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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CITY OF BANNING,
Plaintiff,
v.
MARY ANN DUREAU, et al.,
Defendants.

Case No. ED CV 12-00043 BRO (SPx)

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW AFTER
COURT TRIAL**

I.

INTRODUCTION

On January 9, 2012, Plaintiff City of Banning (“Banning”) filed a complaint for damages, alleging, among other things, a violation of the Comprehensive Environmental Response Compensation and Liability Act of 1980 (“CERCLA”). (Dkt. No. 1.) The court has federal question jurisdiction pursuant to 42 USC section 9601 et seq.. There is no right to a jury trial in a private party CERCLA cost recovery action, for such relief is equitable in nature. *Hatco v. W.R. Grace*, 59 F.3d 400, 412-414 (3rd Cir. 1995); *U.S. v. N.E. Pharmaceuticals*, 810 F.2d 726, 749 (8th Cir. 1986) Liability under CERCLA is strict, joint and several, *Idaho v. Hanna Mining*, 882 F.2d 392 (9th Cir. 1989)

1
2 On August 14 through 16 and August 20, 2013, the Court tried the CERCLA
3 matter. After consideration of the parties' trial briefs, the witnesses and evidence
4 presented by both sides at trial in the case, the Court makes the following Findings of
5 Fact and Conclusions of Law.¹

6 **II.**
7 **FINDINGS OF FACT**

8 **A. Stipulated Facts**

9 Plaintiff and Defendants Mary Ann Dureau and DBBF Enterprises, LLC ("DBBF")
10 (collectively, "Defendants") stipulated to the following facts which the Court finds as
11 true.

- 12 1. Banning is a California government entity.
- 13 2. "The Property" consists of four (4) single-story structures located in a
14 commercial/industrial area in the City of Banning, California.
- 15 3. For many, many years, The Property has been exclusively used for
16 automotive business purposes.
- 17 4. Defendant Douglas James operated DJ's Smog Shop and Automotive
18 on the Property from 2006 until 2009.
- 19 5. Though there had been various prior leases regarding the Property, the
20 last such lease ended in 2009, when DJ's Smog Shop vacated the
21 Property; and there has been no tenant on the Property since that time.
- 22 6. On July 25, 2011, defaulted Defendant Steven Ryan dumped multiple
23 55-gallon drums containing waste/motor oil, on the Property.
- 24 7. At the time of the spill, one of the drums displayed a label stating
25 "DJ's Automotive" and contained a different address than the
26 Property.

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28 ¹ Any finding of fact which constitutes a conclusion of law is hereby adopted as a conclusion of law.

1 8. At approximately 9:50 a.m. on July 25, 2011, the Banning Police
2 Department, Banning Fire Department and California Department of
3 Fish and Game (“DGF”) responded to a hazardous materials spill at
4 the Property.

5 9. Duane Burk, the City’s Public Works Director, contacted HCI
6 Environmental & Engineering Service (“HCI”) and requested that it
7 respond to the spill.

8 10. The City of Banning has incurred necessary costs of responding to the
9 waste spill consistent with the National Contingency Plan in the
10 amount of \$592,665, which is the entirety of damages Banning is
11 requesting in this case.

12 11. The City of Banning has incurred necessary costs of responding to
13 the waste spill consistent with the National Contingency Plan in the
14 amount of \$592,665, which is the entirety of the damages Banning
15 seeks from Dureau.

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17 B. Trial Testimony

18 1. *Jacqueline Branom Testimony*

19 Jacqueline Branom worked for Douglas James and his smog shop cleaning
20 bathrooms. She lived at 553 East Ramsey Street, Banning, California (“The
21 Property”) and remembers an oil spill.² Ms. Branom originally did not have
22 permission from Defendant Mary Ann Dureau to stay on The Property. At one point,
23 Dureau confronted Branom as to why Branom was staying on The Property. Dureau
24 then gave Branom permission to stay on the property as long as she kept the place
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28 ² It is undisputed that the oil spill occurred on July 25, 2011.

