UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and JOSEPH MARTENS, as Commissioner of the New York State Department of Environmental Conservation,

Plaintiffs,

v. No. 1:14-CV-747

GENERAL ELECTRIC COMPANY,

Defendant.

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CHRISTIAN F. HUMMEL
U.S. MAGISTRATE JUDGE

MEMORANDUM-DECISION AND ORDER

Presently pending before the Court is plaintiffs' motion to dismiss defendant's counterclaims pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."). Dkt. No. 18. Defendant opposed the motion (Dkt. No. 24), and plaintiff filed a reply. Dkt. No. 31. For the following reasons, plaintiffs' motion to dismiss defendant's counterclaims is granted in part and denied in part.

I. **Background**

Plaintiffs State of New York ("State"); the New York State Department of Environmental Conservation ("DEC"); and Joseph Martens, as Commissioner of DEC (collectively: "the State" or "plaintiff," where appropriate), have filed suit under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601, et seq., as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SAA"), Pub. L. No. 99-499, 100 Stat. 1613 (1986), as well as under New York State common law. See generally Dkt No. 1 ("Compl.") at 1-2. In the underlying action, the State seeks

> to recover certain costs incurred by the State in responding to releases of hazardous substances at a site known as the Luzerene Road Site, located at 51 and 53 Luzerene Road, in the Town of Queensbury, Warren County, New York. These releases have contaminated soil and groundwater at and in the vicinity of the Site with polychorinated biphenyls (PCBs), volatile organic compounds (VOCs) and other hazardous substances.

Compl. at 1. The State further seeks "a declaratory judgment that defendant is liable for certain past response costs incurred by the State in responding to the release of hazardous substances at the Site, and an order requiring defendant to abate a public nuisance and to reimburse the State for response costs." Id. at 2. The State also requests "attorney's fees, costs and expenses, and pre-judgment interest, as allowed by law[.]" Id. at 19.

Defendant General Electric Company ("GE" or "defendant") thereafter asserted counterclaims against the State for "contribution" under CERCLA § 113(f), 42 U.S.C. § 9613(f); for "declaratory relief" under CERCLA § 113(g)(3), 42 U.S.C. § 9613(g)(3), and the Declaratory Judgment Act, 28 U.S.C. § 2201(a); and for common law recoupment.[1] Dkt. No. 9 at 16, 18. GE provides that "[t]he State's actions in arranging for the disposal of hazardous substances at the Landfill, as well as its actions and inactions as the owner and/or operator of the Landfill, resulted in the release of hazardous substances from 51 Luzerene Road and 53 Luzerene Road into the environment." Id.

Subsequently, the State filed this motion to dismiss the counterclaims, pursuant to Rules 12(b)(1) and 12(b)(6).

II. **Brief Background of CERCLA**

Congress enacted CERCLA in 1980 "in response to the serious environmental and health risks posed by industrial pollution." Burlington N. & Santa Fe Ry. Co. v.

[1] For the sake of consistency, the Court will refer to the sections of CERCLA as they are codified in the United States Code.

United States, 556 U.S. 599, 602 (2009); see also CTS Corp. v. Waldburger, ___ U.S.___, 134 S.Ct. 2175, 2180 (2014); United States v. Bestfoods, 524 U.S. 51, 55 (1998). "As CERCLA is a remedial statute, it must be 'construed liberally to effectuate its two primary goals: (1) enabling the [Government] to respond efficiently and expeditiously to toxic spills, and (2) holding those parties responsible for the releases liable for the costs of the cleanup.'" New York v. Adomowicz, 609 F. App'x 19, 20 (2d Cir. 2015) (summary order) (quoting B.F. Goodrich Co. v. Murtha, 598 F.2d 1192, 1198 (2d Cir. 1992).

CERCLA

> facilitates the achievement of Congress' goal to place the cleanup costs of the nation's hazardous waste sites on the polluter by permitting the United States or a state to hold any party that is at least partially responsible for the presence of hazardous substances liable for the sites' cleanup costs.

Pennsylvania, Dep't of Envtl. Prot. v. Lockheed Martin Corp., No. 1:09-CV-0821, 2015 WL 412324, at *4 (M.D. Pa. Jan. 30, 2015) (citing 42 U.S.C. § 9607(a)).

Section 9607(a) identifies the categories of "persons" who may be liable under CERCLA: (1) owners and operators of facilities at which hazardous substances are located; (2) those who owned or operated such facilities when the disposal of hazardous substances occurred; (3) persons who arranged for the disposal or treatment of hazardous substances; and (4) certain transporters of hazardous substances to disposal or treatment facilities from which there is a release or threatened release of hazardous substances. See 42 U.S.C. § 9607(a)(1)-(4). "Person" includes the United States and the states. Id. § 9601(21). "Facility" includes a

site where hazardous substances were disposed of, placed, deposited, or otherwise located. Id. § 9601(9).

For liability as an owner or operator under section 9607(a)(3), "it must be shown, inter alia, that the State *owned* or *possessed* the hazardous substances of which it arranged to dispose." State of New York v. City of Johnstown, 701 F. Supp. 33, 36 (N.D.N.Y. 1988) (citations omitted). Further, "there has to be some nexus between the allegedly responsible person and the owner of hazardous substances before a party can be held liable under 42 U.S.C. § 9607(a)(3)." Id. Section 9607(d)(2) provides that states and local governments shall not be liable under CERCLA, absent gross negligence, for "actions taken in response to an emergency created by the release or threatened release of hazardous substances generated by or from a facility owned by another person." 42 U.S.C. § 9607(d)(2). Section 9607(d)(1) provides that, absent negligence, "no person" shall be liable for "actions taken or omitted in the course of rendering care, assistance, or advice in accordance with the National Contingency Plan."[2] 42 U.S.C. § 9607(d)(1).

Section 9607(b) sets forth defenses to liability:

> there shall be no liability under subsection (1) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by – (1) an act of God; (2) an act of war; (3) an act or omission of a third party

[2] "'The national contingency plan "provide[s] the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants' and is promulgated by the Environmental Protection Agency." Price Trucking Corp. v. Normapac Indus., Inc., 748 F.3d 75, 80 n.4 (quoting 40 C.F.R. § 300.1-2).

> other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous 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; or (4) any combination of the foregoing paragraphs.

42 U.S.C. § 9607(b).

Section 9613(f) allows a potentially-responsible person to seek contribution from any other potentially-responsible person. It provides that:

> [a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) [§ 107(a)], during or following any civil action under section 9606 [§106]. . . or section 9607 [§107(a)] . . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 [§106] . . . or section 9607 [§107].

42 U.S.C. § 9613(f)(1); see Burnette v. Carothers, 192 F.3d 52, 59 (2d Cir. 1999), (noting that a party may only recover contribution pursuant to section 9607(a) if they claim to be a potentially-responsible party), cert. denied, 531 U.S. 1052 (2000).[3]

[3] The remedies under sections 9613(f) and 9607(a) are "clearly distinct": "[s]ection 113(f)(1) [9613(f)] authorizes a contribution action to PRPs [potentially responsible parties] with common liability stemming from an action instituted under § 106 [9606] or § 107(a) [9607(a)], while § 107(a) [9607(a)] permits cost recovery (as distinct from contribution) by a private party that has itself incurred cleanup costs." United States v. Atlantic Research Corp., 551 U.S. 128, 129 (2007); see also Schaefer v. Town of Victor, 457 F.3d 188, 194 (2d Cir. 2006) ("CERCLA permits cost recovery actions under § [9607](a) by the government and certain private parties against potentially responsible parties; contribution actions under §

In Pennsylvania v. Union Gas Co. the Supreme Court of the United States held that Congress validly abrogated the states' sovereign immunity when it allowed polluters to seek recovery from states pursuant to sections 9607 and 9613(f). 491 U.S. 1, 17-18 (1989). In Seminole Tribe of Florida v. Florida the Supreme Court expressly overruled Union Gas Co., holding that it was "wrongly decided." 517 U.S. 44, 66, 72-73 (1996) ("Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."). As the Second Circuit explained,

> [t]he Supreme Court in Seminole held that Congress could abrogate the states' Eleventh Amendment immunity only when acting under the power vested in it by Section 5 of the Fourteenth Amendment. See 517 U.S. at 59, 65-66. CERCLA, however, was enacted pursuant to the Commerce Clause, and any provision in it that makes a state liable to private parties is accordingly unenforceable.

