co. et al.*, Case No. 09-6632 (the "San Bernardino Action"); and *Emhart Industries, Inc. v. American Promotional Events, Inc.-West et al.*, Case No. 09-7508 (the "Emhart Action") (collectively, the "Consolidated Actions").

[2] The Court refers to these defendants as the Goodrich Defendants for the sake of convenience and not to imply that they are organizationally related to Goodrich.

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to recover the United States' response costs. *See* 42 U.S.C. § 9607(a)(4)(A). To finance its response efforts, the EPA draws from the Hazardous Substance Superfund (the "Superfund"), *see* 42 U.S.C. § 9611(a), and the EPA may bring § 107(a) response cost actions to replenish the Superfund after initiating a response, *see* 42 U.S.C. § 9613(g)(2) ("[A]n action may be commenced under section 9607 of this title for recovery of costs at any time after such costs have been incurred.").

Additionally, CERCLA provides for declaratory judgment with regard to the recovery of response costs under § 113(g). *See* 42 U.S.C. § 9613(g)(2) ("In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages.").

Under RCRA, the EPA may also seek an injunction against a party "upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6973(a); *see also La.-Pac. Corp. v. ASARCO Inc.*, 24 F.3d 1565, 1578-79 (9th Cir. 1994).

B. The Prior Colton/Rialto CERCLA Cases

With this statutory regime in mind, the Court proceeds to review the procedural history leading to the current Consolidated Cases. As will be seen, the United States had numerous opportunities to bring the subject claims, but failed to do so. Indeed, several Case Management Orders ("CMOs") in the prior cases deemed other defendants to assert cross-claims under § 107(a), but the United States stipulated to be excluded from asserting deemed § 107(a) claims.

1. The 2004 Rialto Action

In January 2004, the City of Rialto ("Rialto") filed suit against the United States Department of Defense (the "DoD"), the Moving Defendants, and other parties implicated in the contamination at the 2800-acre Rialto Ammunition Storage Point ("RASP"), which is located in the Rialto-Colton Groundwater Basin. *See City of Rialto et al. v. United States Department of Defense et al.*, CV 04-0079 PSG (SSx) (the "2004 Rialto Action"). In its complaint, Rialto asserted claims for recovery of response costs under § 107(a) of CERCLA, declaratory relief under § 113(g) of CERCLA, and injunctive relief under RCRA. *See Request for Judicial Notice*

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("RJN"), Ex. 1 (Rialto's Fifth Amended Complaint filed Nov. 21, 2007).[3] In its Answer to the Fifth Amended Complaint, the DoD asserted counterclaims for *contribution* pursuant to § 113(f) of CERCLA and declaratory relief for *contribution* pursuant to § 113(g) of CERCLA. *See RJN*, Ex. 2 (the DoD's Answer to the Fifth Amended Complaint filed Nov. 23, 2007).

2. The 2005 Colton Action

On February 28, 2005, the City of Colton ("Colton") filed suit against several of the same defendants from the 2004 Rialto Action for recovery of response costs—Black & Decker, Emhart, Kwikset, PSI, KTI, and Goodrich. *See City of Colton v. American Promotional Events, Inc.-West et al.*, Case No. 05-1479 JFW (SSx) (the "2005 Colton Action"). On September 28, 2005, PSI filed a Cross-Claim against the United States, among others, for contribution and declaratory relief arising out of the contamination. *See RJN*, Ex. 7. Furthermore, on that same day, Defendant Whittaker Corporation filed a Cross-Claim against, *inter alia*, RCP. *See* Dkt. #108 (CV 05-1479). RCP, however, never appeared in the 2005 Colton Action, and the Proof of Service of the Cross-Claim may have been defective. *See* Dkt. #109.

CMO No. 1 issued in the case deemed "[e]ach defendant, cross-defendant, or third-party defendant . . . now in this case, or appearing in the case in the future" to have filed "a CERCLA sec. 113, state statutory, and common law cross-claim for contribution and declaratory relief, as applicable." *RJN*, Ex. 8, at 181:2-4. These defendants were also deemed to have denied these cross-claims in their respective answers. *See id.* at 181:7-10. CMO No. 1 did not "affect[] the right of any party to file additional claims or defenses pursuant to the Federal Rules of Civil Procedure." *See id.* at 181:23-182:1.

The United States filed an Answer to PSI's cross-claim, but did not include any counter-claims or cross-claims. Subsequently, the Court issued CMO No. 2 pursuant to the parties' stipulation, which deemed all defendants—except cross-defendants (such as the United States)—to have asserted cross-claims for response costs under § 107(a), contribution, and declaratory relief against each other defendant. *See RJN*, Ex. 11, at 231:1-7. Thus, in the 2005

[3] On April 19, 2010, the Goodrich Defendants filed a Request for Judicial Notice in the United States Action. The Goodrich Defendants provide 30 exhibits ranging from court filings to administrative documents. *See RJN*, Exs. 1-30. Additionally, on May 28, 2010, the Moving Defendants filed a Supplemental Request for Judicial Notice of the parties' Court Ordered Joint Mediation Report (Dkt. #407). The Court takes judicial notice of these exhibits to the extent that they are relied upon in this Order. *See* Fed. R. Evid. 201(b), (d).