1 clean. Branom remained on the property with her boyfriend, Doug, for
2 approximately four months. She did not know whether other people were staying on
3 the property.
4

5 When Mr. James left the property, he left barrels on The Property. After his
6 departure, Ms. Branom saw people breaking into The Property and stealing copper
7 wire. On the day of the oil spill, Branom saw the oil barrels. She also saw two people
8 breaking windows and knocking barrels over with oil spilling out. Ms. Branom has a
9 history of cocaine abuse. She was incarcerated in 2010 and has not used drugs since
10 her incarceration. In 2011, Dureau came onto the property every month or every other
11 month and repaired things.
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14 2. *Mary Ann Dureau Testimony*

15 Ms. Dureau is a licensed real estate broker. She learned of the oil spill on
16 August 2, 2011. Dureau characterized her relationship Theresa Bleul as acquaintances
17 for many years, a contractor who performed work on The Property. Dureau knew that
18 James would operate a salvage yard, smog and auto repair business, but did not ask
19 whether James had obtained the appropriate permits. Dureau also knew that the type
20 of business engaged in by James generated waste matter. James did tell Dureau that
21 he hired a business to clean up waste products from the smog shop. Yet, Dureau
22 never saw a permit authorizing the disposal of waste material. Dureau also denies
23 ever giving Branom permission to stay on The Property.
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28 On February 16, 2007, Dureau received a letter from the City of Banning

1 notifying her of a list of problems on her property, including: (1) an accumulation
2 used tires on her property; (2) broken windows; (3) the metal roof pulling away from
3 the building; (4) cracks and peeling paint; (5) loose wires hanging down; (6) a two-
4 inch gap in the block foundation; (7) the operation of a business without a license.

5 Dureau denied that the paint was peeling or that there were broken windows .
6

7 Thereafter, Dureau spoke with James about “taking care of the situation.” Dureau
8 also hired Theresa Bleul to cure the problems. Dureau did not provide anyone with a
9 bill or invoice for the work completed. Nor does Dureau know whether the City
10 approved the work on The Property.
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13 When James moved out from The Property, Dureau saw a hole in the metal
14 fence. Dureau permitted James a period of time to remove his things but later
15 obtained a restraining order against James. Dureau’s lease with James required James
16 to be responsible for any repairs. Banning would frequently send Dureau letters
17 informing of problems and requiring her to fix them. At the time Dureau obtained the
18 restraining order, she saw two to three rusty reddish metal drums on The Property.
19 Dureau had barrels removed from her property a week or two after James left The
20 Property. Dureau admitted that people were putting “junk” on The Property all the
21 time. After James left, Dureau observed mattresses or personal belongings on The
22 Property. Some time before July 2011, Dureau observed persons walking down the
23 street with metal that looked like it came from The Property. Prior to the dumping,
24 Dureau was on The Property in May 2011. At that time, Dureau saw no mattresses on
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1 The Property. Dureau claims she cleaned up all defects, fixed broken locks, posted a
2 No Trespassing sign, and complained to the police. Dureau claims she gave a key to
3 the fence on her property to the police. A transient, Steve Ryan, was arrested for the
4 actual dumping; he apologized for the dumping.
5

6 On August 2, 2011, Dureau noticed that The Property had been “cannibalized”,
7 meaning the buildings were vandalized and items stolen. Dureau never personally did
8 anything to prevent the release of hazardous materials from The Property.
9

10 On August 2, 2013, the day of Dureau’s interview with Riverside County
11 Sheriff Detective Fisher, Dureau filed a grant deed deeding The Property to DBBF.
12

13 *3. Theresa Bluel Testimony*

14 Bluel states that Dureau is her friend and has been so for “quite a long time”.
15 Bluel owned The Property for some period of time, with Dureau holding the note on
16 The Property. When Bluel ran into financial difficulties, Bluel returned ownership of
17 The Property to Dureau. Dureau forgave the \$200,000 note. At Dureau’s request,
18 Bluel cleaned up The Property and performed repairs on The Property, hiring
19 “homeless people” and paying them cash. She is a licensed contractor, but was not
20 licensed from 2000 to February 2013. In May 2009, Bluel was present when James
21 left The Property. She denies seeing Branom on that day. Bluel did not see any
22 barrels on The Property, but she did not look for barrels. Bluel painted buildings on
23 The Property, fixed beams, and drywall. She also threw away mattresses. Later,
24 Bluel found two empty red barrels. She claims the barrels were removed two weeks
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1 later. After James left, Bluel visited The Property every 30 to 60 days. Frequently,
2 Bluel found evidence of homeless people on The Property. From the time James left
3 until May 2011, Bluel denies that oil was ever on The Property.
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5 *4. Burk Testimony*

