United States District Court, E.D. California.
AMERIPRIDE SERVICES, INC., A Delaware corporation, Plaintiff,
v.
VALLEY INDUSTRIAL SERVICE, INC., a former California corporation, et al., Defendants.
And Consolidated Action and Cross- and Counter-Claims.
No. CIV. S-00-113 LKK/JFM.

Feb. 28, 2007.

ORDER

LAWRENCE K. KARLTON, United States District Court Senior Judge.

This litigation addresses the environmental cleanup of the soil and groundwater at 7620 Wilbur Way, Sacramento, California. The property at issue was used as a laundry facility. AmeriPride, the current owner of the facility, brought suit against Mission Linen ("Mission") and several other parties who were, at some point and some manner, connected to the property.[FN1]

FN1. AmeriPride brought nine causes of action against Mission Linen: (1) CERCLA cost recovery; (2) CERCLA contribution; (3) Liability un the California Hazardous Substance Accountability Act; (4) Breach of contract (against Mission only); (5) Contribution under Porter-Colegne Act; (6) Contractual indemnity; (6) equitable indemnity; (7) mandatory injunction; and (8) declaratory relief.

Pending before the court are three motions for summary judgment. Two are brought by Mission. The first seeks summary judgment on AmeriPride's breach of contract claim. Specifically, Mission argues that it never agreed to indemnify Ameripride for environmental liability. The second motion filed by Mission seeks summary judgment on the remainder of AmeriPride's claims, alleging that Mission was never an "owner" as defined by CERLCA and therefore cannot be liable as a potentially responsible party. AmeriPride also seeks summary judgment to enforce an indemnity provision in the sales contract with Mission.

I.

FACTS[FN2]

FN2. Undisputed unless otherwise noted.

The property at issue was developed into a dry cleaning and uniform-washing facility by Valley Industrial Services ("Valley Industrial") in 1965. The solvent used in the dry cleaning process was PCE. Dry cleaning was discontinued someone time 1981 or 1982.

In the early 80's, Mission began negotiations with Petrolane (the company which wholly owned Valley Industrial) to purchase five industrial laundry facilities, including the property located at Wilbur Way. On March 1, 1983, Mission entered into a purchase agreement with Valley Industrial and Petrolane to purchase the facilities for $17 million. The president of Petrolane specifically asked that the federal government be involved because he was concerned about antitrust issues.

Prior to closure of the sale, Mission provided the purchase agreement to the Federal Trade Commission ("FTC") for approval. Mission agreed not to consummate the March 1, 1983 purchase agreement before June 9, 1983 without the FTC's consent.

The FTC reviewed the agreement and determined that due to Mission's other holdings, the sale of all five properties to Mission would violate antitrust law. Mission would be permitted to operate only two of the facilities it had negotiated to purchase, one in Union City and the other in Anaheim. The FTC informed Mission of its determination on March 16, 1983.

In order to comply with the FTC's mandate, Mission was required by the FTC to acquire all five of the businesses it had negotiated to purchase and then divest itself of the forbidden businesses (including the property at Wilbur Way) immediately upon closing of the transactions. In short, the FTC required that Mission purchase and sell the property simultaneously.

Accordingly, Mission entered into negotiations for Welch's to purchase the businesses that the FTC barred Mission from owning. At the closing of the

sales transactions, all five businesses were deeded from Valley Industrial to Mission, and Mission immediately deeded parcels associated with the three "barred" businesses-including the property at Wilbur Way-to Welch's. Defendant Valley Industrial executed a deed to Mission on June 9, 1983 and Mission executed a deed to Welche's on June 10, 1983. The deeds were recorded concurrently on June 30, 1983.

Fourteen years later, in 1997, it was discovered that the soil at the Wilbur Way property was contaminated with PCE. AmeriPride filed suit in 2000 and asserted, among other things, that Mission was liable as a former owner under CERCLA.

II.