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Colton Action, Black & Decker, Emhart, Kwikset, PSI, KTI, and Goodrich all asserted deemed cross-claims, including § 107(a) response cost claims, against the United States, and the United States was deemed to deny these claims and to assert contribution cross-claims against them in its Answer to PSI's Cross-Claim. Of the Goodrich Defendants, only RCP did not appear against the United States in the 2005 Colton Action.

On October 31, 2006, District Judge John F. Walter entered summary judgment against Colton on the grounds that Colton had not incurred any response costs at the time of suit. *See RJN*, Ex. 12, at 258 (Order Granting Defendants' Motion for Summary Judgment, or in the Alternative, for Partial Summary Judgment). In the order, the court also held that:

> In light of the Court's granting summary judgment on all of Plaintiff's CERCLA claims, the Counterclaims and/or Cross-claims filed by Defendants seeking contribution and declaratory relief pursuant to CERCLA and/or the Declaratory Judgment Act are dismissed. The Court declines to exercise jurisdiction over the state law claims alleged in the Counterclaims and Cross-claims and dismisses those claims without prejudice.

See id. at 260. On October 31, 2006, the Court entered judgment against Colton and terminated the case. *See* Dkt. #578.

3. The 2006 Colton Action

On November 22, 2006, Colton filed a follow-up action that was consolidated with the 2004 Rialto Action. *See City of Colton v. American Promotional Events, Inc.*, Case No. CV 06-1319 (the "2006 Colton Action"). Colton again sought response costs under § 107(a) of CERCLA against, *inter alia*, Goodrich and PSI. *See RJN*, Ex. 15 (Colton's Complaint in the 2006 Colton Action filed Nov. 22, 2006). On December 8, 2006, Goodrich filed a Third-Party Complaint against the United States for recovery of response costs under § 107(a) and § 113 of CERCLA. *See RJN*, Ex. 18 (Goodrich's Third Party Complaint filed December 8, 2006). Similarly, on September 12, 2007, PSI filed a Third-Party Complaint against the DoD for recovery of response costs under the same provisions. *See RJN*, Ex. 16 (PSI's Third Party Complaint filed September 12, 2007). The United States did not include in its answers any counterclaims against Goodrich or PSI for recovery of response costs.

On August 7, 2007, the Court issued CMO No. 6 to apply to all cases consolidated with the 2004 Rialto Action. According to CMO No. 6, all defendants' answers were deemed to

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include cross-claims for contribution and declaratory relief under § 113(f) of CERCLA against all other defendants. *See RJN*, Ex. 3, at 110:23-28. This CMO also deemed that all defendants' answers, except the DoD's, included cross-claims for § 107(a) recovery of response costs. *See id.* at 110:17-23. All defendants' answers were also deemed to deny these cross-claims. *See id.* at 110:28-111:2. On June 13, 2008, the parties stipulated to a voluntary dismissal to promote settlement, and the Court issued an Order dismissing the case without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2).

C. The Current Consolidated Actions

After the parties failed to reach a settlement, they began to file the Consolidated Actions presently before the Court. On February 4, 2010, the United States filed its Complaint, asserting the subject claims for the first time in approximately six years of litigation. *See Compl.* ¶ 1. Similarly, in the 2009 Goodrich Action and the 2009 Colton Action, the United States filed Counterclaims against, *inter alia*, Goodrich, PSI, and Emhart, which incorporate by reference the United States' Complaint. *See, e.g., Answer to PSI's Third-Party Compl. and Counterclaims* 9:26-28 (Dkt. #222).

On April 19, 2010, the Goodrich Defendants filed a motion to dismiss the United States' Complaint. Similarly, on April 22, 2010, Goodrich and PSI also filed a motion to dismiss the United States' Counterclaims in the Consolidated Actions (collectively, the "Rule 13 Motions"). Both motions seek dismissal of the subject claims due to the United States' failure to assert them as compulsory counterclaims in any of the previous actions.[4]

Additionally, on May 19, 2010, the Emhart Defendants (together with the Goodrich Defendants, the "Moving Defendants") filed a motion to dismiss the United States' Complaint in the United States Action, and Emhart filed a motion to dismiss the United States' counterclaims in the Consolidated Actions. The Emhart Defendants seek dismissal of the subject claims under both Rule 13 and Connecticut law. The Emhart Defendants and the United States have stipulated that (1) the briefs filed in support of and in opposition to the Rule 13 Motions are deemed to have been filed by the Emhart Defendants and the United States, and (2) the Court's

[4] The arguments raised in both motions are nearly identical, and after consolidation, Moving Defendants filed a single reply in support of both motions. *See Reply* 1 n.1. In the interest of clarity, the Court cites only to the Motion to Dismiss the United States' Complaint, the United States' Opposition to Certain Defendants' Motion to Dismiss the Complaint, and the joint Reply, unless specified otherwise.

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decision on the Goodrich Defendants' motions will be deemed to be the Court's ruling on the Emhart Defendants' Rule 13(a) grounds for dismissal. *See Mot.* 13:5-14 (CV 10-0824); *Mot.* 15:5-18. Thus, the Court considers the Emhart Defendants together with the Goodrich Defendants in evaluating the application of Rule 13 in this case.

