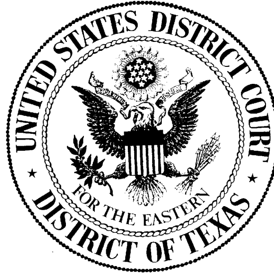

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff**,**	§	
	§	
v.	§	**CIVIL ACTION NO. 1:11-CV-263**
	§	
CHESTER L. SLAY, JR., ***et al.*****,**	§	
	§	
Defendants.	§	

REPORT AND RECOMMENDATION ON MOTION FOR SUMMARY JUDGMENT

Pursuant to 28 U.S.C. § 636(b) and the Local Rules for the United States District Court for the Eastern District of Texas, the District Court referred this proceeding the undersigned United States Magistrate for consideration of pretrial matters and proceedings and entry of a report and recommendation on case-dispositive issues. Pending before the Court is the consolidated defendants/counter-claimants David Durrett, Lewie Byers, Golden Triangle Maritime, LLC, NBR Maritime I, LLC, NBR Maritime II, LLC, and New Birmingham Resources, Inc.'s, (collectively, "NBR" or "NBR Parties"), *Motion for a Traditional and No Evidence Summary Judgment* (doc. #126).

I. Background

A. Claims and Procedural Background

As the parties are aware, the procedural history of this litigation is complicated. On May 26, 2011, the United States filed its complaint in this case, 1:11-CV-263, asserting causes of action for

recovery of response/clean-up costs pursuant to Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607. The United States filed suit seeking recovery of cleanup costs against defendants Chester L. Slay ("Slay"), Texas Family Trust, Odessa Family Trust, Louis Family Trust, Peckham Family Trust, McGee Family Trust, Kaiser Family Trust and Union Texas Limited Partnership.[1] The United States alleged that Slay and the trust entities are "owners and operators" of a Superfund Site within the meaning of CERCLA. The Government also sought a declaratory judgment under Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2) and the Declaratory Judgment Act, 28 U.S.C. § 2201, finding the defendants liable for the response costs or damages connected with the Site. *See Complaint* (doc. #1), at pp. 1-2.

Concurrent with the filing of the Complaint, the United States also filed expedited applications for three prejudgment writs of garnishment against three garnishees: Chambers Trust, NBR Maritime II, LLC, ("NBR II") and Stewart Title. As set forth in the application for writs and the accompanying affidavit of Kenneth Talton, an Environmental Superfund Specialist with the Superfund Division of the EPA, on June 5, 2008, some or all of the defendant trusts conveyed real property including the Superfund Site to NBR II for a total price of $1,088,010.00. At the time of the sale of the property NBR II made partial payment to the defendant owner-trusts at a settlement of $544,005.00. Following litigation between Slay and NBR regarding the sale of the property, Slay and NBR entered into a settlement agreement, the terms of which required that the remainder of the sale price - $544,005.00 - to be paid on or before June 6, 2011. Because the United States contended

[1]The McGee Family Trust, Peckham Family Trust and Union Texas Limited Partnership were voluntarily dismissed by order on November 7, 2011. *See Order of Partial Dismissal* (doc. #99).

that this money is subject to the United States' claim for a debt (the debt being the cleanup and recovery costs for which it has pled under CERCLA), the United States further argued that it was entitled to a writ of garnishment of the $544,005.00 as a prejudgement remedy under the Federal Debt Collection Procedures Act (FDCPA), 28 U.S.C. § 3101 *et seq*. *See Motions for Writ of Garnishment and Brief in Support* (doc. #3, 8, 9, 10).

On May 27, 2011, the Court signed the requisite orders granting the motions for prejudgment writs of garnishment, and the writs of garnishment were issued as to Chambers Trust, NBR, and Stewart Title. On May 31, 2011, NBR filed its answer and an emergency motion to modify the writ of garnishment as to NBR. In the motion to modify the writ, NBR sought to protect its interest in transferring the $544,005.00 to Stewart Title on June 6, 2011, as part of its obligations under the sale contract and settlement agreement regarding the transfer of the property from Slay to NBR. This Court granted that emergency motion to modify, and the writ of garnishment was modified to NBR to allow for the transfer of the funds to Stewart Title.

On June 8, 2011, Stewart Title filed its answer to the writ of garnishment and made its appearance. In its answer, Stewart Title represented that it has custody, control or possession of the $544,005.00 in escrowed funds. *See Answer of Garnishee Stewart Title* (doc. #23).