STANDARDS

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *See also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Secor Limited v. Cetus Corp.*, 51 F.3d 848, 853 (9th Cir.1995).

Under summary judgment practice, the moving party

> [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.' " *Id.* Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *See id.* at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id* . In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *See also First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968); *Secor Limited*, 51 F.3d at 853.

In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Fed.R.Civ.P. 56(e); *Matsushita*, 475 U.S. at 586 n. 11; *See also First Nat'l Bank*, 391 U.S. at 289; *Rand v. Rowland*, 154 F.3d 952, 954 (9th Cir.1998). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Owens v. Local No. 169, Assoc. of Western Pulp and Paper Workers*, 971 F.2d 347, 355 (9th Cir.1992) (quoting *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, *Anderson*, 477 U.S. 248-49; *see also Cline v. Industrial Maintenance Engineering & Contracting Co.*, 200 F.3d 1223, 1228 (9th Cir.1999).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First Nat'l Bank*, 391 U.S. at 290; *See also T.W. Elec. Serv.*, 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.' " *Matsushita*, 475 U.S. at 587 (quoting Fed.R.Civ.P. 56(e) advisory committee's note on 1963 amendments); *see also International Union of Bricklayers & Allied Craftsman Local Union No. 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1405 (9th Cir.1985).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c); *See also In re Citric Acid Litigation*, 191 F.3d 1090, 1093 (9th Cir.1999).

The evidence of the opposing party is to be believed, *see Anderson*, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, *see Matsushita*, 475 U.S. at 587 (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) *(per curiam)); See also Headwaters Forest Defense v. County of Humboldt*, 211 F.3d 1121, 1132 (9th Cir.2000). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. *See Richards v. Nielsen Freight Lines*, 602 F.Supp. 1224, 1244-45 (E.D.Cal.1985), *aff'd*, 810 F.2d 898, 902 (9th Cir.1987).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts.... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita*, 475 U.S. at 587 (citation omitted).

III.

ANALYSIS

The court first addresses the owner/control issue and then turns to the question of indemnity. For the reasons discussed below, the court concludes that Mission was not an "owner" within the meaning of CERCLA and therefore, cannot be liable as a potentially responsible party ("PRP"). The court also concludes that a plain reading of the contract supports a finding that Mission is not obligated to indemnify AmeriPride for environmental liability.

A. OWNERSHIP

In its third amended complaint, AmeriPride brought claims against Mission for, inter alia, cost recovery pursuant to CERCLA, 42 U.S.C. 9607(a), and contribution pursuant to CERCLA, 42 U.S.C. 9613(f).[FN3] Both parties agree that AmeriPride's other claims against Mission are derivative of the CERCLA claims and that the both federal and state law rely on the same definition of "owner." Mission seeks partial summary judgment on the grounds that it was never an "owner" of the facility.

FN3. Under Section 113, "Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title." 42 U.S.C. § 9613(f). *See also Fireman's Fund Ins. Co. v. City of Lodi, Cal.*, 302 F.3d 928, 945 (9th Cir.2002) ("CERCLA § 107 and CERCLA § 113 provide different remedies: a defendant in a § 107 cost-recovery action may be jointly and severally liable for the total response cost incurred to cleanup a site, whereas a defendant in a § 113(f) contribution action is liable only for his or her pro rata share of the total response costs incurred to cleanup a site.")

1. "Ownership" within context of CERCLA liability

In order to succeed on either of its CERCLA claims against Mission, AmeriPride must establish that Mission is a potentially responsible party. Ameripride must demonstrate that (1) the site on which the hazardous substances are contained is a "facility" under CERCLA's definition of that term; (2) a "release" or "threatened release" of any "hazardous substance" from the facility has occurred; (3) such "release" or "threatened release" has caused the plaintiff to incur response costs that were "necessary" and "consistent with the national contingency plan,"; and (4) that Mission is within one of four classes of persons subject to the liability provisions of Section 107(a). *3550 Stevens Creek Assoc. v. Barclays Bank*, 915 F.2d 1355, 1358 (9th Cir.1990); 42 U.S.C. § § 9613(f); 9607(a).