II. Legal Standard

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss a cause of action if the plaintiff fails to state a claim upon which relief can be granted. In evaluating the sufficiency of a complaint under Rule 12(b)(6), courts must be mindful that the Federal Rules of Civil Procedure require that the complaint merely contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although detailed factual allegations are not required to survive a Rule 12(b)(6) motion to dismiss, a complaint "that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, —U.S.—, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

In resolving a Rule 12(b)(6) motion, the Court must engage in a two-step analysis. *See id.* at 1950. The Court must first accept as true all non-conclusory, factual allegations made in the complaint. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993). Based upon these allegations, the Court must draw all reasonable inferences in favor of the plaintiff. *See Mohamed v. Jeppesen Dataplan, Inc.*, 579 F.3d 943, 949 (9th Cir. 2009). After accepting as true all non-conclusory allegations and drawing all reasonable inferences in favor of the plaintiff, the Court must then determine whether the complaint alleges a plausible claim to relief. *See Iqbal*, 129 S. Ct. at 1950. In determining whether the alleged facts cross the threshold from the possible to the plausible, the Court is required "to draw on its judicial experience and common sense." *Id.* "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.*

III. Discussion

The Moving Defendants seek dismissal of the United States' Complaint and Counterclaims on the grounds that (1) Federal Rule of Civil Procedure 13(a) precludes the United States from asserting the subject claims in any of the current Consolidated Actions, and

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(2) CERCLA does not provide an exception to Rule 13. In its opposition, the United States argues (1) that the policy and legislative history underlying CERLA demonstrate that Congress intended to grant the United States significant flexibility in determining when to bring § 107 claims, (2) that the Court should follow *Raytheon Aircraft Co. v. United States*, 532 F. Supp. 2d 1316 (D. Kan. 2008), and (3) that the compulsory counterclaim rule does not otherwise apply to the subject claims. The Court considers, first, whether the subject claims fall under Rule 13(a) and, second, whether CERCLA exempts the United States from Rule 13(a) in this case.

A. Whether Rule 13(a) Bars the Subject Claims

According to Federal Rule of Civil Procedure 13(a),

> A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim: (A) arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction.

Fed. R. Civ. P. 13(a). "The Rule bars a party who failed to assert a compulsory counterclaim in one action from instituting a second action in which that counterclaim is the basis of the complaint." *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League*, 652 F.2d 852, 854 (9th Cir. 1981) (citation omitted); *see also* 3 *Moore's Federal Practice*, § 13.14(1) (3d ed. 2009) ("Generally, the timing of a counterclaim and its classification as compulsory do not become vital until a second action is brought, in which the pleader attempts to raise a claim based on the same transaction or occurrence that was the basis of the first suit, and the opposing party moves to dismiss it as barred.").

1. Whether the Subject Claims were Compulsory in the Prior Actions

A party's claim is subject to the compulsory counterclaim rule only if (1) it arises from the same transaction or occurrence as an opposing party's earlier claim, (2) the party served or was required to serve a responsive pleading to the earlier claim, and (3) the party asserts the claim against the same opposing party.

a. Same Transaction or Occurrence

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Claims for recovery of response costs under § 107(a) may be considered compulsory counterclaims where they arise from the same transaction or occurrence as other CERCLA claims. *See United States v. Iron Mountain Mines, Inc.*, 952 F. Supp. 673, 678 (E.D. Cal. 1996) ("A claim in recoupment [under § 107(a) of CERCLA] must arise out of the same transaction or occurrence as the primary claim."); *Dent v. Beazer Materials & Servs., Inc.*, 156 F.3d 523, 532 (4th Cir. 1998) (noting that § 107(a) and § 113 claims arising out of the same lead contamination incident were compulsory counterclaims where the party was on notice of the basis for those claims and was subject to several cross-claims under CERCLA ten months before attempting to file its § 107(a) and § 113 claims).

In determining whether a counterclaim was compulsory in a prior action, courts must determine whether "the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit." *See Pochiro v. Prudential Ins. Co. of Am.*, 827 F.2d 1246, 1249 (9th Cir. 1987). Courts apply a flexible "logical relationship" test in making this determination. *See Iron Mountain*, 952 F. Supp. at 678 n.9 ("In the Ninth Circuit, the test under [Rule] 13(a) is the 'logical relationship' test." (citing *Hydranautics v. FilmTec Corp.*, 70 F.3d 533, 536 (9th Cir. 1995))).

The United States acknowledges that the prior federal actions and the current Consolidated Cases involve common questions of fact. *See Opp.* 21:6-9. Nevertheless, the United States argues that the cases involve distinct transactions and occurrences because (1) the prior cases involved claims against the DoD and not the EPA, (2) the United States is seeking to recover response costs incurred after the prior federal actions, and (3) the United States' claims concern only a small part of the entire 2800-acre RASP. *See id.* 21:5-22:2, 25 n.13. The Court, however, is not persuaded.