After receiving numerous briefs and conducting two hearings, the Court ultimately quashed the writs of continuing garnishment. *See Order* (doc. # 130). According to NBR's filings with the Court, after the writs were quashed, Slay accepted delivery of funds at issue in the writs and released the deeds of trust for the subject property as requested by NBR. *See Supplemental Notice of Alteration of Material Facts* (doc. #144). Stewart Title, escrow agent for the $544,005.00 subject to the writs of garnishment, transmitted those funds after the writs were quashed, subject to certain

limitations.[2] *See Exhibit B to Supplement Notice of Alteration of Material Facts*.

The United States, Slay, and the remaining defendant Slay trusts have also since settled the causes of action related to the Government's claims against Slay and the Slay trusts. *See Joint Stipulation and Motion to Dismiss* (doc. #150). An order of partial dismissal regarding those claims has been submitted to the District Court for signature. Upon filing of that order, all that will remain pending in this litigation are the claims asserted between NBR and Slay and the Slay Trusts, as discussed below.

In the interim, on June 6, 2011, Chester Slay, proceeding *pro se* and as trustee of the Louis Family Trust, the Texas Family Trust, Odessa Family Trust, Kaiser Family Trust, McGee Family Trust, Peckham Family Trust, Smith Family Trust and Successor at Interest for the Birch Family Trust (hereinafter "Slay" and "the Slay Trusts" for purposes of the NBR litigation), filed suit against the NBR parties in the 172nd Judicial District Court of Jefferson County, Texas. *See Original Petition, filed with Notice of Removal (doc. #1) in 1:11-CV-302.*

According to the facts set forth in the Original Petition, Slay alleges that he and NBR entered into a settlement agreement on January 10, 2011. *See id.* Under the terms of the settlement agreement, Slay contends that he "provided a wide range of relief to Defendant for all acts prior to the effective date of January 20 in return for payment of the outstanding balance of a $544,005 mortgage by June 6, 2011." *Id.* Slay further alleges that "[s]ubsequent to the agreement being

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[2] According to documents submitted by NBR, specifically the *Escrow Account Settlement Agreement* attached as Exhibit B to NBR's *Supplemental Notice of Alteration of Material Facts*, after this Court quashed the writs in this matter, on October 26, 2012, the 58th Judicial District Court of Jefferson County, Texas, issued a temporary injunction in cause numbers A-188,403 and A-188,403-C, requiring Stewart Title to transfer a portion of the escrowed funds in the amount of $333,000.00 into that court's registry by October 29, 2012. This left $211,005.00 in the escrow account. After deductions for miscellaneous fees, $210,818.62 remained in the account. This balance was then disbursed by check to the Chambers Trust.

signed and after the effective date for which Defendant was granted relief, Defendant dredged contaminated soil from in front of the mortgaged property and spread it over a wide area formerly known by the Plaintiffs." *Id*. He goes on to discuss the background of the property and alleges certain facts related to the NBR parties' involvement with the property at issue. *Id.* Slay claims that "[t]he action taken by Defendants in this cause of action either has or is likely to cause Plaintiffs to suffer renewed involvement and liability to the EPA and/or other federal or state jurisdictions." *Id*. He also contends that the NBR parties have "knowingly reintroduce(d) contamination to the Superfund sites" and this "is probably a criminal act in both federal and state jurisdictions." *Id.* Slay further states that "the commission of a crime is not the basis of Plaintiff's request for relief. The recontamination of property that is still the subject of EPA litigation exposes Plaintiff's [sic] to potentially huge future cleanup costs assessed by the EPA." *Id*. Slay's *Original Petition* then references the case before this Court, stating "Plaintiffs and the EPA are currently engaged in litigation over the mortgaged property with the EPA seeking 'recovery of response costs that have been and will be incurred by the Unites States Environmental Protection Agency..." *Id.* Based on his various allegations, Slay requests the following relief: (1) that the Court find the NBR parties responsible and liable for the re-contamination of the State Marine and Palmer Barge Line Superfund Sites; (2) the Court assess damages sufficient to reimburse the EPA for any future costs that may be assessed against Slay as a result of the NBR parties' actions; and (3) a Court determination that the NBR parties are liable for all court costs, fees, and attorney fees related to the case. *Id.*

On June 7, 2011, Slay filed a First Amended Petition in Jefferson County. *Exhibit B to Notice of Removal filed in 1:11-CV-302* (doc. #1). This amended pleading seems to assert essentially the same facts and causes of action except that it appears to allege new a claim based on

breach of contract against the NBR parties by requesting relief in the form of a Court order finding that "Defendants or their assignee have violated the terms of the Compromise Settlement Agreement or the Deed of Trust or both and issue an Order for foreclosure." *Id.*

Construing Slay's *pro se* pleadings, the Court concludes that Slay, on behalf of himself and the trusts, has essentially asserted a claim for contribution against NBR, seeking to hold the NBR parties partly responsible for the United States CERCLA claim filed against Slay and the defendant/debtor trusts in this case. He has additionally claimed that the NBR parties violated the terms of the relevant settlement agreement.