The four classes of responsible persons are defined as follows:
1) The owner and operator of a vessel or a facility;
2) Any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;
3) Any person who by contract, agreement, or otherwise arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances; and
4) Any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous

substance.

42 U.S.C. § § 9607(a)(1)-(4).

Given that Mission is not the current owner, the court must determine if Mission, at the time of a disposal of a hazardous substance, owned the Wilbur Way property. *See Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 846 (9th Cir.1992) ("The trigger to liability under § 9607(a)(2) is ownership or operation of a facility at the time of disposal, not culpability or responsibility for the contamination.")

The word "owner" is defined in CERCLA as "any person owning or operating [a] facility" where a disposal of hazardous substances occurred. 42 U.S.C. § 9601(20)(A)(ii). As the Circuit has remarked, this definition is hardly helpful:
CERCLA gives no definition of "owner" and therefore does not tell us whether parties owning an interest that is much less than a fee-such as an easement-are to be deemed owners for purposes of CERCLA liability. Rather, 42 U.S.C. § 9601(20)(A) defines "owner or operator" as "any person owning or operating" a toxic waste facility, which is a bit like defining "green" as "green."

Long Beach Unified School Dist. v. Dorothy B. Godwin California Living Trust, 32 F.3d 1364, 1368 (9th Cir.1994). Despite the lack of a statutory definition, the *Long Beach* court explained that "[c]ircularity too provides a clue to the legislature's purpose, for it 'strongly implies ... that the statutory terms have their ordinary meanings rather than unusual or technical meanings.' " *Id.* at 1368 (internal citations omitted). *See also Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1498 (11th Cir.1996) (in the absence of any unique definition of "ownership" in CERCLA, court looks to state law to define the ownership).

Under California law, "ownership" is defined as "the right of one or more persons to possess and use it to the exclusion of others ." Cal. Civ.Code § 654. "Owner" in its general sense means one who has full proprietorship in and dominion over property. *Directors of Fallbrook Irr. Dist. v. Abila*, 106 Cal. 355 (1895).

2. Whether Mission "Owned" the Property at Wilbur Way

Mission argues that it was never an "owner" under California law. Mission maintains that it only held title to the property for several seconds and that it never exercised any control or exclusive use over the property. AmeriPride responds by arguing that although Mission did not yet possess the deed to the property, Mission exercised equitable ownership over the property between the time it signed the purchase agreement (March, 1983) and the time it signed over the deed to Welch's (June, 1983). The question of whether Mission "owned" the property may be analyzed with both a formal and function perspective.

Mission did not formally own the property in question until it had obtained the deed from Valley Industrial on June 9, 1983. *See Estate of Stephens*, 28 Cal.4th 665, 671 (2002) ("a deed is a written instrument conveying or transferring the title to real property; it is an executed conveyance and operates as a present transfer of the real property.") It is undisputed that Valley Industrial executed a deed to Mission on June 9, 1983 and Mission executed a deed to Welche's on June 10, 1983. The deeds were recorded concurrently on June 30, 1983. Thus, under a formal view of the situation, Mission only technically owned the property for the time it took for the deed to be transferred to Welch's-less than 24 hours. It is undisputed that in this short amount of time, Mission did "possess and use [the property] to the exclusion of others." Cal. Civ.Code § 654.

AmeriPride suggests that the court should take a more broad and functional approach to examining the question of ownership. AmeriPride argues that even though Mission did not hold title to the property, it equitably owned the property from the time Mission signed the purchase agreement with Valley Industrial in March of 1983, to the time Mission signed the deed over to Welch's in June. Even if the court were to accept AmeriPride's argument that equitable ownership may constitute ownership for purposes of CERCLA, there is simply no evidence that Mission did in fact "possess and use to the exclusion of others" the property in question.