First, the United States contends that the "United States on behalf of the EPA" in the current action is a different party than the "United States on behalf of the DoD." *See Opp.* 7:14-17 ("The distinct role EPA has with respect to cost recovery claims under CERCLA would be undermined if, as the Moving Parties urge, EPA were treated as the same party as DoD for purposes of the compulsory counterclaim rule."). However, CERCLA does not differentiate between the various agencies of the United States in defining what "persons" can sue or be sued under CERCLA. *See* 42 U.S.C. § 9601(21) (defining "person" as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, *United States Government*, State, municipality, commission, political subdivision of a state, or any interstate body." (emphasis added)); *see also* 42 U.S.C. § 9601(27) (defining the term "United States"

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without reference to its branches, agencies, or departments).[5] Indeed, in its Answer to Goodrich's Complaint in the 2009 Goodrich Action, the United States filed an answer to Goodrich's claims on behalf of the DoD as well as a set of counterclaims on behalf of the EPA in the same pleading. *See RJN*, Ex. 23, at 458, 470. Thus, the Court treats the United States as a single party under both CERCLA and the Federal Rules of Civil Procedure.

Second, the United States' subject claims are logically related to the contamination in the Rialto-Colton Groundwater Basin. *See Mot.* 13:2-4 ("They all concern the *same* physical site, the *same* discharge or disposal by the *same* defendants of the *same* hazardous substances, and the *same* injury to municipal water wells." (emphasis in original)) Though the United States contends, in a footnote, that it is seeking recovery for later-incurred response costs, *see Opp.* 21 n.13 ("[T]o the extent EPA incurred CERCLA costs after the date that DoD served answers to their third party complaint, the claims after the answer would not be compulsory."), these claims are logically related to the prior actions because the United States began incurring response costs in connection with the RASP in 2002, before the filing of the 2004 Rialto Action, *see Mot.* 13:23-14:8. Thus, the United States had a § 107(a) claim at the time of the 2004 Rialto Action, arising out of the same incident in the Colton-Rialto Groundwater Basin. *See Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1154 (9th Cir. 1989) ("[A] plaintiff must allege at least one type of 'response cost' cognizable under CERCLA that has been incurred to state a prima facie case.").

Third, the United States' argument that the subject claims involve a different transaction or occurrence because they concern a sub-parcel of the 2800-acre RASP is equally unavailing. The United States admits that the 160-acre B.F. Goodrich parcel is part of the RASP. Thus, the Court finds that its response costs incurred at the B.F. Goodrich site are logically related to the overall RASP contamination. *See Reply* 12:5-13. Accordingly, the Court finds that the United

[5] The Court notes that CERCLA's waiver of sovereign immunity does acknowledge the existence of the various political branches and administrative agencies that make up the United States government. *See* 42 U.S.C. § 9620(a)(1) ("Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) . . . ."). That provision, however, is titled "Application of chapter to *Federal Government*," does not differentiate substantively among the various agencies, and, in fact, requires them to be treated equally as non-governmental entities. *See* 42 U.S.C. § 9620(a) (emphasis added). Nothing in § 120(a) indicates that the various executive departments are to be treated as separate "persons," as defined in § 101(27) of CERCLA.

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States' subject claims against the Moving Defendants arise from the same transaction or occurrence as the prior federal cases.

b. Responsive Pleadings

Rule 13(a) bars a party's claim only if that party served or was required to serve a responsive pleading in the earlier action. *See* Fed. R. Civ. P. 13(a); 3 *Moore's Federal Practice*, § 13.14(1) (noting that a compulsory counterclaim will "only be barred in [a] subsequent action if a responsive pleading was required to be, or was served[,] in the earlier action . . . ."). In the opposition, the United States claims that the Moving Defendants can identify only two responsive pleadings filed by the United States, and that KTI and RCP "have not even identified a responsive pleading that should have contained a compulsory counterclaim." *See Opp.* 20:25-21:3.

In the 2005 Colton Action, the Moving Defendants (with the exception of RCP) and the United States were all named as either defendants or cross-defendants. CMO No. 1 deemed all of them to have asserted contribution claims against each other. *See RJN*, Ex. 8, at 180:22-181:6.[6] Their respective answers were also deemed to include denials to these deemed claims. Furthermore, CMO No. 2 in the 2005 Colton Action also deemed these defendants—with the exception of the United States—to have included cross-claims for recovery of response costs under § 107(a) in their answers. Therefore, with the sole exception of RCP, the United States was deemed to have filed a responsive pleading to these deemed cross-claims in the 2005 Colton Action.

While RCP was not an opposing party to the United States in either the 2005 or 2006 Colton Actions, *see Mot.* 5 n.8; *id.* at 7 n.11, RCP was named a defendant in the 2004 Rialto Action. According to CMO No. 6 in the cases consolidated with the 2004 Rialto Action, RCP's answer was deemed to include cross-claims for response costs and contribution against all other defendants, which included the United States. *See RJN*, Ex. 3, at 110:17-111:2. Again, the United States was exempted from the CMO's deemed § 107(a) cross-claims provision, but was

[6] Even though the United States had not yet served an answer to PSI's Third-Party Complaint, CMO No. 1 provided that third-party defendants who had yet to appear in the action, such as the United States, were defined as "defendants" for the purpose of the order. *See RJN*, Ex. 8, at 180, at 22-23. Thus, Goodrich's and KTI's deemed cross-claims were asserted against the United States.