On June 20, 2011, the NBR parties collectively filed their *Notice of Removal* (doc. #1) in this United States District Court. In support of removal to federal court, the NBR parties argued that the Court has original jurisdiction over Slay's case against them because it involves a federal question pursuant to 28 U.S.C. § 1331. Specifically, the NBR parties contend that federal jurisdiction is premised upon the CERCLA cause of action. NBR argues that Slay is required by federal law to file his claim for contribution in this case rather than filing another case in state court. The NBR parties cite 42 U.S.C. § 9613(b) and (f), the CERCLA provisions addressing contribution, in support. According to the Notice of Removal, all defendants in the second case consented to removal to federal court.

On June 22, 2011, the NBR parties filed their answer and counterclaim in response to Slay's causes of action. The NBR parties have counterclaimed for breach of contract based on Slay's alleged breach of the relevant settlement agreement. *See Answer and Counterclaim, Filed in 1:11-CV-302* (doc. #3).

Upon removal, the second case was assigned to United States District Judge Ron Clark and

referred to United States Magistrate Judge Earl S. Hines, and then subsequently referred to United States Magistrate Judge Zack Hawthorn. NBR filed motions to consolidate in both the instant case and 1:11-CV-203. The undersigned concluded that consolidation was appropriate to avoid unnecessary costs or delay in the resolution of common issues of law and fact under Federal Rule of Civil Procedure 42(a). The Court based this decision on Slay's state court pleadings which reveal that his claim for relief in the form of contribution from the NBR parties in the second case is based directly on the claim for CERCLA liability that the United States filed against Slay and the debtor/defendant trusts in this case. The settlement agreement between Slay and NBR Maritime, II, LLC, was at issue in this Court's garnishment orders. Furthermore, the Court noted that the facts at issue in the CERCLA action overlap with those put at issue by the claim for contribution and breach of contract in the second case. While the NBR parties were only involved in the garnishment portion of United States' claims against Slay and the Slay trusts, NBR was brought into the CERCLA claims by virtue of Slay's cause of action requesting contribution for any damages assessed against him and the trusts in the first-filed case. *See Report and Recommendation on Motion to Consolidate* (doc. #87). The District Court adopted the undersigned's recommendation and consolidated the NBR/Slay litigation , cause number 1:11-CV-302, into this case and referred all pretrial matters to the undersigned magistrate judge. *See Order Adopting on Motion to Consolidate* (doc. #101). Accordingly, the claims at issue between NBR, Slay and the Slay Trusts are properly before the Court in this case and are the only remaining issues to be decided.

B. Motion for Summary Judgment and Related Briefs

On May 25, 2012, NBR filed its *Motion for a Traditional and No Evidence Summary Judgment* (doc. #126). At the time of the filing of the motion, NBR presented two issues to be

decided by the Court. However, certain developments in the case have since rendered one of those issues moot as explained by NBR's *Supplemental Notice of Alteration of Material Facts* (doc. #144). Accordingly, the only issue remaining for resolution is as follows:

> "is there any evidence that NBR is liable to Slay and the Slay Trusts for the alleged re-contamination of the former State Marine Superfund Site?"

See Motion for Summary Judgment, at p. 2. NBR argues that there is no evidence to support Slay's claims against NBR in this regard.