Burnette, 192 F.3d at 59 (citing Seminole Tribe, 517 U.S. at 62) (additional citations omitted). The court held that, although Congress intended to divest the states of their Eleventh Amendment immunity, Congress did not enact CERCLA pursuant to a constitutional provision granting it the power to abrogate. Id.

III. **Relevant Legal Standards**

[9613](f)(1) for parties who have been sued under § [9606] or § [9607]; and contribution actions under § [9613](f) (3)(B) for parties that have entered an administrative or judicially approved settlement with the United States or a state."); New York v. Next Millennium Realty, LLC, 03-CV-5985 (SJF/MLO), 2008 WL 1958002, at *6 (E.D.N.Y. May 2, 2008) (same).

A. **Motion to Dismiss for Lack of Subject Matter Jurisdiction**[4]

As a threshold matter, in opposing the State's motion to dismiss the counterclaims, GE contends that the Court should "disregard" the affidavits appended to the State's motion, Dkt. Nos. 18-1, 18-3, as the Court may not properly consider facts outside of the pleadings in determining whether it has subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Dkt. No. 24 at 12. GE states that, because the State's challenge to the counterclaims is not factual, but based on the sufficiency of the subject matter jurisdiction allegations, the Court cannot consider the affidavits. Id.

A case or a counterclaim "is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000) (citing FED. R. CIV. P. 12(b)(1)). In a 12(b)(1) motion to dismiss counterclaims, the nonmoving party receives the same protections as it would defending against a motion brought pursuant to 12(b)(6). See generally Rehabilitation Support Services, Inc. v. City of Albany, New York, 1:14-CV-499 (LEK/RFT), 2015 WL 4067066, at *2 (N.D.N.Y. July 2, 2015) ("The standard for a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction is substantively identical to the 12(b)(6) standard.") (internal citations and quotation marks omitted). Thus, the Court must "accept as true all material factual allegations in the counterclaim, it [is] not to draw

[4] Because dismissal of an action for lack of jurisdiction renders all other defenses and motions moot, courts will generally consider a Fed. R. Civ. P. 12(b)(1) motion before ruling on other bases for dismissal. U.S. ex rel Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148, 1155-56 (2d Cir. 1993), cert. den. sub. nom. Kreindler & Kreindler v. United Techs. Corp., 508 U.S. 973 (1993).

inferences from the [counterclaim] favorable to [the] plaintiffs." See Gristede's Foods, Inc. v. Poospatuck (Unkechague) Nation, 06-CV-1260 (KAM), 2009 WL 4547792, at *3 (E.D.N.Y. Dec. 1, 2009) (quoting J.S. ex. rel. N.S. v. Attica Cent. Schs., 386 F.3d 107, 110 (2d Cir. 2004)). The burden of proving federal jurisdiction, however, is on the party seeking to establish it, and that party must prove jurisdiction by a preponderance of the evidence. Id. (citing Makarova, 201 F.3d at 112).

A Rule 12(b)(1) challenge to subject matter jurisdiction can either challenge the "facial sufficiency" of a pleading's allegations regarding jurisdiction, in which the court's review is confined to the pleadings, or attacks on "the existence of subject matter jurisdiction in fact," in which the court's review is not confined to the pleadings, but extends to "extraneous evidence submitted with the motion." Dow Jones & Co., Inc. v. Harrods, Ltd., 237 F. Supp. 2d 394, 404 (S.D.N.Y. 2002)). In a facial attack – a challenge that, even if the claims are truthful, the facts alleged in the claims are insufficient to establish jurisdiction – the trial court must accept the complaint or counterclaim's material factual allegations as true. See Latino Quimicia-Amtex S.A. v. Akzo Nobel Chem. B.V., 03-CV-10312 (HBDF), 2005 WL 2207017, at * 4 (S.D.N.Y. Sept. 8, 2005) (citation omitted). If the attack is factual, the court does not need to accord the allegations in the complaint or counterclaim with a presumption of truth. See id.

GE contends that the Court may not consider the affidavits attached to the State's complaint because the State is raising challenges to the sufficiency of the allegations in the counterclaims – a facial challenge, rather than a factual challenge.

Although the Court does not find clear support in GE's provided case law, the Court agrees that the State is challenging "the sufficiency of the jurisdictional facts alleged, not the facts themselves," and, thus, is making a challenge that is legal in nature, a facial challenge. See Worldcom, Inc. v. Connecticut Dep't of Pub. Util. Control, et al., 229 F. Supp. 2d 109, 111 (D. Conn. 2002) (quoting Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 887 n.15 (2d Cir. 1996). Accordingly, in deciding the motion to dismiss pursuant to Rule 12(b)(1), the Court shall take as true GE's allegations in support of its counterclaims and limit its review to the pleadings. The Court further concludes that the State bears the burden of establishing that it is entitled to immunity under the Eleventh Amendment.

B. **Motion to Dismiss for Failure to State a Claim**

To survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 663 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)); see also FED. R. CIV. P. 12(b)(6). This plausibility standard requires "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the alleged misconduct]." Twombly, 550 U.S. at 556; ATSI Commc'n, Inc. v. Sharr Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007). "[U]nadorned, the-defendant-unlawfully-harmed-me accusation[s]" do not suffice. Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 555). Thus, although a court must accept the factual allegations contained in a complaint as true and draw all inferences in favor of the non-

movant, Allaire Corp. v. Okumus, 433 F.3d 248, 249-50 (2d Cir. 2006), the action is subject to dismissal where the court is unable to infer more than the "sheer possibility that a [non-movant] has acted unlawfully." Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 556).

IV. **Discussion**

GE's first counterclaim is for contribution under section 9613(f)(1), on the grounds that the State is an owner, operator, and one who arranged for the disposal of hazardous substances at the landfill, as set forth under section 9607(a)(1)-(4).[5] Dkt. No. 9 at 16. GE's second counterclaim seeks declaratory relief pursuant to section 9613(g)(3)[6] and the Declaratory Judgment Act:

> only in the event that the court finds GE to be a liable party, GE seeks a declaratory judgment under CERCLA 113(g)(3) [§ 9613(g)(3)] and the Declaratory Judgment Act, 28 U.S.C. § 2201(a): (i) declaring that there is a reasonable basis for divisibility of harm at the Site; (ii) declaring the State liable for any response costs beyond GE's divisible share; and (iii) otherwise declaring that the State is liable to GE for all response costs to be incurred by GE in the future which exceeds GE's divisible share.

Id. at 17. GE's third counterclaim titled recoupment,[7] apparently brought pursuant to

[5] GE refers to such award as "an equitable offset of response costs." Dkt. No. 9 at 18.