6 Banning employs Burk as its Director of Public Works. He has worked for
7 Banning for 25 years. All told, on July 25, 2011, four barrels containing 55 gallons
8 were spilled, for a maximum of 220 gallons of oil. Burke estimates that DJ Smog
9 generated 50 gallons of used oil per month. After the oil spill, Burk responded to The
10 Property. The oil spill was the largest in Banning; as a result Banning passed an
11 emergency ordinance creating an incident command. Because the oil seeped into
12 Banning's storm drain, it was responsible for the cleanup. The cleanup was
13 completed in accordance with National Contingency Plan. The cleanup protocol
14 required the storm drain to be replaced. The storm drain emptied into the San
15 Gregornio River. On July 26, 2011, Burk saw barrels on the Property as depicted in
16 Exhibit 44. Banning paid \$1.8 million to remediate the oil spill.
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21 In 2006 or 2007, Banning created a redevelopment district and acquired certain
22 properties for public use. The Property is located four parcels away from the acquired
23 property. In 2006, Banning adopted a new general plan, and implemented a zoning
24 change. The area changed to commercial. From 2009 to the present, nothing
25 prevented Defendant from seeking a condition use permit for The Property. In 2011,
26 the governor dissolved the redevelopment agency, thereby stopping any
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1 redevelopment.

2 *5. Dong Testimony*

3
4 Mr. Dong is the Vice President and Project Director of SCS Engineers, an
5 environmental consulting firm. Mr. Dong holds a bachelor degree and a master's
6 degree in environmental engineering from the University of Southern California. He
7 is a registered environmental property assessor and a certified energy auditor. He has
8 personally worked on the investigation and cleanup of contaminated property
9 hundreds of times. Based upon his expertise, Mr. Dong opines that \$592,665 of the
10 \$1.8 million paid by Banning to clean up The Property was necessary and consistent
11 with the National Contingency Plan.
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14 *6. Chacon Testimony*

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16 Mr. Chacon works for the City of Banning as a Code Enforcement Officer.
17 Chacon inspected The Property on July 26, 2011, the day after the oil spill. He took
18 photographs of the structure, looking for municipal code violations. Chacon identified
19 exhibit 37 as one of the photographs he took that day. Exhibit 37 depicts mattresses,
20 clothing and trash on The Property. When he inspected The Property, Chacon found
21 doors kicked in and makeshift beds in the buildings. Chacon noted structural
22 deficiencies, cracks in joists, broken windows and trash and debris throughout the
23 property.
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26 *7. Fisher Testimony*

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28 Banning employs Fisher as a police officer, currently assigned to patrol. He has

1 been a sworn police officer for 20 years. And is certified by the Police Officer
2 Standards and Training (“POST”). In 2011, Fisher was assigned to the detective
3 bureau, and assigned to investigate the oil spill at The Property. His investigation
4 revealed Steven Ryan, a transient, as a person of interest. Fisher interviewed Ryan.
5 Ryan first denied spilling the oil. After Fisher used an investigative ruse, telling Ryan
6 that video surveillance captured Ryan spilling the oil, Ryan confessed to spilling the
7 oil. Ryan stated he spilled the first barrel thinking it was water; he dumped the other
8 barrels over because he was “just being stupid.” Ryan wrote a letter apologizing for
9 the spill. To his knowledge, Ryan was never prosecuted for spilling the oil.

13 Fisher inspected The Property with Ms. Dureau who pointed out a hole in a wall
14 of The Property big enough for someone to walk back and forth through. Fisher
15 estimated the hole to be about ten feet. There was tin and wood boarding up the hole.
16 Dureau told Fisher that she believed that a vehicle belonging to her had been stolen
17 from The Property. Dureau told Fisher that James told her (Dureau) that someone was
18 purchasing his oil. Dureau also told Fisher that Branom was watching The Property
19 for her. Dureau also stated that she provided Branom with money. Dureau told Fisher
20 she (Dureau) gave Branom permission to stay on The Property. Dureau made a
21 pretext call to James at Fisher’s request.

25 During the pretext call, Fisher denied that his oil was on The Property. James
26 blamed the oil spill on transients. James did admit that he didn’t remember leaving
27 barrels on The Property but he might have done so. James informed Fisher that James
28

1 used the company Safty-Kleen to dispose of the oil.

