

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF WASHINGTON

3 ASARCO, LLC, a Delaware limited liability company, )

NO. CV-12-0381-LRS

4 Plaintiff, )

**ORDER DENYING DEFENDANT  
CALLAHAN'S MOTION TO DISMISS**

5 -vs- )

6 HECLA MINING COMPANY; WILLOW )  
7 CREEK MINERALS LLC; EQUINOX )  
RESOURCES (WASH.), INC.; )  
8 WASHINGTON RESOURCES LLC (a/k/a )  
ATLAS MINE AND MILL SUPPLY, )  
9 a/k/a SUMERIAN MINING CO. OF )  
SPOKANE, a/k/a WASHINGTON )  
10 RESOURCES, INC.); and CALLAHAN )  
MINING CORP., )

11 Defendants. )  
12 )

13 **BEFORE THE COURT** is Defendant Callahan Mining Corp.'s ("Callahan")  
14 Motion to Dismiss First Amended Complaint Pursuant to Fed.R.Civ.P.  
15 12(b)(6), Ct. Rec. 25, filed on August 10, 2012, and telephonically  
16 argued on November 8, 2012. Raymond Ludwiszewski participated on behalf  
17 of Defendant Callahan; Gregory Evans participated on behalf of Plaintiff  
18 Asarco, LLC. At the close of the oral argument, the Court took the  
19 motion under advisement. Having considered the oral and written argument  
20 of counsel, the Court enters this order denying the motion to dismiss.

21 **I. BRIEF STATEMENT OF THE CASE**

22 This is a civil action brought by Asarco pursuant to the  
23 Comprehensive Environmental Response, Compensation, and Liability Act of  
24 1980, as amended ("CERCLA" and "SARA"), 42 U.S.C. §§ 9601-9675  
25 ("CERCLA"). Asarco LLC ("Asarco") seeks contribution under Section  
26 113(f) of CRECLA from Callahan for CERCLA response costs Asarco paid

1 under a settlement with the State of Washington ("Settlement") at the Van  
2 Stone Mine Site in northeastern Washington ("Site").

3 On August 9, 2005, Asarco filed a voluntary petition for relief  
4 under chapter 11 of the United States Bankruptcy Code in the Bankruptcy  
5 Court for the Southern District of Texas (the "Bankruptcy Court"). On  
6 March 13, 2009, Asarco filed a motion in the Bankruptcy Court for  
7 approval of a settlement under which Asarco would pay the State of  
8 Washington State Department of Ecology \$3.5 million to resolve its  
9 environmental liabilities at the Van Stone Mine Site ("Van Stone Mine  
10 Site Settlement"). The Van Stone Mine Site Settlement was approved by the  
11 Bankruptcy Court and United States District Court for the Southern  
12 District of Texas. The Van Stone Mine Site Settlement was to be funded  
13 upon court approval of a plan of reorganization.

14 On November 13, 2009, Asarco's Plan of Reorganization, under  
15 which Asarco would make full payment on its environmental claims as  
16 approved by the Bankruptcy Court, was approved by the District Court for  
17 the Southern District of Texas. On June 5, 2009, the Bankruptcy Court  
18 issued its Order and Judgment Approving Amended Settlement Agreement  
19 Regarding Miscellaneous Federal and State Environmental Sites, which  
20 included the settlement with Ecology for the Van Stone Mine Site. (See  
21 ECF No. 27, Ex. 2 to Stafford Decl.)

22 On December 9, 2009, Asarco's Plan of Reorganization became  
23 effective, enabling disbursement of funds for environmental settlements,  
24 including funds for the Van Stone Mine Site Settlement. Asarco fully  
25 funded the Van Stone Mine Site Settlement as part of its reorganization.  
26 The Van Stone Mine Site Settlement appears to constitute a judicially

1 approved settlement which stems from enforcement action taken pursuant  
2 to Section 106 or Section 107 of CERCLA, 42 U.S.C. §§ 9606, 9607.