Mission presents the testimony of John Greaver, who worked at the laundry facility during that time. Mr. Greaver states that Mission personnel never operated the laundry business at the property nor did they conduct business of any nature at the property. Mission SUF 16. Indeed, none of the records, business contacts or customer contacts for the three properties, including the Wilbur Way property, were ever transferred to Mission. The FTC also made it clear that the sale was not to be final until June of 1983. In short, Mission presents undisputed facts which demonstrate that, even when viewing the period from March to June, Mission did not possess

the property in a way that is consistent with ownership.

The only evidence relied upon by AmeriPride is a interoffice communication dated April 5, 1983. The memo is from the president of Valley Industrials to the president of Mission. The memo reveals that at the time, Mission and Valley Industrials were thinking through how Mission might structure staffing and organization. The memo does not make specific reference to the Wilbur Way property. Even when drawing all reasonable inferences in favor of AmeriPride, the court cannot conclude that this evidence establishes that Mission was actually possessing and controlling the laundry facility at Wilbur Way. At most, the evidence reveals that Mission may have been contemplating the day it took control, but the evidence does not show that Mission was, in fact, in control of the Wilbur Way property.

Concluding that Mission did not "own" the property for purposes of CERCLA is consistent with the small body of case law that exists on this point. For example, in *Robertshaw Controls Co. v. Watts Regulator Co.,* 807 F.Supp. 144, 150 (D.Me.1992) the court found that defendants who only held ownership for 24 hours were not "owners" for purposes of CERCLA. The court concluded that the defendants were merely a conduit for the title to transfer; it explained that, "[t]o impose owner liability under Section 9607(a) on the basis of one twenty-four hour period of title possession during a two-step sales transaction seems beyond the bounds of congressional intent." *Robertshaw Controls Co.*, at 150. *See also In re Diamond Reo Trucks, Inc.,* 115 B.R. 559, 568 (Bkrtcy.W.D.Mich.1990) (holding that no CERCLA liability could be imposed on an entity that held title to the site as a conduit and only momentarily).

The legislative history of CERCLA and the explicit purpose of CERCLA provides additional support for the court's conclusion that Mission did not "own" the property in question. *See Perlman v. Catapult Entm't, Inc.*, 165 F.3d 747, 753 (9th Cir.1999) (explaining that courts shall resort to legislative history, even where the plain language is unambiguous, "where the legislative history clearly indicates that Congress meant something other than what it said.")

It is well established that CERCLA was enacted to "provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites." *3550 Stevens Creek Assocs.,* 915 F.2d at 1357 (quoting Pub.L. No. 96-510, 94 Stat. 2767 (1980)). However, CERCLA also has a secondary purpose-assuring that "responsible" persons pay for the cleanup:
CERCLA was a response by Congress to the threat to public health and the environment posed by the widespread use and disposal of hazardous substances. Its purpose was [(1)] to ensure the prompt and effective cleanup of waste disposal sites, and [(2)] to assure that parties responsible for hazardous substances bore the cost of remedying the conditions they created.

Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863, 880 (9th Cir.2001) (citations omitted). Moreover, the House Report on the legislation stated that " '[o]wner' is defined to include not only those persons who hold title to a ... facility, but those who, in the absence of holding a title, possess some equivalent indicia of ownership." H.R.Rep. No. 172, 96th Cong., 2d Sess. 36, reprinted in 1980 U.S.Code Cong. & Admin. News 6119, 6160, 6181. In short, the legislative history and explicit purpose of CERCLA suggest that ownership means that there needs to be a certain amount of control over the property. Merely acting as a straw-man, without more, does not trigger liability.

Finally, even if Mission were considered an "owner" under CERCLA, there is no evidence that Mission owned the Wilbur Way property "at the time of disposal of any hazardous substance." 42 U.S.C. § 9607(a)(2). In other words, there needs to have been a release from the property while Mission owned it.