2 Fisher later contacted Safety-Kleen representatives who stated that they never
3 picked up any oil from James. The Safety-Kleen representatives informed Fisher that
4 James rented a parts cleaner from Safety-Kleen. James told Fisher that his paperwork
5 was “squared away.” Fisher followed up with the State of California’s website
6 regarding licensing. Fisher determined that as of 2009, James did not have
7 government permission to dispose of hazardous waste. Fisher disbelieved James
8 about Safety-Kleen and James’ permits.

9 Fisher interviewed Branom who stated that there were barrels of oil on the
10 property and some “white boy from Cabazon” spilled the oil. Branom did not know
11 the name of the person who spilled the oil, but gave Fisher a description. Fisher
12 interviewed Beverly James Banks, who is employed by James. Banks recalled a
13 barrel with James’ information on it located on The Property at the time of the spill.
14 Fisher estimates that Ryan spilled approximately 300 gallons of oil.

15 8. *Green Testimony*

16 Mr. Green is another Vice President and Project Director of SCS Engineers.
17 Green holds a degree in biology from Long Beach State University and attended
18 graduate courses in geology. He is a professional geologist in the State of California.
19 Green has been involved in dumping site investigations for 27 years. Courts have
20 qualified Green as an expert. Green is familiar with the Comprehensive
21 Environmental Response Compensation and Liability Act (CERCLA) and the
22

1 National Contingency Plan. In his expert opinion there was a “release” of a hazardous
2 substance, as defined by CERCLA, on The Property. Green reviewed reports
3
4 analyzing samples taken from The Property. The samples contained heavy metals and
5 Polyaromatic Hydrocarbons (PAHs). According to Green, Exhibit 43 depicts 55
6 gallon drums, with each drum weighing approximately 500 pounds. Green explained
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8 exhibits 15, a site assessment, and 46, a photograph depicting the flow of hazardous
9 waste for 3,514 feet into the storm drain. In Green’s expert opinion, Banning’s
10 remedial actions were consistent with the National Contingency Plan.
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12 *9. Steele Testimony*

13 Mr. Steele attempted to rent The Property in June 2009. During that month,
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15 Steele inspected The Property. He “liked what he saw” when he inspected The
16 Property. In his opinion, The Property was clean. He did not see any barrels on The
17 Property, but doesn’t recall seeing the bermed area where the barrels were
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19 photographed after the oil spill. Steele signed a lease with Dureau on June 15, 2009
20 and gave her a \$5,000 deposit. Later, Bluel hired Steele to put up plywood on the
21 windows. When he worked on The Property, everything was unlocked and The
22
23 Property filled with debris.

24 *10. Kelly Testimony*

25 Mr. Kelly is a police officer employed by Banning and has been so employed
26
27 for five and one-half years. Prior to that, Kelly worked for the Riverside County
28 Sheriff’s Department. He is POST certified. Banning assigned him to respond to the

1 oil spill on July 25, 2011. He responded to The Property where he discovered some
2 55-gallon drums on their side. Exhibit 43 accurately depicts the drums.
3

4 *11. Vaughn Testimony*

5 Safety-Kleen employs Mr. Vaughn as the branch general manager. Safety-
6 Kleen did business with DJ's Smog Shop from 2001 until 2009. Safety-Kleen
7 provided James with a parts washer rental service and washer solution disposal.
8 During their relationship, James never contracted with Safety-Kleen to dispose of used
9 oil.
10

11 C. Exhibits

12 Exhibits 40, 41, 42, 43 and 44 show oil barrels on The Property after the oil
13 spill. Specifically, the barrels are shown in a bermed area. At least one of the barrels
14 bears the identification, "DJ's Smog Shop" and "Hazardous Waste".
15

16 D. Credibility Determinations

17 Ninth Circuit Model Jury Instruction 1.11 provides guidance to jurors when
18 assessing credibility. The factors include: (1) the opportunity and ability of the
19 witness to see or hear or know the things testified to; (2) the witness's memory; (3)
20 the witness's manner while testifying; (4) the witness's interest in the outcome of the
21 case and any bias or prejudice; (5) whether other evidence contradicted the witness's
22 testimony; (6) the reasonableness of the witness's testimony in light of all the
23 evidence; and, (7) any other factors that bear on believability. Ninth Cir. Model Jury
24 Instr. 1.11 (Civil) (2007). The Court finds these factors helpful in assessing the
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1 credibility of the witnesses.