3 Asarco, having recently paid over \$3 million to settle all of its  
4 environmental-related liability at the Site, filed a Complaint in this  
5 Court on June 5, 2012. Asarco alleges that its settlement included costs  
6 to clean up and control contamination allegedly associated with  
7 Defendants' historic activities. Plaintiff filed a First Amended  
8 Complaint on July 10, 2012. Answers to the Amended Complaint have been  
9 filed by Defendants Hecla Limited ("Hecla") and Washington Resources LLC.  
10 Hecla denies it is responsible for releases, within the meaning of  
11 Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), into the environment at  
12 or from the Van Stone Mine at times relevant to this action. Further,  
13 Hecla answers that Asarco has not paid more than its equitable share of  
14 response costs. Finally Hecla states that Asarco has failed to prove  
15 its share, if any, of Asarco's overpayment, if any, of response costs.  
16 (ECF No. 41). Washington Resources answers that it is without sufficient  
17 information to admit or deny the allegations. (ECF No. 15). A  
18 scheduling conference has not been held in this case.

## 19 II. DISCUSSION

### 20 A. Defendant Callahan's Motion to Dismiss

#### 21 1. Callahan's Arguments

22 Callahan argues that Asarco's settlement in bankruptcy for which it  
23 seeks contribution only resolved Asarco's own liability at the Site and  
24 CERCLA does not provide for contribution for payments that are not more  
25 than a party's fair share. Callahan asserts that Asarco did not pay more  
26 than its fair share in the settlement with Ecology for Van Stone Mine

1 Site. Callahan argues that the settlement agreement does not state that  
2 Asarco is paying "costs to clean up and control contamination associated  
3 with Defendants' historic activities" as alleged by Asarco. Rather  
4 Asarco is paying a "reduced" amount to settle its own liability. Because  
5 Asarco has clearly neither funded the full site cleanup nor even paid its  
6 own entire liability for the Site, permitting this contribution action  
7 to continue puts Callahan at risk of making a contribution payment to  
8 Asarco and still being potentially liable to Ecology in a subsequent cost  
9 recovery action.

10 Second, Callahan argues that under *Cooper Indus., Inc. v. Aviall*  
11 *Servs., Inc.*, 543 U.S. 157 (2004), Asarco has not alleged sufficient  
12 facts to support Callahan's responsibility for disposal of hazardous  
13 substances at the Site. Callahan states the bare assertion that all  
14 defendants "disposed of, placed, released" hazardous substances at the  
15 Site fails to allege sufficient facts to state a claim.

16 Finally, Callahan argues that Asarco did not timely file the  
17 Complaint for contribution pursuant to the statute of limitations  
18 provided in 42 U.S.C. § 9613(g) (3) (B). Section 113(g) (3) (B) provides the  
19 applicable limitations period for claims for contribution under CERCLA:

20 "No action for contribution for any response costs  
21 or damages may be commenced more than 3 years after  
22 -- (B) the date of . . . entry of a judicially  
approved settlement with respect to such costs or  
damages."

23 42 U.S.C. § 9613(g) (3) (B).

24 Callahan points out that rather than the date of approval of  
25 Asarco's plan of reorganization (November 13, 2009), the date of approval  
26 of the Settlement (June 5, 2009) is critical for determination of the  
limitations period pursuant to 42 U.S.C. § 9613(g) (3) (B). The Bankruptcy

1 Court issued its Order and Judgment Approving Amended Settlement  
2 Agreement Regarding Miscellaneous Federal and State Environmental Sites,  
3 which included the settlement with Ecology for the Van Stone Mine Site,  
4 on June 5, 2009. (ECF No. 27, Ex. 2 to Stafford Decl.). Callahan  
5 concludes that Asarco could not commence an action for contribution more  
6 than three years after June 5, 2009. Asarco filed its Complaint on June  
7 5, 2012, which Callahan argues is the first day of the fourth year and  
8 is more than three years . . . after the date . . . of entry of a  
9 judicially approved settlement. For this reason alone, the action should  
10 be dismissed as untimely according to Callahan.

## 11 **2. Asarco's Opposition**

12 As a party that has settled its liability for "some or all" of the  
13 response costs at the Site in a judicially approved settlement, CERCLA  
14 § 113(f) (3) (B) explicitly authorizes Asarco's contribution action against  
15 Callahan. 42 U.S.C. § 9613(f) (3) (B). Asarco argues that neither the  
16 Bankruptcy Court nor any other court has determined that the \$3.5 million  
17 paid by Asarco toward remediation is less than or equal to Asarco's  
18 equitable share of the total cost of cleaning up the Site, and Callahan  
19 admits that it has paid nothing toward Site cleanup. Thus, it is up to  
20 this Court to determine the parties' equitable shares of liability under  
21 CERCLA.