In the case at bar, there is no evidence that any "release" occurred between March of 1983 and June of 1983. AmeriPride merely states "if the Court determines that any alleged leaks occurred, for any leaks that occurred from March to June 1983, Mission is liable." AmeriPride Opp'n at 9. AmeriPride fails, however, to tender any evidence that there were in fact releases between the months of March and June, 1983. Although there is general evidence that releases occurred prior to AmeriPride taking ownership of the facility, there is no evidence as to whether these releases occurred during that four month period in 1983. In short, there is no evidence of a release. On this ground alone, the court may conclude that Mission is not an "owner" as defined by CERCLA.

In conclusion, the court finds that Mission cannot be liable as a potentially responsible party under CERLCA as it never owned the property in question. FN4

FN4. The case provided to the court during oral argument, *United States v. Carolawn Co.,* is not instructive. There, the court noted that the facts regarding ownership were "cloudy" and thus the court could not resolve the question of ownership. *United States v. Carolawn Co.,* 21 E.R.C. 2129 (D.S.C.1984).

B. CONTRACTUAL INDEMNITY

Even though Mission is not liable under CERLCA, AmeriPride maintains that the purchase agreement ("agreement") between Mission and AmeriPride indemnifies AmeriPride for costs associated with environmental litigation. Both AmeriPride and Mission filed motions for summary judgment on this issue.

AmeriPride's fourth claim against Mission, for breach of contract, is premised entirely on certain language in Section 18 of the agreement.[FN5] Mission argues that this section does not provide for indemnification and that the parties never reached an agreement, explicit or implied, regarding liability or indemnification for environmental contamination. AmeriPride, on the other hand, argues more generally that the contract taken as a whole does in fact provide for indemnification. For the reasons set forth herein, the court concludes that the agreement does not cover indemnification against CERCLA liability.

FN5. Section 18 of the agreement reads as follows:
Records and Litigation. For a period of seven (7) years subsequent to Closing Date, Purchaser agrees to preserve such of the records of the Rental Business pertaining to operations prior to the Closing Date, as are in Purchaser's possession, as were typically maintained by Seller prior to Closing Date, or, at its option, to return these records to Seller for preservation by Seller. With respect to claims and items of litigation resulting from operations of the Rental Business prior to the Closing Date, Seller shall continue to defend such matters without regard to the limitations on survival of representations and warranties set forth herein and will be liable for all liabilities and expenses resulting therefrom. Purchaser will, however, make available such of its personnel as Seller reasonably requires, in connection with the defense of of such claims and items of litigation, but only on the condition that Seller reimburse Purchaser for expenses incurred by it in making such persons available, such as wages, fringe benefits, travel expenses and other out-of-pocket expenses. (emphasis added)

1. Interpreting Indemnity Provisions in CERCLA Cases

The court begins by recognizing that CERCLA contains a provision expressly addressing the permissibility of indemnification clauses:
*8 No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

42 U.S.C. § 9607(e)(1). The Ninth Circuit has interpreted this provision to mean "that enforcement of indemnification clauses does not frustrate public policy as expressed in CERCLA." *Jones-Hamilton Co. v. Beazer Materials & Services, Inc.,* 973 F.2d 688, 692 (9th Cir.1992).

California law controls the court's interpretation of the indemnification provision. *Mardan Corp. v. C.G.C. Music, Ltd.,* 804 F.2d 1454, 1458 (9th Cir.1986). Under California law, any "contract must be construed as a whole, with the various individual provisions interpreted together so as to give effect to all, if reasonably possible or practicable." *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 68 Cal.App. 4th 445, 473 (1998) (citing Cal. Civ.Code, § 1641; Code Civ. Proc., § 1858; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 686, pp. 619-620.)