[6] As the Court will discuss, it appears that GE intended to reference section 9613(g)(2) as a basis for its request for declaratory relief. See Section IV(4), supra pp. 34-38.

[7] GE refers to such award as "an offset based upon the State's fair share of clean-up costs attributable to its own liability." Dkt. No. 9 at 18.

state common law,[8] asks that any monetary award the Court may provide to the State "pursuant to the third claim for relief in the Complaint . . . be offset by the State's fair share of clean-up costs attributable to the State's own liability." Id. at 18; see also Dkt. No. 24 at 12 (alleging the State's liability "under the doctrine of equitable recoupment.").

The State contends that GE's counterclaims must be dismissed, pursuant to 12(b)(1), because it has not consented nor waived its sovereign immunity to suit. The State alleges that its commencement of this action to recover costs does not act as a waiver of its immunity under the Eleventh Amendment.[9] Dkt. No. 18-5 at 29. The State further argues that "to the extent that GE asserts counterclaims against the State as an owner/operator or arranger for the disposal of hazardous substances under CERCLA 107(a) [9607(a)] and 113(f) [9613(f)], the State is immune from such liability under the Eleventh Amendment and the Supreme Court's holding in Seminole Tribe." Dkt. No. 18-5 at 28; see also id. at 25 ("[a]ny provision of CERCLA that purports to give a private right of action against the State, including the claims GE alleges under Section 113

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[8] GE does not provide the basis for its recoupment request; however, from the parties' motion papers, it appears GE is contending that its recoupment claim is based in the common law, equitable theory. See Dkt. No. 9 at 18 ¶¶ 30-40; Dkt. No. 18-5 at 10 ("GE asserts . . . one counterclaim for recoupment pursuant to the New York common law.").

[9] At times, the parties and the Court refer to the State's sovereign immunity as Eleventh Amendment immunity. However, the Court recognizes that

> [t]he phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which the retain today . . . except as altered by the plan of the Convention or certain constitutional amendments.

Alden v. Maine, 527 U.S. 706, 712 (1999); see also Burnette, 192 F.3d at 56 n.1.

[9613] is not subject to federal court jurisdiction.").

Next, the State argues that it is also immune from GE's third counterclaim for recoupment due to its sovereignty under state law, and, as such, "[t]o bring a case against the State sounding in tort for contribution, common law public nuisance and offset/recoupment, as GE's third counterclaim alleges, it must be brought in the Court of Claims." Dkt. No. 18-5 at 29. The State also argues that GE's third counterclaim is improperly framed as one for recoupment "because it is alleged against the state in a capacity different from the one in which the state has sued." Dkt. No. 18-5 at 33.

A. **Does the State's Eleventh Amendment/Sovereign Immunity Bar GE's Counterclaims ?**

The State contends that the Eleventh Amendment bars GE's counterclaims because the State has not consented nor waived its immunity to suit. The State argues that, although Congress expressed an intent to abrogate the states' sovereign immunity by including the states in the definition of "person" under sections 9607(a) and 9613(f) and allowing for liability for providing negligent care or advice or grossly negligent or intentionally negligent conduct under sections 9607(6)(1), (2), such abrogation is unauthorized, as provided by the Supreme Court in Seminole Tribe, 517 U.S. at 59-67 (finding Congress did not have power to abrogate States' Eleventh Amendment immunity via CERCLA and overruling Union Gas, 491 U.S. 1). Dkt. No. 18-5 at 25 n.1. Although the State acknowledges the existence of case law recognizing that a state may, by voluntarily commencing an action, "waive" its immunity to recoupment and/or

compulsory counterclaims, it argues that GE's counterclaims do not fall within this "exception." Id. at 29-32. By contrast, GE argues that the "State's reliance on Seminole Tribe . . . is misplaced because that case relates to Congress's authority to *abrogate* the states' Eleventh Amendment immunity by federal statue, not to the State's *voluntarily* [sic] *waiver* of sovereign immunity at issue here." Dkt. No. 24 at 14 n.4.

It is well-settled that CERCLA does not abrogate a State's sovereign immunity. See Burnette, 192 F.3d 52, 59. However, such is a different question from whether, in a CERCLA action voluntarily commenced by a state, a private party can bring counterclaims pursuant to sections 9607 and 9613 without running afoul of the state's sovereign or Eleventh Amendment immunity. Thus, the first question the Court must address is whether, by commencing this action, the State waived its immunity to counterclaims, and, if so waived, the extent of that waiver. Case law addressing whether a state waives its immunity to counterclaims by commencing an action in court varies widely on this issue, and a review of the case law is necessary for a background on this far-from-settled issue.

1. **Counterclaim 3: Recoupment and Eleventh Amendment Immunity**

In United States v. Forma, the Second Circuit provided that the doctrine of sovereign immunity "operates as a jurisdictional limitation on suits against the United States" unless the United States waives its immunity or consents to suit. 42 F.3d 759, 763 (2d Cir. 1994). The Forma Court further held that sovereign immunity is not waived solely by the government's commencement of an action:

> Courts might very well have developed a rule that when the Government starts a suit, it fully waives sovereign immunity as to all counterclaims, or at least to those counterclaims arising from the same transactions as the Government's claims . . . . But case law has clearly established the contrary. '[J]urisdictional limitations based on sovereign immunity apply equally to counterclaims against the Government' . . . and jurisdiction for 'a suit against the United States . . . whether it be in the form of an original action or a set-off or a counterclaim . . . does not exist unless there is specific congressional authority for it . . . . And it is clear that the United States, by filing [an] original complaint . . . [does] not thereby consent to be sued on a counterclaim based upon a cause of action as to which it had not otherwise given its consent to be sued.

Id. (internal citations omitted). Despite this pronouncement, the Forma Court and its progeny acknowledged that "case law has developed a significant limitation to the general bar of sovereign immunity in the context of counterclaims." Id. at 763 (citing United States v. Wissahickon Tool Works, Inc., 200 F.2d 936, 939 (2d Cir. 1952). The Court recognized that, "[d]espite sovereign immunity, 'a defendant may, without statutory authority, recoup on a counterclaim an amount equal to the principal claim." Id. (citing United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 511 (1940)). Recoupment has been defined as the "'common law precursor to the modern compulsory counterclaim.'" United States v. Green, 33 F. Supp. 2d 203, 223 (W.D.N.Y. 1998) (citations omitted).

Although not deciding whether this "exception" was grounded in a waiver of sovereign immunity or is "properly conceptualized as a defense," the Court noted that "it has long been absolutely clear that the exception does not permit any affirmative recovery against the United States on a counterclaim that lacks an independent

jurisdictional basis." Forma, 42 F.3d at 765;[10] see also U.S. v. Livecchi, 605 F. Supp. 2d 437, 450 (W.D.N.Y. 2009) (citing Forma, 42 F.3d at 765); Green, 33 F. Supp. 2d at 223 ("The common law equitable doctrine of recoupment permits a defendant to assert a defensive claim against . . . the United States, so long as such claim arises from the same contract or transaction as plaintiff's claim, to reduce the amount of damages covered by the United States as plaintiff.") (citation omitted); City of Johnstown, 701 F. Supp. at 37 ("[t]here is no dispute that the State waives its sovereign immunity with respect to compulsory counterclaims when it is the plaintiff in a CERCLA action."). The Forma Court did not specify whether its holding was strictly limited to common law recoupment or extended to compulsory counterclaims seeking relief authorized by statute, such as contribution pursuant to section 9607(a), that do not seek affirmative relief. See generally Forma, 42 F.3d at 764-65.