2 First, witness Jacqueline Branom's testimony is not without inconsistencies.
3 Her memory was, at times, spotty. However, the Court observed her demeanor while
4 testifying. Ms. Branom responded to questions in a straightforward and forthright
5 manner. She was not evasive in any way. Ms. Branom presented as an unbiased
6 witness who simply answered the questions. She held no bias against Dureau.
7 Indeed, on a previous occasion, she believed that the police lied. Ms. Branom's
8 testimony was corroborated by the photographic evidence and testimony of witnesses.
9 Exhibits 40 through 44 show barrels on the property immediately after the oil spill.
10 Officer Kelly interviewed Ms. Banks who corroborated Branom's account that barrels
11 remained on The Property after James' departure. Detective Fisher interviewed
12 Branom and identified Ryan based upon Branom's description. Ryan confessed to
13 spilling the oil. Accordingly, on balance, the Court believes the testimony of Ms.
14 Branom.

15 In contrast, the Court finds Ms. Dureau's demeanor differed significantly. She
16 refused to answer simple questions, seeking to re-define the question. The Court
17 observed her demeanor and believes Dureau feigned a lack of understanding. Much
18 of Dureau's testimony is not based upon her observations, but rather what she heard.
19 Dureau trial testimony contradicts her previous statements, and that of other
20 witnesses. For example, Dureau denies a friendship with Bluel, yet Bluel
21 characterizes their relationship as friends. Dureau brought Bluel to the interview with
22

1 Fisher. During the interview, as depicted in exhibit 55, Bluel and Dureau interrupt
2 each other. Bluel answers for Dureau, indicating a deeper relationship than that
3 described by Dureau. Unlike her demeanor during the trial, Dureau was sarcastic and
4 combative during Fisher's interview. Unlike other witnesses, Dureau has the greatest
5 interest in the outcome of this case. Finally, her testimony is not reasonable given the
6 other evidence adduced at trial. She maintains that there were no barrels on The
7 Property after James' departure, yet immediately after the oil spill, photographs depict
8 five barrels on The Property. It is not reasonable to believe that Ryan or anyone else
9 carried five 55-gallon drums, weighing 500 pounds each onto The Property only to
10 spill them. Dureau, a licensed real estate broker and sophisticated owner of
11 properties, claims that she transferred title to The Property to DBBF well before the
12 July 25, 2011, but did not transfer title to The Property until August 3, 2011, the day
13 after Dureau's interview with Fisher. The Court finds that a sophisticated
14 businesswoman and real estate broker would have ensured that the title to The
15 Property passed well before the August 2011 date. Accordingly, the Court finds
16 Dureau's testimony not credible.

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22 Bluel, like Dureau, suffers from the same credibility deficit. She too could not
23 answer the question simply. She, no doubt, did make repairs upon The Property, but
24 she did not possess a contractor's license. Her longtime friendship with Dureau biases
25 her in favor of Dureau. She too denies oil being on The Property after James'
26 departure. For the same reasons, this Court finds her testimony not reasonable in light
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1 of all the other evidence at trial.

2 The other witnesses who testified at trial were essentially not in dispute and the
3 Court credits their testimony.
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5 III.

6 CONCLUSIONS OF LAW

7 A. CERCLA CLAIM

8 Per *Carson Harbor Village v. Unocal*, 270 F.3d 863, 870-871 (9th Cir. 2001),
9 the *prima facie* elements of a CERCLA private cost recovery action pursuant to 42
10 U.S.C. section 9607(a) brought in the Ninth Circuit are:
11

12 1. The Property is a “facility”: 42 U.S.C. section 9607(a)(1)

13 42 USC section 9601(9) defines “facility” as:

14 (A) any building, structure, installation, equipment, pipe or
15 pipeline (including any pipe into a sewer or publicly owned
16 treatment works), well, pit, pond, lagoon, impoundment,
17 ditch, landfill, storage container, motor vehicle, rolling
18 stock, or aircraft, or

19 (B) any site or area where a hazardous substance has been
20 deposited, stored, disposed of, or placed, or otherwise come
21 to be located; but does not include any consumer product in
22 consumer use or any vessel.