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deemed to include denials to all deemed cross-claims in its answer. *See id.* at 110:17-18; *id.* at 110:28-111:2.

The United States appears to suggest in a footnote that the deemed denials and cross-claims did not constitute "responsive pleadings" for the purpose of Rule 13(a):

> We recognize the possible ambiguity as to the filing of responsive pleadings arising out of the case management orders in the Rialto and Colton cases under which [DoD's] contribution claims were deemed included in filed answers, but it remains the case that there were no other responsive pleadings *filed* apart from [DoD's] answers to the PSI and Goodrich third-party complaints.

Opp. 21 n.13 (emphasis added). The CMOs in the prior federal cases were not "ambiguous," and the Court does not accept the United States' proposed distinction between filed and deemed pleadings. The CMOs were stipulated to by the parties and issued by the Court to promote the "orderly and efficient administration" of the consolidated cases, *see RJN*, Ex. 3, at 108:26-27 (CMO No. 6), and to conserve the parties' (including the United States') time and expense in having to file numerous cross-claims and answers. Additionally, the United States specifically carved-out an exception for itself in the 2005 and 2006 Colton Actions' CMOs with regard to the deemed § 107(a) cross-claims, presumably because it believed that such deemed claims would have operative legal effect. *See RJN*, Ex. 3, at 110:17-23; *RJN*, Ex. 11, at 231:1-7. The United States stipulated to the CMOs in the prior cases, and it cannot, now, disavow them.

For these reasons, the Court finds that the United States served or was deemed to have served responsive pleadings to the claims of each of the Moving Defendants in the prior federal actions.

c. Same Opposing Parties

In order for a claim to have been compulsory under Rule 13(a), it must have been between the same opposing parties. *See* Fed. R. Civ. P. 13(a); *see Campbell v. Castle Stone Homes, Inc.*, 2009 WL 3807178, at *6 (D. Utah Nov. 12, 2009). Goodrich, PSI, and KTI, Emhart, Black & Decker, and Kwikset each opposed the United States in the 2005 Colton Action, and RCP opposed the United States in the 2004 Rialto Action. As discussed previously, the United States' attempt to recast itself as "the United States on behalf of the EPA" and "the United States on behalf of the DoD" is unavailing. While this would likely negate the element of opposition required under Rule 13(a), CERCLA defines the "United States Government" in

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unitary terms. *See* 42 U.S.C. § 9601(21). Thus, the Court treats the United States as a single "person" under both CERCLA and the Federal Rules of Civil Procedure. Each of the Moving Defendants was an opposing party against the United States in the prior actions because they either filed claims or were deemed to have filed cross-claims against the United States.

d. Summary

In their reply, the Moving Defendants claim generally that the three prior actions bar the subject claims because (1) the United States failed to assert the subject claims in the 2005 Colton Action and the case was adjudicated on the merits, and (2) the United States failed to assert the subject claims in the 2004 Rialto and 2006 Colton Actions, the deadline for amending the pleadings had passed, and those cases were terminated. *See Reply* 10:7-19. The Court agrees that the United States was required under Rule 13(a) to assert the subject claims in the prior actions, though the analysis is a bit more complicated. In the 2005 Colton Action, the United States should have asserted the subject claims against Goodrich, PSI, KTI, Emhart, Black & Decker, and Kwikset because (1) the claims arose from the same transaction, (2) the United States filed or was deemed to file responsive pleadings as to these parties, and (3) they were opposing parties in that prior case and the current Consolidated Cases. For the same reasons, the United States should have asserted the subject claims against RCP in the 2004 Rialto Action. Accordingly, the Court finds that the subject claims were compulsory in those prior actions under Rule 13(a).

2. Whether the Subject Claims Are Barred Under Rule 13(a)

While the Court finds that the United States' subject claims were compulsory in the earlier cases, the question remains whether Rule 13(a) bars those claims in the current Consolidated Actions. The parties disagree on the effect of a party's failure to plead a compulsory counterclaim under Rule 13(a). On the one hand, the Moving Defendants argue that Rule 13(a) is based upon a "wavier theory." *See Reply* 6:24-9:15. Under this approach, a claim may be barred under Rule 13(a) even if the prior action did not proceed to a final judgment. On the other hand, the United States argues that the compulsory counterclaim rule is based on a "preclusion theory," which requires a final judgment. *See Opp.* 14:8-20:2.

Although courts have applied both rationales to varying degrees, the waiver theory has been the most widely used. *See* 3 *Moore's Federal Practice* § 13.14(1) ("Federal courts are not in agreement on the legal theory underpinning the compulsory counterclaim bar. Some decisions have used theories of claim or issue preclusion but most courts rely on principles of

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waiver."). The Ninth Circuit appears amenable to both approaches. For example, *Moore's Federal Practice* cites to one Ninth Circuit case, *Hydranautics*, 70 F.3d at 536, as a "waiver theory" case and another, *Springs v. First Nat'l Bank of Cut Bank*, 835 F.2d 1293, 1296 (9th Cir. 1988), as a "claim preclusion theory" case. *See id.* at 13-35 n.9; *id.* at 13-36 n.11. Applying the waiver theory used most commonly in the Ninth Circuit, the Court finds that the United States waived its right to bring the subject claims against Goodrich, PSI, KTI, Emhart, Black & Decker, and Kwikset based on its failure (and refusal) to assert them in the 2005 Colton Action.[7] However, the Court also finds that the voluntary dismissal of the 2004 Rialto Action and the cases consolidated with it saves the United States' subject claims against RCP.