Specifically, NBR contends that Slay has no evidence to support the allegations that NBR dredged contaminated soil in front of the property or that this dredging and alleged re-contamination could expose the plaintiffs to liability and future cleanup costs assessed by the EPA. *See Motion for Summary Judgment*, at p.10, *see also First Amended Petition*, at pp. 4-5. In support, NBR offers summary judgment evidence establishing that at the time it bought the Superfund Site property, there was no actionable contamination on the property. NBR also states that the site was deleted from the EPA's National Priorities List (NPR) on February 6, 2012, and designated as safe for development for industrial/commercial purposes in March 2012. *See Motion*, at pp. 10-11. NBR therefore contends that the evidence shows that Slay and the Slay Trusts cannot establish that during NBR's ownership of the property it did anything to re-contaminate the property which would make NBR liable to Slay or the Slay Trusts for a contribution claim under CERCLA. NBR relatedly argues that there is no evidence that it conducted dredging on the Superfund Site and avers that an independent report shows that the dredged soils were not contaminated. *Id*. at pp. 12-13. Finally, NBR argues that Slay and the Slay Trusts cannot establish CERCLA liability as a matter of law because NBR is not a "covered person" from whom Slay and the Slay Trusts can claim contribution. *Id*. at p. 13.

After obtaining leave of court to file a late response, Slay responded in opposition to the motion for summary judgment on September 11, 2012, over three months after the motion was filed.[3] *See Response* (doc. #129). He contends that NBR has misstated his claims because he claims for contribution for recovery of funds expended at the site for future liability and damages based on the United States' claim for future response costs. *See Response*, at pp. 2-3. He further points to evidence submitted by NBR which he argues establishes that dredging took place on the Superfund Site and that the dredged material exhibited levels of lead in excess of EPA standards. *See id.* at p. 4. He also argues that the evidence submitted by NBR regarding what levels of exposure are dangerous "has absolutely no bearing on whether or not the EPA will take action against those whom it deems responsible for the contamination." *Id.* He reasserts that NBR has exposed Slay to future actions by the EPA as well as future costs. *Id*. at p. 5. Slay's response does not include sworn, verified evidence which controverts the evidence submitted by NBR; rather, the only sworn evidence is has been reattached from the evidence already submitted with NBR's motion for summary judgment.[4]

NBR replied on September 24, 2012. *See Defendants' Reply to Slay's Response* (doc. #138). First, NBR argues that Slay has admitted to NBR's "Statement of Undisputed Material Facts"

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[3]Chester Slay filed the response individually and does not include the trusts in the response.

[4]The court may not grant summary judgment for the sole reason that the party against whom it is directed fails to file an appropriate opposition. *John v. Louisiana (Bd. of Trustees)*, 757 F.2d 698, 708 (5th Cir. 1985); *see also Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 282 (5th Cir. 2001). "A summary judgment nonmovant who does not respond to the motion is relegated to her unsworn pleadings, which do not constitute summary judgment evidence." *Bookman v. Schubzda*, 945 F. Supp. 999, 1002 (N.D. Tex. 1996) (citing *Solo Serve Corp. v. Westowne Assocs*., 929 F.2d 160, 165 (5th Cir. 1991)). Although Slay's failure to comply with the rules governing summary judgment briefing does not permit the court to enter a "default" summary judgment, plaintiff's pleadings are not verified, and, therefore, he has presented no summary judgment evidence to dispute defendant's version of the facts.

pursuant to Local Rule CV-56(c). NBR then summarizes the uncontroverted summary judgment evidence and reasserts that Slay has presented no evidence explaining how NBR, "in light of the fact that the Site was deemed safe by the EPA prior to NBR"s ownership, could expose Slay and the Slay Trusts to further liability." *See Reply*, at p. 6. NBR also contends that Slay's response fails to address the fact that Tubal-Cain, not NBR, performed the dredging that is the subject of his allegations against NBR and that he attempts to shift liability for his own responsibilities to NBR without evidence in support. *Id.* at pp. 6-7. NBR next points out that Slay failed to provide any reports or independent expert analysis controverting its own report establishing that the soil at the Superfund Site was not contaminated at the time of dredging. *Id.* at p. 8. Finally, NBR reiterates its contention that it is not a "covered person" subject to contribution under CERCLA, pointing out that Slay ignored this argument in his response.

Finally, as mentioned above, on November 13, 2012, NBR filed its *Supplemental Notice of Alteration of Material Facts* (doc. #144). This filing notifies the Court that because Slay and the Slay Trusts executed a Release of Lien which effectively fulfilled the contractual issues/specific performance portion of NBR's motion for summary judgment, only the request for relief regarding NBR's alleged liability for the "re-contamination" of the Superfund Site remains viable for consideration by the Court. *See id.* at pp. 2-3.