23 The drums of oil were located within the berm of a building on The Property.
24 Thus, it is a “structure,” and “an area where a hazardous substance has come to be
25 located.” As a result, the Court finds that The Property was a “facility” within the
26 meaning of CERCLA.
27

28 2. “Hazardous substances” stored at the facility were “released” into the environment: 42 U.S.C. section 9607(a)(4)

Kevin Green testified that in his expert opinion, a “release” of “hazardous
substances” occurred on July 25, 2011. (Dkt. 249, 8/16/13 at p. 613.) He reviewed
reports of samples taken from The Property finding that the waste materials in the four

1 drums contained several chemicals in a class called “polynuclear aromatic
2 hydrocarbons” (“PAHs”) and several metals. (Dkt. 249, 8/16/13 at p. 614.) Both
3 PAHs and heavy metals falls within the definition of a “hazardous substance” in 40
4 CFR section 302.4. Therefore, “hazardous substances” within the meaning of
5 CERCLA.

6 In Green’s opinion, dumping the contents of four drums onto the Property on or
7 about July 25, 2011 and allowing the hazardous substances to flow off site into storm
8 drains constituted a “release” of such hazardous substances. 42 U.S.C. section
9 9607(a)(4). (Dkt. 249, 8/16/13 at p. 614.)

10 **3. Plaintiff incurred response costs “necessary” and consistent**
11 **with the National Contingency Plan, 40 CFR section 300 et seq**
12 **(“NCP”):**

13 Both Green and Dong qualified as experts and testified regarding whether
14 Banning’s response to the spill and the attendant costs were consistent with the
15 National Contingency Plan (“NCP”). According to Fisher and Chacon, the actual
16 response to the spill was overseen by the California Department of Fish and Game,
17 Riverside County Environmental Health, and the City’s Department of Public Works,
18 with Banning paying for the costs of response. Green testified that such response was
19 consistent with the procedures and guidelines set forth in the NCP for the size and
20 type of release at bar. (Dkt 249, 8/16/13 at p. 617.) However, even though the
21 response was consistent with NCP protocol, Dong testified, and the parties stipulated,
22 that of the approximately \$1.8 million the City spent on responding to the release,
23 only \$592,665.00 was “necessary.” Accordingly, the amount of response costs
24 recoverable by the City under CERCLA is \$592,665. (Dkt. 247, 8/15/13 at p. 372.)

25 **4. Defendants are in one or more classes of liable parties under 42**
26 **U.S.C. section 9607(a):**

27 42 U.S.C section 9607(a) states, *inter alia*, that the following persons are liable
28 under CERCLA:

- 1 (1) the owner and operator of a vessel or a facility, and
2 (2) any person who at the time of disposal of any hazardous substance owned or
3 operated any facility at which such hazardous substances were disposed of.

4 The Court finds that Defendant Dureau owned and operated The Property on
5 July 25, 2011, the day of the spill. She did not transfer title of The Property to DBBF
6 until August 3, 2011. As a result, Dureau is a liable party under CERCLA. Because
7 Defendant DBBF did not own or operate the Property on July 25, 2011, DBBF is not a
8 liable party under CERCLA.

9 **5. Defendant's Defense Pursuant To 42 U.S.C. § 9607 (b)(3)**

10 In defense, Defendant Dureau raises the “innocent landowner
11 defense” codified at 42 U.S.C. section 9607(b). Section 9607(b) states,
12 in relevant part:

13 “(b) Defenses

14 There shall be no liability under subsection (a) of this
15 section for a person otherwise liable who can establish by a
16 preponderance of the evidence that the release or threat of
17 release of a hazardous substance and the damages resulting
therefrom were caused solely by—...

18 (3) an act or omission of a third party other than an
19 employee or agent of the defendant, or than one whose act
20 or omission occurs in connection with a contractual
21 relationship, existing directly or indirectly, with the
22 defendant (except where the sole contractual arrangement
23 arises from a published tariff and acceptance for carriage by
24 a common carrier by rail), if the defendant establishes by a
25 preponderance of the evidence that (a) he exercised due care
26 with respect to the hazardous substance concerned, taking
27 into consideration the characteristics of such hazardous
28 substance, in light of all relevant facts and circumstances,
and (b) he took precautions against foreseeable acts or
omissions of any such third party and the consequences that
could foreseeably result from such acts or omissions.