a. Waiver of Claims Not Asserted in the 2005 Colton Action

In this case, the Court concludes that the procedural history supports a finding of waiver. Since 2004, the United States has been on notice of its § 107(a) claim because it began to incur response costs in 2002. The United States waited over six years before asserting the subject claims. In the 2005 Colton Action, each of the Moving Defendants (with the exception of RCP) were deemed to have filed § 107(a) claims against the United States, and the United States was excluded from this CMO. *See RJN*, Ex. 11, at 231:1-7 (CMO No. 2 in the 2005 Colton Action). In the opposition, the United States does not explain why it waited until 2010 to assert the subject claims. Furthermore, the 2005 Colton Action concluded when Judge Walter granted a motion for summary judgment against the City of Colton and dismissed all other claims in the case. *See RJN*, Ex. 12, at 260. As the United States could have raised the subject claims in the 2005 Colton Action but failed to do so, the Court finds that the United States waived these claims against Goodrich, PSI, KTI, Emhart, Black & Decker, and Kwikset. *See Hydranautics*, 70 F.3d at 536 ("If a party has a counterclaim which is compulsory and fails to plead it, it is lost, and cannot be asserted in a second, separate action after conclusion of the first."). For these reasons, the Court finds that Rule 13(a) bars the subject claims against these parties.

b. Effect of the Voluntary Dismissal in the 2004 Rialto Action

[7] To the extent that a "stand-alone waiver/estoppel" standard is applied to the United States' subject claims, the United States claims, in a footnote, that such an inquiry is fact intensive and not suitable for a motion to dismiss. *See Opp.* 19 n.11. However, the United States provides no authority for the proposition that a court cannot dismiss a claim on waiver grounds pursuant to Rule 13(a).

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Of the Moving Defendants, only RCP did not appear in the 2005 Colton Action. RCP and the United States were both opposing parties in the 2004 Rialto Action. However, unlike the 2005 Colton Action, the 2004 Rialto Action and the cases consolidated with it were voluntarily dismissed pursuant to Rule 41(a)(1)(B). As discussed, the United States otherwise waived its right to bring the subject claims against RCP in the 2004 Rialto Action, but the United States' waiver in that case cannot be carried over to the present Consolidated Actions due to the intervening voluntary dismissal. *See Cadkin v. Loose*, 569 F.3d 1142, 1149 (9th Cir. 2009) ("In fact, we have squarely held waiver in one lawsuit does not carry over to a subsequent lawsuit following a voluntary dismissal without prejudice under Rule 41(a)."); *City of South Pasadena v. Mineta*, 284 F.3d 1154, 1158 (9th Cir. 2002) (noting that "[Rule] 41(a)(1) provides a categorical rule that is much broader—one that disallows the 'carry-over' of *any* waivers from a voluntarily dismissed action to its reincarnation." (emphasis in original)). This rule is consistent with the general principle that a voluntary dismissal "leaves the situation as if the action never had been filed." *See Cadkin*, 569 F.3d at 1150. Accordingly, the voluntary dismissal of the 2004 Rialto Action distinguishes the United States' subject claims against RCP from those against the other Moving Defendants. Accordingly, the Court DENIES the motion to dismiss as to RCP.

B. Whether CERCLA Saves the United States' Compulsory Counterclaims

The United States' principal argument is that Rule 13(a) should not bar the subject claims because such a result would undermine CERCLA's underlying policies and Congress' intent. *See Opp.* 7:2-11:13; *see id.* at 8 n.4 (noting that "CERCLA's legislative history confirms Congress's intent to preserve flexibility for government cost recovery litigation and to avoid interference with response actions from litigation"). However, the United States fails to point to a single CERCLA provision that either directly supports its position or is ambiguous. Furthermore, the United States relies upon a single case from the District of Kansas, which has not been cited in any subsequent cases. The Court finds the United States has not demonstrated that CERCLA trumps Rule 13(a).

1. The Text of CERCLA

While no binding precedent is directly on point, the Moving Defendants highlight three relatively recent U.S. Supreme Court cases, which each preferenced the plain terms of CERCLA over policy arguments. *See United States v. Atl. Research Corp.*, 551 U.S. 128, 136, 127 S. Ct. 2331, 168 L. Ed. 2d 28 (2007) ("Consequently, the *plain language* of subparagraph (B) [of § 107(a)(4)] authorizes cost-recovery actions by any private party, including PRPs." (emphasis added)); *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167, 125 S. Ct. 577, 160 L. Ed.

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2d 548 (2004) ("Each side insists that the purpose of CERCLA bolsters its reading of § 113(f)(1). Given the *clear meaning of the text*, there is no need to resolve this dispute or to consult the purpose of CERCLA at all. As we have said: '[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.'" (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998)) (emphasis added)); *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1878, 173 L. Ed. 2d 812 (2009) ("*It is plain from the language of the statute* that CERCLA liability would attach under § 9607(a)(3) if an entity were to enter into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance." (emphasis added)).