II. Discussion

A. Summary Judgment Standard of Review

Summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). This rule places the initial burden on the moving party to identify those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548 (1986) (quoting Rule 56(c)); *Stults v. Conoco, Inc.,* 76 F.3d 651, 655-56 (5th Cir. 1996) (citations omitted). An issue is *genuine* if the evidence is sufficient for a reasonable jury to return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255-56, 106 S. Ct. 2505, 91 L. Ed.2d 202 (1986). A fact is *material* when it is relevant or necessary to the ultimate conclusion of the case. *Anderson*, 477 U.S. at 248. The movant's burden is only to point out the absence of evidence supporting the nonmovant's case. *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 913 (5th Cir.); 5th Cir.), *cert. denied*, 506 U.S. 832, 113 S. Ct. 98, 121 L. Ed.2d 59 (1992).

When the moving party has carried its burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party bears the burden of coming forward with "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In considering a motion for summary judgment, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255, 106 S. Ct. 2505 (1986). However, the non-movant may not rest on the mere allegations or denials of its pleadings, but must respond by setting forth specific

facts indicating a genuine issue for trial. *Webb v. Cardiothoracic Surgery Assocs. of North Texas, P.A.*, 139 F.3d 532, 536 (5th Cir. 1998). The Court must consider all of the evidence but refrain from making any credibility determinations or weighing the evidence. *See Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007) (citation omitted).

When a moving party makes an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita*, 475 U.S. at 586. Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *See Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.), *cert. denied*, 513 U.S. 871, 115 S. Ct. 195, 130 L. Ed.2d 127 (1994). The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.*; *see also Skotak.*, 953 F.2d at 915-16 & n. 7. If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322-23.

B. The Claim Against NBR for "Re-Contamination"

In their live pleading against NBR, Slay and the Slay Trusts vaguely claim for contribution for "potentially huge cleanup costs assessed by the EPA." *See First Amended Petition*, at pp. 4-5.

The First Amended Petition references the United States' litigation against Slay and the trusts in this case. Although the legal basis for the "re-contamination" cause of action against NBR is not stated in the First Amended Petition, the Court can only construe the *pro se* pleading as an attempted claim against NBR for damages under CERCLA.

Through the creation of the Hazardous Substance Response Trust Fund, or Superfund, 42 U.S.C. § 9631, CERCLA provides money to the federal government for waste site cleanup, 42 U.S.C. § 9604, or for compensating other governmental or individual parties who have incurred response costs, 42 U.S.C. § 9611(a)(2). *Uniroyal Chem. Co. v. Deltech Corp., Inc*., 160 F.3d 238, 242 (5th Circ. 1998). Second, CERCLA also affords private parties the right to bring a cost-recovery action against "responsible persons" for costs associated with responding to an environmental threat. *Id.* Citing 42 U.S.C. § 9607(a); *Amoco Oil Co. v. Borden, Inc*., 889 F.2d 664, 667 (5th Cir. 1989).

Relatedly, 42 U.S.C. §9613(f)(1) provides for contribution claims against persons who are potentially liable under Section 9607(a): "[a]ny person may seek contribution from any other person who is liable or potentially liable under section 107(a), during or following any civil action under section 106 or under section 107(a)....[i]n 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 106 or section 107." 42 U.S.C. § 9613(f)(1). The text of this provision provides that parties seeking contribution under Section 113 (42 U.S.C. § 9613(f)(1)) must look to Section 107 to establish the basis and elements of the liability of the defendants. *Kalamazoo River Study Group v. Menasha Corp*., 228 F.3d 648, 653 (6th Cir. 2000) (internal citations omitted). The only difference is that with a contribution claim, unlike

Section 107, liability is not joint and several, but several only. *Id.* Section 113 grants the court discretion to allocate response costs among liable parties. *Id. See also OHM Remediation Serv. v. Cooperage Co.*, 116 F.3d 1574, 1579-1581 (5th Cir. 1997). Accordingly, for purposes of this Court's inquiry, whether Slay and the Slay Trusts are asserting a private cost-recovery cause of action under Section 107 or a contribution claim under Section 113, the applicable elements remain the same.

To establish a prima facie case for a private cost-recovery action under Section 107(a) of CERCLA (42 U.S.C. § 9607), the plaintiff must prove the following four elements:

(1) the site must be a "facility" under § 9609(9);

(2) the defendant must be a "responsible person" under § 9607(a);

(3) a release or threatened release of a hazardous substance must have occurred; and

(4) the release or threatened release must have caused the plaintiff to incur response costs.