The Court finds that the State's Eleventh Amendment immunity does not require dismissal of common law recoupment counterclaims where the state voluntarily commenced an action in federal court. Case law from the Supreme Court, the Second Circuit, and various district courts supports this finding. The State has not provided a case that supports its sweeping contention that Eleventh Amendment immunity bars

[10] Here, the plaintiff is the State of New York and its agencies, rather than the United States. However, the undersigned concludes that rationale set forth in Forma applies equally to claims brought against the states and to the states' Eleventh Amendment immunity. See generally City of Johnstown, 701 F. Supp. at 37(noting that the state waived its immunity to the common law compulsory counterclaims and observing that the defendant may be able to assert a claim for recoupment against the state, subject to the state's defenses, but declining to reach the merits of such a claim).

common law recoupment claims in CERCLA actions.[11] Instead, the State relies on cases that have recognized the common law recoupment exception, but have denied such relief after concluding that recoupment was contrary to CERCLA's intent. However, whether the relief is contrary to CERCLA's intent is a different question from whether the counterclaim is barred by the states' sovereign immunity.[12] The State cites United States v. Rohm and Haas Co., 939 F. Supp. 1157 (D. NJ 1996), U.S. v. Iron Mountain Mines, 881 F. Supp. 1432 (E.D. Cal. 1995) ("Iron Mountain II"), and Green, 33 F. Supp. 2d at 220, to argue that recoupment claims barred by sovereign immunity. Dkt. No. 18-5 at 34.

In Rohm and Haas Co., the District of New Jersey concluded that counterclaims in recoupment were not permissible in CERCLA actions because Congress intended to provide similar relief to that sought in the recoupment claim, and "allowing recoupment . . . allows remnants of the common law to infect what Congress meant to establish with CERCLA – the otherwise abolishment of common law doctrine with respect to clean-up of hazardous waste sites." 939 F. Supp. at 1162-63. The court further concluded that no waiver of sovereign or Eleventh Amendment immunities occurred because there was no voluntary waiver of sovereign immunity where the sovereign's intervention as a plaintiff in the case was defensive. Id. at 1164.[13]

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[11] The State relies heavily on Forma to argue that the states' sovereign immunity bars recoupment claims, but in Forma, the Second Circuit recognized a "recoupment-counterclaim exception" to the United States' sovereign immunity. 42 F.3d at 765-66.

[12] The former question will be addressed in section IV(1)(a), supra pp. 23-27.

[13] The Environmental Protection Agency commenced a suit pursuant to CERCLA § 105. The State agency intervened pursuant to CERCLA Section 104(c) . 939 F. Supp. at 1158.

In a similar fashion, in Green, the Western District of New York concluded

> if recoupment applies, no independent waiver of sovereign immunity is required as recoupment rests on the principle that sovereign immunity should not prevent a private person from raising, in his or her defense, claims that arise from the same transaction or occurrence on which the government is seeking to recover damages.

33 F. Supp. 2d at 223 (citation omitted). Relying on "Iron Mountain II"[14] and Rohm and Haas Co., the court determined that common law recoupment claims were barred in CERCLA cost recovery actions. Id. at 224 ("[R]ecoupment claims are not permitted in a CERCLA cost recovery action."). The Green court further concluded that recognizing a common law recoupment claim in CERCLA actions was inconsistent with CERCLA's purpose; would open the government to additional liability; and was inconsistent with the language of the statute itself, which "provides for recovery from the government in its proportionate share. 42 U.S.C. § 9607(d)." Id. at 224-25 (citing Iron Mountain II, 881 F. Supp. at 1453-54). Thus, although recognizing that sovereign immunity does not bar recoupment counterclaims where the claims arose out of the same transaction or occurrence as the plaintiff's claim and did not seek affirmative relief, the court determined that, regardless of immunity, claims in recoupment were not viable counterclaims in a CERCLA cost-recovery action. See id. at 223, 225.

After the Supreme Court decided Seminole Tribe, the Eastern District of

[14] The Green decision did not address Seminole Tribe or the Iron Mountain III case, discussed supra, despite being decided after those cases.

California,[15] following a motion to dismiss the defendant's counterclaims and crossclaims which was "prompted by the Supreme Court's recent decision in Seminole Tribe v. Florida[,]" the court reassessed its holding in Iron Mountain II. United States v. Iron Mountain Mines ("Iron Mountain III"), 952 F. Supp. 673 (E.D. Cal. 1996). The court concluded that, as to the defendant's counter- and cross-claims brought against the state under CERCLA: (1) unless the state waived its immunity, the defendant could not bring a claim for relief "except for the limited, defensive claim that may be permitted by the recoupment doctrine"; (2) the State did not "make a general waiver of the Eleventh Amendment" by bringing a suit; (3) "Seminole does not bar CERCLA claims in recoupment"; (4) "CERCLA contribution and indemnity claims are only invalid upon an invocation of the Eleventh Amendment"; and (5) because the defendant's counterclaims "are brought in recoupment, the Eleventh Amendment, and therefore Seminole do not apply." 952 F. Supp. at 676-78.

In reaching these conclusions, the court assessed the basis for the recoupment doctrine. 952 F. Supp. at 677-78. The court noted that

> although the label and remedy may be the same, the recoupment doctrine may have a different legal basis depending on whether the remedy is sought against the United States – in derogation of sovereign immunity or some other bar to recovery – or against a state, in derogation of the Eleventh Amendment.

Id. at 677. The Court noted that "[w]hen recoupment is invoked as against the United

[15] In Iron Mountain III, the State and United States "conced[ed] that they [were] subject to claims in recoupment by [the defendant] and only dispute whether the particular claims made by [the defendant] are within the same transaction or occurrence as their claims." 952 F. Supp. at 676.

States it rests on federal common law, the federal law of sovereign immunity," but observed that it was unclear whether recoupment counterclaims brought against a state could be viewed as a waiver of Eleventh Amendment immunity or fell outside of the scope of the Eleventh Amendment's prohibition of federal jurisdiction over suits commenced against a state. Id. at 677-78. The court observed that recoupment has been viewed as a form of limited waiver, but found this explanation "not entirely convincing." Id. It opined that recoupment counterclaims "reasonably may be viewed as falling outside the scope of . . . [the Eleventh Amendment's] language in much the same way as the Supreme Court's appellate jurisdiction has been viewed as outside the scope of the Eleventh Amendment because [it is] not a 'suit.'" Id. Further, the court noted that "application of the Eleventh Amendment may depend on whether any damages awarded would be paid out of the state's treasury." Id. at 678. "Under this test," the court observed that a recoupment claim cannot be read as a "suit" against a State under the Eleventh Amendment because "the relief sought is merely responsive to and no greater than the relief sought by the state and requires no payment by the state from its treasury." Id.