The Moving Defendants also provided a recent Ninth Circuit case, *United States v. Aerojet Gen. Corp.*, Case No. 08-55996 (9th Cir. June 2, 2010), as supplemental authority after briefing on the motion was closed.[8] While the Moving Defendants contend that the case's "binding decision . . . squarely rejected the United States' argument that CERCLA's policy and legislative intent can trump the Federal Rules of Civil Procedure," *Joint Notice of Supp. Auth.* 1:4-7, the Court notes that the question before the Ninth Circuit in *Aerojet* was substantially different from the question currently before the Court. In *Aerojet*, the Ninth Circuit held that a non-settling PRP may intervene in litigation as of right to oppose a consent decree that would bar contribution from settling PRPs. *See id.* at 7830. While that issue is, simply, not relevant to this motion, the Court observes that the Ninth Circuit did display a clear preference for the text of CERLA where the plain language was unambiguous:

> Appellees would have us rely on arguments based on policy and legislative intent as a justification for concluding that non-settling PRPs' interests are not sufficient to support intervention. Some district courts have been persuaded by policy arguments against intervention, based on the desirability of giving the EPA leverage to encourage early settlement. . . . There are, however, countervailing policy arguments in favor of treating all PRPs fairly, an interest that is itself embodied in the statutory scheme. . . . *But we do not rely on arguments based on policy*. We agree with the Eighth and Tenth Circuits that § 113(f) and 113(i) of CERCLA are unambiguous.

[8] Moving Defendants filed an *ex parte* application for leave to file the notice of this authority. The United States opposed the application on the grounds that *Aerojet* is distinguishable from this case, but the Court granted the *ex parte* application on June 14, 2010. Thus, the Court considers the *Aerojet* case while noting the United States' arguments about its relevance.

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Id. at 7840 (emphasis added).

Case law from the Supreme Court and the Ninth Circuit instructs the Court to start with the text of CERCLA. *See Burlington*, 129 S. Ct. at 1878 ("[W]e begin with the language of [CERCLA]."). The United States fails to point to any provision in CERCLA that provides an express exception to Rule 13. In fact, CERLA does not trump other procedural rules. *See Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co.*, 68 F.3d 1016, 1019 (7th Cir. 1995) (Easterbrook, J.) (finding that CERCLA does not trump Federal Rule of Civil Procedure 17(b) and noting that "[CERCLA] does not displace the many ancillary rules that influence how litigation proceeds. It does not displace the rules of preclusion and allow a plaintiff to sue without regard to prior defeats . . . it does not permit frivolous litigation, which Fed. R. Civ. P. 11 condemns; it does not permit a plaintiff to ignore a motion for summary judgment properly presented under Fed. R. Civ. P. 56 . . . ."). Furthermore, according to CERCLA's waiver of sovereign immunity, "[e]ach department, agency, and instrumentality of the United States . . . shall be subject to, and comply with, [CERCLA] in the same manner and to the same extent, both *procedurally* and substantively, as any nongovernmental entity." 42 U.S.C. § 9620(a)(1) (emphasis added).

The United States also fails to point to any CERCLA provision that is ambiguous and would, thus, support a consideration of policy arguments. Rather, the United States claims that three CERCLA provisions—§ 104, § 113(h), and § 113(g)(2)—"clearly reflect[] that the President *should be* in control of the timing of litigation and *should have* the flexibility to focus government response actions on the cleanup rather than on litigation." *Opp.* 9:11-13 (emphasis added).

First, § 104 authorizes the President to initiate national response efforts to environmental disasters. *See id.* at 7:20-8:2. It does not discuss the applicability of procedural rules to CERCLA cases involving the United States as a party. This section is not relevant to the Court's evaluation of the subject claims.

Second, § 113(h) precludes pre-enforcement review of federal responses or unilateral administrative orders ("UAOs"):

> No Federal court shall have jurisdiction under Federal law . . . to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except one of the following: (1) An action under section 9607 of this title to

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> recover response costs or damages or for contribution. (2) An action to enforce an order issued under section 9606(a) of this title or to recover a penalty for violation of such order. . . . (5) An action under section 9606 of this title in which the United States has moved to compel a remedial action.

42 U.S.C. § 9613(h)(1), (2), (5). According to the United States, § 113(h) bars pre-enforcement review until the United States "chooses to bring a Section 107 cost-recovery action against a private party, not when a private party brings cost recovery or contribution claims against the United States." *Opp.* 8:6-9. Thus, as the United States contends, if it were forced to file § 107(a) counterclaims when sued by private parties, federal courts would have premature jurisdiction over challenges to § 104 responses or § 106 UAOs. *See Raytheon*, 532 F. Supp. 2d at 1318 ("The court, however, relied on section 113(h) not to suggest that the provision was pertinent to Raytheon's claims in this case but to demonstrate that the EPA, by statute, is encouraged to file a claim for cost recovery only after the completion of cleanup activities such that the EPA in this case was permitted to delay the filing of its claim and was not required to file its claim in response to Raytheon's complaint.").