Id. See also Liccardi v. Murphy Oil U.S.A., Inc., 111 F.3d 396, 398 (5th Cir. 1997); *Regional Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 704 (6th Cir. 2006); *Sycamore Indus. Park Assoc. v. Ericsson, Inc.*, 546 F.3d 847, 850 (7th Cir. 2008). If the plaintiff successfully establishes those elements, and the defendant is unable to prove one of the defenses listed in § 9607(b), the plaintiff is entitled to summary judgment. *Id.* Citing 42 U.S.C. § 9607(b)[5]; *Amoco Oil Co.*, 889 F.2d at 668. Based on the arguments and evidence presented in NBR's motion, the issues here center

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[5] Section 9607(b) sets forth defenses to a cost-recovery action, which include "(1) an act of God, (2) an act of war, (3) an act or omission or a third party 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).

around the last three elements, as well as NBR's possible defenses.

The second element of a CERCLA cost-recovery action applies to several categories of "covered persons," including,(1) present owners and operators of facilities that accepted hazardous substances, (2) past owners and operators of such facilities, (3) generators of hazardous substances, and (4) certain transporters of hazardous substances. *OHM Remediation*, 116 F.3d at 1578 (citing CERCLA § 107(a)). CERCLA's broad reach extends liability all the way down the causal chain, from those who generate waste through those who dispose of it. *Id.* Citing *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir.1992); *see also* 42 U.S.C. § 9607(a)(1)-(4). In other words, CERCLA provides that a prior owner of a facility is a responsible party if it controlled the site at the time of disposal of a hazardous substance. *Sycamore Indus. Park Assoc.*, 546 F.3d at 850 (citing 42 U.S.C. § 9607(a)). "Covered persons" are also referred to as "potentially responsible parties" or "PRPs." *Halliburton Energy Svcs. Inc. v. NL Indus, Inc.*, 648 F. Supp. 2d 840, 848 (S.D. Tex. 2009).

Here, the summary judgment evidence presented by NBR shows that it acquired property which was previously part of the Superfund Site from Chambers Trust, whose trustee is Slay, on June 5, 2008, and June 3, 2010, respectively. NBR has also shown that prior to these sale dates, in April 2007, the EPA issues its Record of Decision ("ROD") in which it determined that no further remedial action was necessary at the Site because the "Time-Critical Removal Action conducted in 2001 had reduced the levels of contamination at the Site below levels that posed a risk to human health and the environment." *See State Marine Site Record of Decision Issued April 18, 2007, Exhibit 1 to Motion for Summary Judgment.* The evidence further shows that in June 2007, the EPA issued a Preliminary Close Out Report for the Superfund Site ast issue which documents that the EPA and the Texas Commission on Environmental Quality (TCEQ) had completed cleanup activities

for the Superfund Site. *See State Marine Site Close Out Report, Exhibit 2 to Motion for Summary Judgment*. Effective September 14, 2011, the EPA and NBR executed an agreement under which the EPA waived and released its CERCLA Section 107 liens against the Superfund Site property tracts acquired by NBR. *See Affidavit of David Durrett, Attachment to Motion for Summary Judgment, and EPA Release of Federal Lien, Exhibit 7 to Motion for Summary Judgment*. Furthermore, on December 14, 2011, the EPA issued a letter to NRB's counsel in which it specifically states that "NBR was never identified as a potentially responsible party (PRP) for the Sites." *See Durrett Affidavit; EPA Letter, Exhibit 8 to Motion for Summary Judgment*. The evidence further shows that on March 14, 2012, the EPA issued a Site Status Summary as to the Site stating that the EPA proposed to delete the Site from the National Priorities List and a Notice of Intent to Delete and Direct Final Notice of Deletion were published in the Federal Register on December 6, 2011. *See Marine Site Status Summary, Exhibit 3 to Motion for Summary Judgment*. The deletion became effective February 6, 2012. *Id.*

Slay and the Slay Trusts have not presented any verified summary judgment evidence in response disputing that facts that the EPA issued its notice that no further remedial action was required for the Site prior to NBR's ownership; that NBR was never identified as a PRP; and cleanup activities were completed prior to NBR's ownership. Through these facts, NRB has established as a matter of law that it does not fall into any of the categories of "covered persons" subject to CERCLA liability. NBR acquired the property after the completion of the EPA clean-up.[6] Slay and

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[6]In its motion, NBR further argues that it is exempt from liability as a bona fide prospective purchaser (BFPP). Under 42 U.S.C. § 9607(r), certain subsequent owners are exempted from liability. *See* 42 U.S.C. § 9607(r): "a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the purchaser's being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action

the Slay Trusts did not present evidence to the contrary creating a genuine issue of material fact as to whether NBR is a "covered person" or "PRP" under CERCLA subject to liability to Slay and the Slay Trusts for recovery under CERCLA. Accordingly, NBR is entitled to summary judgment on this element of the Slay and Slay Trusts' claim for liability against it. Because NBR has established as a matter of law that Slay and the Slay Trusts cannot prevail on at least one essential element of their CERCLA claim, the CERCLA claim must fail in its entirety.