1 Defendant Dureau failed to show by a preponderance of the evidence that she
2 exercised due care relating to the waste material. Despite knowing of constant
3 transient break-ins, she permitted the oil to remain in the drums on The Property after
4 DJ's Smog Shop left. Despite knowledge of repeated violations, she visited The
5 Property infrequently. She permitted the oil drums to remain on vacant, inadequately
6 secured, property for a lengthy period of time. She also did not seek permits to store
7 such waste, nor require such permits from her tenants. She was largely an absentee
8 landlord who knew of the problems on The Property based upon repeated notice from
9 Banning. It was reasonably foreseeable that an inadequately secured property would
10 invite transients to occupy it, and that transients may cause the waste materials in the
11 drums thereon to be spilled, with the waste material flowing into the storm drain.

12 **B. COUNTERCLAIM: EQUITABLE INDEMNITY**

13 In order to state a claim for equitable indemnity, Defendants must show:

- 14 (a) Defendants are liable in this case; and,
15 (b) Banning's City's own negligence is responsible for causing some of
16 the damages that are being claimed against Defendants.

17 *See* CACI 3800. AMA v. Sup Ct., 20 Cal 3d. 578 (1978); Cal. Civil Code § 1431.2.

18 **C. COUNTERCLAIM: CONTRIBUTION**

19 In order to state a claim for contribution, Defendants must show:

- 20 (a) Defendants are liable in this case; and,
21 (b) Banning is responsible for causing some of the damages that are
22 being claimed against Defendants.

23 33 U.S.C. § 2709; 43 U.S.C. § 113 (F); Cal Civ. Code § 1432.

24 **D. COUNTERCLAIM: DECLARATORY RELIEF**

25 Defendants' claim for declaratory relief shares similar elements: In order to
26 WHETHER, Defendants are assessed liability in this case. Defendants must prove:

- 27 (a) Defendants are liable in this case; and,
28

1 (b) Banning is responsible for causing some of the damages that are
2 being claimed against Defendants.

3 33 U.S.C. § 2709; 43 U.S.C. § 113 (F); Cal Civ. Code § 1432.

4 In this case, the first three counterclaims require the same elements. First, as
5 detailed above, the Court has found Defendant Dureau liable in this case. The second
6 element centers on Banning's negligence and/or responsibility for causing some of the
7 damage. The Court finds Banning was not negligent and did not cause any portion of
8 the damages in this case. Banning repeatedly sent letters to Dureau of clean up the
9 violation on The Property. Banning did not permit homeless persons to vandalize The
10 Property. Banning sought permission to prosecute trespassers on The Property.
11 Banning was not obligated by taking a key, which they later returned, to look after the
12 The Property. The Court rejects the testimony of Dureau that she was informed that
13 police officers permitted Branom to remain on The Property without permission.
14 Chacon testified that he sent a letter to Dureau regarding multiple violations. (Dkt.
15 247, 8/15/13 at p. 407.) Moreover, Banning does not fall within the defined
16 categories of persons liable for an CERCLA violation. Accordingly, the Court rejects
17 Counterclaimant Dureau's request for contribution or equitable indemnity.

18 **E. COUNTERCLAIM: INVERSE CONDEMNATION**

19 In order to state a claim for inverse condemnation, Defendants must show:

- 20 (a) Defendants/Counterclaimants own private property;
21 (b) Banning took or damaged the property; and,
22 (c) Compensation to the owner.

23 Cal Const., art 1, Sec 14; *Klopping v. City of Whittier*, 8 Cal. 3d 39 (1972); 3 Witkin,
24 Summary of Cal. Law (7th ed. 1960) Constitutional Law Sec 223 p. 2033; Rose v.
25 State of California 19 Cal 2d. 713 (1942) (Damages are "just compensation to be
26 measured by the market value of the property at the time of the taking"); Code of Civ.
27 Proc. § 1249.
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1 As detailed above, Dureau owned private property, namely The Property, in this
2 case during the relevant periods.³ The next question centers on whether Dureau
3 proved that Banning, through its actions, either engaged in a total or partial “taking” of
4 The Property. The salient issues are whether Banning intentionally “withheld”
5 business licenses for automotive purposes, lied, and encouraged third parties to
6 trespass upon The Property and thereby effectively “taking” the use of The Property.
7 The Court finds that Dureau has failed to meet her burden. She has not shown that
8 Banning encouraged third parties to trespass on The Property. Banning did not permit
9 homeless persons to vandalize The Property. Banning sought permission to prosecute
10 trespassers on The Property. Nor has Dureau shown that Banning “lied” to Dureau or
11 anyone else, or intentionally withheld business licenses, or intentionally sent Dureau
12 letters regarding municipal code violations in order to harass her.