The Court did not reach whether the defendant may properly bring counterclaims sounding in state law, finding that matter not fully briefed, but concluded that "recoupment claims have been permitted when a state files suit in federal court[,]" and, thus, concluded that the defendant "may bring CERCLA claims against the State in

recoupment." Id. at 678 (citation omitted).[16] The court then concluded that Seminole and the Eleventh Amendment did not bar recoupment claims in CERCLA actions: "Since [the defendant's] claims are brought in recoupment, the Eleventh Amendment, and therefore Seminole, do not apply." Id. at 677-78. Thus, Iron Mountain III held that Eleventh Amendment Immunity did not bar claims for recoupment, or cost recovery.[17]

In Livecchi, 605 F. Supp. 2d at 449-50, the Western District reviewed a counterclaim brought against the United States that sounded in recoupment. Citing to Forma, the court stated that "[o]ne theory for this exception to the doctrine of sovereign immunity is that 'a counterclaim seeking a set off or recoupment is properly conceptualized as a defense, arising out of the transaction that grounds the main action, and therefore will not be jurisdictionally barred when there is jurisdiction for the main action.'" Id. at 450 (citation omitted). Thereafter, the court determined that "the equitable doctrine permits a defendant in an action asserted by the government may file a counterclaim for recoupment seeking recovery of an amount up to the principal amount claimed by the United States." Id. (citation omitted); see also Oneida Indian Nation of New York v. New York, 194 F. Supp. 2d 104, 136 (N.D.N.Y. 2002) ("[I]t is well

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[16] The Court recognizes that it is unclear on which counterclaims the Iron Mountain II court based its holding – common law recoupment or recoupment counterclaims based in CERCLA. Although the court referred to the remedy as "CERCLA claims in recoupment," it also refereed to the recoupment relief as an equitable doctrine. 952 F. Supp. at 677-79.

[17] Acknowledging that the appropriate test to determine whether the defendant's allegations were valid was based on Fed. R. Civ. P. 13(a) – whether the claims arose from the same transaction or occurrence as the original claim – the court concluded that determination whether the recoupment claims arose out of the same transaction or occurrence was premature: "Only when the facts of the case have been more well developed will the court be able to determine the answer to this question." Iron Mountain III, 952 F. Supp. at 678-79.

established that when the United States . . . initiates a lawsuit, a defendant may assert counterclaims that sound in recoupment even absent a statutory waiver of immunity.").

Similarly, in City of Johnstown, 701 F.Supp. at 37, although decided prior to Seminole Tribe, this Court dismissed the defendant's CERCLA contribution counterclaim, brought under section 9613(f)(1), as it concluded that the State was not an owner of hazardous substances, as defined by CERCLA. Id. at 36. However, in reviewing the defendant's common law recoupment claim, this Court concluded that compulsory counterclaims sounding in recoupment may be asserted against a state and are not barred by the state's sovereign immunity. Id.

The Court is not persuaded that case law supports a finding that the states' Eleventh Amendment immunity or sovereign immunity bars common law or CERCLA counterclaims sounding in recoupment where the state voluntarily commences an action. Precedent from both within and outside of this Circuit support that recoupment, based both in common law and pursuant to CERCLA, logically sounds in defense, does not implicate the Eleventh Amendment, and, thus, is not barred by the doctrine of sovereign immunity. In reaching this conclusion, this Court finds the rationale of precedent from within this Circuit, Forma, Livecchi, and City of Johnstown, and from cases outside of this Circuit, Iron Mountain III, to be well-reasoned. Thus, the weight of the case law supports a finding that, in an action commenced voluntarily by the United States or a state, sovereign immunity or Eleventh Amendment immunity does not bar a defendant from bringing a counterclaim for common law or CERCLA-based recoupment.

a. **Recoupment and CERCLA**

The State argues that, even if sovereign immunity is not a bar to recoupment, such claims are contrary to CERCLA's intent and should not be permitted in a CERCLA action. Dkt. No. 18-5 at 34.

In United States v. Keystone Sanitation Co., Inc., 867 F. Supp 275, 282 (M.D. Pa. 1994), the court expressed concern whether common law recoupment claims were permissible in a section 9607 cost recovery action commenced by the government. The court observed that "[a]lthough [recoupment] sounds like a defense to the amount of damages . . . it is recognized as an independent claim . . . Therefore, recoupment claims are counterclaims for damages caused by the [government] when it has acted in a sovereign capacity in cleaning up the site, and to allow the claim to go forward requires a waiver of immunity." Id. The court further noted that the recoupment counterclaim,

> as a practical matter . . . may provide no relief to the CERCLA defendant in addition to that which can be obtained from asserting the defense of inconsistency with the NCP. In fact, it is fair to question whether CERCLA defendants in general assert recoupment claims as a creative means of expanding the NCP inconsistency defense . . . [I]t would not appear that the recoupment claims are necessary to afford . . . [d]efendants' relief from the costs associated with cleaning up such additional contamination.

Id. at 283. The court, however, declined to dismiss the recoupment counterclaim, deferring it for further development of the case. Id. at 285.

In Iron Mountain II, the court similarly assessed the defendant's common law

recoupment counterclaims. 881 F. Supp. at 1453. The Court concluded that recoupment would expose the federal government to

> counterclaims under state tort law for any of its activities during the cleanup. Whereas CERCLA provides that certain actions of the federal government are to be reviewed under a negligence standard or under the arbitrary and capricious standard, state law could well impose strict liability or some other standard . . . . The same inconsistency with standards set out in CERCLA could well arise.

Id. at 1454 (citing sections 9607(d)(1), (d)(2), (j)(2)). The Court continued that waivers of sovereign immunity could not be implied and that "there is no compelling need for application of the recoupment doctrine in the context of a government cost recovery action under CERCLA because CERCLA itself permits the defendant in a suit by the government to seek contribution and make claims against the government." Id. at 1456; see also Rohm and Haas Co., 939 F. Supp. at 1162 (citing Iron Mountain II and Keystone Sanitation).

In arguing that the Court should not follow the Iron Mountain II and Rohm and Haas reasoning, GE points out that in Iron Mountain III, the court concluded that the defendant could bring "CERCLA claims against the State in recoupment." See 952 F. Supp. at 678. However, it is not entirely clear whether the court was referring to common law recoupment counterclaims or a cost recovery claim pursuant to section 9607(a). As discussed, although the court referred to these counterclaims as CERCLA recoupment claims, the court earlier in that section engaged in a detailed assessment of what it labeled the "recoupment doctrine," suggesting it may have concluded that the recoupment claims in that case were based in the equitable common law doctrine,

rather than in the statute. See id. at 676-77.[18] Moreover, the Iron Mountain III decision refers the reader to its earlier decision, Iron Mountain II, when it provides: "in the context of a CERCLA action there is no reason to extend or create a judicially implied remedy against the United States when Congress has expressly provided the remedy. Indeed, the possibility of conflict between the judicial remedy and the statutory scheme provides a sound reason not to imply a remedy." Id. at 678. Referencing this language further suggests that the court is reviewing the viability of a common law recoupment claim. Thus, Iron Mountain III is the only case which seems to hold that a recoupment counterclaim against the state is permissible; however, this does not provide the Court with a clear understanding of its rationale or whether the recoupment claim it discussed arose out of CERCLA or was a common law claim. Thus, the Court hesitates to rely on Iron Mountain III's conclusion to permit the recoupment counterclaim to go forward against the state.

The Court finds the reasoning of the cases holding recoupment claims to be contrary to CERCLA's intent to be more persuasive. It would appear that permitting a defendant to bring a common law recoupment claim against the state could

> undermine the statutory scheme devised by Congress which permits only those defenses listed in CERCLA section 107(b) to be asserted during the liability phase of a CERCLA cost recovery action and requires claims which go to the alleged inconsistency of a response action to the NCP to be asserted during the damage/cost assessment phase of trial.

United States v. American Color and Chem. Corp., 858 F. Supp. 445, 453 (M.D. Pa.

[18] As mentioned, the defendants in Iron Mountain III conceded that they were subject to recoupment claims. 952 F. Supp. at 676.