However, for the sake of completeness, the Court also finds that NBR is entitled to summary judgment on two of the other elements of Slay's and the Slay Trusts' CERCLA claim. Specifically, Slay has not produced summary judgment evidence in response creating a genuine issue as to whether NBR "re-contaminated" the Site by somehow re-releasing hazardous materials when the property was dredged after NBR acquired it. NBR has established through verified evidence that there was no actionable contamination on the property before it acquired it in 2008 and 2010. Furthermore, after the dredging was completed by Tubal-Cain - a third party lessee - evidence shows that the EPA deleted the Site from its National Priorities List and noted that the Site could be developed for industrial/commercial purposes. *See State Marine Status Summary, Exhibit 3 to*

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or natural resource restoration." A party who is a PRP under Section 9607(a) may assert that it is a BFPP as a statutory *defense. Saline River Props., LLC v. Johnson Controls, Inc.,* 823 F. Supp. 2d 670, 686 (E.D. Mich. 2011) (emphasis added). To be exempt in this manner, NRB must (1) meet the definition of a BFPP and (2) not impede the performance of a response action. *Id.* 42 U.S.C. § 9601(40) defines a BFPP in great detail and sets forth the eight elements or criteria that a BFPP must establish by a preponderance of the evidence to be exempt from liability. *See id. See also* 42 U.S.C. § 9601(40)(A)-(H); *Ashley II of Charleston, LLC, v. PCS Nitrogen, Inc.,* 791 F. Supp. 2d 431, 498 (D.S.C. 2011); *Voggenthaler v. Maryland Square, LLC*, No. 2:08-cv-1618-RCJ-GWF, 2012 WL 1815651, 2012 U.S. Dist LEXIS 69395, at *25 (D. Nev. May 17, 2012). Here, NBR has not carried its burden in establishing each of the painstakingly detailed statutory elements with supporting summary judgment evidence. *See, e.g., Voggenthaler*, 2012 U.S. Dist LEXIS 69395, at *26. Furthermore, the Court has already determined that NBR established as a matter of law that it is not a covered person or PRP, so the Court need not even reach issue of the argued BFPP defense.

Motion for Summary Judgment. NBR's evidence shows that no release of hazardous substances occurred after it acquired the property and that it did not re-contaminate the property. This is further supported by the expert opinion of C.N. Reddy, director of Chemtex Environmental Laboratory, Inc. *See Reddy Affidavit, Attached to Motion for Summary Judgment; Chemtex Soil Report, Exhibit 10 to Motion for Summary Judgment*. Slay's response does not offer any scientific evidence to controvert the facts regarding the status of the Site as set forth by NBR and its supporting evidence. Accordingly, Slay has failed to create a genuine issue of material fact on the issues of whether a release or threatened release of a hazardous substance occurred during NBR's ownership which necessitated Slay to incur response costs now or in the future. Therefore, NBR is also entitled to summary judgment on the third and fourth elements of the CERCLA liability claim asserted by Slay and the Slay Trusts.

C. *Pro Se* Representation of Trusts

The Court also must address, *sua sponte*, the procedural problem created by the fact that Slay filed suit *pro se* not only on behalf of himself but on behalf of the Slay Trusts. 28 U.S.C. § 1654 states that "in all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." Courts have uniformly interpreted this statute to mean that corporations, partnerships, or associations are not allowed to appear in federal court other than through a licensed attorney. *Rowland v. California Men's Colony*, 506 U.S. 194, 202-203 (1993); *see also Memon v. Allied Domecq QSR*, 385 F.3d 871, 873 (5th Cir. 2004). Other Circuits have specifically included trusts and limited liability companies within this group, holding that nonlawyer trustees or company members acting *pro se* could not appear in court on behalf of the trust or organization. *See Lattanzio*

v. COMTA, 481 F.3d 137 (2d Cir. 2007) (sole member limited liability company); *Knoefler v. United Bank*, 20 F.3d 347 (8th Cir. 1994) (nonlawyer trustee); *C.E. Pope Equity Trust v. United States*, 818 F.2d 696 (9th Cir. 1987) (trustee).