The Court is not persuaded. Section 113(h) bars pre-enforcement challenges of remedial actions taken under § 104 and § 106, but requiring the United States to comply with Rule 13(a) and file compulsory § 107(a) counterclaims would not affect this jurisdictional bar. Indeed, § 113(h) expressly permits parties to bring § 107(a) claims, among others, during the pendency of a cleanup operation, even when the § 113(h) jurisdictional bar would otherwise apply. *See* 42 U.S.C. § 9613(h)(1) (exempting § 107 claims from § 113(h)). Accordingly, nothing in § 113(h) suggests that the United States' filing of the subject claims in accordance with Rule 13(a) would have "short-circuited" § 113(h).

Third, the United States argues that the generous statute of limitations in § 113(g)(2) demonstrates Congress' intent to grant the federal government maximum discretion in timing its § 107(a) claims. *See Opp.* 8:14-9:9. Again, this provision is silent as to the applicability of Rule 13. As noted by Defendants, the compulsory counterclaim rule applies to other claims that similarly have statutes of limitations that have yet to run. *See Reply* 6 n.6. For these reasons, the Court finds that the plain language CERCLA does not exempt parties from complying with Rule 13(a).

2. A Note on *Raytheon*

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The United States asks the Court to follow *Raytheon Aircraft Co. v. United States*, 532 F. Supp. 2d 1316 (D. Kan. 2008). That case involved a motion to reconsider a previous order denying the plaintiff's motion to strike the United States' counterclaim for response costs under § 107(a). The court had denied the motion to strike on the grounds that "the statutory framework of CERCLA required that the United States' counterclaim be treated as if it were permissive such that the United States would be free to reassert the claim in a separate action in any event." *Id.* at 1318. The Court denied the motion to reconsider, finding that "it remains convinced that CERCLA supersedes Rule 13(a) under the unique facts presented here."[9] *Id.* The court found, in part, that a strict application of Rule 13(a) would undermine § 113(h) and provide for pre-enforcement review of cleanup efforts. *See id.* at 1320.

Unlike *Raytheon*, however, the United States' is not attempting to amend its pleadings to include a § 107(a) claim. Here, the 2005 Colton Action has closed, and the United States is no longer able to amend its pleadings in that case. The delay in this case is also more egregious than that in *Raytheon*. Moreover, the *Raytheon* court took great pains to limit its holding to "the unique facts presented here," "these unique facts," and "the unique circumstances presented by this case." *Raytheon*, 532 F. Supp. 2d at 1318, 1319, 1320.

The United States also claims that the Court has already followed the *Raytheon* court's prior decision barring a "pattern and practice" claim under § 113(h). *See Opp.* 12 n.7 (citing *Raytheon Aircraft Co. v. United* States, 435 F. Supp. 2d 1136 (D. Kan. 2006)). Though the Court admittedly discussed the prior *Raytheon* case in its order, it did so in summarizing the United States' position. *See* Dkt. #1175, at 9 (discussing *Raytheon*, 435 F. Supp. 2d 1136 (D. Kan. 2006), in the section entitled "EPA's Position"). In resolving that motion, the Court instead relied upon controlling Ninth Circuit precedent. *See* Dkt. #1175, at 10 (following *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325 (9th Cir. 1995)). For these reasons, the Court declines to follow *Raytheon* in this case.

3. Summary

The United States fails to provide a specific provision in CERLCA that exempts the United States from Rule 13(a), nor does the United States point to any relevant CERCLA provision that is ambiguous. The Court, therefore, applies the plain terms of CERCLA and Rule

[9] Alternatively, the court concluded that the United States would have been able to amend its pleadings in any event pursuant to Rule 13(f). *See id.* at 1318. That provision, however, has since been abrogated.

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13(a), and finds that the United States' Complaint and Counterclaims must be dismissed with prejudice as against Goodrich, PSI, KTI, Emhart, Black & Decker, and Kwikset.

IV. Conclusion

Based on the foregoing, the Court:

(1) GRANTS the motion to dismiss filed by Defendants Goodrich Corporation, Pyro Spectaculars, Inc., Ken Thompson, Inc., and Rialto Concrete Products with prejudice (CV 10-0824, Dkt. #18) only as to Goodrich Corporation, Pyro Spectaculars, Inc., and Ken Thompson, Inc.;

(2) DENIES the motion to dismiss filed by Defendants Goodrich Corporation, Pyro Spectaculars, Inc., Ken Thompson, Inc., and Rialto Concrete Products (CV 10-0824, Dkt. #18) as to Rialto Concrete Products;

(3) GRANTS the motion to dismiss filed by Counter-Defendants Goodrich Corporation and Pyro Spectaculars, Inc. with prejudice (CV 09-1864, Dkt. #321);

(4) GRANTS the motion to dismiss filed by Defendants Emhart Industries, Inc., Black & Decker, Inc., and Kwikset Locks, Inc. with prejudice (CV 10-0824, Dkt. #60); and

(4) GRANTS the motion to dismiss filed by Emhart Industries, Inc. with prejudice (CV 09-1864, Dkt. #408).[10]

IT IS SO ORDERED.

[10] As the Court finds that Rule 13 bars the subject claims against the Emhart Defendants, the Court does not consider the Connecticut law grounds of their motions to dismiss.