1994). Section 9607(d)(1), for example, sets forth that

> no person is to be held liable under this subchapter for costs or damages as a result of actions taken or omitted in the course of rendering care, assistance, or advance in accordance with the National Contingency Plan ("NCP") or at the direction of an onscene coordinator appointed under such plan, with respect to an incident creating a danger to public health welfare or the environment as a result of any releases of a hazardous substance or the threat thereof. This paragraph shall not preclude liability for costs or damages as the result of negligence on the part of such person.

Furthermore, a State is not to be held liable for costs or damages

> as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

42 U.S.C. § 9607(d)(2).

Therefore, although the Court finds that sovereign immunity does not bar a defendant from bringing common law recoupment counterclaims against a state that has voluntarily commenced an action in federal court, because recoupment counterclaims could result in the application of a standard and remedy not provided for by Congress as part of its statutory scheme, and may allow for relief when CERCLA itself would not, such a claim should not be permitted against the State.[19]

[19] Although the Court recognizes that the District Court of the Virgin Islands, St. Croix, declined to apply Green and Rohm and Haas for the proposition that recoupment is impermissible in CERCLA actions, the Court found that the defendants "overstate[d] the holdings of those cases, concluding that the defendants in Green and Rohm and Haas "failed to establish the first element of any recoupment counterclaim, namely, that it arises from the same transaction as the main claim." Commissioner of Dept.

Accordingly, the State's motion, insofar as it seeks to dismiss GE's third counterclaim sounding in common law recoupment, is granted.

2. **Counterclaim 1: Contribution Pursuant to Section 9613(f)**

It still must be determined whether the "recoupment-setoff exception" to sovereign immunity applies equally to a counterclaim sounding in contribution pursuant to section 9613(f). Contribution "is not defined in CERCLA, but it is interpreted to mean 'the tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her responsible share, the shares being determined as a percentage of fault.'" Ameripride Services Inc. v. Texas E. Overseas Inc., 782 F.3d 474, 480 (9th Cir. 2015) (quoting United States v. Alt. Research Corp., 551 U.S. 128, 138 (2007). "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1).

The Court finds that a counterclaim for contribution pursuant to Section 9613(f) does not violate a state's sovereign immunity for the same reasons that recoupment counterclaims do not violate the State's sovereign immunity. Assuming, without deciding, that the contribution counterclaim arises out of the same transaction and occurrence as the State's complaint, because a contribution claim merely reduces the amount that a defendant could be held liable to the sovereign, rather than permit

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of Planning and Natural Resources v. Centry Alumina Co., LLLP, 2009 WL 1749952, at *6 (June 19, 2009). Thus, the Court concluded that those cases' rationale did not apply to the case before it, where the claims related directly to the pollution of the affected site. Id.

affirmative relief, it is not barred by sovereign immunity. Thus, the Court concludes that the Eleventh Amendment and the State's sovereign immunity does not bar a counterclaim brought against the state seeking contribution pursuant to section 9613(f) in the event that the defendant is deemed a liable party.

Moreover, the Court does not share the concern it has with CERCLA contribution counterclaims with common law recoupment counterclaims. Pursuant to 9613(f), recovery would only be permitted after a court has determined that the State is a liable party. Unlike with a common law recoupment counterclaim, where it is feasible that a lesser standard of liability may be used to require payment from a state, a contribution claim pursuant to CERCLA allows the Court to apply equitable factors to determine allocation of costs. 42 U.S.C. § 9613(f). It does not allow for the possibility of a state law standard, not contemplated by Congress, being applied to hold a state liable to a private party. Thus, the Court concludes that GE's claim for contribution pursuant to section 9613(f) is not barred by the State's Eleventh Amendment or sovereign immunity.

Accordingly, the State's motion to dismiss, pursuant to Fed. R. Civ. P. 12(b)(1), GE's first counterclaim for contribution is denied.

3. **Permissive Counterclaims**

GE urges the Court to find that a state's sovereign immunity does not serve as a bar to a defendant's permissive counterclaims. In so urging, GE relies on Lapides v. Board of Regents of Univ. Sys. of Georgia ("Lapides"), Ossen v. Department of Social

Services ("Charter Oak"), and State of New York v. Oneida Indian Nation of New York ("Oneida Indian Nation"). A review of this case law is necessary to determine whether a state waives its immunity to permissive counterclaims as well.

In Lapides, 535 U.S. 613 (2002), where the underlying action involved section 1983 and state tort law claims, the Supreme Court found that the state waived its immunity to counterclaims when it voluntarily removed the case to federal court. In so finding, the Court cited a litany of Supreme Court cases which held that a state's voluntary appearance in court amounted to waiver of Eleventh Amendment immunity. Id. at 620. The Supreme Court explained that its conclusion

> makes sense because an interpretation of the Eleventh Amendment that finds waiver in the litigation context rests upon the Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might, after all, favor selective use of 'immunity' to achieve litigation advantages.

Id. at 620 (internal citation omitted). The court advised that, in determining whether the state waived its immunity, the relevant focus is "on the litigation act the State takes that creates the waiver." Id. at 621. In responding to the state's protestation that the Court's finding will "prove confusing" for states to apply, the Supreme Court provided that, "once 'the States know or have reason to expect that removal will constitute a waiver, then it is easy enough to presume that an attorney authorized to represent the State can bind it to the jurisdiction of the federal court (for Eleventh Amendment purposes) by the consent to removal.'" Id. at 624 (citing Wisconsin Dept. of Corr. v. Schacht, 524 U.S. 381, 397 (1998). Thus, the Supreme Court finds that Lapides,

stands for the proposition that, in assessing whether a state waived its immunity its involvement in litigation depends on the specific act involved: thus, a state or state entity's voluntary *removal* of a matter to federal court amounts as a waiver of Eleventh Amendment immunity.

Some cases have extended the waiver by litigation rationale to find that the waiver extends to compulsory counterclaims beyond recoupment or to permissive counterclaims. Some of the cases that take a more expansive view of the "recoupment-counterclaim exception" are bankruptcy actions. In Charter Oak, 361 F.3d at 767, after the Connecticut Department of Revenue Service filed a proof of claim against a debtor's estate, the trustee filed an adversary complaint against the state Department of Social Services to recover certain rental reimbursements. Id. at 763. The Department of Social Services moved to dismiss the adversary complaint, contending that the Court lacked subject matter jurisdiction and the adversary complaint was barred by the Eleventh Amendment. Id. at 764. The Court noted that "section 106 [of the Bankruptcy Code] stipulates other circumstances in which a state will be deemed to have waived its immunity to certain types of claims as a result of its conduct in litigation," including that when a state files proof of claim, it waives its immunity to claims that did and did not arise out of the same transaction or occurrence. Id. at 766. The court cited to Lapides, 535 U.S. at 619, and Gunter v. Atlantic Coast Line R. Co., 200 U.S. 273, 284 (1906), a tax case, for the proposition that a "State is deemed to have invoked the court's jurisdiction when it has made a 'voluntary appearance in federal court.'" 361 F.3d at 767. The court observed that "[t]he doctrine of waiver by

litigation, which derives directly from the Eleventh Amendment, is founded 'not upon a State's actual preference or desire,' but rather upon 'the judicial need to avoid inconsistency, anomaly, and unfairness.'" Id. at 767 (citing Lapides, 535 U.S. at 620). The Court, citing Gardner v. State of New Jersey, 329 U.S. 565, 573-74 (1974), a bankruptcy case, noted that "[o]ne practical application of the waiver-by-litigation doctrine is the long-standing rule that a state waives its sovereign immunity by filing a proof of claim in a bankruptcy case," and concluded that it was "indisputable" that the state waived its sovereign immunity when the Department of Social Services filed proof of claim. Id. at 768. After observing that Gardner did not determine whether the waiver was limited to compulsory counterclaims or could extend to permissive counterclaims "capped by a setoff limitation," the court concluded that "principles derived from Eleventh Amendment jurisprudence support the proposition that the scope of a state's waiver by litigation should extend to such claims." Id. at 769.