When a corporation is unrepresented by counsel, the court may properly dismiss its claims. *Robinette v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 3:97-CV-0353-D, 1998 WL 641815, 1998 U.S. Dist. LEXIS 14763, at *3 (N.D. Tex. Sept. 16, 1998). While holding that corporations are barred from appearing in federal court with counsel, the Fifth Circuit also requires that a district court warn a corporation that it must retain counsel or formally order it to do so before striking the pleadings of a corporate defendant attempting to proceed without an attorney. *See Memon*, 385 F.3d at 873. A handful of district courts in the Fifth Circuit have followed suit, ordering unrepresented corporate or partnership entities to retain counsel and make an appearance through counsel within a certain amount of time. *See e.g., Lowman v. Whitaker*, No. 10-cv-1603, 2011 U.S. Dist. LEXIS 25978 (W.D. La. Feb. 16, 2011); *AICCO, Inc. v. Tradestar Constr. Svcs, Inc.*, No. H-08-2938, 2010 U.S. Dist. LEXIS 133801, (S.D. Tex. Dec. 17, 2010); *Patent Group, LLC v. Johnny Ray, LLC*, No. 2:10-CV-380, 2010 WL 4287200, 2010 U.S. Dist. LEXIS 115930, (E.D. Tex. Nov. 1, 2010) (Ward, J.); *Mount Vernon Fire Ins. Co. v. Obodoechina*, No. 08-3258, 2009 WL 424326, 2009 U.S. Dist. LEXIS 12875 (S.D. Tex. Feb. 19, 2009). If counsel fails to appear on behalf of the entity, the district court may then entertain a motion for default, strike the entities' pleadings, or dismiss its claims with prejudice. *See id; see also Concept Analysis Corp. v. Internal Revenue Svc.,* No. 04-71282, 2004 U.S. Dist. LEXIS 23732 (E.D. Mich. Oct. 21, 2004) (dismissal without prejudice).

The Court put Slay on notice of the prohibition against him appearing *pro se* in federal court on behalf of the Slay Trusts during the first show cause hearing on the writs of garnishment, and

again in filings specific to the consolidated NBR litigation. *See Transcript of June 21, 2011, Motion Hearing* (doc. #49); *see also Report and Recommendation on Motion to Consolidate* (doc. #87), at p. 7, n.1. Slay never retained counsel to represent the Slay Trusts on their claims against NBR. Slay is prohibited from representing those trusts and does not have the authority to prosecute their causes of action under Section 1654. This lack of authority to prosecute those causes of action *pro se* is sufficient to sustain dismissal in itself because the trust entities must have legal counsel to proceed. The Court cites this in further support of the recommendation that judgment be granted in favor of the NBR parties regarding the Slay Trusts' claims.

III. Conclusion and Recommendation

Based upon the findings and legal conclusions stated herein, the undersigned United States Magistrate Judge concludes that the NBR parties have established that no genuine issue of material fact exists to support the only remaining cause of action left for determination by the Court: the CERCLA liability claim asserted by Slay and the Slay Trusts. Accordingly, the Court recommends that the *Motion for a Traditional and No Evidence Summary Judgment* (doc. #126) be **granted** and that the District Court dismiss the claims asserted by Slay and the Slay Trusts against the NBR defendants in their entirety and enter judgment in favor of those defendants.

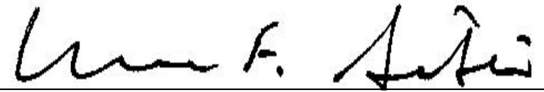
IV. Objections

Pursuant to 28 U.S.C. § 636(b)(1)(c), all parties are entitled to serve and file written objections to the report and recommendation of the magistrate judge within fourteen (14) days of service.

Failure to file specific, written objections to the proposed findings of facts, conclusions of law and recommendations contained within this report shall bar an aggrieved party from *de novo*

review by the District Judge of the proposed findings, conclusions and recommendations, and from appellate review of factual findings and legal conclusions accepted by the District Court except on grounds of plain error. *See Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Douglass v. United Serv. Auto. Ass'n.,* 79 F.3d 1415 (5th Cir. 1996) (*en banc*); 28 U.S.C. § 636(b)(1).

SIGNED this the 27th day of February, 2013.



KEITH F. GIBLIN
UNITED STATES MAGISTRATE JUDGE