22 Second, Asarco argues it has alleged specific facts regarding  
23 Callahan's historic activities at the Site, including the nature and  
24 extent of Callahan's mining-exploration activities that allegedly damaged  
25 the environment Asarco has paid to clean up. Asarco concludes that these  
26 specific and clear allegations satisfy the requirements of Fed.R.Civ.P.

1 8. Asarco concludes it has alleged sufficient facts that Callahan is  
2 liable under CERCLA as an "owner or operator" of a facility during the  
3 period that hazardous substances were disposed of. See 42 U.S.C. §§  
4 9607(a)(2), 9613(f)(3)(B).

5 As to the statute of limitations issue, Asarco asserts the original  
6 complaint was timely filed, within the applicable three-year statute of  
7 limitations. Even if the June 5, 2009 Settlement date triggered Asarco's  
8 statute of limitations under § 113(g)(3)(B), Asarco argues it has  
9 conformed to the requirements of Fed.R.Civ.P. 6(a) by timely filing its  
10 claim on June 5, 2012.

11 Asarco also argues that Callahan's request for judicial notice is  
12 improper because it relies only on unproven and disputed facts in an  
13 attempt to establish that Asarco has not paid more than its equitable  
14 share of liability at the Site. See ECF No. 26 at 12-16. In particular,  
15 Callahan relies on statements in the Settlement as well as assertions in  
16 a declaration submitted by the State of Washington in support of that  
17 Settlement ("Ecology Declaration"). ECF No. 26 at 14-15 (citing ECF No.  
18 27-1, 27-3). Asarco concludes the statements in these documents are not  
19 appropriate for judicial notice because the assertions in the various  
20 documents are and always have been disputed.

21 Contrary to Callahan's assertions, the Bankruptcy Court did not  
22 determine Asarco's equitable share at the Site. Instead, it approved the  
23 compromise documented in the Settlement. ECF No. 26 at 13-16. Asarco  
24 and the State agreed to an estimate of the State's allowable claim  
25 through a negotiated settlement for an amount between the "joint and  
26 several" position asserted by the State and the "equitable share"

1 position advanced by Asarco. See ECF No. 27-1. Asarco concludes that  
2 legal and factual issues must be adjudicated by this Court, which have  
3 never been adjudicated or conceded in any prior action or pleading--  
4 namely, the exact amount of Asarco's equitable share of liability at the  
5 Site and Callahan's contribution liability for Asarco's payments under  
6 the Settlement.

7 **B. Legal Standard - Motion to Dismiss**

8 A cause of action may be dismissed under Fed.R.Civ.P. 12(b)(6)  
9 either when it asserts a legal theory that is not cognizable as a matter  
10 of law, or if it fails to allege sufficient facts to support an otherwise  
11 cognizable legal claim. *SmileCare Dental Group v. Delta Dental Plan of*  
12 *California, Inc.*, 88 F.3d 780, 783 (9th Cir. 1996). In addressing a Rule  
13 12(b)(6) challenge the Court accepts all factual allegations in the  
14 complaint as true (*Hospital Bldg. Co. v. Trustees of the Rex Hospital*,  
15 425 U.S. 738, 740, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976)), and construes  
16 the pleading in the light most favorable to the nonmoving party. *Tanner*  
17 *v. Heise*, 879 F.2d 572, 576 (9th Cir.1989).

18 To survive a motion to dismiss under Fed.R.Civ.P. 12(b)(6), a  
19 complaint need only set forth a short and plain statement of the claim  
20 showing the pleader is entitled to relief, and it "does not need detailed  
21 factual allegations[.]" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127  
22 S.Ct. 1955, 1964, 167 L.Ed.2d 929 (2007). A plaintiff must, however, set  
23 forth "more than labels and conclusions, and a formulaic recitation of  
24 the elements of a cause of action will not do[.]" *Id.* at 1965.  
25 Allegations must indicate the pleader has a right to relief, and they  
26 must rise above the level of mere speculation. *Id.* The pleading must at

1 least set forth factual grounds supporting a plausible basis on which  
2 liability can be imposed, or it must set forth enough facts "to raise a  
3 reasonable expectation that discovery will reveal evidence of" a basis  
4 for liability. *Id.* Even if a court believes actual proof of the facts  
5 alleged is improbable, or that recovery is remote or unlikely, a pleading  
6 should still survive dismissal. *Id.*

7 Nonetheless, dismissal can be granted if there is a lack of a  
8 cognizable legal theory or if there is an absence of sufficient facts  
9 alleged under a cognizable legal theory. *Robertson v. Dean Witter*  
10 *Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir.1984). Even a liberal  
11 interpretation of a civil rights complaint may not supply essential  
12 elements of a claim that the plaintiff failed to plead initially. *Ivey*  
13 *v. Board of Regents*, 673 F.2d 266, 268 (9th Cir.1982). Additionally, the  
14 Court is not required to accept legal conclusions cast in the form of  
15 factual allegations if those conclusions cannot reasonably be drawn from  
16 the facts alleged. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55  
17 (9th Cir.1994) (*citing Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct.  
18 2932, 92 L.Ed.2d 209 (1986)).