The Court went on to hold that "fairness and consistency concerns that undergird the waiver-by-litigation doctrine favor an approach that would reduce or eliminate its indebtedness to the state." 361 F.3d at 769. The Court held that, "[f]rom an equitable standpoint, [it] could see no reason why a state that has filed a proof of claim in a bankruptcy case should be permitted to raise the immunity shield in response to permissive counterclaims brought by the debtor, at least where they are limited by a setoff limitation . . . ." Id. at 769. The Court noted that, since the State voluntarily commenced an action "with a view to reaping a financial benefit, there is no longer any danger that the state will be subjected to the 'indignity' of being haled into court – which

is the primary concern of the Eleventh Amendment." Id. The court further noted that its finding was not contrary to state sovereign immunity because it would not result in affirmative recovery from the state. Id. In reaching its determination, the Court concluded that the relevant bankruptcy statute that allowed for both compulsory and permissive, but capped, relief was "a permissible codification of the waiver by litigation doctrine." Id. at 770. It is not clear from Charter Oak itself whether the Second Circuit intended its holding to be limited to bankruptcy cases.

However, this Court has applied Charter Oak to a non-bankruptcy context. In State of New York v. Oneida Indian Nation of New York, 95-CV-554 (LEK/RFT), 2007 WL 2287878, at *7 (N.D.N.Y. Aug. 7, 2007), a case assessing whether the Nation's offering of an electronic video game violated a gaming compact between the Nation and State, this Court cited Charter Oaks and Lapides for the proposition that a state "waives its Eleventh Amendment immunity by bringing suit in federal court." Relying on Charter Oaks, the Court stated that it "must determine the nature of the Nation's counterclaims, whether those claims require an affirmative recovery from the State, and whether permitting the claims to go forward would offend fairness and consistency principles and/or the principles underlying sovereign immunity." Id. at *8. The Court, applying the definitions for compulsive and permissive counterclaims set forth in Fed. R. Civ. P. 13(a) and (b) and the "logical relationship test,"[20] ultimately found that the

[20] "When there is a 'logical relationship between the counterclaim and the main claim,' the counterclaim arises out of the same transaction or occurrence and is considered to be compulsory." Oneida Indian Nation, 2007 WL 2287878, at *8 (quoting Jones v. Ford Motor Credit Co., 358 F.3d 205, 209 (2d Cir. 2004).

counterclaims did not seek affirmative recovery. Id. at *8 (internal quotation marks and citation omitted). Citing Lapides, the Court held that "equitable principles countenance against the Court allowing Plaintiffs to raise the immunity shield to prevent the Nation from asserting counterclaims designed to defeat Plaintiffs' related claims." Id. at *9. Thus, the Court held "that Plaintiffs have waived their sovereign immunity and the Nation's counterclaims are not barred by the Eleventh Amendment for purposes of this litigation." Id.

The Court finds that the rationale set forth in the bankruptcy case Charter Oak and applied to a compact in Oneida Indian Nation should not be extended to CERCLA actions. The Second Circuit based its conclusion that permissive counterclaims capped by a set off limitation may be permitted in a bankruptcy action on the need to avoid inconsistency, anomaly, and unfairness. 361 F.3d at 768. Although such concerns are understandable in the context of the bankruptcy proceeding in Charter Oak, where the court noted that "fairness and consistency" favored an approach that would permit a debtor to reduce or eliminate its indebtedness to the state, these equitable principles do not equally apply in a CERCLA action. Id. at 769. In Charter Oak, the Court noted that refusing permissive counterclaims capped by a setoff "would allow states that are creditors to reap benefits from filing proofs of claim in bankruptcy actions while permitting them to withhold the debts they owe to the estate, giving them a distinct and unfair advantage over other (non-state) creditors." Id. Although the state seeks a "financial benefit" in a CERCLA cost recovery action, it is solely in the form of recovery of funds it has already expended from a party who has been determined liable. Unlike

in the bankruptcy proceeding in Charter Oak, the state is gaining no financial advantage over another party, but a mere repayment of costs it expended on the polluter's behalf.

The clear intent behind CERCLA is to place the cost of environmental clean up on the polluter. By allowing the liable party to reduce its indebtedness to the government by arguing that the costs were inconsistent with the national contingency plan and by bringing forth CERCLA-based claims for contribution, CERCLA provides a defendant with multiple avenues to reduce its liability to the government. See, e.g., Lockheed Martin Corp., 2015 WL 412324, at *4 (noting that CERCLA facilitates the achievement of Congress' goal of placing the cleanup costs on the polluter). By contrast, under Charter Oak, the relevant statutory provision, Bankruptcy Code § 106(c), provided that the state waives its immunity with respect to both compulsory and permissive claims of the debtor's estate. Id. at 766. Thus, the clear intent behind the relevant statute in Charter Oak was to permit debtors to bring such claims against the state.

Accordingly, the Court declines to extend the holding in Charter Oak and applied in Oneida Indian Nation to permit permissive counterclaims in a CERCLA cost recovery action, even where capped by a setoff limitation.

4. **Counterclaim 2: Declaratory Judgment under § 9613(g)(2) and the Declaratory Judgment Act**[21]

[21] When faced with a request for a declaratory judgment pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a), a district court must inquire:

> [1] whether the judgment will serve a useful purpose in clarifying or

In GE's second counterclaim it requests, in the event the Court finds GE to be a liable party, a declaration that: (1) there is a reasonable basis for divisibility of harm at the Site; (2) "the State is liable for any response costs beyond GE's divisible share"; and (3) "the State is liable to GE for all response costs to be incurred by GE in the future which exceeds GE's divisible share" and that "such judgment be "binding in this action and in any future action by or against the State under CERCLA §§ 107 or 113(f) in connection with the Site." Dkt. No. 9 at 18. The State argues that these requests are barred by the Eleventh Amendment. Further, the State contends that the second counterclaim must be dismissed because it seeks affirmative relief. Dkt. No. 31 at 10 n.2.

As a threshold matter, the Court is confused by GE's cite to section 9613(g)(3) as a basis for its declaratory relief request. "CERCLA section 113(g)(2) [9613(g)(2)] requires a district court to '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.'" New York v. Solvent Chemical Co., Inc, 664 F.3d 22, 26 (2d Cir. 2011) (quoting 42 U.S.C. § 9613(g)(2)). By contrast, section 9613(g)(3) sets forth statutes of limitations for contribution claims. 42 U.S.C. § 9613(g). Thus, the

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> settling the legal issues involved; . . . [2] whether a judgment would finalize the controversy and offer relief from uncertainty[;] . . . [3] whether the proposed remedy is being used merely for procedural fencing or a race to res judicata; [4] whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court; and [5] whether there is a better or more effective remedy.

Solvent Chemical Co., Inc., 664 F.3d at 26 (quoting Dow Jones & Co., 346 F.3d at 359-60 (internal quotation marks omitted).

Court concludes that the only sensible reading of GE's second counterclaim is that GE intended to seek declaratory relief pursuant to section 9613(g)(2). Thus, the Court will proceed with its review of this portion of GE's counterclaim with this understanding.