Indemnity agreements are construed under the same rules which govern the interpretation of other contracts. *Myers Building Industries, Ltd. v. Interface Technology, Inc.,* 13 Cal.App. 4th 949, 969 (1993). Accordingly, the contract must be interpreted so as to give effect to the mutual intention of the parties. Cal. Civ.Code § 1636. "The intention of the parties is to be ascertained from the 'clear and explicit' language of the contract. And, unless given some special meaning by the parties, the words of a contract are to be understood in their 'ordinary and popular sense.' " *Continental Heller Corp. v. Amtech Mechanical*

Services, Inc., 53 Cal.App. 4th 500, 504 (1997) (citing Cal. Civ.Code, § § 1638-1639, 1644). Indeed, in "interpreting an express indemnity agreement, the courts look first to the words of the contract to determine the intended scope of the indemnity agreement." *Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.*, 234 Cal.App.3d 1724, 1737 (1991)

As a general matter, in determining whether a certain indemnity provision covers environmental liabilities, courts look at whether the clause in question is either "broad enough to cover any and all claims, or clearly refer[s] to environmental liability." *City and County of Honolulu v. Churchill*, 167 F.Supp.2d 1143, 1154 (D.Haw.2000); *see also Purolator Products Corp. v. Allied-Signal, Inc.*, 772 F.Supp. 124, 132 (W.D.N.Y.1991); *Beazer East Inc. v. Mead Corp.*, 34 F.3d 206, 211 (3rd Cir.1994) (stating that the clause must be either specific enough to include CERCLA liability or general enough to include any and all environmental liability).

Several jurisdictions have found that pre-CERCLA indemnification provisions must express a clear and unequivocal intent to include CERLCA liability. *See, e.g., Kerr-McGee Chemical Corp. v. Lefton Iron & Metal*, 14 F.3d 321 (7th Cir.1994) (finding indemnification provision in purchase agreement for any "claim ... concerning pollution or nuisance" sufficiently clear and unequivocal to indemnify seller for CERCLA liability arising from seller's own negligence), *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10, 15 (2d Cir.1993) (finding indemnification agreements sufficiently broad so as to state a clear and unmistakable intent to include CERCLA liability in indemnification agreement even though there was no mention of environmental liability in provision).

2. Whether the Purchase Agreement Contains an Indemnity Clause Which Covers Environmental Liability

The court notes at the outset that the purchase agreement contains an express indemnity provision. Section 13(b), states in relevant part:

(b) Indemnification. The Seller shall indemnify and hold the Purchaser harmless against and in respect of any liabilities, claims, damages or deficiencies asserted against or suffered by Purchaser, its successors or assigns, arising from any misrepresentation, breach of warranty or a non-fulfillment of any agreement on the part of Seller under this Agreement, or any misrepresentation in or omission from any certificate or other instrument to be furnished to Purchaser hereunder, and any and all actions, suits, proceedings, demands, assessments, judgments, costs and expenses incident to any of the foregoing, subject, however, to the twelve (12) month limitation provided, above (except as otherwise provided herein).

The twelve month limitation is in reference to Section 13(a), which states that:

Subject to the provisions hereof, all covenants, agreements,-representations and warranties of Seller and Purchaser under, this Agreement, with the exception of Subsection 7(n), shall survive the Closing for a period of twelve (12) months following Closing ...

Neither party appears to dispute that given the twelve month limitation, this indemnity provision explicitly does not cover the type of indemnity AmeriPride now seeks.

Given that the indemnity provision of the agreement is of no assistance to AmeriPride, AmeriPride seeks indemnity elsewhere in the agreement. It its complaint, AmeriPride maintains that section 18 of the agreement provides for indemnification. Section 18 of the agreement reads as follows:

Records and Litigation. For a period of seven (7) years subsequent to Closing Date, Purchaser agrees to preserve such of the records of the Rental Business pertaining to operations prior to the Closing Date, as are in Purchaser's possession, as were typically maintained by Seller prior to Closing Date, or, at its option, to return these records to Seller for preservation by Seller. With respect to claims and items of litigation resulting from operations of the Rental Business prior to the Closing Date, Seller shall continue to defend such matters without regard to the limitations on survival of representations and warranties set forth herein and will be liable for all liabilities and expenses resulting therefrom. Purchaser will, however, make available such of its personnel as Seller reasonably requires, in connection with the defense of such claims and items of litigation, but only on the condition that Seller reimburse Purchaser for expenses incurred by it in making such persons available, such as wages, fringe benefits, travel expenses and other out-of-pocket expenses.