### 19 **C. Analysis**

20 The Court denies Defendant's motion to dismiss the Amended Complaint  
21 pursuant to Rule 12(b)(6) based on *Bell Atlantic Corp. v. Twombly*, 550  
22 U.S. 544, 127 S.Ct. 1955, 1964 (2007). The allegations indicate Asarco  
23 has a right to relief, and Asarco's allegations rise above the level of  
24 mere speculation. Even if this Court believes actual proof of the facts  
25 alleged is improbable, or that recovery is remote or unlikely, a pleading  
26 should still survive dismissal. *Twombly* at 1164.



1 Taking all of Plaintiff's allegations together, i.e., Amended  
2 Complaint paragraphs 10, 14, 16, 21, 24, 29, 30, and 38, the Court finds  
3 Plaintiff has sufficiently pleaded a CERCLA contribution claim.  
4 Plaintiff has plausibly alleged facts which suggest but do not prove that  
5 the Defendant Callahan may have legal liability herein. However, without  
6 basic discovery, Plaintiff cannot reasonably be expected to go further  
7 at this time. Plaintiff is not required at this stage in the litigation  
8 to state with any extra specificity the nature and extent, if any,  
9 Callahan may have contributed to the disposition of hazardous substances  
10 during the applicable period.

11 The Court finds the current state of the record is insufficient to  
12 determine whether the Bankruptcy Court Settlement resolved only Asarco's  
13 liability or whether it actually resulted in overpayment to which Asarco  
14 is entitled to seek contribution from others. Although Callahan was  
15 never pursued as a potentially liable party, that fact standing alone is  
16 insufficient to suggest that Callahan is immune from a contribution suit.  
17 Any doubts must be resolved in favor of the non-moving party.

18 The paperwork filed in the Bankruptcy proceeding suggesting that  
19 Asarco was 90% liable was never adopted by Asarco as a statement of fact  
20 and has to be considered in the context in which it was rendered, i.e.,  
21 a compromise in bankruptcy. The Court agrees with the non-moving party  
22 in that the Bankruptcy documents are both hearsay and cannot be  
23 judicially noticed because they are subject to reasonable dispute. See  
24 *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9<sup>th</sup> Cir.2001); FRE  
25 201(b)(2).  
26

1 Finally, although Callahan claims that the Complaint was not timely  
2 filed under *Cooper Industry*, the Court finds that case is not as clear  
3 as the Court would prefer. Given the lack of cases on point in the Ninth  
4 Circuit Court of Appeals, the Court finds the better practice to follow  
5 in determining the Statue of Limitations in this case is to utilize  
6 Fed.R.Civ.P. Rule 6(a) as advocated in *Idaho v. Howmet Turbine Component*  
7 *Corp.*, 627 F.Supp. 1274, 1277 (D. Idaho 1986).

8 The Court concludes that whether Asarco paid only its portion of  
9 liability or overpaid with the right of contribution can only be  
10 determined after a hearing affording both parties the opportunity to  
11 present evidence dealing with the extent of Callahan's activities on the  
12 Site. Additionally, after some discovery, the parties will have an  
13 opportunity to present evidence, if any, suggesting that toxic wastes  
14 were generated and deposited above ground which may have contaminated  
15 below-ground water as alluded to at oral argument.

16 **IT IS ORDERED** that Defendant Callahan's Motion to Dismiss, **ECF**  
17 **No. 25**, filed on August 10, 2012 is respectfully **DENIED** for the  
18 reasons stated above.

19 **IT IS SO ORDERED.** The District Court Executive is directed to  
20 enter this order.

21 DATED this 27<sup>th</sup> day of November, 2012.

22 ***s/Lonny R. Suko***

23 \_\_\_\_\_  
24 LONNY R. SUKO  
25 UNITED STATES DISTRICT JUDGE  
26