13 To the extent Dureau seeks to sustain her burden by showing that Banning’s
14 zoning change “took” her property, she must have exhausted her administrative
15 remedies, which she did not. *See, e.g., Hensler v. City of Glendale*, 8 Cal. 4th 1, 10-
16 11 (1994) (plaintiff must exhaust administrative remedies when challenging
17 government regulation which allegedly “takes” property). Moreover, Judge Phillips’
18 ruling regarding exhaustion does not apply because Judge Phillips concluded “[h]ere,
19 Dureau challenges neither the denial of a permit nor the City’s zoning ordinance.”
20 (Dkt. 44 at 14.) In context then, Dureau has not shown that she sought a non-
21 conforming use or sought to “grandfather” her use. *See Williamson County Regional*
22 *Planning Commission v. Hamilton Bank of Johnson*, 473 U.S. 172, 188 (1985)
23 (“[R]espondent did not then seek variances that would have allowed it to develop the
24 property according to its proposed plat, notwithstanding the Commission's finding that
25 the plat did not comply with the zoning ordinance and subdivision regulations.”)

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³ Because DBBF did not acquire title to The Property until August 4, 2011. DBBF and Dureau have not provided any evidence of Banning’s conduct after 2011, thus any claim by DBBF fails.

1 Thus, she has failed to show that she exhausted her administrative remedies with
2 respect to the regulatory taking.


3 Even assuming Dureau exhausted her administrative remedies, she failed to
4 meet her burden. Because The Property remained economically viable, she has not
5 shown a *per se* taking. *See, e.g., Tahoe Sierra Preservation Council v. Tahoe*
6 *Regional Planning Agency*, 535 U.S. 302, 330 (2002) (“[C]ompensation is required
7 when a regulation deprives an owner of ‘all economically beneficial uses’ of his
8 land.”). Thus the Court must examine the factors articulated in *Penn Central Trans.*
9 *Co. v. City of New York*, 438 U.S. 104 (1978). In analyzing such claims, *Penn Central*
10 articulated certain relevant factors: (1) the economic impact of the regulation; (2) the
11 investment backed expectations; and, (3) the “character” of the invasion by the
12 government. *Penn Central*, 535 U.S. at 124.

13 In this case, Dureau has failed to show the economic impact of the regulation.
14 She has not attempted to develop The Property in any way. She sought a lease on one
15 occasion, which was denied. She did not further attempt to develop The Property.
16 Courts have held that such a diminution in value must be extreme. *See, e.g., Haas v.*
17 *City and County of San Francisco California*, 605 F.2d 1117, 1120 (9th Cir. 1979)
18 (diminution in value from \$2,000,000 to \$100,000 insufficient to require “just
19 compensation”). Second, Dureau fails to show that her reasonable investment-backed
20 expectations were “taken” by Banning. She did not attempt to further develop The
21 Property for any other purpose than automotive uses. Indeed, she never attempted to
22 be “grandfathered” in. Finally, courts have consistently upheld the use of zoning
23 regulations to promote redevelopment, even where a use of a property is prohibited.
24 *See, e.g., Penn Central*, 438 U.S. at 125. Because Dureau has failed to satisfy this
25 element, the Court will not reach the element of damages. Therefore, Dureau has
26 failed to meet her burden of proof on the her counterclaim for inverse condemnation.

1 Judgment is for Plaintiff in the amount of \$592,665 against Defendant Dureau.
2 Banning's Complaint against Defendant DBBF is dismissed with prejudice. Dureau
3 and DBBF's counterclaims are dismissed with prejudice.

4 **IT IS SO ORDERED.**

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6 Dated: November 18, 2013

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9 HONORABLE BEVERLY REID O'CONNELL
10 UNITED STATES DISTRICT COURT JUDGE
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