The parties contest whether this provision constitutes an indemnification provision and if it does, whether it

covers environmental liabilities.

The court first examines the plain meaning of the words to determine whether Section 18 is in fact an indemnification provision. *See* Cal. Civ.Code § 1648 ("When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone.") The words of Section 18 denote Mission's duty to "continue to defend" ongoing litigation which pertains to the rental business. Prior the phrase "continue to defend" is a qualifying statement: "with respect to claims and items of litigation resulting from operations of the Rental Business prior to the Closing Date." The plain meaning of "continue to defend" along with the qualifying phrase, mean that the provision does not cover prospective liability and instead covers litigation which is on-going at the time of the agreement.

The Oxford University Press defines "continue" as "persist in an activity or process; remain in existence, operation, or a specified state; carry on with ..." In light of the court's duty to view the words of a contract as to be "understood in their 'ordinary and popular sense,' " *Continental Heller Corp.,* at 504, the court cannot agree that this provision includes litigation which has not yet commenced at the time of the agreement.

Reading the contract as a whole also supports the finding that section 18 is not an indemnity provision. *See City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal.App. 4th at 473 (contract must be construed as a whole). As Mission correctly points out, the agreement explicitly discusses indemnity in several different sections of the agreement. In four separate provisions, the agreement addresses indemnity:

"Purchaser will indemnify and hold Seller harmless from liability under the accrued contracts accruing or incurred subsequent to closing." (Section 1 (after sub paragraph (d))

"Purchaser shall indemnify, defend and hold Seller Harmless from all costs, expenses, fees ..." (Section 7(n) at bottom of P.7 and top of 8);

"Seller shall indemnify and hold the Purchaser harmless against and in respect of any liabilities, claims, damages, or deficiencies...." (Section 13(b));

"Seller and purchaser shall each indemnify the other and hold it harmless against and in respect to any claim for brokerage or other commissions" (Section 14); and

"Seller covenants and agrees to protect, defend, indemnify and save and hold Purchaser harmless from and against any obligations and liabilities of Seller...." (Section 16). [Emphasis added in each instance.]

When construing the contract as a whole and when looking "to the words of the contract to determine the intended scope of the indemnity agreement," *Smoketree-Lake Murray,* 234 Cal.App.3d at 1737, it is apparent that Section 18 is not an indemnity provision. The court cannot give a more expansive reading of this section, as it is well established that, "[h]owever broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." Cal. Civ.Code § 1648. Here, based on a plain reading of the words, it appears that Section 18 addresses litigation which was commenced prior to the closing and which continues. Neither the words of Section 18, nor the other provisions within the four corners of the agreement suggest that the parties intended section 18 to be an indemnity provision (much less an indemnity provision which covers environmental liability).

Even if the court were to construe section 18 as an indemnification provision, it cannot be read so as to cover prospective environmental liability. As previously noted, in determining whether a certain indemnity provision covers environmental liabilities, courts look at whether the clause in question is either "broad enough to cover any and all claims, or clearly refer[s] to environmental liability." *City and County of Honolulu,* 167 F.Supp.2d at 1154. In the case at bar, section 18 clearly does not expressly refer to environmental liability, therefore, the question is whether the provision is broad enough to cover any and all claims.

To interpret section 18 as being broad enough to encompass environmental liability would frustrate other parts of the purchasing agreement. As Mission points out, to read Section 18 as imposing indemnity on any and all claims would be to create, in essence, an "omnibus indemnification provision" making the express indemnification provision (section 13(b)) moot. *See* Mission's Reply Br. at 4. Indeed, section 13 specifically imposes a one-year limit on certain enumerated representations and warranties, a seven year limit on others and clearly lists the representations and warranties covered by the indemnity provision. To read section 18 as covering all claims arising from activities prior to the closing date would be to render section 13 meaningless.