It appears that, in determining whether requests for declaratory relief are barred due to a state's sovereign immunity, a court is to consider whether the requests "are no broader than those of [the government]" and, thus, "might . . . qualify as defensive counterclaims that would ordinary be cognizable against a state plaintiff." Massachusetts v. Wampanoag Tribe of Gay Head, __F. Supp. 3d __ , 2015 WL 854850, *15 (D. Ma. Feb. 27, 2015). The Tenth Circuit, in United States v. Hardage, 982 F.2d 1436 (10th Cir. 1992), held that section 9613(g)(2) permits entry of a declaratory judgment as to *liability* of future response costs, though not the award of future response costs. See also Solvent Chemical Co., Inc., 664 F.3d at 27.

Here, the Court concludes that GE's second counterclaim does not request affirmative relief insofar as it seeks both a declaration: (1) as to a divisibility of harm, and (2) that the State is liable for response costs beyond GE's divisible share, as such requests are defensive and do not appear to seek relief beyond that contemplated by the State in its cost recovery action. See generally Wampanoag Tribe of Gay Head, 2015 WL 854850, *15. However, the Court declines, at this juncture, to determine whether these portions of GE's request for declaratory relief could be considered to arise out of the same transaction or occurrence as the State's claim. As discussed below, additional development of the facts of this case is necessary for the Court to make that determination. Therefore, the Court defers a decision whether a declaration

that, should GE be determined a liable party, there is a reasonable basis for a divisibility of harm at the site and the state liable for response costs beyond GE's divisible share, arises out of the same transaction or occurrence as the State's claim. Thus, the insofar as the State seeks to dismiss such portions of GE's second counterclaim, this request at this time, is denied without prejudice.

The portion of GE's second counterclaim that requests a declaration "that the State is liable to GE for all response costs to be incurred by GE in the future which exceeds GE's divisible share" and that such declaration be binding in this action and in future actions is not limited to defensive relief. Dkt. No. 9 at 18. GE's request for a declaration that the state is liable to GE for costs and damages to be incurred in the *future* seeks relief beyond that sought by the State in its cost recovery action. In pursuing this action under section 9607(a), the State sought relief only for *past* response costs already expended in "investigation, remediation, oversight, operation, maintenance, and management at the Site." Dkt. No. 1 at 18-19. Although the Court acknowledges that this portion of the counterclaim does not seek an allocation or award of future response costs, but a declaration as to *liability* for such costs, the practical result of granting this declaratory relief request could lead to an award of affirmative relief from the State. Should the Court grant this request, the Court would essentially be authorizing an affirmative reward should GE bring a future action or motion against the State for allocation of liability for these future response costs.[22] See generally

[22] The Court does not render an opinion as to whether sovereign or Eleventh Amendment immunity would permit or prohibit such an action.

Hardage, 982 F.2d at 1445-46 (noting that, where the court granted declaratory judgment as to future liability, the liable party could later challenge the allocation of that relief by arguing its inconsistency with the NCP in a future action) (citations omitted); Solvent Chemical Co., Inc., 664 F.3d at 27 ("Once the uncertainties regarding ongoing response costs have been resolved, a declaratory judgment allows the parties to invoke the jurisdiction of the district court pursuant to 28 U.S.C. § 2202 and obtain 'further relief' in the form of an order establishing the precise costs that each party will bear."). GE provides no case, nor could the Court locate any, wherein a court granted a private defendant's counterclaim for a declaration that the state plaintiff is liable for all *future* response costs beyond the private defendant's divisible share.

Therefore, the Court concludes that granting a declaratory judgment stating that the State is liable to a private party for future response costs amounts to a grant of affirmative relief that is barred by the State's Eleventh Amendment immunity. Accordingly, insofar as the State seeks dismissal of this portion of GE's third counterclaim, its motion is granted. The motion, insofar as it seeks to dismiss GE's third counterclaim is otherwise denied.

B. **Motion to Dismiss Counterclaims pursuant to 12(b)(6)**

The State argues, among other things, that GE's counterclaims fail to state a claim upon which relief can be granted because "the State at all times acted in a regulatory capacity, as a result of an emergency, and otherwise rendered care and advice." Dkt. No. 18-5 at 10. The State further contends, "[t]o the extent that the court

exercises jurisdiction over GE's counterclaims, the State is not within the scope of liability set forth in CERCLA's scheme and is expressly protected from liability under CERCLA Section 107(d)(1) and (2)" and "cannot be considered to be within the class of persons encompassed in Section 107(a) as the owner or operator of a facility, or as one who arranged for disposal of hazardous substances." Id. Finally, the State contends that "[t]o the extent that GE's counterclaims allege facts from an entirely different point in time, involve different circumstances, and are brought against the State in a capacity other than the one in which it is suing, they cannot be considered to arise from the same transaction and occurrence under Rule 13(a) and subject to a waiver of immunity." Id. at 33-34.

The Court declines to determine, at this time, whether GE's remaining counterclaims arise out of the same transaction or occurrence as the State's claims. As discovery is not complete, and the facts have not yet been fully developed, the Court is unable to make a determination on this ground. Accordingly, a determination whether the counterclaims arose out of the same transaction or occurrence is, that this point, premature. See generally, Green, 952 F. Supp. at 678-79 ("Only when the facts of the case have been more well developed will the court be able to determine the answer to this question."). It is also premature for the Court to be able to conclude whether the State, in its involvement in remedying the land at issue, acted in an regulatory capacity, emergency capacity, or was rendering care or advice, or whether the State fits into the definition as owner, operator, or arranger of hazardous substances, as defined under CERCLA.

Accordingly, as the Court is unable to determine, at this time, the merits of the remaining counterclaims, the State's motion to dismiss GE's counterclaims pursuant to Rule 12(b)(6) is denied, without prejudice to the State's ability to raise these claims at later point in the case.

V. **Conclusion**

WHEREFORE, it is hereby:

ORDERED that plaintiffs' motion to dismiss defendant's counterclaims (Dkt. No. 18) pursuant to Fed. R. Civ. P. 12(b)(1) is **DENIED** insofar as it seeks to dismiss defendant's first counterclaim for CERCLA contribution; and it is further

ORDERED that plaintiffs' motion, pursuant to Fed. R. Civ. P. 12(b)(1), to dismiss defendant's second counterclaim, is **GRANTED** insofar as it seeks to dismiss the portion of the second counterclaim that requests a declaration that "the State is liable to GE for all response costs to be incurred by GE in the future which exceeds GE's divisible share" with such "declaratory judgment binding in this action and in any future action by or against the State under CERCLA §§ 107 or 113(f) in connection with the Site" (Dkt. No. 9 at 18), and such portions of the counterclaim are **DISMISSED** with prejudice; and plaintiffs' motion to dismiss defendant's second counterclaim is otherwise **DENIED** insofar as it seeks to dismiss the remainder of defendant's second counterclaim; and it is further

ORDERED that plaintiffs' motion, insofar as it seeks to dismiss, pursuant to Fed. R. Civ. P. 12(b)(1), defendant's third counterclaim for recoupment is **GRANTED**,

and such counterclaim is **DISMISSED** with prejudice; and it is further

ORDERED that any requested relief not addressed above is **DENIED**; and it is further

ORDERED that the Clerk of this Court serve a copy of this Memorandum-Decision and Order upon the parties in accordance with Local Rules.

IT IS SO ORDERED.

Dated: September 29, 2015
Albany, New York

Christian F. Hummel
U.S. Magistrate Judge