Reading section 18 in a way that makes section 13 moot contradicts well settled cannons of contract interpretation. It is well established that any contract must be construed as a whole, with the various individual provisions interpreted together so as to give effect to all, if reasonably possible or practicable. Cal. Civ.Code, § 1641; Code Civ. Proc., § 1858; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 686, pp. 619-620.) Indeed, courts must interpret contractual language in a manner which gives force and effect to every provision, and not in a way which renders some clauses inoperative or meaningless. *New York Life Ins. Co. v. Hollender*, 38 Cal.2d 73, 81-82, (1951); *Titan Corp. v. Aetna Casualty & Surety Co.*, 22 Cal.App. 4th 457, 473-474 (1994) Reading Section 18 to be so broad as to include environmental liability would be to make the express indemnification provision (Section 13(b)) inoperative and meaningless.[FN6]

FN6. The court also notes that section 18 is easily distinguishable from indemnity provisions which have been found to be so broad as to encompass indemnity for environmental liability. For example, in *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10 (2nd Cir.1993), the Second Circuit held that a provision obliging the indemnitor to indemnify the indemnitee for "all liabilities, obligations and indebtedness of Olin related to [its aluminum business] ... as they exist on the Closing Date or arise thereafter" was "sufficiently broad to encompass CERCLA liability." *Id.* at 15-16. *See also Joslyn Manufacturing Co. v. Koppers Co., Inc.*, 40 F.3d 750, 754 (5th Cir.1995) (holding that two leases were sufficiently broad so as to require indemnification where the leases read "Lessee forever shall ... indemnify ... Carrier ... for ... any and all liability, judgment, outlays and expenses" and "[l]essee agrees to indemnity the Railway Company and save it harmless from any and all claims and expenses that may arise or that may be made for death, injury, loss or damage ..."); *SmithKline Beecham Corp. v. Rohm and Haas Co* ., 89 F.3d 154 (3rd Cir.1996) (finding that an indemnification clause requiring indemnification for "all losses, liabilities, damages or deficiencies "was sufficiently broad to express "the parties' intent to allocate all present and future liabilities" including CERCLA response costs. *Id.* at 159-60); *Purolator Prods. Corp. v. Allied-Signal, Inc.*, 772 F.Supp. 124, 131 (W.D.N.Y.1991) ("all liabilities and obligations ... relating to or arising out of the Assets" sufficiently broad to include CERCLA indemnification); *Polaroid Corp. v. Rollins Envtl. Servs. (NJ), Inc.*, 416 Mass. 684, 624 N.E.2d 959, 966 (1993) (a promise to indemnify the indemnitee for "all liability" arising from the indemnitor's services "broad enough to encompass liability under CERCLA").

Finally, it is well established that "[i]ndemnity provisions are to be strictly construed against the indemnitee." *Heppler v. J.M. Peters Co.*, 73 Cal.App.4th 1265, 1278 (4 Dist.1999). California law also dictates that the specificity of the language used is a key factor in construction of an indemnity agreement. Indeed, "to obtain greater indemnity, more specific language must be used." *Smoketree-Lake Murray*, 234 Cal.App.3d at 1737. In the case at bar, the language in Section 18 is not specific and therefore, greater indemnity cannot be obtained. In short, when strictly construing Section 18 against AmeriPride, it is evident, for all the reasons discussed above, that Section 18 does not provide indemnity for environmental liability.

III.

CONCLUSION

1. Mission Linen's Motion for Summary Judgment regarding the owner/control issue is GRANTED.
2. Mission Linen's Motion for Summary Judgment regarding contractual indemnity is GRANTED.
3. AmeriPride's Motion for Summary Judgment regarding contractual indemnity is DENIED.

IT IS SO ORDERED.